

**Implications of regulating social media on democracy in the EU –  
through a freedom of expression lens**

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## **Abstract**

The regulatory framework controlling social media in the European Union (EU) and its impact on freedom of expression (FoE) and democracy are examined in this thesis. The article investigates the global democratic collapse and the role of social media in this trend. It emphasizes the importance of regulating FoE in the digital era, as well as the EU's regulatory framework the Digital Services Act (DSA). The thesis explores the question: In what ways does the regulatory framework governing social media in the European Union affect the exercise of FoE and what are the implications for democracy? The findings show that the EU's regulatory system, particularly the DSA, has serious consequences for FoE and democracy. While the DSA seeks to strike a balance between user protection and free conversation, there are worries about the unintentional removal of lawful content and potential constraints on FoE. Recommender system transparency criteria are consistent with democratic norms. Maintaining free expression and democracy in the digital environment requires striking the correct balance between regulation and open communication. Future studies should analyze the DSA's long-term influence on democracy and investigate additional aspects of FoE and related legislation.

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## 1. Introduction

In an era marked by the global rise of democracy, a remarkable shift has recently emerged. Over the past century, an increasing number of states around the world have adopted a democratic regime. Since 2006, the seemingly unstoppable trend has come to a halt and gradually started to decrease (*The World Has Recently Become Less Democratic*, n.d.). In fact, the number of people having democratic rights has plummeted from 3.9 billion in 2016 to 2.3 billion in 2022. This shift is also reflected in the Democracy Index (DI), an index used to evaluate political regimes around the world (*Democracy Index*, 2022). Western democracies, in particular, appear to be affected by the “crisis” of democracy, as this phenomenon is sometimes referred to (e.g. (Dalton, 2004; Ercan & Gagnon, 2014; Waldner & Lust, 2018). In an attempt to understand this trend, scholars have investigated various possible causes (Dalton, 2004; Ercan & Gagnon, 2014; Merkel & Kneip, 2018). One of the repeatedly identified challenges of democracy is the relatively new influence of the digital environment (Adams & Prins, 2017; Fountain, 2023)<sup>1</sup>.

The growing dependency on social media platforms has changed certain aspects of democracy. As the internet is connecting an increasing number of people (World Economic Forum, 2011), it is becoming more difficult to remain offline. Only in the last two decades, the number of social media users has risen to nearly 4.8 billion people (Petrosyan, 2023) and is predicted to continue on this positive trend in the future (World Economic Forum, 2011). As a result, social media platforms, such as Twitter and Facebook, have become a crucial part of modern culture, changing how we organize our lives and how we interact with each other (Cheung & Chen, 2022; Hanschitz, 2017; Porter & Tan, 2023). The internet and social media, in particular, are increasingly perceived and used as a public sphere, where public discourse takes place

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<sup>1</sup> It is important to note that the focus of this analysis is primarily on the democratic backslide that predates the Covid-19 pandemic, which undeniably had an impact on the DI since 2020.

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(Fountain, 2023). As such, social media platforms have certainly had a significant impact on democracy (Adams & Prins, 2017; Porter & Tan, 2023).

One aspect that has changed with the progressive use of social media as a public sphere is the exercise of the right to freedom of expression (FoE). FoE is considered a cornerstone of democracy, and is enrooted in its definition (Bhagwat & Weinstein, 2021b). Democracy literally translates to the rule *by* the people, which means that (decision-making) power lies with the people. It follows that the purpose of a democratic government is to serve the common good. Meanwhile, FoE is “[...] the right to express oneself without interference or censorship.” (‘Freedom, n.’, n.d.). FoE is undeniably an important right for the functioning of democracy (Emerson, 1964). The imbalance between FoE and other fundamental democratic rights, however, requires regulation (Docksey, 2016; Hildebrandt, 2013). Both in theory and in practice there appears to be no consensus on a right approach to regulate FoE. Therefore, democratic governments, as well as international institutions, have been regulating FoE differently (Heller & van Hoboken, n.d.). The development of a digital public sphere has added another layer of complexity (Adams & Prins, 2017; Masferrer, 2023). The yet unregulated environment has significantly changed dynamics by introducing, for example, recommender systems and anonymity (Fountain, 2023).

Having recognized this problem, the European Union (EU) has integrated digitalization into its principles. Currently, one of the five key principles the European Parliament (EP) enforces is adaption to the digital age (European Parliament, n.d.). Meanwhile, the European Commission (EC) aims to achieve “a Europe fit for the digital age” (European Commission, n.d.-b). Additionally, digitalization is also a central component of the European Democracy Action Plan (EDAP) (European Commission, 2021). The EDAP seeks to support democracy of the EU as a whole and its Member States, fostering free and fair elections, strengthening media plurality and freedom, and combating misinformation (European Commission, 2021). Within this Plan,

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the EU has come up with the Digital Services Act (DSA). In short, the DSA aims at safeguarding users' rights and ensuring a safe digital environment (Directive 2000/31/EC, 2022).

This paper aims to analyze the current regulation on social media regarding FoE, whereby the key question is: In what ways does the regulatory framework governing social media in the European Union affect the exercise of freedom of expression and what are the implications for democracy? Drawing on theories from political science, philosophy, and law, I argue that the most recent regulations concerning FoE are promoting certain functions of FoE, but also hinder others. These changes can protect democracy but also have severe effects and arguably harm democracy. It is essential to acknowledge that although the right to freely express oneself is often understood in a democratic context, it is not explicit to it. Nonetheless, considering the research question and the focus on the EU context, the paper will examine FoE on social media platforms in democratic regimes. When addressing social media platforms, I specifically refer to the most commonly used providers, such as Meta or Twitter.

To answer the research question, this thesis is divided into five chapters. The first defines FoE and dives deeper into philosophical and legal perspectives. The second chapter explores the relationship of FoE and democracy. This chapter is divided into three subsections, namely political participation, pluralism, and legitimacy. The third chapter investigates the regulation of FoE offline. The subsequent chapter explains the current regulatory framework, with a specific focus on the DSA, in the EU. The last chapter explores the implications of this regulation by combining information from the preceding sections.

## 2. Defining Freedom of expression

In order to understand the implications of regulations regarding FoE on social media on democracy, it is necessary to identify relevant themes within the definition of FoE. While the definition of FoE might seem straightforward, it is actually a rather abstract concept with multiple layers. It is important to acknowledge that FoE is a stand-alone concept and its understanding can vary in different context and across time (Masferrer, 2023). As aforementioned it is not explicit to democracy. For instance, in authoritarian and totalitarian regimes the concept of FoE may still be acknowledged, albeit it may be subject to severe restrictions and limitations (Masferrer, 2023; Momen, 2020). In this section, the concept will be addressed outside of the realm of governance. Instead, to gain a more holistic perspective, I have chosen an interdisciplinary approach to analyze the different layers; as such, the following section will draw on knowledge from the legal and philosophical field.

### 2.1 Philosophical approach to freedom of expression

In an attempt to define FoE, the first step is to view the term within a vacuum and look at the literal meaning of the individual parts, namely (1) freedom, and (2) expression. The term *freedom* refers to: “The state of being able to act without hindrance or restraint” (‘Freedom, n.’, n.d.). Meanwhile, *expression* can be seen as “the action of expressing or representing (a meaning, thought, state of things) in words or symbols [...]” (‘Express, v.1’, n.d.). According to these definitions, freedom of expression would be the absence of (legal) constraints regarding the sharing of thoughts, opinions, etc. through (non-)verbal communication methods, such as written text, gestures or images. When drawing on the definition of FoE as one term, rather than individual ones, the search leads to the following definition: “the right to express oneself without interference or censorship” (‘Freedom, n.’, n.d.). In this definition it becomes apparent that FoE is more than a freedom, and is instead referred to as a right.

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This differentiation is also reflected in philosophical theories on FoE, which highlight the importance thereof for personal and societal progress. In general, FoE enables people to openly take part in the dissemination of ideas and the construction of meanings that help define not only them as individuals but also society as a whole (Balkin, 2004; Vese, 2022). As Masferrer (2023) suggests FoE is essential for this process, as it allows people to reflect and think critically on topics, under the assumption that they adopt a positive listening attitude to learn from others, especially those who hold a different perspective (United Nations Educational, 2018). This can promote the development of new ideas to evolve and creates space for collective discoveries (Vollenhoven, 2015). While it is an essential aspect of a free society, FoE can be traced back to basic needs of individual human beings and is, as such, the basis for (societal and individual) progress (Cheung & Chen, 2022; Junius Fernando et al., 2022; Mill, 1859; Vollenhoven, 2015, 2015). As an individual right, FoE is a human right that enables people to freely express their ideas and opinions (Mill, 1859). A pioneer in this regard was John Stuart Mill (1859) in his influential work “On Liberty”, which highlights the importance of individual freedom. According to Mill, FoE is essential for growth as a person and the search to acquire the truth. At the same time, he also emphasized that it will not necessarily lead to truth. As Vollenhoven (2015) describes it individuals’ ability to formulate and express their view and opinions is an inherent human characteristic.

In other words, FoE can be described as an individual or a collective right, that enables open dialogue and exchange of ideas that shape people and society as a whole. Being an inherent characteristic makes the execution of this freedom a matter of necessity.

### **2.2 Legal definition of freedom of expression**

As a human need, FoE is safeguarded in international and national legal frameworks (Junius Fernando et al., 2022). There are five key regulatory frameworks to be taken into consideration in the context of the EU: (1) the Universal Declaration of Human Rights (UDHR), and (2) the



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International Covenant on Civil and Political Rights (ICCPR), (3) the European Charter of Human Right (ECHR), (4) the Charter of Fundamental Rights (CFR), as well as (5) national constitutions.

The UDHR protects this right in Article 19 as follows:

„Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.“ (United Nations, Article 19, n.d.)

Essentially, this means that every individual has the human right to express themselves freely without restrictions. Additionally, this definition goes beyond the aspect of expressing oneself, and includes accessing information as another component of FoE. To realize this right, individuals may use any type of media. In accordance with the Article 19, a free and unrestricted media is necessary in any society to guarantee the complete fulfillment of FoE. Additionally, to being a human right itself, FoE and its realization is also connected to a number of other human rights, such as the right to freedom of speech, assembly and association (Ayalew, 2019; Junius Fernando et al., 2022; Vese, 2022). FoE is also protected under other international agreements, such as the ICCPR, which uses a similar definition, further specifying its possible means: “[...] either orally, in writing or in print, in the form of art, or through any other media [...]” (General Assembly resolution 2200A (XXI), Article 19, 1966). Within the EU’s legal system, FoE is defined in the CFR and the ECHR. The CFR gathers the most fundamental freedoms -FoE being one of them- in the EU in a legally binding document (Charter of Fundamental Rights of the European Union, 2012). The ECHR and CFR, in Article 10 and 11 respectively, have a similar definition for FoE to the previous two definitions - especially the one in the UDHR (Charter of Fundamental Rights of the European Union, 2012; Council of Europe, n.d.).

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Lastly, in addition to the international agreements, the right to FoE is ensured in most constitutions, along with other freedoms (Masferrer, 2023). As described above, this protection has fostered the intellectual growth of personal and social technologies (Cheung & Chen, 2022). Different states have different definitions and understandings of FoE, and are in disagreement on when and how this right should be protected and when it needs to be restricted (Junius Fernando et al., 2022; Wimmer, 2006). These discrepancies can be traced back to different contexts, whereby factors, such as history, culture, identity, or ideology play an important role (Anansaringkarn & Neo, 2021). For instance, after World War II, Germany chose to limit pro-Nazi rhetoric – a step that can arguably be seen as a violation of FoE. As a result, the purchase and sale of Nazi propaganda books, such as Hitler's *Main Kampf*, was prohibited (Oppenheimer, 1998).

To conclude, FoE can be described as a natural right and as a need for individuals as well as a necessity for societal advancement in a broader sense. This right has been enshrined in various legal frameworks, amongst others, the UDHR, making FoE a human right. Depending on the institutional tier, there are slight differences in the conceptualization of FoE. All have in common that FoE has two components, namely, the act of expressing and the act of seeking information. This differentiation is particularly important in the context of democracy, as will be elaborated in the following section.

### **3. Freedom of expression and democracy**

Now that philosophical and legal definitions of FoE have been explored, it is further essential to investigate the relation between FoE and democracy. In this context, FoE refers to political expression specifically. When it comes to describing the importance of FoE for democracy, scholars deem different aspects of FoE and democracy as relevant (e.g. Adams & Prins, 2017; Conn, 1973; Deth, 2016; Hanschitz, 2017; Meiklejohn, 1949; Mill, 1859). Let us consider these

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various arguments, as well as insights from the Democracy Index (DI), which measures political regimes across the world (*Democracy Index*, 2022). To evaluate countries, the DI derives results from a questionnaire. There are 60 questions, which are categorized in five categories, namely (1) electoral process and pluralism, (2) civil liberties, (3) political participation, (4) functioning of the government, and (5) political culture (*Democracy Index*, 2022). These categories include aspects of democracy that enable a comprehensive evaluation of each country's democratic procedures. While only one category -*civil liberties*- explicitly mentions FoE in a question<sup>2</sup>, aspects of FoE are mentioned in other categories as well.

Considering the scope of this thesis, I will only focus on the most common theories. As a result, I have identified three primary functions of FoE. This analysis regards three functions of FoE, namely (1) enabling political participation, (2) encouraging pluralism, and (3) facilitating legitimacy. I will be drawing on examples of the DI to help the readers' understanding of the interplay between FoE and democracy in practice. Before delving into these arguments, it is beneficial to revise the definition of democracy. As aforementioned, democracy is the rule *by* the people. Abraham Lincoln (Waldron, 2012) went even further and described democracy as the rule *of, by, and for* the people (U.S. President Abraham Lincoln, The Gettysburg Address, November 19, 1863). Understanding this foundational principle of democracy provides a solid basis for analyzing the relationship between FoE and democratic systems.

### **3.1 Political participation**

FoE plays a vital role in enabling valuable participation, which is essential for the functioning of a democratic society. In a democratic society, the government's responsibility is to serve the common good (Forsskal, 1759). In order to cater to the common good, it is essential for democratic governments to gain an understanding *of* people's individual and collective needs (Adams & Prins, 2017). Political participation serves as a mechanism to provide such

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<sup>2</sup> "Is there freedom of expression and protest [...]" (*Democracy Index*, 2022, Q46)

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information by allowing individuals to engage in the political process by, for example, sharing thoughts and engaging in public debates (United Nations Educational, 2018). More concretely it is defined as any activity that influences politics (Deth, 2016). Already in ancient Greece a high level of participation was regarded as a necessity to fill the gap between those who govern and those in power -the people- by giving them a voice in determining choices (Waldron, 2012). In fact, the Finnish scientist and philosopher, Forsskal (1759), argued in favor of participation by everyone to achieve the common good and provide services for the people. In other words, political participation is a vital aspect of democratic societies, permitting governments to act responsibly and effectively (Adams & Prins, 2017; United Nations Educational, 2018). In this context, FoE serves as a foundation of political participation, enabling individuals to freely express their thoughts, opinions, and concerns without fear of repression or discrimination.

This is reflected in the DI, in which political participation is its own category (*Democracy Index*, 2022). For instance, in the category *electoral process and pluralism* the DI asks the following question in its questionnaire: “Can citizens cast their vote free of significant threats to their security from state or non-state bodies?” (*Democracy Index*, 2022). Elections, a form of political participation, are particularly crucial in representative democracy (Deth, 2016; Hanschitz, 2017). They serve as a way for people to express their needs by choosing who will be their representative. Overall, the ability to freely express one's political opinions during elections gives people more power to influence the political climate and strengthen representative democracies (Hiebert, 1990). In other words, FoE is a means to execute political participation, which is a necessity for governments in democratic societies.

### ***3.1.1 Social media and political participation***

Social media has significantly transformed political participation by providing a platform for anonymous expression and connectivity. With a majority of EU citizens having internet access,

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social media has emerged as a public sphere<sup>3</sup> providing a prominent platform for political engagement (Junius Fernando et al., 2022). Aside from connectivity, an important factor driving the increased political participation on social media is the element of anonymity (Akdeniz, 2002). Thanks to anonymity and the execution of the right of FoE, users can express their political views without worrying about punishment or consequences, which may encourage individuals who might otherwise remain silent to actively engage in discussions and share their perspective (Asenbaum, 2018). Many (e.g. Al-Jenaibi, 2014; Benrazek, 2022; Comunello & Anzera, 2012) discuss the Arab Spring as an example of how social media has amplified political participation. During the Arab Spring, the widespread reach of information allowed for the organization of mass protests across several countries in the Middle East and North Africa. As such, social media played a pivotal role in the Arab Spring. The digital landscape has made it easier for people to actively participate in political discourse, participate in civic activities, and interact with others who share their political beliefs.

### **3.2 Pluralism**

FoE encourages plurality, which under the right conditions, will lead to better-informed citizens who can arguably make better democratic decisions. Social pluralism in the democratic context refers to the acknowledgment, acceptance, and promotion of various viewpoints, goals, and values within the political sphere (Conn, 1973). In this case, FoE is considered the mean to achieve such pluralism. FoE permits individuals to freely discuss their thoughts and share their opinions without fear of persecution or censorship. By allowing individuals to freely share their thoughts, an environment in which differing viewpoints may coexist is created (Eck, 2006;

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<sup>3</sup> Traditionally, Habermas (1989) defined a public sphere as a space where “private people come together as a public”, whereby citizens have the opportunity to express their thoughts and opinions freely. While in the past social media has been disputed as a public sphere, there appears to be a general acceptance amongst scholars, that social media is regarded as a public sphere, making it an important place for public discourse (Fuchs, 2014; Kruse et al., 2018).

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Nelson, 2005; United Nations Educational, 2018). Coming back to the legal definition of FoE, pluralism gives individuals the opportunity to access information.

A pluralistic society exposes individuals to diverse perspectives, which enables more rational discourse. The exposure to different viewpoints can have various effects on individuals. When encountering opposing opinions, individuals are able to gain a better understanding of the issue at hand but also of their own perspective (Conn, 1973; Eck, 2006; United Nations Educational, 2018). They are often confronted with their own biases. Under the assumption that people have an interest in critically reflecting on different thoughts and ideas, individuals may be compelled to re-evaluate their own beliefs. Another aspect of pluralism is that it fosters an inclusivity and tolerance within a society (Conn, 1973; Eck, 2006; United Nations Educational, 2018). As Mill (1859) argued, engaging in a more rational discourse allows people to become better-informed. Meiklejohn (1949), another notable philosopher, further expanded that well-informed citizens are likely to engage in better political participation. This, in turn, will lead to improved decision-making (Meiklejohn, 1949). In other words, FoE enables pluralism, which enhances democratic governance by allowing for the coexistence of diverse perspectives, which individuals can reflect upon to generate more educated and fair judgements (Conn, 1973).

Being its own category in the assessment of the DI, a high level of pluralism is vital for democracy. There are two questions in the questionnaire that target this type of pluralism: “Are citizens free to form political parties” and “[...] civic organizations free of state interference and surveillance?” (*Democracy Index*, 2022). The focus of these questions is more on organizational and institutional plurality, which are a reflection of the individual diversity. The presence of a varied range of political parties and civic organizations is critical in representative democracies for ensuring that all segments of society feel appropriately represented. The establishment of many political parties allows for the presentation of various ideologies,

perspectives, and policy proposals, providing voters with a larger range of options and encouraging healthy competition in the political arena (Dennis & Owen, 2001; Ridge, 2022).

### *3.2.1 Social media and pluralism*

While the element of anonymity on social media platforms is believed to enhance pluralism by providing a platform for marginalized voices to be heard, the operation of recommender systems poses a significant challenge to maintaining a truly diverse and pluralistic society (Asenbaum, 2018; Rogal, 2013). As already mentioned in the previous section, anonymity allows individuals to express themselves more freely, which is particularly important for those whose voices are often silenced or marginalized. By offering a veil of protection, anonymity empowers individuals to share their perspectives and contribute to the broader political discourse (Zhang & Kizilcec, 2014). This is particularly relevant for pluralism, as it ensures that even the most silent and unheard voices have the opportunity to be represented and contribute to the democratic process.

When considering FoE as the right to access information, the presence of recommender systems employed by social media providers becomes concerning. These systems pose a severe risk to the pluralistic nature of society. Recommender systems use algorithms to personalize content for users based on their preferences and behavior (Lü et al., 2012). While this can enhance user experience and engagement, it also has the potential to create filter bubbles and echo chambers, where individuals are exposed only to information that aligns with their existing beliefs and perspectives (Appel, 2020; Dahlgren, 2021). This selective exposure limits the diversity of information and viewpoints to which individuals are exposed, hindering the exchange of diverse ideas and challenging the principle of pluralism (Appel, 2020).

Furthermore, the spread of fake news and disinformation on social media platforms exacerbates the challenge to pluralism. Misleading or false information can easily be amplified through the viral nature of social media, influencing public opinion and undermining the informed decision-

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making process (e.g. (Allcott & Gentzkow, 2017; Suarez-Lledo & Alvarez-Galvez, 2021; Vese, 2022). This distortion of information can have far-reaching consequences for a pluralistic society, as it skews the public discourse and compromises the ability of individuals to make informed choices based on accurate and diverse information.

### 3.3 Legitimacy

FoE can be seen as a mean to give democracy the needed legitimacy, which is essential for the effective functioning of a government. In democracies political institutions require the support and conformity of the people to exercise power effectively, coined legitimacy. A key component of legitimacy is that it serves as a foundation of the authority and credibility of democratic administration; only when a government is considered legitimate it is able to implement policies in a meaningful manner (Buchanan, 2002; Lipset, 1969). By expressing their criticisms and approval, thus making use of the right to FoE, the people can legitimize individual decisions and processes, often encouraging transparency (Bhagwat & Weinstein, 2021a). This legitimation by people provides stability and sets a foundation for a well functioning political system.

In contrast to the previous two functions, legitimacy is not as obviously included in the DI. Nonetheless, considering the above described, elements of legitimacy can be found in a variety of questions. For instance, within the category *functioning of government*, legitimacy is an underlying condition enabling the functioning of a government. As such, it is asked: “Is the civil service willing and capable of implementing government policy?” (*Democracy Index*, 2022, Q21). Another example is the following question: “Is there a sufficient degree of societal consensus and cohesion to underpin a stable, functioning democracy?” (*Democracy Index*, 2022, Q36) in the category *democratic political culture*. This question in particular links to the idea of democratic legitimacy requiring a certain agreeableness from a majority of the people.



### ***3.3.1 Social media and legitimacy***

Given the complex link between legitimacy and political involvement, the previously described characteristics of social media are equally relevant in the context of legitimacy. Citizens' active participation in political debate and expression of opinions through social media platforms plays a critical role in molding the perceived legitimacy of democratic administration (Poell, 2020).

In summary, it can be said that the execution of the right to FoE is crucial for many functions. It enables political participation, pluralism and legitimacy. Throughout this section, it has also become apparent that these three functions are connected to each other. It has been argued that pluralism, for instance, enhances political participation. Meanwhile, certain political participation is an inherent requirement to legitimize a state. Without FoE, individuals would be severely constrained in their capacity to contribute to public discussions, and democracy as a whole. In fact, coming back to the definition of democracy, a lack of FoE would fail the purpose of a political system *by* the people.

## **4. Regulating freedom of expression in democracies**

Having explored the relationship between FoE and democracy has shown that FoE is indispensable to democracy. As such, there is a consensus that the right to FoE should be protected; as previously established, international agreements aim to do so on different governmental tiers. However, even across democracies there appear to be discrepancies regarding the conceptualization of FoE. The disagreement stems primarily from having to balance FoE with other democratic rights (Akdeniz, 2011). As a result, the question that often remains is: to what extent should other democratic rights be protected, at the cost of FoE? This chapter will, therefore, aim to investigate different approaches to regulating FoE offline, as these regulations form the basis for how FoE should be protected online.

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On one hand, Freedom of Expression (FoE) is widely recognized as a fundamental principle of democracy. As such, many have argued against the restriction of FoE for the benefit of protecting other fundamental rights. For instance, Mill (1859) advocated for minimal restrictions on FoE, even when it involves divisive or unpopular viewpoints. He believed in looking beyond socially acceptable arguments, arguing in line with the ideas described in the previous section on pluralism. Similarly, Meiklejohn (1949) advocated for the protection of expression, especially in the political context. Instead, he, and also some more contemporary scholars, supported a self-governing approach to FoE. The underlying idea is that restricting FoE will only tackle a symptom, rather than the actual issue. For instance, in the case of discrimination, restricting FoE will arguably not reduce discrimination itself. These perspectives highlight the importance of allowing a wide range of opinions and ideas to be freely expressed, as efforts to repress or suppress them can ultimately backfire, hindering the democratic process.

On the other hand, it is important to acknowledge that while FoE is a fundamental aspect of democracy, its exercise also entails certain duties and responsibilities. It can sometimes conflict with other democratic values and civil liberties, which contribute to the foundation of democracy (Emerson, 1964). A commonly mentioned example is the clash of FoE with the right to dignity. Therefore, a certain level of regulation is necessary to strike a balance between the freedom of expression and the protection of individuals' rights and well-being (Bhagwat & Weinstein, 2021a). FoE is not considered an absolute right, as scholars like Scanlon argue, and its implementation requires careful consideration of the broader societal context and potential consequences (Wellington, 1979). Recognizing the limitations and potential conflicts surrounding FoE underscores the need for responsible exercise and thoughtful regulation to ensure a democratic society that upholds multiple values and protects the rights and dignity of all its members.

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In practise the extent to which FoE may be restricted varies from country to country, across different democratic systems. A comparison between the US and the EU can serve as an example and shed light on the different approaches. Both, the US and the EU, have relatively similar definitions of FoE, drawing upon the aforementioned international agreements (Charter of Fundamental Rights of the European Union, 2012; First Amendment, U.S. Constitution, 1791; Heller & van Hoboken, n.d.). However, the two entities differ in their restrictions for FoE. The US tends to have a more permissive stance, with strong protection for FoE. While certain types of expression are regulated, the US generally has a high threshold for restricting FoE. Meanwhile, the EU takes a broader approach, emphasizing the need to balance individual liberties and societal interests (Heller & van Hoboken, n.d.). As aforementioned, FoE is protected under the ECHR. However, the EU and its member states have extra legislations to address specific issues relating to FoE such as hate speech, discrimination, and incitement to hatred (European Court of Human Rights, 2022; Heller & van Hoboken, n.d.). For instance, the denial of the Holocaust is regarded as an abuse of the right to freedom of expression by the ECHR. While arguably socially unacceptable in the US as well, it falls within area of protected speech in the US. This highlights the differing legal perspectives and approaches to regulating FoE across countries (Heller & van Hoboken, n.d.).

To conclude, as a fundamental value of democracy, the right to FoE needs to be protected. However, at the same time, FoE needs to be restricted, as a result of clashing with other democratic rights and values. Hence, there are two components to regulating FoE: (1) the protection of FoE, and (2) the protection of other fundamental rights. While there is no consensus on how to regulate FoE offline, governments have laws in place balancing these two aspects. In general, the EU has chosen a rather strict approach, in contrast to the US.

## **5. The EU's approach to regulating freedom of expression online**

Despite having relatively clear laws to regulate FoE offline, governments around the world lack sufficient regulations for the digital sphere (Masferrer, 2023; United Nations Educational, 2018). This gap can be attributed to the rapidly evolving platforms and services, as well as the quick rate of technological advancements (Elia et al., 2021). Another difficulty is posed by the nature of social media platforms, which function across border and as such in different legal systems. Combined, these factors have presented distinct problems to legislators and legal systems around the world (Elia et al., 2021). An early attempt to regulating social media platforms has been the e-Commerce Directive, which has served as the main legal framework for the provision of digital services in the EU (European Commission, n.d.-a). However, considering the fast-evolving digital environment this directive fails to address a variety of issues (Schwemer, 2022). Thus, most recently governments and institutions have made new attempts to address the problems brought on by the increasingly widespread usage of these platforms in order to ensure the secure and responsible use of the Internet (Directive 2000/31/EC, 2022). This chapter aims to explain the current regulatory framework by the EU, namely the Digital Services Act (DSA), which was passed in November 2022 and is currently in its implementation phase. It will only fully apply to all regulated entities in February 2024. It is important to acknowledge that the DSA is a lengthy and complex regulation (*The Digital Services Act Package | Shaping Europe's Digital Future*, n.d.). As such it would exceed the established scope of this thesis to analyse it in depth. Hence, the focus of this section is on regulations deemed relevant for the answering of the research question.

The DSA was introduced in conjunction with the Digital Markets Act (DMA) as part of a comprehensive effort to address challenges posed by the digital sphere by holding internet platforms more responsible for the data they host and creating an equal market (*The Digital Services Act Package | Shaping Europe's Digital Future*, n.d.). The framework specifically

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aims to rebalances the rights and obligations of digital service providers, online users, consumers, and corporate users throughout the EU in conformity with the fundamental rights and values of the EU (*The Digital Services Act*, n.d.). Therefore, it has established three goals: (1) the protection of citizens and their freedom of speech and information, (2) the protection of business and their freedom to operate, and (3) the prohibition against discrimination (Directive 2000/31/EC, 2022).

In order to ensure a fair system, the DSA introduces four classifications for intermediary services providers. The four types of intermediary services providers are: (1) intermediary services, (2) hosting services (e.g. cloud services), (3) online platforms (e.g. social media platforms), and (4) very large online platforms (VLOPs) (Directive 2000/31/EC, 2022). Depending on their service, size and impact, companies will be assigned to a different classification (*The Digital Services Act*, n.d.). The benchmark for VLOPs is 10% of EU citizens, which now equates to approximately 45 million users (Article 33). While all categories are subject to regulation in the DSA, the responsibilities and obligations may differ. The table below shows a selected number of obligations and their applicability to the categories.

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New obligation	Interm. services	Hosting services	Online platforms	VLOPs
Transparency reporting (Article 24)	X	X	X	X
Requirements on terms of service due account of fundamental rights	X	X	X	X
Cooperation with national authorities following order	X	X	X	X
Points of contact and, where necessary, legal representative	X	X	X	X
Notice and action and obligation to provide information to users (Article 16)		X	X	X
Reporting criminal offence (Article 18)		X	X	X
Complaint and redress mechanism and out of court dispute settlement (Article 20 & 21)			X	X
Trusted Flaggers (Article 22)			X	X
Measures against abusive notices and counter-notices (Article 9)			X	X
Transparency of recommender system (Article 27)			X	X
User-facing transparency of online advertising (Article 39)			X	X
External & independent auditing, internal compliance function and public accountability				X
User choice not to have recommendations based on profiling (Article 38)				X
Data sharing with authorities and researchers (Article 40)				X

**Table 1.** New obligations concerning FoE (Directive 2000/31/EC, 2022).

From this table it can be derived that the DSA imposes various obligations for intermediary services providers. They can mostly be summarized into two groups: (1) those concerning content moderation, which concerns the filtering of data; and (2) those concerning recommender systems, which concerns the distribution and access to data.

Firstly, the DSA introduces a comprehensive framework for content moderation, encompassing measures, while emphasizing transparency and limited liability for intermediary service providers. Within the scope of the DSA, *content moderation* is defined as activities undertaken by intermediary services providers to address illegal or inappropriate content. These actions include measures such as removal, demotion, and account suspension to ensure compliance and

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maintain a safer online environment (Directive 2000/31/EC, 2002, Article 3(t)), while adhering to the guiding principle of proportionality as outlined in the Treaty on the European Union (Consolidated Versions of the Treaty on European Union, 2012). For the purpose of reporting by third parties, the DSA relies on a “notice and action” framework (Article 16) as well as trusted flaggers (Article 22). The “notice and action” framework allows third parties to report content that is legally prohibited and content that is prohibited by the platform’s terms and conditions (Leerssen, 2023). Additionally, there are strict obligations for transparency regarding content moderation (e.g. Article 15, 24, and 27). Service providers are required to provide an annual transparency report that elaborates their efforts in content moderation (Article 15). Further, depending on the classification, service providers may be obliged to disclose information regarding their content moderation mechanisms as well as information on how user complaints and appeals are handled (Article 20 & 21).

Secondly, recommender systems are subject to regulatory measures primarily aimed at enhancing transparency. As aforementioned, recommender system is a computerized mechanism that internet platforms use to propose or prioritize material for their users, usually based on user data (Directive 2000/31/EC, 2002, Article 3(s)). The regulation of recommender systems primarily revolves around enhancing transparency obligations. As such, service providers must now provide insight into their algorithm in unambiguous and simple language (Article 27). Further, VLOPs are required to give users the choice to access information not based on profiling (Article 38).

It is important to note, that intermediary service providers do not have an obligation to actively engage in monitoring or fact-finding activities (Article 8). In fact, the DSA reinforces the notion of limited liability for certain types of illegal user-generated information. In other words, it maintains the existing “safe harbor rule”, which protects service providers from liability if they address content in a timely manner upon receiving notice (Leerssen, 2023). In cases in which

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intermediary services providers fail to comply with the new regulations set forth by the DSA, there is a provision for penalties. These can include fines of up to six percent of the company's annual revenue, according to Article 52 and 72. This financial penalty acts as a mechanism to incentivise regulatory compliance and ensure that intermediary services providers take their responsibilities seriously (e.g. Porteous et al., 2015).

In this section, the regulatory framework regarding the regulation of social media platforms in the EU has been explored. The DSA is part of a package aimed at regulating the current digital environment. The regulatory framework differentiates between four different types of intermediary services providers, amongst others the VLOPs. Considering the research question, social media platforms such as Twitter, Instagram, or Facebook, all fall under the classification of VLOPs. As such, they must adhere to stronger transparency obligations, as well as, to take on increased liability. Overall, the DSA imposes a variety of regulations concerning content moderation and recommender systems, and introduces fines for non-compliance.

## **6. Implications of regulating social media on freedom of expression and democracy**

Having established a conceptual understanding of FoE, its intrinsic connection to democracy, its relation to other fundamental rights, and the mechanisms involved in its regulation online, it is now possible to examine the potential effects on FoE and the broader implications for democratic societies. This chapter will be divided into three subsections: (1) a general perspective on the DSA, FoE and democracy, (2) implications of content moderation, and (3) implications of recommender systems.

### **6.1 General perspective on the DSA, FoE and democracy**

The EU has a fundamental obligation to preserve and maintain FoE online. Recognizing the importance of digital platforms in modern communication, the EU has put in place strong legal



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structures to protect this basic right. These restrictions are intended to safeguard democratic values while still protecting individual liberty and public dialogue. As a result, in order to maintain consistency in their commitment to protecting FoE, the EU must extend their obligation to guarantee FoE in the digital world. Nonetheless until most recently, there has been a policy gap in addressing social media providers in regards to FoE. In that way, the DSA is a key legislative breakthrough in the EU. The DSA indicates a genuine commitment to balancing FoE with other fundamental rights. The DSA recognizes the importance of FoE as a cornerstone of democratic society while also acknowledging the necessity to address issues such as unlawful content and harmful online behavior. Following this analysis, it is evident that the DSA's aspirations to balance FoE and other fundamental rights align with the principles upheld by the EU. This approach is consistent with Scanlon's ideas, who calls for restrictions on FoE when necessary to protect persons or society. In this sense, the DSA can be seen as a safeguard for FoE and, as a result, the preservation of democratic norms.

To achieve this balance, the DSA has introduced a variety of mechanisms, including for instance content moderation and transparency obligations, as means to achieve this balance between FoE and other fundamental rights. Looking at those in-depth will give more insight as to what the effects of the regulation are on FoE.

### **6.2. Implications of content moderation**

Considering the aforementioned, there is a need for a certain level of content moderation. As such an extensive part of the DSA concerns the moderation of content. It introduces measures aimed at filtering content to improve online safety and protect users' rights. Amongst others the DSA heightens the transparency obligations for social media providers.

The removal of legal, illegal content and content prohibited under the terms and regulations, as well as the heightened liability for social media providers, poses significant concerns for overregulation which, in turn, constrains FoE. Firstly, the "notice and action" framework

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introduced by the Digital Services Act raises questions about its potential implications for freedom of expression, particularly regarding the possibility of inadvertently removing genuine and lawful content. One of the mechanisms introduced in the DSA is the “notice and action” framework. It entails the removal of content prior to a thorough review of its legality. While the goal of this strategy is to quickly handle illegal or harmful information, its implementation raises questions about the implications for FoE. The possible concern is that genuine and lawful content may be removed. Secondly, the removal of content to create a safer environment for users according to the terms and conditions of social media providers, may exceed the usual regulation of FoE within the EU, leading to an overregulation. Thirdly, concerns have also been raised about the possibility of overregulation and the implementation of overly cautious content screening policies as a result of increased liability and the danger of fines (Leerssen, 2023). Here, Mill’s point of view must be considered, since this technique may go beyond the initial objective of content moderation with the purpose to protect fundamental rights. Overregulation is a significant threat to the protection of FoE; not both the right to express oneself freely but also to the right to access data. As a result, all three functions of FoE in democracy are constrained. Political participation, as with the “notice and action” framework will be less free. Meanwhile, the vitality of a pluralistic society is jeopardized, with fewer opportunities for varied perspectives and viewpoints to thrive. Considering the theories on pluralism, this would lead to a less well-informed individuals, which arguably make worse democratic decisions as a society. In the long run, the limitation on political participation and pluralism may also lead to consequences for the legitimacy of governmental institutions.

### **6.3 Implications of recommender systems**

By compelling internet platforms to provide greater insight into the methods and criteria used in curating and personalizing content for users, the DSA incorporates transparency measures aimed at improving our understanding of recommender systems, particularly those criticized for their impact on pluralism and the creation of filter bubbles. The DSA intends to shed light

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on the methods and criteria used to personalize content for users by mandating internet platforms to offer more information about how their recommender systems operate. Regardless of the transparency, it needs to be noted that the recommender systems continue to personalize content shown to individuals. For that reason, the DSA also has principles that allow consumers more control over their online experiences and minimize the impact of personalized recommender systems. Users can choose not to receive personalised recommendations, which allows them to avoid the echo chamber effect and study a wider range of material. By allowing users to opt out of personalised recommendations, the DSA supports individual autonomy and a more heterogeneous information landscape. This user-centric approach is consistent with democratic norms, which hold that people should be able to access different points of view and make informed decisions based on a range of information sources. The DSA's transparency measures for recommender systems have ramifications for FoE and democracy. The DSA supports individual liberty and a more diverse information landscape by giving consumers greater choice over their online experiences and decreasing the impact of tailored recommendations. This promotes democratic norms by encouraging pluralism and educated decision-making based on a variety of information sources.

To summarize, the DSA makes a comprehensive framework for the regulation of social media providers. While the DSA recognizes the significance of free expression, its regulations must strike the correct balance between protecting users from dangerous information and preserving the openness and diversity of online conversation. Some contend that specific DSA features, including as content takedown responsibilities and the possibility of fines, may inadvertently restrict legitimate forms of speech and discourage platforms from posting controversial but lawful content.

## 7. Conclusion

The aim of this thesis was to answer the question: In what ways does the regulatory framework governing social media in the European Union affect the exercise of freedom of expression and what are the implications for democracy? Therefore, to conclude the thesis on the regulation of FoE on social media, the main aspects of this topic shall be reviewed.

Being a complex concept FoE does not have one clear definition. Nonetheless, some common themes have been identified. FoE can be seen as a natural right that is necessary for individual's as well as society's advancement. As a right, FoE has been manifested in various international agreements, such as the UDHR. These agreements go beyond the obvious sense of FoE by incorporating a second aspect -access to information- next to expression as a key component of FoE. As a cornerstone of democracy, FoE enables other human rights and democratic values, while fostering political participation, legitimizing the system itself and contributing to a pluralistic society. In that regard, social media functions as a platform for FoE, where political participation takes place. From the research, it becomes evident that FoE is an essential component of democracy; without it, democracy in its most rudiment sense would arguably cease to exist. Despite being of such a high value to democracy, it is necessary to limit this freedom to a certain extent in order to balance it with other fundamental rights. Although not consistently across states, FoE has been protected offline by democratic state around the world. The inconsistencies can be seen as a result of different values. In this regard differences between the EU and the US have been investigated more in depth. It has been found that the EU is stricter in its regulation of FoE. Online, the EU has most recently implemented the DSA, a new regulation. The DSA emphasises the need for protection of fundamental rights online and introduces new mechanisms to do so. These measures are predominantly about content moderation and the regulation of recommender systems.

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In regards to the research question, there are three main findings. The EU's legislative framework for social media, particularly the DSA, has substantial consequences for freedom of expression and democracy. Firstly, while the DSA seeks to strike a compromise between user protection and open conversation, there are worries about the notice and action system, which may accidentally remove lawful content. Secondly, the risk of overregulation and careful content filtering practices might limit FoE and obstruct access to varied viewpoints. Thirdly, the DSA's transparency requirements for recommender systems are consistent with democratic principles by encouraging individual autonomy and a more diverse information landscape. Finding the correct balance between regulation and open speech is critical for safeguarding free expression and democracy in the digital realm and while the DSA is a first step in the right direction, there is still room for improvement.

Due to the scope of this thesis, it was impossible to dive deeper into the facets of FoE. As such, there has been no differentiation between forms of FoE such as journalistic or media freedom, as well as religious freedom. Further, the analysis of the DSA could be more in-depth and take regulations that are not as obviously relating to FoE into consideration.

As a result of successfully answering the initial research question, new questions and research interests arose in the process. It has never been sufficiently answered how the EU could tackle these possible implications of regulating FoE. As the DSA will only be fully implemented in February 2024, it has yet to be observed how democracy will actually be affected.

## **Abbreviations**

CFR – Charter of Fundamental Rights

DSA - Digital Services Act

ECHR – European Court of Human Rights

EDAP – European Democracy Action Plan

EU - European Union

FoE – Freedom of expression

ICCPR - International Covenant on Civil and Political Rights

UDHR – Universal Declaration of Human Rights

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