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Does a human right to democracy exist?

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This work would not have been possible without the support of my family, friends, and the providers of my scholarship. Most importantly, the guidance of my supervisor has been a pharos that has provided light throughout this journey. Grateful for her suggestions and advice!

...only those who use their freedom remain free, and the strength of a people is measured by the well-being of its weakest members.

- Switzerland's Constitution

Abstract

This thesis deals with the question of the existence of a human right to democracy. After an overview of the gaps regarding the definition of it, and the main arguments presented by the most well-known proponents of the human right to democracy, this thesis shows the shortcomings of the definitions provided. Further, through an in-depth analysis of democracy in the context of the fulfilment of the elements of human rights (inherence, inalienability, fundamentality, equality, universalism), this thesis points out that democracy is not inherent, inalienable, fundamental, equal, and universal. This thesis also demonstrates that a human right to democracy can not be found in the sources of international law. Ultimately, it concludes that there is no human right to democracy.

Kurzfassung

Diese Arbeit beschäftigt sich mit der Frage nach der Existenz eines Menschenrechts auf Demokratie. Nach einem Überblick über die Lücken in der Definition und die wichtigsten Argumente der bekanntesten Befürworter des Menschenrechts auf Demokratie zeigt diese Arbeit die Mängel der bereitgestellten Definitionen auf. Darüber hinaus weist diese Arbeit durch eine eingehende Analyse der Demokratie im Kontext der Erfüllung der Elemente der Menschenrechte (Inhärenz, Unveräußerlichkeit, Fundamentalität, Gleichheit, Universalismus) darauf hin, dass Demokratie nicht inhärent, unveräußerlich, grundlegend, gleich und universell ist. Diese Arbeit zeigt auch, dass ein Menschenrechtsrecht auf Demokratie nicht in den Quellen des Völkerrechts zu finden ist. Letztendlich kommt die Arbeit zu dem Schluss, dass es kein Menschenrechtsrecht auf Demokratie gibt.

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I. INTRODUCTION

The position that people have certain rights is venerable, however, there is a widely accepted understanding that the internationalization of human rights occurred only after the Second World War. Since then, “the concepts and norms of human rights have evolved through several centuries and are now codified under international human rights law.”¹ This evolution has included the emergence of new human rights, the creation of new mechanisms to monitor their implementation, and many other developments. Among these developments is the debate among scholars regarding the existence of a human right to democracy.

There are several scholars² who claim that a human right to democracy exists and for that, they cite various sources, including primarily the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR)³. Moreover, there have been attempts to grasp what a human right to democracy entails. Nevertheless, a clear and precise definition of it remains challenging and seems to be missing in the texts of such authors. Thus, the first chapter of this thesis deals with the issues concerning the definition and points out the first research gap regarding the overall discussion of the human right to democracy.

The following chapters tackle the issue of the existence of a human right to democracy from two perspectives: first, by using the elements (features) that human rights have, as a standard that determines the existence of a human right to democracy; second, by referring to the relevant sources of international law. This way, the second chapter is dedicated to whether a human right to democracy would comply with the elements of human rights. After explaining that human rights differ from other rights based on the fact that they have some elements – inherence, inalienability, fundamentality, universalism, and equality – this thesis argues that democracy does not contain them. Therefore, after measuring democracy against these elements, the conclusion that democracy is not a human right derives from the argument that the elements mentioned above are not enshrined in democracy. Additionally, it gives a critical approach

¹ Ravindran Daniel, *Human Rights in Theory and Practice: An Overview of Concepts and Treaties* (Sage Publications 2022) 3

² Thomas M. Franck, Carol Gould, Thomas Christiano, Anita Horn, Stephan Kirste, Samantha Besson, and Karoline Wimmer, are among the scholars who claim that a human right to democracy exists.

³ Samantha Besson, “The Human Right to Democracy: A Moral Defence with a Legal Nuance” (2010) 5. Accessed on 19 September 2024, through: [Microsoft Word - data0000186881.doc \(coe.int\)](#)

toward the instrumental justification of a human right to democracy, while emphasizing that even if such a justification would be agreed upon, it would not prove that a human right to democracy exists, as the issue of justification is separate from the issue of existence of a human right.

The third chapter takes the discussion from a theoretical-doctrinal level into positive law, as it digs through the sources of international law to assess whether a human right to democracy can be found there. While it might be argued that the Universal Declaration on Human Rights contains a right to democracy⁴, the same can not be said for the International Covenant on Civil and Political Rights, which differs with respect to this right. Moreover, the latter contains the right to self-determination which allows peoples to choose another form of government rather than democracy. Hence, considering this and the fact that the Universal Declaration is not legally binding, it is concluded that a human right to democracy can not be found in international law.

⁴ James Griffin, *On Human Rights* (Oxford 2008) 242

II. THEORETICAL DILEMMAS: THE DEFINITION OF A HUMAN RIGHT TO DEMOCRACY

A discussion over the human right to democracy would be completely nonsense if it did not include a definition of that alleged human right. This issue is very problematic because “democracy” is not a definition initially coined by the lawyers but has a long and autonomous meaning. However, even its original meaning is not static, even though the literal meaning of the term is clear. Nowadays, illiberal democracies, the so-called populist politicians, provoke much debate on whether they should be considered democratic regimes or not.⁵ When “a human right” is added before the dynamic term of “democracy”, the issue of the definition becomes even more challenging.

Since its appearance in Ancient Greece until today, democracy has come a long way. As the title of David Held’s book, “Models of Democracy”, suggests, there have been various models of democracy, such as classical democracy, republican, liberal, and participatory democracy. There are many other terms used, notably direct, representative, deliberative, elite democracy⁶, and so on... However, what is relevant for this thesis is the main component of democracy, which is the rule by the people. The scope of democracy, for the author of this thesis, is broad: since people govern/rule, they are the ones who decide on political matters. This involves an active and continuous role from citizens, and not just participation in elections. Thus, the understanding of democracy throughout this thesis is the same as the definition given by David Held, which describes democracy as a system where “everyone⁷ should govern, meaning that they should be included in the drafting of the laws, setting the general policy, enforcing the laws, and government administration. Everyone must be personally involved in decision-making.”⁸ Hence,

⁵ For that, read: Jan-Werner Muller, *What is Populism?* (University of Pennsylvania Press 2016). There, the author analyses the dilemma extensively. Additionally, the authors that are cited in that work may be used for further references as well.

See also: Yuval Noah Harari, *21 Lessons for the 21st Century* (Penguin 2018). Throughout the book, in several chapters, the author tackles the dilemma of illiberal democracies.

⁶ David Held, *Modellet e demokracisë* (3rd edn, first published in 2006 in the original title “Models of Democracy”, Cuneus 2011) 7

⁷ Note from the author of this thesis: David Held does not use the term “everyone” in an absolute (ad litteram) way, as there are some categories of individuals excluded for objective reasons (those underage, non-citizens, etc.). Thus, by “everyone”, he means every individual that has the right to participate in elections.

⁸ David Held, *supra* note, 3.

democracy should not be understood as a system where citizens participate in elections and remain passive for the whole mandate, while those who govern decide in the way that they want for political matters. Contrary to that, they should include citizens in the decision-making process; they can not be satisfied with a simple consultation with the citizens if, in the end, their decisions differ from the will expressed by those citizens during consultations. Hence, democracy has a substantial meaning, which involves not merely the right to participate, but foremost the right to decide. Therefore, democracy is a system that guarantees that each important decision is taken in accordance with the will of the citizens. As Lowery emphasizes, “the consent of the governed and majority rule—are central to all theories of democracy”.⁹ Hence, decisions made by those who govern should always seek the consent of those who are governed. Due to efficiency, decisions on minor issues do not need to follow this strict rule of collective decision-making. Each country should find the means to implement democracy and make it as much practical as possible. Scholars offer various models of how this can be reached: for instance, Emerson has elaborated on different methods, pointing out that “democratic decision-making could be so much more than divisive debates and majority votes. There are voting procedures by which collective opinions can be accurately identified. The Condorcet system can be used to identify a majority opinion; the MBC can be used to identify a consensus opinion; and the true majority opinion and the consensus opinion will often coincide.”¹⁰ A good example, which might serve as a role model, is the Republic of Switzerland: for instance, “on 29 November 2009, the Swiss people and cantons voted in favour of the popular initiative entitled “Against the Construction of Minarets”. In doing so, they also voiced their approval of a new provision in the Swiss Constitution: “The construction of minarets is prohibited” (article 72, paragraph 3).”¹¹ In its Constitution, Switzerland guarantees to its citizens the right to participate in decision-making, most notably via mandatory referendums, but also through initiatives and other referendums. In this regard, in popular initiatives requesting a partial revision of the Federal Constitution, “if the Federal Assembly is in agreement with an initiative in the form of a general proposal, it shall draft the partial revision on the basis of the initiative and submit it to

⁹ Zoe Lowery, *Democracy* (Britannica 2014) 39

¹⁰ Peter Emerson, *Defining Democracy: Voting Procedures in Decision-Making, Elections and Governance* (2nd edn, Springer 2012) 44

¹¹ Switzerland’s Federal Office of Justice, *Minarets* (2010). Accessed on 9 September 2024, through: [Minarets \(admin.ch\)](https://www.admin.ch/minarets)

the vote of the People and the Cantons. If the Federal Assembly rejects the initiative, it shall submit it to a vote of the People; the People shall decide whether the initiative should be adopted. If they vote in favour, the Federal Assembly shall draft the corresponding bill.”¹² This is a typical example of democracy, as citizens have the right to override the decision of the Federal Assembly. Consequently, in this context, even the highest authority in Switzerland can not decide in a different way from the citizens. At the same time, this should not be interpreted in a way that only direct democracy can accomplish democracy as a system where every citizen has the right to be involved in decision-making: representative democracy can ensure that too, especially in big countries. However, that can only happen if the representatives act following the will of those whom they represent. In doing that, they should be in close contact with the people to understand their preferences. Therefore, democracy requires democratic institutions and procedures.

To illustrate the description of democracy as a right to participate in decision-making and not merely in consultations, we are going to use an example from the practice, provided in the article “Is Participation Without Power Good Enough?”, which has a very interesting title: a rhetorical question. There, the author explains how she and “4,500 New Yorkers gathered in a giant convention center to deliberate over what to build on the site of the former World Trade Center”¹³, only to see their views being ignored in the end, as the proposals they voted for were not taken into consideration by those in power. Thus, the deliberations that took place in New York were just a façade. These words describe it perfectly well:

“When the master of ceremonies for the event gave a “brief pep talk on how the meeting was democratic as all get out because ‘in democracy, the people have a chance to speak!’” Sorkin had had enough. He stood up and yelled, “Buuuuuulllllshiiiiit! Democracy means the people have the power to choose!”¹⁴

“Critics like Sorkin ask whether public deliberative forums really count as democracy. The people get to speak, but they have no control over the final decisions that are made.”¹⁵

¹² Switzerland’s Constitution of 1999 with amendments through 2014, Article 139. Accessed on 9 September 2024, through: [Switzerland_2014.pdf \(constituteproject.org\)](https://www.constituteproject.org/Switzerland_2014.pdf)

¹³ Francesca Polletta “Is Participation Without Power Good Enough?” (The Sociological Quarterly, 55:3, 2016) 453

¹⁴ Ibid, 454

¹⁵ Ibid

For the author of this thesis, the answer to that question is clear: no, that does not count as democracy. Democracy ought to be understood as something more than a right to vote and a right to participate in consultations/deliberations.

On the other hand, human rights are based on the inherent dignity that each human has, regardless of ethnicity, gender, sex, religion, or any other feature. As Ravindran Daniel notes, “What makes human rights law different from other legal rights is that human rights are rights that are held simply by being a human. They are based on the notion of the inherent dignity of every individual. They cannot be given or withdrawn by any ruler or legal system.”¹⁶ Andrew Heard, too, acknowledges that human rights are “viewed as arising essentially from the nature of humankind itself. The idea that all humans possess human rights simply by existing and that these rights cannot be taken away from them are direct descendants of natural rights. Human rights may be those entitlements that we have by virtue of being human.”¹⁷ While in the past there were several conditions and subjective criteria that were required from humans in order for them to enjoy a set of rights, such as owning a property, being men and not women, being white, etc., the foundation of human rights in the inherent dignity means that, in principle, nothing is required from humans (except some objective criteria that are not unlawful, such as age) to benefit from human rights. Hence, the nature of humans, which endows them with dignity, is the foundation of human rights. Due to that, human rights are inherent, inalienable, fundamental, universal, and equal. These elements of human rights serve as a “yardstick” to measure the existence of a human right to democracy.

As was already pointed out in the introductory part, one of the gaps that exists in the debate over the human right to democracy is the definition itself. In this context, we will search through the writings of the authors that support the idea that a human right to democracy exists, to find an acceptable definition or at least some common denominators, and in another chapter, the search for a definition will be concentrated at the sources of international law, mainly ICCPR and UDHR.

¹⁶ Ravindran Daniel, *supra note*, 38

¹⁷ Andrew Heard, *Human Rights: Chimeras In Sheep's Clothing?* (1997). Accessed on 10 September 2024, through: [Introduction to Human Rights Theories \(sfu.ca\)](https://www.sfu.ca/~humanrights/introduction.html)

A. What is meant by “A human right to democracy”?

Democracy has been a matter of discussion since the time of old Greek philosophers, who dedicated some parts of their works to it. Thus, for millennia, democracy has been a research topic that has drawn the attention of philosophers, political scientists, and sociologists, but not that much of lawyers. However, democracy has found a deserved place among legal scholars as well: not only for the relations and impact that democracy has on the rule of law and human rights, but also for the possibility of considering democracy as a human right in itself. Thus, there are now many writings about this topic and obviously the first issue that needs to be tackled by an author that writes about the right to democracy is the definition of it: what is a right to democracy, what does it entail, what kind of authorizations does it give to the rightholders, what obligations does it put on states, and so on...

One of the most prominent authors who brought up the idea of the existence of a human right to democracy is Thomas Franck. First, in 1992 he published an article, which would become very influential, “the emerging right to democratic governance”. The title in itself is interesting because it suggests, indirectly, that the right to democratic governance is not yet established, but it is on the verge of being so. There he begins with the democratic entitlement, which for him means that “governments’ just powers derive from the consent of the governed”¹⁸, and he adds that what is giving proliferation to this democratic entitlement is “the craving of governments for validation”.¹⁹ This last term, validation, plays a crucial role in his work, as he interconnects the validation of a government in the international arena (meaning by other states) with democracy. For him, “democracy is beginning to be seen as a sine qua non for validating governance”²⁰, and there are “emerging rules of international law, by which governance is monitored and validated. Legitimacy of each government will be measured by international law rules.”²¹ There are three building blocks to this emerging right: self-determination, free political expression, and the right

¹⁸ Thomas M. Franck, “The emerging right to democratic governance” (The American Journal of International Law, Vol. 86, No. 1, 1992) 46

¹⁹ Ibid, 50

²⁰ Ibid, 46

²¹ Ibid, 50

to participate in free and open elections, which he also calls them as “three generations of the democratic entitlement”.²²

Despite that a clear definition of a human right to democracy is not given in that article, it seems that Franck understands it as a right to participate in choosing the government. This is a narrow conceptualization of the human right to democracy, as it will be seen in the upcoming pages, especially when comparing it with other definitions given by other authors, but even by Franck himself in his later writings. Nonetheless, it might also be argued that his understanding of democracy as a human right is the same as the one enshrined in the UDHR, as he claims that the right to self-determination “now entitles peoples in all states to free, fair and open participation in the democratic process of governance freely chosen by each state.”²³ Taking into consideration that he considers self-determination as a component of a human right to democracy, it could be argued that this definition applies to the latter as well. Furthermore, one can argue that his opinion on the issue of validation is extensively idealistic because states do not pay that much attention to the “validation” by other states. Matter in fact, practice shows that not only there are many states that do not make any attempt to be democratic, but even other states cooperate with them, especially when they have particular interests (for instance, one of the many examples can be the cooperation that the United States have with Saudi Arabia, despite the lack of democracy in the latter). Thus, his central argument that the democratic entitlement is turning into a rule of international law because a non-democratic state will not be admitted by other states and the international community can impose measures against such states, seems unrealistic and not convincing at all. Nonetheless, his argumentation is more precise and clear in his second article, published just two years later.

In 1994, “Democracy as a Human Right” was published in ‘Studies in Transnational Legal Policy’, as an essay which incorporated parts of the first article, and also the author's 1993 General Course in International Law at the Hague Academy of International Law (Recueil de Cours). According to Franck there, “the right to democracy is the right of people to participate, to be consulted, in the process by which political choices are made. It seeks to ensure meaningful participation by the governed in the political consultation process that shapes the quality of their

²² Ibid, 77

²³ Ibid, 59

lives and societies.”²⁴ However, even in this article, Franck shows a dose of skepticism, as he acknowledges that “While democracy has long been a right of people, this is not truly universally.”²⁵ He analyses the process of the evolution of the democratic entitlement in international law, but does not declare that it has finally turned into a rule in international law. Thus, he still maintains the position that this right is in its embryonic phase. Franck sticks to his initial assertion about the consent of the governed, explaining the meaning of democracy as “the kind of governance that is legitimated by the consent of the governed. Essential to the legitimacy of governance is evidence of consent to the process by which a populace is consulted by its government. The key word in this definition is legitimation, which is a continuing – not a static – concept. To be legitimate, the democratic process of consultation must constantly be revalidated by the people being governed: for example (but not exclusively) by their active participation in elections. At the core of the definition, therefore, is the legitimacy not of any particular set of rules but of the process by which the rules are made and revised.”²⁶

Though the second article written by Thomas Franck is more precise and better structured than the first one, considering that he gives a clearer definition of the human right to democracy, there are still several dissatisfactions that originate from that article. To begin with, he describes democracy as a right of people. Thus, although he does not make a clear *ad litteram* statement on whether democracy for him is an individual or a group right, it stems from his definition of a human right to democracy as a right of “people” and not of “individuals”, that he classifies democracy to the second category (group rights). Does this suggest that a membership is required, meaning that if an individual seeks to benefit from the human right to democracy, he must show that is part of the group? If the answer is yes, what kind of group are we talking about? Is it necessary to have the citizenship of the particular state in order to be part of that “group”, or is there any other condition? To get in practical terms, if we take as an example indigenous rights, which are part of group (also called collective) rights, there is no doubt about the features that this group has. There is a definition of the term indigenous and it is well-known what is expected from an individual to benefit from the rights of Indigenous peoples. Put in short

²⁴ Thomas M. Franck, “Democracy as a Human Right” (Studies in Transnational Legal Policy, 26, 1994) 73

²⁵ Ibid, 74

²⁶ Ibid, 75-76

and simple terms, if an individual wants to know whether he can enjoy the rights that Indigenous peoples have, he should verify that he is part of that group (i.e. has a unique traditional culture, an old relationship with its native land, etc.). An even more typical example can be the right to self-determination, which is perhaps the most classical group right, as it can be exercised only by peoples, and not individuals. There, the group of individuals should verify whether they constitute a “people” or not. The elements which define Indigenous peoples, and people in terms of self-determination, are known. Hence, every individual should be able to know, at least approximately, whether he can claim the rights of these groups or not. These two examples also show a difference: while both of them are group rights, even a single person can claim Indigenous peoples rights (e.g. a member of an Indigenous people called “X”, which have lived for 1000 years in the place called “Y”, can claim that he has rights, as a member of the Indigenous people, even if no other member of that people is alive, and he is the only remaining member of that Indigenous people), meanwhile when it comes to self-determination an individual can not do the same thing. Going back to the definition given by Thomas Franck, there is ambiguity, as individuals can not know whether they can enjoy these rights alone, or just as a group. Interestingly enough, in one of the cases that he referred to, related to self-determination in ICCPR, which the author regards as a norm relevant to democratic entitlement, “the Human Rights Committee rejected as inadmissible a claim by a Grand Captain of the Mikmaq tribal society that Canada was denying his people their right of self-determination, based on the applicant's inability to demonstrate that he was authorized to represent the tribe”²⁷, suggesting that the author might hold the opinion that the human right to democracy belongs to people as a group and individuals can not bring claims in their own, but only as representatives of the whole group. Moreover, it is unknown whether the definition of “people” is the same as the one used in the context of self-determination – although it looks like that is the case due to his references to ICCPR and the right of self-determination – or it has another meaning. Thus, the notion “people” makes the right to democracy in Frank’s work even more ambiguous. As Brownlie and Crawford note, “There has been wide disagreement over the meaning of ‘peoples’.”²⁸

²⁷ Ibid, 84

²⁸ James Crawford, *Brownlie’s Principles of Public International Law* (8th edn, Oxford 2012) 647

In addition, even the other terms used by the author are very ambiguous. For instance, he did not provide an explanation of the process of consultation which should take place, bearing in mind that “to be consulted” plays a central role in his definition of a human right to democracy. Furthermore, this consultation should take place “in the process by which political choices are made”, but one can only have assumptions on the meaning of the “political choices” that Franck refers to: is every choice that a politician make in his mandate a political choice? He sheds some rays of light in the conclusion when he writes that “the democratic entitlement seeks to ensure persons' right to be consulted about key issues of governance”²⁹, but yet again it is unclear as to what should be considered as a key issue of governance, and who is entitled to decide upon that. Last, but not least, it remains unclear what is the role of the people in the process of consultation, i.e. what happens if they are not pleased with a decision that is made after that process. When Franck notes that the essence is the consent to the process, he indicates that the end is not relevant. Consequently, this would make the whole human right to democracy a formality, when people have the right to participate in the process, but in the end the politicians decide independently on the choice they want to make.

Another famous author who defends the idea of the existence of a human right to democracy is Carol Gould. While Thomas Franck has been criticized on the basis that “democracy, for him, seems to be reducible to regular elections, for the most part”³⁰, Gould extends the notion of democracy “considerably beyond its rather bare understanding in the recognized international human rights as a matter simply of the free and universal election of representatives. Democracy is a form of decision-making involving equal rights of participation among the members of a given community or institution, applying to all intensionally defined communities (that is, where people take themselves to be part of a community or engaged in “common activities” defined by shared goals).”³¹ Gould’s approach seems defective taking into consideration the possibility that many individuals might not be part of the community. She does not explain the meaning of the term “community” which she uses and the conditions to be part of it. It is hard to imagine an all-inclusive community. For instance, nation-state, as a community, does not include stateless

²⁹ Franck, “Democracy as a Human Right”, *supra note*, 94

³⁰ Roberto Gargarella, “Democracy’s Demands” (American Journal of International Law, Vol. 112, Cambridge University Press 2018) 76

³¹ Carol C. Gould, “The human right to democracy and its global import”, in Cindy Holder and David Reidy (eds), *Human Rights: The Hard Questions* (Cambridge University Press 2013) 286-292

people. In another related article, she writes about “radical democracy, endorsing a requirement for it in a range of associations and communities beyond those currently recognized”³², making the issue of the community even harder to understand. It seems that her understanding of community is quite broad and includes nation states, too, as well as communities that go beyond borders, as the author is focused more on the global rather than national level, and introduces some ideas on how to install democracy in international and transnational institutions, including creating new international institutions, such as a global assembly which would represent individuals from all over the world. In addition, in a similar way with Franck, she does not offer any concrete description of the participation in the decision-making, especially how can democracy secure equality there.

Thomas Christiano, too, mentions certain rights and freedoms, such as the freedom of association, expression “at least regarding political matters”, and writes that this “cluster of rights can be characterized simply as a right to participate as an equal in the collective decision-making of one’s political society, which I refer to as a right to democracy.” Further, a human right to democracy has several requirements: “...persons are able to participate as equals in the collective decision-making of their political society. It can be more precisely characterized in terms of the following three conditions: (1) Persons have formally equal votes that are effective in the aggregate in determining who is in power, the normal result of which is a high level of participation of the populace in the electoral process. (2) Persons have equal opportunities to run for office, to determine the agenda of decision-making, and to influence the processes of deliberation. (3) Such a society also acts in accordance with the rule of law and supports an independent judiciary that acts as a check on executive power.”³³ In the conclusion part he writes that “there is a human right to democracy understood as a minimally egalitarian democracy based on two claims: first, there is strong moral justification for states to realize minimally egalitarian democracy because such democracies are normally necessary and reliable in protecting fundamental human rights of personal integrity; second, there is moral justification for

³² Carol C. Gould, “Structuring Global Democracy: Political Communities, Universal Human Rights, and Transnational Representation” (Blackwell Publishing Ltd 2009) 29. Accessed on 18 August 2024, through: [STRUCTURING GLOBAL DEMOCRACY: POLITICAL COMMUNITIES, UNIVERSAL HUMAN RIGHTS, AND TRANSNATIONAL REPRESENTATION \(carolcgould.com\)](https://www.carolcgould.com/structuring-global-democracy-political-communities-universal-human-rights-and-transnational-representation)

³³ Thomas Christiano, “An Instrumental Argument for a Human Right to Democracy” (Wiley Periodicals, Philosophy and Public Affairs 39, no. 2, 2011) 146

the international community to attempt to protect and promote these democracies because they protect fundamental human rights and because international protection of democracy is a plausible indirect strategy for the protection of the human rights to personal integrity.”³⁴

Franco does not show indifference towards minorities as he notes that they should be protected by the law and be given equal opportunities, and expresses optimism that this “will result in minorities having a significant place in the legislature.”³⁵ However, he does not give any explanation as to how can minorities find a place in the legislature, and how is the equality between them and majorities going to be ensured – a challenge which will be discussed later on. Moreover, he does not neglect the dilemmas regarding the character of a right to democracy in terms of whether it is an individual or a group right, as was already mentioned in the analyses of Thomas Franck’s arguments. “Some might worry that the right to democracy is not really an individual right because the right to participate is normally effective in promoting the morally very urgent goods only if many others exercise the same right. But the rights to a fair trial, freedom of association, and freedom of expression are similar. My right to a fair trial will not be effective if others do not have the same right and are frightened into giving false testimony or not giving exculpatory testimony. Another worry is that my urgent interests would be no less protected if I alone lose the right to participate in a large society. But this is also true of freedom of expression. Many traditional individual rights have collective dimensions to the extent that the effectiveness of each person’s rights dependson others having the same rights and exercising them”³⁶, he adds.

Stephan Kirste defends the idea of the existence of five groups of human rights. What matters for our topic is the third group, which, in his words “regulates the active participation of man in the three powers of the legislature, the executive and the judiciary. It ensures human participation in the establishment, concretization, and enforcement of rights, obligations, and the common good by public authority.” Commenting on the Article 21 of the UDHR, his interpretation is that “every human being has not only the right to be involved in the establishment of public authority, but also to be able to participate in its exercise by the administration in the same way as everyone

³⁴ Ibid, 176

³⁵ Ibid

³⁶ Ibid, 166

else. The granting of rights should be an expression of the political autonomy of citizens. Human rights ensure the participation of the individual in various discourses. Seyla Benhabib has argued that Arendt's idea of the right to have rights means an individual right to inclusion in discourses. The negative rights of the status negativus and the protective and participative rights of the status positivus should not be granted without but based on the political participation rights of the status activus. Persons would be merely the object of a granting of rights that they themselves had not authorized. To avoid this, they must have a free and equal opportunity to participate.”³⁷

There are several remarks in the context of his definition of the human right to democracy. Like the previous authors, his understanding of a human right to democracy is intrinsically linked with participation. However, participation for him is a wide, more comprehensible, term, as Kirste is not satisfied with participation in legitimating the public authority, i.e. choosing a party/coalition to govern the country, but he also requires an active role in governing. Such a role for him is particularly important in the legislative area because humans are legal subjects, and, as such, they should use the autonomy they have, to be involved in lawmaking processes. However, he does not give any explanation about the level of this participation. What that means in practical terms remains a mystery. He does not clarify whether a consultation with every citizen is sufficient in every legislative initiative, or something more is required: i.e. consent from the citizens. This second option is not applied in representative democracies, except in referendums which take place very rarely, and only for highly important or controversial issues. Furthermore, he claims that the human right to democracy, which practically means to have an active role in exercising public authority, belongs to every human being. However, he neglects the fact that this participation, that forms the very essence of his interpretation of the right to democracy, is subject to the fulfilment of several preconditions, and, consequently, is not granted to every human being.

Anita Horn follows a minimalist approach and describes the right to democracy as a right to minimal political participation, but additionally offers an alternative to the human right to democracy, which she names as the right to voice. “The human right to voice can be defined as a right that secures the individual political right to complain, or organize to complain or to protest

³⁷ Stephan Kirste, “The formal and substantive core of human rights” (Humanities and Rights, Global Network Journal, Vol.1, Issue 1, 2019) 25-48

if, for example, the individual becomes endangered or harmed within the society it is living in. The predominant rejection of a comprehensive human right to democracy cannot be seen as sufficient reason to deny the ethical human rights value of democracy in general. To avoid throwing the baby out with the bath water, the categorical repudiation of a human right to democracy should be replaced by the promotion of the softer and universally justified moral claim for a human right to voice.”³⁸

B. Assessment

As it can be seen from the definitions and descriptions of the most prominent authors that defend the existence of a human right to democracy, despite the differences that exist among them, there are nevertheless some common denominators that form the definition of such a human right. From these common terms that can be found in their writings (including the authors such as Thomas Franck, Thomas Christiano, Stephan Kirste, Carol Gould, Seyla Benhabib, Anita Horn), a definition of a human right to democracy can be drawn as a right to participate, on equal terms, in the process of decision-making. This is the position that is maintained by supporters of the human right to democracy. Participation forms the key term and is understood more in a formal, rather than substantive way, meaning that what matters is the procedure to be democratic, the result is irrelevant. Also, this participation is thought to apply to important decisions, and not to every decision or political choice. This is understandable because there are numerous decisions that those in power have to make everyday, but only those that considerably affect the lives of individuals should be taken into account in this context. The second key term is equality, which suggests that no person participating in the processes where decisions are made should have more rights than others. In addition to this, those authors admit that the human right to democracy is a combination, or somehow a product, of other existing rights, such as: the right to vote, freedom of expression, assembly, and association. Subsequently, as a conclusion on this point, three features can be drawn from the dominating definition of a human right to democracy: i) political participation; ii) equal status of participants; iii) indivisibility of the human right to democracy from other similar rights (the ones mentioned).

³⁸ Anita Horn, *The Human Right to Democracy* (De Gruyter 2019) 100-115

Nevertheless, some issues are left uncertain and not fully substantiated with proper argumentation. The definition of the human right to democracy by those scholars who claim that such a right already exists is far from being convincing for the author of this thesis, who maintains that a human right to democracy should involve more than what those authors claim, because, after all, democracy has always had the meaning of governance, and governance is greater than participation. Even a proponent of the human right to democracy, Pablo Gilabert admits that “being consulted, being allowed to dissent and appeal, and being given explanations is not likely to be enough.”³⁹

A human right to democracy should have a substantive meaning, not just a formal one. As the European Court on Human Rights prefers to frame it for the rights guaranteed under the Convention as “not theoretical or illusory rights, but rights that are practical and effective”⁴⁰, the same should apply to a human right to democracy. This implies that every citizen, under an equal status, should have the right to decide in important matters, and not merely participate in consultations. Any kind of political decision (for important matters) which does not have the consent of the citizens that participate in decision-making – using their human right to democracy which has participation in its essence – must be regarded as a violation of the human right to democracy. Since democracy ought to be a right, and not an obligation, citizens might refrain from using it by not participating in these processes. Hence, in principle, the consent required for a decision to be considered legitimate must include half+1 of the citizens who use their right. Whenever more than 50% of the citizens give their consent, it is to be considered democratic.

We can see the difference between the requirements of a human right to democracy from the perspective of the author of this thesis and the requirements from the perspective of some of the authors mentioned above: in this author’s view, the human right to democracy should not be considered as a simple formality, where citizens participate in discussions for important decisions but in the end, those in power may decide unilaterally however they want. For most of

³⁹ Pablo Gilabert, “*Is there a Human Right to Democracy? A Response to Joshua Cohen*” (Revista Latinoamericana de Filosofía Política 2012, Vol. 1, No. 2) 3

⁴⁰ Jeremy McBride, “The Doctrines and Methodology of Interpretation of the European Convention on Human Rights by the European Court of Human Rights” (Council of Europe 2021) 10. Accessed on 19 August 2024, through: [1680a20aee \(coe.int\)](https://www.coe.int/t/0900416800a20aee)

the authors that were cited in this chapter, the result is not relevant. However, some of them, such as Kirste, or even Benhabib, seem to fall more into the second group of perceiving the human right to democracy as a right which gives authorizations that are higher than simply participating and go beyond that; more or less, a right to self-govern, which means having a decisive role and not merely being participants only. Regardless of this, they do not elaborate on their position on this issue very clearly. Nonetheless, the outcome of the process matters as much as the outgoing of the process: both of them must be democratic. After all, as James Griffin rightly states, “it is not just a matter of the people’s having a say, because a say can be ignored.”⁴¹ A human right to democracy should be perceived as a right of means and result. Every political decision on key issues that falls short of at least one of the components (means or result) should be considered a violation of the human right to democracy. This way, citizens should be able to sue their governments before national courts, requesting from them to annul non-democratic decisions *ex tunc*. Such decisions should be regarded as null, meaning that they should never create consequences. This should be the remedy for individuals when their human right to democracy is not respected or fulfilled, and not the remedy of changing those in power through periodic elections because they occur usually every four years. If citizens should have a human right to democracy, they should have it every day, and states should protect it immediately after it is violated. To offer the citizens the possibility of “revalidation” of the government through elections is not sufficient; it is an ineffective protection because it leaves citizens without protection for a large amount of time. For instance, if a government makes an important decision while not offering its citizens the opportunity to participate in the discussion over that decision, or in the end it decides contrary to the will expressed by the participants, meaning that it has violated their right to democracy, and it does this at the beginning of the mandate (let us assume, in their second day of the mandate), the logic that the citizens have the right not to validate again that government and may choose another one in the next elections will lead to a situation where those citizens will be left without a remedy for four years (if that is the period, which in most of the states is). This remedy would be inadequate and can not be considered as effective. Just as a random violation of a human right that requires immediate response from the state, so does the right to democracy, if it seeks to be considered as a human right. For instance, when someone’s

⁴¹ James Griffin, *supra* note, 244

right not to be held in slavery is violated, the state can not stay passive for four years, but it must immediately initiate an investigation and take measures in an efficient way, which requires promptness. Hence, as a human right, democracy should be enforceable/justiciable. As Hilary Charlesworth notes, there must be “some measures of accountability for its breach.”⁴²

By now, it is clear that the concept of a human right to democracy taken in this thesis is somehow broad. However, this idea is not unknown: not only some authors analysed above express their understanding of it as something more than mere participation, but also other authors such as Anita Horn, who writes about “a human right to democracy in the form of an individual right to certain forms of political participation and political decision-making.”⁴³ Even though Horn itself follows a minimalist approach, considering her stance that “the argument for a human right to democracy defined as a basic right to minimal political participation (in the sense that every individual must have the possibility to object and to claim support against the experience of severe injustice that it experiences within the political community he or she is living in), will be supported”⁴⁴, she recognizes that, beyond participation, there can be a higher level that includes decision-making as well. The only difference in this context is that the outcome of the process (meaning the decision) must be democratic, just as the process as a whole in its entirety. This can be reached by consultation too, but also by other means such as referendums, popular initiatives, plebiscites, etc. Nonetheless, the scholars that promote the human right to democracy mention only “consultation”, although they do not describe it. A consultation, where the authorizations of the citizens do not involve only the right to participate in the consultation, but also a right to have a say – in equal terms – on the decision, where in the end the decision would reflect the overall will, would fit perfectly in our understanding of the human right to democracy as something that includes the right to decision-making in important governance matters.

There are at least two areas of concern regarding a human right to democracy: one is related to equality – another key term – among participants, especially concerning minorities, and will

⁴² Hilary Charlesworth, “Is there a human right to democracy?” in Cindy Holer and David Reidy, *Human Rights: The Hard Questions* (Cambridge University Press 2013) 281

⁴³ Anita Horn, *supra note*, 2

⁴⁴ *Ibid*, 6

be discussed in the second chapter, meanwhile the other is related to the right of self-determination.

Human rights have always come as a package, be it in theory when authors and various subjects wrote about the idea that individuals have some human rights, or in documents recognizing them, which contain a whole list of such rights. This suggests that they are always in a correlation with each other; they are interdependent. Hence, because they are all connected in one way or another with each-other, they need to be in conformity, despite that there might always be cases when they collide. This way, a human right to democracy would have to be in conformity with the existing rights. In this sense, perhaps the most problematic issue would be regarding the right to self-determination: how would a human right to democracy fit in a system of human rights that entails the collective right of people to self-determination?

The relationship between self-determination and the human right to democracy has always been interesting and it has gained the attention of the authors that deal with the issue of the human right to democracy. For instance, a proponent of the latter, Thomas Christiano, addresses the issue of self-determination, while maintaining that democracy, as a human right, would not have any negative effect on self-determination. First, he tries to argue that there is no need to talk about the right to self-determination in the absence of democracy, because “normally, the absence of minimally egalitarian democracy seems to imply the absence of legitimate collective self-determination. Furthermore, the second condition is rarely met in societies except if they are minimally egalitarian democracies. Indeed, in every region a majority seems to prefer democracy, at least in the modern world.”⁴⁵ Nevertheless, he admits, at least hypothetically, that democracy is not a *conditio sine qua non* for the right of self-determination, when he writes: “Suppose it is true that a society nearly unanimously accepts nondemocratic rule but not the other kinds of human rights violations and that these violations do not occur.”⁴⁶ In such cases, the solution, according to Christiano, is to be found at “two plausible political principles that might be invoked here in support of the right of collective self-determination that do not conflict with the human right to democracy. The first principle is the *volenti* principle: that one does not do injustice voluntarily to oneself. This principle is often used to limit the impact of principles on

⁴⁵ Thomas Christiano, *supra note*, 173

⁴⁶ *Ibid*, 174

persons. And if near unanimity for nondemocracy holds in society, perhaps we can say that the people involved are not doing injustice. The second principle may attach to the human right to democracy as it does to many rights. Many rights come with normative powers that permit one to waive the right in question. If we have near unanimity, perhaps we can say that the members of the population of the non-democratic society are exercising the normative powers attached to their rights to democracy to waive the right to democracy. Either of these theoretical alternatives could explain why even though there is a human right to democracy, a particular society need not be democratic. Furthermore, both of these theoretical alternatives explain why the defenders of nondemocratic societies maintain the condition of near unanimity. The absence of unanimity would undermine the use of either of the two principles to support nondemocratic regimes.”⁴⁷

Similarly, for Thomas Franck the relationship between the human right to democracy and the right to self-determination is positive. We already saw that he considered self-determination as a building block of the human right to democracy. Meanwhile, another author who supports the idea of a human right to democracy, Anita Horn, argues that such a right “must be understood as a right potentially against one’s own government or people, even if it is democratically established. For example, this could be the case if a democratic government is transformed into a tyranny of the majority through the power of a people’s ideology. Thus, the idea of a human right to democracy acquires its normative force by being interpreted as protective of the value of individual self-determination rather than of collective self-determination.”⁴⁸ These views suggest that Horn admits that a human right to democracy and the right to self-determination can conflict each-other. In that case, for her, the first right serves as a protection against the second. However, in reality, the protection given to each individual is secured by other human rights (most notably in this context the right not to be discriminated against).

Thus, for the scholars that argue in favour of a human right to democracy, there are no conflicts between these two rights, as the right to self-determination is seen as an expression of the human right to democracy, but also vice-versa. In their understanding, there is a symbiotic relationship between these two rights. However, they seem to neglect an important element: what if, people decide to choose an absolute monarchy or any other regime which is simply not

⁴⁷ Ibid

⁴⁸ Anita Horn, *supra note*, 3

democratic, and they do it in a democratic way? The example given by this question also shows the paradox that a human right to democracy would create: in essence, it stems from the very notion of democracy, that this right would not allow non-democratic regimes; however, from the other side, if all citizens, or a majority of them, decides to abolish democracy, wouldn't it be undemocratic to impose on them a system (democracy), or wouldn't it violate the collective right to self-determination? Or, to put it differently, is it allowed to use the right to democracy through participating in a process that establishes a non-democratic regime? If the procedure is right, and individuals are consulted and vote for an absolute monarchy, taken as an example, would it be in accordance with the descriptions of the scholars that promote the human right to democracy? These questions have not been answered properly by the authors who insist on the existence of a human right to democracy. This fact has led to criticism by some authors. In this context, Hua Fan writes:

*"Amy E. Eckert claims that "to promote democracy as the only legitimate result of self-determination" fails to satisfy "the requirements of liberal democracy," because the right to self-determination demands a free determination of political status, but the right to democracy entails a determination to be free. She alleges that Franck confuses the means of self-determination with a particular end. To equate self-determination with "one particular political outcome," democracy or any other, "misconstrues the content of self-determination," because "mandating that a people must determine to be free . . . significantly constrains their right to" self-determination. Therefore, "the right to democracy is not equivalent to self-determination." Eckert concludes that "a people could freely choose to organize itself undemocratically," "as long as the determination itself is freely made," and that such a determination "must receive the same respect as a determination to be free.""*⁴⁹

The very first article of the ICCPR states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."⁵⁰ "By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine,

⁴⁹ Hua Fan, "The Missing Link between Self-Determination and Democracy: The Case of East Timor" (Northwestern Journal of International Human Rights, Vol. 6, Issue 1, 2008) 183

⁵⁰ ICCPR, Article 1.

when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.”⁵¹

For Miller, self-determination is “understood to include the right to decide on the form of one’s own political institutions. Determine their political status might be read in different ways, but one obvious meaning is ‘decide for themselves how they are going to be governed’. If this is a collective right of peoples, then it conflicts with the idea of an individual right to democracy as one specific form of government.”⁵² In its commentary on the ICCPR, Paul Taylor notes that the right to self-determination has its origins in the Atlantic Charter of 1941, which explicitly recognized “the right of all peoples to choose the form of government under which they will live.”⁵³ Not only does the Atlantic Charter proclaim that, *inter alia*, self-determination includes the right to choose the form of government, but also ICCPR, according to the extensive interpretation made by Taylor. Citing various sources, he notes that “internal self-determination, according to the Third Committee drafters, referred to the right of a nation already constituted as a state to choose its own form of government and freely determine its own policies, free from outside interference. It has variously been described...in other words...as the right of a people really and freely to choose its own political and economic regime”⁵⁴ Similarly, commenting on the first article of the ICCPR, Nihal Jayawickrama shares the opinion that “all peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government.”⁵⁵ Consequently, this means that people have the right to choose a non-democratic form of government, which could be oligarchy, absolute monarchy, or other forms. Even decades ago, Zubeida Mustafa acknowledged that “the internal aspect of self-determination implies the right of the people of a state already recognized by international law to determine their own form of government.”⁵⁶

⁵¹ Conference on Security and Co-Operation In Europe Final Act (Helsinki 1975), *Equal rights and self-determination of peoples (VIII)*. Accessed on 9 August 2024 through: [untitled \(osce.org\)](#)

⁵² David Miller, “Is there a human right to democracy” (CSSJ Working Paper SJ032 April 2015), 2-3

⁵³ Atlantic Charter (1941) Accessed on 24 August 2024 through: [Atlantic Charter \(iowa.gov\)](#)

⁵⁴ Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press 2020) 42

⁵⁵ Nihal Jayawickrama, *The Judicial Application Of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press 2002) 791-792

⁵⁶ Zubeida Mustafa, “The Principle of Self-Determination in International Law” (The International Lawyer, Vol. 5, No. 3, 1971) 479

It stems from these interpretations of the right to self-determination that a human right to democracy could easily be in conflict with the former. Thus, the authors that promote the human right to democracy have failed to deal with this issue properly. Considering the relevance and certainty, but also the status it holds, the right to self-determination would prevail in hypothetical cases where an existing human right to democracy would collide with it. Consequently, if a people chooses to adopt a non-democratic system of government for itself, and it does so through a democratic process, the human right to democracy can not be invoked to annul it. As Makau Mutua strongly emphasizes: “It is my argument that the most fundamental of all human rights is that of self-determination and that no other right overrides it. Any right which directly conflicts with this right ought to be void to the extent of that conflict.”⁵⁷ Even Thomas Franck acknowledges that self-determination, “by the terms of the very first article of the UN Charter, it achieved the status of a fundamental right of all peoples.”⁵⁸ Meanwhile Olivier De Schutter goes one step further, claiming that “the right of peoples to self-determination has now acquired the status of *jus cogens*.”⁵⁹ There is abundant evidence for the magnitude of the right to self-determination.

Additionally, a human right to democracy would create other difficulties as well, regardless if we understand it as a right to participation, or as a right to decision-making. This way, while the last point made in regard to Kirste’s arguments in favour of a human right to democracy (when he claims that it belongs to every human being, although the keyword in his definition is participation) exposes one of the features of the so-called human right to democracy, namely that it excludes several categories of human beings, such as non-citizens, people that do not have the citizenship of the country where they are located or do not have a nationality at all, people under a specific age, etc. At the same time, with some exceptions (such as the right to political participation), the legal texts which are the main sources of human rights, maintain that human rights belong to “everyone”. European Convention on Human Rights (ECHR) is even more specific, imposing duties to its member states towards “everyone within their jurisdiction.”⁶⁰ Amartya Sen described this alluringly when he wrote: “There is something very appealing in the

⁵⁷ Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002) 108

⁵⁸ Franck, “The emerging right to democratic governance”, *supra note*, 54

⁵⁹ Olivier De Schutter, *International Human Rights Law* (Cambridge University Press 2010) 68

⁶⁰ Convention on the Protection of Human Rights and Fundamental Freedoms, Article 1.

idea that every person anywhere in the world, irrespective of citizenship, residence, race, class, caste or community, has some basic rights which others should respect.”⁶¹ She makes a distinction between “rights that people can have simply by virtue of their humanity” and “those they have contingently on specific qualifications such as citizenship”.⁶² Other authors make a distinction between human rights, on one hand, and citizenship rights on the other. In this context, “citizens rights are linked not with humans, but with citizens and they are a recent phenomenon compared with human rights which are prebirth rights and belong to every homo sapiens. The second rights empower citizens to become active subjects of their political communities; they are recognized and realized only in states that follow a democratic order, based on constitution, and only by citizens that have a statehood.”⁶³ Article 21 of the UDHR, which is mentioned as the evidence for the existence of a human right to democracy in international law, “is primarily concerned with members of a given political community (citizens), rather than individuals as such.”⁶⁴ Nevertheless, this is not an insurmountable obstacle, because a human right can exist even if it imposes some exceptions based on objective criteria, which are not discriminatory. It is not against human rights principles to link some rights with citizenship, nor it is against public international law which allows a different treatment based on citizenship (obviously while respecting certain standards). However, the tendency should be to have fewer human rights based on citizenship. The mobility of people is greater than ever and there are more and more persons that live or reside in a country whose citizenship they do not have. All of them would be left without protection in the case of the human right to democracy. On top of that, in some countries is quite hard to gain citizenship, as procedures can be complicated and require years to fulfil the criteria required for citizenship. With the rise of far right-wing parties, and especially due to criminality, we are witnessing legislative changes requiring more strict conditions for individuals who are interested in earning citizenship. Jan-Werner Muller, for example, writes about liberal nationalism being “likely to opt for immigration and integration policies that are highly assimilationist, place limits on political dissent”.⁶⁵ Thus,

⁶¹ Amartya Sen, *The Idea of Justice* (Belknap Press 2009) 355

⁶² Ibid, 356

⁶³ Enver Hasani, Përparim Gruda, and Zahir Çerkini, *E drejta kushtetuese* (Universiteti i Prishtinës 2023) 179-180

⁶⁴ Allan Rosas, ‘Article 22’, in Gudmundur Alfredsson and Asbjørn Eide, *The Universal Declaration of Human Rights: a common standard of achievement* (Brill 1999), 432

⁶⁵ Jan-Werner Muller, *Constitutional Patriotism* (Princeton University Press, 2007) 9

for these individuals, it is even more challenging to enjoy the right to democracy, as they need to fulfil several requirements in order to earn the citizenship and only then to have the right to participate in accordance with what a human right to democracy ensures.

However, the biggest challenges are the other preconditions that must be fulfilled in order for an individual to be able to participate and this way exercise his right to democracy, such as, for instance, to begin with the existence of democratic institutions. In this context, Gilabert argues that “the existence of a right to democracy does not depend on whether democratic institutions already exist”,⁶⁶ but here he contradicts himself because he perceived the human right to democracy as an equal right to participation, and participation can not take place without democratic institutions that make it possible for individuals to participate. If not in and through democratic institutions, how and where is the right to democracy going to be exercised?

Thus, even if a narrow conception of a human democracy is accepted, the mere participation creates challenges and makes room for concern, because it is clearly not a simple process, and this has been recognized even outside the works dedicated exclusively to human right to democracy discussions. For instance, the British philosopher, Anthony Clifford Grayling in his general study on the meaning and principles of democracy shares the opinion that “the right to participate in democracy is not, as has been iterated several times in the foregoing, restricted to the right to vote. It is a right to inclusion; a right, at the very least, to the absence of barriers to participation – but as this is in practice not enough by itself, it entails a right to enablement to participation.”⁶⁷ The author elaborates his view further by mentioning some prerequisites for people to participate, such as education, and health services. Matter in fact he touches upon a very important aspect of the so-called human right to democracy, which is the issue of preconditions that must be met to give life to a human right to democracy. Regarding democracy as a “political order characterized by free and fair elections, and a free press/media”, he argues that “the mere absence of coercion at a polling station is not enough for voting to be free, for if voters are not properly informed, or worse are actively misinformed, their choices are not free; so this freedom is connected with the freedom of the media, and the nature of their behaviour.

⁶⁶ Pablo Gilabert, *supra note*, 27

⁶⁷ A.C. Grayling, “*The Good State – On the Principles of Democracy*”, (Oneworld Publications 2020) 142

Are the media free? It is not enough that media of news and opinion are not censored or controlled by authorities in power, for where media are owned by individuals with agendas of their own, and/or where they are obliged by commercial pressures constantly to stimulate the attention of readers by partisanship, exaggeration, and a variety of distractions, they are in fact simultaneously anarchic and constrained, and both in the worst senses. Above all, the advent of the phenomenon of social media has weaponized all that is worst about propaganda, misinformation, deliberate falsehood, manipulation, interference. Cyberspace is the agora of an ochlocracy.”⁶⁸ He cites some risks and challenges which are not merely theoretical, but very practical – as various examples these days show. The list of examples varies from states that intervene in other states during times of elections, including brutal forms of cyber interference, to propagandistic groups that spread misinformation, biased media that favour one candidate or party, rich people that spend high amounts of money as donations for their favourite politicians, propagandistic individuals, and many other stakeholders, who, in different ways, influence the voters in times of elections, using several methods. Free, independent and pluralistic media was recognized as an essential element by the former UN Commission on Human Rights as well. It is believed that the pluralism of political parties is to be considered as a precondition for a human right to democracy.⁶⁹ Additionally, a list of other tasks are put to governments to ensure that democracy can be realized in practice, including the elimination of “undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will.”⁷⁰ Similarly, Bernard Crick elaborates the “conditions to modern democracy”. Beginning with the “role of the inhabitants”, he notes that “voluntary and individual participation is encouraged in modern democracies, but not compulsory”, indicating that many individuals may not be interested at all when it comes to such participation. Then he writes about the “typical social structure”, arguing that “a large middle class is essential”, because “extremes of wealth in the hands of a few can threaten democratic processes, and extremes of poverty remove people from the normal polity

⁶⁸ Grayling, *supra note*, 31

⁶⁹ See UN's publication: “Global issues: democracy”, where it is written that in 2002 the UN Commission on Human Rights declared “free, independent and pluralistic media” and “pluralistic system of political parties and organizations” as essential elements to democracy. Accessed at 27 August 2024, through: [Democracy | United Nations](#) ; also, see Karoline Wimmer, “A human right to democracy” (Master thesis, University of Vienna 2023) 7

⁷⁰ Office of the High Commissioner for Human Rights, General Comment 25 (1996). Accessed on 27 August 2024, through: [Microsoft Word - Document1 \(equalrightstrust.org\)](#) [19]

and can threaten order.”. Furthermore, he mentions “the nature of the elite, type of economy, typical institutions of government, knowledge, diffusion of information (reliable, neutral, objective and accurate information about how the state is run), attitudes to politics.”⁷¹

Thus, even from this narrow definition of a human right to democracy, it is still too demanding, as it requires from the citizens of a mature age to be engaged actively in political processes: they must constantly be informed on political matters – to achieve this, pluralism in political specter and media is required, alongside an active civil society; they must be willing to actively participate in these processes; “even elections can be deeply defective if they occur without the different sides getting an adequate opportunity to present their respective cases, or without the electorate enjoying the freedom to obtain news and to consider the views of the competing protagonists”⁷²; government should inform in advance and organize consultations, because, as Morsink argues, “since elected representatives must know what their constituents are saying, needing or wanting, a modern political representative has to communicate regularly with those constituents”⁷³, due to the fact that “democracy depends on the interest and active participation of its beneficiaries. Being informed and having access to knowledge is a precondition to meaningful participation in a democratic system. Only those with a basic understanding of how the system works and knowledge of the mechanisms and institutions of a democratic society can contribute to and benefit from it.”⁷⁴ These and other preconditions that are necessary for a human right to democracy, which involves primarily participation, give right to Amartya Sen when he says: “Democracy is a demanding system, and not just a mechanical condition.”⁷⁵

As for the last feature regarding the definition of a human right to democracy, namely that it is a sum of other rights, in that case there would be no need at all for a human right to democracy. As Miller rightly puts it, “What is being added when we announce that there is a human right to

⁷¹ Bernard Crick, *supra note*, 93-98

⁷² Amartya Sen, “Democracy as a Universal Value” (Journal of Democracy, Vol. 10, Issue 3, 1999) 10

⁷³ Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration of Human Rights*, (Pennsylvania Studies in Human Rights) 262

⁷⁴ Wolfgang Benedek, *Understanding Human Rights: Manual on Human Rights Education* (European Training and Research Center for Human Rights and Democracy, 2012) 408. Accessed on 29 August 2024, through: [*Manual_2012_Eng_FINAL.pdf \(etc-graz.eu\)](#)

⁷⁵ Amartya Sen, “Democracy as a Universal Value”, *supra note*, 10

democracy, once we recall that many of the rights associated with democracy such as free speech and freedom of association qualify as human rights on independent grounds? If a less extensive right will do an adequate job of ensuring that basic needs are met, then a more extensive right cannot be justified as a human right, even though it might be justified on other grounds.”⁷⁶

Despite the indisputable fact that human rights are intertwined with each other and should be in conformity, existing in harmony altogether, nevertheless they should have different substance. There is no reason, nor there is any logical argument, that two rights can have the same meaning. Every human right must have its own particular substance/content. In addition to the argument that these rights have an independent existence and do not need a new right named as a human right to democracy, Joshua Cohen claims that “the rights of dissent, expression, and conscience are included in the right to self-determination.”⁷⁷

Summa summarum, the current writings on the issue of the human right to democracy have an initial research gap that is related to the very definition of this right. Not only there is no single definition which is maintained by the promoters of that right, but even from the common definition which includes their common elements, there are many issues that have been left without substantial treatment. Moreover, that definition does not portray democracy as a value in itself that is based on the notion of the inherent dignity and exists simply in virtue of our nature as humans. Hence, it is not compatible with the theory according to which human rights are rights that belong to every human in virtue of their nature as beings with inherent dignity, which might be described even as a moral conception of this human right. As Anita Horn argues, “a successful intrinsic moral claim for a human right to democracy must show that it is a right that each human has simply in virtue of being a human being. Democratic rights or institutions must have intrinsic value for maintaining a dignified human life.”⁷⁸ Additionally, even if the normative agency is taken into consideration, nevertheless the definition projected by most of the authors does not fit, based on the argument that it lacks the two major components of the normative agency: autonomy and liberty, which, according to Griffin, are “at the center of normative agency. Autonomy is self-legislation, deciding one’s own goals in life, choosing one’s own

⁷⁶ David Miller, *supra note*, 5-11

⁷⁷ Joshua Cohen, “Is there a Human Right to Democracy” (Harvard University Press 2010) 363

⁷⁸ Anita Horn, *supra note*, 43

conception of a worthwhile life; liberty is being free to pursue that conception.”⁷⁹ A human right to democracy defined merely as a right to participate, but not to decide, in the processes where decisions are made, does not involve autonomy as in the end those who govern may decide however they want, even differently from the will of the citizens; clearly that is not self-legislation. As a consequence, it does not involve liberty either, as citizens will not be able to pursue their conception if the decisions made by those in power follow other conceptions. “A true human right must be in some way grounded in our human dignity—the dignity due to our personhood—and an entitlement merely to be listened to by a ruler who may be dismissive of one’s views is hard to see in that light”.⁸⁰

Furthermore, several obstacles were identified in this chapter, including the justiciability of the right to democracy, the compatibility with the right of self-determination, the preconditions that make individuals able to enjoy the human right to democracy (citizenship and age; eliminating the barriers to participation; securing proper education for every citizen; awareness; continuous information on political matters...) and the duplication of existing rights (freedom of expression, association, assembly, the right to vote). In the upcoming chapters, other hindrances will be discussed, including that regarding the equal status that individuals must have in order to enjoy the human right to democracy, and the issue of universalism.

⁷⁹ James Griffin, *supra note*, 243

⁸⁰ *Ibid*, 250

II. THE EXISTENCE AND JUSTIFICATION OF A HUMAN RIGHT TO DEMOCRACY

The famous Latin maxim “ubi societas ibi jus” tells that laws are not a recent invention, but they have appeared very early among humans. Considering that humans, for several reasons, have always lived in groups, they needed some norms to coordinate their activities and, most importantly, to maintain harmony in order to ensure a peaceful coexistence with each other. Such norms have dealt with various issues, starting from the most basic ones. But, as humans have evolved and improved their ways of organizing in collectivities, the same thing has happened with norms and they have offered more and more protection to individuals. Today there is an abundant set of norms enshrined in international agreements and national laws that recognize numerous human rights. Here appears the first dilemma: how can human rights be identified?

First things first, it is important to make a distinction between legal and non-legal rights. That is because there are different sources of rights, including philosophical and religious sources. For instance, one might argue that the Holy Bible recognizes several rights to humans, such as the right to life (e.g. “thou shalt not kill” – one of the Ten Commandments – framed as an objective rule); many great thinkers, in different eras, have written about rights that humans possess (e.g. Thomas Hobbes wrote about the right against self-incrimination, by claiming that “no man is obliged to accuse himself”.⁸¹), etc. But, although human rights can be analysed from different aspects and may be inspired by religious, philosophical, and other texts, what matters is the legal aspect. Only when a right is protected by law, then it can have power and can make a difference in the world. One of the most famous thinkers who has held such a position (at least similarly), perhaps even in an extreme form, was Jeremy Bentham. As Hohfeld observes, “Bentham had argued that talk about rights made sense only within a legal framework.”⁸²

Having said this, the second distinction that should be made is the one between legal rights, on the one hand, and human rights on the other. As Carl Scutch acknowledges, “legal rights are not necessarily the same as human rights.”⁸³ For instance, a German citizen might have the right

⁸¹ Thomas Hobbes, *Leviathan* (first published in 1651, Wordsworth Editions 2014) 108

⁸² Wesley Newcomb Hohfeld, ‘The Conceptual Neighborhood of Rights’, in William Edmundson, *An Introduction to Rights* (2nd edn, Cambridge University Press 2012) 71

⁸³ Carl Scutch, ‘Human Rights, Ethics, and Morality’, in James Lewis and Carl Scutch, *The Human Rights Encyclopedia* (Vol. 1, Sharpe 2001) 747

to drive with limitless speed on highways, but that does not make such a legal right a human right too. The rationale behind this distinction is to strip the states of their right to decide unilaterally which human rights exist, and this way ensure more protection for every individual around the world. Thus, the distinction between legal and human rights indicates that there are some rights that exist to all human beings, irrespective of what some states might think about them. This idea is similar to what the former British judge, Tom Bingham, wrote: “Law cannot be simply what is dictated by political authority or issued by the state.”⁸⁴ There is no doubt that this applies to national laws due to the indisputable fact that human rights are part of international law and consequently a concern of it, but this is also applicable in the international arena as well, in the sense that states can not, for instance, adopt a treaty that would allow slavery. Hence, the emergence of new human rights is dependent on two factors: i) the will of the states, expressed mainly through international agreements (it can also happen through other sources of international law, such as customary international law); ii) the content of the right at stake. These two factors, which we can name respectively as the subjective and objective factors, should appear cumulatively. In this context, James Griffin argues:

“No matter who we are, we cannot establish the existence of a human right just by declaring it to be one. For example, the Universal Declaration contains a right to periodic holidays with pay, to which the overwhelming and cheering reaction has been that, whatever that supposed entitlement is, it is certainly not a human right.”⁸⁵

The point is that a human right to democracy can not emerge simply because some authors claim that UDHR or ICCPR contain such a right. In addition to that, attention must be paid to the elements of human rights.

A. Elements of human rights: does democracy contain them?

Griffin writes that “in the case of ‘human rights’ there are so few criteria to determine when the term is used correctly or incorrectly.”⁸⁶ By this, he implies that there are, nevertheless, some elements or criteria – as he calls them – that a right should incorporate in order for it to be

⁸⁴ Tom Bingham, *The Rule of Law* (Penguin 2011) 67

⁸⁵ James Griffin, *supra note*, 5

⁸⁶ *Ibid*, 17

classified as a human right. Only when a right contains the necessary elements and is recognized in a source of international law then it reaches the level of human right.

The issue of the elements is very much related to the definition of human rights itself. But, just like the elements, even the definition is not an easy task. In his well-known book, “Principles of Philosophy”, Descartes wrote that “giving logical definitions to simple and clear matters only makes them harder and more complicated”.⁸⁷ Similarly, Jacques Maritain held the opinion that “there is no task more unrewarded than to try to rationally define ordinary notions that have arisen out of practical necessity”.⁸⁸ Obviously, “human rights” might be considered as an ordinary notion, since it is used overwhelmingly in many sites; it is used that often and by that many subjects (lawyers, politicians, activists...), that the focus is not put at defining human rights. Nonetheless, it is important to provide a definition because from that we can draw the elements of human rights. Hence, an attempt will be made to give a definition first, before digging into the area of the elements of human rights. Such a task requires primarily an analysis of the current international documents’ frameworks and writings of highly qualified scholars. Regarding the latest, it is interesting that many distinguished experts of international law do not try to define human rights, even though they write about them, as no book on international law can be imagined without a chapter on human rights. Such experts include the names of Ian Brownlie, Malcolm Shaw, Jan Klabbers, James Crawford, and the list goes on... No attempt to provide the readers with a definition of human rights can be found in their respective books on international law. Usually, the authors who come up with definitions of human rights are philosophers or lawyers who write specifically about human rights. Some of them will be cited below:

Maritain (mentioned above), one of the experts who took part in the drafting of the UDHR, describes human rights as “inalienable rights, inherently possessed by human beings, which exist earlier than written laws, and state does not have to give, but only recognize them as universally valid.”⁸⁹

⁸⁷ René Descartes, *Parimet e Filozofisë* (First published in 1644 in the original title “Principia philosophiae”, Akropoli i Ri 2019) 19

⁸⁸ Jacques Maritain, *Njeriu dhe Shteti* (First published in 1953 in the original title “L’Homme et l’Etat”, DITA 2000) 23

⁸⁹ Ibid, 132-138

According to *Weston*, human rights are “rights that belong to an individual or group of individuals simply for being human, or as a consequence of inherent human vulnerability, or because they are requisite to the possibility of a just society. Whatever their theoretical justification, human rights refer to a wide continuum of values or capabilities thought to enhance human agency or protect human interests and declared to be universal in character, in some sense equally claimed for all human beings, present and future.”⁹⁰

For *Donnelly*, human rights are “inalienable rights belonging to individuals based on their nature as human beings; they protect potentials, attributes, and entitlements, which are essential for a decent life.”⁹¹

A definition of human rights can also be drawn from the Preamble of the UDHR, which states: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”⁹²

Meanwhile, the Preamble of the ICCPR reads as follows: “... recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. These rights derive from the inherent dignity of the human person.”⁹³

Based on the definitions given above, but also other non-given definitions, which are very similar, there are certainly some common features which can serve the objective of formulating a general definition on human rights. Hence, we may define human rights as inalienable rights which belong equally to every human being in virtue of and inherent in their humanity. Considering that they are not concerned with every detail of our lives, but only the most important facets, protecting life, liberty, security, etc., it is correct to add that human rights are also fundamental. Thus, human rights are inherent, inalienable, fundamental, universal, and equal (egalitarian). These are the five core elements that constitute a “human right”. Needless to say,

⁹⁰ Burns H. Weston, “Human Rights” (Human Rights Quarterly, Vol. 6, No. 3, 1984) 258. Accessed on 15 August 2024, through: [Human rights - Universal, Inalienable, Dignity | Britannica](#)

⁹¹ Jordan Paci, *Të Drejtat e Njeriut* (4th edn, Mirgeeralb 2017) 38

⁹² Universal Declaration on Human Rights, adopted by the United Nations General Assembly (UNGA) on 10 December 1948

⁹³ International Covenant on Civil and Political Rights, adopted by the UNGA in 1966, and entered into force in 1976

other elements can be added, such as inter-relativeness, for instance, because human rights are interrelated with one another, but those five are indisputable and form the basic components of every human right. Bearing all these in mind, it must be shown that democracy is inherent, inalienable, fundamental, universal, and egalitarian, and therefore fulfils all of the elements of human rights. On the contrary, if democracy does not entail those elements, the conclusion will be that democracy is not a human right. This second position is maintained by the author of this thesis, as it was already noted in the introductory part. Meanwhile, the authors who claim that there is a human right to democracy have not made any comprehensive attempt to prove that democracy contains all these elements.

1) Is the right to democracy inherent?

Inherence is the first element listed above and, by all means, the most basic and typical one. There is no doubt that human rights are inherent and there are several reasons that can be listed to support that claim. Humans are the reason why human rights exist, as the name itself shows: “human” rights. Humans are the cause, meanwhile human rights are the effect. Without humans, there would be no human rights. The entire system of human rights in international law was built after the horrors that humans experienced by other humans in two world wars, aiming a mission to protect humans from human rights violations – that being a consensus among human rights and international law scholars. For instance, in this context, Brownlie and Crawford share the opinion that “the events of the Second World War, and concern to prevent a recurrence of catastrophes associated with the policies of the Axis Powers, led to a programme of increased protection of human rights and fundamental freedoms at the international level.”⁹⁴ Most importantly, the features which all humans share are the main and direct cause that make human rights inherent, or, as the African Charter on Human and Peoples’ Rights frames it, “fundamental human rights stem from the attributes of human beings.”⁹⁵ Human agency can be mentioned as an example of a basic feature/attribute in that context.

Inherence is very well established as an element of human rights because its roots are considerably old and it can be found everywhere. If there is a stance on human rights for which

⁹⁴ Crawford, *supra note*, 634

⁹⁵ African Charter on Human and Peoples’ Rights (1981) Preamble

there is a universal consensus, that is the stance that human rights are inherent in human beings. Usually, this element is closely connected with dignity. No matter if we are referring to books written by lawyers, philosophers, theologians, or anyone else, the position that human rights are inherent is defended by each one of them. Moreover, inherence is also mentioned in human rights treaties, be their global or regional. UDHR and ICCPR, which were cited previously, are examples of that: they refer to the “inherent dignity” as the ultimate source of human rights. The Arab Charter on Human Rights, which is relatively recent compared to other human rights treaties, speaks about “the dignity of the human person whom God has exalted over since the beginning of the creation.”⁹⁶

It must be acknowledged that Christian teachings have given a remarkable contribution to the argument that human rights are inherent. The Bible itself states that “God created man in his own image.”⁹⁷ This is a strong verse regarding the dignity and inherence of human rights, because dignity literally means worth, from Latin. The Oxford English Dictionary translates and interprets dignity as “the quality of being worthy or honourable; worth; worthiness; nobleness; excellence.”⁹⁸ According to the Bible, God is the creator of everything, including all creatures that exist. But it is only man, among all creatures in the world, that is compared to God. This clearly shows how much worth man has, and it is this concept that lays down the path for inherent human rights. Christian theologians have paid much attention to human dignity in general. “Christian anthropology begins with the fact that God entrusted the world to man, who is the bearer, creator, and goal of all socio-political institutions. Man can never be someone’s tool, but always a subject and an end itself. Man has a privileged and irreplaceable place in the cosmos, and he is invited to rule the world. Compared to other beings, man is endowed with skills for further development and has a limitless opportunity to reach that, as a rational and sublime being. Man has divine attributes and, as a parable of God, is skilled and authorized by God to rule.”⁹⁹ Based on this dignity, upon which man has a privileged place among all creatures, Christian thinkers have developed further the idea that there are some rights inherent in every human being, which are clearly not granted by the states. The Compendium of the

⁹⁶ Arab Charter on Human Rights (2004) Preamble

⁹⁷ Holy Bible, Genesis 1:27

⁹⁸ [dignity - Quick search results | Oxford English Dictionary \(oed.com\)](#). Accessed on 11 August 2024.

⁹⁹ Mikel Sopi, *Njeriu dhe Demokracia: Mësimi shoqëror i Kishës Katolike mbi konceptet bazike të jetës politiko-shoqërore* (Onufri 2017) 27-33

Social Doctrine of the Church includes a chapter on human rights, where the position of the Catholic Church is explained through biblical references. The elaboration given there is that “the roots of human rights are to be found in the dignity that belongs to each human being and is inherent in human life equally to every person. The ultimate source of human rights is not found in the mere will of human beings in the reality of the State, in public powers, but in man himself. Human rights are inherent in the human person.”¹⁰⁰ Natural law, too, regardless if it was represented by authors influenced directly by Christianity, or secular authors, embraced the idea that human rights are inherent in every human being.

With that being said, it is indisputable that inherence is apparent in every human right. Inherence is usually immemorial too: there is no specific time when a human right became inherent. They are inherent since humans have existed, thus their birth time is the same as the birth of human beings. No one may ask when humans gained their right to life, or when did the need for it appear, or even the reasons for such a human right; they are all obvious. However, when it comes to democracy, as a human right, it is the opposite. Additionally, a human right to democracy seems not to belong to humans in virtue of their essence, but based on some preconditions such as age and citizenship, meaning a sort of membership in a given political community. While for the right to life, it can be said that it is intrinsic because without it humans can not even exist, it remains unclear why should democracy be considered as intrinsic: what makes it as such? Probably nothing. Humans can have a decent life without democracy. Matter in fact, “the democratic idea was not really born until the seventeenth century, it would seem that it makes no sense to speak of the right to democratic participation in earlier times and in premodern societies.”¹⁰¹

Whilst the promoters of a human right to democracy usually ignore the issue of the elements and have not paid much attention to give arguments on why should it be qualified as inherent, Gilabert has written about “democracy’s intrinsic significance as expressing due respect for people’s status as agents sufficiently able and equally deserving to be the ultimate rulers of the

¹⁰⁰ Compendium of the Social Doctrine of the Church: Chapter Three, para.153. Accessed on 12 August 2024 through: [Library : Compendium of the Social Doctrine of the Church: Chapter Three | Catholic Culture](#)

¹⁰¹ Johannes Morsink, *Inherent Human Rights*, *supra note*, 253

political system to which they are subject.”¹⁰² This argument can be used in favour of the idea that democracy is inherent, but it can also lead to a nonsense combination of words, because if everyone deserves equally to be a ruler or a governor, then who is going to be governed? Furthermore, regarding the argument that a human right to democracy should be considered as inherent as it ensures the intrinsic equality of all human beings, then why should some persons be excluded from this right? Aren’t non-citizens equal as well? Also, even in democratic countries, there are positions that can never be held by citizens: for instance, in Spain, not every citizen can become a king; in the United Kingdom as well, and so it is in many democratic countries which are monarchies and the absolute majority of individuals can never become monarchs. Furthermore, as Arneson argues: “I do not see any reason at all to accept the claim that only choice of democracy can express the idea that persons have equal basic moral status.”¹⁰³

Similarly, Morsink’s argument that “the right to democratic participation should be seen as inherent because it expresses our species capacity to control our environment and because it is a means for the delivery of other human rights”¹⁰⁴, might be judged as problematic, as it would create a sort of inequality between those that have more capacity to control the environment and those that do not. A rich person, with a lot of funding and connections, will be favourite to control the environment against a poor person with no funding and connections and probably even lower education. Meanwhile, related to the other point according to which it is a means for other human rights, this can be used for the justification of a human right to democracy, and not as evidence of inherence.

Likewise, Amartya Sen’s arguments on the inherence of a human right to democracy are not convincing. He claims that “political and social participation has intrinsic value for human life and well-being. To be prevented from participation in the political life of the community is a major deprivation.”¹⁰⁵ In another article, “Sen posits the intrinsic value of political and social participation as an essential part of human life and well-being. Human freedom is defined as an

¹⁰² Pablo Gilabert, *supra note*, 24

¹⁰³ Richard J. Arneson, “Debate: Defending the Purely Instrumental Account of Democratic Legitimacy” (The Journal of Political Philosophy: Vol. 11, No. 1, 2003) 131

¹⁰⁴ Johannes Morsink, *Inherent Human Rights*, *supra note*, 267

¹⁰⁵ Amartya Sen, “Democracy as a Universal Value”, *supra note*, 10

indispensable part of a self-realizing existence.”¹⁰⁶ However, Sen ignores the fact that participation can amount to nothing if it is not accompanied by decisions that are in accordance with the views shared by the participants; in such cases, it is unlikely to prescribe political participation as something that has intrinsic value, if individuals only participate as spectators but do not have any decisive role in decision-making.

Therefore, taking all of the arguments into consideration, a human right to democracy does not seem to fulfil this element. There is no form of government that is inherent to humans, they are simply inventions that change from time to time.

2) Is the right to democracy inalienable?

One of the most remarkable and controversial phrases in Franck’s “Democracy as a Human Right” article is that the “notion of democracy here set out does not encompass the notion of inalienable rights of the U.S. Constitution.”¹⁰⁷ I could not agree more with this stance, but only add that the human right to democracy, in general, is not inalienable. As Benedek argues, “inalienable means that they apply everywhere and can not be taken away from the human person even with his or her agreement.”¹⁰⁸ Not only a human right to democracy does not apply everywhere, but furthermore it can be taken away from the human person. The idea that a human right to democracy can not be taken from a person even with his or her agreement is contradictory with the idea that peoples, under the right of self-determination, may choose to take away democracy and bring another form of government. Moreover, democracy as a form of government, is currently defended – and even justified as a human right – on the basis that it is better than other forms, or as Churchill rightly put it the least bad form. This implies that if a better system is invented in the future, democracy will cease to be defended and chosen because it will lose its main argument and reason, that of being the best. “No association could maintain a democratic government for very long if a majority of the *dēmos*—or a majority of the government—believed that some other form of government were better.”¹⁰⁹ One of the greatest thinkers of this century, Yuval Noah Harari, analyses how the idea of liberal democracy is losing

¹⁰⁶ Anita Horn, *supra note*, 53

¹⁰⁷ Franck, “Democracy as a Human Right”, *supra note*, 76

¹⁰⁸ Benedek, *supra note*, 38

¹⁰⁹ Zoe Lowery, *supra note*, 4

its followers and, due to many factors, is now at risk, pointing out that people all over the world see “the liberal vision as either undesirable or unattainable. Some discovered a liking for the old hierarchical world, and they just don’t want to give up their racial, national or gendered privileges. Others have concluded that liberalisation and globalisation are a huge racket empowering a tiny elite at the expense of the masses.”¹¹⁰ His observation is clearly relevant as it shows that democracy might be abandoned if the dissatisfaction towards it continues to grow.

3) Is the right to democracy fundamental?

As Andrew Clapham notes, “human rights are a special, narrow category of rights.”¹¹¹ One of the features that human rights have, which makes them special in contrast to other rights, is the fact that they are fundamental. Even if we look at the evolution of human rights and their historical development, it is clear that different acts, be they national or international, offered protection to basic values and needs that humans have. It is by no accident that the rights of the first generation have included such elementary rights as the right to life, freedom from torture, freedom of religion, etc. Likewise, William Edmundson argues that “human rights recognize extraordinarily, special, basic interests, and this sets them apart from other rights.”¹¹² Miller shares the opinion that “human rights are best understood by reference to basic human needs.”¹¹³ Similarly, Stephan Kirste has summarized various approaches, including the evolutionary one, which portrays human rights as protecting fundamental interests or needs: “The evolutionary approach assumes that human rights are those rights, which in the course of history have proven to be central to being human. It is often assumed that human rights have the function of protecting fundamental human interests. An interest or need is fundamental if its violation or non-satisfaction concerns either death or serious suffering or the core area of autonomy. As Robert Alexy specifies: “Human rights are about the protection and satisfaction of fundamental interests and needs. An interest or need is fundamental if its violation or non-satisfaction concerns either death or serious suffering or the core area of autonomy”. “Joseph Raz too has a reciprocal thought in mind when he says that a human right exists when human interests are so

¹¹⁰ Harari, *supra note*, 14

¹¹¹ Andrew Clapham, *Human Rights: A Very Short Introduction* (2nd edn, Oxford 2017) 4.

¹¹² William A. Edmundson, *An Introduction to Rights* (2nd edn, Cambridge University Press 2012) 158

¹¹³ David Miller, *supra note*, 3

strong that they are sufficient to create corresponding obligations in others.”¹¹⁴ Similarly, other authors claim that “human rights tend to protect aspects of human nature that are fundamental to human existence”.¹¹⁵ It is hard to find a basic need or interest which is protected by democracy as a human right, let alone to claim that democracy is fundamental to human existence.

The argument given by Morsink about the human right to democracy leading to “human flourishing and the full and free development of our personalities”¹¹⁶ seems very extensive and opens the path for a large range of potential human rights, as there are many things that lead to human flourishing. As an author puts it, “such overinclusiveness is not harmless error, because rights inflation devalues the currency of human rights.”¹¹⁷

Miller dismisses the existence of a human right to democracy and one of the arguments he uses for that is that such a human right does not coincide with a human need, following somehow a minimalist approach. “I do not think one could argue that there is a human need for democracy. I understand human needs by referring to the conditions required to lead a minimally decent life, and it seems clear to me that one can have such a life without living in a society that provides one with opportunities for democratic political participation”¹¹⁸, he explains. Furthermore, according to Richard Arneson, “rights or purported rights to exercise power over other people’s lives should not be included within the set of fundamental rights. I rule out the right to a democratic say (an equal vote in a democratic political procedure) as a candidate for the status of fundamental moral right”.¹¹⁹ Thus, he argues that a right to democracy is not to be considered as fundamental.

We find no arguments claiming that democracy is fundamental in the writings of the authors that support the idea of a human right to democracy. They also to avoid the fact that “from the time of the Greeks until the 18th century we hear no loud or interesting voices speaking of democracy as either a doctrine of principles and institutional arrangements to be put into practice

¹¹⁴ Stephan Kirste, *supra note*, 31-36

¹¹⁵ Rowan Cruft, S. Matthew Liao, and Massimo Renzo, “The Philosophical Foundations of Human Rights: An Overview” (Oxford University Press 2015) 5

¹¹⁶ Johannes Morsink, *Inherent Human Rights*, *supra note*, 275

¹¹⁷ David Luban, “Human Rights Pragmatism and Human Dignity” in Rowan Cruft, S. Matthew Liao and Massimo Renzo, *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 265

¹¹⁸ David Miller, *supra note*, 4

¹¹⁹ Richard J. Arneson, *supra note*, 125

nor as a theory that might help to explain the rise and fall of states”¹²⁰ If a human right to democracy is fundamental for individuals, they would seek and implement democracy; they would not remain indifferent.

4) Is the right to democracy universal?

One of the main attributes that human rights have is the fact that they are universal. Matter in fact, universalism forms the very essence of human rights, and we know that a human right exists by verifying that it is universal. By the very definition of human rights, as a consequence of the fact that they belong to every human being simply on the virtue of being human, they must be spread universally, as every human – regardless of the living place – is entitled to their protection. Usually, there is no debate over the existence of human rights (with some exceptions, especially for recent topics), but just over their content. For instance, there is no debate whether humans have a right to life or not, while there might be debates over the time when life starts or some particular issues such as assisted suicide. However, when it comes to the human right to democracy, there is clearly no such universalism. It must be emphasized, in the very beginning, that even proponents of it acknowledge directly that the human right to democracy is not universal, or, minimally, they show skepticism about it at least.

One of – if not the most – well-known supporters of the idea of a human right to democracy, Thomas Franck, expressed: “while inalienable and nonderogable rights have an important role to play in the development of a code of international human rights, they are acceptable precisely as to matters on which a cross-cultural consensus has formed. A right not to be deprived arbitrarily of life or liberty may be an example. There is no such clear consensus on the configuration of the right to political democracy; nor is it necessary, or even desirable, that such a consensus should be sought at present.”¹²¹

Another advocate of the human right to democracy, Pablo Gilabert, also admits that “the idea of a right to democracy is not the subject of complete consensus, as the rulers of some countries still reject it, or do not publicly endorse it. But the tendency is toward its recognition in

¹²⁰ Bernard Crisk, *supra note*, 32

¹²¹ Franck, “Democracy as a Human Right”, *supra note*, 76

international law and in human rights political practice.”¹²² Nevertheless, in the same article, later he maintains that the human right to democracy is universal because, according to him, every society needs democracy, claiming that “arguments for democracy clearly address abilities, interests, and threats that are likely to exist in any society.”¹²³ However, this argument can not be left without criticism, as he states a presumption, not a fact, when he claims that “every society needs democracy”. Moreover, even if that would be true, it would still not prove that the human right to democracy is universal. Every society might need high salaries, but this is nowhere evidence of the universality of high salaries.

Democracy itself is not universal, as there are many countries for which democracy is simply a foreign concept, on many occasions portrayed as something imposed by the West, or simply a system that is not desirable for different reasons. For instance, the first and third largest countries in the world, Russia and China, are not used to democracy. For the first case, Orlando Figes explains why democracy is something not desired in Russia and why it simply can not function there. This can be summed up with the quote of Catherine the Great, “who maintained that a country as big as Russia needed to be governed by autocracy: ‘Only swiftness of decision in matters sent from distant realms can compensate for the slowness caused by these great distances. Any other form of government would be not merely harmful, but utterly ruinous for Russia.’”¹²⁴ China, too, due to various reasons, has rejected democracy. However, it has seen an economic growth and major development in various areas, including military and technology. This can be explained by Grayling’s observation that “tyrannies are greatly more efficient than democracies. Democracy is an inefficient way of managing a state, given the time and energy consumed in debate, and the disruptive changes in policy, economic direction, and law that can follow changes of government after elections.”¹²⁵ Furthermore, the same author classifies some countries as democratic, including “the states of Europe and North America, together with Australia, New Zealand and Japan”, but adds that “even these states fall short of what the concept of democracy fully entails; the major democracies of the advanced world can only be regarded as, at best, partial democracies.”¹²⁶ However, even if we recognize them as typical

¹²² Pablo Gilabert, *supra note*, 26

¹²³ Ibid, 27

¹²⁴ Orlando Figes, *The Story of Russia* (Bloomsbury 2022) 8

¹²⁵ Grayling, *supra note*, 12

¹²⁶ Ibid, 9-10

democratic countries, there are many other countries in the world, besides China and Russia, that are clearly not democratic. As statistics shows, “according to EIU’s measure of democracy, almost half of the world’s population live in a democracy of some sort (45.4%), but only 7.8% reside in a “full democracy” (scores above 8.00). Substantially more than one-third of the world’s population live under authoritarian rule (39.4%).”¹²⁷

Democracy Index 2023

EIU classifies 74 countries as democracies

	No. of countries	% of countries	% of world population
Full democracy	24	14.4	7.8
Flawed democracy	50	29.9	37.6
Hybrid regime	34	20.4	15.2
Authoritarian regime	59	35.3	39.4

Note. “World” population refers to the total population of the 167 countries covered by the index. Since this excludes only micro states, this is nearly equal to the entire estimated world population.

Source: EIU.

figure 1) Democracy Index 2023. Source: Economist Intelligence Unit (EIU)

These numbers for 2023 are significant: while the fact that a state is democratic does not *ipso facto* or *ipso jure* lead to the conclusion that a human right to democracy exists in that country, the other way around is true: a human right to democracy does not exist in states that are not democratic. It is beyond absurd to believe that a country with an authoritarian regime, for instance, can secure the right to democracy. Moreover, in some countries not only it does not exist, but it can not exist as long as they follow some particular systems, such as Sharia law. There are many arguments that can be raised against a human right to democracy in countries that apply that system, but two are of great importance: the first is that a human right to

¹²⁷ Economist Intelligence Unit, “Democracy Index: conflict and polarisation drive a new low for global democracy” (15 February 2024). Accessed on 27 August 2024, through: [Democracy Index: conflict and polarisation drive a new low for global democracy - Economist Intelligence Unit \(eiu.com\)](https://www.eiu.com/en/topics/articlesviews/default.aspx?teaser=Democracy+Index:+conflict+and+polarisation+drive+a+new+low+for+global+democracy)

democracy, as it was explained, involves participation which is highly valued in the lawmaking process. In this regard, Benhabib argues:

*“I accept here Jürgen Habermas’s insight that the democratic principle states that only those statutes may claim legitimacy that can meet with the assent (Zustimmung) of all citizens in a discursive process of legislation which has been legally constituted. Only if the people are viewed not merely as subject to the law but also as authors of the law can the contextualization and interpretation of human rights be said to result from public and free processes of democratic opinion and will-formation”*¹²⁸

Also in Stephan Kirste’s explanation, the right to participate in the establishment of rules is a crucial aspect of a human right to democracy, or, as Griffin acknowledges, democracy requires that citizens “must decide the content of all laws.”¹²⁹ This is an element that can not be fulfilled by a country that applies Sharia law. Even if people choose in a democratic way to have Sharia law in their country they will accept a legal system whose rules were not created and can not be changed by them. This is because the source of such rules is God (according to Sharia), or as one of the most prominent Islamic scholars, Muhammad Hamidullah had written “God is the sovereign and source of all law.”¹³⁰ “The belief that God is the sole lawmaker derives directly from the narrative of the Muslim faith, la ilaha illa Allah, which, in this context, might be interpreted as there is no other lawmaker except Allah (God).”¹³¹ Therefore, under Sharia law, individuals can not exert their right to democracy as they can not participate in the process of drafting their basic laws or amending the laws. It suffices to have a look at the existing constitutions of the countries that have embedded Sharia law to have a clear picture of this explanation: i.e. the Constitution of the Islamic Republic of Afghanistan provides: “no law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.”¹³²

As Ed Husain observes, “as man-made law has become dominant in the West, Muslim activists

¹²⁸ Seyla Benhabib, “Is There a Human Right to Democracy? Beyond Interventionism and Indifference” (American Political Science Association Meetings 2011), 14-15

¹²⁹ James Griffin, *supra note*, 244

¹³⁰ Muhammad Hamidullah, *An Introduction to Islam*, (International Islamic Federation of Student Organizations 1970) 60

¹³¹ Charles Le Gai Eaton, *Islami dhe Fati i Njeriut* (Alphabet J&H 2024) 254

¹³² Afghanistan’s Constitution (2004), Article 3

have rallied under the Sharia. A survey in 2011 found that 87% of the population in Egypt wanted Sharia to hold official legal authority.”¹³³

The other inescapable challenge regarding the Sharia law is that it does not recognize democracy at all: not just as a right, but even as a form of government. One can come up with the argument that the fact that for instance Quran does not mention democracy does not mean that it prohibits it, however, Muslims are obliged to follow the examples of Mohamed, and the second source in Sharia law includes the “traditions of Mohamed, his sayings, approvals, and actions.”¹³⁴ The importance of Mohamed and the duty to follow him can be inferred directly from a passage in the Quran where it is written explicitly: “he who obeys the Messenger, obeys Allah”¹³⁵ The Quran teaches Muslims that if they wish to draw closer to God, they should emulate the ways of the Prophet.”¹³⁶ Thus, there is no dilemma that what Mohamed did in his life is a source of Sharia law and that every Muslim must follow his example, as in their belief he is considered to be the greatest person that has ever lived in our planet. As a consequence, the leaders of the countries that govern countries that have Sharia law, which are at the same time Muslim believers, must personally follow the example of Mohamed, due to their religious commitments, and also the laws of such countries must incorporate the acts of Mohamed. In this context, it must be taken into account that, except for being a religious figure, he was also a political one. He set an example of how should a community (read as: a state) be governed. And what was his example which is important for a human right to democracy? “He founded a State, which he administered as supreme head, maintaining internal peace and order, heading armies for external defence, judging and deciding the litigations of his subjects, punishing the criminals, and legislating in all walks of life”¹³⁷, meaning that he concentrated all sorts of powers in his hands: legislative, executive, judicial, and even the military power. Despite the way of organizing the administration, as it is obvious that he needed other individuals holding certain positions as well, “Muhammad would have the final word in all differences, and that there was no limit to his

¹³³ Ed Husain, *The House of Islam* (Bloomsbury 2018) 62

¹³⁴ Ibid, 65

¹³⁵ The Holy Qur'an, translated by Abdullah Yusuf Ali (Wordsworth Editions Limited 2000) Surah 4:80, 69

¹³⁶ Ed Husain, *supra note*, 65

¹³⁷ Muhammad Hamidullah, *supra note*, 13

power of legislation.”¹³⁸ This contradicts one of the tenets of a human right to democracy, which is perfectly described by Grayling, who writes about the importance of “defining and limiting the competencies of those entrusted within the exercise of legislative and executive powers. In an absolute monarchy there are no such constraints; that is what ‘absolute’ means, and it therefore further means arbitrary and unrestrained.”¹³⁹ How can we then expect from Afghanistan, Iran, Saudi Arabia, and other countries that apply Sharia law to recognize a human right to democracy to their citizens? The answer can be found in some valuable passages that Makau Mutua has written: “As currently constituted and deployed, the human rights movement will ultimately fail because it is perceived as an alien ideology in non-Western societies. The movement does not deeply resonate in the cultural fabrics of non-Western states. In order ultimately to prevail, human rights movement must be moored in the cultures of all peoples.”¹⁴⁰ This is applicable to Russia, China, many countries in different parts of the world, and foremost Sharia-law countries, who simply can not have a human right to democracy as long as they have that system: the only way for them to have a human right to democracy is first to abolish the Sharia legal system. Even a Western scholar, Morsink, argues that “the right to democratic participation is a typically Western and modern invention.”¹⁴¹

Conclusively, as long as 1/3 of the countries of the world (more than 35%) are authoritarian, the cross-cultural consensus, which Thomas Franck mentions, is nowhere near when it comes to the acceptance of a human right to democracy.

5) Is the right to democracy egalitarian?

Equality is the last, but not least, basic element of human rights. Sometimes, it is written that human rights are equal (instead of egalitarian), but the meaning is the same. It is of no relevance whether human rights are described as “equal” or “egalitarian”, the idea is that in principle they belong to every human being, without any distinction such as sex, race, ethnicity, religion, etc. As it was mentioned before, there is a consensus that the emergence of human rights in international law has taken place after the end of the Second World War (WWII). This argument

¹³⁸ Ibid, 28

¹³⁹ Grayling, *supra note*, 4

¹⁴⁰ Makau Mutua, *supra note*, 14

¹⁴¹ Johannes Morsink, *Inherent Human Rights*, *supra note*, 254

is shared perhaps by every author. Nevertheless, different authors tend to mention different sources when they speak about the origins of human rights, such as religious ones (Buddha's teachings, Hinduism's principles, The Holy Bible, The Quran, etc.); old documents (i.e. Magna Carta); national declarations (American Declaration of Independence, the French Declaration of the Rights of Men and of the Citizen, etc.), or other texts. This way, one might put the origins of human rights in question. However, the answer is clear: it was the UDHR that contained a catalogue of various human rights belonging to every human being without discrimination. Precisely because it treated human rights as egalitarian, it is this document, and not the precursory ones, that is recognized as the cornerstone of the internationalization of human rights. As Andrew Clapham observes, "Magna Carta can not really be seen as an exemplary human rights violations, because human rights, as that term is understood today, belong to all human beings and therefore can not be restricted to a selected group of privileged men."¹⁴² This explains why the UDHR is considered as a landmark document, despite the fact that it is not legally binding *ipso jure*. Its significance stands on the fact that it recognizes human rights to everyone. The subject of human rights is every human being, and not only some human beings based on some subjective features they may have, such as race, religion, occupation, welfare, etc. Simply said, without equality, there can be no human rights. Hence, a putative human right that do not offer guarantees that it will be applied equally can not be accepted as a human right. Thus, in order to answer the principal question "Is there a human right to democracy", first we must answer the question of equality. For that, Miller has a general formula: "First, we must examine each candidate right to ensure that recognizing it would not impose obligations on others that would violate their candidate rights – the rights we recognize as human rights must be consistent with each other."¹⁴³ According to the author of this thesis, a candidate right of democracy would violate the people's right to self-determination, because it would impose a specific form of government (democratic) regardless of the will of different peoples.

An important point in the author's understanding of democracy and the discussion regarding equality is the myth about majoritarianism. Etymologically, democracy does not mean the rule of the majority, but the rule of all. It is well-known that "the Greek for rule was *kratos*,

¹⁴² Andrew Clapham, *supra note*, 6

¹⁴³ David Miller, *supra note*, 2

and demos was 'the people'”¹⁴⁴, as much as it is well-known that the greats such as Socrates and Plato were not persuaded by democracy. The idea that everyone should govern is nonsense: from a practical perspective, it never happened. There have always been people who simply did not govern or were excluded; from a theoretical perspective, it does not make sense because if everyone governs then no one would be governed by. Who are they going to govern, if everyone governs? This illogical description of democracy is made in order to ensure equality and prevent any majority from using their numerical advantage to the detriment of minorities. However, everyone has the right not to be discriminated against: thus, it is this right, and not democracy, that protects minorities and prevents the majoritarian tyranny. Hence, one can simply describe democracy as a system where in practice the majority – and not everyone – rules, bearing in mind that democracy coexists with the prohibition of discrimination which ensures equality among the citizens of a country. Therefore, every citizen has the right to participate in the decision-making process, but in the end, those decisions that earn the support of the majority will prevail. There is no need to iterate that other human rights restrain democracy and keep it limited within the borders – ensuring that minorities of whatever form will not be discriminated against. Behind all these arguments stands the viewpoint that democracy is simply a form of government: as such, democracy simply ensures that the decision-making procedures must be conducted in a way that promotes equal opportunities to every citizen to participate and decide (however, as stated above, in practice the majority will be “more equal” than the minority). It is the legal order which contains a set of human rights and mechanisms to deal with their application, that guarantees protection to individuals that live within a country. Therefore, the credit must not be given to democracy directly.

An author who promotes a human right to democracy, Allan Buchanan, argues that equality is enshrined in democracy. For him, “democracy is seen as an important element of the institutional recognition of the equality of persons, fostering equal consideration of interests such as respect for autonomy and concern for wellbeing by requiring that all persons have the same fundamental status and are considered as equal participants in political decision-making in their societies.”¹⁴⁵ Despite that his arguments sound appealing, human rights do not exist *in abstracto* but rather in

¹⁴⁴ Bernard Crick, *Democracy: A Very Short Introduction* (Oxford 2002) 1

¹⁴⁵ Anita Horn, *supra note*, 36

concrete spaces and time; they create obligations and authorizations for concrete persons and institutions. Miller raises a realistic point when he states critically that “another respect in which asserting a human right to democracy may be unhelpful, if we are addressing a society in which there is latent or open conflict between different social groups. Most commentators on societies that are sharply divided along lines of religion or ethnicity agree that the best hope of avoiding violent conflict is to create a power-sharing regime in which leaders drawn from the different factions have an incentive to reach compromises and to promote moderate solutions among their followers.”¹⁴⁶ There is no need for a society to be in an open or violent conflict for these arguments to be useful, because every country in the world has different social groups that “compete” against each-other: firstly, it is hard to find monoethnic countries, thus in almost every country of the world there will be ethnic minorities (be there well-established ethnic minorities that have been living in a specific country for a long time, or minorities resulting from recent immigrations; secondly, even if there are no minorities, such as ethnic ones, there can be different divergences between the same ethnic groups (based on territory: i.e. Eastern Germans vs. Western Germans in Germany, Southern Italians vs. Northern Italians in Italy, etc; religion: i.e. Christians vs. Muslims in Nigeria; or any other ground); thirdly, one must not neglect the bitter truth that “all animals are equal, but some are more equal than others”. Consequently, some social groups such as LGBTIQ+ people, women, old people..., will always be threatened by majorities which can be conservative, patriarchal, illiberal, or else. Hence, even if a right to democracy with the divergences within the people of a state do not lead to violent conflicts, it might very easily put some persons in a unfavourable position simply based on the fact that they do not constitute the majority in terms of numbers. It suffices to mention the position that members of the LGBTIQ+ people have in democratic countries, and for that, we do not need to mention controversial laws as one can very easily come up with a counter-argument that a human right to democracy would not suppose discriminatory laws, because the right to democracy would have to be harmonious with other human rights that promote equality, *inter alia*, nevertheless a person that identifies as part of the LGBTIQ+ community will have fewer chances of winning the elections, for instance; women will have fewer chances in being chosen as members of the parliament, or head the courts or other institutions, etc. Tom Bingham reminds

¹⁴⁶ David Miller, *supra note*, 10

us of the risks that might appear from laws that are supported by illiberal majorities, stating that “in Nazi Germany, the law was an expression of the German nation, and the will of the German nation was incorporated in the Fuhrer.”¹⁴⁷ The idea here is that a human right to democracy will favour majorities, whatever their construct is (be their ethnic minorities, religious, or any kind of nature) on the damage of the rest of the population. This is more or less the risk of “the majority of tyranny”, as many authors, such as Andrew Clapham, call it; or how Grayling frames it “everyone is in a minority of some kind on some question and everyone’s individual and minority status requires defence against such majorities as emerge from time to time – on capital punishment, opposition to abortion, hostility to immigration.”¹⁴⁸

Miller acknowledges that there might be creative solutions for this, as he mentions that “constitution may be designed explicitly to counteract majority domination – for example constituencies may be rigged so that minority groups are over-represented in the legislature. Since political equality and majority rule are standardly taken to be defining features of democracy, these arrangements may not appear very democratic, and asserting a human right to democracy would be a way of demanding that they be replaced by institutions that give grass roots majorities greater control over decision-making. But once again, this may not be conducive to the protection of other human rights.”¹⁴⁹

Lord Acton, a prominent thinker of the 19th century, wrote some remarkable sentences: “It is bad to be oppressed by a minority, but it is even worse to be oppressed by a majority. Athenians understood that in order to ensure freedom, justice, and law, it was as necessary to refrain democracy as it was to limit oligarchy. In Plato’s time, constitutions were invented to curb democracy, just as modern constitutions were invented to limit monarchy. Monarchy hardens into despotism. Aristocracy shrinks into oligarchy. Democracy expands to numerical superiority.”¹⁵⁰ Thus, it is clear that democracy is far from being perfect and a human right to democracy would not be compatible with the element of equality.

¹⁴⁷ Tom Bingham, *supra note*, 67-68

¹⁴⁸ Grayling, *supra note*, 144

¹⁴⁹ David Miller, *supra note*, 10

¹⁵⁰ John Emerich Edward Dalberg – Acton, *Ese mbi Lirinë* (First published in 1948 in the original title “Essays on freedoms and power”, ISP & DITA 2019) 27-36

In addition to all these arguments, it suffices to reiterate the preconditions that a human right to democracy imposes: they can easily put some individuals in an unequal position against others.

B. Justifications for the human right to democracy

The first question that may appear when it comes to the justification of human rights is that of why do we even need a justification for them in the first place. James Griffin has answered this by offering several arguments. “Having agreement only on a list of human rights, and not on any reasons behind it, has major drawbacks. A greater measure of convergence on the justification of the list might produce more wholehearted promotion of human rights, fewer disagreements over their content, fewer disputes about priorities between them, and more rational and more uniform resolution of their conflicts—all much to be desired”¹⁵¹, he argues. The issue of justification should not be confused with that of the existence, because “the question of what human rights are and the question of what justifies their existence are clearly distinct.”¹⁵²

“In the case of democracy, for example, we need to be clear whether it matters to us instrumentally, for the other goods and values it helps to promote, or whether it matters for its own sake.”¹⁵³ Mostly, the arguments provided for the justification of a human right to democracy are instrumental, linking it to other rights and claiming that democracy is essential to protecting them. Usually, such authors support their position with practical examples coming from democratic countries, suggesting that the respect, protection, and fulfilment of human rights in general is much better than in other countries, which are not (fully) democratic. They draw lines between democracy and specific human rights, especially the freedom of expression, association, assembly and similar rights. That is what Anita Horn names as instrumental moral conceptions, explaining that “a successful moral instrumental claim for a human right to democracy must show that other human rights are thereby guaranteed or that political preconditions for a dignified life are secured.”¹⁵⁴

¹⁵¹ James Griffin, *supra note*, 26

¹⁵² Rowan Cruft, *supra note*, 11

¹⁵³ David Miller, *supra note*, 2

¹⁵⁴ Anita Horn, *supra note*, 44

According to Cruft, Liao, and Renzo, “the justification for the existence of a special class of rights called ‘human rights’ is that they protect certain distinctive features of humanity. In instrumental terms: human rights are useful or essential means to realize or further valued features of human lives.”¹⁵⁵

In this context, Thomas Christiano speaks of the “central role democracy plays protecting other fundamental moral rights in political societies and in international society. Democracy is essential to the protection of very urgent and widely accepted human rights.”¹⁵⁶ Further defending his instrumental justification for the right to democracy, he compares it to other existing human rights, which, according to him, exist simply because they are instrumental to other rights. “There are a number of rights of great importance whose value is primarily instrumental, such as the right to a fair trial, or at least the components of this right, such as the right to confront one’s accuser or the right to remain silent. These are commonly in the lists of human rights, but the first arguments one would give for them are instrumental. In this respect, the rights argued for are protective rights: they enable persons to defend their rights to personal integrity from violation by others.”¹⁵⁷ According to him, “minimally egalitarian democracy is in fact the best kind of institutional setup we know of for protecting these rights. No democracy no matter how egalitarian has the right to authorize torture, political imprisonment, or state murder or disappearance.”¹⁵⁸

It might be admitted that one way to assess the arguments that present an instrumentalist justification for a human right to democracy, linking democracy directly with the respect, protection, and fulfilment of human rights, is to compare the situation regarding the two components, democracy and human rights, in different parts of the world.

¹⁵⁵ Rowan Cruft, *supra note*, 11

¹⁵⁶ Thomas Christiano, *supra note*, 143

¹⁵⁷ Ibid, 166

¹⁵⁸ Ibid, 176

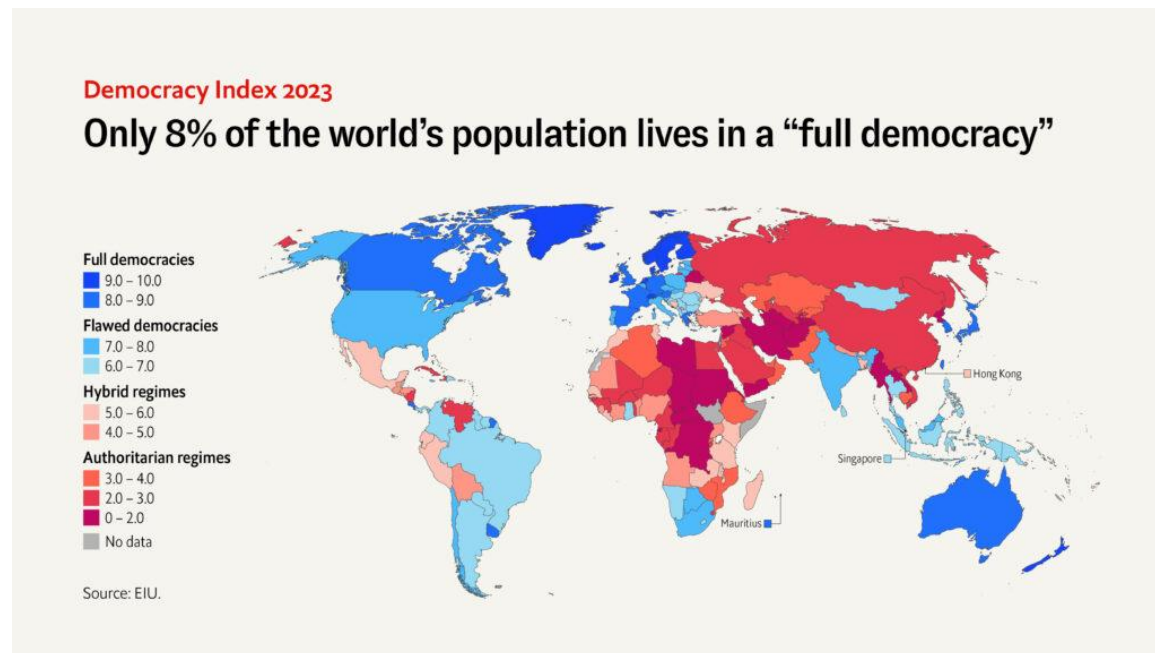


figure 2) Democracy Index 2023. Source: Economist Intelligence Unit (EIU)

In spite of the fact that it might be true that countries that perform better in the democracy index have a better situation regarding human rights as well, that can not serve exclusively as indisputable evidence that having a democratic form of government will necessarily lead to better protection of human rights because those democratic states might also be wealthier, have a better GDP, be financially stable, more advanced in technology, have a better education system, and so on... Thus, there might be many variables that have led to a stronger implementation of human rights in those countries, and not exclusively democracy. For that reason, it is not easy to draw a conclusion according to which democracy is the cause, meanwhile, human rights are the effect; it surely might be one of the causes, but not the only one. Moreover, democracy and human rights do not always stand in a positive relation: India, for instance, is considered a democratic country, but a report ranked it very low in human freedom score in 2021: precisely in the 109th place¹⁵⁹.

¹⁵⁹ Ian Vásquez, Fred McMahon, Ryan Murphy, and Guillermina Sutter Schneider, The Human Freedom Index 2023 (Cato Institute and the Fraser Institute 2023). Accessed on 30 August 2024, through: [Human Freedom Index: 2023 | Cato Institute](#)

“The other argument for a human right to democracy does not ground it in the ideas of persons as free and equal, but in the importance of avoiding terrible outcomes such as tyranny, war, famines, and cruel subordination. Democracy (and the ideas that come associated with it) is supported on the instrumental consideration that it is a requirement for avoiding such unacceptable conditions.”¹⁶⁰ In this regard, Morsink justifies a human right to democracy on the basis that “in order to flourish human beings need to be given choices, including in the political realm”, mentioning some cases of great famines, which according to him, occurred “not that there was not enough food in the nation or region where the famine occurred, but that those starving to death had no legal access or entitlement to that food.”¹⁶¹

Notwithstanding that a human right to democracy might prove to have a positive impact on individuals’ lives, it does not seem that its value is of such a rate as to make it a crucial factor in humans’ lives. Thus, even if there is a consensus that a human right to democracy would serve to improve individuals’ lives, that would not suffice *per se*, because there are many things that have a positive role and can improve the lives of human beings, but they do not reach the degree of justification that human rights have. As James Griffin notes, “if we had rights to all that is needed for a good or happy life, then the language of rights would become redundant. Rights are strong protections, and so require something especially valuable to attract protection.”¹⁶² Democracy might indeed be the most suitable type of governance regarding the aim of fulfilling human rights, but this merely proves the value of democracy as a form of government. As Miller argues, “Even if there is a strong probabilistic connection between democracy and the protection of human rights, they claim, this shows only that there is a human rights-based claim to democracy, not a human right to democracy itself.”¹⁶³ All of the arguments for the justification of a human right to democracy, based on the claim that democracy plays an important role in ensuring other human rights, tell that there is no need for a human right to democracy: all that is needed is a democratic government (based on their arguments about the positive impact of democracy). If people choose to have a democratic government, that is all that is needed, to reach the goal of ensuring other human rights (always using the assumption that human rights are

¹⁶⁰ Pablo Gilabert, *supra note*, 22

¹⁶¹ Johannes Morsink, *Inherent Human Rights*, *supra note*, 275-276

¹⁶² James Griffin, *supra note*, 34-35

¹⁶³ David Miller, *supra note*, 5

ensured in a democracy). Hence, there is no need to classify democracy as a human right to reach that end. Moreover, if democracy has not been able to spread universally as a form of government, it will definitely fail to spread as a human right as well. Thus, considering it as a human right would make no practical difference at all.

In addition to the points presented above, it is assessed that even undemocratic regimes can protect human rights. Just as there is no indisputable conclusion and guarantees that democratic countries safeguard human rights, there is no indisputable conclusion that undemocratic countries violate human rights. In this context, Cohen presents a tool that might be used by undemocratic regimes to ensure the protection and promotion of the interests of every individual, despite the fact that they might not participate directly in the government: self-determination. “Collective self-determination requires: (a) binding collective decisions resulting from, and accountable to, a political process that represents the diverse interests and opinions of those subject to (and expected to comply with) the society’s laws and regulations; (b) rights of dissent from, and appeal to, collective decisions; and (c) the expectation for the government to publicly explain its decisions which must be founded on a conception of the common good.²² According to Cohen, these conditions could also be fulfilled under a theocratic government, which permits only adherents of a particular religion to hold official representative positions or to acquire certain privileges. Further, these representatives need not be selected through democratic partisan elections, but can be elected by separate social groups.”¹⁶⁴

Lastly, when arguing for the justification of a human right to democracy, one must bear in mind that democracy might have a bad impact as well. “As historical experience concerning the interests of property-less workers and women suggests, those who lack equal and effective rights to affect the political process are more likely to be bypassed by decision-makers. Their interests are less likely to be duly represented, and they are less likely to be consulted or offered explanations.”¹⁶⁵ Individuals representing a minority, whatever that might be, will most likely be less represented, despite that, in theory, they might be “equal” to the others. This is what Jan-Werner Muller and many others describe as illiberal democracy. In this kind of democracies, “only some of the people should get to enjoy the full protection of the laws; those who do not

¹⁶⁴ Anita Horn, *supra note*, 19

¹⁶⁵ Pablo Gilabert, *supra note*, 11

belong to the people or, for that matter, who might be suspected of actively working against the people, should be treated harshly. This is ‘discriminatory legalism’, the view that ‘for my friends, everything; for my enemies, the law’.”¹⁶⁶

C) Assessment

Bearing in mind all of the arguments presented in this chapter, it stems that a human right to democracy does not fulfil the elements that human rights have. There is no sufficient evidence that a right to democracy is inherent in every citizen, applying universally and equally, and being fundamental and inalienable. On the contrary, there is evidence of the negative answer to each one of these, especially the universality and equality elements – being the most problematic of all elements of human rights. Moreover, the arguments for a justification for a human right to democracy are not convincing, especially because authors that try to justify a human right to democracy ignore the negative impact that it might have, and focus only on the positive side. Thus, they do not appear very objective. Nevertheless, even though the author of this thesis agrees that democracy might have a very positive impact in regard to other human rights as well, the conclusion stemming from that is that democracy is a suitable form of government, and not one that democracy is a human right. After all, “Human rights and democracy have grown up to meet quite different needs. Human rights grew up to protect what we see as constituting human dignity: the life, autonomy, and liberty of the individual. Democratic institutions grew up in our need for a decision procedure for groups—a procedure that is stable, manages transfer of power well, appropriate to a society whose members are more or less equal in power or worth, reconciles losers in social decisions to the basic structures of the society, and tends to promote the commonweal— that is, order, justice, security, and prosperity.”¹⁶⁷ As Niels Petersen notes, “the protection of human rights or the implementation of the rule of law are separate institutions which can be distinguished from the establishment of democracy and subject to independent analyses. It is possible to imagine an autocratic regime observing the rule of law or complying with human rights obligations.”¹⁶⁸ In addition, even if a justification for a human right to

¹⁶⁶ Jan-Werner Muller, *What is Populism?*, *supra note*, Chapter 2

¹⁶⁷ James Griffin, *supra note*, 249

¹⁶⁸ Niels Petersen, “The Principle of Democratic Teleology in International Law” (Max Planck Institute for Research on Collective Goods 2008) 6

democracy is accepted, and there would be a consensus reached that a human right to democracy has an instrumental justification, that would not prove its existence as a human right. Thus, considering that a human right to democracy is not an indispensable tool for other human rights (such as the freedom of expression, association, assembly) and does not ensure basic needs, it is concluded that it does not contain the elements of human rights. Hence, at least from a moral conception, democracy does not appear to be a human right.

III. SEARCHING FOR A HUMAN RIGHT TO DEMOCRACY IN THE SOURCES OF INTERNATIONAL LAW

For a legal order to exist there must be some legal rules, and for such rules to exist there must be sources. Since legal rules form the basis for rights and obligations, a claim for the existence of a specific human right must be supported by a specific source of international law. It is universally accepted that the sources of international law are those mentioned in Article 38 of the Statute of the International Court of Justice (hereinafter: ICJ): international conventions, international custom, general principles of law (as primary sources); and judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.¹⁶⁹ This chapter will deal with the question of the existence of a human right to democracy from a perspective of international law, more specifically whether any of the sources of international law recognizes democracy as a human right.

Human rights “become positive through state regulation or through international covenants”¹⁷⁰, however, they become as such even via other sources of international law. In the context of the human right to democracy, the most important sources include the UDHR and ICCPR, as they contain articles that are very much related to the topic at stake. As Pablo Gilabert notes, “Core documents such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights are somewhat open to interpretation, although they seem to lean strongly toward a democratic construal of political rights. The rights to political participation stated in these clauses do not use the word “democracy.” But it is hard to think that the idea of democracy is not implied once we see “the will of the people” as “the basis of the authority of government,” and claim that the former is to be given expression (inter alia) in “periodic and general elections” involving “universal and equal suffrage” that “guarantee the free will of the electors”.¹⁷¹ Similarly, David Miller acknowledges that “there are fairly clear indications in the main declarations and covenants that democracy is to be regarded as a human right.”¹⁷² More specifically, Wimmer pretends that “Article 21 UDHR and Article 25 ICCPR

¹⁶⁹ Statute of the International Court of Justice (1945), Article 38. Accessed on 5 August 2024, through: [icj_statute_e.pdf \(un.org\)](https://www.un.org/icej/statute_e.pdf)

¹⁷⁰ Stephan Kirste, *supra note*, 43.

¹⁷¹ Pablo Gilabert, *supra note*, 11-25

¹⁷² David Miller, *supra note*, 3

support a human right to democracy.”¹⁷³

A. International agreements

International agreements (conventions, treaties, charters, pacts, or other titles they may have) are the most common source of human rights today. It is almost impossible to imagine a human right that exists and can not be found in a specific treaty. This way, when it comes to the putative human right to democracy, the most important treaty is clearly ICCPR; more specifically, its Article 25, which provides:

“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.”¹⁷⁴

From a first look at the ICCPR, and more specifically the abovementioned, it is clear that it has differences from the UDHR, whose Article 21 will be analysed in the upcoming subchapter. The major difference lies at the formulation of the right they project: while the latter recognizes the right to take part “in the government”, the former provides a right to take part “in the conduct of public affairs”. When speaking of the formulation or wording, it must always be taken into consideration that no treaty in international law has ever recognized, at least *ad litteram*, a human right to democracy. Thus, “democracy” as a word is not mentioned anywhere. Since it is nowhere written that a human right to democracy exists, the only treaty that is mentioned as a source of that right, ICCPR, should be interpreted, with the final aim of finding an answer to whether the abovementioned article entails a human right to democracy or not. The rules that must be followed during the interpretation are laid down in the Vienna Convention on the Law of Treaties, according to which the primary rule is that “a treaty shall be interpreted in good faith in

¹⁷³ Karoline Wimmer, *supra* note, 5

¹⁷⁴ ICCPR, Article 25. Accessed on 21 August 2024 through: [International Covenant on Civil and Political Rights | OHCHR](#)

accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁷⁵

Just like national laws, even international treaties are not always fully clear in their meaning. That comes partly because new events which are related with the content of these treaties or laws occur all the time, and partly because international treaties do not have an educative purpose. It is not the task of a treaty to educate the reader what is its exact meaning. For these reasons, luckily there are commentaries that can serve as a useful tool in capturing a proper understanding of their content. In this context, in the commentary written by Taylor (which was mentioned earlier), it is explained very clearly that there is no human right to democracy in that article. Thus, he first interprets it positively, describing what rights it does contain: “Article 25 rights fall into two groupings. One is concerned with enfranchisement and addresses the right to vote and be elected by universal and equal suffrage, combined with certain stipulations for elections (such as ballot secrecy and the promise that elections will express the will of electors). It also includes the right to participate in public affairs through representatives thereby elected and enables influence in public debate and dialogue, which is particularly important for engagement by minorities in decision-making that affects them. The other grouping concerns access to employment within the public service on general terms of equality. Both apply only to citizens.”¹⁷⁶ Then, he interprets the article in a negative way, by describing what is not included there: “While Article 25 requires certain voting and representative rights to be guaranteed, it does not specify any particular constitutional model of government or political system. The focus of Article 25 is on specific guarantees, irrespective of the form of government.”¹⁷⁷ Not only does that article not recognize a human right to democracy, but according to the same author, such an interpretation would recognize a human right that would be in discordance with self-determination. “Article 25 is distinct from, but is interpreted consistently with, the right to self-determination in Article 1(1), by which peoples may determine freely their political status and enjoy the right to choose the form of their constitution or government”¹⁷⁸, he notes. This argumentation is also shared by the UN High Commissioner for Human Rights in its General

¹⁷⁵ Vienna Convention on the Law of Treaties (1969), Article 31

¹⁷⁶ Paul Taylor, *supra note*, 693

¹⁷⁷ Ibid, 693-694

¹⁷⁸ Ibid, 694

Comment 25. Except for maintaining that the right of self-determination includes the right to choose the form of the government, it furthermore foresees: “Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects”.¹⁷⁹ Moreover, according to another author, Article 25 “is less than a right to democracy, rather a right of political participation and to political accountability through elections.”¹⁸⁰

In light of all of the arguments written above, a human right to democracy is not included in the ICCPR, which, on the contrary, has put the right to self-determination in the very beginning, which entitles people to choose whatever type of government they want, including non-democratic one. This is clearly different from UDHR’s Article 21, which does not make room for non-democratic forms of government.

B. Customary international law

Customary international law, the second source of international law, is defined in the article 38 as “evidence of a general practice accepted as law”¹⁸¹, showing its two coins of the same medal: one being the general practice, and the other one “accepted as law”. As it was already noted before, the most common source, after ICCPR, to which the authors that try to argue for the existence of a human right to democracy refer, is the UDHR. Certainly, for them it is favourable to treat the UDHR as a source of international law, but there is a continuous discussion as to whether the latter should be treated merely as a resolution with no legal effects – as it was intended in the beginning – or as part of customary international law. In this regard, usually, now most of the scholars of international law admit that the UDHR has evolved from what it was in the beginning and is part of customary international law. Nonetheless, another existing dilemma is to the extent of its transformation into customary international law: is the UDHR part of it in its entirety, or are there just some of its articles to be recognized as such? Kirste, as a supporter of the human right to democracy, claims that “the originally non-binding UDHR has gained binding force as customary international law”¹⁸², however, there is clearly no consensus on this.

¹⁷⁹ High Commissioner for Human Rights, *supra note*, [1]

¹⁸⁰ Hilary Charlesworth, *supra note*, 274

¹⁸¹ Statute of the International Court of Justice, *supra note*, Article 38

¹⁸² Stephan Kirste, *supra note*, 23

For instance, Malcolm Shaw shows doubts, writing that “Although clearly not a legally enforceable instrument as such, the question arises as to whether the Declaration has subsequently become binding either by way of custom or general principles of law, or indeed by virtue of interpretation of the UN Charter itself by subsequent practice.”¹⁸³ As the name itself suggest (Declaration), it is obvious that there was no intention to treat it as a legally binding instrument. As Morsink argues, when analysing the idea and initial preparation steps, the position held by then world’s superpowers, namely the United States and USSR, was “to draw up a declaration or manifesto of principles without any machinery of implementation attached to it.”¹⁸⁴ What is more, not only the world’s leading countries, but actually “most delegations did not see the Declaration as a legally binding document in any case, but as one with moral force only.”¹⁸⁵ Hence, before even digging into the content of the UDHR and analyse whether Article 21 recognizes a human right to democracy, already the very nature of the Declaration and its effect under international law are disputable.

Article 21 of the UDHR:

- “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.”¹⁸⁶

Again, just as in the case of the ICCPR, discussed above, the UDHR does not mention the term “democracy” anywhere. The methodology will be the same as the one used for the ICCPR, where commentaries are going to be consulted in order to find an answer to whether this article confers a human right to democracy, regardless of not mentioning it explicitly. In this context, Humberto Rivera, never, in any of his 837 pages of the commentary of the UDHR, claims that a human right to democracy exists. Specifically for the article at stake, he does not argue that the implication of it is the existence of a human right to democracy, but rather that “it reflects the

¹⁸³ Malcolm N. Shaw, *International Law* (8th edn, Cambridge University Press 2017) 219

¹⁸⁴ Johannes Morsink, *The Universal Declaration on Human Rights*, *supra* note, 13

¹⁸⁵ *Ibid*, 68

¹⁸⁶ Universal Declaration on Human Rights, Article 21.

drafters' will to show their commitment to democratic principles. The word democracy acted as a "legal" taboo... In the meantime, ideals of democracy certainly inspired the Declaration drafters, in a common hope that a universal definition could emerge as a "legal" totem."¹⁸⁷ According to him, "the idea of democracy has been hardly translated into international and european human rights law"¹⁸⁸

In another commentary, Allan Rosas maintains that Article 21 provides that "there must be a system of democratic participation with equal political rights for every citizen", which is basically the definition of a human right to democracy, drawn from the writings of different authors mentioned in the first chapter. However, later in that text, he argues that "Article 21 should be given a broad meaning. There should be genuine democratic participation, with open and informed discussion and interaction and effective accountability. Moreover, the population participating in decision-making..."¹⁸⁹ Here, a diversion from the first claim appears, because democratic participation and genuine participation in decision-making are two different things. Furthermore, despite that the author there claims that "Article 21 is becoming more and more relevant as an expression of the rights of peoples, groups, individuals to democracy", it is important to note that "with respect to the reference to the will of people, the US representative, in an explanation of vote, stated that it proclaimed a political principle rather than a human right."¹⁹⁰ Moreover, he emphasizes that "neither provision uses the actual concept of democracy, instead emphasizing participation. There are some references to a democratic society in UDHR and ICCPR, but these appear in the context of limitation clauses.". In addition, when diverting from global level to regional one, the author writes that "the right of political participation has, in one form of another, been recognized in the regional instruments as well"¹⁹¹, indicating that perhaps there is a right of political participation, that is different from the right to democracy, which – as explained in the first chapter – in the perception of the author of this thesis, is characterized by the right to make decisions, and not merely participate.

¹⁸⁷ Humberto Rivera, *The Universal Declaration on Human Rights: A Commentary* (Brill 2024) 487-489

¹⁸⁸ Ibid, 506

¹⁸⁹ Allan Rosas, 450

¹⁹⁰ Ibid, 435

¹⁹¹ Ibid, 442

For Johannes Morsink, “the claim in Article 21 that “everyone has a [human] right to take part in the government of his country” raises very unrealistic expectations. Most of the world’s people never have lived and still do not live in a democratic country and so cannot be said to be enjoying the substance of this right”.¹⁹² Considering the empirical evidence, as it could also be seen by the statistics shown in two figures used earlier in this document, it is clear that democracy is far from being a universal value accepted in every continent. Thus, from this point of view, the observations made by Morsink seem to be realistic, compared to the idealistic approach that some authors maintain when they claim that a human right to democracy exists and Article 21 recognizes such a right.

Moreover, “in a democracy there can be no question of proscribing anyone from standing for election or office.”¹⁹³ Especially in a human right to democracy this can not be tolerated. However, the constitution of Bosnia and Herzegovina shows a particular case where. While the first paragraph of the second chapter states that “Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms”, the fifth one maintains that “The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska.”¹⁹⁴

Referring to the wording of these two articles, if Bosnia and Herzegovina ensures the highest level of internationally recognized human rights, it must surely ensure the human right to democracy, if it is to be recognized as a human right internationally. If that is the case, then how is it possible to proscribe everyone from standing for election as president, unless they are Serbs, Croats, or Bosnians? Clearly this would be a violation of that human right. The reason why this constitution is relevant in terms of the discussion of the existence of a human right to democracy in customary international law can be explained by offering a short description of the background. The Constitution is a product of the Dayton Agreement and, as James C. O’Brien

¹⁹² Johannes Morsink, *Inherent Human Rights*, *supra note*, 253

¹⁹³ Grayling, *supra note*, 107

¹⁹⁴ Bosnia and Herzegovina's Constitution of 1995 with Amendments through 2009. Full text available at: [Bosnia_Herzegovina_2009.pdf \(constituteproject.org\)](https://www.constituteproject.org/Bosnia_Herzegovina_2009.pdf). Accessed on 24 August 2024.

himself acknowledges, it was “drafted by international mediators.”¹⁹⁵ That agreement was witnessed by the representatives of the United States of America, Russia, United Kingdom, Germany, France, and the European Union Special Negotiator – meaning the international community; and clearly the most important states in the process of establishing new rules in international law. United Nations, United States, Russia, and European Union had also a direct role in the implementation of the agreement.¹⁹⁶ “Formally, negotiators Richard Holbrooke and former Swedish prime minister Carl Bildt convened the conference together. Holbrooke represented the Contact Group: the United States, the United Kingdom, Russia, France, Germany, and Italy. Bildt represented both the United Nations and European Union.”¹⁹⁷

The example that the current Constitution of Bosnia and Herzegovina – as a direct product of the Dayton Agreement – provides, is evidence against the existence of a human right to democracy in international law. It is obvious from its very content that it does not offer a right to participation under an equal status, and it does that in a discriminatory ground, by proscribing every individual of an ethnic community other than Serb, Croatian, or Bosnian. They are not entitled even to the right to vote, which includes the passive right (to be elected). Due to the direct and active inclusion of the international community, where actors such as the United Nations, European Union, United States of America, Russia, France, Germany, and Italy, had a leading role, and the fact that they gave formal consent to this agreement – not to mention that practically the entire Dayton Agreement is written by them – this shows, at minimum, an absence of an *opinio juris* from them that they are bound by a rule of international law to democratic entitlement. If a human right to democracy existed, it would be binding for these countries, and by feeling bound by such a rule, they would not give consent for a constitution that violates this right. Franck’s assumptions and predictions about emerging rules of international law, by which governance is monitored and validated, have been proved wrong by this agreement reached in Dayton.

¹⁹⁵ James C. O’Brien, “The Dayton Constitution of Bosnia and Herzegovina” in Laurel E. Miller and Louis Aucoin (eds), *Framing the State in Times of Transition: Case Studies in Constitution* (US Institute of Peace Press 2010) 332. Accessed on 24 August 2024, through: [Chapter12_Framing.pdf \(usip.org\)](#)

¹⁹⁶ The General Framework Agreement for Peace in Bosnia and Herzegovina, initialled in Dayton on 21 November 1995 and signed in Paris on 14 December 1995. Accessed on 25 August 2024, through: [126173.pdf \(osce.org\)](#)

¹⁹⁷ O’Brien, *supra* note, 336

Apart from *opinio juris*, which is the subjective element of customary international law, the example stemming from Bosnia and Herzegovina is valuable in terms of the objective element (general practice) as well. This is so because “material acts, legislative acts, and legal practices qualify as state practice.”¹⁹⁸ While the Constitution is obviously a legislative act, as it was adopted by the Parliament of Bosnia and Herzegovina, what is even more important for the context of serving as an argument in terms of customary international law rules is that the presence of international community, their active participation in drafting the Dayton Agreement, the tasks they agreed to undertake, and their witnessing of the agreement, all of these acts can qualify as material acts from the most influential states in the world, which historically have shaped international law, such as United States, Russia, United Kingdom, France, Germany, Italy.

Johannes Morsink praises the UDHR for its global impact and inspiring role it has been playing. However, despite its universal character, there has been criticism of Western influence, especially in the beginning. “After the adoption of the Declaration, the worries expressed by the American Anthropological Association became charges that the document that had been produced was indeed a product of Western ethnocentrism. When Antonio Cassese asks, “How did the West succeed in imposing its philosophy of human rights”, upon the Universal Declaration, he more or less assumes that this is what happened.”¹⁹⁹ These points can be raised against the allegations for a human right to democracy as well. Thus, even if that specific article was intended to recognize a human right to democracy, it is not to be considered as part of the customary international law, because it has not been spread all over the world as to constitute a “general practice” by states. Moreover, even Western countries, that are liberal democracies, through various material acts indicate that they do not see themselves to be bound by a human right to democracy. Additionally, the ICCPR changes from UDHR in two dimensions: first, the wording of its Article 25 is different from UDHR’s Article 21, and scholars maintain that Article 25 does not deal with the form of government; second, ICCPR has a right which can not be found in the UDHR: the right of self-determination. As a consequence, Article 25 of the ICCPR must be read in conjunction with Article 1, which entails the right of people to choose the form

¹⁹⁸ Jan Klabbbers, *International Law* (3rd ed, Cambridge University Press 2021), 31

¹⁹⁹ Johannes Morsink, *The Universal Declaration on Human Rights*, *supra* note, 10

of government they want. Thus, bearing this in mind, there are sufficient reasons to state that ICCPR does not recognize a human right to democracy. Considering this, the argument that UDHR recognizes a human right to democracy in Article 21 is not relevant, as the same was not reflected in the ICCPR, showing that a human right to democracy in UDHR – even if we agree that it exists – did not transform into a customary rule.

C. Assessment

While analysing state, as the main subject of international law, and more specifically statehood criteria, the distinguished scholar of international law, Jan Klabbers, argues: “As a logical consequence of the sovereign equality of states, there is no specific form of government prescribed. This is controversial, of course, as it means that nasty dictatorships are treated in the same way as enlightened democracies.”²⁰⁰ This is the case with international law in general and human rights in particular: none of them imposes a specific form of government.

While it has been asserted that the UDHR recognizes a human right to democracy – despite that this is also debatable – considering that UDHR is not legally binding, and only partially part of customary international law, its relevance is clearly secondary compared to the ICCPR, which is fully legally binding, taking into account that it is an international treaty. Thus, “the rights of democratic governance”²⁰¹, the synonym used by the UN Commission on Human Rights for the human right to democracy, which allows no other form of government rather than democratic, is secondary compared to the right of self-determination, enshrined in the ICCPR, which allows other forms too.

As Hurst Hannum notes “many of the Universal Declaration's provisions also have become incorporated into customary international law, which is binding on all states. Those who urge acceptance of the Declaration in toto as customary law are in a clear minority, and there is insufficient state practice to support such a wide-ranging proposition at this date. However, there would seem to be little argument that many provisions of the Declaration today do reflect

²⁰⁰ Jan Klabbers, *supra note*, 77

²⁰¹ UN Commission on Human Rights, “Promotion of the right to democracy” (55th session, 1999, Geneva). Accessed on 28 August 2024, through: [Promotion of the right to democracy. | Refworld.](#)

customary international law.”²⁰² It was argued that the provision, which in the view of the proponents of a human right to democracy recognizes such a right, does not reflect customary international law because the general practice and *opinio juris* of the states after 1948 shows that they have not been acting in a way that would serve as evidence of an existing rule of a human right to democracy in customary international law.

Thus, it is not relevant whether UDHR contains a human right to democracy or not, because the ICCPR does not. On the contrary, the latter contains a right to self-determination, which *inter alia* includes the right to choose a particular form of government, even other than a democratic one.

Eventually, a human right to democracy can not be found in the existing sources of international law. Hence, from a positive law perspective, the human right to democracy is inexistent.

²⁰² Hurst Hannum, “The UDHR in National and International Law” (Health and Human Rights, Vol. 3, No. 2, 1998) 145-148. Accessed on 27 August 2024, through: [16-Hannum.pdf \(hhrjournal.org\)](#)

IV. CONCLUSION

The idea that a human right to democracy exists has not yet appeared in a crystalized image from a theoretical perspective, let alone as a human right in international law. Hence, not only is there no consensus among the scholars that a human right to democracy exists, but even those that claim such a thing, differ in their understanding of such a right: for instance, Thomas Franck views the human right to democracy as a collective right, meanwhile for Thomas Christiano that is an individual right; Carol Gould insists on democratic institutions as an important component of a human right to democracy, meanwhile for Anita Horn democratic institutions are not necessary... These examples suggest that there is ambiguity regarding the definition and scope of a human right to democracy, which would only create legal uncertainty.

Despite that there is no clear and precise definition which is embedded in literature, nonetheless, some common elements have been drawn by the author of this thesis. Hence, for most of the proponents of a human right to democracy, the scope of it is limited to participation, and democracy is perceived in procedural terms, paying no attention to the end of ‘democratic’ processes – while the author of this thesis maintains a substantial understanding, according to which a human right to democracy should not be defined only as a right to participate in political processes, but also to decide on these processes. This stems from the notion of democracy itself, the very essence of which consists in “ruling”. Thus, the outcome of such processes must be democratic, too. The arguments offered by the authors that write about the existence of a human right to democracy maximally can suffice to conclude that “there may be a human right to political participation that is distinct from the idea of a right to democracy”²⁰³, since they focus on participation as a means, meanwhile, the author of this thesis focuses on the end: the result of this participation.

In this thesis, it was argued that democracy is not a human right, following an approach that was based on the position that putative human rights must fulfil two requirements in order for them to exist as such: they must contain the elements that every human right has, and they must appear in the sources of international law. In this context, throughout the second chapter, it was explained why democracy does not fulfil the elements of human rights (inherence, inalienability, fundamentality, universalism, equality), and it was argued that a human right to democracy does

²⁰³ David Miller, *supra note*, 11

not derive from the human nature, nor is it essential to secure basic needs and/or guarantee human dignity; consequently, it lacks the first (substantive) requirement. In addition, throughout the third chapter, it was argued that a human right to democracy can not be found in the sources of international law, in spite of the arguments in favour of a human right to democracy in the UDHR, due to the fact that the latter does not reflect a rule which is part of the customary international law, and it contradicts with the right to self-determination enshrined, *inter alia*, in the ICCPR. Thus, the author of this thesis maintains that the latter does not recognize a human right to democracy.

One of the titles that fueled the debate over the existence of a human right to democracy is titled “the emerging right to democratic governance”. This right, for the author of this thesis, has not emerged... at least not yet...

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