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Abstract/Kurzfassung

This thesis deals with whether or not a human right to democracy exists. The human right to democracy should be understood as the right to political participation (Christiano, 2011, p. 146; Franck, 1994, p. 73). The question of a human right to democracy can be found in regional and global legal texts, and also in legal philosophy. This paper analyses the issue of a human right to democracy by looking at legal texts and moral as well as philosophical reasoning. These legal texts include the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). Also, the idea of a moral human right to democracy is assessed, including criticism from academic scholars. Furthermore, the ideas of Thomas Christiano are illuminated, including critical voices against his line of thinking. Based on both the legal texts and moral as well as philosophical reasoning, and despite valid criticism, a human right to democracy can be established.

Diese Arbeit beschäftigt sich mit der Frage, ob ein Menschenrecht auf Demokratie existiert oder nicht. Das Menschenrecht auf Demokratie ist als Recht auf politische Partizipation zu verstehen (Christiano, 2011, S.146; Franck, 1994, S). Die Frage nach dem Menschenrecht auf Demokratie findet sich in regionalen und globalen Rechtstexten, aber auch in der Rechtsphilosophie. Diese Arbeit analysierte die Frage eines Menschenrechts auf Demokratie, indem es Rechtstexte und moralische sowie philosophische Überlegungen betrachtet. Im Mittelpunkt stehen die Rechtstexte: die Allgemeine Erklärung der Menschenrechte, der Internationale Pakt über bürgerliche und politische Rechte und die Europäische Menschenrechtskonvention (EMRK). Auch die Idee eines moralischen Menschenrechts auf Demokratie wird bewertet, einschließlich der Kritik von akademischen Gelehrten. Darüber hinaus werden die Ideen von Thomas Christiano beleuchtet, einschließlich kritischer Stimmen gegen seine Denkweise. Sowohl aus den Gesetzestexten als auch moralischer und philosophischer Argumentation lässt sich trotz aller Kritik ein Menschenrecht auf Demokratie ableiten.

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I. Introduction

This thesis tackles the question regarding a human right to democracy. A human right to democracy is defined as the right to political participation. This definition is grounded in literature. In 1994, former law professor, lawyer, and international law expert, Thomas M. Franck, referred to the right to democracy as "the right of people to participate, to be consulted, in the process by which political decisions are made" (Franck, 1994, p. 73). More recently, philosopher Thomas Christiano stated that there was a right to a *minimally egalitarian democracy*, or a right to a democracy where "persons are able to participate as equals in the collective decision making of their political society" (Christiano, 2011, p. 146). In such democracies, individuals "are free to organise political parties and interest group associations without legal impediment or fear of serious violence, and they are free to abandon their previous political associations" (Christiano, 2011, p. 146). People also "have freedom of expression at least regarding political matters" (Christiano, 2011, p. 146). In other words, political participation is guaranteed "by ensuring freedom of expression, assembly, and association" (*General Comment No. 25*, 1996, para. 8). In order to make this thesis compact, the focus will be on political participation, with a short reference to freedom of expression, the latter of which will be discussed in the context of the European Court of Human Rights.

The question of a human right to democracy will be analysed from a philosophical and a legal-positivist standpoint. Legal democracy in positive law will be assessed with reference to the UDHR and the International Covenant on Civil and Political Rights (ICCPR) in Section II. Following that, the right to vote and the freedom of expression as found in the European Convention on Human Rights (ECHR) will be illuminated. Then, the philosophical aspect will be delved in. In legal philosophy the main arguments for a human right to democracy are the moral, instrumental, and intrinsic argument. This thesis will focus on the moral and instrumental argument. The moral right to a human right to democracy will be discussed in Section IV. The instrumental argument as put forth by Thomas Christiano shall be described in Section V. This will be followed by a conclusion of the main points in Section VI.

Historically, the human right to democracy has its origins as a response to the massive human rights violations carried out by totalitarian regimes, in particular Nazi Germany, during World War II. It first found its way into international law on the 10th of December

1948 with the UDHR. This non-binding declaration recognizes the freedom of expression in Article 19. It also recognizes the freedom of assembly and association in Article 20. Most importantly, it also entails the right to political participation in Article 21 (Danchin, n.d.). The legally binding 1966 ICCPR recognized these rights in greater detail, with the freedom of thought enshrined in Article 18 and the freedom of association found in Article 22. Article 25 confers the right to vote upon every citizen. Franck regarded Article 25 as "the universally-applicable customary norm," because with the entry of force of the ICCPR in 1976, states started leaning heavily towards "a reasonably credible version of electoral democracy," which thus became the "prevailing practice" (Franck, 1994, p. 79).

The European Convention on Human Rights (ECHR) entered into effect in 1953, codifying a host of democratic rights such as but not limited to the freedom of thought, conscience, and religion (Article 9); the freedom of expression (Article 10); and the freedom of assembly and association (Article 11). Importantly, the right to free elections had a long road until being codified as states could not agree as to what should constitute free elections and were uncomfortable in allowing European judges to deal with a matter they regarded as falling under state sovereignty. On the 4th of December 1991, the United Nations (UN) General Assembly passed resolution 46/137. Under this resolution it was deemed that elections (which are to be held at appropriate intervals) are necessary in order to enjoy other human rights. This notion can be seen on a regional level: in 1990, the Conference on Security and Cooperation in Europe stated that democracy is vital to the rule of law with free and fair elections being at the centre (Franck, 1994, pp. 80-81). Such examples show that democracy and the democratic rights associated with it are important to the legitimacy of a government.

II. The Legal Right to Democracy in International Law

This section deals with the legal right to democracy in the UDHR and ICCPR. The aim of this section is to show that Article 21 UDHR and Article 25 ICCPR support a human right to democracy in terms of a right to political participation, with democracy being understood as governance based on "the will of the people" (Article 21 (3) UDHR). Issues such as the lack of the term democracy in both provisions, and the fact that Article 25 ICCPR confers a right to citizens only will be discussed. This section will use two case examples, the elections in

Namibia in 1994 and the Haitian Crisis from 1991-1995, to show how much the UN values democracy.

a. Democracy in the Universal Declaration of Human Rights (UDHR)

In an analysis of democratic rights, the UDHR, adopted on the 10th of December 1948 by the United Nations General Assembly (UNGA) has to be mentioned (Fahner, 2017, p. 324). The UDHR entails thirty provisions covering civil, political, economic, social and cultural rights. It became the first truly global document to set a common human rights standard (Zamfir, European Parliamentary Research Service, 2018, p. 1). With respect to state power, democracy and human rights were set as limits as to what a state could do. Slowly, human rights concerns were beginning to be prioritised over national interests (Odello & Cavandoli, 2011, p. 45).

Through Article 21, the UDHR normalised the idea of a human right to democracy (Fahner, 2017, p. 326). It states the following:

> 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.

Despite democracy not being explicitly mentioned, it is addressed in Article 21; on the website of the UN, Article 21 (3) is cited as an example of democracy in a founding document of the UN, specifically stating: “It [the UDHR] projects the concept of democracy by stating [that] the will of the people shall be the basis of the authority of government.”

The UDHR is not legally binding. However, many UDHR provisions are considered to be customary international law (Fahner, 2017, p. 324). Brian Lepard defines customary international law as:

> A customary practice among states (that) can evolve into a customary legal norm binding on all states if 1) the practice is consistent among states and endures over a period of time, and 2) states believe that the practice is legally mandated (a belief

referred to as *opinio juris sive necessitatis*, or simply *opinio juris*) (Lepard, 2010, p. 6).

Many UDHR provisions can be considered customary international law and therefore, "universally obligatory" (Lazarou et al., 2018, p. 1). Lepard concludes that "all states are legally obligated to give their rights proclaimed in the Universal Declaration great weight in their decision making" (Lepard, 2010, p. 325).

The influence of Article 21 is also apparent in the work of the UN itself. The UNGA has adopted resolutions pertaining to democracy annually since 1988 (*Global Issues: Democracy*, n.d.). Prior to the establishment of the United Nations Human Rights Council (UNHRC) in 2006, its predecessor, the UN Commission on Human Rights, adopted a resolution in 1999 called "Promotion of the Right to Democracy," endorsing democratic rights such as the freedom of expression, assembly and association and the right to vote (Charlesworth, 2013, p. 271). In 2000, the UN Commission sought to provide a uniform understanding of democratic practices, and to that end, recommended "legislative, institutional and practical measures to consolidate democracy." Two years later, it provided the "essential elements of democracy" (*Global Issues: Democracy*, n.d.). These are referred to in the UN website as follows:

- Respect for human rights and fundamental freedoms
- Freedom of association
- Freedom of expression and opinion
- Access to power and its exercise in accordance with the rule of law
- The holding of periodic free and fair elections by universal suffrage and by secret ballot as the expression of the will of the people
- A pluralistic system of political parties and organisations
- The separation of powers
- The independence of the judiciary
- Transparency and accountability in public administration
- Free, independent and pluralistic media

Resolution 19/36 reaffirms that human rights and democracy are interdependent, stating that - despite myriad ways to have a democratic form of governance - a democracy is a government based upon the will of the people. A democracy is also a form of governance designed to protect human rights, including the right to political participation (General Assembly resolution 19/36).

Resolution 28/14 was established in 2015. With this Resolution, the UNHRC created "a forum on human rights, democracy, and the rule of law". Taking place every two years, it was designed to aid countries so that they "can promote development, protect individuals from discrimination and ensure equal access to justice for all" (UNHR: Office of the High Commissioner). Under this resolution, there was another reaffirmation that democracy was based "on the will of the people," like Resolution 19/36. Also, just like the previous resolution, it also acknowledged that there is not one correct way to carry out a democracy (General Assembly resolution 28/14).

While there is a state obligation to safeguard democratic rights, this resolution also mentioned the important role of the UN in protecting democracies, and cemented the notion of an interdependent relationship between democracy and human rights.

The practical reality of the right to democracy is demonstrated through UN case law dealing with the preservation of democracy and human rights. For example, in 1994, the UN, by supervising elections, supported Namibia in gaining independence from South Africa. The election in Namibia "was overseen by an administrator-general appointed by South Africa" (Joyner, 1999, p. 343). However, it was supervised "by the special representative of the secretary-general" (Joyner, 1999, p. 343). This representative had the power to "approve" of "election procedures" (Joyner, 1999, pp. 343-345). Therefore, the representative had the responsibility of registering voters, and calculating results, as well as ensuring that there was no voter intimidation. Furthermore, the representative ensured that there was no tampering with the results of any kind (Joyner, 1999, p. 345).

The UN Transition Group (UNTAG) also played a role in Namibian Independence because their mandate was to determine whether or not there were free and fair elections. They also certified electoral processes (Joyner, 1999, p. 345). The UNTAG comprised approximately 8000 people (2000 civilians, 1500 police monitors, and 4500 military staff). With the assistance of the UNTAG, 700,000 Namibian voters were registered. The UN efforts in this endeavour allowed for Namibia to win its independence. Free elections are a

democratic right, and the willingness of the UN to aid in this regard offers a practical example of the human right to democracy, by showing that the UN is a "salient…contributor to fostering the democratisation process worldwide." (Joyner, 1999, p. 352).

This paper would also like to focus on the Haitian crisis, which took place from 1991-1995. The international community rallied to protect a newly established democracy, showing a shared commitment to democracy.

The 7th of February 1991 marked the date when Jean-Bertrand Aristide became Haiti's President, in the country's first democratic presidential election. However, in September, Aristide was overthrown by a military coup headed by General Raoul Cedras, plunging Haiti into a reign of terror (Pierce, 1996, p. 481). This immediately elicited a strong reaction internationally, for example: former US President, George H.W Bush called for democracy to be restored, working with the Organisation of American States (OAS) to impose a trade embargo on Haiti. His successor, Bill Clinton worked on securing authorization for military intervention in Haiti (*Intervention in Haiti, 1994–1995, n.d.)*.

In September 1991, the OAS held an emergency meeting, condemning the coup (Pierce, 1996, pp. 481-482). Ministers called for Aristide to be put back in power, urging states to diplomatically isolate Cedras and place an embargo (Pierce, 1996, p. 482). On the 10th of October 1991, the UN General Assembly passed a resolution, condemning Aristide's forced replacement, and the violence as well as human rights violations Cedras was responsible for. Furthermore, in that same month the OAS imposed a trade embargo (*Haiti: Efforts to Restore President Aristide, 1991-1994*, 1995, p. 3).In July 1993, the UN Security Council imposed an oil embargo (Pierce, 1996, pp. 481-483).

The UN embargo forced Cedras into an agreement with Aristide, which also took place in July 1993 with the Governors Island Agreement. One of the provisions of the agreement stated that Aristide was to return to power by October 1993 (Pierce, 1996, p. 483). In August of 1993, the UN Security Council suspended the sanctions because the military government in Haiti was adhering to the Governors Island Agreement. However, this Agreement suffered a setback on the 11th of October 1993; the US was supposed to send their ship, the USS Harlan County to Haiti to ensure "a peaceful transition to democracy" (Pierce, 1996, p. 484). But as the ship neared the dock, Haitian thugs, supported by Haitian police and the military, put on an aggressive demonstration. Rather than confronting the demonstrators, the US National Security Council ordered the USS Harlan County to retreat.

Therefore, the United States was not able to adhere to an important part of the Governors Island Agreement resulting in the UN and the OAS re-imposing their respective embargoes (Pierce, 1996, p. 484).

When it became clear that economic sanctions would not help in restoring democracy to Haiti, the UN Security Council passed Resolution 940 in July 1994. The United States had worked on securing the aforementioned resolution. Resolution 940 authorised "the use of force to restore democracy" to Haiti, ensuring "the reinstatement of the Aristide government." Furthermore, the Resolution conferred "a six-month mandate for the United Nations Mission in Haiti (UNMIH), which would maintain order after the operation" (*Intervention in Haiti, 1994–1995, n.d.*). In September 1994, on the basis of Resolution 940's authorization on the use of force, then US President Bill Clinton ordered US troops to enter Haiti (Pierce, 1996, p. 477 & p. 485). After US troops entered Haiti, Aristide was put back in power in October of 1994.

The Haitian crisis led to scholars such as Franck and Pierce to discuss the possibility of a universal entitlement to democracy (Franck, 1992, p. 46) under which people have a right to be ruled by a democratically elected government (Pierce, 1996, p. 486). Influential in this discussion were Article 21 UDHR, Article 3 Protocol No. 1 ECHR, and the OAS Charter. Article 21 UDHR, affirmed by UNGA Resolution 45/150, shows that free elections are essential for the enjoyment of other human rights and fundamental freedoms (Pierce, 1996, pp. 485-486). Article 3 Protocol No. 1 of the ECHR "requires parties to 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" (Pierce, 1996, p. 488). The OAS Charter states that

> the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and respect for the essential rights of man (OAS Charter).

Further, the preamble of the OAS Charter mentions that

> representative democracy is an indispensable condition for the peace, stability and development of the region (Preamble of the OAS).

The importance of the OAS Charter is also seen through the 1991 Santiago Commitment, which requires "political representation of member states" which has to be "based on the effective exercise of representative democracy". (Pierce, 1996, p. 488).

This case above shows the willingness and vigor in which the international community intervened to protect democracy. For the OAS and the UN, the intervention was necessary in order to safeguard human rights and protect democracy (Pierce, 1996, p. 485).

b. Democracy in the International Covenant on Civil and Political Rights (ICCPR)

The 1948 UDHR gave form to the human right to democracy. The 1966 ICCPR elaborated the ideas of the UDHR, making them more precise. This is exhibited by Article 25 of this Covenant, which states:

> 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.

These rights are also found in Article 3 of Protocol 1 of the ECHR, as well as Article 23 of the American Convention on Human Rights (ACHR). Just as in Article 21 of the UDHR, the term democracy is not mentioned in Article 25 ICCPR, making it appear that the explicit mention of the term is "avoided" (Charlesworth, 2013, p. 36; Kirste, 2013, p. 145; Kurniaty, 2019, p. 295; Varayudej, 2005, p. 8).

Article 25 is the only provision in the ICCPR that applies exclusively to citizens. Hilary Charlesworth argued that Article 25 confers a "right of political participation and to accountability to elections" (Charlesworth, 2013, p. 274) and that there is an inherent tension between individual claims and the collective political context. As an example, Charlesworth presented *Diergaardt v. Namibia,* which was brought against Namibia by the minority group, called Rehoboth Basters. This group claimed that the government of Namibia violated Article

25 (a) and (c) because it assimilated them into regional electoral districts and "reduced their voting power" (Charlesworth, 2017, p. 275). In this case, the HRC stated that Article 25 only conferred an individual rather than a collective right to democracy. Therefore, Article 25 could not be brought forth by a community.

It is also important to mention the adoption of General Comment No. 25 in 1996 by the Office of the High Commissioner for Human Rights, as it gave direction concerning the substance of Article 25. It ensured "free and fair elections" by requiring non-discrimination; freedom of expression; and no coercion, repression or force of any kind (Varayudej, 2005, pp. 8-9). In addition to the democratic rights already mentioned, GC No. 25 also focuses on:

- freedom of expression, assembly and association (paragraph 12)
- non-discrimination with respect to the citizens' right to vote (paragraph 3)
- rejects any condition of eligibility to vote or stand for office based on political affiliation (paragraph 15)
- calls for voters to be free to support or oppose the government without undue influence or coercion of any kind (paragraph 19)
- and requires states reporting under the Covenant to explain how the different political views in the community are represented in elected bodies (paragraph 22) (*General Comment No. 25*, 1996, paras. 3-22)

Indeed, the freedom to information is a requirement that ought to be fulfilled throughout the electoral process (Kirste, 2013, p. 144). This host of further democratic rights to which the General Comment No. 25 pays tribute to, makes it abundantly clear that there is a codified right to democracy, as defined in the introduction, on the international level, that has been laid down with great detail.

General Comment No. 25 gave the necessary guidance as to what constitutes compliance with Article 25, solidifying the democratic rights contained therein (Varayudej, 2005, p. 8). Also, since public affairs are regarded to be on "international, national, regional and local levels", General Comment No. 25 suggests that there might indeed be a right "beyond the sphere of the state" (Maisley, 2017, p. 97).

Article 25 of the ICCPR also deals with political participation in international affairs. In fact, Nahuel Maisley defines a right to democracy as a right derived from Article 25 (a) (Maisley, 2017, p. 96). Based on an interpretation of Article 31 of the Vienna Convention on

the Law of Treaties (VCLT), Maisley seeks to provide Article 25 (a) ICCPR with its ordinary meaning. In this vein, a dictionary definition of public affairs would mean participation in governing on an international level, not merely on a domestic level. This is because dictionaries deem public affairs to be the "business of governing" or "events and questions, especially political ones, which have an effect on most people." As a result, public affairs are relevant on a domestic and international level because governance functions that have an effect on people occur on both levels. Also, the International Court of Justice (ICJ) requires an "evolutionary interpretation" for "generic terms" which provides that the current meaning of the term is relevant. Decades ago, public affairs would have been understood as domestic affairs. However, due to the evolutionary interpretation, public affairs cannot be limited to the domestic domain, considering that globalization has led to "decisions on collective life" not just being made in the national arena, but also in "non-national settings" (Maisley, 2017, pp. 96-97).

When interpreting on the basis of the VCLT, understanding terms "in their context" (Maisley, 2017, p. 97) becomes imperative. In this regard, it is important to mention that the Human Rights Committee the body of independent experts that monitors the implementation of the ICCPR by its States parties (Fahner, 2017, p. 325), stated that citizen participation in terms of public affairs can be realised if the "freedom of expression, assembly and association" (Maisley, 2017, p. 97) are ensured. These mentioned rights "are fully applicable to the international sphere" (Maisley, 2017, p. 97). According to Article 19 (2) of the ICCPR, freedom of expression applies "regardless of frontiers" (Maisley, 2017, p. 97). According to Maina Kaia, former special rapporteur on the rights to freedom of assembly and association, the other two mentioned rights are fundamental and are protected on an international level. Therefore, the freedom of assembly and association provides a voice to those who cannot "be heard on the multilateral stage" (Kaia, as qtd. in Maisley, 2017, p. 97). Hence, the aforementioned rights, which set the context for Article 25 (a), all enjoy international applicability. This is a strong indication that this possibility is granted to the field of public affairs too, with public affairs being defined as "all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels" (Maisley, 2017, p. 97).

Additionally, The VCLT calls for considering "the relevant rules of international law applicable in the relations between the parties" (Maisley, 2017, p. 100). The relevant rules that have to be considered for the interpretation of Article 25 (a) ICCPR are:

- Human rights instruments that allow individuals to participate in political and public life on a domestic and international level.
- International human rights treaties that explicitly confer a right to participation in international law for civil society members.
- State practice: there is a tendency towards a customary right to participation, as exhibited by a 2011 HRC Resolution that stated that there is a right to participation "in domestic and global decision-making."
- General principles of law (Art 38 (1) ICJ Statute): freedom of expression, assembly and association are recognized as general principles.

Thus, when considering the above bullet points, a right to democracy can be derived from Article 25 (a) (Maisley, 2017, p. 101).

Marshall v. Canada, an important case decided by the HRC Committee sees Article 25 in action (Hart, 2003, p. 6). *Marshall v. Canada* was brought before the Human Rights Committee (HRC) in 1986 and was decided in 1991. In 1986, the complaint was brought forth by the Mi'kmaq, a North American indigenous group against Canada. Due to the 1982 Constitution Act, Canada had established "a series of constitutional conferences," inviting members of indigenous groups in cases where indigenous interests were impacted. However, Canada consistently failed to include the Mi'kmaq in this invitation (Hart, 2003, p. 6; *Marshall v. Canada,* 1991, para. 3.1). The Mi'kmaq alleged that because the Canadian government did not allow them to take part in constitutional conferences (despite their interests being impacted), there was a violation of Article 25 (a) ICCPR. However, the HRC decided against the Mi'kmaq, arguing that Canada had sufficient aboriginal representation in the constitutional conferences, and therefore, did not need to specifically include the Mi'kmaq. Furthermore, the HRC stated that each state can choose how their citizens participate in public affairs; just because a group is affected by the state, they do not have the "unconditional right to choose the modalities of participation in public affairs" because it "would be an extrapolation of right to direct participation by citizens" (*Marshall v. Canada,* 1991, para. 5.5). Hence, there was no violation of Article 25 ICCPR (Hart, 2003, pp. 6-7)

HRC case law concerning Belarus is also important, particularly case law from the years 2007 and 2009 (Fahner, 2017, p. 328). In *Sinitsin v. Belarus,* the applicant, a Belarussian citizen named Leonid Georgievich Sinitsin, complained that despite meeting all requirements, the Central Electoral Commission on Elections and Code of Conduct of Republican Referendums (CEC) in Belarus rejected his candidacy for presidential elections. Sinitsin complained before the Supreme Court in Belarus; proceedings did not follow because the Court stated that Sinitsin had no right to file this suit, as there was no legislation in Belarus which allowed for a review of CEC rulings. Sinitsin alleged that this was a violation of Articles 2, 14, and 25 (b) of the ICCPR. The HRC decided in favour of Sinitsin because there was no independent and impartial body where Sinitsin could have asked for a review of the CEC decision. Therefore, the decision to not accept his candidacy violated Article 25 (b) in conjunction with Article 2 of the ICCPR (*Sinitsin v. Belarus,* 2007, paras. 1-10).

In *Korneenko and Milinkevich v. Belarus,* Aleksiandr Milinkevich (presidential candidate), and Viktor Korneenko (member of electoral headquarters of Aleksiandr Milinkevich) complained to Belarussian authorities that their electoral leaflets were unjustifiably seized by the police (*Korneenko and Milinkevich v. Belarus,* 2009, para. 2.1). In response, the Zhoblinsk District Court fined Korneenko (in his absence) because he allegedly violated Article 167-3 of the Administrative Offences Code by transporting electoral leaflets supposedly containing information that Milinkevich was the new president. The Court also ordered the leaflets to be destroyed. The case was re-examined by the Zhoblinsk District Court; Korneenko was still deemed guilty. Afterwards, the Supreme Court also found the decision of the District Court to be lawful. Korneenko then asked the Central Electoral Commission (CEC) to explain what material should not be posted on electoral leaflets (*Korneenko and Milinkevich v. Belarus,* 2009, paras. 2.3-2.5). The CEC stated that:

> Presidential electoral campaign material should not contain calls for war, for forced change of the constitutional order, for a breach of the State territorial integrity, for calls of nationalistic, racial, religious, or social hostility, and should not contain insults or slander in relation to public officials and Presidential candidates. (*Korneenko and Milinkevich v. Belarus,* 2009, para. 2.5)

Korneenko subsequently stated that Article 167-3 of the Administrative Offences Code has to be read in conjunction with Article 49 of the Electoral Code; should a candidate abuse rights during an election campaign, then the Electoral Commission can remove the registration of

that person as an electoral candidate. According to Korneenko, no other sanction is allowed. He complained before the HRC that the confiscation and destruction of the electoral leaflets was designed to purposefully obstruct Milinkevich's campaign, breaching Articles 14, 19, 25 and 26 of the ICCPR. The HRC decided in favour of Korneenko and Milinkevich (*Korneenko and Milinkevich v. Belarus,* 2009, paras. 8.3-8.4). In terms of Article 25 ICCPR, the HRC stated that:

> ...the free communication of information and ideas about public and political issues between citizens is essential; it requires the full enjoyment and respect for the rights guaranteed inter alia by article 19 of the Covenant, including the freedom to publish political material, to campaign for election and to advertise political ideas. In the absence of any further pertinent information from the State party in this context, the Committee concludes that in the present case, the violation of Mr. Milinkevich's rights under article 19 has resulted also in a violation of his rights under article 25, read together with article 26, of the Covenant (*Korneenko and Milinkevich v. Belarus,* 2009, para. 8.4).

The HRC case law on Belarus showed the importance of free and fair political participation, based on objective and impartial grounds.

However, despite elections being important, the HRC has also stated that Article 25 does not mean that all positions of a nation are to be filled via elections (Fahner, 2017, p. 328). This became clear in *Costa v. Spain*. The applicant of an individual communication to the HCR, a Spanish citizen named José Luis Mazón Costa, complained that free and fair elections did not extend to the Spanish monarchy; "his right to vote and to be elected King of Spain was therefore violated" (*Costa v. Spain,* 2008, paras. 1-2.1). Costa stated that this was a violation of Articles 2, 3, 25 and 26 of the ICCPR. Unlike the HRC case law on Belarus, this case did not pass the admissibility stage. Despite the HRC mentioning that a constitutional monarchy with a separation of powers is not per se in conflict with Article 25 ICCPR, this case was deemed incompatible *rationae materiae* because Article 25 (b) of the ICCPR "does not grant a right to elect a head of State or to be elected to such position" (*Costa v. Spain,* 2008, paras. 1, 3.2 & 3.4[a]).

c. Assessment

Article 19 UDHR and Article 25 ICCPR protect the right to political participation, without mentioning the term democracy. The question relevant to this thesis is to what extent these provisions contribute to the human right to democracy. The author would argue that to a great extent these provisions support the discussion of a human right to democracy.

First, the omission of the word democracy is not problematic or surprising. According to social theorist David Beetham, the Cold war was the main reason for democracy not being mentioned. Beetham stated that until the late 1990s, democracy and human rights were treated as separate fields, despite human rights being promoted and recognized after 1945, particularly through the UDHR, ICCPR and the ECHR (Beetham, 1997, p. 351). This divide was mainly due to the political divisions between the East and the West during the Cold War, leading to the word "democracy" not featuring in "official UN documents". Considering the background of the Cold War and the fact that democracy was attributed to political science or comparative politics, whereas human rights was attributed to the legal arena, it is unsurprising that the term democracy is not mentioned. After all, in Anglo-Saxon countries, these disciplines did not share much connection with each other. However, a relationship between human rights and democracy started to find recognition with the end of the Cold War (Beetham, 1997, p. 351).

Also, despite the rise in democracies after World War II and the Cold War, a vast number of countries on the international platform had other forms of political governance, notably autocracies and dictatorships. Even in modern times, half the world is not democratic (Herre & Rosser, 2013). Therefore, the UDHR not explicitly mentioning the term democracy was a strategic decision that allowed for more state signatories from countries that did not have a democratic system of governance.

Secondly, when the UDHR was published in 1948 it was not designed to be legally binding. However, having been invoked consistently in international law for over sixty years, it can be argued that the UDHR is now part of customary international law (Australian Human Rights Commission). Customary international law is binding on states. It is, therefore, highly influential, as exhibited by subsequent resolutions and case law. In particular, the cases of Namibia and Haiti, *Marshall v. Canada*, and the Belarussian cases, show the importance of the right to political participation. Political participation, however, is not limitless, as shown by the case *Costa v. Spain.*

The case of Namibia showed that election monitoring is important to the UN, showcasing the significance that democracy has for the UN. A willingness to ensure fair elections in another country contributes to the discussion of a human right to democracy. Independent election monitors are an uncontroversial way of ensuring democracy; notably, Matthew Lister states that independent election monitors is the least problematic way of promoting democracy (Lister, 2012, p. 272).

The Haitian Crisis exhibited that non-interference in state matters according to Article 2 (7) UN of the UN Charter is not limitless. This is because between democratic entitlement and the prohibition of interference in state matters, democratic entitlement won (Pierce, 1996, p. 491). OAS member states no longer viewed the overthrow of a democracy as a purely domestic matter. Despite the carefully worded UN Security Council resolution citing the "unique and exceptional" circumstances of the crisis, the UN demonstrated a willingness to protect democracy in the future. This is because the UN viewed the overthrow of Aristide as a threat to international peace and security (Pierce, 1996, p. 506). The UN Security Council did not shy away from authorising force to protect democracy. However, the UN cannot intervene in all situations where there is a threat to democracy: the voting mechanism of the UN Security Council dictates that all permanent members have to vote in favour of authorising the use of force, or abstain from voting. Therefore, if a permanent member, such as China acts in a way that constitutes a "threat to democracy," then owing to the voting mechanism of the UN Security Council an intervention in the way it was done in Haiti would not be possible. Furthermore, the interests of bigger and more powerful states are the driving force behind collective action (Pierce, 1996, pp. 510-511). This means that despite the UN placing high value on democracy, it has its limits.

Marshall v. Canada is significant because the HRC held that "constitutional conferences" (Hart, 2003, p. 6) were a part of public affairs. In other words, there is "a right to participate in constitution making" (Hart, 2003, p. 6). Therefore, despite the bleak note left behind in the Marshall case, it is important to mention that its shortcomings were indeed rectified in General Comment No. 25. This comment widened the notion of democratic participation to not only include voting, but also "assemblies and accountable representation, referenda and electoral decision making, "public debate and dialogue," and citizens' "capacity to organise themselves". Furthermore, *Marshall v. Canada* and General Comment

No. 25 have been used by Vivien Hart to show that there is “a right to participate in constitution making” (Hart, 2003, p. 7) in international law.

The Belarussian cases showed that the UN places an emphasis on free and fair elections. Materials associated with elections, for example, are not allowed to be destroyed by courts as it would be arbitrary. It also established a connection to other rights, notably, freedom of expression. In *Korneenko and Milinkevich v. Belarus,* for example, the “free communication of information and ideas…” was considered essential for the fulfilment of Article 19 ICCPR. Since the “free communication of information and ideas" was not fulfilled due to destruction of election material, there was also a violation of Article 25 ICCPR (*Korneenko and Milinkevich v. Belarus*, 2009, para. 8.4). Therefore, the rights of the ICCPR do not exist in a vacuum, but have a relationship to one another to the point where the violation of one right, may also mean the violation of another ICCPR right.

However, as shown by *Costa v. Spain*, Article 25 of the ICCPR does not dictate everything to states. The HRC stated that when it comes to Article 25 of the ICCPR, the provision “does not impose a specific political model or structure,” leaving leeway for states to decide (*Costa v. Spain,* 2008, para. 3.2). Furthermore, in order to fulfil Article 25 of the ICCPR, the legislative, executive and judicative powers have to be separated. States should therefore choose a model in accordance with the separation of powers (*Costa v. Spain,* 2008, para. 3.2).

A shortcoming of Article 25 ICCPR is that it applies only to citizens. This can be viewed critically, as it is indeed questionable whether the right to political participation ought to require citizenship. Ideally, a right to political participation ought not be derived from territory or citizenship, but conferred to an individual regardless of circumstance, since the universality of human rights dictates that they apply to all people at all times (Fahner, 2017, p. 331).

Further criticism can be found with the assessment of Charlesworth, who stated that Article 25 ICCPR cannot be brought forth by the community. This prompted a separate opinion by former UN Special Rapporteur on human rights and counter-terrorism, Martin Scheinin. Scheinin believed that in exceptional circumstances, Article 25 has to confer some form of collective value (Charlesworth, 2017, p. 275). Specifically, he stated the following:

> There are situations where article 25 calls for special arrangements for rights of participation to be enjoyed by members of minorities and, in particular, indigenous peoples. When such a situation arises, it is not sufficient under article 25 to afford individual members of such communities the individual right to vote in general elections. Some forms of local, regional or cultural autonomy may be called for in order to comply with the requirement of effective rights of participation. (Scheinin as quoted in Charlesworth 2017, p. 275)

Other critics to a right to democracy point to "vague" wording in Article 25 (a); or they take issue with a supposed narrow focus "on electoral democracy" in Article 25 (b), with the argument of democracy going beyond elections (Fahner, 2017, p. 325). That being said, Article 25 (a) clearly refers to participation in public affairs, without referencing the geographical scope of public affairs. Therefore, the state obligation to allow citizens to directly or indirectly participate can be derived (Maisley, 2017, p. 98).

Despite Article 25 ICCPR having limits, the above paragraphs highlight that there is a human right to democracy found in positive law. Aside from the UDHR and ICCPR, there are democratic rights enshrined in regional human rights instruments that are instrumental to the discussion concerning a human right to democracy. The next section will focus on the role of the ECHR, an influential regional human rights instrument in the discussion pertaining to the human right to democracy.

III. The Right to Free Elections and Freedom of Expression in the ECtHR

The right to political participation is protected in regional human rights instruments, such as the European Convention on Human Rights (ECHR). In the ECHR, this is protected under Article 3 Protocol No. 1, which deals with free elections. Therefore, the right to free elections under the ECHR will be discussed. Since freedom of expression is important for the fulfilment of the right to free elections, it will also be mentioned (*General Comment No. 25*, 1996, para. 12). The ECHR has weaknesses which will be examined in the assessment of this section. However, it also shows promise.

a. The Right to Free Elections Under the ECHR

Just like the UDHR and ICCPR, the ECHR does not define democracy. Instead, it is "invoked," with the right to free elections being the "democracy clause" (Kovacs, 2020, p. 237). However, already the preamble of the ECHR signifies the importance of democracy and shows the influence of the Universal Declaration of Human Rights. The preamble, published by the European Court of Human Rights states the following:

> The Governments signatory hereto, being members of the Council of Europe,
>
> Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;
>
> Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;
>
> Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms;
>
> Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;
>
> Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,
>
> Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention, Have agreed as follows…(*Preamble of the European Convention on Human Rights*, 1950, pp. 5-6).

In 2020, Linos-Alexandre Sicilianos, former President of the European Court of Human Rights, highlighted the importance of democracy by referencing the preamble of the ECHR: "Only a genuinely democratic regime is compatible with the philosophy and the spirit of the Convention" (Sicilianos, as quoted in Kovacs, 2020, p. 238).

The right to free elections is found in national and international law. In the ECHR, it is codified under Article 3 of Protocol No. 1: "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" (ECHR, 2022).

This provision places a duty on states to "legislate elections, based on universal suffrage and the secret ballot, at reasonable intervals" (Costa, 2008, p. 5). It does not, however, include referendums or presidential elections (*McLean and Cole v. the United Kingdom*, 2011, para. 32; Kovacs, 2020, p. 247). It confers to citizens a right to vote and to stand for elections. Case law of the European Court of Human Rights (n.d.), from now on referred to as "the Court," dictates that states have to take positive measures to ensure that citizens are able to vote and to stand for elections (Costa, 2008, p. 6).

The right to free elections is versatile because there are different ways to establish a system of democratic governance. The Court has always respected and promoted this form of democratic diversity, as shown by *Hirst v. the United Kingdom,* where the Court stated:

> there are numerous ways of organizing and running electoral systems, and a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mold into its own democratic vision (*Hirst v. the United Kingdom,* 2005, para. 61).

Case law from the Court is an interpretative tool for Article 3 (Kovacs, 2020, p. 238). The Court issues binding judgements. This thesis will focus on the *Mathieu-Mohin and Clerfayt v. Belgium* case because it was "the first landmark voting rights decision of the European Court of Human Rights" (Graziadei, 2016, p. 58).

The applicants in *Mathieu-Mohin and Clerfayt v. Belgium* are Belgian citizens: Mrs. Lucienne Mathieu Mohin (senate member) and Mr. Georges Clerfayt (national parliament

member) (*Mathieu-Mohin and Clerfayt v. Belgium,* 1987, para. 1). The Court issued a binding judgement in 1987 (*Mathieu-Mohin and Clerfayt v. Belgium,* 1987, para. 1).

The applicants complained about an alleged breach to the right of free elections in conjunction with Article 14 of the ECHR because "they could not elect French-speaking representatives to the regional assembly under which Halle-Vilvoorde came and, as elected representatives, they could not sit in that assembly, whereas, *mutatis mutandis,* Dutch-speaking voters and elected representatives in the same municipalities could" (*Mathieu-Mohin and Clerfayt v. Belgium,* 1987, paras. 11, 12 & 41).

The European Court of Human Rights decided against the applicants, stating: "The French-speaking electors in the district of Halle-Vilvoorde enjoy the right to vote and the right to stand for election on the same legal footing as the Dutch-speaking electors" (*Mathieu-Mohin and Clerfayt v. Belgium,* 1987, para. 57). The Court deciding against the applicants in *Mathieu-Mohin and Clerfayt v. Belgium* does not weaken the argument for a human right to democracy. This is because in *Mathieu-Mohin and Clerfayt v. Belgium*, the Court determined that fundamental rights are most effectively protected by a functioning democracy, thereby highlighting the relationship between human rights and democracy:

> According to the Preamble to the Convention, fundamental human rights and freedoms are best maintained by 'an effective political democracy'. Since it enshrines a characteristic principle of democracy, Article 3 of Protocol No. 1 is accordingly of prime importance in the Convention system" *(Mathieu-Mohin and Clerfayt v. Belgium,* 1987, cited in Kovacs, 2020, p. 244).

Another case worth mentioning was that of *Timke v. Germany* (1995), which involved the right of free elections. It was decided by the European Commission on Human Rights. German citizen Jan Timke was the applicant in *Timke v. Germany.* In 1993, the Land Niedersachsen in Germany passed a new Constitution. Under Article 9 of this Constitution, election intervals from the Niedersachsen parliament were changed from being held every four years to every five years. Timke launched an application before the European Commission in 1995, stating that there was a violation of Article 3 Protocol No. 1 of the ECHR because there were no regular election intervals. The Commission decided against Timke, stating that his application was "manifestly ill-founded." This is because five-year

election intervals still ensure the "free expression of the opinion of the people in the choice of legislature" (*Timke v. Germany,* 1995, pp. 1-2).

Importantly, the core question that the Court engaged with was the the notion of "reasonable intervals":

> The Commission finds that the question whether elections are held at reasonable intervals 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….Too short an interval between elections may impede political planning for the implementation of the will of the electorate; too long an interval can lead to the petrification of political groupings in Parliament which may no longer bear any resemblance to the prevailing will of the electorate. (*Timke v. Germany*, 1995, p. 2)

The right to free elections shows that the protected democratic diversity is protected on a regional level. Since there is a relationship between the right to free elections and the freedom of expression, the freedom of expression will be discussed in the next subsection.

a. The Right to Freedom of Expression Under the ECHR

Freedom of expression is granted to every human being (Woods, 2006, p. 378). Protection of this right is a priority for the EU because it is important for democracy and individual development. Freedom of expression is codified in Article 10 of the ECHR:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health

> or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Therefore, freedom of expression is granted a wide scope of application protecting:

- "freedom to hold opinions": states cannot indoctrinate citizens, promote "one-sided information", or treat individuals differently because of their opinions. People are protected when voicing their opinion or choosing not to.
- "freedom to impart information and ideas": protects political speech, commercial speech and the arts.
- "freedom to receive information and ideas": right to be informed on matters of public interest and the right to information (Bychawska-Siniarska, 2017, pp. 13- 15).

The Court, has continuously emphasised the significance and broad scope of Article 10 starting with *Handyside v. the United Kingdom* (1976). The Court held that freedom of expression does not just protect ideas that everyone agrees with. It also protects speech that is shocking and offensive in order to uphold democracy. Specifically, the Court stated:

> freedom of expression constitutes one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society. (*Handyside v. the United Kingdom*, 1976, para. 18)

Importantly, the freedom to expression is not an absolute right; rather, it may be restricted along the legislative pre-emption in Article 10 para 2. In the spirit of *Handyside*, the Court usually does not wish to limit political speech, particularly in the context of government criticism (Woods, 2006, p. 378).

This is shown by the case *Orlovskaya Iskra v. Russia* (2017). The applicant in this case was "a non-governmental organisation that publishes Orlovskaya Iskra, a newspaper in the Orel region." (*Orlovskaya Iskra v. Russia*, 2017, para. 5). During the 2007 Russian parliamentary

election campaign, Orlovskaya Iskra published two critical articles regarding the Orel governor at the time, Mr. Stroyev. The articles were published on the 7th and 14th of November 2007. On the 17th of November 2007, the Working Group on Informational Disputes of the regional Electoral Committee examined both articles stating:

> The publications contained "negative, purposeful, systematically published information about a member of the High Political Council of the United Russia political party ... Mr E. Stroyev. The above-mentioned publications have created a negative attitude on the part of the voters towards ... United Russia. Although the text of the articles does not call for people to vote for or against United Russia, all the electorate understand that this is in fact counter-campaigning [against Mr Stroyev]. The publications "did not correspond to the current information policy of the organisations editing mass media", which (the policy) was "aimed at informing the voters about the development of the electoral campaign ... [and] about the political parties participating in it." (*Orlovskaya Iskra v. Russia*, 2017, para. 11)

According to the Electoral Committee, the two aforementioned articles "fell outside the information space created by the political parties during the ongoing electoral campaign" (*Orlovskaya Iskra v. Russia,* 2017*,* para. 11). Since the articles were not published by the "official campaign fund of any party participating in the campaign," the articles violated 52 § 6 of the Electoral Rights Act of 2002. Because of this breach of the Electoral Rights Act, the Electoral Committee fined Orlovskaya Iskra (*Orlovskaya Iskra v. Russia,* 2017, paras. 11-12).

The case was brought to the Court on the 24th of July 2008, after the Vice President of the Russian Supreme Court rejected the applicant's supervisory-review (*Orlovskaya Iskra v. Russia,* 2017, paras. 16-23) . The applicant alleged that there was a violation of Article 10 of the ECHR because their articles were seen as "election campaigning" and subsequently fined. On the 21st of February 2017, the Court decided in favour of the applicant, stating:

> The Court concludes that, in view of the regulatory framework, the applicant organisation was restricted in its freedom to impart information and ideas. By subjecting the expression of comments to the regulation of "campaigning" and by prosecuting the applicant with reference to this regulation, there was an interference with the applicant organisation's editorial choice to publish a text taking a critical stance and to impart information and ideas on matters of public interest. No sufficiently compelling reasons have been shown to justify the prosecution and

> conviction of the applicant organisation for its publications at election time. (*Orlovskaya Iskra v. Russia,* 2017, para. 134)

This case showed that the Court is particularly willing to protect the free press in the context of elections, showing a relationship between the freedom of expression and the right to free elections. This relationship will be discussed further in the assessment.

c. Assessment

Article 3 Protocol No 1. of the ECHR protects the right to free elections. In order to fulfil the right to free elections, there ought to be freedom of expression as found in Article 10 of the ECHR. The question relevant to this thesis is to what extent these provisions contribute to the human right to democracy. The author would argue that despite Article 3 being fraught with weaknesses, it also shows promise.

The case *Mathieu-Mohin and Clerfayt v. Belgium* established that there is an interdependence between the right to free elections and the freedom of expression. This is because freedom of expression is "one of the conditions which will ensure the free expression of the opinion of the people in the choice of the legislature" (*Mathieu-Mohin and Clerfayt v. Belgium*, 1987, paras. 42 & 54).

The Court in *Timke v. Germany* not only affirmed that in order to fulfil Article 3, elections have to be held free and by a secret ballot. However, according to critics, Article 3 has weaknesses. After all, Article 3 does not include Presidential Elections in its scope of protection, as it does not fall under legislature, a necessary prerequisite for the protection of Article 3 (Kovacs, 2020, p. 247). Furthermore, Article 3 only applies to individual citizens, so only nationals of a country have this possibility, again weakening an argument for a human right to democracy, as a human right would mean it is conferred to all individuals, not just citizens.

Another major drawback of Article 3 is that it does not include local or regional elections. However, in *Repetto Visentini v. Italy* and *Miniscallo v. Italy,* upon close examination of Italy's constitutional makeup, the European Court of Human Rights concluded that Article 3 "applied to local elections to provincial councils in Italy." This prompted constitutional reform in Italy whereupon Italy reformed law to meet the demands of Article 3 (*Guide on Article 3*, 2022, para. 2).

Article 10 ECHR, on the other hand, contributes to the human right to a democracy to a great extent. This is significant because it applies to all individuals, not just citizens (Woods, 2006, p. 378). It protects a wide array of areas including political and commercial speech, confers a right to access information and also protects the arts (Bychawska-Siniarska, 2017, pp. 13- 15). Political speech is rarely restricted as shown by the *Orlovskaya Iskrav v. Russia*. This case showed that the Court finds it necessary to protect journalistic freedom; as they stated, "the press fulfils an essential function in a democratic society" (*Orlovskaya Iskra* v. Russia, 2017, para. 108).

Furthermore, *Orlovskaya Iskra v. Russia* not only highlighted the significance of Article 10 ECHR, but emphasised the relationship between the freedom of expression and the right to free elections as the Court stated (with an important reference to the aforementioned *Mathieu-Mohin and Clerfayt v. Belgium*):

> The Court also reiterates that the rights guaranteed by Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law… Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system… The two rights are inter-related and operate to reinforce each other: for example, freedom of expression is one of the "conditions" necessary to "ensure the free expression of the opinion of the people in the choice of the legislature"... For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely. In the context of election debates, the unhindered exercise of freedom of speech by candidates has particular significance …(*Orlovskaya Iskra v. Russia*, 2017, para 110)

In conclusion of this chapter, the freedom of expression combined with the right to free elections is essential to the discussion of a human right to democracy. Without the freedom of expression and the right to free elections, there could be no effective democracy: "one could hardly imagine a functioning democracy without guarantees of free speech, freedom of association, or the right to vote" (Besson, 2010, p. 12). In fact, the freedom of expression allows the fulfilment of the right to free elections because without a free flow of information and ideas, particularly during the election period, it is difficult to have free and fair elections. Therefore, the free expression of opinions, ideas and information allows for free and impartial elections. Free elections and the freedom of expression are therefore linked to the

point where violating the freedom of expression in the context of elections could amount to a violation of free elections.

So far, this thesis has focused upon legal texts and their relation to the discussion surrounding the human right to democracy. However, moral and philosophical reasoning should not be amiss. Therefore, the rest of this thesis will focus upon the moral and philosophical justifications surrounding the human right to democracy, as well as the issues and controversies that are associated with it.

IV. Justifying a Human Right to Democracy

Justifying a human right to democracy is highly debated.Political or moral conceptions are used to advocate or oppose a human right to democracy. Anita Horn explains what a political conception is:

> An approach can be said to be political if it emphasises either the logic and optimization of the existent supranational system or general political normative goals, such as the right of a political community to self-determination, minimal social justice, or, more broadly, peace. A political formulation of an HRD is framed and conditioned by larger international political or legal issues. (Horn, 2020, p. 14)

Moral arguments focus on the "moral standpoint of a rational human being." (Horn, 2020, p. 14).

The moral and political conception can be further subdivided depending on the argument. This includes:

- **normative political conception**: focuses on "a legitimate and just social and political order", emphasising "justice, equality, popular sovereignty, or self-determination." Horn states that "a successful normative political claim" for a human right to democracy has to demonstrate that "democratic rights or institutions are an intrinsically valuable pre-condition to realising such principles and ideals." (Horn, 2020, p. 14).
- **instrumental political conception**: focuses on the "role that human rights play in international relations as political and public instruments." Empirical reasons are considered from a normative perspective, with legitimacy being defined as "practical applicability and efficiency of human rights in international political contexts." Horn

elaborates that “a successful instrumental political claim” for a human right to democracy has to show the importance of political or strategic goals “of the international community, for example, as a legitimate instrument to impose sanctions on regimes that violate human rights.” (Horn, 2020, p. 14).

- **intrinsic moral conception**: emphasises that human rights are derived from assumptions dealing with human nature and the general needs of human beings; human rights protect “essential human features” and allow for individual development and growth by guaranteeing basic rights. Often, authors that advocate for the intrinsic moral conception will discuss “moral rights and obligations.” Horn states that “a successful intrinsic claim” has to show that a right to democracy is a right inherent to all people by virtue of being human; “democratic rights or institutions must have intrinsic value for maintaining a dignified human life.” (Horn, 2020, p. 14).
- **instrumental moral conception**: focuses on the significance of human rights based on “their practical, historical and political constructiveness.” (Horn, 2020, p. 14).

There are different ways to justify or argue against a right to democracy. In order to show that the right to democracy is highly debated the focus will be on: the rejection of a human right to democracy from a normative political conception and moral conception. Furthermore, the ideas of two scholars from the instrumental moral conception will be presented: Samantha Besson and Thomas Christiano.

a. The Instrumental Moral Conception: Samantha Besson’s Moral Defense with a Legal Nuance

Samantha Besson argues for a human right to democracy based on an instrumental moral conception; she emphasises that there is a moral human right to democracy, aka a right to democratic participation (Besson, 2010, pp. 6 & 21; Horn, 2022, p. 78 & 79). Besson views human rights as “moral propositions that ground moral duties”. Human rights are a part of morality and are of value. Specifically, human rights are special moral rights because they protect universal and fundamental interests. (Besson, 2010, pp. 7-8).

In order to argue for a moral human right to democracy, Besson proposes a “modified interest-based theory… modified by reference to considerations of moral-political status in a given community”:

> More specifically, the proposed account is moral in the independent justification it provides for human rights and political in the function it sees them vested with as both shields against the state and guarantees of political inclusion. In terms of justification, its moral-political dimension differs both from accounts based on a purely ethical justification of human rights, and from accounts that seek a political form of minimalist justification of human rights. And with respect to the function of human rights, it can salvage their political role without diluting their moral justification. (Besson, 2010, p. 9)

Besson's use of the modified interest based theory provides an insight into "legal human rights." (Besson, 2010, p. 9). Besson defines legal rights as "legally-protected moral interests." This means that legal rights can "also be regarded as moral interests." However, not all moral interests become legal rights. In the case of a moral human right to democracy, Besson believes that it should be legally enforced: the rights in question being of fundamental and universal interest, including "individual interests when these constitute part of a person's well-being in an objective sense". She cites reasons for this legal enforcement: "security and clarity, intermediary agreement on a contested right or sets of interests, effectivity, sanctions or publicity." Furthermore, legally enforcing the human right to democracy "would enhance its realisation" in practice, enabling "democratic processes through legal directives and protecting them against themselves and their own unmaking." Legal enforcement of the aforementioned right can be done through international law or national law. According to Besson, reasons for transposing the moral human right to democracy into international law as an international human right include the fact that:

- international human rights apply to all individuals and not just citizens.
- international human rights can provide a safety net in case of human rights violations in states (Besson, 2010, p. 22).

Despite reasons in favour of transposing a moral human right to democracy into international law, Besson believes "that national law remains the most legitimate locus for the realisation of human rights" (Besson, 2010, p. 22). This is because the contextualization of fundamental interests takes place at a national level. Furthermore, international democracy is underdeveloped and has not replaced national democracies as the main centre of decision-making; international human rights often have to be enforced within national law (Besson, 2010, p. 22).

Even though Besson believes that a moral human right to democracy should be transposed by national law she believes that "provided the demoi-cratic credentials of international law-making are enhanced, the legal right to democracy could be guaranteed legitimately at the international level as a common interest of states and individuals." (2010). In the context of the EU, Besson uses the notion of *demoi-cracy* to denote that people govern themselves "with strength"; peoples are understood as citizens and as "separate political units under popular sovereignty which constitutes the Union" (Nicolaïdis, 2012, p. 247). Besson uses the term demoi-cracy because she sees the European parliamentary institutions "as a democracy of many European demoi connected vertically at many different levels, but also horizontally at the national level" (Besson, 2007, p. 5). Furthermore, demoi-cracy is used to discuss democracy beyond the state. According to Besson, the more demoicratic international human rights law enforcement and legislation is, the more legitimate the international legal right to democracy will be. Besson believes that in a globalised world there are common issues that create an incentive for states and individuals to decide such issues together. In fact, the right to democracy would become a right which both individuals and states protect together. Participation and inclusion, therefore, is a "legitimate individual claim" on a national level and "participation in the decision-making process" a common interest; as a right that states and individuals protect together. This is the basis for an international legal right to democracy provided that the principle of demoicracy is upheld. Therefore, if the relationship between the international legal right to democracy and international demoicracy is viewed as mutually reinforcing, "the circle may come to be seen as virtuous (Besson, 2010, p. 24).

In summary, Besson believes the following:

- There is a moral human right to democracy: Besson justifies this on the basis of the instrumental and moral considerations, out of which a human right to democracy can be derived.
- The moral human right to democracy is understood as the right to political participation.
- The right to democracy should be transposed on a national level.
- The right to democratic participation as currently codified in international law will become more meaningful the more demoicratic international human rights enforcement and lawmaking becomes. This is because demoicracy goes beyond the

state (to a supranational institution like the EU). Furthermore, in a globalised world there are global issues, meaning that democratic participation could become an aspect that the international community presides on. (Besson, 2010, pp. 24- 25).

Besson's view that there is an instrumental moral human right to democracy is also the premise of Christiano's arguments for a human right to democracy. This will be discussed in the next section.

b. The Instrumental Moral Conception: Thomas Christiano's Argument for a Human Right to Democracy

i. Overview.

This section will focus on the contribution of Thomas Christiano's instrumental moral argument in favour of a human right to democracy. By looking at his article, "An Instrumental Argument for a Human Right to Democracy," this section aims to show how Christiano's concept of a minimally egalitarian democracy contributes positively to the idea of a human right to democracy.

According to Christiano, there is an instrumental moral right to democracy. Christiano defines the right to democracy as a right to a minimally egalitarian democracy that protects "very urgent moral goods" (2011, p. 175). A minimally egalitarian democracy can be understood as the right to political participation. "Very urgent moral goods" are the rights to "personal integrity" (Christiano, 2011, p. 146 & 148).

There are two main instrumental arguments for a human right to a minimally egalitarian democracy:

- The *domestic peace argument*: minimally egalitarian democracies reliably protect the least controversial human rights, whereas societies that do not have "minimally egalitarian democracies" are unreliable in protecting the least controversial human rights.
- The *international significance argument*: the international community has moral reasons "to be concerned whether a society is democratic or not." (Christiano, 2011, pp. 146-147).

The domestic peace argument and the international significance argument show that there is a moral justification to the human right to democracy:

- There is “a strong moral justification” for countries to be minimally egalitarian democracies” (*domestic peace argument*).
- There is a “strong moral justification for the international community “to respect, and to attempt to protect and promote, the existence of minimally egalitarian democracies” (*international significance argument*).

This thesis will first explain the concepts of a minimally egalitarian democracy and “very urgent moral goods” before moving focusing on the domestic peace argument and briefly discussing the international significance argument.

ii. The Concept of a Minimally Egalitarian Democracy.

A minimally egalitarian democracy is a democracy where there is a “formal or informal constitutional structure” that allows peoples to contribute to political decision making “as equals” (Christiano, 2011, p. 146). Christiano also adds three criteria which have to be fulfilled in order to have a minimally egalitarian democracy:

- People should have “equal votes,” meaning that their vote is formally effective, aka. people should have the power to choose their leaders.
- Every person should have the possibility of being able to run for office and take part in decision-making. This includes the freedom to create political parties, without any fear of violence or repression.
- There is a separation of powers whereupon the independent judiciary balances the power of the executive. Christiano sees this as a genuine part of democracy because it allows a “right to participate as an equal in the collective decision-making of one’s political society”... (Christiano, 2011, p. 146).

After establishing both the definition and criteria for a minimally egalitarian democracy, Christiano also states that the simplest way of understanding this notion of a minimally egalitarian democracy is to view it as a right to participate in political decision-making, aka the right to political participation, stating that there is a “moral justification” to ensure these criteria in society (Christiano, 2011, p. 146). Therefore, Christiano does not argue for “perfect democracy or perfect justice” (Christiano, 2011, p. 174). Instead, various types of democracy conform with the concept of a minimally egalitarian democracy including but not limited to:

presidential systems, proportional representation and parliamentary systems (Christiano, 2011, p. 174).

Thus, the idea of a minimally egalitarian democracy includes different kinds of democracies, so long as they adhere to the three criteria specified above and allow for collective decision-making by the people (Christiano, 2011, p. 146).

Minimally egalitarian democracies are instrumental in safeguarding "very urgent moral goods" (Christiano, 2011, p. 144). "Very urgent moral goods" refer to the prevention of torture, protection against arbitrary imprisonment, murder and enforced disappearances, which Christiano understands as the rights to "personal integrity" (Christiano, 2011, p. 144). The notion that there should be a minimally egalitarian democracy is strongly supported by the "democratic peace" and "international significance argument." The next subsection will place a strong focus on the "democratic peace argument." After that, subsection IV.b.iv will briefly discuss the "international significance argument."

iii. The Domestic Peace Argument: A Support for the Right to Minimally Egalitarian Democracies.

The democratic peace argument is based on numerous studies that "give strong evidence" for the notion that minimally egalitarian democracies reliably protect the rights of "personal integrity" as opposed to societies that are not minimally egalitarian democracies which do not reliably protect these "urgent rights" (Christiano, 2011, p. 148). There are four main elements to the domestic peace argument:

- **Correlation**: there is a "very strong correlation between minimally egalitarian democracy and the protection of personal integrity rights; as well as between nondemocracies and the failure to protect these rights."
- **Democracy as an independent variable**: democracy is a key independent variable that explains the "protection of personal integrity rights."
- **Sequencing:** a sequencing argument demonstrates that newly established minimally egalitarian democracies are able to protect personal integrity rights five years after their establishment.
- **An explanatory model:** a model that shows that "minimally egalitarian democracies protect human rights and other societies do not." (Christiano, 2011, p. 148)

For the purposes of this thesis, the correlation between "minimally egalitarian democracies and the protection of personal integrity rights" will be focused on.

In terms of **correlation,** Christiano in particular refers to the studies of Steven C. Poe, Neal Tate and Linda Camp Keith, which served as a basis for Christiano's empirical approach. Using a statistical analysis, the aforementioned scholars analysed 153 countries from the years 1976-1993 with the aim of explaining why human rights violations take place. They pose two questions for their analysis:

1. Why do some states abuse the dignity of the person?
2. What factors cause leaders to conclude that repression is the most effective means of achieving their ends? (Poe et. al, 1999, p. 293).

The aforementioned scholars also seek to provide answers to the questions above:

- **Answer 1**: state leaders abuse the dignity of the person because it is the most effective and efficient way of achieving their political goals.
- **Answer 2**: domestic threats such as civil war "or when a country is involved in international war" cause state leaders to conclude that repression is the most effective means of achieving their ends (Poe et. al, 1999, p. 293).

Based on these questions and answers, the aforementioned scholars created hypotheses of their expected findings:

- **Hypothesis 1**: repression will increase if there is an increase in threats i.e. if there is a war on a domestic or international level.
- **Hypothesis 2**: repression is more likely in military and communist nations.
- **Hypothesis 3** : repression is less prominent in democracies as opposed to other forms of governance (Poe et. al, 1999, p. 293).

The findings of Poe, Tate, and Keith demonstrate nearly all of the above hypotheses were proven statistically significant, with the exception of economic growth, population change, and British colonial influence, which were statistically insignificant and therefore not proven true (Poe et al., 1999, p. 2 & 96). Therefore, Christiano concluded that having democracies leads to "less repression of the human rights to personal integrity" because "there is a general linear and negative relationship between democracy and the violation of rights to personal integrity"… "the more democracy there is, the less repression of the human rights of personal integrity" (Christiano, 2011, p. 149).

Importantly, however, Christiano mentions that more recent studies show that the relationship between democracies and the protection of personal integrity rights is more complex than just a "general linear and negative relationship." (Christiano, 2011, p. 149 & 151). There are three criteria which democracies have to fulfil in order to reach the quality they need to have a linear negative relationship with personal integrity rights; that means "1 The more democracy there is, the less repression of the human rights to personal integrity" (2011, p. 149). These criteria are fulfilled by minimally egalitarian democracies:

- **Accountability**: the "legislature and executive are electorally accountable to the electorate."
- **Free and fair elections:** there should be no "special obstacles" for persons or political parties. Importantly, Christiano does not mention what "special obstacles" are. Also, more than one political party should be able to contest elections and minorities ought to be strongly present in the legislature.
- **Checks and balances:** there should be "serious checks on executive powers" (Christiano, 2011, pp. 151-152).

Furthermore, it is of note that Christiano uses the Polity IV index in his empirical approach. The Polity IV index attempts "to define a continuum of quality of democratic institutions in particular years from 0-10" (2011, p. 149). According to Christiano, countries count as democracies if they score a 6 out of 10 or above. Countries with a score of 8 that secure political participation rights are egalitarian democracies which protect personal integrity rights better than countries with a score lower than 8 out of 10. Furthermore, Christiano evaluates his empirical data "controlling for other variables such as per capita GDP and ethnic diversity within the population," concluding that there is a correlation between a minimally egalitarian democracy and the fulfilment of personal integrity rights (Christiano, 2011, pp. 149-152; Reidy, 2012, p. 198).

In summary, the "domestic peace argument" shows:

- There is a strong correlation between a minimally egalitarian democracy protecting personal integrity rights. Older studies—such as that from Poe, Neal, Tate, Camp, and Keith—demonstrate that democracies lead to less repression of personal integrity rights. More recent studies suggest that democracies only lead to less repression of personal integrity rights if the executive and legislative are accountable to the

electorate, there are free and fair elections, and the power of the executive is checked. These criteria are fulfilled with minimally egalitarian democracies.

- There is a moral justification for countries to have minimally egalitarian democracies. (Christiano, 2011, pp. 148-161).

This subsection showed how the "democratic peace argument" supports a right to a minimally egalitarian democracy by demonstrating that there is less repression of personal integrity rights in democracies as opposed to nondemocracies. The next subsection will briefly discuss how the "international significance argument" contributes to the discussion of a human right to democracy.

iv. The International Significance Argument and the Human Right to Democracy.

The international significance argument demonstrates that "there is a moral justification for the international community" to respect, protect, and promote "the existence of minimally egalitarian democracies." (Christiano, 2011, p. 161). This argument is composed of two aspects which Christiano derives from empirical studies, notably from Beth Simmons:

- The *democratic peace thesis*: one can expect that democracies do not wage war with each other.
- Democracies are the best form of governance for safeguarding international laws. (Christiano, 2011, pp. 163-164).

The democratic peace thesis asserts that democracies may wage war with nondemocracies and that nondemocracies wage war with other nondemocracies; however, democracies do not wage war with other democracies (Christiano, 2011, p. 163): "There is now a strong consensus that democracies rarely if ever fight each other and that this regularity is not the spurious result of other factors like relative power, alliances, and continuity" (Simmons, 2009, as cited in Christiano, 2011, pp. 163-164).

Therefore, the democratic peace thesis supports the idea that a democracy is a "global collective good." After all, democracies are more likely to fulfil their obligations under international treaties as opposed to nondemocracies. As a result, the international community is morally justified in "attempting to respect, protect and assist in the creation of democracies because it is a good indirect strategy for protecting and promoting" personal integrity rights (Christiano, 2011, p. 165).

This subsection explained the importance of the "international significance argument" to the discussion of a human right to democracy by showing that democracies are important for the "collective global good." Subsection IV.b.v will provide a brief summary of Christiano's arguments.

v. A Summary of Christiano's Instrumental Moral Argument for a Human Right to Democracy.

In summary, Christiano's instrumental moral argument dictates:

- There is an instrumental moral argument for a human right to democracy.
- A human right to democracy is defined as the right to a minimally egalitarian democracy better understood as the right to political participation.
- Minimally egalitarian democracies protect very urgent moral goods which are understood as the rights to personal integrity: prevention of torture, protection against arbitrary imprisonment, murder, and enforced disappearances.
- There are two main instrumental arguments that justify a right to minimally egalitarian democracy: the democratic peace argument and the international significance argument.
- These arguments demonstrate that states and the international community are morally justified in establishing, upholding, and, promoting a "minimally egalitarian democracy." (Christiano, 2011, pp. 148-165).

Christiano advocates for a human right to democracy based on an instrumental moral conception by focusing on empirical evidence.

c. Assessment

This section discusses instrumental moral arguments advocating for a human right to democracy by looking at Besson and Christiano.

i. Besson's Instrumental Moral Conception.

Besson's argument—that there should be a legally enforceable moral human right to democracy—is largely convincing. However, it is difficult to legally enforce the human right to democracy. Human rights should be seen as legally enforceable moral rights; the aforementioned rights highlight special values that cannot be identified with institutionalised

duties and rights. Under a moral conception, people have human rights by virtue of being human. This is also known as the universality of human rights. Furthermore, a moral human right to democracy should be legally enforced. This is because human rights are derived from special interests and needs and should therefore be legally protected (Peter, 2013, p. 2; Campbell, 2004, p. 11).

The idea that there is a moral human right to democracy is contested. Under a political conception of human rights (Peter, 2013, p. 2), they are seen as special rights derived from contemporary human rights practice. A political conception dictates that there has to be public reasoning or public reason, at least in some form. Furthermore, the political conception states that the essential features of human rights are derived from institutionalised relationships between people, their government, and/or other political agents. Human rights, under the political conception, are empirically justified.

In the current political climate globally, it may be difficult to legally enforce the human right to democracy. In 2018, the US based non-profit organisation Freedom House, which advocates for democracy and human rights, stated that democracy—which includes free and fair elections, freedom of the press, and the rule of law—is in crisis. As a notable example, they offered the US, which has seen a decline in political and civil liberties in recent years. The Trump administration (2016-2020) in particular was openly sceptical and regularly expressed hostility to "binding agreements" (Abramowitz, 2018).

There is an instrumental moral human right to democracy. However, the current political climate is often critical to democratic ideals. So whilst the idea of a legally enforceable instrumental moral human right is desirable, the current political climate is not conducive for its enforcement.

ii. Christiano's Instrumental Moral Conception.

For the purposes of this assessment, this chapter will focus on the following two claims:

- **Claim 1:** there is a right to a minimally egalitarian democracy.
- **Claim 2:** democracies reliably protect personal integrity rights; nondemocracies are normally unreliable protectors of personal integrity rights (Christiano, 2011, pp. 146-147).

Christiano's concept of a minimally egalitarian democracy is effective. This is because a minimally egalitarian democracy does not have to be fully just or live up to the ideals associated with democracy. Furthermore, because the concept of a minimally egalitarian democracy does not strive for perfection, it allows for different kinds of democracies (Christiano, 2011, pp. 146 & 174). Therefore, Christiano's right to a minimally egalitarian democracy is not an idealistic right to democracy; instead, it is a realistic standard to be achieved nationally and internationally.

Christiano's claim that democracies reliably protect personal integrity rights is contested. Reidy believes that Christiano's empirical approach is unsound and that it is not true that democracies protect human rights better than nondemocracies. Reidy is critical of this approach because he claims that Christiano's data does not allow Christiano to control variables such as the rule of law. Reidy attempts to make the point that the correlation is not between a minimally egalitarian democracy and the fulfilment of personal integrity rights; instead, the correlation is between the rule of law and the fulfilment of personal integrity rights. Therefore, Reidy states that Christiano cannot rule out that there are nondemocratic countries with a rule of law that fulfil personal integrity rights, China and countries in the Middle East citing as examples. Reidy is therefore critical of Christiano's view that democracies protect human rights better than nondemocracies (Reidy, 2012, p. 199).

However, this criticism is unconvincing: Christiano recognizes that his data could contain nondemocratic countries that fulfil personal integrity rights, because his data contains outliers (Christiano, 2011, p. 170). To Christiano, this does not lessen the correlation between a minimally egalitarian democracy and the fulfilment of personal integrity rights. After all, outliers are to be expected in any statistical analysis (Christiano, 2011, p. 170).

In summary, **Claim 1** is convincing because:

- Democracy does not have to be perfect; it simply has to be minimally egalitarian.
- Different styles of democracies are included.

With regards to **Claim 2**, the following ought to be noted:

- Christiano's claim that democracies are reliable protectors of personality integrity rights is contested.

- Despite criticism against Christiano's empirical approach, there is still a strong correlation between a minimally egalitarian democracy and the fulfilment of personal integrity rights because outliers are to be expected in a statistical analysis.

d. The Rejection of a Human Right to Democracy: A Normative Political Conception and Moral Conception

There is a rejection of a human right to democracy in literature. literature. For the purposes of this thesis, the rejection based on a political conception and moral conception will be discussed by looking at scholars Joshua Cohen and David Reidy. Cohen believes in the normative political conception, whereas Reidy believes in the moral conception. Cohen rejects the human right to democracy because he is a human rights minimalist. Human rights minimalists believe that in order for states to be legitimate, certain human rights have to be included; the right to democratic institutions is not among them (Garcia, 2014, p. 681).

i. Cohen's rejection of a human right to democracy: a political conception

Cohen bases his rejection of a human right to democracy on six reasons:

- Justice requires democracy: Cohen refers to American philosopher John Rawls' notion of justice. According to Rawls, justice means fairness, or an "equal right to participate in the processes of collective-decision making."
- Human rights are a proper subset of the rights founded on justice: so a society that fully protects human rights is not ipso facto just.
- A conception of human rights is part of an ideal of global public reason: a shared basis for political argument that expresses a common reason that adherents of conflicting religious, philosophical, and ethical traditions can reasonably be expected to share.
- That conception includes an account of membership, and human rights are entitlements that serve to ensure the bases of membership.
- The democracy that justice requires is associated with a demanding conception of equality, more demanding than the idea of membership associated with human rights. (Cohen, 2005, p. 226)

- A human right to democracy conflicts with the right to self-determination (Christiano, 2011, p. 172; Cohen 2005, p. 226).

Christiano describes Cohen's argument that human right to democracy would be in conflict with the right to self-determination (Christiano, 2011, p. 172). Cohen believes that societies have to tolerate other societies with different kinds of political concepts. Cohen states some countries are nondemocracies because they object to egalitarian ideas. If there is a human right to democracy then the international community has a moral obligation to protect such democracies. However, if the international community protects such democracies, then they do not tolerate nondemocracies. In other words, according to Cohen, having a human right to democracy means that the international community aims at preserving democracy. Cohen believes that in doing so, nondemocracies are not being tolerated, meaning that their right to self-determination is not being upheld. Therefore, he believes that a human right to democracy threatens the right to self-determination (Christiano, 2011, p. 172).

Even though Cohen rejects a human right to democracy, he does not deny the importance of democracy (2005, p. 227). In fact, Cohen uses instrumental arguments to acknowledge democracy, by stating that it preserves peace, safeguards against famines, and aids in protecting "personal liberties"; therefore, Cohen's objections are not based on a rejection of the institution of democracy. Cohen understands the value of democracy, but does not believe that arguments signifying the importance of democracy can be used to allow for a human right to it (2005, p. 227).

In summary, Cohen believes that democracy is required for justice, justice being fairness as defined by Rawls (2005, p. 246). However, democracy is not a requirement for the realisation of human rights. That being said, Cohen believes that democracies are a valuable form of governance, making a point of stating that democracy leads to a "more just world because it gives people the treatment as equals to which they are all entitled" (Cohen, 2005, p. 246).

ii. Reidy's rejection of a human right to democracy: a moral conception

In contrast to Cohen's political conception, David Reidy rejects the idea of a universal moral right to democracy based on a moral conception (2012, p. 178). He distinguishes between a moral and a legal right to democracy. Reidy recognizes that on an international level, there is,

at least to some degree, a legal right to political participation. However, he does not believe that there is a compelling argument in favour of a moral right to democracy (Reidy, 2012, p. 178). According to Reidy, a human right to democracy is defined as:

> a right to political institutions possessed by each and all persons against the state to which they belong. I set aside the human right to democracy as a right to democratic transnational or international institutions … Now, my focus on the claimed human right to democracy as a universal moral right is a focus on more than the idea that each and every person has a valid moral claim to live within a state with democratic institutions. (Reidy, 2012, p. 178-179)

Reidy states that having "a valid moral claim" to something does not mean that there is a legal right to it (2012, p. 179). This is because a moral claim that has not been recognized in positive law or societal practices cannot act as a right or protect an individual. The question of whether a moral claim is to be recognized as a right depends upon justice, defined here as a system where the common good is guaranteed. Therefore, moral rights, defined as rights that an individual has against the state and society, are "justice-based" (Reidy, 2012, p. 180).

Furthermore, Reidy points out that whilst some human rights can be considered to be "universal justice-based moral rights," not all "universal justice-based moral rights" are human rights (2012, p. 179). Currently, human rights are a subset of "universal justice-based moral rights." However:

> Because it is not at all obvious that each and every universal justice–based moral right possessed by persons against the state or society to which they belong is a matter of special international concern or significance in the foregoing sense, we cannot conclude straightway and without further argument that the universal justice–based moral right to democratic institutions amounts to a human right to democracy. (Reidy, 2012, p. 182)

As a result, it would be a stretch to immediately conclude that there is a moral human right to democracy (Reidy, 2012, p. 182).

Reidy further points out that liberal democracies in the international community also have reasons to allow nondemocracies to seek "recognition, or status, or membership" within the international community (2012, p. 188). To Reidy, this means that there is no human right to democracy. However, he does say that a right to democracy may be an ambition within the

international community. Either way, Reidy makes it clear he is unconvinced with a moral human right to democracy (2012, p. 188).

iii. Assessment of Cohen's and Reidy's Rejection of a Human Right to Democracy.

Cohen and Reidy reject a human right to democracy. The aim of this chapter is to briefly discuss the reasons why Cohen and Reidy's objections are unconvincing. First, Cohen's argument that a human right to democracy conflicts with self-determination will be discussed (Christiano, 2011, p. 172).

Cohen uses the political conception to state that a human right to democracy conflicts with the right to self-determination; Cohen believes that democracies have to tolerate nondemocracies because they would otherwise violate the right of nondemocracies to self-determination (Christiano, 2011, p. 172). However, democracies would not violate the right to self-determination if they chose not to tolerate nondemocracies. According to Christiano's instrumental moral conception this is because nondemocratic societies do not have a legitimate right to self-determination; a legitimate right to self-determination means that a society respects urgent and uncontroversial human rights. However, nondemocracies normally do not respect urgent and uncontroversial human rights. Furthermore, tolerating nondemocracies could potentially be detrimental: if democracies were to indiscriminately tolerate nondemocracies, this would mean tolerating societies that could potentially or actually violate human rights on a huge scale. Thus, there is no conflict with the right to self-determination and the human right to democracy (Christiano, 2011, pp. 172-173).

Reidy argues that there is a universal justice-based right to democratic institutions, but not to democracy; this reasoning is flawed because Reidy stating that there is a moral right to democratic institutions thus inadvertently implies that there is a right to democracy (Reidy, 2012, p. 181). Reidy defines the human right to democracy as a moral claim to live in a state with democratic institutions; he does not, therefore, truly differentiate between a universal-justice based right to democratic institutions and a human right to democracy. Furthermore, according to Reidy, justice determines whether a moral claim is a right, with justice being defined as a system where the common good is guaranteed. This is problematic given that the common good is often used to restrict human rights. Furthermore, Christiano's instrumental moral right to democracy offers a counterargument, namely that there is a moral right to democracy because there are moral justifications to have such a right; empirical

evidence suggests that democracies protect personal integrity rights better than nondemocracies. Therefore, the human right to democracy is more than just a mere moral claim (Christiano, 2011, pp. 145 & 175). When it comes to Reidy's point concerning justice it is important to mention that the common good is often invoked to restrict human rights, showing a further weakness in Reidy's argumentation.

V. Conclusion

This thesis dealt with whether or not a human right to democracy exists, with the human right to democracy being understood as the right to political participation (Christiano, 2011, p. 146; Franck, 1994, p. 73). The issue was analysed by looking at legal texts as well as moral and political reasoning. The legal texts discussed were the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). Furthermore, the thesis discussed the instrumental moral conceptions of scholars Samantha Besson and Thomas Christiano, juxtaposing these to the rejection of a human right to democracy. By looking at legal texts as well as moral and political reasoning, the author of this thesis concludes that a human right to a democracy exists.

On an international level, Article 21 of the UDHR and Article 25 of the ICCPR support the discussion of a human right to democracy to a great extent, despite not mentioning the term democracy. Article 21 of the UDHR and 25 of the ICCPR protect the right to political participation. The omission of the word democracy is neither problematic nor surprising; after all, despite the rise in democracies, much of the world after World War II and the Cold War did not have a democratic style of government (Herre & Rosser, 2013). Omitting the word democracy, therefore, allowed for a higher number of signatories for the UDHR and subsequently the ICCPR. Unlike the ICCPR, at the time of its conception the UDHR was not intended to be legally binding. However, many of the UDHR's provisions became customary international law, developing into binding norms influencing subsequent resolutions and case-law (Australian Human Rights Commission, https://humanrights.gov.au/our-work/what-universal-declaration-human-rights**)**.

In particular, the cases of Namibia and Haiti, *Marshall v. Canada*, and the two Belarussian legal cases as discussed in chapter II showed the importance the UN placed on political participation. The cases of Namibia and Haiti showed a willingness of the UN and

the international community to intervene in a country in order to secure democracy (Pierce, 1996, p. 506). *Marshall v. Canada* showed that the right to participate in the electoral process of a country was a democratic right and the Belarussian cases showed the emphasis that the UN placed on free and fair elections (Hart, 2003, p. 7). In *Korneenko and Milinkevich v. Belarus,* a link between free and fair elections and the right to freedom of expression was established (*Korneenko and Milinkevich v. Belarus,* 2009, para. 8.3). Importantly, the case *Costa v. Spain* stated that there should be a separation of powers, implying that the UN wants to safeguard democracy (*Costa v. Spain,* 2008, para. 3.2). Therefore, despite the shortcoming that the ICCPR applies only to citizens, the UN has shown its support for a right to political participation and a democratically governed country.

On a regional level, Article 3 Protocol No. 1 of the ECHR protects the right to free elections. In order to fulfil the right to free elections, there ought to be freedom of expression as codified under Article 10 of the ECHR (*Mathieu-Mohin and Clerfayt v. Belgium,* 1987, paras. 42 & 54). Case law from the European Court of Human Rights (aka "the Court") showed that on an EU level, an "effective political democracy" is associated with the fulfilment of the right to free elections, as shown by the case *Mathieu-Mohin and Clerfayt v. Belgium.* Furthermore, *Mathieu-Mohin and Clerfayt v. Belgium* demonstrated the interdependency between the right to free elections and the freedom of expression, a notion that the UN also supports (*Mathieu-Mohin and Clerfayt v. Belgium*, 1987, paras. 42 & 54). Therefore, despite the drawbacks of Article 3, as outlined in chapter III.c, the right to free elections and the freedom of expression contribute positively to the discussion of a human right to democracy.

Apart from legal texts, there is the moral and political conception that can be used to advocate for or reject a human right to democracy. There is a human right to democracy on an instrumental moral level, as shown by Besson and Christiano. In particular, Christiano's argument that there is a right to a minimally egalitarian democracy is particularly appealing: his argument confers a right to political participation, considering that there are different styles of democratic governance (Christiano, 2011, p. 146). His is therefore, a realistic standard that could be achieved nationally and internationally.

However, the existence of an instrumental moral right to democracy should be separated from the question of a legally enforceable right to a democracy. Besson, for example, argues that there should be a legally enforceable moral human right to democracy

(Besson, 2010, p. 6). This is somewhat problematic: in the current political climate, it is safe to say that democracy is in crisis, as affirmed by a respected institution, the Freedom House (Abramowitz, 2018).

In conclusion, there is a human right to democracy, understood as the right to political participation. However, due to the current political climate, the current rights to political participation are being eroded. Therefore, the human right to democracy is a worthy goal that is facing challenges. It is the hope of the author that the EU and in particular the UN will display the same willingness to safeguard democracy as they did in the past.

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