

Fake News in Strasbourg: Electoral Disinformation and Freedom of Expression in the European Court of Human Rights (ECtHR)

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Abstract

This article examines case law of the European Court of Human Rights (ECtHR) concerning the right to freedom of expression and considers relevant case law in the context of electoral disinformation. Despite growing academic focus on the harmful effects of disinformation on electoral democracy, there have been persistent legal concerns surrounding how restrictions on false information could chill freedom of expression. At present, legal responses to disinformation across Europe are in flux. While there are growing shifts away from self-regulation and towards co-regulation at the EU level, it is unclear as to how stronger rules to curb false information can remain consistent with freedom of expression safeguards under international human rights law. This concern is also relevant when considering shifts in national laws across Europe, as numerous states have introduced restrictive legislation to tackle online falsehoods and have failed to provide adequate human rights safeguards.

Against this backdrop, this article provides clarity as to how lawmakers in Europe can restrict disinformation while respecting the right to freedom of expression. Specifically, this article narrows its focus to ECtHR case law concerning Article 10 of the European Convention on Human Rights (ECHR). Applying this provision, the Strasbourg Court has developed extensive jurisprudence on freedom of expression and identifiable patterns can be derived from this case law that provide useful lessons when combatting false information in political and electoral environments. Focusing on relevant patterns of the Court's reasoning and considering these in the disinformation context, this article provides clarity on how legislators across Europe can develop binding legal rules to combat electoral

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falsehoods while respecting the protective contours of the right to freedom of expression under Article 10.

Keywords: Freedom of expression, electoral disinformation.

1. Introduction

The deleterious effects of electoral disinformation are well documented.¹ Political falsehoods and spurious electoral promises are nothing new to democracy and can be traced back to the evolution of the printing press.² However, the speed and efficiency of online communication presents new opportunities for anti-democratic actors to disseminate lies in a manner that can manipulate voters and distort election outcomes.³ This is highly problematic when considering the need for informed political participation.⁴ As Hochschild states, ‘factual knowledge about politics is a critical component of citizenship’.⁵ For elections to be truly democratic, voters must understand ‘who and what they are choosing and why.’⁶ Considering the novel technological developments of recent years that make electoral disinformation politically and commercially useful,⁷ it is unsurprising that there is a growing academic and legal consensus that robust legal action is needed to curtail falsehoods in the election context. In particular, broader concerns surrounding the failure of social media companies to ‘flatten the curve’ of online deception have been spurred since the outbreak of COVID-19.⁸ As Donovan posits, the pandemic has further exposed existing shortcomings in how platforms have failed to act ‘recursively’ in

¹ Chris Marsden and others, (2020) Platform values and democratic elections: How can the law regulate digital disinformation? *Computer Law & Security Review*, Volume 36, 2020, 105373, ISSN 0267-3649, <https://doi.org/10.1016/j.clsr.2019.105373>; Schia, N. N., & Gjesvik, L. (2020). Hacking democracy: managing influence campaigns and disinformation in the digital age. *Journal of Cyber Policy*, 5(3), 413-428.

² João, P. B., & Gradim, A. (2020). Understanding fake news consumption: A review. *Social Sciences*, 9(10), 185. doi:<http://dx.doi.org/10.3390/socsci9100185>.

³ W. Lance Bennett, and Steven Livingston, (2018) ‘The disinformation order: Disruptive communication and the decline of democratic institutions’, *European Journal of Communication*, 33(2), pp. 122–139. doi:10.1177/0267323118760317.

⁴ Jacob Rowbottom, (2012) Lies, Manipulation and Elections—Controlling False Campaign Statements, *Oxford Journal of Legal Studies*, Volume 32, Issue 3, Autumn 2012, Pages 507–535. Jennifer L. Hochschild, (2010) If Democracies Need Informed Voters, How Can They Thrive While Expanding Enfranchisement?, *Election Law, Rules Politics and Policy* 111-123.

⁵ MX Carpini (1993) ‘Measuring Political Knowledge: Putting First Things First’ *American Journal of Political Science* 37, no. 4: 1179–1206.

⁶ (Hochschild 2010).

⁷ F Roesner and others, (2018) Technology-enabled disinformation: Summary, lessons, and recommendations. arXiv preprint arXiv:1812.09383; Krisztina Rozgonyi, European Commission for Democracy Through Law (Venice Commission): The Impact of the Information Disorder (Disinformation) on Elections, 26 November 2018.

⁸ Joan Donovan, (2020) Social-media companies must flatten the curve of misinformation, *Nature*, doi: <<https://doi.org/10.1038/d41586-020-01107-z>>

restricting the spread of false claims online.⁹ This critique carries particular weight when considering piecemeal legal responses to disinformation across Europe. Specific problems with existing disinformation legislation—either nationally or through European Union (EU) institutions—are not the core focus of this article. However, it is nonetheless useful to briefly provide factual background on relevant legal frameworks in Europe to contextualise the need for freedom of expression safeguards in responding to disinformation. The fractured European legal framework for disinformation exists both at the EU level and at the national level.

The most concrete response to disinformation in the EU is the European Commission's development of a self-regulatory framework through the Codes of Practice on Disinformation. Here, technological platforms such as *Facebook*, *Twitter*, and now *TikTok* make voluntary commitments to disincentivise misleading claims on their platforms. However, shortcomings have been documented in the implementation of these guidelines. Crucially, platforms vary widely their definitions of paid 'political' content and this has led to a lack of 'consistent implementation of specific restrictions' in the scrutiny of political advertising. The Commission itself has also criticised the 'episodic and arbitrary' access afforded for researchers to access relevant data concerning disinformation. This lack of access, coupled with the fact that platforms generally aggregate relevant data at a global and not European level, has fostered knowledge gaps that prevent researchers from ascertaining 'persistent or egregious purveyors of disinformation' in Europe.¹⁰ A further overarching problem is the self-regulatory method itself. Technological intermediaries have no binding obligations under the Codes and their primary incentive for implementing its measures are ultimately based on preserving global reputation and evading more direct regulation in Europe. Accordingly, 'clear and binding rules of conduct specifically designed to tackle disinformation online' have yet to materialise.¹¹ The eagerly anticipated Digital Services Act (DSA) does little to establish clear and binding obligations for disinformation. The core commitment to combat disinformation under the DSA is to improve existing self-regulatory standards. The 'trusted flagger' and risk assessment schemes under this new regulation is geared towards notification and removal of digital content that is unlawful. Thus, like its predecessor in the E-Commerce Directive, the DSA fails to address a key grey area by keeping 'harmful but lawful'¹² content under the purview of voluntary guidelines.

⁹ (Donovan 2020).

¹⁰ Guidance to strengthen the Code of Practice on Disinformation – Questions and Answers (European Commission) 26 May 2021

<https://ec.europa.eu/commission/presscorner/detail/en/QANDA_21_2586>

¹¹ Madeline De Cock Buning, A multi-dimensional approach to disinformation (European Commission 2018).

¹² Ronan Ó Fathaigh & Others, (2021). The perils of legally defining disinformation. *Internet Policy Review*, 10(4). <https://doi.org/10.14763/2021.4.1584>.

While these continued shortcomings are problematic, a narrow view of the ‘harmful but lawful debate’¹³ could be somewhat misleading when adopting a broader assessment of disinformation laws across Europe. As O’Faithigh et al. highlight, EU instruments such as the DSA define illegal content as content that is classified as unlawful at the domestic level.¹⁴ A crucial point here is that many national legislatures across Europe have already introduced rules that make the spread of false information illegal. National laws that restrict—and even criminalise—the dissemination of false information have grown considerably during the COVID-19 pandemic. While examples are numerous,¹⁵ most notable is Hungary’s emergency legislation that criminalised the sharing of any false or ‘distorted’ information deemed to cause public ‘confusion’.¹⁶ Under this widely condemned legislation, offences included a maximum sentence of 5 years, surpassing the maximum sentence for both defamation and slander offences under the 2012 Hungarian criminal code.¹⁷

The excess of such legislation highlights a persistent issue when considering legal solutions to online falsehoods. That is, the tension between needing to reduce the spread of disinformation in electoral democracies and the need to avoid far-reaching legislation that could chill freedom of expression. As documented extensively in literature, further problems in this area are linked to the vague and ‘slippery’ legal terminology that is often used when framing this problem.¹⁸ While the term ‘fake news’ gained significant popularity since 2016, its complex meaning makes it a woefully problematic as a legal term. As Tandoc et al. find, fake news can encompass ‘satire, parody, fabrication, manipulation, advertising, and propaganda.’¹⁹ This definitional variance has correctly driven commentators to caution against using this term. McGonagle argues that the catchy nature of the phrase veils its problematic conceptual flexibility.²⁰ Venturini cites the ‘awful vagueness’ of fake news as one of five reasons to avoid using the term.²¹ Considering the evident link between vague terminology and excessive laws in this area, it is vital that law makers across Europe combat false information without illegitimately violating legal and constitutional safeguards to

¹³ [The Draft Online Safety Bill and the legal but harmful debate - Digital, Culture, Media and Sport Committee \(parliament.uk\)](#) <[The Draft Online Safety Bill and the legal but harmful debate - Digital, Culture, Media and Sport Committee \(parliament.uk\)](#)>

¹⁴ (Ó Fathaigh et al. 2021).

¹⁵ See examples in Europe. Republic of Slovakia <https://www.legislationline.org/download/id/3763/file/Slovakia_CC_2005_en.pdf>; Austrian Criminal Code <<https://www.jusline.at/gesetz/stgb>>

¹⁶ See Hungarian law Iromány száma: T/9790. Benyújtás dátuma: 2020-03-20 20:45 Parlex azonosító: B89KC6RV0001.

¹⁷ Section 227, Hungarian Criminal Code, 2012.

¹⁸ Maria Murphy, What is the Future for Fake News? (RTE Brainstorm 2018) <[What is the future for fake news? \(rte.ie\)](#)>

¹⁹ Edson C. Tandoc Jr. & Others, ‘Defining “Fake News”’ (2018) *Digital Journalism*, 6:2, 137-153.

²⁰ Tarlach McGonagle, ‘Fake news’’: False fears or Real concerns? (2017) *Netherlands Quarterly of Human Rights*, Vol. 35(4) 203–209.

²¹ Tommaso Venturini, ‘Confession of a Fake News Scholar’, (2018) 68th Annual Conference - International Communication Association, Prague.

freedom of expression.²² While there is undeniably a requirement to curtail falsehoods in the election context, relevant aspects of this right must be understood. As O’Faithigh argues, the human rights framework of the Council of Europe is ‘well positioned to play a larger role in coordination and standard setting with regards to European disinformation policy.’²³ Discussed below, highly instructive principles for this endeavour can be found in ECtHR where the Court has applied the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). Considering the voluminous and diverse lines of freedom of expression cases in the ECtHR, an examination of relevant Article 10 case law is not only needed to explain how restrictive laws on disinformation can remain compatible with the right to freedom of expression but also to glean how legal approaches to this problem can be guided by human rights principles.

2. Article 10: A Safeguard for Democracy

Considering Article 10 in the disinformation context, it is necessary to provide an overview of the mechanics of this provision under the ECHR. Importantly, any restriction on the transmission of false information must firmly correspond to the textual requirements under this provision. Article 10 states that ‘everyone’ has the right to freely receive and impart information and ideas ‘without interference by public authorities and regardless of frontiers.’²⁴ Wragg correctly observes that this language demonstrates the ‘extensive broadness’ of Article 10.²⁵ The wide application of Article 10 is also evidenced ECtHR cases. The Strasbourg Court has applied the provision to verbal statements,²⁶ news articles,²⁷ plays,²⁸ paintings,²⁹ and commercial advertisements.³⁰ Moreover, Article 10 cases can arise from spheres of individual relations governed by public and private law.³¹ Notwithstanding this broad application, it is notable that the text of Article 10 contains extensive reference to possible conditions wherein freedom of expression can be limited. The circumstances where an interference with Article 10 can arise are wide ranging. The ECtHR has identified interferences where national authorities have confiscated published materials,³²

²² Irini Katsirea (2018) “Fake news”: reconsidering the value of untruthful expression in the face of regulatory uncertainty, *Journal of Media Law*, 10:2, 159-188.; Aleksandra Kuczerawy, (2019) Fighting Online Disinformation: Did the EU Code of Practice Forget about Freedom of Expression? (September 11, 2019). *European Integration and Democracy Series*, Vol. 6.

²³ [O’Faithigh et al. 2021]

²⁴ See Article 10 text.

²⁵ Paul Martin Wragg (2009) Critiquing the UK Judiciary’s Response to Article 10 Post-HRA: Undervaluing the Right to Freedom of Expression? Durham University. <<http://etheses.dur.ac.uk/68/>> pg. 36.

²⁶ *Perinçek v. Switzerland* (No. 27510/08 2015).

²⁷ *Sunday Times v. The United Kingdom* (No. 6538/74 26 Apr 1979); *Dichand and others v. Austria* (No. 29271/95 2002).

²⁸ *Unifaun Theatre Productions Ltd and others v. Malta* (Application no. 37326/13).

²⁹ *Vereinigung Bildender Künstler v. Austria*, (No. 68354/01 2007).

³⁰ *Sekmadienis v. Lithuania* (No. 69317/14 2018).

³¹ *Fuentes Bobo v. Spain* (2001) 31 EHRR 50.

³² *Handyside v. United Kingdom*, Application no. 5493/72, Dec 7, 1976.

prohibited individuals from posting advertisements,³³ arrested protestors,³⁴ refused to grant broadcasting rights,³⁵ and imposed criminal convictions.³⁶ The room for interferences with freedom of expression are not only stated under in the limitation clause under Article 10(2) but also in Article 10(1), which states that Contracting Parties can limit the transmission of information through telecommunications licensing infrastructures.³⁷ Importantly, any restrictions on Article 10 freedoms must comply with key criteria under Article 10(2). Thus, while the text of Article 10 reflects the broad application of this provision, it explicitly references ‘duties and responsibilities’ that go hand in hand with this right.

The permissible conditions for interferences with freedom of expression under Article 10(2) have been described as a three-pronged test. This ‘triple test,’ asks:³⁸

- *Is the interference prescribed by law?*
- *Does the interference pursue a legitimate aim?*
- *Is the interference necessary in a democratic society?*

The examination of whether interferences with Article 10 are prescribed by law is generally broken down into two sub-questions of whether the legal basis for the interference was accessible and foreseeable. Citizens must be able to comprehend the law that led to the interference and understand its consequences.³⁹ The ECtHR has reasoned that this requirement is necessary to prevent ‘arbitrary interferences by public authorities.’⁴⁰ However, the Court has clarified that this requirement does not mean that citizens must understand laws with absolute ‘certainty’.⁴¹ Such a threshold is impractical since states must often adjust laws to reflect societal changes.⁴² The need for accessibility and foreseeability merely requires that citizens reasonably understand how their actions could have legally actionable consequences in certain contexts. The ECtHR rarely finds that interferences with Article 10 are not prescribed by law. The Court may also find that interferences are prescribed by law but still criticise certain aspects of domestic legal

³³ *Murphy v. Ireland* July 10, 2003, No. 44179/98

³⁴ *Éva Molnár V. Hungary*, 2008, § 42. See also *Fáber v. Hungary*, 2012.

³⁵ *Schweizerische Radio-und Fernsehgesellschaft SRG v. Switzerland*; *Autronic AG v. Switzerland*, 22 May 1990.

³⁶ *Lindon, Otchakovsky-Laurens and July v. France* [GC], §59.

³⁷ *Monica Macovei*, *A Guide to the Implementation of Article 10 of the ECHR*. (Council of Europe).

³⁸ *Janneke Gerards*, *How to improve the necessity test of the European Court of Human Rights*, *International Journal of Constitutional Law*, Volume 11, Issue 2, April 2013, Pages 466–490, <https://doi.org/10.1093/icon/mot004>.

³⁹ *Talita de Souza Dias*, *Accessibility and Foreseeability in the Application of the Principle of Legality under General International Law: A Time for Revision?* *Human Rights Law Review*, Volume 19, Issue 4, December 2019, Pages 649–674, <https://doi.org/10.1093/hrlr/ngz029>

⁴⁰ *Malone v. the United Kingdom* judgment of 2 August 1984, A 82, Para 67.

⁴¹ *Perinçek v. Switzerland*, §§ 131.

⁴² See *Sales and Hooper*, (2003) *Proportionality and the form of law*’ LQR 26, 438-439.

frameworks that could adversely affect freedom of expression.⁴³ If the Court is satisfied that interferences with Article 10 are prescribed by law, it proceeds to ask whether the interference pursues a legitimate aim. That these aims are listed exhaustively under Article 10(2) does not preclude the ECtHR from considering other aims not mentioned under this clause. The Court's interpretation of legitimate aims under Article 10(2) is often influenced by national circumstances. For example, to understand whether a restriction on freedom of expression pursues the aim of protecting national territorial integrity or preserving morals, it is often necessary to examine national contextual circumstances. If a Contracting Party submits that an interference with Article 10 is based on multiple aims under Article 10(2), the Court can accept that one legitimate aim has been pursued but reject others.⁴⁴ The crucial and final element of this triple test is where the Court asks whether interferences with Article 10 are necessary in a democratic society. As Kozłowski highlights, this inquiry 'occupies most of the ECtHR's judicial attention',⁴⁵ as it often involves detailed scrutiny of the proportionality of restrictions and examines-in relevant context- whether the restriction corresponds to a 'pressing social need.' Often, the Court's final determination of whether interferences violate Article 10 hinges on this pivotal question.⁴⁶ Failure to satisfy the democratic necessity test often relates to the proportionality of measures and where criminal sanctions are imposed.⁴⁷ Applying the necessity test to Article 10, the ECtHR generally examines whether sufficient reasons can justify the interference and whether the interference is proportionate to the legitimate aim pursued.⁴⁸ It is crucial that any restrictions are imposed in a 'sufficiently precise, transparent and non-discriminatory' manner.⁴⁹ The importance of national circumstances means that the ECtHR can often interpret the democratic necessity test 'dynamically' according to evolving conditions. This aspect of the Court's assessment is linked to its application of the margin of appreciation principle. Under the margin of appreciation doctrine, the ECtHR affords varying levels of discretion for States to interfere with Convention rights. As Carozza describes, the doctrine has roots in the international legal principle of 'subsidiarity'.⁴⁹ Greer explains that the principle reflects the ECtHR's acknowledgment that domestic states are often in a 'better position' to identify circumstances where ECHR freedoms must be limited

⁴³ *Observer and the Guardian v United Kingdom* 1991 at Para 66 where the Court explicitly questioned 'whether the different aspects of common law applied in the present case were entirely clear', but still found that the interference had been prescribed by law.

⁴⁴ *Morice v. France* [GC], §170; *Perinçek v. Switzerland* [GC], §§146-154; *Stoll v. Switzerland* [GC], §54.

⁴⁵ Dan Kozłowski (2006) "For the Protection of the Reputation or Rights of Others": The European Court of Human Rights' Interpretation of the Defamation Exception in Article 10(2), *Communication Law and Policy*, 11:1, 133-178, DOI: [10.1207/s15326926clp1101_4](https://doi.org/10.1207/s15326926clp1101_4).

⁴⁶ *Sunday Times v. The United Kingdom* app no. 6538/74 26 Apr. 1979; *Vereniging Weekblad Bluf!* v. The Netherlands, 9 February 1995.

⁴⁷ *Castells v. Spain* 11798/85 23 Apr 1992; *Lingens v. Austria*, 9815/82, 8 July 1996; *Gunduz v Turkey* Application no. 35071/97 (2004); *Ukrainian Media Group v. Ukraine* 72713/01 29 Mar 2005.

⁴⁸ Dirk Voorhoof (2014) *The Right to Freedom of Expression and Information under the European Human Rights System: Towards a more Transparent Democratic Society*. <[The right to freedom of expression and information under the European Human Rights system: towards a more transparent democratic society \(eui.eu\)](#)>

⁴⁹ Paolo G Carozza, 'Subsidiarity as a Structural Principle of International Human Rights law' *American Journal of International Law*, Vol. 97, No. 1, 2003, pp. 38–79, at p. 40.

and how best to execute restrictions.⁵⁰ Where States have a wide margin of appreciation, it can be argued that they have more 'room for manoeuvre' or 'breathing space' to impose restrictions on ECHR rights. Ultimately, however, this doctrine represents the varying latitude that national authorities are given to fulfil Convention commitments rather than an unfettered discretion to fulfil these obligations.

Both in the text of Article 10 and in the ECtHR's application of this provision, the protection of an 'effective political democracy' is central. The ECHR is an instrument that is shaped by the tumultuous political background preceding it.⁵¹ As Buyse and Hamilton highlight, the Convention was drafted at a time when Europe was in a fragile 'transition from authoritarianism to democracy'.⁵² The legacy of xenophobia and totalitarianism shaped the drafting of the Convention in 1950,⁵³ leading to prevailing concerns that the Convention provisions could only be truly protected 'within a democracy capable of defending itself.'⁵⁴ Fears surrounding potential resurgence of 'totalitarian regimes of national-socialist, fascist or communist persuasion' meant that there was a specific need to prevent Convention provisions such as Article 10 from being misused to attack democratic values.⁵⁵ As Wragg highlights, the principle of democracy also feeds heavily into the Court's assessment of restrictions with freedom of expression. Owing to 'effective political democracy' referenced in the ECHR preamble, the Strasbourg Court generally affords a narrow margin of appreciation where Contracting Parties restrict the free flow of information and ideas that contribute to democracy. Conversely, an expanded margin is afforded to restrict expression offering no contribution to democracy and an even wider margin to curtail ideas that threaten the democratic order. This often manifests in the ECtHR's identification of a narrow margin of appreciation to limit political debate⁵⁶ and a wide margin to impede commercial speech.⁵⁷ This is because 'the former connects with the democratic process more keenly than the latter.'⁵⁸ As is discussed below when considering freedom of expression cases in the disinformation context, it is unsurprising that the need to protect democracy runs extensively throughout the judicial rhetoric of the ECtHR in Article 10 cases.

⁵⁰ Convention on Human Rights, Council of Europe Publishing, Strasbourg, 2000, p. 5.

⁵¹ Andrew Murray, *Information Technology Law: The Law and Society* (4th Edn, Oxford 2010).

⁵² Antoine Buyse and Michael Hamilton *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights* (Cambridge University Press) pg. 131.

⁵³ (Buyse)

⁵⁴ Dirk Voorhoof and Hannes Cannie (2011) *The Abuse Clause and Freedom of Expression in the European Convention on Human Rights: An Added Value for Democracy and Human Rights Protection?* <<https://www.corteidh.or.cr/tablas/r25909.pdf>>

⁵⁵ (Voorhoof 2011).

⁵⁶ *Animal Defenders International v. The United Kingdom* (No. 48876/08 2013). See also Nicola McCormick, 'Freedom of political expression: R. (on the application of Animal Defenders International) v. Secretary of State for Culture, Media and Sport' (2008) *Entertainment Law Review* 147).

⁵⁷ *VgT v. Switzerland* (2002) 34 EHRR 4.

⁵⁸ (Wragg 2009).

3. ECtHR Approaches in Article 10 Cases

The focus of this article now shifts to ECtHR freedom of expression jurisprudence that provide identifiable lessons in the context of electoral disinformation. Spanning over 1,000 cases, the ECtHR has developed patterns of reasoning where the Court has addressed false and harmful political communications. Thus, this section maps key Strasbourg decisions and identifies the ECtHR's interpretive approaches to Article 10 that can be used to inform laws aimed at curtailing electoral disinformation. The dominant reasoning in these lines of case law and pivotal factors that influence the Court's decisions are dissected. This is not only important to understand how disinformation fits into the protective framework of Article 10 but also to identify the Court's interpretive focus on the need for factually accurate information in a democratic society and the dangers of harmful and deceptive communications in the election context. As McGonagle observes, nothing in Article 10 requires citizens to impart 'truthful information,'⁵⁹ That statements may mislead citizens does not necessarily mean that they should be restricted. This notwithstanding, there are identifiable limits to freedom of expression in contexts that have specific relevance in the disinformation context. The falsity of statements, the political environment in which statements are made, and the potentially harmful and discriminatory effects of statements are all factors that the Court has paid attention to when scrutinizing interferences with freedom of expression by domestic legal authorities. Highlighting these critical factors, the sections below examine the ECtHR's robust protection of political debate and the Court's intolerance of anti-democratic speech. The following sections further probe the Court's important distinction between facts and value judgements and how this applies in the context of false communications. Specific focus is given to how the Court applies its relevant principles in the context of false electoral communications.

3.1 Political Expression

At its core, electoral disinformation is a problem that distorts political communication.⁶⁰ Thus, it is vital to explain the robust protection of political expression in the ECtHR and to identify areas where political communications may be limited. A dominant theme in Article 10 jurisprudence is the ECtHR's 'clear and consistent' stance that political expression must only be limited in exceptional circumstances. the ECtHR has defined political expression broadly. It encompasses parliamentary speeches,⁶¹ media criticism of politicians,⁶² political

⁵⁹ Tarlach McGonagle (2020) Defamation law reform, the European Convention on Human Rights and EU law

<https://www.justice.ie/en/JELR/McGonagle_Paper_Defamation.pdf/Files/McGonagle_Paper_Defamation.pdf>

⁶⁰ (Freelon & Wells 2020) Disinformation as Political Communication, Political Communication, 37:2 145-156, DOI: [10.1080/10584609.2020.1723755](https://doi.org/10.1080/10584609.2020.1723755)

⁶¹ Brzezinski v. Poland (No. 47542/07 25 Jul 2019).

⁶² Castells v Spain, 1992.

advertisements,⁶³ and the circulation of petitions.⁶⁴ The Court has made clear that even graphic, offensive, and vulgar communications should be protected if they convey information that is political in nature.

Crucial in the Court's interpretation of political expression is not only the idea that thriving democracies require vigorous political debate but also that political leaders must be accountable to the electorate. The Court's extensive protections for political expression is strongly evidenced in its assessment of restrictions with the speech of political leaders and its reluctance to accept restrictions with journalistic coverage of political matters. The Court generally identifies debates concerning political matters as carrying significant public interest and must therefore be widely tolerated. The Court's focus on 'public interest' stems from two formative Strasbourg cases on freedom of expression. In *Handyside v. The United Kingdom*, the applicant planned to disseminate copies of 'The Little Red Schoolbook'⁶⁵ in the United Kingdom.⁶⁶ Aimed at children, the book attracted considerable media attention and 'press comment', leading to Handyside's prosecution under the Obscene Publication Act 1964 and a confiscation of copies. While the ECtHR ultimately found no violation of Article 10, it produced a lasting and now famous endorsement of the need for democracies to allow a wide range of potentially relevant public interest information. The Court explicitly stated that its role was to analyse interferences with Article 10 with 'utmost attention to the principles that characterise a democratic society.' Moreover, the Court elucidated that democracies require protections for political information and ideas that are not only 'favourably received' or 'inoffensive' but 'also to those that offend, shock or disturb the State or any sector of the population.'⁶⁷ Another early but contrasting decision is that of *Sunday Times v. United Kingdom*,⁶⁸ where the ECtHR found a violation of Article 10 for the first time. In that case, the applicant newspaper had published articles documenting birth defects associated with the drug thalidomide. While the Court accepted that there was a legitimate interest in preventing further reports on this sensitive issue to maintain an 'objective judiciary' during pending litigation, it was of important that the articles covered issues of widespread public scrutiny and extensive parliamentary debate. The fact that the articles highlighted an issue that 'formed the background of pending litigation' did not justify their restriction because of the intense public interest related to the 'responsibility' for the 'tragedy' of thalidomide induced birth defect.⁶⁹ Moreover, the Court further reasoned that the articles were helpful in shedding light on information of intense public scrutiny. By 'bringing to light certain facts' on the issue of thalidomide, the Court opined that the articles 'might have served as a brake on speculative and unenlightened discussion'.⁷⁰ A crucial theme in these formative cases was

⁶³ Animal Defenders V United Kingdom, 2013.

⁶⁴ Appleby and Others v The United Kingdom: ECHR 6 May 2003.

⁶⁵ This 'reference book' contained sections on 'intercourse', 'contraceptives', and 'menstruation'.

⁶⁶ Para 12.

⁶⁷ Para 49.

⁶⁸ App no. 6538/74 26 Apr 1979. This was the first decision in which the ECtHR found a violation of Article 10.

⁶⁹ Para 66.

⁷⁰ Para 66.

that relevant information that fuels public and political debate should generally be allowed to flow freely in a functioning democracy.

Owing to the need for open discussions on public interest matters, the ECtHR has consistently extended strong protections to political speech. Importantly, political figures must be subjected to rigorous public scrutiny in a functioning democracy. In Article 10 cases, the ECtHR distinguishes ordinary citizens from politicians by highlighting how politicians have democratic responsibilities to represent citizens and must therefore expect extensive criticism. This was outlined in *Lingens v Austria*,⁷¹ where the applicant was a journalist convicted for defamation. He published articles condemning a chancellor's support of a politician who had served in the SS during the Second World War. While the ECtHR accepted that the applicant's publications could harm the politician's reputation, it was vital that the applicant was commenting on 'political issues' concerning Nazism in Austria. It was not only important that the articles focused on 'political issues of public interest in Austria' but also that the target of criticism was a politician.⁷² Finding a violation of Article 10, the ECtHR reasoned that political debate lies at the 'very core of' democracy and 'prevails throughout the Convention.'⁷³ Similar reasoning was evidenced in *Castells v. Spain*.⁷⁴ Here, the applicant was a Senator who made a series of harsh allegations that Spanish state officials were complicit in abuses against Basque political dissidents. He was convicted for making statements 'that seriously insult, falsely accuse or threaten' state officials and was denied any opportunity to substantiate his claims.⁷⁵ A key reason for the Court's finding of an Article 10 violation was that the applicant was a member of the political opposition. Considering the 'dominant position' of the Spanish government, it was crucial for him to publicly question and substantiate alleged state corruption. A violation was again found on similar grounds in *Incal v. Turkey*.⁷⁶ Here, the applicants were a Kurdish political party and distributed leaflets alleging a state campaign to drive out Kurds from the Izmir constituency.⁷⁷ They were convicted for disseminating separatist propaganda because the leaflets instructed Kurds to 'oppose' the campaign and protect Izmir's Kurdish population.⁷⁸ The ECtHR disagreed with Turkey that they had disseminated propaganda to fuel an insurrection and reasoned that the leaflets merely contained 'political demands.' The Court stated that freedom of expression was particularly important for minority 'political parties and their active members.'⁷⁹ Allegations of governmental suppression were also raised in *Manole and Others v. Moldova*,⁸⁰ where the applicants were editors of media company Teleradio-Moldova (TRM). They argued that they were censored through governmental interference with editorial decisions.⁸¹ Specifically, the applicants argued

⁷¹ App no. 9815/82, 8 July 1996.

⁷² Para 43.

⁷³ *Lingens v. Austria* (1986) 8 EHRR 407.

⁷⁴ App no. 11798/85 23 April 1992.

⁷⁵ Even as a parliamentary member, the applicant's immunity had been lifted.

⁷⁶ Application no. 41/1997/825/1031, 9 June 1998.

⁷⁷ Para 10.

⁷⁸ Para 50.

⁷⁹ Para 46.

⁸⁰ Application no. 13936/02.

⁸¹ Teleradio-Moldova (TRM).

that state officials imposed a 'censorship regime' by demoting senior editors and tightly screening political reporting. Agreeing that Moldova violated Article 10, the ECtHR reasoned that democratic pluralism requires 'diverse' political viewpoints even if certain viewpoints 'call into question the way a State is currently organised, provided that they do not harm democracy itself.'⁸²

Even offensive and vulgar insults may receive protection if the ECtHR interprets such language as a form of legitimate political criticism. In *Oberschlick v. Austria*,⁸³ the applicant was convicted for defaming a politician who had glorified German soldiers in the Second World War.⁸⁴ The applicant had written that the politician was 'not a Nazi' but was an 'idiot.'⁸⁵ The ECtHR agreed with Austria that the article's remarks could 'certainly be considered polemical' but rejected that they were a 'gratuitous personal attack.' Crucial here was that the applicant had commented on actual statements made by the politician. His insult was expressed in polemic language but was an 'objectively understandable' form of political criticism.⁸⁶ Similar reasoning was seen in *Lopes Gomes da Silva v. Portugal*⁸⁷ where the applicant journalist was convicted for libel after describing a political chairman as 'grotesque' and 'buffoonish'. The applicant himself identified the comments as 'virulent and provocative' but maintained that they were 'justified in view of the equally virulent nature of the political ideology advocated by the targeted politician.'⁸⁸ Agreeing with this, the Strasbourg Court stressed that 'political invective often spills over into the personal sphere'. Here, the statements were polemic but not gratuitous attacks. In any event, they were a form of political criticism for which high protection was required.⁸⁹

Even stronger protections are afforded if the ECtHR identifies satirical elements in political criticism. In *Vereinigung Bildender Künstler v. Austria*,⁹⁰ a violation of Article 10 was found where an applicant was ordered to suspend an art exhibition depicting public figures in sexually explicit positions.⁹¹ The ECtHR highlighted that the exhibition did not intend to convey realistic portrayals but conveyed 'satire.' Such expression requires significant protection as a 'form of artistic expression and social commentary' that 'naturally aims to provoke and agitate.'⁹² This decision could be contrasted with *Muller v. Switzerland*,⁹³ also concerning sexually explicit paintings. In that case, the ECtHR agreed with Switzerland that the artwork was obscene and that the interference with Article 10 was proportionate. Notably, the paintings made no reference to political figures and did not convey political criticism. If artistic satire does reference political figures, it is more likely to receive

⁸² Ibid 95.

⁸³ Application no. 20834/92 1 July 1997.

⁸⁴ Para 8.

⁸⁵ Para 9.

⁸⁶ Para 33.

⁸⁷ Application no. 37698/97 28 September 2000.

⁸⁸ Para 25.

⁸⁹ Para 35.

⁹⁰ Application no. 68354/01, 25 January 2007.

⁹¹ Para 3.

⁹² Para 33.

⁹³ Application no. 10737/84, May 24, 1988.

protection. This protection extends to satire expressed in non-speech forms. In *Alaves da Silva v. Portugal*,⁹⁴ the applicant was convicted for displaying a puppet that depicted a well-known mayor receiving vast sums of money. This was presented during a carnival festival and was accompanied by audio recordings containing a 'satirical message suggesting that the mayor had acted unlawfully.' The ECtHR accepted that Portugal had an interest in protecting the mayor's reputation but noted the crucial factor that the applicant's depiction was 'quite clearly satirical in nature.' Finding a violation of Article 10, the ECtHR again distinguished satire as a form of 'social commentary' that involved an 'exaggeration and distortion of reality.'⁹⁵ Such expression 'naturally sought to provoke a reaction' and was critical in a functioning democracy. Even if the politician interpreted the satire in a literal sense he was still required to show 'a greater degree of tolerance towards criticism' as an elected official. Similar reasoning was applied in *Eon v. France*⁹⁶ where the applicant was a political activist convicted for waving an incendiary placard at the French President. The ECtHR accepted that the placard contained vulgar language but highlighted how it referenced a phrase that the President was widely known for uttering. This phrase was the subject of extensive media coverage and was widely circulated online as a means of political mockery. Finding a violation of Article 10, the Court again highlighted the 'inherent features of exaggeration' in political satire that how its 'distortion of reality' is a form of criticism that is 'naturally aimed to provoke and agitate.' Recalling 'fake news', the failure of this term to clearly delineate satire from more sinister deception is an important example of how broad legal terminology in this area is undesirable from the perspective of freedom of expression.

While the protection of political speech by the ECtHR is undeniably strong, it is not unlimited. Importantly, the Court appears willing to permit restrictions with political debate if such debate becomes distorted by disproportionately powerful interests. Of direct relevance to debates surrounding disinformation and election interference, the room for manoeuvre in this area is instructive. Particularly in the pre-election context, the ECtHR is prepared to accept statutory restrictions aimed at ensuring fair and undistorted political communications. In *Bowman v. United Kingdom*,⁹⁷ the Court accepted that the UK's statutory restriction to prevent uncontrolled election spending was aimed at ensuring 'equality between candidates.'⁹⁸ Implicit in the Court's reasoning was that without such restrictions disproportionate spending could lead to an unfair distortion of political debate.⁹⁹ In *TV Vest AS & Rogalaand vs. Norway*,¹⁰⁰ the ECtHR again accepted that Norway's restriction on political advertisements in broadcast media was aimed at avoiding circumstances whereby 'complex issues might easily be distorted' by 'financially powerful groups' in a manner that could put financially weaker groups at a significant

⁹⁴ Application no. 41665/07 2009.

⁹⁵ Ibid.

⁹⁶ Application no. 26118/10, 14 March 2013.

⁹⁷ Application no. 24839/94, 19 February 1998.

⁹⁸ Para 47.

⁹⁹ Para 47.

¹⁰⁰ Application no. 21132/05, 11 March 2009.

disadvantage.¹⁰¹ However, both in *Bowman* and *TV Vest* the applicant parties were unreasonably disadvantaged. Restrictions to ensure fair political debate must generally be aimed at preventing unfair influence over voters and must avoid unintended consequences of preventing smaller political parties from imparting information to voters in pre-election periods. This point was made explicitly in *VgT Verein Gegen Tierfabriken v. Switzerland*.¹⁰² Here, the ECtHR's main criticism of Switzerland's application of a restriction on political advertising was that the affected group was neither financially powerful nor capable of exerting 'undue commercial influence' over citizens.¹⁰³ This can be contrasted with *Animal Defenders International v. The United Kingdom*,¹⁰⁴ where the application of a statutory restriction was proportionate because the applicant was an NGO with considerable financial resources. Threaded throughout these decisions is a legitimate interest under Article 10 for Contracting Parties to institute restrictions on political and election advertising if national authorities perceive political debates to become unfairly dominated.

3.2 Article 17 and Hate Speech

While the ECtHR affords extensive room for criticism of politicians and governments under Article 10, this does not extend to criticism that condemns seeks to overthrow the democratic order itself. When considering how anti-democratic actors weaponise digital disinformation to influence the democratic process of elections- and often target vulnerable minorities- this distinction is of critical importance. While the ECtHR has reviewed even vulgar political speech under Article 10,¹⁰⁵ the Strasbourg Court has categorically excluded certain 'dangerous expression' from Article 10.¹⁰⁶ This has arisen where the Court has refused to apply Article 10, and instead has invoked Article 17 of the Convention. Inspired by Article 30 of the UDHR, Article 17 reads:

'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.'¹⁰⁷

Where certain speech is deemed incompatible with Article 17, Article 10 is not applied. Hannie and Voorhoof characterise the application of Article 17 in this manner as the

¹⁰¹ Para 70.

¹⁰² Application no. 32772/02, June 30, 2009.

¹⁰³ Para 14.

¹⁰⁴ Application no.48876/08, April 22, 2013.

¹⁰⁵ *Jersild v. Denmark* No. 15890/89 1994.

¹⁰⁶ Hannes Cannie and Dirk Voorhoof, 2011, The Abuse Clause and Freedom of Expression in the European Human Rights Convention, *Netherlands Quarterly of Human Rights*, Vol. 29/1, 54–83.

¹⁰⁷ Article 17, European Convention on Human Rights (ECHR).

ECtHR's 'abuse clause'.¹⁰⁸ The earliest case in which the Strasbourg Court applied this clause is *Communist Party of Germany v. the Federal Republic of Germany*,¹⁰⁹ where the applicant was the German Communist Party. Following the dissolution of a German neo-Nazi party, the Communist party was also banned in 1952. The Federal Government's justification was that the 'revolutionary' party sought to abolish Germany's liberal 'democratic order'.¹¹⁰ The Commission rejected admissibility under Article 10 and invoked Article 17. Accepting that the Communist doctrine promoted dictatorship of the proletariat, it accepted that the ban was necessary to prevent the party from 'fundamentally' eroding rights and democratic values of the ECHR.¹¹¹

In subsequent Article 17 admissibility decisions, the ECtHR has reasoned that certain racist expression can threaten democratic values and therefore must not receive protection under Article 10. This was considered in the election context in *Glimmerveen and Hagenbeek v. the Netherlands*, where the applicants were members of the far-right Nederlandse Volks Unie' political party that promoted an 'ethnic homogeneous' Dutch population. The applicants were convicted for possessing and distributing racially discriminatory leaflets.¹¹² As they had planned to stand in municipal elections, they argued that their 'freedom of expression in the context of elections' was jeopardised.¹¹³ The ECtHR stated that no provision, including Article 10, could be used to advance political activities 'aimed at the destruction of any of the rights and freedoms' in the Convention. That the applicants were political figures engaged in an election campaign was irrelevant. Crucially, the dissemination of racist political propaganda ran contrary to protections against discrimination and the abuse of rights under Article 14 and Article 17 respectively.¹¹⁴

In light of the aforementioned tumultuous context of Article 10, the abuse clause has been used to categorically exclude anti-Semitic propaganda. In maintaining that Article 10 cannot be used as a protective veil to promote holocaust denial, it is arguable that the ECtHR already prohibits specific types of disinformation through Article 17. In *Lehideux and Isorni v. France*, the applicants had publicly praised the collaboration of Marshal Petain with Nazi Germany in World War II and were convicted of publicly defending crimes of collaboration with state enemies. While Article 10 was applied in this case, the ECtHR's reference to Article 17 is nonetheless prescient. The Court reasoned that the issue of Nazi collaboration formed 'part of a continuing debate between historians.'¹¹⁵ While the applicants 'omitted to mention historical facts which were a matter of common knowledge'

¹⁰⁸ Hannes Cannie and Dirk Voorhoof, The abuse clause and freedom of expression: An added value for democracy and human rights protection? *Netherlands Quarterly of Human Rights*, Vol. 29/1, 54–83, 2011.

¹⁰⁹ App No 250/57 20 July 1957.

¹¹⁰ *Ibid.*

¹¹¹ This reasoning was seen again in subsequent decisions concerning prohibited political associations, *Refah Partisi (the Welfare Party) and Others v. Turkey* in 2001.

¹¹² Para 3.

¹¹³ *Ibid.*

¹¹⁴ Pg. 194.

¹¹⁵ *Ibid.*

this omission could not in itself justify restrictions.¹¹⁶ However, the Court explicitly stated that if the statements had promoted holocaust denial, Article 17 would have applied. Here, the contested statements did 'not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17.'¹¹⁷ This hypothetical situation came to fruition in the subsequent case of *Garaudy v. France*, where the applicant authored and distributed a book entitled '*The Founding Myths of Modern Israel*'. The book disputed the facts of the holocaust, and the applicant was convicted of defaming an ethnic group and inciting racial hatred. The ECtHR held that the book promoted revisionist theories, and that its true purpose was to promote Nazism and not to engage in genuine historical research. Accordingly, the Court analysed the application under Article 17. Restating its position from *Lehideux and Isorni*, the Court reasoned that 'the negation or revision of historical facts'¹¹⁸ of the holocaust contravenes goals of the ECHR, of which combatting anti-Semitism is one.

The ECtHR consistently reasons that Article 17 applies to speech that abuses ECHR rights and undermines democracy. While it could conceivably be suggested that all forms of deceptive communications threaten the democratic order, Article 17 is an unfit tool for the ECtHR to apply in the disinformation context. While the Court initially invoked Article 17 specifically to prevent totalitarian regimes, the ECtHR has been increasingly predisposed to applying Article 17 in any circumstances wherein speech could constitute an attack against an ethnic group.¹¹⁹ This expansive use of Article 17 has elicited significant criticism from commentators, particularly because it could undermine the need to analyse speech under the requirements of Article 10(2) and to assess interferences with speech 'in light of the case as a whole'.¹²⁰ The Strasbourg Court's refusal to analyse certain speech under Article 10 can also contradict the Court's clear and consistent commentary on the need to closely scrutinise interferences with political speech. While certain forms of digital disinformation are unlikely to be considered under the purview of Article 17, there are many forms of deceptive messaging that would undoubtedly fall into this category. Considering its increasingly flexible use of the abuse clause, it would certainly be undesirable for the ECtHR to apply the abuse clause to disinformation. This notwithstanding, the Court's extreme reluctance to offer protections to discriminatory and hateful expression is instructive.

3.3 A Matter of Opinion? Facts vs. Value Judgements

While there is no textual requirement under Article 10 for speech to be factually accurate, the ECtHR does not view all types of false statements in the same manner. Under its criteria for reviewing defamatory statements, the Court makes a crucial distinction between

¹¹⁶ See *Honsik v. Austria* and *Marais v. France*, both concerning a publication denying acts of genocide were committed in gas chambers.

¹¹⁸ Para 47.

¹¹⁹ *Pavel Ivanov v Russia*. Application no. 35222/04 20 Feb 2007 See also *Pastörs v. Germany* Application no. 55225/14 3 Oct 2019.

¹²⁰ *Erdoğdu and İnce v. Turkey* Application Number: 25723/94 9 Sep 2020.

whether false statements are alleged factual claims or subjective value judgements. Applying this distinction, the Strasbourg Court has clarified that domestic legal restrictions on false statements are more difficult to justify if such statements are presented as merely opinions as opposed to alleged factual assertions. This distinction is important when considering electoral disinformation because it fits neatly with academic distinctions between disinformation and misinformation. As Wardle and Derakhshan highlight, disinformation involves knowingly false information while misinformation is merely be shared out of mistake and without malicious intent.¹²¹ An analogous principle is evidenced in the ECtHR's distinction between false factual statements and good faith opinions. Through this distinction, the Court interprets malicious lies with more trepidation than mistaken statements disseminated in good faith. In the aforementioned case of *Lingens v Austria*, it was crucial that the applicant was a journalist and was imparting 'information and ideas on political issues.'¹²² However, arguably the most important point made by the Court was that the applicant's criticisms were 'value judgements,' and not expressed as purported facts. Importantly, the Court noted that opinions —unlike facts—could not always be established with evidence. Accordingly, misled opinions must not be restricted to the same degree as damaging factual inaccuracies.

Whether statements carry alleged facts or evaluative judgements carries weight in the ECtHR's assessment of political criticisms. In the Grand Chamber decision of *Dalban v. Romania*,¹²³ the applicant journalist had published an article alleging that a chief executive of a state-owned agricultural company committed fraud. The ECtHR recalled that the applicant was a journalist and therefore served a role as a 'public watchdog' to impart 'information of serious public concern.' Moreover, his comments were 'critical value judgements' concerning 'the management of State assets and the manner in which politicians fulfil their mandate.' Affirming that his statements reflected an honest political opinion as opposed to a 'totally untrue' factual allegation, the Grand Chamber disagreed that the journalist should be prevented from disseminating such criticisms unless he could 'prove their truth.'¹²⁴ In *Scharsach and News Verlagsgesellschaft mbH v. Austria*,¹²⁵ the ECtHR examined the applicant's use of the term 'closeted Nazi' to describe a well-known politician. The Court disagreed with Germany that the statement was a factual allegation and reasoned that it was a permissible value judgement. Thus, the political nature of the criticism and its classification as a value judgement was critical in the Court's finding of an Article 10 violation.¹²⁶ These two factors were also important in *Lopes Gomes da Silva v. Portugal*,¹²⁷ where the ECtHR accepted that the applicant was 'provocative' when calling a high profile politician 'buffoonish' but maintained that they were expressed in the context

¹²¹ Wardle & Derakhshan, 'Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making' (2017) Council of Europe.

¹²² Para 41.

¹²³ Application no. 28114/95 28 Sep 1999.

¹²⁴ *Ibid.*

¹²⁵ App No 39394/98 27 Oct 2005.

¹²⁶ *Ibid.*

¹²⁷ Application no. 37698/97 28 September 2000.

of heated political debate.¹²⁸ Moreover, they were value judgements rather than gratuitous attacks and therefore could not be classified as plain insults exceeding the limits of freedom of expression.¹²⁹ Thus, the ECtHR is more reluctant to accept restrictions with political opinions as opposed to damaging factual allegations. Even in *Dichand and Others v. Austria*,¹³⁰ where the ECtHR accepted that certain criticisms made by an applicant newspaper were published 'on a slim factual basis', the Court disagreed that all statements were factual assertions requiring proof. In any event, the criticisms arose in a discussion probing activities of a prominent public official. That certain statements were factually dubious carried less weight because the applicants were discussing a 'politician of importance' whose affairs gave 'rise to public discussion'.¹³¹ Similar reasoning was applied in *Lepojic vs. Serbia*,¹³² where the applicant himself was a prominent politician who published an article accusing a Mayor of 'near-insane' spending of public funds on frivolous events. While the ECtHR accepted that certain language used could ordinarily be construed as factual assertions it was critical that they were conveyed in a political context. Considering this, the Court agreed with the applicant that his use of the term 'near-insane' had 'obviously' been used to describe the Mayor's financial spending as opposed to his actual mental state. Accordingly, a violation of Article 10 was found.¹³³

The ECtHR's position that unfounded opinions must receive stronger protections than unfounded facts does not mean that individuals can use this protection to make damaging statements with impunity. Even where political criticisms convey value judgements, the need for factual veracity never truly becomes superfluous. In *Brasilier v. France*,¹³⁴ the applicant was a parliamentary candidate convicted for defamation after publicly alleging a rival candidate of rigging an election ballot. Here, the ECtHR found a violation of Article 10 and explicitly criticised the domestic court's failure to distinguish between facts and value judgements in political debate. However, it was also important that certain aspects of the applicant's claims had factual elements because the politician had previously been arrested in connection with fraudulent activities. Similar reasoning was adopted in *Dyuldin v. Russia*¹³⁵ where the applicant published an open letter criticizing 'destructive' governmental policies. Again, the ECtHR noted that the applicant's comments addressed public interest matters and questioned why domestic courts applied 'no distinction between value judgements and statements of fact.' Notably, however, the Court reasoned that a 'value judgement must be based on sufficient facts in order to constitute a fair comment under Article 10' and that 'the difference between a value judgement and a statement of fact finally lies in the degree of factual proof which has to be established.'¹³⁶ Here, even though the applicant's description of 'destructive' policies was subjective, it was

¹²⁸ *Ibid.*

¹²⁹ Para 31.

¹³⁰ Application no. 29271/95 26 February 2002.

¹³¹ *Ibid.*

¹³² App no. 13909/05 6 Nov 2007.

¹³³ *Ibid.*

¹³⁴ Application no. 71343/01 11 Apr 2006.

¹³⁵ Application no. 25968/02, 2007.

¹³⁶ Para 48.

still relevant that he possessed a document containing ‘first-hand experience’ corroborating this claim. Thus, even where certain statements are value judgements, the Strasbourg Court will often look for a grain of truth underpinning a polemic opinion. While this distinction in Strasbourg case law undeniably shows the need for disinformation laws to avoid harsh sanctions for factually inaccurate opinionated statements, the Court’s emphasis on the need for factual proof in this case law is also instructive.

3.4 False Statements in the Election Campaign

In cases involving false electoral communications, the ECtHR has applied its distinction between facts and value judgements where false political expression is imparted. Crucially, these cases shed light on how the Strasbourg Court interprets the damaging effects of false information in the pre-election context and how the Contracting Parties must carefully impose restrictions.

A key element in this line of cases is whether applicants disseminate false information in bad faith. In *Salov v. Ukraine*¹³⁷ the applicant was prosecuted for sharing a false rumour about the death of a Presidential election candidate. The ECtHR agreed that Ukraine has a legitimate aim to provide ‘voters with true information’ during an electoral campaign but unanimously found a violation of Article 10. Pivotal was the lack of proof that the applicant had intentionally deceived voters. The rumour was ‘not produced or published by the applicant himself’ and had been ‘referred to by him in conversations with others.’ He had ‘doubted its veracity’¹³⁸ and merely passed on the false information as opposed to confecting a lie himself. A similar focus on deception was demonstrated in *Kwiecień v. Poland*¹³⁹ where the applicant was convicted for disseminating an open letter containing spurious claims surrounding misconduct of an election candidate. The ECtHR criticised how all statements were ‘unreservedly qualified’ as lies ‘without a factual basis.’ While certain statements could have been interpreted as factual allegations, they were not made in bad faith. The ‘thrust of his argument’ was not to lie about the politician but to ‘cast doubt’ on his electoral suitability.¹⁴⁰ This hasty classification of the applicant’s statements as malicious false allegations was again met with disapproval *Kita v. Poland*.¹⁴¹ Here, the applicant publicly accused high ranking municipality officials of misusing public funds. The Strasbourg Court again accepted that the applicant’s statements were not all ‘based on precise or correct facts’ but found a violation of Article 10 because the domestic courts immediately categorized his statements as false factual statements. Again, it was important that the applicant’s primary motive was not to deceive voters but to legitimately ‘cast doubt on the suitability of the local politicians for public office.’¹⁴²

¹³⁷ Application no. 65518/01 6 Sept 2005.

¹³⁸ *Ibid.*

¹³⁹ Application no. 51744/99, 9 January 2007.

¹⁴⁰ *Ibid.*

¹⁴¹ Application no. 27710/05 22 Oct 2008.

¹⁴² *Ibid.*

The above reasoning suggests that the ECtHR is aware of possible harms caused by electoral disinformation but is reticent to accept restrictions that fail to discern lies from unfounded statements made in good faith. This was evidenced in *Brzeziński v. Poland*.¹⁴³ Interestingly, this decision is the first- and only- where the Strasbourg Court has uttered the problematic phrase ‘fake news.’ The applicant was an election candidate who published a booklet accusing politicians of receiving unlawful subsidies. The Court accepted that the electoral law was ‘justified by the need to ensure that ‘fake news’ did not harm the ‘reputation of election candidates’ in a manner that could ‘distort’ election results. However, a violation of Article 10 was found on the grounds that his statements were ‘immediately classified’ as ‘malicious’ lies without any delineation between confected allegations and good faith criticism of political officials.¹⁴⁴ In *Jeziór v. Poland*,¹⁴⁵ the Court again focused on good faith when examining the applicant’s conviction in connection with false statements contained in user generated comments hosted on his website. Here, the Court accepted that the speed of the internet communications could exacerbate the harm caused to the election candidate¹⁴⁶ but highlighted how the applicant had integrated notification mechanisms to detect and remove defamatory content.¹⁴⁷ In *Staniszewski v. Poland*,¹⁴⁸ the ECtHR finally found that Poland’s application of its law on electoral disinformation did not violate Article 10. In that case, the applicant journalist alleged that a local Mayor had chosen a specific village for a regional harvest festival solely to generate support in the village for his candidacy in upcoming elections. Accepting that there was a legitimate aim to protect ‘the integrity of the electoral process’ from ‘false information’ that could affect voting results,¹⁴⁹ the Court found no violation of Article 10. A key factor distinguishing this case was that the applicant had been given ample opportunity to prove the veracity of his claims or at least demonstrate his attempt to verify his claims. However, he had failed to do so. While his ‘untrue’ claim needed to be assessed in context of his role as a political journalist, he was still obligated to take good faith steps to ‘verify a factual allegation’ directed at the election candidate.¹⁵⁰

The question of whether false statements are made in bad faith is central to ECtHR’s approach under Article 10. This lack of nuance is critical where leads to a chilling effect on political debate. In *Salov v. Ukraine*,¹⁵¹ it was important that the applicant’s statements concerned ‘the ability of the electorate to support a particular candidate.’ The Court reasoned that such issues ‘give rise to a serious public discussion in the course of the elections’ and that therefore any restrictions were subject to a narrow margin of appreciation. This was even more prescient considering the ‘very severe’ nature of penalties imposed. The revocation of the applicant’s legal licence and his five-year prison sentence did not sit well with the Court considering the public interest of his statements.

¹⁴³ Application no. 47542/07 25 Jul 2019.

¹⁴⁴ *Ibid.*

¹⁴⁵ Application [31955/11](#), 4 June 2020.

¹⁴⁶ Para 21.

¹⁴⁷ *Ibid.*

¹⁴⁸ Application no. 20422/15 14 Oct 2021.

¹⁴⁹ Para 19.

¹⁵⁰ Para 51.

¹⁵¹ Application no. 65518/01 6 Sept 2005.

This was point was also raised in *Kwiecień v. Poland*.¹⁵² In that case, it was not only important that the applicant acted in good faith but also that he was discussing a matter ‘of public interest for the local community.’ The fact that he was questioning- albeit on spurious factual grounds- actions of a politician meant that any restrictions needed to consider how the ‘limits of acceptable criticism of someone heading a local administrative authority were wider than in relation to a private individual.’¹⁵³ Moreover, in *Kita v. Poland*,¹⁵⁴ it was crucial that the applicant was discussing alleged misconduct of a public official who was running in an election campaign. This Court pointed out that it was ‘particularly important’ for information on such matters to be widely and freely imparted’ in pre-election periods. Even in *Brzeziński v. Poland*¹⁵⁵ where the Court’s explicitly cautioned against the dangers of ‘fake news’, restrictions needed to be assessed alongside the narrow margin of appreciation to curb political criticism. In that case, the Court pointed out that the applicant’s statements may have been false but concerned a matter of ‘undoubted’ public interest. Thus, the Court sharply criticised the ‘cumulative effect’ of the severe sanctions imposed because it could inspire a ‘chilling effect’ on media scrutiny of political matters.¹⁵⁶

4. Lessons from Strasbourg

It must be pointed out that ECtHR case law is by no means the only interpretive framework on how freedom of expression should be protected within laws to combat electoral disinformation. Many conflicting factors are at play in this area. While the purpose of this article is to provide lessons that can be used to inform lawmakers across Europe, it should be highlighted that many Contracting Parties to the ECHR are also Member States of the European Union and thus are subject to EU law. National laws in Europe geared to restrict disinformation in the online context will need to navigate the contours of evolving EU laws on intermediary liability. As stated, EU law has struggled to keep pace with disinformation, and it is uncertain as to whether new instruments such as the DSA provide adequate progress. Moreover, it should also be pointed out that the primary human rights framework related to the EU is seen in the Charter of Fundamental Rights of the European Union. Charter provisions—including the right to freedom of expression under Article 11—are interpreted by in case law of the Court of Justice of the European Union (CJEU) and EU institutions make extensive reference to CJEU decisions. This analytical limitation notwithstanding, there is significant overlap between Charter and Convention interpretations of freedom of expression and—in any event—Strasbourg freedom of expression case law provides a robust framework that can assist law makers across Europe in developing solutions to this disinformation that respect this right. Provided that certain safeguards exist, the cases discussed in this article demonstrate extensive room to restrict

¹⁵² Application no. 51744/99, 9 January 2007.

¹⁵³ *Ibid.*

¹⁵⁴ Application no. [57659/00](#), 8 August 2008.

¹⁵⁵ Application no. 47542/07 25 Jul 2019.

¹⁵⁶ *Ibid.*

electoral disinformation while acknowledging protective contours of Article 10. Specific lessons can be identified from the above cases.

Threaded throughout the Court's interpretive approaches is the need for vigorous but also fair political debate. As identified, the ECtHR affords limited room for states to restrict the free flow of political information. A key justification for the ECtHR's robust protection of political speech is the democratic requirement for transparency and accountability of political figures. Accordingly, laws that combat disinformation must not be used as a veil to suppress legitimate political criticism. Any restrictions that thwart political debate must generally receive extensive scrutiny and must be limited in their application. However, the Court is keen to avoid situations whereby political debates become unfairly dominated by powerful stakeholders. In recognising that political debates can become distorted by commercially and politically powerful groups, the Court affords room for States to impose statutory restrictions that are specifically geared towards protecting manipulation of the electorate. Provided that restrictions in this area are proportionate and do not result in blanket denials of access to all media, it is doubtful that restrictions aimed at safeguarding pre-election from distortion by false narratives and computational propaganda can be questioned from a Convention standpoint.¹⁵⁷

The mere fact that information is disseminated in a political or even electoral context does not necessarily mean that it contributes to democracy. This is arguably most evident in the ECtHR's categorical exclusion of hate speech from Article 10. Through its application of Article 17, the Court has made an important distinction between speech involving genuine contributions to democratic debate and speech that promoting harmful political ideologies under the ostensible guise democratic debate. The Court's disapproval of the latter is highly relevant when considering electoral disinformation. Many disinformation campaigns carry narratives that either overtly or covertly exploit racial divisions.¹⁵⁸ While disinformation and hate speech are distinguishable online harms, false narratives often manifest in the election context through various forms of 'identity propaganda.'¹⁵⁹ The type of anti-democratic propaganda addressed in the Court's approach to hate speech is now interconnected to disinformation campaigns in a manner that is amplified and more efficient online. New communication technologies can exacerbate the spread of hateful and discriminatory messaging.¹⁶⁰ As Suiter and Culloty point out, the proliferation of anti-immigrant disinformation is facilitated by the communicative infrastructure of online

¹⁵⁷ See Venice Commission

<[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-LA\(2018\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-LA(2018)002-e)>

¹⁵⁸ M Reddi and others, (2021) Identity propaganda: Racial narratives and disinformation. *New Media & Society*. July 2021.

Reddi, Madhavi, Rachel Kuo, and Daniel Kreiss. 'Identity propaganda: Racial narratives and disinformation' *New Media & Society* (2021): 14614448211029293.

¹⁵⁹ D Freelon and others (2020). Black trolls matter: Racial and ideological asymmetries in social media disinformation. *Social Science Computer Review*, 0894439320914853.

¹⁶⁰ T Dobber, and others (2019). The regulation of online political micro-targeting in Europe. *Internet Policy Review*, 8(4).

platforms.¹⁶¹ Considering this, the Court's approaches to anti-democratic propaganda appear to demonstrate considerable room for legal intervention to curtail propaganda that manifests as hateful disinformation. Considering this in the disinformation context, the Court's approaches to anti-democratic propaganda appear to demonstrate considerable room for legal intervention to curtail propaganda that manifests as hateful disinformation.

The distinction between statements of facts and value judgements in Article 10 cases is a further indication that the ECtHR is far more willing to protect genuine attempts to contribute to political and public interest debate than gratuitous and knowingly false accusations. The core reasoning behind the Court's differentiation between statements of alleged fact and opinions is that facts, unlike opinions, can be proven. In the election context, the ECtHR's interpretation of false statements firmly aligns with academic distinctions between disinformation and misinformation. The Council of Europe lists both 'disinformation' and 'misinformation' as sub-components of a broader 'information disorder'.¹⁶² However, these two concepts have a crucial distinction. As stated, misinformation involves content 'that is false, but the person who is disseminating it believes that it is true.' Conversely, disinformation consists of 'a deliberate, intentional lie, and points to people being actively disinformationed by malicious actors.'¹⁶³ A key lesson from this distinction is that states must not impose restrictions on disinformation and misinformation in a manner that is indiscriminate. The importance of this point is evidenced in the Court's proportionality assessment of Poland's electoral law that prohibits electoral disinformation. Many of the above cases involve Polish electoral law that provides for expeditious summary judicial proceedings against individuals who make false claims during elections. It is arguable that the speed and immediacy of such proceedings does not sit well with the ECtHR because it often prompts a speedy classification of statements as deceptive lies without applying the distinction between facts and opinion. Key here is the element of deception. While legal definitional challenges persist in this area—even evidenced in the ECtHR's reference to 'fake news'¹⁶⁴—the Strasbourg Court undeniably separates targeted deception from innocent error in the context of imparting false information to voters. In any event, the Court's identification of legitimate aims to safeguard voters from false electoral information is an important development in Strasbourg case law and highlights clear justifications under the ECHR for States to impose restrictions on false information in the pre-election period.

5. Conclusion

This article has examined ECtHR case law on freedom of expression and considered

¹⁶¹ Eileen Culloty and Jane Suiter, *Anti-immigration disinformation*, Chapter in *The Routledge Companion to Media Disinformation and Populism* (Routledge, First Edn 2021).

¹⁶² (Wardle & Derakhshan 2017).

¹⁶³ *Ibid.*

¹⁶⁴ See Ó Fathaigh, *Brzezinski v. Poland: Fine over 'False Information' During Election Campaign Violated Article 10*, (Strasbourg Observers 2019).

relevant jurisprudence in the disinformation context. As stated in the introduction, the article has limited its focus to the Court's key interpretive approaches that are evidenced in cases concerning political communications, anti-democratic propaganda, and false statements. Scrutiny has been given to how the Court applies Article 10 in cases concerning false statements in the pre-election period. While this article has highlighted problems with EU and national laws on disinformation across Europe, it has not substantively addressed core issues regarding developments in EU law and in CJEU case law. Many Council of Europe States are also EU Member States. Thus, developments in CJEU cases—and relevant supranational law relating to technological intermediaries—are undeniably important for law makers across Europe but require separate focus. As identified in this article, an analysis of ECtHR freedom of expression jurisprudence shows significant room for Contracting Parties of the Convention to restrict the dissemination of electoral disinformation while maintaining harmony with Article 10.

Particularly when false statements are made in political and electoral contexts, the ECtHR looks for the most convincing justifications as to why interferences with freedom of expression may arise. As identified, however, a key reasoning behind the Strasbourg protection of political speech is not merely the political nature of the speech but the contribution of such speech to the democratic process. This has not only been examined through the ECtHR's wide tolerance of political criticism but also in its categorical rejection of hate speech. In both areas, a key theme in judicial commentary is that Article 10 is geared towards protecting and promoting democratic debate. It follows that the right to freedom of expression must not be misused and abused by actors who seek to undermine democracy. When considering laws that combat electoral disinformation either online or offline, this principle is crucial.

Extensive room exists for States to restrict electoral disinformation that conveys discriminatory or hateful messaging. The Court is extremely reluctant to facilitate xenophobic and anti-democratic electoral communications. As democracy is the only political system compatible with the ECHR, the Court affords extensive discretion for States to restrict propaganda and election manifestos that threaten the integrity of democratic regimes. A key standard here is that political campaigning does not require Convention protections if it promotes regimes that frustrate ECHR objectives and undermine the rights of others. Where false electoral communications are disseminated in bad faith, Contracting Parties unquestionably have legitimate aims to combat electoral disinformation under Article 10. There is more room to limit deceptive communications as opposed to misled and innocently mistaken communications in the election context. The Court places an important distinction between false factual statements and factually dubious value judgements and applies this in the pre-election context. Thus, the critical distinction between disinformation and misinformation is already firmly integrated in the Court's approach to false statements in election contexts. National authorities who impose sanctions for disseminating false information during election campaigns must carefully delineate genuine errors from deception.

Threaded throughout ECtHR approaches to Article 10 is the need for proportionality and to only reserve criminal sanctions for the most egregious of expression. Thus, to ensure

compatibility with freedom of expression, legislation to combat electoral disinformation must generally be limited to knowingly false information that seeks to manipulate voters or undermine the rights of others. Restrictive laws to curtail less deceptive falsehoods such as misinformation are best avoided, particularly if criminal sanctions are proposed. Instead, legal focus must be exerted towards robust oversight mechanisms that are justified on the legitimate aim of preventing unfair distortion of political debate and electoral campaigning.