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The Talkative Leviathan

Deliberative Democracy, Legitimacy and Freedom of Expression

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Summary

With a political party accused of fascism in the Swedish parliament and neo-nazis marching in the streets, questions of democracy and freedom of expression are as important as ever. Where to draw the boundaries of the freedom of expression? Why have, or limit, such freedoms in the first place? The purpose of this thesis is to investigate a possible solution to the problems facing contemporary democracy. This is done by constructing a conceptual framework of deliberative democracy that can be used to discuss questions of democracy and law, and to illustrate this framework with a discussion on the freedom of expression and hate speech criminalization. It is argued that this approach has important implications for the freedom of expression, and for the project of legitimizing the democratic state. A theoretical focal point for the discussion, is Habermas's *The Structural Transformation of the Public Sphere* and subsequent debates. The thesis partly overlaps Maheila Malik's proposed model of deliberative democracy to deal with extremist groups within a liberal context, but stretches beyond the liberal framework by questioning the liberal derivations of legitimacy. The principles of modern individualism states that individuals are free and equal, and that the individual will is the sole source of legitimate obligation. With the conventional understanding of individual will as something already formed at the point of decision-making, what follows is the principle of unanimity, i.e. that only rules that all affected individuals can accept are legitimate. For practical purposes, however, this principle is substituted with the majority principle. This necessitates a conception of rights in order to counter the tyranny of the majority. If, instead, the will of the individuals is conceived of as something that is formed through the process of deliberation, it is suggested that the principle of participatory parity can replace the principle of unanimity. For rational debate in a political public sphere, private interests must be bracketed. This has problematic implications for the participatory parity. It is argued that bracketing serves to promote the interests of dominant groups. Alternative strategies for subordinate groups, such as organization in subaltern counterpublics, and uses of public space for contestation and empowerment, are discussed. However, it is argued that participatory parity requires some level of social equality. The discussion is illustrated with a commentary on the circumstances in the legal case of Pastor Green, who held a sermon on the topic "Is Homosexuality a Congenital Urge or Evil Powers' Play with Men?" It is concluded that freedom of expression, together with some level of substantive equality, is crucial to fulfilling the ideals of modern individualism. This is best achieved within the framework of deliberative democracy, which carries a transformative potential.

Sammanfattning

Med ett politiskt parti anklagat för fascism i riksdagen, och nynazister marscherande på gatorna är frågor om demokrati och frihet viktigare än någonsin. Var bör yttrandefrihetens gränser dras? Bör den överhuvudtaget begränsas? Syftet med den här uppsatsen är att utforska en möjlig lösning till de problem som dagens demokrati står inför. Det här åstadkoms genom en konstruktion av ett konceptuellt ramverk, baserat på teorier om "deliberative democracy", som kan användas för att diskutera frågor om demokrati och lag, och genom att illustrera detta ramverk med en diskussion om yttrandefrihet och kriminalisering av "hate speech". Det hävdas att det här angreppssättet för med sig viktiga konsekvenser för yttrandefriheten, och för ansatserna att rättfärdiga den demokratiska staten. Det teoretiska fokuset i uppsatsen ligger på Habermas *The Structural Transformation of the Public Sphere* och den debatt som boken har väckt. Uppsatsen sammanfaller delvis med Maheila Maliks deliberative democracy-modell för att hantera extremistiska grupper i en liberal kontext, men rör sig utanför det liberala ramverket i sitt ifrågasättande av hur detta härleder legitimitet. Den moderna individualismens principer anger att individer är fria och jämlika samt att individens vilja är den enda källan för legitimitet. Av den konventionella förståelsen av vilja som någonting redan bestämt vid tiden för beslutsfattande följer enhällighetsprincipen, dvs. att endast de regler som alla berörda individer kan acceptera är legitima. För praktisk tillämpning ersätts dock den här principen med majoritetsprincipen. Det här nödvändiggör att rättigheter införs, för att motverka majoritetens tyranni. Om istället individens vilja förstås som någonting som formas i en resonerande process, kan förslagsvis principen om jämlikhet i deltagande ("participatory parity") ersätta enhällighetsprincipen. För rationell debatt i en politisk offentlighet måste privata intressen sättas inom parantes ("bracketing"). Detta har problematiska konsekvenser för jämlikheten i deltagandet. Det anförs att sådan "bracketing" för fram dominanta gruppers intressen. Alternativa strategier för underordnade grupper diskuteras, som till exempel ett organiserande i subalterna "counterpublics", eller användandet av offentliga rum för att utmana ojämlikheten, och för "empowerment". Det argumenteras dock för att deltagarjämlikhet kräver ett visst mått av materiell jämlikhet. Diskussionen illustreras med en kommentar av omständigheterna i rättsfallet Pastor Green, som handlar om en predikan på temat "Är homosexualitet en medfödd drift eller onda makters spel med människor?" Det konstateras att yttrandefrihet tillsammans med något mått av materiell jämlikhet är nödvändigt för att tillgodose den moderna individualismens ideal. Detta åstadkoms bäst inom ramen för "deliberative democracy", som bär på en transformativ potential.

Acknowledgements

I would like to express my gratitude to Nagoya University Professor Yasutomo Morigiwa, who, as an inspiring proponent of liberal democracy, made me take liberal theory more seriously. He is, however, not to blame for any shortcomings of this thesis on the topic.

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1 Introduction

> This is the Generation of that great L E V I A T H A N, or rather (to speak more reverently) of that *Mortall God*, to which wee owe … our peace and defence.
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> Thomas Hobbes, *Leviathan*, ch. XVII.

> I wanna talk to you / I wanna talk to you / Hey … don't feel my world's untrue / Yeah, I wanna talk to you / My world can be true / I wanna talk to you
>
> Stevie Wonder, "I Wanna Talk to You", *Where I'm Coming From*.

1.1 General Remarks

Democracy is a heated topic in today's Sweden. With a political party accused of fascism in the national parliament and neo-nazis marching in the streets, questions of democracy and freedom of expression are as important as ever. Western democracies have long been aiming to guarantee a robust exchange of ideas.[1] But the Western discourse seems to turn increasingly repressive, marred by fears of crisis, terror and *the other*. Where to draw the boundaries of the freedom of expression? Why have, or limit, such freedoms in the first place?

In a British and international context, Professor of Law Maleiha Malik addresses the problem of liberal democracies not abiding to their self-professed criteria[2], citing the argument that "[l]iberalism … is able to mask its own ideological foundations by presenting itself as the neutral truth about the world in which we live".[3] Against, and under the cover of, hegemonic liberal standards, subordinate groups are disciplined, racialized, or, in the international context, even tortured (as in Abu Ghraib or Guantanamo Bay).[4] She proposes a framework for engaging with extremists, that includes the theory of deliberative democracy, and claims that it may "provide an invaluable and more wide-ranging opportunity to affirm and apply liberal values in domestic and international politics."[5] Malik constructs her model within a framework of modern liberal democracy. Is it possible to go further?

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1   Heinze (2009a), p. 191.
2   Malik, p. 120.
3   Malik, pp. 118–9.
4   Malik, p. 119.
5   Malik, p. 120.

1.2 General Purpose of the Essay

The purpose of this thesis is to investigate a possible solution to the problems facing contemporary democracy. This will be done by constructing a conceptual framework of deliberative democracy that can be used to discuss questions of democracy and law, and to illustrate this framework with a discussion on the freedom of expression. The conceptual framework will be based on theories of deliberative democracy, and I will argue that this approach has important implications for the freedom of expression, and for the project of legitimizing the democratic state.

1.3 Problematic

To fulfill the stated purpose, I will answer the following questions:

- What could a model of deliberative democracy look like?

- What would a concept of legitimacy entail in such a model?

To illustrate this, I will discuss the implications of the model for the freedom of expression, and also make a brief comment on a Swedish legal case.

1.4 Delimitations

As my approach is wide, and discusses the entire democratic project, I will not go into any depths on a variety of matters. I will focus the discussion on matters of legitimacy, the public sphere, and freedom of expression, and leave out the implications of my model in other areas, for instance criminal law, the project of nationalism, war, international human rights, constitutional law or corporate law.

1.5 Materials

Habermas's *The Structural Transformation of the Public Sphere* contains both a historical narrative of the rise and fall of the bourgeois public sphere, and a normative conception of the public sphere which may serve as a basis of contemporary discussions on the matter.[6] In *STPS*, Habermas argues that the political public sphere was first conceived by the bourgeois classes of Enlightenment Europe. While this historical analysis has been the target of much critique[7], *STPS* does provide a theoretical starting point for my analysis. The book has even been called "an indispensable point of

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6   Hohendahl, p. 99, Calhoun, p. 39, cf. Habermas (1991), p. 232.
7   Cf. Eley, p. 306, Garnham, p. 359, Fraser, p. 115–6.

theoretical departure".[8] As I will argue below (with the help of many a theorist, including Habermas himself[9]), the conception of the public sphere in *STPS* is in need of some modification, but has spurred a rich discussion on the topic and will serve as a theoretical focal point for this thesis, together with a variety of texts on deliberative democracy and on freedom of expression. To mention a few, I will make use of the articles in *Habermas and the Public Sphere*, edited by Craig Calhoun and published on the occasion of the English translation of *STPS*, and those in *Extreme Speech and Democracy*, edited by Ivan Hare and James Weinstein, and John Stuart Mill's classic *On Liberty*.

1.6 Methodology and Theoretical Framework

In this thesis, I will treat matters of political philosophy and the philosophy of law. My approach is conceptual and vertical, to the extent that I will construct a model starting with its very justifications, arriving at the implications it carries for the freedom of expression, and finally illustrate these with an actual legal case.

Habermas's account in *STPS* is both historical/scholarly and normative/political.[10] My aim in this thesis is to abstract a model from the more normative/political aspects of Habermas's theory and the subsequent discussions.

1.7 Previous Research

Malik, in a chapter of *Extreme Speech and Democracy*, proposes a model of deliberative democracy to deal with extremist groups within a liberal context. While this thesis will be partly overlapping Malik's text, my ambition is to contribute something new besides Malik's argument, with a different approach, including a greater focus on the legitimacy of the democratic project. I will integrate Malik's discussion on extremism in the thesis.

1.8 Structure

Following this introduction, the treatise part will commence with a chapter discussing the different theories of democracy, and the matter of legitimacy. The next chapter deals with the public sphere, starting with Habermas's initial conception, and then developing the theory. In the subsequent chapter, questions of participation, truth and rationality will be highlighted. After this follows a

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8   Calhoun, p. 41.
9   Cf. Habermas's response to his critics in Habermas (1992).
10 Boyte, p. 343.

chapter focusing on Malik's model, which she argues entails alternatives to rationality. Then follows a chapter on the topic of hate speech bans, in which the Swedish case of Pastor Green will be introduced. Finally, the treatise part of the thesis will be concluded with a discussion on the transformative potential of deliberation. Concluding the thesis, the last part consists of discussions on legitimacy, deliberation and the implications of this model, including an illustrative discussion of the case of Pastor Green.

Each chapter will be concluded with a summary of its important points.

2 Treatise

2.1 Foundations—the Legitimacy of the Democratic State

2.1.1 Background: Gutmann on Theories of Democracy

Amy Gutmann's chapter on democracy will serve as a starting point for the discussion. Gutmann recalls Winston Churchill's famous words as the strongest general justification for democracy, "that it is the worst form of government except all others".[11] She discusses six types of democracy.

First, she describes *Schumpeterian democracy*, based on Joseph Schumpeter's procedural, minimal definition of democracy as "that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for people's vote".[12] Gutmann points out that such "procedural minimalism entails forsaking democracy as an ideal",[13] permitting many consequences that would seem foreign to individuals of contemporary Western democracies.

The next version, still with a procedural focus, but with some substantive content, is that of *populist democracy*. Here, "popular rule is the ultimate political value".[14] This conception contains the ideal of modern individualism,[15] that individuals are free and equal, which puts some constraints on the popular government. These constraints are "free speech, press and association necessary for political freedom; the rule of law, as contrasted to the arbitrary will of public officials; formal voting equality"[16] and universal suffrage.

Third, Gutmann describes what she names *liberal democracy*, as qualifying "the value of popular rule by recognizing a set of basic liberties that take priority over popular rule and its conditions".[17] This allows for further constrictions on popular rule, such as judicial review, checks and balances and separation of powers, all to guarantee the rights and freedoms of individuals—and minorities—against majoritarian rule.[18] For Mill, these rights also apply between individuals.[19] Mill wrote this

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11 Gutmann, p. 522.
12 Gutmann, p. 522, quoting Schumpeter, Joseph (1943). *Capitalism, Socialism and Democracy*, p. 269. London: George Allen & Unwin.
13 Gutmann, p. 522.
14 Gutmann, p. 523.
15 Cf. Manin, p. 340, and the discussion on legitimacy below.
16 Gutmann, p. 522.
17 Gutmann, p. 523–4.
18 Gutmann, p. 524.
19 Mill, p. 141–4

on the limits of liberty:[20]

> The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it … Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.

Tamanaha identifies four basic liberties in modern liberal democracies. These are: *political liberty* (meaning self-rule, individuals rule themselves through democratic laws); *legal liberty* (the dominant understanding of the rule of law, or liberty to do whatever the law permits,); *personal liberty* (procedural or substantive restrictions on government infringement "upon an inviolable realm of personal autonomy",[21] also knows as human or civil rights), and; *the institutionalized preservation of liberty* (horizontal and vertical separation of powers of government to prevent concentrations of power).[22] These liberties would be manifest to some extent in a popular democracy as well, but enjoy a more instrumental status. Gutmann argues that popular democracy and liberal democracy are in practice quite similar, diverging "only when confronted with a conflict between popular rule and those basic liberties that are not conditions of democracy".[23] She gives the example of apolitical hard-core pornography. For the liberal democrat, restrictions on the freedom of expression is principally wrong. For the populist democrat, restrictions in accordance with the majority will may be placed on apolitical expressions. Against such restrictions, the populist democrat may give the "slippery slope" argument: that the restriction (in this example) gives the government opportunity to regulate pornographic expressions with political content. But even if this would not be the case, Gutmann argues, the principal difference remains the same—that there will be cases where a populist democracy may restrict the freedom of expression according to community standards without encroaching on political freedoms.[24]

The fourth version of democracy discussed by Gutmann, is *participatory democracy*. Inspired by the ancient Greek democracy, proponents of participatory democracy downplay the liberal focus on personal freedom and stresses the value of participation, that individuals should participate in politics to a greater extent. Participatory democracy, argues Gutmann, can be understood as a

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20 Mill, p. 23.
21 Tamanaha, p. 35. This personal liberty coincides with the human liberties as defined by Mill, pp. 22–3: liberty of conscience (including all kinds of thought and expression); liberty of tastes and pursuits, and; liberty of combination among individuals (freedom of assembly).
22 Tamanaha, pp. 34–5.
23 Gutmann, p. 524.
24 Gutmann, p. 524–5. This is not to say that self-proclaimed liberal democracies abide to these principles. Indeed, Heinze (2009a) on p. 192 discusses this very problem: the US Supreme Court upholding prohibitions on apolitical obscene materials. The view that certain (political) types of speech should enjoy more state protection is, of course, common, cf. Weinstein, p. 30.

response to the many problems of democratic accountability facing todays large-scale representative democracies, presenting participation as "a necessary means to a good society, and an essential part of the good life".[25]

The fifth form of democracy is *social democracy*. In such democracies, the problem of the tyranny of the majority, the focus of many liberals, is modified into a resistance against the tyranny of concentrations of power threatening all individuals. The logic of liberal democracy is extended "to realms that traditional liberals considered private and therefore not subject to democratic principles".[26] Thus, realms like the economic and that of the family are subject to democratization.[27] The formal equality of liberalism is balanced with its substantive counterpart.

The final version of democracy discussed, and the version promoted (with reservations) by Gutmann, is that of *deliberative democracy*. This version integrates the ideals of populist and liberal democracy—popular rule and individual freedom—as "valuable to the extent that they express or support individual autonomy", defined as "the willingness and ability of persons to shape their lives through rational deliberation".[28] Gutmann grants that this may be the more compelling form of democracy, if only it is possible to construct "institutions of public accountability [that] encourage[s] deliberation about public issues that affect people's lives".[29] Deliberative democracy has some important implications for the question of legitimacy. Let us delve deeper into this matter.

2.1.2 Legitimacy

Liberal and democratic discussions on the legitimacy of the state focus on *the principle of unanimity*; only rules that all individuals can accept are legitimate.[30] An extreme liberal position, according to Manin, is that "[t]he liberty of individuals is identified with their security; protected from coercion by others, every individual may freely seek happiness as he understands it … as long as this exercise of his freedom does not encroach upon the freedom of his fellows."[31] As this principle of liberty is all that can be legitimized through unanimous decision, only a minimal state is possible—and legitimate.[32]

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25 Gutmann, p. 525–6. Quote on p. 526.
26 Gutmann, p. 526.
27 Gutmann, p. 526–7.
28 Gutmann, p. 527.
29 Gutmann, p. 528.
30 Manin, p. 338. The principle of unanimity reminds the nostalgic reader of Hobbes classic generation of the commonwealth, cf. Hobbes, chs. XIII, XIV and XVII.
31 Manin, p. 338.
32 Manin, p. 339.

Rawls's veil of ignorance is an attempt to justify a broader conception of the state, that provides some positive freedom—actual means—to pursue happiness.[33] But the unanimous agreement still provides the foundation, and the only foundation, of legitimacy.[34]

Manin traces this "project of basing political legitimacy on unanimity" to the "fundamental principles of modern individualism": that individuals are free and equal, and thus the legitimate basis from which all political power flows can be only the will of these individuals.[35] This original postulate can be formulated as such: "the individual will is the sole source of legitimate obligation".[36] This individualism forms the basis, not only for liberalism, but also for other modern democratic theories.[37]

The principle of legitimacy by unanimity makes necessary a principle for effective decision making. This is the majority principle. But this practical substitute does not meet the mentioned requirements of modern individualism.[38] This solution, argues Manin, that majority will "must be considered as the *equivalent* of unanimous will", is an "untenable fiction".[39] This fiction, in the conception of early liberalism, was problematized as the "tyranny of the majority".[40]

Manin argues that in both Rousseau and Rawls, the will of the free individual, from which legitimacy and political obligation flows, at the point of deliberation is already determined.[41] Manin agrees with the project of the liberals, that "the problem consists … in finding out how it is possible to constitute a collective entity that does not violate the freedom of individuals."[42] He thus agrees with the individualist premise, but criticizes the assumption that individuals already know exactly what they want at the point of deliberation. His claim is that will is finally formed through the very process of deliberation. Thus, Manin poses the following definition of legitimacy:[43]

> It is necessary to alter radically the perspective common to both liberal theories and democratic thought: the source of legitimacy is not the predetermined will of individuals, but rather the process of its formation, that is, deliberation itself. . . . A legitimate decision does not represent the *will* of all, but is one that results from the *deliberation of all*. It is the process by which everyone's will is formed that confers its legitimacy on the outcome, rather than the sum of already formed wills. The deliberative principle is both individualist and democratic. . . . We

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33 Manin, p. 339.
34 Manin, p. 340–1.
35 Manin, p. 340.
36 Manin, p. 342.
37 Manin, p. 341. Cf. 2.1.1 above.
38 Manin, p. 341–4.
39 Manin, p. 360.
40 Habermas 1992, p. 440–1, referring to Tocqueville and Mill. Cf. Mill, p. 7.
41 Manin, p. 344–51.
42 Manin, p. 351. Cf.
43 Manin, p. 351–2, as quoted by Habermas (1992), p. 446.

must affirm, at the risk of contradicting a long tradition, that legitimate law is the *result of general deliberation*, and not the *expression of general will*.

In liberal theory the individual will is the source of legitimacy. For a democratic decision to be truly legitimate, unanimity is required. To Habermas, the notion of deliberative democracy is grounded in the ideal of equal citizens arguing publicly to decide on matters concerning their association. He cites the above quote by Manin. The deliberative process is the very root of democratic legitimacy.[44]

2.1.3 Summary

In this chapter I have dealt with different theories of democracy and the question of legitimacy. Democracy can be conceived as a procedural matter, as in a Schumpeterian or in a populist theory. Substantive notions of democracy takes a bigger place in the liberal theory, in the form of civil rights. While certain liberties are vested with an instrumental status in popular democracy for the sake of free political discourse, in a liberal democracy, they are placed above the more procedural values, and function as constraints on the majority rule, and also regulates the relations between individuals. Participatory democracy stresses the value of participation in politics for democratic accountability. Social democracy extends the liberal logic with even more substantive content, stressing social equality. The perceived evil is concentrations of power throughout society. Deliberative democracy, finally, may carry the potential of integrating and realizing many of the democratic ideals of the other theories.

In the discussion on legitimacy, a few ideals have been noted. The principles of modern individualism states that individuals are free and equal, and that the individual will is the sole source of legitimate obligation. From these principles derives the principle of unanimity, that only rules that all affected individuals can accept are legitimate. This principle is the foundation of most democratic thought. But it makes necessary a principle for effective decision-making: the majority principle. Thus, in the name of pragmatism, the will of all is substituted with the will of the majority. This fiction gives rise to the tyranny of the majority, which in its turn gives rise to the need for civil rights (next to their function as regulating relations between individuals). But rights can be criticized as undemocratic, since they constrain popular rule.

They problem consists of how to construe a collective entity that does not violate the freedom of individuals, or how to realize a legitimate association according to the principles of individualism. In conventional theories of democracy, including those of social and liberal democracy, individual

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44 Habermas (1992), pp. 446–7. Cf. Habermas (1991), p. 180.

will is conceived as something already formed at the point of decision-making. This assumption underlies the principle of unanimity. But will can in fact be formed through the process of deliberation. Legitimate rule, in that case, is the result of general deliberation, and not the expression of general will.

A deliberative concept of democratic legitimacy, rooted in the individualist principle, could be formulated as equal opportunity to participate in the public political deliberation, or what Fraser calls participatory parity.[45] But where would such deliberation take place?

2.2 The public sphere(s)—leveling the field

2.2.1 Habermas's Concept of the Public Sphere

The deliberative process has to take place somewhere. This would be in a public sphere. What is this concept? Sometimes, it can even seem almost frightening:[46]

> The 'public sphere' of open, democratic discourse is a real, yet also ineffable thing. We cannot draw a neat line around it, showing where it stops and starts. The realities that shape it do not reduce to the formal norms governing it.

But let us try to define it. According to Habermas, the public sphere is "first of all a realm of our social life in which something approaching public opinion can be formed".[47] The principle of the public sphere is that of critical publicity.[48] When the object of this critical, public discussion is related to matters of the state, the public sphere becomes political.[49] In Habermas's initial account, the (idealized) political function of the public sphere is stated as such: "that of subjecting the affairs that it had made public to the control of a critical public".[50]

It is as private individuals coming together that we form portions of the public sphere. That is, when we "behave neither like business or professional people transacting private affairs, not like members of a constitutional order subject to the legal constraints of a state bureaucracy".[51] Eley summarizes

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45 Cf. Fraser, section 3, or below, section 2.2.2.
46 Heinze (2009a), p. 203.
47 Habermas (1974), p. 49.
48 Habermas (1991), p. 140.
49 Habermas (1974), p. 49. Through this essay I use the terms "public sphere" or "political public sphere" interchangeably, to signify the latter, unless stated elsewhere.
50 Habermas (1991), p. 140.
51 Habermas (1974), p. 49. Cf. Habermas (1991), p. 222.

the concept as such:[52]

> In a nutshell, the public sphere means "a sphere which mediates between society and state, in which the public organizes itself as the bearer of public opinion".

Thus, the public sphere is separate from the state, and from the private economic sphere. Habermas also separates the economic sphere of the market, naming it the private sphere, from that of the family, the intimate sphere.[53] For the public debate to be rational, we have to put our private interests aside. A kind of bracketing of social inequalities is necessary.[54] The aim is not to reach a compromise between particular interests, relegated to a private sphere, but, by the means of rational-critical public debate, to reach a consensus that can provide a rational justification for political domination.[55] As McCarthy puts it, the ultimate moral-political significance of Habermas's "agreement based on reasons is to provide an alternative to open or latent coercion as a means of social coordination".[56] This, on another, more basic level, presupposes "a possible consensus, that is, the possibility of an objective agreement among competing interests in accord with universal and binding criteria".[57] Structural conflicts of interest are to be relativized on the basis of agreement on an universal interest.[58]

Fraser summarizes Habermas's concept in two categories: "at one level the idea of the public sphere designated an institutional mechanism for rationalizing political domination by rendering states accountable to (some of) the citizenry … At another level, it designated a specific kind of discursive interaction."[59]

Habermas modeled this ideal of the public sphere on the historical bourgeois public spheres of Enlightenment Europe. Based on circles of literary critique amongst the bourgeois, the discussions turned more and more political.[60] It becomes apparent that "[s]uch a theory … must be aware of its historical context".[61] As Hohendahl puts it: "there is no *single* model of the public sphere, rather different societies have developed a variety of models with specific institutional and formal

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52 Eley, p. 290.
53 Habermas (1991), p. 55.
54 Habermas (1991), pp. 179, and 234. Cf. Fraser's discussion, recaptured below in section 2.2.2.1, for the term "bracketing".
55 Habermas (1991), pp. 179 and 180.
56 McCarthy, p. 66.
57 Habermas (1991), p. 234.
58 Habermas (1991), p. 235.
59 Fraser, p. 112.
60 Cf. Habermas (1991), parts I, II and III.
61 Postone, p. 175. Of course, Habermas aim is to use his historical analysis to say something about contemporary issues, cf. Kramer, p. 257, or Boyte, p. 343.

(procedural) feature".[62] Indeed, Habermas's conception has been the subject of critique among different writers because of its exclusionary implications. Let us delve deeper into a part of this critique.

2.2.2 Towards a Modified Concept of the Public Sphere

Boyte calls for a renewal of Habermas's deliberative citizenry, and argues that such a renewal should focus on "political education for action in public sphere [sic!] based more on the reworking of existing, mainstream settings and institutions than on the creation of counterinstitutions on the one hand or protest groups and new social movements on the other".[63] Boyte, who draws from American experience, is skeptical towards the latter kind of solutions, claiming that they lead, and indeed have lead to moral simplifications and excessively ideological politics, where one's own group and the opponents are perceived in terms of good and evil. While the new social movements have a participatory flavor, this kind of politics makes difficult any attempt at discussion with opposing groups, and results in "a restriction of any possibility for a genuine public sphere".[64] The key to democratization today is, Boyte concludes, by means of a different political education, "the development of a widespread sensibility and experience of citizen agency and authority, with the responsibilities and capacities those entail".[65]

I contend that there does not have to be a contradiction between the politics of new social movements and a democratization of society. While the furthering of one general public sphere may be crucial for political deliberation on a greater societal level, the existence of a multiplicity of public spheres can be just as crucial for the opportunity of members of marginalized groups to participate in the political process. For this argument, let us turn to Nancy Fraser.

Fraser contends that Habermas's conception of the public sphere "is not adequate for the critique of the limits of actually existing democracy in late-capitalist societies".[66] She still takes for a basic premise that Habermas's concept of the public sphere is an essential conceptual resource to critical theory and democratic political practice, but in need of some reconstruction.[67] She criticizes four assumptions that are constitutive for Habermas's conception, and gives corresponding tasks to a critical theory of existing democracy.

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62 Hohendahl, p. 107. Cf. Zaret, p. 230, on the implications of the historical fact of a multiplicity of public spheres next to the liberal/bourgeois one.
63 Boyte, p. 353.
64 Boyte, p. 350.
65 Boyte, p. 353.
66 Fraser, p. 136.
67 Fraser, p. 111. Cf. Ryan, p. 260, on the advantages of Habermas's theory for feminists.

2.2.2.1 Bracketing of Inequalities vs. the Necessity of Equality

Firstly, Fraser argues that it is not enough for social inequalities to be merely bracketed in a public sphere; they must be (to some extent) eliminated. The ways in which bracketing taints deliberation should be rendered visible.[68]

The participants of the historical bourgeois public sphere "bracketed" their inequalities to enable rational discussion, but as the "protocols of style and decorum" governing that sphere functioned as markers of statuses, members of minority groups (such as women and working class men) were marginalized, although informally.[69] Fraser stresses the importance of recognizing the informal aspects of deliberation; in fact, formal and legal license of participation, in combination with informal impediments, may result in that the deliberative process, formally equal, "can serve as a mask for domination".[70] She suggests that a strategy of *un*bracketing inequalities may in fact prove advantageous for subordinate groups. She claims that this is also in line with the spirit of the later works of Habermas.[71] While the liberal project struggles to insulate the political process from substantive inequalities to ensure equal participation, Fraser argues that circumstances suggest that some degree of actual social equality is a precondition for participatory parity.[72] A recent study by Gilens and Page, proclaiming that the US perhaps no longer should be considered a democracy, but rather that it is an oligarchy, seems to support this argument. The study shows that an economic elite in American society in fact controls political policy-making. In spite of electoral rights and liberal freedoms, the political reality is that "[w]hen a majority of citizens disagrees with economic elites or with organized interests, they generally lose".[73] Habermas would call this *generalized particularism*, defined as "the privileged assertion of local and group-specific special interests that, from Burke to Weber, Schumpeter, and today's neoconservatives, has provided the arguments of a democratic elitism".[74] Thus, in the words of Fraser: "*Pace* liberalism, then, political democracy requires substantive social equality."[75]

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68 Fraser, p. 136–7.
69 Fraser, p. 118–9.
70 Fraser, p. 119.
71 Fraser, p. 120. Cf. Discussion below on truth and rationality, section 2.3.2. This is also in line with the spirit of Mill, who stresses the value of diverging opinions, cf. for instance his discussion on pp. 88–9.
72 Fraser, p. 121.
73 Giles and Page, p. 576.
74 Habermas (1992), p. 451.
75 Fraser, p. 121. Cf. the words of Cassegård (p. 693): "[W]hile bracketing creates a democratic or egalitarian semblance, it also prevents real inequalities in power, wealth, and status from being challenged" or Heinze (2009a), pp. 192–5. Fraser's "political democracy" is similar to Tamanaha's (p. 34) "political liberty", meaning "self-rule"; that "the individual is free to the extent that the laws are created democratically".

2.2.2.2 A Multiplicity of Publics

Secondly, Fraser argues that "the ideal of participatory parity is better achieved by a multiplicity of publics than by a single public".[76] This goes for both stratified and egalitarian societies. A critical theory "should show how inequality affects relations among publics … how publics are differentially empowered or segmented, and how some are involuntarily enclaved and subordinated to others".[77] Fraser defines a stratified society as a society "whose basic framework … generate[s] unequal social groups in structural relations of dominance and subordination".[78]

Fraser contend that, as a consequence of her above mentioned analysis of the need for social equality in a democracy,[79] "in stratified societies, arrangements that accommodate contestation among a plurality of competing publics better promote the ideal of participatory parity than does a single, comprehensive, overarching public".[80] In a stratified society, Fraser argues, the creation of what she calls *subaltern counterpublics* "has been found to be advantageous for members of subordinated social groups".[81] Counterpublics help to expand the discursive space, by publicly contesting assumptions previously exempted from the debate. This function is performed even if the counterpublic is anti-democratic and anti-egalitarian, as long as it has emerged as a "response to exclusions within dominant publics".[82] Fraser then problematizes the issue of separatism. As long as the orientation of counterpublics is publicist, and they constitute publics, they do not constitute enclaves ("which is not to deny that they are often involuntarily enclav*ed*"), because of the inclusive potential inherent in the self-identification as a (potentially wider) public.[83] Fraser identifies a dialectic between two functions subaltern counterpublics in stratified societies, namely between their "function as spaces of withdrawal and regroupment", and their "function as bases and training grounds for agitational activities directed toward wider publics". This is where "their emancipatory potential resides"; it enables them to counteract "the unjust participatory privileges enjoyed by members of dominant social groups".[84]

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76 Fraser, p. 127. Cf. pp. 121 and 122.
77 Fraser, p. 136–7.
78 Fraser, p. 125. Here, I have reversed Fraser's definition of nonstratified societies: "societies whose basic framework does not generate unequal social groups in structural relations of dominance and subordination".
79 Cf. section 2.2.2.1.
80 Fraser 122.
81 Fraser, p. 123.
82 Fraser, p. 124.
83 Fraser, p. 124. Cf. Habermas (1991), pp. 31–43, or Ryan, p. 285, who concludes that "women's assiduous efforts to win and practice the right of public access is an example of the practical ways in which the public ideal has maintained its resilience over time, that is, through a progressive incorporation of once-marginalized groups into the public sphere."
84 Fraser, p. 124. This theme will be developed below in section 2.2.3, with the aid of Cassegård.

In egalitarian, multicultural societies, a multiplicity of public spheres is necessary by definition, as they, constitute "the arenas for the formation and enactment of social identities", beside their function of "the formation of discursive opinion".[85] But there would still have to exist a limited comprehensive public sphere, where debates across the lines of cultural diversity could be conducted on issues that concern all. Fraser argues that such a sphere is possible as a participatory democracy, but suggests that even though she sees no conceptual barriers against such a public sphere, its construction is an empirical, rather than conceptual, question. In conclusion, she states that an egalitarian multicultural society "will necessarily be a society with many different publics, including at least one public in which participants can deliberate as peers across lines of difference about policy that concerns them all".[86]

2.2.2.3 Conceptions of Private and Public

Thirdly, Fraser argues "that a tenable conception of the public sphere must countenance not the exclusion, but the inclusion, of interests and issues that bourgeois, masculinist ideology labels 'private' and treats as inadmissible". The "ways in which the labeling of some issues and interests as 'private' limits the range of", and possible approaches to, problems, should be exposed.[87]

Fraser identifies several different senses of "public" with a corresponding "private" in Habermas's conception. She mentions "public" as "(1) state-related, (2) accessible to everyone, (3) of concern to everyone, and (4) pertaining to a common good or shared interest", and adds two more meanings of "private", as "(5) pertaining to private property in a market economy and (6) pertaining to intimate domestic or personal life, including sexual life".[88] "Public" as accessible to all was dealt with in Fraser's discussion on the multiplicity of publics. On the meaning of "public" as "of concern of everyone", she states that whether a matter concerns one or not, must be decided by the participant's themselves. Therefore, which matters should be debated publicly cannot be decided in advance: "democratic publicity requires positive guarantees of opportunities for minorities to convince others that what in the past was not public in the sense of being a matter of common concern should now become so."[89] Criticizing the implications of the sense of "publicity" as pertaining to a common good or shared interest, Fraser argues that "the existence of a common good cannot be presumed in advance", and, therefore, no matters should be precluded from public debate on such grounds.[90]

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85 Fraser, p. 125–6, quotes on p. 125.
86 Fraser, pp. 126–127, quote on p. 127.
87 Fraser, p. 137.
88 Fraser, p. 128.
89 Fraser, p. 129.
90 Fraser, p. 129–131, quote on p. 130.

Fraser thus points out that the terms "public" and "private" are no mere designators of societal spheres, but powerful tools of political discourse "frequently deployed to delegitimate some interests, views, and topics and to valorize others".[91] "Private" in the senses of pertaining to private property in a market economy, or intimate domestic or personal life, including sexual life, are "at the center of a rhetoric of privacy that has historically been used to restrict the universe of legitimate public contestation", to the advantage of dominant groups.[92] This is, to Fraser, another argument showing that the formal right of participation in public debate (the public sphere) does not "ensure inclusion in practice".[93] The advantages of dominant groups lives on informally.

The argument of this section is clearly formulated, as follows, by Benhabib:[94]

> All struggles against oppression in the modern world begin by redefining what had previously been considered private, nonpublic, and nonpolitical issues as matters of public concern, as issues of justice, as sites of power that need discursive legitimation.

2.2.2.4 Blurred Lines (Between State and Society)

Lastly, Fraser discusses "the assumption that a functioning democratic public sphere requires a sharp separation of civil society and the state".[95]

In Habermas's description of the ideal of the liberal public sphere, it is a "realm of private people assembled into a public who, as the citizenry, linked up the state with the needs of civil society according to the idea that in the medium of this public sphere political authority would be transformed into rational authority".[96] It is, in the words of Fraser, precisely the "extragovernmental character of the public sphere that confers an aura of independence, autonomy, and legitimacy on the 'public opinion' generated in it".[97] But she challenges Habermas's concept of the public sphere as separate from the state (together with the liberal insistence on a sharp division of state and society). Fraser names those associations of civil society that do not have decision making power, but only serve an opinion-forming function, *weak publics*. Sovereign parliament, with the ideal function as a public sphere within the state, i.e. with decision making power, she names *strong publics*. In contrast to Habermas's conception, this approach, argues Fraser, enables a discussion of both kinds of institutions, and their interrelations, in a democratic society: "any conception of the public sphere

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91 Fraser, p. 131.
92 Fraser, p. 131.
93 Fraser, p. 131.
94 Benhabib (1992), p. 84.
95 Fraser, p. 132.
96 Habermas (1991) p. 222.
97 Fraser, p. 134.

that requires a sharp separation between (associational) civil society and the state will be unable to imagine the forms of self-management, interpublic coordination, and political accountability that are essential to a democratic and egalitarian society".[98] I will add that Fraser's concepts of weak and strong publics does not seem to interfere with a maintaining of the sharp distinction between those concepts and the state, if the state is understood in terms of the executive and judicial powers. Fraser concludes that a conception of the public sphere "must allow both for strong publics and for weak publics … [and] should help theorize the relations among them".[99]

Later in his career, Habermas seems to move in a direction similar to Fraser's. He writes that the political public sphere requires not only a free political culture, but the institutions to support it. And these have to be unsubverted by power—the political public sphere requires a civil society of opinion-forming associations.[100] What Habermas describes matches Fraser's term of "weak publics". This civil society, a term which no longer means the economic sphere, is constituted by "voluntary unions outside the realm of the state and the economy".[101] He states that examples of such associations of opinion-forming function, range "from churches, cultural associations, and academies to independent media, sport and leisure clubs, debating societies, groups of concerned citizens, and grassroots petitioning drives all the way to occupational associations, political parties, labor unions, and 'alternative institutions'".[102] Habermas points to the fact that these associations are not parts of the administrative system, but still have impact on the public debate, be it through the media or through other activities. The line, then, seems to be drawn somewhere around political parties, which, as Habermas notes, tend to become fused with the state.[103] Now, let us develop the discussion on counterpublics, and the realms of their struggles.

2.2.3 Alternative Spaces for Contestation and Empowerment

2.2.3.1 Dimensions of Publicity

Cassegård summarize the ideal of the public sphere as such:[104]

> This idea of political will-formation through debate and discussion is informed by the idea that
> the public sphere must be an arena of free and open contestation; publicness requires that no
> issue or argument is banned.

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98 Fraser, p. 134–136, quote on p. 136.
99 Fraser, p. 137.
100 Habermas (1992), p. 453–4.
101 Habermas (1992), p. 453.
102 Habermas (1992), p. 453–4.
103 Habermas (1992), p. 454.
104 Cassegård, p. 693.

He argues that there are limits for which political practices are allowed within the deliberations of the public sphere. Instead, marginal or subordinate groups turn to two types of public spaces to challenge mainstream norms and to further processes of empowerment. Cassegård aims "to clarify in what sense space is seen as playing a crucial role in particular political practices and whether or not an idea of a public sphere can be articulated in which such practices are recognized as legitimate".[105]

For his analysis, Cassegård makes use of two dimensions of publicness that he argues are central thinkers like Habermas and Arendt:[106]

> – In one conception, publicness arises when egalitarian arenas of interaction are created by a systematic *bracketing* of inequality. Publics, in other words, arise when participants systematically disregard real differences and relations of dependency in order to create a semblance of equality between participants.

> – In the other conception, it is rather by *contestation*, by openly challenging exclusion and inequality, that genuine publicness can occur.

Cassegård draws on Fraser's discussion on bracketing, cited above,[107] and stresses the point "that *both* of these dimensions can be understood as indicating publicness".[108] The two dimensions of publicness are not necessary incompatible, but their distinction if necessary for Cassegård's further analysis.[109]

2.2.3.2 Public Spaces

Cassegård focuses on two conceptions of public space. The first conception is that of a *counterspace*, a space for the public manifestation of, and made public by, dissent and contestation. This space lacks the orientation of rationality and consensus that defines Habermas's public sphere. This relates to a concept of "democracy as an interminable work of creating polemical situations where power is challenged in the name of everybody's equal worth",[110] where it is crucial for subordinate groups to be able to breach, upset and even shatter the discursive field. Bracketing in the existing forms of the public sphere is challenged with techniques of unbracketing.[111]

But bracketing can also serve the empowerment of subaltern groups, in such alternative spaces that

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105Cassegård, pp. 690–692, quote on p. 692.
106Cassegård, p. 691. These two dimensions are apparent in Fraser's discussion, cited above in section 2.2.2.2.
107Cf. above, section 2.2.2.1.
108Cassegård, p. 694.
109Cassegård, p. 694.
110Cassegård, p. 694.
111Cassegård, p. 694–5.

Cassegård names *no-man's-land*. This is an alternative norm for bracketing, that governs the interactions amongst strangers and make their diversity agreeable. Empowerment is provided in the form of protection. Members of subordinate groups may be strangers to each other, but they can retreat to a no-man's-land without being questioned, exchange information and attend to their daily needs.[112] The example Cassegård gives is that of a hobo camp, where "hobo life is temporarily *freed from its stigma*, since the social norms that underlie stigmatization are suspended".[113] In contrast to counterspaces, these spaces "feed on the inattention or neglect by mainstream society".[114] Necessary for the survival of the members of the subordinate group, this is also where they conduct business that mainstream people conduct in their private spheres.[115]

This shows, Cassegård argues, "that principles of bracketing are not uniform for society as a whole, but plural, and that they vary depending on context".[116] In the context of counterpublics, "alternative principles of bracketing" can serve to "create a semblance of equality among their own participants —a semblance which helps them to function as places of refuge".[117] It is often in spaces like these, that "more openly political counterpublics" can form.[118]

The historical bourgeois public sphere, in Habermas's conception, could perhaps be understood as a space in this way, although with a different kind of spatiality. From the beginning, perhaps bracketing has only been employed successfully within already roughly equal groups. In the light of Fraser's above mentioned argument, that bracketing only serves the dominant groups within a public sphere, this reasoning returns to the conclusion that some level of social equality is a necessary condition for participation in a public sphere (where rational-critical debate is conducted with the help of bracketing).

2.2.3.3 Implications for the Public Sphere

After discussing these two dimensions of publicity and their functions in the public spaces of subaltern counterpublics, Cassegård concludes that in the classical notion of the public sphere of Habermas and Arendt, the two dimensions typically coincide: "bracketing is employed in order to facilitate communication, while at the same time contestation tends to be contained by being limited

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112 Cassegård, p. 696–7.
113 Cassegård, p. 697.
114 Cassegård, p. 697.
115 Cassegård, p. 698.
116 Cassegård, p. 698.
117 Cassegård, p. 698.
118 Cassegård, p. 698.

to things not considered disruptive of the norms of public communication itself."[119] Thus, public spaces may serve the critical cause better than the public sphere in many cases. Both types of public spaces play a crucial role in the expansion of the political discourse.[120] Cassegård concludes:[121]

> To a politics geared to counteract exclusion, public spaces created through contestation can play just as crucial a role as public spaces constituted for the excluded through alternative forms of bracketing. At whichever of these two senses of public space one looks, one finds a political significance that is particularly great to those excluded from or disadvantaged in the politics of the public sphere … The correct way to put it is surely that public space is not inherently radical, but a crucial and irreducible element in all politics—including that of the public sphere.

2.2.4 Summary

In this chapter, the concept of the publics sphere has been discussed. Habermas's initial conception of the ideal political public sphere was that of private individuals coming together for rational-critical, public deliberation, forming public opinion on matters of the state. The idealized political function of the public sphere is to make matters public, and to subject them to the control of a critical public. This process would justify political domination, and constitute an alternative to coercion for social coordination. Rational debate presupposes that individuals bracket their private interest in the name of impartiality. This is a problematic conception.

Fraser makes four important points. First, the concept of bracketing has exclusionary consequences in the public sphere. Even if there are formal rights of participation, bracketing of social inequalities gives advantages to dominant groups. For subordinate groups, strategies of unbracketing may prove advantageous for contesting domination. Anyhow, the ideal of participatory parity requires some extent of social equality.

Second, this ideal is better achieved with a multiplicity of publics, than in a single public sphere. This goes for both stratified and egalitarian societies. In a stratified society, the creation of subaltern counterpublics is advantageous for subordinate groups. Such counterpublics help expand the discursive space by publicly contesting assumptions previously exempted from the debate. This is achieved even if the counterpublic is anti-democratic or anti-egalitarian. Self-identifying as a public has an inherently widening, inclusionary potential, that prevents the counterpublic from becoming separatistic, or an enclave. Still, there is danger of being enclav*ed* by dominant groups. There is a dialectic in the functions of subaltern counterpublics; they can both serve as places for retreat and regrouping, and as vehicles for contestation. This means that it enables them to counteract the

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119Cassegård, p. 699.
120Cassegård, p. 699–701.
121Cassegård, p. 699–702.

participatory privileges of dominant social groups. This is their emancipatory potential.

Egalitarian, multicultural societies, requires a multiplicity of publics by definition. Here, the publics constitute the arenas for the formation and enactment of social identities, and have a function in the formation of discursive opinion. There would still be a need for a comprehensive public sphere, where issues that concern all could be debated across the lines of diversity.

Third, the relegation of certain topics to a private sphere is a way to preclude matters from discussion in the public sphere. Which matters can be debated should not be decided on in advance. Redefining that which is considered private as political is important for all struggles against oppression.

Fourth, the concepts of strong and weak publics enables a critical discussion of the public sphere. Weak publics are opinion-forming associations of civil society, without decision-making power. Strong publics have both opinion-forming and decision-making power; they are the sovereign parliaments. Weak publics are crucial to the critical function of the public sphere. Political parties can constitute weak publics, but they tend to fuse with the state.

Cassegård clarifies the concept of public space, and the two dimensions of publicness, bracketing and contestation. Excluded from the public sphere, subordinate groups can turn to public spaces for emancipation. "Counterspaces" are the public spaces of contestation, where strategies of unbracketing are employed to publicly manifest dissent and to question inequalities. "No-man's-land" are public spaces that feed on the neglect of mainstream society, places for empowerment, survival and regrouping, where alternative principles of bracketing are employed to free the inhabitants from stigma. The two dimensions are not necessarily incompatible, and they coincide within the classical notion of the public sphere. Bracketing facilitates communication, but with the effect that contestation, a necessary component for critical debate, is contained. This shows that bracketing is not a uniform concept. Public space is thus a crucial and irreducible element in the politics of the public sphere. Next, let us develop the themes of rationality and participation a little further.

2.3 The Process of Rational Debate in the Public Sphere

2.3.1 Participation

The problem of participation, and participatory parity, is a central theme throughout this thesis. Let us treat this matter more. Manin, in his discussion on legitimacy, states the following:[122]

> As political decisions are characteristically imposed on *all*, it seems reasonable to seek, as an essential condition for legitimacy, the deliberation of *all* or, more precisely, the right of all to participate in deliberation.

The aim of the deliberative process is "to broaden the participants' information and enable them to discover their own preferences".[123] By defending their positions, refuting the arguments of their opponents and perhaps reconsidering their own, the participants of deliberation may come to a decision. This process is both individual and collective; it requires a multitude of conflicting views in order to be achieved.[124] Thus, in other words, deliberation itself is the true goal of pluralism, and it is necessary that minorities are able to participate in the process of deliberation.[125]

Manin argues (reiterating liberal thought) that the majority will should be checked.[126] The concept he proposes "does not justify the sovereignty of the majority".[127] All (except, for instance, children) should have "the rights to vote and to participate in deliberation".[128] This provides an answer to Mill's classic riddle whether one has the right to sell oneself to slavery.[129] This necessitates the rights and freedoms ("freedom of conscience, of opinion, of speech, and of association") necessary to realize such participation. The point is, that:[130]

> [T]he majority must be forbidden to exclude any group from the deliberative body on the pretext that it disagrees with the majority, however overwhelming this majority may be. The majority should also not be permitted to eliminate the diversity of proposed solutions.

2.3.2 Truth and Rationality

Absolute truth is not a matter for the political public sphere, according to Manin:[131]

122Manin, 352.
123Manin, p. 352.
124Manin, p. 352.
125Manin, p. 360–2.
126Manin, p. 361.
127Manin, p. 362.
128Manin, p. 362.
129Weinstein, p. 26–7. Cf. Mill, p. 195–196. The answer is, of course, no.
130Manin, p. 362.
131Manin, p. 354. Cf. Habermas (1992), p. 450.

> In the political sphere, deliberation does not permit us to arrive at necessary and universally
> admitted truths, but it also does not permit the absolute and incontestable refutation of a norm or
> a value.

A similar standpoint is apparent in classic liberal thought, when Mill argues that "[c]omplete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its truth for purposes of action".[132]

Habermas, drawing on Rawls and Dworkin's (among other) discussion on the moral point of view,[133] states two conditions for communication in a rational debate, "the presumption of impartiality and the expectation that the participants question and transcend whatever their initial preferences may have been".[134] These preconditions should be guaranteed through legislation. Habermas also points to some interesting implications for the debate, also confirming Manins point stated above:[135]

> These idealizing preconditions demand the complete inclusion of all parties that might be
> affected, their equality, free and easy interaction, no restrictions of topics and topical
> contributions, the possibility of revising the outcomes, etc. In this context the legal procedures
> serve to uphold within an empirically existing community of communication the spatial,
> temporal, and substantive constraints on choices that are operative within a presumed ideal one.

Thus, the conditions for communication in rational debate precludes the possibility of deciding on absolute truths in the course of such a debate. But rationality is troublesome. As will be developed below,[136] such conditions for participation have exclusionary implications for subordinate groups, deemed "irrational" on the basis of their substantive moral differences.[137] Does it make sense to build a political theory based on rational consensus in a reality characterized by a "plurality of evaluative and interpretative standpoints"?[138] The demand for complete inclusion at the same time seems to have inherently exclusionary tendencies. On the other hand, it has been argued that cultural relativism and democratic polity are incompatible.[139] Rational consensus of some kind could be pitched against a Hobbesian state of nature, a war of all against all.[140] Where, and how, to draw the line?

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132 Mill, p. 35.
133 Habermas (1992), p. 447.
134 Habermas (1992), p. 449.
135 Habermas (1992), p. 449.
136 Cf. ch. 2.4 below.
137 Cf. Cassegård, p. 695.
138 Thompson, p. 184–5.
139 Garnham, p. 369.
140 Garnham, p. 375.

2.3.3 Summary

This chapter has highlighted matters of participation, truth and rationality. The right of all to participate in deliberation, once again, is an essential condition for the legitimacy of the outcome of the debate. The aim of the deliberative process is to aid its participants in discovering their own preferences, and to provide them with new information. For this, a multitude of conflicting views is necessary. Therefore, minorities must participate. A universal right of participation necessitates the freedoms of conscience, opinion, speech, and association. Dissenting minority groups must not be excluded.

Decisions of the political public sphere cannot be treated as absolute truths, as everything must be contestable. There are two preconditions for communication in a rational debate, known as the moral point of view in liberal theory: the presumption of impartiality and the expectation that the participants question and transcend their initial preferences. Somewhat paradoxically considering the above discussion, "[t]hese idealizing preconditions demand the complete inclusion of all parties that might be affected, their equality, free and easy interaction, no restrictions of topics and topical contributions, the possibility of revising the outcomes, etc".[141] Although notions of rationality may function exclusionary, it has been argued that some kind of consensus is necessary in a society. Are there any alternatives to rational consensus?

2.4 Alternatives to Rationality?

2.4.1 Limiting Rationality

Malik criticizes the traditional liberal theory that presents liberal democracy as rational consensus (which happens to be the same concept that Habermas utilizes above).[142] Malik illustrates her argument with Rawls, whose theory "limits public debate to those comprehensive doctrines that recognize the limits imposed by: (a) deep diversity and pluralism; and (b) public reason."[143] To participate in the public sphere, according to this theory, a group has to accept general principles of justice, and relegate their substantive ethics to a private sphere. When a group refuses to do this, the group is taken for irrational or mad, which make it difficult for it to take part in public debate, and may make it necessary for the group to be contained. Malik argues that theories like this too quickly

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141Habermas (1992), p. 449.
142Malik, p. 109.
143Malik, p. 108.

abandons the public debate, and they fail "to link our discussions of justice and political legitimacy to the reality of political claims and struggles".[144] Malik writes that[145]

> the most pressing democratic struggles in our times … is often by those 'extremists' who seek to enter public discourse, and yet whose claims seem, at first sight, to be irreconcilable with liberal democratic politics.

Ryan argues that a politics of contestation and inclusion, where notions of interest and identity are articulated, does not have to be antithetical to the public good, but rather, history (i.e. of history women's inclusion in the public sphere) has showed that such a politics is "as essential to the public as is a standard of rational and disinterested discourse".[146] From her feminist revisionist history of the public sphere, she concludes that:[147]

> Those most remote from public authorities and governmental institutions and least versed in their language sometimes resort to shrill tones, civil disobedience, and even violent acts in order to make themselves heard … However we draw the normative or procedural boundaries of the public sphere, they must be permeable to even distorted voices of people like these, many of whom still remain outside its reach.

Deeming a group irrational thus seems to be a very risky business in a democracy.

2.4.2 Agonistic Respect

Malik "proposes an alternative way of defining the goals of liberal politics".[148] Thus, still within a liberal framework, she introduces the concept of "agonistic respect", balanced against the theory of deliberative democracy and its discourse ethics.

Agonistic respect "emphasizes the importance of a complex notion of political identity, but it does not seek rational consensus as a goal" and it "welcomes the introduction of 'difference' into the public sphere rather than relegating it to the private sphere".[149] These notions prevent liberalism from becoming a dogma, providing space for new ideas. It also "recognizes that an individual's political identity may transcend national boundaries … thereby providing an ideal paradigm for considering the 'global context' of extremism".[150] Such a concept places great importance on the

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144Malik, p. 108.
145Malik, p. 108. Cf. Ryan, p. 285, who concludes that a lesson from the history of women's history of politics consists in a warning "against a spatial or conceptual closure that constrains the ideal of the public to a bounded sphere with a priori rules about appropriate behavior therein."
146Ryan, p. 285.
147Ryan, p. 285–6.
148Malik, p. 96.
149Malik, p. 110.
150Malik, p. 110. The other side, not that of individuals but that of the law itself, too could be subject to a discussion transcending national boundaries. Cf. Heinze (2009a) pp. 186–7, when, in his comparison of the US and European

procedural aspects of democracy, that is, agreement on a framework for debate, rather than substantive ones. Such a framework, argues Malik, can be provided by the theory of deliberative democracy and its discourse ethics.[151]

2.4.3 The Discourse Ethics of Deliberative Democracy

Malik argues that "[m]odels of deliberative democracy provide a more expansive way of defining the public sphere", in that it[152]

- (a) encourages discourse about the lines separating the public from the private sphere;

- (b) also locates the public sphere in civic society and is therefore more sensitive to the interaction between the two; and

- (c) focuses on fluid processes for forming opinions in the public sphere.

- [d] Most importantly, unlike the Rawlsian model, this way of thinking about democracy opens up some room for connecting national (or international) public discussion and politics with the more private (individual or group) claims of social groups.

The discourse ethics of deliberative democracy, according to Malik, consists of two foundational principles, universal moral respect ("recognizing the right of all beings capable of speech and action to be participants in the moral conversation") and egalitarian reciprocity ("each individual should have the right to speech acts, to initiate conversations and new topics and to ask for justifications for the model itself").[153] These principles boils down into three important constraints on the process of deliberation. These constraints coincides with the three liberal core values, or individual rights, identified by Benhabib, who argues that they are "compatible with a universalist deliberative democracy model".[154] These values are:[155]

(1) egalitarian reciprocity (that members of minorities must be entitled to the same rights as the majority);

(2) voluntary self-ascription (self-identification and self-ascription with group membership may be

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free speech, the focus is on the *jurisdiction* of the Council of Europe, as compared to that of the US Constitution.

151Malik, p. 111.

152Malik, p. 112. Malik mixes the plural and singular forms of "model" in this section.

153Malik, p. 112.

154Benhabib (2002), p. 19.

155Cf. Malik, pp. 98–9, and Benhabib (2002), pp. 19–20. The value of egalitarian reciprocity is indeed in line with liberal thought, cf. Mill, p. 96: "If Christians would teach infidels to be just to Christianity, they should themselves be just to infidelity."

contested by the group, but should be left to the individual as far as possible); and

(3) freedom of exit and association (of/with the group).

These principles serve three functions: The level of extremism of a group, and its development over time, can be determined by the extent to which it deviate from them. These principles are also the preconditions for groups to enter the public discourse. Finally, they "set the minimal standard of protection that the State must guarantee for vulnerable individuals within groups".[156] The universality of these constraints "is a major compromise to the principle of agonistic respect"[157] but it allows for this principle to be applied within "institutionalized liberal politics".[158] This "framework of discourse ethics [...] is a precondition for all participants in public discourse".[159]

The result, argues Malik, is a wider, more allowing, definition of the public sphere. "Extremist" groups accepting the procedural framework can now partake in public deliberation. It is critical that the focus is on "process (normative syntax) in a way that distinguishes it from substantive moral content (normative justification)".[160] This process will legitimize its outcomes (political norms). Malik states that it, in addition, will "enhance the virtues of democratic citizenship" of its participants (including "extremists").[161]

Later period Habermas gives us a hint of a more modest, minimal definition of rational consensus, not as precondition for entering the debate, but as a precondition for the existence of debate in the first place:[162]

> I think that [the regulative function of consensus] can only be identified against the background of the intended agreement. There are conceptual necessities, but beyond these conceptual necessities there are pragmatic presuppositions. What would it mean to have a discussion if we did not presuppose the possibility that we can agree, and of course disagree, on certain issues and propositions? It wouldn't be meaningful.

What are the implications of Malik's proposal for the debate on the criminalization of incitement to hatred? This will be discussed in the next chapter.

2.4.4 Summary

This chapter was centered around Malik's discussion of her model to engage with extremists. Not

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156Malik, pp. 98–9, quote on p. 99. Cf. Benhabib (2002), pp. 19–20.
157Malik, p. 112.
158Malik. p. 113.
159Malik, p. 116.
160Malik, p. 113.
161Malik, p. 113. Cf. the discussion on the transformative potential, 2.5 below.
162Calhoun et. al. (ed.), p. 477.

all groups will accept general principles of justice and relegate their substantive ethics to a private sphere, in order to participate in public debate. Groups that refuse participation on such grounds, should not be condemned as irrational and mad too quickly. It is important to see that even illiberal extremist groups often try to enter the public debate. Politics of contestation and inclusion are argued for the public, not antithetical to, but just as essential as a standard of rational and disinterested discourse.

In Malik's model, the principle of agonistic respect does not seek rational consensus as a goal. It allows for complex identities, including nation-transcending ones. The emphasis is on the process, rather than on substantive aspects. This principle is balanced by the discourse ethics of deliberative democracy. These ethics have two foundational principles, universal moral respect and egalitarian reciprocity, that place three constraints on the principle of agonistic respect. These constraints are identical to the proposed core values of liberalism: egalitarian reciprocity (that members of minorities must be entitled to the same rights as the majority); voluntary self-ascription (self-identification and self-ascription with group membership may be contested by the group, but should be left to the individual as far as possible); and freedom of exit and association. They function as standards to classify extremism, preconditions to enter public debate, and the minimal standard of state protection of vulnerable individuals. Malik argues that with her model, it is easier for extremists to participate, something that legitimizes the outcome of the deliberations. I have to note, however, that her proposed preconditions for participation seem rather strict. Perhaps an even more allowing model could be found in Habermas's later, minimal definition of rational consensus. Here, rational consensus is a precondition for the existence of debate in the first place; debate makes no sense if the participants do not agree on the possibility of consensus. Now, let us turn to the implications of this discussion for the criminalization of incitement to hatred.

2.5 Hate speech

2.5.1 Hate Speech Criminalization

It has been argued that hate speech should be restricted by the state because it "invades the rights of its targets" and "violates the basic rules that should govern democratic debate".[163] Malik questions the effectivity of criminalization of incitement to hatred. She shows that incitement legislation historically has been used to suppress minorities criticizing the British colonial rule. She then

163Heyman, p. 181.

argues that contemporary debate on the topic fails to address the essential topic: that of the actual harm caused by hate speech. Malik states that it is in fact the mainstream public discourse that constitutes the "most powerful source of hate speech against vulnerable minorities such as Muslims".[164] But such mainstream discourse is not susceptible to hate speech legislation.[165] Malik argues that, as the normalization of prejudices and stereotypes in mainstream media may in fact pose a greater threat to minorities, media regulation and the enabling of more speech and possibilities for minorities to participate in the public discourse, is a non-legal strategy superior to criminalization.[166]

Malik concludes that, in the place of hate speech criminalization, her proposed framework of discourse ethics "performs three key functions in the process of engaging with extremists". These are, as mentioned above, that the framework "enables the classification of extremists", "provides protection for vulnerable individuals who may be at risk from extremist ideas and practices" and it "permits and facilitates liberal critique of extremist groups without excluding them from the public sphere".[167] Groups that does not strive for participation in mainstream society are not allowed to mistreat individuals within the group in violation of the liberal core norms, and while the public sphere is defined by inclusion and understanding in relation to new ideas, the challenge will be to "maintain an authentic critical perspective towards these".[168]

Malik does not describe what level of coercion the actual legal responses to extremism would entail. Not putting up hard barriers against anti-democratic extremism could be the subject of criticism for being naïve. For instance, the Weimar democracy of Germany gave rise to the Nazi regime. But, as Heinze notes, "[t]he Weimar democracy cannot seriously compare with today's democracies in any relevant respect".[169] It is important not to make the fallacy of ahistoricism, i.e. to take " a snapshot of one historical moment" and use it "to provide a general depiction of the society, eclipsing other, contrasting histories".[170] Today, anti-democratic parties are banned in Germany.[171] Heinze, too, is an opponent of hate speech bans, but he stresses that his argument concern hate speech bans in "stable, prosperous, and longstanding democracies".[172] In emerging democracies, or in a state of emergency,

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164Malik, pp. 103–5, quote on p. 105. Cf. Heinze (2009a), p. 197 for a further discussion.
165Malik, p. 105.
166Malik, pp. 105–6.
167Malik, p. 116.
168Malik, p. 116–7, quote on p. 117.
169Heinze (2009a), p. 202.
170Heinze (2009a), p. 202.
171Barendt, p. 169. As a result of this history, and perhaps justly so, the German Basic law approves of measures against attempts (speech is not enough) to overthrow the democratic system. Thus, Germany is dubbed a *militant democracy*, cf. Grimm, p. 14.
172Heinze (2009a), p. 202. Cf. Heinze (2009b), p. 280.

perhaps such bans can serve as temporary measures.[173] He points out that as long as "hate speech bans are not, and cannot be, extended to protect all vulnerable individuals or groups, they violate [the] principle of universality".[174] Such stable democracies, he claims, are able to protect their minorities and vulnerable groups "without having to impose inevitably arbitrary limits on speech".[175]

2.5.2   The Case of Pastor Green Part I

In this context, let us have a look at the Swedish case of Pastor Green, an evangelical pastor who was indicted for incitement to hatred of people on the basis of their sexual preferences (Sweden's Criminal Code Chapter 16, section 8). Pastor Green was acquitted by the Supreme Court, that made a narrow interpretation of the Swedish law in light of the freedom of expression and the freedom of religion as formulated in the European Convention of Human Rights Articles 9 and 10, and subsequent case law.[176] The Supreme Court ruled against what could be argued to have been the intention of the parliament, which "had legislated relatively recently so as to include sexual preferences in the incitement crime".[177] The case accentuated questions of conflict of norms[178], in this case the national criminalization of incitement to hatred, pitched against the freedom of expression as stated in the European Convention of Human Rights,[179] or arguably even against the civil rights as stated in the Constitution of Sweden.[180] Österdahl argues that the European Court of Human Rights might have supported a Swedish ruling against Pastor Green on the basis that his conduct could have been seen as a denial of rights according to Article 17, on the condition that the Court would consider homophobic statements as objectionable as their racist counterparts.[181] It is unclear how the European Court of Human Rights would have ruled if this case was ever brought before it.[182] Bull, commenting the case and calling for a more theoretical discussion on the matter, notes that the traditional conceptions of freedom of expression are having problems when facing matters of extreme speech.[183] He argues that the protection of undemocratic expression serves to

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173Heinze (2009b), p. 280.
174Heinse (2009b), p. 281.
175Heinze (2009b), p. 285.
176NJA 2005:805, p. 830–1. The Supreme Court notes on p. 830 that this case was not a matter of hate speech in the sense of ECHR case law. Cf. also Cameron, p. 132–3, and Danelius, pp. 39–40, 427 and 465.
177Cameron, p. 139. Cf. Prop. 2001/02:59.
178And deemed there not to be an actual conflict of norms, cf. NJA 2005:805, pp. 830–1.
179Cameron, p. 193. Cf. NJA 2005:805, p. 830–31. Cf. also Österdahl, p. 221, who observes that it in the Swedish preparatory works is stated that the freedom of expression does not protect contemptuous speech directed towards minorities, but also that the criminalization of incitement to hatred must not restrict the freedom of expression. Cf. Prop. 2001/02:59, p. 36.
180Österdahl, p. 222.
181Österdahl, p. 218.
182Österdahl, p. 219.
183Bull, p. 534.

further democracy (even if those very expressions do not) and could be taken for a proof of a society's democratic strength.[184]

While the case of Pastor Green raises interesting and important questions,[185] my aim here is not to comment on the positive law of Sweden, but to use make use of the relevant circumstances of the case in order to illustrate my discussion on deliberative democracy.[186] Here follows a brief summary of those circumstances.

In the small community of Borgholm, on July 20, 2003, evangelical Pastor Åke Green gave a sermon in a local church, on the topic "Is Homosexuality a Congenital Urge or Evil Powers' Play with Men?"[187] The sermon was, according to Pastor Green, a response to recent gay parades and the extensive media coverage these groups had received. Green was of the opinion that his and his God's thoughts on the matter should receive equal media coverage. His aim was primarily to reach young people on the verge of becoming homosexual and to stop them from this, and to "convert" already homosexual people. In order to achieve this, Pastor Green contacted local media in advance to invite them to the sermon. None came, but afterwards Green distributed a transcript of the sermon, which was subsequently printed in one newspaper, resulting in his indictment.[188]

As for the contents of the sermon, citing the Bible, Pastor Green made his case against what he considered the sickness of homosexuality. The statement considered most far-reaching by the Supreme Court is one where "sexual abnormalities" (including homosexuality) is likened to a cancer on the societal body.[189] He also links homosexuality with HIV/AIDS,[190] pedophilia,[191] God's punishment in the shape of disaster and death,[192] and concludes that christians cannot be homosexuals, and, of course, that homosexual people cannot go to heaven.[193] He is horrified by the fact that homosexual people are openly kissing each other on TV and in public places.[194] The case of Pastor Green will be discussed in the light of a theory of deliberative democracy below.[195]

184Bull, p. 535. Bull, on p. 534, also correctly notes that rights applies to dissenting unsympathetic persons, too.
185Cf. Bull, p. 534, on the implications for constitutional law.
186This illustrative discussion will be conducted below in chapter 3.3.
187NJA 2005:805, p. 812. "Är homosexualitet en medfödd drift eller onda makters spel med människor?" In mine own translation.
188NJA 2005:805, p. 812–3. His struggles to reach the media are also mentioned in the sermon on p. 808.
189NJA 2005:805, p. 809, cf. p. 830.
190NJA 2005:805, p. 806.
191NJA 2005:805, p. 810. The Swedish word "gosseskändare" (defiler of boys) is utilized as well.
192NJA 2005:805, p. 809–10.
193NJA 2005:805, p. 811.
194NJA 2005:805, p. 806–7.
195Below, in chapter 3.3.

2.5.3 Summary

Hate speech is bad, because it invades the rights of whomever it targets, and it violates the rules that should govern debate. But the criminalization of incitement to hatred is not effective, and the actual harm caused by hate speech is not addressed in the debates. In fact, mainstream public discourse is the most powerful source of hate speech, through the normalization of prejudices and stereotypes in mainstream media. But that discourse is not susceptible to criminalization. For vulnerable minorities, free speech is more effective than restrictions of it. Malik propose that making space in public debate with more free speech, in combination with regulation of the media, could serve as non-legal alternatives to criminalization. The challenge consists, she argues, in welcoming new ideas while remaining critical towards them. It was was also argued that hate speech bans violate the principle of universality, and constitute arbitrary limits on free speech. While perhaps necessary when democracy is weak, it was argued that stable, prosperous, and longstanding democracies are able to protect minorities and vulnerable individuals without hate speech criminalization. Also, the circumstances of the Swedish case of Pastor Green have been expounded, and will be discussed further below. But first: What are the alternatives to coercion? Let us delve into the topic of the transformative potential of deliberation.

2.6 The Transformative Potential of Deliberation

The proponents of deliberative democracy stresses the transformative potential of deliberation. Within the self-identification of a group as a "public", there is an inherent inclusionary potential, as discussed above.[196] Gutmann discusses the hopes Mill had for liberal democracy to educate "public opinion to respect individual liberty, a possibility which if realized would permit democracy to do without any constraints on popular rule",[197] and concludes that such a result has yet to be realized, and is hard to imagine in a foreseeable future. But for a deliberative democracy, there may still be a chance:[198]

> The more political life encourages autonomy, the more agonizing decisions may become. But the level of political acrimony and violence may decrease as citizens learn to respect each other as deliberative, rather than merely wilful or self-interested, beings … And greater public deliberation may also lead to more justifiable public policies. These are among the most inspiring prospects democracy has to offer.

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196 Cf. section 2.2.2.2.
197Gutmann, p. 524. Cf. Mill, ch. II.
198Gutmann, p. 530.

Manin too, argues that while political deliberation and argumentation places demands on its participants and audience, they also, as showed by Mill, "constitute processes of education and of training in themselves".[199]

Malik discusses this transformative potential in relation to the risk of extremist groups making strategic agreements while using the process of deliberative democracy to mask their true, anti-democratic intents. She identifies three different types of agreements between actors in the public sphere, that have different consequences for the potentially agreeing extremist group:[200]

- (1) Procedural agreement: agreeing on the minimum requirements and normative basis for entering into political discourse based on principles such as universal humanity or egalitarian reciprocity;

- (2) Principled substantive agreement: the outcome of argument which rests on identical reasons and that are able to convince parties in the same way; and

- (3) Compromised agreement: a compromise and negotiated solution based on different reasons between the various parties to the discourse; (Rawls' overlapping consensus/modus vivendi would fall into this category).

Malik argues that strategic agreements have transformative potential. Even if an extremist group can go as far as making even a compromised agreement only for strategic purposes, the complex relationship between the public and private spheres, and the corresponding dialogical formation of the public and private identities of individuals, may transform this compromised agreement, given time, into a principled substantive agreement. Deliberative democracy, Malik argues, carries a potential of fundamental transformation for all its participants. But this "requires an understanding that democratic processes are intrinsically important (whilst also being limited by the normative principles of ethics).[201]

Habermas himself—in a response to Kramer's question of the appropriate responses to those who does not accept the consensus of the public sphere, if "despite your clear desire to exclude violence from the public sphere, isn't it always, in some sense, dependent on an implicit or explicit threat or use of violence?"—states (somewhat cryptically) that:[202]

199Manin, p. 354.
200Malik, p. 114.
201Malik, pp. 114–5, quote on p. 115.
202Calhoun et. al. (ed.), "Concluding Remarks", pp. 475–6.

I would question only the word "always." Every public sphere I know still depends on violence. Nevertheless, what is the outcome of this criticism? If it has any impact, it is to redefine the conditions of access and the level of discussion to do away with the identified exclusionary mechanism. Now, you ask, must it not always be that? This is only the case if the measures of institutions of procedural rationality are in principle a contradictory enterprise. Must the attempt to find rules that, under ideal conditions, could be recognized for all parts of the world necessarily reflect one's own interests, desires, identities, and so on? I can't see how one can make such an a priori argument. Historically, there is also evidence for the self-corrective process of overcoming the selections by which all public spheres as complete embodiments of that one idea [of procedural rationality] have been marred. So we are back to the question, Is procedural rationality an idea on which all publics can agree? If so, there is a regulatory embodiment that can be interpreted differently from different parts but that is seen by all parts as the best embodiment of that idea of procedural impartiality at a given time, in a given context, for the time being. That means until the next argument is able to show how in fact everything is biased. I think that is the issue: procedural rationality.

To summarize, this chapter has discussed the transformative potential of deliberative democracy. In a group's self-identification as a public there lies an inherently inclusionary potential. There is also a transformative potential in the process of deliberation, where participants gradually educate themselves and nurture a mutual respect. Such a transformation may lessen the need for restraints on popular rule. At the same time as the public policies become more justifiable, political acrimony and violence might also decrease, lessening the need for repression in general.

Malik argued that even if an extremist, anti-democratic group partakes in public debate for strategic purposes only, given time, their strategic agreement may be transformed into a real one. It is important to stress the intrinsic value of the democratic processes.

However, these processes must be constrained, or governed, by some kind of ethics. These ethics would probably be in the form of law, with accompanying sanctions. Habermas's last comment could be interpreted as stating that violence is necessary in society to the extent that participatory parity fails. If only a consensus could be reached, however minimal, on a rational procedure for deliberation, and if this consensus were not exclusionary, perhaps violence could be avoided.

3 Discussions and Conclusions

3.1 On Legitimacy

The principles of modern individualism states that individuals are free and equal, and that the individual will is the sole source of legitimate obligation. With the conventional understanding of individual will as something already formed at the point of decision-making, what follows is the principle of unanimity, i.e. that only rules that all affected individuals can accept are legitimate. For practical purposes, however, this principle is substituted with the majority principle. This, then necessitates a conception of rights in order to counter the tyranny of the majority. Rights, of course, also applies in between individuals.

If, instead, the will of the individuals is conceived of as something that is formed through the process of deliberation, the principle of participatory parity can replace the principle of unanimity. Rights can be conceived of as having a crucial function in the fulfillment of this principle.

Thus, the problem consists in how to meet the demands of the individualist principle. What of individuals that do not agree with the decision arrived upon? In systems based on unanimity, substituted with majority rule, and then countered with rights, legitimacy can be questioned to the extent that individuals disagree with the decisions. Social contract theories try to alleviate this by stating that the individual may disagree with particular norms, but agree with the legitimacy of their origins, e.g. the constitution. In systems based on participatory parity, legitimacy stems from the process of will-formation, rather than from the will itself. There will of course still exist dissenting individuals. But to the extent that their points of view has been heard and debated, the outcome of the process is still considered legitimate. This could be described as a weaker derivation of legitimacy than that of the conventional version. On the other hand, conventional models have to provide fictional theoretical constructions to legitimate their norms, while the deliberative model provides a more practical, and perhaps, an even more realistic solution. This claim, however, weakens to the extent that actual participation is substituted with opportunity of participation.

3.2 On Deliberation

The discussion on the concept of the public sphere has shown a number of things. The participants

in a public sphere must be prepared to reevaluate their positions during the course of debate. This can be described as a perceived possibility of consensus, which, even if such a consensus is never reached, is precondition for the existence of debate. Thus it can be argued that for such a possibility of consensus to exist, there must be some level of rationality in the debate.

For the deliberations to be rational, private interests must be bracketed in the public sphere. This has problematic implications for the participatory parity, and thus for the legitimacy of the system. It has been argued that bracketing, or notions of neutrality, or the relegation of private interests and structural conflicts to a private sphere, while facilitating communication, serves to promote the interests of dominant groups within the public sphere. Bracketing seems to contradict the critical, or contesting function of the public sphere. This could be alleviated, to some extent within a stratified society, with the promotion of a multiplicity of publics, where subordinate groups can form opinion and gather strength outside the reach of the dominant groups. From these bases of empowerment, subordinate groups could launch (discursive) attacks and contest structural inequalities. With the strength of a counterpublic behind them, members of subordinate groups could perhaps achieve some kind of participatory parity within a comprehensive public sphere.

One important point, though, is that participatory parity still requires some level of social equality. The public deliberation, once again, requires some level of rationality, which requires some level of bracketing of private interests. To the extent that there are social inequalities among those bracketed interests, the discussion promotes the interests of dominant groups and exclude subordinate groups, and thus fails to live up to the parity requirement. One could even go as far as to suggest that the ideal of the public sphere is impossible in a stratified society. It could also be argued that the parity requirement is contained within the liberal theory of the moral point of view. The precondition of presumption of impartiality, in this theory, is nothing but fiction without some substantive equality. Then again, were the liberal legitimations ever intended for practical use? Anyway, the result is politically radical in that it provides a strong case for a rough, substantive equality.

Malik's model, balancing agonistic respect and discourse ethics to engage with extremist groups, is an example of how some practical tools could be drawn from the theory of discourse ethics. While she argues that her model is more inclusive than a model based on rationality, it must be noted that the conditions she propose are set rather high. Anyway, she proposes a framework that arguably could be applied within a liberal context, and it also explicitly develops from liberal core values the standards to classify extremism, the preconditions to enter public debate, and a minimal required standard of state protection of vulnerable individuals. The vision of deliberative democracy, then,

while possible to accent to the point that it becomes utopian (my personal inclinations certainly leans towards this), might have practical applications here and now. Such applications are accommodated, too, by the different strategies proposed by Fraser and Cassegård.

3.3 An Illustration—the Case of Pastor Green Part II

Now, let us look again at the above presented case of Pastor Green. From the viewpoint of deliberative democracy, Pastor Green's freedom of expression must, of course, be protected. He does not seem to propagate violence (other than that of his God) towards homosexuals. While he is horrified to see homosexuality in media and in the streets, his response is to try to enter the public debate. He does not explicitly try to exclude homosexual people from the debate (although he tries to "convert" them). While I am not inclined to applaud his argument, I can see no reason not to allow Pastor Green in the public sphere. Perhaps, on a more sociological note, Pastor Green could be understood as being half-ways through the transformative process. As he strives to participate in public discourse, he exhibits the hope of possible consensus. Although, by academic standards, his rationality could be questioned, and it does not seem like he would be prepared to reevaluate his position, he seems to acknowledge his "opponents" as partners in debate. At the same time, though, these "opponents" are his targets for conversion. But in entering public debate, Pastor Green will have to conceive of himself as part of a public, and in doing so, as mentioned, he already expresses a notion of parity in that he should receive equal media coverage as the gay public. His position could be described as a possible strategic agreement in framework of Malik. Perhaps, then, his transformation could already be well under way.

While Green, as implied above, could not be said to be anti-democratic, his substantive views certainly disregards the principle of individualism, that all individuals are free and equal, and thus could be said to be undemocratic. But as Malik points out, it is the mainstream media discourse that poses the greatest threat to vulnerable minorities. She suggest some kind of media regulation, but also points out that it is the normalization of stereotypes and prejudices that is the outcome to be avoided. Pastor Green should thus be met, not with indictment, but with massive debate. However, allowing undemocratic views, such as those of the Pastor, to the public sphere should be done with great care to the extent that they are perceived to contradict the fundamental ideals of democracy. There is always the danger that the resulting debate becomes simplified and polarized. The conclusion is that a great responsibility rests on the shoulders of decision-makers within the media.

The media, to some extent, can be said to make up parts of the public sphere, with all that this entails. Exclusion against the will of the excluded, in all its forms, must be avoided. If the entering of one group in the public sphere makes difficult the inclusion of another, the theory faces a problem analogous to that of balancing rights in the liberal model. But the deliberative model rooted in participatory parity, I suggest, provides a more coherent theory when dealing with issues like these.

3.4 Concluding Visions and Fears

There are many implications of the discussions in this thesis. For instance, how would this theory apply to criminal law? Of course, for criminalization to be legitimate, the prospective criminal would have to have had a chance to participate in the public discourse. And how to deal with separatist groups, threatening others with violence? Most instances of terrorism, for instance, could perhaps be understood as consequences of long-running breaches of the principle of participatory parity by the powers at be (i.e. the West and other powers asserting their policies on subordinate groups all over the world). In the light of the discussed transformative potential, notions of transformative justice come to mind. Such matters clearly requires more careful considerations, but are outside the reach of this thesis.

There is a danger that a theory of deliberative democracy could be used as a justification for undemocratic rule, in small or large scale associations, where processes of deliberation would only amount to hearing people out in order to create an air of legitimacy, followed by a decision made by an elite (local or national government or perhaps a company management). The theory of deliberative democracy could as such be interpreted as to legitimize vast transgressions against what many Westerners hold to be human rights, as long as the targets of the transgressions were provided with (a sham) opportunity to participate. But with all of its components taken seriously, such an ideological degeneration of the concept could hopefully be avoided.

On the other hand, perhaps isolated aspects of the theory could be abstracted and used as strategies for opposing and contesting domination, as mentioned above, through the subaltern counterpublics proposed by Fraser and in the public spaces of Cassegård's discussion, or as shown by Malik, by providing more space for minorities in a liberal context. As a gradually realized project, or a general direction for the development of existing democracies, the transformative potential of the theory

suggests that deliberative democracy would, eventually, lead to less repression and violence, and more tolerance.

I will note one more aspect here. Liberal values, more directly realized in a theory of deliberative democracy, carries within them certain anti-nationalistic implications. A society must perhaps be contained within a physical space, but the theory carries an expansive potential. In a world where the policies of one entity can affect individuals all over the world, legitimacy, individualism and participatory parity taken seriously have far-reaching implications. As a distant echo of socialist internationalism, perhaps deliberative democracy can be the vehicle to carry its passengers closer towards an utopian, global vision.

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