FAKE NEWS IN STRASBOURG: DIGITAL DISINFORMATION, FREEDOM OF EXPRESSION, AND THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract

The threats that disinformation and 'fake news' pose to democracy are increasingly acknowledged in European legal debates. However, such debates largely neglect to probe disinformation from a human rights perspective. As the prospect of binding regulation grows in Europe, concerns have simultaneously grown surrounding how prospective regulatory frameworks could chill freedom of expression. While there is scope for blunt regulation to jeopardise freedom of expression, further legal scrutiny is nonetheless required for this problem. Accordingly, this paper examines the relationship between digital disinformation and freedom of expression under Article 10 of the European Convention on Human Rights (ECHR), as interpreted by the European Court of Human Rights (ECtHR). In doing so, this paper has several aims. Firstly, the tension between disinformation regulation and freedom of expression is contextualised, with reference to relevant legislative examples. Secondly, the approach of the ECtHR to false and harmful expression is examined. Specifically, this paper examines the Strasbourg Court's priviliged treatment of political expression, its distinction between statements of alleged facts and value judgements, and its application of the abuse clause under Article 17 of the Convention in certain hate speech cases. These patterns, and their applicability for digital disinformation, are critically assessed. In particular, the incompatability between these traditional approaches and the challenges of digital political communication is scrutinised. Finally, this paper outlines how, in light of novel technological developments, the approach of the ECtHR must be adapted to address digital disinformation. Unlike false information offline, digital disinformation is disseminated with unprecedented speed and efficiency. In light of this, the ECtHR must clarify how the regulation of digital disinformation can be squared with freedom of expression, in order to provide urgently needed legal guidance in this area.

1. Introduction

Social media reshapes how citizens receive and impart information and ideas. These technological shifts have mixed effects on democratic engagement. Digital platforms can empower marginalised groups to expedite systemic injustices to the forefront of political discourse, without editorial approval or institutional gatekeeping mechanisms. This was demonstrated by the death of George Floyd in 2020, and the resulting surge in race related activism.[1] By eroding traditionally robust access barriers, new technologies pluralise access to the public sphere,[2] challenging its historical roots as a realm reserved for white, educated, and wealthy male citizens.[3] Notwithstanding this democratic potential, social media remains constrained by its harms. The same technological infrastructures that empower vigorous social activism also spur new opportunities for subversive actors to sow division, foster hatred, and artificially manipulate elections. These conflicting effects encapsulate what Shirky describes as social media's "mixed record" in electoral democracy.[4]

Digital disinformation exemplifies social media's harmful effect on democracy. It should be pointed out at the outset that the spread of false information is not new in democracy. Conspiratorial narratives about minority groups, fabricated claims by politicians, and factually spurious promises on the campaign trail can all be traced back to the evolution of the printing press.[5] However, the speed, efficiency, and piecemeal legal oversight of *digital* disinformation make the current manifestation novel. In the continued absence of modern legal safeguards, the spread of digital disinformation threatens electoral democracy in Europe. As Hochschild argues, an "informed electorate" is a necessary precondition for effective "democratic practice."[6] For elections

[1] Kat Devlin and others, "Outside U.S., Floyd's killing and protests sparked discussion on legislators' Twitter accounts. (Pew Research,

[2] Jürgen Habermas, The Structural Transformation of the public sphere (MIT Press 1963).

[3] Guy-Uriel Charles & Luis Fuentes-Rohwer, 'Habermas, the Public Sphere, and the Creation of a Racial Counterpublic', (2015); María Pía Lara, Habermas's Concept of the Public Sphere and the New Feminist Agenda.

[4] Clay Shirky, 'The Political Power of Social Media: Technology, the Public Sphere, and Political Change' (2011*)* Foreign Affairs Vol. 90, No. 1 (2011), pp. 28-41.

[5] See Alexander Burkhardt (2017), where the author says "The invention of the printing press and the concurrent spread of literacy made it possible to spread information more widely. Those who were literate could easily use that ability to manipulate information to those who were not literate. As more people became literate, it became more difficult to mislead by misrepresenting what was written."

[6] Jennifer Hochschild, If Democracies Need Informed Voters, How Can They Thrive While Expanding Enfranchisement?. Election Law Journal 2010; 9 (2): 111-123.

to be truly democratic, voters must understand "who and what they are choosing and why."[7] Digital disinformation, often weaponised to interfere with elections, can disinform the electorate in a manner that undermines this democratic prerequisite. The influx of digital disinformation in Europe also presents new challenges from a human rights perspective. Citizens must be able to freely express their choice in the legislature, and should have access to pluralistic media. These rights are codified both in EU related instruments such as the Charter of Fundamental Rights of the European Union (CFREU) and in non-EU related instruments such as the European Convention on Human Rights (ECHR).[8] Digital disinformation undermines the ability of citizens to freely express and receive information and ideas, in a manner antithetical to the principles underpinning these formative constitutional documents.

In spite of this, academic commentary on disinformation in the context of European human rights remains woefully underdeveloped. Scrutiny that *has been applied* to disinformation in the context of fundamental rights has placed an overwhelming focus on one issue in particular. That is, legislators must be careful in regulating disinformation, so as not to impede free speech.[9] Within these surface level caveats, commentators often adopt the problematic term "fake news," exacerbating confusion on this complex issue.[10] Accordingly, literature in this area has yet to substantively engage in questions surrounding how regulation can be applied to digital disinformation while safeguarding freedom of expression. To fill this knowledge gap, specific instruments that protect freedom of expression must be consulted, in order to accurately measure the scope and limits of this fundamental right in the face of this uniquely modern challenge.

This paper addresses this gap by examining digital disinformation, and its prospective regulation, in the context of freedom of expression under the ECHR. Article 10 of the Convention protects the right of citizens to freely receive and impart information and ideas *of all kinds*. This framing is reflective of a wide tolerance for freedom of speech envisaged by formative scholars. Meiklejohn points to the need for unencumbered debate to promote "vigorous thinking".[11] Barendt argues that freedom of expression cannot be meaningfully achieved without "uninhibited public debate on political issues."[12] However, freedom of expression should never truly be isolated from its surrounding material conditions. The right to receive and impart information and ideas has never been interpreted as a carte blanche to undermine democracy itself. The scope of freedom of expression, its limitations, and how it can be reconciled with digital disinformation are core aspects that this paper dissects. To probe how Article 10 freedoms should be weighed against disinformation, relevant case law is examined. As the judiciary tasked with interpreting Article 10, the European Court of Human Rights (ECtHR) has been instrumental in clarifying both the scope and limitations to freedom of expression. Throughout its extensive commentary on Article 10, the Strasbourg Court has adopted numerous approaches when reviewing legal interferences with false and harmful expression. These approaches, and their applicability for digital disinformation, are analysed in order to understand how this delicate balancing task should materialise. Before this analysis occurs, it is firstly necessary to contextualise the complex legal framework in which this problem currently sits.

2. Hard Cases and Bad Law

Commentators such as Smith posit that laws to curb disinformation are “inherently suspect” due to their potential chilling effects on expression.[13] This anxiety stems from the slippery terminology that envelopes disinformation. Since the 2016 U.S Presidential election, debates in this area have been steeped in conceptual confusion. Often, the umbrella term fake news has been ascribed. "Fake news" was crowned the

[7] Ibid.
[8] In particular, see Article 10 of the ECHR, Article 11 of the Charter, and Article 3 of Protocol 1 of the ECHR.
[9] Irini Katsirea (2018) “Fake news”: reconsidering the value of untruthful expression in the face of regulatory uncertainty, Journal of Media Law, 10:2, 159-188.
[10] Rebecca K Helm, (2021) Hitoshi Nasu, Regulatory Responses to ‘Fake News’ and Freedom of Expression: Normative and Empirical Evaluation, Human Rights Law Review, Volume 21, Issue 2.
[11] Alexander Meiklejohn, Free Speech And Its Relation to Self-Government. The Lawbook Exchange, Clark, New Jersey, 2004. p. 88.
[12] Eric Barendt, Freedom of Speech, Oxford University Press, 2nd Edition, 2005.
[13] Rachael Craufurd Smith (2019) Fake news, French Law and democratic legitimacy: lessons for the United Kingdom? Journal of Media Law, 11:1, 52-81.

2017 Collins Dictionary "word of the year".[14] In spite of this term's pervasive usage, its qualitative variety makes it woefully problematic. Tandoc et al. develop a conceptual "typology" of fake news, finding that the concept encapsulates "satire, parody, fabrication, manipulation, advertising, and propaganda."[15] This drives commentators to caution against using this term. McGonagle argues that the catchy nature of the phrase veils its problematic definitional flexibility.[16] Venturini cites the "awful vagueness" of fake news as one of five reasons to avoid using the term.[17] When considering freedom of expression, the problem with this phrase is particularly significant. Not all variants of fake news should be subjected to regulation. Satire, for example, plays an important role in holding political leaders accountable, and has been demonstrated to have a positive effect in informing voters.[18]

Another problem is that political actors routinely weaponise this muddled concept to silence oppositional criticism. Dentith highlights how authoritarian leaders wield the rhetorical power "fake news".[19] President of the Philipines Rodrigo Duterte has routinely dismissed critical reports from the newspaper *Rappler* as "fake news".[20] During a joint press conference in 2019, Donald Trump and Jair Bolsonaro both dismissed media criticism leveraged towards them as "fake news".[21] The weaponisation of terms like "fake news" to attack the free press has understandably spawned concerns surrounding how legal responses to disinformation could erode constitutional guarantees to freedom of expression. McGonagle posits that an "absence of clear definitions" in this area is linked to harmful criminal legislation that entails "arbitrary interpretation and enforcement".[22] This observation is demonstrably true. In 2018, the Malaysian parliament passed the *Anti-Fake News Act*. This legislation criminalised the "creation, offering or publication" of "any news, information data and reports which is or are wholly or partly false, whether in the form of features, visuals or audio recordings or in any other form capable of suggesting words or ideas".[23] This law elicited criticism from human rights watchdogs, on account of its vague terminology and arbitrary enforcement. While this draconian legislation was eventually struck down in parliamentary debates, new legislation engendering similar terminology resurfaced during COVID-19.[24] This reflects how the pandemic has fostered feelings of urgency that have rejuvenated censorious laws in this area. In Hungary, emergency legislation criminalised the spread of false information after the outbreak of the pandemic. This legislation introduced severe sanctions for sharing false or "distorted" information deemed to cause public "confusion".[25] Notably, offences included a maximum sentence of 5 years, surpassing the maximum sentence for both defamation and slander offences under the 2012 Hungarian criminal code.[26] In India, the Supreme Court adopted the term fake news when excoriating the role of social media in driving social unrest and "panic."[27] Attributing a mass exodus of migrant workers to unverified rumours online, the Court advised the central Indian government that "no electronic/print media/ web portal or social media shall print/ publish or telecast anything without first ascertaining the true factual position from the separate mechanism provided by the central government."[28] In practice, this meant that only state sanctioned information could be approved for dissemination in the press. The lesson from these anecdotal examples is both clear and blunt. Without precise definitions as to what type of false information is legally prohibited, and without proportionality, it is doubtful that disinformation regulation can be realistic achieved without running foul of speech protective frameworks.

Alongside these fears exists a legal framework in Europe that lags behind digital disinformation. This framework, to the extent that a "framework" truly exists, does nothing to alleviate concerns surrounding how

[14] 'Fake News, the 2017 Word of the Year' (Collins Dictionary 2017).
[15] Edson C. Tandoc Jr. & Others, 'Defining "Fake News"' (2018) Digital Journalism, 6:2, 137-153.
[16] Tarlach McGonagle, 'Fake news": False fears or Real concerns? (2017) Netherlands Quarterly of Human Rights, Vol. 35(4) 203–209.
[17] Tommaso Venturini, 'Confession of a Fake News Scholar', (2018) 68th Annual Conference -International Communication Association, Prague.
[18] Daxton Stewart (2018), 'The Daily Show Effect' Revisited: How Satire Contributes to Political Participation and Trust in Young Audiences, Texas Christian University.
[19] M. R. X. Dentith, (2016) The Problem of Fake News, Public Reason 8 (1-2):65-79.
[20] Editorial Board, 'A Philippine News Outlet is Exposing Duterte's Abuses. He Calls it Fake News' Washington Post (12 Dec 2018).
[21] Kevin Liptak, 'Trump of the Tropics' Fawns Over US President, Decries 'Fake News' CNN (19 Mar 2019).
[22] Tarlach McGonagle, "Fake news": False fears or real concerns? Netherlands Quarterly of Human Rights. 2017; 35(4): 203-209.
[23] "Anti- Fake News Act 2018", Interpretation 2.
[24] New emergency powers include sentences for those who share false information, and maximum fines of $121,000.
[25] Iromány száma: T/9790. Benyújtás dátuma: 2020-03-20 20:45 Parlex azonosító: B89KC6RV0001 .
[26] Section 227, Hungarian Criminal Code, 2012.
[27] Diary no. 10789 of 2020, Supreme Court of India.
[28] Ibid.

freedom of expression. Since 2018, the European Commission has driven a self-regulatory agenda through the Codes of Practice on Disinformation (CPD). In a nutshell, signatories to the CPD such as *Facebook*, *Twitter*, and now *TikTok* make voluntary and non-binding commitments to combat disinformation. The CPD have important shortcomings. The Commission has been critical of the varied "speed and scope" in how the codes have been implemented across platforms. For example, all platforms specify that political advertisements must display a "paid for by" sign. However, signatories vary widely in their definitional scope of paid "political" content. This "absence of a definition agreed among signatories" causes a lack of "consistent implementation of specific restrictions" in the area of political advertising. The Commission has also been particularly critical of the "episodic and arbitrary" access afforded to researchers. This has led to knowledge gaps that prevent researchers from ascertaining "persistent or egregious purveyors of disinformation" in Europe. The self-regulatory nature of the CPD means that platforms are not *technically* obliged to implement these codes in any specific manner. Incentives for implementing the CPD are largely based on maintaining reputation and evading regulation. Accordingly, there is vacuum whereby "clear and binding rules of conduct specifically designed to tackle disinformation online", have yet to materialise.[29]

Binding regulation of technological harms *does exist* through flagship legal instruments that govern the liability of digital intermediaries. However, these instruments barely address digital disinformation. Under the E-Commerce Directive, Articles 12-15 exempt service providers from liability for third party unlawful content, provided that intermediaries act "expeditiously" to remove content. In light of the reality that the E Commerce Directive was introduced before the advent of *Facebook, Twitter*, and *YouTube*, changes are occurring in the EU legal framework for digital intermediaries. In 2020, the European Commission announced the Digital Services Act (DSA). Overly optimistic responses to the DSA hail it as the EU's "most ambitious plan yet to rein in online platforms".[30] However, for digital disinformation, the "watershed" arrival of the DSA is overstated.[31] The DSA does not target disinformation with rigour or precision, and instead only commits to revamping the existing self-regulatory scheme.

A persistent legal problem, and one that allows EU law to continuously eschew digital disinformation, is linked to the uncertain legal categorisation of harmful but lawful content. The DSA, like its predecessor in the E-Commerce Directive, does not address the problem of content that, while *harmful*, is not *necessarily illegal.* Unlike child pornography and content inciting terrorism, digital disinformation is often not illegal *per se*. Consequently, while other online harms are subjected to binding legislative rules in Europe, disinformation continues to be relegated to ineffective, piecemeal, and non-binding soft law. A collateral problem is that, because of this lack of regulatory coverage, the governance of disinformation is often reserved for commercial actors. While the removal of unlawful content entails clear-cut responsibilities, there are often no concrete legal obligations for platforms to remove disinformation, leaving wide discretion. A chief concern is that certain "notice and takedown" regimes allow platforms to indirectly assume a de facto role in regulating freedom of expression. An example of this was crystallised with the 2018 passage of the Network Enforcement Act (NetzDG) in Germany. The NetzDG imposes obligations on platforms to remove unlawful and harmful content within a 24-hour period, at the risk of severe financial sanctions. This elicited human rights criticism that characterised the NetzDG as a "vague" and "overbroad" mechanism that "turns private companies into overzealous censors to avoid steep fines, leaving users with no judicial oversight or right to appeal."[32] Without clear, binding, and measured legal rules in this area, an emerging source of consternation is that disinformation could continue to be a problem of *public* discourse regulated *private* platforms.

3. Old Habits Die Hard: Approaching False and Harmful Expression in Strasbourg

The above environment calls for much needed clarification. As highlighted at the outset of this paper, the relationship between freedom of expression and disinformation regulation can be understood through the framework under Article 10 of the ECHR, and associated case law in the ECtHR. Threaded throughout the

[29] Madeline De Cock Buning, A multi-dimensional approach to disinformation (European Commission 2018).
[30] Daniel Milo and Peter Kreko, Is the Digital Services Act a watershed moment in Europe's battle against toxic online content? (New Europe 2021)
[31] Ibid.
[32] Germany's Flawed Social Media Law (Human Rights Watch 2018).

ECHR, and evidenced through Strasbourg jurisprudence, is the prevailing theme that protecting democracy requires proportionate balances between individual rights and public interests.[33] As Costa states, the "democratic deal" underpins the provisions and "spirit" of the Convention.[34] In *Soering vs. The United Kingdom*, the ECtHR stressed the need for a "fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."[35] Article 10, while protecting the right to freedom of expression, remains subject to limitations. In the first paragraph of Article 10, it is stated that this fundamental right "shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises." Notably, the express limitations to Article 10 are laid out in the first paragraph. This is not the case for other personal freedoms, including the right to freedom of conscience and religion under Article 9 or the right to freedom of assembly under Article 11.[36]

Assessing digital disinformation under the ECHR is insightful, because the ECtHR has addressed false information throughout its extensive freedom of expression jurisprudence spanning over 1,000 cases, and has been instructive in guiding domestic states on how to regulate expression. The Strasbourg Court exercises a supervisory role in reviewing decisions by national authorities, without usurping the competence of such authorities. This mutual relationship exists under the margin of appreciation doctrine, whereby the ECtHR gives states discretion in securing Convention freedoms, and limiting freedoms in line with national interests. Under Article 10, the margin of appreciation narrows or widens depending on the nature of interferences and the European legal consensus on the subject matter of interferences. Specific aspects of Strasbourg jurisprudence on freedom of expression offer interpretive assistance as to how the regulation of digital disinformation can be squared with Article 10 safeguards.

3.1 The Privilege of Political Expression

The ECtHR has consistently reasoned that not all "expression" is equal. Since its formative jurisprudence, the Strasbourg Court has reviewed interferences with Article 10 in line with democratic values. This stems from the seminal case of *Handyside v. The United Kingdom.* Here, the applicant planned to disseminate copies of "The Little Red Schoolbook"[37] in the United Kingdom.[38] Aimed at children, the book attracted considerable media attention and "press comment", leading to Handyside's prosecution under the Obscene Publication Act 1964 and a confiscation of copies.[39] In Strasbourg, the ECtHR adopted its now famous balancing test of weighing Article 10 freedoms against the UK's ability to subject these freedoms to "formalities, conditions, and "restrictions" within the margin of appreciation.[40] Specifically, the Court considered whether actions taken against Handyside were prescribed by law, pursued a legitimate aim under the Convention, and whether they had been limited to what was necessary in securing that aim within a *democratic society*. Accepting the legitimacy of the aim to protect "morals in a democratic society"[41], the ECtHR then scrutinised "whether the protection of morals in a democratic society necessitated" Handyside's prosecution and seizure of materials. While the book was "purely factual", it addressed "young people" at a critical developmental stage. These vulnerable readers could be encouraged to "indulge in precocious activities harmful for them."[42] Recognising this as a "tendency to deprave and corrupt" children, the ECtHR found the interference to be justified and proportionate under this aim. While the ECtHR ultimately found an Article 10 violation in *Handyside*, the Court pointed out that its role was to analyse interferences with Article 10 with "utmost attention to the principles that characterise a democratic society." In this connection, *Handyside* is famous for its enunciation that *democratic* debate requires protections

[33] Başak Çali, (2018) Balancing Test: European Court of Human Rights (ECtHR).
[34] Jean-Paul Costa, 'The links between democracy and human rights under the case-law of the European Court of Human Rights', President of the European Court of Human Rights, Helsinki, 5 June 2008.
[35] Soering v United Kingdom 161 Eur. Ct. H.R. (ser. A) (1989).
[36] European Convention on Human Rights Section 1.
[37] This "reference book" contained sections on "intercourse", "contraceptives," and "menstruation."
[38] Para 12.
[39] Ibid.
[40] Para 42.
[41] Para 45.
[42] Para 52.

for information and ideas that are not only "favourably received" or "inoffensive" but "also to those that offend, shock or disturb the State or any sector of the population."[43]

Since *Handyside*, the ECtHR has gone further to develop a hierarchy of expression that requires the most robust protections. Importantly, this has manifested through the Court's specification of a narrow margin of appreciation for states to regulate *political* information and ideas.[44] This is in stark contrast, for example, to the regulation of commercial expression, where states have greater latitude.[45] The scope of *political* expression is wide. It can encompass parliamentary speeches,[46] media criticism of politicians, political advertisements, and the circulation of petitions by NGOs.[47] Attached to this category of expression has been a ring of protection by the ECtHR. Domestic restrictions on political debate have seldom met with approval in Strasbourg, due to the ECtHR's stance that political debate runs to the "very core of" democracy and "prevails throughout the Convention."[48] The Strasbourg Court's rationale underpinning this position is threefold. Firstly, politicians have broader "limits of acceptable criticism" than private citizens. Political figures, unlike ordinary citizens, knowingly expose themselves to a higher degree of public scrutiny.[49] Secondly, political figures have a broader freedom to express convictions.[50] As a vector for the views of the electorate, politicians have an important role in airing the "anxieties" of the electorate.[51] Accordingly, restrictions impairing political speech call for the closest scrutiny. Thirdly, coverage of political matters in the press requires special protection. This is due to the important "watchdog" role of the press in holding politicians to account.[52]

This protection for political expression is relevant when considering digital disinformation. The mere fact that malicious actors have disseminated false information in the run up to elections is not in itself a justification for legal proceedings. In recent jurisprudence, the ECtHR has invoked its protection of political expression when reviewing disinformation in the run up to elections. The Court has clarified that interferences with offensive expression in the run up to elections could run contrary to freedom of expression even where there is "strong suspicion" that impugned remarks are untrue.[53] This is demonstrated in the recent case of *Brzeziński v. Poland*, where the ECtHR used the term fake news for the first time.[54] The applicant was an electoral candidate in Częstochowa. While campaigning, he published booklets alleging that a local mayor and councillor had received unlawful subsidies. Shortly before municipal elections, Brzeziński distributed booklet copies to a "large number" of churchgoers. The mayor and councillor sought injunctive relief to prevent further dissemination of the material and a judicial order to correct the untrue information and issue a public apology, invoking Section 72 of the Local Elections Act, which permitted injunctions to obstruct the dissemination of false election material. The Polish court characterised Brzeziński's allegations as "maliciously made", ordering him to pay charitable donations, cease further dissemination, and publicly apologise. Disagreeing with the Polish courts, the ECtHR held that Brzezinski's criticisms fell "within the limits of exaggeration and provocation usually allowed in political debate". The Strasbourg Court was particularly critical of the "cumulative application" of the penalties imposed, arguing that a coerced public apology and fiscal punishment would chill future political debate. Accordingly, the ECtHR found a violation of Article 10. The lesson from *Brzezinski* is that the regulation of digital dinformation, when disseminated in an electoral context, must be treated delicately, and interferences may constrain Article 10 freedoms on account of the special statuts of political expression.

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[43] Ibid.
[44] Animal Defenders International vs. The United Kingdom (No. 48876/08 2013). See also Nicola McCormick, 'Freedom of political expression: R. (on the application of Animal Defenders International) v. Secretary of State for Culture, Media and Sport' (2008) Entertainment Law Review 147).
[45] VgT v. Switzerland (2002) 34 EHRR 4.
[46] Brzezinski v. Poland (No. 47542/07 25 Jul 2019).
[47] Appleby and Others v The United Kingdom: ECHR 6 May 2003.
[48] Lingens v. Austria (1986) 8 EHRR 407.
[49] Ibid.
[50] Castells v. Spain 11798/85 23 Apr 1992
[51] Ibid.
[52] Animal Defenders International vs. The United Kingdom 48876/08 22 Apr 2013.
[53] Salov vs. Ukraine.
[54] Ronan Ó Fathaigh, Brzeziński v. Poland: Fine over 'false' information during election campaign violated Article 10 (Strasbourg Observers 2019).

Accordingly, domestic authorities have a narrower margin of appreciation and "little scope ... for restrictions on political speech or debates on questions of public interest."[55]

3.2 A Matter of Opinion? Facts vs. Value Judgements

Under its criteria for reviewing defamatory statements, the Court has taken into account whether false and offensive statements are conveyed as a statement of alleged fact or or a subjective value judgement (opinion). Through this distinction, the Strasboug Court has clarified that domestic legal restrictions on false statements are more difficult to justify if such statements are presented as merely opinions as opposed to alleged facutal assertions. The distinction between facts and value judgements was enunciated in *Lingens v Austria*. Here, the applicant published articles condemning the retiring chancellor Bruno Kreisky's "immoral" and "undignified" support of Liberal Party President Friedrich Peter.[56] These articles circulated following the 1975 general elections, when allegations surfaced that Peter had served in the SS during World War 2. Kreisky brought defamation proceedings under Articles 111 and 112 of the Austrian Criminal Code.[57] The Vienna Regional Court found Lingens guilty of defamation, classifying his "immoral" publications as "baseless."[58] He was fined 20,000 schillings and the articles were confiscated. Lingens appealed to the ECHR, arguing that the defamation prosecution violated his freedom of expression. The Strasbourg Court balanced Lingen's right as a journalist to impart "information and ideas on political issues" alongside Austria's aim of preserving reputations of political figures.[59] Assessing these, the Court noted that Lingens had communicated his criticisms of Kreisky as "value judgements", and not as purported facts. This was significant, as the Court noted that opinions could not always be established with evidence, unlike purported facts. Accordingly, *opinions* must not be restricted to the same degree as *purported facts*. Finding an Article 10 violation, the ECtHR noted that the statements were good faith value judgements,[60] and therefore should not have been subjected to the defamation prosecution.

The distinction has also been applied in the context of political expression. Since *Lingens*, the Strasbourg Court has considered whether criticisms directed towards politicians have been statements of alleged fact or statements of evaluative judgement. In *Lopes Gomes da Silva v. Portugal*,[61] the ECtHR found that the criminal libel conviction of the applicant for referring to a politician as "grotesque" and "buffoonish" violated Article 10. In distinguishing the applicants comments as an expression of opinion *which did have some factual basis*, the Court noted that, "political invective" often spills over into the personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society."[62] The Court has further underscored its willingness to analyse the facts vs. values distinction in light of the *political nature* of impugned expression. In *Dyuldin vs. Russia*,[63] the ECtHR found that a defamation prosecution on foot of an open letter to the "highest levels of the Russian state" had violated Article 10. Decisively, the domestic Courts failed to differentiate whether the statements had been good faith value judgements or statements of alleged fact.[64]

Implicit in the *Lingens* distinction is that, if false statements are made in bad faith and designed to deceive, there is wider scope for domestic legal authorities to restrict freedom of expression. Conversely, if false statements are innocently conveyed as an opinion, legal restrictions are difficult to justify. The Strasbourg Court has clarified that this distinction should not issue a carte blanche that allows any "opinions" to be

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[55] 2002, § 38.
[56] Para 15.
[57] Article 111, 112 of the Austrian Criminal Code.
[58] Para 21.
[59] Para 41.
[60] See Para 46, "Under paragraph 3 of Article 111 of the Criminal Code, read in conjunction with paragraph 2, journalists in a case such as this cannot escape conviction for the matters specified in paragraph 1 unless they can prove the truth of their statements (see paragraph 20 above).As regards value-judgments this requirement is impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (art. 10) of the Convention."
[61] Application no. 37698/97, 2000.
[62] Ibid.
[63] Application no. 25968/02, 2007.
[64] Ibid.

expressed with impunity. As the ECtHR qualified in *Pedersen and Baadsgaard v. Denmark,* the Court will still look for a "sufficient factual basis to support" certain value judgements, in particular when evaluative statements could jeopardise the reputation of others.[65] Notwithstanding this qualification, this pattern implies an important difference between how digital disinformation (knowingly false) and digital misinformation (unknowingly false) should be treated in line with freedom of expression.

3.3 Article 17 and the Abuse Clause

As the above two sections have outlined, the ECtHR does not approach all expression equally. However, the Court has occasionally adopted a bolder approach as to argue that not all *expression should even be reviewed* under Article 10. While concerns surrounding the balance between freedom of expression and the regulation of disinformation have intensified, less weight has been given to the important question of *whether all forms of disinformation should even be considered* as forms of "expression", and if Article 10 should even be applied to future cases concerning digital disinformation in Strasbourg. As referenced above, the *Handyside* decision has become famous (or infamous) for the Court's refrain that Article 10 protects speech that is "offensive" as well as "inoffensive", and ideas that shock and disturb as well as innocuous ideas. However, the ECtHR has not always been consistent in its adherence to this logic. While the Strasbourg Court has often reviewed interferences with offensive and vulgar speech under Article 10,[66] it has also adopted a haphazard approach whereby certain types of harmful expression have been categorically excluded from Article 10 scrutiny. Generally, this has arisen where persons who have disseminated racist, and discriminatory ideas have made applications on foot of alleged Article 10 violations. In such instances, the Court often invokes Article 17 of the Convention, which reads:

> "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."[67]

In cases where Article 17 has been applied for hate speech, Article 10 is *not* applied, and applications are deemed inadmissible on account of their incompatibility with Article 17. Hannie and Voorhoof characterise this application of Article 17 as the ECtHR's "abuse clause".[68] An illustrative example can be seen in the admissibility decision of *Glimmerveen and Hagenbeek v. the Netherlands*. Here, the applicants were members of "Nederlandse Volks Unie", a political party that advanced beliefs that the "state is best served by an ethnical homogeneous population and not by racial mixing." The applicants were convicted for possessing racially discriminatory leaflets with a view to distribute.[69] As they had planned to stand in municipal elections, they argued that their "right to freedom of expression in the context of elections" had been jeopardised under Article 10, and that their right to stand for election had been impeded under Article 3 of Protocol 1. The ECtHR found the application inadmissible. The Court stated that no provision, including Article 10, could be used to advance activities "aimed at the destruction of any of the rights and freedoms" in the Convention. Here, the Court pointed out that Article 10 could not be used to advance material that would run contrary to the Convention's protections against discrimination and the abuse of rights of others, contained in Article 14 and Article 17 respectively. Ultimately, the ECtHR held that to permit the applicants to incite racial discrimination under the guise of Article 10 would allow applicants to neglect the "duties and responsibilities"[70] that underpin the exercise of freedoms under the Convention. The rationale for using Article 17 to preclude certain hate speech from freedom of expression protections is linked to the rationale of privileging freedom of political debate; to protect democratic values. Just as vigorous and spirited political debate can contribute to a flourishing democracy, certain forms of repugnant, hateful, and democratically subversive expression can be a barrier to democracy.

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[65] Application no. 20928/05.
[66] Jersild v. Denmark (No. 15890/89 1994)
[67] Article 17, European Convention on Human Rights (ECHR).
[68] Hannes Cannie and Dirk Voorhoof, The abuse clause and freedom of expression: An added value for democracy and human rights protection? Netherlands Quarterly of Human Rights, Vol. 29/1, 54–83, 2011.
[69] Para 3.
[70] Pg. 194.

4. A Long Way from Handyside: Digital Gaps in the Strasbourg Approach

A commonality between the three patterns of the ECtHR's approach to Article 10 is that decisions related to freedom of expression should be guided by the protection of democracy. However, as outlined at the outset of this paper, technology has changed democracy in paradigm shifting ways. These shifts, and their harmful effects on political communication, have not yet been fully appreciated by the Strasbourg Court.

Much has changes since the formative and influential *Handyside* case. The speed, scale, and efficiency of information exchange has radically shifted in recent years. In response to this, the ECtHR has correctly acknowledged the democratic potential of the internet, and how social media contributes to political debate. In *Times Newspapers Ltd v. The United Kingdom*,[71] the ECtHR pointed out that a restrictive "Internet publication rule" could amount to an interference, both with the right to express opinions and to receive and impart information and ideas. This was because the internet "plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general" because of its "accessibility" to political information."[72] Similarly, in *Cengiz and Others v. Turkey*,[73] the ECtHR clarified that the blocking of access to sites such as YouTube could constitute an interference with Article 10. Here, YouTube was recognised as an important audio-visual conduit for facilitating "information of specific interest, particularly on political and social matters".[74]

In spite of this recognition of the internet's democratic potential, the Court has been slow to address how the same speed, efficiency, and access to political information afforded by the internet can foster anti-democratic actors. This oversight is highly relevant when considering how digital disinformation should be treated in Strasbourg. When reflecting on the ECtHR's patterns discussed above, the Court has often addressed both political communication and false expression on *offline materials*. When applying the protective veil to political expression, the Court has often scrutinised interferences with information that has been spread by polemic leaflets, statements made on public broadcasts, and columns written in news publications. This has also been the case where the Court has applied the facts vs. values distinction, and also where Article 17 has been applied in order to prevent malicious statements from being considered under the purview of Article 10.

While these patterns can be instructive as to how domestic states, and the ECtHR itself, should approach digital disinformation, it should also be pointed out that it is not always the correct option to merely translate offline principles to the digital environment. While the precise consensus on how technology manipulates democratic communication remains contentious, a vast array of scholarship elucidates how modern communicative techniques can interfere with the formation of public opinion and the free exchange of political information and ideas. Less contentious is the reality that the same technological intermediaries that have discretion in regulating digital disinformation are themselves often complicit in its spread. Technology assists in curating individualised news consumption, ensconcing citizens in 'filter bubbles'[75] that deepen what Sunstein calls 'group polarisation'.[76] As Urquhart highlights, "how content is served to individuals on their social media feeds is determined by curated algorithmic processes".[77] Consequently, information is not freely imparted online, but targeted, selective, and often artificially curated. In light of this algorithmic targeting, citizens increasingly "only ever read content that matches their existing perceptions of the world," This reinforces "rather than combats existing biases and reduces access to pluralistic content which is supposed to underpin true democratic values and processes.[78] In particular, online political microtargeting is employed to identify politically valuable personal information. As Borgesius et al. outline, microtargeting involves "collected data, sometimes enriched with other data", in order to identify what type of "targeted political

[71] Applications nos. 3002/03 and 23676/03.
[72] Para 26.
[73] Applications nos. 48226/10 and 14027/11.
[74] Ibid.
[75] Eli Pariser, The Filter Bubble: How the New Personalized Web Is Changing What We Read and How We Think (Penguin, 1st Edn 2012).
[76] See Cass Sunstein, The Law of Group Polarization (December 1999). University of Chicago Law School, John M. Olin Law & Economics Working Paper No. 91. SSRN: https://ssrn.com/abstract=199668 or http://dx.doi.org/10.2139/ssrn.199668
[77] Law, Policy and the Internet (1st Edn, Hart 2018) page 247.
[78] Ibid.

advertisements" could appeal to users.[79] Barocas argues that political actors use microtargeting to identify users that are vulnerable to political "wedge issues", which are then used to target citizens through curated algorithmic methods. This generates "de facto disenfranchisement" and indirect voter suppression,[80] raising questions not only as to how truly *free* political expression is, but also how *free* political processes like elections are, in the face of these communicative shifts.

In enabling anti-democratic actors to target the electorate, these communicative shifts have important consequences on elections in Europe. Constantly emerging data points demonstrate how digital disinformation accelerates in the run up to European elections.[81] Importantly, electoral disinformation in Europe often focuses on divisive issues, sows division, and targets already marginalised groups.[82] Often, the deluge of junk information and conspiratorial rumours are both financially backed and targeted towards ethnic minorities. Marchal et.al find, "junk" information in the run up to the 2019 European Parliamentary elections often focused on "populist themes such as anti-immigration and Islamophobic sentiment,"[83] Ferrara finds that in days preceding the 2017 French Presidential election, disinformation campaigns were coordinated through automated "social media accounts controlled by computer scripts that try to disguise themselves as legitimate human users." Deceptive messages spread by these digital accounts were designed to appeal to citizens outside of France "with a preexisting interest in alt-right topics and alternative news media, rather than French users with diverse political views." Pierri et al. examine disinformation campaigns in Italy, five months preceding the 2019 European parliamentary elections. The authors find that within this period, a small concentration of far-right disinformation websites were responsible for circulating "deceptive" political information on Twitter, and that these disinformation websites had links with "outlets across Europe, U.S. and Russia, featuring similar, even translated, articles in the period before the elections." These sources of disinformation focused on "controversial and polarizing topics of debate such as immigration, national safety."[84] These aspects of digital disinformation diffusion call for closer human rights scrutiny in future research. While the right to freedom of expression is often addressed in disinformation legal debates, the right to free elections, and to non-discrimination, is rarely addressed, and this lacuna must be promptly closed off in order for research in this area to develop more cohesively.

The emergence of digital disinformation, in particular in periods preceding elections, calls for a re-examination by the ECtHR as to whether its patterns and approaches require updates in the face of this ever-growing problem. Even in its 21st century case law, the Strasbourg Court has been reluctant to abridge expression in the run up to elections. For example, in *Orlovskaya Iskra v. Russia*,[85] the Court found a violation of Article 10 where domestic electoral legislation proscribed "mass media outlets" from "pre-election campaigning" under The Mass Media Act of 1991."[86] The Court noted a lack of "sufficient" grounds that "print media should be subjected to rigorous requirements of impartiality, neutrality and equality of treatment during an election period."[87] As reasoned in this case, the freedom of political debate is uniquely important during elections. Accordingly, the margin of appreciation for domestic states to abridge expression "narrows" significantly in pre-election periods. In this case, the Court also made reference to how domestic electoral "regulatory frameworks" must furnish a "compelling justification" when attempting to limit the scope for press expression" and in doing so "impinging upon the applicant organisation's freedom to impart information and ideas during the election period "[88] This is reflective of the ECtHR's overarching position on freedom of expression in the run up to elections, and for political expression more generally. The Court's approach has yet to factor in how periods preceding elections are often targeted by malicious anti-democratic

[79] Frederik Zuiderveen Borgesius and others, 'Online Political Microtargeting: Promises and Threats for Democracy' Utrecht Law Review, Vol. 14, No. 1, p. 82-96, 2018.
[80] Solon Barocas, 'The price of precision: voter microtargeting and its potential harms to the democratic process'.
[81] Stubbs and Ahlander, 'Right-wing sites swamp Sweden with 'junk news' in tight election race'; See also Emilio Ferrara, 'Disinformation and Social Bot Operations in the Run Up to the 2017 French Presidential Election'.
[82] Swedish election second only to US in proportion of 'junk news' shared (Oxford Internet Institute).
[83] Nahema Marchal, Junk News During the EU Parliamentary Elections: Lessons from a Seven-Language Study of Twitter and Facebook, Oxford Internet Institute (March 2019).
[84] Francesco Pierri F and others, (2020) Investigating Italian disinformation spreading on Twitter in the context of 2019 European elections (Plos One).
[85] 42911/08.
[86] Law of the Russian Federation On Mass Media, No. 2124-1 of December 27, 1991 as of July 7, 2003.
[87] Para 129.
[88] Ibid.

actors who pollute public debates. The more pervasive and sophisticated that these invasive techniques become, the more powerful digital disinformation becomes as a tool for modern election interference. The Court, having yet to address this quagmire in the context of freedom of expression, must clarify how its traditional approaches can be recalibrated in light of emerging technologies.

5. Going Forward: Room to Recalibrate?

From the outset, this paper has acknowledged that while the ECHR provides a useful framework for balancing freedom of expression with disinformation regulation, the operation of the Convention cannot be viewed in isolation. As McGonagle, points out, the ECtHR is not the only key stakeholder in the area of digital disinformation, with the revision of EU instruments such as the E-Commerce Directive being of particular influence.[89] However, severe limitations exist in such European frameworks, as renewed instruments such as the Digital Services Act (DSA), remain hamstrung in their efforts to address harmful but lawful problems such as digital disinformation. In light of this grey area, the ECtHR provides a useful blueprint on how to mediate freedom of expression with the regulation of this ever-pervasive technologically spawned problem.

When reflecting on the above-discussed patterns of Strasbourg case law, the harmful speed and efficiency of digital disinformation has yet to be fully addressed in the ECtHR jurisprudence on freedom of expression. This is a problematic gap. As Borje highlights, the Strasbourg Court has interpreted the Convention in a "dynamic" and "evolutive" manner, and has issued important guidance to national supreme courts that that domestic states have scope to account for modern changes in their protection of Convention rights. This is evidenced in the Court's jurisprudence, wherein extensive reference has been made to the "difficulties in policing modern societies."[90] However, the ECtHR has yet to reconcile this scope for evolution with the changing nature of how information and ideas are communicated online. Consequently, important questions emerge that the Court must grapple with. Are the traditional principles applicable to the problem of digital disinformation? Which approach should the ECtHR take in reviewing digital disinformation under Article 10? Should Article 10 *even be applied* to digital disinformation, on account of its potential incompatibility with Article 17? If these patterns are difficult to apply for digital disinformation, what alternative route should the Court take? These prescient questions must be addressed, in order to provide clarity as to how the ECtHR should face the problem of digital disinformation, and in order for domestic legal authorities to be able to align legislative interference with the provisions and spirit of the Convention.

To shift this legal debate forward, the applicability of the above-discussed approaches of the Strasbourg Court should be critically assessed in light of digital disinformation. The privilege of political expression, the facts vs. value judgements distinction, and the abuse clause under Article 17, are all aspects of the ECtHR's approach to freedom of expression that should be taken into account when aligning treatment of digital disinformation with Convention freedoms. However, none of these approaches, in and of themselves, can independently offer a tangible solution.

The traditionally robust protection of political expression should be revisited and potentially recalibrated in the context of digital disinformation. As discussed, political information and ideas are comfortably perched at the apex of the ECtHR's hierarchy of expression. In contributing to public interest debate and informing the electorate, political expression should receive the most robust protections, and legal interferences with this type of expression should be scrutinised to the highest degree. As outlined, this has even extended so far as to provide protective coverage for false information in the run up to elections. This broad tolerance could present a quagmire in future jurisprudence without important clarifications. On one hand, the ECtHR has been consistent and clear that domestic states have little room in regulating political forms of expression. However, digital disinformation itself could easily be characterised as a form of *political expression*.[91] A growing body of research demonstrates that elections in Europe are often now targeted with disinformation campaigns, many of which focus on xenophobic themes. In doing so, anti-democratic actors attempt to

[89] Tarlach McGonagle (2020) Defamation law reform, the European Convention on Human Rights and EU law.
[90] See for example Osman v. The United Kingdom (87/1997/871/1083) at Para 116.
[91] Dan Freelon & Chris Wells (2020) Disinformation as Political Communication, Political Communication, 37:2, 145-156.

undermine elections, and to pollute *political* debate. New technologies foster this in a manner that has yet to be addressed in Strasbourg. Crucially, the Court must not allow actors who disseminate digital disinformation to benefit from the broad veil of protection that ordinarily cloaks political debate. Going forward, it is imperative that the Court makes an explicit, precise, and consistent distinction between genuine political expression and targeted electoral disinformation online.

The application of the facts vs. value judgements distinction can have limited value to the Court's assessment of digital disinformation. This distinction could be of particular relevance when distinguishing disinformation from misinformation in future case law. Disinformation is deceptive by design, whereas misinformation is mistakenly shared by users who are unaware of its falsity.[92] In future cases, the Court could certainly give weight to whether false information is knowingly shared in a malicious manner, or innocently shared as a genuine error. While a relevant distinction, this consideration must be taken into account as part of a broader assessment of the relevant factual circumstances. Applying the facts vs. value judgements distinction will often be challenging, on account of the reality that digital disinformation, unlike the defamatory information transmitted in *Lingens*, exists along nodes of sophisticated systems of digital information distribution. This is often diffused with automaticity, at a rapid speed and heightened scale. To delve through the vast amounts of digital disinformation in a single case, and to delineate whether the sharing of disinformation was intended to be conveyed an expression of opinion or a deceptive allegation of an asserted fact, would be an extremely burdensome task for the Strasbourg Court. The scale of digital disinformation, often spread by small accounts in the run up to election and then shared by voters, makes the traditional application of the facts vs. values distinction a challenging prospect in the digital context. While statements in broadcast media can be dissected through its language and context, digital disinformation can be more easily cosmetically veiled to appear as a subjective opinion rather than an assertion of fact. In this connection, it is questionable whether certain forms of digital disinformation are always easily visible as statements of opinions or alleged facts. This could lead the ECtHR down rabbit holes that are best avoided.[93]

Undeniably, the boldest option for the ECtHR to take in its approach to digital disinformation would be to invoke the abuse clause under Article 17 and to simply not scrutinise disinformation under Article 10. There is scope to argue that digital disinformation is not a legitimate form of speech or expression that Article 10 should protect. The dissemination of disinformation in the run up to elections, as outlined, is often not conducted by natural or legal persons. Inauthentic, bot, and non-human accounts have an important role in diffusing this form of harmful content. In this connection, it is certainly plausible that some forms of disinformation simply should not be dignified with Article 10 scrutiny; as to do so would be to legitimise certain statements as forms of expression that ought not to be legitimised under the Convention. Notwithstanding the potential scope for *future* research on this admittedly interesting line of inquiry, the application of Article 17 to digital disinformation would be hugely problematic. The application has already elicited criticism in hate speech scholarship. As Hannie and Voorhoof point out, the application of Article 17 as the abuse clause in cases of certain hate speech has been fraught with problems. The scope of what constitutes unacceptable expression in this area has never been clearly defined, and has expanded over time. Initially, Article 17 (or the abuse clause) was invoked to prevent the propagation of ideas supporting totalitarian states. The very first case wherein Article 17 was applied related to the prohibition of a Communist Party in Germany, on foot of the Party's intention to impose a totalitarian dictatorship. Since this decision, the ECtHR has reasoned that support towards "recourse to a dictatorship" should be categorically excluded from scrutiny under Article 10, and should therefore be analysed through the abuse clause under Article 17.[94] However, the ECtHR has been haphazard in its application of the abuse clause, particularly in terms of the material scope of speech and expression categories that it purports to exclude. In numerous cases, the ECtHR has confirmed that holocaust denial,[95] support of communist dictatorships,[96] and support of Nazi ideals[97] are to be excluded from Article 10 considerations. However, in more recent cases, the Court has expanded the scope of Article 17 to cover information and ideas that are incompatible with the aims and

[92] See Wardle, First Draft News, The Disinformation Disorder (Council of Europe, 2018).
[93] See also the concurring opinion from Judge Pinto De Albuquerque in ATZ ZRT vs. Hungary.
[94] Communist Party of Germany v. the Federal Republic of Germany (App no 250/57) 17th August 1956.
[95] Garaudy vs. France (No. 64496/17 1998).
[96] Kommunistische Partei Deutschlands vs. Germany, (No. 250/57 1957).
[97] B.H., M.W., H.P. and G.K. vs. Austria (No. 12774/87 1987).

"spirit" of the Convention, including Islamophobic, racist, and anti-Semitic sentiments.[98] The distinction between whether the application of Article 17 is necessary in cases of direct incitement to totalitarian regime change, or whether it applies more broadly to any racist or discriminatory sentiments, remains unclear. As this scope has become increasingly mystified, the number of cases assessed under the limitation clause of Article 10(2) has become uncertain. Crucially, this means that, the more cases that end up being viewed under Article 17 and not Article 10, the less common it becomes for the Court to address interferences with freedom of expression under the Court's tried and tested principles. This should be avoided for digital disinformation.

The above patterns cannot be viewed in isolation. As discussed above, each approach entails problems when considering their application to digital disinformation. However, the formative principles that are evident in these approaches are important to consider when reconciling digital disinformation, and its regulation, with Article 10. It is important to point out that, while the above patterns entail problems when considered in light of digital disinformation, important lessons can be discerned. The ECtHR's approach to freedom of expression through these patterns flesh out the scope of freedom of expression in a manner that the text of Article 10 cannot. What these approaches underscore is that freedom of expression is not absolute, and is not intended to be misused to abuse the rights of others. Article 10 should be exercised in a manner that contributes to the freedoms underpinning the ECHR, not to frustrate such freedoms. Genuine mistakes of fact must not be sanctioned; as to do so could legitimise the chilling of freedom of expression and political debate. However, the sophisticated spread of knowingly false information, even in a political context, should neither be rewarded not facilitated by Article 10, or the ECtHR's protection of freedom of expression. As a sophisticated form of electoral interference that threatens the foundations of European democracy, it can be readily inferred from the Court's approaches that freedom of expression under Article 10 should not be used as a tool to undermine elections.

Importantly, it must also be pointed out that, even in the special context of political expression, the ECtHR often takes issue with the sanctions that accompany interferences with freedom of expression, rather than the mere existence of interference. The fact that domestic legal authorities restrict the spread of knowingly false expression in the run up to elections may not be decisive in the Court's finding of an Article 10 violation; but *the imposition of severe criminal sanctions could be*. For this reason, a clear message that the Court must clarify to domestic states, in addressing digital disinformation going forward, is the fundamental importance of *proportionality*. The Court must prepare to set updated standards that can guide domestic authorities in interfering with digital disinformation. This requires a nuanced assessment of interferences that allow scope for the Court to clarify its principles in light of this contemporary challenge. Importantly, the Court must address digital disinformation, and any associated legal interferences, in light of its tried and tested thresholds. The Court should assess the legality of interferences, the legitimate aims underpinning interferences, and the crucial assessment of whether, in light of these legal aims, interferences are proportionate. Because of the constantly evolving and complex nature of this problem, the optimal approach for the Court is to employ these three part test, and assess any related sub-questions in light of the case as a whole. While some electoral disinformation does involve content that could conceivably run foul of the abuse clause under Article 17, this is not universally true. Furthermore, disinformation, unlike most forms of hate speech, can be difficult to classify as legal or illegal. For this reason, there is a particularly important need for the Court to address interferences with electoral disinformation under the requirements of Article 10(2).

While the above discuss the ECtHR should take patterns into account, none should be independently decisive in finding a violation of Article 10. Instead, the Court must examine disinformation cases *in context*, and *as a whole*. The Court has also made reference to the reality that states have a margin of appreciation in "policing modern societies", and in responding to "country specific threats." The problem of digital disinformation, often implicating the electoral process, is a uniquely delicate problem that can affect different national environments in varying ways and to varying degrees. Therefore, the Court should not reduce its assessment of digital disinformation to any single principle or test, but should instead take care to examine cases in this area as a whole, as situated in their respective domestic and electoral contexts. In balancing its assessment of interferences with disinformation with freedom of expression, the Court should develop a

[98] ECommHR, X. vs. Federal Republic of Germany, 16 July 1982, Application No. 9235/81; and ECommHR, T. vs. Belgium (No. 9777/82 1983).

stance whereby legislation to combat disinformation should be precisely framed and proportionately executed. Criminal sanctions should be avoided, and pre-legislative scrutiny should be advised. Furthermore, the Court should recalibrate how it thinks about legitimate aims under Article 10(2) with respect to legal measures to combat disinformation.

6. Conclusion

This paper has examined the delicate link and tension between the regulation of digital disinformation in Europe and the right to freedom of expression under Article 10 of the ECHR. As discussed, this complex relationship is still evolving. As digital disinformation becomes more pronounced in Europe, so to do concerns surrounding how it can be tackled without chilling freedom of expression. As outlined, these concerns are somewhat justified. Global examples both inside and outside of Europe have underscored the difficulties associated with tackling this problem in a precise, measured, and balanced manner. These concerns are not helped by the uncertain legal position of disinformation in Europe, in particular the ambiguous intermediary liability for harmful but lawful content.

As highlighted, there is a growing need for human rights guidance in this area. As the struggle to calibrate laws with freedom of expression grows, the case law of the ECtHR can be useful to provide important legal grounding. The ECtHR, through its long and rich adjudication of freedom of expression under Article 10, has been no stranger to the problem of false, manipulative, and abusive forms of expression. The struggle to balance the Court's privilege of political speech with false and harmful expression has been difficult, and the Court has often responded to this problem by distinguishing between facts and value judgements and simply denying certain hate speech consideration under Article 10. However, as this paper has discussed, the ECtHR's jurisprudence on freedom of expression is also fraught with the increasingly conspicuous gap between its traditional principles and the digital realities of contemporary electoral engagement. This legal lag behind technology makes it difficult to realistically apply its traditional distinctions to digital electoral disinformation. As this paper has argued, the Court in certain cases will be able to examine legal interferences with disinformation with these distinctions in mind. However, a pragmatic and safer approach would be to assess cases in this area with regard to the context and limitations under Article 10(2). As has been central to this paper, the Court should take an active role in setting out how legislative intervention to this growing democratic problem should be achieved while safeguarding Article 10 freedoms. To do so, the Court needs to issue updated distinctions, but also needs to ground future assessments of digital disinformation in the need for precision and proportionality in this delicate area.