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# Human Rights and Democratic Resilience

An Analysis of Regional Human Rights Instruments as  
Safeguards for Democracy

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## Summary

Democracy is declining in several states in all regions of the world. To avoid and recover from democratic backsliding, it is important that states can maintain or improve their levels of democracy. This concept is commonly referred to as ‘democratic resilience’. Democratic backsliding has a negative impact on the ability of people to enjoy their human rights, and therefore, there must be a safety mechanism in place when a democratic government is unable to protect itself. This thesis examines to what extent the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and People’s Rights can work as such safety mechanisms and protect democratic resilience in their Contracting States.

Democratic resilience in regional human rights instruments is influenced by many factors, such as the history and purpose behind their drafting, the scope of their human rights protection, and their jurisdiction and enforcement mechanisms. The first part of this thesis explores these aspects, analyzing how they contribute to the protection of democratic resilience in the Contracting States. For the purpose of this thesis, the concepts of democracy and democratic resilience are defined from a human rights perspective based on the Universal Declaration on Human Rights. This democratic framework focuses on the rule of law, the independence of the judiciary and separation of powers, the freedoms of expression, association, and assembly, and participation in elections. The second part of this thesis examines how these features of democracy are protected in the three instruments. This section analyzes and compares the specific provisions and mechanisms within the European Convention, the American Convention, and the African Charter that are designed to uphold democratic institutions. The aim is to determine how these instruments defend democratic institutions and support democratic resilience in their respective regions.

The findings reveal that all three instruments protect numerous democratic principles and contain mechanisms for protecting democratic resilience in their Contracting States. However, due to factors such as state sovereignty, influence from political fluctuations within Contracting States, and a general reluctance to take a strong stance in favor of democracy, none of the instruments fully realize their potential in promoting democratic resilience. For these instruments to function effectively as safety mechanisms for democratic resilience, both the human rights systems and their Contracting States must be willing to hold states accountable in times of democratic decline.

# Sammanfattning

Demokratier nedmonteras i stater runtom i världen. För att undvika och återhämta sig från demokratisk nedmontering är det viktigt att stater kan bibehålla eller förbättra sina nivåer av demokrati. Detta koncept är känt som 'democratic resilience' eller demokratins motståndskraft. Demokratiers nedmontering har en negativ inverkan på människors möjlighet att åtnjuta mänskliga rättigheter, varför säkerhetsmekanismer måste finnas på plats när demokratiska regeringar inte längre kan stå emot hot mot demokratin. Denna uppsats utreder i vilken utsträckning Europakonventionen om de mänskliga rättigheterna, Amerikanska konventionen om de mänskliga rättigheterna och Afrikanska stadgan om mänskliga och folkliga rättigheter kan utgöra sådana säkerhetsmekanismer och skydda demokratins motståndskraft i sina medlemsstater.

Den demokratiska motståndskraften i regionala människorättsinstrument påverkas av flera faktorer, så som historien och syftet bakom deras utformning, omfattningen av deras rättighetskydd samt deras jurisdiktion och verkställighet. Den första delen av denna uppsats undersöker dessa aspekter och analyserar hur de bidrar till att skydda den demokratiska motståndskraften i medlemsstaterna. I denna uppsats definieras begreppen demokrati och demokratins motståndskraft utifrån ett människorättsperspektiv baserat på den Allmänna förklaringen om mänskliga rättigheter. Detta demokratiska ramverk fokuserar på rättsstatsprincipen, rättsväsendets oberoende, maktindelning, yttrandefrihet, föreningsfrihet, mötesfrihet och deltagande i val. Uppsatsens andra del undersöker hur dessa områden skyddas i de regionala människorättsinstrumenten. I detta avsnitt analyseras och jämförs specifika bestämmelser och mekanismer i de tre instrumenten som är utformade för att upprätthålla demokratiska institutioner. Syftet är att fastställa hur dessa instrument försvarar demokratiska institutioner och främjar demokratisk motståndskraft i sina respektive regioner.

Resultatet visar att alla tre instrument skyddar många demokratiska principer och innehåller mekanismer för att skydda demokratins motståndskraft i medlemsstaterna. På grund av faktorer som statsuveränitet, påverkan från medlemsstaternas politiska strömningar och en allmän återhållsamhet i att ta alltför tydlig ställning för demokrati lyckas dock inget av instrumenten främja demokratins motståndskraft fullt ut. För att instrumenten ska fungera som säkerhetsmekanismer för demokratins motståndskraft måste både människorättsystemen och medlemsstaterna vara villiga att hålla stater ansvariga när deras demokratier nedmonteras.

# Preface

This thesis concludes my legal studies at Lund University, a time I will look back on with much happiness and gratitude.

First and foremost, I want to thank my supervisor, Karol Nowak, for all the interesting conversations and valuable insights that guided me through this process.

To the incredible friends I have met during my studies, thank you for making my time in Lund so precious. Special thanks to Isabelle - it has been a pleasure to experience this Master's Programme with you.

To my family, thank you for your unconditional love and support during my academic journey. None of this would have been possible without you.

To Felix, thank you for always believing in me and making even the worst days worth remembering. I am forever grateful to have found you.

Lastly, I am grateful for those who came before us and fought for the democratic society we enjoy today. May we never forget to appreciate it.

# Abbreviations

AU	African Union
OAS	Organization of American States
OAU	Organization of African Unity
The African Charter	African Charter on Human and People's Rights
The African Commission	African Commission on Human and People's Rights
The African Court	African Court of Human and People's Rights
The American Convention	American Convention on Human Rights
The Declaration	Universal Declaration of Human Rights
The European Convention	European Convention on Human Rights
The European Court	European Court of Human Rights
The Inter-American Commission	Inter-American Commission on Human Rights
The Inter-American Court	Inter-American Court of Human Rights

# 1 Introduction

## 1.1 Background

Democracy has, since its emergence in Athens over 2,500 years ago, consistently been threatened by enemies of freedom and equality.<sup>1</sup> The present is no different, and global levels of democracy have been declining since the mid-2000s in dozens of states in multiple regions.<sup>2</sup> Democratic norms and institutions are being purposely dismantled by elite actors, a phenomenon explained by the expression ‘democratic backsliding’.<sup>3</sup> Leaders of democratic states are weakening democratic elements by limiting independent checks on their powers, stifling criticism, dismantling democratic oversight, and working towards their own long-term rule.<sup>4</sup>

The development of democratic backsliding has a negative impact on the possibility for people to enjoy their human rights.<sup>5</sup> The concept of democracy has a close connection to human rights, and if a state is experiencing democratic backsliding, the protection of human rights will also decline. Therefore, states must be resilient in situations where their democratic system is challenged. To be resilient, a democratic regime must be able to absorb external challenges and internal stressors. States must adapt to the changing functional conditions of democratic governance without it resulting in a change of regime or damaging and abandoning democratic principles.<sup>6</sup> The more resilient democracies are on all the levels of the political system, meaning the political community, the institutions, the actors, and the citizens, the less vulnerable they are in the present and future.<sup>7</sup>

Because of democratic backsliding, mechanisms for protecting democracy are more important than ever. If a state is experiencing democratic backsliding, it is essential that there is a system in place that can serve as a safeguard

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<sup>1</sup> Frank Furedi, *Democracy Under Siege* (1<sup>st</sup> edn, Zer0 Books 2020) 8.

<sup>2</sup> Thomas Carothers and Benjamin Press, ‘Understanding and Responding to Global Democratic Backsliding’ (2022) Carnegie Endowment for International Peace Working Paper, 4 <[https://carnegieendowment.org/files/Carothers\\_Press\\_Democratic\\_Backsliding\\_v3\\_1.pdf](https://carnegieendowment.org/files/Carothers_Press_Democratic_Backsliding_v3_1.pdf)> accessed 12 February 2024.

<sup>3</sup> Ibid, 11.

<sup>4</sup> United Nations Office of the High Commissioner, ‘About democracy and human rights’ (*The Office of the High Commissioner for Human Rights*) <<https://www.ohchr.org/en/about-democracy-and-human-rights>> accessed 18 January 2024.

<sup>5</sup> Ibid.

<sup>6</sup> Wolfgang Merkel, ‘What is Democratic Resilience and How Can We Strengthen It?’ (2023) Policy Brief No. 169, Toda Peace Institute 3.

<sup>7</sup> Wolfgang Merkel and Anna Lührmann, ‘Resilience of democracies: responses to illiberal and authoritarian challenges’ (2021) 28(5) *Democratization* 869, 874.



when the democratic government is unable to protect itself. A concept closely related to democracy is the ability to prevent the regression of democratic institutions and practices.<sup>8</sup> This concept is referred to as ‘democratic resilience’, and can be defined as the persistence of democratic institutions and practices.<sup>9</sup> Democracies experience democratic resilience by maintaining or improving their level of democracy.<sup>10</sup> In this thesis, I will be examining whether regional human rights instruments can work as safeguards for democracy by analyzing them from the perspective of democratic resilience. More specifically, I will be examining democratic resilience in the European Convention on Human Rights<sup>11</sup> (the European Convention), the American Convention on Human Rights<sup>12</sup> (the American Convention), and the African Charter on Human and People’s Rights<sup>13</sup> (the African Charter). This study will provide insight into how these regional human rights instruments can work as safety mechanisms in situations where a Contracting State is experiencing democratic backsliding.

## 1.2 Purpose and Research Question

The purpose of the thesis is to illustrate what strengths and limitations the three regional human rights instruments possess in this area and evaluate what the most important aspects are when protecting democratic resilience through these instruments. A comparative analysis will highlight the common trends, the challenges, and the best practices in protecting democratic principles in regional contexts. An analysis can further contribute to a deeper understanding of the complex interplay between law, politics, and human rights in diverse regional contexts. The purpose will be fulfilled by answering the following research question:

*To what extent do the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and People’s Rights serve as effective mechanisms for safeguarding the democratic*

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<sup>8</sup> Merkel and Lührmann (n 7), 876.

<sup>9</sup> Vanessa A Boese et al., ‘How Democracies Prevail: Democratic Resilience as a Two-Stage Process’ (2021) 28(5) *Democratization* 885, 885-887.

<sup>10</sup> *Ibid.*, 893-895.

<sup>11</sup> The European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953).

<sup>12</sup> The American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978).

<sup>13</sup> The African Charter on Human and People’s Rights (adopted 27 June 1981, entered into force 21 October 1986).

*resilience in their Contracting States, considering the historical context and political dynamics shaping their implementation?*

### 1.3 Methodology and Material

In this thesis, the concept of democratic resilience will be broken down into different aspects relevant for an analysis of how democratic resilience is protected in human rights instruments. This is achieved by using a legal doctrinal method with elements of comparison. A legal doctrinal method is used to describe the established law, and the aim is to make a conceptual and critical analysis of legislation to draw conclusions about the law in question.<sup>14</sup> Legal doctrinal research uses legal doctrine to provide a systematic illustration of legislation of a certain area by analyzing the relationship between rules and explaining any challenges or difficulties.<sup>15</sup> The doctrine refers to all types of legal concepts, such as cases, statutes, and principles.<sup>16</sup> The legal doctrinal method will be used to establish the relevant law in the human rights instruments, and to analyze the role of the law in the context of democratic resilience by looking at strengths, weaknesses, and challenges faced. The legal doctrinal method will further be used to make a conceptual examination and draw conclusions based on the findings.

The comparative method will be used in the analysis throughout the thesis. This method falls under the legal doctrinal method and can be used to analyze similarities and differences between laws and legal systems.<sup>17</sup> The comparative legal method includes systematically illustrating rules, institutions, and procedures and their applications in different legal systems. These rules and their applications are then compared and evaluated, with a focus on their similarities and differences and what they imply. The purpose is to receive insight into the social purpose of law.<sup>18</sup> It is necessary to describe the legislation and legal systems that are to be compared, and it is further important to illustrate the context in which these comparative elements prevail since elements such as history and culture can explain similarities and differences.<sup>19</sup> The aim of

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<sup>14</sup> Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 8(3) *Erasmus L Rev* 130, 131.

<sup>15</sup> Nigel Duncan and Terry Hutchinson, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deaking L Rev* 83, 101.

<sup>16</sup> *Ibid*, 84.

<sup>17</sup> P. Ishawara Bhat, *Idea and Methods of Legal Research* (online edn, Oxford Academic 2020) 29.

<sup>18</sup> *Ibid*, 269-270.

<sup>19</sup> *Ibid*, 291.

the comparison is therefore to examine why some jurisdictions are more effective in protecting certain human rights than others.<sup>20</sup>

In terms of material used for this thesis, it mainly consists of the human rights instruments themselves as well as commentaries, academic materials, and case law to understand the instruments and put them into context. Some authors are recurrent when studying these subjects, and their work has been a great starting point for this research and has enabled a comparison of the instruments. This thesis aims to contribute with a new approach when analyzing and comparing the instruments from the perspective of democratic resilience.

## 1.4 Theoretical Framework

### 1.4.1 Defining Democracy

To analyze democratic resilience, an understanding of the meaning and scope of democracy is necessary. This thesis is written from a human rights-based perspective, and this perspective will influence the following establishment of a democratic framework. Given the constant influence of historical development on the concept of democracy, the term is vague and disputed.<sup>21</sup> There are many types of democracy, and the specific form of democracy depends on a State's socioeconomic conditions, state structures, and policy practices.<sup>22</sup> This thesis interprets human rights and democracy as interdependent concepts based on the Universal Declaration of Human Rights<sup>23</sup> (the Declaration). The Declaration is used as a template for democracy in this thesis in an attempt to establish a democratic framework that is not based on a regional understanding of democracy. Article 21 of the Declaration states that everyone has the right to take part in the government of their country, that everyone has the right to equal access to public service, and that the will of the people shall be the basis of the authority of government through periodic and genuine elections. Although not mentioning democracy explicitly, this Article establishes fundamental principles of democracy and makes these principles a human

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<sup>20</sup> Bård A. Andreassen, 'Comparative Analyses of Human Rights Performance' in in Bård A. Andreassen, Hans-Otto Sano and Siobh a McInerney-Lankford (eds), *Research Methods in Human Rights* (1<sup>st</sup> edn, Edwar Elgar Publishing 2017) 224.

<sup>21</sup> Aleksander Peczenik, *Vad  r r tt?* (1st edn, Fritzes f rlag AB, 1995) 65.

<sup>22</sup> Philippe C Schmitter and Terry Lynn Karl, 'What Democracy Is... and Is Not' (2002) 2(3) *Journal of Democracy* 75, 76-78.

<sup>23</sup> The Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).

right. The Declaration further protects the freedom of expression and the freedom of assembly and association.<sup>24</sup> The Preamble to the Declaration states that it is essential that human rights are protected by the rule of law<sup>25</sup>, and the rule of law is protected through several Articles of the Declaration.<sup>26</sup> The concept of rule of law means that there must be a system of law and the law must rule, meaning that power is only exercised based on law, protecting individuals from arbitrary governmental power.<sup>27</sup>

The Declaration implies a clear relationship between democracy and human rights. The definition of democracy in the Declaration is narrow and can be understood as describing the minimum requirements for democracy. The author Aleksander Peczenik has written about necessary conditions for democracy, describing features which when all are fulfilled can be sufficient for a democratic society and at the same time be used as a way of measuring the level of democracy in a state. These features are majority rule, assembly and association, citizens' participation in politics and the administration of justice, freedom of opinion, transparency and access to information, protection of human rights, the rule of law, separation of powers, and responsibility over political officials.<sup>28</sup> A democratic framework for this thesis has been established based on The Declaration and Peczenik's definition of democracy. This democratic framework consists of the rule of law, the independence of the judiciary and separation of powers, the freedoms of expression, association, and assembly, and participation in elections.

#### 1.4.2 Democratic Resilience from a Human Rights Perspective

For the purpose of this thesis, it is necessary to define the concept of democratic resilience from a human rights perspective. The concept will be examined by focusing on the legal aspects and the protection of human rights based on the democratic framework established in Section 1.4.1. Democratic resilience refers to a state's ability to be resilient on all levels of the political system when its democratic institutions are challenged.<sup>29</sup> To be resilient, a state must

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<sup>24</sup> See Articles 19 and 20 of the Declaration.

<sup>25</sup> Universal Declaration of Human Rights (1948), Preamble.

<sup>26</sup> See Articles 6-11 of the Declaration.

<sup>27</sup> Geranne Lautenbach, *The Concept of Rule of Law and the European Court of Human Rights* (online edn, Oxford University Press 2013) 4-5 and 18.

<sup>28</sup> Peczenik (n 21), 71.

<sup>29</sup> Merkel (n 6), 3.

maintain or improve its level of democracy. Regional areas can experience so-called ‘spill-over effects’, meaning that states tend to adapt to regional norms concerning for example democracy.<sup>30</sup> When examining democratic resilience from a human rights perspective, it will be analyzed whether the regional human rights instruments can work as safety mechanisms to help Contracting States maintain their level of democracy or help Contracting States that are experiencing democratic backsliding.

In the article *How Democracies Prevail: Democratic Resilience as a Two-Stage Process*, Vanessa A. Boese et al. explain democratic resilience as the ability to prevent substantial regression in the quality of democratic institutions and practices. The authors present democratic resilience as a two-stage process, where democracies either completely avoid democratic declines or avert democratic backsliding. The first stage, ‘onset resilience’, means that some democracies are resilient by preventing democratic backsliding altogether and, thus, have not experienced substantial declines in democratic resilience. The second stage is called ‘breakdown resilience’, which takes place when onset resilience fails and a democracy experiences democratic backsliding. A democracy can then exit breakdown resilience by avoiding democratic breakdown in this second stage.<sup>31</sup> Both stages of democratic resilience will be relevant for the analysis of this thesis.

Democratic resilience constitutes an interdisciplinary subject that is hard to narrow down, and the perspective used in this thesis is theoretical. Democratic resilience is naturally affected by more aspects than what can be included in this thesis, many of which cannot be included in a theoretic framework. Hence, this thesis must be read as focusing on a specific part of democratic resilience as established in this chapter, and the examination is made through the lens of regional human rights instruments.

### 1.4.3 Liberal Democracy

Since the Universal Declaration on Human Rights is influenced by the tradition of liberal democracy<sup>32</sup>, a brief introduction to this concept is important for understanding this thesis. A liberal democracy is recognized by free and

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<sup>30</sup> Boese et al. (n 9), 893-895.

<sup>31</sup> Ibid, 885-887.

<sup>32</sup> Henry J. Steiner, ‘Political Participation as a Human Right’ (1988) 1 Harvard Human Rights Yearbook 77, 87.

fair elections, the rule of law, separation of powers, and the protection of basic liberties, such as freedom of expression and assembly.<sup>33</sup> From a perspective of liberal democracy, democracy without liberalism is dangerous, as it results in the decline of liberty and abuse of power.<sup>34</sup>

Since the Declaration is built on the idea of liberal democracy, the democratic framework established in this chapter is built on this idea as well. An examination of democratic resilience presupposes an established and functioning democracy. In accordance with the democratic framework, ‘democratic backsliding’ refers to the dismantling of liberal democratic institutions. Democracies that are not liberal, ‘illiberal’ democracies<sup>35</sup>, fall outside the scope of functioning democracies in this thesis. While illiberal democracies are not specifically examined further, it is worth mentioning that they are closely related to the concept of democratic backsliding.

#### 1.4.4 Concluding Remarks on the Theoretical Framework

A relatively narrow framework of democracy is used as a point of departure for this thesis, focusing on what is necessary for a society to be democratic. This framework is used in an attempt to make the comparison between the regional instruments fair as possible and not tailored to a regional understanding of democracy. Democratic resilience in the regional instruments will be analyzed based on the rule of law, the independence of the judiciary and separation of powers, the freedoms of expression, association, and assembly, and participation in elections. This selection is made based on the liberal concept of democracy found in the Universal Declaration on Human Rights and Peczenik’s idea of necessary and sufficient conditions for democracy. This thesis is built on the assumption that this democratic framework is necessary for a state to be democratic, and when these human rights are dismantled, democracy is dismantled as well. However, it is worth mentioning that human rights do not exist in a vacuum. Other rights will also be relevant for analyzing democratic resilience, although not examined in the same detail in this thesis.

It is important to keep in mind that the democratic framework used in this thesis is formalistic. Many factors affect the form of governance in a state,

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<sup>33</sup> Fareed Zakaria, ‘The Rise of Illiberal Democracy’ (1997) 76(6) *Foreign Affairs* 22.

<sup>34</sup> *Ibid*, 42–43.

<sup>35</sup> The term was first used by Zakaria (n 33).

but a narrow definition of democracy is needed to analyze democratic resilience from a perspective of international human rights law. The definition of democracy established in this thesis is not meant to be a contribution to the debate of defining democracy, but a framework to use to be able to answer the research question within the scope of this master thesis.

## 1.5 Delimitations

### 1.5.1 Democracy and Other Human Rights Instruments

This thesis uses the framework explained in Section 1.4 as the definition of democracy, which implies certain limitations. Economic factors affect a state's democratic resilience since a state that does well economically is more likely to sustain democracy.<sup>36</sup> However, the economic factors of democratic resilience fall outside of the scope of this thesis. Civil society's impact on democracy falls outside the scope of this thesis as well.

Furthermore, it is worth commenting on the selection of human rights instruments analyzed in this thesis. Considering the limited amount of space in a master thesis, a selection was necessary. This thesis focuses on three regional human rights instruments since this provides an opportunity for an interesting comparison. The Declaration serves as an important template for the democratic framework, but because of the regional focus, it will not be considered further. The Declaration has been chosen to serve as a template instead of the International Covenant on Civil and Political Rights<sup>37</sup> because this Covenant was drafted to specify and give legal effect to the rights protected in the Declaration.<sup>38</sup> The same argument can be made for why the European Convention has been chosen over the Charter of Fundamental Rights of the European Union<sup>39</sup>, since this Charter was drafted to strengthen and emphasize the rights protected in the European Convention.<sup>40</sup> The European Convention further

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<sup>36</sup> Boese et al. (n 9), 893-895.

<sup>37</sup> The International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

<sup>38</sup> United Nations Human Rights Committee, 'General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add.13, §§ 1-3.

<sup>39</sup> Charter of Fundamental Rights of the European Union (2012) OJ C326/391.

<sup>40</sup> Europeiska Kommissionen, 'Varför behöver vi stadgan?' (*Europeiska Kommissionen*) <[https://commission.europa.eu/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/why-do-we-need-charter\\_sv](https://commission.europa.eu/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/why-do-we-need-charter_sv)> accessed 16 May 2024.

serves as a more natural choice for the comparison to the other regional instruments, since the three instruments chosen have similar roles in their regions. While it would be interesting to look at other instruments as well, this falls outside the scope of a master thesis.

### 1.5.2 Politics

The concept of democratic resilience is closely linked to politics. However, the purpose of this thesis is not to contribute to the political debate around whether democracy is a human right. By defining democratic resilience from an international human rights law perspective, this thesis aims to examine to what extent regional human rights instruments are protecting democracy in their Contracting States based on the established democratic framework.

Since the interdependency between human rights and democracy is a premise for the subject of this thesis, the purpose is not to argue that democracy and human rights are related. Instead, this thesis is built on the assumption that there is a relationship between human rights and democracy, which can be derived from the fact that the democratic framework used in this thesis is based on a human rights instrument. In this sense, this thesis includes indirect political reasoning by assuming that human rights presuppose democracy. Lastly, it is worth noting that there is no political reasoning behind the selection of the regional instruments used in this thesis.

## 1.6 Outline

The structure of this thesis aims to provide a comprehensive image of how democratic resilience is protected in the regional human rights instruments. The theoretical framework has provided insight into how this purpose will be fulfilled. However, it is clear from its definition that democratic resilience is also affected by the conditions in a specific state. Therefore, it is relevant to look at the history, scope, and enforcement of each human rights instrument to enable a comparison of how the instruments operate in practice.

To compare and analyze the democratic resilience in the regional instruments, this thesis is divided into two sections. The first section, Chapter 2, provides context of the regional human rights instruments. This chapter explains the



history and purpose of the instruments, the scope of their human rights protection, and their jurisdiction and enforcement. The chapter ends with a concluding analysis of what this context means for the protection of democratic resilience in the different instruments. Chapter 3 will then focus on the defense of democratic institutions found in the regional human rights instruments based on the definition of democracy made in Section 1.4. This chapter will explain how the instruments protect the rule of law, the independence of the judiciary and separation of powers, the freedoms of expression, assembly, and association, participation in elections, and other important aspects relevant to the defense of democratic institutions. The chapter ends with an analysis of what this implies for the protection of democratic resilience. Lastly, concluding remarks will be provided in Chapter 4.

## 2 History, Scope, and Enforcement of the Regional Human Rights Instruments

To understand how the human rights instruments protect democratic resilience, it is important to be aware of the context they have emerged from and operate in. Therefore, this chapter will provide insight into the historical context of the instruments and the underlying purposes for which they were created. The scope of their human rights protection will also be examined, as well as their jurisdiction and enforcement. These descriptions provide the reader with important context, enable a nuanced comparison, and offer valuable insight into the protection of democratic resilience. The chapter ends with an analysis of what this context implies for the protection of democratic resilience in the regional human rights instruments.

### 2.1 The European Convention

#### 2.1.1 History and Purpose

The European Convention is a product of the post-war era and was established as an effort to unify Europe after the Second World War. It was further a reaction to the human rights abuses the war had caused.<sup>41</sup> The Council of Europe, the main regional body dedicated to the protection of human rights in Europe, was created at a Congress at the Hague in 1948. The Council was tasked with creating a charter of human rights, which resulted in the European Convention. The Convention came into force in 1953, and it established two main institutions to protect the rights listed in the Convention, the European Commission of Human Rights and the European Court of Human Rights (the European Court).<sup>42</sup> The European Court was created in 1959 and was set up to ensure that the Contracting States were living up to their obligations under the European Convention. The two-part system with a Commission and a

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<sup>41</sup> Joseph Zand, 'The Concept of Democracy and the European Convention on Human Rights' (2017) 5(2) *University of Baltimore Journal of International Law* 195, 198.

<sup>42</sup> Jeffrey A Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law,' (2004) 11(1) *Columbia Journal of European Law*, 113, 113-114.

Court was replaced in 1998, and the Court is now the only monitoring body of the European Convention.<sup>43</sup>

Originally, the purpose of the European human rights system was to work as an alarm bell if a State was at risk of falling into totalitarianism.<sup>44</sup> The Travaux Préparatoires state that the European Convention was established to prevent the European States from developing into totalitarian states and to protect people from dictatorship, and it is mentioned in the Preamble that fundamental freedoms are best maintained by an effective political democracy.<sup>45</sup> The European Convention was further intended to define and guarantee a foundation of European politics and ensure that the Member States of the Council of Europe are democratic and stay democratic.<sup>46</sup> A code of law for the European democracies was to be established and the European States were to stand strong as a democratic ‘we’ against the totalitarian ‘they’.<sup>47</sup>

The European Convention has been called the most effective human rights instrument ever established, and has set a standard for peace and democracy among European States. It has further been an inspiration for other regions of the world when it comes to promoting democracy and democratic values.<sup>48</sup>

## 2.1.2 Scope of Human Rights Protection

The European Convention protects and defines several core human rights. It deliberately does not protect economic and social rights, focusing instead on rights derived from national constitutions.<sup>49</sup> Fourteen articles in the European Convention protect human rights or freedoms, and more rights are protected by the sixteen added Protocols. However, these Protocols are not ratified by all Contracting States.<sup>50</sup>

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<sup>43</sup> Janneke Gerards, *General Principles of the European Convention on Human Rights* (2nd edn, Cambridge University Press 2023) 1.

<sup>44</sup> Ibid.

<sup>45</sup> European Convention on Human Rights (1950), Preamble.

<sup>46</sup> Zand (n 41), 198.

<sup>47</sup> Susan Marks, ‘The European Convention on Human Rights and its ‘Democratic Society’ (1995) 66(1) *British Yearbook of International Law* 209, 210-211.

<sup>48</sup> Zand (n 41), 196-197.

<sup>49</sup> William A. Schabas, *The European Convention on Human Rights: A Commentary* (1<sup>st</sup> edn, Bloomsbury Academic 2013) 1.

<sup>50</sup> Koen Lemmens, ‘General Survey of the Convention’ in Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (5<sup>th</sup> edn., Intersentia 2018) 3-6.

When deciding what rights should be protected by the European Convention, the drafters focused on the rights that were seen as essential for the foundation of European democracies. The focus of the European Convention was further based on what rights and implementation methods all Contracting States could agree upon, implying that the rights protected are mainly based on what rights were already protected in the Contracting States. It was harder to agree on economic, social, and cultural rights because of differences in history, culture, and religion, and therefore, these rights were not included in the European Convention.<sup>51</sup>

### 2.1.3 Jurisdiction and Enforcement

Article 1 of the European Convention requires the Contracting States to observe the rights and obligations deriving from the Convention and to make sure everyone within their jurisdiction can enjoy their rights and freedoms. The Contracting States are not obligated to make the European Convention part of domestic law or guarantee its domestic applicability and supremacy over national law. However, the majority of the Contracting States have provided for the European Convention to have an internal effect or have accepted that the European Convention prevails over national legislation.<sup>52</sup> A total of 46 states are bound by the European Convention.<sup>53</sup>

The European Court is established by Article 19 of the European Convention. According to Article 32, the jurisdiction of the Court extends to all matters concerning the interpretation and application of the European Convention and its protocols. National authorities have the main duty to guarantee the rights and freedoms established in the European Convention. The Court has a subsidiary role, meaning that the Court can only assess a complaint when the national authorities fail to comply with their obligations under the European Convention. The common view is that the Contracting States themselves are more fitted to make policy choices and to protect human rights in a way that fits their national constitutional traditions. This is the basis of the Court's margin of appreciation doctrine.<sup>54</sup>

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<sup>51</sup> Lemmens (n 50), 3-6.

<sup>52</sup> Ibid, 23-24.

<sup>53</sup> Council of Europe, '46 Member States' (*Council of Europe*) <<https://www.coe.int/en/web/portal/46-members-states>> accessed 1 May 2024.

<sup>54</sup> Lemmens (n 50), 23.

Article 34 of the European Convention regulates individual applications. It states that the Court can receive applications from any person, non-governmental organization, or group of individuals claiming to have suffered a violation by one of the Contracting States. Article 35 of the European Convention states that the Court can only deal with matters where all domestic remedies have been exhausted. If a national procedure is not available or does not provide for an adequate remedy, or the judgment is not satisfactory to the injured party or another Contracting State, the Convention works as a supervisory mechanism on the basis of individual or state complaints.<sup>55</sup> Very few State complaints have been made and this has not proven to be an effective supervisory tool.<sup>56</sup> However, there are some situations where the inter-state applications can have a symbolic significance. For example, Georgia made complaints about Russia in 2009 and 2011 that were ruled admissible by the Court. The first complaint concerned human rights violations of Georgians living in Russia, and the second concerned the armed conflict between the two states in 2008.<sup>57</sup>

When the European Court finds that a Contracting State has violated a provision of the European Convention, Article 41 states that it may afford a payment of just satisfaction to the injured party if the consequences of the violation cannot be fully repaired according to the domestic law of the state concerned. Payment of such compensation is a strict obligation.<sup>58</sup> A Contracting State can further be obligated to amend its domestic legal order to put an end to the violation found by the Court and make reparation for its consequences.<sup>59</sup> Contracting States must take measures in favor of the applicant to end the violations of the European Convention and erase their consequences as far as possible. The Contracting States must further make sure to prevent similar violations in the future. Article 46(1) of the European Convention obliges the Contracting States to abide by the final judgment of the Court. According to Article 46(2), once the Court's final judgment has been transferred to the Committee of Ministers, the Committee invites the respondent state to inform what steps have been taken to pay the compensation awarded to the applicant and what measures have been taken to abide by the judgment. A Contracting State is free to choose the means with

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<sup>55</sup> Lemmens (n 50), 9.

<sup>56</sup> Ibid, 46.

<sup>57</sup> Steven Greer, 'Europe' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) *International Human Rights Law* (3<sup>rd</sup> edn, Oxford University Press 2018) 450.

<sup>58</sup> Leo Zwaak and Clara Burbano Herrera, 'Supervision' in ieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (5<sup>th</sup> edn, Intersentia 2018) 277.

<sup>59</sup> *Papamichalopoulos and Others v Greece* (1995) Series A no. 330-B § 34.

which it wants to implement individual or general measures to rectify an applicant's situation and prevent further violations of the European Convention.<sup>60</sup>

Any Contracting Party shall, on a request from the Secretary General of the Council of Europe, furnish an explanation of how its internal law ensures the effective implementation of any of the provisions in the European Convention. This is regulated in Article 52 of the European Convention, but this Article has rarely been invoked. The answers provided by the Contracting States are made public, which in itself can be seen as a sanction for a state that has not taken any measures to remedy a violation.<sup>61</sup>

According to Article 47 of the European Convention, the Court may give advisory opinions on legal questions at the request of the Committee of Ministers. Protocol 16 to the European Convention further allows the highest courts and tribunals of a Contracting State to request the Court to give advisory opinions on the interpretation or application of the European Convention.<sup>62</sup>

The Contracting States generally implement decisions from the European Court.<sup>63</sup> Even though the European Convention had little impact on victims of human rights violations during its first 30 years, this changed dramatically from the 1980s and onwards.<sup>64</sup> In 2010, Protocol 14 was adopted as an attempt to combat the Court's build-up of pending cases. This Protocol enabled a single judge to reject manifestly inadmissible applications, which has led to many cases being dismissed. This extension of the competencies of single judges has been justified by the development of the Court and the fact that it has helped the Court reduce its backlog. The Court announced that the backlog problem was eliminated in 2017. However, the Court has been criticized for trying to free itself of too many applications to make the system more effective and thereby dismissing cases too quickly.<sup>65</sup>

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<sup>60</sup> Zwaak and Burbano Herrera (n 58), 274-277.

<sup>61</sup> Ibid, 296-303.

<sup>62</sup> Damjan Grozdanovski, 'The Workload of the European Court of Human Rights: A Back-Door to Becoming a Constitutional Court of Europe' (2019) 2(1) *Nordic Journal of European Law* 50, 64.

<sup>63</sup> Ramute Remezaite, *Compliance with Judgments of the European Court of Human Rights* (1<sup>st</sup> edn, Brill | Nijhoff 2023) 3.

<sup>64</sup> Greer (n 57), 448.

<sup>65</sup> Grozdanovski (n 62), 54-55.

## 2.2 The American Convention

### 2.2.1 History and Purpose

In the beginning of the 20<sup>th</sup> century, the United States regularly intervened in the domestic affairs of Latin American States. Therefore, the earliest efforts to support human rights in the area were focused on creating a regional public order system based on sovereignty, non-intervention, and equality of states. However, it was not until after World War II that the focus on human rights increased considerably.<sup>66</sup>

The Inter-American human rights system was created by the Organization of American States (the OAS).<sup>67</sup> All 35 states in the region have joined the OAS.<sup>68</sup> In 1959, after some political unrest, it was recognized that harmony among the states could only be effective if human rights and fundamental freedoms were respected and the states were representative democracies. Therefore, the Inter-American Court of Justice was tasked with drafting a convention for establishing a regional Court for protecting human rights, as well as creating an Inter-American Commission on Human Rights (The Inter-American Commission). The Inter-American Commission was created in 1960<sup>69</sup> and became a principle organ of the OAS in 1967.<sup>70</sup> The American Convention was adopted in 1969 and entered into force in 1978.<sup>71</sup> The Inter-American Court of Human Rights (the Inter-American Court) was created in 1979.<sup>72</sup> The Preamble of the American Convention explains that the purpose of the Convention is to create a system of personal liberty and social justice based on the respect for the essential rights of man within the framework of democratic institutions.<sup>73</sup>

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<sup>66</sup> Robert K Goldman, 'History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31 *Human Rights Quarterly* 856, 857-860.

<sup>67</sup> Thomas M Antkowiak, 'The Americas' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3<sup>rd</sup> edn, Oxford University Press 2018) 425.

<sup>68</sup> Thomas M Antkowiak and Alejandra Gonza, *The American Convention on Human Rights, Essential Rights* (1<sup>st</sup> edn, Oxford University Press 2017), 5.

<sup>69</sup> Goldman (n 66), 862.

<sup>70</sup> Antkowiak (n 67), 427.

<sup>71</sup> Goldman (n 66), 865.

<sup>72</sup> Antkowiak (n 67), 431.

<sup>73</sup> American Convention on Human Rights (1969), Preamble.

### 2.2.2 Scope of Human Rights Protection

The American Convention protects 23 civil and political rights. Article 26 is the only Article explicitly mentioning economic, social, and cultural rights. This Article regulates progressive development and establishes that States Parties must undertake to progressively achieve the full realization of economic, social, educational, scientific, and cultural standards protected by the OAS. Two protocols have been added to the American Convention, one recognizing economic, social, and cultural rights, and one to eliminate the death penalty. Sixteen states have ratified the first protocol and thirteen states have ratified the second.<sup>74</sup>

When the American Convention was drafted, it included many rights that were not respected by the Governments of the Contracting States even when they were a part of domestic law. In this sense, it can be said that the American Convention protects maximum human rights rather than minimum human rights. The purpose of the American Convention was not only to strengthen already protected rights but also to create new rights.<sup>75</sup>

### 2.2.3 Jurisdiction and Enforcement

According to Article 1 of the American Convention, all Contracting States must respect the rights and freedoms protected by the Convention and ensure that all persons subject to their jurisdiction enjoy the free and full exercise of those rights and freedoms without discrimination. Of the 35 OAS Member States, 22 have ratified the American Convention.<sup>76</sup> The United States, Canada, Belize, and various Caribbean island States have not ratified the American Convention, resulting in the system established under the Convention applying primarily to Latin American States. When the Commission examined Trinidad and Tobago during the 1990s, the State acted by formally denouncing the American Convention.<sup>77</sup> Venezuela denounced the Convention in 2012.<sup>78</sup>

The OAS has two supervisory bodies, the Inter-American Commission and the Inter-American Court. These organs are established by Article 33 of the

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<sup>74</sup> Antkowiak and Gonza (n 68), 7-8.

<sup>75</sup> Goldman (n 66), 866-867.

<sup>76</sup> Antkowiak and Gonza (n 68), 6.

<sup>77</sup> Goldman (n 66), 880-887.

<sup>78</sup> Antkowiak (n 67), 427.



American Convention. According to Article 43 of the Convention, States Parties must undertake to provide the Commission with any information it requests about how their domestic law ensures the effective application of the provisions in the American Convention. According to Article 44 of the American Convention, any person, group of persons, or non-governmental organization recognized in one or more Member States of the OAS may lodge petitions with the Commission. States Parties may also, according to Article 45, declare that they recognize the competence of the Commission for inter-state complaints. The aim of the Commission is always to reach a friendly settlement of the dispute. The Commission is not judicial in nature, and therefore, if the Commission finds that a state has violated the American Convention it is obliged to write a non-binding report including proposals and recommendations for the offending state.<sup>79</sup>

An individual petition of state responsibility for a human rights violation must first be filed with the Inter-American Commission according to Article 61, and the Commission shall submit it to the Inter-American Court if certain circumstances are at hand. In the beginning, most cases addressed by the Court were those of gross or systematic human rights violations. However, the Court's jurisprudence has evolved to include the protection of many of the rights protected in the American Convention.<sup>80</sup> The Commission can only refer cases to the Court if the case is directed against a state that has ratified the American Convention as well as explicitly accepted the jurisdiction of the Court.<sup>81</sup> As of now, 20 States Parties to the American Convention have accepted the Court's jurisdiction.<sup>82</sup> According to Articles 63 and 64 of the American Convention, the Court is further authorized to issue advisory opinions and command a state to take provisional measures to protect a person or a group of persons who are in grave and imminent danger.

The Commission and the Court cannot find a state responsible for a violation without the exhaustion of domestic remedies. While the Commission and the Court are not intended to be used for reviewing the judgments of national Courts, they frequently examine domestic proceedings to evaluate whether they are compatible with the American Convention.<sup>83</sup> According to Article

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<sup>79</sup> Pietro Pustorino, *Introduction to International Human Rights Law* (translated edn, T.M.C. Asser Press 2023) 68.

<sup>80</sup> Antkowiak (n 67), 426.

<sup>81</sup> Goldman (n 66), 866

<sup>82</sup> Antkowiak (n 67), 431.

<sup>83</sup> Antkowiak and Gonza (n 68), 10.

64 of the American Convention, the Court may answer inquiries from Contracting States regarding the interpretation of the American Convention or provide opinions regarding the compatibility of any domestic law with the American Convention.

The Inter-American Court can order reparations and state compliance, and it is known for its expansive reparations with a clear victim focus. The Court has further directed remedies to individuals as well as communities and societies. Contracting States generally comply with orders of financial compensation, but not all states comply with orders ruling that the injured party be ensured enjoyment of the right or freedom that was violated.<sup>84</sup> For example, the Court ordered that Peru must release the wrongfully imprisoned university professor Maria Elena Loayza Tamayo, and Peru followed this order.<sup>85</sup> However, when the Court decided that Paraguay must give back ancestral lands to the Yakye Axa community, Paraguayan lawmakers voted against, despite the judgment from the Court. The Inter-American Court can further conclude that the consequences of the situation that constituted a violation be remedied, and require that Contracting States amend or repeal domestic legislation or constitutions. Having victims in mind, the Court has ordered other creative remedies, such as human rights training for police and armed forces, medical and physical treatments, and scholarships. The Court can further order states to undertake certain public acts to make sure people can learn from the judgments and the truth will come out. According to Article 68, the States Parties undertake to comply with the judgment of any case to which they are parties. However, the Inter-American human rights system does not have an effective political mechanism to enforce state compliance with judgments.<sup>86</sup>

The impact of the American human rights system varies, but states generally follow the Court's judgments against them. Resistance and delay are however not uncommon in politically sensitive orders. Some Latin American States enable the jurisprudence of the Court to deeply influence national law, institutions, and politics.<sup>87</sup> At the same time, many Contracting States have failed to implement the human rights regulated by the American Convention, as well as not fully complying with decisions or orders from the Commission or the Court. This has affected the functionality and integrity of the system.<sup>88</sup>

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<sup>84</sup> Antkowiak (n 67), 432-434.

<sup>85</sup> *Loayza Tamayo v Peru*, Inter-American Court of Human Rights Series C No 33 (17 September 1997).

<sup>86</sup> Antkowiak (n 67), 434-435.

<sup>87</sup> Antkowiak and Gonza (n 68), 4-5.

<sup>88</sup> Goldman (n 66), 883.

## 2.3 The African Charter

### 2.3.1 History and Purpose

Africa emerged from colonial rule in the 1960s, exploited of natural resources but with most socio-economic development having ended up elsewhere. Because of the colonial history, the common idea was that the independent states themselves should be responsible for the rapid political, social, and economic reforms.<sup>89</sup> The transition from colonial rule to independent states proved to be challenging.<sup>90</sup> The first efforts to establish a human rights system in Africa, mainly initiated by the United Nations, failed since they were met with resistance from African leaders who did not want to give up any sovereignty. After the rise of dictatorships in some African States in the 1970s, the Organization of African Unity (the OAU) concluded that the area needed a system to protect human rights. Two conferences on human rights and development were held in 1978, where it was concluded that the lack of resources in many African States did not justify a lack of respect for human rights.<sup>91</sup>

The African Charter was developed over the following years. It was adopted in 1981 and entered into force in 1986, along with the establishment of the African Commission on Human and People's Rights (the African Commission). During a transformation of the OAU in 2000, the Constitutive Act of the African Union (the AU) was adopted. The AU established a new constitutional framework for the protection of human rights, including the African Court on Human and People's Rights (the African Court).<sup>92</sup> The Preamble of the African Charter explains that the purpose of the Charter is to eradicate all forms of colonialism from Africa, to increase the cooperation of the Contracting States, and to achieve the total liberation and independence of Africa.<sup>93</sup> The African Charter places great emphasis on African traditions and values.<sup>94</sup> The Preamble states that the virtues of historical tradition and the values of

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<sup>89</sup> Christopher Mbazira, 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and People's Rights: Twenty Years of Redundancy, Progression and Significant Strides' (2006) 6(2) *African Human Rights Law Journal*, 333, 335-336.

<sup>90</sup> Makau Mutua, 'Africa and the Rule of Law' (2016) 13(23) *SUR International Journal on Human Rights* 159, 161.

<sup>91</sup> Mbazira (n 89), 337-338.

<sup>92</sup> Christof Heyns and Magnus Killander, 'Africa' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) *International Human Rights Law* (3<sup>rd</sup> edn, Oxford University Press 2018) 466-467.

<sup>93</sup> African Charter on Human and People's Rights (1981), Preamble.

<sup>94</sup> Evangel Augustine and Malachi Elisha Brown, 'The African Charter of Human and People's Rights: An Analysis' (2014) 1(3) *SCSR Journal of Development* 52, 53.

African civilization are important for the concept of human and people's rights.<sup>95</sup>

### 2.3.2 Scope of Human Rights Protection

An extensive catalog of rights is protected in the African Charter. The Charter protects not only civil and political rights but also some economic, social, and cultural rights.<sup>96</sup> The African Charter proclaims civil and political rights and socio-economic rights as indivisible<sup>97</sup>, and the Preamble states that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.<sup>98</sup> The African Charter protects both individual rights and people's rights, and provides duties for the Contracting States.<sup>99</sup> Furthermore, the African Charter establishes duties that each individual has towards their family, others, and the state. Individuals must treat others without discrimination and contribute to their societies.<sup>100</sup>

Some civil and political human rights that are protected in other instruments are not protected in the African Charter, such as the right to privacy and the right against forced labor. The African Charter further protects the right to a fair trial and the right to political participation but does so in less detail than other human rights instruments. The African Commission has, nevertheless, interpreted the Charter in line with international standards, and found that some rights or aspects of rights not explicitly stated in the Charter are still protected in the African human rights system.<sup>101</sup>

### 2.3.3 Jurisdiction and Enforcement

According to Article 1 of the African Charter, all Contracting States must recognize the rights, duties, and freedoms protected by the Charter. They shall further undertake to adopt legislative or other measures to give them effect.

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<sup>95</sup> African Charter on Human and People's Rights (1981), Preamble.

<sup>96</sup> Heyns and Killander (n 92), 468.

<sup>97</sup> Mbazira (n 89), 338.

<sup>98</sup> African Charter on Human and People's Rights (1981), Preamble.

<sup>99</sup> Heyns and Killander (n 92), 468.

<sup>100</sup> See Articles 27-29 of the African Charter.

<sup>101</sup> Heyns and Killander (n 92), 468.

The African Charter has been ratified by 54 of the 55 Member States of the AU. Morocco has not ratified the Charter.<sup>102</sup>

The African Commission is established by Article 30 of the African Charter, and the functions of the Commission are listed in Article 45. By its broad promotional mandate, the Commission shall promote human and people's rights by disseminating information and researching African problems in the field of human and people's rights. The Commission shall further formulate and lay down principles and rules aimed at solving legal problems relating to human and people's rights upon which African Governments may base their legislations, and ensure that human and people's rights are protected under the conditions laid down by the African Charter. The Commission can interpret any provision of the African Charter at the request of a State Party, an institution of the AU, or an African organization recognized by the AU. The Commission's interpretative mandate is quite broad and resembles the advisory jurisdiction of some international Courts.<sup>103</sup>

The African Charter establishes an inter-state complaint mechanism, although rarely used.<sup>104</sup> If a state believes that another State Party has violated a provision of the African Charter, it can communicate this to the state in question as well as to the African Commission in accordance with Article 47 of the African Charter. The state to which the communication was addressed has three months to give a written explanation or make a statement on the matter. The Commission does not have an active role in these proceedings, and if the states do not decide to take their dispute to the Commission, the negotiations can go on for years.<sup>105</sup> If the issue is not settled peacefully to the satisfaction of both states within these three months, Article 48 establishes that either state has the right to submit the matter to the African Commission. According to Article 49, states also have the possibility of communicating with the African Commission directly instead of contacting the state in question first. If the African Commission finds that a violation has been made, it can recommend that continuing violations must stop or specific laws be amended or repealed. The recommendations are commonly vague, stating for example that states should take necessary steps to comply with their obligations under the Charter. The Commission sometimes recommends that the complainant should be economically compensated, but usually does not recommend a specific sum, even though this has started to change in recent years. A system to follow up

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<sup>102</sup> Heyns and Killander (n 92), 468.

<sup>103</sup> Augustine and Brown (n 94), 57.

<sup>104</sup> Heyns and Killander (n 92), 472.

<sup>105</sup> Augustine and Brown (n 94), 57.

on the recommendations of the African Commission has not been established.<sup>106</sup>

Individual complaints are not explicitly mentioned in the African Charter. However, the African Commission has accepted complaints from individuals as well as non-governmental organizations under Article 55 of the African Charter.<sup>107</sup> Article 55 states that the Commission shall make lists of ‘other communications’ before each session and that these communications are considered if a simple majority of its members so decide. The individual petition system of the African Charter is not designed to deal with individual human rights violations and only permits the Commission to act in relation to special cases with a series of violations or extensive violations of human rights.<sup>108</sup> Individual complaints to the African Commission are rarely made, which could to some extent be explained by lack of awareness of the system. When awareness exists, there is sometimes still a lack of faith in the system because of the extensive respect for state sovereignty. Even though the African Commission receives a relatively low number of cases, it usually takes more than five years to decide a case.<sup>109</sup>

The African Court on Human and People’s Rights is not mentioned in the African Charter but was instead created with the Protocol of 10 June 1998<sup>110</sup>. The African Court has important advisory functions, as well as broad adjudicatory powers in relation to disputes about the interpretation and application of the African Charter.<sup>111</sup> The African Court complements the protective mandate of the African Commission, and the African Commission will submit a case to the African Court if it has found a violation and has established that the state in question has not complied with the recommendations. Individuals can only bring cases before the African Court if the respondent state has made an additional declaration based on the Protocol of the African Court to specifically authorize the jurisdiction of the Court.<sup>112</sup> While 34 states have ratified the Protocol of the African Court, only 8 states have made the decla-

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<sup>106</sup> Heyns and Killander (n 92), 473-474.

<sup>107</sup> Ibid, 472.

<sup>108</sup> Augustine and Brown (n 94), 58

<sup>109</sup> Heyns and Killander (n 92), 474.

<sup>110</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 9 June 1998, entered into force 25 January 2004) OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III).

<sup>111</sup> Pustorino (n 79), 69-70.

<sup>112</sup> Heyns and Killander (n 92), 477-478.

ration needed for individuals and non-governmental organizations to file applications.<sup>113</sup> If the African Court finds a violation, it can order remedies for the violation, including payment of fair monetary compensation or reparation.<sup>114</sup> Judgements from the African Court are binding, and the AU Executive Council monitors the proper implementation of the judgments based on annual reports on state compliance from the Court.<sup>115</sup> The African Court can further deliver advisory opinions if requested by the AU.<sup>116</sup>

According to Article 62, every two years, each Contracting State must submit a report on its legislative or other efforts to comply with the African Charter. The African Commission then measures the performance of the state in relation to the African Charter. However, reporting has not been consistently made and some states have never submitted a report.<sup>117</sup>

Enforcement is an issue in the African human rights system and there are few effective methods for taking action against abusive leaders or governments.<sup>118</sup> The African Charter places great emphasis on negotiation and conciliation. Trials are avoided, and if a case is taken to Court, people go there to dispute rather than to resolve a legal issue. This leads to drawn-out processes and issues are often left unsolved.<sup>119</sup>

## 2.4 Analysis

### 2.4.1 Analysis of the History and Purpose

Democratic resilience is affected by many different factors, why context is relevant for how the human rights instruments can help Contracting States prevent and recover from democratic backsliding. The background of the establishment of a human rights instrument provides insight into whether the different aspects of democratic resilience were taken into account when the instrument was drafted, and whether the purpose of the instrument was to help

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<sup>113</sup> African Court on Human and People's Rights, 'About Us' (*African Court on Human and People's Rights*) <<https://www.african-court.org/wpafc/>> accessed 2 May 2024.

<sup>114</sup> Heyns and Killander (n 92), 477-478.

<sup>115</sup> Pustorino (n 79), 69-70.

<sup>116</sup> Heyns and Killander (n 92), 477-478.

<sup>117</sup> *Ibid*, 474.

<sup>118</sup> *Ibid*, 465.

<sup>119</sup> Augustine and Brown (n 94), 55-59.

Contracting States maintain a democratic system. Since a human rights instrument is a result of the history and context in the specific region, it must be analyzed within its contexts and the specific conditions it operates in.

The European Convention was created with a clear focus on uniting the Contracting States, and preserving democracy and hindering totalitarianism were some of the main purposes of the European Convention. The European Convention was even created to serve as an alarm bell for totalitarianism, and therefore, the concept of democratic resilience permeates the European Convention. The purpose of maintaining the democracy of Contracting States provides a strong foundation for creating onset resilience. When it comes to breakdown resilience, the common goal of democracy creates a system where the European States should naturally be able to hold each other accountable for democratic regression.

The American Convention emerged from the ideas of equality of states, non-intervention, and sovereignty, and the purpose of uniting states was not as clear during its establishment. Still, there was a consensus that democracy and human rights were needed for harmony among states. Democracy was important and seen as a solution to unrest in and among the Contracting States, and in this sense, the idea of democracy permeates the American Convention as well.

While democracy was an important factor during the establishment of the European and American Conventions, it was not as prominent in the establishment of the African Charter. The African Charter emerged from a background of colonialism, why sovereignty was a natural priority. While democracy is not explicitly mentioned, there is a clear focus on anti-dictatorship and cooperation. The African Charter further emphasizes African traditions and values, which indicates a will to unite the African States.

It can be argued that the European Convention was created for the most obvious purpose of protecting democratic resilience compared to the other two instruments. The aspects that constitute democratic resilience can be found in the arguments for establishing the European Convention, and the Convention is meant to work as a safety mechanism if a state experiences severe democratic backsliding. However, this does not diminish the commitments to democracy made in the African or American human rights systems. The purpose of the establishment of an instrument can indicate its effectiveness, but another instrument cannot be ruled out simply because of differences in the orig-



inal purpose. The instruments are living and each has its strengths and weaknesses when it comes to protecting democratic resilience. Furthermore, the instruments are tailored to their specific regions, and it is hard to know if the European Convention would be able to protect democratic resilience in a different region under other conditions.

The focus on uniting states is relevant for potential positive spill-over effects, which is also an important aspect of democratic backsliding. The European focus on uniting states and creating an alarm system for states falling into totalitarianism creates promising conditions for positive spill-over effects of democracy. This is helped by the fact that there were already many democracies among the Contracting States and that many states have ratified the European Convention. A clear majority of Europe and Africa have ratified the regional human rights instruments. In contrast, only 22 of the 35 OAS Member States have ratified the American Convention, most of them in Latin America. This does not create the same conditions for positive spill-over effects. Ratification of the human rights instruments indicates a collective commitment to human rights and democratic values, and as many states as possible must ratify the instruments for democratic improvements in states to potentially inspire other regional states to make similar progress.

The European focus on the democratic ‘we’ against the totalitarian ‘they’ can lead to positive spill-over effects and unite the Contracting States, but it can also be argued to be exclusive. This ‘us against them’ mentality will limit the potential spill-over effects beyond the Contracting States. Of course, the main purpose of the European Convention in this regard is to protect democratic resilience in the Contracting States, but this mentality hinders a broader perspective on democratic resilience that recognizes interconnections between democracy and human rights across borders. A less limiting perspective on democracy could make democracies in and around Europe more resilient in the long run, which, in turn, will help protect the democratic resilience of the Contracting States to the European Convention.

#### 2.4.2 Analysis of the Scope of Human Rights Protection

The history of a human rights instrument is understandably relevant to what human rights are protected in that instrument. Since Europe was focused on uniting the Contracting States, the European Convention protects a smaller number of rights that all Contracting States could agree upon. For this reason,

economic and social rights were not included. The fact that the rights protected were seen as essential for protecting democracy indicates again that democracy was an important factor during the establishment of the European Convention. However, the scope of democracy becomes narrow when focusing on a small number of rights. Some rights are protected by additional protocols, but not all states have ratified these protocols and fewer people are familiar with them. The European Convention can be seen as a compromise between politics and law in the sense that the rights protected in the Convention are mainly 'safe' rights that were easy to agree upon, and the Convention was not established to create new rights. Rights that were seen as more controversial are instead protected by protocols, still included but not with the same standing.

The catalogs of rights protected are more extensive in the American Convention and the African Charter, and they are not to the same extent a result of trying to make every Contracting State satisfied. When the American Convention was created, it contained not only rights that were already protected in the Contracting States but also created new rights. Because of historical and socio-political reasons, both the American Convention and the African Charter include more rights than just civil and political rights. Especially the African Charter protects many rights of different types, and it was stated that economic, social, and cultural rights were essential for the enjoyment of civil and political rights. From the perspective of democratic resilience, an instrument can be seen as more resilient by containing rights that all Contracting States agree upon since this creates promising conditions for enforcement and can reduce the risk of varying levels of commitment from Contracting States. However, if Contracting States are not obliged to protect certain human rights, this could lead to a 'slippery slope' situation where the state becomes less inclined to protect other rights as well. An instrument containing many different rights could also be seen as more resilient since it captures a larger part of society and helps address systemic inequalities, while a narrower focus on civil and political rights may overlook systemic issues that undermine democratic institutions.

The duties listed in the African Charter are worth mentioning. Duties are not inherently problematic, but they can be dangerous from the perspective of democratic resilience. States experiencing democratic backsliding could easily abuse duties individuals have against their state by for example holding that individuals have the duty to not criticize the Government. When it comes to the protection of human rights and democracy, states cannot have too much power over their citizens, or a democracy will not be resilient.

### 2.4.3 Analysis of the Jurisdiction and Enforcement

The idea of the regional instruments is that they are binding for all states that have ratified them. Many Contracting States to the European Convention have gone as far as to provide for the European Convention to have an internal effect or have accepted that the European Convention prevails over national legislation. Therefore, the European Convention can be seen as a safeguarding mechanism for democratic resilience in the sense that it becomes difficult for Contracting States to ignore their obligations under the Convention when the European Convention prevails over national legislation. Some Contracting States to the American Convention have let the jurisprudence of the Inter-American Court deeply influence national law, but many Contracting States still struggle with implementing the American Convention. The African Charter also struggles with enforcement, for example when states do not submit the compliance reports they are obliged to submit. This will have consequences for the spill-over effect that proper implementation would create, as well as create a weaker foundation for the supervisory mechanisms to influence the Contracting States. It will further lead to citizens having less knowledge of and trust in the system.

Jurisdiction and enforcement are relevant factors for the concept of democratic resilience, and enforcement mechanisms are important for both onset resilience and breakdown resilience. Supervisory bodies can help prevent democratic backsliding in states by for example reviewing laws, writing reports, or holding states accountable for human rights violations that lead to democratic backsliding. They can further help states recover from democratic backsliding by calling them out for through judgments or by working as an alarm bell for states falling into totalitarianism.

Judicial bodies and supervisory mechanisms can contribute significantly to democratic resilience by serving as safeguards against human rights abuses and providing possibilities for redress in cases of democratic backsliding. While the European Convention only has a Court, both the American Convention and the African Charter have both a Court and a Commission. The Inter-American Commission is non-judicial in its nature and writes reports with proposals and recommendations if it finds a violation. Non-judicial bodies can play important roles by monitoring human rights situations, reporting violations, and recommending actions to address issues related to democratic resilience. They can complement the judicial functions of Courts and enhance the overall effectiveness of regional human rights systems. The African Commission is the main supervisory organ in the African human rights system,

and the African Court was established long after the Commission. The establishment of a Court in the African human rights system indicates a willingness to strengthen the effectiveness of the protection of human rights.

A Contracting State to the European Convention is naturally bound by the jurisdiction of the European Court, while the Inter-American Court and the African Court need explicit acceptations of their jurisdiction. Out of the 22 Contracting States to the American Convention, 20 have accepted the jurisdiction of the Inter-American Court. Of the 45 Contracting States to the Protocol of the African Court, 34 have ratified it, but only 8 have made the declaration needed for individuals and non-governmental organizations to file applications. This indicates a varying level of commitment among states to subject themselves to the adjudicative authority of regional human rights bodies. Because of the relevance of enforcement mechanisms for democratic resilience, as many states as possible must accept the jurisdiction of the Courts.

There is no specific judicial system that prevails according to the concept of democratic resilience. Each system operates in a unique political environment, shaped by history and culture. This necessitates tailored approaches to address challenges related to democratic governance. However, it can be said that enforcement of human rights instruments is essential if the instruments are going to work as safety mechanisms for democratic resilience. A working system must be in place to make sure democracy is maintained, and if a state is suffering from democratic resilience, there must be a method in place for delivering judgments on human rights violations and a supervisory mechanism for making sure the judgments are implemented.

State complaints are essential for democratic resilience. If a population is oppressed or even brainwashed by a state where democratic backsliding has gone very far, it is likely that individuals will not complain to Courts or other judicial bodies. In those cases, states must hold each other accountable for democratic backsliding and use regional human rights instruments to bring attention to the situation, thereby reinforcing democratic norms within the region. Common for all the regional human rights systems is that states are not overly willing to intervene in the national affairs of other states. This is problematic from a perspective of democratic resilience, since it means that the regional human rights instruments are not the democracy safety nets they could be. States must hold other Contracting States accountable for the human rights instruments to reach their full potential as protectors of democratic resilience.

Individual complaints are also significant for democratic resilience since they show that there is trust and belief in the system, and they will further lead to cases that result in jurisprudence for other Contracting States to learn from. A well-functioning procedure that individuals have faith in will help the regional human rights instrument gain credibility in the region. The African Court is still relatively new and might therefore receive more individual complaints in the future. This assumption can be made based on the example of the European Court, which did not receive many complaints in the beginning. However, from a perspective of democratic resilience, more states must declare that individuals can complain to the African Court, especially since the Commission system is not designed to deal with individual complaints.

The European Court has dismissed many cases lately to get rid of its backlog issue. Delaying justice is undeniably problematic, and the backlog can undermine the effectiveness of the Court in protecting human rights and fostering democratic resilience. However, it can still be questioned if it is better to dismiss than to delay. When many cases are dismissed, it can affect people's trust in the Court. For the Court to be able to protect democratic resilience, people must believe that the Court will help them and take up their case. Otherwise, people might not turn to the Court in situations where grave violations have taken place. In situations of democratic backsliding, people must turn to the Court regularly for states to be held accountable and thereby implement cases from the Court. If there are no cases to implement, the state will not have the same opportunity to change its behavior. Therefore, it is important that there is an individual complaint system in place and that this system is used properly to maintain trust in the Court.

When it comes to reparations, it is important that the supervisory body can adapt the reparations to a specific violation. Instructions to change domestic law, end ongoing violations, and prevent similar violations in the future can be particularly helpful in building a resilient democracy. The European, American, and African supervisory bodies can all decide on different reparations depending on the case at hand. The Inter-American Court is further known for its creative reparations, and it can for example decide that states make sure the truth about human rights violations is known. This focus on the truth can be significant for democratic resilience since public awareness can help prevent similar violations from taking place in the future.

The regional human rights systems can help Contracting States maintain or develop their level of democracy and thereby prevent democratic backsliding

by reviewing laws or judgments, writing reports, or offering advisory opinions. If there are functioning and well-developed methods for advising and helping Contracting States comply with the human rights instruments, there is less risk that human rights violations resulting in democratic backsliding will happen. All the Courts have the mandate to provide advisory opinions, and the Inter-American Court can further examine domestic proceedings. The African Charter places great focus on promotion and interpretation, and the Commission creates principles and rules that the Governments of Contracting States can base their legislation on. This can help Contracting States develop their levels of democracy. It can further be used as a safety mechanism in unforeseen situations and can be adapted to different circumstances of democratic backsliding if needed. Focus on interpretation and research is essential for preventing democratic backsliding. If the human rights instruments are to help Contracting States prevent and recover from democratic backsliding, it is important that the Contracting States have faith in the instruments and that they are offered the help they need to maintain and improve their democracies. Reporting systems, which is seen the most clearly in the African Charter, can also be important for preventing democratic backsliding and is something that could be used more. Reports could highlight common trends or challenges, and work as a way of highlighting what states must work on their protection of democracy and human rights.

#### 2.4.4 Concluding Remarks on the History, Scope, and Enforcement

Democratic backsliding is taking place in all regions, and it is obvious that no regional instrument functions as a perfect safeguard for democracy when a Contracting State experiences democratic backsliding. The human rights instruments have emerged from situations of human rights violations and unrest, and all regions are still affected by this today. The concept of democratic resilience can be found most clearly in the European Convention, which implies that democratic resilience is affected by the context, background, and history of human rights instruments. However, the same purpose of protecting democracy can be found in the other instruments as well, although not as distinctly. Europe had a common goal of uniting states, and because of the circumstances, the purpose was not to the same extent to protect the sovereignty and the independence of states. When looking at the background and history of the American Convention and the African Charter, it is understandable that there is not only a focus on cooperation but also independence. Because of

the aspects constituting democratic resilience, the European Convention had better conditions to create a system that protects democratic resilience, and from this specific perspective, a focus on uniting states is essential. However, because of the different conditions they have faced, it is unfair derive excessive conclusions on what instrument is better at protecting democratic resilience.

Evidently, a functioning supervisory mechanism and a way of ensuring enforcement is vital for the protection of democratic resilience. A human rights instrument needs a thorough enforcement mechanism built on trust from Contracting States and their citizens. Nevertheless, the human rights instruments must encourage Contracting States to hold each other accountable without creating conflict. From a perspective of democratic resilience, it must become normalized to question states that experience democratic backsliding as a way of helping said states and their citizens.

## 3 Safeguarding Democratic Resilience through the Defense of Democratic Institutions

Since an assessment of democratic institutions is essential for analyzing democratic resilience, the purpose of this chapter is to examine how the regional human rights instruments protect democratic institutions in their Contracting States based on the democratic framework established in Chapter 1. The chapter provides context for how the human rights systems protect democracy in their Contracting States and then examines the rule of law, the independence of the judiciary and separation of powers, the freedoms of expression, association, and assembly, and participation in elections. The chapter concludes with an analysis of what the findings imply for the protection of democratic resilience.

### 3.1 The European Convention

#### 3.1.1 Background

The European Convention was designed to maintain and promote democratic values and set a standard for and uphold democracy in Europe.<sup>120</sup> The Preamble of the European Convention states that fundamental freedoms are best maintained by an effective political democracy and by a common understanding and observance of the human rights on which these fundamental freedoms depend.<sup>121</sup> It further states that the European States have a common heritage of political tradition, ideals, freedom, and the rule of law. These underlying values of the European Convention correlates with the principles of democracy. The Court has stated that there is a clear connection between the European Convention and democracy based on the mentioning of democracy in the Preamble.<sup>122</sup>

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<sup>120</sup> Zand (n 41), 197-198.

<sup>121</sup> European Convention on Human Rights (1950), Preamble.

<sup>122</sup> Zand (n 41), 198-200.



It is not clear what type of democracy is endorsed by the European Convention. The Court has held that full participation of all citizens is utterly important.<sup>123</sup> However, democracy in the European Convention cannot be understood solely as majority rule. Democracy entails participatory democracy, where different opinions and beliefs are respected and there is a focus on freedom of expression as a means of involving citizens in decision-making processes.<sup>124</sup> Democracy is the only political model that the European Convention aims for and is compatible with.<sup>125</sup> Nevertheless, many European States are dealing with democratic backsliding and erosion of the rule of law and fundamental rights today.<sup>126</sup>

### 3.1.2 The Rule of Law

The rule of law is mentioned in the Preamble of the European Convention and is a foundational value of the Convention. It informs the working of the Convention and is one of the central aims to which it aspires. European States share a similar view on the rule of law, and the European Convention is built on the assumption that the Contracting States share the same view on the concept.<sup>127</sup>

Since the Preamble of the European Convention clarifies that the European States have a common heritage of political traditions, the European Court does not always draw clear boundaries between the rule of law and democracy. The rule of law and democracy are interdependent in all Contracting States. According to the Court, procedural safeguards and judicial control over the executive are essential elements of both the rule of law and democracy. Because of democracy and national democratic processes, the European Convention must maintain a subsidiary role and only demand a minimum rule of law standard. The Court should not assume legislative functions that are not accepted by a European consensus. The rule of law makes sure the Court maintains a subsidiary role, but the Court can also review national law by standards based on the rule of law and thereby protect democratic values.<sup>128</sup> The concept of the rule of law has been developed by the Court and the case

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<sup>123</sup> Zand (n 41), 201.

<sup>124</sup> Ibid, 227.

<sup>125</sup> Ibid, 201.

<sup>126</sup> European Parliament, 'Report on the Commission's 2023 Rule of Law Report' (2023/2113(INI), Committee on Civil Liberties, Justice and Home Affairs 2024), § 72.

<sup>127</sup> Lautenbach (n 27), 11-12.

<sup>128</sup> Ibid, 198-209.

law of the Court has made the conceptions of the rule of law more alike in the different European States. When the Court interprets the European Convention, it takes inspiration from the rule of law standards in the legal systems of the Contracting States. Thereby, the Court both takes inspiration from and influences national legal systems.<sup>129</sup> The Court mainly refers to the rule of law in relation to legality, meaning the compliance with national laws and procedures as well as the quality of the law in question.<sup>130</sup>

Article 5 of the European Convention protects the right to liberty and security and states that all deprivations of liberty must be lawful. To meet the requirement of lawfulness, the detention must be made in accordance with a procedure prescribed by law, must be clearly defined by the law and the law must be foreseeable in its application. Case law related to Article 5 normally refers to the rule of law.<sup>131</sup> Article 7 of the European Convention prohibits retroactive criminal laws, apart from trials and punishments for acts that were criminal at the time they were committed according to the general principles of law recognized by civilized nations. This last exception was included to make sure prosecutions of the crimes committed during the Second World War were valid.<sup>132</sup> The European Court has stated that this Article is an essential element for the rule of law. In addition to prohibiting the retrospective application of criminal law, the Article embodies the principle that only the law can define a crime and prescribe a penalty.<sup>133</sup> Furthermore, Article 18 of the European Convention states that the restrictions permitted under the Convention to the listed rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed. The purpose of this Article is to prohibit the misuse of power.<sup>134</sup>

The margin of appreciation doctrine, meaning the amount of discretion the Court gives national authorities in fulfilling their obligations under the European Convention, was created by the European Court to establish whether a particular interference with a right can be seen as necessary in a democratic society. The expression ‘margin of appreciation’ is not included in the text of

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<sup>129</sup> Lautenbach (n 27), 10-14.

<sup>130</sup> Ibid, 70-73.

<sup>131</sup> European Court of Human Rights, *Guide on Article 5 – Right to liberty and security* (Council of Europe/European Court of Human Rights, last updated 2022) §§ 29-33.

<sup>132</sup> European Court of Human Rights, *Guide on Article 7 – No punishment without law: the principle that only the law can define a crime and prescribe a penalty* (Council of Europe/European Court of Human Rights, last updated 2022) § 62.

<sup>133</sup> Ibid, §§ 1-2.

<sup>134</sup> European Court of Human Rights, *Guide on Article 18 – Limitation on use of restrictions on rights* (Council of Europe/European Court of Human Rights, last updated 2022) § 1.

the Convention and was not discussed during its drafting history. When determining the margin of appreciation, the Court considers for example if there is a European consensus on the matter at hand. However, there is no clear definition of the margin of appreciation doctrine, and this has been criticized as resulting in unpredictable results and threatening the rule of law.<sup>135</sup>

### 3.1.3 Independent Judiciary and Separation of Powers

The importance of an independent judiciary and separation of powers has been established by the European Court. Article 6 of the European Convention regulates the right to a fair trial and states that everyone has the right to be heard by an independent and impartial tribunal established by law. The Court finds judicial independence to be a prerequisite for the rule of law.<sup>136</sup> ‘Independence’ refers both to the ability of the judge to stand against external pressure as a matter of moral integrity and that the procedure of appointment of judges must provide safeguards against undue influence of state powers. There can be no influence during the appointment procedure or later when the judge is performing his or her duties.<sup>137</sup> ‘Impartiality’ refers to the absence of prejudice or bias.<sup>138</sup> In cases regarding Article 6, the Court assesses both the behavior of the particular judge and the impartiality of the tribunal itself.<sup>139</sup>

The separation of powers between the Government and the judiciary is increasingly important in the case law of the European Court, indicating the growing importance of separation of powers and an independent judiciary. States should not reform their judiciary in a way that undermines the independence of the judiciary and its governing bodies.<sup>140</sup> States are not, however, required to comply with any theoretical constitutional concepts regarding the permissible limits of the interaction between the political organs of the Government and the judiciary. The question is if the requirements of the European Convention are met in the specific case.<sup>141</sup> The Parliament appointing judges is not a violation of Article 6 if the judges do not receive any pressure or

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<sup>135</sup> Brauch (n 42), 115-128.

<sup>136</sup> *Grzeda v. Poland* [GC] App no 43572/18 (European Court of Human Rights, 15 March 2022) § 301.

<sup>137</sup> *Gudmundur Andri Ástráðsson v. Iceland* [GC] App no 26374/18 (European Court of Human Rights, 1 December 2020) § 234.

<sup>138</sup> European Court of Human Rights, *Guide on Article 6 – Right to a fair trial (civil limb)* (Council of Europe/European Court of Human Rights, last updated 2022), § 283.

<sup>139</sup> *Ibid.*, § 286.

<sup>140</sup> *Ibid.*, § 257.

<sup>141</sup> *Ibid.*, § 265.

instructions on how to perform their judicial duties once they are appointed.<sup>142</sup> When assessing the independence of a body, the Court considers the manner of appointment of its members, the duration of their term in office, the existence of guarantees against outside pressures, and whether the body presents an appearance of independence.<sup>143</sup>

### 3.1.4 Freedom of Expression

The freedom of expression is protected in Article 10 of the European Convention. This right includes the freedom of opinion and the right to receive and impart information and ideas without interference by the public authorities, regardless of frontiers. The scope of Article 10 is wide, both regarding the substance of the ideas and information expressed and in the form in which they are conveyed. Certain elements of freedom of expression are not specifically mentioned in Article 10, but have been incorporated into the Convention system by the European Court. This includes pluralism, access to information, protection of whistle-blowers, and freedom of expression on the internet.<sup>144</sup> The Court has established certain positive obligations for the Contracting States to protect the freedom of expression. This includes the requirement to establish an effective mechanism for the protection of authors and journalists to ensure a favorable environment for participation in public debate.<sup>145</sup> The press has a significant function as a ‘public watchdog’, spreading information of public interest which the public has a right to receive.<sup>146</sup>

The European Court has stated that freedom of expression constitutes one of the foundations of a democratic society.<sup>147</sup> According to the Court, there can be no democracy without pluralism. Even in a state of emergency, any measures taken by Contracting States should seek to protect the democratic order from threats to it, and efforts must further be made to safeguard democratic values such as pluralism, tolerance, and broadmindedness.<sup>148</sup> This in-

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<sup>142</sup> *Sacilor Lormines v. France* ECHR 2006-XIII, § 67.

<sup>143</sup> *Guide on Article 6* (n 158), § 276.

<sup>144</sup> European Court of Human Rights, *Guide on Article 10 – Freedom of expression* (Council of Europe/European Court of Human Rights, last updated 2022) § 7.

<sup>145</sup> *Ibid*, § 11.

<sup>146</sup> Marks (n 47), 213.

<sup>147</sup> *Ibid*, 212.

<sup>148</sup> *Guide on Article 10* (n 168), § 687.

cludes the freedom of political debate, and also the possibility for the legislative authorities, the judicial authorities, the press and the public to examine the actions of the Government.<sup>149</sup>

### 3.1.5 Freedom of Association and Assembly

Article 11 of the European Convention guarantees that everyone has the right to freedom of association with others. The right to freedom of association includes both the freedom to join an association and the freedom from being forced to join an association.<sup>150</sup> Citizens participate in the democratic process by belonging to an association in which they integrate and pursue common objectives collectively.<sup>151</sup> The freedom of association includes the right to establish and join political parties.<sup>152</sup> The freedom of assembly is also regulated in Article 11 of the European Convention. Those taking part in an assembly are not only seeking to express their opinion but to do so together with others.<sup>153</sup> The primary purpose of the freedom of assembly in Article 11 is to protect the right of political peaceful demonstration and participation in the democratic process, but other forms of assembly fall under this Article as well.<sup>154</sup> Article 11 does not protect assemblies where the organizers and participants have violent intentions, incite violence, or otherwise reject the foundations of a democratic society.<sup>155</sup>

The freedoms of association and assembly are essential for the functioning of civil society organizations and political parties. The Court has affirmed the direct relationship between democracy, pluralism, and the freedom of association. How national legislation enshrines the freedom of association and its practical application reveals the level of democracy in the state concerned.<sup>156</sup>

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<sup>149</sup> Marks (n 47), 213.

<sup>150</sup> Hansko Broeksteeg, 'Freedom of Assembly and Association' in Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak, *Theory and Practice of the European Convention on Human Rights*, (5<sup>th</sup> edn, Intersentia 2018) 822.

<sup>151</sup> European Court of Human Rights, *Guide on Article 11 – Freedom of assembly and association* (Council of Europe/European Court of Human Rights, last updated 2022), § 113.

<sup>152</sup> Broeksteeg (n 150), 813.

<sup>153</sup> *Primov and Others v Russia* App no 17391/06 (European Court of Human Rights, 12 June 2014) § 91.

<sup>154</sup> *Guide on Article 11* (n 175), § 19.

<sup>155</sup> *Kudrevicius and Others v. Lithuania* [GC] ECHR 2015-VI § 92.

<sup>156</sup> *Guide on Article 11* (n 175), § 111.

Because of their role in a democratic society, the Court does a strict assessment of restrictions on the freedom of association of political parties.<sup>157</sup> Dissolution of an entire party or refusal to register a party can only be made in cases where political pluralism or fundamental democratic principles are threatened.<sup>158</sup> The right to register a political party can be restricted if there is a pressing social need. In the *Refah Partisi* case, the political party planned to re-introduce a Sharia-based regime in the Turkish State and publicly called for the use of force. In this case, the Court found that there was a pressing social need to dissolve the party. Re-introducing a Sharia-based regime would not be compatible with the democratic principles on which the European Convention is based.<sup>159</sup> In *Partidul Communistilor (Nepercisti) and Ungureanu v. Romania*, the Romanian authorities refused the registration of a communist party. Nothing in the party's program called for violence or rejected democratic principles. The Court did not accept the argument that Romania could not allow the emergence of a new communist party. Even when considering Romania's experience of totalitarian communism, this could not by itself justify the need for the restriction, especially since communist parties exist in several states.<sup>160</sup>

The European Court has stated that the right to freedom of peaceful assembly is a fundamental right in a democratic society and should therefore not be interpreted restrictively.<sup>161</sup> It is not only important for associations like political parties to be able to have meetings, but also for demonstrations and manifestations.<sup>162</sup> When restricting the right to freedom of assembly, the chilling effects of the restriction must be considered. A prior ban of an assembly might discourage the participants from taking part in it.<sup>163</sup>

### 3.1.6 Participation in Elections

The first draft of the European Convention included an undertaking of all Contracting States to respect the fundamental principles of democracy in good faith. This would include free elections and a commitment to not taking

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<sup>157</sup> Broeksteeg (n 150), 824.

<sup>158</sup> *Guide on Article 11* (n 175), § 176.

<sup>159</sup> *Refah Partisi (the Welfare Party) and Others v Turkey* [GC] ECHR 2003-II.

<sup>160</sup> *Partidul Communistilor (Nepercisti) and Ungureanu v. Romania* ECHR 2005-I (extracts).

<sup>161</sup> *Guide on Article 11* (n 174), § 1.

<sup>162</sup> Broeksteeg (n 150), 813-814.

<sup>163</sup> *Guide on Article 11* (n 174), § 77.

any action that would interfere with the right to criticism or the right to organize a political opposition. This statement was met with a lot of criticism, and it was argued that it should be deleted in its entirety since it was of a constitutional and political character. ‘Fundamental principles of democracy’ was found to be too vague, and the provision was criticized for not being based on the traditional content of human rights. The provision was never included in the European Convention but is instead regulated in Article 3 Protocol I<sup>164</sup>. This Article states that the States 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 choice of legislature. This right includes a right to vote and to stand for election.<sup>165</sup> The Article obliges Contracting States to hold elections under conditions where the free expression of the opinion of the people in choice of the legislature is ensured.<sup>166</sup> It further protects the principle of equality when exercising the right to vote.<sup>167</sup> Article 3 of Protocol I presupposes a representative legislature as the basis of a democratic society. The word 'choice' entails that there must be a real choice, meaning that the state must enable political parties to present candidates for the elections. A one-party system would not be compatible with Article 3.<sup>168</sup>

There can be no democracy without pluralism and political parties play an essential role in ensuring pluralism and a functioning democracy. Therefore, the obligation under Article 3 to hold elections guarantees pluralism.<sup>169</sup> The Court has emphasized the importance of accessibility for democracy for opposition parties, which means that any restrictions made on the right to vote or stand for elections cannot affect opposition parties disproportionately.<sup>170</sup> Protocol I entered into force in 1954 and has been signed by all Contracting States, but Monaco and Switzerland have never ratified the Protocol.<sup>171</sup>

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<sup>164</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol No 1) (adopted 20 March 1952, entered into force 18 May 1954) ETS 9.

<sup>165</sup> Marks (n 47), 221-225.

<sup>166</sup> Hansko Broeksteeg, “Right to Free Elections” in Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak, *Theory and Practice of the European Convention on Human Rights*, (5<sup>th</sup> edn, Intersentia 2018) 909-910.

<sup>167</sup> European Court of Human Rights, *Guide on Article 3 of Protocol No. 1 – Right to free elections* (Council of Europe/European Court of Human Rights, last updated 2022) § 9.

<sup>168</sup> Broeksteeg (n 166), 909-911.

<sup>169</sup> *United Communist Party of Turkey and Others v. Turkey* ECHR 1998-I, §§ 43-44.

<sup>170</sup> Broeksteeg (n 166), 912.

<sup>171</sup> Council of Europe Treaty Office, ‘Chart of signatures and ratifications of Treaty 009’ (Council of Europe), <<https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treaty=009>> accessed 1 May 2024.

## 3.2 The American Convention

### 3.2.1 Background

The Preamble of the American Convention states that the Convention aims to create a system of personal liberty and social justice within the framework of democratic institutions.<sup>172</sup> The Inter-American Court has held that although the concept of democracy is crucial for interpreting the American Convention, it is not a substantive right of the Convention.<sup>173</sup> When assessing a coup d'état in Honduras in 2009, the Inter-American Court found that there is a duty to defend democracy resting especially upon domestic judges. In this case, three judges and a justice opposed the overthrow of the president by protesting in favor of the re-establishment of democracy and the rule of law. The Court found that this was not only a right but also part of the obligation to defend democracy based on the provisions of the American Convention.<sup>174</sup>

In the early 1990s, the Inter-American Commission started to closely monitor the states with the most fragile democratic institutions and wrote reports on them. For example, a report was made on Peru under the Fujimori Government. The Government refused to settle cases or adopt recommendations from the Commission where violations had been found, and the Commission responded by referring to representative jurisprudence from the Inter-American Court. Peru further tried to withdraw its declaration of acceptance of the jurisdiction of the Court, but the Court found this withdrawal to be without effect. The Fujimori Government ignored all decisions from the Court. In 1998, the Commission managed to visit Peru and prepared a report on the human rights situation. The report was released in June 2000 and was discussed by the OAS General Assembly. The report covered how the Fujimori Government had dismantled the rule of law and the democratic system, and established that the election where Fujimori was elected for a third term as president was an interruption of the democratic process. The OAS required the Fujimori Government to take several measures which was one of the reasons why Fujimori resigned a few months after the report was published.<sup>175</sup>

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<sup>172</sup> American Convention on Human Rights (1969), Preamble.

<sup>173</sup> *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Inter-American Court of Human Rights Series C No. 182 (5 August 2008), §§ 222-223.

<sup>174</sup> *López Lone et al. v. Honduras*, Inter-American Court of Human Rights Series C No. 302 (5 October 2015), § 153.

<sup>175</sup> Goldman (n 66), 875-878.



Even though many of the American States have come a long way from the dictatorships during the 1970s and 1980s, several states still struggle with the consequences from that time. Some states are further dealing with contemporary human rights issues, such as discrimination, poverty, and restrictions on the freedom of speech.<sup>176</sup>

### 3.2.2 The Rule of Law

The Inter-American Court has recognized that the rule of law is constructed by a series of rules that limit the scope of power, and subordinates this power to human rights.<sup>177</sup> The few times in which the Court has referred directly to the rule of law, it has done so to emphasize the connection between the rule of law and the limitation of power. States must respect the principles of legality, non-retroactivity, and due process of law.<sup>178</sup> The Court has interpreted legality as meaning the law being interpreted uniformly in a way expected by all parties.<sup>179</sup> The Court has tried to promote the rule of law in the Contracting States by condemning Governments for massive human rights violations committed during military or authoritarian regimes.<sup>180</sup>

The American Convention guarantees several rights that are fundamental to the rule of law. The right to personal liberty can be found in Article 7, which states that no one can be deprived of their liberty without the detention being made in accordance with the law and without being brought promptly before a judge or other officer authorized to exercise judicial power. From this Article follows both that the circumstances, reasons, or cases for a deprivation of liberty must be specifically established by law, and that the conditions of the deprivation must be established beforehand by law.<sup>181</sup>

Article 8 protects the right to a fair trial and limits the power of state authorities when judging crimes. Court procedures must be previously established by the law.<sup>182</sup> Article 9 regulates the freedom from “ex post facto” laws,

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<sup>176</sup> Antkowiak (n 67), 425.

<sup>177</sup> Gonzalo Candia Falcón, ‘Derechos Implícitos y Corte Interamericana de Derechos Humanos: Una Reflexión a la Luz de la Noción de Estado de Derecho’ (2015) 42 *Revista Chilena de Derecho* 873, 886-887.

<sup>178</sup> Gonzalo Candia-Falcón, ‘El Estado de Derecho y la Corte Interamericana de Derechos Humanos’ (2015) 24(2) *Dikaion* 225, 237-238.

<sup>179</sup> Candia Falcón, (n 177), 886-887.

<sup>180</sup> Candia-Falcón (n 178), 237-238.

<sup>181</sup> Cecilia Medina Quiroga and Valeska David Contreras, *The American Convention on Human Rights: Crucial Rights and their Theory and Practice* (3<sup>rd</sup> edn, Intersentia 2022) 266.

<sup>182</sup> Antkowiak and Gonza (n 68), 193.

meaning that no one can be convicted of any act that did not constitute a criminal offense under applicable law at the time the act was committed. According to Article 30, the restrictions applicable to the rights listed in the American Convention must be established through laws enacted for reasons of general interest.

The Court has been criticized for making decisions without clear support in the American Convention. Article 63 of the American Convention establishes that the jurisdiction of the Court extends to all cases concerning the application or interpretation of the Convention and for violations of rights protected by the Convention. However, the Court sometimes makes expansive interpretations of the rights included in the American Convention. Consequently, the Court protects rights that are not expressly recognized in the American Convention. The Court's reasoning can be derived from Article 29 of the American Convention, which states that the Convention does not exclude other rights that are inherent to the human person or that derive from the democratic representative form of government. The Court has further argued that the American Convention is a living instrument and that the rule of law should not only be connected to the actual text of the Convention but also the interpretation of the judges.<sup>183</sup> An example of an interpretation made by the Court is that the right to property in Article 21 of the American Convention also includes the communal right to indigenous property.<sup>184</sup>

In terms of maintaining the rule of law in the Inter-American human rights system, both the Commission and the Court have struggled with funding. Some voluntary contributions come from OAS Member States, the very same states that are subject to the jurisdiction of the Court. Recently, the Court has also been criticized for being less transparent in its assessment of potential human rights violations and reparations, while also more considerate to states.<sup>185</sup>

### 3.2.3 Independent Judiciary and Separation of Powers

The right to a fair trial in Article 8 of the American Convention guarantees the right to be heard by a competent, independent, and impartial tribunal. The

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<sup>183</sup> Candia Falcón (n 177), 874-879.

<sup>184</sup> *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-American Court on Human Rights Series C no. 79 (31 August 2001) § 148.

<sup>185</sup> Antkowiak (n 67), 426-437.

Inter-American Court has held that two obligations arise from the right to a hearing from an independent tribunal. Firstly, the judge must rule pursuant to the law, and secondly, states must respect and ensure the right to be heard by an independent judge. Prevention of interference and external pressure entails the adoption of laws and regulations to ensure an adequate process for the appointment and tenure of judges.<sup>186</sup>

The Court has emphasized the jurisdictional guarantee as a mechanism for controlling the acts of the executive branch or the administration of a state. The Court has further stated that all public authorities must comply with judicial decisions and execute them without hindering the meaning or scope of the decision. States that have tried to limit the impartiality of national judges have been sanctioned by the Court.<sup>187</sup>

### 3.2.4 Freedom of Expression

The freedom of thought and expression is regulated in Article 13 of the American Convention. This article protects the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers and with any medium. The American Convention was designed to strongly protect the freedom of thought and expression. It is the only international treaty containing a prohibition against prior censorship, and the Inter-American Court was the first international human rights tribunal to establish the right of individuals to access state-held information.<sup>188</sup>

Case law and reports from the Inter-American organs reflect the significance of the right to freedom of expression to preserve, protect, and strengthen democracy.<sup>189</sup> The Inter-American Court has described the freedom of expression as a cornerstone of democratic societies, and called it indispensable for the formation of public opinion. It has further emphasized its importance for the development of political parties and for keeping the general public informed. Statements concerning public officials are essential for the functioning of a democratic system and should therefore enjoy an even higher level of protection.<sup>190</sup> The freedom of expression must be especially protected in

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<sup>186</sup> Antkowiak and Gonza (n 68), 190.

<sup>187</sup> Candia Falcón (n 178), 237-238.

<sup>188</sup> Antkowiak and Gonza (n 68), 25-26.

<sup>189</sup> Ludovic Hennebel and Hélène Tigroudja, *The American Convention on Human Rights: A Commentary* (1<sup>st</sup> edn, Oxford University Press 2022), 434.

<sup>190</sup> Antkowiak and Gonza (n 68), 231-238.

the context of an electoral campaign, since it is essential for the formation of public opinion. It is further relevant for transparency and better control over the future administration. Political expression enables voters to exercise their political rights.<sup>191</sup> Individuals further have the right of access to state-held information, meaning that the state consequently has the positive obligation to provide it.<sup>192</sup> Actions of states should be governed by transparency and individuals must be enabled to control these actions by questioning, investigating, and assessing public administration. In a democratic society, a state should be governed by the principle of maximum disclosure.<sup>193</sup> Journalists are often attacked, intimidated, or persecuted in the Americas. The Inter-American Court has stated that journalists must receive the protection necessary and states are obligated to adopt special measures of prevention and protection.<sup>194</sup>

Before 2008, the Inter-American Court saw the freedom of expression as the primary means of fostering democracy and limiting state power. However, in later cases, the Court has started to allow more constraints on expression and require more responsibility from speakers. In several of these instances, the Court has cited judgments from the European Court, since it has a more restrictive view on the freedom of expression. The Court has held that criminal sanctions on expression are legitimate means to protect honor and reputation and that states are required to establish such laws. However, the Inter-American Commission does not agree with this position.<sup>195</sup>

### 3.2.5 Freedom of Association and Assembly

The right to assembly is recognized in Article 15 of the American Convention, which states that there is a right to peaceful assembly without arms. The Inter-American Court has stated that the right of peaceful assembly contributes to the effectiveness of the rule of law and democracy. Although having emphasized the importance of this right for a democratic society, the jurisprudence of the Inter-American bodies remains limited on Article 15. Assemblies must be peaceful and unarmed to fall under the scope of Article 15, otherwise, states have the right or even the duty to regulate or prohibit them. However, isolated acts of violence or a few incidents are not enough to deem

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<sup>191</sup> Hennebel and Tigroudja (n 189), 445-446.

<sup>192</sup> Antkowiak and Gonza (n 68), 242.

<sup>193</sup> Hennebel and Tigroudja (n 189), 449.

<sup>194</sup> Antkowiak and Gonza (n 68), 240.

<sup>195</sup> *Ibid*, 233.

an assembly as violent. The Commission has affirmed that a certain degree of disruption caused by for example demonstrations is a natural effect of the right to protest. The freedom of assembly in Article 15 is important for upholding and defending the democratic values at the heart of the Inter-American system. Private and public assembly makes it possible for individuals to interact with their peers to express ideas, protest, and thereby indirectly participate in the conduct of public affairs.<sup>196</sup>

The freedom of association is regulated in Article 16 of the American Convention, stating that everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes. The Article aims to allow the establishment of permanent groups and the right is essential for a democratic society. The jurisprudence from the Inter-American Court concerning this Article is not as developed as the jurisprudence from the European Court. The Inter-American case law has not yet dealt with the application of Article 16 in relation to the right to establish a political party. The Court has, however, endorsed the view of the European Court to an extent and has stated that political parties, organizations, or groups taking part in the life of the state must have aims that are compatible with regard for the rights and freedoms protected by the American Convention.<sup>197</sup>

### 3.2.6 Participation in Elections

Article 23 of the American Convention establishes the right to participate in Government. Citizens have the right to take part in the conduct of public affairs, to vote and be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters. This right can never be suspended, not even in times of war, public danger, or other emergencies threatening the independence of a state.

The right to participate in Government and public life in Article 23 represents one of the basic principles and the democratic aim of the OAS, and representative democracy is the only form of rule the OAS has explicitly endorsed. Representative democracy is seen as legitimate and necessary to ensure the respect of human rights.<sup>198</sup> Article 29 of the American Convention states that

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<sup>196</sup> Hennebel and Tigroudja (n 189), 477-488.

<sup>197</sup> Ibid, 494-501.

<sup>198</sup> Ibid, 690-693.

no provision of the Convention shall be interpreted to preclude other rights derived from representative democracy as a form of Government.

### 3.3 The African Charter

#### 3.3.1 Background

The Preamble of the African Charter, unlike its counterparts in the European and American Conventions, lacks explicit reference to democracy.<sup>199</sup> Article 13 of the African Charter regulates the right to participation in government, but does not favor any political system over others. Contracting States to the African Charter have the sovereign right to choose their political system in accordance with the will of the people. However, the political system must be in conformity with the Constitutive Act of the African Union and the universally accepted principles of democracy.<sup>200</sup>

In the last 30 years, Africa has been growing in the judicial, economic, social, and political sectors. Today, Africa has some of the world's fastest-growing economies. At the same time, problems still exist even in states that have returned to political democracies. For example, some populations are still excluded from political participation and power is sometimes centered to small groups of people.<sup>201</sup>

#### 3.3.2 The Rule of Law

The African Commission has held that the opposite of the rule of law is the rule of power and that without the rule of law and an independent judiciary, equality before the law cannot exist.<sup>202</sup> According to the African Commission, the principle of legality means that a limitation on a right cannot be overly broad or vague.<sup>203</sup>

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<sup>199</sup> African Charter on Human and People's Rights (1981), Preamble.

<sup>200</sup> Rachel Murray, *The African Charter on Human and People's Rights: A Commentary* (1<sup>st</sup> edn, Oxford University Press 2019) 347.

<sup>201</sup> Mutua (n 90), 162-163.

<sup>202</sup> *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) / Zimbabwe*, African Commission on Human and Peoples' Rights, Communication 294/04 (3 April 2009) § 118.

<sup>203</sup> Murray (n 200), 301.

Everyone has the right to liberty in accordance with Article 6 of the African Charter, which means that no one can be deprived of their freedom except for reasons and conditions previously established by law. This Article requires that the law in question be clear, accessible, and precise, as well as consistent with international standards. When a state has argued that a limitation should be permissible simply because it is regulated in domestic law, the African Commission has stated that such laws must comply with international human rights law as well as the African Charter. Domestic law can further not be applied retrospectively. In line with international law and jurisprudence, there is further an absolute right to be brought before a Court or judicial officer and this right should be protected by legislation.<sup>204</sup>

Article 7 of the African Charter states that everyone has the right to have their cause heard within a reasonable time by an impartial court or tribunal. This Article further establishes that no one can be condemned for an act that did not constitute a legally punishable offense at the time it was committed, since the African Commission holds that the rule of law is undermined if laws are retroactive and people are not aware of the law.<sup>205</sup> This Article does not only apply to criminal procedures and the African Commission has referred to civil procedures a few times.<sup>206</sup> Generally, the African Commission has linked the independence of courts with economic development, sustainable democracy, and respect for the rule of law. Human rights depend on the rule of law, and the rule of law depends on courts and tribunals to resolve disputes free from all pressure and interference.<sup>207</sup>

However, worth mentioning is the way some of the rights protected in the African Charter are phrased. The African Charter is drafted in a way that permits Contracting States to impose extensive restrictions and limitations on the rights protected by the Charter. For example, Article 9, protecting the freedom of expression, and Article 10, protecting the freedom of association, state that individuals enjoy these rights as long as they abide by the law or that they can enjoy the right within the law.<sup>208</sup> These clauses, sometimes called ‘claw-back’ clauses, permit the Contracting States to restrict basic human rights to the maximum extent allowed by domestic law.<sup>209</sup> The African Charter does

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<sup>204</sup> Murray (n 200), 184-190.

<sup>205</sup> Ibid, 242.

<sup>206</sup> Ibid, 205.

<sup>207</sup> Ibid, 565.

<sup>208</sup> Augustine and Brown (n 94), 53-55.

<sup>209</sup> Makau Mutua, ‘The African Human Rights System: A Critical Evaluation’ (2000) Human Development Occasional Papers (1992-2007), HDOCPA-2000-15 6 <<https://hdr.undp.org/system/files/documents/mutua.pdf>> accessed 22 April 2024.

not contain a general derogation clause permitting Contracting States to suspend the enjoyment of certain rights during national emergencies.<sup>210</sup> However, because of the clawback clauses, nothing prevents the Contracting States from denying certain rights during national emergencies through domestic law.<sup>211</sup>

After Africa became independent, some Western academics believed that the new African States needed to become ‘civilized’ by the rule of law. The opinion was that Africa before colonialism was also Africa before the law and that the new states needed to follow the systems of Western legal regimes to become modern. Very little credit was given to the African legal systems that existed before colonialism. Another perspective argued that while a system based on the rule of law was more likely to prevent the collapse of social and political order, it would not solve all inequities. Critics argued that African States suffered from large gaps in legitimacy and that the rule of law alone would not be sufficient without undertaking social transformation. The rule of law could address certain issues, but should not be expected to undo deep societal distortions.<sup>212</sup>

The African Commission often interprets Articles in the African Charter to have a bigger scope than what is explicitly mentioned in the text, and thereby to protect more than what can be read from the text of the Articles.<sup>213</sup> When drafting legislation and proposing legal solutions, Articles 60 and 61 of the African Charter enables the Commission to draw inspiration from international law on human and people’s rights and other general or international conventions to which the AU States are Parties, as well as case law. This enables the African Commission to draw from a vast body of law when interpreting and applying the African Charter, and ensures that the Charter keeps up with international law on human and people’s rights.<sup>214</sup> The African Commission has referred to case law from the United Nations, the European Court, and the Inter-American Court.<sup>215</sup>

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<sup>210</sup> Augustine and Brown (n 94), 55.

<sup>211</sup> Mutua (n 209), 8.

<sup>212</sup> Mutua (n 90), 160-163.

<sup>213</sup> Murray (n 200), 783.

<sup>214</sup> Augustine and Brown (n 94), 57

<sup>215</sup> Murray (n 200), 783.



### 3.3.3 Independent Judiciary and Separation of Powers

To fulfill its obligations under Article 7 of the African Charter, the right to a fair trial, states must take all appropriate measures to make sure that justice is delivered by a competent, independent, and impartial trial.<sup>216</sup> The African Commission has stated that Article 7 entails the right to be heard by a competent court, which is defined as a court that has been given its power and jurisdiction by law.<sup>217</sup>

Article 7 is more commonly referred to in the context of the independence of Courts than Article 26, which imposes a duty on Contracting States to guarantee the independence of the Courts. While Article 7 focuses on the individual right to a fair trial, Article 26 is directed towards the institutions that are essential to give meaning and content to that right. For a court to be independent, the Constitution should guarantee judicial independence and judicial bodies should be created by law. A judiciary shall not be externally influenced, and states must refrain from actions that might threaten the independence of judges. The African Commission has reminded several states of their obligations regarding an independent judiciary.<sup>218</sup>

### 3.3.4 Freedom of Expression

The freedom of expression is regulated in Article 9 of the African Charter. The Article states that every individual has the right to receive information and that every individual has the right to express and disseminate their opinions within the law. The African Commission has established that everyone has the right to receive information held by the state.<sup>219</sup> The right for the individual and the public to receive information might be violated if an individual's right to express themselves on political topics is violated, especially if the individual is a journalist. The freedom of expression further entails the right to seek, receive, and impart information and ideas using any form of communication. state monopoly of public broadcasting is not necessarily in violation of Article 9, but private and community broadcasting should be encouraged. States should further work to enhance the circulation of print media

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<sup>216</sup> *Mr Mamboleo M. Itundamilamba v Democratic Republic of Congo*, African Commission on Human and People's Rights, Communication 302/05 (18 October 2013) § 115.

<sup>217</sup> Murray (n 200), 237.

<sup>218</sup> Ibid, 565-568.

<sup>219</sup> *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, African Commission on Human and People's Rights, Communication 323/06 (12 October 2013) § 250.

in rural areas.<sup>220</sup> In the early years, the African Commission was criticized for not elaborating on the content of the right to freedom of expression. In recent years, however, the Commission has established that freedom of expression is a fundamental right and a cornerstone of democracy.<sup>221</sup> States are obliged to ensure the safety of journalists, media practitioners, and human rights defenders. Freedom of expression is essential to an individual's personal development, political consciousness, and participation in the public affairs of a state. Political speech should be met with a higher degree of tolerance, especially if it is directed towards the Government or Government officials. In a democratic society, expressions regarding public figures should not be seen as insulting.<sup>222</sup>

Article 9 states that freedom of expression is protected as long as it is enjoyed within the law. Some African States have argued that this means that they have complete discretion as to what restrictions on the right to freedom of expression can be imposed under domestic law. However, the African Commission has elaborated on the scope of Article 9, establishing that no one shall be subject to arbitrary interference with their freedom of expression and restrictions on this right must be provided by law, serve a legitimate interest and be necessary in a democratic society. The African Commission has further relied upon jurisprudence from Europe and the Inter-Americas to establish that there is an international consensus on the right to freedom of expression and its restrictions. The 'law' referred to in Article 9 therefore, according to the African Commission, refers to the African Charter and international norms.<sup>223</sup>

### 3.3.5 Freedom of Association and Assembly

Article 10 regulates the freedom of association, and states that every individual has the right to free association in accordance with the law. The African Commission has established in its jurisprudence that any interference with the right to freedom of association must be prescribed by law and meet the conditions listed in Article 27, namely the protection of the rights and freedoms of others, collective security, morality, and collective interests. Political parties fall under the right to freedom of association, and a prohibition of the

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<sup>220</sup> Murray (n 200), 270-277.

<sup>221</sup> *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* (n 219), § 250.

<sup>222</sup> Murray (n 200), 276-282.

<sup>223</sup> *Ibid*, 280.

establishment of political parties and dissolution of political parties has been considered a violation of this right.<sup>224</sup>

Article 11 protects the freedom of assembly. Everyone has the right to assemble freely with others and this right can only be restricted for necessary reasons provided for by law. This right can, for example, be enjoyed through protests or demonstrations. There should be a presumption of the right to free assembly, and restrictions should only be made in exceptional cases. All restrictions must be consistent with the African Charter, and excessive force should not be used if an assembly must be dissolved. The African Commission has further called upon states to ensure the right to assembly during electoral periods and has condemned all use of violence, intimidation, or harassment against citizens in the context of elections.<sup>225</sup> The credibility of an electoral process and the legitimacy of the elected authorities depend on the effective participation of citizens in a fair and transparent election process, and the fundamental freedoms of expression, association, and assembly must be respected.<sup>226</sup>

### 3.3.6 Participation in Elections

Article 13 states that every citizen shall have the right to participate freely in the Government of their state, directly or through freely chosen representatives in accordance with the law. This Article further protects the right to equal access to public service. Article 13 has been criticized for not being as extensive as its equivalents in other human rights instruments.<sup>227</sup> Still, the African Commission has interpreted the Article to include a right to take part in the conduct of Government, either directly or through freely chosen representatives. This includes a right to vote and to be elected at genuine periodic elections, which should be by universal and equal suffrage and shall be held by secret ballot.<sup>228</sup> The African Commission has stated that elections should be under democratic constitutions and under a system of separation of powers which ensures the independence of the judiciary. However, the role of the judiciary in protecting against electoral anomalies has been questioned. The

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<sup>224</sup> Murray (n 200), 294-302.

<sup>225</sup> Ibid, 309-316.

<sup>226</sup> African Commission on Human and People's Rights, 'Resolution on 2015 Elections in Africa' (ACHPR/Res.293, Banjul 2015) EXT.OS/XVII.

<sup>227</sup> Murray (n 200), 344.

<sup>228</sup> *Mouvement ivoirien des droits humains (MIDH) v Côte d'Ivoire*, African Commission on Human and People's Rights, Communication 246/02 (29 July 2008) § 76.

African Commission has interpreted Article 13 to include a right to vote, which includes respect for the result and thereby respect for the free will expressed by the voters. If election results are annulled after a free and fair election has taken place, this constitutes a violation of Article 13. Civil society organizations, human rights defenders, and journalists play an important role in elections and their rights must be respected and protected. States are required to permit and promote election observers, both national and international, in the entire electoral process. The African Commission has further held that coups to take over the power in a state violate Article 13.<sup>229</sup>

In a case against Tanzania, independent candidates were banned from elections following constitutional amendments. The State argued that this was necessary for good governance and to stop anarchy and disorder. The African Court did not agree and argued that Article 13 was clear in its purpose to give citizens the right to participate in the governance of their states directly or through representatives. Nothing in the phrase ‘in accordance with the law’ made the restrictions done by Tanzania justifiable. The African Court further drew upon jurisprudence from the European Court and the Inter-American Court and found that restrictions can only be made in line with Article 27(2) of the African Charter, which states that the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest. The restrictions imposed by Tanzania were neither permissible nor proportionate.<sup>230</sup> Considering limitations on Article 13, the African Commission has held that Governments should avoid restricting rights and take special care regarding rights protected by constitutional or international human rights law.<sup>231</sup>

According to Article 20 of the African Charter, all peoples have the right to self-determination. They have the right to freely determine their political status and pursue their economic and social development in line with a policy they have chosen freely. This Article further serves as a protection for colonized and oppressed peoples to free themselves from domination, and states that all States Parties to the African Charter should be of assistance in this liberation.

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<sup>229</sup> Murray (n 200), 349-357.

<sup>230</sup> *In the Consolidated Matter of Tanganyika Law Society and the Legal and Human Rights Centre, and Reverend Christopher R. Mtikila v United Republic of Tanzania*, App no 009/2011 and 011/2011 (African Court on Human and People’s Rights, 14 June 2013).

<sup>231</sup> Murray (n 200), 359.

Many of the current presidents in Africa came to power through military coups, even though several of them have tried to justify their positions by holding elections afterwards. The African Commission has held that a military coup does not only constitute a violation of the right to political participation but also a violation of the people's right to self-determination. States that want to join the AU are not required to live up to a certain standard when it comes to human rights. However, there is a theoretical possibility that a state can be suspended from the AU or face other sanctions if it violates human rights. The AU has not used this power in practice more than to sanction states after military coups, which indicates that the principle of non-interaction is still predominant in the area. A leader who has come to power under non-democratic circumstances by for example manipulating elections will normally not have to worry about facing any consequences from other Member States.<sup>232</sup>

## 3.4 Analysis

### 3.4.1 Analysis of the Rule of Law

The rule of law is essential for democracy, and therefore, essential for democratic resilience. A resilient democracy must have mechanisms in place for limiting the power of the state to make sure that human rights can never be restricted in unreasonable ways. A strong foundation of the rule of law prevents democratic backsliding, and thus, it is of relevance to analyze how the rule of law is protected in the different human rights instruments.

The rule of law is undoubtedly significant for all the instruments and the Courts have referred to and developed the concept similarly. The European Convention refers explicitly to the rule of law in its preamble, and the Convention is built on the presumption that the Contracting States have a common idea of what the rule of law is. This is once again an example of the European Convention being adapted to the consensus among Contracting States, which can be both positive and negative from a perspective of democratic resilience. Consensus understandably creates a strong foundation to build upon, and paints a clear picture of what the rule of law is and what must be protected. However, the resilience depends on Contracting States maintaining the common objective of protecting the rule of law. If the European consensus on the

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<sup>232</sup> Heyns and Killander (n 92), 467-469.

rule of law changes, it would be disastrous for the protection of democratic resilience if the European Court takes the opinions of Contracting States into consideration.

The European Court has stated that the European Convention must maintain subsidiary and demand a minimum rule of law standard. From a perspective of democratic resilience, as long as the European Convention continues to protect the aspect of democratic resilience, it is mainly relevant that the Court does interfere in situations where the rule of law is threatened, not that it takes on a subsidiary role. Subsidiarity can of course have relevance for other reasons, but when discussing democratic resilience, what matters is that the Court helps Contracting States that experience democratic backsliding in relation to the rule of law.

The American Convention and the African Charter do not have the same objective of political consensus among the Contracting States as the European Convention, but they have also not developed the concept of the rule of law as much. Both instruments have emphasized the limitation of power in relation to the rule of law. All three instruments contain similar provisions that are of importance for the rule of law, such as the right to liberty and the prohibition of retroactive laws. Individuals or Contracting States can apply to supervisory bodies if any of these rights protecting the rule of law are violated. Thus, the instruments provide a strong foundation for protecting the rule of law.

The European Convention holds that permitted restrictions to rights and freedoms shall not be applied for any purpose other than those for which they are prescribed. This is an important provision from the perspective of democratic resilience since it hinders those in power from abusing the human rights listed in the European Convention. The American Convention contains a similar provision that states that restrictions must be established through laws enacted for reasons of general interest. The African Charter does not include a clear equivalent to these provisions. According to the wording of the African Charter, the Contracting States can make restrictions on rights protected by the Charter by denying these rights through domestic law. However, the African Commission has stated that such laws must comply with international human rights law as well as the African Charter. This implies that the underlying principles are similar to the European and American Convention, and from a perspective of democratic resilience, it is important that the Commission interpreted the rights in this way. However, it becomes more difficult for Contracting States to know how to act when the wording of a provision is different

from how it should be interpreted, and there is an increasing risk that Contracting States can get away with violations when it is more difficult to determine whether a restriction is lawful.

Both the European Court and the Inter-American Court are in some ways considerate to the Contracting States in their judgments, the European Court because of the margin of appreciation, and the Inter-American Court has been criticized for being considerate to states which contribute with funding to the Court. This can be dangerous if the consensus among Contracting States changes to believing that democracy is something bad. If the Courts consider the states' standpoints in their judgments, this could mean that democratic resilience fully relies on the regional consensus that democracy is the best system of governance. In this aspect, the human rights systems can easily turn to not protecting democratic resilience at all and the systems are not resilient enough.

Judgements are sometimes a balancing act between the law and politics. Regional instruments are fragile in the sense that the Contracting States can choose to leave or denounce the instrument if they are unhappy with for example judgments or supervision and feel like their sovereignty is threatened. For example, in the American system, states have reacted by denouncing the American Convention after being examined by the Inter-American Commission. Therefore, regional instruments and their supervisory bodies might have to choose between legally accurate judgments and maintaining the trust of all Contracting States. Denouncing a human rights instrument will of course have dire consequences for the democratic resilience in the state in question, since its citizens will no longer have access to the extra safety net for democracy that was provided by the regional instrument. In this context, it can be beneficial for the democratic resilience of Contracting States that supervisory bodies take into account the specific circumstances of a certain state. However, this might lead to a watered-down system in the long run and less positive spill-over effects. Furthermore, if people believe that the regional instrument will not protect them from human rights violations, this will have consequences for the population's trust in the system. For the human rights system itself to be resilient, it is important to adhere to the human rights protected in the instruments and not let specific states have too much impact.

The Inter-American Court is sometimes criticized for its expansive interpretations of the Convention. The African Commission also commonly interprets provisions of the African Charter to have a bigger scope than is explicitly

stated. This can be valuable if they interpret provisions in line with democratic resilience, and it can further be helpful to be able to help Contracting States withstand different and unforeseen threats to their democratic institutions. However, it can be dangerous for a supervisory body to have too much discretion since it might start interpreting provisions more narrowly instead. This could lead to Contracting States not being able to receive proper help from the supervisory body during times of democratic backsliding. No matter how the supervisory body interprets the provisions, it is important that the system is not watered down and that citizens have trust in it. In that sense, it would be beneficial to have clear guidelines on interpretation for the supervisory body to follow.

The rule of law has been interpreted similarly in all three regions, but there must be room for cultural differences. The protection of the rule of law is comparable in the different instruments and they all provide a strong foundation for the protection of the rule of law. From the perspective of democratic resilience, the balancing act between interfering and not interfering in the domestic affairs of Contracting States is not the most relevant aspect. What is important is that the regional human rights system does interfere when needed and that the supervisory bodies do not falter when it comes to choosing between protecting the rule of law or satisfying Contracting States.

### 3.4.2 Analysis of the Protection of Other Democratic Institutions

Democracy is mentioned in the Preambles of the European and American Conventions and its importance for the instruments and the interdependence between democracy and human rights is evident. The European Convention once again emphasizes the idea of a common view among the Contracting States, and the purpose of the European Convention was to maintain European democratic values. The American Convention has a similar focus with the purpose of defending democracy based on the provisions of the Convention. Maintaining and defending democracy captures the very essence of democratic resilience. The fact that these purposes enshrine the instruments implies that both instruments were designed to protect the principles of democratic resilience. Actual provisions protecting democracy would evidently make the intent to protect democratic resilience even more clear, but mentioning democracy in the Preamble does at least influence the interpretation of the provisions listed in the instruments. Since democracy is not mentioned



in the Preamble of the African Charter, the intent to interpret its provisions from a perspective of democracy is not as obvious. However, the African Commission and the African Court have stated that many provisions should be interpreted similarly to the provisions in the European and American Conventions. It is, nevertheless, evident that taking a strong stance for democracy was seen as too politically risky in all the instruments.

Both the European Convention and the American Convention are only compatible with forms of democracy, even though the form of democracy is not defined. It is understandable to not want to interfere excessively with how the Contracting States structure their political systems, especially since the human rights systems want the Contracting States to be able to guarantee a more extensive protection of rights than what is protected in human rights instruments. A restricted definition of democracy could lead to Contracting States only guaranteeing a minimum right to democracy. There is further always the hypothetical scenario that another form of government is created and provisions about democracy become outdated. The American Convention includes a provision that establishes that no other provision of the Convention shall be interpreted to preclude other rights from representative democracy as a form of government, which clearly shows that The American Convention is not intended to protect minimum rights. The European Convention contains a provision to make sure totalitarian movements cannot use human rights as a way of furthering their cause, which is helpful for states to remain democratic. However, from a perspective of democratic resilience, it would be helpful to include clearer regulations about what democracy implies and what is expected from the Contracting States. This would make it easier to prevent potential abuse by state actors and hold states accountable for democratic backsliding.

The African Charter does not favor any political system over others and states have the sovereign right to choose their form of government. This is understandable because of the context that the African Charter emerged from, and when looking at the interpretations of the Charter made by the African Commission and Court it is clear that there is a preference for democracy. Furthermore, the right to self-determination protected in the African Charter is important in this context. It can be argued that self-determination presupposes democracy, and while this is not an obvious interpretation, it is worth mentioning that this right could be read as a protection of democracy. This interpretation is further supported by the fact that the African Commission has held that a military coup can constitute a violation of the right to self-determination. From a perspective of democratic resilience, however, the lack of

clarity makes it more difficult to hold Contracting States accountable for democratic backsliding in the African human rights system. It is not as clear that democratic values are expected from states and certain aspects of democratic backsliding might not be in violation of the Charter.

All the instruments have stressed the importance of freedom of association in relation to political parties, even though the case law from the European and African Courts has been the most evident on this issue. The instruments further share similar views on the importance of the freedom of assembly when it comes to demonstrations and protests, and protect the separation of powers by emphasizing the independence of the judiciary.

All three instruments protect the freedom of expression and have underlined that this right is foundational for a democratic society. The freedom of expression has a wide scope of protection in the American Convention, and it is problematic that the Inter-American Court has started to allow more constraints on this right. The Inter-American Court has justified this by referring to the European Court, and as has been discussed in this thesis, the European human rights system is heavily influenced by the politics of the Contracting States. It is important that a human rights system can stand strong and protect human rights as they are expressed in the instruments even when challenged by opposing political opinions. Otherwise, the human rights system becomes fragile and will have a hard time protecting democratic resilience during times of unrest and democratic backsliding in the Contracting States.

Both the American Convention and the African Charter include a right to participate in elections in their main texts. The provision in the African Charter has been criticized for not being as extensive as its equivalents in other human rights instruments, but it is nevertheless included in the Charter and has been interpreted extensively. During the negotiations of the European Convention, the provision demanding respect for the fundamental principles of democracy was seen as too controversial and to not fall within the normal scope of human rights. This is once again an example of the European system trying to please all Contracting States. It is further interesting that the provision was criticized for not being based on the traditional content of human rights when democracy is said to be of such importance for the Convention. This makes the stance for democracy seem like a political grandstanding, and it appears hypocritical to argue that democracy is one of the very purposes of the Convention but still find it to fall outside of its scope. The right to participate in elections is regulated in the first protocol to the European Convention, which is

ratified by almost all Contracting States. However, the fact that it is not included in the original text of the Convention gives the impression that it is less important than the other rights, and the provision becomes less known among citizens.

Human rights systems must occasionally do things that make the Contracting States feel uncomfortable, but that will have a positive outcome from the perspective of democratic resilience. For example, when the Inter-American Commission monitored Peru, the report they released was one of the reasons why an authoritarian leader resigned. To properly protect democratic resilience, the human rights systems must impose requirements on the Contracting States and not be afraid to intervene to help states recover from democratic backsliding. For example, the African Commission has spoken against military coups, but the AU has generally not done anything to interfere with the domestic affairs of its Member States even during such serious situations. Here, the African human rights system could do what the AU has not done and make further demands on the Contracting States. As seen in Peru, sometimes putting pressure on a state through a report can be enough. Of course, there is always the risk of Contracting States choosing to leave the human rights system when questioned. This is undoubtedly dangerous for the protection of human rights in that particular state, but from a perspective of democratic resilience, it is impossible to build a system where the Contracting States can use the human rights instrument as a safety net for democratic backsliding if the human rights system never intervenes in domestic affairs. It is further important that other states are willing to intervene as well, to create an environment where a state will be held accountable for democratic backsliding and the positive spill-over effects are as extensive as possible.

## 4 Concluding Remarks

Analyzing regional human rights instruments from a perspective of democratic resilience provides valuable insights into their potential role as safety mechanisms for Contracting States experiencing democratic breakdown. To protect democratic resilience, the instruments must have mechanisms in place for protecting both onset resilience, meaning helping the Contracting States maintain their democracy, and breakdown resilience, meaning being able to help Contracting States recover from democratic backsliding.

In theory, the regional human rights instruments protect democratic resilience to a great extent. They protect the human rights most relevant for defending democratic resilience, have supervisory bodies to ensure compliance, and have established mechanisms for supporting and advising the Contracting States. Thus, the main issue is not that the instruments lack the protection of democracy. However, none of the instruments reach their full potential when it comes to protecting democratic resilience in the Contracting States in practice. Therefore, this thesis concludes that all the regional human rights instruments protect democratic resilience to some extent, but that there is still a long way to go before the instruments properly work as safety mechanisms for democratic resilience. A functioning supervisory mechanism and a way of ensuring enforcement is vital for the protection of democratic resilience, and although the instruments have mechanisms in place, this area is lacking. States further tend to refrain from intervening in the domestic affairs of other states, and although state sovereignty is an important concept in many aspects, sovereignty is not essential from the perspective of democratic resilience. It is more important that human rights systems and their Contracting States are prepared to intervene when a state is experiencing democratic backsliding. Otherwise, the human rights instruments will never work as the safety nets for democracy they have the potential to be.

The drafters of the instruments found it politically unwise to take a strong stance for democracy. Democracy was seen as something too fragile and vague to regulate, which does not indicate protection of democratic resilience. If the instruments do not provide a good example of protecting democracy, they cannot place higher expectations on the Contracting States. For the human rights instruments to provide real protection of democratic resilience, they would have to take a stronger stance in favor of democracy. It can undeniably be discussed whether democracy falls outside the scope of a human

rights instrument, but from the perspective of democratic resilience, a provision protecting democracy would be beneficial.

Human rights instruments must further be resilient in their decisions on issues concerning democracy. If the human rights system is influenced by the opinions of Contracting States, there is always the risk that the common view of the Contracting States changes. The Contracting States' opinions on democracy cannot be decisive for the human rights instruments if they are to safeguard democratic resilience. The human rights systems must be resilient in themselves and be able to stand against such political fluctuations in their Contracting States.

It is relevant to keep the history of the human rights instruments in mind since it can explain a lot about how they operate. The European Convention had the most apparent focus on uniting states during its establishment, which created a promising foundation for protecting democratic resilience. Nevertheless, it would be unreasonable to expect the same purpose from the American Convention and the African Charter because of the different environments the instruments emerged from. The instruments are living and although their purpose can provide insight into how they operate, their protection of democratic resilience can change and develop over time.

The purpose of this thesis has been to analyze the human rights instruments from a perspective of democratic resilience. This analysis can bring insight into how the different human rights instruments can help Contracting States maintain their democracies or help Contracting States experiencing democratic backsliding to recover. The interaction and interdependency of democracy and human rights remain fundamentally important for ensuring resilient democracies in evolving societies.

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