

LUISS



DIPARTIMENTO DI GIURISPRUDENZA

Cattedra di Diritto Internazionale

THE RIGHT TO VOTE: EFFECTIVE PROTECTION IN
INTERNATIONAL HUMAN RIGHTS LAW AND EXERCISE
FOR THE IMPROVEMENT OF DEMOCRACY

RELATORE

Chiar.mo Prof.

Christopher Michaelsen

CORRELATORE

Chiar.mo Prof.

Fulvio Maria Palombino

CANDIDATO

Axl Tosco

Matr. 149013

Anno Accademico 2021/2022

INDEX

INTRODUCTION

CHAPTER 1: VOTING AS A FUNDAMENTAL HUMAN RIGHT

- 1.1. Global challenges to human rights
- 1.2. Universality: Global human rights implementation
- 1.3. The right to vote as enshrined in international conventions and instruments
 - 1.3.1. Guiding principles and standards of protection
 - 1.3.2. The European Court of Human Rights jurisprudence and the State margin of appreciation
- 1.4. The foundation of democracy: a core yet insufficient right

CHAPTER 2: POPULISM AND THE THREAT TO DEMOCRATIC INSTITUTIONS

- 2.1. State obligations and the issue of internal enforcement
- 2.2. Election monitoring activities
 - 2.2.1. Historical evolution and enucleation of principles
 - 2.2.2. From election observation to electoral assistance: the state of international guidelines
- 2.3. Electoral autocracies and democracy worldwide

2.3.1. Forms of government and their approach to voting rights: external voting rights as a telling example

2.3.2. Authoritarianism on the rise in Europe and prospective indications

CHAPTER 3: THE STATE OF DEMOCRACIES, A HUMAN RIGHTS OVERVIEW

3.1. Prerequisite rights in the UN framework, the OHCHR “Human rights and elections” handbook on International Human Rights Standards on Elections

3.2. Special state measures and non-discrimination

3.3. Freedom of opinion and expression

3.4. Freedom of peaceful assembly and freedom of association

3.5. Voting rights and access to fundamental resources: an unexpected link

CONCLUSION: RIGHT TO EDUCATION AND INFORMED VOTING: THE TRANSVERSAL SOLUTION

BIBLIOGRAPHY

ACKNOWLEDGEMENTS

INTRODUCTION

In treating the subject of voting rights in what could hopefully be a practical, multi-faceted and even proactive way, this dissertation should aptly begin with a general overview of the peculiar nature of this fundamental right, outlining its inextricable link with nationality and citizenship while also proposing a definition, structured as if it was a logical proposition, centered around its quality of being a necessary yet not sufficient condition of democracy. As a matter of fact, although voting rights represent the core of political rights, their exquisitely internal nature tends to escape the chance for the international community to push for uniformity and uphold satisfactory standards worldwide, their fate entirely relying on and being intertwined with the solidity of democratic foundations and the governmental commitment thereto.

The starting point to frame the advancement in the protection of such a complex set of rights must therefore be the analysis of landmark texts and international instruments meant to confront this challenge, remarkably those that find global application, meaning the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, adopted by the United Nations (UN) General Assembly. Drawing comparisons and identifying similarities in the wording and the scope of the most preeminent documents on the matter will allow to enucleate the guiding principles and to consequently evaluate their grade of reach and effectiveness, while simultaneously showing how the right to vote has both an individual and a collective dimension that coexist and bear several duties upon states. As the focus will progressively shift towards regional contexts, the range of positive and negative obligations that states must abide to will be examined and their behavior scrutinized, towards the end of the first chapter, especially in light of the most rich, fertile and influencing jurisprudence, rendered by the European Court of Human Rights (ECtHR), and its interpretation of the margin of appreciation.

Speaking of state-imposed limitations to the right to vote that affect both of the above said dimensions and looking to furthermore stress their interplay, the crucial topic of disenfranchisement will be faced in the variety of its practices and as a transversal topic

to the entire discussion, that will be linked to its political grounding in the second chapter and to its effects and harms on human rights in the third one.

Bearing in mind the first feature that was mentioned - that voting rights predominantly depend on the states' capacity and willingness to ensure their recognition - should prepare the appropriate ground for the beginning of the second chapter to delve into the issue of internal enforcement and sketch a distinguishment between different forms of government and the instruments through which states promote or, on the other hand, limit access to vote and voter participation.

The issue of the so-called "external voting rights" may come into consideration in a short digression, since the approach to emigrant enfranchisement is proved to be telling of the philosophical background and political attitude that governments have towards democratic institutions and true representation, once again pointing towards the fundamental connection between citizenship and ownership of voting rights.

The rise of populism in Europe, let alone the shadow of war dawning over it after a couple of decades of peace, does indeed confirm how disaffected and misinformed people have grown towards politics and how much this, in turn, has favored dangerous outsiders. The phenomenon, however, is not confined to this kind of exotic figures, but is, in fact, exploited by tenured professionals of the game just as well, in the way that eastern European countries best exemplify. So called electoral autocracies, as the name may suggest, only retain the formal hull, or rather the hulk, of democracy, yet are not stable nor capable of serving democratic purposes must be signaled in order to decipher the worrying tendency of elected leaders, who apparently fulfill a democratic mandate, to subvert and distort institutions to strengthen their grip on power, holding - de facto - their countries as hostages. Russia and its degeneration towards authoritarianism, and, more extensively, negative examples of democratic deterioration within the EU, represented by Poland and Hungary, with reference to the recent declaration made by the European Parliament, are three cases to be placed under the spotlight, with the ultimate and overarching objective of showing that holding regular elections does not, by any means, guarantee truthfulness in their results or genuineness of the statal system.

This last reasoning may also serve as a useful step to move into a second part of the thesis, dealing with the current healthiness of democracies, considering the suggested indicators and in connection to the whole framework of human rights.

From the short circuit in political communication, to the uncontrolled flow of momentum shifting, carefully crafted fake news and obscure fundings of parties, democracies face a wide range of potentially lethal menaces that may share a common origin but have diverging ramifications.

The leading aspect to develop this consideration may be identified in the perceived untrustworthiness of the political class as a widespread sentiment and the paradoxical effects it leads to: poorer quality in the political debate, resort to simple, catchy but fallacious lines of reasoning (lies and preconceived ideas fed to the general public that extend the sense of discomfort and undermine the complexity of solutions needed to achieve progress for all), lowering turnout records and the deepening drought of polarization, where truth and reason are to be lost but hardly ever found.

Elections, which are meant to be the celebration of democracy, thus rise among its worst expressions. Victory more and more frequently belongs to outsiders, extremists and those who better exploit the holes in social media advertisement.

Disinformation from the side of governments and the correspondent misinformation on the public opinion's side can be pinpointed as the issue that has become the key player in a game that shall not, contrary to the troubling manifestations that were earlier warned against, be tilted. This matter could be carefully studied in its findings and consequences, along with other examples of distortion of the authentic display of ideas by conflicting parties. All while stressing the fact that the sacred space for freedom of expression and the development of political affinities between different countries in the landscape of international relationships must be preserved and promoted.

Reaffirming that other human rights are both an essential precondition and a corollary of the correct exercise of the right to vote is pivotal in approaching a review of all human rights involved and their discipline, insofar as the genuine conduct of the electoral process, from its beginning to its outcome, and the interests at stake are

concerned. Since the automatic link between democracy and adequate standards in the protection of human rights shall not be taken for granted, rather, as we shall see, is far less certain than one could expect, those identified by the Office of the United Nations High Commissioner on Human Rights as “prerequisite rights” shall all be taken, one by one, into careful account. Recalling what was formerly said about the relevance of the ECtHR rulings on the states’ ability to intervene on every aspect surrounding voting procedures and expanding the discussion to any kind of intrusion with fundamental rights implies the adoption of a comparative view on the balancing of human rights made in constantly mutant circumstances - where fundamental freedoms such as that of expression have become two-faced and double-edged weapons - and growing new challenges. It is apparent that the lodestar must be found in seeking authenticity, transparency, and truthfulness in the circulation of information and in the conduct of electoral procedures.

While democracy and human rights do not always go hand in hand, the first might help develop the latter in even surprising ways, as hope, in this sense, can be found in the evidence pointing towards a correlation between the level of enjoyment of political rights and that of basic facilities, like access to clean water, food and land: a connection that is unfortunately bound to become more and more significant as the rate of climate change picks up speed.

Such considerations should naturally bring to the encompassing and consequential suggestion that in order to restore and build stronger grounds for democracies, the center of attention, both for economic and strategic investment and for cultural development, shall be put on education. Last but not least, amongst the fundamental rights mentioned by the OHCHR document, and actually deserving the headlines, the right to education is a means of achieving progress while acting on both ends of the relation. It is, in fact, defined as “an indispensable means of realizing other human rights”¹ and an indispensable tool to achieve genuine political participation, better life opportunities and unique growth perspectives, from an individual and collective point of view.

¹ Office of the United Nations High Commissioner for Human Rights. (2021). Human Rights and Elections - A Handbook on International Human Rights Standards on Elections, para. 68, p. 36.

Pertaining to the first aspect, studies suggest the existence of a causal relation between higher education and voting, in terms of turnout, broad participation and quality decision-making. A more conscious and schooled society would be meant to offer substantially equal chances to all and hereby curb social tensions that stem from poverty, discrimination, and inequality.

Overall, findings are clear-cut in showing that easier and genuine expression of the right to vote and access to fundamental resources and basic human rights mutually influence each other positively, meaning that where social dignity and higher standards of life are ensured, likewise voting rights are benefited, and vice versa.

Moving to draw conclusions from these assumptions, the dissertation's purpose is to bring adequate evidence to support the intention of pushing to promote bigger investments in the field of education, at all levels, and uniformity in its development, thereby also hoping to depict and display the bigger picture, where human rights are inevitably and inextricably linked one another.

CHAPTER 1: VOTING AS A FUNDAMENTAL HUMAN RIGHT

1.1. Global challenges to human rights

International law is constantly faced with the challenge of effectiveness and quintessentially criticized for its failures in providing it. However, its ramification for human rights protection, if possible, finds itself hampered by even more hurdles along the way and hostility from political agents.

Although intuitively, and apart from philosophical theories elaborated over their nature, the acquis of the international community after centuries-long, troubled and troublesome experience and struggle for advancement should unanimously place human rights standards ahead and above other sources of law, on a platform of intangibility and respectability, this is unfortunately not the case outside of constitutional utopia.

Human rights are instead, quite ironically and whether directly or indirectly, perhaps the most argued topic in the political debate and, with all certainty and more worryingly, the main matter of discussion between parties. In the context of many parliamentary assemblies in western countries, that still can rightfully pride themselves of defending and promoting fundamental freedoms, generally speaking, better than anyone², their affirmation or, on the other hand, even their utter negation, are exposed to destructive, misleading and polarizing propaganda, with the lone effect of completely alienating the subject matter itself and disaffecting the public opinion from the love of it. Indeed, it is a saddening and far-reaching conclusion - which will be later assessed in detail - that the level of protection of human rights globally is waning³ in the face of

² Sources: CATO Institute (2021) Human Freedom Index <https://www.cato.org/human-freedom-index/2021>

The Global Economy, Human rights and rule of law - global rankings, https://www.theglobaleconomy.com/rankings/human_rights_rule_law_index/;

³ Ibidem

waves of populism and of the incapacity of the political agora to efficiently break and reject them.

Already established superpowers, instead, strongly tow emerging autocracies under a never-fully abandoned idea of spheres of influence and a shared feeling of anti-western resentment. Nations such as China, through their massive machines of propaganda, agitate diplomatic relations and question the hardly established set of values moved by the self-manufactured, two-fold suggestion that the same western countries who call them out for gross violations play dumb on their own⁴, and even the same values from which the ideological dispute arises are a product of western ways and an innate colonialist attitude.

As we shall shortly see, this last bit of the assumption is historically false, meanwhile the previous one is rhetorically deceptive to say the least, since to state that the US, for instance, “dismiss their own violations” and concurrently “launch groundless attacks”⁵ is to do exactly what they are imputing their political enemy of doing, only in an even shadier way.

Nonetheless, as shown, this register of expressions is relentlessly and staunchly advanced by the government and the local media, with intensity that is equal and opposite to the perceived accusations and with interesting influence over a comparatively and relatively significant portion of public opinion in western countries.

Moreover, the broadest and most valuable takeaway that can be obtained by reading such indoctrination stunts is to identify the attempt to shield from international scrutiny the old-fashioned, sadly still not obsolete, way, hence to claim that extremely concerning situations, like the one infamously regarding Hong Kong, are, in fact, of purely national interest and to store them away as “internal affairs” that other countries must absolutely refrain from “interfering in” and cover even in the media. Such an assertion, however, clearly belongs to an anachronistic model of conducting international

⁴ China Today (2021) Western countries should stop imposing double standards regarding human rights.

⁵ Ibidem

relations that has long been abandoned in favor of the positive contributions brought on especially by the human rights doctrine, in the hopes of authentically granting this nucleus of indefeasible prerogatives the primary status they deserve and in the mutual recognition that this is the most conducive means to perform relations between sovereign states while generating widespread progress.

Similarly fashioned statements have echoed throughout a consistent block of nations, amongst which Belarus, whose peculiar position we will specifically cover later on, has stood out for persistency, a feat that has made it a prominent spokesperson for Russia and China, as well as for all members of the so-called “Like-Minded Group”, notably within the United Nations Human Rights Council (UNHRC).

The UNHRC, an inter-governmental body acting in the framework of the United Nations⁶ as a subsidiary organ of the UN General Assembly⁷, is composed of 47 states, elected by the General Assembly to serve on a three-year term and chosen to adequately represent every geographical area of the planet. In spite of its purpose, its predecessor, the Commission on Human Rights, had drawn serious criticism in the past for allegedly being too politicized to function properly and truthfully to its mandate, leading to its dissolution and its transformation, finally operated by UNGA Resolution A/RES/60/251 of 2006 “following up on the suggestion made” in the “*In Larger Freedom: Towards Development, Security and Human Rights for All*” Report of the Secretary-General, in today’s UNHRC. Still, the Council’s agenda is said to be dictated by the EU and the US - thanks to the strength of their persuasive power and leadership - from the perspective of the above-mentioned group of countries⁸. Yet still, it is one of the main forums for open discussion on all matters related to human rights, to investigate them through ad hoc special procedures and to deliberate on them by adopting recommendations.

⁶ OHCHR, <https://www.ohchr.org/en/hrbodies/hrc/home>

⁷ UN General Assembly - Subsidiary organs of the General Assembly <https://www.un.org/en/ga/about/subsidiary/councils.shtml>

⁸ Essam, A. (2016). *The Like-Minded Group (LMG): speaking truth to power*. Universal Rights Group Geneva

Actually, and recalling the previous reference to cold war-like divisions, reasons for the traditional difficulty for the UNHRC to operate incisively are to be found essentially in its membership being split in at least two distinct and irreconcilable blocs. Geneva-based NGO UN Watch covered the issue already back in 2009, when it described the Council as a “mutual-praise society”⁹ that was therefore bound to remain stuck in its own quicksand. Independent reports drawn up by news agency Reuters along the years¹⁰ have also demonstrated the growing presence of the Islamic-African alliance and the central role played within the organ by North African and Middle Eastern nations - because of their numerosity - in which “authoritarianism is once again on the march”¹¹.

It is not by chance, then, that the leadership for the coordination of the LMG activities in the Council is held by Russia, China and since 2013 - as another nod to their expanding position - by Egypt. And it wasn't until extremely recently, in October 2022, that the Human Rights Council was able to target “one of its so-called P-5 members”¹², meaning one of the countries holding a permanent seat - thus veto power - in the Security Council, by passing a motion to establish a Special Rapporteur which will be in charge of inspecting and collecting evidence of the Russian regime perpetrating “repression and violence” against its own people, obviously all while conducting a war of aggression against Ukraine. Russia hurried to specify that it will not cooperate with the expert, despite a record of denouncing western countries for allegedly failing to do so¹³. The innate standing contradiction between judgmental words spoken against others and concrete action, along with the possibility for Russia to reject the expert's future conclusions and refuse to comply with them, however, shall not downplay the significance of this decision by the HRC.

⁹ Evans, R. (2009) China says protects human rights, West voices doubt. Reuters <https://www.reuters.com/article/us-un-rights-china-sb-idUSTRE51840I20090209>

¹⁰ Ibidem

¹¹ Lynch, J. (2021) Part of the problem: a better European approach to human rights in the Middle East and in Africa. European Council on Foreign Relations

¹² Farge, E. (2022). UN body votes to establish Russia human rights investigator, Moscow protests. Reuters, <https://www.reuters.com/world/europe/un-body-votes-establish-human-rights-investigator-russia-2022-10-07/>

¹³ Report on the 46th session of the Human Rights Council. (2021) Universal Rights Group Geneva

The appointment of a Special Rapporteur¹⁴ in this case tellingly highlights how Special Procedures, which can be in the hands of a relative majority (the motion against Russia was passed with 17 votes in favor, six in opposition and 24 abstentions), are powerful instruments to push forward accountability in the most divisive cases, even circumnavigating vetoes elsewhere and filling in the gaps where the Security Council's impossibility to act is ascertained. By sending a message of intent, further mobilizing and encouraging the civil society and intervening directly on site, "efforts made within the framework of Special Procedures"¹⁵ have proved to be astonishingly successful, in particular in proportion with the amount of monetary support that has been given to sustain these projects, amounting to roughly 0.01% of the UN's annual budget.

The fortune enjoyed by Special Procedures, one of the original mechanisms - whose introduction, as a matter of fact, is coeval to the establishment of the Human Rights Commission - that has survived untouched the reform of 2006, has also brightly overcome fears that plans to rationalize existing mandates could marginalize their relevance¹⁶, demonstrating once again how non-binding procedures ("the only powers of the special procedures are of a persuasive nature")¹⁷ and soft law instruments, despite or maybe precisely because of their nature, enjoy a higher rate of success and compliance.

The 46th session of the Human Rights Council - held from February 22 to March 23, 2021 - in which Russia, amongst others, voiced an invective towards western countries for being hypocritical and negligent about their own deficiencies in protecting human rights, was not a casual occasion. It was the meeting that saw the United States return to the stage after a two-and-a-half-year absence forced by the Trump administration and decisively reinvigorate their full engagement in the cause of human rights, with President Biden committed to set his Presidency in stark contrast with the previous one. The US, consequently, convincingly argued in rebuttal of Russian provocations and vowed not to wipe the slate clean, but rather to adopt an introspective approach,

¹⁴ Special Procedures can designate both an individual or a working group of experts to act within their mandate

¹⁵ Rathgeber, T. (2013) Performance and challenges of the UN Human Rights Council. Friedrich Ebert Stiftung

¹⁶ De Schutter, O. (2010) International Human Rights Law. Cambridge University Press. p. 881-883

¹⁷ *ibidem*, p. 883

specifically in “acknowledging the corrosive legacy of racism and racial discrimination (...) to proactively address this shameful legacy to make lasting progress”¹⁸, thereby strategically elevating itself to a condition where it could also diplomatically counterattack. Particularly, when Belarus delivered a joint statement on behalf of 71 countries - including, obviously, Russia and China - centered around polemically and pretentiously expressing vague “concern over credible reports of systemic human rights violations”¹⁹ in EU member states and the United Kingdom, to indirectly ensure that the opposing superpower experienced a proper reinstatement, the US delegation effectively and energetically managed to argue back on behalf of another group of 50 states by affirming: “in response to these points, we have a very simple position: States that commit human rights violations must be held to account”.

With the focus shifted back towards the central issue, the US could hence insist upon the fact that the anachronistic doctrine according to which states enjoy independence from external interferences in dealing with so-called domestic affairs, as an attribute descending from their sovereignty, is in contrast with the same UN Charter that the LMG, through Cuba’s speech, had appealed to. Insofar as human rights are concerned, and due to their non-negotiability and universality, “State sovereignty cannot be used to shield a country from international scrutiny for its behavior toward those within its borders”, with this latter capacity being the exact purpose for which the UNHRC has been established and burdened with the “responsibility to act when States are not meeting their obligations”.

This diplomatic showdown between the LMG on one side and western democracies on the other has been dissected because it plastically manifests the profound fracture that, possibly more than any else, imperils human rights protection on a general scale, threatening to shake the foundations and vandalize the architecture of the fragile and precious castle of cards composed by the shared values upon which modern states and international cooperation existentially rely on, more than any national or regional

¹⁸ Office of the Spokesperson (2021) Key outcomes at the 46th session of the UN Human Rights Council. US Department of State

¹⁹ Report on the 46th session of the Human Rights Council. (2021) Universal Rights Group Geneva, ibidem

situation by itself could. Recent and even presently unfolding history offers a series of convincing examples in this sense - raising and raging potential or current disputes are bound to be motivated or have been substantially caused by the ethically unbothered dismissal of fundamental norms and principles, supported by pretentious motivations, ultimately reflecting and spiraling into a negative course of action undertaken by governments, with devastating and indistinct effects on the safety of individuals living within or outside the concerned country. This existential menace and the incapacity to confront it through a cohesive and coherent course of action is what holds back the UNHRC to separate itself from the past experience of the Commission and, alike any other regional and global organization working in the field of human rights, to authentically fulfill its mandate.

As soon as rights cease to be acknowledged as necessary preconditions for the establishment of a truly global, human and humane society and are apprehended by politics, falling into arbitrary interpretation, distortion and functional enslavement to cultural misconceptions, the urgent aspiration to satisfactorily tackle discriminations and of being able to meet objectives of collective progress, in the understanding that global challenges, inherently facing all, can only be confronted through the commitment and realization thereof by all, can disturbingly turn into a mere fantasy.

Human rights thus, unless strongly advertised and reinforced by states and public opinion, severely run the risk of becoming, and in some form have become, by this time, mere instruments of foreign policy for countries to reciprocally blame each other of their shortcomings and aggressively undercut the chances of progress, reversing the course and the entire purpose of a common framework in the matter, which obviously has never been intended to dissolve into a messy children's playground vested as a giant powder keg in an adult's battleground.

French President Emmanuel Macron, taking advantage of his country's unique geopolitical collocation, at a cultural and economic crossroads with African and Middle Eastern nations, judiciously warned against the growing tendency to question the

universality of human rights in favor of “cultural, historical and religious relativism” during the initial stages of the UN General Assembly’s 73rd session, in October 2018²⁰.

While detractors claim the pretense of the universal validity and applicability of standards on human rights to be a western misconstruction and imposition, the French stance, taken in the most prominent global forum by a country with highly influential colonial past and philosophical background, dismantles the idea of the hardly fought for set of common values being solely a late byproduct of Enlightenment with a twist of evangelist attitude. If anything, France could ideally be a master in explaining the extensive difference between freedom of thought and arbitrariness, scientific critical sensibility and denying the obvious, embracement of different viewpoints and moral revisionism, mental openness and abdication to core principles. One facilitates cultural enrichment thanks to mutual exchange and cooperation and promotes the exchange of ideas, the other intolerantly counterposes a preconceived and indisputable elaboration of the world, impregnated with philosophical dogmas.

The juxtaposition becomes all the more pressing and consequential with regard to Arab countries - towards which France has a standing of being amongst the most suitable interlocutors - where, over the course of the last few decades and with fermenting vehemence, the hegemonic Muslim majority has turned to criticize universal standards under the renewed assumption, that had long been disregarded by most even inside these states, that they are an expression of social conceptions confined to the western world and in contrast with the Shari’a.

The argument, posed in such fashion, openly gives away the intention of reaffirming the supremacy of religious precepts as a direct source of law, overwhelming others and watching over the proper display of daily life for it to unfold in full accordance to them: a circumvention of international rules and responsibilities and an astoundingly unacceptable conclusion, in the name of unjustified cultural specificities, to the ears of any reasonable, unbiased, twenty-first century listener.

²⁰ Shaheed, A., Richter, R.P., (2018) Is “Human Rights” a western concept? IPI Global Observatory

As sociologist Bassam Tibi put it, “both Muslims and non-Muslims alike, who subscribe to democracy agree with Max Weber’s view that democratic systems are based on legal rule”²¹. Conservatist and extremist forces in political Islam, in their reversed crusade against anything remotely European, have found in dusting off theocracies, fabricating the model Islamic state or more subtly imposing religiously-derived norms through autocratic regimes, shared ground to evade their “responsibility to protect”²² in its broader, innovative and humanitarian definition - which goes beyond criminal atrocities to identify a general obligation upon a State “to protect its own people”²³ descending from State sovereignty, as affirmed by Francis Deng²⁴, an input picked up shortly after by the International Commission on Intervention and State Sovereignty (ICISS)²⁵ - and their duties under international human rights law.

If human rights can be used as instruments to conduct and dictate foreign and internal policy, religion can serve as a powerful justification to cover for a country’s disastrous record on human rights, an aspect for which Arab countries have recently been forcibly drawn under the spotlight in a variety of situations, linked by noncompliance with international standards, defiance of international agreements and abuse of Islamic law, the latter being upheld in defense of an alleged religious order that claims to maintain adherence to secular traditions while wittingly ignoring the need for secularization itself and - even more significantly - the strictly terrain political manipulation to which sacred texts are exposed. Mostly due to these reasons, the Middle East and North Africa region ranks dead last in Human Freedom and has suffered the steepest decline of all in the decade spanning from 2008 to 2019²⁶, a trend that is set to worsen in light of current events, especially those taking place in Iran.

²¹ Tibi, B. (1994). Islamic Law/Shari’a, Human Rights, Universal Morality and International Relations. *Human Rights Quarterly*, 16(2), 277–299. <https://doi.org/10.2307/762448>

²² Responsibility to Protect. United Nations Office on Genocide Prevention and the Responsibility to Protect.

²³ Report of the Secretary General A/59/2005, 21 March 2005. In larger freedom: towards development, security and human rights for all

²⁴ Deng, F.M., Kimaro, S., Lyons, T., Rothchild, D., & Zartmann, I. W. (1996). *Sovereignty as Responsibility: Conflict Management in Africa*. Washington: Brookings Institution Press. ISBN 978-0-8157-1827-7

²⁵ The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (2001)

²⁶ CATO Institute (2021) Human Freedom Index <https://www.cato.org/human-freedom-index/2021>

On a side note, it must be also clarified that Afghanistan, although it is both culturally and historically close to MENA countries, its geographical collocation has caused confusion regarding its position and the categorization is set to change over time, is not to be included among these²⁷- except in the definition of “Greater Middle East” coined by the Bush administration and valid to a certain political extent - for statistical purposes, and data concerning the country is hardly available. Yet the dramatic downward spiral the country has been subjected to after the latest takeover of power by the Taliban, coupled with the systematic massacre of anti-regime protesters pursued by ayatollah Khamenei in neighboring Iran, renders the perfect display of the worst consequences to which fundamentalist rule can be pushed to, as well as it is the manifestation of the vital mistakes or omissions western countries are responsible for in trying to handle those local situations.

Bear in mind, it wasn't just the U.S. who was at fault in the more than two decades long foreign administration of Afghanistan, and it couldn't be otherwise, considering that the EU has been the biggest contributor to the U.S. mission and “that Afghanistan has been the largest beneficiary of EU development assistance for some time”²⁸. The magnitude of the colossal strategic and operative failure, albeit the contribution being relatively less substantial, has simply never been specifically addressed by European institutions, unlike the activity conducted by the U.S. Special Inspector General for Afghanistan Reconstruction. The EU has therefore managed to evade accountability, though what it has thereby ignored, as a side effect, is the opportunity to examine its performance, grasp the degree of its monetary waste and understand the urgent need to shift towards a different approach: a new global governance in the matter of human rights, which we will further define later on, and a change of attitude in the conduct of diplomatic relations, which instead we shall shortly analyze.

²⁷ Sources: Migiros, G. (2019) Is Afghanistan in the Middle East?, World Atlas <https://www.worldatlas.com/articles/is-afghanistan-in-the-middle-east.html>
Afghanaid. Is Afghanistan in the Middle-East? Afghanaid explains!

²⁸ Hassan, O. (2021) Reassessing the European strategy in Afghanistan. Carnegie Europe

Numbers, at least the few that - as mentioned - are attainable pertaining to Afghanistan, will not give in return the complexity of the full story, but will serve as a useful ally in tracking and estimating the shortsightedness of the European and American conjoined investments on Afghan soil, highlighting how unmistakable cries of distress from the state of democracy were inexplicably neglected until far too late. According to the Economist Intelligence Unit *Democracy Report* of 2020, Afghanistan ranked 142nd in the world on the quality of democracy, seven places lower than where it stood in its first report, in 2006, putting practical results in stark contrast with the billion-dollar budget that had been poured into peace and democracy building efforts. The health of Afghan institutions and overall democracy had been declining long before Taliban re-established their grip on power, the U.S. withdrawal escalated a conclusion that had already been reached.

What the EU and the United States had been financing, because of their lack of comprehension of the situation and their superficiality, was actually nothing short of a vicious cycle of corruption and clientelism. The reconstruction process was never envisioned to cure Afghanistan's wounds and to be tailored to its necessities, it rather took shape as a top-down imposition of a vague and inconsistent conception of democracy that expected to treat Afghanistan as a "blank state", as if the civil war and the Taliban rule had not brought irreversible changes to the country's political and civil landscape. The nation and its people had adapted to overcome the hardships of war, breaking down its unity into smaller tribal alliances that had developed strong networks, previous attempts to build a centralized state had failed, yet it wasn't until 2008 that the EU Special Representative for Afghanistan acknowledged that Afghanistan "had turned into a criminal narco-state".

The massive European funding programs, generally and generically destined to the "continued commitment to democracy, the rule of law, human rights, and gender equality" and often dependent on the greater framework of U.S. and NATO action, grew increasingly detached from the reality on the ground, where these major monetary injections ended up fueling submerge economy and open conflict between decentralized

actors and the weak Kabul-based government, revealing the utopist mirage of the supposedly shared goals of western states.

To proactively understand and timely correct the trajectory of the intervention in Afghanistan, adhering to a simple rule could have been vital: “follow the money”²⁹. As this became the first commandment in fighting heavily structured criminal organizations and since drug trafficking and corruption have always played a crucial role in the fate of the Afghan state, critically investigating on how money devolved to sustain democracy was actually being spent and realizing that the Taliban, just like the mafia, were perceived to be better at intercepting and interpreting the needs of people in highly disadvantaged, rural and poor regions over which centralized power had no control, could have saved the day.

Instead, the action driven by the U.S. and followed by the EU exclusively focused on establishing the formal appearance of a democratic government, in the hopes that this would be sufficient to outlast centrifugal forces and bring on change by itself, no matter how practically authoritarian and corrupt this same government would turn out to be.

The objective as a whole was set in an elusive and dysfunctional manner, the plan to pursue it was even more inadequate, the outcome was destructive: unfortunately, a leit motif in peacekeeping and peacebuilding operations on which the USA and the EU, through NATO as well, have embarked over the past few decades.

Attempting to draw broader conclusions from this single case, the main reason, as it has already been pointed out, is to be found in the “overly narrow conception of democracy” that was meant to be implanted with little commitment and even less knowledge of the circumstances and the risks at stake, followed by no responsibility being taken in the aftermath of the failure. It’s an unsatisfying idea of democracy that has also been widely promoted, whether voluntarily or merely consciously, by the European Union but especially by its member states acting on their own and in disharmonized

²⁹ Lynch, J. *ibidem*

manner, in their international relations, in which they have often bowed to autocratic regimes, sacrificing long-term security interests and fundamental achievements in exchange for volatile political and economic return.

This submissive strategy, all the more so when combined with disorganized military intervention, has been enacted especially in favor of MENA countries in the wake of the Arab Spring³⁰ and more recently towards China, not to mention the ongoing war that is tearing Syria apart, has always ran on the edge of a razor blade and has been destined to provoke severe damage, since it paradoxically entrusts autocrats to be able to provide the conditions for adequate security - and therefore control over migration - in the states they exert their power upon, or bloody civil wars to quickly make a legitimate and respectful leader rise from their ashes. “The approach is therefore highly unlikely to deliver long-term resilience on Europe’s borders and is ultimately a recipe for instability”, however, and in spite of proven unsuccessfulness, it has still pretty much not been abandoned for good.

As far as bilateral and multilateral relations are concerned, European countries have to commit to tough diplomacy to transform their words that put human rights at the forefront of their priorities into conducive action and to expect other countries to follow the lead and to abide to standards in the understanding that these are not exclusive to western culture but belong to everybody as a global heritage that must be preserved and cherished. They must be alert and hold these values near and dear particularly in dealing with oil and natural resources rich Arab nations or China, meaning when temptation by bigger and diversionary counter-interest of economic nature lurks, as the recent “Qatargate” scandal involving the European Parliament³¹ and the whole organization network revolving around the latest football World Cup, through the silenced voices of millions of people stripped of their fundamental rights, testifies³².

³⁰ Lynch, J. *ibidem*

³¹ Wheaton, S. (2022) Qatar scandal: What just happened at the European Parliament?. Politico, <https://www.politico.eu/article/eva-kaili-doha-panzeri-qatargate-what-just-happened-at-the-european-parliament/>

³² Noury, R. (2022) Qatar 2022, i Mondiali dello sfruttamento. Infinito Edizioni

Dwelling on monetary interests, it is apparent that western countries have lazily shied away from taking care of solving the profound causes of instability when championing humanitarian aid and pledging to provide providential assistance in a certain situation. Assuming once more Afghanistan as a paradigmatic example, of the reduced amount of funds that wasn't blindly poured into Kabul's government coffers, worn out by corruption, none were meant to be invested into tangible and long-lasting projects from which the population could benefit, and everything was squandered in the hands of local organizations that could offer nothing more than emergency support and rapidly dried out³³.

With the vision obstructed by the illusion that a passive top-down approach and external support could create the conditions for a healthy democratic life, no interest at all was displayed towards reshaping the country's economy and addressing the issue of poverty and the absence of opportunities that common people struggled with. The resort to corruption methods was endemic, nonetheless no attention was placed to curb the phenomenon, which, as expert James Lynch explains, is both an extremely common factor of delegitimization in countries transitioning to democracy and a driving and symptomatic one for human rights abuse. A disillusioned attitude could easily lead to argue that nothing different could be expected coming from western nations, who are constantly stuck in the limbo between promoting free-market values and fighting exploitation practices that their regulation can open the doors to, but most importantly stumble and tumble into major corruption scandals as the one just cited or naively find out that private or public investments being carried out bolster systemic violations of human rights, exposing huge flaws in due diligence processes both inside and outside their boundaries.

For hope in future progress to be restored, however, it must be noted that awareness over the connection between economic behavior and human rights protection has been steadily on the rise, encouraging the adoption of stronger corporate social responsibility schemes and driving the topic of business and human rights to center stage of discussion.

³³ Hassan, O. (2021) Reassessing the European strategy in Afghanistan. Carnegie Europe

To this regard and to assume greater credibility, a “Corporate Sustainability Due Diligence Directive” (CSDDD) is currently in the works among European institutions, following up on the MEPs invite, dating back to March 2021³⁴, to provide Europe with a comprehensive framework, applicable to both European companies and non-EU companies active in the EU, to ensure the pursuit of sustainable development goals (SDGs) - in the words of the Council - “in the EU and beyond”³⁵.

The initiative, of course, has been welcomed and fostered by the UN Office of the High Commissioner on Human Rights, since it intensifies the tendency from governments all around the world to define “mandatory Human Rights Due Diligence” (mHRDD)³⁶ norms and to recognize the pivotal role that the adequate display of economic activities plays in the safeguarding of human rights and - surely but not only - democratic institutions and the set of values it implies.

By strongly reaffirming this advancement and taking pride in their expression, European countries should then be enabled to finally act more consistently, returning to sender criticism that has constantly been raised about the contradiction “between Europe’s professed values and its actions”³⁷, a negative opinion that has been already weighed in its reasonable validity and that intuitively applies to the United States as well.

Becoming openly self-critic, in contrast to what we have seen happening after the abandoning of the campaign in Afghanistan and contrary to the self-indulgent, presumptuous attitude that is wrongly believed to be more productive in diplomatic relations, appears to be the only solution to pave the way to then be more assertive and acceptable global leaders. To give euro-centrism a new dimension. To assert that - even

³⁴ European Parliament, press release, 10 March 2021. MEPs: Companies must no longer cause harm to people and planet with impunity

³⁵ Sources: Council of the EU, press release, 1 December 2022. Council adopts position on due diligence rules for large companies; Accountancy Europe, 8 December 2022. Joint statement on the Corporate Sustainability Due Diligence Directive;

SECNewgate. (2022). Corporate Sustainability Due Diligence: A just and sustainable economy

³⁶ OHCHR. Mandatory Human Rights Due Diligence (mHRDD)

³⁷ Lynch, J. *ibidem*

more so in times of crisis, internal and continental division (see Poland and Hungary) and war - unity is to be found in the consciousness that human rights are universal.

The kind of fruitful tough diplomacy that has been mentioned above runs through the acknowledgment that human rights must be the cornerstone of European external relations and be used, as if they were the most important economic asset, as leverage to induce partners into gradually accepting their imperative nature, and not be treated as awkward elephants in the room that can be easily traded off.

And when aiming to operate in post-war scenarios to rebuild democratic foundations, the sensibility must radically change in the sense of providing only strictly necessary emergency aid and prioritizing the eradication of the deeper causes that make corruption flourish in conditions where statal supervision is lost. To invest in economic and social rights is to strengthen a population's resilience and to win the battle against illegality and missing freedom, whether imposed in the form of widespread corruption or of an autocratic government.

1.2. Universality: Global human rights implementation

Challenges to the paramount principle of the universality of human rights, as we have been able to sketch, are worryingly on the rise, as a conflicting vision of state - in its role and obligations - and international relations is gaining popularity, certainly due to the perceived incapacity of current developments in the international status quo to lead to the achievement of its overly ambitious goals and even provide for the balanced and general progress it had promised. When an assurance made to all fails many, human instinctive response kicks in to suggest a more prudent and defensive attitude, leading to a resort towards idealized but well overcome ideological autarky, more conflictual relationships with outside agents and a personalized, greatly reassuring set of "traditional values". The deviation is an extremely imprecise and potentially dangerous miscalculation, which, as we shall see in Chapter 2, often thrusts open the doorways to power to populist parties, in terms of political effects, and persuades the general public

into trading away an increasing portion of their rights and freedoms, in exchange for the unclear benefit of security, in terms of practical effects on the quality of life.

The dispute was brought on the intertwined grounds of sovereignty and of relativism in the identification of the set of values worthy of being conceived as human rights, the connection between the two elements stemming from the claim of the existence of state freedom to determine and interpret the latter in a condition of independence from external judgment.

Diving into a deeper analysis, it therefore seems appropriate to start from the decisive meaning given to sovereignty, its attributes and the extent of its range in international law and in the contrasting views of some countries, in order to then move on to the second aspect and finally be able to critically dismantle both arguments in the light of historical evolution of the main legal instruments in human rights law.

To pinpoint a critical time and space in the development of the matter is to clearly refer to post-second World War reconstruction and its subsequent determinations giving rise to the modern conception of human rights, in response to the atrocities that the conflict had caused worldwide, with no distinction and no regard for human life. Admitting that the way military operation had been conducted had to be reformed and assuming that the escalation that had been witnessed was as close as it gets to a point of no return, especially considering the state of the art in technological development and the degree of hatred displayed, for humanity was conducive to studying the causes of such aberration, which were primarily found in the degeneration of the nineteenth century conception of State into nationalism and mutual hostility.

It was under these preconditions that the newly founded United Nations took their first steps and that an innovative definition of sovereignty began to spread, supported by the factual evidence of what the previous one had been responsible for.

The threat of historical memory waning over the decades and - like it has been indicated - the unaccomplished display of some of the founding premises of the new system of global governance have paved the way for politically motivated actors to seek

consensus in casting doubt over the current path undertaken by the international community, x-raying it from head to toes and questioning it from top to bottom, bolstering insecurity and suspiciousness over its health, rightfulness and genuineness.

China and Russia leading the charge both within the main UN bodies and its subsidiary organs, such as the UNHRC, through the exemplified dynamics inside the preeminent Like-Minded Group, the speculative idea that the erosion of the notion of sovereignty is driven by western countries to support, in neocolonial fashion, their quest for global hegemony and push their pervasive human rights agenda has achieved supporters globally.

According in particular to the thesis promoted by Chinese diplomacy, the state of human rights within a certain territory, alike any other event taking place inside it, pertains to the discretion and the authority of the government ruling over it, as a consequence of statehood and of state sovereignty³⁸, hence leaving no space for other states to enquire and monitor their situation without this behavior amounting to an illicit interference.

If such a system was to be adopted, it would immediately turn back the clock to a time where statal entities had absolute power within their jurisdiction, as the Latin saying “*rex superiorem non recognoscens in regno suo est imperator*” concisely expressed, and the rule of law as a whole would be squashed, together with the basic prerequisite for modern international relations to unfold.

The concept of sovereignty, instead, has been developed and refined in the second half of the twentieth century essentially for the purpose of giving solid and egalitarian foundations for democratic societies to prosper upon, in the shared recognition that a trustworthy global network of relationships between states is the best system to mutually safeguard peace and the improvement of living standards.

³⁸ Teitt, S. (Oxford, 2017; online edn, Oxford Academic, 16 Feb. 2017) 'Sovereignty as Responsibility', in Tim Dunne, and Christian Reus-Smit (eds), *The Globalization of International Society*, <https://doi.org/10.1093/acprof:oso/9780198793427.003.0017>, accessed 2 Jan. 2023.

The ultra-“negative sovereignty game”³⁹ that unleashed itself in its full, outrageously lethal force during the two world wars was both forcibly and naturally superseded by a reshaping of the predominant role that had been assigned to states in favor of a more conscious and precautionary superiority undertaken by the law and, above all, by fundamental and undisputable rights. But the radical change in perspective was not merely driven by western remorse and rebuttal towards the consequences of the wars; it was just as much brought on by the understanding, which began to take shape in the mind of world leaders as the conflict was still raging, that international cooperation and integration were to become increasingly vital in guaranteeing world order, from microscopic, individual perspective to a macroscopic design.

The epilogue to another potentially catastrophic but thankfully never escalated tension, represented by the Cold War, and its “wind of change” were another decisive warning to urgently trigger the implementation of other adaptations in the theoretical elaboration of sovereignty and its practical repercussions, while actual bloodsheds in conflicts that hardly fit the definition of “civil war” - which was used to gain exemption from international scrutiny - simultaneously led to “key normative developments (...) in democratic entitlement, right to humanitarian assistance, and protection of civilians in armed conflict”⁴⁰, all in the narrow span of less than a decade during the 1990s.

An underappreciated aspect of this historical evolution is the contribution, which clearly shows itself to a careful eye through the filigree and the wording of the main bodies of law that it produced, given, as an irony of fate, precisely by advocates of decolonization and by the position those newborn countries, germinated from this process, assumed within the UN and the international community. Sovereignty as a concept was able to detach itself from liberticide constraints precisely because of its tying to the experience of enfranchised countries and the profound connection they established between it and the system of human rights that was then taking shape (the Universal Declaration of Human Rights and the two International Covenants - on Economic, Social and Cultural Rights, and on Civil and Political Rights), through the principles of self-

³⁹ Teitt, S. *ibidem*

⁴⁰ Teitt, S. *ibidem*

determination, envisioning these as “a primary condition for upholding the suite of individual human rights negotiated under the [documents]”⁴¹ and thereby anchoring their quest for freedom and recognition to a higher cause and a crucial legal basis.

This step forward in reasoning and the “normative revolution” with which it went hand in hand were so significant that they functioned to progressively defuse the attempts made, during the first decades of activity of the UN and amidst uncertainty pertaining its capacity, to cling onto a narrow interpretation of the UN Charter provisions in order to limit its scope and, especially with regard to the sovereign right to non-interference, reaffirm statal independence and its hierarchical superiority through the staunch defense of the limits imposed by “domestic jurisdiction”⁴².

Concurrently, the momentum-shifting impulse transmitted by geopolitical events, linked with the normative proliferation on the matter of human rights, collaborated towards setting “minimum standards of conduct” that are to be upheld regardless of pretensions to recall non-interference, and both in times of peace and of war, by virtue of the recognition, reaffirmed in the milestone 1993 Vienna Declaration on Human Rights, that “the promotion and protection of all human rights is a legitimate concern of the international community”⁴³ which gives rise to an international mandate to scrutinize on human rights abuses.

The codification of these standards into human rights law and the development of international criminal law - from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide onwards - thus mutually influenced each other, modeling this international mandate out of the awareness of the fact that necessary measures adopted by States or international organizations were consistent with the generally recognized principles of international law insofar as the atrocious conducts

⁴¹ Teitt, S. *ibidem*

⁴² Korowicz, M.S. (1959). Sovereignty in the Practice of International Law. Domestic Jurisdiction. In: Introduction to International Law. Springer, Dordrecht. https://doi.org/10.1007/978-94-011-9226-2_6

⁴³ Vienna Declaration and Programme of Action <https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action>

being criminalized and the violation of the corollary international obligations were concerned, because of the international relevance assigned to the interests at stake.

Aligned with this sensibility with regard to gross human rights infringements, notwithstanding any difference between international and internal situations, grew the support for the idea that a “positive” attribute of sovereignty had to be elaborated⁴⁴, meaning that if sovereignty had to be certified in its importance, as Asian countries lamented, this came with a share of responsibilities that complemented deriving rights. First and foremost came the duty to prevent and repress crimes under international law and a number of violations perpetrated against fundamental human rights, as an indispensable precondition for other rights and life itself to mature. To put it once again in the words used by the Vienna Declaration, since “human rights and fundamental freedoms are the birthright of all human beings, their protection is the first responsibility of Governments”.

This concept of “sovereignty as responsibility”⁴⁵, rapidly grasped in the fullness of its potential, evolved, thanks to international human rights law, humanitarian law and UN humanitarian practice - driven by the events of the 1990s - into a decisive shift in the vision of one of the most controversial topics in international law - the right to humanitarian intervention - and into the enucleation of the revolutionary notion of “Responsibility to Protect” (R2P)⁴⁶. Based on the management of the early nineties crises in Iraq, Somalia and Liberia and the backing of the actions offered by UN organs, it had already become clear that “the traditional assessment of the legality of humanitarian intervention [needed] to be reconsidered”⁴⁷, while less than a decade later, the 2001 ICISS report on the Responsibility to Protect stressed the presence of this burden in the hands of the international community to take appropriate steps in defending the rights of civil populations at least in the cases where states are “unwilling or unable” to perform such

⁴⁴ This notion of sovereignty can be described as “positive” in contrast with the “negative” display of sovereignty shown during the world wars (*supra*) and with the concept of it as an “unmitigated state right” (Teitt, S. *ibidem*)

⁴⁵ Deng, F.M., and others, *ibidem*

⁴⁶ *supra*

⁴⁷ Greenwood, C. (1993) Is there a right to humanitarian intervention? *The World Today*, Vol. 49, No. 2, pp. 34-40 Published by: Royal Institute of International Affairs. <https://www.jstor.org/stable/40396480>

obligations, this stance being as well motivated by historical events, by the mission “to prevent genocides as seen in Rwanda and Srebrenica”⁴⁸.

By carefully listening and integrating the concerns over the disputed issue, the doctrine of R2P has managed to gain transversal support and to become a hallmark test for democratic legitimacy and even legitimate statehood, with the principle of the responsibility to protect finally being set forth in paragraphs 138 and 139 of the 2005 World Summit Outcome Document - a General Assembly resolution (A/RES/60/1) adopted at the level of Heads of State and Government - stating:

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. (...) The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

Paragraph 139 provided necessary systematic coordination between the principle as conceived by other international instruments and the action of the UN adding:

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁴⁹

⁴⁸ The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (2001), *ibidem*

⁴⁹ Responsibility to Protect. United Nations Office on Genocide Prevention and the Responsibility to Protect. *ibidem*

With the extent of R2P being decisively asserted in the framework of the UN and investing the entire range of competences at the Security Council's disposal, it became often the Secretary-General's business to clarify and implement this notion, and, as a matter of fact, it was Ban Ki-moon in 2015 who noted that "there now exists a consensus that spans all regions" and "there is no longer any question that the protection of populations from atrocity crimes is both a national and an international responsibility"⁵⁰.

Aiming to draw conclusions upon this aspect, it can be said that, as far as basic human rights principles are threatened - but bearing in mind that the list of situations that can trigger international intervention, under its various and graduated forms, is open, subject to case-by-case verification and physiologically and continuously evolving interpretation and broadening - the vision according to which sovereignty is conflicting and not consonant to universality in the protection of human rights has to be deemed outdated. Fundamental rights, because of their aforementioned essentiality, appear not to be merely exempted from the application of the principle of non-interference, but rather to be a self-standing cornerstone of international law, as the isolation of the right to humanitarian intervention and its evolving application proves, and a factor of legitimation for genuine, twenty-first century valid sovereignty.

In treating the protection of human rights as a matter of legitimate international concern bearing governments with the responsibility to act in its assurance, the 1993 Vienna Declaration on Human Rights expressed the link between sovereignty and universality in the recognition of these rights⁵¹, as a necessary corollary of uniformity in the obligation to protect them, against the push for particularist interpretation by Arab and Asian countries: a key logical passage in moving on to dealing with the second point of emphasis being raised to question the principle of universality.

⁵⁰ United Nations Secretary-General. (2015). *'A Vital and Enduring Commitment: Implementing the Responsibility to Protect: Report of the Secretary-General'*. A/69/981, 13 July.

⁵¹ "That the codification of international human rights standards defined sovereign responsibilities and placed limits on domestic jurisdiction was reflected in the 1993 Vienna Declaration on Human Rights (...)" Teitt, S. *ibidem*

Specifically during the World Conference on Human Rights - a landmark occasion to discuss and revise the state of the battles and the objectives of human rights action, “a pivotal moment”⁵² in the words of the Office of the High Commissioner for Human Rights, (whose mandate was introduced at this time and whose post was created later that year by the General Assembly) held with the purpose of setting forth strong and joint programmatic intent (through its outcome document), and the culmination of the transformation process that had been kickstarted in 1968 by the Teheran International Conference on Human Rights⁵³ - ministers of foreign affairs of Arab nations meeting in Vienna immediately exploited the platform to advocate for “the specific character of their culture against the claim of the universality of human rights”⁵⁴ and strict derivation of human rights from the Shari’a in Muslim culture.

In Vienna, the long-standing issue of compromising, *rectius* promoting, pluralism while keeping it in balance with democratic values and fundamental rights, exploded into open verbal confrontation of opposed visions between developing and western countries, or more precisely, between “the West (...) and a coalition of Islamic and Confucian states rejecting Western universalism”⁵⁵, bringing to mind the division upon religious grounds that has been analyzed in the previous paragraph.

Not even the policy - recalled through the speech delivered by Belarus at the 46th session of the Human Rights Council⁵⁶ - that has been widely adopted by Asian and like-minded countries, of calling out Europeans for tolerating widespread human rights violations on their ground as a justification for their own abuses and as speculative proof to criticize the underlying system of human rights protection is newly coined. The practice had been already carried out within and in the wake of the Vienna Conference, by ASEAN foreign ministers, regarding the situation in Bosnia⁵⁷, but - having already stressed the

⁵² OHCHR, World Conference on Human Rights, Vienna, 1993

⁵³ United Nations, World Conference on Human Rights, 14-25 June, 1993, Vienna. <https://www.un.org/en/conferences/human-rights/vienna1993>

⁵⁴ Tibi, B. *ibidem*, p. 278

⁵⁵ Huntington, S.P. (1993) "If Not Civilizations, What?," *Foreign Affairs*, 72, 3, p. 188

⁵⁶ *supra*

⁵⁷ Richardson, M. (1993) Asians, Turning Tables, Denounce EC on Bosnia. *International Herald Tribune*, 28 July 1993, 2, col. 2.

key importance of self-criticism, coherence and moral rectitude for western counterparts to regain credibility - it is still self-evident that the rightfulness and righteousness of a system does not rely on the amount of its breaches.

The main argument articulated by those who advocate the impossibility to establish a universally valid set of human rights, or at least to do so under current euro-centric premises, however, revolves around a previous period in time, and the claim that those rights that are enshrined in the most prominent international conventions are philosophically rooted in Europe and drenched in Judeo-Christian cultural environment, which renders them non-fungible and inapplicable to entirely different contexts. The harshest attack coming from Muslim fundamentalists, as previously seen⁵⁸, it is now possible to fully disclose that, although a silent minority in political Islam, an interpretation of Islamic law seeking “cross-cultural foundations”⁵⁹ and compatibility with human rights law is entirely possible and desirable⁶⁰. Altogether, lessening the degree of permeation of religious precepts into the fabric of society is clearly advisable, precisely in the name of pluralism and state laicity, while at the same time embracing cultural diversity and reasonable differences in the implementation of human rights norms in accordance with regional particularities. The effects of this vision, which are visible on a smaller scale within the framework of the Council of Europe and the European Court of Human Rights - whose “margin of appreciation” jurisprudence will be examined in the following paragraphs - are entirely beneficial to the development and the pursuit of higher standards in every sector.

Broadly speaking, human rights justify their universality because their origins, both historically and ideologically, are absolutely not a cultural propriety and trademark of western thought, as they have to be sought, as mentioned, in the collective response that followed the destruction brought on by the world war, which too, by definition, was a global phenomenon with widespread repercussions.

⁵⁸ *supra*

⁵⁹ Tibi, B. *ibidem*, p. 286

⁶⁰ Sources: An-Na'im, A. A. (1990) *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law*. Syracuse University Press, p. 185.

Taha, M. M. (1987) *The Second Message of Islam*, trans. and intro. by An-Na'im A. A. Syracuse University Press

As a consequence, the category was not created with the intent to sponsor or reflect European philosophical elaborations over their origin, assumptions taken by natural law, or morally invasive dogmas: “the international expressions of rights claim no philosophical foundation, and “articulate no particular moral principles or any single, comprehensive theory of the relation of the individual to society”⁶¹, being, instead, a product of diplomatic arrangement and compromise through political debate.

Most significantly, the firm political will to commit to justice, enclose the action of states within the defined boundaries of law and announce the sacred role of “*inherent*” human *dignity* and “*equal and inalienable rights*”⁶² that had been lost was incorporated, in terms of human rights law, in the most fundamental document ever produced by the United Nations: the Universal Declaration of Human Rights (UDHR).

Holding the word “universal” as its introductive and most eye-catching should already symptomatically suggest the global reach of the instrument (universality also being the basic principle sustaining the architecture of the UN organization itself) and the portentous body of law that it inspired⁶³, yet exclusively appealing to literal interpretation would not be sufficient to silence the claims of non-universality.

Asian and Arab commentators and governments’ recurring argument is that the consensus of these countries over the adoption and the norms contained within the UDHR was inferred or tacit, while never actually given or anyways not “substantive”. The statement, which, all in all, becomes the source of all issues with interpretation and consistent application in these countries, strikingly disregards the historical background and therefore, once again, the diplomatic agora that discussed and conceived the Declaration.

⁶¹ Sources: Shaheed, A., Richter, R.P., (2018) Is “Human Rights” a western concept? IPI Global Observatory;

Henkin, L. (1990) *The Age of Rights*, Columbia University Press

⁶² Universal Declaration of Human Rights, Preamble

⁶³ “More than seventy human rights treaties, applied today on a permanent basis at global and regional levels (all containing references to it in their preambles)” according to the UN, and countless other state constitutions, judiciary decisions or legislative works.

The document was at the forefront of the agenda right from the first session of the UN General Assembly in 1946, further manifesting the necessity, shared by all members, to rapidly adopt a “road map to guarantee the rights of every individual everywhere”⁶⁴, an “International Bill of Rights”⁶⁵ that would complement the UN Charter. The draft was curated by the Commission on Human Rights and, later, by a restricted formal drafting committee, both carefully composed to take into account all religious, cultural, political backgrounds and geographical distribution; the final drafting was open and participated by over 50 member states. It was voted within the General Assembly, who back then counted on 58 representatives - 37 of Judeo-Christian tradition, 11 Islamic, 6 Marxist and 4 Buddhist-Confucian - and adopted through resolution 217 A (III) with widespread success (48 votes in favor, 8 abstentions - the Soviet Bloc, Saudi Arabia and apartheid-driven South Africa).

The debate, in spite of the final abstention, motivated by the lack of even further attention on socio-economic rights, was decisively enriched by the Soviet and Arab positions, and further developments in the crafting and refinement of the so-called International Bill of Rights heavily relied on the contribution offered by the experience of decolonization, as we have seen, and by Latin American and African countries in general, the push for the enshrinement of the “protection” of human rights coming exclusively from non-Western nations.

Even more significantly, for the purpose of our analysis, is the fact that it was the Egyptian delegate, Omar Lutfi, who, citing the need for rights and freedoms to be recognized and available to all, including the people who were still under colonial rule, was the first to advance the idea that the UDHR referenced “universality” as a fundamental feature of human rights. Equally important was the stance of many Muslim states in that moment and in the early decades of UN activity, during the course of which pressure by extremists to interpret Islamic law in a way that is openly and willingly

⁶⁴ History of the Declaration, United Nations, <https://www.un.org/en/about-us/udhr/history-of-the-declaration>

⁶⁵ It would become complete thanks to the adoption of the two Covenants in 1966 and their entry into force in 1976

conflictual with human rights was far less perceived, opposed to the current situation where Egypt itself, for instance, has become a leading voice in the anti-western LMG, that advocates for “anti-western revolt” within the UNHRC.

To sum it up, the conditions in which the UDHR took shape are adequately summarized by none other than the UN website itself, distinctly stating that the document was “drafted by representatives with different legal and cultural backgrounds from all regions of the world” and technically leaving no space to differ.

In light of this, it should be evidently clear what perhaps could have been imaginable right from the start: much of the specious challenge brought to the universality of human rights hinges on a narrative tainted by political animosity. Therefore, if the dream hope to at least achieve global commitment to uphold the value of universality would be an “ideal depoliticization” of the matter in its degenerate terms, the more realistic goal can be to invest and praise the role of human rights groups, highlight the “participation of *Global South* states in advancing recognition of human rights norms, and their leadership in establishing the accompanying international bodies and procedures for better realizing them”⁶⁶ and finally to educate people all around the globe about the crucial significance of their dignity and action.

1.3. The right to vote as enshrined in international conventions and instruments

Having thoroughly sketched the fragmented situation vis-à-vis uniformity in the advancement of human rights and the capacity for the system to live truthfully to its expectations, it is time to turn the historical considerations made so far and the eye of the juridical analysis towards the main focus, the right to vote.

Quintessentially crushing the ongoing struggles for universal suffrage, the rise across Europe, with the notable exception of Francoist Spain, of dictatorships, in the time

⁶⁶ Shaheed, A., and other, *ibidem*

spanning between the two wars, reached the apex of mass destruction, alienation and discrimination through and profiting off the worst imaginable distortion of the right to vote, having permeated every corner of the state machinery to the point where no margin for independence was left. Electoral consultations were propaedeutic to claiming power legitimately and, in some cases, to maintain the semblance of a popular mandate being exercised, although process and result being rigged, multipartyism abolished, freedoms annihilated and military control over them established. A formula that, with factors being alternatively or cumulatively present, is currently reprised by electoral autocracies, which will be among the focal issues in Chapter 2, and that has most recently been used by Russia in the sham referendums it issued to declare the annexation of four regions of Ukraine.

The collapse of democratic institutions, at least as how they were known before World War II, was - it must be once again referred - the driving force behind the forging of brand new safeguards for a free and liberal society, with the right to vote being identified as its perimeter wall, whose solid and true standing guarantees the enjoyment of the rights descending from and depending on democracy and the activation of the system of checks and balances onto which the non-degeneration into an autocratic regime hinges.

This sort of awareness also suggests and contains, in embryonic form, the nucleus of the raising interest towards protecting democracy not just as a formal requirement to access the forum of international relations, but rather as an “inchoate human right”⁶⁷, tied to the emergence and consolidation of the individual and the collectivity both as direct recipients of rights under international law and of a corresponding duty upon states to act and remain accountable towards the domestic population, which will then develop into a substantial precondition for “democratic entitlement”.

⁶⁷ Franck, T.M. (1992). ‘The Emerging Right to Democratic Governance’. *American Journal of International Law* 86 (1): pp. 46–91.

This aspect we will resume shortly, but given these premises, the expression and the wording of the first document of global reach and application adopted in international law addressing voting rights⁶⁸ should be clear in their intent, their extent and their massive consequentiality.

1.3.1. Guiding principles and standards of protection

Article 21 of the 1948 Universal Declaration of Human Rights states as follows:

1. *Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.*
2. *Everyone has the right of equal access to public service in his country.*
3. *The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.*

Being the first example of such kind, and as part of a document designated with the task of encompassing the *ius in itinere* and laying the foundations for further, flexible evolution, this Article boldly asserts the fundamental notion of democratic rule of law. The core elements of democracy complement and strengthen the power and the resilience of volatile ideological principles such as compliance with the law and separation of power, which, rested merely in the hands and the common sense of the political circuit, had been violently abused and broken. Through the hindsight of seventy-five years of living practice, and worldwide increasing levels of democratic engagement (till recent troubling trends that will be later scrutinized), the mission to etch the core elements of democracy into human rights law can be deemed successful in its effects, in spite of the

⁶⁸ “The League of Nations Covenant was broadly silent on the issue of human rights, in keeping with the convention of the times”. Burley, J. (2019) *The independence of the international civil service, 1919-2019: minority rights at the League of Nations and human rights at the UN – Part 2*. Universal Rights Group Geneva.

However, the American Declaration on the Rights and Duties of Man, adopted in May 1948, preceded the UDHR by a matter of months, thus becoming “the world’s first general international human rights instrument”. LSE Center for Women, Peace and Security, *American Declaration on the Rights and Duties of Man*.

fact that, curiously, the word “democracy” never actually appears inside the UDHR, apart from a reference contained in Article 29 to a “democratic society”⁶⁹.

The rationale behind this choice is both strictly political and legal. Surely it is a product of the times in which it was made and the early bloc-like divisions that expanded into the Cold War played a role, but the consecration of democracy into a legally satisfying definition would have inherently exposed to arbitrary interpretation. Consequently, the notion of democracy supported within the UDHR and the UN cautiously moves amidst potentially diverging interests and the consciousness that a stand-alone right to democracy does not belong, *per se*, to international law⁷⁰. Because of the vagueness of the concept being hard to channel into regulation, the effort has been efficiently placed into setting in stone the set of values that the concept emanates, allowing by other means the “elements defining democracy” to be “largely guaranteed by international law”.

In implicitly referring to pluralism and in cherishing the unique dimension of every country’s experience with democracy, the UN finds itself between a rock and a hard place, struggling to fulfill its mission of promoting uniformity towards democratization, as a vehicle for the protection of human rights, while coming to terms with particularist tensions.

“The necessity of due respect for sovereignty and the right to self-determination” appears to be strangely at odds with “stressing that democracy, development and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing”, despite the two sentences composing subsequent preambular paragraphs inside resolution 68/164⁷¹, the keystone being found by redirecting towards the first preambular paragraph, which, in its full exposition, reaffirms “that democracy is a universal value based on the freely expressed will of the people to determine their own

⁶⁹ Office of the High Commissioner for Human Rights (2019) Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles. Press Release

⁷⁰ Strengthening International Law to Support Democratic Governance and Genuine Elections, The Carter Center, Democracy Reporting International

⁷¹ United Nations (General Assembly). (2013). *Resolution 68/164 on Strengthening the Role of the United Nations in Enhancing Periodic and Genuine Elections and the Promotion of Democratization*.

political, economic, social and cultural systems and their full participation in all aspects of their lives”.

The whole sentence echoes and endorses the words of Article 21 of the UDHR, but most importantly, referencing the “free will of the people” directly recalls its Paragraph 3, and allows to put at the forefront of the resolution on such a delicate topic the attestation of democracy as a universal value, precisely because of the trailblazing work done by the UDHR to definitively elevate democratic values to an international standard, inside Article 21 and throughout the document. Considering this will as foundational to the “authority of government”, as Article 21 (3) declares, implies the need for those who seek or hold power to refer to and respect the set of duties and rights thereby enshrined, abide to a process meant to skim and outcast those who are not fit and reinforce the rule of law for them to legitimize their claims to the eyes of international observers and to those of the domestic population. The expression contained in Article 21 (3) is accordingly extended by resolution 68/164 to a full-scale popular investment in the fashioning of a country’s structure, with transparency and open participation spearheading the list of means by which people can feel adequately represented and defended under the law.

The honing of a general right to access democratic governance has progressively been expanded to approach its full potential and the ICCPR, which will be shortly investigated, in reaffirming the right to take part in public affairs in Article 25 (a), has been interpreted in the sense of broadening its scope to encompass the obligation upon State parties to grant citizens effective participation in constitution-making processes⁷². Since dealing with the supreme and hierarchically-dominant source of law - dictating the standards to which others must adhere - and further taking into account that loopholes in the definition of these same standards translate into hazardous implementation, constitutional order has been on the one hand considered, and still traditionally maintained to be an exquisitely expert matter, isolated from traditional political debate, and on the other it has been progressively recognized that “Constitution making is the

⁷² Strengthening International Law to Support Democratic Governance and Genuine Elections, The Carter Center, Democracy Reporting International, *ibidem*

foundation of democratic governance”⁷³, therefore its exclusion from the notion of “public affair” for which participation must be granted is manifestly unreasonable.

The Human Rights Committee⁷⁴ ruling in the case of *Marshall v. Canada* in 1991⁷⁵, later upheld by the issuing of a General Comment on Article 25 of the ICCPR, provided the legal precedent for the incardination of a right to participate in constitution-making, announcing, on a first-time basis, that “constitutional conferences (...) do indeed constitute a conduct of public affairs”⁷⁶. Subsequently, through the highly-requested General Comment, the Committee, tasked with the duty of defending and expanding the ICCPR, operated to alleviate the difficulties created by the open-ended wording of Article 25 (a), with regard to the expressions “take part” and “public affairs”. It hence focused on delivering sure grounding for the right to be finally and clearly assertable in its “emergence”⁷⁷ by professing “the right to freely determine [the] political status and to enjoy the right to choose the form of their constitution or government”⁷⁸, followed by the clear-cut identification of the notion of public affair⁷⁹ as inclusive of the acts of

⁷³ Hart, V. Constitution Making and the Right to Take Part in a Public Affair, https://www.usip.org/sites/default/files/Framing%20the%20State/Chapter2_Framing.pdf

⁷⁴ “The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its States parties”. Its activity is mainly focused around the examination of regular reports submitted by State parties concerning their implementation of civil and political rights, on the basis of which the Committee outlines its “concerns” and “recommendations” in the form of “concluding observations”. By virtue of Article 41 of the ICCPR, it has competence over inter-state complaints, and by that of the First Optional protocol (currently counting 117 State parties and 35 signatories) it can “receive and consider” (art. 1) individual complaints. Likewise important is the adoption of “general comments” for the interpretation of specific topics and Articles of the Covenant. It therefore enjoys a very broad, peculiar and significant mandate, carrying out which it has heavily influenced the success of the instrument, enhanced the evolution of regulations and practices and tangibly improved the lives of many. Its fortunes and its moral suasion mainly depend on the authority given by the fact that “its membership represents all parts of the world”.

⁷⁵ *Marshall et al. v. Canada* (Human Rights Committee, CCPR/C/43/D/205/1986), 3 December 1991; Human Rights Committee, “The right to participate in public affairs, voting rights and the right of equal access to public service” (Art. 25): 12/17/96. CCPR General Comment 25, 6(b)

⁷⁶ *Marshall et al. v. Canada*, paras. 5.2 and 5.3.

⁷⁷ Franck, T. M., Thiruvengadam, A. K. (2003) International Law and Constitution-Making, *Chinese Journal of International Law*, Volume 2, Issue 2, Pages 467–518, <https://doi.org/10.1093/oxfordjournals.cjilaw.a000486>

⁷⁸ General Comment 25, paras. 1–2.

⁷⁹ “The Human Rights Committee has defined the conduct of public affairs as “a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels””. Office of the United Nations High Commissioner for Human Rights. (2021). *Human Rights and Elections - A Handbook on International Human Rights Standards on Elections*.

constitution-making, in the processes of transition towards democracy, and constitution reform⁸⁰.

The product of these moments, as a matter of fact, decides the fate of the state organization it is meant to supervise, proving vital to the effective display of democratic life in its future implementation. For this very reason, the OHCHR, in its document on “Human Rights and Constitution Making”⁸¹, stressed the magnitude of “broad participation of all parts of society”, while simultaneously, and consonant to the indications of the Human Rights Council⁸² warning on the crucial role of adequate supervision, transparency and fairness; independence and preparedness also being one of the factors in motivating the advice to possibly divide the process in two parts, still relying on lawyerly competences for the drafting of constitutions.

The “Bill of Rights” also composes the heart and the spirit of every modern state’s constitutional text, emphasizing how closely entangled human rights and democracy are, especially after the previously evaluated, crucial contribution of decolonization, and the preamble of the UDHR encouraging men “to have recourse, as a last resort, to rebellion against tyranny and oppression”. In light of this, and foreshadowing the evolution of an autonomous right to democratic governance⁸³, the principle of self-determination can once again be appreciated not as a counterbalance but, quite the opposite, as an integration of norms protecting rights and freedoms, whose enjoyment needs to be assured in the framework of a system whose functioning is ultimately decided by the domestic population and arranged by the rule of law. As paragraph 2 of the General Comment on Article 25 explains, the “right of self-determination”, which is re-invoked and attributed to “all peoples” by Article 1 (1) of the ICCPR, relates to the previously mentioned right to freely choose their form of constitution and government, while Article 25 more strictly pertains to democratic

⁸⁰ General Comment 25, para. 6. “Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b)”.

⁸¹ OHCHR. (2018) Human Rights and Constitution Making, p. 3

⁸² The Carter Center, Democracy Reporting International, *ibidem*

⁸³ Franck, T.M. (1992). *ibidem*

governance and refers to the right to participate in the carrying out of the whole range of processes that fall under the category of “public affairs”⁸⁴.

The combined provisions regarding the principle of self-determination and democratic governance imply and require that governments be accountable for their score on democracy both outwards and inwards and submit themselves to democratic procedures; elections being the main instrument for internal scrutiny during the life of a state and the electoral cycle having been implicitly recognized by international law⁸⁵.

Sovereignty, thanks as well to the general and consolidated practice of the international community, thereby becomes a matter of international legitimacy, particularly a democratic one. In the absence of this latest feature, domestic populations, relying on self-determination, the indications set forth by the preamble of the UDHR and the numerous principles pointing towards a *de facto* and complex right to democratic governance, are authorized to rebellion, while the international community holds a right/duty to monitor the situation and to intervene in the most concerning cases. The quality of sovereignty as described by this normative and customary evolution - which may be called “popular sovereignty” - helped forge the idea of “sovereignty as responsibility”, now revealing its strongly democratic foundations, underscored by Francis Deng, who pointed out that “it is the will of the people, democratically invested in the leaders they elect freely or otherwise accept as their representatives, that entitles authorities to value and uphold the sovereignty of a nation”⁸⁶.

Popular participation in public governance, insofar as international law and relations are concerned, sadly not so much in practical applications, is gradually arising to the top of a society’s markers of its commitment to human rights and its degree of advancement, from the ashes of a political landscape dominated by the isolation and the

⁸⁴ “The rights under article 25 are related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by article 1 (1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs.”

⁸⁵ The Carter Center, Democracy Reporting International, *ibidem*, p. 7

⁸⁶ Deng, F. M. (1995). ‘Frontiers of Sovereignty: A Framework of Protection, Assistance and Development for the Internally Displaced’. *Leiden Journal of International Law* 8 (2): pp. 249–86.

uncontrolled powers of governments with respect to their populations and the international community.

The ICCPR, a multilateral treaty adopted by the UN General Assembly resolution 2200A (XXI) of 1966 and entered into force in 1976, after its thirty-fifth ratification or accession⁸⁷, and, as a result of its nature, the first binding instrument on the matter of civil and political rights, in its Article 25 sets forth the general protection for the broad right to public participation in a tripartite manner, stating:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

(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.”

Both electoral and non-electoral participation are outlined, the latter in its ramifications of participation to “public affairs” and equal access to “public service”, encompassing, together with voting rights at paragraph (b) and albeit in extremely primitive and loose terms, every aspect of a future right to democratic governance. The clear choice, though, is already made towards an almost exclusive preference for the “historically bounded form of governance in modern states” that is liberal democracy⁸⁸.

⁸⁷ Article 49 allowed that the covenant would enter into force three months after the date of the deposit of the thirty-fifth instrument of ratification or accession. The ICCPR currently has 173 State members that have ratified it

⁸⁸ Luckham, R., Goetz, A. M., Kaldor, M. (2000). Democratic Institutions and Politics in Contexts of Inequality, Poverty and Conflict, IDS Working Paper no. 104, Institute of Development Studies, Brighton, p. 1.

Far from perceiving it as a (Western) imposition, it is important to understand and envision “liberal democracy” as the quintessential model form of governance that arose in the context of post-World War II reconstruction and that establishes the best procedural framework, supported by strong legal guarantees, for authentic representation, truthful enjoyment and balance of rights to prosper and flexibly adapt, allowing for the model to be tailored to a country’s socio-cultural background as an integral part and foundational premise of its structure. The UN has had to cope with deviating stances of cultural relativism and tautologically pleased its sustainers with vague enunciations such as those contained in resolution 68/164, which, for instance, affirmed that “there is no single model of democracy and that democracy does not belong to any country or region”⁸⁹.

An overarching summary of the mission conducted by the UN and by human rights groups and of the underlying spirit of human rights law, could be handed to us by the powerful expression of Iranian lawyer and 2003 Nobel Peace Prize winner Shirin Ebadi⁹⁰, who, paraphrasing and echoing the message sent by the two norms that have so far been dealt with, famously said: “democracy doesn’t recognize east or west; democracy is simply people’s will. Therefore, I do not acknowledge that there are various models of democracy; there is just democracy itself”⁹¹.

The seeming contradiction must be resolved in terms of interpreting the unity of the notion of democracy consonantly and in adherence with the principle of universality of human rights and pursuant to the idea, equally underscored by Ebadi, that democracy and human rights are “universal standards” to be reckoned with and embraced by all. Democracy, in its purity and essentiality, means to value “the will of the people” and to consequently protect the set of rights thanks to which it materializes; it may be molded into infinite different shapes, but its core is indivisible. That is why Ebadi, in conformity with our previous reasoning, argued that human rights standards, regardless of their origin and once that political manipulations have been ousted, belong to every culture and

⁸⁹ United Nations (General Assembly). (2013). *Resolution 68/164, ibidem*

⁹⁰ She was the first Muslim women to ever be awarded this prize

⁹¹ World Summit of Nobel Peace Laureates, Meet the Laureates: Shirin Ebadi, Nobel Peace Prize 2003,

religion, with efforts being made for cultural relativism to prevail being motivated by the will to cover up for gross human rights violations.

The value of democracy as hereby intended is reinvigorated, and progress systematically anticipated by provisions ahead of their times, by evolutions instated at a regional level. The Organization of American States (OAS), whose membership reunites all 35 independent states of the Americas⁹², shines as a brilliant example, since its Charter of 1951 enshrines in its Preamble the conviction about representative democracy as “an indispensable condition for the stability, peace and development of the region”, ideals whose effectiveness, in turn, depends on the “consolidation (...), within the framework of democratic institutions, (...) of the respect for the essential rights of man”. Further developing and institutionalizing this innate bond, the Organization has established the promotion of democracy and the defense of human rights as its two main pillars, while the Charter moreover adds, in Article 2 (b), that among the purposes of the OAS stands the objective “to promote and consolidate representative democracy”, regardless of the formal and recurrently encountered exception made for the “due respect for the principle of nonintervention”. To reinforce the commitment and concurring to change the way the right to external intervention was conceived, insofar as populations of member states are concerned, the General Assembly of the OAS, in 1991, instituted a process by virtue of which the Organization is authorized to act in case of interruption of the democratic order⁹³.

The traditional principle of non-intervention was definitively left behind and superseded by the groundbreaking language utilized in the 2001 Inter-American Democratic Charter, with the formulation of Article 19 breaking the resistance upon the topic of national sovereignty and establishing, pursuant to the scope of the document to “reinforce OAS instruments already in place for the defense of representative democracy”, “an unconstitutional alteration of the constitutional regime” as a sanctionable offense. The reaching of an agreement at the intergovernmental level on such controversial matter and the attention given to the inputs and the worries offered by

⁹² Organization of American States, https://www.oas.org/en/member_states/default.asp

⁹³ University of Minnesota Human Rights Center (2003). Study Guide: The right to vote. <http://hrlibrary.umn.edu/edumat/studyguides/votingrights.html>

civil-society organizations⁹⁴ reflects the shared intention among member states to actually and actively commit to the objective set of democracy becoming the “common form of government for all countries of the Americas”⁹⁵ and the deeper feeling of an obligation from governments towards their citizens to provide for their well-being through the recognition of a wide range of rights in the undeniable framework of democratic governance. Democracy was, as a matter of fact, envisioned, practically and yet again far from philosophical elaboration, as a “reciprocal contract of peoples with governments”⁹⁶; the “right to democracy” was explicitly affirmed in Article 1 and the essence of reciprocity with regard to the role of citizens was specified by Article 6, which described public participation as a right and a responsibility and as a “necessary condition for the full and effective exercise of democracy”.

The cutting-edge content of the Charter extensively carries over into its Chapter II, emblematically titled “Democracy and Human Rights”. Its opening Article 7 insists on the quality of democracy as being “indispensable for the effective exercise of fundamental freedoms and human rights” and echoes the 1993 Vienna Declaration⁹⁷ by underscoring their core principles of “universality, indivisibility and interdependence”, concluding, through another nod to constitutionalism and its fundamental role in guaranteeing constitutional order, that these are “embodied in the respective constitutions of states and in inter-American and international human rights instruments”. The extremely innovative architecture of the Charter finally finds its pinnacle in the aforementioned connection between democracy and human rights, sublimated in Article 11, extending interdependence to the relationship of “mutual reinforcement” existing between these and recalling once more the expressions of the Vienna Declaration⁹⁸.

⁹⁴ Hart, V. *ibidem*;

Graham, J. W. (2002) A Magna Carta for the Americas: The Inter-American Democratic Charter: Genesis, Challenges and Canadian Connections, Policy Paper FPP-02-09, Canadian Foundation for the Americas

⁹⁵ OAS, (2011) Tenth Anniversary of the Inter-American Democratic Charter

⁹⁶ Inter-American Democratic Charter, art. 1, Graham, “A Magna Carta for the Americas,” p. 7.

⁹⁷ UN, Vienna Declaration and Programme of Action, 25 June 1993, art. 5.

⁹⁸ UN, Vienna Declaration, Art. 8: “Democracy, development, and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.” See examples linking participation with development in Dias, C. J. (2005) Peacebuilding: International Law and Constitution Making, Report for the United Nations Development Programme

Moving towards a broad analysis of this relationship, an indispensable and primary precondition for the genuineness of democratic governance is equality under any circumstance, which translates, in its negative aspect, into the principle of non-discrimination, expressed by Article 2 of the ICCPR. This norm posits, in a non-exhausting list, the prohibition of “distinction of any kind”, subsequently mentioning “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. The significance of this proposition is reaffirmed by the General Comment on Article 25, which reiterates the catalog in its paragraph 3.

The other “negative” requirement imposed by the disposition pertains to “unreasonable restrictions” and mostly pertains to measures of so-called “disenfranchisement” adopted by states to limit the enjoyment of voting and relative rights. Paragraphs 3 and 4 of the General Comment maintain, in accordance with the principle of legality, that any of such distinctions or limits shall be established by law and supported by reasonable and objective criteria.

Irrespective of the form of constitution and government chosen through the exercise of the right of self-determination, paragraph 1 of the General Comment extracts a general principle from the Covenant and requires states to adopt all due measures to guarantee the effectiveness of the rights the document itself disciplines. About Article 25 which, by admission of the Committee, “lies at the core of democratic government based on the consent of the people”⁹⁹, the set of rights that allow the will of the people to freely and fairly manifest itself must be preliminarily protected.

The entirety of these rights, that the OHCHR names as “prerequisite rights”¹⁰⁰, is foundational to the fruition of those established by Article 25, and those protected under paragraph (b) above all. Accordingly, they are crucially dealt with by both the Covenants and the General Comments, whose main purpose, in consideration of the Committee’s role and authority, is to advance their protection and direct the efforts made by State parties towards efficiency in the use of resources and meaningfulness of the results.

⁹⁹ General Comment 25, para. 1

¹⁰⁰ Office of the United Nations High Commissioner for Human Rights. (2021). Human Rights and Elections, *ibidem*

The Covenant, that - apart from a minor inversion in the set out of rights, deriving from the different topics of the two - shares its Preamble with the fellow ICESCR, immediately, and through it, grasps the idea that in order for civil and political rights to be attained, suitable conditions must be created¹⁰¹, these conditions corresponding to the fertile humus made up by prerequisite human rights. First thing in Article 1 (1), comes, as we have just managed to see, the right of self-determination, autonomously mentioned and defined in its effects, rephrased by General Comment 25, paragraph 2. The right to freedom from discrimination follows in Article 2 - pinpointing some among the main and direct guarantees, and supporting the provision with the duty for states to ensure internal remedies¹⁰² - and then again in Article 26, this time in terms of “equal and effective protection” before the law. Article 25 is also surrounded by other norms concerning fundamental human rights, such as those regarding freedom of opinion and of expression (Article 19) and their limits (Article 20), the right of peaceful assembly (Article 21) and freedom of association (Article 22).

The extent of these rights in the system of the UN and in international law, in light of their essential conjunction with voting rights will be assessed in Chapter III. For the purpose of this paragraph it will suffice to say that these rights forge the safeguards of democratic governance and therefore determine the degree of authenticity, or - brought to the extreme consequences - the possibility itself, of popular participation, public scrutiny and the chances of expression through the exercise of voting rights in particular.

The Human Rights Committee, through its General Comment on Article 25, indirectly emphasized the historical link, that has been already pointed out, between the formulation of the UDHR and that of the ICCPR, observing how the respect for fundamental human rights, which Article 25 implicitly assumes as a basis for democratic governance, is especially critical for the correct expression of the famously cited “will of

¹⁰¹ “Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights”

¹⁰² ICCPR, Art. 2 (3)

the people” through electoral processes. Elections, among the tripartite articulation of rights operated by art. 25, stand out as the “primary means through which individuals exercise their right to participate in public affairs”¹⁰³ in all its consequent and immense implications.

Strictly pertaining to the conduct of electoral processes and to the enjoyment of pure voting rights, international instruments have produced and identified a number of common general principles covering the matter in its full display. Conventions adopted both at a regional and a global level variously but unanimously recognize the freedom, fairness and periodicity of the election, universal and equal suffrage, the secrecy of the ballot and the transparency and openness of the procedure as principles defining the right to vote in its practical implementations. Voting rights include both active and passive electorate, encompassing and applying the right to public participation to the democratic processes by virtue of which this comes into action. This aspect is dealt with through expressions such as “the right to take part in the government (...) directly or through freely chosen representatives” and the similar one used by art. 21 of the UDHR and art. 25 (a) of the ICCPR, respectively, yet it is the “right to vote and be elected”, first enshrined in Article 20 of the futuristic American Declaration of the Rights and Duties of Man (also known as “Bogota Declaration”) then reprised by Article 25 (b) of the ICCPR and Article 23 of the 1969 American Convention on Human Rights, that truly expresses the pivotal role of elections for democracies to actually be considered as such.

The growing trend of constitutionalism and the affirmation of the constitution as the outline, the genetic imprinting and the defense shield of democratic states has led to this instrument understanding and undertaking its primary function of setting clear guarantees of fundamental rights and mutually operating with supranational and international sources of law for these rights to receive the utmost protection. As a consequence, the activity of recognizing and promoting the set of voting rights which, by definition, distinguishes democracies is transferring upon constitutional texts as well: a necessary conquest given the inherently national character and the exposure to political power that voting rights suffer in their unfolding.

¹⁰³ General Comment 25

A survey conducted in 2003 revealed that 108 out of the 119 electoral democracies placed under the spotlight follow the example set by international law and constitutionally guarantee such rights for their citizens, at least in the form of freedom to elect their representatives¹⁰⁴. Curiously, and probably as a heritage of traditional common law, the eleven countries who do not provide this guarantee are the United Kingdom - that does not have a written constitution - the United States, India and other former British colonies, and other territories which belonged to former states, with the lone exception of Indonesia. Based on empirical evidence, constitutions have been classified into four groups:

- 1) no constitutional right to vote or equivalent regulation;
- 2) right to vote and annexed guarantees mandated only for the election of sovereign bodies;
- 3) stand-alone right to vote;
- 4) right to vote and establishment of positive and negative obligations upon the state and the government.

The provision of a stand-alone right to vote represents the general standard in democratic constitutions. Its presence intuitively responds, as its main purpose, to the need to protect citizens from the abuses of power, which may otherwise arbitrarily limit or crush their freedoms, by offering the highest possible anchoring of their rights at an internal level. The principle according to which any limitation or restriction of the right to vote must be contemplated by law, backed by the General Comment on Article 25, and the positive obligations with which the Committee, and international law as a whole, burden the states allow for courts to scrutinize their actions or inactions and intervene, although with due and often employed self-restraint, in its most blatant violations¹⁰⁵. While also used in limited cases, regional human rights systems in Europe and America both are equipped with enforcement mechanisms.

¹⁰⁴ Kirshner. (2003) The international status of the right to vote, Democracy Coalition Project, <http://archive.fairvote.org/media/rtv/kirshner.pdf>

¹⁰⁵ "Not only have courts viewed the right to vote as a bulwark against government infringement (e.g., keeping certain groups from voting), they have also seen the right to vote as imposing a positive obligation on the state to ensure that people can vote (e.g., making special efforts)." Kirshner, (2003) *ibidem*

This latter aspect once again highlights the level of precocious advancement that the protection of voting rights and human rights in general have enjoyed within the American continent, where the 1948 Bogota Declaration set a milestone and became, as previously noted, the first international human rights instrument and the first one to recognize the right to vote. The picture was later on completed by the progressive formation of the Inter-American System for the protection of Human Rights (“IAHRS”), as well composed by two independent bodies: the Inter-American Commission on Human Rights, created in 1959, and the Inter-American Court of Human Rights, established in 1969 by the American Convention of Human Rights as a judicial institution with the duty of interpreting and applying the document. The Commission, whose structure (consisting of seven independent members) and mandate is fashioned in a way that may have inspired the UN Human Rights Committee, also enjoyed similar success and, in fact, it is this institution, and not the Court, who consistently deals with the protection of the right to vote.

Apart from regional and international instruments offering enforcement and protection mechanisms, an umbrella that usually opens only after the exhaustion of internal remedies, weaving the right to vote within the fabric of the constitution, particularly when accompanied by a direct incorporation or a norm redirecting to international conventions, renders the principles of international law immediately preceptive and enforceable, bringing them “home to channels within the nation”¹⁰⁶. The establishment of such fundamental helpline and lifeline for democracy supports the tendency, witnessable in every new constitution since the last three decades of the twentieth century, to hereby define and protect the right to vote.

¹⁰⁶ Hart, V., *ibidem*

1.3.2. The European Court of Human Rights jurisprudence and the State margin of appreciation

The first and most comprehensive regional system for the protection of human rights in Europe is accordingly offered within the framework of the continent's "leading human rights organization"¹⁰⁷. The Council of Europe, founded in 1949 on the initiative of 10 countries and currently composed by 46 member states (following Russia's early 2022 exclusion after its war of aggression against Ukraine¹⁰⁸), among which all 27 member states of the EU, enunciates the safeguarding and the promotion of democracy, human rights and the rule of law as its main focus. The European Convention on Human Rights - formally known as the Convention for the Protection of Human Rights and Fundamental Freedoms - represents its landmark document and is an international treaty, drafted in 1950 and entered into force in 1953, to which all members of the Council are parties and that all new members are expected to ratify. Though formulated in the wake of the adoption of the UDHR and the American Declaration of the Rights and Duties of Man, the Convention did not completely adhere to the blueprint set by these precedents and followed a different and narrower conception of human rights, resulting in the initial exclusion of political rights from its text. Motivated by the idea that these stood outside of the "tradition of human rights", the drafters ignored the full dignity and recognition already ascribable to so-called "first-generation human rights"¹⁰⁹ and, irrespective of the influence of these pivotal examples, inferred that these belonged "outside the proper scope of the European Convention"¹¹⁰.

Even prior to the actual entry into force of the Convention, the necessity to course-correct emerged, leading to the discussion and the introduction, in 1952, of the First Additional Protocol, that, through its first three articles, guarantees the "protection

¹⁰⁷ Council of Europe, <https://www.coe.int/en/web/portal>

¹⁰⁸ Council of Europe (2022). Newsroom: Russia ceases to be party to the European Convention on Human Rights <https://www.coe.int/en/web/portal/-/russia-ceases-to-be-party-to-the-european-convention-on-human-rights>

¹⁰⁹ Council of Europe, The evolution of human rights, <https://www.coe.int/en/web/compass/the-evolution-of-human-rights>

¹¹⁰ Steiner, H. J. (1988). Political Participation as a Human Right, Harvard Human Rights Yearbook 1, p. 94.

of property”, the “right to education” and, last but not least for our purposes, the “right to free elections”. Insofar as this latter right is concerned, however, the heading of the article suggests a persistent lack of sensibility, from the perspective of the drafters, towards “non-electoral participation”, which is altogether absent¹¹¹, and the enucleation and affirmation of a stand-alone right to vote.

Article 3 of Protocol 1 of the ECHR states:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

Contrary to the UN documents - the UDHR and the ICCPR - and other regional agreements, such as the Bogota Declaration, the protocol does not explicitly refer to and therefore fails to explicitly qualify a right to vote with its related guarantees pertaining to the entitlement to such right, the universality of the suffrage, the protection against discrimination and the conditions for the admissibility of restrictions. The vague reference to the holding of “free elections” rather posits a corresponding duty upon states (*“The High Contracting Parties”*), in the traditional fashion of the Convention, which often prefers adopting broad and generic terminology and addressing states instead of thoroughly defining a right, leaving much open space for the Court to fill through its interpretation.

As a matter of fact, it was up to the Court to derive a right to vote and to stand for elections from the obligation set by the protocol. Since its very first judgment on the matter, it drew a connection between Article 3 of Protocol No. 1 and the overarching principle of democracy that inspires the whole Convention, and continuously refers to this interrelation in its case law. It also remarked, thanks to a reference to the Convention’s Preamble, according to which fundamental human rights and freedoms are best maintained by “an effective political democracy”, that Article 3 of Protocol No. 1 “enshrines a characteristic principle of democracy” and “is accordingly of prime

¹¹¹ Steiner, H. J. (1988). *ibidem*

importance in the Convention system”¹¹². In this cited case of *Mathieu-Mohin and Clerfayt v. Belgium* and in that of *Ždanoka v. Latvia*, the Court managed to assimilate the Article at issue to the other Convention rights, in spite of it being phrased in a completely different manner than the “other substantive provisions of the Convention and the Protocols”¹¹³, and, by having regard to the preparatory works of the Article and its interpretation in light of the wording and the scope of the whole Convention, it established that it implied individual rights, comprising the active and the passive aspect of the right to vote¹¹⁴.

The Court thereby manufactured a “fully-fledged human right”¹¹⁵ out of the provision, however, a democratic deficit can still be signaled in the fact that the evolution left the absence of any other form of participation, apart from the state obligation to ensure the holding of free elections, untouched. Moreover, with regard to the conditions that the electoral process must guarantee, the article only mentions the freedom and secrecy of the ballot, constantly stressed in their importance by the European Commission of Human Rights and the Court¹¹⁶, and a reasonable interval between elections. The principles of equal and universal suffrage are not included, but rose to become “benchmark principles”¹¹⁷ after being necessarily implied from the principle of equal treatment of all citizens. Coordinating the expression of Article 3 with case law, though, clarifies that the scope of Article 3 is limited to the choice of the legislature, it does not, at least in principle, entail a right to vote in a referendum and only requires every vote to carry the abstract capacity to influence and determine the composition of the legislature, not that every vote holds equal weight in the outcome of the election¹¹⁸. Pertaining to the first two aspects, the interpretation of national situations is critical to determine, on a case by case basis, if the very same falls under the scope of Article 3; the exercise of “legislative power” in the

¹¹² *Mathieu-Mohin and Clerfayt v. Belgium*, 1987, § 47

¹¹³ European Court of Human Rights. (2022). Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights - Right to free elections.

¹¹⁴ *Mathieu-Mohin and Clerfayt v. Belgium*, 1987, §§ 48-51; *Ždanoka v. Latvia* [GC], 2006, § 102

¹¹⁵ ECHR (2022), *ibidem*

¹¹⁶ ECHR (2022), *ibidem*; *X. v. the United Kingdom*, Commission decision of 6 October 1976

¹¹⁷ *X. v. Germany*, Commission decision, 1967; *Hirst v. the United Kingdom* (no. 2) [GC], 2005, §§ 59 and 62; *Mathieu-Mohin and Clerfayt v. Belgium*, 1987, § 51.

¹¹⁸ *Riza and Others v. Bulgaria*, 2015, § 148

context of the constitutional structure¹¹⁹ and the presence of the conditions that define an election as expressed by Article 3, in consideration of the broadness and the “diversity of electoral systems in various states”¹²⁰ must be, respectively, taken into account.

Alike the UDHR and the ICCPR, the ECHR P1-3 does explicitly identify the freedom of expression as a core value and precondition for the genuineness of the elections to be ensured and correspond to the standards of an “effective political democracy”. Therefore, it does establish a clear correlation with Article 10 of the Convention and it underscores their interdependent role in “realizing and preserving the democratic society”¹²¹. And alike most of the rights enshrined in the convention, with the notable exceptions of Articles 2 to 4¹²², it posits qualified and not absolute rights. On an opposite note, however, it confirms the ideological distance, already apparent from their wording, between P1-3 and the other “rights and freedoms” discussed in Section I of the Convention, especially in Articles from 8 to 11, and that carries over from the phrasing to the content and the application of P1-3.

Article 3 firstly diverges from the structure of Articles 8 to 11 for the fact that it does not contain a list of enumerated “legitimate aims” that states can pursue when restricting those rights. It does instead leave space for “implied limitations”, meaning that there is an open field of possible limitations that states can adopt. The difference consequently affects the width of the margin of appreciation enjoyed by states and the kind of tests that the Court resorts to when needing to judge and evaluate the extent and the effects of a certain restriction. When scrutinizing the legitimacy of an aim underlying a form of restriction under Article 10, the Court proceeds to strike a balance between the rights involved - freedom of expression on the one hand and the other rights that the state measure intends to protect on the other - and weighs the cost of these interferences against the substantive notion of democratic society it has elaborated. When doing so in relation

¹¹⁹ Timke v. Germany, Commission decision, 1995

¹²⁰ Moohan and Gillon v. the United Kingdom (dec.), 2017, § 40-42

¹²¹ ECHR (2022), *ibidem*

¹²² Art. 2: right to life. Art. 3: right not to be subjected to torture or to inhuman or degrading treatment or punishment. Art 4 (1 and 2): right not to be held in slavery or servitude, or made to do forced labour. Sources: Equality and Human Rights Impact Assessment, Convention Rights and Principles; Equality and Human Rights Commission, Article 4: Freedom from slavery and forced labour

to Article 3, it surprisingly chooses to adopt a much looser notion of democracy and analyzes the compatibility of the measure with mere regard to the rational connection between it and the aim pursued, not assessing its normative basis¹²³. Accordingly, the Court does not apply its traditional criteria of “necessity” and “pressing social need”, that effectively tighten the space for statal freedom, but instead adopts a “modified-proportionality test” and examines the evidence under two different aspects: arbitrariness or lack of proportionality, and interference with the free expression of the will of the people.

Furthermore, considering that the Court urges to consider the compliance with Article 3 in light of the political evolution and the historical context of the concerned country (therefore measures that are not unacceptable in one country may be reasonably fair in another), the framework results in a strikingly broad margin of appreciation conceded to each State. Article 3 covers also post-election activities, such as the counting of the votes, and the width and the extent of the margin of appreciation appears and applies to any stage, from the adoption of an electoral law, to the electoral term (a “reasonable interval must be determined by reference to the purpose of parliamentary elections (...) to ensure that fundamental changes in prevailing public opinion are reflected in the opinions of the representatives of the people”¹²⁴), and down to the organization of the ballot¹²⁵. Correspondingly, the setting of unequal electoral boundaries - which could signal a practice of gerrymandering, a topic that will be discussed in Chapter II - or an active system of voter registration do not, by themselves, constitute a breach of Article 3, unless the expression of the free will of the people is altered.

More specifically, the Court has regularly given a wider margin in the cases of the “passive” right to stand for an election, in regard to which it has limited its scrutiny to verifying the lack of arbitrariness in domestic procedures that decided on the exclusion of an individual from standing as a candidate, than it has with the “active” right to vote,

¹²³ Beduschi, L., Colella, A. (2011). La giurisprudenza di Strasburgo 2008-2010: il diritto a libere elezioni (art. 3 Prot. 1)

¹²⁴ Timke v. Germany, Commission decision, 1995

¹²⁵ Pérez Alberdi, M. R. (2013). Demarcation of the right to vote by European Court of Human Rights. *Revista De Derecho Político*, 1(88). <https://doi.org/10.5944/rdp.88.2013.12786>

which it adequately felt deserving of a more significant examination of proportionality and in connection to which it has determined that the exclusion of a person or a group from participating in the political life is never an admissible effect¹²⁶.

Comprehensively, and in spite of the use of a dubious standard in evaluating interferences with the right to vote, the textually incomplete Article, the failure to fully acknowledge the importance of the right to vote as a pillar of the democratic society that the Convention aspires to create and that to mention other prerequisite rights, in addition to the single freedom of expression, the Court has traced a system that effectively allows itself, through its usual instruments, to flexibly adapt P1-3 to the circumstances of each case and the various diversities within the Council of Europe, setting a positive example and offering a fertile insight into how global governance in the right to vote could look, even when practically implemented and judicially confronted.

Finally, Protocol No. 15 to the Convention, which entered into force on 1 August 2021, has taken a step forward in promoting harmonization and responsibility, by adding the principle of subsidiarity to the Preamble of the Convention and thereby establishing a “shared responsibility between State parties and the Court” in the protection of human rights. By virtue of this, national authorities and courts are obliged to interpret and apply domestic law in conformity with the Convention, its Protocols and the Court’s jurisprudence, in order to give full effect to the rights and freedoms that the ECHR system expresses.

1.4. The foundation of democracy: a core yet insufficient right

The examination conducted thus far should have already conveyed the idea and fortified the impression about the extremely peculiar nature of the right to vote and the number of challenging aspects arising and descending from its worldwide dominant expression. As the utmost fundamental right and the truly essential one in a democratic society, as the first and primary pillar of so-called first-generation human rights, the

¹²⁶ *Aziz v. Cyprus*, 2004, § 28; *Tănase v. Moldova* [GC], 2010, § 158

complex of voting rights, in fact, finds itself struggling between its key significance and the difficulties of it being generally accepted and transposed into reality. Standing at the crossroads of constitutional and international law on one side and the quintessential political domain on the other, the matter encounters the harshest opposition when aspiring to be formulated and, even more crucially, applied in an open, inclusive, internationally harmonized and accountable manner.

The right to vote is the basic fundamental right allowing for the others to be effectively and fully realized, the most exposed to political exuberance and abuses of power, the first gateway to democracy being shut down when democratic institutions crumble and the fate of personal freedoms falls into the hands of a regime, yet the highly aleatory efforts put in in the scarce attempt to defend and implement this right often pale in comparison with its importance and with the scale of the menaces being placed against it. Late and passive action mark the plan outlined and utilized by a disaggregated if not disaffected international community to counterattack against threats or even actual impediments to the normal display of democratic life, ultimately abandoning the arsenal of democratic instruments for them to become weapons of war and friendly, compliant toys at the disposal of autocracies. A sham referendum orchestrated by Russia, the questioning of electoral results and the attempted coups d'état in the USA and in Brazil and numerous other events, which are rapidly increasing and globally escalating by emulation, all share the common thread of the absence of a strong, responsive system of protection and promotion of the right to vote and the overarching ideal of democracy.

The primary source and condition of democracy, actually and paradoxically lacks strong foundations and guarantees. Its expression has historically been crafted by conflicts, an intrinsic connection with international criminal law and the influential power of the will of the people but, in the end, all the various, concurring factors lead to the conclusion that the effective availability and recognition of the right to vote almost entirely depends on the actions of the government, with their self-restraint, their law-abiding spirit and their respect for institutions and values deciding and building the democratic imprinting of a certain country.

The right to vote has consequently and accurately been described as holding two main features: fragility and impersonality¹²⁷. Its reliance on governments to provide the conditions and to administer genuine elections means that the solidity of those structures determines the democratic resilience, and the quality of the investments being made to support, renovate and upgrade its architecture, just as if it was a building that hosted the whole society, holds its natural fragility under control and limits the impact of “systemic strain” and potential external threats. Moreover, the right to vote has actively and quite exclusively been shaped through, or at least as an effect of, litigation. The need to historically define and retrace the steps of the struggle for enfranchisement as such, by itself sufficiently points out that voting rights, long kept as jealously safeguarded privileges, are bound to be obtained through hard fought battles, both at diplomatic tables and in the streets. From the campaigns for equal and universal suffrage in the early twentieth century, to the 1960s groundbreaking success of the civil rights movement, to the constant, seemingly never-ending strife to achieve effective equality in the distribution of opportunities, resources and access to development, to which a sincere expression of the right to vote is obviously critical, it is far too clear, as it will be later reassessed, that to invest in education, inclusivity and capacity-building, and to establish a culture for human rights protection is the key demand to ensure the fulfilling of a general and generally conscious exercise of the right to vote.

¹²⁷ Sellers, & Weinstein-Tull, J. (2021). Constructing the right to vote. *New York University Law Review.*, 96(4), 1127–1178.

CHAPTER 2: POPULISM AND THE THREAT TO DEMOCRATIC INSTITUTIONS

2.1. State obligations and the issue of internal enforcement

The right to vote has been described as poorly equipped¹²⁸ to shield itself from threats to its recognition. More generally speaking, during the introduction and of Chapter I, it has been recalled that a problem with the enforceability of its premises and norms has traditionally affected international law as a whole, and international human rights law in an even more severe and concerning manner, mostly due to the invasive nature of its precepts. Given as an unavoidable circumstance that all States display a certain degree of intolerance towards the implementation, within their territory, of principles matured outside of it, which are bound to be a product of compromise and, therefore, also meet at least partial dissatisfaction, it may be, however, easily noticed that the extent of the challenges with which the establishment of the right to vote at an international level is widely met is absolutely particular and unique.

The system of the European Convention on Human Rights, as we have been able to examine in paragraph 1.3.2, has cleverly developed, through the precious and inexhaustible contribution of the Strasbourg Court's case law, a mechanism to control and enforce its set of conventional rights, in a progressive work of refinement and enlargement of both the scope and the level of protection granted by the Convention. Not coincidentally, the birthmark represented by the omission of political rights was immediately canceled and reabsorbed, as the right to vote which was left out the door in the original text of the Convention rapidly re-entered through the window of the First Additional Protocol. Even the aforementioned lack of any other form of public participation outside of those formally connected to the right to vote has been fairly compensated for by the comprehensive jurisprudence, to a point that adequately reflects the state of advancement shared within the framework of the Council of Europe.

¹²⁸ Sellers, & Weinstein-Tull, J. (2021). *ibidem*

The Convention itself, thanks to the Protocol and the interpretation thereof made by the Court, surrounded the provision of the right to vote - granting it equal status with regard to the other conventional rights - with a set of state obligations enucleated from its wording and scope. Article 3 of Protocol No. 1 itself is phrased as an obligation towards state parties, making them its main recipients, rather than being an expression of a fundamental right. The first and apparent obligation to which state parties must submit themselves is to hold free elections for the choice of the legislature. One must note, as a matter of fact, that the heading of P1-3 exclusively recognizes the “right to free elections”. Strictly interdependent with this affirmation thus became the necessity for the Court to identify voting rights as a stand-alone individual human right, whose nature was assessed on the basis of preparatory works, the framework of the Convention and the consensus that was building itself in international law. The active and the passive aspect of voting rights - the right to vote and the right to stand for elections - were both asserted, and with this came the imposition of different paradigms upon states to limit them, in accordance with proportionality, in its dual ramification of lack of arbitrariness and non-interference with freedom of expression. Ensuring freedom throughout the entire display of the electoral process rose to become the essential value of it all, and the right to free elections, taken by itself, has consequently been defined as an absolute right, allowing no restrictions to it¹²⁹. A comprehensive network of principles, substantive and procedural rights has been developed, especially within the Council of Europe and under the Court’s authoritative watch, but by other international conventions as well, to guarantee the effectiveness of a right that is otherwise not self-sufficient, as highlighted in the last paragraph of Chapter I, and to offer direct protection, enhanced by Protocol No. 15 and the principle of subsidiarity, to individuals, who must obviously be recognized as the actual recipients and beneficiaries of those rights.

It is mainly thanks to human rights law and international criminal law, in their repeatedly reported interrelation, that the individual has gradually, although

¹²⁹ Equality and Human Rights Commission, Article 3 of the First Protocol: Right to Free Elections

asymmetrically¹³⁰, gained - *rectius* reclaimed¹³¹ - a status, up to international subjectivity, in international law, as an addressee of both rights and duties, in a dynamic relationship with states.

Holding free, fair and periodic elections, guaranteeing freedom of choice through the secrecy of the ballot and the presence of valid candidates, protecting fundamental freedoms of expression, assembly and association, and providing equal and universal suffrage has since become a universal standard, extensively supported by the idea of multi-party democracy endorsed by the ECHR and reaffirmed on a global, not regional, level by the Human Rights Committee, through its General Comment No. 25. In addition, the document exploits the broader formulation of Article 25 of the ICCPR in order to stress the democratic interpretation of the right of self-determination and encourage all forms of political participation and inclusion in the carrying out of public affairs, as a means to obtain full democratic accountability. Regarding the right to passive electorate, it significantly establishes a link with the duty to protect the rights of all citizens by affirming, in light of the general goal to achieve complete and conscious public engagement - meaning, in this case, growing turnout numbers - further positive duties that states must comply with. Specifically, the Committee intended to target disenfranchisement policies in their various manifestations, ranging from the most visible, such as impediments to freedom of movement, to the most subtle, like language barriers, illiteracy and poverty, by imposing the adoption of positive measures from governments to “overcome” these “specific difficulties”¹³² which might result in the ineffective enjoyment of the right to vote for certain individuals or groups of people.

Strict requirements for voter registration such as literacy tests and poll taxes were old and common discriminatory practices that still, where present, permeate, in their deviating effects on the actual implementation and its outcome, electoral laws and procedures. While a system for voter registration does not, by itself, conflict with freedom of expression and thereby constitute a breach of Article 3 of Protocol 1 of the ECHR,

¹³⁰ Giorgetti, C. (2019). Rethinking the Individual in International Law, 22 Lewis & Clark L. Rev. 1085

¹³¹ Janis, M. W., (1984). Individuals as Subjects of International Law. Faculty Articles and Papers. 408. https://opencommons.uconn.edu/law_papers/408

¹³² University of Minnesota Human Rights Center (2003). *ibidem*

restrictions that disproportionately and arbitrarily affect specific individuals or group, or that alter and obstruct the free flow of information, as well as undue interference in any stage of the election, all amount to severe breaches of the state's obligation to fairly conduct an electoral process for the government to regularly and properly submit itself to public scrutiny and for the population to genuinely select its representatives.

As we shall see throughout this Chapter, however, these practices are the go-to techniques adopted by rulers in power or aspiring leaders to tailor the law to fit their own benefits and revert to a state of hardly exercisable control over their behavior. The manipulative management of everything concerning electoral matters directly stems from the diversion of democratic entitlement into authentic abuse of power, yet, as openly as this might manifest itself to the exterior world, its internal entanglements are roughly detectable and opposable. As to the capacity to apply internationally established principles within a certain country, apart from the extensively discussed issues regarding the supposed tension between these and the principle of state sovereignty, much harder boundaries opposed by cultural and political establishment, or the lack thereof, stand in the way of the concrete possibility of eradicating anti-democratic tensions, which is part of the reason why the conclusive part of the thesis will move away from strictly legal argumentations towards proposing an evolution in the investment in the socially and culturally driving field of education.

Without intellectual elaboration over the profound and systemic causes of political unawareness, the manufacturing defects embedded in the soil of every territory will continue to deposit noxious sediments, to the direct harm of the greater objective of satisfying the requirements of democracy and human rights, whose stances are sometimes, in practice, brought separately and even divergently.

Taking into account how inherently politicized the debate over the universal applicability of democratic standards and their consequences on the genuine exercise of voting rights has increasingly turned out to be, the international collective response in support of calls for democratic empowerment and in the backing of transitional democracies has become a strong index in deciphering the commitment and the ability to

promote and advance these values simultaneously, as well as a manifesto of the distance between ideals and the complexity of practical implementation.

More significantly and encouragingly, the analysis of the framework of the international organization's action in delivering electoral assistance and monitoring services will provide an insight into the major democratic impulse that drew the exponential growth of countries progressing and achieving a democratic status, before the recent trend inversion, up to the all-time high number of 97 electoral democracies in 2012¹³³, and hand over the instruments to understand how to promptly turn the tide.

2.2. Election monitoring activities

All that has been said thus far about the leading international will to promote democracy - balancing this pressing need and the principle of universality in the protection and recognition of human rights with the respect of state sovereignty and the state's prerogative freedoms in administering their internal affairs - perfectly applies to the topic of the conduct of domestic and international observers, acting to ensure that the electoral process in a certain country follows international standards.

Firstly, in order to frame the issue in the sense of understanding on what grounds is the intervention by members of the local civil society or by external actors motivated, it must be recalled that organizing free democratic elections and making sure that every citizen has the chance to effectively exercise its right and opportunity to participate in them are primary obligations of all states, which have been often dissected and reaffirmed by the UN.

Holding genuine democratic elections is itself an expression of sovereignty, fundamentally instrumental to the certification of democratic governance on behalf of the citizens and to the obtainment of international legitimacy, whose validation, and therefore

¹³³ Lührmann, A., Tannenberg, M. and Lindberg, S. (2018). Regimes of the World (RoW): Opening New Avenues for the Comparative Study of Political Regimes. *Politics and Governance* 6(1): 60-77

the ultimate voice in defining sovereignty, rests in the hand of the people, whose “free will” is manifested through the elections.

Election monitoring is consequently conducted to pursue a dual aim: to support the democratic expression of citizens of the country involved and to satisfy the interest held, both in the form of a right and a duty, by the international community to verify the adequate protection of all human rights at stake, in every state. The activity is meant to investigate the domestic legal framework, follow its implementation and oversee, through an independent eye, the reasonability of state practices, the fairness of the procedure and the acceptable degree of advancement of human rights. Since its main obligation is to respect state sovereignty and show due appreciation towards its peculiarities, the mission must, though not only in constant accordance with international human rights norms but also aspiring to promote them, act consistently with the national law of the host country. Correspondingly, it must limit itself to supervising the conduct of national authorities without interfering with the election process through the imposition of any kind of behavior. The adoption of case-by-case country-based suggestions in the form of recommendations may only be the final, expected and desirable product of the mission, coherently with its function and purpose to contribute to the advancement of the country’s democratic mechanisms and to enhance the stability of its institutions.

2.2.1. Historical evolution and enucleation of principles

The United Nations has taken on a trailblazing role in promoting democratic progress by the means of electoral assistance and envisioned its global vocation as the ideal platform for its organization to push for the formation of growingly efficient expertise in this sector and sponsor the development of global best practices among intergovernmental and international non-governmental organizations. Its virtuous ambitions drew over 80 countries to request its assistance during just its first decade of activity in the matter, from the late 1980s onwards.

The proliferation of missions providing election observation or more engaging electoral assistance happened during the 1990s, not accidentally in coincidence with the widespread, and well recounted, shift in the perception of the international relevance of internal affairs and the request for domestic as well as international accountability of leaders who engaged in human rights abuses and who claimed power through undemocratic pathways. The initial, significant input foreshadowing the changes to come was sent across 1988 and 1989, when the UN General Assembly, in its 75th plenary meeting, first underscored the principles of “open, multiparty, secret ballot elections under universal and equal suffrage”¹³⁴ in their mutually influential relationship with other human rights and highlighted their potential to be crucial vehicles of peace, thanks to the event of the elections being instrumental to democratic entitlement and to the peaceful settlement of the political competition for power¹³⁵. In identifying this link, the UNGA called on the UN Commission on Human Rights to study means to respond to the goal that gave the title to its resolution - “*Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*”¹³⁶. Words were put into action the following year - 1990 - as the UN sent the first ever monitoring mission on site, inside a sovereign state, to follow the democratic elections in Nicaragua, which took place after the US had consistently funded its transitional democracy and the electoral law had been reformed: the blueprint had been set for the main regional organizations to follow, throughout the last decade of the twentieth century, in adopting provisions centered around the rights to democratic participation and in taking their capacity to foster democratic values in closer consideration.

From the acknowledgement of democracy, in the form of a government receiving a popular mandate, as the legitimizing factor for sovereignty, stemmed the

¹³⁴ Sources: UNGA (United Nations General Assembly). (1988). Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections. Resolution 43/157, A/RES/43/157, 8 December;

UNGA (United Nations General Assembly). (1991). Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections. Resolution 46/137, A/RES/46/137, 17 December

¹³⁵ “*The General Assembly (...)* Stresses, its conviction that periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, embracing political, economic, social and cultural rights”

¹³⁶ OHCHR (2011) Compilation of documents or texts adopted and used by various intergovernmental, international, regional and subregional organizations aimed at promoting and consolidating democracy

recognition of democracy as a basic human right, which, in turn, determined an absolute commitment to democracy and the rule of law in regional and global instruments, the establishment of a general prohibition of coups d'état and subversive methods, their subjection to sanctions and the consolidation of a practice of isolation in response to leaders who perpetrated such violations.

The international community determinedly enacted what, in the early 2000s, became known within the African Union as a “zero tolerance policy” towards military coups, with the Organization of American States and European leaders, once again, spearheading regional action¹³⁷.

Thanks to a new realization and the dawn of a different geopolitical order, the aftermath of the Cold War saw the OAS actively engage in activities pointed at reinforcing democracy in the Americas, a purpose which had always stood among its founding principles, since the adoption of the OAS Charter in 1948¹³⁸. In late 1989, the organization's General Assembly gathered the will, that had been already expressed by member states in previous decisions¹³⁹, “to support and strengthen genuinely democratic and participatory systems through full respect for all human rights” in the unitary corpus of resolution 991, and interestingly inferred that the point of reference had to be maintained in the “periodic holding of honest electoral processes in which the will of the people is freely expressed and respected in the election of officials, without external interference”¹⁴⁰, offering an extremely mature and insightful interpretation of the relevant international instruments. In the same resolution, aptly named "Democracy and Human Rights - Election Observation", it gave the mandate to its Secretary-General to “regulate the development of electoral observation missions (EOMs)”¹⁴¹ and recognized their role

¹³⁷ Rich, R. (2001) Bringing Democracy into International Law, Johns Hopkins University Press, Journal of Democracy, Volume 12, Number 3, July 2001, pp. 20-34 (Article), DOI: <https://doi.org/10.1353/jod.2001.0056>

¹³⁸ “As noted above, in its 1948 Charter the OAS was the first regional organization to consider representative democracy a purpose (Article 2b), a principle (Article 3d), and a condition of membership (Article 9).” Rich, R. (2001), *ibidem*, p. 28

¹³⁹ Such as the 1985 Cartagena Protocol, amending the OAS Charter, restating the centrality of processes of democratization and proclaiming representative democracy as the basis of the states' organization

¹⁴⁰ Organization of American States, General Assembly. (1989). Democracy and Human Rights - Election Observation. AG/RES. 991 (XIX-O/89), November 18

¹⁴¹ Hugo de Zela, H. E. (2011). 10 Years of the Inter-American Democratic Charter

as “a means to strengthen the Organization”. In the following two-year period, spanning from 1990 to 1991, the OAS created a specialized agency to focus on this objective - the Unit for the Promotion of Democracy - and extended its action on the matter through the coordinated programs enacted under the defining umbrella of “Santiago Commitment to Democracy and the renewal of the inter-American system”. A fundamental part of it was OAS General Assembly resolution 1080¹⁴², which recalled the Organization’s Charter and its Preamble, in particular, to establish a “formal diplomatic mechanism”¹⁴³ to authorize the organization’s institutions to act in response to democratic breakdowns in the continent and corresponding sanction mechanisms, despite its reaffirmation of state sovereignty and nonintervention.

Insofar as the elaboration on the matter went in the European continent, the Council of Europe, as previously emphasized, embraced a position similar to that of the OAS, imposing the ratification of the ECHR, the endorsement of democratic values and the guarantee of certain standards as conditions for its membership. It thereby came to the early realization, into which we will shortly delve, that providing genuine elections wasn’t enough of a guarantee to certify and ascertain democratic governance.

Through the 1990 Charter of Paris for a New Europe, adopted as the final document of the Second CSCE Summit of Heads of State or Government, within the framework of what will be renamed, in 1995, as Organization for Security and Cooperation in Europe and therefore inclusive of Canada, the USA and the USSR, these global leaders who were involved, agreed to elevate and celebrate democracy as “the only system of government of our Nations”.

The Americas and Europe thus quite simultaneously managed to establish a “process of negative and positive reinforcement of democracy”¹⁴⁴, these aspects being respectively based upon the threat of membership suspension in regional organizations

¹⁴² Organization of American States, General Assembly. (1991). Representative Democracy. AG/RES. 1080 (XXI-O/91)

¹⁴³ Barry S. Levitt. (2006). A Desultory Defense of Democracy: OAS Resolution 1080 and the Inter-American Democratic Charter. *Latin American Politics and Society*, 48(3), 93–123. <http://www.jstor.org/stable/4490479>

¹⁴⁴ Rich, R. (2001), *ibidem*, p. 28

and the institution of mechanisms and programs to administer election monitoring and democracy promotion.

The measure of international commitment was first put to the test by the end of 1991, by the military coup that overthrew the Government of President Jean-Bertrand Aristide in Haiti. The OAS first confronted the situation, cutting its economic ties with the member state, and heralding the further development brought on by the Washington Protocol - adopted in 1992 and entered into force in 1997 - which granted the OAS General Assembly the power to suspend a member state whose democratic government had been deposed. The UN General Assembly followed in the OAS footsteps a week after it, unanimously passing a resolution that urged the restoration of the legitimate government and invoked the respect for human rights¹⁴⁵.

A groundbreaking challenge in opposition to military attacks on democracy was finally sent by the Security Council, which activated its powers under Chapter VII of the UN Charter to authorize the use of force aimed at reinstating democratically elected leaders in power both in the cases of Haiti in 1994 and of Sierra Leone in 1998. In the case of East Timor, the connection between self-determination and democratic entitlement can be most notably witnessed, since the 1999 East Timorese crisis exploded after an overwhelming majority of its people had voted for independence through a referendum¹⁴⁶, administered by the United Nations Mission in East Timor (UNAMET) but with Indonesia taking responsibility for ensuring security and disallowing the presence of external peacekeepers. In response to a breakout of violence, the UNSC adopted resolutions 1264 and 1272; the latter followed the first one's call for the intervention of a multinational force and established the UN Transitional Administration in East Timor (UNTAET), which held control over the territory till its independence in 2002. UNTAET received a composite mandate that included the "development of local democratic institutions"¹⁴⁷ and other elements that granted it the rare full command over

¹⁴⁵ UNGA (United Nations General Assembly). (1991). The Situation of Democracy and Human Rights in Haiti. Resolution 46/7, A/RES/46/7, 11 October.

¹⁴⁶ Shah, A. (2006) Records of East Timor: 1999 UCLA International Institute

¹⁴⁷ UNSC (United Nations Security Council). (1999). S/RES/1272 (1999)

“the organization and conduct of elections”¹⁴⁸ to finalize the democratic transition of the country. The Security Council therefore interpreted all of these situations, although not theoretically amounting to threats to international peace and security, as within its mandate and substantially worthy of international attention, because of the need to preserve the underlying and crucial interests of democracy and human rights, paving the way for international collective interventions in defense and restoration of democratic states. It consequently validated, although within due limits, the doctrine of intervention in support of efforts for democratic entitlement eminently proposed by Michael Reisman, who posited the legitimacy of the recourse to humanitarian intervention as a last resort, where necessary to fulfill the international community’s obligation to sustain democracy, once democracy itself had been widely recognized and generally accepted as a *conditio sine qua non* for global peace and economic stability¹⁴⁹. As a matter of fact, and recalling previous considerations made on the definition of sovereignty and its subsequent responsibilities, Reisman argued, “the sovereignty of the people is violated by the dictator, not by the international force ousting him”¹⁵⁰.

Once the right to democratic governance and the duty to protect human rights in the framework of a democratic society had surged to the top of international priorities, the practice of intervention gradually consolidated itself and norms on self-determination, interpreted in light of the primary necessity to guarantee the free will of the people, evolved to comprise and define the possibility for international organizations to supervise and, in some cases, intervene on the ground in other states to protect and promote democracy. A cooperative attitude in the promotion of democracy greatly developed under the auspices of the UN and, on parallel and contiguous grounds, thanks to the reciprocal influence exerted by its policies and by the open platform of international conferences.

¹⁴⁸ The only other example of such all-inclusive mandate for the display of UN electoral assistance activities is offered by Cambodia (1992-1993). ACE Project, The Electoral Knowledge Network. United Nations Electoral Assistance Division (UNEAD). <https://aceproject.org/about-en/ace-partners/UNEAD>

¹⁴⁹ Reisman, M. (1990) Sovereignty and Human Rights in Contemporary International Law, in Gregory Fox and Brad Roth, eds., *Democratic Governance and International Law*, 251, 258.

¹⁵⁰ Rich, R. (2001), *ibidem*, p. 31

The first of its kind, as another positive effect played by post-Cold War scenarios, was the 1988 International Conference of Newly Restored Democracies, which adopted the Manila Declaration, focused around gaining approval for the idea of mutual support as a key factor in advancing the quality of democracy and sustaining the resilience of state institutions in emerging and thus particularly fragile democracies. Five rounds of conferences, from then on known as International Conferences of New or Restored Democracies, have followed since, successfully drawing the backing of the UN. The second meeting, held in 1994, produced the Managua Declaration and Plan of Action, addressing the UN in renewing the request to formulate a plan of action by virtue of which the organization could lend substantial support to newborn or newly restored democracies. The invitation was picked up by the UNGA through resolution 49/30¹⁵¹ and followed through in subsequent action.

The UN strikingly diversified and multiplied its efforts on the field and through diplomatic channels, throughout the nineties and into the twenty-first century¹⁵². In order to coordinate and further enhance the organization's capacity to respond to the growing number of country requests and to the need for systemic protection of democracy, in 1991, the General Assembly approved resolution 46/137, which led, in 1992, to the establishment of an electoral assistance unit. The unit, enlarged to acquire the name of Electoral Assistance Division (EAD) in 1994, firmly anchors its purpose to the principles enshrined in the main instruments of international law, especially in the UDHR's fundamental provision that the will of the people, expressed through periodic elections, shall be the basis of the authority of the government. As remarked by its Deputy Director, the EAD pursues consistency and harmonization in the carrying out of missions for electoral assistance, aims to build "institutional memory" in the sense of storing and implementing experience as it is accumulated, and actively encourages partnering with regional organizations and other intergovernmental entities.

¹⁵¹ UNGA (United Nations General Assembly). (1994). Support by the United Nations system for the efforts of Governments to promote and consolidate new or restored democracies, G.A. res. 49/30, 49 U.N. GAOR Supp. (No. 49) at 36, U.N. Doc. A/49/49

¹⁵² Rich, R. (2001) *ibidem*

The 1993 World Conference on Human Rights collected this mounting set of initiatives and programmatic action in its crucial final document, setting forth and setting in stone the interdependence between democracy and human rights. The influential power of the Vienna Declaration, in its ability to review and reform international human rights law in full accordance with the collaborative and progressive spirit that permeated the international community during those years, may be exemplified by the words spoken in his closing statement by the Secretary-General of the Conference, Mr. Ibrahima Fall, who stated that the Declaration gifted the international community with a "framework of planning, dialogue and cooperation that will enable a holistic approach to promoting human rights and involve actors at all levels - international, national and local"¹⁵³. Understanding the concept of universality as the opportunity for all to enjoy equal, satisfying and advancing levels of human right and as the global interconnecting factor between human rights, and uniting all members of the international community, at various levels and competences, in jointly undertaking the mission to install and promote these universally valid standards to the ultimate benefit of all, is the precious legacy of the Conference that provided the adequate impulse for democracy-building initiatives to become a widely accepted and applauded practice. If democracy is to be conceived as the fundamental source of legitimation for the authority of government, then, in the highest hopes of Thomas Franck¹⁵⁴, to have the elections in a certain country observed and its results verified by the international community would be the both necessary and sufficient instrument to achieve direct democratic entitlement.

The sudden increase in the number and the activities conducted by international and local actors to support democratization, however, gradually gave rise to the issue of regulation, in the absence of a strong legal framework for election observation provided by international law¹⁵⁵, caused by the fact that much of the normative structure through which operators moved was an ever-evolving practice developing out of those heavily mentioned fundamental principles. The need, when acting inside another country, to hold its sovereignty in due respect and to act in consistent, trustable and consequential manner

¹⁵³ OHCHR, World Conference on Human Rights, Vienna, 1993

¹⁵⁴ Franck, T. M. (1992). The Emerging Right to Democratic Governance. *The American Journal of International Law*, 86(1), <https://doi.org/10.2307/2203138>

¹⁵⁵ Democracy Reporting International, The Carter Center, *ibidem*

required proper indications that could ensure credibility and professionalism. Bearing this objective in mind, the UNEAD worked together with The Carter Center and the National Democratic Institute, between 2002 and 2005, to draft the Declaration of Principles for International Election Observation¹⁵⁶ and the Code of Conduct for International Election Observers. These documents, that have since been endorsed by numerous other intergovernmental and international non-governmental organizations, guarantee the respect of high standards and the pursuit of best practices in the conduct of international election observation and, still nowadays, represent - along with the previously mentioned UNGA Resolution 68/164 on “Strengthening the role of the United Nations in enhancing periodic and genuine elections and the promotion of democratization” - the most relevant and internationally dignified expression to maintain discipline in a matter that is otherwise left quite untouched by international law¹⁵⁷. The resolution explicitly referred to the Declaration of Principles and the Code of Conduct, in a couple of its operative paragraphs, by acknowledging their harmonization efforts, and praised their success in setting a model declaration by which other guidelines could be inspired and an example of the success found in sharing “knowledge and experience”, while following the UNEAD’s goal to involve all “other international, governmental and non-governmental organizations”¹⁵⁸.

¹⁵⁶ Declaration of Principles for International Election Observation; (UNGA Resolution A/C.3/64/L.26/Rev.1).

¹⁵⁷ Democracy Reporting International, The Carter Center, *ibidem*, p. 45

¹⁵⁸ “*The General Assembly, (...) 10. Notes with appreciation* the additional efforts being made to enhance cooperation with other international, governmental and non-governmental organizations in order to facilitate more comprehensive and needs-specific responses to requests for electoral assistance, encourages those organizations to share knowledge and experience in order to promote best practices in the assistance they provide and in their reporting on electoral processes, and expresses its appreciation to those Member States, regional organizations and non-governmental organizations that have provided observers or technical experts in support of United Nations electoral assistance efforts; 11. *Acknowledges* the aim of harmonizing the methods and standards of the many intergovernmental and non-governmental organizations engaged in observing elections, and in this regard expresses appreciation for the Declaration of Principles for International Election Observation and the Code of Conduct for International Election Observers, which elaborate guidelines for international electoral observation;” UNGA Resolution 68/164 (2013)

2.2.2. From election observation to electoral assistance: the state of international guidelines

The Declaration of Principles and the Code of Conduct masterfully carried out the demanding job of providing a comprehensive framework of norms that could adapt and intercept “the evolving nature of requests for assistance” in a manner that is conducive to producing country-tailored and “needs-specific” responses. In its preamble, the Declaration thoroughly overviews and recounts the evolution in the emergence of the right to democratic governance and the understanding of its link with human rights law. As such, international election observation is defined as an integral and substantive part of the broader obligation to ensure human rights monitoring. The widespread acceptance of its practice and its pivotal role in guaranteeing “accurate and impartial assessments” and overall articulation of the electoral process is then underscored to introduce the main purpose of the Declaration, to equip the international community with an instrument for the international community to frame the conduct of election monitoring, build strategic cooperation and develop long-lasting capacities for healthier democratic societies, offering a perimeter of rules to which international election observers shall abide.

The Declaration immediately and importantly reaffirms the right to vote and to be elected in periodic, genuine democratic elections as “internationally recognized human rights” providing the “mandate for democratic governance”¹⁵⁹ and thereby pinpoints the basis of its interest. Moreover, it preliminarily recalls and restates the expressions of the UDHR and the ICCPR, embracing their broad notion of civil participation in public affairs and referring, through an open clause, to both direct and representative forms of democracy. It then proceeds, in its pivotal statement, to offer the clear-cut definition of international election observation in an exhaustive resume of the aspects thus far analyzed, as the “*systematic, comprehensive and accurate gathering of information concerning the laws, processes and institutions related to the conduct of elections and other factors concerning the overall electoral environment; the impartial and professional analysis of such information; and the drawing of conclusions about the*

¹⁵⁹ Declaration of Principles for International Election Observation, para. 2

character of electoral processes based on the highest standards for accuracy of information and impartiality of analysis". The description is completed by adding that the final output of the process shall be the presentation of useful recommendations obtained through the impartial judgment of the country's overall situation and not the interference, thus resulting in the hindrance, with the state's sovereign space and in the naturally produced results of the election.

International election observation missions as a whole are likewise delineated as simply being "*organized efforts of intergovernmental and international nongovernmental organizations and associations to conduct international election observation*"¹⁶⁰, stressing the role of international coordination, for the sharing of practices and instruments, as conducive to "maximizing their contribution"¹⁶¹ and to the mission's achievement of the highest success rate possible. It is also indirectly remarked that these subjects, engaging in election observation, are urged to comply with the standards hereby established and act within the delimited boundaries in order to respect their obligations.

The missions may potentially cover every step of the election process - pre-election, election-day and post-election periods - or focus on certain aspects through specialized observation, however - for instance - two necessary conditions must be met for the UN to deploy its UNEAD forces to provide electoral assistance in any form. Either, in the most frequent and desirable scenario, the concerned member state or territory, wishing to submit itself to election observation or asking for broader electoral assistance, may issue an official request, or the General Assembly or the Security Council must provide an ad-hoc mandate. Subsequently, a needs assessment must be conducted by the Deputy Secretary-General in charge of the Department of Political Affairs (DPA), in concert with any other relevant UN entities, who are all activated to determine the focal points of intervention and the primary necessities in the given country¹⁶².

¹⁶⁰ *ibidem*, para. 4

¹⁶¹ *ibidem*, para. 8

¹⁶² Nanitelamio, S. P., (2017) Electoral assistance provided by the UN is the outcome of the mobilization of the whole system. UNOWAS

Election observation, as a matter of fact, in order to avoid conflict with state sovereignty and to be as efficient as it is allowed to be, must be strictly needs-specific and use its resources to swiftly identify and impartially analyze the main issues, to then deliver prompt and accountable communication. Impartiality and accuracy being the cardinal values to follow, election observation is, indeed, process oriented, meaning it is disinterested in the practical outcome, insofar as the fairness of the procedure is ensured, human rights are upheld during and surrounding the whole election process by state authorities and the results are presented “in a transparent and timely manner”¹⁶³. It must be noted, accordingly, that the same principles in analyzing information and producing country-based documentation, also taking into account the highly influential point of reference that the findings represent for the international community¹⁶⁴, apply to election observers in drawing their conclusions and disclosing them to the public.

As a consequence, it may be discerned that the Declaration of Principles, too, in paragraph 12 (a) requires, for states to be placed under scrutiny, for them to extend a formal invitation or otherwise express their willingness to adequately accept the presence in their territory of an international election observation mission and to set out their obligations with respect to the protection of the entire range of prerequisite human rights and fundamental freedoms without which the mission itself is unable to perform its duties and the fairness of the election itself is preliminarily ruled out. It may be required for such positive requirements to be set forth in “a memorandum of understanding or similar document agreed upon by governmental and/or electoral authorities”.

Generally speaking, election observation and electoral assistance are meant to build credibility and increase public trust in the political circuit and the election process, contributing to making democratic institutions grow in health and stability by transparently opening their processes to public scrutiny through the optimal filter of transparent and professional evaluation. The missions therefore promote national ownership and entrust requesting member states to act independently and in compliance with international law and applicable international standards, which constitute the track

¹⁶³ Declaration of Principles for International Election Observation, para. 6

¹⁶⁴ see *ibidem*, para. 4

along which the system moves. They should also seek to openly collaborate with the country, entering a dialogue with national electoral administrations, engaging in communications with all political competitors, in the hopes of gaining the explicit approval of at least the major candidates and “welcoming information”¹⁶⁵ coming from them regarding the nature of the local electoral process. This constructive exchange is intended to help the country develop a conscious attitude and a better environment for the political dialogue between national actors in both a short and long-term perspective, en route for it to become progressively able and sufficiently sustainable in its foundations to administer its own elections without external assistance.

Speaking of cooperation with local actors, the civil society may as well be active in pouring in its efforts and resources for democratic safeguarding through domestic nonpartisan election monitoring bodies and organizations. Their knowledge and insight of the actual national situation understandably proves to be fundamental in acquiring the notions upon which the international forces may base their country-specific assessments and, although independence in fact-finding, sharing and interpretation of the information must be preserved, this link is extremely conducive to establishing credibility and contact with the domestic population. The collaboration with such entities is hence stressed by paragraphs 16 and 17 of the Declaration of Principles and, in evaluating the degree to which national authorities have undertaken their responsibilities under international law and do, in fact, pledge respect to human rights, international election observers shall also function as watchdogs in defense of their local equivalents, reporting on the extent to which their freedoms are protected and advocating for the citizens’ fundamental right to public participation, in this and in any other display.

While the capacity for international actors to conduct election monitoring and electoral assistance activities rests in international practice elaborated over the universal obligation to ensure human rights protection and the rights and responsibilities of international observers or assistance providers are based “on mutual agreement with the government of the host country” (grounded in the MoU or the official letter of invitation

¹⁶⁵ *ibidem*, para. 15 (a)

received)¹⁶⁶, domestic observers - abstractly - enjoy much stronger protection. They find their rights sheltered under the great umbrella of Article 25 of ICCPR, which also covers, as previously remarked, the right to participate in the conduct of public affairs and to organize to pursue this aim collectively, given that effective participation is “supported by ensuring freedom of expression, assembly and association”¹⁶⁷. Deriving from this right as such is the possibility to aggregate through non-governmental organizations, whose presence, as a matter of fact, is explicitly endorsed by the Human Rights Committee, that affirmed their essentiality to the system of human rights protection and provided limits and impediments to protect their work, in the sense of banning onerous registration procedures and expresses the right for their members to act free from harassment and intimidation.

The distinction reflects in the fact that no norm in international law, instead, directly addresses and explicitly establishes a positive obligation upon states to invite international observers, yet its relevance from this perspective is valid to the extent that a trend for public accountability in light of its connection with international legitimacy is consolidating itself, that democracy and human rights are growingly paramount and indivisible and, finally, that, as it has been outlined, the UN can opt to activate its electoral assistance missions upon formal authorization from the UNGA or the UNSC. Significantly, this vision is taking shape and gaining support especially at a regional level, where there is even “a strong basis to argue that international observation is emerging as an obligation within international customary law”¹⁶⁸.

The OSCE, for instance, has made a focal point of its attention out of election observation and has gone as far as placing the requirement for member states to allow international observation in its mandate. The 1990 Copenhagen commitment constitutes the initial framework for any election-related matter within the organization and, holding the purpose “to ensure that individuals are permitted to exercise their rights to peaceful assembly and freedom of association, including the right to form, join and participate effectively in non-governmental organizations, which seek the promotion and protection

¹⁶⁶ Democracy Reporting International, The Carter Center, *ibidem*, pp. 45-46

¹⁶⁷ HRC, General Comment 25, para. 8.

¹⁶⁸ Democracy Reporting International, The Carter Center, *ibidem*, p. 45

of human rights and fundamental freedoms”¹⁶⁹ - a familiar sounding expression which will resonate in the wording of the 1996 HRC’s General Comment 25 - it sets out the commitment to ensure adequate protection for both international and domestic observation, as a means to “enhance the electoral process for States in which elections are taking place”¹⁷⁰. In the same year as the Copenhagen commitment, the cited Paris Charter formalized the creation of the Office for Democratic Institutions and Human Rights (ODIHR), originally known as the Office for Free Elections in correspondence with what it still maintains as its main duty¹⁷¹.

The ODIHR best encompasses the objective of a simultaneous and multilevel advancement of democratic values and human rights, providing assistance for the OSCE’s 57 member states to refer to to fulfill their challenges. In providing election observation services, the ODIHR operates in a way that is comparable to the UNEAD and, as a particularly relevant feature, it concludes its monitoring by issuing a detailed and freely accessible report, clearly indicating the key recommendations that states are obliged to follow up on; the ODIHR will then offer technical assistance, when needed, to support the countries in their implementation, going full circle in effectively assisting each member state. The prestige and respectability of the ODIHR activity has been extremely conducive to reinforcing the democratic foundations of its member states and, coherently with the ultimate goal set by election observation, it has fostered peace, stability and government accountability in the regions, while also offering a fundamental forum for “crisis management and post-conflict rehabilitation”¹⁷².

Alike the ODIHR, the OAS has always put democracy and human rights at the forefront of its action and has established similar authority in the Americas where, thanks to the Unit for the Promotion of Democracy (UPD), it promotes broad political participation and heavily focuses on building democratic consciousness, both in institutions and in society, delivering information through a number of sources. Its

¹⁶⁹ OSCE Permanent Council No. 1323. The Permanent Delegation of Norway to the OSCE. (2021). "EU Statement on the continued crackdown on civil society in Russia". 8 July

¹⁷⁰ OSCE, Copenhagen Document, para. 8

¹⁷¹ The ODIHR now stands as the OSCE’s main institution dealing with the “human dimension” of its tripartite objective-based structure

¹⁷² OSCE, Who We Are <https://www.osce.org/who-we-are>

Election Observation Missions (EOMs) have achieved remarkable success and provide great systematic coherence in pursuing the objectives of enhancing structural capacities and supporting legitimate, trustable institutions.

In the European continent, different regional organizations and just as many mechanisms for the promotion of democracy and the evaluation of electoral processes coexist and complement themselves, greatly benefiting from the previously mentioned indications pointing towards the harmonization of rules of conduct and stressing the importance of sharing information in order to formulate best practices.

The European Union first approached and regulated the matter in the years that foreran its biggest expansion in scope and membership. Council Regulations 975 and 976 of 1999 arranged the legal basis for the EU to conduct operations that would “contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms”, stating that, to this aim, the EU shall be able to provide technical and financial aid, especially pertaining to the support for electoral processes. As a consequence, these documents were mentioned in a Communication from the Council on EU Election Assistance and Observation¹⁷³. Ever since, the EU has given extreme attention and taken great pride in incisively promoting democracy within and outside its enlarging borders, extending its reach worldwide, building bridges in cooperation with partner countries and international and regional organizations¹⁷⁴.

The extent of its involvement has grown exponentially over the past few years and in particular following the outbreak of the COVID-19 pandemic, in light of the fading numbers of democratic support, after decades of encouraging growth, and in consideration of the pandemic’s singularly dramatic impact on democratic life. In the “EU Action Plan for Human Rights and Democracy 2020-2024”¹⁷⁵ the organization has

¹⁷³ University of Minnesota Human Rights Center (2003). *ibidem*

¹⁷⁴ EU High Representative for Foreign Affairs and Security Policy (2021) Annual Report on Human Rights and Democracy in the World, pp.137-160

¹⁷⁵ European Democracy Action Plan, COM (2020) Final of 3 December 2020: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A790%3AFIN&qid=1607079662423>

closed its ranks and firmly set forth its priorities in such a challenging five year term, making a strong statement particularly with regard to defending and promoting the rights of women and youth and decisively pitching in the renewed global effort to expand democratic governance, for instance, in the occasion of the 2021 Summit for Democracy hosted by the newly-elected US President Joe Biden.

The EU significantly invests in financial assistance towards its neighboring countries to strengthen human rights protection and sponsor democracy-oriented reforms, which also serve as fundamental preconditions to apply for EU membership. In so-called “enlargement countries”, the EU offers technical assistance, currently through the “Instrument for Pre-accession Assistance (IPA) III” Regulation, the latest update of the measure adopted in 2021. Candidate countries, as it may be well known, are scrutinized with respect to the level of compliance with EU core values and their commitment to enact reforms, and the 2020 revised enlargement methodology has placed such aspects at the center of its functioning.

Remarking the centrality and the universality of human rights, the EU has prioritized action to foster the rights of women and youth worldwide under the auspices of the Common Security and Defence Policy (CSDP) missions and operations, and through development cooperation programs, which complement and participate in the implementation of the EU policy on human rights and in meeting the overarching goal of the Women Peace and Security (WPS) Agenda. UN resolutions represent the blueprint for European policy, reminding that the mutual integration between systems is stronger than ever in the matter of human rights law. In pursuit of the primary need to advance “inclusive, participatory and representative democracy”, the EU has correspondingly actively supported youth and women representation, struggling in eliminating barriers that excluded youth from enfranchisement, replacing them with inclusive civil registries on the one side, and promoting political participation from women on the other¹⁷⁶.

¹⁷⁶ The two aspects were interestingly combined in a trailblazing project in Malawi, the EU-funded Young Women in Active Politics (YWAP), that identified discriminatory obstacles and supported young female candidates in testing the scene in the 2019 local and national elections. Source: EU High Representative for Foreign Affairs and Security Policy (2021), *ibidem*, p. 146

Coherently with the spirit of the Declaration of Principles, the established practice and the scope of effectively establishing or solidifying democratic institutions globally, the EU has activated EOMs all around the planet, and insisted on using the crucial instrument of recommendations to assess women and youth participation in every role of the electoral process, “as candidates, electoral administrators and voters”¹⁷⁷. Furthermore, in the conduct of EOMs, it has developed synergic coordination with other international and regional observer groups and focused especially on building capacity and long-term effectiveness for the implementation and the follow-up stages of recommendations. The topic has been discussed and agreed upon in the November 2021 “Declaration of Principles” (DoP) Convening Committee (comprising most key international and regional observer organizations including OSCE/AU and OAS¹⁷⁸), while the EU and the OSCE alone have focused especially on joint follow-up and coordination of their recommendations, for a consistent action within the European continent. Conclusively on the matter, it must be noted that, in fact, the problem of equal gender representation or, *rectius*, women under-representation in public affairs affects “generally well-functioning democracies” as well, since, according to the Inter-Parliamentary Union, “the average global percentage of women members of parliament” in 2018 settled at around 24 percent of the total¹⁷⁹.

Recalling the message sent by the UNEAD Deputy Director, according to whom “electoral assistance provided by the UN is the result of the mobilization of the whole UN system”¹⁸⁰, and confirming the inherent truthfulness of the statement, along with the complexity of the system of supervision of electoral processes, it is indeed worth saying that the EU, alike other regional organizations, primarily looks at the results enshrined in the Universal Periodic Review (UPR) to approach the overall status of democracy, grasp the electoral framework of the observed country and conduct its first assessment.

¹⁷⁷ EU High Representative for Foreign Affairs and Security Policy (2021), *ibidem*, p. 143

¹⁷⁸ *ibidem*, p. 143

¹⁷⁹ OHCHR (2018) Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles - Article 21. Press release, November 30

¹⁸⁰ Nanitelamio, S. P., (2017), *ibidem*

The UPR is an extremely precious process and an insightful instrument whose popularity and success is steadily growing, adopted within the operative framework of the Human Rights Council. Its introduction, notably, dates back to the transformation of the Commission into today's Council. Following its initial presentation made by the UN Secretary-General to the Commission on Human Rights in April 2005¹⁸¹, the unborn system was described once again by the Secretary-General, as a “peer review mechanism” that would subject the “performance of all Member States” - indiscriminately - “in regard to all human rights commitments (...) to assessment by other States”¹⁸², taking a huge step forward towards genuinely applying the notion of universal scrutiny and, in a manner that is conducive to explaining the particular moment of its establishment, aiming at eradicating the innate politicization and selectivity that doomed the Commission and whose overcoming inspired the Council's creation. As such, the UPR was envisaged in operative paragraph 5(e) of the UN General Assembly Resolution 60/251 that, in forming the Human Rights Council, it gave it the mandate to “undertake a universal periodic review”, defining it as “based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States”¹⁸³. Finally, the UPR was comprehensively structured thanks to the appendix to the Human Rights Council Resolution 5/1 of 2007¹⁸⁴ and began taking shape as a cyclical and dynamic mechanism, involving all UN member states for their accountability, based on information provided by the State under review, the reports drafted through the work of Special Procedures (analyzed in Chapter I), human rights treaty bodies, and other UN entities, plus feedback from “other stakeholders”, mainly NGOs¹⁸⁵. The review is conducted by the UPR Working Group, which is assisted by the OHCHR and ultimately finalizes, at the end of consultations and confrontations with the State under review and with the participation of other member states, an “outcome report”, setting forth

¹⁸¹ De Schutter, O. (2010) *International Human Rights Law*. Cambridge University Press. p. 870-880

¹⁸² Report of the Secretary General, Addendum (A/59/2005/Add. 1, 23 May 2005). In *larger freedom: towards development, security and human rights for all*, para. 8

¹⁸³ UNGA Resolution 60/251 (2006), operative para. 5(e)

¹⁸⁴ HRC Resolution 5/1 (2007) *Institution-building of the United Nations Human Rights Council*, appendix, (18 June)

¹⁸⁵ OHCHR. Basic facts about the UPR. <https://www.ohchr.org/en/hr-bodies/upr/basic-facts>

recommendations that the State is obliged and supported in enacting, having to progressively motivate and recount on the state of their implementation.

The procedure through which the UPR mechanism unfolds, the involvement of all main international actors and its influential effects on election observation perhaps are the best example to demonstrate the interplay of different dimensions and the indivisibility of democracy and human rights. But while the practice of the international community evolved into election assistance and election assistance developed into broader and long-term oriented electoral assistance, to support a state's capacity building, it is still inherently true, keeping in mind that the solidity of the right to vote depends on the willingness of the state government to protect and promote it, that the fate and the success of electoral assistance missions ultimately relies on the degree of compliance and commitment to democratic values that those in charge decide to adopt. The UN, as well as the EU and the Council of Europe, just to mention a couple of regional organizations sincerely pouring in efforts for comprehensive democratic transition or reinforcement, nowadays often provide technical assistance (which usually includes, but is not limited to, "electoral administration and planning, review of electoral laws and regulations, electoral dispute resolution, boundary delimitation, voter registration, election budgeting, logistics and procurement, use of technology, training, voter and civic education, voting and counting operations and election security"¹⁸⁶), yet, as a study on the impact of UN electoral assistance in Sudan, Nigeria and Libya reveals, the mission brought great advancement in the process of democratization or else had an impact in Nigeria (2011) and Libya (2012), "in the presence of regime elites prioritizing electoral credibility", meanwhile it is very likely to fail in opposite conditions such as the ones faced in Sudan (2010)¹⁸⁷.

Success in the challenge for democratization, against recent opposing trends, thus, can only be achieved by viewing the issue of waning democratic sympathy and participation in the perspective of growing authoritarianism, plummeting public trust in

¹⁸⁶ ACE Project, The Electoral Knowledge Network. United Nations Electoral Assistance Division (UNEAD).

¹⁸⁷ Lührmann, A. (2019). United Nations electoral assistance: More than a fig leaf? *International Political Science Review*, 40(2), 181–196. <https://doi.org/10.1177/0192512117740915>

democratic institutions, extremely poor democratic consciousness and sensibility, lack of adequate civic education and raging disinformation. The short circuit and the deviating effects that the combination of these factors produces we are now ready to take a closer look to.

2.3. Electoral autocracies and democracy worldwide

The Nineties Post-Cold war era produced a wave of optimism and genuine faith towards democracy and the chance to effectively install it as a global and collectively praised form of government. A record number of countries rapidly transitioned to democracy, abandoned their isolationist stances, and entered regional and international cooperation. The holding of periodic, free and fair elections seemed to be naturally establishing itself, by virtue of moral authority and not just military enforcement, as a principle near and dear to the majority of states. Using data from the “Episodes of Regime Transformation (ERT)-project”¹⁸⁸, accounting for “smaller changes in democracy that fall short of regime change”¹⁸⁹, it may be seen that, across the Nineties and especially in 1992, thanks to the carry-over effects of the dissolution of the USSR, not only did the number of countries experiencing sudden regime change peak, but so did that of countries “democratizing”, meaning that they were on a consolidated path towards achieving higher standards of democracy.

From a time in recent history that can be pinpointed around the beginning of the second decade of the twenty-first century onwards, however, such widespread global tendency has reversed into a worldwide regression of democratic rights, into many countries falling into authoritarianism, or simply, on an opposite trend than the one just described, drifting towards such regime, in a process symmetrically called

¹⁸⁸ Boese, V., Edgell, A., Maerz, S., Maxwell, L., Morgan, R., Medzihorsky, J., Wilson, M., Boese, V., Hellmeier, S., Lachapelle, J., Lindenfors, P., Lührmann, A., Lindberg, S., (2020). Episodes of Regime Transformation Dataset (v2.0).

¹⁸⁹ Maerz, S., Edgell, A., Wilson, M., Hellmeier, S., Lindberg, S. (2021). A Framework for Understanding Regime Transformation: Introducing the ERT Dataset. Varieties of Democracy Institute: Working Paper No. 113. University of Gothenburg.

“autocratization”¹⁹⁰. The International IDEA “Global State of Democracy” (GSoD) report for 2022¹⁹¹ confirms the deepening trend for the period spanning from 2016 to 2021, showing that twice as many countries moved towards authoritarianism than they did in the opposite direction over this time, and the astounding number of 52 democracies - thus over one fourth of all states considered or exactly half of the world’s 104 democracies - suffered a process of erosion (“experiencing a statistically significant decline on at least one subattribute”¹⁹²), compared to 12 only a decade ago. To be more precise, the number of countries experiencing “autocratization” has returned to exceed those democratizing since 2011, as a consequence of the great financial crisis and of widespread outrest. Even more concerning is the fact that, in terms of global population, 68 to 70% of mankind lives under autocratic regimes according to the “Varieties of Democracy (V-Dem)” democracy report 2021¹⁹³. Its electoral democracy index is the most useful and insightful for our purposes, scrutinizing comprehensive voting rights in free and fair elections, inclusive of the extent to which fundamental prerequisite freedoms of association and expression are guaranteed¹⁹⁴, and it shows how people’s democratic rights have decreased much more severely than countries, on average, did, weighing on the amount of people living in non-democratic states or in states whose democratic record is worsening.

The end of the Cold-war had brought on the perfect conditions for the auspices of a great democratic future to blossom, as former head of the UN Democracy Fund Roland Rich signaled in 2001¹⁹⁵. However, the international community’s incapacity to

¹⁹⁰ Herre, B. (2022) The World has recently become less democratic. Our world in data. University of Oxford. <https://ourworldindata.org/less-democratic>

¹⁹¹ International IDEA, (2022) The Global State of Democracy Indices v. 6.1, <<https://www.idea.int/gso-d-indices>>

¹⁹² To understand the methodology through which this analysis is conducted: “The Global State of Democracy Indices (GSoD Indices) measure aspects of democracy and human rights that have been central to International IDEA’s work for more than two decades. While some primary data collection is conducted within International IDEA, the majority of the input data for the GSoD Indices are derived from 12 other publicly available data sources, with a total of 116 input variables.” International IDEA, (2022) Global State of Democracy Report 2022: Forging Social Contracts in a Time of Discontent, Chapter 1 - Global Trends <https://idea.int/democracytracker/gso-d-report-2022#chapter1.1>

¹⁹³ Coppedge, M. & others (2022) Varieties of Democracy report VDem [Country–Year/Country–Date] Dataset v12.4

¹⁹⁴ Herre, B. (2022) The “Varieties of Democracy” Data: How do researchers measure democracy? Our world in data. University of Oxford, <https://ourworldindata.org/vdem-electoral-democracy-data>

¹⁹⁵ Rich, R. (2001) *ibidem*, p. 33

capitalize on these encouraging circumstances and the poor performance displayed by democratic governance, given that even the most prosperous democracies stagnated in delivering an advancement in democratic rights and human benefits, came to a first breaking point following the 2008-2012 financial crisis. The excessive confidence and the perilous illusion that conquered rights would last undiminished for centuries to come, in the ever-untrue conclusion that any such thing as an undisputable *acquis* exists in the matter of human rights, ultimately collided with the harsh reality against which Rich himself, among others, had knowledgeably warned¹⁹⁶: that lone and growing superpowers like China would mature to become a menacing force to the cultural promotion of fundamental concepts and principles such as the universality of human rights, juxtaposing and confronting “western ideals”, with the promise of a more successful and people-oriented system to fulfill their aspirations.

This last premise maintains its inherent untrustworthiness and fallacies, as democracy still is the “form of governance that delivers the best for people everywhere and in all spheres”, as the EU correctly likes to remark¹⁹⁷, nonetheless, democratic institutions have dramatically lost their appeal to citizens and public trust in the efficiency of their work and the fairness and justness of their procedures has plummeted, making the ideal or perceived issue worse than factual reality, but even more damaging and less controllable in its consequences. This inability to reflect a credible image on the outside has been most recently confirmed, in the midst of threats to peace, security and economic stability, and in the wake of the pandemic, by the democracies’ hardships in weathering such storm and curing public discontent: the years between 2017 and 2022 have witnessed a twofold increase in the number of anti-government protests around the world¹⁹⁸, sparked by a variety of reasons - from corruption to hardened inequalities, down to health, public freedom and economic concerns - but jointly lamenting disillusion and dissatisfaction with the state’s ability to ensure generally adequate living conditions. And democratic

¹⁹⁶ “We should not lull ourselves into believing that there is anything inevitable about the triumph of democracy.” Rich, R. (2001) *ibidem*, p. 33

¹⁹⁷ EU High Representative for Foreign Affairs and Security Policy (2021), *ibidem*, p. 137

¹⁹⁸ Carnegie Endowment for International Peace, Global protest tracker, [n.d.], <<https://carnegieendowment.org/publications/interactive/protest-tracker>>

governments and state authorities, even more worryingly, have failed to respond in a prompt and decisive manner, that could re-establish confidence lost.

As International IDEA points out, although embracing protests and recognizing the right to demonstrate are cornerstones of democracy and the organization of public manifestations of protest may be a healthy sign of public engagement and a truly functioning democracy, this is not the case as long as faith in the active display of the democratic process is diminishing. Perhaps the most concerning data is the one collected by the World Values Survey, covering 77 countries and tellingly exposing that less than half - only 47.4% - of the survey's respondents - in contrast with 52.4% in 2017 - believe that "democracy is important", and a mere half of these would state that "democracy is very good", a stunning decline in the matter of a handful of years¹⁹⁹.

This correspondingly converts into an increasing amount of people supporting a shift towards "autocratization", and fascinated by what a "strong" leader, unbound by law, could bring to the table, to the extent that, at least in the context of small talk and of a survey - although effects on election results are already visible - the same World Values Survey reported that over half of the respondents, or 52%, would agree that they would support an autocrat who would not bother himself or the government with respecting the electoral process and the parliament, up from 38% measured before the steep decline in affection towards democracy, in 2009.

The democratic model is clearly - and rapidly - fading in attractiveness to the eyes of people who are constantly more easily influenced, especially through the disruptive power of social media, and persuaded by propaganda. Taking into consideration the growing detachment from the political process, and reminding in advance that the importance of education and informed voting will be dug into and better assessed in Chapter 3, it is sadly true that, as a result of a population that is generally ignorant and poorly conscious of the significance of democracy, populist waves, which, from the point of view of "clever" abuse of communication and its means, rise and thrive

¹⁹⁹ Inglehart, R. & others (2014) World Values Survey: All Rounds. Country-Pooled Datafile Version, JD Systems Institute, <<https://www.worldvaluessurvey.org/WVSDocumentationWVL.jsp>>

on information manipulation, are quickly taking over the political landscape. The interplay of these factors bringing a causal contribution to the decay of democratic institutions is thus inherently sustained and integrated - or shall we say “aided and abetted”, in the terminology of international criminal law - by cultural impoverishment, in what creates, as we will see, a vicious circle in the form of an educational downward spiral.

Populism and extremism rhyme and often proceed hand in hand, in the conjoined effort of profiting from the destabilization of democracies and willfully abusing their own instruments to gain consensus and, bringing the process to its extreme and most subversive consequences, claim power, even overthrowing democratic institutions. Populism pushes its way forward “via existing democratic processes”²⁰⁰ and, in the words of the late UN Secretary-General Kofi Annan, its promoters are “charismatic individuals or fake prophets promising simplistic solutions to people’s grievances through radical policies that dismiss institutions and laws as either irrelevant or inconvenient”. This description, as it is plain to see, perfectly fits with the majority of the responders to the earlier mentioned survey and their perception that an outsider storming in and revolutionizing the democratic process could perform better than democracy itself, whose institutions are trained and intended to pursue the betterment of society.

As it is once again worth restating, democracy is, in spite of all its shortcomings, the only form of government that is both legitimate and capable of meeting the needs of all in a decent and respectable manner. However, the main regret of the international community needs to be the failure to recognize, unlike Roland Rich did²⁰¹, the importance of readily giving universal acknowledgement and entitlement within international human rights law to the concept of democracy. Though it would have been the ideal vehicle and platform to promote authentic universality for democratic values with adequate credibility and authority, international law has had a limited impact on shaping “national debates and international discussions on democratic governance and elections”²⁰²,

²⁰⁰ OHCHR (2018) Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles - Article 21. Press release, November 30

²⁰¹ Rich, R. (2001) *ibidem*, p. 33

²⁰² Democracy Reporting International, The Carter Center, *ibidem*, p. 10

therefore playing an extremely limited role, as well, in influencing the people and making them feel relevantly considered and involved at all levels. By taking post-Cold war rapid evolution for granted and underestimating the importance of dignifying and elevating democracy to its due status as a fundamental human rights, international organizations and the international community as a whole tricked themselves into believing that the little attention devoted to political rights and the scarce care in effectively guaranteeing their implementation would have no practical repercussions on democratic life worldwide.

The enforceability of common democratic standards, as much as the human rights framework in its entirety, and the capacity to ensure different channels and broad alleys to invite and promote public participation are instead key elements for the balance and well-being of a human society. It must be understood and be clearly stated in all appropriate international forums and grounds, that “the universality of the democratic form of government is based on a logic that flows from the innate dignity of human beings and their right to have a say in how they are governed”²⁰³, it does not, by any means, constitute, as it has been clarified across Chapter 1, a “Western” cultural imposition and it is consequently tied to, *rectius*, it is itself a part of the set of international obligations that all states undertake and are bound to respect to be legitimately included in the international community.

Reticence and indecisiveness under this aspect have driven the world, on a turn, to take the road towards “autocratization”, the rebuttal of democratic values and the resurfacing of extreme and dormant tensions. In a world that collectively feels anger and anxiety²⁰⁴, public opinion has split down an apparently irreconcilable line into severely polarized factions, preparing the perfect, fertile - or rather filthy - ground for populism to grow upon.

The COVID-19 pandemic and the complexity of the response to the sanitary emergency worsened the systemic strain, by also adding new diverging factors to the mix,

²⁰³ Rich, R. (2001) *ibidem*, p. 33

²⁰⁴ International IDEA, The Global State of Democracy Indices v. 6.1, 2022, <<https://www.idea.int/gsod-indices>>

and, simultaneously, offered authoritarian regimes the perfect chance to tighten their grip on power and further compress fundamental freedoms. It is not a coincidence, therefore, that the number of coups d'état has spiked since then and that, once again referring to data collected by IDEA International, almost half of all authoritarian countries have suffered a decline in the degree and the quality of their democratic rights. Significantly, in ascertaining the exacerbation of autocracies and their retaliation, in the battle against democratization, on their citizens, it must be reported that the most common subattributes - among the indices considered - that have been impacted are those regarding "Clean Elections" and "Effective Parliament", indirectly manifesting, if ever necessary, the vital significance of core democratic rights and the existence of effective, internal and international, mechanisms to provide for their protection, being, as it is, that their collapse signifies the ultimate retreat and defeat of democracy.

As a matter of fact, the distinguishing factor between the so-called hybrid regime form of "electoral autocracy" and other autocracies is commonly identified in the adoption of the "formal institutions" of democracy²⁰⁵ to maintain the façade of a liberal democracy and speciously legitimizing the government's mandate: a mask that has often been dropped recently, to blatantly reveal the authentic autocratic nature hidden behind such regimes.

Electoral autocracies, however, and unpleasantly so, now represent the most common form of "non-democratic rule" in the world²⁰⁶, and by a wide margin, making up two-thirds of all post-Cold War regimes²⁰⁷. Although uncertainty remains and debate is wide open among scholars as to the appropriate methods of classification and the essential properties that define and set electoral autocracies apart, vis-à-vis the complexity and the fuzziness of empirical reality²⁰⁸, agreement has been established upon the fact that it does constitute the most widespread form of dictatorship. To avoid bearing

²⁰⁵ Just, A. (2022). Partisanship, Electoral Autocracy, and Citizen Perceptions of Party System Polarization. *Polit Behav* <https://doi.org/10.1007/s11109-022-09839-6>

²⁰⁶ Schedler, A. (2013). *The politics of uncertainty*. Oxford University Press.

²⁰⁷ Miller, M. (2020). The Strategic Origins of Electoral Authoritarianism. *British Journal of Political Science*, 50(1), 17-44. doi:10.1017/S0007123417000394

²⁰⁸ Del Rio, A. (2022) A "cat-dog" called electoral autocracy. *The Loop*. ECPR's Political Science Blog

“high analytical costs” on “researchers and decision-makers”²⁰⁹, consequently triggering a dangerous chain reaction in the treatment of dysfunctional democracies, Italian political scientist and sociologist Giovanni Sartori warned against the abuse of “electoral autocracy” as a blanket term, recognized this as one of the causes for its perceived proliferation and coherently, through the use of the metaphor of imaginary “cat-dogs” warned against the creation of undefined hybrid concepts. Researcher Del Rio picked up this input to suggest settling the “rules of the game”, especially in order to assess the dynamics that amount to a regime change.

Considering that the V-Dem report counted 87 electoral autocracies in the world as of 2021, and that these countries are home to 68% of the world’s population²¹⁰, it is crucial to examine the process by which electoral autocracies form themselves, to give at least a proper, albeit broad, background definition to the phenomenon and to explore their structure and tenure.

Electoral autocracies are usually assimilated and referred to as “mixed, hybrid or semi-democratic” regimes²¹¹, causing the undesired effect, as it is possible to affirm by reflecting on the consideration brought forward by Sartori, of mistakenly confusing and associating different kinds of structures of power, while losing sight of the essence of electoral autocracies.

In the initial stages of doctrinal elaboration, the post-Cold war proliferation of electoral autocracies was interpreted - in the context of absolute faith towards democratization - as a natural, transitional step characterizing democratization. This research, as it was later revealed in its turbulent consequences, however, “suffered from a teleological bias”²¹², which, when not amounting to the so-called “fallacy of

²⁰⁹ Del Rio, A. (2022) *ibidem*

²¹⁰ This number is due, in a major part, to the downgrading of India, source: Biswas, S. (2021) “Electoral Autocracy”: the downgrading of India’s democracy. *BBC News*

²¹¹ Just, A. (2022). *ibidem*

²¹² MORSE, Y. L. (2012). THE ERA OF ELECTORAL AUTHORITARIANISM [Review of *Competitive Authoritarianism: Hybrid Regimes after the Cold War; Democratization by Elections: A New Mode of Transition; Voting for Autocracy: Hegemonic Party Survival and Its Demise in Mexico; Electoral Authoritarianism: The Dynamics of Unfree Competition*, by S. Levitsky, L. A. Way, S. Lindberg, B. Magaloni, & A. Schedler]. *World Politics*, 64(1), 161–198. <http://www.jstor.org/stable/41428375>

electoralism”, still assumed that the process of liberalization, once having been expressed in the act of holding an election, already had culminated in the consolidation of a democracy, and that was believed to be, actually, the only conceivable outcome. This deceiving prejudice affected UN-led and other main international organization’s missions to perform international election observation, as well, in their primitive structure. With their focus solely directed towards monitoring, without interference, the display of the first electoral process in transitioning, newly born or fragile democracies, the missions had no concern in effectively asserting democratic rights locally and produced no consequential, long-lasting action outside of the episodic event of electoral consultations. This flawed vision was later corrected in principle, through the shift towards much more extensive and incisive overview mechanisms and the conversion to a more long-term oriented, capacity-building type of assistance. This notwithstanding, it still supported the claim and criticisms that these missions, in fact, had the opposite impact than the one desired and could, in some instances, even result in indirectly lending their support to autocratic, liberticide regimes, mainly because of the apparent sponsorship effect that the lone presence of controlling bodies on the territory had on the public opinion. It was only later understood that the process of democratization cannot be deemed complete after just one, even successful, election and no democracy can actually ever consider itself perfect, mature or intangible.

Based on the comprehension of such dynamics, the “transitions paradigm”²¹³ was irreparably undermined in its ideological foundations and abandoned in favor of a more realistic approach, leading comparative politics to fully elaborate on the notion of electoral autocracy without conceiving it as a transitional and positive status, bound to evolve into a fully-fledged democracy. As a natural consequence, the idea according to which such form of government is “inherently unstable” was inevitably refuted as well, and electoral autocracies were finally recognized as a unique entity, marked by durability and adaptability, and therefore also capable, as it has been mentioned, to further degenerate into more openly autocratic regimes²¹⁴.

²¹³ Carothers, T. (2002). The End of the Transition Paradigm. *Journal of Democracy*, 13(1), 5-21.

²¹⁴ Sources: Carothers, T. (2002). *ibidem*;

Miller, M. K. (2015). Electoral Authoritarianism and Human Development. *Comparative Political Studies* 48 (12):1526–1562

The fate of an electoral autocracy as a stable model for the government to rely on hinges on the combination of few fundamental factors that allow the false pretenses over which the regime is built to renew themselves. This conditionality stands as a direct consequence of the structure of its system, which raises concern in the international community because, by common definition, it exploits the institutions of a regular liberal democracy, distorting and deteriorating them by “at the same time engaging in extensive and systematic manipulation of those institutions to ensure the ruler’s hold onto political power”²¹⁵. Having been internationally recognized that elections are the legitimizing factor for governments to reclaim power and boast sovereignty, governments abusively exercising such state prerogatives within an electoral autocracy essentially look to hold these regularly and formally in compliance with the letter of the norms in international law. What these elections totally lack, as it may easily be inferred, is respect for the spirit and the human rights significance of this set of principles.

The dominating political actors within an electoral autocracy take advantage of their leadership position to bend laws and constitutional foundations of the state to their own exclusive benefit and to the utter disqualification of the opposition, which merely serves the role of a puppet, to preserve the appearance of multiparty contention although, *de facto* if not *de iure*, being deprived of any effective chance to compete and to exercise its functions. The entire playing field is heavily tilted to favor the incumbent and the electoral process is entirely manipulated so as to predetermine the winner and let those in power reassert their supremacy. Therefore elections, which should be the occasion for the population to exercise their free will and express their judgment on the government, transform into the instance during which its hegemony is most brazenly reaffirmed.

Miller, M. K. (2020). *ibidem*;

Schedler, A. (2006). *Electoral authoritarianism*. Lynne Rienner.;

Schedler, A. (2013). *ibidem*.

²¹⁵ Sources: Hale, H. E. (2005). Regime cycles: Democracy, autocracy, and revolution in post-Soviet Eurasia. *World Politics*, 58(1), 133–165;

Hale, H. E. (2010). Eurasian polities as hybrid regimes: The case of Putin’s Russia. *Journal of Eurasian Studies*, 1(1), 33–41;

Levitsky, S., & Way, L. A. (2002). The rise of competitive authoritarianism. *Journal of Democracy*, 13(2), 51–65;

Levitsky, S., & Way, L. A. (2010). *Competitive authoritarianism: Hybrid regimes after the Cold War*. Cambridge University Press;

Schedler, A. (2013). *ibidem*.

Accordingly, it has been well articulated that political elites in such regimes pursue a dual aim, as elections become the entry gateway to being able to regulate access and exercise of power as they please and, thus, both “electoral and regime objectives” are placed at stake²¹⁶.

This state of things raises the question of what circumstances may bring a leader to submit its authority to - albeit ostensible - public scrutiny and, consequently, what is the choice behind maintaining and operating a regime in the form of an electoral autocracy.

Once that electoral competition has been defined - in strict accordance with the most advanced elaboration in international law, which also identifies multi-partyism as a fundamental component for the effective exercise and the full enjoyment of the right to vote - as “the openness of voters to cast their votes for multiple political parties”²¹⁷ without any irregularities and that the absence thereof, in its genuine display, has been well ascertained within electoral autocracies, such pressing question, that begs to be answered for the sake of authentic democracy, can be restated aiming to examine to what extent do contested elections represent a double-edged sword for autocrats to unsheathe²¹⁸.

When autocrats resort to the electoral process, they inherently prepare themselves to do so in an aptly prepared, significantly biased socio-political environment and through the exploitation of “power and resource asymmetries”²¹⁹, meaning that “the stakes of political competition are higher in these regimes than in democracies” in light of the profound ideological and behavioral divide between ruling and opposition parties, that the ruling one is constrained to handle with care and strategic self-restraint, insofar as the façade of election competition is intended to be held valid.

²¹⁶ Bunce, V., & Wolchik, S. (2011). *Defeating authoritarian leaders in post-communist countries*. Cambridge University Press.

Schedler, A. (2013). *ibidem*.

²¹⁷ Wagner A, Krause W (2021) Putting electoral competition where it belongs: Comparing vote-based measures of electoral competition. *Journal of Elections, Public Opinion and Parties*.

²¹⁸ MORSE, Y. L. (2012). *ibidem*

²¹⁹ Just, A. (2022). *ibidem*

Holding apparently competitive elections entails the undertaking of some sort of political risk and carries itself with a load of uncertainty that, alone, may imperil the survival of the regime, so, to the precise aim of curbing this risk, autocrats load the dice of the tilted electoral playing field and often appeal to its manipulation, or otherwise profit off the democratically altered institutional and social environment they have tailored to their needs²²⁰. Although committing electoral fraud secures the victory of the incumbent, the flip side of the coin is that indulging in this behavior may endanger or even defeat the primary, yet arguably not the sole, motivation at the root of holding elections in these regimes, which is to use the quintessential instrument of democracy to fortify and legitimize an anti-democratic rule, giving it the stamp of approval and respectability on both the internal and the international stages²²¹. In other words, the role of elections as a potential and genuinely propulsive factor for democratization always resists and never completely fades away, and while “frequent unfair elections” are meant to sustain authoritarianism, they might as well “sow the seeds of its downfall by providing the opposition with a set of tools and elites with incentives to defect from the ruling regime”²²².

Most significantly, this unfolds in the sense that the framework of restrained fundamental freedoms and hidden obstacles to the free organization of opposing forces to the authority in control, impeding their adequate capacity to form a credible alternative to it, may then allow for these lost tools to resurface and for the coordination of protests to happen specifically offering the pretext of the hoaxed elections²²³. An evident example of such scenario is, quite reassuringly, offered by the outbreak of protest against stolen elections in countries like Serbia, Georgia and Ukraine²²⁴.

²²⁰ Wong, S. (2019). Gerrymandering in Electoral Autocracies: Evidence from Hong Kong. *British Journal of Political Science*, 49(2), 579-610. doi:10.1017/S0007123416000685

²²¹ Birch, S. (2011). *Electoral Malpractice*. Oxford: Oxford University Press.

²²² MORSE, Y. L. (2012). *ibidem*, p. 162

²²³ Tucker, Joshua A. (2007). Enough! Electoral Fraud, Collective Action Problems, and Post-communist Colored Revolutions. *Perspectives on Politics* 5 (3):535–551.

²²⁴ Kuntz, Philipp, and Thompson, Mark R.. (2009). More than Just the Final Straw: Stolen Elections as Revolutionary Triggers. *Comparative Politics* 41 (3):253–272.

Overall, as Professor Miller argues²²⁵, it is correct to say that multiparty politics are misconstrued to adapt to the purposes of autocrats under a twofold set of external conditions. Behind the widespread success of the anti-model of electoral autocracies stands the flexible abuse of democratic institutions that it allows for. In the context of an international community that recognizes democracy as the “only legitimate game in town”²²⁶, and, consequently, intends elections as the only vehicle to obtain an authentic popular mandate to govern and its connected benefits, the instrumental power of elections to provide international legitimacy becomes the most desired and demanded asset. It has been generally acknowledged and logically inferred by autocrats that offering even the bare minimum of formal democratic guarantees is enough to ensure the reaping of such abstractly exclusive and precious privileges. But autocrats are willing to run the risk of presenting to the outside world these democratic credentials, which are the key to entering in productive and otherwise precluded aid, trade and military alliances, only if they are confident enough in the stability of their rule and their ability to obtain landslide wins. Their degree of interference in the substance of the electoral process is also obviously dependent on the evaluation of this probability.

Taking this crucial interconnection into account, it may be affirmed that the institutional asset of electoral autocracies will be influenced by international variables, in a relation that grows in direct proportionality to the degree of dependence on external democracies.

Conclusively, autocratic leaders will conduct contested elections to the extent that international incentives pushing in this direction outweigh opposed risks of proclaiming them, the inquiry upon the rationale of this choice thus ultimately resulting in nothing short of a cost-benefit analysis. This consideration underscores and explains the substantial difference, in definitive contrast with previous doctrinal elaborations that saw the two concepts overlapping, between the transition process towards the establishment of an electoral autocracy and that of democratization. The latter intrinsically and - on a simultaneous platform - constitutionally presents the leader with

²²⁵ Miller, M. K. (2020). *ibidem*

²²⁶ Donno, D. (2013). *Defending Democratic Norms: International Actors and the Politics of Electoral Misconduct*. New York: Oxford University Press.

a physiological loss of the unlimited power that is typical of autocratic regimes. It will accordingly be adopted by autocrats as a last resort measure to retain power when the circumstances - meaning the control over the socio-economic factors within the country, and therefore the electoral arena - offer no alternative through autocratic methods of government²²⁷.

2.3.1. Forms of government and their approach to voting rights: external voting rights as a telling example

This last consideration interpreting the use of elections as the result of fine calculations made by the autocratic leader over its rate of approval and success is interestingly corroborated by studies conducted on the differences in the attitude held by democratic or autocratic governments towards their emigrant citizens and how these treat the issue of their enfranchisement²²⁸. A similar cost-benefit evaluation is, in fact, carried out with regard to non-residents, to the aim of ascertaining their degree of support for the incumbent. As it is easy to infer once these premises are given, data confirms that autocrats will tend to be more indulgent and extensively guarantee voting rights to these individuals as far as their consensus is aligned - or at least perceived to be so - with the interests of the incumbent. In the opposite case, franchise for non-resident individuals will be limited or totally withheld.

This conclusion enriches the simplistic deduction by which higher levels of inclusion are an exclusive prerogative to democracies. As it has been demonstrated, levels of inclusion within electoral autocracies will strictly depend on the chances for the incumbent to enjoy the landslide win it ultimately seeks and therefore be connected to its will.

²²⁷ Miller, M. K. (2020). *ibidem*

²²⁸ Umpierrez de Reguero, S.A., Yener-Roderburg, I.Ö., Cartagena, V. (2021). Political Regimes and External Voting Rights: A Cross-National Comparison. *Frontiers in Political Science*, <https://doi.org/10.3389/fpos.2021.636734>

While it is still inherently true that democracies have higher levels of inclusion, the discerning factor between electoral autocracies and democracies introduces the twofold articulation, theorized by the American political scientist Robert Alan Dahl²²⁹, of competition (or contestation) and participation (or inclusion) to further identify, in successive elaboration²³⁰, four different types of political regimes, namely liberal democracy, electoral democracy, electoral autocracy, and closed autocracy. It has relevantly been explained, to this regard, what should already appear as evident, that “whereas contestation refers to the procedures of political competition in free and fair elections, participation is mainly concerned with who partakes in the democratic decision-making process”²³¹.

In liberal democracies, both indexes of inclusion and contestation are the highest and the form of government is inspired and imprinted on liberal principles and a solid conception of the rule of law. Electoral democracy still displays competition and participation to a satisfying degree, however, the rule of law and other fundamental principles are not so strongly guaranteed. Electoral autocracy, as well documented, only revolves around one effective party, and the field of political competition is uneven regardless of the structure of multiparty elections mimicking democratic systems. Lastly, among closed autocracies are those political regimes where neither *de jure* nor *de facto* competitive elections occur and core principles of democracy are systematically violated, with the civil and political rights of citizens, both resident and non, being completely annihilated.

Democracies, nonetheless, ought to mind great attention to preserve its values and the resilience of its structure, meaning, to this aim, that it must take care in expanding its degree of participation, in the various forms recounted in Chapter 1, and competitiveness of its elections, that remain foundational to its genuineness. This mission and the aspect of emigrant enfranchisement thus become mutually connected and

²²⁹ Dahl, R. A. (1971). *Polyarchy: participation and opposition*. New Haven, CT: Yale University Press.

²³⁰ Lührmann, A., Tannenberg, M., and Lindberg, S. I. (2018). Regimes of the World (RoW): opening new avenues for the comparative study of political regimes. *Polit. Governance* 6 (1), 60–77. doi:10.17645/pag.v6i1.1214

²³¹ Clark, W. R., Golder, M., and Golder, S. N. (2017). *Principles of comparative politics*. Washington DC: CQ Press.

positively influence each other. At the same time, flaws in the democratic system and the attention of political parties towards true participation may result in disinterest towards establishing a solid legal framework for non-resident enfranchisement, a defect that signals the broader and growing lack of concern for the fundamental issue of providing quality and effective representation to citizens everywhere.

2.3.2. Authoritarianism on the rise in Europe and prospective indications

The crisis of democratic institutions and the wave of “authoritizing” countries has struck even the world’s most democratically sound regions and led to question their effectiveness in responding to actual threats to their status quo, as the complexity of the challenges with which the European Union and the European continent as a whole have been faced with paradigmatically exposes.

In the “old continent”, the shared bedrock of democratic values is eroding as an effect of the perceived failure of democratic institutions to deliver the kind of qualitative and stable progress that was at the heart of its premises and promises. Just like the “great resignation” affecting the labour market is a direct product of the “great discontent” towards the workplace environment and concerns the extremely disengaging and disconnecting background in which the working obligation is performed²³², the galloping disenfranchisement in politics, resulting in depressing voter turnout records since the beginning of the new millennium²³³, has been driven by egoistic and general carelessness towards the fate of the *res publica* in response to the loss of credibility by democratic institutions, endowed with the mission and the possibilities of generating progress yet

²³² Gandhi V, Robison J. (2021) The “Great Resignation” is really the “Great Discontent”. Gallup

²³³ International IDEA, Voter Turnout Database, [n.d.], <<https://www.idea.int/data-tools/data/voter-turnout>>

Castillo, A., Huang, C. and Silver, L., (2019) In many countries, dissatisfaction with democracy is tied to views about economic conditions, personal rights, Pew Research Center, 29 April, <<https://www.pewresearch.org/fact-tank/2019/04/29/in-many-countries-dissatisfaction-with-democracy-is-tied-to-views-about-economic-conditions-personal-rights>>

constantly falling short in doing so. Statistical data processed by the International IDEA plainly and unanimously point towards a failing model of democracy, as almost half of the region's democracies have undergone a process of contraction, which has surprisingly struck in a slightly more impactful manner those so-called "high performing democracies".

Notably, among the many countries that are witnessing the exacerbation of social tensions consequently resulting in increasing or even majoritarian support for nationalistic, populist parties²³⁴, two of the EU member states - Poland and Hungary - have suffered severe backsliding, a process that can even take place through rapid action, due to which democratic institutions are most unsettlingly threatened or distorted. The late, defective and ineffective response given by the EU to such a massive momentum shift in what had been, up to that point, a choral and steady evolution in democratic advancement, together with the significant setback caused by "Brexit", has manifested the organization's structural incapacity to stand up to conflicting forces and grave breaches of its fundamental principles.

Reconstructing Poland and Hungary's path into "autocratization" and democratic backsliding is particularly useful to identify these limits and partially reject, with respect to these cases, the previously examined and traditionally dominant narrative according to which electoral autocracies are formed only as a product of a failed democratic transition. These similar instances, as a matter of fact, are comparable for the purpose of introducing backsliding as a separate cause of descent into electoral authoritarianism and noticing its growth in incidence. It is likewise important to note the different display of this process, which presents itself with different degrees of intensity and does not necessarily go beyond the extreme boundaries of democracy into producing a regime change. While Hungary is now widely recognized as a failed democracy and a perfected electoral autocracy, the same cannot be said with regard to Poland, a state that,

²³⁴ Coman, J., '(2022) "Times have changed": Italian town once run by communists poised to vote far right', The Guardian, 22 September: <https://www.theguardian.com/world/2022/sep/22/italy-election-communist-far-right-sesto-san-giovanni>; The article recounts the recent drift towards extremism, and nationalist, xenophobic far-right in particular, that has uniformly overwhelmed the Italian political landscape, through the lens of the latest national-level elections, that have produced an alarming result that the EU is collectively called to reflect upon.

despite seeing the quality of its democracy drastically compressed, has not fully compromised its status, as its consonant vision and close partnership with the rest of the European Union in weathering the diplomatic and social consequences of the Russian war of aggression against Ukraine proved.

A remarkable aspect in the two countries' common backsliding arch is the unsuspected dimension of this event given the nature of the previous democratic establishment. Both states were rightfully considered to be the best example of positive democratic transition and progress in post-communist east central Europe²³⁵, having spearheaded the fight for enfranchisement from the USSR by holding their first free elections in 1989 and having expeditiously consolidated their democracies, as global indexes and the rapid admission within the EU itself confirmed²³⁶. Also, worth noticing on an opposite note is the fact that, as mentioned, backsliding can be a rapidly unfolding process, and this was the case in both Hungary and Poland which, ironically, and in comparison with other regional neighbors who as well are going through democratic erosion, took a down-spiraling trajectory that was just as steep as their climb towards democracy had been²³⁷.

At a closer look, these situations reveal the fault in their democratic architecture which allowed for extremism to infiltrate the fabric of the local society and soak it in the noxious products of anti-establishment rhetoric, hence offering the mirror image of the process of deterioration that is consuming western democracies as well. The now authoritatively ruling parties of Fidesz in Hungary and Law and Justice (PiS) in Poland,

²³⁵ Bernhard, M. (2021). Democratic Backsliding in Poland and Hungary. *Slavic Review*, 80(3), 585-607. doi:10.1017/slr.2021.145

²³⁶ "According to Freedom House's *Nations in Transit* Scores both Poland Hungary were consolidated democracies by the late 1990s. Hungary lost that ranking in 2014 and Poland remains one." Bernhard, M. (2021). *ibidem*

Representative studies of this academic consensus include Ágh, A. "The Early Consolidation in East Central Europe: Parliamentarization as a Region-specific Way of Democratization," *Társadalom és gazdaság Közép- és Kelet-Európában/Society and Economy in Central and Eastern Europe* 21, no. 3, "Ten Years After: Democratic Transition and Consolidation in East and Central Europe" (1999): 83–110; and Grzegorz Ekiert and Daniel Ziblatt, "Democracy in Central and Eastern Europe One Hundred Years On," *East European Politics and Societies* 27, no. 1 (February 2013): 90–107. On the role of this early progress in affecting decisions on EU membership, Vachudova, M. (2005) *Europe Undivided: Democracy, Leverage, and Integration After Communism*, Oxford.

²³⁷ V-Dem report (2020)

although differing in their ideological and contextual origins, both started off as establishment parties, perfectly inserted and accommodated in the democratic playing field of their own two countries. Apart from the divergence in their political fortunes and upcoming, the phantom of the subversive entities they would later reveal themselves being already showed itself in the watermark of post-communist rebellion to the deposits of slag left, in an irreconcilably divided population, by the process of extrication from the previous regime. The persistence of communist incumbents within the political agora and, in alternation with opposition-led coalitions, as a governing force of the country that took on a reformist, progressive agenda, supporting market reforms and negotiating the accession to NATO in 1999 and the EU in 2004, opened a “discursive space on the right”²³⁸ which led parties from the opposition to channel public discontent on the right side of the political spectrum to abandon programmatic resistance in favor of what has been labeled a “memory warrior stance”²³⁹. Under this systematic commitment, both parties followed the *divide et impera* diktat in the attempt to fragment and polarize the national public opinion and in the hopes of captivating a significant portion of it, to build a consensus around the fabricated belief that the lasting legacy of communism in their post-regime successors had tainted the democratic transition to the aim of preserving power and privileges in the hands of a corrupt elite and to the expense of “real Poles and Hungarians”, who had thereby been denied the enjoyment of the pure and “true fruits of democracy and economic transformation”²⁴⁰.

The forgery of myths that celebrate the greatness and intrinsic superiority of a nation, as well as the sponsoring of a conflictual narrative opposing a valuable and noble majority of the population embodying and heralding the vital seed of the “purported general will”²⁴¹ to an oppressive and egoistic establishment, wishes to revive revolutionary spirits and agitate repressed anger slithering among the people, while

²³⁸ Bernhard, M. (2021). *ibidem*

²³⁹ Bernhard and Kubik, “A Theory of the Politics of Memory,” in Bernhard and Kubik, eds., *Twenty Years After Communism*, 15.

²⁴⁰ Bernhard and Kubik, “Roundtable Discord: The Contested Legacy of 1989 in Poland,” 60–85; and Anna Seleny, “Revolutionary Road: 1956 and the Fracturing of Hungarian Historical Memory,” 37–59, in Bernhard and Kubik, eds., *Twenty Years After Communism*.

²⁴¹ Mudde, “The Populist Zeitgeist.” For an overview of populism in the post-communist space see the introduction to the “Critical Forum: Global Populism” published in this journal: Anna Grzymala-Busse, “Introduction,” *Slavic Review* 76, Supplement S1 (August 2017), S1-S2, at doi.org/10.1017/slr.2017.151

promising to legitimize the voices of those who feel mis or under-represented. In the concise expression of political scientist Cas Mudde this attitude embodies “the populist zeitgeist” that parties all over the world who embrace this ideology adopt to incite the masses and conquer apparently unconditional, polarized and heavily conflictual, if not violent, support.

For this reason, the adversarial rhetoric through which populist parties in democracies build their success and ruling parties in electoral autocracies pretentiously justify their actions creates increasingly higher levels of party system ideological polarization the more autocratic the national system gets²⁴². This effect on the general public’s opinion is augmented and extremized through the grasping of control over the media, which is especially critical in this day and age to erase their independence and give the regime its unified information outlet. Freedom of the media, as we will analyze in Chapter 3, has consequently risen to become a core value and benchmark for democracy, determining the ability for citizens to freely access a pluralistic range of sources of information and shape their personal convictions based on objectively verified news and fact-checked opinions, rather than on biased partisanship and manipulated propaganda. On the opposite end, populist parties prosper on the opportunity offered by gaps in the information network to push their divisive discourse and promote their democratically disruptive agenda.

Poland and Hungary’s backsliding constitutes a symbolic example in this sense, besides being an international reference model on how democratic parties are able, if not promptly limited through democratic safeguards, to evolve into autocratically leading monsters by fully exploiting the potential of information manipulation, a silent, elusive, pervasive and extremely efficient weapon of mass control, polarization and, ultimately, destruction. The crusade to incite communist resentment through inflammatory verbal and physical tactics gave wavering success to PiS and Fidesz up till the mid-2010s, when the plagues of an economic crisis and waves of migration made the European forged promises of delivering shared progress and stability drop dead to the eyes of a discontent population, which, in extreme response, turned towards these parties and the ethno-

²⁴² Just, A. (2022). *ibidem*, hypothesis 3A

national xenophobic narrative they fed to their electors to rehabilitate and dignify their presence, which had long been confined to extra-parliamentarian extremism.

To the purpose of exposing the EU's negligent and lackluster handling of a continent-wide degeneration that should and could have been prevented or at least mitigated in its most negative effects, if only the signs of cultural demotion and institutional crackdown had been timely recognized and tackled, it is important to note that the organization's superficiality and ineffectiveness in monitoring the implementation of its values and policies during every step of its evolution has been the decisive breach in the system, which opened the gates for anti-democratic rhetoric to regain popularity and an influential standpoint.

Among the crucial issues that helped these extremist parties plant and nourish the seeds of their future infesting growth stands, "quite counterintuitively", the two countries' entrance into the EU. As a matter of fact, the strict terms of scrutiny that are applied, holding the so-called Copenhagen criteria as reference, when evaluating the candidature of aspiring new members are then cast aside once that membership is acquired, paradoxically enabling extremist forces to act with even more freedom than before²⁴³.

The inconsistency in ensuring the pursuit of democratic values within each member state was atop of the reasons causing them to slide into arbitrariness in applying European law and general principles as well as ideologically maturing a reactionary sentiment. The long-unrestrained divergence, for instance, has also slid into institutional frictions and an open, ongoing judicial conflict between Polish national courts and the European Commission. In the most recent development on the case, on 15 February 2023, the EU institution referred the Polish state to the European Court of Justice for alleged violations of EU law committed by its Constitutional Tribunal. The decision concludes an infringement procedure which had been opened following two separate rulings by the

²⁴³ R. Daniel Kelemen, "Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union," *Government and Opposition* 52, no. 2 (April 2017): 211–38. Sedelmeier, 'Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession' (2014) 52 *Journal of Common Market Studies* 105

country's constitutional watchdog, respectively dating back to 14 July 2021 and 7 October 2021, that had declared the incompatibility between EU laws and the Polish constitution, challenging the primacy of EU law and other landmark, interconnected principles, such as the autonomy and uniform application of Union law and the binding effect of CJEU rulings²⁴⁴. Although the question at stake was not a complete novelty in its fashioning, since similar disputes, most notably the “*Taricco* saga”²⁴⁵ (concerning the hierarchical interplay between EU laws and fundamental principles of the Italian legal system, while revolving around the proposed theory of “counter-limits”), had already sparked debate and perhaps suggested a more compromising and dialoguing relationship between national and international courts, the European Commission also lamented the violation of Article 19(1) TEU, enshrining the right to effective judicial protection and incidentally argued that the authority with which they were communicating no longer satisfied the imposed requirements of an independent and impartial tribunal previously established by law²⁴⁶. This was a direct consequence of the PiS improper “court-packing”²⁴⁷ strategy enacted immediately after Andrzej Duda’s rise to the presidency, between 2015 and 2016²⁴⁸, and had been hit before by two infringement procedures, launched in 2019 and 2020 to counterattack and protect the offended rule of law, while Poland pledged to make amends for it through the Recovery and Resilience Plan (RRP), yet, as of today and as confirmed by the 2022 Rule of Law Report²⁴⁹, the situation still points towards an illiberal structure and attitude from the Court.

²⁴⁴ European Commission (2022) The European Commission decides to refer Poland to the Court of Justice of the European Union for violations of EU law by its Constitutional Tribunal, Press release, 15 February

²⁴⁵ Piccirilli, G. (2018). The ‘*Taricco* Saga’: The Italian Constitutional Court continues its European journey: Italian Constitutional Court, Order of 23 November 2016 no. 24/2017; Judgment of 10 April 2018 no. 115/2018 ECJ 8 September 2015, Case C-105/14, Ivo Taricco and Others; 5 December 2017, Case C-42/17, M.A.S. and M.B. *European Constitutional Law Review*, 14(4), 814-833. doi:10.1017/S1574019618000433

²⁴⁶ Scheppele and Pech, (2017) Poland and the European Commission’ (Parts I, II, and III) (Verfassungsblog);

Konieczny, ‘Of institutions, democracy, constitutional self-defence’ (2016) 53 *Common Market Law Review* 1753.

²⁴⁷ “People often use “court packing” to describe changes to the size of the Supreme Court, but it's better understood as any effort to manipulate the Court's membership for partisan ends. A political party that's engaged in court packing will usually violate norms that govern who is appointed and how the appointment process works”: Moore, E. (2020) What is court packing? *Rutgers Today*, Rutgers University

²⁴⁸ Matczak, M. (2020) Poland's Constitutional Crisis: Facts and interpretation, Oxford University
Sitnicka, D. (2020). Captured Constitutional Tribunal rules on the Supreme Court: Implementation of CJEU judgment inconsistent with EU law. *Rule of Law*. 22 April

²⁴⁹ European Commission (2022) 2022 Rule of Law Report Country Chapter on the rule of law situation in Poland. 13 July

Once again, intuitive similarities emerge, joining Hungary and Poland's position, both inside the Union yet misaligned with the European framework. Insofar as the first is concerned, and as it has been pointed out, this country has nonetheless suffered much more severe backsliding, finally causing the EU to intervene more drastically. In a comprehensive overview that could simultaneously show Europe's deficiencies as well as its prospective ability to act in a consequential manner, one must bring to mind that both countries were targeted by procedures under Article 7 of the TEU, triggered by the European Commission and the European Parliament respectively (the procedure can be alternatively started by the EP, the Commission or a third of the Union's member states), one year apart from one another, in 2017 and 2018²⁵⁰.

Article 7 procedures are the most openly confronting instruments in the hands of the EU to place states under scrutiny and investigate their record with respect to compliance and promotion of those fundamental European values contained in Article 2 of the EU Treaties. The provision mandates the Council with the duty to interact with the targeted member state, to ascertain the presence of a "clear risk" and, eventually, "the existence of a serious and persistent breach" of such core values by the member state and to subsequently adopt such sanctioning measures, consisting in the suspension of treaty rights²⁵¹. Despite the unrelenting and progressive democratic backsliding in both of these countries, EU member states never actually resolved to vote on these following steps of the procedure, thus resulting in the Union's main decisional body not deciding on one of the most crucial topics of its entire existence.

While Poland on its own, also thanks to the effort generously placed in accommodating more Ukrainian refugees than any other country²⁵², has made some of the aforementioned progress required to at least be still considered a full democracy in the unanimous opinion of all scholars and commentators, the Hungarian government has

²⁵⁰ European Parliament. (2022) Rule of law in Hungary and Poland: plenary debate and resolution. Briefing, Newsletter - 2-5 May 2022 - Strasbourg plenary session

²⁵¹ Article 7 of the EU Treaties, EUR-Lex <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M007>

²⁵² Higgins, A. (2023) How Poland, long leery of foreigners, opened up to Ukrainians. *New York Times*. 22 February

instead persistently worsened its situation, to the point where the European Parliament, in September 2022, had to autonomously and decisively reprimand both the state and the Council for their separately active and passive conduct which had caused and favored democratic failure²⁵³. In an extremely significant political and diplomatic move, the MEPs energetically launched a clear-cut accusation against the EU as a whole, to call for it to take on its responsibilities and live up to its role. The EU inaction was blamed for having “exacerbated the backslide” and for contributing “to the emergence of a hybrid regime of electoral autocracy” and, in particular, the Parliament deplored the Council’s political ineptitude to reaffirm the urgency for EU institutions to act and be held accountable for their inaction, concluding that further passiveness on the side of the Council with regard to the Article 7 procedure would amount to a breach of the rule of law. As such, this stance represented the culmination of a process by virtue of which the EP repeatedly condemned Hungary for human rights violations throughout the years of democratic deterioration, and ended up stating that Hungary cannot be anymore considered as a full democracy.

Apart from the demonstrative but scarcely impactful influence of soft law instruments such as these press releases, it is significant to reconsider the potential and the usefulness of enforcement and sanction mechanisms of the kind of Article 7. Beyond the fact that, as it has been already presented, progress, albeit minor, in Poland has been achieved thanks to a combination of infringement proceedings advanced by the Commission and judicial actions before the Court of Justice of the European Union²⁵⁴, the claims that have often smashed Article 7 as “unusable” must be refuted and its richness must be restored²⁵⁵, in order to adopt this, among others, as a powerful tool to refresh the key importance of European common intervention in support of democratic values the Union is born to protect and to promote²⁵⁶, and to exit the quicksand-like impasse in which it has stuck itself.

²⁵³ European Parliament (2022) MEPs: Hungary can no longer be considered a full democracy. Press release. 15 September

²⁵⁴ Michelot, M. (2019) The “Article 7” proceedings against Poland and Hungary: what concrete effects? *Notre Europe*, Jacques Delors Institute

²⁵⁵ Kochenov, D. (2017) Busting the myths nuclear: A commentary on Article 7 TEU. European University Institute, Department of Law

²⁵⁶ Pech, “‘A Union Founded on the Rule of Law’: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law” (2010) 6 *EU Constitutional Law Review* 359; Kochenov, ‘The Acquis

The incardination of cases before the CJEU and the advancement of procedures under Article 7, as a matter of fact, must serve as a collective wakeup call and an unmissable, if not last, opportunity to demonstrate to working professionals, political actors and people around the continent and the world that the European Union is not founded on merely procedural principles, but on tangible, essential values, or - to quote Professor Kochenov - that the list made by Article 2 TEU is composed by “more than empty proclamations” and that it must be shown “beyond any reasonable doubt that the Union cherishes democracy, the protection of human rights, and the Rule of Law”²⁵⁷.

Rediscovering and embracing this kind of combative spirit that none other than the great former President of the European Parliament David Sassoli often recalled and attempted to channel is especially decisive as the battle against anti-democratic forces has sadly turned more intense and military. The war brought by Russia - which, in the meantime, has become the third autocratic regime in Europe after Belarus and Azerbaijan - in Ukraine, with its complex geopolitical ramifications and implications, has resurfaced Cold War-era social divide and manifest political antagonism “between a relatively united democratic community and authoritarian regimes”²⁵⁸, as well as it has contributed to the surge of anti-western, hypocritical stances as those described throughout Chapter 1, whether directly expressed or conveyed through ambiguous or, more rarely, openly pro-Russian opinions on the invasion²⁵⁹.

and Its Principles: The Enforcement of the “Law” Versus the Enforcement of “Values” in the EU’, in Jakab and Kochenov (ed), *The Enforcement of EU Law and Values* (Oxford University Press, 2017).

²⁵⁷ Kochenov, D. (2017) *ibidem*

²⁵⁸ Landler, M., Bennhold, K. and Stevis-Gridneff, M., (2022) How the West marshaled a stunning show of unity against Russia, *The New York Times*, 5 March, <<https://www.nytimes.com/2022/03/05/world/europe/russia-ukraine-invasion-sanctions.html>>

²⁵⁹ Small, J., (2022) Mexico, Brazil leaders ignore their UN delegates, refuse to sanction Russia, *Newsweek*, 4 March:

<https://www.newsweek.com/mexico-brazil-leaders-ignore-their-un-delegates-refuse-sanction-russia-1685001>

Note that returning President Lula was welcomed back in office in Brazil on the first day of 2023, putting an end, in spite of an attempted anti-democratic revolt that followed his inauguration, to Bolsonaro’s controversial tenure as the leader of the country, under whose rule the Brazilian democracy had greatly backslided, in a decay towards populism, nationalism and heavy discriminations

However, if this can be held as true, the same can be said in the sense that the unprecedented scale of the menace has also favored an opposite and equal reaction, with the effect of aggregating western democracies around the importance of defending Ukraine as a metaphor of ideally defending the entire architecture of democracy. Consequently, after years of heavily influential populist rhetoric, characterized by a public environment dominated and poisoned by racist responses to migration flows and nationalistic propaganda, democracy in its purity has regained center stage, reclaiming its position as the most important value defended by European institutions and, according to Eurobarometer, rising in significance in the perception of the people²⁶⁰.

Symmetrically, it is remarkable that many of Russia's neighboring countries, with the stark exception of its brotherly united autocracy of Belarus, already prior to the fact that Russian pressure escalated into military action (and perhaps acting preventively in the event of such degeneration) and obviously even more so after the war broke out, have buttressed their democracy, bolstered their international alliances and gathered their strength to defend against potential political or military aggression by the hands of their invasive next-door rival. Among the most encouraging signs of development on European soil and at the actual root of Russian's fierce resentment held against these countries, grounded in an irredentist and neo-imperialist compromised vision of the region, is the great democratic expansion witnessed in Ukraine, Moldova and Armenia, overall, notwithstanding the divergence between the three of them with regard to the situation in the region of Nagorno-Karabakh. To this extent, regardless of biased political disagreements, what clearly appears in light of recent events such as the ongoing Azerbaijan-led blockade of the Lachin corridor in the self-proclaimed Republic of Artsakh is the overarching and superior will of Russia, besides Azerbaijan, to tolerate gross human rights violations²⁶¹ and fuel tensions and insecurity in the area, so as to pursue the master plan of, arguably, turning it into a "Crimea scenario"²⁶² and achieving

²⁶⁰ European Union, (2022) EP spring 2022 survey: Rallying around the European flag—democracy as anchor point in times of crisis — June 2022 — Eurobarometer survey <<https://europa.eu/eurobarometer/surveys/detail/2792>>

²⁶¹ Amnesty International (2023) Azerbaijan: blockade of Lachin corridor putting thousands of lives in peril must be immediately lifted. 9 February

²⁶² Kucera, J. (2023) Ukrainian officials support Azerbaijan in blockade of Karabakh. Eurasianet.org. 25 January

long-term reintegration “of its former satellites into an interstate union”²⁶³. The same pressure is currently being applied, as warned by Ukrainian intelligence and members of the resigning Moldovan pro-western government, against Europe’s absolutely most virtuous case of democratic evolution, “a bright example” in finally attempting to overcome the common difficulties of post-communist transition and the affliction of state-wide corruption practices yet similarly facing the menace of Russian interference and the issue of keeping under control the situation in the Russian-administered and Ukraine-neighboring independentist region of Transnistria.

The social contract, in Europe and in America as well, is clearly tearing apart because of exogenous and endogenous diverging forces and requires rapid renegotiation on solid and credible basis, now and forever represented by the core values of democracy, in the face of the crisis of political party identification, with three out of four Europeans reportedly not trusting them²⁶⁴. The COVID pandemic has contributed to exacerbating social distress, isolation and disenfranchisement, revamping conspiracy theories and further polarizing societies through increased information manipulation. While the context of this event has significantly amplified the space for illiberal voices to fill and gain support to the expense of scientific and democratic ones, and an identical conclusion may be reached with regard to the war in Ukraine, the latter also represents a fundamental opportunity to re-establish cohesion in defending democracy. For this reason, it is crucial for governments and international organizations to maintain engagement and support for the Ukrainian’s cause at the highest possible level both at a popular and an institutional level, while, on an opposite note, the trend adhered to by many donor countries to cut back their expenses on development aid²⁶⁵ is unacceptable in this particular historical moment.

²⁶³ Minzarari, D. (2020) Russia’s stake in the Nagorno-Karabakh War: Accident or Design? *Stiftung Wissenschaft und Politik*

²⁶⁴ European Commission, (2022) Standard Eurobarometer 96: Public Opinion in the European Union, Annex, April, <<https://europa.eu/eurobarometer/api/deliverable/download/file?deliverableId=81059>>.

²⁶⁵ Chadwick, V., (2022) Sweden pulls \$1b in foreign aid for ukrainian refugees at home, *Devex*, 5 May: <https://www.devex.com/news/sponsored/sweden-pulls-1b-in-foreign-aid-for-ukrainian-refugees-at-home-103164>

Electoral and comprehensive democratic assistance are needing of strategic and substantial investments, that should follow the example set by European sponsored initiatives and the pledges to enhance its democratic support collected in the previously mentioned “Action Plan for Human Rights and Democracy 2020-2024”, whose effective implementation must be guaranteed. To the effect of surmounting the highest hurdle holding back EOMs and democratic assistance projects from witnessing the application and the deservingly consequential effects of their actions in the countries where they are established or with which domestic and international actors cooperate, an objective framework for observation organizations and the legal enforceability of their recommendations must be both guaranteed, building consensus on the common set of criteria successfully set forth by the Declaration of Principles. “This in turn should help election observers have a more positive and sustainable impact on democracy building more broadly”²⁶⁶ and even more significantly, it should finally elevate the right to democracy to the status of a cornerstone, fully-fledged human right that states have the international obligation to protect and develop.

For a final and encouraging consideration, the purpose of this chapter has been to demonstrate that the international community does, in fact, have the concrete potential to ensure democratic development, as long as it confides in the instruments offered by international law and acts with determination to impose them. Moreover, the decline in global democracy has been substantial, but also “uncertain” in its true dimensions (depending on the theoretical and analytical approach) and quite “limited”, and the world has undergone similar - or actually bigger - phases of involution twice in the last century, in the 1930s and again between the 1960s and the 1970s, managing to overturn both of those cycles into democratic improvements. It has been done before and it will be done again²⁶⁷ resorting to the power of the established core values, their persuasive allure over human nature, the consolidated resilience of democratic institutions and the dedicated faith in adopting the universal language of human rights.

²⁶⁶ Avery Davis-Roberts & David J. Carroll (2010) Using international law to assess elections, *Democratization*, 17:3, 416-441, DOI: 10.1080/13510341003700253

²⁶⁷ Herre, B. (2022) *The World has recently become less democratic. Our world in data.* University of Oxford. <https://ourworldindata.org/less-democratic>

CHAPTER 3: THE STATE OF DEMOCRACIES: A HUMAN RIGHTS OVERVIEW

3.1. Prerequisite rights in the UN framework, the OHCHR “Human rights and elections” handbook on International Human Rights Standards on Elections

When discussing how to theoretically and practically empower and enforce democracy and how to raise both the awareness about the critical importance of democracy at a popular level and the recognition of it, through its identification as a stand-alone, fundamental human right, on international and institutional stages, the absolutely unique interplay between such complex and multi-faceted human right and the entire framework of fundamental freedoms must be assessed, too, as an inseparable corollary deriving from and guaranteeing the existence of democracy.

It is a socio-political and empirical certainty, as a matter of fact, that democracy does not exist in a vacuum and does not defend itself on its own; as human life on Earth, it may be said, it requires the presence of precise conditions for it to be sustained and sustainable.

The essence of a democratic model - its articulation of society and its functioning - is inherently and by etymological definition contained in popular participation, adopted in different and varying forms, and quintessentially expressed through the exercise of voting rights in aptly organized democratic elections.

As a consequence, it is possible to observe that although, as it has been recounted, voting rights are somewhat formally guaranteed and the façade of an electoral process is presented to the people also in a regime type which does not satisfy democratic requirements - that of an electoral autocracy - there is a substantial difference between mere participation, deprived of actual and consequential decision-making power, and

authentic contestation, with the two aspects complementing each other. The difference, that furthermore justifies the distinction, among democratic forms of government, between electoral democracy and liberal democracy, is represented by the extent to which liberal rights, mainly the systemic keystone principle of the rule of law, are protected, to the functional scope of ensuring the effectiveness of public participation and the concrete chance for it to produce effects in the institutional asset of the country.

A potentially open number of human rights therefore comes into play to shape and determine the quality of democratic life, especially in the event of the holding of elections, annexing a further purpose to the original one they keep in custody and for which they are essentially meant. It is an “additional importance” given to these rights in this specific context that constitutes the bedrock of democratic life and is consequently referred to by the United Nations Office of the High Commissioner for Human Rights, which by name and mandate (forged by UN General Assembly resolution 48/141 of 1993) has the duty to “promote and protect all human rights of all people everywhere”²⁶⁸. Correspondingly, and descending from the affirmations made in the context of the Vienna Declaration which firstly encouraged the creation of such post, the OHCHR undertakes its mission having regard to inserting its action in the framework of a democratic society and with the purpose of promoting democracy as the only viable structure that states shall adopt.

The UN as a whole has given special attention and put in great effort into the objective of promoting the unity of democracy and human rights and into interpreting the fundamental principles of human rights law²⁶⁹ in light of the overarching democratic scope, for these principles to be now appreciated in their natural connection and consubstantiality with it. Insofar as planning and executing electoral assistance projects is concerned, as well as with any other activity conducted by the UN and characterized

²⁶⁸ UN General Assembly, (1993) Resolution 48/141, followed up on the recommendation contained in *paragraph 18 of section II of the Vienna Declaration and Programme of Action* and established this post

²⁶⁹ The United Nations Populations Fund (UNFPA) enumerates: universality and inalienability, indivisibility, interdependence and interrelatedness, equality and non-discrimination, participation and inclusion, and finally accountability and rule of law.

by such broad and significant reach, the entire UN system is mobilized to offer its specific support, as remarked in Chapter 2 through the words of the UNEAD Deputy Director.

The OHCHR, in particular, sees its multi-level activity significantly unfold under this aspect, consistently with its goal to “play an active role in removing the current obstacles and in meeting the challenges to the full realization of all human rights”²⁷⁰, and its intent to “provide, through the Centre for Human Rights of the Secretariat and other appropriate institutions, advisory services and technical and financial assistance”²⁷¹, thus exemplifying the “engagement in comprehensive human rights work”²⁷², the collaborative dimension incentivized within the United Nations and the extensive support it lends to member states. Every action carried out by the UN and its agencies is therefore aimed at creating the previously mentioned conditions for the positive display and expansion of democracy in the daily lives of all individuals.

In order to fully grasp the depth of the concept of the centrality of public participation in genuinely constructed democratic societies and to understand the path through which universality of all human rights, including that to democratic governance, is pursued by international law, one must, first and foremost, recall Article 25 of the ICCPR, as it has been dissected in Chapter 1. In its often quoted General Comment on the Article, the Human Rights Committee, whose task is to strengthen uniform understanding and effective enforcement of the document, reaffirmed that Article 25 “lies at the core of democratic government based on the consent of the people” and, more specifically, restated the article by inferring that “elections lie at the heart of democracy, and remain the primary means through which individuals exercise their right to participate in public affairs”²⁷³.

For this reason, the event of elections itself and the whole social surroundings arranged and monitored at a domestic level have gradually become a matter of

²⁷⁰ UNGA res. 48/141, operative paragraph 4(f)

²⁷¹ UNGA res. 48/141, operative paragraph 4(d)

²⁷² Office of the United Nations High Commissioner for Human Rights. (2021). Human Rights and Elections - A Handbook on International Human Rights Standards on Elections.

²⁷³ Human Rights Committee, General Comment 25.

international concern, legitimizing external overview and, upon the conditions explained in paragraph 2.2, graduated intervention. The nature of the services offered to member states and to the benefit of all has expanded, under the auspices and the practical contribution of the UN, to encompass every aspect of the electoral cycle²⁷⁴, and the OHCHR has played a pivotal role in directing the efforts and setting the priorities of this operation straight. These efforts have brought EOMs and, in turn, the international community, to be able to professionally scrutinize and assist all macro-phases of the process - pre-polling, polling and/or post-polling - in its micro-articulations: pre-election preparation, campaign period, electoral administration and administrative staff training, voter registration, voter education, voter information and media outlets, voting itself, the count, the delivery of the results and the follow-up (through ad-hoc recommendations)²⁷⁵.

It is apparent that, in order to perform these activities, the UN has strategically invested on establishing, in a long-term perspective, the foundations to pursue what surely remains its main and original goal to ensure global peace and security, which, as utopist as it may seem in its complete fulfillment, must nonetheless be constantly and tendentially chased. Enabling citizens and unleashing their potential to contribute and participate in all “public affairs”, in its broad conception enshrined by the most relevant international documents and, once again, the HRC General Comment 25, is clearly identified as being conducive to harmonizing social tensions and delivering an adequate representation, in which every citizen and members of minorities may ideally mirror themselves. In order for this to happen, human rights norms and standards guaranteeing political participation²⁷⁶ must be held as guiding stars at all times, for that, as the Universal Declaration of Human Rights intends to convey, respect for human rights is essential for the “free will of the people” to be accurately reported and faithfully followed. In an opposite scenario, as the OHCHR indicates, elections may become the target of manipulation, the vehicle to consolidate discriminations and, to the utter repudiation of

²⁷⁴ As the OHCHR recalls, “In several resolutions, the General Assembly has requested the Secretary-General to continue to ensure that OHCHR is able to respond, within its mandate and in close coordination with the Electoral Assistance Division, to the numerous and increasingly complex and comprehensive requests from Member States for advisory services. See, most recently, General Assembly resolution 74/158, para. 17.”

²⁷⁵ University of Minnesota Human Rights Center (2003). *ibidem*

²⁷⁶ A/72/260, para. 27.

its highest purposes, the cause of the exacerbation of existing tensions and the theater of violence and remarkable human rights abuses.

To defuse these threats and to help foster their replacement with a safe and secure environment, which has hence been widely ascertained as being conducive to inclusive and peaceful elections, the UN holds human rights standards atop in its wide range of activities²⁷⁷, while adopting a capacity-building, state-enabling attitude, for state authorities, institutions and the civil society to feel protected and held responsible, at the same time.

Pertaining to this vision, the OHCHR provides assistance to all entities tasked with a responsibility to protect human rights (a sophisticated aspect clarified in Chapter 1) for them “to fulfill their obligations and individuals to realize their rights”²⁷⁸ and closely collaborate with National Human Rights Institutions (NHRIs) for local and on the ground implementation. Even more significant to the scope of our analysis and particularly relevant in executing its mandate and providing, in terms of soft law instruments, a comprehensive legal framework to set forth the vital role of human rights law in allowing the expression of voting rights, is the OHCHR function of conducting legal research and producing “an extensive range of publications on a variety of topics related to human rights”, for governments, and all other international subjects to refer to. This is motivated by the fact that, among these, the “Human rights and elections” handbook on International Human Rights Standards on Elections stands out and deserves to be praised for comprehensively defining, one by one, the importance of all of the essential human rights involved in constituting an adequate framework for elections to be democratically held. For their role of being essential preconditions to ensure free and genuine elections and, therefore, the enjoyment of voting rights, these human rights are addressed, in this context, as so-called “prerequisite rights”.

²⁷⁷ Department of Political and Peacebuilding Affairs, (2021) Policy on principles and types of UN electoral assistance.

²⁷⁸ OHCHR. What we do: an overview

3.2. Special state measures and non-discrimination

The guarantee of these fundamental prerequisite rights undoubtedly constitutes the load-bearing axis and the cornerstone that states must guarantee, in pursuance with their international obligations, in setting up the foundations and the architecture of the state's democratic infrastructure. Following the suggestion of Professor Joshua Sellers²⁷⁹, this overarching duty, in its institutional implications and the subsequent requirement of sustainable investments in this field, can be summarized by referring to the provision of "electoral adequacy", articulated in the three subsidiary components of adequate funding, competent management and inclusive democratic structures. To this end and echoing the words and spirit of popular constitutional provisions (for instance, Article 3(2) of the Italian constitution), states must commit to removing all obstacles preventing citizens from full participation. Strictly connected to this principle (even within the Italian constitution) is the previously analyzed right to equality and non-discrimination²⁸⁰, which intuitively holds a priority position in electoral matters, and, more generally speaking, in guaranteeing equal access to participation in public affairs.

The OHCHR's handbook revolves around the norms of the ICCPR, which in turn, as it has been manifested throughout Chapter 1, surrounds the pivotal provision of Article 25 with an extensive overview of prerequisite rights, beginning with the imperative and absolute interpretation key of non-discrimination and, as the handbook itself recalls, other treaty provisions of all major international documents "also guarantee non-discrimination and equal participation in public affairs in relation to various groups, imposing both negative and positive obligations" related and directed at protecting against the discrimination, among all, on the grounds of race, sex, age, disability and language, the category of "other status" adopted by Article 2 of the ICCPR intentionally being non-exhaustive.

²⁷⁹ Sellers, & Weinstein-Tull, J. (2021). *ibidem*

²⁸⁰ "The right to freedom from discrimination is guaranteed by articles 2 and 7 of the Universal Declaration of Human Rights and is further defined by articles 2 (1), 3 and 26 of the International Covenant on Civil and Political Rights": Office of the United Nations High Commissioner for Human Rights. (2021). Human Rights and Elections - A Handbook on International Human Rights Standards on Elections. p. 15

Regarding such particular categories, facing specific challenges because of concerning deviances in the dominant social construction, states hold a reinforced duty to act, although efforts to protect minorities, pursue effective equality and true political recommendations should be much more incisive than what they currently are. Objectively speaking and through empirical observation of reality, based on over a century-long and still ongoing struggles for emancipation and equality, the most comprehensive framework has been adopted to protect and enhance women's rights to public participation. International standards allow for temporary special measures to be adopted to amend past discriminations, embedded in the fabric of society, and sponsor participation of people facing structural inequalities.

Specifically concerning women, states have an obligation to adopt legal measures, at constitutional, legislative and judicial levels²⁸¹ (with strong preference for constitutional enshrinement), among which, accordingly, are these special measures, that may be, and usually are represented by policies and practices, such as preferential treatment and quotas, ideally aiming at erasing the original sin in society and establishing *de facto* equality between sexes²⁸². In spite of the formal recognition by the United Nations human rights mechanisms of “sexual orientation, gender identity and sex characteristics” among the prohibited grounds of discrimination under international human rights law²⁸³, the “specific barriers” to which the organization refers stand perhaps even taller in these cases, and the system is consequently even more stacked against the victims of these forms of discrimination, who may particularly suffer from and be exposed to personal and group attacks in the event and in the context of elections, when exercising their right to vote or be elected, and in the daily dynamics and political life of a country.

An incisive review and update of international and domestic protection systems is consequently urged and required to face the complex present scenario, to tackle a

²⁸¹ A/HRC/23/50, paras. 77 and 97.

²⁸² See also Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004) and general recommendation No. 23 (1997), para. 15.

²⁸³ Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 32; CCPR/C/TUN/CO/6, para. 16; CCPR/C/SEN/CO/5, para. 11; CCPR/C/VNM/CO/3, para. 14; and Human Rights Committee, *Toonen v. Australia*, communication No. 488/1992. See also A/HRC/35/36, para. 20.

growing sense of hatred and discrimination, in a new wave of intolerance, and to adequate the structure of society to truly encounter the needs of all.

3.2. Freedom of opinion and expression

Starting off this personal examination of the main prerequisite rights, whose need for protection arises in connection with an electoral process, with quintessentially fundamental and extremely consequential freedoms, such as freedom of opinion and expression, it must be primarily recalled that, within the UN framework, these are most significantly enshrined in Article 19 of both the text of the UDHR and that of the ICCPR.

Freedom of opinion is concisely and just as much incisively defined by Article 19(1) of the ICCPR, which briefly states that “*Everyone shall have the right to hold opinions without interference*”, as an absolute right, the unconditional hard-core nucleus of fundamental rights for the sake of which, even more so in electoral contexts, this quality, also protecting the negative aspect of the right, is imperative to allow “the authentic assertion of popular will”.

This feature, moreover, constitutes the differentiating trait between this and the rights to free expression and free media²⁸⁴. The two of them are strictly entangled, composing the vital network through the work of which, thus wholly relying on its quality, citizens access selected information, elaborate it and transform their political thought into action. Restating this affirmation, Article 19(2) of the ICCPR adopts an open-ended conception of media sources - bearing in mind their essentiality to the pluralistic, flexible and evolving presence and regulation of the flow of information - and refers to “seeking, receiving or imparting information or idea of all kinds” to stress the importance of indiscriminately protecting all modes of manifestation of thought into any

²⁸⁴ Human Rights Committee, general comment No. 34 (2011), paras 9–10. See also Park v. Republic of Korea (CCPR/C/64/D/628/1995) (convicted and sentenced for having opinions critical of the Government); Human Rights Committee, Kang v. Republic of Korea, communication No. 878/99, paras. 7.2 and 8 (person held in solitary confinement for 13 years for holding communist political opinions and subjected to “ideology conversion”).

form of expression, following and covering its chain of transmission between individuals. The General Comment No. 34 reaffirms the stance for inclusivity taken and entrenched by the notion of media of expression²⁸⁵ and it does, as well, re-establish a triangular dynamic, on which each side must be able to work properly to offer a respectable outcome, between the general public, the media and the state's authorities.

Through General Comments 25 and 34, the Human Rights Committee underscores the conjunction between Article 19 and Article 25 of the ICCPR, it recognizes the “free communication of information and ideas about public and political issues between citizens, candidates and elected representatives” as key to enjoying rights under Article 25 and it consequently underscores the necessity for free media to weigh on public issues, in the fulfillment of their purpose, free from restraints or censorship, to inform the people²⁸⁶²⁸⁷.

Access to information is thus adequately designed as a two-way street, flowing inside and outside of media, as a right for media to access information on public affairs and as a right for citizens to receive the media output, in its original, unfazed and credible version²⁸⁸. To this aim, states are encouraged to proactively deliver information regarding the government which is worthy of raising public interest to the public domain and urged to ensure a systemic framework easing and sponsoring public access and engagement, in the sense of providing “comprehensive, accurate and reliable information” about the electoral process and timely creating the conditions for diverse and consciously-formed visions to emerge, for people to study the candidates and know their positions and build as wide of a range of opinions of their own as it is possible to conceive²⁸⁹. It is consequently imperative for all the main actors involved in the electoral processes, both during and preceding election periods (as in everyday political life, yet even more pressingly), to enjoy their safe space for their ideas to take shape and be heard, for voters

²⁸⁵ Human Rights Committee, general comment No. 34 (2011), para. 12.

²⁸⁶ Human Rights Committee, general comment No. 25 (1996), para. 25. See also general comment No. 34 (2011), para. 13.

²⁸⁷ See also guidelines for States on the effective implementation of the right to participate in public affairs, paras. 19 (f), 33 and 34.

²⁸⁸ Human Rights Committee, *Ibid.*, para. 18, referring to Human Rights Committee, *Gauthier v. Canada*, communication No. 633/95, and *Mavlonov and Sa'di v. Uzbekistan* (CCPR/C/95/D/1334/2004)

²⁸⁹ A/HRC/26/30, para. 46.

to be truly informed and process information, that may result in aligning with their preferred political view or otherwise exercising, without undue influences and interferences, their freedom of expression; for candidates and political parties to conduct their campaigning activities, with the tangible objective of communicating their political message to the fullest and to the broadest audience; and for the media and civil society organizations to exercise their genuinely and utmost democratic role of serving the public, providing food for intense and truthful political elaboration in the form of information and a checks-and-balances assessment for government scrutiny, recalling to mind that one of the main functions of elections is precisely to give citizens the greatest universal stage to evaluate the governing party, potentially voice their discontent and constant, observable accountability²⁹⁰.

3.4. Freedom of peaceful assembly and freedom of association

In this intricate and consequential context, the vital democratic assets hereby outlined are inherently linked to the guarantee of freedom of peaceful assembly and freedom of association, guaranteed by Articles 21 and 22 of the ICCPR, respectively, which in turn are as well strictly interrelated.

The latter, in its broad scope and infinite horizon of possible applications, extensively protects the capacity for citizens to discipline and coordinate their politically relevant action in structured and organized forms. It specifically responds to the internationally derived right for individuals to participate in the conduct of public affairs, offering the instruments for an ideally authentic representation, the undertaking of sincere political responsibility and an effective overseeing of the commitment and the conduct of elected officials.

This mostly happens through the dominant expression of political parties and through the formation of civil society organizations, which significantly differ from political parties for their unique kind of political engagement, by virtue of which they are

²⁹⁰ A/HRC/26/30, para. 11.

deserving of separate legal consideration registration. Both forms are praised by the Human Rights Committee for their role in ensuring the genuineness of the electoral process, in spite of the recounted crisis in the ideology and credibility of such entities, however, civil society organizations are worthy of a honorable mention for their efforts in monitoring human rights protection locally and internationally, reporting on government abuses, spreading factual knowledge and consciousness and promoting good governance and rule of law initiatives²⁹¹.

Freedom of peaceful assembly, on the other - conjoined - hand, is intended to protect the non-violent gathering of persons for specific purposes, usually motivated by the purpose of channeling and unifying a group's expression. By reason of the essence of its nature and this latest consideration, this right applies to the event of elections to ground in human rights law the possibility for candidates to hold their political rallies as an essential part of a campaign and for civil society organizations or lone individuals to manifest through public demonstrations. Because of its centrality for the arrangement of political debates and the expression of a political speech, which benefits from broader protection under the umbrella of freedom of expression, so does the right to peacefully assemble. Particularly relevant is the statement made by the Special Rapporteur on the rights to freedom of peaceful assembly and of association, who cemented this status for higher protection, heightening the standard to challenge these rights and impose limitations from the criteria of "necessity in a democratic society" and "proportionality" to stricter requirements, considering the context.

Correspondingly, as with the right to free expression, the influence of the Internet and social media as ways to organize, make information circulate and build consensus is increasingly and astonishingly growing day after day, resulting in the importance of presenting a secure regulatory space and allowing "unimpeded access to and use of the Internet and other ICT, which are essential tools, especially in times of elections, through which the right to freedom of peaceful assembly can be exercised"²⁹².

²⁹¹ A/68/299, para. 44.

²⁹² Human Rights Committee, para. 34. See also A/HRC/44/24.

3.5. Voting rights and access to fundamental resources, an unexpected link

Perhaps surprisingly, the existential bond between exquisitely political voting rights and the broader sphere of daily life activities is not confined, so to be said, to fundamental human rights that materially and intuitively support the expression of a political discourse and the setting up of an electoral event, such as freedom of movement guarantees.

The enjoyment of political rights, especially in the occasion of elections, really does concern any of the most superficial or more profound aspects of us as individuals and as a human society.

Nearly not enough light is shed upon this often-overlooked aspect, not even in a concerning case presented by current American Vice President Kamala Harris, who, following the wave of restrictive voting laws passed nationwide in Republican-led states, warned against a particular form of intervention, arguably amounting to indirect voter suppression or at least some nuanced and ghosted escamotage to discourage voters from exercising their right in strategically sensible areas: the newly-passed provision in the state of Georgia, applying a more restrictive attitude than similar laws existing in New York and Montana, prohibiting food and beverage giveaways in lines at polling stations that often become hours-long, a problem disproportionately affecting Black-majority neighborhoods.

A large-scale issue troubling the fates and de facto endangering the stability and the political responsiveness of the poorest states in the world is hinted at by the results yielded by a study conducted by the UN. What the study unsuspectedly revealed is the connection, to be more carefully assessed from a causal relation standpoint, yet probably mutually influencing the degree of political freedom and consciousness on one side and the ability for citizens to access even the most basic needs and services apart from and far beyond their rate of inclusion and enjoyment of political rights on the other. The focus of

the attention, in this case, shifts towards the most essential necessities, regarding access to fundamental resources: food and water.

The takeaway from this example of the infinite and crucial implications of a solid democracy must point towards holding states accountable and vehemently condemning and decrying the abusive state of distribution of vital resources, an aging vow to solve which has never been addressed, lacking, once again, the political standing and will to back it.

CONCLUSION

Right to education and informed voting: the transversal solution

These noteworthy findings, as the whole body of the thesis, should now naturally start leading to a conclusion, to be clearly found in the identification of voting rights as a complex set of principles which cannot be separated from the cultural, and only subsequently political, environment in which it is weighed and considered.

This humus that feeds and nourishes a democratic society, as in biology for human life, determines a state's healthiness, its physical stability, its resilience, and its life expectancy, which, in terms of international relations and international human rights law, converts to its respectability, its international legitimation, its capacity to fulfill its international obligations and its potential to live up to its people's dignified necessities and expectations.

This humus may be lab-analyzed and chemically dissected, and it will ultimately reveal the degree to which a country keeps its people educated, for the extent to which its institutions are democratically educated and sound will be strictly proportional.

Overarching ignorance and lack of opportunities to develop and mature in such sense are the doom of a society, the seed of detachment and consequential self-disenfranchisement, the perfect instrument for those in charge of power to evade accountability and the driving force of populism and extremism, in a disruptive vicious circle and a whirlwind of misconstrued lies agitated by inflammatory language.

In light of its egregious importance, education shall gradually rise, following the path it has, in fact, already undertaken, to become the supreme value and inspiration. Quite accordingly, it has been defined as "both a human right in itself and an indispensable means of realizing other human rights", drawing from the never abusable saying by virtue of which education is the key to become truly free. As the OHCHR specifies, it does, correspondingly, hold the potential of enabling all persons to participate effectively in a

free society; it is, not over-simplifying but rather summarizing, the sacred grail and the keystone to meeting all of the aforementioned democratic goals and to giving full implementation to the principles that have been analyzed throughout this thesis.

As an all-encompassing signature instrument of enlightened governments, the UN and the international community are shifting towards establishing a common framework of state obligations to promote education and corresponding goals. These are: availability of functioning educational institutions and programs, universal accessibility, without discrimination, acceptability of form and substance and, finally, flexibility to respond to rapidly and ever-changing societies and communities. Coherently, the UN supports the implementation of civic education programs in all schools, tailored to the necessities of classes and communities, and most importantly aiming at erasing, since the earliest of ages, the disparities stemming from the social background, on the grounds of discrimination that have been earlier faced.

This continued effort of civilization in its broadest significance is meant to continue up to the highest levels of education, taking into consideration that college education has been scientifically proved to foster public participation and conscious enfranchisement, apart from being more traditionally envisioned as the doorway for future generations into leading, impactful positions. As a matter of fact, it holds the promising seeds to curb the socioeconomic inequalities, close a gap that is, instead, progressively enlarging itself, and cure systemic deficiencies. While college education has shown greatly positive effects on the total population, the sharpest and direct jump in benefits has been registered with regard to the most disadvantaged youth, the so-called “low propensity” individuals who are less likely to attend – or rather to have the opportunity to attend college.

Since dictators in electoral autocracies, a link that has so far been left willingly unexplored, decisively profit off the co-optation of poor voters who are unable to adequately inform themselves and to develop a conscious criticism of the tyrannic incumbent, while wealthier voters also have access to greater opportunities and better sources of information to mentally free themselves from ideological and de facto physical

enslavement, investing in education runs completely counter-interest to those seeking unrestrained power, who therefore deliberately choose to maintain poverty and ignorance, while, more often than not, longing for isolation and indulging in information manipulation in the face of a globalized society that, amongst its many threats, also offers a more accessible route to approach culture that they wish to promptly seclude.

Ultimately, education is, by definition and by empirical demonstration, the tool that is able to break the chains of undemocratic subjugation and the wheels of the evil and thus far perpetual engine of the machinery fostering systemic discrimination, the gateway for cultural refinement and for sustainable and shared progress, the key to reverting the course and replacing the vicious circle with an extremely positive and conducting one, inherently based upon peace for, in the words of Giuseppe Mazzini, which might sound as if they have later been echoed by Dr. Martin Luther King, “Education is a great word that sums up our whole doctrine, what we have to do is not to establish a new order of things by violence”.

It will sound utopic, but it would be achievable.

BIBLIOGRAPHY

Ahearn, C.E., Brand, J.E. & Zhou, X. (2022). How, and For Whom, Does Higher Education Increase Voting?. *Res High Educ.* <https://doi.org/10.1007/s11162-022-09717-4>

Beckman, L. (2017). Legal Power and the Right to Vote: Does the Right to Vote Confer Power? *Canadian Journal of Law & Jurisprudence*, 30(1), 5-22. doi:10.1017/cjlj.2017.1

Beckman, L. (2014). The Right to Democracy and the Human Right to Vote: The Instrumental Argument Rejected, *Journal of Human Rights*, 13(4), 381-394, DOI: 10.1080/14754835.2013.824265

Beduschi, L., Colella, A. (2011). La giurisprudenza di Strasburgo 2008-2010: il diritto a libere elezioni (art. 3 Prot. 1)

Chengeta. (2018). WHEN AT LOGGERHEADS WITH CUSTOMARY INTERNATIONAL LAW: THE RIGHT TO RUN FOR PUBLIC OFFICE AND THE RIGHT TO VOTE. *Brooklyn Journal of International Law.*, 43(2).

Clark, R. (2014). A Tale of Two Trends: Democracy and Human Rights, 1981–2010, *Journal of Human Rights*, 13(4), 395-413, DOI: 10.1080/14754835.2014.886946

Dothan. (2018). Comparative Views on the Right to Vote in International Law. In *Comparative international law* /. Oxford University Press., <https://doi.org/10.1093/oso/9780190697570.003.0018>

Duignan, B. (2021, December 2). voter suppression. *Encyclopedia Britannica.* <https://www.britannica.com/topic/voter-suppression>

European Commission for Democracy through Law (2002). Code of good practice in electoral matters

European Court of Human Rights. (2022). Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights - Right to free elections.

Fox, G. (2000). The right to political participation in international law. In G. Fox & B. Roth (Eds.), *Democratic Governance and International Law* (pp. 48-90). Cambridge: Cambridge University Press. doi:10.1017/CBO9780511522307.003

Ghaelian. (2013). Restoring the vote: former felons, international law, and the Eighth Amendment. *Hastings Constitutional Law Quarterly.*, 40(4).

Grabewarter, C. (2014) *European Convention on Human Rights: Commentary.* Beck/Hart, 399-409.

Kamarck, E, Eisen, N. (2022). Democracy on the ballot- what do election deniers want?, Brookings. <https://www.brookings.edu/blog/fixgov/2022/10/20/democracy-on-the-ballot-what-do-election-deniers-want/>

Kirshner. (2018). Nonideal democratic authority. *Politics, Philosophy & Economics.*, 17(3), 257–276. <https://doi.org/10.1177/1470594X17732068>

Kirshner. The international status of the right to vote, Democracy Coalition Project, <http://archive.fairvote.org/media/rtv/kirshner.pdf>

Kornezov, A. (2016). THE RIGHT TO VOTE AS AN EU FUNDAMENTAL RIGHT AND THE EXPANDING SCOPE OF APPLICATION OF THE EU CHARTER OF FUNDAMENTAL RIGHTS. *The Cambridge Law Journal*, 75(1), 24–27. <http://www.jstor.org/stable/24693932>

Lee. (2022). Electoral competition and government health expenditure in electoral autocracies: A pessimistic view. *International Area Studies Review.*, 25(3), 195–213. <https://doi.org/10.1177/22338659221112997>

Levinson, D.J. (2012). Rights and Votes. *The Yale Law Journal*, 121(6), 1303–1315.
<http://www.jstor.org/stable/41510449>

Levitsky, S., Ziblatt, D. (2018). *How Democracies Die: What history reveals about our future*. Penguin Books

Martorano Miller, N, Hamm, K.E., Aroca, M, Hedlund, R.D. (2019). An Alternative Route to Voting Reform: the Right to Vote, Voter Registration, Redistricting and U.S. State Constitutions, *Publius: The Journal of Federalism*, 49(3), 465–489,
<https://doi.org/10.1093/publius/pjz013>

Office of the United Nations High Commissioner for Human Rights. (2021). *Human Rights and Elections - A Handbook on International Human Rights Standards on Elections*.

Pérez Alberdi, M. R. (2013). Demarcation of the right to vote by european Court of Human Rights. *Revista De Derecho Político*, 1(88).
<https://doi.org/10.5944/rdp.88.2013.12786>

Sellers, & Weinstein-Tull, J. (2021). Constructing the right to vote. *New York University Law Review.*, 96(4), 1127–1178.

Tuccinardi, D., Wally, M., Nagore de Sousa, L., Garbuglia, M., Gould, R. (2014). *International Obligations for Elections: Guidelines for legal frameworks*. International Institute for Democracy and Electoral Assistance.

Umpierrez de Reguero, S.A., Yener-Roderburg, I.Ö., Cartagena, V. (2021). Political Regimes and External Voting Rights: A Cross-National Comparison. *Frontiers in Political Science*, <https://doi.org/10.3389/fpos.2021.636734>

University of Minnesota Human Rights Center (2003). Study Guide: The right to vote. <http://hrlibrary.umn.edu/edumat/studyguides/votingrights.html>

Wetzel, J.E. (2011). The EU as a “Global Player” in human rights? *Routledge Research in Human Rights Law*, 25-31/66-81/197-212.

Winnipeg Free Press. (2018). Informed voting fundamental to democracy

Wong. (2019). Gerrymandering in Electoral Autocracies: Evidence from Hong Kong. *British Journal of Political Science.*, 49(2), 579–610. <https://doi.org/10.1017/S0007123416000685>

Zysset. (2019). Freedom of expression, the right to vote, and proportionality at the European Court of Human Rights: An internal critique. *International Journal of Constitutional Law.*, 17(1), 230–251. <https://doi.org/10.1093/icon/moz002>