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**Master's Thesis**

# Disinformation as a Threat to Democracy: Does Article 10 of the ECHR Provide a Basis for Legitimate Restrictions?

# Dezinformacija kaip grėsmė demokratijai: ar EŽTK 10 straipsnis suteikia pagrindą teisėtiems ribojimams?

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**ABSTRACT AND KEY WORDS**

The scale and speed of disinformation dissemination in modern democracies have attracted the attention of both States and scholars studying the phenomenon. Its connection with the important freedom of expression enshrined in the ECHR is unquestionable. Therefore, the aim of this work is to assess, by drawing on the extensive and detailed ECtHR case law on freedom of expression and electoral matters, the models and potential measures that could operate in the context of managing disinformation. It is essential not to overlook the fact that restricting one phenomenon may significantly limit another; thus, in this case, the search for an overall balance is crucial to ensure that, in combating disinformation, the rights guaranteed by the ECHR are not curtailed.

**Keywords**: freedom of expression, restrictions, soft law, disinformation, human rights.

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## INTRODUCTION

From Aristotle's agoras (Ἀγορά) of ancient Greece – where "statesmen and diplomatic envoys engaged in verbal combat to persuade others to their causes and win debates against equally impassioned opponents[1]" – to the internet, which may be understood as "modern public square", linking together actions in the digitalised world and their interactions with actual events in the physical space[2]", the free circulation of ideas, opinions, and information has long constituted the very core of democracy. From a contemporary perspective, "the global public sphere and social media tools have replaced the agora of ancient Greece[3]", simultaneously introducing entirely new challenges to freedom of expression.

Manifestations of falsehood likely appeared as soon as communication began between different groups of people. Written records from ancient Greece not only confirms the existence of deceit but also distinguish its various forms. Aristotle, who regarded lying as inherently negative, classified one type of lie among the "acts which are clearly morally reprehensible insofar as they are harmful to other individuals or to the polis. This species includes lies about oneself whose aim is some unfair share of honors or financial gain[4]." The transmission of stories, including false ones, from mouth to mouth was later replaced by the advent of the printed word, which in turn has been overtaken by the digital reality of the twenty - first century – a reality that fits in the palm of one's hand. This new environment has not only introduced unprecedented speed and accessibility to information exchange but has also posed undeniable challenges to democratic governance.

From the perspective of freedom of expression as enshrined in the European Convention on Human Rights[5] (ECHR or Convention), social networks and online platforms have created unprecedented opportunities to exercise this freedom. The dissemination of local and global news, the availability of both important and entertainment - related information, and the promotion of political pluralism – understood as the circulation of diverse political ideas, opinions, and proposals – initially seemed to promise

[1] ZAHARNA, Rhonda S. (2022). Boundary Spanners of Humanity: Three Logics of Communications and Public Diplomacy for Global Collaboration [online]. New York, NY: Oxford University Press. https://doi.org/10.1093/oso/9780190930271.001.0001, p. 63

[2] MARIQUE, Enguerrand and MARIQUE, Yseult (2019). Sanctions on digital platforms: Balancing proportionality in a modern public square. *Computer Law & Security Review*, 36, 105372 [online]. https://doi.org/10.1016/j.clsr.2019.105372, p. 2

[3] ibid

[4] Zembaty, Jane S. (1993). Aristotle on Lying. Journal of the History of Philosophy 31, 1; Johns Hopkins University Press, ProQuest p. 17

[5] Council of Europe. (1950). Convention for the Protection of Human Rights and Fundamental Freedoms. In Council of Europe Treaty Series 005. Council of Europe.

a strengthening of civic engagement, participation, and, consequently, democratic processes.

However, from today's perspective, it has become evident that this vision was overly utopian. Alongside information relevant and essential to democratic processes, there is now a vast flow of "information aimed at achieving desired (both legal and illegal) objectives by means of unlawful forms of public discourse and communication, thereby exceeding the boundaries of constitutionally protected freedom of expression[6]." Such information – commonly referred to as disinformation (or fake news, as used by some authors) – has become a threat to the rights and freedoms enshrined in the ECHR.

**Relevance of the topic under consideration**

As discussed above, just as falsehood (false information) emerged once humanity began to communicate more intensively, disinformation is likewise "nothing new and can be traced back to the printing press[7]." Disinformation distorts the centuries - old paradigm that "to say of what is that it is, and of what is not that it is not, is true[8]." By manipulating truth, the very possibility of knowledge is distorted. And knowledge, understood as the acquisition of reliable, verified information "is crucial for everyday life[9]." Knowledge is not possible without information, the fundamental basis of which is language – the word – whether spoken, written, or preserved in any medium accessible today. It is therefore essential to emphasise that "without free speech, people cannot debate ideas or hold powerful vested interests to account[10]."

As early as 2014, the Columbian Chemicals[11] incident tested the limits of public resilience and revealed the operational methods of Russian "trolls". That same year saw information attacks accompanying the annexation of the Crimean Peninsula, and the 2016 suspicions of foreign interference in the United Kingdom's Brexit referendum and the United States presidential elections further demonstrated that not all individuals or states exercise their freedoms with the aim of strengthening democracy. Consequently, following

[6] ŠINDEIKIS Algimantas (2013). Žodžio laisvė ir jos ribų kaita per du atkurtos nepriklausomybės dešimtmečius. Jurisprudencija 20(3), p. 1023–1060 [online]. doi:10.13165/JUR-13-20-3-09

[7] SHATTOCK Ethan (2022). Free and Informed Elections? Disinformation and Democratic Elections Under Article 3 of Protocol 1 of the ECHR. Human Rights LawReview, 2022, 22, 1–25 [online]. https://doi.org/10.1093/hrlr/ngac023, p. 1

[8] Aristotle, Metaphysics IV.7, 1011b25, [online] https://www.loebclassics.com/view/aristotle-metaphysics/1933/pb_LCL271.201.xml, p. 201

[9] DELUGGI Nicky and ASHRAF Cameran (2023). Liars, Skeptics, Cheerleaders: Human Rights Implications of Post-Truth Disinformation from State Officials and Politicians. Human Rights Review 24:365–387 [online]. https://doi.org/10.1007/s12142-023-00697-1, p. 365

[10] HUMPHERY-JENNER Mark (2024) Legislating Against Misinformation: Lessons from Australia's Misinformation Bill. Statute Law Review, 45, hmae023 [online]. https://doi.org/10.1093/slr/hmae023, p. 1

[11] https://www.nytimes.com/2015/06/07/magazine/the-agency.html?smid=url-share, žr. 8/10/2025

the annulment of the first round of elections by the Constitutional Court of Romania in 2024, and in light of apparent interference in this year's parliamentary elections in Moldova, it has become clear that the right to receive and impart information and ideas freely cannot be absolute.

The extensive case - law of the European Court of Human Rights (ECtHR or Court) concerning freedom of expression provides a solid starting point for examining its limitations. In the summer of 2025, upon the delivery of the significant Bradshaw[12] judgment by the ECtHR, I observed that, perhaps for the first time, the Court analysed issues relating to disinformation and foreign state interference in democratic processes such as elections. Nevertheless, it should be noted that, although the judgment is significant within the broader context of the Court's jurisprudence, it does not contain any revolutionary pronouncements on the subject matter. Therefore, given the scale of disinformation and its impact, it is no longer feasible to wait for a case to reach the Court in which it would invoke the restrictions provided for in Article 10(2) to address disinformation as a direct threat both to human rights and freedoms and to the democratic order itself.

**The aim of the research**

In conducting this research, I seek to determine whether the grounds set out in Article 10(2) of the European Convention on Human Rights, together with the existing legal framework, can effectively address disinformation without infringing upon the value protected by the same article. Given the clearly defined scope of this study, it will not examine the relationship between disinformation and other rights and freedoms guaranteed by the ECHR, except for the right to free elections enshrined in Article 3 of Protocol No. 1, which is undeniably connected to Article 10 of the Convention in the context of disinformation. Furthermore, the research will not address the broader global context beyond the borders of the member states of the Council of Europe, as doing so would considerably expand the scope of the present study.

**Objectives of the research**

1. To determine the definition of disinformation and identify its modes of interaction with the freedom enshrined in Article 10 of the Convention.

[12] *Bradshaw and others v. The United Kingdom*. [ECHR], No. 15653/22 [22-7-2025].

2. To draw on European Court of Human Rights case - law in freedom – of - expression cases, assessing the doctrines it has developed and their impact both on the protection of this freedom and on disinformation as a phenomenon restricting it.
3. On the basis of Article 10(2) of the Convention and Article 3 of Protocol No. 1, together with the related jurisprudence, to analyse the impact on democratic processes in the face of the threat posed by disinformation.

**Object of the research**

The object of the research is the phenomenon of disinformation and its legal regulation in relation to the freedoms protected under Article 10 of the ECHR, as interpreted and developed in the Court's jurisprudence.

**Research methodology**

By **analysing** documents of the European Union and the Council of Europe, judgments of the European Court of Human Rights (ECtHR), and the works of legal scholars, this research seeks to **identify** the challenges that the existing legal framework faces in addressing the use and spread of disinformation within the democratic processes of states. Case law will be sourced primarily through the ECtHR's HUDOC database, while academic legal literature will be consulted using major databases such as HeinOnline, EBSCO, JSTOR, Oxford University Press, etc. For European Union and Council of Europe (CoE) legal acts, resolutions, and related documents, the official websites of these institutions – together with their respective references to legal document repositories – will be used. All of the above-mentioned case law, legal acts, and related materials will be located using the keywords provided under Article 10 in the HUDOC "List of Keywords", as well as additional search terms relevant to the research topic, such as disinformation, freedom of expression, elections, and fake news. The ECHR Knowledge Sharing Platform will also be used to access resources such as the ECHR Case - Law Guide and Key Themes related to the specific provisions relevant to this study.

In this work, I will not only **compare** ECtHR jurisprudence by analysing specific cases and the approaches of national governments to the rights guaranteed by the Convention, but I will also, using this method, assess the positions taken by legal scholars on the questions addressed in my master's thesis. An **analytical** and **systematic** approach will be applied both in evaluating the tests employed by the ECtHR to justify or reject restrictions on freedom of expression, and in examining the influence of the margin of appreciation

doctrine – frequently applied by the Court in such cases – on the extent of discretion afforded to national authorities.

**Originality**

In the course of reviewing academic literature related to the subject of this study, I found that, over the past five years, a considerable number of scholarly articles – by authors such as Andela Dukanovic[13], Jason Pielemeier[14], Nicky Deluggi and Cameran Ashraf[15], Katie Pentney and Ethan Shattock[16] – as well as several books by Ronald J. Krotoszynski Jr., András Koltay and Charlotte Garden[17], Steven J. Barela and Jérôme Duberry[18] have been devoted to the topic of disinformation. However, in most of these works, only one or two chapters are directly relevant to the specific issues addressed in this thesis. Another strand of the literature focuses on the challenges posed by disinformation primarily from a technical or technological perspective, with significant attention also given to the liability of technological intermediaries and the analysis of their emerging obligations. For the purposes of this research, it is particularly noteworthy that a significant gap remains in studies examining the threats posed by the spread of disinformation to the freedoms safeguarded under the European human rights system. Although the European Court of Human Rights has developed extensive jurisprudence concerning freedom of expression, it has so far dealt with very few cases seeking to define or characterise the phenomenon of disinformation itself. Given that both national and, in particular, international legal instruments relevant to this topic have been adopted or updated in recent years, and that the most recent jurisprudence of the Court dates from the second half of 2025, I consider that the chosen research direction has the potential to contribute to the existing body of scholarship not only through an original perspective but also by engaging with as-yet unexplored jurisprudence.

[13] Limitations on Freedom of Expression in Practice of the European Court of Human Rights and the Notion of Disinformation 26 NBP. Nauka, Bezbednost, Policija 31 (2021)
[14] Disentangling disinformation: what makes regulating disinformation so difficult? Utah law review (No. 4, 2020)
[15] Liars, Skeptics, Cheerleaders: Human Rights Implications of Post-Truth Disinformation from State Officials and Politicians Human Rights Review (2023) 24:365–387
[16] Disinformation and Democracy on the Docket: Reformulating the Approach to Electoral Disinformation under the ECHR, Oxford Journal of Legal Studies 2025, Vol. XX, No. XX pp. 1–31
[17] Disinformation, Misinformation, and Democracy: Legal Approaches in Comparative Context Cambridge University Press (2025)
[18] Understanding Disinformation Operations in the Twenty-First Century In: Defending Democracies. Edited by Duncan B. Hollis and Jens David Ohlin, Oxford University Press (2021). DOI: 10.1093/ oso/ 9780197556979.003.0003

**Most important sources**

The main sources used in the preparation of this research paper include the European Convention on Human Rights and the case - law of the European Court of Human Rights, as well as William A. Schabas's commentary[19], which provides the foundation for understanding how the human rights protection system operates and what its principal pillars are. Notable works include those of Ronald J. Krotoszynski, Jr., András Koltay, and Charlotte Garden[20], Mart Susi[21], Alessio Sardo[22], Rebecca K. Helm and Hitoshi Nasu[23], Katie Pentney and Ethan Shattock[24]. These works have assisted me in analysing and comparing the challenges posed by disinformation within the context of freedom of expression examined in this thesis.

[19] The European Convention on Human Rights: A Commentary (2016)
[20] ibid
[21] Human Rights, Digital Society and the Law: A Research Companion, edited by Mart Susi (Taylor & Francis Group, 2019)
[22] Categories, Balancing, and Fake News: The Jurisprudence of the European Court of Human Rights (2020)
[23] Regulatory Responses to "Fake News" and Freedom of Expression: Normative and Empirical Evaluation (2021)
[24] Disinformation and Democracy on the Docket: Reformulating the Approach to Electoral Disinformation under the ECHR (2025)

## 1. DISINFORMATION IN A FUNCTIONING DEMOCRACY

At the outset of any research, it is essential to define and examine the object of study, to determine its boundaries, and to identify the most appropriate legal definition – particularly where the views or proposed definitions of authors writing on the subject diverge. It is equally important to clarify what does not constitute disinformation and to assess its impact on human rights and freedoms, with primary attention given to freedom of expression.
This section also considers the scope and content of freedom of expression and highlights the ways in which disinformation can restrict this freedom, at times even approaching the threshold of its denial.

The growing significance of the Internet in everyday life over recent decades, due to the opportunities it offers, has compelled closer attention to the impact it has on the spread of falsehood (disinformation) and the ways in which it can be used when it is "designed specifically to sow mistrust and confusion and to sharpen existing divisions in society[25]." Identifying the relevant concepts will provide the basis for further examination of a phenomenon that has a marked influence on contemporary democratic processes.

### 1.1. Definition

The conceptual identification or definition of the phenomenon or problem under examination is the essential foundation of any high - quality academic inquiry. To achieve this, it is first necessary to determine the constituent elements of a definition, which "consist of words, and words are symbols representing ideas or facts, that is, singled - out states of knowable reality[26]." Thus, it may be stated that the environment and the reality surrounding us are knowable. Accordingly, Wacker, delving further into the formalisation of definitions, observes that a formal conceptual definition is a clear, concise verbalization of an abstract concept used for empirical testing[27].

The definition of disinformation may, in terms of its subject matter, be broadly divided into two main categories: definitions formulated by institutions such as the Council of Europe and the United Nations, and those proposed by scholars writing on legal and human

[25] Council of Europe Committee of Ministers. Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries [online] https://rm.coe.int/0900001680790e14 p. 1
[26] TIMASHEFF N. S. (1947). Definitions in the Social Sciences. American Journal of Sociology, Nov., 1947, Vol. 53, No. 3, pp. 201-209 [online] https://www.jstor.org/stable/2771304, p.201
[27] WACKER John G. (2004) A theory of formal conceptual definitions: developing theory-building measurement instruments. Journal of Operations Management 22 (2004) 629–650 [online]. doi:10.1016/j.jom.2004.08.002, p. 645

rights issues. An examination of several representative examples enables the identification of divergences between these definitions, as well as the common elements that underpin them.

The Aristotelian reflections on falsehood cited in the introduction appear to be echoed in the modern definition of disinformation. The High - Level Expert Group (HLEG) does not depart significantly from Aristotle's observation that one of the purposes of disinformation (falsehood) may be profit. Defining disinformation as "all forms of false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit[28]", the HLEG identifies falsity, inaccuracy, and deception as its key elements, and notes that the purpose of such information is to cause public harm or to generate profit. All of this is carried out with deliberate intent. The European Commission, which established the HLEG, defines disinformation as "verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm[29]", thereby supplementing the concept by emphasising the verifiability of the information and, importantly, including the factor of its dissemination.

With regard to authors writing on legal topics, some, recognising the heightened risks to freedom of expression, define disinformation as "information that is deliberately created to mislead and influence the public[30]", thereby introducing the criterion of social influence. Others, combining the definitions of disinformation from several authors, present the concept very broadly, defining it as the "orchestrated dissemination of untruthful news or data through any type of communication channels, whether traditional – printed press, radio, television – or horizontal – social networks, etc. – with the intention of obtaining an economic, social, or strategic benefit, or of harming rivals, whether individuals, societies, institutions, or states[31]." However, such a broad definition does not necessarily render the concept effective or facilitate its broader application.

[28] EUROPEAN COMMISSION (2018). A multi-dimensional approach to disinformation. Report of the independent High level Group on fake news and online disinformation. ISBN 978-92-79-80419-9

[29] Communication from the Commission to the European Parliament, The Council, The European economic and social committee and The Committee of the regions. Tackling online disinformation: a European Approach COM/2018/236 final [online] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0236

[30] NUNEZ Fernando (2020). Disinformation Legislation and Freedom of Expression. UC Irvine Law Review, vol. 10, no. 2. HeinOnline pp. 783-[viii] [online], https://heinonline.org/HOL/Page?handle=hein.journals/ucirvlre10&collection=usjournals&id=796&startid=&endid=815 p. 785

[31] BERDUD C. E. (2025). Tightening up the eu's policy towards large platforms in the fight against disinformation. VISUAL Review, 17(2), pp. 315-331 [online], https://doi.org/10.62161/revvisual.v17.5772, p. 316

Disinformation is also defined in national legislation. For example, Article 2(15) of the Law on the Provision of Information to the Public of the Republic of Lithuania defines disinformation as "intentionally publicly disseminated false information[32]", whereas in the United Kingdom, the legislature largely follows the European Commission's definition, further emphasising the deliberate nature of disinformation and extending the notion of benefit to include political gain ("deliberate creation and sharing of false and/or manipulated information that is intended to deceive and mislead audiences, either for the purposes of causing harm, or for political, personal or financial gain[33]"). Nevertheless, due to the overly broad discourse and the limited scope of this thesis, the regulation of disinformation within national states will be examined only to the extent necessary to achieve the objectives of the research.

The United Nations Human Rights Council provides a precise and concise definition of disinformation: "false information that is disseminated intentionally to cause serious social harm[34]", and highlights that, in the contemporary context, the concept of disinformation is becoming increasingly complex. The UN Human Rights Council notes that, with numerous subjects seeking to provide their own definitions of disinformation for various purposes, the concept is most often "described in broad, ill - defined terms not in line with international legal standards[35]". Given the rapidly changing environment – such as the swift expansion of artificial intelligence, which directly impacts this issue – formulating a universal definition of disinformation may be becoming practically impossible. These challenges are further compounded by difficulties in distinguishing disinformation from other closely related types of false information, which will be addressed in the following subsection.

### 1.1.1. Distinction from other forms

A considerable variety of terminology can be found in legal scholarship to describe the presentation of information to the public when such information is misleading, distorted, or false. For instance, Kai Shu and colleagues identify the following keywords:

[32] Lietuvos Respublikos Visuomenės informavimo įstatymas [online] https://www.e-tar.lt/portal/lt/legalAct/TAR.065AB8483E1E/asr
[33] Disinformation and 'fake news': Final Report (2019). House of Commons Digital, Culture, Media and Sport Committee Eighth Report of Session 2017–19 [online] https://publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/1791/1791.pdf, p. 7
[34] United Nations General Assembly, Human Rights Council (2021). Disinformation and freedom of opinion and expression. A/HRC/47/25, [online] https://docs.un.org/en/A/HRC/47/25, p. 4
[35] ibid

"misinformation, disinformation, fake news, hoax, rumor, and conspiracy theory[36]" and, relying on other academic articles, provide precise definitions for each. However, as noted in the previous section, such definitions are neither universal nor capable of being universal, and the definitions offered do not always convey the European context that is central to this thesis. For instance, both these authors and, frequently, scholars of the American legal tradition use the terms disinformation and fake news interchangeably.

Meanwhile, within Europe, Wardle and Derakhshan, who conducted research for the Council of Europe (CoE) in the broader context of information disorder, distinguish, in addition to disinformation, which they shortly define as "false information is knowingly shared to cause harm[37]", two further categories:

"- Mis - information. Information that is false, but not created with the intention of causing harm.

- Mal - information. Information that is based on reality, used to inflict harm on a person, organization or country[38]".

In legal literature, however, much of the debate centres on the distinction between the concepts of fake news and disinformation. The aforementioned HLEG proposes[39] that these concepts should be distinguished, as they are not synonymous, for two reasons:

- The inadequacy of the term fake news. As it constitutes only one component of disinformation, it is not necessarily false, and is most often a mixture of genuine and fabricated information;
- The misleading nature of the term fake news. It is used by influential interest groups and politicians (for example, by Donald Trump before and after the 2016 presidential elections) to dismiss media content that is unacceptable to them, allowing them not only to discredit independent media but also to influence the content of information.

While some authors (including the HLEG) propose abandoning the term fake news, others recognise its usefulness within the broader context of disinformation, as "there is also evidence suggesting that it may describe a novel format or genre within disinformation

[36] SHU K, BHATTACHARJEE A, ALATAWI F, et al. (2020). Combating disinformation in a social media age. WIREs Data Mining Knowl Discov. 10:e1385. https://doi.org/10.1002/widm.1385, p.2
[37] Wardle, C., & Derakhshan, H. (2017). Information Disorder: Toward an interdisciplinary framework for research and policy making (Report DGI(2017)09). Council of Europe. https://rm.coe.int/090000168076299d, p. 6
[38] ibid, p. 20
[39] EUROPEAN COMMISSION (2018). A multi-dimensional approach to disinformation. Report of the independent High level Group on fake news and online disinformation. ISBN 978-92-79-80419-9, p. 10

practices[40]". The authors provide a clear and informative schema of misleading information (Table 1), which effectively illustrates the relationship between the content itself and the way in which it is disseminated.

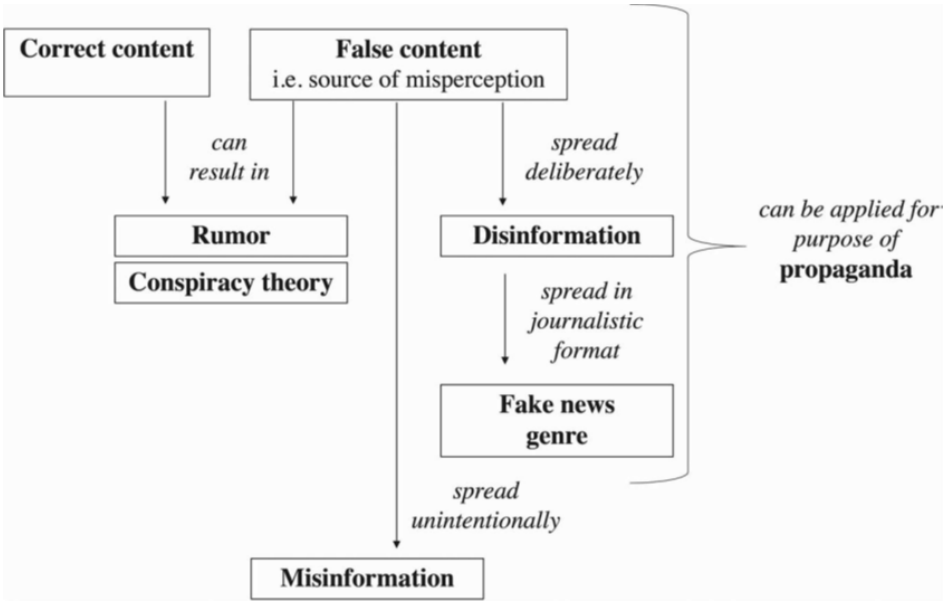


Table 1. How the fake news genre relates to other concepts (created by: Sophie Lecheler and Jana Laura Egelhofer) [41]

It is evident that disinformation originates from a misleading (false) basis, as do certain other types of information. Nevertheless, it is important to note that there are forms of presenting information which do not fall within the definition of disinformation (or of other categories of information discussed above). In this regard, the following forms should be distinguished: "misleading advertising, reporting errors, satire and parody, or clearly identified partisan news and commentary[42]", as set out in a soft - law European Commission document. It appears that the Commission's additional delineation of certain forms of misleading information signals a comprehensive application of the ECtHR's developing practice in cases under Article 10 of the ECHR within European Union law-making. The relationship both of these forms of information and of disinformation with the concepts discussed in this section will be examined further in this work.

[40] LECHELER Sophie and EGELHOFER Jana Laura (2022). Disinformation, Misinformation, and Fake News Understanding the Supply Side In: Knowledge Resistance. In: High-Choice Information Environments. Edited by Stromback J., et al. Taylor & Francis Group (2022). DOI: 10.4324/9781003111474 p.71

[41] EGELHOFER J. L., LECHELER S. (2019). Fake news as a two-dimensional phenomenon: a framework and research agenda. Annals of the International Communication Association, 43:2, 97-116, DOI: 10.1080/23808985.2019.1602782, p. 103

[42] European Commission (2018). Code of Practice on Disinformation [online] https://digital-strategy.ec.europa.eu/en/library/2018-code-practice-disinformation, p. 1

### 1.1.2. The need for regulation

In several of its documents, the European Commission notes a distinction between illegal content, such as hate speech and defamation, and disinformation. During the Covid-19 pandemic, when commenting on the highly intensified information environment at the time, the Commission regarded disinformation as a threat that is "not necessarily illegal but can directly endanger lives and severely undermine efforts to contain the pandemic[43]." Similar distinctions between illegal content and disinformation are set out by HLEG in its report, noting that disinformation may be considered "forms of speech that fall outside already illegal forms of speech, notably defamation, hate speech, incitement to violence, etc. but can nonetheless be harmful[44]." In assessing this divide between illegal and potentially harmful content, reasonable doubts may arise as to the necessity of regulating the latter. The need to coordinate and, where required, to curb the spread of disinformation is primarily linked to the impact of such information and the potential (anticipated) harm which, notwithstanding the absence of illegality, may diminish the level of freedom of expression (the right to information), affecting, for example, journalists, including "threats and intimidation, or that they were wrongly accused of spreading disinformation[45]." The possible harm arising from such content is also noted by HLEG.

Some authors note that disinformation shares "certain key characteristics with other categories of harmful content, such as terrorist incitement and hate speech[46]", thereby equating its level of risk with phenomena that are already criminalised. In a democratic society where a given phenomenon is still not (or cannot be) fully defined, a greater danger may be posed to that society's rights and freedoms, because, in seeking to curb the spread of disinformation, measures must not erode the content of freedom of expression as embedded in the free sharing of information, the exchange of opinions, and other forms of expression. Finally, the Internet, its speed, and the volume of such information mean that both disinformation and other harmful content "tend to produce diffuse social impacts, rather than narrow personal harms[47]", thereby conferring the status of the "injured party"

[43] Joint communication to the European Parliament, The European Council, The Council, The European economic and social committee and The committee of the regions. Tackling COVID-19 disinformation - Getting the facts right. JOIN/2020/8 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020JC0008, p.3

[44] EUROPEAN COMMISSION (2018). A multi-dimensional approach to disinformation. Report of the independent High level Group on fake news and online disinformation. ISBN 978-92-79-80419-9, p. 10

[45] Ibid, p. 11

[46] PIELEMEIER J. (2020). Disentangling disinformation: what makes regulating disinformation so difficult? Utah law review No. 4, 917. [online] https://doi.org/10.26054/0D-CJBV-FTGJ, p. 921

[47] ibid.

on democratic society as a whole rather than on a single individual, whose process of defending rights may be more readily implemented (and defined).

The broad scope of disinformation's operations and its impact on societies „impose serious social costs on a mass scale, around the world, and do so with great regularity[48]". It is therefore unsurprising that research[49] has shown that Member States are seeking, predominantly through traditional (legislative) measures, to regulate the scale of the spread of this phenomenon, even without expressly referring to the concept of disinformation in their legislation (with the exception of the Republic of Lithuania, which is arguably the only one to provide such a definition[50]). It should be noted that the regulatory measures adopted, as indicated by the Commission (with specific reference to the Republic of Hungary), are overly broad in scope, and the penalties selected are disproportionate "can constrain sources willingness to speak to journalists, as well as lead to self - censorship[51]."

Notwithstanding the seemingly legitimate desire of States to control the spread of propaganda, disinformation, and fake news within their territories through legal regulation, it is crucial to assess whether the measures employed do not provide a basis for encroaching upon the sphere of „free speech" and for controlling manifestations of pluralism in society. As Benedek and Kettemann note, for Member States to intervene in this sphere, it should be done by „an independent body in a non-arbitrary and non-discriminatory way[52]."

Looking more deeply into the regulatory need arising from the incompatibility between disinformation and freedom of expression, we observe that in the ECtHR case Case of Bowman v. The United Kingdom, in assuming the role of a supervisory authority that helps to ensure adherence to the principles of a democratic society, the Court emphasises that „freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man[53]." Therefore, in order to understand the consequences of the regulation discussed above, the following

[48] KROTOSZYNSKI R. J. Jr., KOLTAY A. GARDEN C. (2025). Disinformation, Misinformation, and Democracy: Legal Approaches in Comparative Context. Cambridge University Press, http://dx.doi.org/10.1017/9781009373272 p. 3

[49] ERGA (2020). Notions of Disinformation and Related Concepts. (ERGA report). European Regulators Group for Audiovisual Media Services. https://erga-online.eu/wpcontent/uploads/2021/01/ERGA-SG2-Report-2020-Notions-of-disinformation-and-relatedconcepts.pdf [online], Chapter 4, p. 32-33

[50] Disinformation – deliberately disseminated false information. Lietuvos Respublikos visuomenės informavimo įstatymas 2 str. 15 d. [online] https://www.e-tar.lt/portal/lt/legalAct/TAR.065AB8483E1E/asr

[51] Joint communication to the European Parliament, The European Council, The Council, The European economic and social committee and The committee of the regions. Tackling COVID-19 disinformation - Getting the facts right. JOIN/2020/8 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020JC0008 p. 11

[52] BENEDEK, Wolfgang, KETTEMANN Matthias C. (2013). Freedom Of Expression And The Internet (2014). Council of Europe. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/viluniv-ebooks/detail.action?docID=3138760. [online] p. 45

[53] *Bowman v. The United Kingdom* [ECHR], No. 141/1996/760/961, [19-2-1998].

subsection of this work must examine the material content of Article 10 of the Convention and the significance of the Court's case - law for the management of disinformation.

### 1.2. The impact on freedom protected under Article 10 of the ECHR

As discussed above – contemporary disinformation exerts a significant impact on societal, political, and inter-state processes, both in democracies and in states that have adopted other forms of governance. It is also important that the functioning of contemporary democracies is inconceivable without one of their essential (most important) elements – human rights and freedoms. One of these freedoms, enshrined in Article 10 of the European Convention on Human Rights, is closely connected with information, regardless of its nature – whether verified, accurate, or misleading. Since freedom of expression, as a natural freedom, is „an important precondition for the exercise of various rights and freedoms enshrined in the Constitution, because an individual can fully exercise many of their constitutional rights and freedoms only if they have the freedom to seek, receive, and disseminate information without hindrance[54]“. The very internal content of freedom of expression, set out in Article 10(1) of the Convention, encompasses the right freely to receive and share information.

From what we have already examined, it is apparent that the essential constituent element of disinformation, both grammatically and structurally, is information; however, this information is verifiably false or misleading. Moreover, when two distinct phenomena share the same source (information), they inevitably intersect at one point or another, without negating each other's existence, yet unable to operate simultaneously under the same conditions. Perhaps this is why some authors note that „it may seem difficult to tackle disinformation and, at the same time, preserve freedom of expression[55].“

It is clear that an individual does not exercise the right to freedom of expression in isolation, but in conjunction with others. This raises the question of how truth is discerned in the age of the internet, where the essence of freely expressed ideas should lie in the pursuit of truth. John Milton proposed his own method of attaining truth, advocating that "by reading Controversies, his Senses awakt, his Judgement sharpn'd, and the truth which he holds more firmly establish't[56]". Milton's belief in truth, also reflected in his work "Areopagitica" where he asserts that the triumph of truth over falsehood is inevitable, could

[54] The Constitutional Court of the Republic of Lithuania. Resolution of 23 October 2002. Official Gazette, 104-4675 and The Constitutional Court of the Republic of Lithuania. Resolution of 26 January 2004. Official Gazette, 15-465

[55] DUKANOVIC, A. (2021).Limitations on Freedom of Expression in Practice of the European Court of Human Rights and the Notion of Disinformation. NBP. Nauka, Bezbednost, Policija, 26(2), 31-42, p. 32

[56] MILTON, J. (1673). Of true religion, hæresie, schism, toleration, and what best means may be us'd against the growth of popery. Early English Books Online (2019), ProQuest LLC Images reproduced by courtesy of The Huntington Library [online] https://www.proquest.com/docview/2240921045/11982847/49307D5F467E4421PQ/2?sourcetype=Books p.16

not have anticipated that this claim would verge on an oxymoron, and that in the 21st century it would be possible to conclude paradoxically that "consequently, in an age of information overflow, access to truth remains scarce[57]".

The following inquiry seeks to clarify the relationship between disinformation and "truth", or, more precisely, with the possibility freely to disseminate (and receive) information which, as established above, also serves as a guarantee of an individual's freedom of expression and speech. To that end, however, we must first elucidate the content of freedom of expression itself, which will be addressed in the next subsection.

### 1.2.1. Freedom of expression

Freedom of expression can be compared to one of the pillars supporting a democratic regime, as it allows individuals to express their thoughts and beliefs freely and without fear, conveying their own perspective of the world. In autocratic and totalitarian regimes, such freedom is typically persecuted, restricted, or even punished, making its exercise difficult, and often rendering it altogether impossible. Perhaps this is why it is "important to recognize how damaging it can be when this freedom is denied[58]".

As Schabas observes, „free speech and political democracy has always been fundamental[59]." Therefore, this right is enshrined in the constitutions of democratic states (e.g., Article 25 of the Constitution of the Republic of Lithuania) and in the principal instruments of international organisations, such as the European Convention on Human Rights (Article 10), the Universal Declaration of Human Rights (Article 19), and the International Covenant on Civil and Political Rights (Article 19). Given the scope of this research and in line with the focus of this thesis, the subsequent analysis will concentrate primarily on Article 10 of the Convention, the first paragraph of which provides that:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

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[57] DELUGGI N., ASHRAF Cameran (2023). Liars, Skeptics, Cheerleaders: Human Rights Implications of Post-Truth Disinformation from State Officials and Politicians. Human Rights Review (2023) 24:365–387. https://doi.org/10.1007/s12142-023-00697-1, p. 368

[58] SORABJI R. (2021). Freedom of Speech and Expression: Its History, Its Value, Its Good Use, and Its Misuse. New York, NY: Oxford University Press. DOI: 10.1093/oso/9780197532157.001.0001, p. 2

[59] SCHABAS William A. (2015). The European convention on human rights A commentary. New York, NY: Oxford University Press. ebook ISBN 978-0-19-106677-1, p. 842

Examining the internal content of this freedom, it becomes evident that it is universal and broadly applicable (for everyone), which marks a notable distinction from the seemingly liberal guarantees of freedom of expression offered by Emperor Ashoka in India (3rd century BCE), which nevertheless " [did] not say for all individuals, but for all the pasandas, or religious affiliations[60]". The second sentence of Article 10 defines both the internal structure of the freedom, which encompasses "opinions, information, and ideas", and the means of exercising it, free from government interference and unrestricted by state borders. The third sentence reflects the state monopoly in the spheres of broadcasting and television that existed at the time the Convention was drafted – a reality that has largely lost its original significance today.

Although the Convention was adopted by the member States of the Council of Europe, in terms of its practical implementation the principal role falls to the European Court of Human Rights, which treats the Convention as „a living instrument which, <...>, must be interpreted in the light of present - day conditions[61]". The importance of the Court in giving effect to the rights and freedoms enshrined in the Convention is also highlighted by commentators, some attributing to the Court primarily „a supervisory function[62]", while others contend that „towards the middle of the 1970s the Court began 'strategically embedding' the Convention into the national legal systems of the Member States in the functional and purposive sense <....>, by developing its case law, both broadly and deeply[63]." It should be noted that the Court's jurisprudence on freedom of expression is particularly extensive. Emphasising the importance of freedom of expression, the Court stated in one of the fundamental Article 10 cases that "freedom of expression constitutes one of the main foundations of a democratic society and constitutes one of the basic conditions for the progress of this society and the self - realization of every individual[64]". Nevertheless, according to Alessio Sardo, the Court does not necessarily interpret the Convention strictly in accordance with its original text, because „the construction Art 10 is always the result of a "dynamic update" which takes into account societal values and beliefs, both from the internal perspective (the position of the participant) and from the external perspective (looking at national systems from a broader, European, standpoint)[65]".

[60] ibid. p. 5
[61] *Tyrer v. The United Kingdom,* [ECHR], No. 5856/72, [25-4-1978].
[62] ibid, p. 849
[63] SPANO R. (2018). The Future of the European Court of Human Rights-Subsidiarity, Process-Based Review and the Rule of Law. Human Rights Law Review, 2018, 18, 473–494. doi: 10.1093/hrlr/ngy015, p. 476
[64] *Handyside v. The United Kingdom*, [ECHR], No. 5493/72, [7-12-1976].
[65] SARDO A. (2020). Categories, Balancing, and Fake News: The Jurisprudence of the European Court of Human Rights. Canadian Journal of Law & Jurisprudence XXXIII No.2 August 2020, 435-460. doi: 10.1017/cjlj.2020.5, p. 438

Furthermore, the Court has developed its case - law in a manner that confirms that freedom of expression encompasses a far broader spectrum than merely oral or written communication. Article 10 also covers artistic expression – painting[66], theatre plays[67], photography[68], certain forms of behaviour[69], or even the display of vestimentary symbols[70], as well as other forms of expression[71]. Article 10 also encompasses a "negative" aspect of the freedom of expression, meaning that "the right to freedom of expression by implication also guarantees a 'negative right' not to be compelled to express oneself, i.e. to remain silent[72]."

In the context of this thesis, it is important to note that freedom of expression is not absolute (in contrast, for example, to Article 2 of the Convention) and may be subject to restrictions, both those established in paragraph 2 of Article 10 and those arising in the context of disinformation, where the provision of false information, the expression of opinions not aimed at truth, or the dissemination of ideas contrary to the democratic foundations of the state may undermine the very structure of freedom of expression itself. These aspects will be examined in greater detail in the following chapters.

### 1.2.2. Disinformation as a constraint on freedom of expression

There are several factors associated with disinformation that may, in one way or another, affect or influence freedom of expression and the right freely and without restriction to receive and share reliable (verified) information. One of these is the internet, which can both strengthen and enable freedom of expression, and also „adversely affect these and other rights, freedoms and values[73]". On the one hand, the significance of the internet in expanding the bounds of freedom of expression is unquestionable (given minimal financial and regulatory costs), and owing to this technological progress there is „immensely greater genuine freedom of expression today, than the was in 1950[74]". However, on the other hand, the ECtHR itself discerns not only the internet's capacity to empower human rights and freedoms, including freedom of expression, but also its risks, comparing it with the

[66] *Müller and Others v. Switzerland,* [ECHR], No. 10737/84, [24-5-1988].
[67] *Ulusoy et autres c. Turquie,* [ECHR], no 34797/03, [24-9-2007].
[68] *Axel Springer AG v. Germany*, [ECHR], No. 39954/08, [7-2-2012].
[69] *Ibrahimov and Mammadov v. Azerbaijan*, No. 63571/16, [13-6-2020].
[70] *Vajnai v. Hungary*, No. 33629/06, [8-10-2008].
[71] Council of Europe / European Court of Human Rights (2022). Guide on Article 10 of the European Convention on Human Rights. Freedom of expression. p. 12
[72] *K v. Austria*, [EUROPEAN COMMISSION OF HUMAN RIGHTS], No. 16002/90 [13-10-1992].
[73] Council of Europe Committee of Ministers. Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet
[74] SCHABAS William A. (2015). The European convention on human rights A commentary. New York, NY: Oxford University Press. ebook ISBN 978-0-19-106677-1, p. 861

traditional press and noting that „the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press[75]“.

While the State remained able to regulate and control the dissemination of information through traditional means of communication, the advent of new technologies (the internet) made this not only difficult to manage, but also resulted in „the exponential growth of user - generated content that can be easily shared and disseminated through social media[76]“. And although, as I have already noted in the text, disinformation has existed practically since the beginning of humanity's ability to communicate (at least in the form of lying), it is crucial to note that only „the combination of social media and advancing technology has enabled the production of disinformation at a scale that threatens an individual's right to receive and impart ideas[77]“. And, in my view, correctly identifying the contemporary phenomenon of informational noise (overload), Sardo observes that „information overload can disincentivize "quality journalism" and, paradoxically, this phenomenon might end up by frustrating the right of the citizens to be adequately informed[78]“, thereby narrowing the scope of the freedom enshrined in Article 10 of the Convention and contradicting Schabas's assertion.

Another important factor influencing freedom of expression concerns the phenomenon of disinformation itself, more precisely the measures employed to limit it. When States and international organisations seek to curb the spread of disinformation and opt for disproportionate blocking measures, freedom of expression may not only be restricted but outright denied. This, in turn, entails that a democratic system of government may face significant challenges.

The management of disinformation is impossible without political measures (the adoption of legislation), while "the policy responses to disinformation include the adaptation of existing laws and policy measures, as well as the drafting of new ones. Both contain risks to freedom of expression[79]." Even if the measures applied are *soft law* and

[75] *Editorial board of Pravoye Delo and Shtekel v. Ukraine* [ECHR], No. 33014/05 [5-5-2011]
[76] HELM Rebecca K., NASU Hitoshi (2021). Regulatory Responses to 'Fake News' and Freedom of Expression: Normative and Empirical Evaluation. Human Rights Law Review, 21, 302–328 doi: 10.1093/hrlr/ngaa060, p. 315
[77] NUNEZ Fernando (2020). Disinformation Legislation and Freedom of Expression. UC Irvine Law Review, vol. 10, no. 2. HeinOnline pp. 783-[viii] [online], p. 784
[78] SARDO A. (2020). Categories, Balancing, and Fake News: The Jurisprudence of the European Court of Human Rights. Canadian Journal of Law & Jurisprudence XXXIII No.2 August 2020, 435-460. doi: 10.1017/cjlj.2020.5, p. 446
[79] European Parliament (2021). The fight against disinformation and the right to freedom of expression. Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies PE 695.445 doi: 10.2861/305, p. 13

implemented on the basis of agreement, for example the EU 2018 Code of Practice on Disinformation, which, notwithstanding the publication in 2022 of the latest (strengthened) version of the Code, still remains in force, the actions of intermediaries (large internet companies) aimed at reducing the spread of disinformation (particularly during election periods) raise concerns that their conduct may "becoming arbitrary in the absence of specific criteria[80]", determining approaches not (necessarily) in favour of the protection of the freedom under Article 10.

Closely connected with all the factors identified above, and perhaps even arising from them, is the dissemination of information by civil servants (officials) and politicians concerning their office or status. The manner in which such information is presented (or not presented), as chosen by a public official or politician, does not necessarily guarantee that the information will be reliable and accurate. A further risk lies in the fact that society often, not without reason, accepts information provided by its government (its representatives) as „more 'correct', more authentic and more reliable than other types of information[81]." However, such information does not necessarily accord with the public's access to reliable information without government interference, as guaranteed by the freedom of expression.

The Court addressed this issue in TASZ v Hungary, where a non-governmental organisation was refused access to information, and indicated that such State measures (laws) cannot arbitrarily restrict access to information of public interest (even where it is collected by an NGO), because this may result in „a form of indirect censorship should the authorities create obstacles to the gathering of information[82]." It should be noted that the arbitrary refusal to provide information is dangerous and leads towards a real form of censorship, while the concealment of information is no less dangerous, since it „undermines the purposes the right was meant to achieve[83]"; again, it is necessary to bear in mind that „Court's early jurisprudence construed Article 10 more narrowly than these purposes seem to call for[84]." The Court's role will be discussed in greater detail in Part 2.

[80] KUCZERAWY A. Fighting Online Disinformation: Did the EU Code of Practice Forget about Freedom of Expression? In: Terzis G, Kloza D, Kużelewska E, Trottier D, eds. Disinformation and Digital Media as a Challenge for Democracy. European Integration and Democracy Series. Intersentia; 2020:291-308. p. 300
[81] DÖHMANN I. Communication of State Authorities: The Power of the Office. In: KROTOSZYNSKI R. J. Jr., KOLTAY A. GARDEN C. (eds.) (2025). Cambridge University Press, http://dx.doi.org/10.1017/9781009373272 p. 83
[82] *Társaság a Szabadságjogokért v. Hungary*, [ECHR], No. 37374/05 [14-7-2009].
[83] PENTNEY K. (2022). Tinker, Tailor, Twitter, Lie: Government Disinformation and Freedom of Expression in a Post-Truth Era. Human Rights Law Review, 22, 1–29. https://doi.org/10.1093/hrlr/ngac009, p. 8
[84] Ibid, p. 9

## 2. THE COURT AS GUARDIAN OF FREEDOM OF EXPRESSION

Although the title of this chapter refers to the Court as the guardian of freedom of expression, it is important to emphasise that the Court acts as the guarantor of all the rights and freedoms enshrined in the Convention. Nevertheless, the title is not inaccurate, at least with regard to political rights and freedoms. The Court's principal vision is "the ideal of a liberal representative democracy with the emphasis placed on protecting the key liberal rights of free expression, assembly and association[85]."

Despite the fact that the Court is only one of the three institutions established under the Convention, it is "the Court, through its case - law, that has given – and continues to give – the Convention its full significance, making it the principal binding international instrument for the protection of human rights[86]."

Taking into account the relationship between disinformation and freedom of expression, and seeking to understand the issues raised by that relationship, we should look for answers in the Court's jurisprudence. Only through the practical application of the Convention can both the potential impact and the methods (approaches) be revealed which, by analogy, this practice may offer for resolving the problem examined in this work. Perhaps the most precise (and vivid) articulation of the Convention's place within the legal framework – and, at the same time, of the Court's importance in interpreting it – was given by the Court's former President, Jean-Paul Costa, in his 2008 speech in Helsinki. Emphasising that the Convention is like „the skeleton that supports and protects the democratic state[87]," he also observed that „through its extensive case law, composed of cases from mature democracies as well as emerging democracies, the European Court has put flesh on these bones[88]."

[85] O'CONNELL, R. (2020). Law, democracy and the European Court of Human Rights. New York, NY : Cambridge University Press. doi: 10.1017/9781139547246, p. 268
[86] Costa, J.-P. (2020). La Cour européenne des droits de l'homme. Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional, 21–29. https://doi.org/10.7202/1078526ar, p. 24
[87] COSTA Jean-Paul, President of the European Court of Human Rights (Helsinki, 5 June 2008). The links between democracy and human rights under the case-law of the European Court of Human Rights [speech]. https://www.echr.coe.int/documents/d/echr/Speech_20080605_Costa_Helsinki_ENG, p. 2
[88] Ibid.

### 2.1. Judicial practice in the application of Article 10

In analysing the subject, an important auxiliary tool is the ECHR Knowledge Sharing platform[89], which not only clearly organises the jurisprudence according to the individual Articles of the Convention, but also provides relevant keywords, connections with other Articles, and useful references. From this, we may observe that the jurisprudence on the application of Article 10 of the Convention is quite well developed by the Court.

Nevertheless, despite the extensive list of cases relating to this freedom, each new related case presents the Court with fresh challenges, primarily due to rapid technological progress. The raising of questions of responsibility when something goes wrong on the internet, the rights and duties of content-access service providers (intermediaries), which can readily turn into censorship, and, finally, the State's aspiration, according to its own understanding, to regulate online communication - all of this inevitably permeates the Court's daily adjudicatory practice. Perhaps for this reason „navigating the middle between the two extreme positions is proving increasingly difficult for Strasbourg judges[90]". And, according to some authors, this leads to the conclusion that „more than in judgments dealing with other rights in the European Convention on Human Rights (ECHR), the Court has often shown itself to be a house divided when it comes to freedom of expression[91]".

Therefore, to form a broader picture of the field in which the means of disinformation operate, we must first employ the analysis of specific cases concerning freedom of expression, including cases involving its restriction. Only through the analysis of these cases, together with the doctrines developed and the principles applied by the ECtHR, can we assess the real risk that may arise when fake news affects the key processes by which States and their individual citizens obtain information, as well as the true impact of disinformation on the right freely to express ideas, and to receive and impart information. It is also necessary to evaluate the role, within the Court's judgments, of the establishment of relevant standards by European institutions (e.g., the Council of Europe), particularly when discussing normative instruments related to the protection of freedom of expression online.

[89] https://ks.echr.coe.int/web/echr-ks/article-10

[90] HUSOVEC, M., GROTE, T., MAZHAR, Y., MIKHAEIL, C., ESCALONA, H. M., KUMAR, P. S., SREENATH, S. (2024). Grand confusion after Sanchez v. France: Seven reasons for concern about Strasbourg jurisprudence on intermediaries. Maastricht Journal of European and Comparative Law, 31(3), 385-411. https://doi.org/10.1177/1023263X241268436, p. 386

[91] BUYSE A. (2014). Dangerous expressions: the ECHR, violence and free speech. International and Comparative Law Quarterly, vol 63, pp 491–503 [online]. doi:10.1017/S0020589314000104, p. 492

As some authors have already observed, the Court is making the necessary "efforts to adapt traditional free speech principles to the challenges posed by digital communication <...>", thereby striving "not to fall behind social developments and developing new jurisprudence in parallel, despite sources of law that are older[92]." Accordingly, when analysing the judicial application of Article 10, attention will be paid to how such reasoning in freedom of expression cases may be applied to the issues examined in this research.

It should be noted that the subsequent division of freedom of expression cases into offline and online categories is solely the author's own classification, based on the nature of the Court's judgments, and is intended to facilitate a more convenient and structured analysis of the cases in light of the subject matter of this thesis.

### 2.1.1. Offline freedom of expression

Drawing on the context of the Convention as interpreted by the ECtHR, Jaskiernia argues that the member States of the Council of Europe „have an obligation to secure the rights and freedoms for everyone within their jurisdiction, both offline and online[93]." Proceeding from this proposed interpretation, this subsection will focus primarily on the Court's jurisprudence concerning the application of Article 10 in offline practice cases.

It is advisable to begin the analysis with a trio of cases against Poland, which are significant for understanding the Court's development of offline practice and were connected with local electoral laws. In the first of these, Kwiecień v. Poland, the applicant, dissatisfied with a local candidate in the forthcoming elections, circulated an open appeal (letter) in which the candidate was urged to withdraw his candidacy and his performance as a public official was criticised. The candidate brought proceedings against the applicant under local electoral laws, seeking the refutation of what he considered false information about him and compensation for damage. In the applicant's letter – something acknowledged by the courts - not all of the applicant's statements could be (and were) substantiated by facts. Given that the case concerned elections, the Court sided with the public interest, stating that „opinions and information pertinent to elections, both local and national, which are disseminated during the electoral campaign should be considered as forming part of a debate on questions of public interest, unless proof to the contrary is

[92] SUDAR, V. & MISEVIC, S. (2025). Freedom of Speech and Democracy in Europe: Legal Challenges and Institutional Responses. EU and Comparative Law Issues and Challenges Series, 9, 21-41. DOI: https://doi.org/10.25234/eclic/38089 p. 26

[93] JASKIERNIA, A. (2021). Information pollution in a digital and polarized world as a challenge to human rights protection – the Council of Europe's approach. Review of European and comparative law Volume XLVI, Issue 3, pp. 7–26 [online] DOI: https://doi.org/10.31743/recl.12389, p. 16

offered[94]". Moreover, the ECtHR noted that the Polish courts treated all the applicant's statements as facts requiring proof, whereas the Court indicated (and substantiated this with specific examples in its judgment) that part of the statements could be characterised as value judgments, which is very important in the electoral context when society debates candidates' suitability for office. Thus, in finding that "applicant's statements were not a gratuitous personal attack on Mr S.L., but part of a debate on matters of public interest[95]," the Court's judgment highlighted the importance of value judgment as an element not necessarily susceptible to proof, which would be emphasised in other Court cases.

In another case, Kita v. Poland, the applicant distributed leaflets reproducing an article that exposed alleged financial irregularities within the local municipality. The Court, as in the previous case, emphasised the crucial distinction between factual statements and value judgments, noting that the Polish courts had "unreservedly qualified all of them as statements which lacked any factual basis without examining the question whether they could be considered to be value judgments[96]." As in the earlier case, the Court held that, although some of the statements might have lacked a factual basis, given that they were made within an active political environment and aimed at stimulating debate about the conduct and suitability of politicians, the applicant's statements "formed part of a debate on matters of public interest[97]."

The third case against Poland, Brzeziński v. Poland, similarly involved a claim brought against the applicant for distributing leaflets containing information about other candidates in local elections. The applicant himself was a candidate for the same municipality council. The Court again observed that the local courts, without conducting any detailed analysis, adopted a decision directed against the applicant, merely declaring that all the information he had disseminated was false. Although the Court acknowledged that "it is necessary to combat the spread of misleading information about election candidates in order to preserve the quality of public debate during the pre - election period[98]", it nevertheless emphasised that the promotion of political pluralism during election campaigns is of exceptional importance and should be actively encouraged.

Another, arguably fundamental, case is Salov v. Ukraine, which also concerned elections. Unlike in the previous cases, the applicant, who was both a journalist and a participant in an electoral campaign, distributed a newspaper containing information that a

[94] *Kwiecień v. Poland,* [ECHR], No. 51744/99 [9-4-2007].
[95] Ibid.
[96] *Kita v. Poland,* [ECHR], No. 57659/00 [8-10-2008].
[97] ibid.
[98] *Brzeziński c. Pologne,* [ECHR], No. 47542/07 [25-7-2019].

presidential candidate had died and been replaced by a look - alike. The applicant was neither the author nor the editor of the newspaper in question. Domestic courts imposed criminal sanctions against him. And the Court, again noting that the national courts assessed only questions of fact (with the ECtHR accepting that the information disseminated was false), did not undertake a more thorough evaluation of the applicant's true intentions - namely, that he not only did not seek to mislead voters, but sought to use the opportunity to discuss the issue with those potential voters. Such actions, in the Court's view, are recognised as consistent with the spirit of the Convention, emphasising that „article 10 of the Convention as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful[99]".

The ECtHR has examined numerous cases in which, when a collision arose between matters of fact and value (moral) assessment, the Court's scales - under certain conditions, such as political pluralism, the public interest, and the like - tilted in favour of the latter[100]. Despite the fact that, at times, the contested passages in articles or other works (e.g., a poem) approached an accusation of a fascist past (in a figurative sense), the Court held that „applicant's statement was clearly made in a very political context[101]". This implies a possible excessive strictness in Member States' legal regulation, contrary to established human rights standards. As commentators rightly note when discussing the Polish court decisions addressed above, there arise „serious questions about the compatibility of legislation that seeks to target false information, but does not allow for examination of whether there has actually been undue harm to reputation or candidates' personality rights[102]." These compatibility concerns may undoubtedly also arise when assessing the legal regulation devised by Member States aimed exclusively at the containment of disinformation.

### 2.1.2. Online freedom of expression

Already in one of the cases mentioned earlier in this work, the Court expressed a position on the role of the internet as posing a threat to human rights and freedoms (in comparison with the printed press). However, in more than one case the Court has also recognised the

[99] *Salov v. Ukraine*, [ECHR], No. 65518/01 [6-12-2005].
[100] *Feldek v. Slovaki*, [ECHR], No. 29032/95 [12-10-2001]. Lombardo and Others v. Malta, [ECHR], No. 7333/06 [24-7-2007].
[101] *Feldek v. Slovaki*, [ECHR], No. 29032/95 [12-10-2001] para 84
[102] HOBOKEN, J.V. & Ó FATHAIGH, R. (2021). Regulating Disinformation in Europe: Implications for Speech and Privacy. UC Irvine Journal of International, Transnational, and Comparative Law , 6(1), Retrieved from https://escholarship.org/uc/item/87m4t6vf, p. 25

enabling potential of the internet in relation to freedom of expression. In one of the first cases of this kind, Times Newspapers v The United Kingdom, the Court not only emphasised the benefits of the internet („plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general[103]") and of online archives to the general public, but also pointed out, as a significant detail, that online archives are „important source for education and historical research, particularly as they are readily accessible to the public and are generally free[104]." Thus, the Court underscored the advantages - already discussed above in this work - of the accessibility of information via the internet in terms of speed and low economic costs (or their complete absence).

In two further cases against Turkey, the Court likewise emphasised the importance of the internet and its undeniable impact on the exercise of freedom of expression. In Ahmet Yıldırım v. Turkey, which concerned the blocking of the applicant's website pursuant to a measure unrelated to his site, the Court, while noting the limited effect of such measures, nevertheless observed that „internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest[105]". In another case, Cengiz and Others v. Turkey, which concerned the blocking of the video-sharing platform (YouTube) with a view to controlling the dissemination of information regarding the commemoration of the country's leader, the Court, referring to the above-mentioned cases which highlighted the importance of the internet in the field of human rights, further noted that the video-sharing site YouTube, beyond enabling users to view, upload, and share content, is „undoubtedly an important means of exercising the freedom to receive and impart information and ideas[106]".

When analysing Article 10 cases relating to the receipt, reproduction, and sharing of content (information) disseminated on the internet, in the case already referenced in this work - Editorial Board of Pravoye Delo and Shtekel v. Ukraine - the Court's reasoning emphasised the significance of the journalist (the media) in a democratic society. Even though, in that case, the media republished sources found online which did not necessarily contain only verified and accurate information, the Court noted that even then „complete exclusion of such information from the field of application of the legislative guarantees of

[103] *Times Newspapers Ltd (nos. 1 and 2) v. the United Kingdom,* [ECHR], Nos. 3002/03 and 23676/03 [10-6-2009]
[104] ibid, para 45
[105] *Ahmet Yıldırım v. Turkey*, [ECHR] No 3111/10 [18-12-2012].
[106] *Cengiz and Others v. Turkey,* [ECHR], Nos. 48226/10 and 14027/11 [1-3-2016].

journalists' freedom may itself give rise to an unjustified interference with press freedom under Article 10 of the Convention[107].“

The landmark and frequently cited case Delfi AS v. Estonia not only clarified the liability of major online news portals for unlawful (defamatory) comments posted in their comment sections – in this instance concerning a large shipping company – but also established that such intermediaries have a duty to respond to these comments and remove them when notified by individuals whose rights have been infringed. While acknowledging that the anonymity of Internet users contributes to the free flow of information and ideas online, the Court nonetheless emphasised its awareness of the "ease, scope and speed of the dissemination of information on the Internet, and the persistence of the information once disclosed, which may considerably aggravate the effects of unlawful speech on the Internet compared to traditional media[108]." In this judgment, we can also discern an acknowledgement that, throughout the history of the dissemination of information, there has been nothing comparable to the way in which „fast, and deeply social media has changed the world order.[109]“

In two further cases against Hungary, the Court, in finding violations of Article 10 of the Convention, addressed journalists' freedom of expression. In Magyar Jeti Zrt v Hungary, where an online hyperlink was published together with an article and the linked content consisted of defamatory information, and the domestic courts held that responsibility should be borne by the entity that published the article (the media outlet), the Court, having examined in detail the nature of a hyperlink, nevertheless found in favour of the journalists, disagreeing with the domestic decisions and stating that „the mere posting of a hyperlink with the dissemination of defamatory information, automatically entailing liability for the content itself.[110]“ The Court again noted that punishing a journalist for such an act would weaken the role of the media in safeguarding the public interest.

By contrast, in Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary, the issue again arose in relation to offensive (defamatory) comments posted by third parties in comment sections operated by internet portals. And although the Court discerned similarities with Delfi v Estonia, given that one of the applicants was also one of Hungary's largest online news portals, the Court assessed the other applicant (a small company) differently, whose influence and reach could have produced only minimal consequences

[107] *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, [ECHR], No 33014/05 [5-5-2011].
[108] *Delfi AS v. Estonia*, [ECHR], No 64569/09 [16-6-2015].
[109] SINGER, P. W., & BROOKING, E. T. (2018/2019). LikeWar: The Weaponization of Social Media. Eamon Dolan/Houghton Mifflin Harcourt, 416 pp. ISBN: 978-1328695741, p. 219
[110] *Magyar Jeti Zrt. v. Hungary,* [ECHR], No 11257/16 [4-3-2019].

even without removing the comments. Moreover, taking into account that the comments did not contain hate speech, the Court classified them as comments „common in communication on many Internet portals[111]". The Court reiterated the essential role of the media (including online media) in a democratic society, noting that „punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest[112]".

In summary, across all the "offline" cases discussed above, the ECtHR consistently prioritises the protection of political pluralism and upholds wide latitude for permissible political criticism. This constitutes a fundamental condition for the existence of states founded on the protection of human rights, as the Court itself has emphasised that "it is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself[113]."

It is important to note that in all of these cases (with the exception of Delfi v. Estonia, where the opposite conclusion was reached), a common feature is that the Court not only found a violation of Article 10 in favour of the applicants, but also recognised that they had acted in good faith – a factor that constituted one of the decisive elements in the Court's reasoning in their favour.

From the perspective of restricting disinformation, it is important to note the doctrine developed by the Court concerning facts and value judgments, which may constitute one of the components when deciding on the liability of a person disseminating incorrect, unsubstantiated, or even fabricated information. Accordingly, whenever an absolutely well-founded and accurate factual basis is demanded, we encounter a challenge to forms of freedom of expression grounded in value-based convictions, which would likewise have to be proved (substantiated), whereas both judicial practice and commentators indicate that „place the emphasis on judging the expression of opinion as a whole, the participation of the speaker in the democratic dialogue becomes much more protected[114]."

[111] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v. Hungary*, [ECHR], No 22947/13 [2-5-2016].
[112] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v. Hungary,* [ECHR], No 22947/13 [2-5-2016].
[113] *Manole and Others v. Moldova*, [ECHR], No 13936/02 [17-9-2009].
[114] TÖRÖK B. The Fight against Disinformation in the Council of Europe, and the Relevant Case Law of the European Court of Human Rights. In: KROTOSZYNSKI R. J. Jr., KOLTAY A. GARDEN C. (eds.) (2025). Disinformation, Misinformation, and Democracy: Legal Approaches in Comparative Context. Cambridge University Press, pp. 161–196. http://dx.doi.org/10.1017/9781009373272 p. 174

## 2.2. ECtHR mechanisms for implementing Article 10(2)

As already noted earlier in this work, freedom of expression cannot be absolutised; accordingly, the grounds for its restriction are set out in Article 10(2). The Convention, stipulating that the exercise of the rights enshrined in Article 10(1) may be subject to certain constraining conditions (restrictions, sanctions) which may be imposed only on a legitimate (statutory) basis and, emphasising the democratic structure of society, establishes that the Contracting States' ability to restrict freedom of expression is very limited. And the exhaustive list of these restrictions is laid down only where it is necessary to protect:

- The interests of national security, territorial integrity, or public safety;
- The prevention of disorder or crime;
- The protection of health or morals;
- The protection of the reputation or rights of others;
- The prevention of the disclosure of information received in confidence;
- The maintenance of the authority and impartiality of the judiciary.

All of the protective measures listed above, which are of particular significance for democracy, are also employed by the ECtHR as one of the methods (approaches) when examining cases related to hate speech and freedom of expression. The use of these measures may be crucial when the Court has to adjudicate a case involving the dissemination of disinformation that directly and significantly affects the State; it is therefore necessary to look more closely at the approaches the Court is shaping in this regard. When adjudicating such cases, the first approach adopted by the Court is: "the approach of exclusion from the protection of the Convention, provided for by Article 17" (which will be examined in subsequent sections), and the second is: "the approach of setting restrictions on protection, provided for by Article 10(2).[115]"

Indeed, the ECtHR does not confine itself to the classification of only these two methods; rather, it „has gradually developed a full array of categories of expression and balancing tests, which operate in virtually every corner of the ECHR system[116]". One of the most significant of these – the so - called three - part test (referred to by Sardo as "the necessity test") – will be examined in the following subsection.

[115] Factsheet – Hate speech [ECHR]. Press unit, 2023 [online] https://www.echr.coe.int/factsheets
[116] SARDO A. (2020). Categories, Balancing, and Fake News: The Jurisprudence of the European Court of Human Rights. Canadian Journal of Law & Jurisprudence XXXIII No.2 August 2020, 435-460. Doi: 10.1017/cjlj.2020.5, p. 440

### 2.2.1. The three – part test

For a Contracting State to be recognised as having lawfully restricted freedom of expression under the Convention, it must satisfy the three - part test established in the Court's jurisprudence. The conditions justifying restrictions on freedom of expression are as follows:

1. It must be prescribed by law;
2. It must be aimed at achieving one of the legitimate goals stated in the wording of Article 10(2) of the ECHR;
3. It must be necessary in a democratic society[117].

Given that freedom of expression is interpreted very broadly, any restrictions upon it are subject to a strictly narrow interpretation (only to the extent expressly provided). As emphasised by Judge Evrigenis in his separate opinion in Sunday Times v. the United Kingdom, the limitations set out in Article 10(2) "constitute exceptions to the exercise of that right" and therefore "must be narrowly interpreted <…> clearly and unequivocally defined, thus <…> permitting anyone exercising his freedom of expression to act with reasonable certainty as to the consequences in law of his conduct[118]." It follows that a State's interference with the freedom of expression of individuals within its jurisdiction can be regarded as lawful only if all three requirements are met. The primary responsibility for conducting this assessment lies with national courts, which must draw on the jurisprudence developed by the ECtHR. The Court itself, by contrast, functions as "the last resort[119]."

Whenever allegations arise that a Contracting State has violated the freedom guaranteed under Article 10, the Court first examines whether the interference was "prescribed by law". In the aforementioned case Sunday Times v. the United Kingdom, the Court identified two essential requirements for such a law: accessibility and foreseeability. Accessibility refers to the individual's ability to obtain adequate information about the applicable legal provisions, ensuring that, in the circumstances of a particular case, they are aware of the obligations imposed upon them by law. An appropriate example, according to the Court, is the official publication of legislation in the State's official legal gazette (Semir Güzel v. Turkey, para 35[120]).

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[117] DUKANOVIC, A. (2021). Limitations on Freedom of Expression in Practice of the European Court of Human Rights and the Notion of Disinformation. NBP. Nauka, Bezbednost, Policija, 26(2), 31-42, p. 35
[118] *Sunday Times v. the United Kingdom*, [ECHR], No 6538/74 [26-4-1979].
[119] MACOVEI M. (2004). A guide to the implementation of Article 10 of the European Convention on Human Rights 2nd edition. Directorate General of Human Rights Council of Europe. [online] https://www.coe.int/en/web/human-rights-rule-of-law/human-rights-handbooks p. 30
[120] *Semir Güzel v. Turkey*, [ECHR], No 29483/09 [13-12-2016].

The Court further held that only a legal norm "formulated with sufficient precision to enable the citizen to regulate his conduct <…>" and allowing them "to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail[121]" can be regarded as a law within the meaning of Article 10(2). Nevertheless, foreseeability does not imply absolute certainty of outcome, as the Court has acknowledged that this would be impossible. The law must be capable of adapting to changing circumstances and prevailing social attitudes, even if this means that "many laws are couched in terms which are to some extent vague and whose interpretation and application are questions of practice[122]."

Regarding the second part of the test, the Court determines whether the restrictions listed in Article 10(2) were aimed at achieving legitimate objectives. Without discussing each ground for restriction individually, it is worth noting that the Court is not obliged to accept them all; it may endorse some and reject others. For instance, in the case of *Stoll v. Switzerland*, where the Government invoked several grounds, the Court dismissed most of them and confirmed only one, noting that "concepts need to be applied with restraint and to be interpreted restrictively and should be brought into play only where it has been shown to be necessary[123]." Moreover, the Court may find a violation of Article 10 solely on the basis that no legitimate aim was pursued, without proceeding to the third stage of the test. Nonetheless, depending on the circumstances of the case, the Court may also choose to continue its analysis to assess whether the restriction was "necessary in a democratic society[124]," even if the legitimacy of the aim is in doubt.

The third element – the "necessity in a democratic society" – is perhaps the most extensively developed in the Court's jurisprudence. Applying the principle of proportionality, the Court assesses whether the measure adopted by the State was proportionate to the legitimate aims set out in Article 10(2). In this context, a "measure" refers to the specific action by which the State restricted freedom of expression. Examples include "a criminal conviction for insult or defamation; an order to pay civil damages; an injunction against publication; prohibition of the journalistic profession; the search of a newspaper's premises; the seizure of the means by which an opinion is expressed, etc.[125] "

In its Guide on Article 10, the Court further categorises this criterion as follows:

1. Existence of a "pressing social need";

[121] Ibid, para 34.
[122] *Perinçek v. Switzerland*, [ECHR], No 27510/08 [15-10-2015].
[123] *Stoll v. Switzerland*, [ECHR], No 69698/01 [10-12-2007].
[124] *Kövesi v. Romania*, [ECHR], No. 3594/19, [5-8-2020]. para 199
[125] BYCHAWSKA-SINIARSKA D. (2017). Protecting the right to freedom of expression under the European Convention of Human Rights. A handbook for legal practitioners, Council of Europe, 2017, p. 44

2. Assessment of the nature and severity of the sanctions:

i) The least restrictive measure;

ii) General measures;

3. Requirement of relevant and sufficient reasons[126].

It is not sufficient for a restriction to be merely "reasonable" or "appropriate." As the Court stated in Barthold v. Germany, "necessary" is not synonymous with "indispensable," nor does it have the flexibility of expressions such as "admissible," "ordinary," "useful," "reasonable," or "desirable"; rather, it implies a "pressing social need[127]." The Court also emphasised that, while Contracting States enjoy a certain margin of appreciation, this does not exempt them from European supervision, and it is ultimately for the Court to determine whether the restriction was justified on appropriate grounds.

In assessing how proportionality is maintained within the scope of measures adopted by States, the Court carefully ensures that those measures are not censoring[128] and do not have a „deterrent" effect[129]. Equally strictly, the Court assesses situations in which sanctions have been imposed for insufficient or unfounded reasons, holding that „the leniency of the penalty imposed cannot in itself compensate for the lack of relevant and sufficient reasons for restricting the right to freedom of expression[130]."

A broader examination of the relationship between the restriction grounds referred to in this subsection and freedom of expression (including disinformation) will be undertaken in the third part of the thesis.

### 2.2.2. The Margin of Appreciation

Article 1 of Protocol No. 15, amending the Convention for the Protection of Human Rights and Fundamental Freedoms, introduced an addition to the Convention's Preamble, stipulating that the States Parties, guided by the principle of subsidiarity, are obliged to secure the rights and freedoms defined in the Convention and, in doing so, "enjoy a margin of appreciation[131]." The Protocol entered into force on 1 August 2021. However, neither the Protocol nor the Convention itself provides an explanation of what the margin of

[126] Council of Europe / European Court of Human Rights (2022). Guide on Article 10 of the European Convention on Human Rights. Freedom of expression. p. 23-26
[127] *Barthold v. Germany*, [ECHR], No 8734/79 [25-3-1985].
[128] *Bédat v. Switzerland*, [ECHR], No. 56925/08, [29-3-2016] para 79
[129] *Timpul Info-Magazin and Anghel v. Moldova*, [ECHR], No. 42864/05, [2-6-2008] para 39
[130] *Tőkés c. Roumanie*, [ECHR], Nos 15976/16 et 50461/17 [27-4-2021].
[131] Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedom, Council of Europe Treaty Series - No. 213, Strasbourg, 24.VI.2013 [online] https://www.echr.coe.int/documents/d/echr/Protocol_15_ENG

appreciation (MoA) referred to in the Preamble actually entails. This doctrine has been most thoroughly developed by the Court through its case - law, as well as by subsequent scholarly analysis.

In academic literature, the MoA doctrine is often described as a process through which "central authorities within the treaty system decide upon the scope of their own supervisory powers, and consequently upon the scope of the discretion that will remain vested in the national authorities[132]" when interpreting and applying the rights and freedoms guaranteed by the Convention. Other authors describe the doctrine as seeking "to strike a balance between the needs of the community, such as public interest and public order (in other words, certain state interests), and the requirements of protecting the rights and freedoms of the individual[133]." Yourow additionally notes that the doctrine can be defined as "the breadth of deference the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies[134]" before the Court decides to overturn national measures on Convention grounds.

The most relevant application of the MoA in this context concerns cases under Article 10. Accordingly, it is worth examining how the doctrine operates within the Court's jurisprudence. A landmark case that clearly set out the limits of the MoA is Handyside v. the United Kingdom. The case concerned the content of an educational publication for children issued by the applicant, who was the owner of a publishing company. In addressing the issue of morality, the Court observed that it is far better understood by the States, given their familiarity with prevailing societal attitudes, than by an international body such as the Court. Recognising that the United Kingdom enjoyed a wider MoA in matters concerning morality, the Court nevertheless observed (in a statement frequently cited in later cases) that the protection of freedom of expression applies "not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population[135]." Nevertheless, having noted this, the Court refrained from defining the concept of morality itself and therefore recognised that discretion in this case lay with the United Kingdom (the confiscation of the books was held to be necessary in a democratic society).

[132] YOUROW H. C. (Fall 1987), The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence, Connecticut Journal of International Law 3, no. 1: 111-160, [online] https://heinonline.org/HOL/Page?handle=hein.journals/conjil3&id=119, p. 111
[133] VIENAŽINDYTĖ J. (2014). Vertinimo nuožiūros laisvės doktrina europos žmogaus teisių teismo jurisprudencijoje. TEISĖ 90, pp 188-210. ISSN 1392-1274. p. 189
[134] ibid. p. 118
[135] *Handyside v. The United Kingdom*, [ECHR], No. 5493/72, [7-12-1976].

Another area where the Court tends to grant States a broader MoA is that of economic affairs or commercial advertising. Even where "speech falls outside the commercial advertising context <...> it is nevertheless closer to commercial speech than to political speech *per se*[136]", thus permitting States a wider MoA.

An illustrative case combining both religion (morality) and advertising is Sekmadienis Ltd. v. Lithuania. The applicant relied on the principles established in Handyside, and although the Court acknowledged that the MoA in such areas tends to be wider, but not absolute, it upheld the applicant's arguments, finding that "the domestic authorities failed to strike a fair balance[137]". This demonstrates that the scope of the MoA in the Court's jurisprudence may vary depending on the circumstances of the case.

The Court has repeatedly emphasised that States enjoy a much narrower MoA where freedom of political expression or debates on matters of public interest are concerned. In the case of *Baka v. Hungary*, which involved the freedom of expression of a public official (the President of a Supreme Court), the Court acknowledged that while stricter standards of professional conduct apply, the applicant's position "fell within the context of a debate on matters of great public interest, [which] called for a high degree of protection for his freedom of expression and strict scrutiny of any interference[138]." However, the Court has never clarified precisely what is meant by "great public interest" within its jurisprudence.

Moreover, the Court's doctrine has been criticised for the inconsistent application of the consensus theory, as well as for the uncertainty regarding how many Member States are required to establish a particular national context or prevailing European practice, since this directly affects the scope of the MoA. Consequently, it has been argued that "the consensus theory argument may become a tool of judicial arbitrariness[139]."

To summarise, it should be noted that the application of the MoA has been developed quite comprehensively in the Court's adjudication of freedom of expression cases. However, both certain cases and commentary by legal scholars indicate that the doctrine has limits to its application, which can be reviewed (and, where necessary, adjusted) only through new case-law.

[136] *Mouvement raëlien suisse v. Switzerland*, [ECHR], No. 16354/06, [13-7-2012].
[137] *Sekmadienis Ltd. v. Lithuania*, [ECHR], No. 69317/14, [30-1-2018].
[138] *Baka v. Hungary*, [ECHR], No. 20261/12, [23-6-2016].
[139] VIENAŽINDYTĖ J. (2014). Vertinimo nuožiūros laisvės doktrina europos žmogaus teisių teismo jurisprudencijoje. TEISĖ 90, pp 188-210. ISSN 1392-1274. p. 198

### 2.3. Article 17 of the Convention – Prohibition of abuse of rights

Generally, the internal legal structure of laws, codes, and international instruments such as human rights conventions is based on the principle that all provisions within a legal act do not operate in isolation but interact with and complement one another. This is also true for Article 10 of the Convention, which, within the overall system of the Convention, does not and cannot function independently of its other provisions. Therefore, this section will examine the interaction of the aforementioned article with Article 17[140] of the Convention, referred to in legal literature as the "abuse clause[141]" or "guillotine[142]" provision, in the Court's jurisprudence.

In the case of *Garaudy v. France*, the applicant, an author of numerous books, published a book that examined in detail the events of the Second World War, including the Holocaust, which he denied. The applicant argued that all excerpts taken from his book were quoted out of context and that his conviction violated Article 10 of the Convention. The Court, however, noted that the applicant's statements could not be regarded as historical research when they involved denying universally established facts such as the Holocaust, and that his statements could be classified as racist. On this basis, the Court stated "that, in accordance with Article 17 of the Convention, the applicant cannot rely on the provisions of Article 10 of the Convention regarding his conviction for denying crimes against humanity[143]." Commenting on this judgment, Bychawska - Siniarska observes that such decisions reflect the theory of the paradox of tolerance, which holds that "an absolute tolerance may lead to the tolerance of ideas promoting intolerance, and the latter could then destroy the tolerance[144]."

In another case, Perinçek v. Switzerland, the Court adopted a somewhat different approach to legal assessment. In this landmark case concerning Article 10, the applicant was convicted for denying the existence of the Armenian genocide during official events in Switzerland. The Court, on its own initiative and as its first point of consideration,

[140] Article 17 of the Convention provides that: 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.
[141] Hanych M, Pivoda M. Disinformation and Fake News in Current Jurisprudence of the Strasbourg Court: An Unsolved Problem. In: Terzis G, Kloza D, Kużelewska E, Trottier D, eds. Disinformation and Digital Media as a Challenge for Democracy. European Integration and Democracy Series. Intersentia; 2020:249-268. p. 255
[142] FLAUSS J. F. (2009) The European Court of Human Rights and the Freedom of Expression. Indiana law journal [Vol. 84:809]. [online] https://ilj.law.indiana.edu/197/ p. 837
[143] *Garaudy c. France*, [ECHR], No. 65831/01, [24-6-2003].
[144] BYCHAWSKA-SINIARSKA D. (2017). Protecting the right to freedom of expression under the European Convention of Human Rights. A handbook for legal practitioners, Council of Europe, 2017, p. 44

examined whether Article 17 should apply and concluded that "the applicant had not used his freedom of expression for ends contrary to the text and spirit of the Convention[145]" and therefore found no legal grounds for applying Article 17. Continuing its examination of the alleged violation of Article 10, the Court classified the applicant's statements as legal and political, and most importantly, as necessary for public discourse, which undoubtedly implied a reduction of Switzerland's margin of appreciation.

This case also highlighted the division within the Court noted earlier in this work – the Grand Chamber did not reach a unanimous decision on any issue: four judges (out of seventeen) opposed the non - application of Article 17, while seven judges opposed finding a violation of Article 10. At this point, one may recall the observations of authors mentioned above regarding the Court's differing criteria (interpretation of genocide) when (not) applying Article 17, as well as the criticism concerning the inconsistent development of the margin of appreciation doctrine. These concerns were also raised in the dissenting opinions of the Grand Chamber judges, who noted that the Court had found no universal consensus on the fact of the Armenian genocide ("the question of consensus, as a limit to the national authorities' margin of appreciation, would arise only if there were a consensus that criminalising such conduct was explicitly forbidden[146]"). In another separate opinion, worthy of further analysis, the judges reviewed the historical context of Article 17's application in other cases and emphasised the lack of substantive examination of Article 17. The judges argued that the Court should have applied Article 17 "as a guiding principle for the interpretation of Article 10 at the 'necessity' stage of Article 10 (2)[147]."

In several other cases, such as *Kühnen v. Germany* or *W.P. and Others v. Poland*, the Court directly applied Article 17, and it should be noted that these cases also concerned Holocaust denial or denigration of Jews as a people. However, in another case, *Lilliendahl v. Iceland*, the Court held that offensive statements about homosexual persons did not fall within the scope of Article 17, observing that "it is not immediately clear that they aimed at inciting violence and hatred or destroying the rights and freedoms protected by the Convention[148]" and proceeded to examine the case using the three - part test. Although in this case the applicant's complaint was declared inadmissible, it appears that we are confronted with an individualised approach by the Court in applying Article 17 (we infer that cases concerning the Holocaust of the Second World War will fall within the ambit of this Article), which means that we cannot derive any rules of a more general nature that

[145] *Perincek v. Switzerland*, [ECHR], No. 27510/08, [15-10-2015].
[146] ibid.
[147] ibid. Additional dissenting opinion of judge Silvis, joined by judges Casadevall, Berro and Kūris, p. 127.
[148] *Lillendahl v. Iceland*, No. 29297/18, [11-6-2020].

would, with the assistance of the case-law, help to form a broader picture in this type of case. A clear formulation of rules would assist the Member States, which far more often than the Court must decide on the necessity of restricting freedom of expression (including harmful disinformation).

When discussing the application of Article 17 in freedom of expression cases, it should be noted that such cases typically concern hate speech, defamation, or other forms of expression that fundamentally undermine the values protected by liberal democracy and the Convention. While not identical, hate speech contains elements of disinformation. Accordingly, the Court's jurisprudence and its principles of application discussed above could also be applied to disinformation, since "in its radical sense, this concept is per se contrary to all values that the Convention promotes and protects[149]." A similar position is taken by Hanych and Pivoda, who, drawing from the Court's jurisprudence related to the application of Articles 17 (including 10), identify the key arguments of the Court that would be relevant in examining cases related to disinformation. The authors highlight the following points:

1. The Court takes into consideration the truthful nature of the statements expressed;

2. It recognises certain duties and responsibilities of the speakers when assessing their conduct;

3. It carefully examines the pressing social need and proportionality of the restrictions, taking into account a number of aspects, such as the severity of the limitation, the intention of the speakers, the impact of the statements and the nature of the false information[150].

[149] DERENČINOVIĆ D. (2021). Freedom of Expression and its Restrictions in Europe: On the Applicability of Article 17 of the European Convention of Human Rights to Disinformation (Fake News). Law, Identity and Values, 1(2), 7–18. https://doi.org/10.55073/2021.2.7-18. p. 15.

[150] Hanych M, Pivoda M. Disinformation and Fake News in Current Jurisprudence of the Strasbourg Court: An Unsolved Problem. In: Terzis G, Kloza D, Kużelewska E, Trottier D, eds. Disinformation and Digital Media as a Challenge for Democracy. European Integration and Democracy Series. Intersentia; 2020:249-268. p. 261

## 3. PROTECTION OF DEMOCRATIC PROCESSES IN THE FACE OF DISINFORMATION

The foundations of any democracy rest on critically important elements such as national security, public health, the administration of justice, and elections. From a broad perspective, all these areas can be, and frequently are, affected by disinformation. Yet, as cases directly addressing disinformation have not been examined – more precisely, as disinformation has featured only incidentally (for instance, in cases related to foreign information manipulation and interference (FIMI)) – it becomes necessary to draw analogies from existing jurisprudence on freedom of expression. Only by doing so can we assess how the restrictions permitted under Article 10(2), or its interaction with Article 3 of Protocol No. 1 to the Convention, may assist not only in establishing the presence of disinformation in a given case but also in formulating effective measures to safeguard modern democracy against the challenges it presents.

### 3.1. Grounds for restriction against disinformation

The purpose of this subsection is to elucidate, in the Court's case-law, the internal structure of the restrictive grounds laid down in Article 10(2) as one stage of the tests, as well as their significance for freedom of expression and for the receipt and dissemination of information (which is not necessarily true or reliable). In Part 2 of the thesis we established that these restrictions are examined in the Court's case-law as the second limb of the three-part test and are referred to as the legitimate aim.

It should be noted that, in the first instance, it is for the national court, having assessed the legal tradition of the specific State, to apply this legitimate aim of restrictions, whereas the ECtHR in this context serves as a court reviewing the national court's decision by reference to international law. From this follows the premise - supported, as we shall see, by legal authors - that national courts, when applying the law (in this case its restrictions), will likely enjoy a broader MoA, since they operate „within a cultural context and are embedded in an ongoing legal and general discourse[151].“ Although one of the legitimate aims set out in Article 10(2) may be defined in very broad terms, its application "always

[151] GRIMM Dieter. Freedom of Speech in a Globalized World. In: HARE, Ivan, and WEINSTEIN, James, (eds) Extreme Speech and Democracy. Oxford: Oxford University Press, Incorporated, 2009. pp. 55-68. [online] *ProQuest Ebook Central*, https://ebookcentral.proquest.com/lib/viluniv-ebooks/detail.action?docID=4700863. p. 67

depends on the specific circumstances of each individual case and any restriction should be interpreted narrowly[152]."

Although all the restrictive grounds described below may be useful when assessing the facts in cases that contain elements of disinformation, some authors view this limb of the test with considerable scepticism as the least significant and note that „it is not uncommon for the Court to simply pass over the issue entirely[153]." Even so, having established in this thesis that false information can cause harm not only to an individual natural person but may also be aimed at exerting a much broader impact on fundamental democratic processes, it can be discerned that the aforementioned restrictive grounds may assume far greater importance in future cases; just as the dissemination of hate speech and defamation may pose a threat to national security and the integrity of the State, so too disinformation most often does not target a particular segment of society but sets objectives capable of undermining the most vital national interests. This premise is supported by significant events of the past decade associated with attempts to influence public health (the case of the COVID-19 pandemic) or free elections in democratic states. Accordingly, in the parts that follow, each of the legitimate aims is reviewed, taking as the point of departure the Court's case-law in Article 10(2) cases.

### 3.1.1. Interest of national security

As ECtHR case law demonstrates, Member States frequently rely on the concept of national security when restricting freedom of expression. National security is often linked to the protection of State secrets, the disclosure of highly sensitive strategic or military information, and related matters. In one of its more recent cases, the Court examined precisely such a situation, involving a journalist who sought access to information – specifically, the reasoning of a court decision acquitting a former Bulgarian Minister of the Interior. The requested information had already been prepared and was readily available; moreover, the need to edit certain parts of the document could not reasonably be regarded as a significant obstacle to its disclosure. When the Bulgarian court nonetheless refused to provide it on the grounds that the document was classified, the case was brought before the ECtHR.

[152] Hanych M, Pivoda M. Disinformation and Fake News in Current Jurisprudence of the Strasbourg Court: An Unsolved Problem. In: Terzis G, Kloza D, Kużelewska E, Trottier D, eds. Disinformation and Digital Media as a Challenge for Democracy. European Integration and Democracy Series. Intersentia; 2020:249-268. p. 258

[153] SCHABAS William A. (2015). The European convention on human rights A commentary. New York, NY: Oxford University Press. ebook ISBN 978-0-19-106677-1, p. 870

The Court accepted that information concerning the State's secret surveillance methods was of such a sensitive nature that its disclosure could pose a potential threat to national security, particularly because making those methods public would "impede the efficient future use of such methods or equipment for tasks related to national security[154]". Nevertheless, it is evident that, in many instances where the issue concerns State-held information of such significance, it may be expected that the Member States will be afforded a broader MoA, as they are closest to their own national defence and security matters.

In another, albeit older but still leading, case on this issue – Zana v. Turkey – the Court examined statements made by an imprisoned former mayor of a Turkish town, who had previously belonged to an unlawful organisation, expressing support for the Kurdistan Workers' party (PKK) national liberation movement (illegal in Turkey and subject to criminal penalties). The remarks were made precisely at a time when the PKK was intensifying its activities, including the killing of civilians. The Turkish Government argued that, in those circumstances, the penalty imposed on the applicant was justified in the interests of national security. The Court agreed, noting that, given his status as a well - known local politician whose views could exert considerable influence, it was reasonable for "the national authorities' taking a measure designed to maintain national security and public safety[155]."

It should be noted that the decision not to find a violation of Article 10 revealed a significant division within the Court, with eight out of twenty judges dissenting. In a partly dissenting opinion, Judge van Dijk, joined by Judges Palm, Loizou, Mifsud Bonnici, Jambrek, Kūris, and Levits, acknowledged that the prevailing mood in the region could have posed a threat to national security but disagreed with the severity of the penalty imposed. They observed that the Turkish courts had not even afforded the applicant an opportunity "to explain what he had actually said and had meant to say and against what background the statement had to be interpreted[156]."

Nevertheless, when assessing this separate opinion, it is worth considering whether narrowing the States' MoA and, at the same time, imposing upon them the responsibility to ascertain the true motives of the creator (disseminator) of such information may be a proportionate measure. This is particularly so where national security challenges compel the adoption of the most effective possible measures, as authors note when evaluating the

[154] *Girginova v. Bulgaria*, [ECHR], No. 4326/18, [4-6-2025].
[155] *Zana v. Turkey*, [ECHR], No. 69/1996/688/880, [25-11-1997].
[156] ibid.

European Union's position - where disinformation „is called a hybrid threat, alongside radicalization and violent extremism[157].“

### 3.1.2. Territorial integrity or public safety

In one of the cases recently examined by the Court, the applicant was accused of spreading disinformation when, on her Instagram account, she stated that no Covid - 19 cases had been recorded in her region and that, therefore, it was worth paying attention to the information provided by the Government. The applicant claimed that she had relied on online media to support her statements. The Court found that the Russian Federation had violated Article 10, but when addressing the necessity of the restriction, it noted that "the spread of false information about COVID - 19 could, in principle, relate to the legitimate aims of protecting health and public safety[158]."

In a joint opinion by Judges Ktistakis, Kovatchev and Durović, not only was the application of the restrictive measure on grounds of public health (or safety) questioned, but the judges also emphasised that, in ensuring the legitimacy of States' efforts to combat disinformation, especially during difficult periods for the State, the belief that "State authorities should serve as arbiters of 'truth' in public debate is fundamentally at odds with the principles enshrined in Article 10[159]."

Accordingly, although this case directly involves manifestations of disinformation, it is worth noting that the Member States' MoA may be significantly reduced, and attention should also be paid to the circumstances of the case - in this instance, to the identity and reach of the subject of the proceedings. In this case, the individual concerned was a private person with an Instagram account followed by 2,200 users (the post was liked or commented on by only a handful of persons); therefore, the application of the principle of proportionality was of particular importance, notwithstanding that the dissemination of disinformation was evident.

[157] HOBOKEN, Joris van and Ó FATHAIGH, Ronan (2021). Regulating Disinformation in Europe: Implications for Speech and Privacy. UC Irvine Journal of International, Transnational, and Comparative Law, 6(1), pp. 9-36. [online] https://escholarship.org/uc/item/87m4t6vf, p. 22
[158] *Avagyan v. Russia*, [ECHR], No. 36911/20, [29-7-2025].
[159] ibid.

### 3.1.3. Prevention of disorder or crime

When analysing the legitimate aim of preventing disorder or crime, attention should be drawn to the case of *Ludes et autres v. France*, in which climate activists removed portraits of the President from municipal buildings, arguing that France was failing to adopt stricter measures to address climate change. The key point is that the portraits were not returned but were kept by the applicants as a means of exerting pressure to secure their demands. All the applicants were fined and charged with theft.

The Court emphasised that the protection of freedom of expression also covers active conduct (political activism) and that the applicants' conviction constituted an interference with the freedom safeguarded by Article 10. Nevertheless, when determining the legitimate aim of such interference, it stated that the measure "pursued at least one of the legitimate aims listed in paragraph 2 of Article 10, namely the defence of order and the prevention of crime[160]."

In this case, both the national courts and the ECtHR, taking into account the Court's previous case - law, recognised the symbolic nature (performance) of the applicants' actions but assessed the appropriation of the portraits as unjustifiable conduct, for which only minimal sanctions were imposed. The Court was not unanimous in this case either, and two judges in their dissenting opinion[161] stated that the finding of theft simply meant that "the State will not take the necessary measures which it is nevertheless obliged to take <…>, and that the action could only be punishable <…if public order is significantly disturbed[162]."

Accordingly, in this case the State's narrow MoA nevertheless did not preclude the adoption of appropriate law-enforcement measures without overstepping its bounds. Moreover, even notwithstanding the Court's separate opinions, we can discern that the Court maintains the position that the limits of freedom of expression are assessed primarily within the national context (for example, scrutiny of the boundaries of a performance where it disrupts public order whilst also skirting the boundary of legality). The analysis of this case also highlights the prerogative of national courts to determine whether, where public order is disturbed, an aim - such as environmental issues that are currently of pressing concern to society - may be justified.

[160] *Ludes et autres c. France*, [CEDH], nos40899/22, 41621/22 et 42956/22, [3-11-2025].
[161] Judges Zünd and Šimáčková
[162] ibid.

### 3.1.4. Protection of health or morals

Moral questions have always been an area in which the Court has had to balance between maintaining the direction of its jurisprudence and granting a broader MoA to the Member States. Nevertheless, at times this balance has been disrupted, and the Court has been criticised for this - for example, for the application of the consensus theory in morality-related cases already discussed in Part II of this work. Religious (moral) aspects remain salient in contemporary societies, as can also be seen in the ECtHR's case-law (the case Sekmadienis v Lithuania mentioned in this thesis). This was also pertinent in Mouvement raëlien suisse v. Switzerland, which concerned posters bearing eye-catching slogans about messages from aliens or the victory of science over religion. An important fact in the case was that the posters included a link to a website hosting information prohibited in Switzerland (human cloning services or geniocracy). For these reasons the national courts banned the campaign. The ECtHR agreed with the legitimate aims advanced by the Government „to prevent crime, to protect health or morals and to protect the rights of others[163]." The Court held that the speech (the posters and the online content) did not fall within the sphere of political speech and, although it was not classified as commercial advertising either, it was nevertheless „closer to commercial speech than to political speech per se, as it has a certain proselytising function[164]." According to the Court's developing practice, this implies a broader MoA, since the moral and value foundations of the State will always be closer to the national judge than to an international court applying international law. In this case, further elaborating the limits of the States' MoA, the Court emphasised that only they can determine important issues in their societies, such as, for example, „the protection of morals, road traffic safety or the preservation of the landscape[165]," and thus intervention by the ECtHR could be justified only for compelling reasons.

Nevertheless, this case is also distinctive in that the Court's division was very evident, and the conclusion that Article 10 had not been violated was reached by a margin of a single vote (9 to 8). In the judges' separate opinions[166], opposing the decision adopted, it is stated that the Court's supervision cannot be justified as „passive acceptance of domestic speculation about the capacity of an idea to undermine public order, safety and morals[167]."

[163] *Mouvement raëlien suisse v. Switzerland*, [ECHR], No. 16354/06, [13-7-2012].
[164] ibid, para 62.
[165] ibid, para 65.
[166] Joint dissenting opinion of judges Sajó, Lazarova Trajkovska and Vučinić
[167] Ibid.

The divergence of judicial views in cases of this kind clearly shows that the question of morals (religion) in the sphere of freedom of expression remains one of those areas in which the Court very often prefers to broaden the national courts' MoA rather than to determine these questions itself. It appears that, even in the twenty-first century, societal attitudes from earlier centuries persist, with international judges still relatively rarely undertaking to assess which measures would least infringe the freedom protected by the Convention. Nevertheless, the situation is changing, and in the guidelines provided to national judges when applying the principle of proportionality in morality cases, an important emphasis is that „a real damage to "morals" should be identified, to avoid arbitrariness[168]."

### 3.1.5. Protection of reputation or rights of others

As can be seen from the cases involving politicians examined in this work, this legitimate aim is frequently invoked by Member States. At the same time, a keyword search of the ECtHR case - law database demonstrates that the Court's jurisprudence in this area is also well developed. One of the landmark cases, frequently cited in subsequent judgments, is *Lingens v. Austria*. In this case, an Austrian journalist was convicted under defamation laws solely for publishing articles in which he used certain evaluative terms about a politician, taking into account the latter's past involvement with SS units and the political coalition being formed at the time. Austrian law required factual proof even for value judgments. The Court acknowledged that the restrictions imposed were intended to protect the reputation of others (in this instance, politicians) but established a principle widely cited in subsequent case - law: such a requirement is impossible to fulfil and, in itself, infringes freedom of expression ("as regards value - judgments this requirement is impossible of fulfilment and it infringes freedom of opinion itself[169]").

Thus, in this case and in subsequent cases involving political speech, States were left with a very narrow margin of appreciation, while the permissible scope of criticism directed at public politicians was broadened, reaffirming the crucial role of journalists (and the media more generally) as public watchdogs.

A somewhat different situation arose in another significant case, *Sanchez v. France*, where the applicant, a politician, was sanctioned for failing to remove racist comments

[168] MACOVEI M. (2004). A guide to the implementation of Article 10 of the European Convention on Human Rights 2nd edition. Directorate General of Human Rights Council of Europe. [online] https://www.coe.int/en/web/human-rights-rule-of-law/human-rights-handbooks, p. 49
[169] *Lingens v. Austria*, [ECHR] No. 9815/82, [8-7-1986].

posted under his entry on the social network Facebook, which insulted specific third parties. In this case, the Court applied not only the principle of so - called cascading liability but also held that the applicant was subject not only to the Government's stated ground for restriction (protection of reputation or the rights of others) but also to an additional ground identified by the Court: the prevention of disorder and crime.

Although politicians enjoy broad freedom of expression, the Court stated that "where the remarks in question incite violence against an individual or a public official or a sector of the population, the State authorities enjoy a broader margin of appreciation[170]."

Of course, this judgment (no violation of Article 10 was found) was criticised and again was not reached by consensus in the Court (13 to 4). However, in relation to our subject matter, it is also significant in that, in assessing the opportunities afforded by the internet, the Court noted that defamatory and other unlawful speech „including hate speech and speech inciting violence, can be disseminated as never before, worldwide, in a matter of seconds, and sometimes remain available online for lengthy periods[171]."

The case is also important in the context of modern technologies, in that failure to remove (delete) comments disseminating hatred and inciting violence may give rise to liability not only for legal persons (the Delfi v Estonia case) but also for natural persons. Nevertheless, cases of this kind are rare in the Court's jurisprudence and, looking at today's broader social-media context, in the view of authors assessing this case „it would be difficult to justify breaching Article 10 for the purpose of stopping political misinformation and disinformation on Meta platforms[172]," thereby, through the prism of political expression, legitimising the spread of disinformation (at least online).

### 3.1.6. Preventing the disclosure of information received in confidence

Although this category can be seen as closely related to the legitimate aim of national security, the Court's evolving jurisprudence indicates that it also constitutes a distinct ground, particularly in cases concerning the right of non - governmental organisations or the media (including journalists) to obtain and disseminate information of public interest.

For example, in *Stanev et Comité Helsinki bulgare c. Bulgarie*, the Court examined the applicants' – an individual and a non - governmental organisation – right to access

[170] *Sancez v. France*, [ECHR] No. 45581/15, [15-5-2023].
[171] ibid, para 162.
[172] O'CONNOR, Tom (2021). A challenge we did not ask for but cannot avoid: Tackling misinformation and disinformation on Meta platforms while respecting the principle of freedom of expression established in Article 10 of the European Convention on Human Rights. Galway Law Review, 201 – 215. [online] https://doi.org/10.13025/29246, p. 206

information on a matter of significant public interest: the deaths of migrants at the Bulgarian border. The requested information included details such as case numbers, the names of prosecutors, and the progress of the proceedings. National authorities refused to provide this information, and the Government invoked this legitimate aim before the Court.

The ECtHR noted that, although the Government invoked several legitimate aims to justify restricting access to the information, it failed to provide specific arguments, and the Court "expressed doubts as to how providing the requested information would have prevented the achievement of those aims[173]." Therefore, the Court stated that it "considers it appropriate to leave open the question of the relevance of the aims invoked by the Government since, in any event[174]", and proceeded directly to the third criterion of the test without further examining this one – an approach of the Court already noted earlier in this work.

In finding a violation of Article 10, the Court, emphasising the importance of non - governmental organisations (and the individuals representing them) in providing information of public interest, noted that neither the authorities nor the Government "made any effort to assess the potential harm that disclosure of the requested information might cause to the preservation of the secrecy of criminal investigations or any other protected public interest[175]."

Viewed through the prism of the already-examined case, it appears that the Court is more often inclined to narrow States' margin of appreciation when the necessity arises to inform the public about important matters. This also implies additional positive obligations for Member States - not only to ensure mechanisms and means for obtaining such information, but also to take measures to prevent non - governmental and other socially significant organisations from facing undue obstacles in serving the public interest. In this case, they also perform a function akin to journalists' public watchdog role, whereby, by monitoring the activities of state institutions and (or) requesting certain information, they can serve the public interest.

It also appears that the Court does not prioritise the protection of State secrecy at the expense of freedom of expression; rather, it has clearly "followed a policy of eroding 'public secrets' with the enhanced promotion of, and regard for, the public's right to information[176]."

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[173] *Stanev et Comité Helsinki bulgare c. Bulgarie*, [CEDH], No. 50756/17, [18-11-2025].
[174] ibid.
[175] ibid, para 73
[176] FLAUSS J. F. (2009) The European Court of Human Rights and the Freedom of Expression. Indiana law journal [Vol. 84:809]. p. 834-835 [online] https://ilj.law.indiana.edu/197/

### 3.1.7. Maintaining the authority and impartiality of the judiciary

Although the Court's jurisprudence on this legitimate aim establishes specific protective boundaries, the judiciary "does not function in a vacuum[177]," and related issues can fall within the sphere of public interest. Perhaps one of the most frequently cited cases on this point is *The Sunday Times v. the United Kingdom*, where the Court, in considering restrictions imposed on the media and examining in detail the internal provisions governing this legitimate aim, stated that allowing the newspaper to publish sensitive information in advance would have led "to replies by the parties, thereby creating the danger of a 'trial by newspaper' incompatible with the proper administration of justice[178]," which would clearly have undermined the proper authority of the judiciary.

However, a somewhat different case was examined very recently, concerning the limits of statements made by a lawyer defending a client in court about the functioning of the judiciary. Although the Court acknowledged that imposing a fine on the lawyer "is undisputed that the interference pursued the legitimate aim of maintaining the authority of the judiciary within the meaning of Article 10 § 2 of the Convention[179]," it found a violation of Article 10 of the Convention when assessing whether the interference was necessary in a democratic society.

It is important to note the sole dissenting opinion in this case, in which the judge argued that imposing excessive restrictions on judicial sanctions solely for "extremely serious and overwhelming personal attacks on judges might have a chilling effect on judges <…>," and in this instance Judge Sancin supported a broader margin of appreciation for Member States, as they are "<…better placed than the Court to understand and appreciate the applicant's choice of words in the domestic context[180]."

For the purposes of our discussion, it is noteworthy that some opinions within the Court suggest that a chilling effect may occur not only in cases concerning society, the media, or political speech, but also for a judge carrying out judicial duties, when their freedom of expression is restricted, even in a particular context.

[177] BYCHAWSKA-SINIARSKA D. (2017). Protecting the right to freedom of expression under the European Convention of Human Rights. A handbook for legal practitioners, Council of Europe, 2017, p. 72
[178] *The Sunday Times v. the United Kingdom*, [ECHR], No. 6538/74, [26-4-1979].
[179] *Marko Tešić v. Serbia*, [ECHR], No. 61891/19, [4-11-2025].
[180] ibid.

### 3.2. Disinformation in free elections

One of the foundations of democracy is free, secret, and information - based elections. Or, as some authors writing on the subject note that "a central function of elections is to make a political system democratic <…> and since, according to the author, there is a consensus, at least among those writing on legal matters, that democracy is the most acceptable form of governance, therefore <…this becomes a general argument about the legitimacy of a political system, which is legitimate because it is democratic, and democratic because it holds elections[181]."

When emphasising the inseparable link between elections and democracy, and in reference to the freedom protected by Article 10 of the Convention, the ECtHR has stated that "free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system[182]." And, as Judge Freeland noted in his partly dissenting opinion (joined by Judge Levits), in the context of elections: "one of the essential foundations of a democratic society is a system which will ensure that parliamentary elections are freely and fairly conducted[183]."

As noted earlier in this work, disinformation, by presenting false or distorted information, undermines the level of informedness guaranteed by Article 10 of the Convention. This, in turn, can influence free elections by affecting open and free debates among citizens entitled to vote, debates that are "an essential condition for democracy, which, after all, relies on free and fair elections to imbue governing institutions with legitimacy[184]." It should be noted that the Court, having once again emphasised the importance of freedom of expression and elections, and for the first time explicitly referencing fake news, identified the direct threat posed by the spread of such information to the electoral process, stating that "the Court recognises the importance of protecting the integrity of the electoral process from false information that affect voting results, and the need to put in place the procedures to effectively protect the reputation of candidates[185]."

Accordingly, the following section of this work will examine another important provision, Article 3 of Protocol No. 1 to the Convention, in relation to Article 10, with a

[181] KATZ, R. S. (1997) The Roles of Elections', In: Democracy and Elections. New York; online edn, Oxford Academic, 22 Sept. 2011), https://doi.org/10.1093/acprof:oso/9780195044294.003.0007 p. 101-102
[182] *Bowman v. The United Kingdom* [ECHR], No. 141/1996/760/961, [19-2-1998].
[183] ibid.
[184] KROTOSZYNSKI R. J. Jr., KOLTAY A. GARDEN C. (2025). Disinformation, Misinformation, and Democracy: Legal Approaches in Comparative Context. Cambridge University Press, http://dx.doi.org/10.1017/9781009373272 p. 11
[185] *Staniszewski v. Poland*, [ECHR] No. 20422/15, [14-10-2021].

view to analysing both their interaction and the possibility of impact of disinformation on each, or on both collectively.

### 3.2.1. Interaction with Article 3 of Protocol No. 1

In its 2018 communication, the European Commission noted that the security of the electoral process, being "the basis for our democracy, requires particular attention <…>" and that its greatest need arises precisely as the electoral cycle approaches, since "<…compressed schedules may prevent timely detection of disinformation and response[186]." The Commission also highlighted that, in the same year, surveys conducted among respondents from EU Member States indicated that "intentional disinformation aimed at influencing elections and immigration policies were the two top categories considered likely to cause harm to society[187]."

Meanwhile, the Committee of Ministers of the Council of Europe emphasised that citizens, increasingly confronted with disinformation that "making it more challenging to maintain the integrity of elections <…>," consequently find it more difficult "<…protect the democratic process from manipulation[188]."

Above, we have discussed several cases concerning the exercise of freedom of expression by politicians or those criticising them. Nevertheless, the freedom of expression guaranteed by Article 10 of the Convention is not identical to the right enshrined in Article 3 of Protocol No. 1 (P1 - 3[189]), although the Court state that "the two rights are inter - related and operate to reinforce each other <…>," explaining that freedom of expression is "<…one of the 'conditions' necessary to 'ensure the free expression of the opinion of the people in the choice of the legislature[190]." It is evident that, although the Court juxtaposes these two Convention rights, it nevertheless treats them separately, noting that freedom of expression is a crucial pre - electoral element, ensuring that "opinions and information of all kinds are permitted to circulate freely[191]." However, the Court immediately adds that these rights "may come into conflict <…>" and that both during the pre - electoral period

[186] Communication from the Commission to the European Parliament, The Council, The European economic and social committee and The Committee of the regions. Tackling online disinformation: a European Approach COM/2018/236 final [online] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0236, p. 11
[187] ibid, p. 4
[188] Council of Europe Committee of Ministers. Recommendation CM/Rec(2022)12 of the Committee of Ministers to member states on electoral communication and media coverage of election campaigns.
[189] The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.
[190] *Bowman v. the United Kingdom*, [ECHR], No. 141/1996/760/961, [19-2-1998]. para 42
[191] ibid.

and the elections themselves it may be necessary "<…to place certain restrictions[192]" on electoral communication (and thus on freedom of expression) in order to guarantee the right to free elections enshrined in P1 - 3.

Some authors also highlight the relevance of the principle of proportionality, from which the three - part test discussed above is derived. According to these authors, the ECtHR almost invariably applies this test when examining cases under Article 10, whereas in P1 - 3 cases its application is limited to assessing "whether the measure taken by the state party was rationally connected to the aim pursued and whether it was strictly necessary <…>," meaning that "<…normative basis of the measure itself – and its compatibility with the ECtHR's democratic society – is not assessed in substantive terms[193]." The Court has hinted at this in its judgments, noting that one element of the aforementioned test (legitimate aims) does not apply to P1 - 3, unlike Articles 8 – 11 of the Convention. This means that Member States may invoke a different legitimate aim (not listed in those Articles), provided that "it is compatible with the principle of the rule of law and the general objectives of the Convention[194]."

It should be noted that the case of Bowman v. the United Kingdom, from which much of the subsequent ECtHR jurisprudence on elections and freedom of expression has developed, concerned what might appear to be a relatively straightforward breach of electoral law in the United Kingdom. The applicant had arranged for the distribution of over one million leaflets (including more than 25,000 in a specific constituency) informing voters about politicians' positions on abortion, thereby violating the relevant electoral spending restriction under UK law, which prohibited spending more than £5 to promote a particular candidate. Although the Court acknowledged that the applicant's freedom of expression had been infringed, it emphasised that, in cases of this kind, States seeking to balance these rights enjoy a wider margin of appreciation, given their superior understanding of their own electoral systems. Most importantly, when assessing the issue of funds allocated to elections, the Court highlighted the purpose of such restrictive legislation: to ensure equality between candidates in the electoral process ("achieve the legitimate aim of securing equality between candidates[195]").

From the perspective of Bowman, and in light of other ECtHR jurisprudence, it is evident that the Court, while recognising the importance of pre - electoral debates in

[192] ibid. para 43.
[193] ZYSSET Alain (2019). Freedom of expression, the right to vote, and proportionality at the European Court of Human Rights: An internal critique. International Journal of Constitutional Law, Volume 17, Issue 1, 230–251, doi:10.1093/icon/moz002, p. 231
[194] *Paksas v. Lithuania*, [ECHR], No. 34932/04, [6-1-2011].
[195] *Bowman v. the United Kingdom*, [ECHR], No. 141/1996/760/961, [19-2-1998]. para 47

democratic processes, may be willing to accept certain restrictions imposed by Member States to prevent unfair practices during this particularly sensitive period. This, as we shall see later, is also significant for the effective management of disinformation in political and electoral processes. For example, the interplay between P1 - 3 and freedom of expression was further examined in the case of *TV Vest AS & Rogaland Pensjonistparti v. Norway*, where the Court accepted the national Government's position that, by prohibiting political advertising, Norway could rely on a broader margin of appreciation in seeking to "striking a fair balance <…>" between the necessary freedom of expression in elections and the need for regulation (restrictions) "<…in order to secure the free expression of the opinion of the people in the choice of the legislature[196]." In its judgment, the Court also noted the absence of consensus among Member States regarding the prohibition of political advertising.

Nevertheless, despite the Court's willingness to grant States a broader margin of appreciation, it is not prepared to allow Member States to interfere so extensively in the electoral process that they "end up causing more disruption than potential transgressions caused by this behaviour[197]."

### 3.2.2. Current case law and disinformation

The ECtHR's case - law has been supplemented by several recent cases that are important not only for ensuring fair and democratic electoral processes, but also for highlighting the methods, technologies, and intensity with which attempts were made to influence voters and the electoral process itself. In the context of this work, it is particularly relevant to emphasise instances where information intended for elections was distorted or manipulated, thereby affecting, and potentially altering, voters' informedness and their right to receive complete, impartial, accurate, and undistorted information both during the pre - electoral period and on election day.

Attention should be drawn to an ECtHR case which, although it concerned a State (its authorities) refusing to provide non - governmental organisations with information about nuclear waste disposal, and despite the fact that, according to the Court, Article 10 of the Convention does not explicitly establish a general right of access to information held by public authorities, illustrates a significant development in the Court's jurisprudence towards a qualitative standard for information. Specifically, the Court recognised that an

[196] *TV Vest As & Rogaland Pensjonistparti v. Norway*, [ECHR], No. 21132/05, [11-3-2009].
[197] SHATTOCK Ethan (2022). Free and Informed Elections? Disinformation and Democratic Elections Under Article 3 of Protocol 1 of the ECHR. Human Rights Law Review, 2022, 22, 1–25 [online]. https://doi.org/10.1093/hrlr/ngac023, p. 22

individual's right of access to information would be rendered meaningless "if the information provided by the competent authorities were insincere, inaccurate or even insufficient[198]."

Although in this instance the issue concerned information provided by public authorities, as further examination of the jurisprudence will show, this qualitative requirement for information may also extend to the provision of misleading or inaccurate information to individuals, including voters, particularly in the context of electoral processes. Within the framework of this case, citing an academic observation that recognition of such a qualitative criterion for information may be "useful precedent for civil society and future litigants to rely on and (ideally) build upon to hold public officials accountable for the quality and sufficiency of the information they provide to the public[199]," one could envisage that, in the context of disinformation, the circle of responsible actors might reasonably be expanded – for example, to include politicians.

#### 3.2.2.1. The Bradshaw case

The first case – and indeed both cases examined below – are closely linked to the dissemination of disinformation during elections and to so - called FIMI (foreign information manipulation and interference). In the first case, the applicants argued that the State (its institutions) had failed to act proactively; however, the Court, for objective reasons, concluded that there had been no violation of Article 3 of Protocol No. 1 to the Convention. In the case of *Bradshaw and Others v. United Kingdom*, the issue concerned the State's (the United Kingdom's) alleged failure, or improper action, specifically in relation to election - related disinformation and FIMI. The applicants, relying on reports published by the UK Parliament and intelligence services regarding interference by the Russian State in a series of UK elections and referendums since 2014, accused both the State and the Prime Minister of failing to take appropriate measures (by not initiating an investigation) to establish an "effective legal framework to ensure conditions which will ensure the free expression of the opinion of the people," thereby violating their right to free elections.

The UK security service, in its own investigation, also focused more on a reactive measure already discussed in this work – legislation – stating that "the Intelligence

[198] *Association BURESTOP 55 et autres c. France*, [CEDH], No. 56176/18, [1-10-2021].
[199] PENTNEY Katie, (2024). The Right of Access to 'Reliable' Information Under Article 10 ECHR: From Meagre Beginnings to New Frontiers. European Convention on Human Rights Law Review 5, 230–267. DOI: https://doi.org/10.1163/26663236-bja10093, p. 266

Community must be given the tools it needs and be put in the best possible position if it is to tackle this very capable adversary, and this means a new statutory framework[200]". Unfortunately, however, it did so without assessing the potential impact on freedom of expression.

The Court, for perhaps the first time in such detail, drew in its reasoning on legal literature and sources from recommendations of international institutions concerning disinformation. It reiterated that free elections and freedom of expression – encompassing freedom of political debate – form the foundation of democracy, and emphasised Member States' obligations "to ensure that a balance is achieved between the requirements of defending democratic society and protecting individual rights[201]." The Court further noted that, despite the Internet's empowerment of political processes in democratic States, it has also "made it possible for hostile actors to spread disinformation and manipulate information at a scale and with a speed never seen before[202]," which, according to the Court, constitutes an unequivocal threat to democracy itself.

Although the Court's judgment demonstrates a degree of proactivity by stating that this "should not prevent States from taking measures to defend democratic values[203]" even before large - scale disinformation or FIMI occurs – reflecting the positive obligations of States under the Convention and the Court's jurisprudence – it nonetheless notes a lack of consensus among Member States on the issue. This indicates that, even on matters posing a clear risk to democracy, such as disinformation and FIMI, the Court affords States a wide margin of appreciation in determining how to regulate issues related to their elections and the challenges they face.

The Court also emphasised that, under Article 10, even in the face of such challenges, Governments should not restrict the dissemination of all types of information, particularly during the pre - electoral period. It concluded that "the United Kingdom's response to the threat of Russian election interference did not fall outside the wide margin of appreciation afforded to it in this area [204]."

Although the judgment was unanimous, Judge Jakob's concurring opinion contains several points that could guide future Court decisions, highlighting potential directions for the Court's jurisprudence in addressing the threat of disinformation. First, the judge, noting

[200] Russia (2020). Intelligence and Security Committee of Parliament, [online] isc.independent.gov.uk/wp-content/uploads/2021/01/20200721_HC632_CCS001_CCS1019402408-001_ISC_Russia_Report_Web_Accessible.pdf, p. 3
[201] *Bradshaw and Others v. the United Kingdom*, [ECHR], No 15653/22 [22-7-2025].
[202] ibid, para 134.
[203] ibid, para 159.
[204] ibid, para 163.

the Court's founding purpose as a safeguard for peace and liberal democracy, emphasised that interference by non - democratic States in democratic electoral processes is far more dangerous; accordingly, the response in such cases should be considerably more robust. Second, the relationship between Articles 10 and P1 - 3 gives rise not only to potential conflicts but also to enabling conditions for States' positive obligations. In modern circumstances, the level of "noise" generated by disinformation is so high that "the right to receive information under Article 10 might be violated[205]." Third, if this "noise" is allowed to become too entrenched, we risk losing the advantage whereby "democratic accountability mechanisms (such as elections) tend to be relatively more strongly influenced by fact - based discourses weighing arguments[206]."

Authors writing on legal matters, who had hoped for clearer guidance from the Court's jurisprudence, appear disappointed. It was anticipated that this judgment would clarify not only States' positive obligations but also the aspect of Article 10 that the Court has examined far less: namely, "the electorate's right to receive accurate information, to be properly informed[207]." Clearly, this issue was not addressed in the case.

#### 3.2.2.2. Călin Georgescu case

The second significant case contributing to a deeper understanding of this topic is *Călin Georgescu v. Romania*. More precisely, the case arose as a consequence of an important decision adopted by the Romanian Constitutional Court on 6 December 2024, which, relying on the country's Constitution, annulled "the entire electoral process for the election of the President of Romania[208]."

The Romanian Constitutional Court adopted this decision after considering reports from the security services (which the incumbent President had made public) and assessing the evidence presented concerning the manipulation and distortion of voters' opinions, as well as breaches of the relevant provisions of Romanian electoral law, including, but not limited to, violations of campaign financing rules (including online financing). It was established that the presidential candidate, Călin Georgescu, had not only failed to declare

[205] ibid.
[206] ibid.
[207] PENTNEY Katie, SHATTOCK Ethan (2025). Disinformation and Democracy on the Docket: Reformulating the Approach to Electoral Disinformation under the ECHR. Oxford Journal of Legal Studies 2025, Vol. XX, No. XX pp. 1–31 [online]. https://doi.org/10.1093/ojls/gqaf026, p. 28
[208] Curtea Constituțională a României Ruling No 32 of 6 December 2024 „On the annulment of the electoral process for the election of the President of Romania in 2024" [online] https://www.ccr.ro/wp-content/uploads/2025/02/Hotararea-2-24.pdf

his extensive electoral campaign on the TikTok platform, but that this campaign might also have been linked to the dissemination of false or misleading (distorted) information. The Romanian Constitutional Court emphasised that, before voters make their electoral choice, the right to be properly informed is essential, noting that the right to form an opinion about a candidate is grounded primarily in "the right to obtain accurate information[209]."

On the one hand, the Romanian Constitutional Court may be seen as acting proactively, particularly given that, as this section of the work has shown, some Member States – when considering their positive obligations under P1 - 3 – have tended to adopt necessary measures only retrospectively, that is, after elections have taken place (as in the cases of Brexit, UK parliamentary elections, and European Parliament elections), often relying on reactive measures such as the adoption of new legislation. Moreover, the Romanian case is exceptional because FIMI was identified during the electoral process itself; after assessing the scale of interference (including, but not limited to, the disinformation campaign), it was recognised that the election results had been affected, prompting an immediate decision to implement a particularly severe measure in a democratic State.

However, it should also be noted that the Constitutional Court reversed its own earlier decision, which, on 4 December 2024, had validated the results of the first round of the same elections (despite complaints from two unsuccessful candidates regarding recounts and allegations of manipulative practices). From the perspective of the recommendations set out in the Venice Commission's declaration – upon which the Constitutional Court itself relied – this still amounts to a reactive decision - making process, taken only after the fact. The Venice Commission, in its recommendations elaborating States' positive obligations in organising elections, defines these obligations as including "effective steps to ensure a supportive environment for robust public debate, preventing and punishing infringements of the voters' freedom to form an opinion[210]." When examining the Romanian electoral case, it cannot be concluded that the State fulfilled these positive obligations.

Again, positive obligations do not imply that the State is entitled to interfere in elections, particularly where this concerns safeguarding freedom of expression within the electoral process. As the Venice Commission itself notes, virtually any statement, expression of opinion, or political message may be characterised by opponents as disinformation, even though such statements will typically constitute "value judgments or

[209] ibid. p. 3

[210] European commission for democracy through law (Venice commission), Opinion No. 1171/2024. Interpretative declaration of the code of good practice in electoral matters as concerns digital technologies and artificial intelligence. CDL-AD(2024)044 [online] https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2024)044-e

statements that fall under the candidate's freedom of expression[211]." Therefore, in light of all the above, any decision to annul election results must adhere strictly to the principle of *ultima ratio*.

Turning to the applicant's request before the ECtHR, it is worth noting first that he initially sought interim measures under the Convention. The Court, however, relying on Rule 39 § 1 of the Rules of Court, rejected the request on the ground that it fell outside the scope of that provision. In particular, the Court found no "risk of irreparable harm to a Convention right which, on account of its nature, would not be susceptible to reparation, restoration or adequate compensation[212]." The applicant's complaint was declared inadmissible. The Court's central argument was that Article 3 of Protocol No. 1 applies only to the election of the legislature and "do not normally apply to the election of a Head of State[213]," a position the Court reaffirmed in the present Romanian case.

The applicant further claimed a violation of his freedom of expression. However, the Court found this argument inadmissible as well, considering it to be precluded by the reasoning it had already given in relation to Article 3 of Protocol No. 1.

Had the Court, hypothetically, agreed to examine such an application, it would likely have stressed – alongside the positive obligations already discussed – the broad margin of appreciation afforded to States, particularly in matters concerning their electoral systems and related regulatory frameworks. It is also plausible that, in analysing any Article 10 dimension of the complaint, the Court would have addressed the restrictions placed on the applicant's freedom of expression during the pre - electoral period. Such an assessment might have concerned limitations on his ability, as a candidate, to disseminate information about himself in the manner of his choosing, including via social media platforms such as TikTok. In such a scenario, the Court would likely have been required to apply the full three - part test under Article 10. The first two elements of that test – whether the interference was prescribed by law and pursued one of the legitimate aims listed in Article 10(2) – could plausibly have been satisfied on the State's account. However, when turning to the third element, namely whether the interference was "necessity in a democratic society", the Court would have been compelled to move beyond the relative comfort of its established jurisprudence. It would have had to grapple with the specific threat that disinformation

[211] European commission for democracy through law (Venice commission), Opinion No. Opinion No. 1218/2024. Urgent report on the cancellation of election results by Constitutional courts. CDL-AD (2025)003. [online] https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2025)003-e

[212] Press release, issued by the Registrar of the Court, ECHR 022 (2025). [online] https://hudoc.echr.coe.int/eng-press?i=003-8138373-11400351

[213] *Călin Georgescu v. Romania*, [ECHR], No. 37327/24 [6-3-2025].

disseminated by an electoral actor poses to the democratic values safeguarded by the Convention.

In doing so, the Court might have been required to move beyond its traditionally individualistic perspective, which generally focuses on protecting the rights and freedoms of individuals under the Convention, and, in assessing the criterion of necessity in a democratic society, consider the threat posed by disinformation to all citizens of a given State. Although elections are inherently complex, presenting significant challenges to modern States – such as managing campaign financing and ensuring transparency – ignoring the impact of modern technologies, which facilitate the cross - border dissemination of information, and, as the Venice Commission notes "proving violations of the law by campaigning online and via social media is particularly challenging" – would be an unforgivable mistake and an increasingly pressing challenge for Council of Europe Member States in managing the scale of disinformation.

## CONCLUSIONS

1. In examining disinformation as a phenomenon, this study encountered the multifaceted nature of the concept. Although different sources offer their own formulations, the need for a single, unified definition remains pressing. Even the definition advanced by the European Union, notwithstanding efforts to define disinformation as comprehensively as possible, is regarded as rather broad. Conversely, disinformation – while a phenomenon that has existed for centuries – has, in recent decades, when confronted with the latest technologies, become significantly more difficult to identify. It should nonetheless be noted that the operation of the freedom of expression enshrined in the Convention is predicated upon information, which is precisely the principal target of disinformation. Taking this freedom as a starting point for examining the modes and means by which false (fabricated) information spreads, we observe that states' primary responses to disinformation are regulatory in nature (frequently through criminal - law measures). As the Court's case - law also demonstrates, such measures often infringe the freedom guaranteed by Article 10 of the Convention.

2. The core processes of free and democratic societies targeted by disinformation – such as the right freely to receive and impart information and the right to be elected to organs of state government (or to canvass for others without hindrance) – are grounded in the fundamental freedom of expression. The content of that freedom is given effect through the case - law of the European Court of Human Rights (the Court). The Court's extensive jurisprudence has developed "tools", such as the *margin of appreciation* doctrine, which delineate the limits of State interference across the various aspects of the assessment under Article 10. Those limits are not infrequently overstepped. As under the three - part test applied by the Court, member States of the Council of Europe often fail to justify restrictions as "necessary in a democratic society". It is also of particular importance that, in its case - law, the Court distinguishes between statements of fact and value judgments, indicating that requiring proof of the latter would impose a disproportionate burden.

3. Reliance on the principle of (European) consensus in a number of the Court's cases to delineate the limits of the margin of appreciation (MoA), though sometimes criticised, should be regarded as significant. Through its judicial practice, it signals to member States the barriers that exist in the field of restrictions on freedom of expression, and how readily those barriers may carry over into the governance of a phenomenon such as disinformation. The Court has established that, in cases concerning political speech, the MoA will generally be applied more narrowly, thereby protecting the freedom to disseminate political opinion

and information. By contrast, in matters relating to morals (religion) or certain economic interests, States are afforded considerably wider latitude. There are, however, exceptions: emphasising the low cost, speed and scale of dissemination enabled by modern technologies (the Internet), the Court has affirmed the liability of legal persons and even natural persons.

4. Elections, as a cornerstone of modern democracy, are also the process most acutely harmed by disinformation. The experiences of Romania, Moldova and the United Kingdom illustrate this. Within the Court's case - law, the doctrine of States' positive obligations indicates that States should act proactively in this field. The same is confirmed by the Council of Europe's soft - law instruments which, owing to their detail and breadth, are frequently cited by the Court itself. The Court's practice must likewise be the primary point of reference when examining the restrictions on freedom of expression enshrined in Article 10(2) of the Convention. These grounds may serve as an important foundation for the Court, in future, when considering and seeking to curb the spread of false information as impairing freedom of expression. Notwithstanding the fact that, in 2025, the Court examined several cases related to disinformation, it will still take time for certain principles and methods to crystallise.

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**SUMMARY**

# Disinformation as a threat to democracy: does Article 10 of the ECHR provide a basis for legitimate restrictions?

**Marius Dijokas**

This thesis interrogates whether Article 10(2) ECHR furnishes a coherent, rights - compatible basis for restricting disinformation without hollowing out the very freedom of expression it protects. It situates disinformation within democratic information ecologies, clarifies definitional boundaries across Council of Europe, EU, UN and selected national approaches, and distinguishes disinformation from mis - and mal - information. Building on ECtHR jurisprudence, the work maps how the internet simultaneously expands expressive opportunities and magnifies risks, and how the Court's doctrinal toolkit – the three - part test (legality, legitimate aim, necessity), the margin of appreciation (calibrated narrowly for political speech and more broadly in morality/commerce), and Article 17's abuse clause – structures judicial balancing in both offline and online contexts.

Part 3 operationalises Article 10(2)'s legitimate aims for disinformation control: national security; public safety / health (including pandemic - era falsehoods); prevention of disorder / crime; protection of health or morals; reputation/rights of others; confidentiality; and maintaining judicial authority. The thesis then analyses the tight coupling of Article 10 with Article 3 of Protocol No. 1, arguing that free elections and free political debate are mutually reinforcing yet sometimes in tension, which warrants proportionate, pre - electoral safeguards and positive obligations. Recent case law – Bradshaw (UK) on foreign information manipulation and interference and proceedings surrounding Romania's 2024 presidential election – illustrates wide state discretion but also emerging standards, including qualitative expectations for reliable public information. The conclusions caution against over - broad legislative responses and advocate a process - based, proportionate regime that leverages ECtHR doctrine, protects political pluralism, and develops clearer criteria for electoral disinformation, while acknowledging the Court's still nascent, case - specific engagement with the phenomenon.