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***Limiting Freedom of Speech During  
E-deliberation***

Feinberg's offense principle as a principle that can be used to improve  
and regulate the quality of speech during e-deliberative processes

**Bachelor Thesis**

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## Introduction

The Internet allows rapid and global dissemination of information, ideas, and interaction.<sup>1</sup> This way, the internet has an impact on institutions and current practices of representative democracy, including the public's perception of these institutions and practices.<sup>2</sup> In this context, the Internet has – just like the printing press did, but with a wider range – opened a new door to an upgrade of the democratic system.<sup>3</sup>

The internet has given new means of political participation, which we may call 'digital political participation' (henceforth: **e-participation**). This form of participation has been widely established in everyday politics and people could be encouraged to become more aware of the Internet as an open space for politics, and to actively participate inside legislative processes.<sup>4</sup> At present, this ideal of e-participation is beyond doubt.<sup>5</sup> However, finding the correct approach to e-participation seems to be a difficult task. Some sceptics, e.g., fear potential risks such as that the interference of democratic processes by the dissemination of false information may damage political participation.<sup>6</sup>

While the freedom of speech is indispensable for democracies, it might be important to emphasize that people still have obligations about how they communicate with each other via the internet. This applies more with social media becoming an essential tool within the digital 'public sphere'.<sup>7</sup> This (new) public sphere could make it easier for people to, e.g., manipulate other participants by discriminating and spreading hate speech.<sup>8</sup> Hence, to preserve the potential that the internet offers for a digital democracy, it is necessary to have norms, conditions, and legal and administrative regulation of fundamental rights like the freedom of speech. This thesis will focus on current norms that restrict the freedom of speech. More specifically, this thesis will focus on whether norms that restrict the conduct of participants in online communication should differ from what applies offline, and how they relate to a philosophy of deliberative democracy that values freedom of speech. The following question is central to this thesis:

*What norms regarding freedom of speech (if any) should regulate online deliberation?*

To answer this question, I will assume that the internet can strengthen deliberative democracies. While freedom of speech is indispensable in a democracy, online deliberation (henceforth: **e-deliberation**) needs to include equal access to available resources, openness to all potential participants, free speech, disclosure of relevant information, and a pluralistic network of bound participants. Thence, the quality of e-deliberation depends for example on the degree to which its participants treat each other with respect, and the social and cultural context. In this sense, it is interesting to analyse a conception of deliberative democracy that deals with and shows the importance of deliberative processes, such as Joshua Cohens' conception of deliberative democracy. In this model,

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<sup>1</sup> Andrew Blick, "The internet and democracy: an historical perspective," *Policy Papers*, May 31, 2021, <https://www.historyandpolicy.org/policy-papers/papers/the-internet-and-democracy-an-historical-perspective>.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Leonhard Hennen, et al., "Introduction," in *European E-Democracy in Practice*, ed. Leonhard Hennen, et al. (Switzerland: Springer, 2020), 2-3.

<sup>5</sup> Blick, "The internet and democracy".

<sup>6</sup> Ibid.

<sup>7</sup> Hennen et al., "Introduction," 2-3

<sup>8</sup> Ibid.

public reasoning, political discussion about fundamentals of policy and political appeal to reasons are key features of democracy.<sup>9</sup> Besides, Cohen's conception specifically, is a philosophy that values freedom of speech.<sup>10</sup>

In the first chapter of this thesis, I will introduce the general conception of deliberative democracy. By studying Joshua Cohens' conception of deliberative democracy and his recent contribution with Archon Fung, I will explain several key features of both deliberative democracy and collective participation.<sup>11</sup> A conception of public reasoning and some conditions of communicative freedom will be outlined.

In the second chapter, Cohen's conception will be connected to the online dimension, i.e., digital democracy or e-democracy. Following Lindner Ralf's and Georg Aichholzer's contribution to conceptual foundations and recent trends related to e-democracy and Jan van Dijk's contribution to Digital democracy, I will introduce and describe the conception of digital democracy.<sup>12</sup> This chapter outlines how the Internet improves participation, but it also explains some challenges posed by the use of digital tools at present. Most importantly, I will suggest that, based on Cohen's work, the regulation of speech is an aspect that needs to be developed to create a more democratic digital public sphere.

The third chapter analyses to what extent (absolute) freedom of speech can be part of digital literacy. In this regard, this chapter provides, firstly, an illustration of the freedom of speech and its role in e-deliberative democracy. Thereby, I analyse and critically illustrate current laws related to the freedom of speech, such as article 19 of ICCPR<sup>13</sup> and European jurisprudence<sup>14</sup> (henceforth: **ICCPR**). Subsequently, this chapter critically analyses how hate speech manifests itself during e-deliberation and what limitations may arise concerning the freedom of speech. For instance, sometimes it is necessary to impose certain restrictions on the freedom of speech because discussion takes place within a context of competing interests and values. Certain restrictions however could result in a slippery-slope claim. A slippery-slope argument shows that a small change could have drastic and tyrannical consequences (on society).

In the fourth chapter, Feinberg's offense principle is described and critically analysed. For this purpose, I will delve into Feinberg's book *The Moral Limits of the Criminal Law*.<sup>15</sup> According to the offense principle, the conduct of an offender is legitimized under different maxims such as the motives, the degree of spite and the social context.<sup>16</sup> Furthermore, the conduct of an offender can be restricted if such conduct applies to different standards such as the intensity, length and the abnormal susceptibilities of the offended individual.<sup>17</sup> In this chapter, it is assumed that this principle can be used as a norm to understand when the freedom of speech should be restricted during e-deliberation, i.e.,

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<sup>9</sup> Joshua Cohen, "Democracy and liberty," in *Deliberative democracy*, ed. Jon Elster (Cambridge: Cambridge Press, 1998), 193-201.

<sup>10</sup> Cohen, "Democracy and liberty," 208.

<sup>11</sup> Cohen, "Democracy and liberty." And Joshua Cohen and Archon Fung, "Democracy and the Digital Public Sphere", in *Digital Technology and Democratic theory*, ed. Lucy Bernholz, Hélène Landemore and Rob Reich (Chicago: The University of Chicago Press, 2021).

<sup>12</sup> Lindner Ralf and Georg Aichholzer, "E-democracy: Conceptual Foundations and recent trends," in *European E-Democracy in Practice*, ed. by Leonhard Hennen, Ira van Keulen, Iris Korthagen, Georg Aichholzer, Ralf Lindner, and Rasmus Øjvind Nielsen (Switzerland: Springer, 2020); Jan A.G.M. van Dijk, "Digital democracy: Vision and reality," in *Public administration in the information age: Revisited*, eds., Ig Snellen, Marcel Thaeens, and Wim van de Donk (Amsterdam: IOS-Press, 2012).

<sup>13</sup> "International Covenant on Civil and Political Rights," <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

<sup>14</sup> European Court of Human rights 26 April 1979, (*The Sunday Times vs. The United Kingdom*). <https://www.ucpi.org.uk/wp-content/uploads/2018/03/The-Sunday-Times-v-The-United-Kingdom-A30-1979-80-2-E.H.R.R.-245.pdf>.

<sup>15</sup> Joel Feinberg, *The Moral Limits of the Criminal Law* (New York, USA: Oxford University Press, 1986).

<sup>16</sup> Joel Feinberg, *The Moral Limits of the Criminal Law* (New York, USA: Oxford University Press, 1986), 25.

<sup>17</sup> Feinberg, *The Moral Limits of the Criminal Law*, 35.

when it offends psychologically, which means that a person experiences a mental state of a universally disliked kind following the aforementioned maxims and standards.<sup>18</sup> This chapter, thus, shows how the principle is related to speech during e-deliberation.

Considering the connection made between Cohen's conception of deliberative democracy and the online dimension, I will conclude that Feinberg's offense principle offers grounds for abridging expression during e-deliberative processes. For instance, when the speech is aimed at inflicting psychological offense, which is a morally wrongful deed, and the target group cannot avoid being exposed to it. This also applies because Cohen's conception of deliberative democracy values freedom of speech. Feinberg's offense principle can therefore be used to regulate and improve the quality of speech during e-deliberative processes.

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<sup>18</sup> David van Mill, "Freedom of Speech," *The Stanford Encyclopedia of Philosophy*, accessed March 2, 2022, <https://plato.stanford.edu/archives/spr2021/entries/freedom-speech/>.

## Chapter 1 – Democracy and deliberation

Democracy has often been interpreted in many ways, as the concept has taken on various forms and conceptions since its existence. This chapter provides an introductory overview of the deliberative democracy conception. More specifically, this chapter provides Cohen's conception of deliberative democracy, which will be used as a basis to answer the question central to this thesis. I will dwell on Cohens' conception of deliberative democracy and his contribution with Fung. In this context, several key features of both deliberative democracy and collective participation will be explained. Additionally, this chapter outlines the concept of public reasoning, some conditions of communicative freedom and other norms and dispositions, such as Truth, Common good and Civility. Usually, the conception of deliberative democracy is opposed to pluralistic and social choice conceptions of democracy. Although relevant, I do not mean to address these opposing views further in this thesis.

### 1.1 Cohen's conception of deliberative democracy

The guiding conception of deliberative democracy is drawn by Cohen as a model:

*"... in which political discussion about fundamentals of policy and political appeal to reasons – including reasons of justice, fairness, and the common good – that are suited to cooperation among free and equal persons with deep disagreements. Moreover, the authorization to exercise collective power through the democratic political system traces to such argument".<sup>19</sup>*

Following Cohen, the conception of deliberative democracy combines democracy through arrangements of binding collective participation with free public reasoning among equal members who are governed by the decisions. These decisions are developed by procedures that can guarantee their legitimacy, because they are, e.g., the result of collective power. To exercise that collective power, citizens offer each other justifications in terms of considerations that can be acknowledged by all the participants as reasons. This is also called public reasoning. As Cohen puts it, this conception is not primarily aimed at the equal weighing of interests. Some interests, for instance, might have to be discounted by arrangements of such a binding collective power.<sup>20</sup>

In Cohen's deliberative conception, democracy is not only a form of politics but also a structure in which social and institutional bodies play an important role. For instance, this structure facilitates not only the process of public reasoning through political deliberation but also among equal citizens. This means that this kind of democracy facilitates good conditions for expression, association, and participation. It ensures that citizens can discuss freely and equally during the process of public reasoning. However, in any view of democracy or any view of political decision-making, public discussion plays an important role. With this in mind, Cohen makes a relevant distinction between public discussion and public reasoning. As Cohen puts it, a deliberative conception cannot just be distinguished by its emphasis on discussion rather than negotiating or voting as methods of collective decision making.<sup>21</sup> According to him, discussion is important in any view of political decision making,

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<sup>19</sup> Cohen and Fung, "Democracy and the Digital Public Sphere," 27.

<sup>20</sup> Cohen, "Democracy and liberty," 186.

<sup>21</sup> Cohen, "Democracy and liberty," 193.

even if it is only because the essential role it has merging all kinds of information against a background of asymmetries in its dissemination. Discussion helps to reach decisions or to exchange ideas. Cohen, however, further elaborates on public reasoning rather than on public discussion because for him it seems that reasoning leads to better conditions for expression, association, and participation. Public reasoning aims at the public justification of moral or political norms, which might be partly determinate prior to any actual discussion. On this account, deliberative democracy also ties the authorization to exercise public political power by institutions through, e.g., regular competitive elections and legislative oversight. Recently, he stated however that public discussion is also relevant and is part of the framework.<sup>22</sup>

This being said, public reasoning allows citizens to reason freely among each other. According to Cohen, the conception of justification through public reasoning can then be portrayed as a procedure of political deliberation, in which different notions like free, equal and reason are captured.<sup>23</sup> This means that these notions help to establish a procedure that serves to organise a strong framework of free reasoning among equals. Cohen argues that in an ideal deliberative procedure participants see each other as free beings. This means that participants for example recognize reasonable pluralism. In other words, they recognize that no moral or religious view offers a defining definition of participation, neither does this recognize a test of the acceptability of arguments supporting any form of exercise of political power. Furthermore, as he puts it, participants regard each other as equals. The rules regulating the deliberative process do not acknowledge any special advantages or disadvantages to its participants. Every being with deliberative capacities – in fact almost all human beings – has and ought to be recognized as having equal standing during each stage of the deliberative process. Put differently, any existing distribution of power does not shape the chances of any participant to contribute to the deliberative process, nor does the distribution has an authoritative role in their deliberation. Moreover, Cohen argues that participants ought to be reasonable. Participants ought to aim to defend and criticize institutions. Thereby, participants need to consider that others, being free and equal, have reasons to accept other beings' considerations, taking into account reasonable pluralism and assuming that these others are themselves concerned to offer adequate justifications. As Cohen claims, a reason can be described as a consideration – a belief or action – that counts in favour of something. According to him, citizens recognize as reasons considerations that conflict with their previous preferences and interests, selecting and ordering alternatives in conformity with such considerations and adjusting to them.<sup>24</sup>

By emphasizing the importance of shared reasons, the deliberative conception of democracy offers a convincing framework of the potential relations among people within a democratic structure. The deliberative conception states namely a forceful ideal that equalizes the principal virtues of a democratic order, i.e., community, legitimacy, and democracy. By requiring justification, as mentioned before, deliberative democracy renders for political autonomy. In terms acceptable to others, participants must find a basis for the collective decisions, even when they disagree. This political autonomy is important for the ideal of community because it expresses the free and equal membership of all the participants in the sovereign body. These participants are responsible for authorizing collective

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<sup>22</sup> Cohen and Fung, "Democracy and the Digital Public Sphere," 27.

<sup>23</sup> Cohen, "Democracy and liberty," 193

<sup>24</sup> Ibid., 194, 199.

power. Therefore, this political autonomy establishes the common reason and will of that body. Accordingly, when the exercise of collective power has sufficient justification, i.e., justification employing conditions as equal, free, and reasonable participation, it can be assumed that there is political legitimacy.<sup>25</sup>

Recently, Cohen and Fung argued about what a healthy democracy requires.<sup>26</sup> For instance, a democracy requires a deliberative public sphere: an informal space where citizens can communicate and gain information with one another, discuss problems, bring them to public view and be able to debate and address these problems whether they are important for society and worth to address. A place that makes public reasoning possible.

According to Cohen and Fung, the core of deliberative democracy relies on two essential aspects.<sup>27</sup> The first aspect is based on the integration of public discussion and opinion formation without formal decision-making. This aspect implies space for the informal and unregulated exploration of issues in an informal public sphere, where participants can produce public opinions, but do not shape any binding or authoritative collective decisions. The second aspect concerns the formal will or policy formation. This aspect includes competitive elections and legislative processes, such as processes and decisions of courts, whereby elected official representatives deliberate about public opinions produced by the informal public sphere, and consequently shape binding authoritative decisions. Both aspects are linked to each other and form a framework that shapes public debate and public opinion, i.e., public reasoning, by merit of which laws are created.<sup>28</sup> In Cohen's conception of deliberative democracy, public reasoning lies, therefore, at the centre of political justification. When consensus or something like it is not possible, the majority rule can be used.<sup>29</sup>

As mentioned before, deliberative democracy requires participants to offer considerations tolerable to others, and whose conduct will finally be governed by final binding decisions. Habermas argued, e.g., in this context, that government and capital systems – systems governed by money and power –, when disconnected from a public sphere, were insufficient on their own to accomplish social integration.<sup>30</sup> Building on Habermas, Cohen argues, therefore, that a deliberative democracy from its core must restrain the exercise of political power to public reasoning by the formation of will and opinion, thereby strengthening communicative power.<sup>31</sup> Considering this, Cohen's conception seems to fit the somewhat banal natural law standard maxim "lex iniusta non est lex", i.e., an unjust law is not a law.<sup>32</sup> Laws that are shaped by public reasoning, with the principal virtues of deliberative democracy in mind (community, legitimacy, and democracy), may, following this natural law approach, be qualified as valid laws that create a moral obligation.

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<sup>25</sup> Ibid., 222-224.

<sup>26</sup> Cohen and Fung, "Democracy and the Digital Public Sphere," 23-61.

<sup>27</sup> Cohen and Fung, "Democracy and the Digital Public Sphere," 27.

<sup>28</sup> Cohen and Fung, "Democracy and the Digital Public Sphere," 28.

<sup>29</sup> Cohen, "Democracy and liberty," 193.

<sup>30</sup> Jürgen Habermas, *The Theory of Communicative Action, Volume 2: Lifeworld and System: A Critique of Functionalist Reason* (Boston, MA: Beacon Press, 1985), 154.

<sup>31</sup> Cohen, "Democracy and liberty," 186-187; Jürgen Habermas, "Further reflections on the public sphere," in *Habermas and the public sphere*, ed. Craig Calhoun, (Cambridge, Mass.: MIT Press, 1992), 446, 452.

<sup>32</sup> Andre Santos Campos, "Aquinas's 'Lex Iniusta Non Est Lex': A Test of Legal Validity," *ARSP: Archiv Für Rechts- Und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy* 100, no. 3 (2014): 366



## 1.2 The public sphere

Participants of the public sphere cannot fully understand by themselves how to participate in such a framework unless they are nurtured. A well-functioning public sphere, therefore, needs a framework of valid laws and opportunities to achieve an ideal balance of collective participation and public reasoning to ensure equal and substantive communicative freedom.<sup>33</sup> According to Cohen and Fung, substantive communicative freedom has a significant meaning, because it helps to achieve the ideals of a healthy deliberative democracy. In this context, they introduce five conditions that describe the structure of substantive communicative freedom: (i) Rights; (ii) Expression; (iii) Access; (iv) Diversity, and (v) Communicative power.<sup>34</sup> According to Cohen and Fung these conditions can be clarified as follows:

(i) Rights: all human beings have rights to fundamental freedoms, including the freedom of expression. This condition has a strong presumption against, e.g., regulating speech for discriminatory reasons. In general, this condition aims to protect the expressive interest of all human beings aiming to speak. Specifically, it aims to protect the deliberative interests of spectators by employing reasonable pluralism. Furthermore, rights secure the independence of public discussion from the authoritative public regulator. Put simply, this condition is designed to not only afford protection against, e.g., censorship, but it is more importantly democracy enabling. The protection of speech helps establish conditions that enable community, legitimacy, and democracy.

(ii) Expression: this condition supports expression in a wide sense. Accordingly, all human beings should have good and equal chances to express themselves on public issues to a public audience. This condition seems to be in line with the first essential aspect of a deliberative democracy mentioned before. This first essential aspect is based on the integration of public discussion and opinion formation without formal decision making. Expression implies space for the informal and unregulated exploration of issues in an informal public sphere, where participants can produce public opinions, but do not shape any binding decisions. In the terms of Expression, it is required that everyone has fair participatory opportunities in public discussion. This implies that everyone should have the ability to communicate their views on matters of common concern in the widest sense and to audiences that go beyond personal acquaintances and friends. Therefore expression, unlike Rights, which requires the absence of discriminatory restrictions on the freedom of expression, adds substance to it.

(iii) Access: equal and good access to instructive and reliable information on matters of common concern is required by this condition. Access implies not only the right to be informed, but this right also requires a measure of effort by the institution involved. There must be reliable sources that act in a trustworthy way and are reasonable to trust; this condition also accepts a certain level of inaccuracy, because information cannot always be accurate. Additionally, the inability to obtain information implies a discussion of low quality, which is a product of the low understanding of the issues involved. Just as Expression, Access adds substance to fair opportunity. By acquiring information, everyone has equal standing, and this indirectly results in the ability to participate in free public discussion.

(iv) Diversity: this condition means that all human beings should have good and equal chances to hear different views on issues of public common concern. It requires a wide scope of qualities:

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<sup>33</sup> Cohen and Fung, "Democracy and the Digital Public Sphere," 28.

<sup>34</sup> Cohen and Fung, "Democracy and the Digital Public Sphere," 29-30.

equality, fairness, justice, and the common good. This condition is valuable because it accepts the exposure to disagreement, a circumstance that finally can lead to understanding the meaning and justification of someone's view. Exposure to disagreement allows a good environment for the formation of reasonable and accurate beliefs. This condition also seems to recognize reasonable pluralism. Just like diversity, reasonable pluralism recognizes that no moral or religious view can define participation, neither does this recognize a test of the acceptability of arguments supporting any form of exercise of political power. Diversity enables people to have different perspectives, which in turn contributes to the quality of public deliberation.

(v) Communicative power: this last condition is a capacity for persistent collective action, which is generated using open-ended discussion, exploration, and mutual understanding. This condition allows human beings to associate and explore interests and issues that finally lead to common understandings. Therefore, this condition adds substance to the freedom of association contained in the rights condition.

Ideally speaking, the five conditions suggest that a deliberative democracy needs to include equal access to available resources, openness to all potential participants, free speech, disclosure of relevant information for those involved, and a pluralistic network of bound participants.<sup>35</sup> The informal public sphere demands access to the five conditions particularly. As Cohen and Fung put it, this may be a substantial challenge, one that hits the core of deliberative democracy. In common public discussions, people need to be able to think of themselves as participants – despite their differences and conflicts.<sup>36</sup>

Together, these conditions not only secure the independence of common public discussion but also contain a strong presumption against, e.g., regulating speech. That seems almost certainly because speech is vulnerable and political institutions have strong incentives to regulate it.<sup>37</sup> The protection of speech against, e.g., censorship, creates conditions that legitimately enable participants to form and discuss their views, and to make political judgments. Also, it ties the authorization to exercise public political power by institutions.

Furthermore, even if the public sphere has achieved an ideal balance between collective participation and reasoning by laying down a strong framework of laws and opportunities, this framework may be insufficient for a healthy deliberative democracy.<sup>38</sup> This framework does not automatically solve potential risks, such as the disruption of democratic processes through the dissemination of false information that may damage political participation. Nor does it solve manipulation and intimidation of others through hate speech, which limits their ability to express themselves in public debate. Following Cohen and Fung, this are substantial challenges, because a strong framework of laws and opportunities does not imply that participants will act well together. The realization of this framework, therefore, depends on the norms and dispositions of the different participants in the public sphere. This is especially true because some participants can disregard the rights and opportunities of others. They can, e.g., manipulate and harass others through hate speech, reducing their expressive opportunities in public discussion. Norms and dispositions shape the public sphere, and, therefore, the quality of public reasoning.

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<sup>35</sup> Cohen and Fung, "Democracy and the Digital Public Sphere," 29-30; see also: Lindner and Aichholzer, "E-democracy: Conceptual Foundations and recent trends," 14.

<sup>36</sup> Cohen and Fung, "Democracy and the Digital Public Sphere," 28.

<sup>37</sup> Joshua Cohen, "Freedom of Expression," *Philosophy and Public Affairs* 22, no. 3 (1993): 227-228.

<sup>38</sup> Cohen and Fung, "Democracy and the Digital Public Sphere," 31.

Cohen and Fung suggest that – although not legally binding – a strong framework of rights and opportunities, and a well-functioning democratic public sphere, must rely on three important demanding norms and dispositions.<sup>39</sup> (i) Truth: although uncertainty, error, and disagreement are part of public discussion, participants must not deliberately misrepresent their beliefs or show negligence about truth or falsity. Errors ought to be fixed and uncertainty ought to be taken away. (ii) Common good: participants need to be guided by a reasonable conception of the common good, i.e., a sense to respect and understanding of the equal importance to intervene during a public discussion. (iii) Civility: participants need to recognize the obligation to justify the views that lead them binding decisions.

To conclude, briefly and a bit crudely, the aforementioned core of conditions, norms, and dispositions might have a settled meaning for the deliberative democracy conception, especially for its public sphere. But there will be, as well, a penumbra during certain deliberative processes, which means that some of those conditions, norms, and dispositions are neither applicable nor ruled out. In the best-case scenario, one could argue that deliberative processes will benefit from the conditions, norms, and dispositions given by Cohen and Fung. Notwithstanding, a process that allows a group of actors to exchange and receive information – in the sense of substantive communicative freedom for example – will depend on the circumstances of such case whereby these might have and lack some features of the standard case. For instance, the interaction between those actors might be vulnerable because a public institution has strong incentives to regulate how information flows in practice. Therefore, in applying the previously mentioned core of conditions, norms, and dispositions, someone must take responsibility for deciding which of these must be applied in hand with all the practical consequences involved in this decision. Following the approach of deliberative democracy, this responsibility is relevant for both the informal and the formal public sphere; laws are a result of public reasoning made by both the informal and the formal public sphere.

A good illustration of a current penumbra is the upcoming digital technologies. This means that the upcoming digital era can have and lack some features of the standard case, making it difficult to apply conditions, norms, and dispositions as participants were used to in the offline sphere. This seems certain because according to Cohen and Fung upcoming digital technologies have destroyed the democratic qualities of the public sphere.<sup>40</sup> This insight will be set out in the following chapter.

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<sup>39</sup> Ibid., 31-32.

<sup>40</sup> Cohen and Fung, “Democracy and the Digital Public Sphere,” 24.

## Chapter 2 – Digital democracy and the public sphere

This chapter aims to discuss the relationship between Cohen's conception of deliberative democracy and digital democracy or e-democracy. Following Ralf's and Aichholzer's contribution to e-democracy and van Dijk's contribution to digital democracy, I introduce and describe the conception of digital deliberative democracy I will focus on. In this context, I will explain that Cohen's conception of deliberative democracy can be improved if digital technologies are implemented more effectively. Additionally, this chapter outlines a conception of the digital public sphere building on the previously described conditions of communicative freedom, and the norms and dispositions provided by Cohen.

### 2.1 A conception of digital deliberative democracy

The Internet opens the door for the conception of digital democracy.<sup>41</sup> Digital democracy or e-democracy is, according to some literature, a conception in which technological and communication tools are interwoven through a variety of media. Lindner and Aichholzer suggest that, on the one hand, a digital democracy can be regarded as

*“a collection of attempts to practice democracy without the limits of time, space and other physical conditions, using information and communication technology or computer-mediated communication instead, as an addition, not a replacement for traditional ‘analogue’ political practices”.*<sup>42</sup>

On the other hand, van Dijk suggests that a

*“digital democracy can be defined as the pursuit and the practice of democracy in whatever view using digital media in online and offline political communication. The online–offline distinction should be added because political activities are not only happening on the internet but also in physical meetings where mobile digital media are used for assistance.”*<sup>43</sup>

In this thesis, I consider van Dijk's definition to be more concise than Lindner's and Aichholzer's. Van Dijk's definition provides the online-offline distinction, which as a concept is better suited to the scope of this thesis, namely e-deliberation. Therefore, building on van Dijk, I understand deliberative digital democracy as the pursuit and the practice of democracy using digital technologies in online and offline political communication. More specifically, deliberative digital democracy refers to the use of these technologies in political debates and decision-making processes, complementing, contrasting, and reinforcing traditional means of communication, such as a one-to-many (broadcast) to a many-to-many (networked) form of communication. These two forms of communication will be considered later.

Additionally, in agreement with Lindner and Aichholzer, I recognise that digital technologies, e.g., help to disseminate information easily, with the result that more people are becoming increasingly informed and aware of the Internet as an open space for politics.<sup>44</sup> With the arrival of digital technologies,

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<sup>41</sup> Hennen et al., “Introduction,” 2-3.

<sup>42</sup> Lindner and Aichholzer, “E-democracy: Conceptual Foundations and recent trends,” 16.

<sup>43</sup> Van Dijk, “Digital democracy: Vision and reality,” 51.

<sup>44</sup> Lindner and Aichholzer, “E-democracy: Conceptual Foundations and recent trends,” 18.

e.g., it has become easier for citizens to join forces and manipulate the market in the broadest sense.<sup>45</sup> By encouraging each other, citizens can boost the market stocks, resulting in profits in the capital markets,<sup>46</sup> which implies strategic organization of citizens. Furthermore, in Madrid there is an online platform that helps to e-deliberate about the city budget.<sup>47</sup> More than 90,000 citizens decide about the use of more than 100 million euros from the city budget. In 2019 the platform had around 450,000 registered users. By the same period in Amsterdam, between 13 and 19% of Amsterdam residents from that area participated in the online distribution of neighbourhood budgets.<sup>48</sup>

In my opinion, this implies that digital technologies cannot only improve economic processes but can also improve e-deliberative processes. Moreover, this suggests that digital media can enable greater involvement of individual citizens, informal groups, and other civil society organizations in the digital public sphere. With this and the 'new' definition in mind, I understand that digital technologies can be implemented more effectively in Cohen's conception of deliberative democracy. A more effective implementation of digital technologies can help to improve Cohen's two essential aspects described earlier, namely the integration of public discussion and opinion-formation without formal decision-making (the informal public sphere), and the formal will or policy-formation (the formal public sphere). In my opinion, this also means that public reasoning becomes more attractive. I will refer to the improvement of Cohen's conception as e-deliberative democracy or e-participation.

Although digital media has a positive influence on an e-deliberative democracy in general, one must also be aware of the potential risks of using digital media. According to Lindner and Aichholzer, the use of digital media could on the one hand lead to quick superficial e-deliberation processes.<sup>49</sup> Besides, an e-deliberative democracy might make it easier for people to manipulate other participants by deliberately making use of hate speech.<sup>50</sup> Digital platforms, e.g., have a relatively high proportion of incorrect or misleading information. Participants of the digital public sphere (henceforth: **e-participants**) can deliberately spread false or misleading information.<sup>51</sup> On the other hand, digital technologies must not be disregarded and the potential for the success of a digital public sphere should be embraced.

## 2.2 The digital public sphere

The Internet makes the digital public sphere possible by creating new means of participation. The latter stems from practices of online engagement of public reasoning. Following Cohen and Fung, there is a shift from a one-to-many (broadcast) to a many-to-many (networked) form of communication in this conception of e-participation.<sup>52</sup> This also means that the digital public sphere clearly creates an entirely new way of communicating that enables more people to express themselves through bigger public networks, i.e., e-participation.<sup>53</sup>

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<sup>45</sup> Nick Campuzano, "GameStop en particuliere beleggers. Eerlijk meegespeeld of marktmanipulatie?," *Ars Aequi* (2021): 904.

<sup>46</sup> Campuzano, "GameStop en particuliere beleggers," 903.

<sup>47</sup> "Digitale democratie in de praktijk", accessed May 8, 2022, <https://vng.nl/sites/default/files/2019-12/20191224-digitale-democratie-in-de-praktijk.pdf>.

<sup>48</sup> "Digitale democratie in de praktijk", accessed May 8, 2022, <https://vng.nl/sites/default/files/2019-12/20191224-digitale-democratie-in-de-praktijk.pdf>.

<sup>49</sup> Lindner and Aichholzer, "E-democracy: Conceptual Foundations and recent trends," 19.

<sup>50</sup> Cohen and Fung, "Democracy and the Digital Public Sphere," 39.

<sup>51</sup> Campuzano, "GameStop en particuliere beleggers," 905.

<sup>52</sup> Cohen and Fung, "Democracy and the Digital Public Sphere," 36.

<sup>53</sup> Sarah Jackson, Moya Bailey, and Brooke F. Welles, *#HashtagActivism: Networks of Race and Gender Justice* (Cambridge, MA: MIT Press, 2020).

Cohen and Fung claim that the digital infrastructure of the public sphere not only offers easier access to a wider range of information, narrative, and political processes but also reduces the cost of consuming and distributing information. This infrastructure provides a place for discussion and dissemination of news, and it is a network that can be used to publicise legally binding decisions. Moreover, it enables the existence of many more providers and distributors of information, which are dominated by Google, Facebook, YouTube, and Twitter.<sup>54</sup>

In this constellation, Lindner and Aichholzer argue that these and other platforms make it possible for elected official representatives, e.g., to directly deliberate with citizens.<sup>55</sup> For instance, political representatives spread information and statements through these and other social media platforms.<sup>56</sup> Not only these actors, but also scholars, journalists, and others have embraced the infrastructure of the digital era.<sup>57</sup> Besides private actors of high reputation are fully aware of the high potential this infrastructure can have. For instance, Elon Musk, best known for Tesla and SpaceX, trying to influence Twitter, which in his words is “the platform for free speech around the globe”.<sup>58</sup>

For Cohen and Fung, the availability of information that is managed by so many providers and distributors requires careful qualification.<sup>59</sup> One of the reasons is that this wide access to information increases the possibilities for misinformation. In this sense, e-deliberative processes can be seen – just as mentioned previously – as a penumbra for the application of not only laws, but also existent conditions, norms, and dispositions. The digital public sphere may be a penumbra for Cohen’s framework of substantive communicative freedom conditions (Rights; Expression; Access; Diversity and Communicative power), and/or norms and dispositions (Truth; Common sense; and Civility). This applies more because e-participants may feel that they are beyond the reach of the state. In this constellation, Lindner and Aichholzer argue that the digital public sphere can for example be used for anti-social communication with irrelevant noise, misinformation, cyberbullying, and expressions of hatred.<sup>60</sup>

Moreover, Cohen’s norms and conditions can at the same time make a strong framework of rights and opportunities, and a well-functioning, democratic public sphere possible. Such norms and conditions are also relevant because the digital world can also be the key to threats to constitutional orders. On January 8, 2021, Ex-President Donald J. Trump Tweeted:

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<sup>54</sup> Cohen and Fung, “Democracy and the Digital Public Sphere,” 36.

<sup>55</sup> Lindner and Aichholzer, “E-democracy: Conceptual Foundations and recent trends,” 33.

<sup>56</sup> See e.g., Mark Rutte, “The prime minister of the Netherlands,” LinkedIn profile, <https://www.linkedin.com/in/mark-rutte/?originalSubdomain=nl>; Mark Rutte (@minpres), “The prime minister of the Netherlands,” Instagram profile, <https://www.instagram.com/minpres/>; Joe Biden (@joebiden), “The president of United States,” Instagram profile, <https://www.instagram.com/joebiden/>; Joe Biden, “The president of United States,” Twitter profile <https://twitter.com/joebiden>; Justin Trudeau (@justinpjtrudeau), “The prime minister of Canada,” Instagram profile <https://www.instagram.com/justinpjtrudeau/>; Justin Trudeau, “The prime minister of Canada,” Twitter profile, <https://twitter.com/justintrudeau>; Jacinda Ardern, “The prime minister of New Zealand,” Instagram profile, <https://www.instagram.com/jacindaardern/>; Jacinda Ardern, “The prime minister of New Zealand,” Twitter profile, <https://twitter.com/jacindaardern>.

<sup>57</sup> Alfred Hermida, “Post-Publication Gatekeeping: The Interplay of Publics, Platforms, Paraphernalia, and Practices in the Circulation of News,” *Journalism & Mass Communication Quarterly* 97, no. 2 (2020): 469-91.

<sup>58</sup> Robert Wright, “Elon Musk launches hostile bid for Twitter at \$43bn valuation,” *The Financial Times*, April 15, 2022, <https://www.ft.com/content/e1b87776-2f7d-459d-9671-f3e58f79fc73>.

<sup>59</sup> Cohen and Fung, “Democracy and the Digital Public Sphere,” 39.

<sup>60</sup> Lindner and Aichholzer, “E-democracy: Conceptual Foundations and recent trends,” 34; see also Cohen and Fung, “Democracy and the Digital Public Sphere,” 40.

*“The 75,000,000 great American Patriots who voted for me, AMERICA FIRST, and MAKE AMERICA GREAT AGAIN, will have a GIANT VOICE long into the future. They will not be disrespected or treated unfairly in any way, shape or form!!!”*<sup>61</sup>

By that time, this speech was received by Trump’s supporters as an affirmation of the breach of the legitimacy of the American elections, which consequently resulted in violent attacks on the American capitol. Given the norms of Truth, Common good, and Civility, this kind of speech is dangerous, and regulators should be aware of the risks involved. While error and disagreement are part of public discussion, Trump should have not deliberately misrepresented his beliefs or should have shown negligence about truth or falsity. He should have recognized his obligation as a political figure to justify his views. After several warnings, Trump was banned from the provider.

Perhaps digital technologies are indeed destroying the democratic qualities of the public sphere, as Cohen and Fung argued earlier. In my opinion, this is something that can be recognized for now, at least to a certain level because digital technologies can be improved. The digital public sphere, more specifically online platforms, alone cannot solve the weaknesses of e-deliberative processes. Thence, something is needed to restrain the exercise of dangerous speech, just as the government and capital systems are insufficient on their own to accomplish social integration when disconnected from a public sphere.

### **2.3 The digital public sphere & challenges**

The digital public sphere poses numerous challenges. One of these is the question of who is responsible for determining what conditions, norms, and dispositions must be applied. This actor must consider all the practical consequences involved in such a decision. But who? Private actors? Elon Musk would for example avoid deleting posts and advocate for “timeouts” over “permanent bans”.<sup>62</sup> This position could ultimately pave the way for a return of banned figures to the platform, such as former US President Donald Trump. Is this all desirable?

Lindner and Aichholzer emphasize that the responsibility to solve the weaknesses in democratic systems must lie with the e-participants.<sup>63</sup> In my opinion, this view also fits Cohen’s e-deliberative conception, because, in this conception, the decisions taken are the result of e-deliberative processes. Nevertheless, according to Klos, e-participants may think that the government does not or cannot control what happens on online platforms.<sup>64</sup> This can create the impression that by entering the digital public sphere, they have the ‘Ring of Gyges’ – a mythical tool that makes someone invisible –, allowing them to carry out (illegal) acts in an untraceable way. According to Plato, the Ring of Gyges is the only barrier between a just and an unjust person.<sup>65</sup> Gyges was able to seduce a queen, kill her king, and take over the kingdom through this invisibility. Analogously applied in the digital discourse, e-participants may

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<sup>61</sup> Twitter, “Permanent suspension of @realDonaldTrump,” accessed January 8, 2021, [https://blog.twitter.com/en\\_us/topics/company/2020/suspension](https://blog.twitter.com/en_us/topics/company/2020/suspension).

<sup>62</sup> Robert Wright and Criddle Cristina, “Elon Musk launches hostile bid for Twitter at \$43bn valuation,” *The Financial Times*, January 17, 2022, <https://www.ft.com/content/e1b87776-2f7d-459d-9671-f3e58f79fc73>.

<sup>63</sup> Lindner and Aichholzer, “E-democracy: Conceptual Foundations and recent trends,” 34.

<sup>64</sup> Michael Klos, “Bestuursrechtelijk ingrijpen in cyberspace?,” *Ars Aequi* (2022): 86.

<sup>65</sup> Dorothea, Frede, “Plato’s Ethics: An Overview”, accessed April 19, 2022, <https://plato.stanford.edu/archives/win2017/entries/plato-ethics/>.

experience this delusional belief of invisibility despite being contradicted by reality or rational arguments. They can think that they are completely invisible when being part of e-participatory processes. This is however a misconception. According to Klos, digital tools do not allow this kind of invisibility or absolute anonymity; in many cases, users can be traced back.<sup>66</sup> This freedom e-participants experience can result in negative consequences for the e-deliberative processes.

Obtaining authentic and reliable information in the digital public sphere can be regarded as another challenge. In this context, participants require considerable effort to identify reliable information from misinformation, disinformation, and fake news. To prevent this challenge, e-participants need, among others, to distinguish who is aiming to make a serious contribution to e-deliberative processes. Truth, Common sense, and Civility are norms that participants should consider. These allow e-deliberative processes to be legitimate and democratic.

Additionally, there is currently an emerging phenomenon called “trial by media”. In a trial by media, an individual is publicly condemned by other citizens based on the staunch belief that he has acted contrary to a social or legal norm and has deserved (preferably a lot of) punishment.<sup>67</sup> The individual becomes in this sense a target of the media, without having had a fair trial. The authorities are called upon by the public sphere to impose the desired punishment. However, in Dutch Criminal law e.g., the norm of presumption of innocence applies. This means that the person who is prosecuted is presumed innocent “until his guilt has been established in court”.<sup>68</sup> For instance, a criminal case with a lot of media attention in which a harmful image of the suspect predominates, even if the outcome of the criminal process is not influenced by this and a high-quality verdict follows.

In sum, the penumbra of the digital public sphere is challenging. According to Cohen and Fung, however, democratic effects will certainly evolve in the future.<sup>69</sup> A well-functioning democratic digital public sphere requires well-thought and more oriented action by all its actors.<sup>70</sup> For instance, not only governments, but also private companies, non-governmental organizations, and carriers of the Ring of Gyges. In this context, Cohen and Fung argue that the current digital public sphere still lacks gatekeepers that control content from truthfulness for example.<sup>71</sup> Both scholars argue that certain aspects need to be developed to improve e-deliberative processes. With this in mind, norms that apply online should differ from what applies offline. Among others, they refer to the regulation of speech, powerful private corporations, the production of high-quality information, privacy and security, the creation of a civic culture of responsible, etc.<sup>72</sup> In this thesis, I focus on the aspect of speech regulation.

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<sup>66</sup> Klos, “Bestuursrechtelijk ingrijpen in cyberspace?,” 86.

<sup>67</sup> Peter C. Schouten, “Trial by media: banger voor de pers dan voor de strafrechter,” *Ars Aequi* (2013): 641.

<sup>68</sup> Nick van den Hoek, “Vrijgesproken en toch belast: strijd met de onschuldpresumptie?,” accessed March 8, 2022, <https://www.njb.nl/blogs/vrijgesproken-en-toch-belast-strijd-met-de-onschuldpresumptie/>.

<sup>69</sup> Cohen and Fung, “Democracy and the Digital Public Sphere,” 42.

<sup>70</sup> *Ibid.*, 43.

<sup>71</sup> *Ibid.*, 41.

<sup>72</sup> *Ibid.*



## Chapter 3 – The freedom of speech

How far can the freedom of speech be part of digital literacy? To answer this question, this chapter provides, firstly, an illustration of the freedom of speech and its role in e-deliberative democracy. I analyse and critically illustrate current laws related to the freedom of speech, such as article 19 of the ICCPR and European jurisprudence. Subsequently, I will analyze and critically illustrate how hate speech manifests itself during e-deliberation and the restrictions that may arise.

### 3.1 Free speech

Freedom of speech is a controversial topic in liberal societies. Most societies with a democratic system have the fundamental right of freedom of speech enacted in their constitutions.<sup>73</sup> Freedom of speech or free speech means the free and public expression of opinions without censorship, interference, and restraint by the government.<sup>74</sup> According to Cohen, this freedom is associated with different values, e.g., individual self-expression, a well-functioning democracy, the discovery of the truth, and a balance of social emancipation and social stability.<sup>75</sup>

Internationally, article 19 of the ICCPR forms a legal basis for the protection of this freedom.<sup>76</sup>

According to paragraph 1,

*“everyone shall have the right to hold opinions without interference.”*

Paragraph 2 states that

*“everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”*

If free speech is highly valued, it becomes a volatile matter, for only then do the restrictions placed upon it become controversial.<sup>77</sup> In this sense, any sensible discussion about the free speech ideal will have to be restricted because this ideal is considered too important. However, discussions in general take place within a context of competing interests and values, which requires societies to impose certain restrictions on free speech. Or as Fish puts it, “free speech, in short, is not an independent value but a political prize”.<sup>78</sup> Therefore, any discussion about the free speech ideal, even if highly valued, should not be considered controversial. Under certain circumstances, citizens should be able to discuss about it and even about how the free speech ideal fits into a (digital) public sphere.

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<sup>73</sup> E.g., the United Kingdom: “Article 10 of the Human Rights Act,”

<https://www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/1/chapter/9>; the United States: “The First Amendment to the United States Constitution,” <https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/>; and Europe: “Article 10 of the European Convention on Human Rights,” [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf).

<sup>74</sup> “Freedom of speech. The American Heritage Dictionary of the English Language, Fifth Edition, 2020,” accessed at <https://web.archive.org/web/20200728051257/https://ahdictionary.com/word/search.html?q=Freedom+of+speech> on January 21, 2022.

<sup>75</sup> Cohen, “Freedom of Expression,” 223.

<sup>76</sup> “International Covenant on Civil and Political Rights,” <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

<sup>77</sup> van Mill, “Freedom of Speech.”

<sup>78</sup> Stanley Fish, *There's No Such Thing as Free Speech...and it's a good thing too* (New York: Oxford University Press, 1994), 102.

Some scholars, like Fish, argue that there is no such thing as free speech (in the sense of unlimited speech).<sup>79</sup> If we take the European approach as an example, fundamental rights such as freedom of speech can be restricted by the government under certain circumstances. In the Netherlands, this is called the vertical effect – the relationship between government and citizens – of fundamental rights.<sup>80</sup> This vertical effect opposes the horizontal effect – the relationship between citizen and citizen – of fundamental rights. The latter effect means that fundamental rights are assessed differently in situations in which the government is not (directly) involved, e.g., contractual situations among citizens (and businesses).<sup>81</sup>

### 3.2 Limitation of free speech

Freedom of speech becomes only necessary within a social setting. Appeals to it as an abstract and absolute right hinder rather than improve e-deliberation.<sup>82</sup> This means that without norms and conditions, a conversation may be impossible. The limitation of speech is, thus, sometimes essential.

At the same time, the limitation of speech might lead to censorship and tyranny. In this context, Schauer argues and warns of the dangers of the slippery slope.<sup>83</sup> The latter means that, e.g., in the case of free speech, the authorization of speech limitation, which is not alarming at first, will lead to increasing limitations in the future. However, future limitations are unwanted. Put simply, a change from the status quo will lead to an unwanted future limitation on speech, which in the most desirable cases should be avoided. This argument can also be used to make the opposite point.<sup>84</sup> For instance not having any norms introduced to the freedom of speech, might as well lead to unwished circumstances, such as chaos and anarchy.<sup>85</sup> Hence, limitations on freedom of expression may lead to further limitations over time, but it is also possible that this is not the case.

Although in this thesis I am sceptical about the regulation of speech, I am on the contrary also sceptical about non-regulation, certainly within the digital public sphere. I will argue in favour of a “golden mean” where, if it is decided that online norms should differ from offline norms, this line of reasoning must be justified. This applies more in an e-deliberative democracy where collective power emphasizes the priority of shared reasons, and where a strong ideal of political legitimacy for democracy is stated. Collective power requires participants to offer tolerable considerations to others. In this view, free speech cannot be absolute and unlimited. Also, the absolute right of free speech leads to non-regulation. Subsequently, this may, as well, lead to greater misinformation, cyberbullying, and hate speech. In this sense, laws that are shaped by public reasoning – with the principal virtues of e-deliberative democracy in mind (community, legitimacy, and democracy) – may be qualified as valid laws that create a moral obligation. If shaped by for example e-deliberative processes, such laws are legitimate. The same applies to the limitation of speech. However, this requires attention because we have already concluded that during the e-deliberative process e-participants must be able to communicate freely and equally

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<sup>79</sup> Ibid., 114.

<sup>80</sup> D.E. Bunschoten, “Civielrechtelijk publicatieverbod en de vrijheid van meningsuiting,” *Ars Aequi*, (1987): 310.

<sup>81</sup> Remco Nehmelman, en C.W. Noorlander, *Horizontale werking van grondrechten* (Deventer: Kluwer. 2013), 205-256.

<sup>82</sup> van Mill, “Freedom of Speech.”

<sup>83</sup> Frederick Schauer, “Slippery Slopes,” *Harvard Law Review* 99, no. 2 (1995): 363.

<sup>84</sup> Ibid., 363-64.

<sup>85</sup> Ibid., 363-64; see also van Mill, “Freedom of Speech.”

and gain information with one another. They must be able to discuss issues and bring them to the attention of the public whether these issues are important for society and worth addressing.

As mentioned earlier, the limitation of speech can lead to censorship.<sup>86</sup> Censorship is the a priori prohibition of the expression of certain opinions or the disclosure of certain information. Legally speaking, only the government, as a public institution, can factually commit censorship.<sup>87</sup> On the one hand, this implies that a private organization can never commit censorship. Although social media are often seen as a digital public sphere, their networks are private. Merely hosting someone else's speech does not convert a private platform into a public forum.<sup>88</sup> On the other hand, in a democratic constitutional state, there is no room for censorship.<sup>89</sup> In my opinion, this means that in principle, there is also no room for censorship within e-deliberative processes. This would result for instance in a breach of Cohen's framework of norms, conditions, and dispositions. Criticism of the government and government agencies is necessary to maintain transparency and curb corruption.<sup>90</sup>

This notwithstanding, the exercise of article 19 ICCPR, specifically paragraph 2, carries with it special duties and responsibilities. These duties and responsibilities entail that the freedom of speech may be subject to limitations. To avoid censorship, speech may only be limited if those limitations are provided by law and if they are necessary, i.e., the vertical effect.

According to paragraph 3 of article 19 ICCPR, a limitation may arise when it is necessary for respect of the rights or reputations of others; the protection of national security or of public order, or of public health or morals. Put simply, the freedom of speech may be limited by time, place, and manner – though otherwise strongly protected from government limitations, many state constitutions, and different state and federal laws.

Thus, within the European legal system, there is a system of limitations that applies to the regime of European societies individually. According to the jurisprudence, any limitation of free speech must be “provided for by law”, there must be “specific target criteria” and they must be “necessary in a democratic society”.<sup>91</sup> Moreover, some limitations can be necessary for the interests of national security territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, protection of the reputation or the rights of others, preventing the disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary. This system does not, however, give a criterion that understands when an offense is inflicted on the participants of the digital sphere.

The special duties and responsibilities that freedom of speech entails bring that adding conditions, norms, and dispositions to speech might have a settled meaning for the e-deliberative conception of democracy, especially for the digital public sphere. Cohen's framework helps to maintain the reputation or the rights of others, prevent the disclosure of information received in confidence and can maintain the authority and impartiality of the judiciary. In other words, Cohen's framework expands

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<sup>86</sup> van Mill, "Freedom of Speech."

<sup>87</sup> D.E. Bunschoten, "Civielrechtelijk publicatieverbod en de vrijheid van meningsuiting," *Ars Aequi*, (1987): 310 et seq.

<sup>88</sup> Brett M. Pinkus, "The Limits of Free Speech in Social Media," accessed April 19, 2022, <https://accessiblelaw.uttdallas.edu/limits-free-speech-social-media>.

<sup>89</sup> van Mill, "Freedom of Speech."

<sup>90</sup> van Mill, "Freedom of Speech."

<sup>91</sup> European Court of Human rights 26 April 1979, (*The Sunday Times vs. The United Kingdom*).

<https://www.ucpi.org.uk/wp-content/uploads/2018/03/The-Sunday-Times-v-The-United-Kingdom-A30-1979-80-2-E.H.R.R.-245.pdf>.

opportunities because everyone can be part of e-deliberative processes, helps to obtain reliable information that can be distinguished from propaganda and screeds, such as information based on plot theories and helps to inform citizens with truthful information after qualifying it. The framework helps to put forward information, narratives, arguments, values, and normative considerations to a broader public. However, also in such cases, there will be a penumbra during certain processes in which some of these conditions, norms, and dispositions are neither applicable nor ruled out. For instance, private hate speech norms tend to be too open ended and are not tied to concerns about offense or harm, thence, sweeping up legitimate public discussion.<sup>92</sup>

### 3.3 Hate speech

According to Cohen and Fung, the digital public sphere reduces barriers to expression.<sup>93</sup> Some thoughts people share via the digital public sphere defame other participants and threaten imminent harm and/or offense. For example, the revelation of someone's private and personal information, i.e., doxxing.<sup>94</sup> A recent case in the Netherlands is the case of the Deputy Prime Minister and Minister of Finance, whose residential address was shared and spread through Twitter leading to a threatening experience.<sup>95</sup>

Another example is one of the world's top tennis player, Novak Djokovic. He was successively called 'liar', 'cheater', and 'dangerous madman'.<sup>96</sup> Djokovic flew to Australia believing he had been given a medical exemption allowing him to play, despite not having been vaccinated against the coronavirus. Clearly, this is an example of a trial by media. Djokovic's action was not condoned at the international level and the digital media exploded with reactions that were either defensive or noxious for the tennis player. The pandemic has indeed led to international polemical disputes. However, people should not be taken down for their choices to invoke their own social and political rights, despite their moral choices or actions, even if these are not directly perceived as desirable. In the current situation, Novak Djokovic's case stays polemical whatsoever and if such expression threatens imminent harm or offense, it has little democratic value.

Football can also illustrate the aforementioned. Football is one of the most important sports in England. Sports bring people together, irrespective of who you are. However, during the final of Euro 2020, black players of the English football team were subjected to an outburst of online racist abuse after they missed penalty kicks following the team's defeat.<sup>97</sup> According to Cohen, as a response to different incidents like this and the longstanding traditions of racial hatred, some institutions have adopted codes regulating racist and other forms of hate speech.<sup>98</sup> Nonetheless, the United States is internationally known for its unique legal toleration of hate speech.<sup>99</sup>

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<sup>92</sup> Cohen and Fung, "Democracy and the Digital Public Sphere," 34.

<sup>93</sup> Cohen and Fung, "Democracy and the Digital Public Sphere," 39, 43.

<sup>94</sup> Ibid.

<sup>95</sup> "Willem Engel zet adres Kaag online, D66-leider doet aangifte," NOS, 9 January 2022. <https://nos.nl/artikel/2412491-willem-engel-zet-adres-kaag-online-d66-leider-doet-aangifte>.

<sup>96</sup> Nic Fildes, "Novak Djokovic departs Australia after court upholds visa cancellation," *The Financial Times*, 17 January 2022, <https://www.ft.com/content/5d41778b-1ee5-43a7-a61d-3fa88f4a1e00>; see also: Niel Van Essch, "Internationale pers spaart 'gevaarlijke gek' Djokovic niet nu tenniscothoed Australië heeft verlaten," *het AD*, 16 Januari 2022, <https://www.ad.nl/tennis/internationale-pers-spaart-gevaarlijke-gek-djokovic-niet-nu-tenniscothoed-australie-heeft-verlaten~a208c301/>.

<sup>97</sup> Mark Landler, "After Defeat, England's Black Soccer Players Face a Racist Outburst," *The New York Times* July 12, 2021, <https://www.nytimes.com/2021/07/12/world/europe/england-european-championships-racism.html>.

<sup>98</sup> Cohen, "Freedom of Expression," 207.

<sup>99</sup> Ibid., 208.

The impact of these developments is complex because invisibility and anonymity can promote inclusion or exclusion. People can speak without fearing repercussions for speech that could face social sanction or government repression – as if they were wearing the Ring of Gyges. For instance, according to McKay and Tenove, there may be actors that misrepresent their identities using fake accounts operated by humans or political bots (algorithms that operate over social media).<sup>100</sup> With this in mind, governments, and other actors, such as dominant private platforms, should act to address harmful, offensive, and noxious speech. In practice, there is a growing consensus that social media platforms should be democratized. Or as Mark Zuckerberg, the brain behind Facebook, puts it, private companies should not make so many decisions alone when they affect fundamental democratic values.<sup>101</sup>

All this suggests that the current norms regulating speech are not enough and therefore different doctrines should be created to regulate e-deliberation. But regulating speech for example may jeopardize some conditions of substantive communicative freedom, i.e., Expression, Diversity, and Communicative power. For instance, people with less money or power – assuming again the past as precedent. Therefore, government cannot simply block access to the internet and digital media.<sup>102</sup> After all, this would be an infringement of the freedom of expression.<sup>103</sup> The government must be restrained about regulation and act indirectly (as a gatekeeper) to discourage misinformation, cyberbullying, and expressions of hatred, maybe even with the help of independent and impartial actors, such as judges and courts.

According to McKay and Tenove, states must adopt and enforce laws to at least address the most extreme and offensive forms of speech on digital technologies, such as social media.<sup>104</sup> Any state's policy must address the fact that citizens can contribute to the success or failure of disinformation,<sup>105</sup> e.g., during e-deliberative processes. This also means that it should create awareness among citizens and their role within the digital public sphere. The state should properly nurture e-participants. Just as people learn to interact decently and to engage politically in families, schools, and clubs, they will need to learn how to engage democratically in the digital public sphere. Besides, McKay and Tenove argue that new journalistic norms are needed to avoid falsehoods, moral denigration, and fake accounts.<sup>106</sup>

As mentioned earlier, deliberative democracies constrain the exercise of political power to public reasoning. After political e-deliberation, it is, then, reasonable to constrain freedom of speech to certain principles. This applies more if the digital public sphere forms a barrier to expression and creates space for hate speech. As Cohen suggests, the regulation of speech should be developed to create a more democratic digital public sphere.<sup>107</sup>

In this light, the final problem is deciding how far freedom of speech can be part of digital literacy and how different it can be from offline literacy. As mentioned before, European jurisprudence offers

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<sup>100</sup> Spencer McKay and Chris Tenove, "Disinformation as a Threat to Deliberative Democracy," *Political Research Quarterly* 74, no. 3 (September 2021): 706, <https://doi.org/10.1177/1065912920938143>.

<sup>101</sup> McKay and Tenove, "Disinformation as a Threat to Deliberative Democracy," 710.

<sup>102</sup> United Nations General Assembly, resolution 32/13 of 27 June 2016, (A/HRC/32/L.20), <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G16/131/89/PDF/G1613189.pdf?OpenElement>.

<sup>103</sup> "Zolang we het maar eens zijn: Nederlanders over de vrijheid van meningsuiting en demonstratievrijheid," Rapport College voor de Rechten van de Mens, September 2018, 13-16, <https://mensenrechten.nl/nl/publicatie/38662>.

<sup>104</sup> McKay and Tenove, "Disinformation as a Threat to Deliberative Democracy," 711.

<sup>105</sup> Ibid.

<sup>106</sup> McKay and Tenove, "Disinformation as a Threat to Deliberative Democracy," 712.

<sup>107</sup> Cohen and Fung, "Democracy and the Digital Public Sphere," 43.

already some guidelines for this problem. Limitations need to be provided by law, with a specific target criterion and must be necessary for a democratic society. Moreover, the limitation cannot be occasional. These guidelines do not, however, give a criterion that distinguishes when the offense is inflicted on participants of the e-deliberative process through speech. So, what criterion could, then, serve both as an evaluative guideline and be suitable for a range of cases, covering different types of speech (racist, ethnic, sexuality, and so on)? In the next chapter, I discuss under what principal speech could be restricted online.

## Chapter 4 – Feinberg’s offense principle

This chapter describes and critically analyses how Feinberg’s offense principle and speech relate to each other during e-deliberation. For this purpose, I will delve into Feinberg’s book *The Moral Limits of the Criminal Law*. The next questions will be a guiding basis to answer the question central to this thesis. What types of speech cause offense? How intense can the offense be during e-deliberation? When is unavoidable offense acceptable?

### 4.1 Feinberg’s offense principle

Feinberg distinguishes different categories of what the public might refer to as principles of the criminal law in *The Moral Limits of the Criminal Law*. He seeks to show how these principles factor into the regulation of individual freedoms. He distinguishes three categories. Actions that can be hurtful to others, harmful to others, and offensive to others.<sup>108</sup> This thesis explores the third category which is also named the offense principle. This principle is formulated by Feinberg as follows:

*“It is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor, and that it is probably a necessary means to that end”*<sup>109</sup>

According to Feinberg, “to offend” is “to cause another to experience a mental state of a universally disliked kind”.<sup>110</sup> As cited above, the offense principle states that conduct causing wrongful offense to others is always a legitimate reason for the criminalization of such conduct. In other words, the government is justified in restricting individual freedom to prevent offense to others. As Feinberg puts it, offensiveness can produce unpleasant experiences and causes unpleasant inconveniences, i.e., evils.<sup>111</sup> Acts can be evil if they are immoral or if they interfere with people’s perfectibility and are therefore dangerous to traditional ways of living. According to Feinberg, however, these evils are not as great as actual harm.<sup>112</sup> The latter implies an action that directly and in the first instance invades the rights of a person.<sup>113</sup> On the contrary, the offense principle appears to be less serious than the harm principle, therefore, any limitation imposed should not be severe.<sup>114</sup> For instance, speech like “You are not the same as the others” – referring to minorities –, might be offensive but is less serious than harm and therefore any limitation imposed to it should not be severe. However, the offensiveness depends on different criteria.

As Feinberg puts it, the offense principle only commits someone “when public conduct causes offense to someone”.<sup>115</sup> Although relevant, this principle is sometimes hard to apply because some people for example can be deeply offended by someone’s speech, while others perceive speech as

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<sup>108</sup> Feinberg, *The Moral Limits of the Criminal Law*, ix.

<sup>109</sup> Ibid., 1.

<sup>110</sup> Ibid., 2.

<sup>111</sup> Ibid., 25.

<sup>112</sup> Ibid., 2, 36.

<sup>113</sup> van Mill, “Freedom of Speech.”

<sup>114</sup> Ibid.

<sup>115</sup> Feinberg, *The Moral Limits of the Criminal Law*, 26.

mildly amusing.<sup>116</sup> Annoyance, disappointment, disgust, shame, and other unpleasant experiences such as fear, tension, and 'harmless' pain are not necessarily offensive in themselves.<sup>117</sup> As a result, the offense principle does not provide a legitimate basis for criminalization in those cases in which people experience these feelings. If someone says that a person is “not the same as the others” referring to a certain group, e.g., the queer community, the speech is not necessarily offensive. For these and more reasons, Feinberg argues that the offense principle must be formulated in a precise way. The principle must be supplemented by different maxims and standards, which are not too open and intuitively unwarranted legal interference.<sup>118</sup> For instance, on the offender's part, there are three important maxims:

(i) Justifying social value: this maxim focuses on the importance of the offending conduct to both the individual offender's perspective of life and society. The greater the importance, the less legitimate the limitation of the conduct;

(ii) Alternate opportunities: this maxim focuses on the time and place where the offending conduct might be performed. If it is possible to perform the conduct at another time or place with a less offensive result, then the limitation is more legitimate; and

(iii) motives: this maxim focuses on the intent of the offender. The more spiteful or evil the motives, the more legitimate the limitation of the conduct.

Furthermore, Feinberg elaborates on different standards which determine the seriousness of an offense:<sup>119</sup>

(a) The magnitude of the offense: this is the result of the intensity, duration, and extent of the offense. These three factors determine the seriousness of the offense. The more intense, the more durable, and the more widespread the offense the more serious the actual instance of it and, thus, the more legitimate the limitation of the conduct.

(b) The standard of reasonable avoidability: if the offender can avoid the offensive situation, the limitation of the conduct becomes more legitimate.

(c) The Volenti maxim: if the individual vis a vis the offender consents to the conduct, directly or indirectly, then the conduct will be accounted as less offensive. This means that the limitation of the conduct will be less legitimate.

(d) The discounting of abnormal susceptibilities: if the conduct is sensed as offensive because a person is too sensible and, thus, more susceptible to the conduct, then the conduct will be qualified as a less serious offense. Just as the Volenti maxim standard, this also means that the limitation of the conduct will be less legitimate.

In sum, the conduct of an offender is legitimized under the previous maxims, i.e., the offense must be personally and socially important, it must be necessary at the time and place, and unmotivated by spite or evil. In other words, under these circumstances, the offender gets a justification to carry the Ring of Gyges when it comes to public conduct, because his conduct is not classified as “offensive”. Therefore, the offender is invisible for legitimate criminalization or limitation. Under these circumstances, I refer to the Ring of Gyges as the Ring of Feinberg. The Ring of Feinberg permits the carrier of the ring

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<sup>116</sup> Ibid.

<sup>117</sup> Ibid, 7.

<sup>118</sup> Ibid, 26.

<sup>119</sup> Ibid, 34-35.



to be invisible for legitimate criminalization or limitation during e-deliberative processes if and only if his action can be justified under the previously mentioned circumstances.

On the contrary, the conduct of an offender will be restricted if such conduct applies to the previous standards, i.e., when the offense is intense, long-lasting, affects a high number of persons, is hard to avoid, has been consented and if the person does not have abnormal susceptibilities.

To illustrate this, Feinberg provides some obscene examples. According to him, public nudity does not cause harm and if public nudity does offend someone it can be easily avoided by averting one's eyes.<sup>120</sup> However, even if the situation is not offensive, e.g., sex in public, it can be legitimately restricted according to community standards. On the contrary, pornography – excluding child-pornography<sup>121</sup> – is protected in America by free speech.<sup>122</sup> Anti-porn feminists however disagree with this. According to them, pornography harms society.<sup>123</sup> Given the specific nature of this thesis, I limit the discussion to offensive forms of speech.

## 4.2 Offense Principle & Speech

When a psychological offense is inflicted, there can be grounds for abridging expression, provided that the circumstances are such that the target group cannot avoid being exposed to it. For this reason, a psychological offense depends on the content of the speech, the way the speech is expressed, the intentions and the motives of the speaker, and the circumstances in which the speech takes place.

Leaning on William L. Prosser,<sup>124</sup> Feinberg argues that the law does not seek to remedy all the petty annoyances and disturbances of everyday life.<sup>125</sup> For instance, if the law limits free speech through permits or something else, simply on the ground that the expressed conduct is unpopular or might result in physical assaults, then Feinberg argues that the law punishes the criminal “proclivities” of others. Accordingly, the obvious remedy is increasing the protection of the speaker, rather than speech suppression.<sup>126</sup> Or as he puts it: “It is necessary that there be a wrong, but not that the victim feel wronged”.<sup>127</sup> Someone may offend others, often with expressions that are taboo, and that can be seen as inappropriate. Sometimes the offensive conduct contains for example vulgar expletives terms, i.e., vulgar terms that are inserted to a sentence and are considered offensive, but that are not needed to express the basic meaning of the sentence.<sup>128</sup> Some of these terms are for example ‘fuck,’ ‘dick,’ or ‘shithead’. In my opinion this kind of words are not offensive in the terms of Feinberg unless they are used without the Ring of Feinberg, i.e., without a justification. The magnitude (intensity, duration, extent) of the offense made by such words can be regarded as a minor offense under certain circumstances, such as when the actor is deliberating with (good) friends.

In contrast, e-participants can be very susceptible to these words during e-deliberation. If the offense is made by vulgar expletive terms that are intense, is long-lasting, affects a high number of

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<sup>120</sup> Ibid, 18-19.

<sup>121</sup> U.S. Supreme Court in *New York v. Ferber*, 458 U.S. 747, 764 (1982), <https://supreme.justia.com/cases/federal/us/458/747/>.

<sup>122</sup> U.S. Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), <https://supreme.justia.com/cases/federal/us/413/15/>.

<sup>123</sup> Luveell Anderson and Michael Barnes, “Hate Speech,” *The Stanford Encyclopedia of Philosophy*, accessed May 7, 2022. <https://plato.stanford.edu/archives/spr2022/entries/hate-speech/>.

<sup>124</sup> Feinberg borrows his framework from Prosser’s *Handbook of the law of torts (Hornbook series) 1941*.

<sup>125</sup> Feinberg, *The Moral Limits of the Criminal Law*, 7, 90.

<sup>126</sup> Ibid, 90.

<sup>127</sup> Ibid, 2.

<sup>128</sup> Anderson and Barnes, “Hate Speech.”

persons, is hard to avoid, has not been consented and if the person does not have abnormal susceptibilities, then the conduct of the offender can be restricted. To illustrate this, take for instance the example about the black players of the English football team.<sup>129</sup> Online messages such as "dressed as a ghost," and "black c---," can be offensive for a black person, certainly if the messages come from a networked form of communication. Also, because the motives under those circumstance are evil and spiteful. The more intense, the more durable, and the more widespread the offense of these expressions the more serious the actual instance of it and, thus, the more legitimate the limitation of the offensive expression.

The same applies for gendered slurs like 'bitch,' 'slut,' and 'sissy' and racial and ethnic slurs like 'ni\*\*er,' 'k\*ke,' 'cracker,' 'monkey' and 'sp\*c'. These expressions are not only inappropriate, but also carry associated attitudes and/or practices that amplify their offense.<sup>130</sup> If the offense is caused by these expressions, then it becomes more personally and socially important, certainly because it is not necessary at any time and/or place and is more motivated by spite and/or evil.

Furthermore, Feinberg argues that the greater the number of people in society who experience certain conduct as offensive, the sooner limitation is legitimate.<sup>131</sup> This line of reasoning also fits e-deliberative processes. On this matter, Feinberg argues for example that when fighting words are used to provoke others who are prevented by law from using a fighting response, the offense is profound enough to restrict it.<sup>132</sup>

The aforementioned can be illustrated with the following example. During a party meeting on the election night of 19 March 2014, Wilders, a Dutch politician who has led the Party for Freedom (PVV), asked the audience whether they wanted more or fewer Moroccans. The public responded with repeatedly 'less, less', after which Wilders said, 'then we will arrange that'. In that speech, Wilders deliberately stated, in interaction with a pre-instructed audience, that he wanted to commit for "fewer Moroccans", whereby he deliberately spoke about this group as a whole. According to the Dutch Supreme Court, this is also how he insulted this group. This kind of offensive speech is prohibited by law. The fact that Wilders spoke as a politician did not change this. It is true that in the Netherlands a politician should be able to raise matters of general interest, even if he thereby offends or disturbs others. This, however, does not alter the fact that Wilders bears the responsibility in the public debate to avoid spreading statements that are contrary to the law and with the fundamental principles of the democratic constitutional state, including statements that directly or indirectly incite intolerance. Wilders was convicted for group insult. This conviction was however without a penalty.<sup>133</sup> In this case, there is an offense, but the offense appears to be less serious, and therefore, the limitation that is imposed is not severe, i.e., wilder is convicted, but without a penalty. Perhaps, there was not penalty because he referred to the group instead of an individual, causing the offense to be less harmful and evil. This also implies that the greater the offense, the greater the penalty.

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<sup>129</sup> Landler, "After Defeat, England's Black Soccer Players Face a Racist Outburst."

<sup>130</sup> Anderson and Barnes, "Hate Speech."

<sup>131</sup> Feinberg, *The Moral Limits of the Criminal Law*, 30-32.

<sup>132</sup> van Mill, "Freedom of Speech."

<sup>133</sup> Dutch Supreme Court, 6 July 2021, ECLI:NL:GHDHA:2020:1606 (*Wilders-case*), <https://deemlink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2021:1036>.

According to the literature, very few liberal democracies are willing to support the claim that only speech causing direct harm to rights should be prohibited.<sup>134</sup> In this constellation, most liberal democracies support some form of the offense principle. Some liberal scholars argue, on the one hand, that hate speech should be banned even if there is no offensive conduct.<sup>135</sup> On the other hand, other scholars argue that almost all places in which humans interact are governed by norms and principles. Therefore, speech must fit in with these ideals: “regulation of free speech is a defining feature of everyday life”.<sup>136</sup> For instance, universities value the expression of ideas, which means that speech should be less restricted. The opposite applies in the military. The principle in the military is hierarchy and authority and therefore free speech will be more restricted. In this sense, the offense principle will be applied more strictly in the military than in universities.<sup>137</sup>

During e-deliberation, the scope of limitation might be complex. In e-deliberative processes, public reasoning is at the centre of political justification and therefore the principle. In this sense, substantive communication is important, and this norm takes five conditions into account: Expression; Access; Diversity, and Communicative power. Assuming that the five conditions include equal access to available resources, openness to all potential participants, free speech, disclosure of relevant information for those involved, and a pluralistic network of bound participants, this implies that speech cannot be absolute. Collective power requires participants to offer tolerable considerations to others. This requires attention because during the e-deliberative process e-participants must be able to communicate freely and equally and gain information with one another. Absolute speech can infringe the substance of these conditions. As argued before, vulgar expletive terms and/or gender and racial slurs can offend others. Furthermore, Truth, Common sense and Civility are three important demanding norms and dispositions of e-deliberation. This means that some form of the offense principle is needed to make this framework possible during e-deliberation. In this sense, I agree with the claim that most liberal democracies support some form of the offense principle, certainly because liberals tend to be united in, e.g., moralistic justifications for limiting free speech. According to liberals, free speech is the only way that the autonomy of citizens can be respected.

This notwithstanding, Feinberg suggests that speech should not be restricted if this conduct is easily avoidable: “If a mere sneeze causes a glass window to break, we should blame the weakness or brittleness of the glass and not the sneeze”.<sup>138</sup> Therefore, his principle recommends a restricted intervention to liberties, such as free speech. This applies more taking into consideration that annoyance, disappointment, disgust, shame, and other unpleasant experiences such as fear, tension, and 'harmless' pain are not necessarily offensive in themselves. Whether governments apply strict scrutiny, or a lower form of scrutiny should depend on the character and context of the speech.

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<sup>134</sup> van Mill, "Freedom of Speech."

<sup>135</sup> van Mill, "Freedom of Speech."

<sup>136</sup> Fish, "There's No Such Thing as Free Speech," 129.

<sup>137</sup> van Mill, "Freedom of Speech."

<sup>138</sup> Feinberg, *The Moral Limits of the Criminal Law*, 34.

## Conclusion

This thesis answers the following research question: *What norms regarding freedom of speech (if any) should regulate online deliberation?*

In the first chapter of this thesis, I presented the model of deliberative democracy as developed by Cohen (and Fung). I concluded that in this model, public reasoning, and political discussion about the fundamentals of policy and political appeals to reasons are key features of democracy. According to the approach of deliberative democracy, participants must embrace responsibility, certainly, since laws are the result of public reasoning from both the informal and the formal public sphere. Moreover, I also concluded that this model is based on different conditions, norms, and dispositions that have a fixed meaning for deliberative democracies, especially for the public sphere. Rights, Expression, Access, Diversity, and Communicative power described the structure of substantive communicative freedom. I emphasized that a deliberative democracy needs to include equal access to available resources, openness to all potential participants, free speech, disclosure of relevant information, and a pluralistic network of bound participants. Furthermore, I found that a strong framework of laws and opportunities does not imply that participants would act well together. The realisation of a strong framework of rights and opportunities and a well-functioning democratic public sphere must rest on three main demanding norms and dispositions: Truth, Common good, and Civility. I concluded that these conditions, norms, and dispositions not only guarantee the independence of common public discussion but also contain a strong presumption against, e.g., regulating speech. Although Cohen's conception specifically values freedom of speech, I have identified that participants sometimes disregard the rights and opportunities of others. They may, e.g., manipulate and harass others through hate speech, reducing their expressive opportunities in public discussion, certainly because information plays a central role in Cohen's deliberative conception.

In the second chapter, I connected Cohen's conception to the online dimension i.e., e-deliberative democracy. Following Ralf's and Aichholzer's contribution to e-democracy and van Dijk's contribution to Digital democracy, I pinpointed e-deliberative democracy as the pursuit and the practice of democracy using digital technologies in online and offline political communication. More specifically, in this thesis, deliberative e-democracy referred to the use of these technologies in political debates and decision-making processes, complementing, contrasting, and reinforcing traditional means of communication, such as a one-to-many (broadcast) to a many-to-many (networked) form of communication. I also concluded that contrary to some critics, the internet could strengthen e-deliberative processes. This could be possible because the model places such emphasis on raising issues of a social and political sort within a sphere composed of e-deliberating e-participants. With the internet and the fundamental changes in the mass media that it has brought about, I concluded that politics are changing dramatically. Furthermore, in this chapter, I argued that citizens could now directly participate in and influence the decision-making process. This was all the more true since, in the current discourse, digital technologies help to disseminate information easily, with the result that more people are becoming better informed and aware of the Internet as an open space for politics. Sometimes the interaction between e-participants might be vulnerable because a public institution has strong incentives to regulate how information flows in practice or because e-participants themselves could experience

anonymity or invisibility. In this context, I concluded that this also indicated that the digital public sphere poses plentiful challenges. These included powerful private companies, the production of high-quality information, the regulation of speech, etc.

In the third chapter, I focused on the freedom of speech as a part of digital literacy. I concluded that the Freedom of speech is a controversial topic in liberal societies and most societies with a democratic system have the fundamental right of freedom of speech enacted in their constitutions. I concluded that this freedom is associated with different values, e.g., individual self-expression, a well-functioning democracy, the discovery of the truth, and a balance of social emancipation and social stability. However, I identified that sometimes it is necessary to impose certain restrictions on the freedom of speech because discussion takes place within a context of competing interests and values. Certain restrictions could result in a slippery-slope claim. The restriction of speech can lead to a chain reaction resulting in an undesirable end. This could be that at some point the government is able to censor the ideal of free speech. A small change could have drastic and tyrannical consequences, but this is not necessary. Moreover, I concluded that according to Cohen and Fung, the digital public sphere reduces barriers to expression. I argued that some thoughts people shared through the (digital) public sphere defamed other participants or threaten imminent harm, e.g., hate speech. I also concluded that according to McKay and Tenove, states needed to update and enforce laws to address the most extreme forms of speech on digital technologies, such as social media. Any state's policy must also address the fact that citizens could contribute to the success or failure of disinformation. Notwithstanding, I found that deliberative democracies constrain the exercise of political power to public reasoning. Therefore, I explained why it was reasonable to constrain freedom of speech to certain values after societal e-deliberation, certainly, if e-participation formed a barrier to expression and created space for hate speech. In this context, I analysed that Cohen suggested that the quality of speech during e-deliberative processes needed to be improved to create a more democratic digital public sphere. The final problem was deciding how far freedom of speech could be part of digital literacy and how different it should be from offline literacy. I concluded that European jurisprudence offers some guidelines for this problem. In this light, I concluded that limitations needed to be provided by law, with a specific target criterion and must be necessary for a democratic society. Moreover, the limitation could not be occasional. These guidelines did not, however, give a clear criterion that understood when the offense was inflicted on participants of the e-deliberative process through speech. Finally, I concluded that without norms and conditions, e-deliberation appears to be poor.

In the fourth chapter, this thesis described and critically analyzed Feinberg's offense principle. I concluded that according to the offense principle, the conduct of an offender is legitimized under different maxims: Justifying social value, Alternate opportunities, and Motives. If this was the case the e-participant could be part of e-deliberative processes wearing the Ring of Feinberg. Furthermore, the conduct of an offender could be restricted if such conduct applied to different standards which determine the seriousness of an offense: the magnitude of the offense, the standard of reasonable avoidability, the Volenti maxim, the discounting of abnormal susceptibilities. In this light, I concluded that speech could only be restricted when it offended psychologically following these maxims and standards. When such an offense was inflicted, there could be grounds for abridging expression, provided that the

circumstances were such that a group could not avoid being exposed to it. In this context, I concluded that vulgar expletive terms and/or gender and racial slurs can be offensive. Moreover, in e-deliberative processes, public reasoning is at the center of political justification and therefore the main principle. In this sense, I concluded that substantive communication is important, and that this norm takes five conditions into account: Expression; Access; Diversity, and Communicative power. I explained that most liberal democracies support some form of the offense principle, certainly, because liberals tend to be united in, e.g., moralistic justifications for limiting free speech. I found that according to liberals, free speech is the only way that the autonomy of citizens could be respected. I also concluded that Feinberg's principle recommends a restricted intervention to free speech that is consistent with moralistic justifications. This applied more taking into consideration that annoyance, disappointment, disgust, shame, and other unpleasant experiences such as fear, tension, and 'harmless' pain do not necessarily create offensive situations. Finally, I concluded that whether governments should apply strict scrutiny, or a lower form of scrutiny should depend on the character and context of the speech.

Based on the above, the answer to the research question is as follows. The penumbra of the digital public sphere is challenging. Contrary to some critics, digital technologies not only improve economic processes but can also improve e-deliberative processes. During e-deliberative processes, information plays a central role alongside with achieving equality of access to it. Equality of access to information and an unlimited means of access is foundational to a more ambitious practice of e-deliberative processes. E-participation enables greater involvement of individual citizens, informal groups, and other civil society organizations. Following the approach to e-deliberative democracy that I used, e-participants must however embrace some kind of responsibility, certainly because laws are a result of public reasoning made by both the informal and the formal public sphere. A well-functioning democratic digital public sphere requires well-thought and more oriented action by all its actors. For instance, not only governments, but also private companies, non-governmental organizations, and carriers of the Ring of Gyges. Current e-deliberative processes lack gatekeepers that control content for truthfulness for example.

In the best-case scenario, e-deliberative processes will benefit from the conditions, norms, and dispositions given by Cohen and Fung. Considering this, an e-deliberative democracy includes equal access to available resources, openness to all potential participants, free speech, disclosure of relevant information for those involved, and a pluralistic network of bound participants. Besides, the realisation of a strong framework of rights and opportunities and a well-functioning e-deliberative democracy must rest on three main demanding norms and dispositions: Truth, Common good, and Civility. Although uncertainty, error, and disagreement are part of public discussion, e-participants must not deliberately misrepresent their beliefs or show negligence about truth or falsity. Besides e-participants must be guided by a reasonable sense to respect and understand the equal importance to intervene during a public discussion. They need to recognize the obligation to justify the views that lead them to a final decision. These norms and dispositions allow e-deliberative processes to be legitimate and democratic. Together, Cohen's framework of conditions, norms, and dispositions not only guarantee the independence of common public discussion but also contain a strong presumption against, e.g., regulating speech. However, this strong presumption may be deemed under certain circumstances.

Although e-deliberative democracy is a philosophical conception that values freedom of speech, participants sometimes disregard the rights and opportunities of others. They may, e.g., manipulate and harass others hate speech, reducing their expressive opportunities in public discussion, certainly because information plays a central role in Cohen's conception. Therefore, in applying the previously mentioned framework of conditions, norms, and dispositions, someone must take responsibility for deciding which of these must be applied in hand with all the practical consequences involved in this decision. According to McKay and Tenove, states need to update and enforce laws to at least address the most extreme forms of speech on digital technologies. Any state's policy must also address the fact that citizens can contribute to the success or failure of disinformation. This also means that states should create awareness among e-participants and their role within the digital public sphere. The state should properly nurture e-participants and just as people learn to interact decently and to engage politically in families, schools, and clubs, they will need to learn how to engage democratically in the digital public sphere.

This notwithstanding, deliberative democracies constrain the exercise of political power to public reasoning. It is, then, reasonable to constrain freedom of speech to certain values after societal e-deliberation, certainly, if e-participation forms a barrier to expression and creates space for hate speech. In this context, Cohen suggests that the quality of speech during e-deliberative processes needs to be improved to create a more democratic digital public sphere. The final problem is deciding how far freedom of speech can be part of digital literacy and how different it should be from offline literacy. European jurisprudence offers already some guidelines for this problem. Limitations need to be provided by law, with a specific target criterion and must be necessary for a democratic society. Moreover, the limitation cannot be occasional. These guidelines do not, however, give a clear criterion that understands when the offense is inflicted on participants of the e-deliberative process through speech. without norms, conditions, and dispositions e-deliberation may not result in good political participation.

Considering the preceding, Feinberg's offense principle offers grounds for abridging expression during e-deliberative processes. According to the offense principle, the conduct of an offender is legitimized under three maxims: Justifying social value, Alternate opportunities, and motives. This makes that the cases of annoyance, disappointment, disgust, shame, and other unpleasant experiences such as fear, tension, and 'harmless' pain are not necessarily offensive. Furthermore, the conduct of an offender can be restricted if such conduct applies to different standards which determine the seriousness of an offense: the magnitude of the offense, the standard of reasonable avoidability, the Volenti maxim, the discounting of abnormal susceptibilities. Speech then can only be restricted when it offends psychologically following these maxims and standards. This is for example the case when vulgar expletive terms and/or gender and racial slurs are used during e-deliberative processes. Moreover, Feinberg suggests that speech should only be restricted if this conduct is easily avoidable: "If a mere sneeze causes a glass window to break, we should blame the weakness or brittleness of the glass and not the sneeze". Thus, when the speech is intended to inflict psychological offense, which is a morally wrongful deed, provided that the circumstances are such that the target group cannot avoid being exposed to it. This applies more because e-deliberative democracy values freedom of speech. On some occasions, even if the situation is not offensive – like sex in public or public nudity – the conduct can be

legitimately restricted according to community standards. In any case, the principle can be a small change that could have drastic and tyrannical consequences. This opens the door for the slippery-slope argument. The authorization of speech limitation, which is not alarming at first with the offense principle can lead to increasing limitations in the future. This argument can also be used to make the opposite point. For instance, not having any norms introduced to the freedom of speech, might as well lead to unwished circumstances, such as chaos and offended e-participants. Hence, introducing the offense principle on freedom of expression may lead to further limitations over time, but it is also possible that this is not the case. Feinberg's offense principle can therefore be used to regulate and improve the quality of speech during e-deliberative processes. This all means that whether governments should apply strict scrutiny, or a lower form of scrutiny should depend on the character and context of the speech.



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