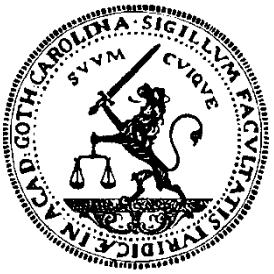

FACULTY OF LAW

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Electoral Political Participation at the Core of Democracy

A Human Rights-Based Study of the Swedish Electoral System

JURM02 Graduate thesis

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Contents

Summary

In this thesis, I investigate how the democratic form of government is maintained and protected in the Swedish legal system, as well as what kinds of risks the legal system poses to the maintenance of democracy in Sweden. Recent reports from NGOs show that the world, and Europe, are going through a trend of democratic backsliding. Thus, it is timely to evaluate what risks the Swedish system might face, from a legal point of view.

The study is based on a human rights perspective, where my definition of democracy is based on international human rights law, in particular the right to political participation of Art. 21 of the UDHR and Art. 3 of Protocol No. 1 of the ECHR. Through these sources, I build a democratic framework that identifies the basic requirements for a democratic state. This approach is based on an understanding of democracy as political participation, in particular electoral political participation in relation to parliamentary elections. This framework consists of five requirements for the realization of electoral political participation as a cornerstone of the democratic state, those are: (1) a legislative power that derives its authority from the will of the citizens, (2) that this will is expressed through contested elections, (3) that the citizens have the right to vote and may stand for election, (4) these elections must meet conditions of universal and equal suffrage, periodicity, free and secret elections, and that (5) limitations from these requirements must be justified, are proportionate and prescribed by law.

This framework is used as the backbone for the study of the Swedish system of electoral political participation, especially its regulation in the Constitution, as in the Instrument of Government. The study finds that although the regulation is extensive and that the requirements are mainly met, the system is vulnerable due to the relatively simple procedure to amend the Constitution. Furthermore, many of the provisions of practical nature are governed by the Elections Act, an ordinary law. In this sense, a fairly weak political majority would be able to amend laws in a way that could put democracy at risk. Therefore, the democratic form of government needs stronger legal protection, at least through an amended procedure of changing the Constitution.

Sammanfattning

I detta examensarbete undersöker jag hur det demokratiska statsskicket upprätthålls och skyddas i det svenska rättssystemet, samt vilka typer av risker rättssystemet utgör för upprätthållandet av demokratin i Sverige. Nyligen publicerade rapporter från icke-statliga organisationer visar att världen, och Europa, är i en trend av demokratisk tillbakagång. Det är därför dags att utvärdera vilka risker det svenska systemet kan stå inför, ur juridisk synvinkel.

Studien utgår från ett människorättsperspektiv, där min definition av demokrati utgår från folkrätt och mänskliga rättigheter, i synnerhet rätten till politiskt deltagande i Art. 21 i UDHR och art. 3 i tilläggsprotokoll nr 1 till EKMR. Genom dessa källor bygger jag ett demokratiskt ramverk som identifierar de grundläggande kraven för en demokratisk stat. Förhållningssättet bygger på en förståelse av demokrati som politiskt deltagande, i synnerhet valpolitiskt deltagande i förhållande till riksdagsval. Ramverket består av fem krav för att förverkliga valpolitiskt deltagande som en hörnsten i den demokratiska staten, de är: (1) en lagstiftande makt som härleder sin auktoritet från medborgarnas vilja, (2) att denna vilja kommer till uttryck genom val med flera valbara alternativ, (3) att medborgarna har rätt att rösta och kan ställa upp i val, (4) att dessa val måste uppfylla villkor för allmän och lika rösträtt, periodicitet, fria och hemliga val, och (5) att begränsningar från dessa krav måste motiveras, vara proportionerliga och föreskrivna i lag.

Detta ramverk används som ryggraden för studien av det svenska systemet för valpolitiskt deltagande, särskilt dess reglering i grundlagen – Regeringsformen. Studien konstaterar att även om regleringen är omfattande och att kraven i huvudsak är uppfyllda, är systemet sårbart på grund av det relativt enkla förfarandet för att ändra grundlagen. Vidare styrs många av bestämmelserna av praktisk karaktär av Vallagen, en vanlig lag. I den meningen skulle en ganska svag politisk majoritet kunna ändra lagar på ett sätt som i slutändan skulle kunna äventyra demokratin. Därför behöver det demokratiska statsskicket ett starkare rättsskydd, åtminstone genom ett ändrat förfarande för att ändra grundlagen.

Preface

Through the submission of this thesis, six years of legal studies seem to be completed. I will look back on this time with mixed feelings, but above all, with joy and pride. To those of you I met along the way, and to those of you who stuck around – Thank you for everything.

When looking back, writing this thesis was probably the most challenging task I had to face during the course of my studies. Now that I'm across the finish line, I am proud to have risen to the occasion. Overall, I am happy to have been able to write about a subject close to my heart: the maintenance and strengthening of democracy. May we never take it for granted.

I would like to thank my supervisor, Karol Nowak, for being a valuable and knowledgeable sounding board when devising this thesis.

To my family and friends, who have acted as my tireless support system, I am grateful for all you have done for me.

To Linnea, my rock, you deserve all my gratitude. Without you, writing this thesis would not have been possible.

Hereby, I present my graduate thesis. Any shortcomings and errors that may be found are entirely my own.

Lund, February 2023.

1 Introduction

1.1 Background

> *"All offentlig makt utgår från folket."*
>
> "All public power in Sweden proceeds from the people."
>
> – The Instrument of Government, Ch. 1, Art. 1.

There is a close connection between human rights and a democratic form of government. They are interrelated and mutually reinforcing. Within international human rights law, a right to political participation has evolved since the mid-20th century. It provides an interesting outlook on the foundational parts of a democratic system.

At the time of writing this thesis, there are alarming reports on the continuing trend of democratic backsliding around the world. For example, in "Democracy Report", the latest annual published by the V-Dem Institute, they found that, in 2021, the level of democracy enjoyed by the average person in the world was down to the levels of the year 1989. According to the V-Dem liberal democracy index (LDI), there were only 34 liberal democratic States in the world, the fewest since 1995. The number of States undergoing substantial autocratization was at its highest level in 50 years, with six of them being EU Member States. Over the last ten years, most States decreased their LDI scores.[1] Similarly, the annual report of the International Institute for Democracy and Electoral Assistance (IDEA), "The Global State of Democracy 2022" (GSoD), revealed that democracy is stagnating and declining globally, whilst 50 % of non-democracies are becoming significantly more repressive.[2] In Europe[3], democracy remains the main form of government, but its development has stagnated. 43 % of democracies in Europe have suffered erosion in the last five years. Furthermore, Europe is said to be facing the most challenging times in many years due to democratic stagnation, economic shocks, and security concerns. There is also a trend in the region where voters in long-standing democracies are increasingly supporting far-right parties which disregard basic principles of democracy.[4]

In this context, Sweden ranks high in different democracy indices and has done so for a long time.[5] Nevertheless, there is public debate regarding the

[1] V-Dem Institute, pp. 10 ff.
[2] IDEA, p. 1.
[3] It should be noted that IDEA does not limit Europe to the EU as V-Dem does.
[4] IDEA, pp. 24 ff.
[5] See IDEA, "GSoD Indices – Sweden"; V-Dem Institute, p. 10; and Freedom House, "Freedom in the World 2022 – Sweden".

question of whether democracy in Sweden is, in fact, under threat.[6] Also, organisations such as Civil Rights Defenders have done large campaigns on the need to further protect democracy in Sweden.[7] This does not seem unfounded, as both the GSoD and LDI indices show that Sweden's democracy scores are declining over time, albeit marginally.[8] Democracy in Sweden often seems to be taken for granted, as it has been established for a comparatively long time. The question is if it is time to re-evaluate this assumption, given the challenges Europe, including Sweden, is facing.

In light of these global and regional developments, several questions arose in me – what legal restraints are there to limit democracy in Sweden? Are there constitutional guarantees, or obstacles under international law that protect democracy as a form of government? To begin this investigation, I turned to legal doctrine in the field of Swedish constitutional law. However, I was surprised that the term "democracy" was nowhere to be found in the subject indices[9]. Thus, I realised there is a clear gap between the public and legal debate on this field, where the concept of democracy does not seem of particular concern in the legal field. Thus, I became even more curious about how the constitutional protection of the democratic form of government is legally structured in Sweden. During my studies in the Swedish Professional Law Program, a professor once told me: "The best Constitution is the one written with the worst kind of legislator in mind". This is a thought that resonated with me and has made a lasting impact on my legal thinking throughout the years. It does not necessarily mean that the worst kind of legislator exists or will exist. Still, since the potential risk of one coming to power is always there, a Constitution needs to be safeguarded against this as a final precaution. My thesis is rooted in this idea and basic view of the role of the Constitution.

When the literature on constitutional law failed me, other questions were brought to light, what is democracy? How is it legally defined? In simplified terms, the origin of political democracy is often assigned to Ancient Greece.[10] The basic concept of democracy is coupled with notions of popular sovereignty and the principle of equality. In Western societies, the American and French revolutions of the 18th century offered the first declaratory language on these notions. However, political democracy in the modern sense took time to manifest itself. It was only at the end of the 19th century and early 20th century that gradual developments of universal suffrage and many civil and social rights for democratic participation gained ground in national and

[6] See for example: Svenska Dagbladet, "Är Sveriges demokrati hotad?" (Article series); Svenska FN-förbundet, "Varningslamport blinkar för demokratin i Sverige", and Ohlsson, Sydsvenskan, "Medan klockan klämtar".

[7] Civil Rights Defenders, "Skydda demokratin från grunden!".

[8] See IDEA, "GSoD Indices – Sweden" and V-Dem Institute, p. 10.

[9] See e.g., Derlén, Lindholm & Naarttijärvi, p. 752; Bull & Sterzel, p. 325; Nergelius, p. 613. However, other closely related concepts, such as popular sovereignty ("*folksuveränitet*") can be found.

[10] See e.g., Held, p. 18 and Landman, p. 25.

international settings.[11] Political science has studied the concept of democracy for a very long time, but there exists no generally accepted definition. However, given that this thesis is written in the field of law, a legal definition of democracy seemed more useful. Thus, I turned to the field of international human rights law to discern a legal definition of democracy based on universal norms of human rights.

In the sphere of international law, the question of democracy was brought into a new light in the mid-20th century when international human rights law had its breakthrough. When the UN Universal Declaration of Human Rights[12] (UDHR/ the Declaration) was drafted and adopted in 1948, it was proclaimed in its preamble as a common standard of achievement for all peoples and all nations. The UDHR is by some, including me, seen as a revolutionary document as it shifts the international system and its legal structure from a State-centred perspective to also addressing universal values as well as equal and inalienable rights for individuals in relation to their States.[13] In the development of international human rights law, the concept of political participation is said to have been a crucial building block.[14] In this context, Art. 21 of the UDHR has been described as "a revolution within a revolution" as it sets out minimum requirements for a democratic system of the States that are meant to fulfil the rights protected under the Declaration.[15]

UDHR in general, and Art. 21 in particular, has catalysed several regional and thematic treaty-based provisions relating to political participation.[16] In extension, Art. 21 of the UDHR has been developed into a right to political participation[17], arguably part of customary international law. One of these regional developments of international human rights law could be seen in Europe, culminating in the foundation of the Council of Europe and the adoption of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR/the Convention), with a principal goal to promote democratic values and prevent totalitarian regimes.[18]

Thus, the concepts provided by international human rights law make it possible to understand the concept of democracy as political participation. Based on these sources, I intend to build a human rights-based framework on democracy to define the basic elements of a democratic form of government.

[11] Rosas, p. 432.
[12] Universal Declaration of Human Rights, Paris 10 December 1948, A/RES/217(III).
[13] Rosas, p. 431.
[14] Steiner p. 77.
[15] Rosas, p. 431.
[16] Rosas, pp. 442 ff.
[17] See for example Art. 25 of the International Covenant on Civil and Political Rights (ICCPR), New York 16 December 1966, A/RES/2200(XXI), SÖ 1971:42, and Protocol No. 1 Art. 3 to the Convention for the Protection of Human Rights and Fundamentral Freedoms (ETS No. 005) (ECHR), Rome 4 November 1950, SÖ 1952:35.
[18] Schabas, p. 1011; Steiner p. 95; and as shown in the preparatory work of the ECHR. See eg., Council of Europe, Vol VI at p. 126 and Vol VII at p. 158.

Using this framework, I want to investigate how the legal protection of the democratic form of government is structured in Sweden and identify its potential risks and vulnerabilities.

Democracy and human rights are often seen as mutually reinforcing.[19] In light of the developments over the last few years, as described above, it is interesting to study the basic principles of democracy as political participation understood through a human rights perspective. Choosing the form of government as the object of study is, therefore, a logical choice, as it determines the most fundamental ways in which a State is organised and how its citizens may exercise public power. I, therefore, turn to my own country, Sweden, to study its democratic form of government and investigate its vulnerabilities. Nevertheless, the concept of democracy is broad, so within the scope of this thesis, I have chosen to study its strict fundamental aspects by building a democratic framework based on the concept of electoral political participation provided by the UDHR and the ECHR[20].

1.2 Purpose and Research Question

The main purpose of this thesis is to investigate the legal protection of the democratic form of government in Sweden, in reference to general elections, against a democratic framework built on international human rights law and norms. Furthermore, the purpose is also to identify potential vulnerabilities and threats against this democratic form of government posed by the current domestic legal order. To achieve this purpose, the following research questions will be answered:

- How is the democratic form of government maintained and protected in the Swedish legal system?

- What kinds of risks does the legal system pose to the maintenance of democracy in Sweden?

In the following sections, I will present in more detail the methodology, the theoretical frameworks as well as the delimitations and definitions I am departing from, to map out how I intend to answer the research questions.

[19] See eg., Office of the High Commissioner for Human Rights (OHCHR), "About democracy and human rights – OHCHR and democracy".

[20] Sweden ratified the ECHR on 4 February 1952. The Convention is also incorporated into Swedish law, see the Act on the European Convention for the Protection of Human Rights and Fundamental Freedoms (1994:1219).

1.3 Methodology, Material and Theoretical Framework

1.3.1 Methodology and Material

This is a thesis in legal science, written within the context of the Swedish Professional Law Degree Programme and the Master's Programme in International Human Rights Law at Lund University. Thus, the thesis is anchored in a human rights perspective and different forms of jurisprudential methods, mainly a legal dogmatic method combined with elements of a legal analytical method, as will be further described below[21]. These methods are distinct but should be viewed as a continuum, as the latter is an extension of the former.[22] The methodology forms the structure of the thesis and informs what sources to use.

I have also chosen to depart from a human rights-based perspective. Here, it is relevant to point out that this choice of perspective provides a basis for the object and purpose of the thesis, and influences how my method is carried out. Thus, the human rights perspective is used by determining what type of sources I have chosen to consult. The democratic framework I will build from these sources provides a fundamental understanding of electoral political participation from a human rights perspective. Systematizing the Swedish legal system through this framework enables one to view the electoral system from new perspectives. A human rights-based perspective allows me to look at the electoral system, a vast societal construct, through the lens of individual rights and freedoms. Furthermore, it provides the normative base that this thesis assumes: democracy is worthy of protection.

Moreover, the method itself is chosen with the intention to form an overall picture of the democratic form of government in Sweden based on a democratic framework built on sources of international human rights law. The aim is to study the Swedish democratic system as a whole and not the components in detail.

A legal dogmatic method is used to describe established law, guided by recognized legal sources based on the concept of the sources of law[23]. Describing the law is a two-part task: First, one must interpret and settle on what is established law. Second, one must systematize established law into, for example, rules and principles. The concept of the sources of law is a crucial feature of all legal science, particularly within a legal dogmatic theory. It stipulates

[21] These three concepts are in Swedish understood, respectively, as: "*Rättsvetenskaplig metod", "rättsdogmatisk metod"*, and "*rättsanalytisk metod"*.

[22] Sandgren, p. 51.

[23] In Swedish understood as: "*Rättskälleläran"*.

which legal sources exist, their built-in hierarchy, and which other principles of legal sources are available. The contents of these elements vary between different areas of law, which will be shown below. A legal analytical method will also be used; its core feature is to go beyond identifying established law by analysing the law itself and enabling me to criticise the results of the legal dogmatic method. The legal analytical method also permits the use of sources beyond traditionally recognized sources of law.[24] I use it to complement the legal dogmatic method to bridge the gaps left by the limitations of the latter, especially due to the political character of the subject I am writing about.

The structure of the thesis is based on a step-by-step approach, where the methods are used in turn. The first step is to build a democratic framework based on sources of international human rights law. Second, based on this framework, to identify relevant Swedish legislation on democracy. And third, to evaluate the findings of the Swedish legislation and the democratic framework as understood by the first step. I will now go deeper into these steps, also explaining how the methodology is applied. As the first step is to develop the democratic framework which will be at the core of the thesis, it has been given a predominant position, both in the description of methodology and in the substantive part of the thesis.

1.3.1.1 The First Step – Building a Democratic Framework

The first step is to build a democratic framework, introduced by the theoretical points of departure explained in Section 1.3.2, based on the concept of electoral political participation as provided by international human rights law, in particular Art. 21 of the UDHR and Art. 3 of Protocol No. 1 of the ECHR, given the limitations provided in Section 1.4.3. To understand these sources of established law, I use a legal dogmatic method. Using such a method determines my choice of sources to use in order to interpret the UDHR and the ECHR as established law by demanding the use of recognized legal sources. In the field of international law, recognized legal sources are reflected in Art. 38 of the ICJ Statute[25], listed in a hierarchy of most to least authoritative: (1) international conventions and treaties, (2) international customary law and (3) general principles of law. Furthermore, Art. 38 stipulates that case law and literature of jurisprudence are not sources of law in themselves but may be used as tools to interpret the meaning of the recognized sources of law. In this context, the Vienna Convention[26] is of key importance to use as a recognized source of law, in the form of an international convention, to interpret the ECHR at least, as it provides authoritative guidance on how to interpret a treaty.

[24] Sandgren, pp. 51 ff.
[25] Statute of the International Court of Justice, San Fransisco, 24 October 1945.
[26] Vienna Convention on the Law of Treaties, Vienna 23 May 1969, SÖ 1975.

Art. 31 of the Vienna Convention states, inter alia, that a treaty primarily should be interpreted in good faith, in accordance with the ordinary meaning of the terms of the treaty, in their context and in the light of its object and purpose, unless any special meaning was intended by the State Parties. Subsequent practice in the application of the treaty can also be of importance, as well as other relevant rules of international law applicable between State Parties. Art. 32 of the Vienna Convention provides supplementary means of interpretation by referring to, inter alia, the preparatory work of the treaty and the circumstances of its conclusion. As mentioned, literature of jurisprudence and case law are also of interpretive importance according to Art. 38 of the ICJ Statute.

However, the UDHR is an ambiguous document, not drafted with the intention of being regarded as a treaty.[27] At most, its provisions have developed into international customary law and at least into general principles of international law, as described in the following sections. However, as there is an actual text to refer to, the principles of interpretation provided by the Vienna Convention are analogously applied to the UDHR. Thus, I use preparatory work and literature of jurisprudence to interpret the UDHR, as those are the most readily available sources.

When it comes to the ECHR, the principles of interpretation and recognized sources described above are applied. Nevertheless, a special feature of the ECHR is its connection with the European Court of Human Rights (ECtHR/The Court). The Court's jurisdiction encompasses the interpretation and application of the Convention and its Protocols, as provided by Art. 32 of the ECHR. Given Art. 38 of the ICJ Statute, I have chosen to use a fair amount of case law from the ECtHR as a tool to interpret the ECHR itself. However, it should be noted that the Court's judgements are only legally binding to the parties of the dispute according to Art. 46 of the ECHR. Nevertheless, the Court often seeks to remain faithful to its previous judgements. Therefore, I try to reference multiple cases to show how the Court consequently applies specific principles and reaches certain conclusions. Furthermore, the Court has, over the years, developed a dozen or so principles of interpretation, provided the special character of a human rights treaty, rooted in the teleological principle of the Vienna Convention. These principles are for example: The principle of dynamic interpretation, the doctrine of margin of appreciation and the principle of democracy.[28] I will go over some of these principles when regarded as relevant when speaking of the ECHR and the ECtHR.

Through comparison and analysis, by determining where the UDHR and the ECHR are similar and where they might complement each other, the results of this investigation of established law will be systematized into a democratic framework that will be used for the rest of this thesis, corresponding to the

[27] Bates, p. 19.
[28] Greer, pp. 456 f.

second task of the legal dogmatic method. However, since I combine results from two different legal structures, the framework is in itself not to be seen as a concept *of* established law but rather a concept *based* on established law. This is where the legal analytical method first starts to show. By establishing the democratic framework, I find myself in the area of intersection between the systematizing task of the legal dogmatic method and the analytical feature of the legal analytical method.

1.3.1.2 The Second Step – Investigating Relevant Swedish Legislation

The second step is to describe the established Swedish national law on democracy. However, I will also provide a brief account of historical and societal aspects of democracy in Sweden to put today's developments into the specific national context. Describing established national law is based on a legal dogmatic method using recognized sources of law. However, as the concept of democracy within this thesis is limited by the democratic framework established in the first step, the Swedish laws and specific articles subject to investigation are limited correspondingly. Thus, an international legal framework of democracy is applied to a national context to understand the latter. However, I want to clarify that the task is not to determine whether Sweden fulfils any potential obligations on democracy under international human rights law, but rather to investigate the Swedish system within itself. This approach also solves what could have been a potential issue: the disputed relationship between national constitutions and international obligations, especially as one important principle of the ECHR is to not interfere with constitutional and political matters of the State Parties[29]. Here, I should also address the fact that the ECHR is part of Swedish law, but as will be explained in the coming sections, I have limited my task to reviewing the Swedish Constitution independently. Thus, the democratic framework provides a definition of democracy based on legal sources, nothing more.

When it comes to investigating Swedish domestic law, other sources of law are relevant than those described in the field of international law. In this context, the concept of the sources of law, listed in a hierarchy of the value of the source from highest to lowest, are: (1) Law, (2) preparatory work of the law, (3) court precedent, (4) custom and literature of jurisprudence.[30] "Laws" must however be further divided into categories of law with different authoritative values, being the four constitutional laws[31]; the Riksdag Act (2014:801) with

[29] See eg., Council of Europe, Vol III at p. 182.

[30] Sandgren, pp. 47 f. The question of which sources are actually part of the concept of the sources of the law has no comprehensive answer. There is a fairly established consensus on the ones I have listed here. However, it is possible to break these components down further. Nevertheless, I do not find such a break-down necessary for the object and purpose of this thesis.

[31] The Instrument of Government (1974:152), The Act of Succession (1810:0926), The Freedom of the Press Act (1949:105), and The Fundamental Law on Freedom of Expression (1991:1469).

its special status; and laws of an ordinary character.[32] On a national level, this thesis primarily focuses on constitutional matters, thus suggesting that recognized sources of law in the area of constitutional law should be of primary focus. Such sources go beyond the constitutional laws and can roughly be divided into the written part of constitutional law and the unwritten. The former constitutes constitutional laws, ordinary law, the ECHR, and EU law. The unwritten law corresponds to general principles of law and court precedent.[33] Thus, the Instrument of Government will be the primary object of study, as it on a constitutional level regulates the fundamental protection of democracy. Ordinary law relevant to the research question is also considered, as well as general principles of law. These will be analysed based on the legal dogmatic method, through close reading and under the light of preparatory work and literature of jurisprudence. However, the effects of ECHR and EU law on a national level will be left aside. The delimitations of laws worthy of studying are further explained in Section 1.4.3.

After mapping out the legal position in Sweden on these matters, I will move on to the final step by analysing these findings in more depth.

1.3.1.3 The Third Step – Analysing the results

The last part of my thesis will be more analytical in nature[34], as the legal analytical method is predominantly used. Such a method is used to analyse the law itself and provides space for considering the effects, risks, and strengths of the Swedish regulation on democracy. Here, the task is to evaluate where there may be overlaps or gaps between the Swedish legislation and the democratic framework as understood by the first step. Here, both the material (what) and formal (how) aspects of the legislation are scrutinized, to identify potential flaws or vulnerabilities within the Swedish legal structure. Thus, this step provides an opportunity to critically examine the law as such. That analysis is grounded in the human rights perspective. Such a perspective assumes that human rights- and freedoms are worthy of protection, even for the minority, and that a democratic society best fulfils that goal.

1.3.1.4 A Final Word on Material

Issues of the right to political participation and democracy have been internationally discussed for decades within the field of international law and international human rights law. I draw from this discussion to continue the conversation in a national context. In particular, the works of Henry J. Steiner, Professor of Law at Harvard Law School, have influenced my understanding

[32] Derlén, Lindholm & Naarttijärvi, p. 94.

[33] Derlén, Lindholm & Naarttijärvi, p. 92.

[34] The previous steps naturally have analytical parts in them as well, through the application of the legal dogmatic method itself, comparisons made and the building and application of a democratic framework. However, the legal dogmatic method is limited in the sense that it can help draw few conclusions on the effects of the established law, see Sandgren, p. 52.

of the right to political participation as he is a highly qualified publicist in this field. Otherwise, preparatory work, case law where applicable and the text of the instruments themselves have constituted the material I have consulted to understand the UDHR and the ECHR.

On the contrary, the discussion around the democratic form of government in Sweden has mainly been discussed by political scientists and to some extent within the legal field of constitutional law, albeit sparingly. The conclusions presented in this thesis aim to contribute to this underrepresented subject in these legal fields. To understand the Swedish legislation, I draw from the writings of highly qualified publicists within Swedish constitutional law, such as Tomas Bull and Joakim Nergelius, as well as preparatory work and the legal texts themselves.

The thesis is based on both Swedish national legislation and international human rights law. When referencing Swedish legislation, the authentic versions in Swedish are sourced. When providing quotes and excerpts from Swedish legislation, translations of the laws provided by the Swedish government are used. Such translations are referenced in the bibliography. I have chosen to quote central legal text to enhance clarity for the reader. However, it should be noted that only the Swedish version of the national legislation is authentic. When discussing jurisprudence and preparatory work, it is thereby the Swedish versions that are referenced. To make sure that specific legal terms are translated correctly, I have consulted the Glossary for the Courts of Sweden[35]. When the glossary has failed to provide a translation, I have chosen to point this out in a footnote with the correct Swedish term for clarification.

At the time of writing this thesis, the 2020 Committee of Inquiry on the Constitution (Ju 2020:04) is nearing the end of its work. The Parliamentary Committee of Inquiry was appointed in 2020 with the purpose of strengthening the constitutional protection of the democratic structure. The task of the Committee is to investigate the forms of amending the Constitution and the need to strengthen further protection for the independence of the judiciary in the long term. Inter alia, it should assess whether a requirement of a qualified majority should be introduced for the Riksdag to be able to take decisions on amendments of the constitution, whether there should be a requirement that a certain number of members of the Riksdag must participate in the vote when deciding on an amendment of the Constitution, and whether the general election to the Riksdag that is to be held between the two decisions on an amendment of the Constitution must be an ordinary election.[36] These are issues that are directly connected with the issues of this thesis. Unfortunately, the Committee will not present its results until March 31st, 2023.[37] Therefore, I have not been able

[35] Sveriges domstolar, Dnr 938-2010, ”Svensk/engelsk ordlista – Swedish/English Glossary”.

[36] Committee terms of reference, Dir. 2020:11.

[37] Committee terms of reference, Dir, 2023:8.

to take into consideration those results when writing this thesis. In any case, it is a positive sign that the legislator seems to have identified potential issues that are similar to those I will raise within this thesis. I look forward to studying their findings.

1.3.2 Democracy – Theoretical points of departure

The most basic understanding of democracy can be derived from its Greek origin, with its literal meaning being "rule by the people" (in Greek, *"dēmokratia"*). Democracy as a form of government means that the authority of the public power derives from the people, in contrast to, for example, aristocracies and monarchies. It thereby presupposes some sort of political equality between people and, by definition includes political participation as a key feature. However, this basic understanding of democracy and the further meaning of its elements is something political scientists have debated for a long time, as every component of "rule by the people" can be defined and understood in different ways. Therefore, there is no comprehensive definition to turn to in political science.[38]

With this in mind, as this is a thesis written within the subject area of legal science, any discussion on democracy as a concept within political science will not be of focus. Instead, I base my understanding of democracy on the concept of political participation understood through the definitions provided by UDHR and the ECHR. The judicial meaning of the relevant provisions within these instruments is of primary focus. Albeit, some consideration in respect of the ideals and theories, such as liberalism, which informed the instruments at the time of their drafting, must be taken into consideration to understand them. This theoretical point of departure provides a narrow definition of the core aspects of democracy and political participation based on a human rights perspective. This path is a conscious choice, made in consideration of the scope of this thesis, to achieve its purpose in a manageable way. Further below, I will explore the meaning of these instruments and relevant articles, as well as develop how their content can be used to build a democratic framework applicable to the Swedish context.

As stated, I depart from a human rights perspective. Democracy, and the closely related concept of the right to political participation, is often seen as one of the fundamental rights. Without it, other rights would simply be illusive.[39] To be clear, the issue at hand is not to determine whether a human right to democracy exists. Instead, the UDHR and ECHR, as sources of international human rights law provide a legal definition of democracy, understood as political participation. The instruments have been chosen based on the

[38] Held, pp. 17 f.
[39] Steiner, p. 77.

different delimitations this thesis assumes, which are specified in more detail in Section 1.4. This legal definition is discerned by building the democratic framework in Chapter 2.

1.3.2.1 UDHR

The UDHR was adopted on December 10, 1948, by the UN General Assembly, including Sweden. However, it was not adopted with the intention to be a legally binding convention, and thereby it did not create State obligations. Instead, it was to be seen as a first step in the evolutionary process of fundamental human rights. By being backed by the authority of the body of opinion of the UN as a whole, the declaration would be a great source of help, guidance, and inspiration.[40]

However, it has been argued that the Declaration has acquired a more ambiguous status as a relevant source of international law. Many of the provisions in the UDHR have become part of widely accepted human rights treaties. Also, there is an established State practice of invoking the Declaration in arguments among States. This, together with the view that the UDHR should be considered a clarification of the UN Charter's Arts. 55 and 56, leads to the conclusion that the UDHR should be regarded as part of customary international law.[41] The first circumstance mentioned, that the Declaration is referenced in many international treaties, lends itself to the conclusion that the UDHR should at least be considered to be part of international law at a level of general principles.[42] In a Swedish national context, the Supreme Administrative Court has for example referred to the UDHR in judgements, specifically Art. 21, when discussing the right to vote.[43]

The UDHR is one of the first and most widely accepted international instruments solidifying concepts of human rights, including the right to political participation enshrined in Art. 21. These circumstances and its substantial normative value on these issues render the UDHR a relevant source of authority for building a framework of democracy based on a human rights perspective. Art. 21 of the UDHR can be understood to set out the minimum requirements for a democratic system within a State by focusing on the right to political participation. It is heavily influenced by the tradition of liberal democracy[44]. It stipulates[45]:

> 1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. *[Non-electoral political participation]*.

[40] A./PV.183, pp. 933 f.
[41] Steiner, p. 79.
[42] Rosas, p. 447.
[43] HFD 2013 ref 72.
[44] Steiner, p. 87.
[45] My additions italicized.

[…]

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. *[Electoral political participation]*.

These are the requirements that will set out the basis for my understanding of democracy for the rest of the thesis, with emphasis on the third paragraph on electoral political participation, as will be explained in Section 1.3.2.3. Here, it suffices to observe that the drafters of the article chose to focus on political participation rather than explicitly referring to the concept of democracy. This can be explained by the political connotations that democracy entailed and the subsequent loss of meaning the word "democracy" itself had at the time of drafting[46]. Moreover, political participation can be further divided into two forms of political participation: non-electoral ("taking part") and electoral ("voting") political participation, where UDHR seem to emphasise the latter.[47] Moving forward, I will refer to these two concepts as distinct elements, especially when referring to the respective paragraphs of Art. 21. When I speak of the right to political participation, I refer to the article as a whole.

A common criticism against the UDHR is that it was highly influenced by "Western" ideals and therefore lacks legitimacy to represent universal norms. But when it comes to Art. 21, at least, it enjoyed broad formal consent from various political groupings, as it was unanimously adopted by the UN membership[48]. What is important here is that in relation to Sweden, the UDHR is viewed as an international legal source of great normative value. Sweden clearly adheres to a Western liberal tradition based on ideals of democracy and human rights. For example, Sweden was one of the founding members of the Council of Europe and a drafter of the ECHR, which was drafted with a clear purpose to protect and promote those values, as will be shown below. Thus, there exist no apparent contradictions between the Western ideals the UDHR is based on and the Swedish ideals. The question of the actual universality of the UDHR is thereby not of relevance in the context of this thesis.

The further meaning and components of Art. 21, as well as understanding the UDHR as a source of human rights, will be further developed in Chapter 2. Art. 21 has been criticized for being defined by norms which are vague or bear disputed meanings[49]. Nevertheless, the UDHR in general, and Art. 21 specifically, has paved the way for many human rights treaties with similar provisions, one of them being the ECHR, which I will now turn to.

[46] Rosas, p. 438.
[47] Steiner, p. 87.
[48] A/PV.183, p. 931.
[49] Steiner, p. 84.

1.3.2.2 ECHR

The ECHR was drafted in 1950 by the Council of Europe, of which Sweden is a founding member, and entered into force in 1953.[50] Given the geographical limitations of this thesis (see more in Section 1.4.2), the ECHR is of relevance to further develop the concept of democracy and political participation this thesis assumes. The Convention was drafted by Member States from a fairly uniform normative background, based on a common, Western European heritage of political tradition and ideals, grounded in the underlying values of the ECHR. Democracy is one of those underlying values the Convention aims to promote.[51] This common heritage is claimed to be rooted in the tradition of liberal democracy.[52] Thus, the ECHR is a valuable additional source of international human rights law to help build the basic framework of democracy.

The preamble to the ECHR both recognizes the authority of the UDHR and refers to "an effective political democracy" as the foundation for the realisation of human rights. Indeed, the preamble does not give rise to State obligations as the articles in the Convention do. However, relying on the preamble can effectively determine the object and purpose of an international instrument, as confirmed by the Council of Europe's Commission on Human Rights[53]. Nevertheless, the preamble clearly indicates that democracy is an integral part of realising the human rights and freedoms established by the ECHR and constitutes one of the fundamental ideals which the Member States of the Council of Europe are founded upon.

The original text of the ECHR does not have a direct counterpart to Art. 21 of the UDHR. Instead, a right to free elections is protected through Art. 3 of Protocol No. 1 to the ECHR[54], stating:

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

Protocol No. 1 to the ECHR was opened for signature in 1952 and entered into force on May 18, 1954. Today, it is ratified by all State Parties to the ECHR, except Monaco and Switzerland, which have only signed it.[55]

The implications of this article and the ECHR will also be developed in Chapter 2. But at first glance, Art. 3 of Protocol No. 1 seems to only concern itself

[50] Council of Europe, "Chart of Signatures and ratifications of Treaty 005".

[51] United Communist Party of Turkey and Others v. Turkey [GC], § 45; Soering v. the United Kingdom, §§ 87 f and Kjeldsen, Busk Madsen and Pedersen v. Denmark, § 53.

[52] Steiner, pp. 95 f.

[53] Schabas, p. 54.

[54] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 009), Paris 20 March 1952.

[55] Council of Europe, "Chart of signatures and ratifications of Treaty 009".

with electoral political participation over non-electoral political participation. As will be shown in the coming chapters, this is not entirely true. Linguistically speaking, the ECHR does not seem to go beyond Art. 21 of the UDHR. However, as it is written within a specific regional context, as explained above, it is possible to draw more far-reaching conclusions about the meaning of this provision than would be possible with the UDHR. Therefore, it serves as a complement to the UDHR in order to establish the basic framework of democracy understood through the lens of electoral political participation, which this thesis assumes.

1.3.2.3 Thick and Thin Notions of Democracy

Something should be said about the difference between so-called "thin" and "thick" (sometimes referred to as "strong") notions of democracy, and therefore why the former is of focus in this thesis.

Democracy, in the thin sense, refers to the principle of popular sovereignty, i.e., that all power within a State emanates from the people within it, and collective decision-making.[56] The central feature is the right to free elections, corresponding to the concept of electoral political participation. Thin democracy is often related to concepts and theories of representation, protective and liberal democracy.[57] Democracy, in the thick sense, includes other principles and mechanisms, all of which are components of realizing democracy. It is often related to concepts of participation, developmental democracy, and positive liberties.[58] They view elections as indispensable but acknowledge the State's responsibility to develop participatory institutions to realize non-electoral political participation.[59] The division between thick and thin notions of democracy should not be seen as two-pieced, it can rather be seen as layered into ever-thickening concepts of democracy.[60]

The legal instruments I am using to build the democratic framework I am to use in this thesis arguably contain aspects of democracy in a thin and thicker sense, in the meaning of electoral and non-electoral political participation. However, both instruments focus primarily on electoral political participation. Inevitably, this thesis will correspondingly primarily focus on notions of thin democracy in the sense of electoral political participation. The strength of focusing on thin democracy is that it means focusing on the absolute core components of what constitutes a democracy. By using a definition of democracy provided by the UDHR, I proceed from a definition with emphasis on electoral political participation and thin democracy based on a text that is widely recognized globally, albeit not legally binding. By using the ECHR, I draw on the regional understanding of democracy with an even greater focus

[56] Landman, pp. 30 f.
[57] Steiner, p. 127.
[58] Ibid., p. 99.
[59] Ibid., p. 127.
[60] Landman, p. 30.

on the element of electoral political participation, with a text that clearly references the authority of UDHR. Understanding democracy in this manner means recognizing that a democratic society can be organized in different ways but that certain common denominators form the foundation of a democratic State.

To be clear, my aim is not to advocate a certain form of democracy. I lay no value into the notions of thin and thick democracies nor the rights to electoral and non-electoral political participation. The goal is instead the investigation itself, mapping out how democracy is protected under Swedish law.

1.3.2.4 Democratic Liberalism

Democratic liberalism has been mentioned above as the theory which has informed both the UDHR and the ECHR. Simplified, the traditional goal of liberalism is to protect the individual against abuse of State action by assuring negative liberties. It has been argued that this goal is not necessarily achieved through democracy, as majority rule can invade private autonomy. In contrast, a benevolent despot may be perfectly adept to fulfil this goal, theoretically speaking.[61]

Traditional theories of liberal democracies are grounded in the individual's opportunity to political participation. Rights acknowledged to individuals entail corresponding duties for the State. These duties, according to traditional theories of liberal democracies, require the State to protect individuals when engaging in political organizations and activities, rather than actually having to create these institutional frameworks where participation can take place. Thus, the State is obliged to keep different avenues, such as political participation, available, but it is up to the individual to open and pursue them. Under liberal democratic theory, the outer limits of the State's obligation to guarantee individuals' right to political participation have previously been limited to establishing an electoral system and protecting individuals' right to freedom of expression and assembly, but in the last few decades, States have expanded their government functions to heighten popular participation.[62] Liberal democracies emphasise negative and expressive rights, such as free speech and assembly, as they protect the environment of political pluralism. The main purpose of a political process which requires popular and contested elections is to produce a representative legislature and a directly or indirectly elected chief executive. Nevertheless, elections serve a multitude of aims for all parties involved.[63]

I will not go further into discussing different liberal theories, as it goes beyond the scope of this thesis. Nevertheless, a basic understanding of what

[61] Steiner, p. 102.
[62] Ibid., pp. 109 f.
[63] Ibid., p. 98.

liberalism, and more specifically, political liberalism entails, is important to have in mind when moving forward in this text.

1.4 Delimitations and Definitions

1.4.1 Democracy

Democracy is a broad concept and phenomenon that is relevant in many subject areas, for example, political science, sociology, and philosophy. Insights and perspectives from these areas can be interesting to get an overall picture of what shapes and constitute a democracy. In this thesis, however, these perspectives are considered, if at all, to a limited extent to give priority to the legal issues in the light of my methodology as described above.

The concept of democracy is further delimited by the theoretical framework I have chosen to depart from, as explained in Section 1.3.2. As described above, theories of democracy range from "thick" to "thin", which include different elements. This thesis primarily focuses on what could be associated with thin notions of democracy, understood as electoral political participation. Therefore, various elements attributable to thick theories of democracy are left outside the scope of this thesis.

One concept left outside the scope of this thesis worth mentioning is the rule of law[64]. Rule of law could be said to be a key feature of democracy and the realization of human rights, meaning (heavily simplified) that a State is ultimately governed by laws. I acknowledge the importance of the principle of rule of law as a closely related concept to liberal democracies. Regardless, it is not of primary focus of this thesis, as participation is the element of focus of the sources from which I have chosen to build the democratic framework.

The right to political participation cannot be understood in a vacuum without consideration of other relevant rights and freedoms. For example, free speech and assembly are also indispensable to realise the right to political participation.[65] Nevertheless, this thesis will emphasize the core right to political participation, by using it as a framework to understand the fundamental aspects of democracy, and its protection, in Sweden.

Another important delimitation this thesis assumes is to focus on the general elections of the National Parliament *(Riksdag)* in Sweden. The internal division of power between regional and municipal elections nor elections on an international level, such as the elections to the European Parliament, will be considered. Referendum as a form of political participation is neither an

[64] In Swedish referred to as both "*rättsstatsprincipen"*, and "*rättssäkerhet"*. These two meanings are however not completely interchangeable. I primarily speak of the former.

[65] Steiner, p. 88.

object of interest[66]. This also means that it is primarily the legislative power in general, and in particular the electoral system that will be the object of study. It is the broad strokes and fundamental aspects of democracy as electoral political participation that is the object of study, not the details nor the grey areas of the limits of democracy.

1.4.2 Geographical Aspects

As stated, this thesis deals particularly with democracy in Sweden and thus with the Swedish legal system.

An EU perspective will be left outside the scope of this thesis. Such a perspective could definitely be interesting to explore but would result in another end product. An EU-oriented perspective would rather be a question of democracy as a way to create a State or result in a thesis about the EU's legitimacy and its internal demand for democracy. Therefore, this aspect is intentionally left outside the scope of the thesis, by instead focusing on democracy from a human rights perspective.

Furthermore, the geographical division is important for which legal sources are given importance in this thesis, as explained in the section on methodology and below. However, it must be emphasized that different legal sources and the provisions therein, legally have different binding effects, but in any case, give expression to basic norms and principles.

1.4.3 Delimitations of Legal Systems

Thus, on the level of international human rights law, I have chosen to use the UDHR and ECHR, because of their strong normative position, local relevance, and because they deal with fundamental principles of democracy and political participation. Considering the limited space of this thesis, the ICCPR is intentionally left aside. Art. 25 of the ICCPR in many ways corresponds to Art. 21 of the UDHR. The ICCPR was drafted to specify and give legal effect to rights recognized in the UDHR. However, the UDHR is more comprehensive and has therefore been chosen as one of the instruments informing the democratic framework I intend to build. Where human rights law is mentioned in the context of electoral rights within sources of Swedish law and jurisprudence, the UDHR is more often referenced than ICCPR[67], giving the former more authority (at least on a level of principle). However, some source material discusses both Art. 21 of the UDHR and the corresponding Art. 25 of the ICCPR. Where seen fit and given that the UDHR goes further than the ICCPR, reflections from source material on Art. 25 of the ICCPR is analogously applied to understand Art. 21 of the UDHR.

[66] With exception for its role when amending constitutions.
[67] See for example, HFD 2013 ref 72 and Johansson, p. 19.

Nevertheless, the UDHR remains too vague to be used independently. Instead of using the ICCPR, I have chosen to complement the framework with the ECHR. Furthermore, the ECHR applies as a law and is directly referenced in the Swedish Constitution, and is, therefore, more relevant for the Swedish context. This also means that the ECHR provides independent protection of rights and freedoms, including political participation, within the Swedish system which complements the Swedish Constitution. The Instrument of Government also stipulates that no laws may be passed in conflict with the ECHR. What I intend to investigate, however, is how the Swedish legal system (with a focus on the constitution) is independently structured around the subject of democracy and political participation. In this way, I disregard the fulfilment of the ECHR as such. At the same time, it must of course be highlighted that the Convention's protection of human rights and the democratic ideal means that there is an additional security mechanism within the Swedish system, which I will not focus on. This division may be considered somewhat artificial since the ECHR has been largely integrated into the Swedish legal system since the 1990s. My assessment rests on a perception that the Swedish Constitution, which ultimately stands above the EKMR, is in need of its own review. Due to the limited space of this thesis, I have therefore chosen to focus specifically on the Swedish Constitution independently.

Thus, the ECHR serves as a complement to the UDHR, as the former's regional character can give further guidance where the instruments have similar provisions – especially when considering the context they were drafted within and the basic assumptions their drafters could depart from. Even if the documents were drafted around the same time period, the normative framework on which the documents are based varies. The ECHR was drafted in a Western European context with clear liberal and democratic values due to the relative homogeneity of its membership[68]. Nevertheless, the ECHR formulates the common regional values and aims more clearly than the UDHR can, whilst still leaving some issues open by leaning on the doctrine of the margin of appreciation, which is a prevalent feature of the ECHR system. The drafters of the UDHR were also heavily influenced by Western liberal tradition, but on the other hand, had the task to identify universal values, which had to be reconciled between States from an even broader body of differing (and even contradictory) values and ideals, most notably the east/west liberal and communist traditions which were prevalent at the time[69].

1.4.4 Politics or Law?

The subject of this thesis may at first glance be perceived as a political issue, and to some extent it certainly is. However, my ambition with the thesis is to examine, from a legal perspective, the Swedish regulatory framework that

[68] Steiner, p. 95; this is not to say that there are no contestation of what democracy and political participation means between Western European States.

[69] Ibid., pp. 77 ff.

maintains and protects the democratic form of government, from a structural perspective, based on the normative framework built from international human rights law. Democracy and the protection and fulfilment of human rights are often proclaimed to be mutually reinforcing. This notion is one of the fundamental principles of, e.g. the ECHR, as shown in its preamble. It also explains why the research question to be answered within this thesis has a normative point of departure in such a way that it implies that the democratic form of governance in Sweden is worthy of protection. However, democracy's being or not being is not the central question of the thesis. I have chosen to start from a premise which acknowledges the value of democracy in order to have the opportunity to focus more on the core issue. Thus, the thesis primarily concerns *how* the democratic state is protected and maintained, not whether it *should* be.

However, the thesis is written at a time when democratic backsliding is taking place globally and regionally in Europe, where popular support for anti-democratic forces is increasing. It is therefore important to point out that this thesis does not intend to comment on the current political situation. The thesis does not concern political tactics nor what agreements and amendments to the law different political parties conceivably would enter into or make. That political parties have different ideologies, interests and priorities is an inherent part of a functional democracy. Instead, the thesis concerns which legal changes a political majority could implement, against the backdrop of the legal framework that regulates the democratic state.

1.5 Outline

The structure of this thesis has been thoroughly presented in Section 1.3.1 when covering the methodology I use in this thesis. Therein, I describe the three steps that will be taken towards answering the research question. These steps correspond to the disposition of the thesis. I will in the next chapter go more in-depth with the concept of democracy as electoral political participation which this thesis adopts, building on the theoretical points of departure I presented in Section 1.3.4., Chapter 2 will conclude with the establishment of the democratic framework which will be used in the rest of the thesis, which corresponds to the first step of the methodology. In Chapter 3, I will apply the framework on the legal framework of Sweden, to study its regulations on electoral political participation. Chapter 4 will consist of a critical examination of the law as such, where I identify its potential vulnerabilities. I will conclude the thesis through Chapter 5, where I offer my final remarks based on the findings.

2 Democracy based on ECHR and UDHR

In Section 1.3.2 I presented how Art. 21 of the UDHR, and Art. 3 of Protocol No. 1 of the ECHR provides the building blocks for a democratic framework which I intend to build in order to legally define democracy. In this chapter, I will delve deeper into these articles and develop the concept of democracy as political participation based on these provisions. I will begin by discussing each instrument separately, with emphasis on mentioned articles, and then compare them to solidify the framework.

2.1 The UDHR: Article 21 – Participation and Popular Sovereignty

The strong normative status of the UDHR is what awards it the status as an authoritative source on democracy in the form of political participation as a human right. Thereby, the Declaration provides a valuable foundation for the human rights-based democratic framework I am building to apply to the Swedish context. Thus, it is relevant to go deeper into Art. 21 to understand the core elements of democracy, in terms of political participation, within the Declaration.

Even if the term democracy is not directly referenced in Art. 21, it is clearly indicating a demand for a democratic form of government as part of the human rights regime based on the requirements within the article. In that manner, the drafters of the Declaration concentrated on the core aspects of democracy by identifying these concrete requirements of political participation for democracy, instead of simply demanding democracy as such.

Essentially, the UDHR grants rights to individuals in general, which the State is to respect, protect and fulfil. However, the wording of Art. 21 only grants rights to individuals within a given community. Yet, the article does not provide how "his country" and thereby, the membership of said country, should be defined. Nevertheless, the article is said to primarily concern itself with the citizens of a State in question, in contrast to other rights[70].

A special feature of the right to political participation is that the right presumes that the State in question actively realises the right by instituting a practice of political participation. If a State violates the right, it cannot simply stop the criticized conduct as it would be able to do if it was criticized for engaging in torture or censorship. If a State is criticized for a given mode of

[70] Rosas, p. 431.

political participation for being too restrictive, it must replace said practice with a new one.[71]

Furthermore, it should be mentioned that Art. 21 cannot simply be understood in a vacuum as it is part of a larger structure. The article implies that other rights must also be respected to realise Art. 21. Some degree of political debate, the organization within political groupings etc. seems necessary to realize the right to participation. Thus, expressive rights such as assembly, association and free speech must be taken into consideration to understand the right to participation.[72]

Nevertheless, the right to political participation as formulated in Art. 21 of the UDHR and subsequently in the ICCPR, is argued to be one of the most contested rights, at least in terms of how to realize it. Fundamental disagreements persist, for example, whether the right requires political pluralism or can be fully satisfied in a one-party state. The article is worded to permit both democratic and non-democratic States to argue that they function in compliance with the provision.[73] At first glance, that argument might seem convincing, but I would argue that the article can only be fully complied with in a democratic society, based on the liberal democratic tradition which the article was written within. Nevertheless, non-democratic states could possibly argue they fulfil certain criteria of the article. This potential issue and dividing views regarding the actual meaning of Art. 21 is why I have opted to not solely build the democratic framework of off the UDHR, but also the ECHR.

Moving on, I will break down and explore the article further in the following sections. The requirement for democracy in terms of political participation within Art. 21 is found in two of its three paragraphs and can be divided into the following elements: a) the right to take part in the government (paragraph 1), b) the principle of popular sovereignty (paragraph 3) and, c) the principle of periodic and genuine elections (paragraph 3). There is a division between the two paragraphs, as they describe a fairly vague and abstract right to non-electoral political participation and respectively, a fairly specific right to electoral political participation[74]. As stated earlier, this thesis correspondingly focuses on the electoral form of political participation. Therefore, I will only make a brief account of the concept of non-electoral political participation within Art. 21, to get a fuller picture of the right to political participation within the UDHR.

[71] Steiner, p. 85.
[72] Ibid., p. 88.
[73] Ibid., pp. 84 ff.
[74] Ibid., p. 78.

2.1.1 Article 21.1 – The Basic Principle of Political Participation

The first paragraph of Article 21 focuses on the right for individuals to take part in the government of their country and thereby recognizes a right to political participation. Taking part in government can be done directly or through freely chosen representatives. Thus, the right to political participation technically as stated within this paragraph implies the right to political participation in the electoral form (by reference to "directly" and "freely chosen"), as it at least covers the rights to stand for election and to vote respectively. It also seems to cover a form of non-electoral political participation, as the reference to "directly" can be argued to go further than standing for election. The institutionalization of the electoral form of political participation is further specified in the third paragraph of Article 21. The paragraph can be understood to be of general scope, which from a liberal democratic point of view presupposes elections which are open to contest[75]. Thus, the paragraph covers different forms of indirect and direct democracies.

The right to political participation as understood in Article 21.1 of the UDHR covers at least, but not solely, the electoral right to participate in the government at the national level, either by the individual voting for elected representatives or standing for election themselves.[76]

2.1.2 Article 21.3 – The Institutionalization of Electoral Political Participation

Art. 21.3 is not formulated as an individual right as in its earlier proposals. Instead, it was expressed by some of the drafters that the paragraph should be seen as a political principle rather than an individual human right, or as a collective right on the part of the people as a whole.[77] Thus, the contents of Art 21.3 can be interpreted as being the only specified way, albeit not necessarily the only permissible one, to realise the right to political participation implied by Art. 21.1, by institutionalising an electoral form of political participation.[78] In comparison to Art. 21.1, Art. 21.3 is more specific in its contents, and was debated in a wider extent during the drafting procedure of Art. 21. Furthermore, a specific right to free elections, which is only implied within Art. 21, has since been established, for example through Art. 3 of Protocol No. 1 to the ECHR, which I will go over in Section 2.2.

Turning to the contents of Art. 21.3, it states that the basis of authority of a government should be derived from the will of the people, meaning the

[75] Steiner, p. 87.
[76] Rosas, p. 450.
[77] A/C.3/SR.132 p. 45.
[78] Steiner, p. 87.

principle of popular sovereignty should prevail. It goes on to declare that the will of the people is determined through periodic elections, but does not specify the length of said periods. The periodicity is crucial as it subjects the elected officials to regular scrutinization by the electorate, which in a functioning democracy, has the power to replace them[79]. Furthermore, these elections should be genuine, by universal and equal suffrage and by secret vote, which refers to the inclusive aspects of democracy.

The term "genuine elections" is a vague formulation which could be argued to refer to many different aspects deemed crucial for democracy, for example, the question of public contestation. Art. 21 does not make explicit if plural political parties and contested elections are necessary to comply with the article. Neither was there any consensus on the issue during the drafting procedure, despite the fact that pluralism is seen as a vital feature of democracy by Western states. [80] Nevertheless, I would argue that the wording "genuine elections" implies that the electorate should also have genuine alternatives to choose between when voting. It is said that the wording can at least be said to refer to a pluralist aspect of democracy[81]. An opposing view claims that the wording only covers formal (albeit also crucial) criteria such as whether elections take place or not, and the integrity of casting and counting ballots[82].

The absence of a requirement of competition in the electoral clause, and the vague meaning of the term "genuine elections" are great flaws of the UDHR. It is a crucial point where the ECHR can serve as a complement to the UDHR when building the democratic framework.

Moreover, Art. 21 leaves room for other equivalent free voting procedures to be valid as well. As intended by the drafters, the paragraph leaves a fair margin of choice for States in how to organize their electoral systems and therefore enable different types of democratic States to coexist. Thus, the right to political participation entails no preference between, for example, single-member constituencies, proportional voting systems, presidential systems, and parliamentary systems[83].

Ensuring the enforcement of electoral political participation seems quite concrete. As Steiner puts it[84]:

> Elections either take place or they don't; they are or are not contested; fact finders can make judgements about the integrity of the casting and counting of ballots; those elected do or do not take and hold office.

[79] Steiner, pp. 101 f.
[80] Rosas, p. 439.
[81] Ibid., p. 436.
[82] Steiner, p. 111.
[83] Rosas, pp. 438 f.
[84] Steiner, p. 111.

I would not be as confident, as it remains unclear if the State is obliged to take other positive measures to ensure that the individual can avail themselves of their right. Political participation requires some degree of positive action from the State, as it at least must establish an electoral system.

2.1.3 Article 29 – Limitations of Article 21

It is worth to mention the only actual reference to democracy within the UDHR is in Art. 29, the limitation clause. Therein, it is stated that individuals are only to face limitations of their rights and freedoms set out in the Declaration if they are determined by law, to recognize and respect the rights and freedoms of others, while also meeting just requirements of morality, public order, and the general welfare in a democratic society. It is not specified further what is meant by a democratic society. But clearly, the UDHR underlines democracy as a standard for how a society should function.

The article, and its reference to "democratic society" does not clarify the meaning of any other declared right. Instead, the criteria, including "democratic society" is used as a standard of control or a contextual test, as to how limitations of the rights and freedoms set forth in the UDHR, including Art. 21, may be possible.[85] Thus, the limitation clause provides the basis for how to limit voting rights in a given community, by for example setting age limits. In general, despite referencing the concept of democracy itself, the limitation clause does not offer much to develop any concept of democracy based on the UDHR.

2.1.4 Concluding Remarks on Article 21

Understanding Art. 21 of the UDHR gives a clearer picture of what constitutes the basic qualities of a democratic society. I have in the above presentation of Art. 21 focused on lifting contested and unanswered issues of the article. It focuses on inclusive elements of democracy, limited to political participation as direct or indirect participation in the government, at least through periodic and genuine elections by universal and equal suffrage. Broader conceptions of political participation have since been discussed, especially in the West. But it is doubtful to say that such broader concepts are reflected in Art. 21 of the UDHR.[86] Art. 21 expresses an important ideal of political participation as a way to organise society, what is striking however, is that it gave little indication as to how to institutionalize it.

[85] Steiner, p. 89.
[86] Ibid., p. 85.

2.2 ECHR: Article 3 of Protocol No. 1 – The Right to Free Elections

The ECHR was drafted within a specific legal and cultural context, based on common Western European values and ideals.[87] It is clear that the promotion of democratic values, and the prevention of totalitarian regimes is one of the main objectives of the Convention and its governing institution, the Council of Europe.[88] This is not to say that a comprehensive understanding of democracy and political participation exists between Western European States either, as many significant issues have been left open within the Convention system with reference to the doctrine of margin of appreciation, which will be shown below.[89]

Art. 3 of Protocol No. 1[90] obliges State Parties[91] to the ECHR to hold free elections. Art. 3 establishes the right to free elections within the framework of the ECHR. The provision is said to be "[…] crucial to establishing and maintaining the foundations of an effective and meaningful democracy[…]"[92]. However, the ECtHR has declared that the State Parties enjoy a wide margin of appreciation in the sphere of this provision.[93]

I will in this chapter examine the meaning of Art. 3 and thereby dive deeper into the concept of democracy as political participation within the ECHR. I will in particular highlight the crucial issue of pluralism as understood in the Convention system. Finally, I will go over how the rights set forth in Art. 3 can be limited in accordance with the ECHR. My interpretation of the ECHR in general and Art. 3 specifically is heavily influenced by the judgements of the ECtHR and opinions of the former European Commission of Human Rights (The Commission), which over the years has developed a fairly coherent case law in this sphere.

It is worth mentioning that the ECHR continuously refers to concepts such as democracy and democratic society. The latter is often used as a contextual test on how to permit limitations of rights as proscribed in the Convention. More interesting is the preamble of the ECHR, which refers to an "effective

[87] United Communist Party of Turkey and Others v. Turkey, § 45.

[88] Steiner, p. 95; Schabas, p. 1011; and as shown in the preparatory work, eg., Council of Europe, Vol VI at p. 126 and Vol VII at p. 158.

[89] Steiner, p. 97 and eg., Scoppola v. Italy (no. 3) [GC], § 83.

[90] In this section, I refer to Art. 3 of Protocol No. 1 as "Art. 3", not to confuse with Art. 3 of the ECHR.

[91] In this section, I refer to "State parties", "Contracting States" and "States" interchangeably. If a third-party State is referenced, this will be made clear.

[92] Hirst v. the United Kingdom (no. 2) [GC], § 58; Scoppola v. Italy (no. 3) [GC], § 82; and Georgian Labour Party v. Georgia, § 101.

[93] Labita v. Italy [GC], § 201; Podkolzina v. Latvia, § 33; Scoppola v. Italy (no. 3) [GC], § 83; Mathieu-Mohin and Clerfayt v. Belgium, § 52; and Matthews v. the United Kingdom [GC], §§ 63 f.

political democracy" as one of the crucial ways to maintain the fundamental freedoms which the convention sets out to protect and fulfil, which are based on the UDHR. Thus, there is no doubt that the Convention system values democracy. However, I am more interested in what the Convention has to say on what democracy is and will therefore turn to Art. 3 of Protocol No. 1 and the right to free elections.

The first drafts of Art. 3 were considerably more substantial than the end product. It referred to, inter alia, the right to vote by universal suffrage and the secret ballot, described as a way to guarantee that the will of the people was expressed. Thus, the State was to be obliged to respect fundamental democratic principles by, in particular, holding elections.[94] Thereby, the original drafts both contained references to the concept of popular sovereignty, universal suffrage, and democracy itself. Nevertheless, such concepts were met with criticism, as they were seen to be of a constitutional and political character[95]. To avoid the danger of creating an obligation imposing a specific system of parliamentary representation States, the drafters settled on what would be the final version of the article, which was met with general agreement.[96] Its heading "Right to free elections" was added through Protocol No. 11 to the ECHR in 1994.[97]

2.2.1 Structure of Article 3 of Protocol No. 1

At first glance, the provision corresponds to the concept of the right to electoral political participation as mentioned in previous sections and leaves out the concept of the right to non-electoral political participation

On its face, Art. 3 is quite differently worded than most other substantial provisions within the ECHR. It is formulated to only impose certain obligations to the State Parties, not to grant individual rights. However, such a restrictive interpretation has been rejected by the ECtHR, with regard to the context of the Convention as a whole and the preparatory work to the article. The Court has concluded that it is clear that the provision grants individual rights.[98] The emphasis put on the State's obligations rather highlights the commitment they have undertaken in terms of promoting democratic societies, as parties to the Convention. Thus, the obligations are of an adoptive character which demands positive measures to *hold* democratic elections, instead of negative

[94] Schabas, pp. 1013 f.

[95] See e.g., Council of Europe, Vol III at p. 182.

[96] Schabas, pp. 1016 f.

[97] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restricting the control machinery established thereby, (ETS No. 155), Strasbourg 11 May 1994, Art. 2.

[98] See e.g., Mathieu-Mohin and Clerfayt v. Belgium, §§ 48 ff; and Ždanoka v. Latvia [GC], § 102.

measures based on non-interference and abstention as with most other civil and political rights.[99]

The right to free elections as declared in Art. 3, has three conditions attached to it. Firstly, elections must be held at reasonable intervals. Secondly, the elections must be conducted by secret ballot. Lastly, elections are to be conducted under "conditions which will ensure the free expression of the opinion of the people in the choice of legislature".

2.2.1.1 Elections at Reasonable Intervals by Secret Ballot

The condition "reasonable intervals" has been discussed sparingly in doctrine and by the Court. It corresponds to the requirement of periodicity of the UDHR. The Commission has stated that determining what reasonable intervals entail, is done in reference to the purpose of parliamentary elections. Thus, the purpose must be to assure that the opinions of the elected representatives constitute a reflection of the fundamental changes in predominant public opinion. A guiding principle is that the parliament should be able to execute and implement its legislative intentions, including those more long-term. Thus, both too short and too long intervals between elections can go against this purpose. Too short intervals can prevent the legislature from implementing various changes in the law, conversely, too long intervals can result in a too large disconnect of opinion between the electorate and the elected representatives.[100] The average interval among the State Parties seems to be four years.[101]

The condition of the secret ballot seems to not have sparked any wider disagreement and has not been subject to litigation within the ECtHR.[102] It corresponds to the similar condition of the UDHR.

2.2.1.2 Conduct of Elections – Electoral Systems and the Choice of Legislature

When it comes to the conduct of elections, the Court has emphasized the importance of the authorities in charge of electoral administration to maintain independence and impartiality from political manipulation and to operate transparently.[103]

When irregularities in an election occur, the ECtHR evaluates from a more general point of view whether the State in question has complied with its duty to hold elections under fair and free conditions, and whether it has ensured

[99] See e.g., Mathieu-Mohin and Clerfayt v. Belgium, § 50.
[100] Timke v. Germany.
[101] Schabas, pp. 1020 ff.
[102] Ibid.
[103] Namat Aliyev v. Azerbaijan, § 73; and Georgian Labour Party v. Georgia, § 101.

the effective exercise of electoral rights for the individual.[104] In different electoral contexts, there is a need to avoid abuse of power and arbitrary decisions. Legal certainty and procedural fairness must be defining features of the relevant procedures for such decisions.[105]

It should also be highlighted that the Court has emphasised the close relationship between the right to free elections and other rights, such as freedom of expression. They are interrelated and reinforce each other. For example, they are crucial to ensure freedom of political debate, which is necessary, especially in the period preceding an election. Thus, freedom of expression is one of the conditions necessary to ensure the free expression of the opinion of the people, as different opinions and information must be able to circulate freely as part of the preparation for the election process.[106]

However, State Parties enjoy a wide margin of appreciation in how to organize their electoral systems due to the many differences between the States regarding, inter alia, cultural diversity, political thought, and historical development.[107] For example, the Commission has not shown any preference between systems with majority voting in single-member constituencies versus systems with proportional voting.[108] Moreover, the ECtHR has awarded States a wide margin in how to allocate State funds to political parties and how the setting of minimum thresholds for taking a seat in parliament or stand for election, as long as such national regulation is proportionate to the aim pursued.[109] Nevertheless, the Convention is regarded as a living instrument, the Court thereby stays sensitive to evolving consensus on appropriate standards.[110]

Art. 3 protects elections on the choice of the legislature but is not necessarily limited to the national parliament. The term "legislature" is to be understood under the light of the constitutional structure in the specific State, in particular considering the scope of the legislative powers of the body in question, and the constitutional tradition of the State in question.[111]

[104] Namat Aliyev v. Azerbaijan, § 77.

[105] Schabas, p. 1025.

[106] Bowman v. The United Kingdom, § 42.

[107] Scoppola v. Italy (no. 3) [GC], § 83; Mathieu-Mohin and Clerfayt v. Belgium, § 52; Matthews v. the United Kingdom [GC], §§ 63 f; and Hirst v. the United Kingdom (no. 2) [GC], § 61.

[108] X. v. the United Kingdom, p. 95; and Lindsay and Others v. The United Kingdom, p. 251.

[109] Schabas, pp. 1022 f.

[110] Karimov v. Azerbaijan, § 37.

[111] Timke v. Germany; Matthews v. the United Kingdom [GC], § 40; and Sejdić and Finci v. Bosnia and Herzegovina [GC], § 40.

2.2.2 Subjective Rights

Moving on to the actual rights granted by Art. 3, it has been understood to imply two so-called subjective rights: the right to vote and the corresponding right to stand for election.[112] The former is seen as the "active" element of Art. 3, and the latter as the "passive" element.[113] Both refer to the concept of electoral political participation.

2.2.2.1 The Right to Vote

A right to vote is most likely not a surprising element of a right to free elections. Historically, voting rights have been seen more as a privilege than a right, limited to the elites of a given society. Nowadays, the presumption in a democratic State of the twenty-first century is in favour of inclusion, meaning universal suffrage.[114] Nevertheless, it is interesting to go a bit deeper into what universal suffrage actually means, and how it is compatible with State practice of imposing eligibility criteria for voting rights.

Universal suffrage was not originally recognized by Art. 3. Nevertheless, the Commission has since evolved its position by recognizing universal suffrage, an approach accepted by the ECtHR, and now seen as a basic principle of Art. 3.[115] The democratic validity of the elected legislature and their introduced legislation risks being undermined at any departure from the principle of universal suffrage. Thus, if a State wants to exclude any groups or categories of the general population from the electorate, those measures must be reconcilable with the underlining purposes of the article.[116] Thus, the proportionality of a measure is primarily of concern when assessing the restrictions on the right to vote for certain groups.[117]

All State Parties impose certain eligibility criteria for individuals to be entitled to vote, such as citizenship, residency, and age. Such eligibility criteria inevitably impose restrictions or limitations on the right to vote. There exists no exhaustive list of what those criteria may refer to within the Convention system. Eligibility based on citizenship, meaning States only allowing their own citizens to vote in their general elections, seems to be uncontested State practice. Some States also impose criteria on residency, as citizens living abroad are not considered to have sufficiently close links to the State concerned. However, there is a clear trend among Contracting States on allowing non-residents to vote, but no new general principle can be said to have been established. Nevertheless, the ECtHR does not regard limitations based on

[112] See e.g., Mathieu-Mohin and Clerfayt v. Belgium, §51.

[113] Schabas, p. 1026.

[114] Hirst v. the United Kingdom (no. 2) [GC], § 59.

[115] See e.g. X v. the Federal Republic of Germany, p. 38; and Mathieu-Mohin and Clerfayt v. Belgium, § 51.

[116] See e.g., Hirst v. the United Kingdom (no. 2) [GC], § 62; Sukhovetskyy v. Ukraine, § 52; and Oran v. Turkey [Extracts], § 54.

[117] Schabas, p. 1029.

residency as an arbitrary restriction of the right to vote in parliamentary elections. When a State does allow non-resident citizens to vote, there exists no obligation for State parties to enable them to exercise this right. Regarding age limits, there seems to be no case law on the lower age limit for voting, but the norm appears to be 18 years of age.[118]

2.2.2.2 The Right to Stand for Election

The other side of the right to free elections is the right to stand for election. However, it is not a right to a successful result. Instead, it is to be considered as a right to participate as a candidate under democratic and fair conditions, freely and effectively. What must be ascertained is that the election outcome as such is not prejudiced, as well as that the individual's right to stand for election is not deprived of its effectiveness and that the essence of the right is not impaired.[119]

As the passive dimension of the right to free elections, the right to stand for election is thinner. Thus, the sphere of permissible limitations and restrictions is thicker than the active dimension of the right to free elections. When assessing such limitations with respect to the right to stand for elections, the assessment primarily concerns whether an individual has been prevented from being a candidate due to arbitrary factors. Thus, the State must enact legislation which is sufficiently precise and not arbitrarily marked or interpreted as such.[120]

However, there does exist State practice of disqualifying individuals from holding office on certain grounds which is deemed acceptable by the ECtHR. Such grounds may be related to upholding the separation of powers, protecting the independence of parliamentarians and preventing a conflict of interest with the private sector.[121] Any measure that seems to have the sole or principal function to be of disadvantage for the opposition must be examined with special care, particularly if the nature of the measure affects the very possibilities for opposition parties to gain power in the future.[122]

2.2.2.3 Pluralism

What is illusive with the ECHR is that it was drafted, and has continued to develop, within a specific regional context. It is therefore important to stress the element of pluralism and public contestation as part of a democratic form of government. Art. 3 is said to refer to elections based on a Western European democratic framework, grounded in liberal conceptions of contested

[118] Ibid., pp. 1026 ff.
[119] Namat Aliyev v. Azerbaijan, § 75.
[120] Schabas, p. 1029.
[121] Ibid., pp. 1029 f.
[122] Tănase v. Moldova [GC], § 179.

elections[123]. This has also been addressed by the Commission, which has asserted that different political parties must be guaranteed a reasonable opportunity to present their candidates.[124] Moreover, the ECtHR has made it clear that in an effective democratic system, the State is the ultimate guarantor of pluralism.[125] The Convention system must also be seen as a whole. The exercise of other civil and political freedoms, such as free speech and association, is needed to guarantee the respect for pluralism of opinion in a democratic society. Thus, there is a clear link between different provisions of the Convention.[126] The "free expression" referred to in Art. 3 presumes the participation of a plurality of political parties to represent different nuances of opinion which can be found within the population of a State.[127]

2.2.3 Limitations to Article 3 of Protocol No. 1

At first glance, Art. 3 does not specify under what conditions limitations to the provision may be imposed. Nevertheless, this circumstance does not signify that the rights set out in the article are absolute. Instead, the ECtHR has applied a theory of implied limitations, as with other provisions of the Convention.[128] States have a wide margin of appreciation in the sphere of Art. 3. However, conditions of limitations may not curtail the rights in question to such an extent as to impair the very essence and deprive them of their effectiveness. They must be imposed in pursuit of a legitimate aim, and the means employed may not be disproportionate.[129] Nevertheless, the margin of appreciation awarded to the State is limited as it must respect the fundamental principle of ensuring the free expression of the opinion of the people in the choice of the legislature.[130]

Since the Convention does not specify or limit the aims of which a restriction must pursue to be legitimate, a wide range of purposes may be compatible with Art. 3.[131] The choice of purposes is limited in the sense that they must be compatible with the general objectives of the ECHR.[132] Examples of legitimate aims which the Court has accepted are: The prevention of crime and enhancement of civic responsibility and respect for the rule of law when disenfranchising prisoners as a form of supplementary penalty[133]; encouraging

[123] Steiner, pp. 95 f.

[124] X. v. the United Kingdom.

[125] Özgürlük ve Dayanişma Partisi (ÖDP) v. Turkey, § 27; and Informationsverein Lentia and Others v. Austria, §38.

[126] Ždanoka v. Latvia [GC], § 115.

[127] Christian Democratic People's Party v. Moldova, § 66.

[128] Schabas, p. 1023 and Mathieu-Mohin and Clerfayt v. Belgium, § 52.

[129] Mathieu-Mohin and Clerfayt v. Belgium, § 52; Podkolzina v. Latvia, § 33; and Hirst v. the United Kingdom (no. 2) [GC], § 62.

[130] Podkolzina v. Latvia, no. 46726/99, § 33; and Mathieu-Mohin and Clerfayt v. Belgium, § 54.

[131] Hirst v. the United Kingdom (no. 2) [GC], § 7.

[132] Paksas v. Lithuania [GC], § 100; and Ždanoka v. Latvia [GC], § 115.

[133] Scoppola v. Italy (no. 3) [GC], § 90.

citizen-like conduct[134]; and the preservation of democratic order[135]. When assessing the proportionality of a given limitation, factors to consider are the nature and severity of the interference.[136]

In contrast to other provisions in the ECHR, Art. 3 does not seem to require that limitations are "prescribed by law" or "in accordance with law". Nevertheless, the rule of law serves as one of the fundamental principles of the Convention and is thereby inherent in all its provisions[137]. In contrast, the criteria "necessity" and "pressing social need" as are applied in relation to other articles in the Convention, are not applied in the context of Art. 3, due to the specificities of the "implied limitations" concept as it is applied here.[138]

2.2.4 Concluding Remarks on Article 3 of Protocol No. 1

Art. 3 offers another perspective on the right to political participation, based on Western liberal concepts of democracy grounded in elements of pluralism and contested elections. It focuses primarily on the aspects of electoral political participation. The ideal of democracy permeates the Convention system as a whole and within this structure, the right to free election is of particular importance. The meaning of the right to political participation within the UDHR and the respective right to free elections within the ECHR are clearly connected and overlapping. Nevertheless, there is value in comparing them to build a more comprehensive framework of democracy than would be possible if only viewing them separately.

The Convention is regarded as a living instrument, meaning that the ECtHR interprets it evolutive and dynamically in the light of present-day conditions.[139] As a result of the work of the Commission and the ECtHR, the meaning and content of Art. 3 has been developed beyond the direct wording of the provision. Over the years, the Court has recognized multiple components of the right to free elections not explicitly referred to in the article, among other things: the principle of universal suffrage; the implied subjective rights to vote, and respectively, to stand for election; and the implied limitations of the right which a State may adopt in national contexts. Admittedly, the margin of appreciation is wide in this sphere, but the case law has clarified the meaning of the right to free elections within the Convention system. This gives greater insight into key factors of the requirements placed on a State for it to be considered democratic, in the meaning of political participation.

[134] Söyler v. Turkey, § 37.
[135] Paksas v. Lithuania [GC], § 100.
[136] Silay v. Turkey, § 32.
[137] Schabas, p. 1024; Karimov v. Azerbaijan, § 42; and Amuur v. France, § 50.
[138] Ždanoka v. Latvia [GC], no. 58278/00, § 115, 16 March 2006.
[139] Greer, p. 457.

2.3 Comparing the UDHR and the ECHR

It is clear that the demand for democracy within the UDHR is more comprehensive, albeit less detailed, than the one in ECHR as the former goes beyond the right to free elections. Furthermore, the election clause is limited by only referring to the choice of the legislature in contrast to the UDHR which refers more broadly to government.

2.3.1 Different forms of political participation

Non-electoral political participation is not mentioned in the ECHR in contrast to the UDHR which refers to political participation more broadly, including both non-electoral and electoral political participation. Nevertheless, within the UDHR, the concept of electoral political participation is more closely defined. Thus, albeit to a different degree, both instruments regard electoral political participation as essential[140].

Given the wording of the Art. 3 in Protocol No. 1 of the ECHR, it does not seem to be much more specific than Art. 21 of the UDHR regarding electoral political participation. But as I have shown above, ECHR was drafted in a different context, making it possible to draw different conclusions than is possible with the UDHR. The latter was instead drafted to be accepted by geographically diverse political systems, multi- and single-party systems. Apparent differences, such as the non-existing reference to universal suffrage in the ECHR have been resolved through recognition by the ECtHR. After all, when breaking down the article, and taking into consideration the subsequent case law, Art. 3 of Protocol No. 1 seems to bring more clarity on what the electoral right to participation may entail. It seems like the ECHR views the realization of liberal democracy to be exclusively grounded in the government's commitment to an open political process, ultimately through the exercise of free, periodic, and contested elections[141].

2.3.2 Electoral Systems

Elections depend on a functional electoral system, which is designed and administered by the State. However, both the UDHR and the ECHR provide little guidance on how an electoral system should be organised for States to fulfil their obligations to hold elections.

As mentioned, both instruments require that the elections should be held regularly[142], and by secret ballot[143]. Moreover, the UDHR requires the elections

[140] Steiner, p. 108.

[141] Ibid., p. 96.

[142] In UDHR this is referred to as "periodic", ECHR instead refers to "at reasonable intervals".

[143] UDHR phrases this as "by secret vote".

to be "genuine" and by universal and equal suffrage, as the elections express the will of the people which is the basis of authority of government. Art. 3 of Protocol No. 1 to the ECHR on the other hand, requires elections to be "free", and "under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." As stated, universal suffrage has for a long time been recognized as a basic principle in this context by the ECtHR. The term "genuine" is not reflected in the ECHR, but may be reflected in the implied limitations doctrine, where permissible limitations are not to curtail the rights in question to such an extent as to impair the very essence and deprive them of their effectiveness. The element of pluralism is a contested subject of the UDHR, where there are separate views on whether it is related to the term "genuine" or not. The ECHR on the other hand, is based on concepts of democracy where pluralism and contested elections are presumed as a part of the very essence of the right to free elections.

The choice of electoral system shapes the degree of representation between different groups and their influence when choosing a legislature depending on the interests the system favour.[144] Beyond the requirements as shown above, this important aspect of political participation, which determine the quality of political participation and distribution of political power, seems to fall outside international law. Different arrangements of power can thus be achieved in compliance with international human rights law and the concept of liberal democracy. Nevertheless, the instruments stay neutral when it comes to choosing an electoral system[145].

2.3.3 Popular Sovereignty

The instruments address the importance of the opinion of the people in different ways concerning political participation. The UDHR references the concept of popular sovereignty by stating that "the will of the people shall be the basis of the authority of government; this will shall be expressed in […] elections" in the third paragraph of Art. 21. Here, elections clearly serve a purpose to identify the will of the people, which is the basis of authority.

The ECHR only states that States are to organise elections under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. Thus, elections rather seem to serve the purpose to protect the free expression of the people's opinion itself in this domain. What authority this expressed opinion has is not specified, as in the UDHR. References to "the will of the people" in the ECHR were edited out at the time of drafting, and the end result was formulated so it would not implicate a requirement for institutionalizing a form of proportional representation as the only valid electoral system[146]. Nevertheless, Art. 3 of Protocol No. 1 to the

[144] Steiner, p. 105.
[145] Ibid., p. 108.
[146] Council of Europe, Vol VII at p. 14.

ECHR is seen as vital for the realisation of the foundations of an effective and meaningful democracy.[147] Thus, it seems that it is rather the choice of an electoral system rather than the concept of popular sovereignty itself that is the focus of the provision in the ECHR.

The emphasis on elections themselves suggests that the right to free elections, as in electoral political participation, has an intrinsic value within the ECHR framework. In contrast, the UDHR suggest that electoral political participation is mainly one of the means to the end of realising popular sovereignty, together with non-electoral political participation. On the other hand, the ECHR is to be seen as a way to realise the common values and ideals of the European system, one of them being democracy. An argument can thus be made that the article in itself, the right to election, is a means to realize democracy.

2.4 The Democratic Framework

Based on this review of the provisions on political participation in the UDHR and the ECHR respectively, it is possible to conclude that a State governed by a democratic system demands the concept of electoral political participation to be protected. This, on the level of general elections, at a minimum requires the elements listed below. These are to be seen as a continuum, where every step aims to clarify the former, where the limits between them are not necessarily entirely strict.

The framework is based on the overlaps between the two instruments. Where there are gaps, I have aimed to identify elements which ensure the right in a fuller sense, and possible limitations understood in their stricter sense. This is motivated by the complementary nature of using both the UDHR and ECHR. The democratic framework consists of the following elements, requiring:

1. A legislator deriving its authority from the will of its citizens;

2. The will of the citizens expressed through publicly contested elections;

3. Citizens to be able to vote and respectively stand for such elections;

4. The conditions of the elections to be based on universal and equal suffrage, periodic elections, free elections, and the secret ballot; and

5. Limitations of this right to be justified, proportional and prescribed by law.

[147] Hirst v. the United Kingdom (no. 2) [GC], § 58; and Scoppola v. Italy (no. 3) [GC] § 82.

3 Political Participation in Sweden

In this chapter, I will investigate the Swedish regulations on democracy as electoral political participation. My selection of relevant laws is guided by the democratic framework I presented in the previous chapter. To provide context, I will begin by making a brief account of the development of democracy in Sweden.

3.1 Historical Development of Democracy in Sweden

It is said that democracy had its breakthrough in Sweden around the turn of the 20th century. Simplified, this breakthrough was a result of gradual political changes over the 19th century, as the power of the monarchy decreased, and the two-chamber parliament was introduced. The issue of universal suffrage was the tipping point. Universal suffrage for almost all men was granted by Parliament in 1909, albeit limiting voting rights to men over the age of 24 who had paid taxes, done basic military service, had not been taken care of by the welfare system[148], and had not been in prison. By 1921, the Parliament granted women voting rights through an amendment of the then-in-effect Riksdag Act[149]. 1921 has since been referred to as the year of the first democratic parliamentary election with universal and equal suffrage.

Democracy has since continued to develop, and voting rights have expanded by the legislator gradually removing the qualifications that previously existed regarding the socio-economic background and lowering age limits for voting.[150] The 1970s was an eventful decade, as fundamental aspects of the Swedish democracy and form of government changed and took the shape it in many ways still has today. In 1971, the one-chamber parliament was established. In 1974 a new Constitution was introduced, The Instrument of Government, effectively ending the political power of the monarchy and introducing clearer protection of human rights and freedoms. In 1975, the age limit

[148] In Swedish understood as: *"Fattigvården"*.

[149] In Swedish, *Riksdagsordningen (SFS 1921:20),* at that time part of the Swedish constitution (Government bill, Prop. 1973:90 p. 474). This act of the Swedish Code of Statutes was surprisingly hard to find. For the interested reader, it is available at <http://trivux.ub.gu.se/kvinndata/portaler/rostratt/pdf/SFS_1921_20.pdf>.

[150] Parliament of Sweden, "Demokratins utveckling i Sverige".

for voting was lowered to 18, effectively granting 72 per cent[151] of the Swedish population voting rights.

In parallel, Sweden has globally compared, in the last century performed rather well when it comes to establishing a democratic society. The Nordic region has been complimented for being quite competitive in international comparison, with inter alia having a genuine multiparty system and free elections.[152] The electoral system of Sweden has in legal terms taken its form over the last few decades. It rests on the major reforms of the Constitution that were made in the 1970s and its fundamental principles are said to have been expressed as part of the human rights law in for example the UDHR and ECHR.[153] Sweden has scored high in international rankings of democracy and the public view seems to be that it is a well-established, if not integral, part of the functions of the State.

3.2 Applying the Democratic Framework

Thus, it is generally accepted that Sweden has a democratic form of government. In the following sections, I will dive deeper into how the form of government is regulated, through the lens of the democratic framework I presented earlier. One initial observation of the Instrument of Government is the fact that the word "democracy" ("*demokrati"* in Swedish*)* is barely used. Instead, the Constitution mainly speaks of "rule by the people" (my translation for the Swedish term "*folkstyrelse")*, as it refers to the constitutional system itself, which realizes the ideal of popular sovereignty, as expressed in the first paragraph of Ch. 1, Art. 1 of the Instrument of Government. That the system of rule by the people should be democratic, is a result of what is stated in the first sentence of the second paragraph of the same provision.[154] Here, it is important to note that the unofficial English version differs from the original version in Swedish, as "*folkstyrelse*" has been translated into "democracy". As the Swedish version is the authentic one, I will make it clear when the word "democracy" is used in the meaning of "*folkstyrelse*".

On a practical note, when moving forward in the following sub-sections, I want to clarify that when referencing provisions, I am referring to the Instrument of Government throughout, if nothing else is stated.

[151] This roughly corresponds to today's ratio, where the numbers of 2021 and 2022 shows that about 74 per cent of the Swedish population was granted voting rights in the latest general election (2022), compare with: The Election Authority, "2022 Swedish election results" and Statistics Sweden, "Population Statistics".

[152] Rosas, p. 450.

[153] Johansson, p. 19.

[154] Bull & Sterzel, p. 46.

3.2.1 The Authority of the Legislator

The most fundamental element of the democratic framework is the requirement of a legislator to derive its authority from the will of its citizens. I would argue that this corresponds to the principle of popular sovereignty, but in a limited way. Popular sovereignty means the idea of the people as the ultimate authority, the sovereign within the State, instead of any other ruler. Public power is thus derived from the people and is ultimately exercised by a popularly elected assembly.[155] Here, I want to highlight that the principle of popular sovereignty is not limited to the legislator itself, as the democratic framework, but encompasses all forms of public power.

Provisions on the foundations of the form of government in Sweden can be found in the first chapter of the Instrument of Government. The chapter is of preambular[156] character presenting basic norms of constitutional matters, which are specified in subsequent provisions and laws.[157] The material significance of the chapter is therefore limited. As it only gives expression to basic principles, one should be careful with drawing too far-reaching conclusions purely based on this chapter.[158] The legally binding nature of this chapter is disputed.[159] However, as the element of the authority of the legislator from the democratic framework is of similar foundational character it makes sense to start here, at the level of fundamental principles of the functions of the Swedish state. As I go over the different elements of the democratic framework, I will also go deeper into the Swedish Constitution and other relevant laws, primarily the Elections Act, when necessary.

The principle of popular sovereignty has a central role in the Swedish constitutional tradition. The strong position of this principle is signalled at the very beginning of the Instrument of Government, in 1 Ch. Art. 1.[160] The first paragraph therein states, "All public power in Sweden proceeds from the people." However, it is not legally defined what "public power" nor "proceeds from the people" entails. The point seems to be that all exercises of public power ultimately must be derived from the people. "The people" is a term only used in the first chapter of the Instrument of Government. As will be shown, the principal way for power to be derived from "the people" is through public elections. Nevertheless, (albeit contradictory), it has been pointed out that "the people" should not be understood as only referring to citizens with the right to vote, but also includes residents of Sweden and those citizens who

[155] Derlén, Lindholm & Naarttijärvi, pp. 50 ff.

[156] In Swedish understood as: *"Portalparagraf"*.

[157] Hirchfeldt, Instrument of Government (1947:152), 1 Ch. Art 1, Section 2.5, Representativitet och parlamentarism, Lexino 2022-07-01 (JUNO).

[158] Bull & Sterzel, p. 43.

[159] See for example Hirschfeldt, Instrument of Government (1974:152), 1 Ch., Karnov (JUNO) and Nergelius, p. 26.

[160] Derlén, Lindholm & Naarttijärvi, pp. 50 ff.

have no voting rights (for example due to age limits).[161] Thus, the paragraph seems to go beyond the democratic framework, not only demanding that the legislative power should derive its authority from the will of the citizens, but that all public power should be derived from the people. However, when looking closer at the main components of Swedish governance, a logical structure can be observed, leading back to the central role of the legislator and the act of voting.

When it comes to the different bodies of Swedish governance, the following can be said. Ch. 1, Art. 4 stipulates that the Riksdag is the foremost representative of the people. The Riksdag has four main tasks: to enact laws, determine State taxes, decide how State funds shall be employed and examined the government and administration of the State. According to Art. 5 of the same chapter, the monarch is the Head of State. Nevertheless, it is the Government that governs the State, but it is accountable to the Riksdag, according to Art. 6. Here, another fundamental principle of the Swedish form of government comes to light, parliamentarism (first mentioned in the second paragraph of Ch. 1, Art. 1). This means that the governing power, that is the Government, must be supported (or at least tolerated[162]) by the representative of the people, that is the Riksdag. It also means that the power ultimately lies with the majority of the Riksdag.[163] This basic structure of Swedish governance, informed by the principle of popular sovereignty and parliamentarism, implies two central outcomes: first, it is the government, not the head of state, that is assigned the governing power of Sweden. Secondly, the Government must be entrusted with the assignment by the Riksdag.[164] The Instrument of Government, therefore, seems to be built on the idea that the people are to govern themselves, resulting in a high concentration of power for the Riksdag and Government.[165] The power of other institutions, including the Government, is thus derived from the people.[166]

Going back to Art. 1, it states in its third paragraph that public power is exercised under the law. Public power is thus limited by the principle of legality as all exercise of power by public authorities must be in accordance with legal norms. The expression of "the law" goes beyond formal laws, by also

[161] Bull & Sterzel, pp. 44 f. As the framework is limited the electoral political participation of citizens, I will not go into the issue of participation for residents who are not citizens. The issue of limiting voting rights will be dealt with in the coming sections. The issue on how public power is supposed to proceed from those with no voting rights raises questions on Ch. 1, Art. 1, but goes beyond the scope of the thesis. However, it serves as a reminder that the article only provides basic principles, or an ideal, for the form of government of Sweden, and that it does not hold up to any in depth analysis.

[162] Ibid., p. 48.

[163] Hirschfeldt, Instrument of Government (1974:152) Ch. 1, Art. 1, Section 2.5 Representativitet och parlamentarism, Lexino 2022-07-01 (JUNO).

[164] Derlén, Lindholm & Naarttijärvi, pp. 50 ff.

[165] Nergelius, p. 29.

[166] Bull & Sterzel, pp. 44 f.

including for example ordinances and customary law[167]. Nevertheless, legality is subject to the hierarchy of legal sources, where the Constitution, followed by laws have the highest value[168]. The authority of other provisions and sources of law is derived from the law, and ultimately from the Constitution itself. Legal sources are not to be applied if they contravene a legal source of higher value, according to Ch. 11 Art. 14 (regarding courts), and Ch. 12, Art. 10 (regarding administrative authorities). At the same time, only the Riksdag has the authority to enact and amend laws (including the Constitution), according to Ch. 8, Art. 1. Thus, as public power is to be exercised under the law, the public power is in principle subject to the Riksdag, as the ultimate legislator. Furthermore, a characteristic feature of the Instrument of Government is the lack of separation of powers, in the sense that the legislative powers of the Riksdag, are not limited[169].

Thus, the core institution of public power in Sweden is the Riksdag as the legislative body and the representative of the people. Concluding that the principle of popular sovereignty as understood in Ch. 1 Art. 1, goes beyond the first element of the democratic framework may not be entirely true. But what is important here is to note that the legislator in Sweden clearly derives its authority from the will of the people. Moreover, this principle is one of the (if not the) most fundamental parts of the Swedish Constitution[170].

3.2.2 The Will Expressed through Elections

The next element of the democratic framework is that democracy as electoral political participation requires that the will of the citizens is expressed through publicly contested elections. At this step of the democratic framework, we are still in the sphere of more general principles and the foundations of the form of government. I will take a closer look at the conditions of elections in the coming sections. The purpose of this step within the framework is to investigate how the limited form of popular sovereignty as discussed in the previous section[171], is institutionalized.

Again, departing from Ch. 1, Art. 1, it is stated in its second paragraph:

> Swedish democracy is founded on the free formation of opinion and on universal and equal suffrage. It is realised through a representative and parliamentary form of government and through local self-government.

[167] Committee on the Constitution, KU 1973:26 p. 59.

[168] Bull & Sterzel, pp. 187 f.

[169] Derlén, Lindholm & Naarttijärvi, p. 233. However, a potential competitor to the Riksdag is the municipal self-government. Nevertheless, that topic goes beyond the scope of this thesis.

[170] Derlén, Lindholm & Naarttijärvi, p. 50 and Nergelius, p. 29.

[171] Meaning that the authority of the legislator should be derived from the will of its citizens.

Thus, the public power that proceeds from the people (according to the first paragraph) understood as "the rule of the people", is to be realised through a representative and parliamentary form of government. As such, the will of the citizens is expressed through a representative electoral system[172]. As the Riksdag is the representative of the people, according to Ch. 1, Art. 4, the question is how this representation is arranged. The answer is to be found in Ch. 3, where the fundamental aspects of the composition of the Riksdag and the electoral system are to be found. As it is technically very difficult to construct an electoral system that will realize set goals and principles, it was seen fit to regulate it separately. Most provisions of the electoral system can therefore be found in the Elections Act (2005:837).[173] Nevertheless, I will begin with addressing the rules of more fundamental value, as are found in the Instrument of Government, to address how the electoral system is structured to secure election results that reflect the will of its citizens.

The electoral system is structured in such a way that it on one hand must meet requirements for a proportional outcome to the votes, and on the other hand, provide a good basis for forming a suitable Government based on a majority.[174] It is based on the following principles[175]:

> 1. that, with the exception stated in point 5, a distribution between the parties is obtained that is fair with regard to the election results of the whole country (national proportionality),
>
> 2. that national proportionality cannot be disturbed by artificial party formations or other tactical electoral manoeuvres,
>
> 3. that national proportionality cannot be disturbed by changes in the division of constituencies,
>
> 4. that the system leads to a satisfactory regional representation that is also as stable as possible with regard to the requirement for national proportionality,
>
> 5. that it makes it difficult for very small parties to win representation in the Riksdag.

Going back to Ch. 3. It is stated in Art. 1, that the Riksdag is appointed through direct elections, meaning that the members of the Riksdag are chosen directly by the voters. Nevertheless, it should be noted that the Instrument of Government in fact promotes a form of government based on indirect representative democracy according to Ch.1, Art. 1[176]. The representatives are independent in the sense that they do not need to consider public opinion when

[172] This does not prevent the system from being supplemented by the institution of referendums, see Hirschfeldt, Instrument of Government (1974:152) Ch. 1, Art. 1, Lexino 2022-07-01 (JUNO).

[173] Bull & Sterzel, p. 105.

[174] Johansson, p. 16.

[175] My translation, see Swedish Government Official Reports, SOU 1967:26 p. 149.

[176] Nergelius, p. 45.

taking each and every decision when in parliament.[177] Directness rather shows in the procedure of choosing the representatives. Ch. 3, Art. 1 goes on to state that voting in such elections is by party and includes the option for the voter to vote in preference of a specific person within the party. Thus, the system is built on having political parties representing different directions of opinions. This means that public contestation is a built-in feature of the system. Furthermore, the composition of the Riksdag is to be reflected proportionally according to the support these parties receive through the public elections, according to Ch. 3, Art. 8. Legally speaking, the political parties have a crucial function as keystones to the Swedish electoral system.[178] However, since 2015, the Instrument of Government does not define the term "party"[179]. Moreover, their status in Swedish society has changed over the 20th century, as the number of party members has decreased drastically[180]. Only parties who have notified their participation in the election in accordance with Ch. 2 of the Elections Act, can participate in the allocation of seats of the Riksdag, according to Ch. 3, Art. 7 of the Instrument of Government.

Ch. 3, Art. 2 states that the Riksdag consists of one chamber with 349 members. Alternates also need to be appointed for every member. An uneven number of members of the Riksdag was chosen by the legislator to avoid the situation where the governing parties and the opposition parties get the same number of mandates[181]. The Riksdag consists of quite a few mandates. In 2019 it was stated that every mandate represents about 28 600 citizens of Sweden.[182] The purpose of this is to have good local representation reflected in the election results.[183] Ch. 3, Art. 7 provides that only parties which have notified their participation in the election may partake in the distribution of seats to the Riksdag. There is no formal limit on how many parties may be represented in the Riksdag, but there is a barrier in Ch. 3, Art. 7, stating that only those parties who have received at least four per cent of the votes cast in

[177] Johansson, p. 26.

[178] Committee on the Constitution, KU 1973:26 pp. 16 f.

[179] The previous definition was "By party is meant any association or group of voters, which appears in elections under a special designation" (my translation), Instrument of Government (2010:1408), Ch. 3, Art 1. The reasons for removing the definition are vague, as the drafter simply stated it did not view it necessary to define the term in the Instrument of Government. However, it did highlight that the (then in force) definition would be misleading as it did not reflect the contents of the new legislation on requirements on prior notification by parties wanting to participate in elections, see Government bill, Prop. 2013/14:48 p. 63.

[180] This is an issue I would primarily place in the sphere of non-electoral political participation as it concerns the individual's ability to politically participate beyond the act of voting or stand for election. I must remind the reader that the issue of this thesis is the legal nature of the electoral system, not the sociological aspects of why individuals choose to exercise political participation through commitment to a political party or not.

[181] This actually happened in the general election of 1973, before this rule was in place.

[182] This can be compared to Germany with around 130 000 citizens to every mandate, and with the US where every mandate of the House of Representatives of the U.S Congress represent around 700 000 citizens, see Bull & Sterzel, pp. 110 f.

[183] Bull & Sterzel, pp. 110 f.

the entire State. The same provision also provides an exception where a party that has received at least twelve per cent of the votes in a single constituency can participate in the distribution of the fixed constituency seats. The aim of this rule of exception is to have local results reflected in the regional representation, but the rule has never been applied.

The electoral system of Sweden is built on proportionality.[184] The aim is to have a balance of power between the parties taking seat in the Riksdag reflecting the votes cast by the electors.[185] To achieve this, Sweden is divided into constituencies[186] according to Ch. 3, Art. 5. Out of the 349 seats in the Riksdag, 310 are fixed constituency seats and 39 are adjustment seats. The purpose of the constituencies is to have local representation in the Riksdag[187]. Thus, the fixed constituency seats are distributed between the constituencies according to a calculation between the total number of persons with voting rights in the entire State, and the number of persons with voting rights within each constituency prior to each election, according to Ch. 3 Art. 6. Then, the fixed constituency seats are distributed in every constituency between the parties in proportion with the election results of the said constituency, according to Ch. 3, Art. 8. Moreover, the adjustment seats are used to distribute the seats in the Riksdag between the parties to reflect the election results of the entire State. In Ch. 4, Section 2 of the Elections Act, the constituencies are listed. They basically correspond to the division of counties and have been more or less the same since 1921[188]. The Elections Act also provide detailed provisions in Ch. 4, Section 3, on how the calculation of constituency seats are distributed between the constituencies, as well as in Ch. 14, Sections 3–5, on how the fixed constituency seats should be distributed between the political parties when producing the election results. For every seat a party obtains, a member of the Riksdag is appointed, together with an alternate for that member, according to the Instrument of Government, Ch. 3, Art. 9.

Thus, proportionality is a fundamental part of the system and amendments have been made both to the Instrument of Government and the Elections Act with the aim of further ensuring that the seats of the Riksdag are distributed proportionally in relation to the votes cast by the electorate.[189] The principle of proportionality is used both to distribute the number of constituency seats in every constituency to reflect the size of the population therein, as well as to distribute the constituency seats between the political parties in accordance with the number of votes they received in said constituency. The barrier of four per cent for parties to take seat in the Riksdag is a conscious choice by

[184] Derlén, Lindholm & Naarttijärvi, p. 67.

[185] Svahn Starrsjö, Instrument of Government, Ch. 3, Art 7, Section 3 Fyraprocentsspärren, Lexino 2022-01-01 (JUNO).

[186] In Swedish understood as: *"Valkretsar"*.

[187] Johansson, p. 59.

[188] Svahn Starrsjö, Instrument of Government, Ch. 3, Art 5, Section 2 Valkretsar, Lexino 2022-01-01 (JUNO).

[189] Government bill, Prop. 2013/14:48.

the legislator to balance the interest of securing a proportional election result, with the interest of having a somewhat actionable Riksdag and Government[190]. Thus, Sweden does not adopt a system of single-member constituencies (*first past the post)* or a system where the winner of a constituency shall receive all its constituency seats (*winner takes all).* The opposite of a proportional system would be majority elections in single-member constituencies. Such a system normally results in a clear election result with a strong governing body. A proportional system normally results in a fairer representation between the parties.[191] The democratic framework does not provide a preference between different electoral systems. The element discussed in this section aims at the necessity of the will of the citizens to be expressed through publicly contested elections. Thus, there is an argument to be made that this "will" is clearer and more nuanced when expressed through a proportional system. The effectiveness and actionability of the government are not a question that is raised by the framework, albeit they may result in practical issues.

To conclude, the will of the citizens of Sweden come is expressed through publicly contested elections, built on a representative, proportional multi-party system.

3.2.3 Ability to Vote and Stand for Election

The third element of the democratic framework is the requirement that citizens must be able to vote and respectively stand for election.

According to Ch. 1, Art. 1, democracy[192] in Sweden is founded on universal and equal suffrage. The right to vote and the eligibility criteria to stand for election for the Riksdag is further specified in Ch. 3, Art. 4. It is worth noting that the legislator chose to place these provisions in the chapter regarding the functions of the Riksdag and the electoral system, instead of Chapter 2, which regulates fundamental rights and freedoms. Nevertheless, it seems quite certain that the right to vote is, in fact, a right[193]. In Swedish jurisprudence, the right to vote is explained as a two-fold right with a passive (right to stand for election) and active (right to vote) side.[194] Whether this understanding is based on the provisions of the Instrument of Government, or the ECHR is unclear, as the former only speaks of voting as a right, not standing for election.

According to Ch. 3, Art. 4, all Swedish citizens who are or have ever been residents of the country and are 18 years of age, has the right to vote in the general election. Conversely, all those who fulfil the criteria for the right to vote, are also eligible to be a member or alternate member of the Riksdag.

[190] Derlén, Lindholm & Naarttijärvi, p. 67.
[191] Bull & Sterzel, pp. 113 ff.
[192] In the meaning of *"folkstyre"*.
[193] HFD 2013, ref 72.
[194] Johansson, p. 27.

Thus, the possibility to stand for election is not formulated as a right. I will go more into voting rights and the concept of universal suffrage in Section 3.2.5. Here, I will go a bit deeper into the ability of individuals to stand for election.

As stated in the previous section, the electoral system of Sweden is based on political parties but allows the voter to express a personal preference vote. Thus, individuals may only stand for election as a member of a registered party that has notified its participation in the election. The rules on the registration of parties and notification of participation in general elections can be found in Chapter 2 of the Elections Act. The provisions also require documented support from at least 1500 people with voting rights for a party to be able to register. The parties are also able to register candidates for an election, which should be done in written form in accordance with Ch. 2, Section. 9 of the Elections Act. Ch. 2, Section 20 therein also provides that a person running for a party that has registered their participation before an election must consent to their candidacy. Moreover, eligibility criteria nor the ability to stand for election is not widely discussed within the area of Swedish constitutional law.

The eligibility criteria to stand for election to the Riksdag is broadly construed, legally speaking, but it presupposes that the individual is involved in party politics. At the same time, the functions and activities of parties are unregulated[195]. For individuals to be able to stand for election, it presupposes both well-functioning party organizations internally and party systems externally. Thus, I would claim that due respect for, for example, freedoms of opinion, expression, assembly, and association are of crucial importance. This is where we start to move into the sphere of non-electoral political participation as it concerns the individual's ability to politically participate beyond the act of voting. It still relates to the ability to stand for election but takes root in the non-electoral form of political participation, as the ability to be involved in a political party goes further than standing for an election. Thus, it comes down to the internal functions of a party as to whether an individual can stand for election, given internal nomination procedures for general elections for example, which can cause issues. Here, it is worth highlighting that the legislator has not formulated the act of standing for election as a right. Furthermore, the legislator has chosen a path of refraining from regulating parties' internal organization, to secure their independence and freedoms of expression and association[196].

One way to revitalize old party structures and give voters more power to choose their representatives was to introduce the opportunity to express a

[195] Svahn Starrsjö, Instrument of Government, Ch. 3, Art 1, Section 4, Partierna, Lexino 2022-01-01 (JUNO).

[196] Committee on the Constitution, KU 1973:26 p. 17.

personal preference vote.[197] This was done in 1994, through the amendment Swedish Code of Statutes 1994:1469. The aim was to strengthen this aspect of voting procedures whilst still giving preference to the party system.[198] The current system of personal preference votes is based on these points of departure[199]:

> 1. Small groups must not be given the opportunity to control the personal preference vote at the expense of the large voter groups, who may prefer to leave the personal preference vote to the party bodies.
>
> 2. Large financial contributions or other irrelevant circumstances may not be decisive for the personal preference vote.
>
> 3. The method for personal preference vote must not become so complicated that it becomes difficult for the voters to understand it or significantly delay the determination of the election result.

Thus, individuals who stand for election are not only subject to the internal nomination process of the party, but the voters have a say as well (albeit limited). This means that individuals other than those strongly established within a party can take seat in the Riksdag if they raise enough personal preference votes. In practice, however, it is unclear the extent of the effects of this system, as many internal issues within the parties remain.[200] The regulation seems to have been viewed from the perspective of the voters, giving them a greater opportunity to choose their representative. But it also strengthens the possibilities for individuals to stand for election and by extension become elected (at least on a theoretical level).

The ability for citizens to vote and respectively stand for election is not regulated in detail but follows basic principles of universal and equal suffrage that are reflected in the eligibility criteria for individuals standing for election. Thus, the legislator seems to have chosen to refrain from regulating several parts of these areas, to avoid the risk of infringing on closely related rights.

3.2.4 Conditions of Elections

The next requirement concerns the conditions of the elections. They must ensure the free expression of the opinion of the people; thus, they must be based on principles of universal and equal suffrage, periodic elections, free elections, and the secret ballot. I will go over each one by one in this section.

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[197] Svahn Starrsjö, Instrument of Government, Ch. 3, Art 1, Section 3, Personval, Lexino 2022-01-01 (JUNO).

[198] Government bill, Prop. 1993/94:115 pp. 9–10.

[199] My translation. See Johansson, p. 23 with reference to Swedish Government Official Reports, SOU 1963:17 and SOU 1972:15.

[200] Nergelius, pp. 51 ff.

3.2.4.1 Universal and Equal Suffrage

As mentioned earlier, democracy[201] in Sweden is founded on universal and equal suffrage, according to Ch. 1, Art. 1 of the Instrument of Government. It is specified further in Ch. 3, Art. 4, stating that all Swedish citizens who are or have ever been residents of the country and are 18 years of age, have the right to vote in the general election. The principles of universal and equal suffrage are seen as a fundamental part of Sweden's democratic form of government[202].

Suffrage is universal in the sense that it depends on conditions that people in general can fulfil, meaning conditions of age, citizenship, and residency. It is equal in the sense that all persons with voting rights are entitled to one vote each, resulting in an equal opportunity to influence the outcome of the election.[203] From a democratic point of view, the legislator has deemed it most satisfying not to exclude any given group from the right to vote.[204]

In practice, determining whether a person has voting rights is done based on the electoral roll that is drawn up prior to the election, according to the third paragraph of Ch. 3, Art. 4. Provisions of the electoral roll are found in Chapter 5 of the Elections Act. Here, it is regulated when expatriate Swedes are to be included in the electoral roll automatically, and when they need to register their intention to cast a vote in the election. The electoral roll is based on the place of registration of the voter, according to Ch. 5, Section 4 of the Elections Act. Someone who believes that there are inaccuracies in the electoral roll, including incorrect exclusion, may request that the information is corrected within given time limits, according to Ch. 5, Section 5 of the Elections Act.

3.2.4.2 Periodic Elections

The element of periodicity is quite straightforward. Elections take place every fourth year, according to Ch. 3, Art. 3 of the Instrument of Government. According to Ch. 1, Section 3 of the Elections Act, Election Day is the second Sunday of September. All sorts of elections should always be on Sundays, according to Ch. 1, Section 2 of the Elections Act. Thus, there is a clear predictability of when an ordinary election to the Riksdag is to take place. Having Election Day on a Sunday further enables individuals to vote, as people in general only work Monday through Friday. The interval between ordinary elections was until 1994 every third year but was extended to four years to strengthen the Government's and other political bodies' possibilities for planning and long-term action.

[201] In the meaning of *"folkstyre"*.

[202] HFD 2013 ref 72.

[203] Svahn Starrsjö, Instrument of Government, Ch. 3, Art 4, Section 2, Rösträttsvillkor, Lexino 2022-01-01 (JUNO).

[204] Bull & Sterzel, p. 112.

Extraordinary elections may take place in between ordinary elections as decided by the Government, in accordance with Ch. 3, Art. 1 or Ch. 6, Art. 5 of the Instrument of Government. Thus, the system is built on fixed instead of rolling terms of office, based on the 4-year rule of Ch. 3, Art. 3. An Extraordinary Election has never taken place, partly thought to be since an ordinary election would take place at the ordinary time in any case.

The matter of periodicity seems quite uncontroversial, and the 4-year cycle goes in line with European practice. Some issues have been raised when it comes to the common election day of general, regional, and municipal elections, but that goes beyond the scope of this thesis. Here it suffices to note that the Swedish electoral system is based on periodic elections.

3.2.4.3 Free Elections

The concept of free elections within the Instrument of Government can be derived from Ch. 1, Art. 1, and the reference to the principle of free formation of opinion as a fundamental part of Swedish democracy[205]. This is further specified in Ch. 3, Art. 1, as it states that elections of the Riksdag should be free. Thus, the concept of "free elections" is one of the basic principles of the formation of the Riksdag. It means that every person entitled to vote should be able to do so without being exposed to external pressure or coercion.[206] This relates to the principle of free formation of opinion as stated in the very beginning of the Instrument of Government. The public is not to interfere with the elections beyond facilitating the election process, through for example providing ballots, polling stations, and answering for the counting of votes.[207] Thus, it presupposes negative measures from the public as to the absence of coercion, as well as measures of positive nature, to ensure the free expression of opinion. I would claim that these aspects are in one sense related to rights and freedoms relevant prior to an election, such as freedoms of speech, assembly and association, which are necessary for voters to freely form opinions and participate in political debate, without being coerced or limited by the public. However, these are matters that are dependent on other issues than the electoral system itself.[208] I would say they are rather connected with general issues of freedom of expression. Thus, I will concentrate on the aspects of the concept of free elections which are relevant to the election procedure itself.

When it comes to the election procedure, there are various rules in the Elections Act with an aim to safeguard the principle of free elections with the absence of coercion and free expression of opinion. For example, polling stations may not have affiliation with any specific political grouping nor

[205] Understood as *"folkstyre"*.

[206] Svahn Starrsjö, Instrument of Government, Ch. 3, Art 1, Section 2, Riksdagsvalen, Lexino 2022-01-01 (JUNO).

[207] Nergelius, p. 44.

[208] Bull & Sterzel, p. 107.

should have such a connection with a religious grouping or company that may affect the voter when casting their vote, according to Ch. 4, Arts. 20 and 22. There may neither occur any propaganda nor other similar activities that aim to influence or hinder voters in their election, in or near the polling station, according to Ch. 8, Art. 3.

The principle of free elections includes the notion of freedom in another sense as well, related to the voluntary aspect of casting a vote altogether. The principle does not only cover the freedom from coercion when it comes to deciding whom to vote for, but it also covers the voter's choice to cast a vote at all. In Sweden, the right to vote is seen as a right, not an obligation for the individual and they are therefore entitled to abstain from exercising their right to vote[209].

As stated above, the principle of free elections entails that the public is not to interfere with the elections beyond facilitating the election process. The most apparent ways of doing this are through providing ballots and polling stations for example. As with many issues, this is regulated in detail in the Elections Act. It also provides legislation on how the public is to facilitate the voting procedures for the individual, especially for certain voting groups. The different ways to cast a vote are regulated in Ch. 7, Section 1 of the Elections Act. Of more general nature is the possibility for voters to cast their vote in advance of the actual election day through the early voting procedure. According to Ch. 10, Section 2 of the Elections Act, the reception of votes may begin on the 18th day before the election day. At least one voting place in every municipality receiving early votes must be open every day for this period, according to Ch. 4, Section 24. On election day, the polling stations must be open in accordance with Ch. 4, Section 21, between 8.00 and 20.00 as a general rule. There must be at least one polling station in every electoral district, according to Ch. 4, Section 20. The rules for the availability of polling stations and their opening hours are extensive and detailed. My aim here is to illustrate some of these key rules to show that the legislator has taken positive legislative measures aimed at enabling the voters to freely cast their vote when and where convenient to them.

Furthermore, there are special rules in the Elections Act for expatriate Swedes, as they may cast their votes at Swedish missions abroad with voting places, see Ch. 7, Section 1, or by post, see Ch. 7, Section 11. Those due to illness, impairment or age who are unable to cast their vote at a polling station may cast their votes through mobile voting clerks, see Ch. 7, Section 3a, or messenger, see Ch. 7, Section 4. According to the same provision, inmates of detention centres, and correctional institutions may vote through messenger. As a result of the amendment made to the Elections Act through the Swedish Code of Statues 2021:1328, there are also possibilities for individuals owing to impairment or similar to be assisted when taking their ballots and preparing

[209] HFD 2013 ref 72.

their vote at the reception points, according to Ch. 8, Section 2a and Ch. 7, Section 3a. This shows how the legislator has taken positive measures to enable individuals from groups that risk being overlooked, to freely vote.

Thus, the concept of free elections understood as the absence of external pressure or coercion when casting votes is of fundamental importance as expressed in the Instrument of Government. The legislator has taken negative measures by refraining from intervening in electoral matters beyond the practical facilitation of the conduct of the elections. Some positive measures have rather been taken to simplify and make available the voting process, both in general and for specific disadvantaged groups. In this sense, the legislator has tried to balance the interest of the conduct of free elections with the interest of a high voter turnout[210]. However, one issue to be raised is where the line is drawn between coercion and external pressure in relation to the inevitable desire of parties to convince voters and gather votes, which are a natural part of publicly contested elections. Here, it could be asked what role the legislator has in combating disinformation, and anti-democratic forces from private actors. On a public level, the question of access to public funding[211] for the parties and the responsibility of public service media reports can be raised. These are issues that are always relevant, but especially in election times, as it affects the possibilities of parties to reach out to the voters and influences public opinion. As these are very large topics, I will not go into them much deeper, and settle for only acknowledging them by pointing towards potential issues. The only conclusion possible to draw here, is that the legislator seems to have deemed the location of the election procedure as "neutral ground", where propaganda and undue influence may not occur.

3.2.4.4 The Secret Ballot

The last explicit condition of elections is that they should be done by secret ballot, this is a specification of the larger principles of secret elections and the secrecy of elections[212]. This is reflected within the Instrument of Government as well. Like the concept of free elections, the concept of secret elections takes its root in the principle of freedom of formation of opinion as stated in Ch. 1, Art. 1. It is clearly protected in Ch. 2, Art. 2, where it is stated that the individual should never be coerced to divulge an opinion of political, religious cultural or other similar matter in their relations with the public. According to Ch. 2, Art. 3, no Swedish citizen may be recorded in a public register solely based on their political opinions, without their consent. Concerning public elections, it is stated in Ch. 3, Art. 1 that elections are to be secret, in addition to the requirements of free and direct as explained above. This also means that the confidentiality of the election must be upheld, meaning it should not

[210] Bull & Sterzel, p. 108.
[211] Ibid.
[212] In Swedish understood as: *"Valhemligheten"*.

be possible to find out how someone has voted after the fact[213]. Thus, the principle of secrecy of election is also of fundamental value to the Swedish electoral system. However, the elections do not need to be more secret than to fulfil the negative freedom of opinion as stated in Ch. 2, Art. 2.[214]

In practical terms, the conduct of secret elections is again regulated in detail in the Elections Act. The most apparent rule is that of Ch. 7, Section. 3, where it is stated that every voter shall prepare their votes alone behind a voting screen. At every vote reception point, there should be a suitable number of screened-off areas where voters can vote without being observed, according to Ch. 8, Section 1. The votes are to be prepared by choosing ballot papers, putting them into specific vote envelopes and closing them, according to Ch. 7, Section 2. The Ballot papers shall be constructed the same and be presented in a uniform manner according to Ch. 6, Section 4 and Ch. 8, Section 2. Recent amendments to the Elections Act have strengthened the principle of secrecy of election through amendment Swedish Code of Statues 2021:1328, by clarifying that the voters must be able to take their ballot papers in a screened-off area without being observed[215]. There are specific requirements in Ch. 7 for preparing a vote for those not voting in a vote reception point, thus through mobile voting clerks, messenger, or letter. Ch. 8–10 provide detailed provisions on how the vote reception should be conducted, depending on if the vote was submitted at polling stations, at voting places, through messengers, or by post. Inter alia, the votes must be received and stored so no submitted vote envelope may be distinguished from another.

The provisions show there is a high ambition to preserve the secrecy of the election, but inevitably risks persist. For example, one potential issue is how the secrecy of the election should be protected for those who need assistance with taking their ballots and preparing their votes due to impairment or similar as the security of the election inevitably is put at greater risk[216]. This is not only relevant for the secrecy of the election, but can also impact the principle of free elections, as there is a potential risk (at least in theory) of undue influence or coercion when a person is helping another to cast their vote. One measure that the legislature has taken to protect the secrecy of the election is criminalizing breaches of the election rules. These provisions may be found in the Swedish Criminal Code (1962:700) Ch. 17, Sections 8, and 9[217]. There are also provisions in the Public Access to Information and Secrecy Act

[213] Svahn Starrsjö, Instrument of Government, Ch. 3, Art 1, Section 2, Riksdagsvalen, Lexino 2022-01-01 (JUNO).

[214] Nergelius, p. 44.

[215] Government bill, Prop. 2021/22:52 p. 64.

[216] Bull & Sterzel, p. 108.

[217] According to these provisions, three crimes are specified: *"improper interference with voting"* and *"accepting an undue advantage in connection with voting"* and *"breach of ballot secrecy"*. Translation of the Swedish Criminal Code is provided by the Swedish government, see: <https://www.government.se/4adb14/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf> (accessed 2023-01-29).

(2009:400) with a similar purpose. According to its Ch. 40, Section 1, information that emerged when assistance was given to the voter at the time of voting or is evident from the contents of a submitted vote envelope that has not been opened for vote counting, about how a voter has voted inter alia, in a general election, is confidential.

The principles of free and secret elections are closely related.[218] I would argue that they are two sides of the same coin, as the individual should at no stage of the election process be subject to coercion or external pressure. Free elections refer to the ability of the voters to freely form opinions and independently choose whom to vote for in a given election. Conversely, it is up to the individual if they want to share that choice with other people. If the principle of secrecy was not respected, that would threaten the principle of free elections as that would make the voter vulnerable to undue influence. Both these principles are seen as fundamental aspects of the Swedish electoral system and the function of democracy[219]. They are not simply enshrined as fleeting principles in the first chapter of the Instrument of Government. They are reinforced again and again through other parts of the Constitution and the myriad of provisions in the Elections Act. They are further enforceable through criminal law and are specifically put under confidentiality clauses in the Public Access to Information and Secrecy Act (2009:400). Thus, the legislator has taken positive action in forming clear laws on these matters, to protect individuals from undue influence both from private and public actors in the different steps of the voting procedure, as well as by establishing an electoral system based on neutrality and impartiality.

3.2.4.5 Other conditions

One important aspect of enforcing the conditions of electoral political participation is the constitutionally protected possibility to appeal an election, as provided by Ch. 2, Art. 12. The closer provisions on appeals are provided by Ch. 15 of the Elections Act. An appeal may lead to re-election, but that has never been done with a general election.

The conditions of elections I have brought up in this chapter are based on the democratic framework I built in the second chapter. This is not an exhaustive list but is among those conditions clearly established by international human rights law. Other conditions may be perceivable as well but have been left outside the scope of this thesis due to its limited space. As I've mentioned above, electoral political participation presupposes many things. These conditions are at the core of these. But other rights and freedoms may also be deemed necessary to realise both non-electoral and electoral political participation, such as rights to freedom of expression, opinion, assembly, and

[218] Svahn Starrsjö, Instrument of Government, Ch. 3, Art 1, Section 2, Riksdagsvalen, Lexino 2022-01-01 (JUNO).

[219] Understood as *"folkstyre"*.

association. I have alluded to these rights were seen as necessary, related to the specific conditions listed above. But there is also a degree of difficulty to draw the line on where non-electoral political participation stops, where electoral political participation starts and vice versa. One could easily write an entire thesis related to any of these aspects. Here it suffices to note them. The Swedish legal human rights protection against the public can be found in the second chapter of the Instrument of government, where the rights mentioned above are listed.

3.2.5 Limitations Should be Justified, Proportional and Prescribed by Law

The democratic framework leaves room for the right to electoral political participation to be limited, provided such limitations are justified, proportional and proscribed by law. The limitations may not curtail the fundamental principle of ensuring the free expression of the opinion of the people in the choice of the legislature.

This is probably the aspect where the Swedish Constitution differs most from the democratic framework. As stated earlier, the right to stand for election as understood by the democratic framework is not formulated as a right at all within Swedish legislation. On the other hand, the right to vote is established in Ch. 1, Art. 1 of the Instrument of Government[220]. It is further specified in Ch. 3, Art. 4. However, it differs from the greater freedom and rights apparatus of the Swedish Constitution, which is to be found in the second chapter of the Instrument of Government. The status of electoral political participation as a right in Sweden, as defined in the democratic framework is therefore unclear. Chapter 2 of the Instrument of Government provides the main freedom- and rights catalogue which is protected under the Swedish Constitution, but it is not exhaustive[221]. It also contains provisions on which, when and how these rights and freedoms may be limited[222]. Such provisions are either integrated with or separated from the provisions regarding the rights they refer to, see for example Ch. 2, Arts. 17 and 20, respectively. If it is not specified how a right may be limited, the right is regarded as absolute in the sense that an amendment of the Constitution would be necessary to create exceptions or limitations of the right[223]. Thus, one way to look at the right to vote as stated in Ch. 1, Art. 1 is that it is limited through Ch. 3, Art. 4, as it provides the conditions for the right to vote in the form of citizenship, residency, and age. The possibility to enact other forms of limitations to the right is not specified,

[220] HFD 2013 ref 72.

[221] Bull & Sterzel, p. 22.

[222] When speaking of limitations of rights and freedoms as provided by the Instrument of Government, I speak of such limitations in regard to Swedish citizens. Special rules apply to non-citizens according to Ch. 2, Art. 25 of the Instrument of Government. However, that falls outside the scope of this thesis.

[223] Bull & Sterzel, p. 94.

leading me to the conclusion that it is not possible without amending the Instrument of Government.

In relation to the conduct of elections, the negative freedom of opinion as provided by Ch. 2, Art. 2, concerning the prohibition of the public forcing the individual to make his political opinion known, is absolute.[224] This is relevant to the element of secret elections. It is unclear whether other elements of electoral political participation are protected as independent features of the freedom- and rights apparatus. One way would possibly be to see them as integrated aspects of other closely related rights – in particular, the free formation of opinion as stated in Ch. 1, Art. 1. However, it is not clear whether that provision gives rise to enforceable rights and freedoms for the individual or should be viewed as an expression of fundamental principles guiding the Swedish form of government[225]. Instead, it seems more reasonable to look at the principle of free formation of opinion through the content it has been given through the other constitutional laws[226] in general, and the freedoms and rights catalogue in the second chapter of the Instrument of Government specifically.

As noted in previous sections, the exercise of electoral political participation presupposes that other rights are respected, protected, and fulfilled. As the right to stand for election and to vote may be circumscribed by limiting such closely related rights, it is important to at least make a brief account of them. The most obvious examples are the rights to freedom of opinion, expression, assembly, and association, which are protected in Ch. 2, Art. 1 of the Instrument of Government. However, these may be limited following Ch. 2, Arts. 21–24, as provided by Ch. 2, Art. 20. The basic conditions of limitations are that they must be prescribed by law, to satisfy a purpose acceptable in a democratic society, and not go beyond what is necessary in regard to the purpose (proportionality), nor be carried out so far as to constitute a threat to the free shaping of opinion as one of the fundaments of democracy. Limitations may not be imposed solely on political, religious, cultural grounds or other such opinions. Given the wording of the provision, these conditions only apply to the rights referenced in Ch. 2 Art. 20. It is therefore unclear what conditions apply to rights not referenced here, especially those regarded as "absolute" where specifications on limitations are not provided, as they (at least in theory) indeed may be subject to limitations, given they are enacted through amending the constitution.

Acceptable purposes are specified further in relation to the rights of free speech, assembly and association in Ch. 2, Arts. 23–24. When it comes to the

[224] Jermsten, Instrument of Government (1974:152) Ch. 2, Art. 2, Section 2, Negativa opinionsfriheter, Lexino 2022-07-01 (JUNO).

[225] This issue is not as apparent with the right to vote, as there is case law clarifying that the right to vote is derived from Ch. 1, Art. 1, see HFD 2013 ref 72.

[226] Freedom of the Press Act (1949:105) and the Fundamental Law on Freedom of Expression (1991:1469).

freedoms of expression and information, they may only be limited in consideration of national security, the national supply of goods, public order and safety, the good repute of the individual, the sanctity of private life and the prevention and prosecution of crime. Otherwise, they may only be limited where particularly important grounds so warrant. The importance of the widest possible freedom of expression in political matters should be paid particular attention to. Freedom of Assembly may be limited in the interest of preserving public order safety at the meeting. In other cases, it may only be limited in regard to national security or to combat an epidemic. The freedom of association may only be limited when concerning organizations whose activities are of a military or quasi-military nature or constitute persecution of a population group on grounds of ethnic origin or similar. Legislation limiting rights and freedoms based on Ch. 2, Art. 20 is subject to a qualified procedure, as described in Ch. 2, Art. 22. The qualified procedure does not apply to rights which are not explicitly mentioned in Ch. 2, Art. 20[227].

Another issue that must be addressed in this context is the question of what constitutes a limitation of a right. The preparatory work of the Instrument of Government has a restricted view of what constitutes a limitation of a right. It is first important to note that the protection of rights considers the relationship between the individual and the public. It is clear that not every rule that negatively affects the individual's ability to exercise their rights means that it is a limitation of said right within the meaning of the Constitution. A limitation of a right mainly refers to actions of the public that entails physical force or criminalization of certain behaviour.[228] The main determining factors for whether a regulation should be considered to constitute a restriction of a right are the sanction, the purpose, and the area of protection. Thus, a regulation that is not intended for the area of protection of a given right but all the same may affect the exercise of that right in practice does not necessarily constitute a limitation of the right. A development from these criteria seems to have occurred over the years, where the limiting effects in practice have become another factor worth considering when deciding if a provision constitutes a violation of a right.[229]

Thus, rights granted by the Constitution may be limited through law or amendment of the Constitution, depending on the type of right and possibly subject to special conditions. The principle of legality is at the core of this, given all public power is exercised under the laws[230]. It is therefore the task of the Riksdag to decide on limitations of the rights provided by the Constitution. In the next section, I will therefore look more closely at the legislation procedure. However, one potential issue is where to draw the line on what

[227] Bull & Sterzel, p. 96.

[228] Government bill, Prop. 1975/76:209 pp. 153 ff.

[229] Bull & Sterzel, p. 93.

[230] Jermsten, Instrument of Government (1974:152) Ch. 2, Art. 20, Section 2 Allmänt om rättighetsbegränsningar, Lexino 2022-07-01 (JUNO).

constitutes a limitation and what does not. In the context of electoral political participation, the complexity is apparent. Albeit the right to vote is clearly defined in the Instrument of Government, it is left outside the general freedoms and rights apparatus of the Swedish Constitution. Giving electoral political participation a more rights-based language rather means connecting the exercise of electoral political participation and its elements to other rights as protected in Ch. 2, Art. 2. There is a natural connection between these, as the right to vote and stand for election as understood from the democratic framework, in fact, presupposes other rights and freedoms as well, especially those related to freedoms of opinion.

In any case, the ECHR is part of Swedish law, according to the Act on the European Convention for the Protection of Human Rights and Fundamental Freedoms (1994:1219). Furthermore, Ch. 2, Art. 19 of the Instrument of Government provides that no act of law or other provision that contradicts the ECHR may be adopted. This gives the ECHR stronger protection than it has as a regular law. In that sense, the right to free elections as provided by Protocol No. 1 Art. 3 is protected within the Swedish context as well. When there is a conflict between the Constitution and the ECHR, the framework that provides the strongest protection of rights prevails[231].

3.3 Concluding Remarks

I have in this chapter tried to investigate the structure of the Swedish framework on electoral political participation through the lens of the democratic framework I presented in Chapter 2 of this thesis. As a natural consequence of using this specific framework, other aspects of democracy, in particular, those related to non-electoral political participation within the Swedish legal framework have been left outside the scope of this presentation. Not so surprisingly, the Swedish legal system on electoral political participation is extensive and given high authority within the system. Principles of popular sovereignty, rule by the people, universal suffrage and free formation of opinion are at the core of the Swedish Constitution. Many of the foundational provisions on electoral political participation, the electoral system and the protection of freedom and rights are found in the Instrument of Government. However, many important issues related to the electoral system and the exercise of electoral political participation are given content through the Elections Act, which is a regular law. Thus, potential risks to the democratic form of government in Sweden are at this time not found in the contents of the legislation, but rather in the form of legislation. I will go deeper into this in the next chapter. However, I will begin by zooming out on the bigger issues of democracy and electoral political participation in themselves, which are worthy to keep in mind when defending the upholding of a democratic system.

[231] Bull & Sterzel, p. 22.

4 Risks and Vulnerabilities of the Swedish System

The Swedish legislation on democracy as electoral political participation is rooted in fundamental principles expressed in the opening paragraphs of the Instrument of Government, principles like those addressed by the democratic framework. As I have shown in Chapter 3 of this thesis, elements of political participation attributable to the democratic framework are protected by both ordinary law (primarily the Elections Act), and Constitutional law (primarily the Instrument of Government). The freedoms and rights regime within the second chapter of the Instrument of Government is also relevant. As has been stated by many, the true protection of many rights and freedoms lies in the possibilities of how to limit them[232]. I would argue this is also true for electoral political participation. In substance, it is regulated in a comprehensive manner, where the right to vote seems to be absolute and popular sovereignty is the foundation of the Swedish form of government. It rests on an ideological foundation that has been predominating over the last century. At the same time, if the conditions of limitations are not explicit, its protection ultimately lies in the formation and character of the legislation itself. This is what I will look closer at in this section.

Given the limited spatial scope of this thesis, I am not able to account for the entire legislative process nor all conceivable concerns, but I aim to point to the main features of the potential issues when a political majority in the Riksdag is able to make decisions. Obviously, the political reality is filled with compromises, and the multi-party system in Sweden most likely makes it hard for any single party to receive the majority of seats in the Riksdag, albeit there are established political groupings which traditionally aim to cooperate to form a majority in practice. When it comes to the legislation process (governed primarily by the Instrument of Government and the Riksdag Act), the drafting procedure of proposed bills also acts as an avenue of compromise and (ideally) contributes to well-founded laws being enacted. Through the procedures of investigation, referral and possibly referral to the Council legislation, different opinions regarding both material and legal matters may be raised, but it is up to the legislator to listen. Thus, the final decision when enacting and amending laws lies within the majority of the Riksdag, and it is not unheard of that it would enact widely criticized laws (at least from a legal point of view) given there is a political will[233].

[232] See for example, Jermsten, Instrument of Government (1974:152) Ch. 2, Art. 20, Section 2, Allmänt om rättighetsbegränsningar, Lexino 2022-07-01 (JUNO).

[233] For example concerning the law on Cementa, *"Cementalagen",* see Nergelius, p. 318 f.

4.1 The Risks Pertaining to the Structure of the Legal System

4.1.1 The Possibility to Legislate and Amend Ordinary Laws – the Elections Act

The legislative power is first and foremost attributed to the Riksdag, according to Ch. 1, Art. 4 and Ch. 8, Art. 1 of the Instrument of Government. Ch. 8 covers the provisions on how competencies for establishing legal norms are derived from the Riksdag, and when such competencies may be authorized to the Government or other authorities by the Riksdag. Only the Riksdag can enact provisions in the form of laws. In simplified terms, laws are made with a simple majority vote in the Riksdag, under Ch. 4, Art. 7 of the Instrument of Government. This means that a bill may be passed if more than half of the voting members of the Riksdag vote in favour of the bill. There is no requirement for a minimum number of members of parliament to be present when a vote is taken.

As mentioned in previous chapters, the foundations of the electoral system in Sweden are regulated in Chapter 3 of the Instrument of Government. According to Ch. 3, Art. 13, further rules concerning matters under Ch. 3, Arts. 3–12 and the appointment of alternates are specified in the Riksdag Act or other elsewhere law. The reference to "other elsewhere law" primarily concerns the Elections Act[234]. The provision seems to be of informative nature[235]. Thus, it is not clear whether that means that Ch. 3, Arts. 1–2 are final, nor if specifications of Chapter 3 *must* be in the form of law. If not, one must fall back on the provisions of Chapter 8, and its division of competencies for establishing legal norms. Here, I will focus on the Elections Act itself as it is the law in force and relevant to the topic.

The Elections Act contains many substantial rules on the functions of the Electoral system, as presented in the previous chapter. It specifies provisions on how parties and their candidates may register for elections, the role and task of the Election authorities, the division of constituencies, the electoral role, modes of voting, the counting of votes and distribution of seats to the Riksdag and what decisions based on the Elections Act that may be appealed. These are important issues for the exercise of electoral political participation. For example, the design of constituencies may very well affect the voting results and is a practice internationally known as gerrymandering[236]. The

[234] Svahn Starrsjö, Instrument of Government, Ch. 3, Art. 13, Section 2, Ytterligare bestämmelser, Lexino 2022-01-01 (JUNO).

[235] Government bill, Prop. 2013/14:48 p. 89.

[236] Derlén, Lindholm & Naarttijärvi, p. 66.

principle of free nomination[237] (meaning the possibility for voters to freely cast their vote for whomever they want to) was earlier a fundamental part of the electoral system but has in practice been abolished through amendments made in 2015, requiring parties to pre-register their participation in the election[238]. This illustrates how the legislator in theory can be, and in the latter case has been able to make changes in the electoral system simply by amending an ordinary law.

Historically speaking, amendments to the Elections Act seem to have been made with the purpose to enhance voter turnout[239] and to have a more proportional outcome of the election. Ultimately, acceptable amendments to the Elections Act are limited by principles such as free and secret elections, proportionality, and the specific provisions on the composition of the Riksdag as provided by the Instrument of Government. My argument goes to the fact that there is still room to manoeuvre within the Elections Act, where a legislator less interested in upholding traditional democratic values, would rather easily be able to make changes to the Elections Act which could negatively affect the exercise of electoral political participation, without necessarily being in conflict with the Instrument of Government. The most apparent example is the extensive provisions aimed at facilitating the voting procedure and by extension the exercise of electoral political participation in practice. These concerns inter alia, minimum requirements of vote reception points, as well as enabling different ways of voting such as the ability to vote before the election day in general, and respectively through mobile voting clerks, messengers, or letters for certain groups of the electorate. Changes in these sorts of rules could (intentionally or unintentionally) distort election results. Here, it is not clear if and what obligations the State has when it comes to facilitating the voting procedure. This question is most often mentioned in relation to the principle of free elections, where jurisprudence presents facilitation of the voting process as something the State *may* engage in, not that it *should*[240]. Others claim that the State must not do more than is necessary to facilitate the conduct of the elections[241]. The latter statement implies that some sort of obligation exists. However, proponents of that view seem to refer to actions of a more practical nature, such as the provision of ballot papers. A change in the dominating political views may lead to the State taking a less active role in facilitating the election. In this way, (at least in theory) it would be possible for a majority within the Riksdag to exploit this vulnerability of the Elections Act by amending it so that it in practice might circumscribe important functions of the exercise of electoral political participation.

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[237] In Swedish understood as: *"Den fria nomineringsrätten"*.

[238] Johansson, p. 17.

[239] For example, through making different modes of voting possible, and providing assistance for people who due to age, impairment or sickness may have difficulty exercising their right to vote. See Bull & Sterzel, p. 108.

[240] Johansson, p. 21.

[241] Nergelius, p. 44.

Given the above, it is strange that many important issues regarding the functions of the electoral system of Sweden are left to an ordinary law, which easily can be changed, provided there is a majority opinion represented in the Riksdag. Understandably, many of the legal-technical provisions of the Elections Act are not fit for a constitution. One possible solution would be an arrangement where the Elections Act could be given an elevated status, similar to the Riksdag Act. The Riksdag Act has a special status in-between ordinary law and constitutional law, where a special procedure similar to constitutional amendments is necessary to amend it, according to Ch. 8, Art. 17 of the Instrument of Government. In that sense, the electoral system would be protected by a degree of stability as a consequence of demanding a special procedure for it to be amended, not as vulnerable to political whims.

4.1.2 Ordinary Laws Limiting Rights and Freedoms – The Special Procedure

Electoral political participation is not recognized within the main freedoms- and rights apparatus in Chapter 2 of the Instrument of Government. Its status as a right may be derived from Chapters 1 and 3 therein. Another way to look at the realization of electoral political participation is through the protection of other closely related rights, such as the freedoms of opinions and movement, which indeed are protected under Chapter 2. In this sense, possible amendments to the Elections Act, are both limited by their related provisions in the Instrument of Government, but also through the freedom- and rights framework. Limitations of a right according to Ch. 2, Art. 20 must fulfil certain criteria as mentioned in Section 3.2.5. One such criterion is that a limitation may not extend so far as it poses a threat to the freedom of opinion as one of the fundaments of democracy. For example, in the preparatory work, it is claimed that this condition prevents the freedom of movement to be limited in a way that makes it impossible to exercise the right to vote by preventing individuals from coming to the polling station[242]. Thus, the possible limitations of many of the rights and freedoms must meet conditions which protect the fundaments of democracy. However, the issue of what constitutes a limitation in the meaning of the Instrument of Government remains. Given the example above, it is clear that those with voting rights must have the opportunity to vote even though other rights may be limited due to for example detention. However, it remains unclear where the line regarding the basic requirements for accessibility to exercise that right is drawn.

A bill aimed at limiting rights under Ch. 2, Art. 20 is subject to certain formal requirements proscribed by law, meaning that the legislation must undergo a qualified procedure in accordance with Ch. 2, Art. 22. Thus, limitations of the rights and freedoms specified in Ch. 2, Art. 20 is made through ordinary law, but instead of conforming to the main rule of Ch. 4 Art. 7 where a simple

[242] Bull & Sterzel, p. 95.

majority is enough to pass a bill, the legislator has inserted a special mechanism to avoid abuse by a political majority. It states that a minority of the members of parliament, at least 10 in total, can delay a bill aimed at limiting rights according to Ch. 2, Art. 20, if not at least 291 members (five-sixths) of parliament vote in favour of the bill. The provision aims to induce compromise and consensus when making limitations on the rights and freedoms protected by the Constitution, however, it has not proved efficient in preventing disputed interventions with these rights[243]. In any case, this gives the minority some degree of a say in a system where rule by the majority is dominating. This is especially important in relation to the rights- and freedoms regime, where the protection of the rights of minorities must be prioritized[244].

I will not go deeper into the general freedoms- and rights regime provided by the Instrument of Government, and the Swedish Constitution in general, as it is a vast area of constitutional law. Here it suffices to ascertain that the exercise of electoral political participation indirectly also enjoys protection from the freedom- and rights apparatus of Chapter 2 of the Instrument of Governments, as limitations of most rights, especially those related to freedom of opinion, must meet conditions of being acceptable in a democratic society, proportionality and not posing a threat to the freedom of formation of opinion as one of the fundaments of democracy in addition to certain other criteria specific to the right at hand.

4.1.3 Possibilities to Amend the Constitution

When taken to its extreme, the ultimate protection of rights and freedoms is provided by the Constitution, including possible ways to amend it. It is said that one of the fundamental functions of constitutional law within a democratic State is to set procedural, institutional, and material limits to the people's rule. As an integral part of democracy, those constitutional limits may be changed.[245] The question is how easily.

The Instrument of Government provides rules on the special procedure of amending the constitutional laws in Ch. 8, Arts. 14–16. The basic principle is that it requires that two decisions of identical wording are made with a general election in between those decisions. The form prescribed by the law of the decisions follows the main rule of Ch. 4 Art. 7, where support from a simple majority is enough to constitute the decision of the Riksdag. Again, this means that more than half of the voting members of the Riksdag need to vote in favour of the proposal for it to pass. There are no requirements for a qualified majority nor having a certain number of members of the Riksdag participating in the vote when deciding on a constitutional amendment. Furthermore, the election that must take place in between these decisions does not

[243] Bull & Sterzel, p. 96.
[244] Derlén, Lindholm & Naarttijärvi, p. 54.
[245] Ibid., p. 55.

necessarily have to be an ordinary election, an extraordinary election is enough[246]. Thus, the Swedish Constitution is seen as quite easy to change[247]. As mentioned previously in this thesis, these are issues of investigation for the 2020 Committee of Inquiry on the Constitution (Ju 2020:04)[248].

The point of having a special procedure for amending the Constitution is that it has a built-in toughness which is not easily made subject to political whims and short-term motives of the everyday political disagreements which are an integral part of a multi-party democratic system. Requirements making the Constitution harder to change, for example regarding time limits and particularly large majorities increase the degree of toughness attributable to the Constitution, which encourages the legislator to find broad agreements across the political spectrum which leads to a certain degree of stability of the constitutional framework.[249] These are interests worth pursuing, assuming that the purpose of a Constitution is to protect certain core values[250] of the functions of a society, both in times of political stability and respectively, more troubled times. However, it is also possible to imagine that having a degree of flexibility when it comes to amending the Constitution may be of interest, for example, so it does not become obsolete as society develops and new practice evolves. An important principle of popular sovereignty is that a decision-making assembly should not be able to adopt binding decisions for a future one.

Albeit lacking in requirements of a qualified majority or similar, the special procedure of amending the Swedish Constitution does entail certain requirements intended to balance the interests of rigidity and flexibility.[251] In Ch. 8, Art. 14, the most apparent one is the requirement of an election between the two decisions on the amendment. This is intended to function as a barrier for ill-founded amendments, where the electorate can form their opinion and either support or reject the proposal through their vote in the election, thereby changing the composition of the Riksdag after the election and possibly the outcome of the second decision[252]. To provide time for spreading information and debate, Ch. 8, Art. 14 also provides a minimum time limit, in the sense that the initial proposal for the constitutional amendment must be presented in the Chamber of the Riksdag at least nine months before the election. Thus,

[246] Jermsten, Instrument of Government Ch. 8, Art. 14, Section 2, Stiftande av grundlag, Lexino 2022-07-01 (JUNO).

[247] Bull & Sterzel, p. 204 and Nergelius, p. 24.

[248] See Committee terms of reference, Dir. 2020:11 and Dir. 2023:08. Its results are expected to be presented the 31st of March 2023.

[249] Bull & Sterzel, p. 204.

[250] See Nergelius, p. 25 on the purpose of a Constitution.

[251] Bull & Sterzel, p. 205.

[252] Derlén, Lindholm & Naarttijärvi, p. 100.

the procedure of constitutional amendments is supposed to generate democratic legitimacy and make it possible to prevent ill-considered proposals.[253]

I don't find this procedure sufficiently convincing to achieve these aims. First, this means that it is enough that a small majority is formed in the Riksdag for the proposal to pass after the election, which increases the risk of the majority oppressing the minority. Secondly, it presupposes that the voters are informed of the proposal, and view it as important enough to affect their vote. That assumption is flawed, as there are many different factors which influence how a person votes – it can be influenced by anything from different priorities on policy matters, personal preferences of the politicians to unconscious bias or tradition. My point here is not to get involved in how and why an individual chooses to vote, as it is part of their right to electoral political participation to freely cast their vote. Instead, my point is that these quite low thresholds enable a potential authoritarian-minded parliamentary majority to gradually make constitutional amendments by exploiting anti-democratic changes in popular opinion, to secure their own future rule. Here I am not talking about radical proposals that intend to, for example, abolish the right to vote as such. Hopefully, the democratic ideal is so established in the minds of Swedish voters that such a proposal could unthinkably be pushed through. What I am talking about instead is the potential danger of smaller, less apparent constitutional amendments that may be enforced, which may lead to the breakdown of the democratic state where the protection of rights and freedoms is weakened.

On the other hand, another possible safeguard is provided by Ch. 8, Art. 16, which provides the possibility to hold a referendum with deciding powers over a proposal for a constitutional amendment. Such a referendum shall be held on a motion of at least 35 (one-tenth) of the members of the Riksdag, provided at least 117 (one-third) of the members support the motion. The referendum can only provide the options of yes or no to the proposal, and is decisive in the negative sense, meaning that the proposal is rejected if more voters vote against than for the proposal and if more than half of the voters who are entitled to vote, vote against the proposal. If the electorate vote in favour of the proposal, the Riksdag still has the final say as it must take the second decision as provided by Ch. 8, Art. 14. However, such a referendum has never taken place, thus the provision has never been applied[254]. In any case, this provides some sort of legal protection, if a small majority tries to push through a controversial constitutional amendment. In that situation, the voter needs to take a separate stance on the proposal, rather than having that choice integrated into the general election.

[253] Bull & Sterzel, p. 205.

[254] Jermsten, Instrument of Government Ch. 8, Art. 16, Section 2, Folkomröstning om vilande grundlagsförslag, Lexino 2022-07-01 (JUNO).

Even though the Constitution is quite easy to change, even for the smallest majority of the Riksdag, a political practice has been developed over the 20th century, where the members of the Riksdag have sought broad agreements and consensus beyond the borders of political parties and groupings. However, this is not a matter of legally binding practice.[255] This can explain why the vulnerability of the current legal order when it comes to constitutional amendments has not been exploited. Nevertheless, I would argue that this shows how a naïve view of the legislature seems to have dominated the Constitution this far, as a majority of the Riksdag quite easily could be able to enforce amendments to the Constitution according to the provisions of Ch. 8. Thus, it might be time to re-evaluate that view, given the rapid dismantling of democracy that is seen happening across the globe and in Europe. In that sense, it is positive that the result of the 2020 Committee of Inquiry on the Constitution (Ju 2020:04) is underway.

That the Constitution can be changed by majority decision presupposes that the voters vote for a composition of the Riksdag that is willing to make a certain type of decision. My point is that the current system does not set limits or safety barriers for a popular will based on anti-democratic forces to have an overrepresented or exacerbated impact if such a popular will only has a small majority. Again, it must be reminded that it must be the role of constitutional law to stabilize the system and protect the fundamental principles of the form of government, so that major system changes do not occur too quickly, on ill-founded grounds, against democratic principles and in extent prevent the oppression of the minority by the majority.

The ideal of popular sovereignty has been prevailing within the Swedish constitutional tradition over the 20th century and explains why many of the provisions are based on a principle of the majority. The constitutional design of the Riksdag was built on the idea that it should not form an obstacle to the will of a political majority.[256] Thus, one may argue that a strong Constitution restricts the exercise of democracy and the impact of popular sovereignty as it limits what the representative body of the people may do. However, I would adhere to the view of others, claiming that strong constitutional protection for rights and freedoms, including the right to electoral political participation, can be seen as a way for the people to bind themselves to certain principles to be respected and certain actions to not be allowed. The democratic element in this situation comes from the fact that such constitutional limits still may be amended by the representative of the people.[257] Thus, a strong Constitution may very well be compatible with a democratic form of government. The current order does not contain very strong barriers against abuse from the majority.

[255] Derlén, Lindholm & Naarttijärvi, p. 101.
[256] Nergelius, p. 115.
[257] Derlén, Lindholm & Naarttijärvi, pp. 54 f.

Thus, the fairly easy process of amending the Constitution is the largest vulnerability of the Swedish legal framework of democracy as electoral political participation. Therefore, there is reason to call for a constitutional amendment of Ch. 8, Arts. 14–16. Whether an amendment of the constitutional legislative process should refer to all kinds of constitutional amendments, or only certain provisions of fundamental and principled importance for the protection of rights and freedoms and the Swedish form of government can be debated. I would argue that at least the first three chapters of the Instrument of Government should be regarded to hold such fundamental values that amending them would require a more qualified legislative process than is required today. Certainly, there would be more, related to aspects of democracy and the rule of law which I have not taken into consideration within this thesis. Even if there is no immediate threat to Swedish democracy, changes as presented above, are motivated on a principled level, as the best Constitution is the one written with the worst kind of legislator in mind.

4.2 Democracy Beyond Electoral Political Participation

I have in this thesis focused on the elements of democracy attributed to the concept of electoral political participation. Obviously, this can only result in a partial presentation of the vast subject of democracy. The reasons for this delimitation were explained in the initial chapter. However, I do want to remind the reader at this stage, that electoral political participation is merely one, (albeit crucial) way to create and maintain a democratic society.

The criticism I have raised against the Swedish legal framework may very well apply to other parts of democratic elements protected by the Swedish Constitution. However, the dominant view seems to be that the act of voting is the principal way to realise popular sovereignty[258]. Nevertheless, the preparatory work of the Instrument of Government does acknowledge that citizens must have opportunities beyond electoral political participation to express their views and affect public decisions to realize the ideals of representative democracy[259]. Thus, looking beyond this thesis, there are reasons to study the forms of non-electoral political participation within the Swedish framework as well.

I have departed from a definition of democracy provided by international human rights law, understood as the right to political participation, with an emphasis on its electoral form. However, it is worth mentioning that there are many issues of electoral political participation not addressed by international human rights law, for example, the question of distribution of power and the

[258] See for example Bull & Sterzel, p. 45.
[259] Swedish Government Official Reports, SOU 1972:15 p. 76.

quality and significance of electoral political participation. It is left to the discretion of the State in question to design its electoral system beyond the basic demands set out by the UDHR and ECHR. However, electoral processes, including the nomination processes of the parties both form and reflect political power. Thus, the construction of the electoral system affects access to political life for different groups of society. It is clear that the quality of political participation is heavily impacted by how elections are institutionalised.[260] Nevertheless, even though human rights law remains vague on these issues concerning political participation, they might be approached through a more comprehensive understanding of the realisation of human rights and freedoms, where other closely related rights could address the specific issues which affect access to participation, such as discrimination and free speech. These aspects must be kept in mind when building a Constitution where different forms of electoral political participation are promoted.

Democracy is not the only form of government which recognizes some form of political participation. Different institutionalized modes of political participation are permitted, encouraged, and even required by most, if not all regimes – even the most repressive over time. Thus, it is rather the mode of participation which distinguishes liberal democracies from non-democratic societies. Electoral political participation may have its limits (see more in Section 4.1.2), but it does establish some boundaries regarding governmental action as it rules out policies which are met with strong resistance. Nevertheless, this assumes that those in the opposition have a political voice, which calls for democracy beyond electoral political participation.

[260] Steiner, pp. 107 f.

5 Concluding Remarks

In this thesis, I have identified how democracy can be understood in terms of electoral political participation, based on international human rights law. This means that a democratic system must at least meet certain basic requirements: (1) The legislative power needs to derive its authority from the will of the people; (2) this will should be expressed through publicly contested elections; (3) elections presupposes that citizens have the right to vote and stand for election to the legislative body; (4) the conditions of elections should be based on universal and equal suffrage, periodicity, secret ballot, and; (5) limitations of these conditions should be justified, proportional and prescribed by law.

Sweden is considered to have a strong democratic system and is repeatedly ranked among the top places in the world's democracies. The substantive parts of the Swedish Constitution give no reason to doubt this. The principles of popular sovereignty as well as universal and equal suffrage are part of the fundamental principles of the Swedish State and constitute some of the initial provisions of the Instrument of Government. The Constitution is relatively detailed in terms of provisions of the electoral system, and expresses the basic principles found in the democratic framework. Admittedly, some provisions concerning the electoral system, especially of a practical nature, are left to ordinary law in the Elections Act. In many ways, the legislature has chosen to respect the right to electoral political participation by not intervening in certain issues. In this way, some of the most important elements of the electoral system, e.g., political parties, remain unregulated.

The Swedish legal framework on electoral political participation seems to be based on the assumption of a benevolent legislator, which in many ways has been taken for granted during the last century. This has been demonstrated by the fact that, through various constitutional amendments and amendments to the Elections Act, the legislator has prioritized regulating the electoral system in such a way that election results reflect a national majority in which the local representation also gains influence, and that it has been made easier for voters in general to exercise their right to vote. The legislature has sought broad agreements and consensus. In material terms, the democratic state is firmly established.

But formally, the regulation of democracy and political participation is vulnerable. What I have shown in my thesis points to how democracy in the form of political participation can relatively easily begin to be dismantled, if a rather small majority in the Riksdag so wishes. The democratic ideal of following the will of the majority can at the same time be what disassemble it. Thus, I argue for a change of the provisions on constitutional amendments so that a qualified majority is needed to enact amendments, at least for those provisions which regulate the core principles of the form of Government. Furthermore, a re-evaluation of the status of the Elections Act may be appropriate, as many

important issues of the functions of the electoral system are regulated therein. Such a re-evaluation must, however, balance the interest of flexibility and rigidity of the law, which is a delicate task, especially as many parts of the Elections Act are of a very legal-technical nature which is not suitable in a Constitution.

It can be added here that my presentation has been largely based on an examination of the Swedish regulations and the Constitution in particular, independently of EU law and the ECHR. Obviously, the ECHR provides additional protection for liberties and rights, including the right to free elections, but the details of how the functions of this protection are left outside the scope of this thesis.

I have primarily addressed the role of the legislator in these matters, but it should be pointed out that the exercise of electoral political participation also refers to positive measures, which means that practical conditions for people to exercise their right to vote must also be taken into account. Questions about non-electoral political participation are important to fully realize the democratic state. An outlook on these issues would also be interesting to study, to form a comprehensive view of the state of political participation in Sweden.

In my presentation, I have made it clear how democracy in a thin sense, understood as electoral political participation is protected within Swedish constitutional law and identified potential flaws in this system, in particular regarding the conspicuously simple procedure to amend the constitution.

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