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Article

Tinker, Tailor, Twitter, Lie: Government Disinformation and Freedom of Expression in a Post-Truth Era

Katie Pentney*

ABSTRACT

The spread of disinformation has received significant attention in recent years, yet little has been paid to government disinformation, and whether governments may violate freedom of expression not only in how they regulate disinformation, but also in how they facilitate, sow and spread it. This article analyses whether and to what extent Article 10 of the ECHR is engaged by government disinformation. It extends the analysis from well-established violations of freedom of expression—overt censorship and withholding information—into novel forms of government interference in the 'post-truth' age: false claims of 'fake news' levelled at the press and intentional lies about matters of public importance. These latter categories warrant further attention, as governments can cause just as much harm to public discourse and debate by intentionally injecting falsehoods as by censoring truth. A purposive approach to freedom of expression is needed to protect not only the means of expression, but also the ends—vibrant democratic discourse and meaningful public debate.

KEYWORDS: freedom of expression, disinformation, ECHR, COVID-19, post-truth

1. INTRODUCTION

A great deal of ink has been spilled recently on how governments should combat the spread of disinformation on private platforms while respecting freedom of expression. That discussion has focused on governments' role as regulators when disinformation is spread by private actors, and the human rights analysis has focused on how governments can regulate that speech. However, little attention has been paid to the roles governments themselves play as spreaders of disinformation, and whether they may violate freedom of expression not only in the way that they regulate disinformation, but also in the way that they facilitate, sow and spread it.[1]

* DPhil Candidate in Law, University of Oxford, UK; email: katie.pentney@law.ox.ac.uk. This article is based on the thesis the author submitted in fulfilment of the Advanced LL.M. in European and International Human Rights Law at Leiden Law School, for which she was awarded the Max van der Stoel Human Rights Award 2021.

1 For more on 'government speech' and freedom of speech in the American context, see Yudof, *When Government Speaks: Politics, Law, and Government Expression in America* (1983) and Norton, *The Government's Speech and the Constitution* (2019).

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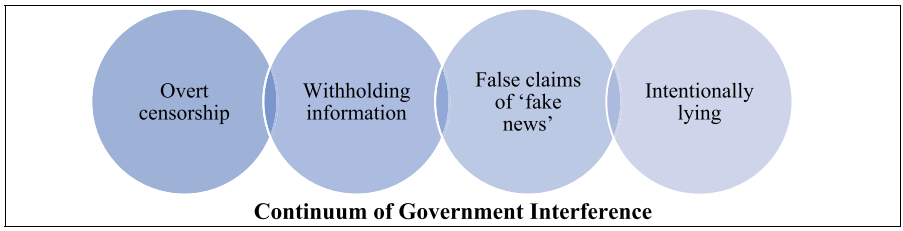
This article analyses whether and to what extent the right to freedom of expression, as enshrined in Article 10 of the European Convention on Human Rights (ECHR),[2] is engaged by government disinformation. It does this by extending the analysis from traditional and well-established violations of freedom of expression—overt censorship and withholding information—into more novel forms of government interference in the 'post-truth' age[3]: false claims of 'fake news' levelled at the press and intentional lies about matters of public importance. These latter two categories—which I define as 'government disinformation'—have yet to be subject to judicial scrutiny by the European Court of Human Rights (ECtHR or the Court). However, the Court's traditional and developing case law on these categories suggests that these novel categories can—and, in some cases, should—be conceived as interferences with freedom of expression, requiring justification under Article 10(2).



These latter categories are the focus of the present article and are deserving of greater scholarly attention for two reasons.

First, the dangers of government disinformation have been made abundantly clear during the COVID-19 pandemic and the most recent American election, which brought into sharp focus the importance of governments providing reliable information and the harmful consequences where they fail to do so.

Second, freedom of expression jurisprudence has traditionally focused on states' regulation of others' expression, and their obligations of restraint in this regard—in particular, their (negative) duty to refrain from censorship. However, limiting or suppressing discussion through the use of state power is only one of the critical roles played by governments in respect of expression: the state also *facilitates* expression through passive or active measures and *participates* in the communicative process by making statements on matters of public importance.[4] Governments are not merely conductors but also members of the orchestra, contributors to the symphony. That they can interfere with—and cause harm to—public discourse and debate by censoring truth is well established; but what about when they intentionally inject falsehoods into the discussion? When they malign the veracity of the press, the independence of the judiciary, the reliability of election results? In sum, how do the assumptions and rationales underlying freedom of expression doctrine apply to the state as speaker, rather than regulator or facilitator of expression?

The aims of this article are threefold: first, to chart the development of the case law of the ECtHR concerning freedom of expression, identifying the key principles it has relied

[2] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ETS No. 005, 4 November 1950).

[3] 'Post-truth' refers to 'circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief'. See Oxford Languages, 'Word of the Year 2016' Oxford University Press, available at: www.languages.oup.com/word-of-the-year/2016/.

[4] McGonagle, 'Minority Rights, Freedom of Expression and of the Media: Dynamics and Dilemmas' (2011) 44 *Netherlands School of Human Rights Research* at 189–90, citing Commission on Freedom of Expression, *A Free and Responsible Press* (1947) at 136; Emerson, *The System of Freedom of Expression* (1970) at 4, 697–716. Yudof noted, 'Tyranny does not lie simply in government censorship' (supra n 1 at xv).

on which may be applicable to novel forms of government interference; second, to analyse whether the novel forms of government interference implicated by state-sponsored and spread disinformation ought to be conceived as violations of freedom of expression; and finally, to offer suggested analysis and signposts in the event such cases make their way before the Court. The proposed approach is rooted in the purposes freedom of expression was meant to achieve: enabling the exchange of information and ideas, fostering public debate and encouraging the pursuit of truth.[5] This article identifies areas that would benefit from further scholarly attention if the language of human rights and freedom of expression is to be applied to government disinformation. For instance, how does the focus on governments as speakers rather than as regulators change the freedom of expression analysis, including courts' aversion to content-based restrictions? Would it be necessary for a claimant to establish that the government *intended to* spread disinformation—a difficult exercise—or would it suffice to establish only that the government speech was false and harmful? In the event of such a breach, what remedies would be available and most appropriate? This article does not purport to set out precisely how each of these questions should be answered by courts, but focuses instead on the preliminary but necessary question of whether government disinformation should be conceived of in terms of human rights and freedom of expression in the first place.

The article proceeds in five parts. Section 2 lays the groundwork for the analysis to follow by exploring the first category on the continuum of government interference. In this section, I briefly discuss traditional justifications for freedom of expression, which pertain in particular to government's role as regulator, and outline the key principles of relevance in the ECtHR's censorship jurisprudence. Although the ECtHR's jurisprudence has permitted very few content-based restrictions in this category, there are important lessons in its case law on the scope and bounds of governments' (permissible) interference in the 'marketplace of ideas', which may be applicable in respect of states' roles as facilitators of and participants in expression.[6]

Section 3 moves along the continuum to examine the Court's developing jurisprudence on access to information, and its corollary: the state's withholding of information. This category relates to the state's role as regulator, but also its second role as facilitator of expression. The Court's burgeoning case law in this area—in particular, its focus on the ends freedom of expression was meant to achieve and the state's obligations in this regard—are particularly relevant for the (undeveloped) categories further along the continuum.

Sections 4 and 5 proceed along the continuum into novel forms of government interference: false claims of 'fake news' levelled at the press and intentional lies about matters of public importance. These categories extend into more difficult terrain from the perspective of freedom of expression in two ways: first, they implicate the state's role as speaker, or participant in the information ecosystem, which has received less attention by the ECtHR; and second, they call on courts to scrutinize the content, rather than the mechanisms, of expression—a contentious and uncomfortable exercise which scholars are reluctant to endorse and courts are wary to undertake. These sections first define what is meant by 'government disinformation' (and, critically, what is *not* included in the definition). They then offer a suggested approach to discern whether and in what circumstances these categories of government disinformation ought to be conceived as an interference with Article 10. In addition, these sections introduce a suggested intention- and effects-based analysis to guide the Court's proportionality assessment under Article 10(2), to minimize concerns about the chilling effects on political speech.[7]

[5] Barendt, *Freedom of Speech*, (2nd ed., 2005) at 6–23; Emerson, 'Toward a General Theory of the First Amendment' (1963) *Yale Law Journal* 72(5) at 878–9.

[6] This is a North American term that has been invoked by the Court. See *Mouvement Raëlien Suisse v Switzerland* Application No 16354/06, Merits and Just Satisfaction, 13 July 2012, Dissenting opinion of Judge Pinto de Albuquerque. All judgments refer to ECtHR decisions, unless otherwise specified, and are available at: hudoc.echr.coe.int/.

These final categories raise important questions about the extent to which longstanding freedom of expression guarantees are applicable to modern forms of government interference in the marketplace of ideas. The article offers some initial thoughts on how such cases could be addressed through a purposive approach to Article 10 which focuses not only on the means of expression—the exchange of information and ideas—but also the ends—vibrant democratic discourse and informed public debate.

2. REGULATING THE REGULATOR: CENSORSHIP AND THE STATE'S ROLE AS REGULATOR OF EXPRESSION

Censorship has been used throughout history as a blunt tool to control the information available for—and the permissible bounds of—public debate. It has been wielded by the powerful—the church and the state, as well as powerful private actors—to ensure that they 'have the first and last say' and 'control access to podium, presidium or press room'.[8]

Censorship by the state is the prototypical form of government interference with freedom of expression. It concerns the government's role as *regulator* of others' expression, based on the contents of the speech in question or the harm that might ensue from it. This form of state regulation goes against the philosophical underpinnings of freedom of expression, in particular arguments from truth, democracy and self-fulfilment. A detailed description of these rationales could fill many volumes,[9] but a brief summation is in any case sufficient for present purposes.

A. The Philosophical Underpinnings of Freedom of Expression

The argument from truth, popularized by John Stuart Mill, rests on the assumption that 'truth will most likely surface when all opinions may freely be expressed, when there is an open and unregulated market for the trade in ideas'.[10] Freedom of expression is, on this reading, 'not an end but a means, a means of identifying and accepting truth'.[11] As Frederick Schauer notes, 'we are reluctant to allow any governmental body with power to suppress to make decisions concerning suppression on the basis of *its* certainty of the falsity of the opinion to be suppressed'.[12]

The argument from democracy, most prominently articulated by Alexander Meiklejohn,[13] is interested in the means of expression, but also the ends:

> First, freedom of speech is crucial in providing the sovereign electorate with the information it needs to exercise its sovereign power, and to engage in the deliberative process requisite to the intelligent use of that power. Second, freedom to criticize makes possible holding government officials, as public servants, properly accountable to their masters, the population at large.[14]

Like the argument from truth, the argument from democracy emphasizes the interests of society at large, rather than the rights of individuals.[15] However, it is primarily concerned with—and

[7] This approach draws significantly on Helen Norton's two-pronged approach to government speech in the United States: see Norton supra n 1.

[8] Jansen, *Censorship: The Knot That Binds Power and Knowledge* (1988) at 7.

[9] In any case, other authors have done this work far better than I could. For explications far more detailed and nuanced than present space permits, see Schauer, *Free speech: a philosophical enquiry* (1982), chapters 1–4 and Barendt supra n 5 at chapter 1.

[10] Schauer, supra n 9 at 16.

[11] Ibid.

[12] Ibid. at 32.

[13] See, e.g. Meiklejohn, *Free Speech and its Relation to Self-Government* (1948).

[14] Schauer, supra n 9 at 36.

[15] Ibid. at 47. The other oft-cited rationale underpinning a Free Speech Principle is 'self-fulfilment', which emphasizes the right of the individual over the interests of society. See Barendt, supra n 5 at 13; Schauer, supra n 9 at chapter 4.

applicable to—political expression, concerned as it is with 'the need to expose citizens to a wide variety of views and to provide it with enough information to hold government to account'.[16]

The arguments from truth and from democracy weigh in favour of more, rather than less speech. They permit very few state restrictions on expression, in particular where the expression relates to matters of public importance—like climate change or corruption, foreign policy or Covid-19—or to the functions of self-government—like the rules around elections and referenda. Both arguments touch on two foundational issues—namely, our innate distrust of government, arising from the state's monopoly on regulatory and informational power, and our desire to counteract these imbalances through appropriate checks and balances.[17]

B. The Court's Approach to State Censorship

Perhaps unsurprisingly then, the Court has, from its earliest cases, brought significant scrutiny to bear on states' censorial conduct. In assessing cases under Article 10, the Court considers first whether there has been an 'interference by public authority'. This first stage of the inquiry is of little difficulty in the case of state censorship, given that it impairs individuals' rights to 'receive and impart information and ideas without interference'.[18] The second stage of the inquiry thus turns to whether the interference is permissible under Article 10(2). There are three requirements: it must be prescribed by law, pursue a legitimate aim and be necessary in democratic society.[19]

From the outset, the Court emphasized the importance of freedom of expression in democracies. In *Handyside*—concerning censorship of 'The Little Red Schoolbook' for purported obscenity[20]—the Court noted that its supervisory functions 'oblige it to pay the utmost attention to the principles characterising a "democratic society"'.[21] Drawing on the philosophical underpinnings described above, the Court held that freedom of expression 'constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man'.[22] The right applies equally to information and ideas that are inoffensive as to those that 'offend, shock or disturb,' for 'such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[23]

The Court reiterated these principles in *Sunday Times (no. 1)*.[24] The case concerned reporting on ongoing litigation into the postnatal effects of the drug thalidomide. The Court made three critical pronouncements. First, it affirmed that the above-noted *Handyside* principles are particularly important for the press, which must impart information and ideas concerning matters of public interest.[25] Second, Article 10 is relational: 'not only do the media have the task of imparting such information and ideas: the public also has a right to receive them'.[26] Third, Article 10 guarantees more than simply the process of expression: it also includes 'the right of the public to be *properly* informed'.[27] The Court noted, in this regard, that reporting factual information about ongoing litigation 'might have served as a brake on speculation and unenlightened discussion'.[28]

16 Barendt, supra n 9 at 18.
17 See, generally, Jansen, supra n 8.
18 ECHR Article 10(1). This first stage of the inquiry may prove more challenging in cases of government disinformation (discussed further below).
19 ibid., Article 10(2).
20 *Handyside v United Kingdom* Application No 5493/72, Merits, 7 December 1976 at paras 14–16.
21 Ibid. at para 49.
22 Ibid.
23 Ibid.
24 *Sunday Times v United Kingdom (no. 1)* Application No 6538/74, Just Satisfaction, 26 April 1979.
25 Ibid. at para 65.
26 Ibid.
27 Ibid. at para 66 (emphasis added).

Both *Handyside* and *Sunday Times (no. 1)* concerned state censorship and contained lofty remarks about the importance of freedom of expression, but they led to different results: in *Handyside,* no violation of Article 10 was found, whereas in *Sunday Times (no. 1)*, it was. According to Eric Barendt, this likely 'reflects the preferred position of speech concerned with political and public affairs':[29]

> In the *Handyside* case the Court said the guarantee of freedom of expression was primarily concerned to protect the dissemination of political ideas. Subsequently, in the *Sunday Times* decision it stressed that the extent of each member state's discretion to determine the measures necessary to restrict free speech varies according to the character of the state interest involved.[30]

A state's 'discretion'—known as the state's 'margin of appreciation' in the parlance of the ECHR[31]—is wider or narrower depending on how the Court balances factors such as (i) the contents of the expression, (ii) the speaker, (iii) the object and tone of the speech and (iv) the nature of the restriction. For instance, political speech is subject to the highest level of protection, compared to commercial speech and gossip, in light of the primacy of government expression in democratic society.[32] Significant protection is also afforded to the press in light of its 'public watchdog' function,[33] particularly where the information concerned is in the public interest. However, Article 10 imposes 'duties and responsibilities' in the exercise of expression,[34] which the Court has interpreted in respect of journalists' reporting[35] and politicians' remarks.[36] In certain circumstances, criticisms levelled at professionals in the performance of their duties or disparaging remarks against members of vulnerable groups have been found deserving of less protection.[37] Finally, the Court has been particularly suspicious of—and averse to—long-term

28 Ibid.

29 Barendt, supra n 5 at 159.

30 Ibid. (footnotes omitted).

31 *Handyside,* supra n 20 at para 49. The principle of subsidiarity and the margin of appreciation have now been codified in the preamble to the ECHR following the entry into force of Protocol 15 on 1 August 2021. See Article 1 of Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms (Strasbourg, CETS No 213).

32 *Mouvement Raëlien Suisse*, supra n 6 at paras 61–2; *Éva Molnár v Hungary* Application No 10346/05, Merits, 7 October 2008 at para 42; *Sunday Times (no. 1),* supra n 24 at para 65; *Von Hannover v Germany (no. 2)*, Application Nos 40,660/08 and 60,641/08, Merits and Just Satisfaction, 7 February 2012 at para 109.

33 *Lingens v Austria* Application No 9815/82, Merits and Just Satisfaction, 8 July 1986 at para 44; *Sunday Times v United Kingdom (no. 2)* Application No 13166/87, Merits and Just Satisfaction, 26 November 1991 at para 50. The Court has recognized that the role of 'public watchdog' and the heightened protection it affords can also apply to non-governmental organizations: see *Animal Defenders International v United Kingdom* Application No 48876/08, Merits and Just Satisfaction, 22 April 2013 at para 103 and *Medžlis Islamske Zajednice Brčko and others v Bosnia and Herzegovina* Application No 17224/11, Merits and Just Satisfaction, 27 June 2017 at para 86.

34 ECHR, supra n 2, Article 10. This is the only such qualifier in the Convention.

35 In particular, journalists must act in good faith, on an accurate factual basis, and provide 'reliable and precise information in accordance with the ethics of journalism': see *Fressoz and Roire v France* Application No 29183/95, Merits and Just Satisfaction, 21 January 1999 at para 50; and *Prager and Oberschlick v Austria* Application No 15974/90, Merits and Just Satisfaction, 26 April 1995.

36 The Court has held it is crucial for politicians to avoid public comments that could foster intolerance in light of their duty to defend democracy and its principles: *Féret v Belgium* Application No 15615/07, Merits, 16 July 2009 at paras 75–6; *Erbakan v Turkey* Application No 59405/00, Merits, 6 July 2006 at para 64.

37 *Castells v Spain* Application No 11798/85, Merits and Just Satisfaction, 23 April 1992 at para 46; *De Diego Nafria v Spain* Application No 46833/99, Merits and Just Satisfaction, 14 March 2002. Beyond Article 10, certain speech—including incitement to violence or inherently discriminatory speech—has been deemed unworthy of any protection under Article 10. For instance, Article 17 of the Convention excludes from protection acts 'aimed at the destruction of any of the rights and freedoms set forth' therein, while more recently the Court has examined the nature of restrictions imposed to determine whether the authorities had an 'ulterior purpose' such as silencing and punishing individuals for their journalistic activities, in violation of Article 18. See e.g. *Khadija Ismayilova v Azerbaijan (no. 2)* Application No 30778/15, Merits and Just Satisfaction, 27 February 2020 at para 119; *Merabishvili v Georgia* Application No 72508/13, Merits and Just Satisfaction, 28 November 2017 at paras 264–83, 309. For more on Article 18, see Çalı and Hatas, 'History as an Afterthought: The (Re)discovery of Article 18 in the case law of the European Court of Human Rights' in Philipp Aust and Demir-Gürsel (eds.) *The European Court of Human Rights: Current Challenges in Historical and Comparative Perspective* (2020, Forthcoming); and

or absolute limitations on publication, as well as overly broad restrictions when lesser means would suffice.[38]

C. Censorship in Action

Notwithstanding the Court's aversion to state censorship, states continue to wield their censorial powers, as recent examples from Turkey and Armenia illustrate. In 2017, the Turkish government blocked all access to Wikipedia on Turkish internet servers. It imposed this ban in response to entries alleging that Turkey sponsored terrorist organizations and traded oil with the Islamic State.[39] When Wikipedia refused to remove the content, the authorities blocked access to all of Wikipedia's contents.[40] Turkish authorities claimed (and the lower courts accepted) that the online encyclopaedia was a 'smear campaign' against the country,[41] the contents were false[42] and national security concerns justified the ban.[43] The ban was only lifted in January 2020 after the Constitutional Court held that it violated freedom of expression under the Turkish Constitution.[44] An application, launched by Wikimedia in April 2019, is currently pending before the ECtHR.[45]

More recently, the Armenian government declared a state of emergency in response to the COVID-19 crisis. As part of this decree, organizations carrying out 'journalistic activities' were prohibited from publishing any information about the virus that did not originate with official government sources.[46] Armenia referred to the 'urgent need to counter the spread of disinformation and "fake news" related to COVID-19' as justification for the ban.[47] Within 10 days of the law coming into effect, more than 20 media outlets were made to change or remove information on the basis that the contents may cause panic.[48]

These cases may be illustrative of how the above-noted principles apply in practice. As noted at the outset, there is little controversy from a legal perspective about the framework and principles that apply to assessing state censorship under Article 10. In these particular

Heri, 'Loyalty, Subsidiarity, and Article 18 ECHR: How the ECtHR Deals with *Mala Fide* Limitations of Rights' (2020) *European Convention on Human Rights Law Review* 1.

38 *Sunday Times (no. 2)*, supra n 33 at para 51; see also *RTBF v Belgium* Application No 50084/06, Merits and Just Satisfaction, 29 March 2011 at para 114; *Cengiz and others v Turkey*, Application Nos 48,226/10 and 14,027/11, Merits and Just Satisfaction, 1 December 2015. But cf. *Animal Defenders International*, supra n 33.

39 McKernan, 'Turkey's Wikipedia block violates human rights, high court rules', *Guardian* (26 December 2019), available at: www.theguardian.com/world/2019/dec/26/turkish-court-wikipedia-block-lifted.

40 The Constitutional Court of the Republic of Turkey, 'Press Release concerning the Judgement Finding a Violation of the Freedom of Expression due to Blocking of Access to Wikipedia' *Individual Application 3/20* (15 January 2020), available at: www.anayasa.gov.tr/en/news/individual-application/press-release-concerning-the-judgment-finding-a-violation-of-the-freedom-of-expression-due-to-blocking-of-access-to-wikipedia/.

41 Atay Alam et al., 'Turkey blocks Wikipedia over what it calls terror "smear campaign"' *CNN* (29 April 2017), available at: edition.cnn.com/2017/04/29/europe/turkey-wikipedia/index.html; Hansen, 'Finding Truth Online Is Hard Enough. Censors Make It a Labyrinth' *New York Times Magazine* (13 November 2019), available at: www.nytimes.com/interactive/2019/11/13/magazine/internet-turkey.html.

42 Zittrain et al., 'The Shifting Landscape of Global Internet Censorship' (Berkman Klein Center for Internet & Society at Harvard University, Research Publication No 2017-4, June 2017) at 2, available at: papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2993485_code727672.pdf?abstractid=2993485&mirid=1.

43 Freedom House, Turkey: Freedom in the World 2020, available at: freedomhouse.org/country/turkey/freedom-world/2020.

44 The Constitutional Court of Turkey, *Constitution of the Republic of Turkey*, as amended on July 23, 1995; Act No. 4121, Article 26; McKernan, supra n 39.

45 *Wikimedia Foundation, INC. v Turkey* Application No 25479/19, Communicated Case, 2 July 2019.

46 OSCE Press Release, *Coronavirus Response Should Not Impede the Work of the Media in Armenia, Says OSCE Media Freedom Representative* (24 March 2020), available at: www.osce.org/representative-on-freedom-of-media/449098.

47 Armenian State reply to the alert 'Emergency Restrictions Force Media to Suppress Independent Information on COVID-19' (n.d.), available at: rm.coe.int/armenia-reply-en-emergency-restrictions-force-media-to-suppress-indepe/16809e4ace.

48 Council of Europe, *Emergency Restrictions Force Media to Suppress Independent Information on COVID-19* (26 March 2020), available at: www.coe.int/en/web/media-freedom; Council of Europe Commissioner for Human Rights, *Press Freedom Must Not Be Undermined by Measures to Combat Disinformation About COVID-19* (3 April 2020), available at: www.coe.int/en/web/commissioner/-/press-freedom-must-not-be-undermined-by-measures-to-counter-disinformation-about-covid-19.

circumstances, the interference is particularly acute, as the Turkish government blocked access to an entire online encyclopaedia for everyone in its territory, and the Armenian government prohibited publication of unauthorized information on an important topic. Such censorship impairs the free and open exchange of information and ideas and undermines the purposes the right aims to achieve—the pursuit of truth and participative democracy.[49] The interference is particularly serious where the censored contents concern matters of public importance, including the adequacy of the state's response to COVID-19 and the appropriateness of the government's foreign policy. Society requires this information for discussion and debate, in order to push for societal progress. The public has a right to be informed.[50]

Moreover, censorship inhibits the 'truth-seeking' function of freedom of expression when only one side of the debate (favourable to the government of the day) is allowed in the public domain. This weakens the vibrancy of public discourse, as neither the press nor the public has the tools necessary to question the government, criticize its shortcomings and demand meaningful change. Finally, such bans may undermine democratic pillars: they restrict the press' ability to meaningfully act as a public watchdog and weaken individuals' ability to form opinions and cast their ballots in an informed manner.

With the interference established, the question turns to whether censorship—like that imposed by the Turkish and Armenian governments—would satisfy the three-part test under Article 10(2). In both instances, it likely would not: the quality of the laws was deficient, and the measures did not correspond to a pressing social need.

As a starting point, the balancing of factors weighed by the Court—including the speaker, contents and object of the censored information and ideas, as well as the nature of the limitation—militate in favour of less deference to the state for the measures imposed.[51] Both measures targeted journalists, and the censored contents related to information and ideas of public importance—the Turkish government's actions and allegiances at home and abroad, and the spread of (and government response to) COVID-19 in Armenia. The Court is rightly concerned about absolute limitations on publication.[52] In addition, while both measures have a basis in domestic law, the quality of the laws raises concern.[53] The Court has clarified that a law should be, *inter alia*, foreseeable and compatible with the rule of law.[54] In *Ahmet Yildirim*, concerning Turkey's blockage of Google sites, the Court found that the sites enabled the exchange of information and ideas, and the domestic courts had failed to consider whether 'a less far-reaching measure could have been taken to block access specifically to the offending website'.[55] The Court held that 'by rendering large quantities of information inaccessible, [the measure] substantially restricted the rights of Internet users and had a significant collateral effect'.[56] This reasoning has been applied more recently in a series of judgments against Russia[57] and would likely apply to the bans imposed in Turkey and Armenia.

The measures would also fail at subsequent stages of the analysis. While both Turkey and Armenia would argue the measures pursued legitimate aims—the protection of national security and health, respectively—such aims must be proportionate. The context in which the bans were

[49] Barendt, supra n 5 at 6–23; Emerson supra n 5 at 878–9.
[50] *Sunday Times (no. 1)*, supra n 24 at para 66.
[51] *Castells*, supra n 37 at para 46.
[52] *Cengiz*, supra n 38.
[53] *Ahmet Yildirim v Turkey* Application No 3111/10, Merits and Just Satisfaction, 18 December 2012 at para 57.
[54] Ibid.
[55] Ibid. at paras 62–4.
[56] Ibid. at para 66. A similar result was reached in *Cengiz*, supra n 38 at paras 59–67.
[57] *Bulgakov v Russia* Application No 20159/15, Merits and Just Satisfaction, 23 June 2020; *Engels v Russia* Application No 61919/16, Merits and Just Satisfaction, 23 June 2020; *OOO Flavus v Russia*, Application Nos 12,468/15 and others, Merits and Just Satisfaction, 23 June 2020. The Court reaffirmed *Ahmet Yildirim* and set out the safeguards which must be in place for bans or blockages to be deemed of sufficient quality.

imposed is critical. Turkey sought to limit access to internet sites it deemed offensive, or against its interest, thereby restricting the expressor's ability to publicize information and millions of peoples' ability to seek and receive it.[58] This is particularly harmful as the internet is 'one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest'.[59] As Judge Pinto de Albuquerque has noted, 'If the streets and parks of a city are the historical quintessential public fora, the Internet is today's global marketplace of ideas'.[60]

Similarly, Armenia sought to control the narrative concerning its response to COVID-19, thereby limiting the press' ability to criticize, question and report on measures taken to address the pandemic—an approach the Council for Europe Commissioner for Human Rights has called 'counterproductive'.[61] Such measures do not pursue a pressing social need, and they are not proportionate to a legitimate aim. Rather, they undermine public debate and democracy.[62] Censorship of this kind stifles public debate and restricts the flow of information and ideas to those which the government has sanctioned and approved. Democracy requires public discourse and debate, which depend on the free exchange of information and ideas, an informed public (and informed public debate) and a government which does not overzealously wield its informational power.

Censorship cases highlight the importance of restraint where governments act as regulators of others' expression; the next section analyses how many of the same principles inform the Court's approach in cases implicating the state's role as facilitator of expression.

3. THE INNOVATOR: WITHHOLDING INFORMATION OF PUBLIC IMPORTANCE AND THE GOVERNMENT'S ROLE AS FACILITATOR OF EXPRESSION

Governments withholding information on matters of public importance is a less tangible, but arguably equally dangerous, interference with expression, as the Court has recognized in recent years. When a government withholds critical information, it is not formally barring individuals from expressing themselves.[63] Nevertheless, the failure to provide information may have the same damaging consequence for public debate as overt censorship. The press cannot publish what it does not know, and the public may be unable to make informed decisions without government provision of information. In this sense, like censorship, withholding information of public importance undermines the purposes the right was meant to achieve, namely the pursuit of truth and participation in democracy. However, the Court's early jurisprudence construed Article 10 more narrowly than these purposes seem to call for.

A. From Meagre Beginnings to Modest Development

For many years, the Court held that Article 10 did not 'embody an obligation on the State concerned to impart . . . information'.[64] The Court was seemingly more comfortable confining

[58] Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36(3) of the ECHR, in *Wikimedia Foundation*, supra n 45 at para 23.

[59] *Ahmet Yildirim,* supra n 53 at para 54.

[60] *Mouvement Raëlien Suisse,* supra n 6, Dissent of Judge Albuquerque.

[61] Council of Europe Commissioner for Human Rights, Press Release, supra n 48.

[62] *Manole and others v Moldova*, Application No 13936/02, Merits, 17 September 2009 at para 95.

[63] I am leaving aside, for the purposes of this discussion, the issue of governmental regulation of employees' speech, which raises distinct issues.

[64] See *Leander v Sweden* Application No 9248/81, Merits, 26 March 1987 at para 74; *Gaskin v United Kingdom* Application No 10454/83, Merits and Just Satisfaction, 7 July 1989 at para 52; *Magyar Helsinki Bizottság v Hungary* Application No 18030/11, Merits and Just Satisfaction, 8 November 2016 (*MHB*) at para 127. See also *Guerra and others v Italy* Application No 14967/89, Merits and Just Satisfaction, 19 February 1998, wherein the Court disagreed with the European

its analysis to what freedom of expression required in respect of states' (negative) obligations of restraint, rather than its (positive) obligations to facilitate expression. This approach has changed over the last two decades: in that time, the Court has recognized 'a limited right of access to information' for the press as a 'watchdog'[65] and held that states' obligations 'include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities'.[66]

In its landmark judgment in *Magyar Helsinki Bizottság*, a Grand Chamber of the Court broadened the protections of Article 10 further. Using the living instrument doctrine and its practical and effective approach, the Court held that such a right may arise where access is 'instrumental for the individual's exercise of his or her right to freedom of expression'.[67] The right of access to information is not limited to the press and non-governmental organizations but extends to academic researchers, authors writing on matters of public concern, and bloggers and social media users.[68] The Court's assessment was a functional one, and the test it enunciated has four threshold criteria: the purpose of the information sought, its necessity for the exercise of freedom of expression, the requestor's role, and the existence and availability of the information.[69]

The Court's evolution marks an important step forward in two respects. First, it demonstrates the Court's willingness to move beyond states' so-called negative obligations of restraint (for instance, not to censor) to examine what states' positive obligations might entail under Article 10 (for instance, to provide access to information).[70] It thus moves the analysis beyond the state's role as regulator to examine the state's role as facilitator of expression. This shift to include positive obligations—and what these obligations ought to entail—is a point to which we return in the next section.

Second, the recognition that a state may be obliged—in certain circumstances—to provide information on issues of public interest is in keeping with the arguments from truth and democracy, and aligns with the Court's early jurisprudence concerning the reciprocal relationship between the press' right to impart information of public interest and the public's right to receive it.[71] Careful scrutiny is thus required where 'measures taken by the national authority are capable of discouraging the participation of . . . society's "watchdogs", in the public debate on matters of legitimate public concern'.[72] In addition, the Court's acceptance of a right of access to information is consistent with international and regional efforts, including within the Council of Europe.[73]

Commission's view that 'the protection afforded by Article 10 therefore had a preventive function with respect to potential violations of the Convention' (at para 52); and *Open Door v Ireland*, Application Nos 14234/88 and 14235/88, Merits and Just Satisfaction, 29 October 1992, concerning the need for information to make decisions about health.

65 For a description of the Court's evolution, see *MHB,* ibid. at paras 128–32. *Társaság a Szabadságjogokért v Hungary* Application No 37374/05, Merits and Just Satisfaction, 14 April 2009 at para 35. See also *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria* Application No 39534/07, Merits and Just Satisfaction, 28 November 2013 at para 41; *Youth Initiative for Human Rights v Serbia* Application No 48135/06, Merits and Just Satisfaction, 25 June 2013.

66 *Társaság*, ibid. at para 36.

67 *MHB,* supra n 64 at para 156. See, more recently, *Centre for Democracy and the Rule of Law v Ukraine* Application No 10090/16, Merits and Just Satisfaction, 26 March 2020 (*CDRL*) at para 87.

68 Ibid.

69 Ibid. at paras 157–70.

70 On the development of states' positive obligations in respect of expression, see McGonagle, 'Positive obligations concerning freedom of expression: mere potential or real power?' in Andreotti (ed), *Journalism at Risk: Threats, challenges and perspectives* (Council of Europe, October 2015) 9–36.

71 *Társaság*, supra n 65 at para 26; *Sunday Times (no. 1)*, supra n 24 at para 66.

72 *Társaság*, ibid. at para 26 [citations omitted]. But cf. *Studio Monitor and Zuriashvili v Georgia* Application No 44920/09, Merits and Just Satisfaction, 30 January 2020 at paras 40–3.

73 Council of Europe, *Convention on Access to Official Documents* (CETS No 205); OSCE Office of the Representative on Freedom of the Media, 'Legal Analysis of proposed amendments on the "Law on Free Access to Information of Public Character"' (December 2018) at 3–5.

B. Room for Improvement? From Functionality to Facilitating Expression

While these cases provide glimmers of hope for further development in states' positive obligations in respect of expression, there is room for improvement. The public's right to be informed requires a broader approach still: it should not be narrowly construed as the right of gatekeepers like the traditional media, or intermediaries such as academics and authors, to be kept apprised by states. Governments play a significant role in facilitating communicative processes, including ensuring the practical and effective guarantee of others' freedom of expression. They may impair democratic discourse and impoverish public debate when they withhold important information, such as COVID-19 statistics or climate change data. Examples of governments withholding information concerning pressing concerns of our day—COVID-19 and climate change—are illustrative.[74]

The Brazilian government of Jair Bolsonaro sought to limit access to COVID-19 information when, in response to rising numbers of cases, the government took down its website reporting the (worsening) daily statistics.[75] When the website went back online the next day, the cumulative number of cases had been removed.[76] The move drew criticism from many quarters, including the medical community which noted the importance of accurate and timely data on decision-making.[77] The Supreme Court of Brazil intervened days later, ruling that the ministry must 'fully re-establish' publication of the data 'in the interests of public health'.[78] Similarly, Ukrainian authorities prevented (certain) independent press organizations from attending municipal council meetings, citing quarantine restrictions.[79] This drew criticism from organizations like Reporters Without Borders for withholding access to critical information on measures the authorities were taking to address COVID-19.[80] Finally, in the United States, the government under President Trump 'removed or buried' thousands of webpages containing climate change information in recent years.[81] This included links to emissions data and pages explaining global warming.[82] The removal and withholding of climate change information has been labelled 'scientific censorship', and a former administrator of the Environmental Protective Agency has highlighted the dangers of 'undermining science' and fact-based decision-making.[83]

These examples demonstrate how governments withholding information of public importance on topics such as COVID-19 and climate change can interfere with freedom of expression in two respects. The narrow approach flows from the Court's jurisprudence but restricts

[74] These examples are included for illustrative purposes; it goes without saying that neither Brazil nor the United States are High Contracting Parties under the ECHR, and they are thus not subject to the Court's oversight.

[75] Londoño, 'Furious Backlash in Brazil After Ministry Withholds Coronavirus Data', *New York Times* (10 June 2020) available at: www.nytimes.com/2020/06/08/world/americas/brazil-coronavirus-statistics.html.

[76] Ibid.

[77] Ibid.

[78] BBC, 'Coronavirus: Brazil resumes publishing COVID-19 data after court ruling' (9 June 2020) available at: www.bbc.com/news/world-latin-america-52980642.

[79] Reporters Without Borders, 'Wave of attacks on reporters covering coronavirus lockdown in Ukraine' (10 April 2020) available at: rsf.org/en/news/wave-attacks-reporters-covering-coronavirus-lockdown-ukraine; IMI, 'Press not admitted to session of city council in Kryvy Rih' (18 March 2020) available at: imi.org.ua/en/news/press-not-admitted-to-session-of-city-council-in-kryvy-rih-i32248;IMI, 'Novokakhovka city council hides from journalists where it will spend money under cover of quarantine' (18 March 2020) available at: imi.org.ua/news/novokahovska-miskrada-pryhovuye-vid-zhurnalistiv-kudy-vytrachatyme-groshi-prykryvayuchys-karantynom-i32230.

[80] Ibid.

[81] Waldman, 'Climate Web Pages Erased and Obscured Under Trump', *Scientific American* (10 January 2018) available at: www.scientificamerican.com/article/climate-web-pages-erased-and-obscured-under-trump/.

[82] Volcovici, 'Trump administration tells EPA to cut climate page from website: sources' *Reuters* (25 January 2017) available at: www.reuters.com/article/us-usa-trump-epa-climatechange-idUSKBN15906G; Dennis and Eilperin, 'Trump administration backs off plan to scrub climate pages from EPA website', *Washington Post* (25 January 2017) available at: www.washingtonpost.com/news/energy-environment/wp/2017/01/25/trump-administration-backs-off-plan-to-scrub-climate-pages-from-epa-website/; Barron, 'Here's What the EPA's Website Looks Like After a Year of Climate Change Censorship', *TIME* (1 March 2018) available at: time.com/5075265/epa-website-climate-change-censorship/.

[83] Barron, ibid.

the right of access to individuals who require it to contribute to public debate. The Court's recent judgments in *MHB* and *Centre for Democracy and the Rule of Law* show a willingness to find that withholding information on COVID-19 and climate change (as in the examples described above) interferes with the right to freedom of expression.[84] The four threshold criteria, described above, appear to be satisfied. The information concerned matters of significant public interest—COVID-19 and climate change—and was readily available. Moreover, journalists and regional governments required it to report on government affairs and make informed decisions, respectively.[85] An interference could therefore be established in these cases, consistent with the Court's jurisprudence.

A broader approach—and one arguably more in keeping with a purposive approach to freedom of expression—would extend the state's obligations to the public at large, in recognition of the interference with the public's right to be (properly) informed.[86] The right to seek and access information pertains not only to information and ideas that have been processed and imparted by gatekeepers and intermediaries, but also information directly from the (democratically elected) government, which acts for and on behalf of the people—and ought to be accountable to it. Such an approach would be consistent with the Court's practical and effective approach to Convention protections: it recognizes that the right to form opinions and make informed choices will in some cases be illusory if the government fails to impart information.[87] Disclosure is especially critical where the government has an information monopoly—for there can be no public discussion without public disclosure. However, even where there is no monopoly of information, government provision of information 'greatly enriches the system [of freedom of expression]; it provides the facts, ideas, and expertise not available from other sources'.[88] Governments that withhold such information or provide information in a way that renders the picture incomplete or one-sided impair 'meaningful participation in democratic processes [which] requires informed participants'.[89]

An interference does not merely require active or direct intervention by the state; it may arise where the state fails to act—for instance, failing to provide assistance,[90] to investigate offences[91] or offer protection.[92] This same approach should be applied to Article 10 to ensure that Convention rights are practical and effective.[93] The public's right to be informed requires the provision of information to formulate ideas, express outrage, criticize majoritarian views, question mainstream beliefs and 'speak truth to power'.

The analysis would then turn to whether the interference was justified under Article 10(2)—and the Court's jurisprudence suggests it would not be, for several reasons. First, it is unlikely the interference in each case was 'prescribed by law', which requires foreseeability and the

84 *MHB,* supra n 64 at para 155; *CDRL,* supra n 67 at para 87. Of course, the ECHR only applies to High Contracting Parties—in this case, Ukraine—but the analysis may be informative for other states (and litigants).

85 The Court has recognized journalists' interest in *first-hand* information and impressions, and that the public may regard such information as more valuable and reliable (*Szurovecz v Hungary* Application No 15428/16, Merits and Just Satisfaction, 8 October 2019 at paras 73–4; but cf. *Pentikäinen v Finland* Application No 11882/10, Merits and Just Satisfaction, 20 October 2015 at para 114).

86 *Sunday Times (no. 1),* supra n 24 at para 66.

87 Emerson, supra n 5 at 878–9. See also *Guerra,* supra n 64 at para 60, wherein the Court found a violation of Article 8 on account of the applicants' wait 'for essential information that would have enabled them to assess the risks they and their families might run' by continuing to live in their town.

88 Emerson, supra n 4 at 698.

89 Stiglitz, 'On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life', *Oxford Amnesty Lecture* (27 January 1999) at 7.

90 *Airey v Ireland* Application No 6289/73, Just Satisfaction, 9 October 1979 at para 25.

91 *Khadija Ismayilova v Azerbaijan (no. 1),* Application Nos 65,286/13 and 57,270/14, Merits and Just Satisfaction, 10 January 2019 at paras 119–20.

92 *Osman v United Kingdom* Application No 23452/94, Merits and Just Satisfaction, 28 October 1998 at para 115; *Opuz* v *Turkey* Application No 33401/02, Merits and Just Satisfaction, 9 June 2009 at para 128; *MHB,* supra n 65 at para 155.

93 *Airey,* supra n 90 at para 24.

absence of arbitrariness.[94] The Brazilian and Ukrainian measures were taken without warning or advance knowledge by the individuals affected. The removal of climate change information across government websites in the United States was undertaken in an arbitrary fashion and was not foreseeable. In any case, the measures did not pursue a pressing social need, were not proportionate on any metric, and (to the extent reasons were provided for withholding information) such reasons were not relevant and sufficient.[95] Moreover, unlike cases where a balancing of rights is required—for instance, where individuals' private information is sought[96] or national security interests are implicated[97]—the information withheld concerned largely statistical and research information about COVID-19 and climate change. To the contrary, the governments sought to control the flow of information, preserve their information monopoly on matters of public importance and impoverish society's ability to hold them accountable for their (in)actions.

This category highlights the myriad ways that governments can interfere with expression, beyond regulating others' speech. Indeed, governments withholding information on matters of public importance can have the same deleterious effects on public discourse as censorship. Even if the state does not prohibit the publication of any material, it nonetheless impairs the availability and reliability of information in the public domain, undermines the vibrancy of public debate and frustrates the process of self-government. This is crucial to the analysis in the next sections which consider the extent to which governments and government actors can interfere with expression in their role as speaker and in particular where they sow and spread disinformation.

Before turning to these latter categories on the continuum, however, it is necessary to define 'government disinformation' and what is included and excluded.

C. Defining 'Government Disinformation'

'Disinformation' is an oft-used concept lacking universal or consistent definition.[98] Indeed, the term has undergone various iterations within Europe in the last five years.[99] However, the critical definitional features of disinformation are that it (i) captures information which is false and (ii) which was created for the nefarious intent of causing harm to a person, group or country.[100] For the purposes of this article, this definition is employed with three key modifications:

(1) the source of the disinformation must be a government actor or public official;
(2) the information must relate to matters of public importance or general concern; and
(3) the *likely harm* that may result is added as an additional element of the enquiry.

As will become evident, in seeking to expand the protections afforded by freedom of expression into novel forms of government interference, this article focuses on the 'sharp end' of

94 *Kenedi v Hungary* Application No 31475/05, Merits and Just Satisfaction, 26 May 2009 at para 44.
95 *Steel and Morris v United Kingdom* Application No 68416/01, Merits and Just Satisfaction, 15 February 2005 at para 87.
96 *MHB,* supra n 64 at para 186; *CDRL,* supra n 67 at para 113.
97 *Hadjianastassiou v Greece* Application No 12945/87, Merits and Just Satisfaction, 16 December 1992 at paras 43–5.
98 Wardle and Derakhshan, 'Information Disorder: Toward an interdisciplinary framework for research and policymaking,' Council of Europe Report DGI(2017)09 (October 2017) at 20–1; European Commission High Level Group on fake news and online disinformation, *A multi-dimensional approach to disinformation* (2018) at 10; European Parliament, *Disinformation and propaganda—impact on the functioning of the rule of law in the EU and its Member States,* Study requested by the LIBE Committee (2019) at 22–5.
99 McGonagle and Pentney, 'From risk to reward? The DSA's risk-based approach to disinformation' in Cappello (ed), *Unravelling the Digital Services Act package* (European Audiovisual Observatory, IRIS Special) at 41–4. See also European Commission, A multi-dimensional approach to disinformation: Report of the independent High level Group on fake news and online disinformation (March 2018) at 11.
100 Wardle and Derakhshan, supra n 98 at 20.

government disinformation—heads of state lying about the reliability of elections, ministries of health withholding crucial information about COVID-19—with discernible real-world consequences. Harder cases—involving actors or matters of lesser power or import—ought to be the subject of future study but are beyond the scope of the present article.

(i) Government actor

As this article is concerned with government interference in the marketplace of ideas through the state's differentiated roles as regulator, facilitator and speaker, the starting point is concern with state (in)action. A government representative or public official must therefore be the source of disinformation to fall within the definition of 'government disinformation'. For present purposes, this includes figures synonymous with the exercise of state power—such as elected officials from the governing party or parties, public officials speaking on behalf of the government and police forces fulfilling public mandates. It could also include other public actors—such as teachers or organizations contracted on the government's behalf, for instance—although this would give rise to other concerns which fall outside the scope of the present article. The context is critical: when sitting Presidents or Prime Ministers make false claims during re-election campaigns, they may be speaking on behalf of their parties and not on behalf of their governments; when civil servants tweet from their private accounts, they are (likely) not doing so in their professional capacity.[101]

Critically, this definition excludes elected members of the opposition—who cannot wield the powers of or speak on behalf of the state—or foreign actors interfering in the domestic affairs of another state, such as foreign governments and bots. However, that is not to suggest that such actors do not warrant attention in their own right, or that as sources of disinformation they may not inflict substantial harm to public discourse. For the purposes of this article, however, the focus is on governments and government actors within their territorial borders.

(ii) Matter of public importance

The disinformation of interest here relates to matters of public importance—pandemic response, electoral integrity, climate change—rather than trivial matters like gossip and bravado.[102] This delineation may seem arbitrary, but it is intentional: in examining whether freedom of expression guarantees protect against modern forms of government interference, I have excluded, for instance, salacious rumours, defamatory content about celebrities or insincere but largely irrelevant bravado. Instead, I focus on the sharpest edge: that is, disinformation which might wreak the most havoc on the objectives the right was meant to protect, and which might therefore inflict the most damage on public debate and/or the public interest. For many subjects of public importance, governments alone possess the critical information on which the public relies. Provision of such information is particularly important, absent permissible limitations such as national security interests or privacy concerns. But even where the government does not have a monopoly on the information, it may nevertheless possess (important) information that is functionally and instrumentally required for individuals to 'govern themselves'.[103]

[101] See e.g. *Wille v Liechtenstein* Application No 28396/95, Merits and Just Satisfaction, 28 October 1999 at para 46 (concerning the state's responsibility for the acts of its agents and servants 'accomplished in an official capacity'); *Castells*, supra n 37.

[102] One can distinguish between President Trump lying about the attendance at his inauguration in 2017, for instance, and lying about the integrity of the 2020 election: while the former is likely 'bravado', the latter is clearly a matter of public importance.

[103] Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948) at 26–7. Price queries whether 'for a state to be a state, even a democratic state, it must have greater sway over the legitimate use of information' (*Free Expression, Globalism and the New Strategic Communication* (2015) at 3–4).

(iii) Nefarious intent and likely harmful effects

The definition of disinformation cited above focuses only on the *intention* of the communicator to cause harm; the actual harm which may be occasioned is not a relevant factor within the definition. The government disinformation of concern in this article, by contrast, incorporates both the (nefarious) intention of the government actor and the (harmful) effects of the state's (in)action. Either a government's nefarious intention or its harmful impact on the mechanisms or ends of expression ought to be construed as interference with freedom of expression, triggering a proportionality assessment under Article 10(2), described further below.

With respect to intention, the government actor must have known or ought to have known that the information was false, manipulative or misleading,[104] and intended to deceive or mislead others into believing falsehoods or doubting verifiable facts.[105] This may be difficult for claimants to prove and the judiciary to assess, either in respect of individual government actors (like a Prime Minister or police officer) or government agencies (like the Ministry of Health).[106] However, where nefarious intention can be shown, that alone ought to be sufficient to establish an interference with freedom of expression, prompting the further inquiry into whether the interference was justified.

Moreover, the definition above is expanded beyond the intention to cause harm to also encapsulate government disinformation that has *the effect of causing* real-world harms. The (likely) harm of government disinformation may be specific and targeted to individual members of the press, or more diffuse, such as undermining the quality of public debate and polluting the information ecosystem. These latter effects are not the traditional purview of freedom of expression, concerned as they are with the ends of expression, rather than the means. Professor Helen Norton has written about these justiciability concerns in respect of the First Amendment in the United States:

> [T]he government's speech that inflicts more concrete and individualized harms is more amenable to constraint through constitutional litigation than its speech that inflicts more diffuse harms, like the damage caused by the government's lies to avoid political and legal accountability, or to justify its military actions. That lies' harms are less tangible or more diffuse does not mean that they're painless or unimportant: indeed, they can be deeply dangerous, threatening to corrode our democracy. But the nature of their harms might mean that law, especially constitutional law, holds limited capacity to address them.[107]

While the approach to freedom of expression under the ECHR differs in material respects from the interpretation of free speech under the First Amendment, the concern Norton raises is not unique to the United States. But, as will be assessed in further detail below, Article 10 may be more amenable to expansion in this direction to address the diffuse harms of disinformation from state sources. The likely harms may include undermining the public's right to be informed and impoverishing public debate. We have seen in the previous section that Article 10 encompasses certain 'sins of omission'—withholding important information from the public—where they may impair public debate. The next section urges a similar approach to 'sins of commission'—injecting false or misleading information into the discourse[108]—where doing so leads to a decay in truth and trust with respect to the media and other public institutions, a

[104] European Parliament, supra n 98 at 9.
[105] McGonagle, '"Fake News": False Fears or Real Concerns?' (2017) *Netherlands Quarterly of Human Rights* 35(4) at 203.
[106] Norton, supra n 1 at 151, 171.
[107] Ibid at 133.
[108] Yudof, supra n 1 at 6–9.

'tainted truth' effect whereby individuals begin to doubt verifiable facts, or a threat to the survival of democracy and the rule of law.[109]

With this definition in mind, we turn now to the next category on the continuum, which implicates the state's role as facilitator of expression as well as its role as speaker.

4. THE DISCREDITOR: FALSE 'FAKE NEWS' CLAIMS AND THE STATE'S ROLES AS FACILITATOR AND SPEAKER

The next category on the continuum concerns false claims of 'fake news' directed at the press, a novel form of government disinformation which has yet to be the subject of judicial consideration. This raises a series of challenges from the perspective of freedom of expression: do the philosophical underpinnings which weigh in favour of more, rather than less, expression and allow for few content-based restrictions on speech, apply where the government is speaking? Do states' positive obligations under Article 10 require governments to exercise restraint, proceed with caution, or do their due diligence before speaking about matters of public importance? Do they interfere with freedom of expression if they fail to do so?

These questions have taken on increased importance in recent years: accusations of 'fake news' have been wielded by government actors around the world 'to discount news reports and organizations they find disagreeable in order to control political news and shape public opinion'.[110] Indeed, 'fake news' claims by governments around the world seeking to undermine accurate news reporting are now (worryingly) commonplace: President Trump employed the 'fake news' label on a near daily basis during his time in office, often labelling the press a danger to the country and an enemy of the people.[111] Syrian President Assad dismissed as 'fake news' reports of extrajudicial killings in military prisons compiled by Amnesty International (and corroborated by an FBI report),[112] while Aung San Suu Kyi, then State Counsellor of Myanmar, labelled as 'fake news' press reports on the military's atrocities against the Rohingya—conduct substantiated by international organizations and cited in justification of provisional measures by the International Court of Justice.[113]

In Europe, Spanish Foreign Minister Dastis rebuffed media criticism of police violence against voters during the Catalan referendum as 'fake news'. Notwithstanding videos, photographs and eyewitness accounts of aggressive police tactics against voters and activists, the minister responded, 'there have been a lot of alternative facts and fake news'.[114]

[109] Butler, 'Protecting the Democratic Role of the Press' (2018) *Washington University Law Review* 96(419) at 428; Freeze et al., 'Fake Claims of Fake News: Political Misinformation, Warnings, and the Tainted Truth Effect' (2020) *Political Behaviour* at 3.

[110] Schwartz, 'Trump's "Fake News" Mantra a Hit With Despots', *Politico* (12 August 2017) available at: www.politico.com/story/2017/12/08/trump-fake-news-despots-287129.

[111] See e.g. Tweet of President Trump (25 February 2017) at twitter.com/realDonaldTrump/status/835325771858251776; Ross and Rivers, 'Discursive Deflection: Accusation of "Fake News" and the Spread of Mis- and Disinformation in the Tweets of President Trump' (Apr-Jun 2018) *Social Media + Society.*

[112] Rahim, 'Syria's Assad Brushes Off Amnesty Report on Prison Executions as "Fake News"', *TIME* (10 February 2017) available at: time.com/4666806/assad_syria-amnesty-international/; Isikoff, 'Defiant Assad tells Yahoo News torture report is "fake news"', *Yahoo News* (10 February 2017) available here.

[113] BBC, 'Rohingya Crisis: Suu Kyi Says "Fake News Helping Terrorists"' (6 September 2017), available at: www.bbc.com/news/world-asia-41170570; UN Human Rights Council, *Statement by Mr. Marzuki Darusman, Chairperson of the United Nations Independent International Fact-Finding Mission on Myanmar, at the Security Council* (24 October 2018) available at: www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23778&LangID=E; *Gambia v Myanmar*, Order for the Indication of Provisional Measures, International Court of Justice, 23 January 2020, General List No 178.

[114] Badcock, 'Spanish Minister: Police Violence Videos Against Catalonia Referendum Supporters are "Fake News"', *Telegraph* (22 October 2017) available at: www.telegraph.co.uk/news/2017/10/22/spanish-minister-says-videos-police-violence-fake-news/; Oppenheim, 'Catalan referendum: Spanish minister claims photos of police brutality are "fake"', *Independent* (2 October 2017) available at: www.independent.co.uk/news/world/europe/catalan-independence-referendum-photos-police-violence-fake-a7978876.html.

A. False Claims of 'Fake News' as Interference with Expression

Despite the proliferation of 'fake news' allegations by government actors, the Court has not had the opportunity to weigh in on whether such claims may constitute interferences with Article 10(1), and if so, whether they are nonetheless justified (or justifiable) under Article 10(2). The Court's case law, as well as a purposive reading of Article 10, suggests that the first stage—of finding an interference—should not prove an inordinate hurdle. Groundless attacks on the reliability and credibility of the media may frustrate its ability to act as 'public watchdog', stifle the vibrancy of public debate by discrediting the press and hinder the potential of a 'well-informed citizenry'. In this sense, a false claim of 'fake news' is comparable to the interference occasioned by withholding information, which hinders the press' ability to perform its function, to do its job.

This analysis builds on several strands of the Court's jurisprudence. First, the Court has repeatedly held that the press is a vital institution in democracy and one which requires special protection. Since its seminal judgment in *Sunday Times* (*no. 1*), the Court has reiterated the essential role played by the press in democratic society.[115] The press acts as a 'public watchdog,' imparting information on matters of public interest, holding governments accountable and contributing to a well-informed citizenry.[116] This function is secured through the recognition of reciprocal rights—journalists have the right to impart information on all matters of public interest, and the public has a right to receive it.[117] The margin of appreciation is accordingly 'circumscribed by the interest of democratic society in enabling the press to exercise its vital role of "public watchdog" in imparting information of serious public concern'.[118] The Court has interpreted the 'public interest' broadly.[119] In light of the press' important role ensuring that democratically elected officials can be held to account by the electorate, the Court has been critical of measures which may have a chilling effect on expression or impede the press' ability to perform its watchdog function, as evident from the Court's access to information jurisprudence, discussed previously. Its jurisprudence on the imposition of criminal sanctions, defamation proceedings and financial penalties is also instructive in this regard.[120]

Second, the Court has not interpreted Article 10 to be limitless, particularly in the exercise of one's professional duties or when acting in an official capacity. For instance, protections for journalists under Article 10 are 'subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism'.[121] Politicians expressing themselves in public are to avoid comments that could foster intolerance in light of their duty to defend democracy and its principles.[122] The context is imperative, but the Court has indicated that vigilance is critical during elections in particular.[123]

115 *Sunday Times (no. 1),* supra n 24 at paras 65–6.

116 *De Haes and Gijsels v Belgium* Application No 19983/92, Merits and Just Satisfaction, 24 February 1997 at para 37; *MHB,* supra n 64 at para 165; *Lingens,* supra n 33 at para 44; *Sunday Times (no. 2),* supra n 33 at para 50.

117 *MHB*, ibid.

118 *Bladet Tromsø and Stensaas v Norway* Application No 21980/93, Merits and Just Satisfaction, 20 May 1999 at para 59.

119 *Couderc and Hachette Filipacchi Associés v France* Application No 40454/07, Merits and Just Satisfaction, 10 November 2015 at para 103 [citations omitted].

120 See e.g. *Morice v France* Application No 29369/10, Merits and Just Satisfaction, 23 April 2015 at para 127; *Taranenko v Russia* Application No 19554/05, Merits and Just Satisfaction, 15 May 2014 at para 95; *Karácsony and others v Hungary*, Application Nos 42,461/13 and 44,357/13, Merits and Just Satisfaction, 17 May 2016 at para 95.

121 *Rusu v Romania* Application No 25721/04, Merits, 8 March 2016 at para 24; *Bergens Tidende v Norway* Application No 26132/95, Merits and Just Satisfaction, 2 May 2000 at para 53.

122 *Féret,* supra n 36 at paras 75–6; *Erbakan,* supra n 36 at para 64. The Court has further held that elected officials have duties and responsibilities where they act in their official capacity and use the powers attached to their office: see *Baldassi and others v France*, Application Nos 15,271/16 and others, Merits and Just Satisfaction, 11 June 2020 at para 69; *Willem v France* Application No 10883/05, Merits, 16 July 2009 at para 37.

123 Ibid.

Third, the Court has recognized that Article 10 does not merely impose *negative* obligations to refrain from conduct which undermines the right, but also *positive* obligations to ensure the 'genuine and effective exercise' of the right.[124] States are thus obliged to 'create a favourable environment for participation in public debate . . . to enable the expression of ideas and opinions without fear'.[125] A practical and effective right to freedom of expression may require measures of protection to create an enabling environment for participation in public debate.[126] For example, this may require steps to investigate and protect newspapers and journalists, including those who are 'victims of a campaign of violence and intimidation'.[127] Moreover, government participation in such campaigns—including stigmatizing remarks against journalists, accusations of 'treason' and so on—may be considered in the constellation of factors giving rise to a violation of Article 18.[128]

B. A Two-Pronged Approach to Harmful Intention and Effects

Taken together, these arguments suggest that although the interference here is less tangible, the Court could (and arguably should) find that false accusations of 'fake news' interfere with freedom of expression in certain cases. It will be necessary in each instance to assess (i) whether the intention was nefarious and/or (ii) whether the effects on expression—or the underlying purposes it was meant to protect—were sufficiently harmful. The Court would be responsible for assessing the factual matrix in each case, but the following paragraphs suggest certain aspects which could be relevant to the Court's analysis.

In respect of the 'intention' component, when a government falsely labels journalism as 'fake news,' it is trying to improperly change the way the public receives the information, and how it perceives the press. This makes it more difficult for the press to do its job and for the public to be properly informed—indeed, that is the objective. The apparent intention in the examples above—from Assad to Trump, Suu Kyi to Dastis—was not only to erode public trust and confidence in the press but also to hamper its ability to perform its watchdog function.[129] Responding to these false accusations requires time and energy, endless fact-checking and corroboration.[130] As Steve Bannon said, 'The real opposition is the media. And the way to deal with them is to flood the zone with shit'.[131]

Far from encouraging an 'enlightened' public, the fake news label seeks to achieve the opposite.[132] Perhaps more worrying still, it often achieves its aim, leading to short- and longer-term harms in the real world.[133] Such claims instil distrust, disbelief and disinterest (for want of

124 *Palomo Sánchez and others v Spain*, Application Nos 28,955/06 and others, Merits and Just Satisfaction, 12 September 2011 at paras 58, 62; *Dink v Turkey*, Application Nos 2668/07 and others, Merits and Just Satisfaction, 14 September 2010 at para 137 [translation].

125 *Dink*, ibid. at para 137 [translation].

126 Ibid. See also *Appleby and others v United Kingdom* Application No 44306/98, Merits, 6 May 2003 at paras 39–40.

127 *Appleby*, ibid. at para 39, citing *Özgur Gündem v Turkey* Application No 23144/93, Merits and Just Satisfaction, 16 March 2000 at paras 42–6. See also *Khadija Ismayilova (no. 1)*, supra n 91 at para 158.

128 *Khadija Ismayilova (no. 2)*, supra n 37 at paras 115–20, 124.

129 McGonagle, supra n 105 at 209; Farhall et al., 'Political Elites' Use of Fake News Discourse Across Communications Platforms' (2019) *International Journal of Communication* 13 at 4370.

130 Beckett, 'Is the Cummings COVID Scandal Showing Boris Johnson as the British Trump?', *LSE Blog* (25 May 2020) available at: blogs.lse.ac.uk/polis/2020/05/25/is-the-cummings-covid-scandal-showing-boris-johnson-as-the-british-trump/.

131 Remnick, 'Trump vs. The Times: Inside an Off-the-Record Meeting', *New Yorker* (30 July 2018) available at: www.newyorker.com/news/news-desk/trump-vs-the-times-inside-an-off-the-record-meeting.

132 *Sunday Times (no. 1)*, supra n 24 at para 66.

133 For instance, polls at the time of the 2020 American election revealed that 70 per cent of Republican supporters believed the election was unfair and fraudulent: see Kim, 'Poll: 70 per cent of Republicans don't think the election was free and fair' *Politico* (11 September 2020) available at: www.politico.com/news/2020/11/09/republicans-free-fair-elections-435488?nname=politico-nightly&nid=00000170-c000-da87-af78-e185fa700000&nrid=0000014e-f10a-dd93-ad7f-f90f318e0001&nlid=2670445. This number had dipped to 53 per cent of Republicans by April 2021: Guardian, 'Most Republicans still believe 2020 election was stolen from Trump—poll' (24 May 2021) available at: www.theguardian.com/us-news/2021/may/24/republicans-2020-election-poll-trump-biden.

certainty about who to trust). For members of the media—for whom a reputation for veracity is essential—false allegations of 'fake news' can have long-term impacts. They are 'uttered in an instant, but their sting can be long-lasting, particularly when they target journalists, for whom honesty and accuracy are the tools of their trade'.[134] The long-term effects of such allegations on public trust and democratic progress are particularly concerning. As Andrea Butler writes, 'Public trust that the press will inform and mediate public discussion is essential to a democratic society because a government is only legitimate if the press performs these functions and facilitates the popular participation in elections and the political process that is essential to sustaining our democracy'.[135]

Yet even if the offending government official is voted out of office, the erosion of public trust and public discourse may prove difficult to rectify. This erosion of trust extends beyond the press. The Committee of Ministers has highlighted this concern in a Draft Recommendation: 'In this increasingly polarised 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'.[136] Disdain for truth comes at a (public) price:

> The combination of *truth* decay and *trust* decay accordingly creates greater space for authoritarianism. Authoritarian regimes and leaders with authoritarian tendencies benefit when objective truths lose their power. If the public loses faith in what they hear and see and truth becomes a matter of opinion, then power flows to those whose opinions are most prominent – empowering authorities along the way.[137]

Regional bodies have called on state officials to 'refrain from making deliberately false accusations against individual journalists, specific media organizations and the media generally in order to undermine their reputation and credibility,' as such accusations can contribute to a climate of hostility towards the media.[138] The erosion of public trust, the fostering of hostility towards journalists and the creation of a climate of uncertainty go against the very purposes which freedom of expression was meant to protect. Unfounded accusations of 'fake news' by government officials—with the requisite nefarious intention and/or causing sufficient real-world harm—should be conceived of, and addressed as, an interference with freedom of expression.

If the Court accepted that a false claim of 'fake news' constituted an interference in the particular circumstances of a given case, the analysis would then turn to whether the interference was justified. Even if the interference was prescribed by law,[139] and pursued a legitimate aim,[140] it is difficult to conceive how it could be necessary in a democratic society. There are several lines of reasoning the Court could pursue.

134 McGonagle, supra n 105 at 209.

135 Butler, supra n 109 at 426.

136 Council of Europe, Draft Recommendation CM/Rec(20XX)XX of the Committee of Ministers to member States on promoting a favourable environment for quality journalism in the digital age (7th draft as of 26 September 2019) at 6.

137 Chesney and Citron, 'Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security' (2019) *California Law Review* 107 at 1786.

138 OSCE Commissioner on National Minorities, *The Tallinn Guidelines on National Minorities and the Media in the Digital Age & Explanatory Note* (February 2019) at 33; OSCE Ministerial Council, Decision on the Safety of Journalists (MC.DEC/3/18 Milan, 7 December 2018) at paras 3–6; Council of Europe, Recommendation CM/Rec(2016)4 of the Committee of Ministers to Member States on the protection of journalism and safety of journalists and other media actors (13 April 2016) at para 15.

139 *Ahmet Yildirim*, supra n 53 at para 57. The facts and legal context will be critical, as government actors are, of course, entitled to speak about matters of public importance and express themselves in public.

140 When government speaks, the Court is likely to provide it a wide berth in assessing the legitimacy of its aim(s). See e.g. *Salov v Ukraine* Application No 65518/01, Merits and Just Satisfaction, 6 September 2005 at para 110.

First, the Court could cite its many precedents (discussed above) to the effect that the Fourth Estate is an important pillar of democratic society, providing checks and balances on government powers and stimulating debate on government (in)action. The Court has accordingly read the protections of Article 10 broadly to preclude interference with how the press performs its functions, from the initial stages of information-gathering through to publication. Spurious attacks on the veracity of individual members of the press, or the reputability of the press in general, undermine the press' ability to fulfil its ultimate (Article 10-protected) mandate: informing the public about matters of import. The Court has noted that the judiciary 'must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against gravely damaging attacks that are essentially unfounded'.[141] There are, of course, important distinctions between the judiciary and the press; but both are essential mechanisms of accountability and are deserving of protections against unfounded attacks on their credibility that are intended to undermine self-government or which have that effect in practice.

Second, the Court could build upon its case law on government actors' duties and responsibilities *as speakers*, and what this role compels. Does it require restraint, and in what circumstances? Does it impose certain due diligence requirements—similar to those on journalists—prior to government actors speaking, or might it compel an obligation to 'correct the record' where false allegations have been made? These are difficult, but necessary, issues which would benefit from the Court's review and analysis.

Finally, and perhaps most fruitfully, the Court could further develop its jurisprudence on states' positive obligations in respect of expression. The Court has held that the practical and effective exercise of freedom of expression requires that states foster a favourable environment for participation in public debate and enable ideas and opinions to be exchanged without fear.[142] As Tarlach McGonagle has written, 'An enabling environment for freedom of expression typically involves a favourable legal and policy environment and a political, socio-economic and cultural climate that is also conducive to pluralist democracy and pluralist media'.[143] The Court has, moreover, frequently reiterated that the state 'must be the ultimate guarantor of pluralism'.[144] This has been expanded upon in respect of state's regulatory and facilitative powers to require, *inter alia*, the provision of access to 'impartial and accurate information and a range of opinion and comment';[145] to allowing 'effective access to market so as to guarantee diversity of overall programme content'.[146] But the state can also impair pluralistic debate, and stoke a culture of distrust and intolerance, through its own speech. Where a state creates an unfavourable environment which stifles—rather than fosters—participation in public debate, by the press or by individuals that rely on it, it may be at odds with its positive obligations.

When governments falsely label journalism as 'fake news', they interfere in one of the critical engines of democracy. They make it harder for the press to perform its role as democratic 'watchdog', inject uncertainty into the public discourse by labelling fact as fiction and contribute to a truth and trust decay which undermines democracy. Far from creating a favourable environment for expression, or protecting the purposes the right was meant to protect, such accusations

141 *Tolmachev v Russia* Application No 42182/11, Merits and Just Satisfaction, 2 June 2020 at para 46. Though broader limits of criticism are permissible against judges than ordinary citizens, the Court carved out 'gravely damaging attacks that are essentially unfounded' (para 46). See also *Morice,* supra n 120 at paras 128–31.

142 *Dink*, supra n 124 at para 137; *Manole,* supra n 62 at para 99.

143 McGonagle, supra n 70 at 15.

144 Ibid. This observation was made first in *Informationsverein Lentia and others v Austria*, Application Nos 13914/88 and others, Merits and Just Satisfaction, 24 November 1993 at para 38. The Court went on to note that its observation 'is especially valid in relation to audio-visual media'.

145 *Manole*, supra n 62 at para 107.

146 *Centro Europa 7S.r.l. and Di Stefano v Italy* Application No 38433/09, Merits and Just Satisfaction, 7 June 2012 at para 130.

may cause a 'tainted truth' effect, whereby individuals 'stop believing real news as well because they no longer trust the mainstream press'.[147] This tainted truth effect is particularly damaging for democracy, as it can lead to disillusionment of (and disengagement by) the populace, for inability to differentiate fact from fiction.[148]

As Eric Barendt has noted, 'Freedom of speech does entail the absence of censorship, but also means an actual robust public debate'.[149] Governments can impair the means and ends of expression as speakers, just as they can as regulators and facilitators of expression. This form of government disinformation goes against the spirit and purposes of freedom of expression and should be conceived of and addressed as an interference with Article 10, which the state must justify under Article 10(2). The next section extends this analysis one step further.

5. THE DECEIVER: LYING TO THE PUBLIC AND THE STATE'S ROLE AS SPEAKER

This final category is the most basic form of government disinformation: government actors lying about matters of public importance. As explained in the definition of government disinformation offered above, this category is not concerned with trivial misstatements or slight inaccuracies, but rather 'egregious false statements that are demonstrably contrary to well-known facts'.[150] It concerns objectively false information, rather than subjective opinions, propaganda or 'spin'.[151] Moreover, the nefarious intention and likely harmful effects are key: this category is concerned with statements that the representative knows or ought to know to be untrue, which mislead or deceive listeners into believing falsehoods or doubting verifiable facts, with lies that are likely to inject chaos and confusion into public debates.

While this is the most rudimentary form of government disinformation, it is the most challenging from the perspective of Article 10. It does not impede the exchange of information of ideas (as is the case with censorship and withheld information), nor does it target or impair the messenger (as in false claims of 'fake news'). Instead, it covers mainly new terrain: governments as participants in communicative processes, conveyors of information of public importance.

The question of whether states' outright lies about matters of public importance can (or, indeed, should) fall within the spectre of Article 10 is a timely one: like false claims of 'fake news', examples of government actors lying about matters of public importance abound. President Jair Bolsonaro of Brazil's Facebook post in March—falsely asserting hydroxychloroquine to be 'totally effective' in treating COVID-19—was swiftly deleted by Facebook.[152] President Trump repeatedly proclaimed that mail-in ballots for the 2020 US federal election would be nothing less than 'substantially fraudulent'.[153] This netted him a 'fact-checking warning' by Twitter and prompted an Executive Order on Preventing Online Censorship.[154] In Europe, Hungarian Prime Minister Viktor Orbán has been labelled 'the origin of fake news' in the country for

147 Butler, supra n 109 at 428; Freeze, supra n 109 at 3.

148 Committee of Ministers' Draft Recommendation, supra n 136.

149 Barendt, supra n 5 at 35, citing Lichtenberg, 'Foundations and Limits of Freedom of the Press' in Lichtenberg (ed.), *Democracy and the Mass Media* (1990) at 102.

150 Pfiffner, 'The Lies of Donald Trump: A Taxonomy' (17 September 2018) available at: papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3286278_code673337.pdf?abstractid=3286278&mirid=1.

151 European Commission, Communication: Tackling online disinformation: A European Approach, COM(2018) 236 final (26 April 2018) at 4.

152 BBC, 'Coronavirus: World leaders' Posts Deleted Over Fake News' (31 March 2020) available at: www.bbc.com/news/technology-52106321.

153 Conger and Alba, 'Twitter Refutes Inaccuracies in Trump's Tweets About Mail-In Voting', *New York Times* (26 May 2020) available at: www.nytimes.com/2020/05/26/technology/twitter-trump-mail-in-ballots.html; BBC, 'Twitter tags Trump tweet with fact-checking warning' (27 May 2020), available at: www.bbc.com/news/technology-52815552; Saul and Epstein, 'Trump Is Pushing a False Argument on Vote-by-Mail Fraud. Here Are the Facts', *New York Times* (28 September 2020) available at: www.nytimes.com/article/mail-in-voting-explained.html.

lying to the public.[155] In 2019, he drew scorn for a Facebook post displaying photographs of then-European Commission President Jean-Claude Juncker with George Soros, a prominent businessman, posted alongside a caption stating 'the EU plans to adopt mandatory relocation quotas for immigrants, weaken the border protection rights of member states and make arrivals easier with a "migrant visa"'.[156] The European Commission responded swiftly, calling the government's campaign 'fake news and disinformation [which] beggars belief'.[157]

Government disinformation of this kind is a far cry from the kinds of state interference which the drafters of the ECHR sought to protect against, like censorship.[158] Yet it implicates the very purposes the right to freedom of expression was meant to uphold, including the pursuit of truth and democratic self-governance, and the ends freedom of expression was meant to protect. This section therefore examines these purposes and how they interact with government speech (and government lies specifically) before drawing on relevant footholds in the Court's Article 10 jurisprudence.

Before turning to this analysis, however, some preliminary issues must be addressed and dispensed with. There is considerable controversy over whether lies fall within the scope of expression (and are deserving of protection under freedom of expression guarantees). Seana Shiffrin argues that freedom of expression does not extend to deliberate misrepresentations or deliberately insincere speech, as such expression does not 'participate, even at the fringe, in the same values as sincere or transparent speech'.[159] Even the United States Supreme Court—a staunch upholder of free speech—has recognized that false statements are of little to no social value, which mitigates concerns about the 'chilling effect' of imposing limits on such speech.[160] Similarly, the issue of whether governments can claim a right to freedom of expression in respect of their own speech is far from clear. These questions should be the subject of further consideration under the ECHR, but they fall outside the scope of the present analysis—which focuses not on the government actor's right to *lie*, but rather on the public's right to be *informed*.

A. A Purposive Right to Freedom of Expression and the Public's Right to be 'Properly' Informed

The 'interference' here is the least tangible of the categories on the continuum and raises perhaps the most challenging case for freedom of expression for several reasons. However, as will be seen, these same reasons compel that we not shy away from these questions or this exercise.

First, the rationales underlying freedom of expressions usually militate against content-based restrictions on speech, in particular on the basis of its perceived truth or falsity. Moreover, the

154 Ibid. In response, Trump drafted an executive order regarding the conduct and liability of social media platforms: Executive Order on Preventing Online Censorship, Office of the President (28 May 2020) available at: www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/.

155 Bradshaw and Howard, 'The Global Disinformation Order: 2019 Global Inventory of Organised Social Media Manipulation' Working Paper (Oxford, November 2019, Case Studies 46). See also Kakissis, 'EU Struggles to Rein In Hungary's Hard-Line Government', *NPR* (16 March 2019) available at: www.npr.org/2019/03/16/703732693/eu-struggles-to-rein-in-hungarys-hard-line-government.

156 Szakacs and Strupczewski, 'EU Commission rebukes Hungary's new media campaign as "fake news"', *Reuters* (19 February 2019) available at: www.reuters.com/article/us-hungary-eu-election-campaign-idUSKCN1Q81I0.

157 Ibid.

158 That is not to suggest that this is a new concern, however. To the contrary, concerns about the dissemination of intentionally false information existed even when the Convention was being drafted over 70 years ago, and one draft of the ECHR permitted limitations on expression to respond to 'the systematic diffusion of deliberately false or distorted reports which undermine friendly relations between peoples and States'. See *Travaux Préparatoires,* Council of Europe, *European Commission of Human Rights Preparatory Work on Article 10 of the European Convention on Human Rights*, Council of Europe Library (17 August 1956) at paras 6, 129–31.

159 Shiffrin, *Speech Matters: On Lying, Morality, and the Law* (2014) at 117.

160 Butler, supra n 109 at 422, citing Justice White in *Ocala Star-Banner Co v Damron*, 401 US 295, 301 (1971): 'Misinformation has no merit in itself; standing alone it is as antithetical to the purposes of the First Amendment as the calculated lie'.

argument from democracy prioritizes political speech above all else, such that imposing limitations on government actors' ability to express themselves would seem to go against this very purpose. However, arguments in favour of more speech, regardless of truth or falsehood, may not apply with the same force to government speech (rather than government regulation). Mill's notion that only open discussions will yield discovery of the truth is of most value when assessing government interference in public debates and stems from the assumption that governments should not be arbiters or imprimaturs of truth for the purpose of regulating others' speech.[161] This poses serious dangers for silencing criticism and minority voices. However, this same justification does not apply with equal force to *government* speech where government actors are participating in communicative processes and conveying knowingly (or know-*ably*) false information on important matters. The notion that truth will succeed in the marketplace of ideas is less compelling when applied to government officials lying about matters of public importance that are uniquely or largely within their information monopoly. Further, the inequality of arms between government officials—who have an enormous platform to disseminate their messages widely—and other actors in the marketplace must be borne in mind.[162]

McGonagle notes that the focus 'should perhaps be less on the inherent resilience and fortitude of Truth, and more on the conditions of a "free and open encounter". . . . There has to be equality of arms in public debate if truth is to have a fair chance to prevail'.[163] For example, a plurality of opinions concerning treatment for COVID-19 from different sources does not necessarily mean that the 'truth' will emerge, particularly where the platform of public officials is greater than most. It is in precisely such circumstances that the public looks to its government for clarity and direction. Individuals do so to form opinions, weigh options and make informed choices about how to govern themselves. When the lie originates from public officials, individuals may make choices based on incorrect information. In this sense, Mill's argument that 'the utility of an opinion cannot be divorced from its truth' is more persuasive.[164]

Similarly, the argument from democracy—described above—is of less import where governments intend to harm (or succeed in impairing) the deliberative process, in order to undermine criticisms of their (in)action or cement their hold on power. While these rationales usually weigh in favour of more, rather than less, speech, they may be less relevant for—or applicable to—government speech.

This kind of claim also poses a second challenge: as discussed previously, it implicates the state's role as speaker or participant in expression, which has received comparatively little attention in freedom of expression scholarship and jurisprudence than states' roles as regulator and (more recently) as facilitator of expression. How this role changes the way the interference is framed and approached by the Court remains to be seen, including whether it ought to be approached through the prism of states' negative obligations (to refrain from lying) or positive obligations (to create a favourable environment for participation in public debate, to correct the record and so on). However, the fact that the government is speaking, rather than censoring or withholding, should not preclude this analysis; to the contrary, I argue that governments' unique position in the information ecosystem makes this inquiry all the more urgent. Governments have many levers to exert power and control over public debate. The balance of (informational) power tilts strongly in favour of the government.[165] They have control over, and access to, important information—about COVID-19, health costs on the public purse, electoral fraud—which is not always in the public realm. This is the difference

[161] Barendt, supra n 5 at 8.
[162] Ibid. at 12.
[163] McGonagle, supra n 105 at 208. See also *Steel and Morris*, supra n 95 at para 195.
[164] Barendt, supra n 5 at 8.
[165] Emerson, supra n 4 at 698.

between government representatives and members of the opposition, or even the press: while government officials are within the 'halls of power', with all the entitlements this affords, members of the opposition, the press and the public are on the 'outside', dependent on government officials for such information.

This power can be dangerous in the wrong hands for several reasons. The 'perceived authority' of government actors carries 'extra psychological weight for many citizens'.[166] Statements by 'a respected, trustworthy, or "expert" government agency, organization, or individual [are] more likely to gain acceptance . . . than an unrespected communicator'.[167] Moreover, the potential reach of government speech is greater than ever. Emerson (writing in 1970) noted governments' 'almost unlimited capacity to reach all members of the community'.[168] He raised concerns about the 'captive audience'—the government's 'commanding position to force its communication upon unwilling or indifferent ears'.[169] This has only increased in the decades since, with the advent of the internet and the rise of social media, which have enhanced the capacity for constant and direct communication and amplification.

Finally, the novelty of such a claim would require the Court to venture into unchartered territory and, through an iterative process or all at once, establish a new doctrine to analyse 'government speech' under Article 10. This is a necessarily complex and fraught exercise, requiring significant care be taken. A number of issues will have to be resolved—including the appropriate threshold criteria to find an interference (as the Court laid out in *MHB* in respect of withholding information); whether the analysis for government speech implicates states' negative or positive obligations (or both), and the scope and contours of these obligations where governments speak; whether harm is required to find an interference where nefarious intent has been established.

That this will be a challenging task—and one that is important for the Court to get right—is clear. But the difficulty of the questions raised should not preclude the development of freedom of expression jurisprudence in this direction, particularly at a time when governments are increasingly seeking to regulate disinformation from private actors on online platforms. The context in which this form of government disinformation occurs must be kept in mind. 'Fake news' proliferation is top-of-mind for many governments and international organizations in light of its deleterious effects on public debate. However, the focus on government regulation of other actors, rather than on government's role in imparting information to the public, is 'only half of the picture'.[170] Governments are powerful communicators, with significant capacity to influence the population. Adding more inaccuracies to the discourse 'does not eliminate the fundamental inaccuracy of the whole. Rather, it aggravates it'.[171] Governments intentionally disseminating falsehoods may interfere with public debate as much as, if not more than, 'fake news' from private actors. Lies of this kind can also just as damaging as other forms of government interference: lies about COVID-19 rates or treatments are just as harmful as censoring or withholding truthful information and may in some instances be more damaging if the public unknowingly relies on them.

At a time when 'fake news' can proliferate with ease and haste, the public should be able to rely on public officials for accurate information. Yet many governments have contributed to and benefited from the polluted information environment, as well as the decay in truth and

166 Ibid.

167 Yudof, supra n 1 at 77. Yudof notes that acceptance of the message depends on a host of other factors—the context, medium used, timing and so on (ibid. at 78).

168 Emerson, supra n 4 at 698.

169 Ibid. at 710.

170 Yudof, supra n 1 at 249.

171 Morales, 'Where lies live: freedom of expression and information in times of hate and hyperinformation' (2020) *Revista CIDOB d'Afers Internacionales* 124 at 43, citing Han, *The Transparency Society* (2015) at 23 [translation].

trust.[172] Curtailing or suppressing the exchange of information 'prevents thinkers from using communication—the only reliable tool they have—in order to realize their interests as human agents'.[173] But like the censor, government officials who lie 'act in ways that are incompatible with the intrinsic role that discursive communication plays' in democratic society.[174] With this framing in mind, how might the Court conceive of such government disinformation under Article 10?

B. (Dis)Informing the Public as Interference With Article 10

A claim that lies by government actors violate freedom of expression would be novel for the Court and would likely face staunch opposition from states and some free speech advocates. It could only succeed if a strong test case presented itself[175] and the Court adopted a purposive approach to Article 10, building on its jurisprudence on duties and responsibilities, states' positive obligations and the public's right to be informed. This analysis was set out in some detail in the previous section dealing with false claims of 'fake news' and will not be repeated here. However, two additional cases—and one old case, viewed in a new light—provide guidance on how the Court might assess such instances of government disinformation.

First, in *Salov v Ukraine*, the Court held that the applicant's conviction for disseminating false information about the alleged death of a presidential candidate violated Article 10.[176] The Court reasoned that there was 'little scope' under Article 10(2) for restrictions on political speech or debate on matters of public interest.[177] This included the electorate's ability to support a particular electoral candidate.[178] The Court held that Article 10 'does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful,' as holding otherwise would 'deprive persons of the right to express their views and opinions about statements made in the mass media'.[179] The Court's judgment was based on several factors which are distinguishable from the examples above and provide insight into how the Court conceives of Article 10 protections for the dissemination of false information. Mr. Salov was a private citizen—acting as representative of a political candidate—rather than a government actor, and he did not produce or publish the false statements of fact himself.[180] It had not been shown that Mr. Salov was intentionally trying to deceive voters or impede their ability to vote.[181] Moreover, the impugned statements were made during elections and the impact of the false information was marginal, as he had only spoken to a limited number of people.[182] Finally, the nature of the penalty imposed (a five-year criminal sentence) was very severe.[183]

Second, in a concurring opinion in *Lindon v France* (a defamation case), Judge Loucaides made a compelling case for certain restraints on expression 'out of respect for the truth'.[184] Much of the defamation jurisprudence concerns journalists and private actors, and the appropriate balance to be struck between Article 10 and Article 8 ECHR (protection of reputation).[185] This

172 Yudof, supra n 1, wrote of the risks posed by government speech to 'self-controlled citizens'—including 'falsified consent'.
173 Letsas, 'Introduction to Special Issue on Seana Shiffrin's *Speech Matters*' (2019) *Law and Philosophy* 38 at 435.
174 Ibid.
175 Careful consideration of victim status would be required, as this category is concerned with lies that affect the *public's* right to be informed (rather than lies about individuals or institutions).
176 *Salov,* supra n 140 at para 13.
177 Ibid. at para 104.
178 Ibid. at para 111.
179 Ibid. at para 113.
180 Ibid. at paras 111–113.
181 Ibid.
182 Ibid. at para 114.
183 Ibid. at para 115.
184 *Lindon, Otchakovsky-Laurens and July v France*, Application Nos 21,279/02 and 26,448/02, Merits and Just Satisfaction, 22 October 2007, Concurring opinion of Judge Loucaides.

is not directly applicable where government actors do not target individuals or their reputations, as illustrated in the cases of Bolsonaro, Trump and Orbán referred to previously. Judge Loucaides focused on the broader public interest, particularly protecting the public's right to 'truthful information' and the benefits of discouraging false speech, improving the quality of public debate and eliminating misinformation in the media.[186]

These pronouncements are an interesting call-back to *Sunday Times (no. 1)*, one of the Court's earliest judgments, in which it held that Article 10 does not merely protect the public's right to be 'informed'; to the contrary, it protects the public's right to be '*properly* informed'.[187] While this qualifier has not been invoked by a majority of the Court since,[188] it supports the finding that the state cannot impoverish debate by knowingly injecting falsehoods into the public arena. Judge Loucaides' opinion in *Lindon*, highlighting the public's right to truthful information, further supports this interpretation.[189]

The Court has accepted that withholding information may interfere with freedom of expression because of its effects on public discourse. The Court should extend this approach to include government representatives intentionally lying about important matters, and in so doing set a principled approach which includes, at a minimum, the speaker's intention and the harm occasioned. Where government officials intentionally lie about matters of public importance to harm public discourse or impair the quality of public debate, this should surely suffice to establish an interference. Moreover, where the lie is intended to cause harm, and succeeds in doing so, an interference should also be found. If an interference was established, the facts and context would be critical to the Court's assessment of whether it was justified. The Court would likely consider the speaker, contents, object and tone of the speech, as discussed in the section on overt censorship.[190]

As a starting point, the Court's practical and effective approach should be employed when considering this novel form of interference, to ensure that the protection afforded to the public's right to be informed is not theoretical or illusory. Several strands of the Court's jurisprudence provide useful guidance and suggest that even if the interference met the other requirements of Article 10(2), the necessity requirement may prove fatal.[191] As set out previously, while Article 10 does not discriminate in applying 'duties and responsibilities' to all participants in expression, the Court has interpreted these duties in respect of individuals acting in their official or professional capacities, such as journalists and elected officials. This requires, in some circumstances, that individuals engaging in public debate strive to impart information that is accurate and reliable.[192] While this requirement of 'responsibility' is most frequently applied to journalists, government officials have also been called on to be responsible with their speech, to temper their comments in public in light of the potential harm that may be occasioned when

185 See e.g. *Medžlis Islamske Zajednice Brčko and Others v Bosnia and Herzegovina* Application No 17224/11, Merits and Just Satisfaction, 27 June 2017.

186 *Lindon,* supra n 184, Concurring opinion of Judge Loucaides.

187 *Sunday Times (no 1),* supra n 24 at para 66 (emphasis added).

188 It has only been referenced in three dissenting opinions: *Verlagsruppe News GMBH v Austria (no. 2)*, Application No 10520/02, Merits and Just Satisfaction, 14 December 2006 (Judge Herndl at para 1); *Observer and Guardian v United Kingdom* Application No 13585/88, Merits and Just Satisfaction, 26 November 1991 (Judge Morenilla at para 7); and *Rashkin v Russia* Application No 69575/10, Merits and Just Satisfaction, 7 July 2020 (Judge Elosegui at para 17, who noted 'In this era of "fake news", citizens deserve to be properly informed and treated as rational beings'). It was also cited by Montenegro in support of sanctions imposed on a journalist: *Koprivica v Montenegro* Application No 41158/09, Merits, 22 November 2011 at para 55.

189 *Lindon*, supra n 184 (Concurring opinion of Judge Loucaides).

190 Within this constellation, it may also be relevant to consider whether the government speech occurred on an 'official' forum, such as a government website.

191 The lies may actually imperil 'legitimate aims': Far from protecting health, Bolsonaro's claim imperilled it; far from ensuring free and fair elections, Trump's claims threatened them.

192 *Steel and Morris,* supra n 95 at para 90.

they speak from their (government) pulpits.[193] In addition to the element of harm, however, the element of intention is of significant relevance here: when government actors are providing information on matters of public importance—from treatments for COVID-19, to statements about migrants, to the integrity of electoral processes—nefarious intention to hamper the process of self-government, to limit the necessary checks and balances on the exercise of state power ought to weigh heavily in the balance. Government actors provide, filter and mediate information for discussion on matters of public interest. They are relied upon to act in good faith to provide information that is accurate and reliable.[194] This is imperative for the survival and functioning of democracies.

While the state must be the 'guarantor of pluralism' and refrain from imposing undue restrictions on others' expression, something more is required where government actors convey information. At minimum, they should impart such information in good faith, in order to ensure that it is both accurate and reliable. Their failure to do so undermines democratic society—from tarnishing reliance on officials to act in the public interest, to frustrating individuals' ability to judge the state's performance and hold officials to account. The Court has emphasized the importance of freedom of expression for elected officials, as 'political speech *par excellence*'.[195] 'Compelling reasons' are therefore necessary for any interference with their speech.[196] Such compelling reasons exist to justify limitations to the dissemination of knowingly false and intentionally misleading information by government representatives. Put another way, there is no pressing social need achieved by governments disseminating knowingly false information.

Moreover, the *Salov* judgment has important *a contrario* potential. Like the case studies above, Mr. Salov disseminated false statements of fact. The Court was persuaded by the absence of knowledge or intention to deceive, the efforts to verify the information and the limited impact of his statements.[197] Accordingly, where it can be established that the government speaker knew or ought to have known the information was false, intended to deceive others, took little or no steps to verify the veracity of the information, and had a significant audience, reach and likely impact on public discourse, the Court may be persuaded that the public's right to be informed should be prioritized.

The examples above meet this threshold. They concern public officials lying about factual information—COVID-19 treatments, EU migration plans, fraudulent elections. The statements were made by (the most) senior public officials with significant platforms and a 'captive audience'. Several were made online, without the opportunity for immediate challenge or pushback to the factual inaccuracies.[198] The statements by Bolsonaro and Orbán were not made during an election campaign, when the actors could claim that they were speaking on behalf of their parties, rather than their governments. No retractions were proffered despite widespread reports on the factual inaccuracies in the statements.

Finally, lies by government representatives undermine states' positive obligations to create a favourable environment for public debate.[199] The positive obligation does not place upon states the onus of ensuring the *truth* is achieved in public debates; but the environment itself must be conducive to it. Thus, 'even if truth proves elusive, the process that leads towards it is a goal in itself and it must be safeguarded'.[200] This process is eroded where government officials

193 *Féret* at paras 75–6; *Erbakan at para* 64, both supra n 36; *Baldassi*, supra n 122 at para 69; *Willem*, supra n 122 at para 37.
194 See e.g. *Rusu*, supra n 121 at para 24; *Bladet Tromsø*, supra n 118 at para 65.
195 *Karácsony*, supra n 120 at para 137.
196 *Baldassi*, supra n 122 at para 67; *Willem*, supra n 122 at paras 32–3.
197 *Salov*, supra n 140 at paras 111–117.
198 But cf. *Gündüz v Turkey* Application No 35071/97, Merits and Just Satisfaction, 4 December 2003 at paras 44, 51.
199 *Dink*, supra n 124 at para 137.
200 McGonagle, supra n 105 at 208.

knowingly lie about matters of public importance, inject uncertainty and falsity into the public realm. As Morales notes:

> Dialogue, public communication, political pluralism, all of this requires the free expression of ideas, opinions, information, the plurality of truths that are formulated in society. This also requires a certain sense of truth. A permanent mistrust erodes and weakens the values of the democratic system. It is impossible to materialize justice, equality, freedom, respect and solidarity in a context of continuous suspicion, deception, manipulation and lies.[201]

These concerns are magnified when the lies originate with elected officials meant to represent the people. This pollution of public discourse has knock-on effects for democratic elections, the press' ability to act as 'public watchdog' and the accountability of governments.

Like the previous categories of government disinformation, public officials who lie about matters of public importance may threaten the purposes the right to freedom of expression was meant to protect. The damaging effects on public discourse can be just as pronounced as withheld information or censorship. An essential ingredient for democracy is that governments do not knowingly lie about matters of public importance in order to undermine the right of the public to be properly informed, to weaken the vibrancy and reliability of public debate—essential foundations of the democratic project.

6. CONCLUSION

Freedom of expression has long been heralded as a necessary precondition to democracy. Governments interfere in the exchange of information and ideas in many different ways: by censoring and withholding information on COVID-19, labelling as 'fake news' credible reports of police violence, intentionally lying about migration to stoke nationalist sentiment. This article analysed four forms of government interference along a continuum, starting with the clearest violations of freedom of expression: (i) overt censorship and (ii) withholding information. It then extended the lessons from these cases to novel forms of government disinformation: (iii) false 'fake news' allegations and (iv) lies by government representatives about matters of public importance.

The common threads running between these categories are twofold. First, states can interfere in the marketplace of ideas through the varied roles they play in the information ecosystem: as regulator, facilitator and speaker. There has been significant scholarly and judicial scrutiny on states' roles as censor and, more recently, withholder of information. This latter role requires further reflection in light of the capacity of government speech to undermine the means and ends of expression. While free expression is a worthy end in itself, it is also a critical means to safeguard the health of a democracy. The Court should expand and further develop its approach to ensure the right fully accounts for the ways governments impact the exchange of information and ideas and the vibrancy of public debate.

Second, each of the categories analysed—from censorship to withholding information, false claims of 'fake news' to lying—implicates the public's right to be (properly) informed about government (in)action. For this long-recognized aspect of Article 10 to be meaningful, more than the availability of information and ideas is required. It requires that gatekeepers (like the media) are free to formulate and convey their messages without government interference—which includes (unfair and systematic) attacks on the media's credibility to undermine how their

[201] Morales, supra n 171 at 28 [translation].

message is received. And it requires that when government actors themselves speak, they do not knowingly lie and intentionally mislead the public.

The article provided a suggested means of conceiving of new forms of government interference, defined as 'government disinformation', which are consistent with a purposive approach to freedom of expression and build on the Court's existing Article 10 jurisprudence. The further evolution in our approach to ensure that freedom of expression safeguards are practical and effective to address modern-day (post-truth) challenges is an urgent one. The perils of government disinformation for social progress and democracy are clear. The intended effects of government disinformation include impoverishing public debate and weakening the democratic system of government. Individuals cast their ballots for representatives who will best represent their interests on the basis of (presumed or actual) evaluations of available information. The elected officials from the successful party (or parties, as the case may be) form government and go about the work of governing. The electorate can then assess the government's performance based on available information. There is an implied trust built into the system—the electorate should be able to trust that the officials chosen to form government will not misuse or abuse their powers. But it is not blind trust: checks and balances are built in to protect against unmitigated executive power. An independent and scrupulous Fourth Estate acts as a watchdog to ensure that governments are held to account for decisions taken, money spent, misuses and abuses of power. Democratic rights—including the rights to assemble and vote—ensure that the public's voices are heard by those in the halls of power.

Government disinformation erodes each of these elements. It jeopardizes public trust in the individuals elected to form government and the press that acts as watchdog. It frustrates the public's ability to gather the information it needs to form opinions and make informed decisions. It hampers the public's ability to protest against government action through demonstrations or democratic elections. More problematic still, it undermines public faith in government and public institutions, which in turn undermines support for the democratic project.

This article assessed whether and in what circumstances government disinformation should be addressed as a human rights violation—but identifying the problem and proposing a means to address it are only the first steps. Further scholarly research is needed into, *inter alia*, the scope of states' positive obligations as facilitators and speakers, the scope and limits of judicial scrutiny of political speech and the appropriate remedies where violations are found. Moreover, there are a number of (non-litigious) avenues which can and should be pursued to curb the erosion of truth and trust which has taken hold in this 'post-truth' era. These efforts may include strengthened access to information laws, media literacy initiatives and law reform to impose certain good faith requirements on government representatives.

These considerations fall outside the scope of this article, which aimed to provide the foundations upon which such research can be undertaken. Above all, this article called for refocused attention on governments' roles as facilitators and participants in expression and a broader conception of how governments may violate freedom of expression in our modern age. Mechanisms and instruments for accountability already exist. The potential of the courts and rights frameworks must be harnessed where governments fail to govern themselves, where leaders fail to lead.

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