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The Fight against Disinformation in the Council of Europe, and the Relevant Case Law of the European Court of Human Rights

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7.1 INTRODUCTION

A broad consensus has emerged in recent years that although rumours, conspiracy theories and fabricated information are far from new,[1] in the changed structure and operating mechanisms of the public sphere today we are faced with something much more challenging than anything to date,[2] and the massive scale of this disinformation can even pose a threat to the foundations of democracy.[3] However, the consensus extends only to this statement, and opinions differ considerably about the causes of the increased threat of disinformation, whom to blame for it, and the most effective means to counter it. From the perspective of freedom of speech, the picture is not uniform either, and there has been much debate about the most appropriate remedies. It is commonly argued, for example, that the free speech doctrine of the United States does not allow for effective legal action against disinformation, while in Europe there is much more room for manoeuvre at the disposal of the legislator.

This chapter presents an example of European thinking: the search for answers to the problem of disinformation within the Council of Europe (CoE). For several reasons, the CoE provides an excellent opportunity to examine this quest as a joint European journey. The organization, that comprises forty-seven Member States, truly represents the vast majority of Europe, and thanks to the diversity of the work within its institutions, it has a complex impact on the legal development and public policy of the continent. The bodies of the CoE, with their sometimes harder,

[1] Cass R. Sunstein and Adrian Vermeule, 'Conspiracy Theories: Causes and Cures' (2009) 17(2) *Journal of Political Philosophy* 202.

[2] Claire Wardle and Hossein Derakhshan, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making*. Council of Europe report DGI(2017)09, Council of Europe, 2nd revised ed., August 2018, p. 4.

[3] The European Democracy Action Plan launched by the European Commission expressly addresses disinformation as a challenge for democracy in its Section 4.

sometimes softer tools – binding international court rulings, opinions on national legislation, public policy recommendations, various reports and analyses – always seek the common European denominator that can provide a solid basis for identifying the peculiarities of the continent's joint approach.

In this chapter, I will examine the practice of three institutions of the CoE (the European Court of Human Rights, the Committee of Ministers and, to a lesser extent, the Venice Commission) which have had a great impact on the development of Member States' legislative and judicial processes. The problem of disinformation has not been directly addressed by a specific policy document, either in the decisions of the European Court of Human Rights (ECtHR) or in the recommendations of the Council of Europe's Committee of Ministers, or among the documents of the Venice Commission. However, the key points that can serve as guidelines for a European approach can be identified from the practice of the three bodies. First, I will outline the common conceptual frameworks in the relevant practice of the three institutions, with special regard to the fundamentals of the doctrine of freedom of speech (Section 7.2). After that, I will analyse the decisions of the ECtHR that can be considered relevant to the question of disinformation, especially those involving the possibility of restrictive legal means against it (Section 7.3). Finally, through the recommendations of the Ministerial Committee, I will examine what public policy solutions the CoE recommends for dealing with disinformation (Section 7.4). My three main sources are: the decisions of the ECtHR (the implementation of which is a fundamental obligation for all Member States), the recommendations of the Committee of Ministers (which provide guidelines for the legislators and political decision-makers), and the relevant documents of the Venice Commission, the advisory body on constitutional matters (which comments on the constitutional processes of the Member States).

The chapter will focus chiefly on the role of the state in the fight against disinformation, so other issues that might be extremely important for the topic – for instance, the complex question of self-regulation – are discussed only tangentially. I hope that by the end of the chapter it will be clear that – although European law undoubtedly seeks answers based on different constitutional doctrines compared to the United States, and this leads to significantly different legal practices on important social issues (especially in the area of hate speech) – the problem of disinformation represents a challenge that even on the old continent cannot be effectively answered by restrictive legal means.

7.2 THE LEGAL FRAMEWORK OF THE FIGHT AGAINST DISINFORMATION IN THE COUNCIL OF EUROPE

Although the CoE has not issued any decision or recommendation specifically aimed at combating disinformation, the outlines of how to deal with the issue can be clearly drawn from the relevant documents. The present problem of

disinformation did not materialize in a vacuum, as clear principles and a system of criteria for the regulation of public discourse have been developed in recent decades. There is no doubt that the challenge posed by disinformation lies precisely in the fact that digital technologies, platforms and social media have significantly subverted the previous operating mechanisms of the public sphere. However, the response to it needs to be situated among established constitutional principles. We must confront the accepted doctrine with the new phenomenon: we must determine whether new approaches are needed at some point and we must also make it clear where it is not possible to compromise on the principles that have been followed so far.

The Council of Europe has been at the forefront of analysing the social issue of disinformation from the beginning. It was one of the first bodies to recognize the gravity of the phenomenon while trying to clear up the increasingly confusing picture. Between the rampant use of the label 'fake news', on the one hand, and the demands for immediate and decisive interventions against misleading information, on the other, a comprehensive study carried out in 2017 for the CoE was pioneering in its emphasis on the importance of taking a calm, analytical approach. The significance of the paper for us is that – examining the intensifying information disturbances in a nuanced manner – it has provided a new conceptual framework for the analysis of the issue. The authors of the study successfully proposed a threefold conceptual categorization to describe information disorders, which until then had been mostly associated with the vague concept of 'fake news'.[4]

In this model, misinformation is when false information is shared, but no harm is meant. Disinformation, meanwhile, is when false information is knowingly shared to cause harm. A further category, mal-information, is when genuine information is shared with the intent to cause harm, often by bringing information designed to remain private into the public sphere. In this section, I will consider this conceptual framework to be authoritative while dealing primarily with the response to disinformation – that is, knowingly and harmfully spreading untruths. The starting points for the regulatory treatment of social information disturbances, including the intensification of attempts at disinformation, are provided by the legal framework of public communication. The most important points of this framework in the work of the bodies of the CoE are summarized below.

[4] It underlines: 'In this report, we refrain from using the term "fake news", for two reasons. First, it is woefully inadequate to describe the complex phenomena of information pollution. The term has also begun to be appropriated by politicians around the world to describe news organisations whose coverage they find disagreeable. In this way, it is becoming a mechanism by which the powerful can clamp down upon, restrict, undermine and circumvent the free press.' Wardle and Derakhshan, *Information Disorder* (n 2), 5.

7.2.1 *The Participatory Model of Free Speech and the Democratic Public Opinion*

The question that defines the entire doctrine of freedom of speech concerns which theoretical justification that right relies on, or to put it more accurately: which aspects each justification prioritizes. The concept of 'speech' has a normative nature that is defined by each constitutional doctrine based on which justification(s) it emphasizes.[5] These justifications have already been systematized by others.[6] Essentially, communications represent three types of value: they can contribute to the discovery of truth we seek together,[7] they can be manifestations of the free fulfilment of our personality (the individualist approach),[8] and they can ensure our participation in democratic social life (democratic theories).[9] Despite the fact that it is neither possible nor necessary to insist on exclusivity among the justifications, the primary basis the European doctrine rests on can be clearly established.[10]

From the very beginning, the ECtHR has focused on the democratic justification of freedom of expression. According to the reasoning it has consistently ascribed to, 'freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment'.[11] Considering the practice as a whole, it is clear that, despite the mention of individual fulfilment, the legal interpretations are not primarily based upon the individualistic justification, although it plays an important role within the democratic approach. Democratic justifications are not completely uniform in all details, and the two main models focus on somewhat different elements in important legal interpretation situations – and the issue of disinformation is one such situation.

One democratic theory sees the value of freedom of speech in that it is essential for the common, informed decision-making which is the essence of democracy, and

[5] Frederick Schauer, 'Categories and the First Amendment: A Play in Three Acts' (1981) 34 *Vanderbilt Law Review* 265, at 272–73.

[6] E.g., Eric Barendt, *Freedom of Speech* (Oxford: Oxford University Press, 2005) pp. 1–39.

[7] William P. Marshall, 'The Truth Justifications for Freedom of Speech' in Adrienne Stone and Frederick Schauer (eds.), *The Oxford Handbook of Freedom of Speech* (Oxford: Oxford University Press, 2021) pp. 44–60.

[8] Martin H. Redish, 'The Value of Free Speech' (1982) 130 *University of Pennsylvania Law Review* 591; Ronald Dworkin, *Freedom's Law. The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996) pp. 199–202.

[9] For the origin of the democratic theories, see Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper & Brothers, 1948).

[10] See Robert Post on the 'lexical priority' of the justifications, Robert Post, 'Participatory Democracy as a Theory of Free Speech' (2011) 97(3) *Virginia Law Review* 617, at 618.

[11] See, e.g., in the latest case law with several references to previous decisions, *Sanchez* v. *France*, app. no. 45581/15, judgment of 15 May 2023, [145].

which places the audience's need for information at the centre.[12] The other theory sees the value of free speech above all in that it ensures that everyone has the opportunity to become involved in the life of the democratic community. In this model, participation is at the centre of the concept of democracy and democratic public opinion,[13] and freedom of speech focuses much more strongly on the speaker and their intention to communicate.[14] The practice of the ECtHR draws on both approaches, but it is chiefly based on the participation model in the sense that the central issue of legal interpretations is the protection of the speaker's right to personal expression.

The aspects of participatory democracy are also emphasized in the documents of other bodies of the Council of Europe. As a recommendation of the Committee of Ministers on the new notion of media highlights, freedom of expression is indispensable for a genuine democracy and for democratic processes. 'In a democratic society, people must be able to contribute to and participate in the decision-making processes which concern them."[15] The internet-related recommendations of the Committee of Ministers – as will be shown below – also recognize the revolutionary importance of the digital age for freedom of speech in the expansion of opportunities for personal participation. In addition, the democracy-based approach is most evident in the concrete interpretation of the law, in which, although the scope of freedom of speech is broader than that of political communication, significantly stronger protection is afforded to political speech. The ECtHR consistently emphasizes that 'the promotion of free political debate is a very important feature of a democratic society and the Court attaches the highest importance to freedom of expression in the context of such debate'.[16] The importance of this approach is particularly highlighted by the practice of the ECtHR on artistic expressions, which grants strong protection to works of art only if they form part of the public debate.[17]

Both the ECtHR and other bodies of the CoE therefore attach special importance to the democratic formation of public opinion, to which they attribute specific characteristics. On the one hand, democratic public opinion means a lively discourse that embraces as many points of view as possible, and develops according to

[12] Alexander Meiklejohn, 'The First Amendment Is an Absolute' (1961) 25 *Supreme Court Review* 245; Owen M. Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Boulder, CO: Westview, 1996); Robert H. Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47(1) *Indiana Law Journal* 1, at 20.

[13] Post, 'Participatory Democracy' (n 10) 618.

[14] Robert C. Post, 'Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse' (1993) 64 *University of Colorado Law Review* 1109.

[15] Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media (Adopted by the Committee of Ministers on 21 September 2011 at the 1121st meeting of the Ministers' Deputies), s. 2.

[16] E.g., *Sanchez* v. *France*, [146].

[17] See *Müller and Others* v. *Switzerland*, app. no. 10737/84, judgment of 24 May 1988; *Wingrove* v. *United Kingdom*, app. no. 17419/90, judgment of 25 November 1996; *Vereinigung Bildender Künstler* v. *Austria*, app. no. 68354/01, judgment of 25 January 2007.

its own logic and under its own rules in a lively discussion of opinions and counter-opinions. As the Venice Commission emphasizes, open and robust public debate is the cornerstone of democracy: 'A democracy should not fear debate, even on the most shocking or anti-democratic ideas. It is through open discussion that these ideas should be countered and the supremacy of democratic values be demonstrated … Persuasion through open public debate, as opposed to ban or repression, is the most democratic means of preserving fundamental values.'[18] On the other hand, although this does not appear *expressis verbis* in the documents, the legal interpretation of the public debate starts from a specific anthropological view.

The decisions of the ECtHR on the restriction of commercial communication can be usefully contrasted with its decisions on communication deemed to be part of the public debate. The court has consistently held that although the freedom of speech extends to commercial advertisements, their publication can be widely restricted. In order to ensure that consumers receive accurate information about the specific features of goods and services, restrictions may be imposed especially in the case of misleading or untrue information. The ECtHR therefore considers the consumer as a player that is vulnerable to the manufacturer, and needs to be protected.[19] As we will see in the democratic public debate, even in the case of untrue information, the Court does not admit the possibility of such a general restriction, and considers citizens participating in the formation of public opinion as autonomous (rather than vulnerable) actors.[20]

It should also be mentioned that, in the European doctrine, the press is an actor in the public sphere with distinct rights and obligations. As multiple recommendations of the CoE function, namely scrutiny of public and political affairs and private or business-related matters of public interest, contributes to justify media's broad freedom; however, it is counterpoised by a requirement of greater diligence in respect of factual information. Regarding the reliability of information, 'professionalism requires verifying information and assessing credibility'.[21]

In the ECtHR's view, electoral campaigns have their own significance for the formation of democratic public opinion. The Court reiterated several times that free

[18] Compilation of Venice Commission Opinions and Reports Concerning Freedom of Expression and Media, CDL-PI(2016)011, 19 September 2016, s. 1.1.

[19] *Casado Coca* v. *Spain*, app. no. 15450/89, judgment of 24 February 1994, [51]; *Stambuk* v. *Germany*, app. no. 37928/97, judgment of 17 October 2002, [39].

[20] A clear framing of this anthropology can be found in the case law of the Hungarian Constitutional Court that closely follows the Strasbourg jurisprudence in the field of political debates: 'The approach of the constitutional evaluation is determined by the consideration that during the democratic discussion of public affairs participants of the debate are the citizens who interpret political events in their complexity, being aware of the special characteristics of partizan political opinions, especially during electoral campaigns that tend to exaggerate in order to attract voters' attention.' Decision No. 3107/2018. (IV. 9.) AB, [28].

[21] Recommendation CM/Rec(2011)7, s. 85.

elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system.

> For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely … At the same time 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.[22]

We will see below in the relevant case law (Section 7.3) that the ECtHR has so far always put the reputation of candidates concerned in the focus.

7.2.2 *The Internet and Freedom of Speech*

To discuss the issue of disinformation, it is important and instructive to examine more closely how the documents of the CoE view the Internet. A wealth of material is available in this regard, as the Ministerial Committee has dealt with the issues raised by the Internet in many of its recommendations – even mentioning disinformation among these problems – and, of course, cases related to the role of the Internet have also been raised before the ECtHR.

It is clear from the documents that the CoE has taken into account new dangers arising from the functioning of the Internet since the very beginning, but in the first place it still welcomes it as a tool that can radically expand the possibilities for democratic participation. The recommendation of the Committee of Ministers on measures to promote the public service value of the Internet notes that while digital tools can significantly enhance the exercise of human rights and fundamental freedoms, such as freedom of expression, it admits that they may adversely affect these and other rights. Still, the Committee recommends that, in order to promote democracy, Member States should strengthen the participation and involvement of their citizens in public debate through the Internet, and encourage the use of infocommunication services, including online forums, weblogs, political chats, instant messaging and other forms of citizen-to-citizen communication. The recommendation strongly supports citizens' engagement with the public through user-generated communities rather than official websites.[23]

The ECtHR also approaches the Internet as one of the principal means of providing essential tools for the participation in discussions concerning political issues, highlighting that the possibility for user-generated expressive activity on the Internet provides an 'unprecedented platform for the exercise of freedom of

[22] *Staniszewski* v. *Poland*, app. no. 20422/15, judgment of 14 October 2021, [47].

[23] Recommendation CM/Rec(2007)16 of the Committee of Ministers to Member States on measures to promote the public service value of the Internet (Adopted by the Committee of Ministers on 7 November 2007 at the 1010th meeting of the Ministers' Deputies), Section III.

expression'.[24] The Court welcomes the fact that the Internet has fostered the 'emergence of citizen journalism', as political content ignored by the traditional media is often disseminated via websites to a large number of users, who are then able to view, share and comment upon the information.[25] However, the bodies of the CoE have also identified the dangers that making use of the new opportunities provided by the Internet entails. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated as never before, in a matter of seconds.[26] Digital transformation and the shift towards an increasingly digital, mobile and social media environment have profoundly changed the dynamics of production, dissemination and consumption of news.[27] Newer materials also mention the problem of disinformation among its dangers: 'Targeted disinformation campaigns online, designed specifically to sow mistrust and confusion and to sharpen existing divisions in society, may also have destabilizing effects on democratic processes.'[28] Meanwhile, '[d]emocracies have experienced growing threats posed by the spread of disinformation and online propaganda campaigns, including as part of large-scale co-ordinated efforts to subvert democratic processes'.[29]

It is worth briefly mentioning the CoE bodies' main approach to responsibility for internet content. The central concept of the documents is 'shared liability'. According to this, 'a wide, diverse and rapidly evolving range of players facilitate interactions on the Internet between natural and legal persons by offering and performing a variety of functions and services',[30] and the responsibility for content must be adapted to this multi-player approach. According to the Ministerial Committee, instead of summary solutions, a fine-tuned approach is needed that elaborates and delineates the boundaries of the roles and responsibilities of all key stakeholders within a clear legal framework, using complementary regulatory

[24] See, e.g., *Vladimir Kharitonov* v. *Russia*, app. no. 10795/14, judgment of 23 June 2020, [33]; *Melike* v. *Turkey*, app. no. 35786/19, judgment of 15 June 2021, [44]; *Times Newspapers Ltd* v. *United Kingdom (No. 1 and No. 2)*, app. nos. 3002/03 and 23676/03, judgment of 10 March 2009, [27].

[25] *Cengiz and Others* v. *Turkey*, app. nos. 48226/10 and 14027/11, judgment of 1 December 2015, [52].

[26] *Sanchez* v. *France*, [161] and [162].

[27] Recommendation CM/Rec(2022)4 of the Committee of Ministers to member States on promoting a favourable environment for quality journalism in the digital age (Adopted by the Committee of Ministers on 17 March 2022 at the 1429 meeting of the Ministers' Deputies), Preamble.

[28] Recommendation CM/Rec(2018)2 of the Committee of Ministers to Member States on the roles and responsibilities of internet intermediaries (Adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies), Recital (3).

[29] Recommendation CM/Rec(2022)4, s. A(6).

[30] Recommendation CM/Rec(2018)2, Recital (4).

frameworks.[31] The ECtHR also focuses on 'a context of shared liability between various actors'.[32]

An important starting point for the CoE's approach to responsibility is that providers of intermediary services – which contribute to the functioning or accessing of media and content, but do not themselves exercise editorial control – should not be regarded as media. However, their activity is certainly relevant in the media context and for the formation of democratic public opinion.[33] The CoE agrees with the view that state authorities should not impose a general obligation on intermediaries to monitor content which they merely provide access to, and recommends that they should ensure that intermediaries are not held liable for such third-party content. Intermediaries may be liable if they do not act expeditiously to restrict access to content or services as soon as they become aware of their illegal nature.[34] As the ECtHR emphasized: 'to exempt these services from all liability might facilitate or encourage abuse and misuse, including hate speech and calls to violence, but also manipulation, lies and disinformation'.[35]

7.2.3 *Competing Values and Their Power against Free Speech*

Before examining the concrete decisions of the ECtHR in Section 3, it is also worth establishing in principle the methodology with which the jurisprudence evaluates the values and interests that may compete with the interest of freedom of speech. It is clear what these values and interests are under the European Convention on Human Rights. Article 10(2) of the Convention, on freedom of expression, lists the reasons that may serve as a basis for restricting freedom of expression. According to this part of the text, freedom of expression can be limited in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. It is well established in the jurisprudence of the ECtHR and the CoE documents that the list provided in the Convention is exhaustive: any restrictions of the right to free speech must pursue a legitimate aim as exhaustively enumerated in Article 10.[36]

The further question of what power these specific reasons for restriction represent against freedom of speech is connected to a dilemma that is also known from the

[31] Recommendation CM/Rec(2007)16.
[32] *Sanchez* v. *France*, [183].
[33] Recommendation CM/Rec(2011)7, s. 36.
[34] Recommendation CM/Rec(2018)2, s. 1.3.7.
[35] *Sanchez* v. *France*, [185].
[36] Recommendation CM/Rec(2016)5 of the Committee of Ministers to Member States on Internet Freedom (Adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers' Deputies), s. 2.4.1.

academic discourse: whether freedom of speech should be protected with a categorical or a balancing approach,[37] or – to adapt this question to the more recent American terminology – whether strict or intermediate scrutiny should be the main method.[38] At one end of the scale of theoretically possible answers is the position that grants constitutional protection to communications in all circumstances, while the other end of the scale is represented by the view that conflicts of relevant constitutional values can only be resolved by considering the special circumstances of specific cases. According to the most common view, which rather oversimplifies the picture, while the categorical approach prevails in the USA, in Europe balancing interests is more typical. However, the situation is more complex than this: although the absolutist understanding of freedom of speech is undoubtedly quite different from the European doctrine, the jurisprudence of the ECtHR strives to combine both the categorical and the balancing approaches in its practice.[39]

On the one hand, the Court must take into account the reasons for restriction listed in the Convention that compete against freedom of speech, which is itself protected by it.[40] On the other hand, with regard to political speech, the jurisprudence applies a more categorical understanding of protection. According to the consistently emphasized thesis, there is little scope under Article 10(2) for restrictions on freedom of expression in the field of political speech, and the authorities' margin of appreciation in assessing competing interests against freedom of expression in this context is particularly narrow.[41] The Recommendation of the Committee of Ministers concerning internet freedom also points out that restrictions on freedom of speech based on legitimate aims, including defamation laws, hate speech laws or laws protecting public order should be specific and narrowly defined in their application so that they do not inhibit public debate.[42] Although included in the above-mentioned list, hate speech is something of an exception to the more categorical approach, as its restriction is accepted by the CoE's bodies, including the Court, with an increasingly permissive attitude. In general, however, it remains true that the

[37] Laurent B. Frantz, 'The First Amendment in the Balance' (1961–1962) 71(8) *Yale Law Journal* 1424, 1432; Wallace Mendelson, 'On the Meaning of the First Amendment: Absolutes in the Balance' (1962) 50(5) *California Law Review* 821, 821; Steven Shiffrin, 'Defamatory Non-media Speech and First Amendment Methodology' (1977–1978) 25 *UCLA Law Review* 915, 955.

[38] T. Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1986–1987) 96(5) *Yale Law Journal* 943, 946; Ashutosh Bhagwhat, 'The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence' (2007) (3) *University of Illinois Law Review* 783, 785.

[39] Alessio Sardo, 'Categories, Balancing, and Fake News: The Jurisprudence of the European Court of Human Rights (2020) 33(2) *Canadian Journal of Law and Jurisprudence* 439.

[40] European Convention on Human Rights, Art. 10(2).

[41] See, among others, *Têtе* v. *France*, app. no. 59636/16, judgment of 26 March 2020, [63]; *Lingens* v. *Austria*, app. no. 9815/82, judgment of 8 July 1986, [42]; *Sanchez* v. *France*, [146].

[42] Recommendation CM/Rec(2016)5 s. 2.4.2.

ECtHR's approach to political speech departs from case-by-case consideration and tends towards a more categorical protection.[43]

7.2.4 *The Role of the State*

In the practice of the CoE concerning freedom of speech, the peculiarities of the European approach to fundamental rights can be clearly identified when considering the role of the state in the enforcement of those rights. Their starting point differs little from the US doctrine: the purpose of the constitution and fundamental rights is, above all, to limit state power, thus ensuring the exercise of civil liberties. The primary obligation of the state is therefore to refrain from violating these freedoms. Regarding freedom of speech, the key point is that the state should not interfere in the formation of public opinion. However, the European approach goes beyond this starting point in two important ways.

On the one hand, the documents of the CoE consistently emphasize that the state has not only negative but also positive obligations in connection with the protection of freedom of speech.[44] The state is obliged not only to refrain from restricting expression but also to actively contribute to the creation of an environment that supports the exercise of freedom of speech.[45] In line with this, states also have a positive obligation in the digital environment, 'to create a safe and enabling environment for everyone to participate in public debate and to express opinions and ideas without fear, including those that offend, shock or disturb State officials or any sector of the population'.[46] The state must not only protect the individual exercise of rights, but also promote the fulfilment of freedom of opinion as a social value and institution based on its obligation to ensure an 'objective institutional protection'. This obligation allows broader scope than the US doctrine to regulate social relations related to the fundamental right. The state's obligation to act in support of the formation of democratic public opinion – as we will see in Section 7.3 analysing the practice of the ECtHR – justifies only a very narrow range of substantive intervention in the content of social communication.

Jurisprudence considers only the 'gravest forms of hate speech' to be inherently incompatible with the basic values of democracy, so they can be excluded from the

[43] Somewhat similar to what Melville Nimmer describes as definitional balancing, Melville B. Nimmer, 'The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy' (1968) 56(4) *California Law Review* 935, 942.

[44] Recommendation CM/Rec(2016)5, s. 1.

[45] For the doctrine and practice of the positive obligation of states, see Andrew T. Kenyon, *Democracy of Expression: Positive Free Speech and Law* (Cambridge: Cambridge University Press, 2001); Andrew T. Kenyon and Andrew Scott (eds.), *Positive Free Speech: Rationales, Methods and Implications* (Oxford: Hart, 2020).

[46] Recommendation CM/Rec(2018)2, Recital (6).

scope of freedom of speech without further consideration.[47] Beyond that, however, the protection of democracy does not justify substantive intervention in the formation of public opinion but serves as a basis for the state to contribute through regulation to the proper framework and structure of the democratic public sphere. Among other things, this consideration creates a solid basis for European media regulations, the development of which is strongly supported by the CoE. According to its Recommendation on media pluralism, the states are the 'ultimate guarantors' of the democratic, plural functioning of the social public domain and have a positive obligation to put in place an appropriate legislative and policy framework to ensure the proper flow of views and information.[48]

On the other hand, the role of the state is fundamentally influenced because, according to the European doctrine, the protection of fundamental rights can not only be relevant between citizens and states. An integral tenet of European constitutional law for decades is that in some cases, when private actors find themselves in a situation that significantly affects the enforcement of the fundamental rights of others, constitutional values also impose requirements on them.[49] States have a 'positive obligation to ensure the exercise and enjoyment of rights and freedoms (which) includes, due to the horizontal effects of human rights, the protection of individuals from actions of private parties by ensuring compliance with relevant legislative and regulatory frameworks'.[50] Recently, the thesis of the horizontal scope of fundamental rights has gained traction in the field of freedom of speech, especially in the relationship between social media platforms and their users.[51] According to this argument, platforms cannot shape and apply their community rules at their own discretion, but must pay attention to the rights of their users, above all their freedom of speech. In terms of content moderation, for instance, the hands of the service providers are therefore tied to a certain extent by the requirements arising from the freedom of speech. As a consequence, while the recommendation

[47] See Section 7.3.7 of this chapter about the application of the 'abuse clause' (Article 17) of the Convention on Human Rights. The Venice Commission also highlights this: 'in a true democracy imposing limitations on freedom of expression should not be used as a means of preserving society from dissenting views, even if they are extreme . . . It is only the publication or utterance of those ideas which are fundamentally incompatible with a democratic regime because they incite to hatred that should be prohibited.' CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, para. 46.

[48] Recommendation CM/Rec(2018)1 of the Committee of Ministers to Member States on media pluralism and transparency of media ownership (Adopted by the Committee of Ministers on 7 March 2018 at the 1309 meeting of the Ministers' Deputies), s. 2.1.

[49] Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford: Oxford University Press, 2019); Hans-Wolfgang Micklitz et al. (eds.), *Constitutional Challenges in the Algorithmic Society* (Cambridge: Cambridge University Press, 2022).

[50] Recommendation CM/Rec(2018)2, Recital (6).

[51] The profound change in relations regarding free speech certainly appears also in the US literature, but in a different conceptualization, see Jack M. Balkin: 'Free Speech is a Triangle' (2018) 118(7) *Columbia Law Review* 2011.

of the CoE welcomes that 'some online platforms have made considerable efforts to prevent the use of their networks as conduits for large-scale disinformation and manipulation of public opinion', it also warns that 'the impact of these measures on the free flow of information and ideas in democratic societies must be studied carefully'.[52]

7.3 FALSE AND HARMFUL INFORMATION IN THE JURISPRUDENCE OF THE ECTHR

According to the previously cited definition from the analysis of the CoE, disinformation is when false information is knowingly shared in order to cause harm. Although, with the exception of a single stray mention, the ECtHR has not yet addressed disinformation in its decisions,[53] it has a remarkable body of practice regarding the untruthfulness of communications and the harm caused by it. By analysing this practice, I will take into account the aspects that play an important role in the Court's consideration when clarifying the conceptual elements of disinformation (falsity, intent and harm).

7.3.1 *Statements of Facts and Value Judgements*

One of the most important guiding threads of the ECtHR's decisions reveals the difficulty of distinguishing between factual statements and value judgements. According to the Court's general practice, the protection of freedom of speech applies differently to statements of facts and value judgements. The Court distinguishes between the two categories on the ground that 'while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof', and 'the requirement to prove the truth of a value judgment is impossible to fulfil and infringe freedom of opinion itself'.[54] The two categories cannot be completely separated, however. First, statements of facts are an integral part of the formation of present or future value judgements, and this must also be taken into account when determining the standards of their protection. Second, the ECtHR reiterates that where a statement amounts to a value judgement, 'the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive'.[55]

[52] Recommendation CM/Rec(2022)4, s. A.6.

[53] For the only exception, see *Sanchez* v. *France*, [185].

[54] E.g. *Feldek* v. *Slovakia*, app. no. 29032/95, judgment of 12 July 2001, [75]; *Lingens* v. *Austria*, app. no. 9815/82, judgment of 8 July 1986, [46]; and *Oberschlick* v. *Austria (No. 1)*, app. no. 11662/85, judgment of 23 May 1991, [63].

[55] *De Haes and Gijsels* v. *Belgium*, app. no. 19983/92, judgment of 24 February 1997, [47]; *Jerusalem* v. *Austria*, app. no. 26958/95, judgment of 27 February 2001, [43].

From the perspective of the legal prosecution of disinformation, an important question is how strictly the categories of facts and value judgements are regarded as separable. If we rigidly insist on the truthfulness of each element of an expression, then the possibility of restriction opens up greatly, while if we 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. In the practice of the ECtHR, the latter approach clearly follows from the fundamental aspects of freedom of speech. This is well illustrated by the Polish cases described below, that dealt with the application of a provision of the local election law that prosecutes falsity.[56]

In *Kita* v. *Poland*, a decision had to be made on the legality of leaflets distributed in a local election campaign, which drew the voters' attention to financial abuses. The ECtHR disallowed the summary classification of the Polish courts, since in the course of the categorization of the statements in question they unreservedly qualified all of them as statements which lacked any factual basis without examining the question of whether they could be considered to be value judgements. While the ECtHR recognized that some of the statements could be considered lacking a sufficient factual basis, it based its decision on the fact that 'the thrust of the applicant's article was to cast doubt on the suitability of the local politicians for public office' related to issues of public interest. According to the *ratio decedendi* of the Strasbourg judgment, 'the distinction between statements of fact and value judgments is of less significance in a case where the impugned statements were made in the course of a lively political debate, even where the statements made may lack a clear basis in fact'.[57]

In *Kwiecien* v. *Poland*, the question was again the interpretation of the Polish election law. In this case, an open letter attacked one of the candidates, and the ECtHR assumed again that the purpose of the speech published in the campaign was to dispute the candidate's suitability for public office. As a general rule of interpretation, the court establishes a presumption for expressions belonging to the campaign that 'opinions and information … should be considered as forming part of a debate on questions of public interest' in the case of campaign communications. The judgment did not dispute the assertion that certain elements of the open letter lacked sufficient factual basis, but overall it considered that 'its thrust was

[56] The relevant provision of the Act reads as follows: 'If posters, slogans, leaflets, statements or other forms of propaganda and campaigning contain untrue data and information, a candidate standing for local election or a representative of an electoral committee has the right to make an application asking the Regional Court to: 1) order the confiscation of such materials, 2) issue an injunction restraining [the defendant] from publishing such data and information, 3) order the information to be corrected, 4) order [the defendant] to apologise to the aggrieved party, 5) order [the defendant] to pay to a charity up to PLN 10,000, 6) order [the defendant] to pay to the claimant up to PLN 10,000 in damages.'

[57] *Kita* v. *Poland*, app. no. 57659, judgment of 8 July 2008, [45] and [46]; *Lombardo and Others* v. *Malta*, app. no. 7333/06, judgment of 24 April 2007, [60].

to cast doubt on the candidate's suitability for local public office, based on the applicant's long experience with him'.[58]

7.3.2 *Good Faith or Bad Faith*

In both *Kita* and *Kwiecien*, the ECtHR also referred to the fact that nothing in the circumstances of the case indicated that the speakers had acted in bad faith. As we have seen, the fact that certain elements of the expressions did not have an adequate factual basis was not enough to establish bad faith. Proving bad faith means rebutting the presumption that the speaker acted with the intention of participating in democratic political debate. If it emerges from the circumstances of the case that the author of the opinion was no longer motivated by the shaping of the debate on public affairs, but by the goal of an unfounded personal attack, then their expression of opinion is not entitled to the same protection.[59]

Salov v. *Ukraine* sheds light on the same consideration in a true 'conspiracy theory case'. One of the candidates in the Ukrainian presidential election campaign was held responsible by the Ukrainian courts for disseminating the false information that the incumbent (and running for re-election) president was actually already dead and was being replaced by a stuntman during his public appearances. However, the ECtHR emphasized in its decision that the original source and publisher of the untrue information was not the convicted presidential candidate, but that he had only dealt in good faith with information that had already emerged during the campaign. The judgment points out that the sharing or discussion of the received information cannot be prohibited in itself, 'even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the media'. The Court considered that the presidential candidate had acted in good faith because he emphasized that he had not known whether this information was true or false while he was discussing it with others, having alleged that he was trying to verify it.[60]

At the same time, the standard of good faith is not uniform, but may vary according to the position of the speaker. In *Medzlis Islamske Zadnice Brcko*, religious and ethnic civil organizations appealed to the competent authorities of an administrative district in Bosnia and Herzegovina and criticized a person they considered to be unsuitable for the post of director of the district's multi-ethnic public radio station by making a number of incriminating allegations. Some of the claims came from other people's reports, while others were presented to the authorities without sources. The ECtHR started from the fact that, in the eyes of society,

[58] *Kwiecien* v. *Poland*, app. no. 51744/99, judgment of 9 January 2007, [51], [54].
[59] Ibid. [54]; *Kita* v. *Poland*, [45].
[60] *Salov* v. *Ukraine*, app. no. 65518/01, judgment of 6 September 2005, [113] and [114].

reputable non-governmental organizations (NGOs) have an increased responsibility for disseminating factual statements. According to the Code of Ethics and Conduct for NGOs adopted by the World Association of Non-Governmental Organizations, they were bound by the requirement to verify the veracity of allegations submitted. In contrast, those involved in the case made statements based on guesswork and rumour without making any serious efforts to verify the authenticity of the non-governmental organizations.[61]

7.3.3 *Journalistic Ethics*

The standard of good faith and careful conduct is always stricter when it applies to the press. The ECtHR attributes a particularly important and prominent role in the functioning of democracy to the press as an institution that professionally informs the public.[62] This role does not mean that the press should not respect the rights of others, but the aspects of information dissemination are given special weight, since its basic task is to present information and opinions related to public affairs.[63]

However, according to the practice of the court, the press is entitled to enhanced protection in its informative activities only when it acts in good faith – that is, when it acts in accordance with the tenets of 'responsible journalism'.[64] The standard of good faith is acting according to journalistic ethics, which sets expectations for journalists in order to provide the public with accurate and reliable information.[65] Based on journalistic ethics, it is the basic task of the press to take steps before publication to verify the accuracy of the information it receives.[66] However, the fulfilment of this obligation is, by definition, adjusted to the circumstances of the given case. When covering communication by others, for example in an interview, the general requirement for journalists to distance themselves systematically and formally from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas. '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

[61] *Medzlis Islamske Zajednice Brcko and Others* v. *Bosnia and Herzegovina*, app. no. 17224/11, judgment of 27 June 2017, [114] and [115].

[62] It is worth noting that the mainstream doctrine about the special duties of the press in the formation of public opinion has recently been debated in the academic discourse, see Paul Wragg, *A Free and Regulated Press: Defending Coercive Independent Press Regulation* (Oxford: Hart, 2020).

[63] *Jersild* v. *Denmark*, app. no. 15890/89, judgment of 23 September 1994, [31]; *De Haes and Gijsels* v. *Belgium*, [37].

[64] *Bédat* v. *Switzerland*, app. no. 56925/08, judgment of 29 March 2016, [50].

[65] *Staniszewski* v. *Poland*, [48]; *Goodwin* v. *United Kingdom*, app. no. 17488/90, judgment of 27 March 1996, [39]; *Bladet Tromsø and Stensaas* v. *Norway*, app. no. 21980/93, judgment of 20 May 1999, [65].

[66] *Sallusti* v. *Italy*, app. no. 22350/13, judgment of 7 March 2019, [56].

public interest.'[67] In addition, it should always be taken into account that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.[68]

It is very instructive, however, that in *Staniszewski*, the ECtHR saw no reason for protecting the free flow of information when the editor of a monthly newsletter completely failed to indicate the sources of his information. Without any indication of sources, we are probably facing a case of fabrication rather than dissemination of news, which the Court considered as clear proof of acting in bad faith.[69] In the Court's approach, in today's ever more effervescent information whirlwind, the importance of journalistic ethics has not diminished at all, in fact it is becoming more and more important: 'In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance.'[70] The ECtHR quite accurately and tellingly identifies that one of the main reasons why disinformation is felt to be overwhelming in our public discourse is that partisan and activist journalism is increasingly trumping standards of responsible journalism.

7.3.4 *The Impact of Speech*

The Strasbourg Court considers the influencing power of speech to be a factor to be taken into account even in the case of harmful communications, including untrue statements of fact. In the above-mentioned *Salov* case, for example, an important circumstance was that the convicted presidential candidate shared untrue information from a small newspaper reporting fabricated news with a limited number of people.[71] When assessing information published in the legacy media, the ECtHR traditionally takes into account the differences between the influencing powers of different media. 'In considering the duties and responsibilities of a journalist, the potential impact of the medium concerned is an important factor and it is commonly acknowledged that the audio-visual media often have a much more immediate and powerful effect than the print media.'[72]

There may also be large variations in the potential impact of different expressions given the extremely wide range of types of communication on the Internet.

[67] *Ólaffson* v. *Iceland*, app. no. 8493/13, judgment of 16 March 2017, [56]; *Jersild* v. *Denmark*, [35]; *Delfi AS* v. *Estonia*, app. no. 64569/09, judgment of 16 June 2015, [135].
[68] *Dalban* v. *Romania*, app. no. 28114/95, judgment of 28 September 1999, [49].
[69] *Staniszewski* v. *Poland*.
[70] *NIT S.R.L.* v. *The Republic of Moldova*, app. no. 28470/12, judgment of 5 April 2022, [181]; *Stoll* v. *Switzerland*, app. no. 69698/01, judgment of 10 December 2007, [104].
[71] *Salov* v. *Ukraine*, [114].
[72] *Delfi AS* v. *Estonia*, [134].

> It is clear that the reach and thus potential impact of a statement released online with a small readership is certainly not the same as that of a statement published on mainstream or highly visited web pages. It is therefore essential for the assessment of a potential influence of an online publication to determine the scope of its reach to the public.[73]

Likewise in connection with the potential influence of speech, it is worth mentioning the thread of interpretation which – primarily in cases related to hate speech – also attributes importance to the person of the speaker. In certain positions, according to the Court, more attention is paid to a speaker's opinion, so its impact can be more significant. In *Sanchez* v. *France*, the ECtHR emphasized that with politicians, the degree of notoriety and representativeness necessarily lend a certain resonance and authority to a person's words or deeds. Owing to politicians' particular status and position in society, they are more likely to influence people.[74] In terms of communication on the Internet, a similarly enhanced impact can be presumed if the speaker is a well-known blogger or a popular contributor to social media.[75]

The Court always evaluates the social and political context of the expression of an opinion as an important or, in some cases, decisive factor in the impact of the communication. When a statement is made against a tense political or social background, the presence of such a background generally leads the Court to accept that some form of interference is justified.[76] In contrast, if there was no indication that a sensitive social or political background existed, the Court was reluctant to admit the necessity of restriction.[77]

7.3.5 *The Use of Internet Sources*

The line of interpretation developed by the ECtHR regarding the use of internet sources in the press has significance beyond the media. The study prepared for the CoE also emphasizes the importance of the fact that 'in the age of disinformation' people are increasingly seeing information created by unofficial sources (from social media accounts, or websites which have only recently appeared), and there is 'a need to be doing source-checking as well as fact-checking'. This is partly because of the fact that the nature of the source which originally created the content or which first shared it can provide the strongest evidence about whether the information is accurate.[78]

At the same time, the practice of the court does not accept objective responsibility for the dissemination of information, even by the press, which is charged with a strict

[73] *Savva Terentyev* v. *Russia*, app. no. 10692/09, judgment of 28 August 2018, [79].
[74] *Sanchez* v. *France*, [150] and [187].
[75] *Savva Terentyev* v. *Russia*, [81].
[76] *Perincek* v. *Switzerland*, app. no. 27510/08, judgment of 15 October 2015, [205].
[77] *Kilin* v. *Russia*, app. no. 0271/12, judgment of 11 May 2021, [92].
[78] Wardle and Derakhshan, *Information Disorder* (n 2), p. 18.

duty of care. In *Editorial Board of Pravoye Delo and Shtekel* v. *Ukraine*,[79] the ECtHR held accountable the Ukrainian regulation since, although the Press Act exempts journalists from civil liability for verbatim reproduction of material published in the press, no such immunity existed for journalists reproducing material from internet sources not qualified as press. The Court admitted that the risk of certain forms of harm posed by content and communications on the Internet is higher than that posed by the press, therefore the policies governing the reproduction of material from the printed media and the Internet may differ. Even so, considering the importance of the Internet for the exercise of the right to freedom of expression, the Court ruled that 'the absence of a sufficient legal framework allowing journalists to use information obtained from the Internet without fear of incurring sanctions seriously hinders the exercise of the vital function of the press as a public watchdog'.[80]

Similarly, the ECtHR considered the practice of the Hungarian Constitutional Court, which only exempted journalists from responsibility for the coverage of official press conferences, to be insufficient. In the case of *Magyar Jeti Zrt.* v. *Hungary*,[81] the Court considered it necessary to enforce such immunity on a much wider scale. In the specific case, in connection with the distribution of hyperlinks, the reasoning explained that their very purpose, by directing internet users to other pages and web resources, is to allow them to navigate to and from material in a network characterized by the availability of an immense amount of information. Hyperlinks, as a technique of reporting, are essentially different from traditional acts of publication in many senses, including that the person offering information through a hyperlink does not exercise control over the content of the website to which the hyperlink enables access. Consequently, the Court could not agree with the approach equating the mere posting of a hyperlink with the dissemination of defamatory information, thus automatically entailing liability for the content itself.[82] Of course, the consideration of other factors also played a role in the decision, especially that the press organ acted in good faith, in the service of the discussion of public affairs.

In another Hungarian case, the ECtHR explained in connection with the comments section of an internet portal that providing a platform for third parties to exercise their freedom of expression by posting comments is a journalistic activity of a particular nature. Therefore, the question of liability for defamatory statements posted there should always be considered on the grounds that 'the 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

[79] *Editorial Board of Pravoye Delo and Shtekel* v. *Ukraine* No. 33014/05, judgment of 5 August 2011.
[80] Ibid. [61]–[64].
[81] *Magyar Jeti Zrt* v. *Hungary*, no. 11257/16, judgment of 4 December 2018.
[82] Ibid. [74]–[77].

matters of public interest'.[83] Although the above theses regarding the use of internet resources were elaborated by the ECtHR in cases related to the press, they are deeply rooted in its general approach to internet communication and are thus also applicable to other speakers.

7.3.6 *The Harm of Speech*

It is also worth briefly considering what in the ECtHR's case law the legal basis for action against false information may be. In other words, what kind of grievances can justify legal restrictions that respond to disinformation? As has already been discussed, the limitation of freedom of speech must be traceable to one of the grounds for limitation listed in Article 10(2) of the Convention. Those decisions of the ECtHR which considered that it was permissible to limit the freedom of expression due to the dissemination of false information accepted such restrictions in order to protect the rights of others. In terms of the legal response to disinformation, the 'protection of the rights of others' can be interpreted in two ways, however. When a restriction is imposed in order to protect the rights of a specific person, typically their reputation, this has long been considered a traditional intervention in line with the doctrine of freedom of speech. In such cases, the ECtHR considers in each situation how much the person affected by the opinion is obliged to tolerate in the interest of the free discussion of public affairs. On the other hand, the 'rights of others' can also be interpreted in a more abstract way if it is understood as the legitimate interests of certain groups or even of the entire society. While the protection of social groups, especially minorities in a sensitive situation, is an obvious consideration in cases related to hate speech, the ECtHR has so far considered the protection of the rights of specific individuals as the appropriate goal in decisions related to the dissemination of false statements.

Although the Court – considering the legitimate aim of the interference – has already referred to the more abstract ways in which disinformation may cause harm in two election-related cases, in both cases the individual candidates concerned were actually affected by the false statements. According to the summarizing statement of the *Salov* judgment, the Court agreed with the government that the interference at issue was intended to pursue the legitimate aim of providing the voters with true information in the course of the presidential campaign.[84] However, the submission of the government was based on the argument that the dissemination of false information about a presidential candidate could have a damaging effect on

[83] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt.* v. *Hungary*, app. no. 22947/13, judgment of 2 February 2016, [79]; see also, *Jersild* v. *Denmark*, [35]; *Delfi AS* v. *Estonia*, [135].
[84] *Salov* v. *Ukraine*, [110].

their reputation and effectively prevent them from conducting an effective electoral campaign.[85]

The rights of the voters therefore only arose indirectly in the case. In *Staniszewski*, the ECtHR similarly indicated that the interference had served to protect the integrity of the electoral process and thus the rights of the voters, but in the first place the Court emphasized that the legitimate aim of the restriction was to protect the reputation of one of the candidates in the local elections.[86] The ECtHR thus considers it relevant to refer to the rights of the voters and the integrity of the election as a more abstract value to be protected in the case of disinformation published in an election campaign, but the restrictions on the freedom of speech that have been deemed legal until now have always been imposed to protect the rights of a specific person, even in the context of an election.

At the same time, the right to adequate information can also be a valid reason for intervention in the field of media law in a more abstract form. The practice of the bodies of the CoE, including the Court, regards the audiovisual media as an actor with particularly strong power to influence others, thus it has developed specific standards of intervention, which are now applied as a matter of convention. The misleading information containing untruths in *NIT* v. *Moldova* was found to be a suitable legal basis even for revoking the right to broadcast, as the measure was intended to ensure the audience's right to a balanced and unbiased coverage of matters of public interest in news programmes.[87]

In principle, 'prevention of disorder' could also be grounds for the limitation of free speech, based on the list in Article 10(2) in the field of disinformation. It may not be a coincidence that the title of the report of the CoE on disinformation is 'Information Disorder'.[88] It can be argued that, within the changed framework of the public sphere, disinformation, especially in relation to election campaigns, disrupts democratic conditions and causes hard-to-repair damage to the smooth functioning of public discourse and democratic elections. However, the case law of the ECtHR does not support that 'prevention of disorder' becomes another legal basis for restricting freedom of speech in the fight against disinformation.

In the Court's approach, given that the Convention serves to protect individual freedoms, the legal grounds for limiting rights must always be interpreted restrictively. The meaning of 'prevention of disorder' was interpreted by the ECtHR together with the term 'protection of public order' used elsewhere in the Convention. Accordingly, while 'public order' appears to bear a wider meaning, referring to the body of political, economic and moral principles essential to the maintenance of the social structure, the notion of 'disorder' 'conveys a narrower

[85] Ibid. [101].
[86] *Staniszewski* v. *Poland*, [44].
[87] *NIT S.R.L.* v. *The Republic of Moldova*, [174].
[88] See note 4.

idea, understood in essence in cases of this type as riots or other forms of public disturbance'.[89] This means that the 'prevention of disorder' can serve as a legitimate aim for restricting free speech in case of disinformation only when the communication in question can trigger riots or other forms of violent public disturbance. This cannot be ruled out, but it is certain that disinformation – even if it clearly disturbs the debate on public affairs – has such an effect only in very special circumstances.

Interventions for the sake of public health have recently come into focus in the wake of the COVID-19 pandemic. The convention mentions public health as one of the reasons for restrictions, and although such a case has yet to be brought before the ECtHR, it may well be relevant in the field of disinformation. It is clear from *Hertel* v. *Switzerland* that when a public health issue – in this specific case, the effect of microwave ovens on health – is the subject of social debate, the state has only a very narrow margin to limit the viewpoints expressed.[90] However, this room for manoeuvre increases according to how solid the (European) consensus is on a given health issue. In the event of such a consensus, fundamental considerations of public health could prevail even over fundamental rights such as freedom of expression.[91]

7.3.7 *Article 17: Abuses of Freedom of Expression*

Due to their significance, I will separately examine the types of harms in which Article 17 of the Convention, the so-called abuse clause, is referred to by the Court. Article 17 of the Convention is a provision on the prohibition of the abuse of rights. It reads as follows: '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.' The methodological significance of Article 17 lies in the fact that, when applied, the ECtHR treats the expression in question as speech outside the scope of freedom of speech, and does not even conduct a strict examination of the legality of the restriction.[92]

Article 17 is the ultimate tool for the protection of human rights and democracy, the application of which is reserved by the ECtHR for cases that deny democratic values and principles.[93] It is only applicable on an exceptional basis and in extreme

[89] *Perincek* v. *Switzerland*, [146] and [151].

[90] *Hertel* v. *Switzerland*, app. no. 25181/94, judgment of 25 August 1998, [47].

[91] *Société de conception de presse et d'édition and Ponson* v. *France*, app. no. 26935/05, judgment of 5 March 2009, [56].

[92] For the key distinction between the scope of the freedom of speech and the protection provided by it, see especially, Schauer, 'Categories and the First Amendment'; Barendt, *Freedom of Speech*, 74–78, Robert C. Post, 'Recuperating First Amendment Doctrine' (1994–1995) 47(6) *Stanford Law Review* 1249, 1250.

[93] Hannes Cannie and Dirk Voorhoof, 'The Abuse Clause and Freedom of Expression: An Added Value for Democracy and Human Rights Protection?' (2011) 29(1) *Netherland Quarterly of Human Rights* 54.

situations, and in cases concerning freedom of expression it should only be resorted to in situations where it is immediately clear that the impugned statements involve this right for ends clearly contrary to the values of the Convention.[94] Given that, according to general opinion, the increasing prevalence of disinformation ultimately undermines democracy, and in its radical sense disinformation is per se contrary to all the values that the Convention promotes and protects, the possibility of applying Article 17 can also be raised.[95] The validity of this suggestion seems to be strengthened by the fact that the ECtHR saw the possibility of its application in several cases in connection with the denial of true facts or untrue statements of facts. However, it is clear from the following relevant cases that Article 17 is actually applied in practice as a means of action against special forms of hateful and discriminatory speech.

The book that is the subject of *Garaudy* v. *France*[96] analysed in detail a number of historical events relating to the Second World War, such as the persecution of the Jews, the Holocaust and the Nuremberg Trials, questioning the reality, extent and seriousness of these historical events. The Court emphasized that this opinion is far from political or ideological criticism, or one calling for 'a public and academic debate' on the historical events.

> There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them.

The Court therefore found that the denial or rewriting of this type of historical facts undermines basic values and is incompatible with democracy and human rights.

In relation to the prohibition of an association in *W.P. and Others* v. *Poland*,[97] the subject of the case was not the denial of historical facts, but the assertion of untrue historical claims. The association of 'Polish Victims of Bolshevism and Zionism' proclaimed, among other things, that the persecution of Poles was a crime perpetrated by the Jewish minority, and one of the main points of its programme was to eliminate the inequality oppressing the Polish majority in favour of the Jewish

[94] *Perincek* v. *Switzerland*, [114]; *Hizb ut-Tahrir and Others* v. *Germany*, app. no. 31098/08, judgment of 12 June 2012, [73], [74] and [78].

[95] Davor Derencinovic, 'Freedom of Expression and its Restrictions in Europe: On the Applicability of Article 17 of the European Convention of Human Rights to Disinformation (Fake New)' (2021) 2 *Law, Identity and Values* 7; Ethan Shattock, 'Fake News in Strasbourg: Electoral Disinformation and Freedom of Expression in the European Court of Human Rights' (2022) 13(1) *European Journal of Law and Technology*.

[96] *Garaudy* v. *France*, app. no. 65831/01, decision of 24 June 2003.

[97] *W.P. and Others* v. *Poland*, app. no. 42264/98, decision of 2 September 2004.

minority. The Court observed that the general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention, and the anti-Semitic activities of the association hence clearly met this standard. The ECtHR also closed the case by applying Article 17 when the applicant did not deny the Holocaust as such, but 'denied an equally significant and established circumstance of the Holocaust considering it false and historically unsustainable that Hitler and the NSDAP had planned, initiated and organized the mass killing of Jews'. The Court found again that these views ran counter to the text and the spirit of the Convention.[98]

Regarding historical facts beyond the Nazi atrocities, a decision of great importance was made in *Perincek* v. *Switzerland*. The essential question in this case was whether the criminal conviction for the opinion that 'the allegations of the "Armenian genocide" are an international lie' is lawful. The ECtHR found that the decisive point under Article 17 – whether the applicant's statements sought to stir up hatred or violence, and whether by making them he attempted to rely on the Convention to engage in an activity or to perform acts aimed at the denial of the rights and freedoms laid down in it – is not immediately clear, thus the question of the applicability of Article 17 must also involve consideration of the merit. First and foremost, the Court admitted that its assessment of the necessity of interference with statements relating to historical events has been quite case-specific.

Taking into account a plethora of aspects – that the applicant's statements related to a matter of public interest and did not amount to a call for hatred or intolerance, that the context in which they were made was not marked by heightened tensions or special historical overtones in Switzerland, that the statements cannot be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal-law response in Switzerland, that there is no international-law obligation for Switzerland to criminalize such statements, that the Swiss courts appear to have censured the applicant for voicing an opinion that diverged from the established opinion in Switzerland, and that the interference took the serious form of a criminal conviction – the Court concluded that the criminal conviction violated the Convention.[99] However, as the remarkable dissenting opinion of four Judges shows, despite all the efforts of the majority's reasoning and the many factors put forward for the sake of distinction, one of the most controversial points of the decision remained the question of the application of Article 17.[100] The debate of the judges clearly points out that the standard used in the context of the abuse clause regarding the denial of historical facts has become unpredictable.

[98] *Witzsch* v. *Germany (No. 2)*, app. no. 7485/03, decision of 13 December 2005.
[99] *Perincek* v. *Switzerland*, [208].
[100] See the additional dissenting opinion of Judge Silvis, joined by Judges Casadevall, Berro and Kuris.

Although they are not directly related to the veracity of factual statements, it is instructive to look at two additional cases regarding the application of Article 17. *Norwood* v. *United Kingdom*[101] concerned a poster that depicted a photograph of the Twin Towers in flames, with the words 'Islam out of Britain – Protect the British People' and a symbol of a crescent and star in a prohibition sign. The Court noted that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, was found to be incompatible with the values proclaimed and guaranteed by the Convention, thus Article 17 was applied.

In *Lillendahl* v. *Iceland*,[102] however, the Court did not find the abuse clause applicable in connection with statements describing homosexual people as disgusting sexual deviants. Trying to clarify its case law, the ECtHR explained that hate speech falls into two categories. The first category is composed of the gravest forms of hate speech which the Court regards as falling under Article 17. The second category includes less grave forms of hate speech which the Court does not consider to fall entirely outside the scope of Article 10, but which it is permissible to restrict.

> Into this second category, the Court has not only put speech which explicitly calls for violence or other criminal acts, but has held that attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for allowing the authorities to favour combating prejudicial speech within the context of permitted restrictions on freedom of expression.[103]

In relation to the discussion about the fight against disinformation, the following conclusions can be drawn from the judicial application of Article 17. The abuse clause has been applied in practice as a tool for handling the gravest forms of hate speech. Cases of disinformation (denial of true facts or untrue statements of facts) may fall within the scope of Article 17 if the Court can establish that they are manifestations of racial discrimination and incitement to hatred. In addition, the conditions for the application of Article 17 are not objective and predictable but were based on complex consideration of the special circumstances of socially sensitive cases. In such circumstances, it is theoretically not desirable to make a decision without applying the strict methodology of restricting freedom of speech, that is, for it to expand the range of cases that can be handled under Article 17. Finally, it is particularly undesirable to circumvent investigation methods in relation to disinformation, the limitation of which is always decided on by the Court, as we have seen, by taking into account a complex set of criteria. The threat posed by disinformation to the sustainable functioning of elections and democracy in general by no means constitutes a sufficient reason for the use of the abuse clause.

[101] *Norwood* v. *United Kingdom*, app. no. 23131/03, decision of 16 November 2004.
[102] *Lillendahl* v. *Iceland*, app. no. 29297/18, decision of 1 May 2020,
[103] Ibid. [33]–[36].

7.3.8 *Restrictive Legal Means against Disinformation*

After Sections 7.2 and 7.3 of this chapter, the main conclusions can already be drawn, based on the doctrine shared by the CoE, on the extent to which the challenge posed by disinformation can be answered by legal means that limit the freedom of speech. The key finding is that there is no justification for general action against speech that can be classified as disinformation, and that restrictive intervention can only take place in rare, exceptional cases. The basic principles and aspects of the democratic participatory concept of free speech bind the legal interpretation of the conceptual elements of disinformation (untrue statement of facts, intent to deceive and causing harm) in such a way that restrictive mechanisms can only be justified within a narrow range of misleading (and socially otherwise problematic) cases. In the following section, I will first summarize the most important arguments against restrictive interventions, and then I will identify the scope in which restrictive measures can still be justified.

7.3.8.1 Arguments against Restrictive Legal Means

Among the theoretical obstacles that stand in the way of imposing legal restrictions on disinformation, the first is the basic approach of the participatory model of free speech, according to which the active involvement of as many people as possible in the discussion of public affairs is not a circumstance that causes risks but a value to be supported. In the logic of democratic public opinion, the answer to the undoubtedly existing risk that anyone can shape public opinion is not the limitation of participation but the corrective power of a robust debate. This represents more than an abstract doctrine: this argument is also based on the fact that where a pathological social weakness of corrective factors exists, legal restrictions are actually unsuitable tools for improving the situation. The findings of the CoE presented in Section 7.4 are telling. Restrictive legal instruments are hardly suited for remedying the problems of the lack of sources of information worthy of public trust, the shrinking of the ethos of quality journalism, and the increasingly irrational tribalism prevailing in public discussions. They can, however, further increase distrust in the institutional system at any time.

Second, under the auspices of democratic public opinion, the European doctrine (also) regards the speaker and their audience first and foremost as autonomous citizens who interpret information and context in their complexity, and who then jointly bear the result of the exchange of opinions. Democratic public opinion emerges from the dialogue of the members of the community that organizes itself democratically regarding how to self-govern. All this supports the rejection of any intervention that would steer the development of public opinion in the 'right' direction and protect the audience in a paternalistic way. In the field of disinformation (and without specific additional circumstances), the many restrictions

applied to commercial communication cannot be taken as an example to be followed,[104] because their anthropological approach sees the consumer as vulnerable to the manufacturer and distributor, whose position must be protected by the state, above all for the sake of their health and safety.

Third, for the doctrine of freedom of speech, statements that can be considered troubling in the informational sense are in many cases not untrue statements of fact, but political opinions in whole or in part, with which the participant in the public debate explains reality. Conspiracy theories, misinterpretations or distortions are traditional elements of the public discourse, which must also be reckoned with in the altered circumstances of the public sphere today.

Fourth, in line with this, in the evaluation of the motivation of the speaker, harmful intent can only be interpreted narrowly. Influencing the plural political public is often accompanied by one-sided communications, thus carrying the possibility of misrepresentation, even without the speaker being guided by the intention to harm. In a public life that is based on political competition, the discrediting of an opponent's ability or policies are parts of participation in the public debate, even if they are based on arbitrary highlighting, exaggeration of certain factors, or subjective and baseless assumptions.

Fifth, in order to promote participation and avoid excessive interventions, the doctrine of freedom of speech also limits the legal consideration of grievances. In the case of public figures, jurisprudence often decides in favour of freedom of speech, even when specific personal rights are involved, and the abstract interest of informing society or the electorate can be used to justify restrictions even more narrowly.

7.3.8.2 Possible Legal Restrictions

While the allegation of untruthfulness alone is not a sufficient reason for intervention, in the case of expressly fabricated news, there is room for limitation under the Strasbourg jurisprudence. This requires both for the intention of the communicator to be clearly and directly aimed at publishing untrue and harmful information, and for this information to have an independent significance and weight (that is, the speech cannot be evaluated as a political expression of opinion as a whole). When these conditions exist, the scope of the restriction is determined by the nature of the harm: the rights of a specific person are more broadly protected, while more abstract social interests (for example, public health) can only be protected at the cost of free speech in special cases, when they are especially endangered. In particular, there is room for intervention in the case of information sources (for example, social media

[104] Paolo Cavaliere, 'The Truth in Fake News: How Disinformation Laws Are Reframing the Concepts of Truth and Accuracy on Digital Platforms' (2022) 3(4) *European Convention on Human Rights Law Review* 523.

profiles) that are created and operated in order to systematically fabricate and spread falsity.

In the field of shaping public opinion, even within the new framework of the public, stricter rules apply to journalists, who have a privileged role, which also carries responsibilities in that they are liable for violating journalistic ethics, especially for untruths reported without a good-faith attempt to check the veracity of the information. This obligation may also apply to other actors (for example, to NGOs) that participate in the discourse with a 'public watchdog' function. In addition, the media law can impose the obligation to provide factual and objective information on the audiovisual media with greater influence as a specific obligation limiting their editorial freedom.

The increased responsibility in the field of shaping the political aspects of the public sphere seems to appear in the practice of the ECtHR in cases where the speaker is an active politician. However, for the time being, the case law has established a higher-level standard only in the field of hate speech, and there are strong arguments against the development of a similar interpretation in the field of disinformation. The arguments for politicians having to accept even the harshest criticism and personal attacks are also valid in the other direction: in their case, the correction of inaccuracies can best be entrusted to the public exchange of ideas. The attention paid to politicians' statements is especially multidirectional, and their misleading statements are attacked by many other speakers in public. Moreover, in the conditions of the democratic, pluralistic, multi-party public sphere, the audience may be aware of the often exaggerated and even manipulative nature of political communication. On the basis of the state's obligation to support the proper structure of democratic public opinion, special requirements supporting the dissemination of quality information can be imposed on the operation of social platforms that do not qualify as media. However, since these requirements are different in nature from the classic restrictive state interventions discussed so far, they will be discussed separately in Section 7.4.1.

Overall, the documents of the CoE and the practice of the ECtHR suggest that measures restricting communication in the fight against disinformation can only play a more significant role than at present if the basic principles of freedom of speech are set aside. The prospect of overruling the aspects that have defined the doctrine of freedom of speech to date can definitely be considered an open question. It can be argued that these aspects were tailored to circumstances in which there were fewer speakers, a slower flow of communication, and more rational expressions of public life. In the new, altered circumstances, new standards must be established and used as tools for effective interventions. However, these constitutional aspects of freedom of speech doctrine were actually not tailored to certain circumstances but to a general principle of the democratic formation of public opinion. It is an undoubted fact that social relations in today's society and the conditions for democratic exchange of ideas are significantly different now than they were decades ago.

Even so, the aforementioned starting points stem from the essence of democracy; hence, as long as there is a shared belief that we want to manage our public affairs democratically, our social practices must be adapted to them, and not the other way around. However, the limitations this responsibility places on the use of restrictive legal instruments does not mean that we are helpless. What is more, deeper reasons for the growth of disinformation can be found in social phenomena against which the state can successfully act primarily not with restrictive measures but through other means. The next section will describe what other tools the regulator has at its disposal in the fight against disinformation.

7.4 POLICY MEANS AGAINST DISINFORMATION

It is clear from the materials of the CoE that the institution is aware that solving the aggravating problem of disinformation cannot be achieved by means of restricting public discourse. It is difficult to imagine such wide-scale interventions without violating the democratic principles of freedom of speech, and the problem in any case has deeper roots than could be successfully countered by enforcing new prohibitions. The common understanding within the CoE is that 'our problem isn't "fake news". Our problem is trust."[105] A large part of the disinformation problem stems from the phenomenon that trust in mainstream media has been falling for decades, as has trust in other public institutions.[106] In other words, there is a serious problem with sources in the sense that people trust neither traditional nor the new sources of the widened information ecosystem.[107] As the Committee of Ministers has summarized it, in the present environment of intensified political partisanship and an increasingly polarized information ecosystem, 'individuals' trust in media, as well as trust in politics, institutions and expertise, has in many States declined to a worryingly low level'.[108]

Several documents produced by the CoE outline a multifaceted action plan for the actors involved, adapted to the complexity of the problem. It is clear that both the old and new players in the digital ecosystem have a lot to do to improve the quality of the public discourse. In accordance with the focus of this chapter, I will now consider the main proposals that identify the areas in which the state can take action. Three such areas stand out in terms of their importance: (1) the state's

[105] Jeff Jarvis, 'Our Problem Isn't "Fake News". Our Problems Are Trust and Manipulation', Medium, 12 June 2017, https://medium.com/whither-news/our-problem-isnt-fake-news-our-problems-are-trust-and-manipulation-5bfbcd716440.

[106] Matthew Harrington, 'Survey: People's Trust Has Declined in Business, Media, Government, and NGOs', *Harvard Business Review*, 16 January 2017, https://hbr.org/2017/01/survey-peoples-trust-has-declined-in-business-media-government-and-ngos.

[107] A Hungarian survey conducted by the Institute of the Information Society at University of Public Service (Budapest) – among others – clearly demonstrates this at the national level, https://iis.uni-nke.hu/hirek/2020/07/15/trust-awareness-and-alarm-on-the-internet.

[108] Recommendation CM/Rec(2022)4, s. A.7.

participation in the regulation of newer actors; (2) the promotion of quality journalism, and (3) the development of media and information literacy skills. The latter two areas are considered soft actions relegated to the background in traditional regulatory logic, but actually represent the best hope for progress in the field of disinformation. The proposals formulated by the Council fit well into the European approach, according to which the state also has a positive obligation to create a regulatory and social environment that best serves the enforcement of free speech. The state has a constitutional responsibility to play its part in forming an appropriate framework for democratic public opinion.

7.4.1 *Regulation of Intermediaries*

7.4.1.1 Content Moderation

Self-regulation is not a subject of this paper for several reasons. First, the role of the state is not a major focus in self-regulation, and second, the importance and complexity of the topic requires a separate analysis.[109] However, it is necessary to consider self-regulation from the point of view that the materials of the CoE also emphasize constitutional reasons why the state cannot leave self-regulation systems completely alone. At certain points, the European doctrine of the horizontal effect of freedom of speech limits the room for manoeuvre of the major actors of digital communication, and compliance with these boundaries must ultimately be guaranteed by the state.

This dichotomy can be observed in every mention of self-regulation in the CoE's documents. On the one hand, the Ministerial Committee also emphasizes that states should encourage the establishment and maintenance of appropriate self-regulatory frameworks or the development of co-regulatory mechanisms. On the other hand, these mechanisms must take due account of the role of intermediaries in providing services of public value and in facilitating public discourse and democratic debate as protected by Article 10 of the Convention. More specifically, and in connection with one of the most pressing issues in this regard, during their content moderation efforts 'Internet intermediaries should respect the rights of users to receive, produce and impart information, opinions and ideas'.[110]

When restricting access to content in line with their own community standards and policies, intermediaries should do so in a transparent and non-discriminatory manner. In addition, the providers must pay attention to users' right to freedom of speech. This is not to say that the system of requirements placed upon states should

[109] See András Koltay, 'Freedom of Expression and the Regulation of Disinformation in the European Union' (Chapter 6 in this book) on the self-regulation of online platforms in the EU.
[110] Recommendation CM/Rec(2018)2, s. 2.3.1.

be transferred wholesale to social media platforms. First, the bearer of obligations with regard to fundamental rights remains primarily the state, so it follows that it is states which are most restricted by precepts arising from freedom of expression. Second, the enforcement of constitutional rights against private actors always takes into account the specific, legitimate interests of the obliged party. In spite of this, the emergence of a fundamental rights aspect hinges precisely on the fact that these interests cannot be invoked without restriction

Although platform providers may, on the basis of the objectives of the social network operator, impose special restrictions, they must respect the essential aspects of the fundamental rights thus affected. One such criterion, which follows from the principle of freedom of expression, is that everyone should be free, above all, to express and publish their views in the debate on public affairs. The more current and legitimate the debate on social issues, the narrower the opportunity for the owners of platforms to intervene with regard to the expression of opinion, and the less the service provider can deviate from the consideration of the key constitutional standards.

Based on all of this, in connection with disinformation there are strong arguments against platforms restricting the content of individual communications that are considered worrisome but are not illegal. Where the criteria for the free discussion of public affairs protect speakers against the state, there is a chance that they can also be invoked against the major social media service providers. Platforms can refer to their own legitimate interests under the doctrine of the horizontal effect of free speech, but they are much more limited in current social debates. On the other hand, considering how difficult it is to judge disinformation, it does not seem reasonable for private companies to be granted the right to decide instead of state authorities, especially courts. In the area of self-regulation, the situation is therefore just the opposite to the usual, and in constitutional terms there is a narrower scope for intervention in Europe. The hands of service providers are tied by the requirements of freedom of speech, and the courts must be careful to develop a corresponding practice.

7.4.1.2 The Regulation of Algorithmic Navigation

The nature of the algorithmic recommendation systems used by platforms seems to be particularly important for state policymaking. The fundamental controlling factor of the communication taking place on social media is algorithmic navigation: an algorithm decides what content it draws the attention of users to, and the content it selects has an incomparably greater chance of enjoying widespread dissemination. It is certainly worrisome that, in the current state of affairs, we can only catch a glimpse of the workings of this influence on the social dialogue through the arbitrarily dripped data of the service providers or the subsequent (self-)critical testimony of their former employees. Particularly strong arguments in favour of

ensuring transparency have resulted from the information that has been made public so far, which mostly points to the deliberate neglect by social media firms of the harmful effects of algorithms.[111]

At the same time, this issue concerns more than just increasing transparency. Navigation can play an important role in alleviating some of the public's problems, which can justify the formulation of meaningful expectations. Either we also regulate algorithms, or they alone will regulate us.[112] It would be a valuable contribution to the further development of public debate, for example, if the platforms used their algorithms to shape the structure of the discourse in their domain in such a way that the masses of users encounter more diverse content – instead of further deepening the gap between echo chambers. In the fight against disinformation, making reliable news sources more accessible could bring substantial progress. Similar to the algorithms they have used so far for their various business goals, the platforms could develop a methodology of navigation that tries to respond to these problems. Ultimately, the state can also oblige them to do so in the context of regulating the structure of the democratic public sphere. However, such an obligation can of course only be meaningful and workable if there are credible news sources that are deserving of public trust, so that their positioning in the digital environment can contribute – across political tribes – to clearing up the information chaos. I am convinced that we have just arrived at key areas of state involvement.

7.4.2 *Promoting Quality Journalism*

The importance of quality journalism is clearly demonstrated by the fact that the CoE dedicated a separate document to the topic among its recommendations discussing the problems of the digital media environment. The Ministerial Committee identifies the shift towards an increasingly digital, mobile and social media environment as posing fundamental challenges that have profoundly changed the dynamics of the production, dissemination and consumption of news and other media content. Resultantly, quality journalism needs to compete for audience attention with other types of content that are not subject to the same legal, regulatory or ethical frameworks. A number of media outlets that have traditionally been committed to producing reliable information now find themselves unable to counteract these processes due to a declining reader or viewer base. They are struggling to adapt their operations to a digital environment and to stay connected to the communities they serve.

[111] The Facebook Files, *The Wall Street Journal*, www.wsj.com/articles/the-facebook-files-11631713039.

[112] See the keynote speech of Lawrence Lessig on the conference titled 'Society of Internet Platforms' at the University of Public Service, Hungary (Budapest, 29 October 2021): www.youtube.com/watch?v=Ucym9AlXr1k&t=84s.

An important question, of course, is what we consider to be quality journalism. According to the definition provided in the recommendation, quality journalism is characterized by a firm commitment to the search for truth, correctness, credibility and independence, as well as the enforcement of social responsibility in the public interest. It is important to note that, in terms of the general picture of the media situation, the task is twofold: it is necessary to work not only on positioning quality journalism in a new environment but also even on recreating it. One of the explanations for the weakening of trust in the media is the participation of a critical mass of activist journalists in the intensified partisanship in the political sphere.

The Council of Europe basically advocates a significant role for the state in two areas: financing and education. States are encouraged to ensure the financial sustainability of quality journalism, which is one of the most formidable challenges facing them. 'Traditional, advertising-based media business models have been disrupted, while the transformation of major online platforms, in many respects, into publishing organizations has separated news production from news dissemination.' State actions should include, in a viewpoint-neutral manner:

- granting tax relief for media organizations;
- making public funds available for community and local media;
- removing any regulatory obstacles to the operation of not-for-profit journalism with new forms of donation;
- providing funds, grants or other targeted assistance to investigative journalism;
- financing self-regulatory press councils and mechanisms.

As for education, the state must help journalists to regularly update their skills and knowledge, specifically in relation to their duties and responsibilities in the digital environment, through fellowship programmes and financial support. In addition, specific education curricula and professional training courses should be made available in the fields of science, health, environment, engineering, law and other specialized subjects of public interest, which would ideally motivate journalism students to acquire the practical skills and theoretical background needed to cover such fields.

Due to its importance, the issue of maintaining public service media should be highlighted separately. The CoE believes that public service media are a key stabilizing actor in the media sector if they function as an authentic and reliable source of information independent from political and commercial interests. Public service media could and should play a special role in setting quality standards.

> States should ensure stable and sufficient funding for public service media in order to guarantee their editorial and institutional independence, their capacity to innovate, high standards of professional integrity, and to enable them to properly fulfil their remit and deliver quality journalism.

The recommendation emphasizes that public service media should be at the forefront of the fight against disinformation and should mobilize the actors of quality journalism to develop and share good practices of fact-checking and credible reporting.

When addressing the issue of the proper financing of quality journalism, the question of the transparency of advertising mechanisms should also be discussed. In light of the dominance of the major online platforms in the online advertising market, measures should be undertaken to improve the transparency of their advertising systems and practices, underpinned by legal obligations and independent oversight mechanisms. States should intervene 'to avoid the diversion of advertising revenues from accurate and reliable news sources to sources of disinformation and blatantly false content, and instead seek to reward reliable sources of news.'

7.4.3 *Media and Information Literacy*

Another crucial field for policy-based state actions is the development of the media and information literacy (MIL) skills of society. A well-informed and media-literate society (including journalists, the media, online platforms, non-governmental organizations and individuals) is an essential part of the defence against information manipulation in democratic societies. States have a responsibility for creating and promoting MIL initiatives to help citizens recognize and develop resilience to disinformation. The aim is 'to encourage a media- and information-literate public that is empowered to make informed and autonomous decisions about its media use, that is able and willing to critically engage with the media, that appreciates quality journalism and that trusts credible news sources'.[113] The skills that are required to understand information disorders should be developed as part of more general MIL skills for accessing and managing the digital space, including the ability to deal with an information and communications environment that provides access to degrading content of a sexual or violent nature.[114]

The Council of Europe lists the following actions that states should take in terms of MIL skills:

- provide maximum support for the development of MIL initiatives that illustrate the benefits of quality journalism to various audiences and help them engage with such content in new ways and on new platforms;
- support MIL programmes and activities, which should help users to better understand how online infrastructure and economy are operated and regulated and how technology can influence choice in relation to media;

[113] Recommendation CM/Rec(2022)4, Recital.
[114] Recommendation CM/Rec(2018)2, Recital 8.

- define the promotion of MIL as an explicit common aim of media, information and education policies;
- invest adequate resources in MIL and in developing strategies for collaboration, communication and education;
- integrate MIL measures in the education of all age groups, as an essential part of school curricula from primary school onwards;
- fund independent MIL initiatives by media organizations, public service media, community media, independent regulatory bodies, civil society actors and other relevant actors;
- promote specific media literacy programmes for newsrooms, in particular to promote newsroom collaboration, community building and participatory audience engagement.
- assist in the development of MIL initiatives that help individuals become more aware of how online advertising works.

7.5 CONCLUSION

Having searched for European answers to the problem of disinformation, this chapter examined the practice of three institutions of the CoE which have had a great impact on the development of Member States' legislative and judicial processes. Overall, the practice of the ECtHR, and the documents of the Committee of Ministers and of the Venice Commission suggest that solving the aggravating problem of disinformation cannot be achieved by means of restricting public discourse. It is difficult to imagine such wide-scale interventions without violating the basic principles of the democratic formation of public opinion, and the problem in any case has deeper roots than could be successfully countered by enforcing new prohibitions.

However, the limitations on the use of restrictive legal instruments does not mean that there is no way to address the challenges of disinformation. Indeed, the deeper reasons for the growth of disinformation can be found in social phenomena against which the state can successfully act primarily not by means of restrictive measures, but through other instruments. The common understanding within the CoE is that the problem of disinformation largely stems from a situation where – in the present environment of intensified political partisanship and an increasingly polarized information ecosystem – people trust neither traditional media nor the new online sources of information. According to the European approach, states also have a positive obligation to create a regulatory and social environment that best serves the enforcement of free speech. The state has a constitutional responsibility to play its part in forming an appropriate framework for democratic public opinion. The materials of the CoE identify important areas in which the state can

take action. Through the promotion of quality journalism, or the development of media and literacy skills, or the regulation of newer actors in the public, states can seek ways of fostering the creation or the positioning of credible news sources that are deserving of public trust across the political spectrum. Make no mistake: if we are to see any positive development in this field, clearing up the information chaos needs to be a joint effort by the whole of society.