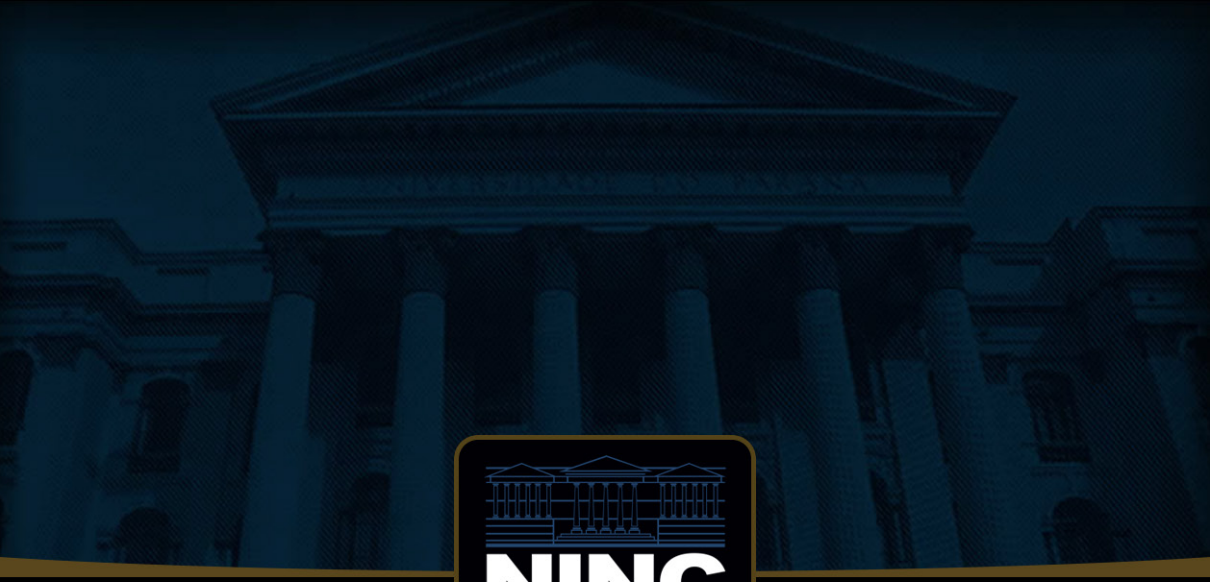

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The principle of proportionality under democratic scrutiny: towards a comprehensive method for the analysis of human rights restrictions

O princípio da proporcionalidade sob o crivo democrático: por uma metodologia abrangente de análise das restrições a direitos fundamentais

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Abstract

This paper aims to answer the question of how democracy is and should be considered in the analysis of limitations on fundamental rights. The case law is based on the I/A Court HR and ECtHR decisions, consequently considering the ACHR and the ECHR. In particular, the paper focuses on the interpretation of the "necessary in a democratic society" clause, a requirement stated in both the ECHR and the ACHR. It proposes to add a first step to the analysis of human rights limitations prior to the proportionality test. The paper builds this step on solid theoretical foundations, in attendance of some of the critics of the proportionality exam and based on theories that put coherence in legal systems at the centre. Furthermore, the research aims to demonstrate the need for this stage through the connection between the effectiveness

Resumo

O presente artigo tem por objetivo responder à seguinte indagação: de que forma a democracia é — e deve ser — considerada na análise das limitações impostas aos direitos fundamentais. O estudo se fundamenta na jurisprudência da Corte Interamericana de Direitos Humanos (Corte IDH) e da Corte Europeia de Direitos Humanos (CEDH), considerando, por conseguinte, a Convenção Americana sobre Direitos Humanos (CADH) e a Convenção Europeia de Direitos Humanos (CEDH). Em especial, o trabalho concentra-se na interpretação da cláusula "necessária em uma sociedade democrática", exigência prevista em ambos os tratados internacionais. Propõe-se, nesse contexto, a introdução de uma etapa preliminar à aplicação do teste de proporcionalidade na análise das restrições a direitos humanos. Essa etapa é construída sobre bases teóricas consistentes,

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of rights and the consistent and coherent application of the current human rights treaties.

considerando críticas já formuladas ao exame de proporcionalidade e apoiando-se em teorias jurídicas que conferem centralidade à coerência dos sistemas normativos. Ademais, a pesquisa busca demonstrar a necessidade dessa fase introdutória a partir da vinculação entre a efetividade dos direitos e a aplicação consistente e coerente dos tratados internacionais de direitos humanos em vigor.

Keywords: democracy, democratic society, human rights, restrictions, proportionality.

Palavras-chave: *democracia; sociedade democrática; direitos humanos; restrições; proporcionalidade.*

CONTENTS

1. INTRODUCTION

The constitutionalism evolution brought about, among other issues, the consideration of human rights norms as principles -as opposed to rules- and the consequent more significant role of the judges in their application.[1] Notwithstanding the criticism that can be made on the conception of principles as optimization requirements,[2] based on the preceding, the control of fundamental rights restrictions has focused on compliance with some conditions, in which the principle of proportionality is the centre of that theory.

Consequently, the proportionality principle is currently being applied by several tribunals and courts, not only by the Federal Constitutional Court of Germany.[3] Both

[1] FERRAJOLI, Luigi. Pasado y futuro del Estado de Derecho. In: CARBONELL, Miguel (Org.) (2009), **Neoconstitucionalismo(s)**, Madrid: Trotta, 2008, p. 13-29.

[2] POSCHER, Ralf. The Principle Theory: How Many Theories and What is Their Merit?. In: KLATT, Matthias. **Institutionalizing reason. perspectives on the legal philosophy of Robert Alexy**, Great Britain, Oxford University Press, 2009, p. 218-247.

[3] In this sense, Barak shows the expansion of proportionality test from Germany (1985) and Europe regional courts (1970 and 1976), to European countries (for instance, Hungary, 1989, Portugal 1982, Russia, 1993, Spain 1995, Poland, 1997, and Belgium, 2000), Canada (1985), South Africa (1995), Israel (1995), New Zealand and Australia (1992), Hong Kong (1999), India (2001), and South America (Colombia, 1992, Brazil 1997, Perú, 2005). *See*

the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (I/A Court HR) have employed this test, founding it normatively on the European Convention on Human Rights (ECHR) and the American Convention on Human Rights (ACHR), as they state that the limits of the rights must be "necessary in a democratic society".[4] Therefore, the proportionality test is based on the interpretation of this statement[5], and its application has positively affected the protection of fundamental rights.[6]

However, the theory of the principle of proportionality faces some criticism. One of the points, little addressed but which raises an extreme interest in this subject, is the absence of an analysis of the aims that are invoked by the authorities to justify the limitations. The principle of proportionality focuses on the means, and it will only warn of the illegitimacy of the aims if the Constitution prohibits those. The preceding is generally in accordance with the Basic Law for the Federal Republic of Germany but not with other constitutional systems that establish certain purposes to limit certain rights. Taking this into consideration, the analysis of the legitimate aim would be an additional step to carry out together with the proportionality test.

Despite the aforementioned, from my point of view, the method usually used to study the cases in which human rights are restricted is still incomplete. Both the inalienable core of fundamental rights, rarely relevant in practice, and democracy are not given enough attention in such cases.

In this sense, the main purpose of this research is to deal with the relationship between rights restrictions and democracy and so with the answer to the question of how democracy is and should be considered in the analysis of fundamental rights limitations. The empirical and case law analysis is based on the ACHR and the ECHR, considering consequently the decisions of the I/A Court HR and the ECtHR.

The central hypothesis of this research is that an initial stage in the process, prior to the principle of proportionality, is needed. Three concepts should be central in that first step: democracy, the essential core of the rights, and the legitimate aim. Those three points, which in the developed theory have been little addressed until now,[7] could, in

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BARAK, Aharon. **Proportionality. Constitutional Rights and their limitations**. New York: Cambridge University Press, 2012, p. 182.
We could even more update that chart with I/A Court of HR and, by it, to other American countries, such as Uruguay (since 2016).

4 For example, Articles 6, 8, 9, 10, and 11 of the ECHR and Articles 15, 16, 22 and 32 of the ACHR.

5 *See*, e.g.: Handyside v. The United Kingdom, 49, ECtHR (7 December 1976); Dudgeon v. The United Kingdom, ECtHR (22 October 1981), and Castañeda Gutman Vs. Mexico, I/A Court HR, C, 184, (6 August 2008).

6 POSCHER, Ralf. Proportionality and the Bindingness of fundamental rights. **MPI-CSL Working Papers**, Germany, v. 2, p. 1-26, 2021.

7 The point of the democracy test is briefly mentioned by Casal, but little analysed. CASAL, Jesús María. Condiciones para la limitación o restricción de Derechos Fundamentales, **Revista de Derecho**, Montevideo, Amalio Fernández-Universidad Católica del Uruguay, 3, p. 107-136, 2002; La cláusula de la sociedad democrática y la restricción de derechos humanos en el sistema interamericano. In: REY, Fernando (Dir.). **Los derechos en Latinoamérica: tendencias juridiciales recientes**. Madrid, Universidad Complutense, 2011, p. 417-437; and

my opinion, complete the method, and this will both represent an improvement in the effectiveness of rights and a consistent and coherent application of the current legal systems.

In order to demonstrate this hypothesis, the structure of this research will be as follows. First, I will question whether democracy is part of the analysis that is currently carried out to resolve cases in which human rights are limited and how it should be considered (Section 2). Secondly, I will propose a practical and complete method to analyse the fundamental rights restrictions foreseeing an initial stage prior to the proportionality test and giving a solid theoretical foundation for it (Section 3). Finally, I will demonstrate the need of this stage through the connection with both the effectiveness of rights and the consistent and coherent application of the current human rights treaties (Section 4).

2. AN ANALYSIS OF THE RIGHTS RESTRICTIONS UNDER THE TREATIES: A LITERAL SENSE NON-CONTEMPLATED WHEN APPLYING THE CLAUSE «NECESSARY IN A DEMOCRATIC SOCIETY»

As a first step in this research, I propose to consider the literal sense of the treaty's clauses that allow human rights restrictions. I will not consider all clauses, but those that relate to general restrictions, -clauses which apply to all rights restrictions-, and those that are particularly connected with democracy.

As clarified in the introduction, this analysis will only consider the ACHR and the ECHR. In this sense, further research could be conducted regarding other regional instruments and constitutional systems.[8] However, even under the scope proposed, a clarification should be made. In cases of States that are part of the respective regional human rights protection system, the ECHR or the ACHR has an internal effect and direct application. Consequently, this research should apply to internal analysis of human rights restrictions, even with particularities.

I will start studying the allowed restrictions under these treaties, referring mainly to the requirement of being "necessary in a democratic society" (Section 2.1). Then, I will follow up with how the I/A Court HR and the ECtHR defined a "democratic society" under the treaties (Section 2.2). Finally, I will dive deep into the method applied to

Los derechos fundamentales y sus restricciones. Bogotá, Temis y Fundación KAS, 2020, p. 175-176 and 370 et seq.

[8] A complete analysis should also contemplate the Charter of Fundamental Rights of the European Union. The conclusions of this research would apply to that Charter too, but I will not consider it in this paper. I will not even analyse the Universal Declaration of Human Rights, or the International Covenant on Civil and Political Rights, or on Economic, Social and Cultural Rights, although these instruments also include the clause examined in this paper.

analyse human rights restrictions and demonstrate that the literal sense of the clause "necessary in a democratic society" is not sufficiently attended (Section 2.3).

2.1. THE ECHR AND THE ACHR UNDER STUDY: THE RESTRICTION REQUIREMENT OF BEING "NECESSARY IN A DEMOCRATIC SOCIETY"

The ECHR does not have, as the ACHR, a general clause for human rights limitations. In this sense, to study the restrictions allowed under the ECHR, we should consider the regulations applicable to each right.

However, the requirements for human rights restrictions in each right's regulation are almost the same or have some points of connection. In this sense, all restrictions should be established by law and follow particular aims. Considering for this analysis the ones related to democracy, we should note that Articles 8 (right to respect for private and family life), 9 (freedom of thought, conscience, and religion), 10 (freedom of expression), and 11 (freedom of assembly and association) refers that the restrictions should be "necessary in a democratic society."[9]

As said, in ACHR Article 32 applies as a rule for rights' limitations and establishes that: "the rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society."

Additionally, and more particularly, the term "necessary in a democratic society" appears, with connection to human right's restrictions, in the following cases: article 15 (right of assembly), Article 16 (freedom of association), and Article 22 (freedom of movement and residence).

As shown, the requirement that the limit should be necessary in a democratic society is not contemplated for the same rights in both treaties. For example, under the ECHR is required for freedom of expression restrictions (Article 10 ECHR), but not in the ACHR (Article 13 ACHR). However, this does not signify that the requirement does not apply for the rights that not mention it expressly. The I/A Court HR stated that the clause "necessary in a democratic society" should apply for restrictions to all rights.[10] In one of the most relevant Advisory Opinions with connection to freedom of expression, the Court ruled that:

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[9] The clause "necessary in a democratic society" is also referred in Article 2 of the Protocol 4 to the ECHR (Freedom of movement). In addition, the term "democratic society" with reference to the legitimate aim is considered in Article 6 of the ECHR (Right to a fair trial).

[10] Case of Castañeda Gutman v. Mexico, 185 I/A Court H.R., C, 184 (6 August 2008). In the same way, the ECtHR applies the requirement (as source for proportionality test), in rights that not contemplate the "necessary in a democratic society" requirement (See, e.g., FASSBENDER, Bardo. El principio de proporcionalidad en la jurisprudencia del Tribunal Europeo de Derechos Humanos, **Cuadernos de Derecho Público**, España, v. 5, p. 51-73, 1998, p. 52-53, and BARNES, Javier. El principio de proporcionalidad. Estudio Preliminar. *Cuadernos de Derecho Público*, España, v. 5, p. 15-50, 1998, p. 22-23.

> *It is true that the European Convention uses the expression "necessary in a democratic society", while Article 13 of the American Convention omits that phrase. This difference in wording loses its significance, however, once it is recognized that the European Convention contains no clause comparable to Article 29 of the American Convention, which lays down guidelines for the interpretation of the Convention and prohibits the interpretation of any provision of the treaty "precluding other rights and guarantees... derived from representative democracy as a form of government". The Court wishes to emphasize, furthermore, that Article 29(d) bars interpretations of the Convention "excluding or limiting the effect that the American Declaration of the Rights and Duties of Man... may have", which instrument is recognized as forming part of the normative system for the OAS Member States in Article 1(2) of the Commission's Statute. Article XXVIII of the American Declaration of the Rights and Duties of Man reads as follows: The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy. The just demands of democracy must consequently guide the interpretation of the Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions.*[11]

I question the meaning of the "necessary in a democratic society" clause. To that end, we shall apply interpretation methods and consider the wording, context, and purpose of the inclusion.

Garibaldi's paper issued in 1984 is magisterial, as it introduces both the historical founding and the clarification for some of the ideas I want to demonstrate regarding the current absence of application of the literal sense of the considered clause.

Garibaldi studied the "necessary in a democratic society" clause, based on the history of the debate under the Universal Declaration of Human Rights (UDHR).[12] He considered what was said by representatives of countries that ask for it, by the ones that were opposites, and the final wording[13]. I will not enter into all details, but summarizing the point, he explained the reasons why this clause could, in theory, be interpreted in three ways:[14] (a) as an attribute of the aim (the restriction should be necessary for the safeguard of the national security or the public order "in a democratic society"); (b) with

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[11] Advisory Opinion OC-5/85, 44 I/A Court H.R., A, 5 (13 November 1985).

[12] For historical references also: CASAL, Jesús María. **Los derechos fundamentales y sus restricciones**. Bogotá, Temis y Fundación KAS, 2020. p. 385 et seq.

[13] GARIBALDI, Oscar M. On the ideological content of human rights instruments: The clause "in a democratic society", 23-68, In: BUERGENTHAL, T (Ed.). **Contemporary issues in international law.** Germany: N.P. Engel, 1984.

[14] We can also combine way (a) and (b) and so apply it to the interpretation of the aim and also to the requirement of the means. In this position: CASAL, Jesús María. **Los derechos fundamentales y sus restricciones**. Bogotá, Temis y Fundación KAS, 2020. p. 395-397, 389-390, and 422-423.

connection to the word "necessary" and so with relation to the measure;[15] or (c) as an autonomous clause, in relation to the term "limitations", and, so, an additional requirement that should be added separately of the aims and the means.[16]

It is important to precise that all the States representative's opinions referred in Garibaldi's paper wanted this clause considering an additional requirement to human right's restrictions.[17] So, as this author concluded, "that clause was introduced, plainly, to make it more difficult for States to restrict certain rights."[18] In my opinion, this is the central idea of Garibaldi's position, that support the third interpretation described, and the one I adopt in this research.[19]

Why should we consider the clause as an autonomous requirement (position "c" above) and dismiss the others? Garibaldi gave the following reason: both the first and the second positions cause that the overall purpose of the clause will not be realized at all. In contrast, the third one is the only one that can give sense to the express inclusion of the words and follow the purpose. Garibaldi said:

> *The overall purpose of the clause "in a democratic society" is best served, in my view, by interpreting that clause as providing for a standard of legitimacy that the limitation itself must meet. In other words, the function of that clause is to create an independent, additional condition for the validity of a limitation, i.e., that limitation, or, more precisely, the content of the limitation, be consistent with the principles of a democratic society.*[20]

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[15] This interpretation could justify the current application with only connection to the means and to the proportionality principle. But this interpretation excludes the third one, supported in this paper, and so, in my opinion, causes the irrelevance of the literal sense of the clause.

[16] Garibaldi created this third position in the following words: "I suggest that the modifier should be interpreted as referring to the word 'limitations'". *See* GARIBALDI, Oscar M. On the ideological content of human rights instruments: The clause "in a democratic society", 23-68, In: BUERGENTHAL, T (Ed.). **Contemporary issues in international law.** Germany: N.P. Engel, 1984. p. 40.

[17] It is interesting that representatives of Uruguay had an important role in discussion the clause in the UDHR and considered the "democratic society" requirement related "with a society based on respect for the rights and freedoms of others" (Statement done by Uruguayan representative Ciasullo, U.N. Doc. E/CN.4/SR.235, at 9 (1951) cited by: GARIBALDI, Oscar M. On the ideological content of human rights instruments: The clause "in a democratic society", 23-68, In: BUERGENTHAL, T (Ed.). **Contemporary issues in international law.** Germany: N.P. Engel, 1984. p. 41.

[18] GARIBALDI, Oscar M. On the ideological content of human rights instruments: The clause "in a democratic society", 23-68, In: BUERGENTHAL, T (Ed.). **Contemporary issues in international law.** Germany: N.P. Engel, 1984. p. 40.

[19] The European Commission of Human Rights adopted this position in the report of the case Handyside vs. United Kingdom, 30 September 1975, 145-46, as was cited by GARIBALDI, Oscar M. On the ideological content of human rights instruments: The clause "in a democratic society", 23-68, In: BUERGENTHAL, T (Ed.). **Contemporary issues in international law.** Germany: N.P. Engel, 1984. p. 37.

[20] GARIBALDI, Oscar M. On the ideological content of human rights instruments: The clause "in a democratic society", 23-68, In: BUERGENTHAL, T (Ed.). **Contemporary issues in international law.** Germany: N.P. Engel, 1984. p. 40.

Additionally, nowadays, an extra argument should be attended to adopt this third position. From my point of view, when interpreting the aims or studying the means of a limitation, democracy is in some way already considered. So, taking this as a certainty, the clause will not produce any effect if we adopt positions (a) or (b) above. In those, if we erase the term "in a democratic society", we will reach out with the same result. I will explain it following.

When we interpret the aim, which is usually expressed as an indeterminate juridical concept, such as "public order" or "national security", it is clear that we must consider public order *in a democratic society* or national security *in the context of a democracy.*[21] In this sense, the interpretation of these aims will never make reach a conclusion separately from the object and purpose of the treaty (Article 31.1 of the Viena Convention on the Law of Treaties).[22] Therefore, the unique ending is that "public order" or "national security" under those treaties means a public order or the national security *in a democratic society*.[23]

In the same way, about the relation of democracy with the means, in my opinion it is almost evident that the measure that a State uses for a right restriction should be suitable in a democratic society. I will explain later that when analysing restrictions on rights, both means and aims may have a narrower connection. The democracy already considered in the interpretation of the aims, will have an impact on the proportionality analysis of the means, as we will attend to the suitability or the necessity in relation to an aim that is a democratic one. Furthermore, when analysing the mean and, mainly, in the proportionality in the narrow sense criterion, in some way the effect on democracy will be attended. So, the weight of the interference should be higher in case of existence of a democratic argument. This occurs, for example, with freedom of expression limitations that, in general, require stronger justifications for a restriction because of its relationship with democracy.[24]

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[21] For further reference to this position concerning the meaning of "public order" see GARAT, María Paula**. Los derechos fundamentales ante el orden público**. España: Tirant lo Blanch, 2020. In the same way, Barak said that if the purpose of a law that limits a right is contrary to the democratic values of the State, this could not be considered a "proper" purpose. *See* BARAK, Aharon. **Proportionality. Constitutional Rights and their limitations**. New York: Cambridge University Press, 2012. p. 251.

[22] Article 31.1 of the Viena Convention on the Law of Treaties states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Additionally, I take particular care of the reservation clause under this Treaty, in which it is said that even a reservation will not be valid if it is "incompatible with the object and purpose of the treaty" (Article 19).

[23] To enforce this conclusion, the ECtHR has held that "any interpretation of the rights and freedoms guaranteed has to be consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a 'democratic society'". See Fedotova and others v. Russia, 179 ECtHR, (17 January 2023).

[24] See, e.g.: Socialist Party and Others Vs. Turkey, 41, ECtHR (25 May 1998), Refah Partisi (The Welfare Party) and others Vs. Turkey, 88, ECtHR (13 February 2003), Advisory Opinion OC-5/85 70 I/A Court HR A,5 (13 November

So, finally, which is the significance of "necessary in a democratic society"?

Three reasons support that the clause is an independent requirement for human rights restrictions that should be added to the aims and means examination: (a) the purpose, that will not be totally reached in case we consider it only as part of the aims and the means interpretation; (b) the evident thing -nowadays, but not necessary in the past- that democracy, as one of the principal objects and aims protected under the considered treaties, will naturally be introduced in the aims and means interpretation and analysis, so in this position, the inclusion of the clause will not cause any different consequence; and (c) the literal sense of the words included.

I will make an additional consideration with reference to the last argument. When considering an interpretation of a treaty clause, it is important to observe -and intend to preserve-, the words expressly included, so the literal sense.[25] Let us analyse Article 11.2 of the ECHR as an example concerning the right to assembly. It states:

> *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.*[26]

If we consider a literal sense of the clause, we shall observe that it establishes three different requirements for the restrictions, in the following order: (1) prescribed by law, (2) necessary in a democratic society, and (3) in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

In a literal sense, the phrase "necessary in a democratic society" is an autonomous request. When arriving at this stage, we should ask what it signifies. For part of the doctrine, this will be only connected with a proportionality test. However, in my opinion, this is not enough. By the reasons explained in this Section, I demonstrated that "necessary in a democratic society" not only refers to the means and their proportionality, but it should also have an additional consideration.

13, 1985); Ricardo Canese v. Paraguay, 82, I/A Court HR C, 111 (31 August 2004); and Herrera Espinoza et al. v. Ecuador, 112, I/A Court HR, C, 316 (1 September 2016).

[25] Article 31 of the Viena Convention on the Law of Treaties already mentioned.

[26] The wording is the same as in Article 15 of the ACHR. Also, I should clarify that in some of the clauses analysed (such as Article 10 of the ECHR or Article 16 of the ACHR) there is a coma prior to the aims ("The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security…"). In my point of view, the existence or not of the coma does not change the meaning of the clause. To support this, I apply a context method of interpretation, by which it will not be coherent that the clause has one meaning in Article 15 ACHR and other in Article 16 ACHR only because of the coma.

2.2. The conception of the "democratic society" for the I/A Court HR and the ECtHR

Following the reasoning, when studying the meaning of "necessary in a democratic society," we may consider what constitutes a "democratic society" in terms of the ACHR and the ECHR. As the treaties do not define it, I will additionally examine some decisions issued by the I/A Court HR and the ECtHR.

The ACHR and the ECHR introduce the importance of democracy under their preambles. In the ACHR, the States reaffirm the intention to consolidate a system of personal liberty and social justice based on respect for the essential rights of the persons "within the framework of democratic institutions" (Preamble, ACHR). The ECHR goes more deeply and states that fundamental freedoms are the foundation of justice and peace and are best maintained both "by an effective political democracy" and by the "observance of the Human Rights upon which they depend" (Preamble, ECHR).

As said, if we want to know what a "democratic society" is in the context of those treaties, the preambles do not give us enough information. However, starting from those preambles, the ECtHR and the I/A Court HR have extended their jurisprudence on the principles composing a democracy. Joining the analysis of the case law of both tribunals, the ten main statements done about the "democratic society" are the following:

i. The ECHR aims to promote and maintain the ideals and values of a democratic society.[27] Furthermore, the ECtHR held that "democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it."[28]
ii. ECtHR stated that democracy does not simply mean that the majority's views must always prevail.[29] In the same way, I/A Court HR established that the democratic process requires a limitation of majority powers to protect minorities,[30] and that "particularly in cases of serious violations of nonrevocable norms of International Law, the protection of human rights constitutes an impassable limit to the rule of the majority."[31]
iii. For the ECtHR, a democracy implies the following fundamental principles: pluralism, tolerance, and broadmindedness.[32]

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27 Gorzelik and Others v. Poland, 89, ECtHR (17 February 2004); Fedotova and others v. Russia, 179, ECtHR (17 January 2023).

28 United Communist Party of Turkey and Others v. Turkey, 45, ECtHR (30 January 1998). In the same sense, *See* Gorzelik and Others v. Poland, 89, ECtHR (17 February 2004).

29 Gorzelik and Others v. Poland, 89, ECtHR (17 February 2004), Leyla Sahin v. Turkey, 104, ECtHR (10 November 2005); S.A.S. v. France, 128, ECtHR (1 July 2014).

30 Advisory Opinion OC-28/21, 71, I/A Court HR (7 June 7, 2021).

31 Gelman v. Uruguay, 239, I/A Court H.R., C, 221, (24 February 2011).

32 Handyside v. The United Kingdom, 49, ECtHR (7 December 1976); Gorzelik and Others v. Poland, 90, ECtHR (17 February 2004); Leyla Sahin v. Turkey, 104, ECtHR (10 November 2005); S.A.S. v. France, 128, ECtHR (1 July

iv. Pluralism is built on "the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts."[33] As well, I/A Court of HR followed these considerations, by expressing that pluralism implies tolerance and spirit of openness "without which no democratic society can exist."[34]

v. Implementing the principle of pluralism is only possible by being able to express the ideas and opinions freely.[35]

vi. In the same way, "freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment."[36] Consequently, freedom of thought, conscience, and religion, as stated under Article 9 of the ECHR, "is one of the foundations of a 'democratic society.'"[37] The I/A Court HR said, as well, that freedom of expression is a cornerstone for the existence of a democratic society.[38]

vii. Furthermore, the European Court held that there is a strong relationship between the freedom of association, pluralism, and democracy.[39] The I/A Court HR ruled that the democratic system is possible only with the protection of equality and non-discrimination of the freedoms of expression, association, assembly and with the effectiveness of the right to be equally chosen for public positions.[40]

viii. Political parties have an essential role in the functioning of democracy and in ensuring pluralism.[41] In this, ECtHR emphasized: "it is of the essence of democracy to allow diverse political programmes to be proposed and debated,

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2014), Terentyev v. Russia, 19, ECtHR (29 May 2017); Fedotova and others v. Russia, 179, ECtHR (17 January 2023); Macaté v. Lithuania, 214, ECtHR (23 January 2023); Halet v. Luxembourg, 110, ECtHR (14 February 2023); Sanchez v. France, 145, ECtHR (15 May 2023).

33 Gorzelik and Others v. Poland, 92, ECtHR (17 February 2004).

34 Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, 83, I/A Court H.R., C, 440, (6 October 2021).

35 Id., and for ECtHR: Gorzelik and Others v. Poland, 91, ECtHR (17 February 2004); and Herri Batasuna y Batasuna v. Spain, 76, ECtHR (30 June 2009).

36 Vogt v. Germany, 52, ECtHR (26 September 1995); United Communist Party of Turkey and Others v. Turkey, 43, ECtHR (30 January 1998); Stoll v. Switzerland, 101, ECtHR (10 December 2007); Animal Defenders International v. The United Kingdom, 100, ECtHR (22 April 2013); Halet v. Luxembourg, 110, ECtHR (14 February 2023).

37 Leyla Sahin v. Turkey, 104, ECtHR (10 November 2005). In the same way, *See* NIT S.R.L. v. The Republic of Moldova, 185, ECtHR (5 April 2022).

38 Advisory Opinion OC-5/85, 70, I/A Court H.R. A, 5, (13 November 1985); Álvarez Ramos v. Venezuela, 93, I/A Court H.R, C, 380 (30 August 2019); Advisory Opinion OC-27/21, 134, I/A Court H.R., A, 27 (5 May 2021).

39 Gorzelik and others v. Poland, 88, ECtHR (17 February 2004).

40 Advisory Opinion OC-28/21, 77, I/A Court HR (7 June 2021).

41 United Communist Party of Turkey and Others v. Turkey, 43, ECtHR (30 January 1998); Refah Partisi (The Welfare Party) and others v. Turkey, 87, ECtHR (13 February 2003). The Case of Refah Partisi is expressly cited by I/A Court HR when ruling this statement: Yatama v. Nicaragua, 215, I/A Court H.R., C, 127, (23 June 23, 2005).

even those that call into question the way a State is currently organised, provided that they do not harm democracy."[42] Similarly, I/A Court HR stated that there should be minimum standards for political participation that allow the celebration of elections that are: periodic, free, fair, and based on universal, equal, and secret votes.[43]

ix. ECtHR also established that the scrutiny of the government is part of a democratic system and will be done not only by legislative and judicial powers but also by press and public opinion.[44] In this order, I/A Court HR insisted on the importance of access to public information.[45]

x. Finally, I/A Court HR has also connected democracy with the requirement that all limitations on human rights should be prescribed by law and with the right to judicial protection.[46]

Additionally to those mentioned above, in the case of the Inter-American Human Rights Protection System, another international document has extreme importance in this topic: the Inter-American Democratic Charter, approved in 2001. Articles 3[47] and 4[48] of the Charter contain the essential elements and fundamental components of a democracy.[49] The I/A Court HR has held that those articles establish a definition of the basic characteristics of representative democracy, so if one is missing the political system shall not be named as a democracy.[50]

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42 NIT S.R.L. v. The Republic of Moldova, 185, ECtHR (5 April 2022).

43 Yatama v. Nicaragua, 207, I/A Court H.R., C, 127, (23 June 23 2005).

44 Sürek v. Turkey (no. 3), 37, ECtHR (8 July 1999).

45 Claude Reyes et al. v. Chile, 87, I/A Court H.R., C, 151, (19 September 19, 2006).

46 Advisory Opinion OC-6/86, 25, I/A Court H.R., A, 6, (9 May 1986); Castillo Páez v. Peru, 82, I/A Court H.R., C, 34, (3 November 3, 1997).

47 Article 3 of the Inter-American Democratic Charter states: "Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government".

48 Article 4 of the Inter-American Democratic Charter establishes: "Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy. The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy".

49 This difference in the language can be noted in the Spanish text, which refers to *"elementos esenciales"* and *"componentes fundamentales"*. The English translation also shows a minor difference between "essential elements" and "essential components". The only one that explained such difference was Nikken, for whom the effect is on the graduation, as a non-fulfilment with the essential "elements" should have a major effect than the essential or fundamental "components". *See* NIKKEN, Pedro. Análisis de las definiciones conceptuales básicas para la aplicación de los mecanismos de defensa colectiva de la democracia previstos en la Carta Democrática Interamericana. **Inter-American Institute of Human Rights Review**, vol. 43, p. 13-53, 2006, p. 43.

50 Advisory Opinion OC-28/21, 69, I/A Court HR (7 June 7, 2021).

The elements and components are according to the analysed decisions. For instance, essential elements are the ones described in some of the above points, related to the elections, the pluralism of political parties and organizations, and the separation of powers and independence of governmental branches. In the same sense, essential components include transparency, the rule of law, freedom of expression and press, and social rights.

One thing to point out mainly is that Article 3 states, as an essential element of democracy, the "respect for human rights and fundamental freedoms", so, in my opinion, here is the intrinsic connection between democracy and human rights protection, as democracy implies the respectful of human rights, and human rights need democracy for their effectiveness and protection.[51]

The conditional relation between the essential elements and components under this Charter, as well as the interdependence with the social rights stated under Articles 11 to 13 of the same Charter, gives origin to what Morales Antoniazzi named as "Inter-American democratic test."[52] Although she did not directly connect this "democratic test" with an analysis of human rights restrictions, I will return later in such a relation.

However, I will first consider the method that is currently applied to analyse human rights restrictions and demonstrate that it does not sufficiently attend a democracy examination that is required.

2.3. Does the actual method applied to analyse human rights' restrictions (proportionality test) sufficiently consider the "democratic society" requirement expressed in the treaties? (A premise for this research)

I will analyse what the ECtHR and the I/A Court HR apply today in the reasoning of human rights restrictions. I will start with an affirmation, as these courts consider the proportionality principle when studying a human right restriction.

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[51] Not expressly nor intentionally, but there is an inevitable link between this conception and the Habermas one, in which the author considers that "the principle of democracy can only appear as the heart of a system of rights". *See* HABERMAS, Jürgen. **Between facts and norms.** Translated by William Rehg. Great Britain: Polity Press, 1997, p. 121. Barak also considers that "to have a democracy, you must guarantee human rights; and to guarantee human rights, you must have a democracy". *See* BARAK, Aharon. **Proportionality. Constitutional Rights and their limitations**. New York: Cambridge University Press, 2012. p. 161 and 163. From the same author *See* BARAK, Ahron. **The judge in a democracy**. USA: Princeton University Press, 2006, p. xi and 24-6, 33, and 81.
In that sense, I/A Court HR has also held that a "true democratic regime is determined by both its formal and substantial characteristics". *See* Gelman v. Uruguay, 239, I/A Court H.R., C, 221, (24 February 2011).

[52] MORALES ANTONIAZZI, Mariela. The Inter-American System's transformative mandate as a response to the pandemic in light of the democratic test, **International Journal of Constitutional Law**, v. 19, p. 1229-1234, 2021, p. 1232.

The ECtHR stated in *Handyside v. The United Kingdom* (1976) that the "necessary" criterion considered under Article 10.2 of the ECHR implies the proportionality examination.[53] Then, in *The Sunday Times v. The United Kingdom* (1979) held, as well, that the interference must correspond to a "pressing social need" and be proportionate to the legitimate aim pursued.[54] In addition, from *Dudgeon v. The United Kingdom* (1981), the Court has been applying this requirement to all rights limitations.[55]

More recently, we can analyse the case law concerning the interpretation of Article 10.2 of the ECHR and, according to the oldest decisions, the Court issued three important statements: first, that the "necessity" implies a requirement of a "pressing social need"; second, that the State has a margin of appreciation when assessing if the need exists; third, but the State is under the supervision of the European Court, so the Court will analyse if the interference "was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient.'"[56]

Regarding the I/A Court of HR, the Court followed the opinion of the ECtHR in this matter[57]. I am particularly interested in showing the reasoning behind restrictions on political rights as an example. I will consider two cases: *Yatama v. Nicaragua* (2005) and *Castañeda Gutman v. Mexico* (2008).

For the first time, in *Yatama v. Nicaragua* case, the Court ruled that the limits to political rights "should respect the principles of legality, necessity and proportionality in a democratic society. "[58] The meaning was as follows:

> *The restriction should be established by law, non-discriminatory, based on reasonable criteria, respond to a useful and opportune purpose that makes it necessary to satisfy an urgent public interest, and be proportionate to this purpose. When there are several options to achieve this end, the one that is less restrictive of the protected right and more proportionate to the purpose sought should be chosen.*[59]

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53 Handyside v. The United Kingdom, 49, ECtHR (7 December 1976). The Court held: "This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued".

54 The Sunday Times v. The United Kingdom, 62, ECtHR (26 April 1979).

55 Dudgeon v. The United Kingdom, ECtHR, 53, (22 October 1981). From these cases Stone and Mathews observed that in United Kingdom judges stopped applying the Wednesbury unreasonableness test, to start considering the proportionality test. See STONE SWEET, Alec y MATHEUS, Jud. Proportionality Balancing and Global Constitutionalism, **Columbia Journal of Transnational Law**, v. 47, p. 68-149, 2008.

56 Sanchez v. France, 145, ECtHR (15 May 2023). *See* also, e.g.: Case of Halet v. Luxembourg, 110-113, ECtHR (14 February 2023).

57 For instance, European cases *The Sunday Times v. The United Kingdom* and *Barthol v. Germay* are cited expressly by the I/A Court HR in: Advisory Opinion OC-5/85, 46, I/A Court H.R., A, 5, (13 November 1985).

58 Yatama v. Nicaragua, 206, I/A Court HR, C, 127 (23 June 23, 2005).

59 Id.

Secondly, in *Castañeda Gutman v. Mexico*, another time in which political rights limitations were considered, the Court remembered the previous jurisprudence in *Yatama* case and held that:

> *Under the Inter-American system there is a third requirement that must be met in order to consider that the restriction of a right is compatible with the American Convention. The Inter-American Court has stated that, for a restriction to be permitted in light of the Convention, it must be* **necessary for a democratic society**. *The Court has incorporated this requirement, which the American Convention has established explicitly in relation to certain rights (of assembly: Article 15; of association: Article 16; of movement: Article 22), as a criterion for interpretation and as a requirement that characterizes restrictions to the rights established in the Convention, including political rights.*[60]

Following, the Court considered, as the content of this requirement, "(a) it fulfils an urgent social need; in other words, that it is designed to fulfil an essential public interest; (b) it is the measure that least restricts the protected rights, and (c) if it is closely adapted to achieving the legitimate purpose."[61]

The first and the last criterion are related to the aim, and the middle one considers the proportionality of the measure. Therefore, according to these case law, both the ECtHR and the I/A Court HR connect the purposes and proportionality analysis with the requirement of "necessary in a democratic society" and apply it not only to the rights in which the clause is expressed but also to all rights limitations under the respective treaty.

Additionally, the aim analysis -particularly in the ECtHR- is flexible and not decisive in practice. As was said, the ECtHR recognizes an internal margin of appreciation for it, so it only considers if the aims are reasonable or sufficient. Then, although the I/A Court HR has more analysis about some of the concepts that are generally used as aims, in cases in which a legitimate aim is not founded, it has also continued with the proportionality analysis, the one that gives the compelling reasons for reaching the conclusion.[62]

Returning to the affirmation done at the beginning, the actual method used to analyse human rights restrictions is the proportionality test. If we question why, from a

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60 Castañeda Gutman v. Mexico, 185, I/A Court H.R., C, 185 (6 August 2008). The bold type is in the original.

61 Id., at 186.

62 For instance, in *In Vitro Ferlitization* case, although I/A Court HR held that the State did not pursue a legitimate aim, the reasoning is based on proportionality in the narrow sense. *See* Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica, 276-317, I/A Court H.R., C, 257, (28 November 28, 2012). For more development about the lack of consideration of the aims in analysing human rights restrictions, I refer to GARAT, María Paula**. Los derechos fundamentales ante el orden público**. España: Tirant lo Blanch, 2020. p. 101-121.

clause that states that the limitation should be "necessary in a democratic society", the courts apply the proportionality test, the answer is unclear.

One possibility is that the word "necessary" is connected to the second subprinciple of proportionality theory, the necessity of a restriction. However, this does not explain why they apply, in addition to the necessity analysis, suitability, and proportionality in a narrow sense.

We can even find a more philosophical reason to justify the application of the proportionality test. In the conception of human rights norms as principles and principles as optimization requirements, "the nature of principles implies the principle of proportionality and vice versa."[63] That is to say that the conception of human rights norms as principles implies, as a consequence, the application of the proportionality test to determine the "greatest extent possible given the legal factual possibilities"[64], or, in the same way but with other words, to conclude what principle shall prevail in each concrete case.

In my opinion, this conception applies to the requirements of human rights restrictions under the ACHR and the ECHR, assuming the following reasoning: for applying one right in a democratic society, we shall consider the rights of others and the legitimate aims for limitations in each case. So, to employ all in a major way, we need a proportionality test.[65]

The preceding is related to what Barak stated, which that the proportionality principle is connected to the notion of democracy. He said that the proportionality requirement is derived from an interpretation of the notion of democracy itself. The explanation is similar to the one already given, as he gave a central reason for considering human rights as part of a democracy and a necessary balance between rights and democratic principles, as limits. He argued that the "limitation clauses, in order to properly fulfil their role, are based on the principle of proportionality."[66]

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63 ALEXY, Robert. Proportionality, constitutional law, and sub-constitutional law: A reply to Aharon Barak, **International Journal of Constitutional Law**, v. 16, p. 871-879, 2018, p. 873.

64 ALEXY, Robert. Proportionality, constitutional law, and sub-constitutional law: A reply to Aharon Barak, **International Journal of Constitutional Law**, v. 16, p. 871-879, 2018, p. 972.

65 This reasoning was adopted by the I/A Court HR, which has held that: "Both freedom of expression and the right to honour, which are both rights protected by the Convention, are extremely important; hence both rights must be guaranteed in a way that ensures that they coexist harmoniously. Each fundamental right must be exercised respecting and safeguarding the other fundamental rights. The State plays a central role in this process of harmonization, endeavouring to establish the necessary responsibilities and penalties to achieve this objective. The need to protect the rights that could be affected by an abusive exercise of freedom of expression calls for due observance of the limits established by the Convention in this regard. The settlement of a dispute between both rights requires weighing them based on a judgment of proportionality and, to this end, each case must be examined taking into account its characteristics and circumstances, in order to assess the existence and intensity of the elements on which this judgment is based". Case Mémoli v. Argentina, 127, I/A Court H.R., C, 265, (22 August 2013).

66 BARAK, Aharon. **Proportionality. Constitutional Rights and their limitations**. New York: Cambridge University Press, 2012. p. 214.

As said, the above could be helpful to justify the proportionality test application, with which I am not in disagreement. The proportionality principle shall be applied in most cases when considering a limitation on a right. Notwithstanding, if we return to the literal sense of the clause ("necessary in a democratic society") we shall note that this reasoning is not clearly connected to the wording considered and that the authors try to build a link with the proportionality principle from a text that did not directly refer to it when was approved.

In addition, under those conceptions, or others that connect the proportionality test with the rule of law,[67] the proportionality test does not need an express clause to be applicable.[68] The proof of it is that many tribunals and courts, both national and international, employ a proportionality test without an express text that enables their use.

In this point, I add my perspective: the only consideration of the proportionality test in the way we analyse restrictions on human rights does not correspond to a literal sense of the clause examined in this paper, or not entirely. If we question why, from the clause "necessary in democratic society", courts apply the proportionality test, we will not find an answer according to a literal sense.

But the critical to be considered is if democracy is sufficiently attended in proportionality test, that is what is mandated by the clause, so if the "necessary in a democratic society" term is substantially contemplated in the proportionality test.

The answer is negative.

Let us analyse it with an example. Let us imagine a law that prohibits all kinds of demonstrations in the public sphere for a year. Under the theory of proportionality test, the aims will not be examined at all or only be considered as they are not prohibited. In this case, that kind of exam may be overcome with the assumption of application of an undetermined concept, such as "public order" or "public health". So, the proportionality test will be based on the measure, in this case, the prohibition, and question whether it is adequate, necessary, and proportionate in the narrow sense.

A criticist with the conception I am proposing will argue that democracy will be attended in such analysis, for instance, in the proportionality in the narrow sense step, when examining the high level of interference that this measure causes on the right to assembly and their importance in a democratic society. The allegation is true.

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67 *See* ALEXY, Robert. On Balancing and Subsumption. A Structural Comparison. **Ratio Juris**, vol. 16, No. 4, p. 433-449, 2003, p. 436. In the same sense, Ralf Poscher and David Beatty refer to the jurisprudence of the Federal Constitutional Court of Germany. *See* POSCHER, Ralf. Proportionality and the Bindingness of fundamental rights. **MPI-CSL Working Papers**, Germany, v. 2, p. 1-26, 2021. p. 5, and BEATTY, David. **The ultimate rule of law**. USA: Oxford University Press, 2004, p. 162.
The latter also said that other Courts connected the principle with pluralism and toleration, and so, to democracy.

68 Alexy stated that clauses that add the proportionality test literally does not exclude that the proportionality principle derives from the definition of fundamental rights. ALEXY, Robert. **A theory of constitutional rights**. Oxford: Oxford University Press, 2007, p. 95.

The impact of the restriction on democracy will be considered in that step, raising the exigence of the other side's justification. However, it is not sufficient. In this stage, we will put and place freedom of expression and right to assembly, on one hand, and in the other field but at the same level, another aim -even non-studied at all-, so there could be cases in which a justification for a right restriction could be done, even when the inalienable core of a democratic principle or a human right is involved.[69]

From my perspective, in the example done, no reason could justify such limitation, as both human rights and democratic principles are affected in their essential core. In proportionality test application, although we will reach the same conclusion in most cases, there could be causes that justify such interference. The proportionality test's structure allows us to justify all limitations, including the ones that affect the central nucleus of democracy. As I will analyse, the proportionality in the narrow sense step is too late to attend it, as this content will be weighted at the same place as the reason alleged to defend the limitation. That shows that the proportionality test is insufficient and does not wholly consider democracy.

3. THE PROPOSAL OF AN INITIAL STAGE TO COMPLETE THE METHOD THAT ANALYSES HUMAN RIGHTS RESTRICTIONS

As mentioned in the introduction, I will propose an initial stage that is not only needed but would be in accordance with a literal sense of the clause we are applying. In this Section, I will focus on the *why* question and answer why a first stage is needed, relating it with the interpretation of the "necessary in a democratic society" term and with the critics of the proportionality principle (Section 3.1). Then, I will dive deep into the content of the proposed first stage (Section 3.2). Finally, I will give other theoretical foundations for it, based on the coherent application of the legal systems, that will complement the preceding (Section 3.3).

3.1. Why a first stage? A complete method to consider the clause "necessary in a democratic society"

I based my position on critics' doctrines to proportionally test that show the loss of strength that this test can cause for rights, because there could always be a justification to argue a restriction, even when restrictions are too high.

Habermas said that "…in cases of collision *all* reasons can assume the character of policy arguments […]. As soon as rights are transformed into goods and values in any

[69] The same argument applies to the "Law of Trumping" proposed by Klatt and Meister as they suggest assigning a more abstract weight to certain principles or rights. *See* KLATT, Matthias y MEISTER, Moritz. Proportionality –a benefit to human rights? Remarks on the I-CON controversy. **International Journal of Constitutional Law**, vol. 10, n. 3, p. 687-708, 2012, p. 690-691.

individual case, each must compete with the others at the same level for priority."[70] The author concludes that rights are not more understanding as a "fire wall."[71]

In the same sense, Tsakyrakis connected this reasoning with the detriment of democracy:

> *It should be noted that in the most simplistic version of balancing, there cannot be any concept of fundamental rights having priority over other considerations. Interests protected by rights find themselves in the scale on a par with any of the other interests that individuals or the government have. On this account, the interests of the majority tend to outweigh the interests of individuals and minorities.*[72]

For its part, Dworkin also mentioned that "certain interests of particular people are so important that it could be wrong -morally wrong- for the community to sacrifice those interests just to secure an overall benefit. […] A political right, we may say, is a *trump* over the kind of trade-off argument that normally justifies political action."[73]

As said, from my perspective, the fact that all reasons can justify all restrictions, even when they affect the minimum content of democracy principles, causes democracy is then not to be sufficiently considered in the proportionality test, and even adding an analysis of the aim invoked. In this way, I do not oppose the proportionality test, but I conclude that only the proportionality exam is insufficient.

I argue, first, that a previous aim analysis is needed.[74] In the ECHR and the ACHR, only some reasons can justify rights limitations. For example, in the case of the right to assembly, only limited aims could be invoked. In some cases, "public order" is one of those, but it is not enough to only mention it. It is necessary to interpret the meaning of the concept and to analyse if it applies to the concrete case.

As explained before, the analysis of the aim is very flexible in the case-law of the ECtHR, as the Court recognizes an internal margin of appreciation and only evaluate if the reason is "reasonable and sufficient". As well, and despite that the I/A Court

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[70] HABERMAS, Jürgen. **Between facts and norms.** Translated by William Rehg. Great Britain: Polity Press, 1997. p. 258-259. For its part, Alexy has considered this criticism and answered it, assuming that it would only be correct if proportionality does not allow to issue rationale statements about the intensity of the restriction, their importance, and its relation, so as it is not true, this critic is not receivable. In my opinion, this answer does not address the appreciation of the same scale in which rights are placed. *See* ALEXY, Robert. Derechos Fundamentales, Ponderación y Racionalidad. **Revista Iberoamericana de Derecho Procesal Constitucional**, vol. 11, p. 3-14, 2009, p. 6-9.

[71] HABERMAS, Jürgen. **Between facts and norms.** Translated by William Rehg. Great Britain: Polity Press, 1997. p. 258.

[72] TSAKYRAKIS, Stavros. Proportionality: An Assault on Human Rights?, **International Journal of Constitutional Law**, vol. 7, issue 3, p. 468-493, July 2009, p. 471.

[73] DWORKIN, Ronald. **Is democracy possible here?** New Jersey: Princeton University Press, 2008, p. 31.

[74] In the same sense, Barak said that "in a constitutional democracy, not every value included in the public interest qualifies as a proper purpose for the limitation of a human right". BARAK, Aharon. **Proportionality. Constitutional Rights and their limitations**. New York: Cambridge University Press, 2012. p. 256.

HR developed interpretations connected to the aims, the exam is not so relevant in practice.

Therefore, the actual method needs a stronger evaluation of the aim, their meaning, if it is present in the concrete case, and if it is one of the allow purposes that are given to justify limitations to the determined right.

In addition, as already explained, democracy should also be considered when interpreting the meaning of the aim, but, as I was saying, this is also not enough to apply the "necessary in a democratic society" clause. If we return to the example done about the prohibition of all demonstrations during a year, maybe a legitimate aim is applicable, and, as said, it could be reasons -even stronger ones- that could defend the measure taken. For instance, bringing a pandemic scenario to the example, the "public health."[75] In such cases, neither the legitimate aim analysis -nevertheless necessary to add-, nor the proportionality test reveal and prohibit, at the beginning, restrictions that nullify democracy.

Then, and as was previously explained in this paper, I argue that the clause "necessary in a democratic society" included in the ECHR and the ACHR as a requirement to limit human rights is an autonomous clause. That means that it is independent of the analysis of the aims (legitimate aim) and the means (essentially, proportionality test), representing an additional exam.

From the ECtHR and the I/A Court HR we can observe similar conceptions of what a "democratic society" is, and the way the democracy is conceived and interpreted in the ACHR and the ECHR is crucial in order to deal with what "necessary in a democratic society" means.

So, what must be considered under the requirement of being "necessary in a democratic society"?

From my perspective, a right restriction shall be accordingly and, more precisely, shall not nullify democracy with the content studied. In this, I come back with the relation between democracy and human rights, which is expressively mentioned in the Inter-American Democratic Charter, but that can be taken out as well from the ECHR. The "necessary in a democratic society" means, on one part, respect for the democratic contents and principles, and, in addition, as a second part, compliance with human rights as also the content of that notion of democracy.

In other words, as we analysed before, democracy implies compliance with some essential principles (that I refer to as "democracy principles"), such as pluralism

[75] Although it is not exactly the same case, an interesting debate about the restriction on demonstrations because of health emergency based on COVID pandemic can be observed in Spain. Some tribunals hold that demonstrations cannot be limited if people comply with safety conditions, but Constitutional Court of Spain states that the limitation was proportionate, as aims to preserve public health. *See* from Spanish Constitutional Tribunal: ATC 40/2020 (30 April 2020), and STC 61/2023 (24 May 2023). In a dissenting opinion to STC 61/2023, judges Ricardo Enríquez Sancho, Enrique Arnaldo Alcubilla, and Concepción Espejel Jorquera considered that assembly right was nullified in the case.

and periodic and free elections, among others. But democracy also means compliance with human rights, all rights, but particularly those that are necessary connected with democratic procedures (as we mentioned, freedom of expression, assembly, and association, among others). Therefore, when we say that a restriction should be "necessary in a democratic society", we assume that with the restriction, we will try to apply all rights and principles in Alexy's position as optimization mandates. However, I have added another previous limit. From my perspective, the requirement of being necessary for a democratic society is not enough considered if we do not study before the aims and the means, prior to proportionality test, if the restriction complies and does not nullify the essential components of the "democratic society", namely, if the restriction affects the essential core of democratic principles and human rights.

3.2. The content of an initial stage before the proportionality test

The content of the stage relates to the central nucleus of democracy as requested in the first place under the clause "necessary in a democratic society": (a) the fulfilment and not invalidation of the central democratic principles, (b) compliance with the essential core of human rights, and (c) the study of the legitimacy of the aim.

As said before, "necessary in a democratic society" implies not only the necessity exam and the balance between rights and other principles or even with other rights. Before them, it is crucial to consider if the restriction nullifies one or more democratic principles as the essential content of a "democratic society".

The reasoning for this stage is logical. It is not possible for a restriction that breaks with a democratic society to be at the same time "necessary" for that democratic society. The contradiction is clear, and so the basis for this analysis.

The question that follows is then how do we know what a democratic society is and, consequently, what the democratic principles are? The content of a "democratic society" is not subject to personal perceptions or ideologies. The only way to apply an impartial reasoning is by deducting it from the considered treaties.

In this sense, we have already deep on what a "democratic society" is under the ECHR and the ACHR, in the perceptions of the ECtHR and the I/A Court HR. The democratic principles cannot be invented, even by those courts. On the contrary, there should be an argumentation throughout which the content could be founded.

The statements done in Section 2.2 of this paper are not close. They represent some of the content attributed and related to what a democratic society is for ECtHR and I/A Court HR as tribunals whose role is to interpret the respective ECHR and the ACHR. The content is almost the same for both tribunals. That shows not only the similarities between the ECHR and the ACHR but also that the conception of democracy involved in both systems has a clear basis from which we can build this step.

Furthermore, with the precedent, we can observe that the interpretation of those treaties gives an essential core of democracy, which we should study in this step. Even when this content should be subject to criticism, there is a minimum in which discussions decrease. Finally, an argumentation that connects the substance with the treaty's interpretation is always needed, and then that considers its impact in the concrete case.[76]

In this first stage, we should question if the measure affects the essential content of democracy, which implies knowing what democratic principles composes democracy and argue when one or more of them become invalid or null because of the measure.

It could also be related to what Morales Antoniazzi called the "democratic test" for the Inter-American System and under the Democratic Charter, as was cited before.[77] As said, although this author was not considering it for the analysis of right's limitations, in my opinion, we are referring to a similar test. The essential and fundamental components of democracy given by such Charter are valuable for arguing what principles built a democratic society under the System and for restriction purposes as well.

Furthermore, this step and the relation with democratic principles stated by the Inter-American Democratic Charter could be helpful to show and then put in evidence other democratic problems or situations that could be happening in the State, in connection, for instance, with the non-fulfilment of the I/A Court HR decisions, or even related to the application of democratic clauses contained in Articles 17 to 22 of the Charter. Likewise, the stage could also sometimes give a common thread with other democratic institutions of the same system and, in the end, represent not only cohesion but also a greater visibility of a major democratic problem.[78]

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[76] In this sense, I will later introduce the concept of coherence, which should lead this stage. In connection to it, Aarnio said, with reference to legal interpretation, that it "must at all times be seeking a coherent interpretation". He added: "The proposed interpretation must be in harmony with all that is otherwise known about the legal order. The contextual connection cannot, however, be interminable. It is the theory of coherence that offers a means of defining -at least passably- what kind of contextual connections (horizontal couplings) yield the most extensive possible acceptance in the respective legal community. Not everyone can produce his or her very own interpretation of legal texts. There are no private legal languages. The core of all law is society, social interaction and coherence". *See* AARNIO, Aulis. Why coherence - A philosophical point of view. In: AARNIO, Aulis, ALEXY, Robert, et. al. (Ed.). **On coherence theory of law**. Lund: Juristförl, 1998, p. 38-39.

[77] *See* MORALES ANTONIAZZI, Mariela. The Inter-American System's transformative mandate as a response to the pandemic in light of the democratic test, **International Journal of Constitutional Law**, v. 19, p. 1229-1234, 2021. Casal also refers to a "democratic test", but it relates it to proportionality in the narrow sense. *See* CASAL, Jesús María. **Los derechos fundamentales y sus restricciones**. Bogotá, Temis y Fundación KAS, 2020. p. 381-383, and 397.

[78] I will not enter other democratic clauses, institutions, or regional problems. However, to clarify the point, in case of a non-fulfilment with a decision of the I/A Court HR, Article 65 of the ACHR mandates the Court to inform it annually to the OAS General Assembly. I argue that the case -and problem- could have more visibility if, in the Court reasoning, at first, the nullification of a democratic principle or the inalienable core of a human right is expressly analysed. In some difficult situations, when the scope of Articles 17-22 is involved, the Court would have already warned about the problem through the system of cases and their reasoning, considering that through a "democratic test" that should be done during the first stage I am proposing.

As a second component of this stage, which comes from the same founding, we should also consider the inalienable core of human rights. As said, democracy implies human rights, so this study is also part of the notion of a "democratic society". Additionally, some Constitutions mandate considering the essential core of human rights as a particular guarantee in limitation cases.

Article 19.2 of the Basic Law for the Federal Republic of Germany states that "in no case may the essence of a basic right be affected."[79] Similarly, the Constitution of Spain establishes that: "The rights and liberties recognized in Chapter Two of the present Title are binding for all public authorities. The exercise of such rights and liberties, (…), may be regulated only by law which shall, in any case, respect their essential content" (Article 53.1).[80]

In practice, and in the actual method that is used to analyse human rights restrictions, the consideration of the essential core of human rights, when it is done, is generally placed at the end, after the proportionality test, and without a real effect on the conclusion.[81] Some authors have recognized the risk that represents admitting that rights have a content that is "essential" and, so, another that is not and can be limited, arguing a possible abuse in the restriction of that "non-essential" content.[82] Others directly affirm that applying the proportionality test is the only way to know the essential core of a human right, so this core is the remaining sphere after applying the proportionality in the narrow sense criteria.[83]

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[79] Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 28 June 2022 (Federal Law Gazette I p. 968). Translation provided by Federal Ministry of Justice of Germany at: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0105 (last visited September 4, 2024).

[80] Constitution of Spain, translation provided by Spanish Official Gazette at: https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf (last visited September 4, 2024).

[81] *See* CATOIRA, Ana Aba. El concepto jurisprudencial de límite de los derechos fundamentales. **Anuario da Facultade de Dereito da Universidade da Coruña**, vol. 2, p. 13-31, 1998, p. 27; RUBIO LLORENTE, Francisco. La configuración de los derechos fundamentales en España. In: Inter-American Court of Human Rights (Ed.). **Liber Amicorum *Héctor* Fix-Zamudio**, Vol. II. Costa Rica: Corte Interamericana de Derechos Humanos, p. 1341; RODRÍGUEZ RUIZ, Blanca. El caso Valenzuela Contreras y nuestro sistema de derechos fundamentales. **Revista Española de Derecho Constitucional**, vol. 56, p. 223-250, 1999, p. 236; GÓMEZ CORONA, Esperanza. **Las Cortes Generales en la jurisprudencia del Tribunal Constitucional**. Madrid: Congreso de los Diputados, 2008, p. 248. Casal applies the same conclusion to Germany, adding a consequent absence of treatment in doctrine publications, but clarify that the constitutional validity remains in force. *See* CASAL, Jesús María. **Los derechos fundamentales y sus restricciones**. Bogotá, Temis y Fundación KAS, 2020. p. 269.

[82] *See, e.g.* RUBIO LLORENTE, Francisco. La configuración de los derechos fundamentales en España. In: Inter-American Court of Human Rights (Ed.). **Liber Amicorum *Héctor Fix-Zamudio***, Vol. II. Costa Rica: Corte Interamericana de Derechos Humanos, p. 1329-1344. p. 1340; GÓMEZ CORONA, Esperanza. **Las Cortes Generales en la jurisprudencia del Tribunal Constitucional**. Madrid: Congreso de los Diputados, 2008. p. 241; and PRIETO SANCHIS, Luis. La limitación de los derechos fundamentales y la norma de clausura del sistema de libertades. **Revista Pensamiento Constitucional**, vol. 8, p. 61-102, 2002, p. 73.

[83] *See* ALEXY, Robert. **A theory of constitutional rights**. Oxford: Oxford University Press, 2007, p. 259, and BERNAL PULIDO, Carlos. **El principio de proporcionalidad y los derechos fundamentales.** Madrid: Centro de Estudios Políticos y Constitucionales, 2007, p. 436 and 568-569. The relative thesis of the essential core was

We should consider the literal sense of the analysed clauses. Constitutions that contain as safeguard the "essential core" clause refer to a minimum one, different from the complete content, but one that cannot be restricted. In my opinion, this content is the minimum definition of the right, a core without which the right will be nullified.

On the opposite side, Bernal has argued that the theory on which I am based does not offer a rational criterion to determine, in a concrete case, the meaning of the nucleus of a fundamental right.[84] Three arguments in response to this criticism:

> (a) The affirmation is not true, as the way to determine the essential core is to identify, by interpretation, the minimum sphere of protection without which the right will become invalid. As Casal said, the idea from which the essential core is built is that the legislator can regulate human rights but cannot annul them[85];
> (b) Bernal's position also appeals to an interpretation and argumentation to end with an essential core after proportionality. So, if the theory I agree with does not give a rational criterion to determine the inalienable core, the other criteria neither.
> (c) More importantly, the position I agree with is compatible with the literal sense of the clause and a sense of coherence. In cases in which the essential core clause is included in constitutional texts, the purpose is to limit restrictions, preserving a minimum content of the right.

The position of Spanish professor Medina Guerrero conciliates an absolute conception with the proportionality test, explaining that even when admitting the proportionality test, there is a minimum that cannot be limited.[86] I have already studied that this thesis is not necessarily contrary to Häberle's one in the matter, as this author expressly said.[87] For Häberle, the essential core is determined by a balancing of the right with other rights and constitutional values, but he explains as well that absolute and relative theories regarding essential content are not necessary in the opposite, as after determining the essential scope by balancing, the content cannot be limited.[88]

Anyway, and besides the affiliation with Haberle's or Medina Guerrero's positions, nowadays, the problem is the absence of a practical effect because, as said, the

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adopted by the Colombian Constitutional Court, as Bernal said, by sentence C-I42 (2001). *See* BERNAL PULIDO, Carlos. El derecho de los derechos. Bogotá: Universidad Externado de Colombia, 2005, p. 84.

84 *See* BERNAL PULIDO, Carlos. **El derecho de los derechos.** Bogotá: Universidad Externado de Colombia, 2005. p. 130-131.

85 CASAL, Jesús María. **Los derechos fundamentales y sus restricciones**. Bogotá, Temis y Fundación KAS, 2020. p. 274.

86 MEDINA GUERRERO, Manuel. **La vinculación negativa del legislador a los derechos fundamentales**. España: McGraw-Hill, 1996, p. 171.

87 *See* GARAT, María Paula**. Los derechos fundamentales ante el orden público**. España: Tirant lo Blanch, 2020. p. 96-97.

88 HÄBERLE, Peter. **Garantía del contenido esencial de los derechos fundamentales**: Madrid, Dykinson, 1962, Ed. 2003, p. 61-67 and 120.

exam, when done, will be at the end, after the proportionality test and without a real impact on the analysis.

The possible impact of the limitation on the essential core of the human rights involved should be at the beginning. If the measure affects the essential content of the right, why continue with the proportionality test? The exam should be finished.[89]

Finally, as a last component of this first stage and before entering the proportionality test, the legitimate aim analysis should be done. As was said before, when analysing the conventional requirements for human rights limits, each article of the ECHR and the ACHR contains particular aims for establishing restrictions. It is not stated that all purposes could justify all limits. It is also not said that, except for the prohibited ones, all other aims could be a reason for a limitation. The ends are given and in each right are different. For instance, in the ECHR, for a restriction to the freedom of assembly, the only possible aims are the "national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others".

The proportionality test only focuses on the means. Presupposes and will only analyse the aim if there is an explicit constitutional or treaty prohibition. However, as said, this differs from what the ECHR and the ACHR state for most rights.[90]

It is crucial to question the interpretation of the aims that are included as aims that allow limitations to certain rights. As already said, democracy should be considered as well. The only "public order" or "national security" to be attended under the ECHR or the ACHR is the one appropriate for a democratic society. In this step, we should interpret the meaning of the concept, evaluate whether it is involved in the particular case, and if it could allow a restriction on the human right considered. It is not only mandated by the respective convention but also will represent a narrower relationship between the means and the aims at the following steps of the proportionality test.

As said, when considering the suitability, necessary and balance of the measure, on the other side, there will be -after this step and when passing it- a legitimate aim that was interpreted and corresponds to a democratic society need. The precedent analysis is crucial for then continuing with the proportionality subprinciples, only with reference to a particular aim, a studied, democratic, allowed, and present one, and not regarding any reason, or even to all reasons that are not prohibited or that could be considered as "reasonable or sufficient".

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89 This position does not imply that, in practice, tribunals cannot extend the argumentation on other steps to robust de conclusion, such as proportionality test. It is possible and, in some cases, even desirable, but the principal argument that built the final decision should be the impact on the essential content.

90 We should add, as allowed aims, the rights of others inclusive in cases in which it is not mentioned expressly, as an immanent limit (constitutionally immanent limitations theory). However, I am contrary to allowing other limitations not expressly derived from the treaty or applicable constitution. *See* GARAT, María Paula**. Los derechos fundamentales ante el orden público**. España: Tirant lo Blanch, 2020. p. 63.

Summarizing the content of the proposed first stage:

a. Firstly, we should focus on the possible impact that the restriction can cause on a "democratic society", and so on democratic principles. If the restriction nullifies one or more democratic principles, then this stage will not be passed, and so the restriction will not be "necessary in a democratic society".
b. Secondly, as a part of the precedent, we should examine if the measure affects the inalienable core of one or more human rights. If the answer is positive, then the restriction could not be considered "necessary in a democratic society", as a democratic society has in its content a minimum of protection for all human rights (defined as the "essential core").
c. Third and finally, we should analyse the aim in the case, questioning what aim the State is protecting with the measure, if that aim could restrict the human rights involved, and if it is applicable to the case. In this sense, as studied, democracy will also be present when interpreting the aim and analysing the applicability of the case. It is not enough that the aim is not forbidden or the only invocation of a general and undetermined concept, such as "public order" or "national security".

Just after this first step, and only if it is passed, we should continue the analysis by applying the proportionality test.

3.3. Theoretical foundations for the proposal: the coherence when applying human rights treaties

Although the initial stage I proposed can be related to the reasonableness review developed principally in United States jurisprudence, I find a more precise relationship between the preceding and the theory of the German author Klaus Günther[91], particularly regarding the "discourses of application."[92]

In this Section, I propose to develop that connection, providing solid foundations for the initial examination. I prefer this one to the reasonableness criterion as the latter starts from the reason given by the State, as in the legitimate aim exam, but not from the seriousness of the interference and the coherent application of the legal system.

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[91] GÜNTHER, Klaus. A normative conception of coherence for a discursive theory of legal justification. **Ratio Juris**, vol. 2, p. 155-166, 1989; *The pragmatic and Functional Indeterminacy of Law*. In: JOERGES, Cristian and TRUBEK, David (Ed.). **Critical legal thought: an American-German debate**. Germany: Nomos Verlagsgesellschaft, 1989, p. 435-460; Critical Remarks on Robert Alexy`s "Special-Case Thesis". **Ratio Juris**, vol. 6, p. 143-156, 1993; and **The sense of appropriateness**. USA: State University of New Tork Press, 1993.

[92] Günther defines these discourses as "the communicative form in which we reflect on the judiciousness of the act of selection". See GÜNTHER, Klaus. The pragmatic and Functional Indeterminacy of Law. In: JOERGES, Cristian and TRUBEK, David (Ed.). **Critical legal thought: an American-German debate**. Germany: Nomos Verlagsgesellschaft, 1989, p. 443.

For Günther, there is a division between the justification of a norm related to the validity and its application. Under the validity applies the universalization criterion, so a norm would be valid only if it is universalizable. I will not enter that issue but explain the one related to the application. The legal system contains valid norms that are prima facie applicable to the circumstances, but "we accept norms as valid, although we know that they collide with other valid norms"[93]. Günther explained that their final application, and the resolution of the conflicts between those norms, would depend on a discourse based on two kinds of arguments: one connected with the circumstances that are considered and the other one that studies the coherence of the system, so "a coherent interpretation of all the norms which are applicable to the completely described situation."[94] Based on that, and in a concrete case, we shall answer the following question: "why this reason is compatible with all the other norms which are prima facie applicable to this case."[95] This author stated that: "The only avenue that remains is a mutual interpretation of all valid norms applicable to an exhaustive description of the situation which allows them to be reconciled with one another. This revocability will emerge within a coherent system of valid norms".[96]

Under Günther's theory, "discourses of application must take account of all the norms within a system and confront them with all the features of a particular situation that can be relevant for the application of those norms. "[97] As a result, "the definite application of a principle then depends on its appropriateness to regulate a particular situation in coherence with all other norms that are applicable to it".[98] In this sense, Günther stated that: "A norm can be applied in consideration of all the circumstances if it is compatible with the application of all the other norms in a situation and with all semantic variants possible in a situation. Thus, the formal criterion for appropriateness

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93 GÜNTHER, Klaus. The pragmatic and Functional Indeterminacy of Law. In: JOERGES, Cristian and TRUBEK, David (Ed.). **Critical legal thought: an American-German debate**. Germany: Nomos Verlagsgesellschaft, 1989, p. 442.

94 GÜNTHER, Klaus. A normative conception of coherence for a discursive theory of legal justification. **Ratio Juris**, vol. 2, p. 155-166, 1989. p. 162. See also GÜNTHER, Klaus. The pragmatic and Functional Indeterminacy of Law. In: JOERGES, Cristian and TRUBEK, David (Ed.). **Critical legal thought: an American-German debate**. Germany: Nomos Verlagsgesellschaft, 1989, p. 444, 449, and 451.

95 GÜNTHER, Klaus. A normative conception of coherence for a discursive theory of legal justification. **Ratio Juris**, vol. 2, p. 155-166, 1989. p. 159.

96 GÜNTHER, Klaus. The pragmatic and Functional Indeterminacy of Law. In: JOERGES, Cristian and TRUBEK, David (Ed.). **Critical legal thought: an American-German debate**. Germany: Nomos Verlagsgesellschaft, 1989, p. 444. In the same way: GÜNTHER, Klaus. **The sense of appropriateness**. USA: State University of New Tork Press, 1993. p. 242.

97 RODRÍGUEZ RUIZ, Blanca. Discourse Theory and the adressees of basic rights. **Rechtstheorie,** vol. 32, p. 87-133, 2001, p. 115.

98 RODRÍGUEZ RUIZ, Blanca. Discourse Theory and the adressees of basic rights. **Rechtstheorie,** vol. 32, p. 87-133, 2001, p. 116.

can only be the coherence of the norm with all the other norms and semantic variants applicable in the situation".[99]

If we apply Günther's position to the topic I am developing in this research, we will have different valid norms in a concrete case. Returning to the example given of a restriction on demonstrations, from one side, the one that protects rights to assembly and freedom of expression, among others, and, on the other side, the one that obliges the State to safeguard another legitimate aim, such as public health. According to Günther's theory, we will apply the one that maintains coherence with the legal system, in the case with the applicable treaty (namely, "the only appropriate norm has to be accorded recognition as the result of an ideal coherent system of all norms applicable to an exhaustive description of the situation").[100]

In the example, coherence requires a minimum application of democracy, so if we reach the conclusion that, because of the measure, the essential core of freedom of assembly is affected, then the sense of coherence will give us the answer: we cannot dismiss the norm that protects freedom of assembly in this case.

In my opinion, it is necessary to complement Günther's conception of coherence with the proportionality test in most cases to lead us to a definitive resolution to solve the conflict of norms. However, there are cases in which a first reasoning based on coherence gives us the conclusion, and this first stage is needed to maintain that coherence.

The question that arises from applying Günther's theory to the topic I am developing in this research is whether coherence is respected in cases where we allow human rights limits that affect the essential content of democracy. The answer is simple: coherence is not present in those cases. Consequently, we shall follow with another question: Why do we not study these statements initially, giving coherence to the system? Discourses of application give the way of reasoning for this first stage and the foundation for it.

In a concrete case in which democracy is nullified because of a restriction, coherence gives us an answer before entering the proportionality test, and we will not have the studied risk of balancing this result.

Furthermore, Günther also criticized Alexy's special-case thesis by emphasizing the principle of universalizability. The author explained that universalizability has a prominent role because "it requires us to look at the consequences of a general

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[99] GÜNTHER, Klaus. **The sense of appropriateness**. USA: State University of New Tork Press, 1993. p. 242.

[100] GÜNTHER, Klaus. The pragmatic and Functional Indeterminacy of Law. In: JOERGES, Cristian and TRUBEK, David (Ed.). **Critical legal thought: an American-German debate**. Germany: Nomos Verlagsgesellschaft, 1989, p. 448.

observance of a norm for the interests of each of us."[101] Although universalizability is more connected with the discourses of justification than with the application ones, in my opinion, this debate could also be related to the concept of coherence and to what I am explaining.

In terms of human rights restrictions, when considering the coherence in the system for its application, we shall also study the effect that the interference could have on it. That is an important difference between the stage I am proposing and the proportionality in the narrow sense step.

When balancing -employing the weight formula- democracy will be considered as, in the concrete case, maybe we will conclude a severe effect on the right involved. However, on the other side, there could even be a stronger reason to justify such high interference.

On the contrary, in the stage I am proposing to add, the consideration is related to the concrete case and to the effect that this measure represents for democratic principles and the essence of rights. There is a difference in the way of thinking in this first stage. When balancing, there could be utilitarian or "cost-benefit" arguments concerning the not-too-high limitation or the even higher importance of the justification when considering one's rights vs. the public interest of the majority.[102] By this reasoning, the proposed example of the prohibition of demonstrations for a year could be justified because it only affects a minority, and the health of the majority is a more important value in the case.[103]

On the contrary, in the method I am proposing, this first step will lead to the study of democracy's impact initially, and so put coherence in the first place. I suggest asking, as a starter, if this prohibition affects democracy's essential content. If the answer is positive, dismiss the restriction without balancing it and rejecting possible risks in this sense, such as utilitarian or "cost-benefits" reasons.

To sum up, the literal sense of the clause "necessary in a democratic society" and the coherence of the treaty systems are the foundations for this stage. In Günther's theory, discourses of application depend on attending to all circumstances applicable to the case and coherence of the system of norms. When analysing the coherence of the

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[101] GÜNTHER, Klaus. Critical Remarks on Robert Alexy`s "Special-Case Thesis". **Ratio Juris**, vol. 6, p. 143-156, 1993. p. 149.

[102] In the same sense HABERMAS, Jürgen. **Between facts and norms.** Translated by William Rehg. Great Britain: Polity Press, 1997. p. 259-260 and in Spain PRIETO SANCHIS, Luis. **Justicia Constitucional y Derechos Fundamentales**. Madrid: Trotta 2014, p. 202.

[103] This reasoning could be observed in the Spanish Constitutional Court's decision to prohibit a demonstration during the last pandemic. In STC 61/2023 (reason 4), when applying proportionality in the narrow sense, the Court held that: "Following this line of reasoning, we come to the last step in the proportionality analysis. From the reports mentioned above, it can be observed that from the prohibition, intending to prevent the spread of a serious disease (Covid-19), it derives more benefits for the general interest than damages to the right involved" (the original text is in Spanish, the translation is mine).

treaties or constitutional systems, we should reflect that neither democratic principles nor human rights could become invalid or null due to limitations. The first stage is to analyse it.

4. TOWARDS A COMPLETE METHOD TO ANALYSE HUMAN RIGHTS RESTRICTIONS: A CHANGE ON THE FIRST QUESTION (CONCLUSIONS)

Could, in some cases, human rights restrictions nullify the meaning of democracy but, at the same time, be "necessary in a democratic society"?

In the proportionality test theory, human rights are in the same place as other public interests. The impact on democratic principles or the essential core of human rights will be considered at the end, in the proportionality in the narrow sense step, as an argument to support the allegation of a high interference on the rights involved. However, it could be, on the other side, a stronger reason that justifies the restriction even in cases when democracy is nullified. Furthermore, the reason could be connected to a "cost-benefit", arguing that the well-being of the majority is more important than the affectedness of a small number of persons (utilitarian reasoning).

Consequently, under this method, restrictions could sometimes nullify democracy and pass the examen, so still be "necessary in a democratic society". This inconsistency shows that the actual method applied to analyse human rights' restrictions does not wholly consider the literal sense of the clause "necessary in a democratic society" and is insufficient.

The term "necessary in a democratic society" represents an autonomous requirement, additionally to the aims and the means analysis, and so it is needed to complete it with content based on coherence. As Barak said: "…there is a certain minimum that must be observed, without which a regime is no longer democratic. A delicate balance must be maintained, therefore, between the two aspects of democracy, in a way that protects the nucleus of each one of its aspects."[104]

A method based on coherence requires the proportionality principle as, through it, we will confirm that the measure is suitable, necessary, and proportionate. However, before it, it is vital to abord a first stage that particularly considers democracy in the scene.

In this paper, I propose adding an initial step before entering the proportionality analysis. In this stage we should consider if the restriction nullifies a democratic principle, if it affects the inalienable core of one or more human rights, and if the aim is legitim and allows a limit to the rights involved.

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[104] BARAK, Ahron. **The judge in a democracy**. USA: Princeton University Press, 2006. p. 26.

Of course, in considering and applying this first step, three important starting points about democracy were explained and agreed: (a) that it is possible to define an essential content of democracy, that it is not what we, each one of us, personally believe, with our subjectivity, but it is what is deducted from the ECHR and the ACHR, or the treaties under consideration; (b) that the essential core of human rights could be defined as the minimum content without which the right will be null and void. If the conception is the one that reduces the inalienable core to what remains after the proportionality in the narrow sense, of course, a first step could not be done, since this essential core, in this position, does not exist; and (c) that democracy is not the decision of the majority, without the consideration of minorities. If we disagree on this, then, in the opposite direction, courts can allow restrictions that nullify essential components of democracy, arguing a "cost-benefit" reason that, in practice, dresses up a conception that prevails a majoritarian interest against minorities, even when a restriction on minorities implies a nullification on their rights, so on democracy.

In this paper, I demonstrated that a first step with the proposed content corresponds to a literal sense of the analysed clause, is based and gives coherence to the legal system, and, more importantly, receives the critics done to proportionality test. So, rights, at the end, will continue acting as *firewalls* (Habermas) or *trumps* (Dworkin).

Likewise, a first stage will enforce their effectiveness and dismiss the criticism to the proportionality test based on the reduction of rights putting them at the same level as any other interest. In this sense, the first stage acts as a first but final barrier, ensuring that not all interests can limit all rights. It gives strength to the analysis of the purpose and the consideration of democracy on it.

It can be argued that only a minority of cases will be resolved in this first step. It could be possible, but they will be the more significant ones. Particularly in societies where democracy is under question, this first step will show the high impact that a measure has on democracy. It will reduce the risk of balancing even when the essential content is affected and could help to visualise other democratic problems that a State could be dealing with, being consistent with other democratic institutions stated under the same regional systems.

Furthermore, the more valuable effect of this first stage is that it would change the first question we always ask when considering a restriction on human rights. The first question will concern something other than the balancing of the measure or even the reason given by the State. The first question will be if this interference affects the essential core of human rights and democracy.

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