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POLITICAL DISINFORMATION AND FREEDOM OF EXPRESSION

Demystifying the Net Conundrum

Christopher Phiri

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To my wife, Regina, and kids, Julian and Gloria

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ABSTRACT

Political disinformation, understood broadly as disinformation relating to matters of public interest, has been a major talking point at least since 2016. Policymakers and academics alike have been arguing and haggling about how to regulate this phenomenon in the fast-evolving online communication environment whilst upholding freedom of expression, a highly-prized freedom that is generally seen as an essential feature of democracy. More often than not, emerging regulatory measures have been greeted with severe criticism. But can the state nonetheless regulate the phenomenon of political disinformation without undermining freedom of expression? If so, how?

In confronting these policy questions, this monograph begins by conceptualising freedom in general and freedom of expression in particular. This in turn helps establish whether at all the law protects as part of freedom of expression the act of communicating political disinformation. The monograph explores these questions in the light of relevant analytical and normative insights garnered from the field of political philosophy and uses as the main case study the human rights system of the Council of Europe. Its main thesis is that the state can, and has a duty to, regulate the phenomenon of political disinformation in a holistic manner and without necessarily taking away from freedom of expression, in particular by providing for a suitable combination of correction and sanction mechanisms. Given its philosophical underpinnings and holistic approach to the problem under consideration, the monograph promises to be useful to all jurisdictions that embrace democracy.

KEYWORDS: democratic society, freedom of expression, new school regulation, old school regulation, online platforms, political disinformation

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TIIVISTELMÄ

Poliittinen disinformaatio, ymmärrettynä laajasti disinformaationa yleistä etua koskevissa asioissa, on ollut merkittävä teema useiden vuosien ajan, ainakin vuodesta 2016 lähtien. Päättäjät ja tutkijat ovat kiistelleet siitä, miten tätä ilmiötä voitaisiin säännellä nopeasti kehittyvässä verkkoviestintäympäristössä. Erityisen haasteellista tämä on, koska samanaikaisesti on huolehdittava siitä, että ei heikennetä sananvapautta, joka on demokraattisessa yhteiskunnassa keskeinen oikeus. Useimmiten uudet sääntelytoimenpiteet ja ehdotukset niistä ovatkin kohdanneet ankaraa arvostelua. Ajankohtaisena sekä oikeudellisesti ja myös yhteiskunnallisesti tärkeänä kysymyksenä kuitenkin säilyy, voitaisiinko poliittisen disinformaation ilmiötä säännellä sananvapautta heikentämättä ja, jos niin voitaisiin tehdä, miten tämä sääntely tulisi toteuttaa demokraattisessa oikeusvaltiossa.

Tutkimuksessa syvennytään vapauden käsitteeseen yleisesti ja sananvapauteen erityisesti. Tämä on tarpeen sen tutkimiseksi, suojellaanko poliittisen disinformaation levittämistä osana sananvapautta. Tutkimuksessa tarkastellaan näitä kysymyksiä erityisesti poliittiseen filosofiaan tukeutuen. Tutkimuksen oikeudellisena viitekehyksenä puolestaan on Euroopan neuvoston ihmisoikeusjärjestelmä. Tutkimuksen keskeinen tulos on, että demokraattisessa oikeusvaltiossa - Euroopan ihmisoikeusjärjestelmän vaatimusten perusteella - voidaan ja on itse asiassa myös velvollisuus säännellä poliittisen disinformaation ilmiötä. Ilmiön kokonaisvaltainen sääntely ei välttämättä heikennä sananvapautta. Samalla on kuitenkin huolehdittava siitä, että sääntelykokonaisuuteen sisältyy myös sopiva yhdistelmä korjaus- ja seuraamusmekanismeja.

ASIASANAT: demokraattinen yhteiskunta, sananvapaus, sääntelymallit- ja koulukunnat, verkkoalustat, poliittinen disinformaatio

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It goes without saying, given the nature of this project, that there are many other scholars (both established and emerging) whose comments I benefited from. During the initial stages of the project, for example, I received a number of valuable comments from several members of the Faculty's group of IP and information law researchers when I presented my research proposal to the group in 2021. A number of my peers also commented on different pieces of draft text during the writing seminars organised by the Faculty as part of the Doctoral Programme in Law. Suffice it to say that I have accumulated debts of gratitude from more people than I can mention by name. I must therefore underline in closing that I am deeply indebted to everyone who contributed to this project in one way or another.

November 2023
Christopher Phiri

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List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACnHPR	African Commission on Human and Peoples' Rights
AI	Artificial Intelligence
AVMSD	Audiovisual Media Services Directive
CDA	Communication Decency Act
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
DSA	Digital Services Act
ECHR	European Convention on Human Rights
ECnHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GC	Grand Chamber
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
P1–1	Article 1 of Protocol 1
P1–3	Article 3 of Protocol 1
POFMA	Protection from Online Falsehoods and Manipulation Act
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNHRC	United Nations Human Rights Committee
US	United States

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African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986)

American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978)

Charter of Fundamental Rights of the European Union [2012] OJ C 326/391

Consolidated Version of the Treaty on European Union [2012] OJ C 326/13

Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953)

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market ('Directive on Electronic Commerce') [2000] OJ L178/1

Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services (Audiovisual Media Services Directive) (codified version) [2010] OJ L95/1

European Convention on Transfrontier Television (adopted 5 May 1989, entered into force 1 May 1993)

European Social Charter (adopted 18 October 1961, entered into force 26 February 1965)

Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976)

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976)

Protocol no 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol no 11, (adopted 20 March 1952, entered into force 18 May 1954)

Protocol no 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby (adopted 11 May 1994, entered into force 1 November 1998)

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Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949)

Strengthened Code of Practice on Disinformation 2022

Universal Declaration of Human Rights (adopted 10 December 1948)

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980)

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Canada Elections Act 2000

Communication Decency Act 1996 (US)

Constitution of the United States 1787
Criminal Code (StGB) 1871 (Germany)
Declaration of the Rights of Man and of the Citizen 1789 (France)
Decree no 2019-297 of 10 April 2019 Relating to Information Obligations of Online Platforms Operators Promoting Information Content Related to a General Interest Debate (France)
Elections Modernization Act 2018 (Canada)
Electoral Code 1964 (France)
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Law no 2018-1202 of 22 December 2018 on the Fight Against the Manipulation of Information (France)
Law on the Provision of Information to the Public 1996 (Lithuania)
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Organic Law no 2018-1201 of 22 December 2018 on the Fight Against the Manipulation of Information (France)
Protection from Online Falsehoods and Manipulation Act 2019 (Singapore)
Representation of the People Act 1983 (UK)
Telemedia Act (TMG) 2007 (Germany)

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1 Context and Framework

1.1 Introduction

The phenomenon of disinformation (or, colloquially, 'fake news') has been known since time immemorial.[1] Be that as it may, technological developments and the emergence of *publicly accessible* online platforms in the 21st century have significantly transformed the mechanics of this phenomenon.[2] The use of online platforms and attendant digital technologies in particular allows for much faster and broader dissemination of disinformation to a global audience, beyond the reach of territorial governments.[3] Purveyors of digitally-enabled disinformation can also circumvent available accountability mechanisms by remaining anonymous or pseudonymous online. The result of these developments has been to accentuate the

1 Robert G Parkinson, 'Fake News? That's a Very Old Story' *The Washington Post* (Washington DC, 25 November 2016); Tarlach McGonagle, '"Fake News": False Fears or Real Concerns?' (2017) 35 *Netherlands Quarterly of Human Rights* 203, 205–07; Peter Roudik, 'Comparative Summary' in Peter Roudik and others, *Initiatives to Counter Fake News in Selected Countries: Argentina, Brazil, Canada, China, Egypt, France, Germany, Israel, Japan, Kenya, Malaysia, Nicaragua, Russia, Sweden, United Kingdom* (Law Library of Congress 2019) 1. cf Andrei Richter, 'Fake News and Freedom of the Media' (2018–19) 8 *Journal of International Media & Entertainment Law* 1, 10.

2 The term 'online platform' has been used to describe a wide range of services and/or providers of services on the Internet but has no universally accepted definition. Compare and contrast, for example, the definitions proffered by the Organisation for Economic Co-operation and Development (OECD), the Council of Europe and the European Union (EU), respectively: OECD, *An Introduction to Online Platforms and their Role in the Digital Transformation* (OECD Publishing 2019) 21; Committee of Ministers of the Council of Europe, 'Recommendation CM/Rec(2022)11 of the Committee of Ministers to Member States on Principles for Media and Communication Governance' (adopted at the 1431st meeting of the Ministers' Deputies, 6 April 2022) (Recommendation CM/Rec(2022)11), appendix; Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1 (DSA), art 3(i). In this monograph, the term 'online platform' refers to a digital service that, at the instance of a member of the public (termed a 'user'), stores and disseminates information to the public and the provider of the service (termed an 'online platform operator') sets rules, by whatever name called, to govern the conduct of users.

3 Roudik (n 1).

various regulatory problems that have long been associated with various categories of disinformation. Given the dynamic nature of digital technologies, moreover, disinformation is an evolving problem.[4] The ensuing policy challenges thus go beyond merely deciding on how to tackle different categories of disinformation. Any policy measures must also keep pace with the evolving nature of the problem.

This monograph focuses on one category of digitally-enabled disinformation that has been a major source of concern for democratic societies, namely political disinformation. The interplay between the phenomenon of political disinformation and the exercise of freedom of expression on the Internet, according to the hypothesis proposed, engenders a regulatory conundrum. This monograph tackles the regulatory conundrum thus envisaged. More specifically, the monograph explores whether and, if so, how the phenomenon of political disinformation can be regulated in a democratic society without undermining freedom of expression.

The present chapter aims to provide context and set the scene for the exploration in this connection. To this end, the remainder of the chapter is organised as follows. Section 1.2 encapsulates the regulatory conundrum in view. Section 1.3 clarifies the scope of the exploration. Section 1.4 presents an outline of the main questions that fall for consideration in the chapters that follow. Section 1.5 provides an overview of existing knowledge bearing upon the questions that fall for consideration and explains, albeit laconically only, how the exploration of each question conducted in the chapters that follow promises to contribute to knowledge. Section 1.6 in turn presents a methodological outline of the argument advanced in the chapters that follow. Section 1.7 concludes.

1.2 The Nub of the Conundrum

The Internet, including the applications that it supports, plays an increasingly important role in people's daily lives. It is, in any event, no exaggeration to say that the Internet has revolutionised the way people participate in public affairs. Given its affordability, instant speed and near-infinite reach in particular,[5] the Internet offers unparalleled opportunities for more inclusive exercise and enjoyment of individual liberties *or* freedoms in political space.[6] Indeed, understood as the metaphorical arena in which the governing authorities continually receive and take into account

4 See High Level Expert Group on Fake News and Online Disinformation, *Report to the European Commission on a Multi-Dimensional Approach to Disinformation* (European Union 2018) 11.

5 Olesya Tkacheva and others, *Internet Freedom and Political Space* (RAND Corporation 2013) 2.

6 Most English-speaking legal and political theorists use the terms 'liberty' and 'freedom' interchangeably. This monograph follows suit.

input from people outside government,[7] political space is now largely in cyberspace.[8] This holds true with respect to all the three spheres of political space, namely voice, collective action and vote.

In legal parlance, these three spheres are protected as component parts of freedom of expression (voice), freedom of assembly and association (collective action), and electoral freedom or the right to free elections (vote).[9] Being constitutive elements of political space, these freedoms are deemed so important that virtually all modern legal systems protect them as human rights, otherwise known as fundamental rights. By the same token, the Universal Declaration of Human Rights (UDHR) 1948 and the International Covenant on Civil and Political Rights (ICCPR) 1966 adopted under the aegis of the United Nations (UN),[10] and all major regional human rights instruments, including the European Convention on Human Rights (ECHR) 1950,[11] the focal point of this monograph, recognise these freedoms as fundamental rights.

Freedom of expression as enshrined in article 10 of the ECHR in particular includes 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.'[12] Thus, people exercise and enjoy this freedom on the Internet in several ways. First, people impart information to Internet users by generating and posting information content on the

7 Tkacheva and others (n 5) 4. See also generally Yale H Ferguson and RJ Barry Jones, *Political Space: Frontiers of Change and Governance in a Globalizing World* (State University of New York Press 2002).

8 See generally Clay Shirky, *Here Comes Everybody: The Power of Organizing Without Organizations* (Penguin Group 2008); Philip N Howard, *The Digital Origins of Dictatorship and Democracy: Information Technology and Political Islam* (Oxford University Press 2010); Clay Shirky, 'The Political Power of Social Media: Technology, the Public Sphere, and Political Change' (2011) 90 *Foreign Affairs* 28; Tkacheva and others (n 5); Jim Willis and Anthony R Fellow, *Tweeting to Freedom: An Encyclopedia of Citizen Protests and Uprisings Around the World* (ABC-CLIO 2017); Kris Ruijgrok, 'From the Web to the Streets: Internet and Protests under Authoritarian Regimes' (2017) 24 *Democratization* 498. cf Evgeny Morozov, *The Net Delusion: The Dark Side of Internet Freedom* (PublicAffairs 2011).

9 Tkacheva and others (n 5) 5.

10 Universal Declaration of Human Rights (adopted 10 December 1948) (UDHR), arts 19, 20 and 21; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) (ICCPR), arts 19, 21, 22 and 25.

11 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) (ECHR), arts 10 and 11 as read together with art 3 of Protocol no 1. See also American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) (ACHR), arts 13, 15, 16 and 23; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986), arts 9, 10, 11 and 13; Charter of Fundamental Rights of the European Union [2012] OJ C 326/391(CFREU), arts 11, 12, 39 and 40.

12 ECHR, art 10(1).

Internet. Such content may be in textual, graphical/pictorial, audio or video format, or indeed in any possible combination of these formats. Second, people impart information to Internet users by sharing or otherwise reacting to content posted on the Internet by others. Third, a growing number of people receive information posted or shared on the Internet by others, by browsing the Web, including through social media sites and applications.

As the European Court of Human Rights (ECtHR) of the Council of Europe, the judicial body that oversees the implementation of the ECHR, has recognised on a number of occasions, the exercise of freedom of expression on the Internet inures to the benefit of both communicators and recipients of information in telling ways. In the ECtHR's own words, 'user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression.'[13] Web 2.0 and the live streaming functionalities offered by popular social media platforms such as Facebook, YouTube and X (formerly Twitter) in particular allow ordinary citizens and political activists alike to engage with politicians virtually and in real time. By the same token, the Internet is also a one-stop 'information shop' for people from all walks of life. In the words of the ECtHR, in view of its 'accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general'.[14] Indeed, 'the Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information'.[15]

The enjoyment of freedom of expression 'regardless of frontiers', too, has never been easier all thanks to the Internet. Unlike prior to the digital age when information shared through legacy media could rarely cross the territorial boundaries of nation states,[16] the Internet now allows people to disseminate information worldwide in a matter of seconds.[17] It is no wonder then that the ECtHR considers that blocking access to the Internet could run counter to the actual wording of paragraph 1 of article 10 of the ECHR, according to which freedom of expression must be guaranteed

13 *Delfi AS v Estonia* App no 64569/09 (ECtHR [GC], 16 June 2015), para 110.

14 *Times Newspapers Ltd v the United Kingdom (nos 1 and 2)* Apps nos 3002/03 and 23676/03 (ECtHR, 10 March 2009), para 27; *Delfi AS v Estonia* (n 13), para 133; *Cengiz and others v Turkey* Apps nos 48226/10 and 14027/11 (ECtHR, 1 December 2015), para 52; *Magyar Jeti Zrt v Hungary* App no 11257/16 (ECtHR, 4 December 2018), para 66.

15 *Ahmet Yildirim v Turkey* App no 3111/10 (ECtHR, 18 December 2012), para 54; *Cengiz and others v Turkey* (n 14), para 49; *Vladimir Kharitonov v Russia* App no 10795/14 (ECtHR, 23 June 2020), para 33.

16 Yaman Akdeniz, *Freedom of Expression on the Internet: A Study of Legal Provisions and Practices Related to Freedom of Expression, the Free Flow of Information and Media Pluralism on the Internet in OSCE Participating States* (OSCE 2012) 5.

17 *Delfi AS v Estonia* (n 13), para 110.

regardless of frontiers.[18]

Online expression and political mobilisation activities similarly facilitate, and manifest in, the exercise and enjoyment of freedom of assembly and association offline. Thanks to Web 2.0 and live streaming applications, moreover, people can directly exercise and enjoy both freedom of assembly and association online, even from the comfort of their homes. Taking cognisance of these unprecedented opportunities, the Committee of Ministers of the Council of Europe has adopted several recommendations calling upon the states concerned to safeguard not only freedom of expression but also freedom of assembly and association and other fundamental rights online. The Committee of Ministers thus considers that 'existing human rights and fundamental freedoms apply equally offline and online'.[19]

It is also worth recalling that the protection that the law on freedom of assembly and association affords to individuals is not only meant to secure the exercise and enjoyment of collective action for its own sake. In the ECtHR's view, freedom of assembly and association as enshrined in article 11 of the ECHR is also intended 'to secure a forum for public debate and the open expression of protest.'[20] Therefore, one of the objectives of freedom of assembly and association is to secure the freedom of expression of personal opinions, through collective action, pursuant to article 10 of the ECHR.[21] The exercise and enjoyment of freedom of assembly and association

18 *Ahmet Yildirim v Turkey* (n 15), para 67; *Cengiz and others v Turkey* (n 14), para 65.

19 Committee of Ministers of the Council of Europe, 'Recommendation CM/Rec(2014)6 of the Committee of Ministers to Member States on a Guide to Human Rights for Internet Users' (adopted at the 1197th meeting of the Ministers' Deputies, 16 April 2014), para 5. See also Committee of Ministers of the Council of Europe, 'Recommendation CM/Rec(2016)5 of the Committee of Ministers to Member States on Internet Freedom' (adopted at the 1253rd meeting of the Ministers' Deputies, 13 April 2016), para 1; Committee of Ministers of the Council of Europe, 'Recommendation CM/Rec(2018)2 of the Committee of Ministers to Member States on the Roles and Responsibilities of Internet Intermediaries' (adopted at the 1309th meeting of the Ministers' Deputies, 7 March 2018), para 1. See further United Nations Human Rights Council, 'Resolution 20/8 on the Promotion, Protection and Enjoyment of Human Rights on the Internet' (adopted at the 31st meeting, 5 July 2012), para 1; United Nations Human Rights Council, 'Resolution 21/16 on the Rights to Freedom of Peaceful Assembly and of Association' (adopted at the 37th meeting, 27 September 2012), para 1; United Nations Human Rights Council, 'Resolution 24/5 on the Rights to Freedom of Peaceful Assembly and of Association' (adopted at the 34th meeting, 26 September 2013), para 2.

20 *Éva Molnár v Hungary* App no 10346/05 (ECtHR, 7 October 2008), para 42. See also *Kudrevičius and others v Lithuania* App no 37553/05 (ECtHR [GC], 15 October 2015), paras 85–86*; Peradze and others v Georgia* App no 5631/16 (ECtHR, 15 December 2022), para 33.

21 *Ezelin v France* App no 11800/85 (ECtHR, 26 April 1991), para 37; *Freedom and Democracy Party (ÖZDEP) v Turkey* App no 23885/94 (ECtHR [GC], 8 December 1999), para 37; *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* Apps nos 29221/95 and 29225/95 (ECtHR, 2 October 2001), para 85; *Éva Molnár v Hungary* (n 20), para 42; *Taranenko v Russia* App no 19554/05 (ECtHR, 15 May 2014),

both offline and online, to put it another way, also operate as specific means of exercising and enjoying freedom of expression.

In the same vein, the ECtHR considers that the right to free elections and freedom of expression, particularly freedom of political debate, are interrelated rights that operate to reinforce each other. In its view, freedom of expression is one of the preconditions for any meaningful exercise of the right to free elections as enshrined in article 3 of Protocol 1 (P1–3) to the ECHR.[22] This appears to be incontrovertible, since people naturally 'make decisions in keeping with the stimuli and kinds of information that enter their minds from their communication environments.'[23] Access to information on the Internet, particularly information of a political nature, thus offers new opportunities for voters to fully leverage the power of the ballot box as a tool to voice their opinion in the choice of political representatives and to hold those representatives to account.

It goes without saying that an electorate that is not properly informed cannot make informed electoral choices. Nor can it effectively hold its elected representatives to account, since even inefficient politicians may be re-elected in the next election. It should therefore come as no surprise that the ECtHR also 'recognises the importance of protecting the integrity of the electoral process from false information that affect voting results, and the need to put in place the procedures to effectively protect the reputation of candidates.'[24]

It follows from the foregoing discussion that freedom of expression, freedom of assembly and association, and electoral freedom are symbiotic. The rights associated with these freedoms thus typify the indivisibility, interdependence and interrelatedness of fundamental rights.[25] Absent freedom of expression in particular, freedom of assembly and association and the right to free elections become devoid of substance. Importantly, all these freedoms have a special place in a political democracy. As the ECtHR has reiterated on many occasions, freedom of

para 68; *Bumbeș v Romania* App no 18079/15 (ECtHR, 3 May 2022), para 67; *Peradze and others v Georgia* (n 20), para 86.

22 Protocol no 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol no 11, (adopted 20 March 1952, entered into force 18 May 1954), art 3. See *Mathieu-Mohin and Clerfayt v Belgium* App no 9267/81 (ECtHR, 2 March 1987), para 54; *Bowman v the United Kingdom* App no 24839/94 (ECtHR [GC], 19 February 1998), para 42; *Orlovskaya Iskra v Russia* App no 42911/08 (ECtHR, 21 February 2017), para 110.

23 Manuel Castells, 'Democracy in the Age of the Internet' (2011) 6 *Transfer*: *Journal of Contemporary Culture* 96, 96.

24 *Staniszewski v Poland* App no 20422/15 (ECtHR, 14 October 2021), para 47. See also *Brzeziński v Polan*d App no 47542/07 (ECtHR, 25 July 2019), para 35.

25 World Conference on Human Rights, 'Vienna Declaration and Programme of Action' (adopted 25 June 1993), s I, para 5.

expression,[26] freedom of assembly and association,[27] and the right to free elections[28] together constitute the bedrock of any democratic system.

In view of the centrality of the role that freedom of expression plays in making the exercise of other political rights worthwhile, the law generally places a premium on freedom of political expression in a democratic society. Such expression, in other words, is (or at least ought to be) guarded more jealously than other categories of expression, such as purely commercial or purely artistic expression. In the exact words of the ECtHR in particular, '[t]here is *little* scope' under paragraph 2 of article 10 of the ECtHR 'for restrictions on freedom of expression in the area of political speech or debate – *where freedom of expression is of the utmost importance*…– or in matters of public interest'.[29] The ECtHR has reiterated this position on numerous occasions.[30]

A question that arises in turn is whether there is any room within the little scope thus envisaged for the regulation of the phenomenon of political disinformation. And if so, how can the regulator ensure that any such regulation is so sufficiently circumscribed as not to undermine democracy by prohibiting or otherwise discouraging the exercise on the Internet of the highly-prized freedom of political expression or freedom of expression on matters of public interest? These are knotty but inevitable policy questions in this disinformation age. Indeed, despite critics, many states around the world have already introduced and many others are either in the process of introducing or are considering introducing regulatory measures aimed

[26] See, for example, *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976), para 49; *Observer and Guardian v the United Kingdom* App no 13585/88 (ECtHR, 26 November 1991), para 59.

[27] See, for example, *Djavit An v Turkey* App no 20652/92 (ECtHR, 20 February 2003), para 56; *Kudrevičius and others v Lithuania* (n 20), para 91.

[28] See, for example, *Mathieu-Mohin and Clerfayt v Belgium* (n 22), para 47; *Bowman v the United Kingdom* (n 22), para 42; *Orlovskaya Iskra v Russia* (n 22), para 110; *Staniszewski v Poland* (n 24), para 47.

[29] *Lindon, Otchakovsky-Laurens and July v France* Apps nos 21279/02 and 36448/02 (ECtHR [GC], 22 October 2007), para 46; *Otegi Mondragon v Spain* App no 2034/07 (ECtHR, 15 March 2011), para 50 (emphasis added).

[30] See, for example, *Handyside v the United Kingdom* (n 26), para 49; *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986), para 42; *Castells v Spain* App no 11798/85 (ECtHR, 23 April 1992), para 43; *Wingrove v the United Kingdom* App no 17419/90 (ECtHR, 25 November 1996), para 58; *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR [GC], 8 July 1999), para 61; *Ceylan v Turkey* App no 23556/94 (ECtHR [GC], 8 July 1999), para 34; *Nilsen and Johnsen v Norway* App no 23118/93 (ECtHR, 25 November 1999), para 46; *Salov v Ukraine* App no 65518/01 (ECtHR, 6 September 2005), para 104; *Mouvement raëlien suisse v Switzerland* App no 16354/06 (ECtHR [GC], 13 July 2012), para 61; *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECtHR [GC], 10 November 2015), para 96; *Standard Verlagsgesellschaft mbH v Austria (no 3*) App no 39378/15 (ECtHR, 7 December 2021), para 86; *Freitas Rangel v Portugal* App no 78873/13 (ECtHR, 11 January 2022), paras 50 and 59.

at tackling online disinformation in general and/or online political disinformation in particular.[31]

At a supranational level, the European Union (EU) has also been at the forefront of the fight against online disinformation. The EU's regulatory efforts in this connection have since culminated in the adoption of the Digital Services Act (DSA) 2022, a landmark regulation which will be directly applicable in all EU member states (all of which are also member states of the Council of Europe and parties to the ECHR) with effect from 17 February 2024.[32] Additionally, the EU's proposed Regulation on the Transparency and Targeting of Political Advertising seeks to regulate political disinformation, albeit indirectly only, by introducing transparency requirements related to paid political advertising and by imposing restrictions on the use by online platform operators of targeting and amplification techniques that involve the processing of personal data in the context of paid political advertising.[33]

Those who are in favour of regulation predominantly claim that the phenomenon of political disinformation threatens democracy, or at least poses a risk of other public harms. This claim also finds support in seminal policy documents adopted

[31] See, for example, Peter Roudik and others (n 1); Yves-Marie Doublet, *Disinformation and Electoral Campaigns* (Council of Europe Publishing 2019) 22–26; Giovanni Pitruzzella and Oreste Pollicino, *Disinformation and Hate Speech: A European Constitutional Perspective* (Bocconi University Press 2020), ch 3; Oreste Pollicino, Giovanni De Gregorio and Laura Somaini, 'The European Regulatory Conundrum to Face the Rise and Amplification of False Content Online' in Giuliana Ziccardi Capaldo (ed), *The Global Community Yearbook of International Law and Jurisprudence 2019* (Oxford University Press 2020) 341–53; Ronan Ó Fathaigh, Natali Helberger and Naomi Appelman, 'The Perils of Legally Defining Disinformation' (2021) 10 *Internet Policy Review* 1, 7–11. For an ongoing update in this connection, see Daniel Funke and Daniela Flamini, 'A Guide to Anti-Misinformation Actions Around the World' *Poynter* <https://www.poynter.org/ifcn/anti-misinformation-actions/#us> accessed 20 October 2023.

[32] DSA (n 2), art 93(2). See also European Commission, 'Tackling Online Disinformation: A European Approach' (Communication) COM (2018) 236 final; European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Action Plan Against Disinformation' (Communication) JOIN(2018) 36 final; European Commission, 'European Democracy Action Plan' (Communication) COM(2020) 790 final; European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Tackling COVID-19 Disinformation - Getting the Facts Right' (Communication) JOIN/2020/8 final. See further Strengthened Code of Practice on Disinformation 2022.

[33] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the Transparency and Targeting of Political Advertising' (Communication) COM/2021/731 final. See also DSA, arts 25–27 and 38–39.

both in the Council of Europe[34] and in the EU.[35] The main concern in this regard is that the Internet and attendant technologies employed for mass-scale dissemination of disinformation exacerbates this otherwise well-known phenomenon. With existing research suggesting that online political falsehood diffuses 'significantly farther, faster, deeper, and more broadly than the truth in all categories of information',[36] the case for regulating online disinformation of a political nature might appear to be particularly compelling.

But there is another twist to the debate. Research has also repeatedly suggested that the problem of online disinformation is not as serious as it is often portrayed.[37] This has prompted some commentators to argue that concerns about online disinformation emanate from a moral panic at best.[38] The case for regulating online political disinformation is further enfeebled by the lack of clarity about how exactly such disinformation threatens democracy.[39] This lack of clarity is bound to persist,

[34] Parliamentary Assembly of the Council of Europe, 'Resolution 2143 (2017) on Online Media and Journalism: Challenges and Accountability' (adopted at the 5th sitting, 25 January 2017), para 6.

[35] European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Action Plan Against Disinformation' (n 32) 1.

[36] Soroush Vosoughi, Deb Roy and Sinan Aral, 'The Spread of True and False News Online' (2018) 359 *Science* 1146, 1147.

[37] Richard Fletcher and others, *Measuring the Reach of "Fake News" and Online Disinformation in Europe* (Reuters Institute 2018); Nir Grinberg and others, 'Fake News on Twitter during the 2016 U.S. Presidential Election' (2019) 363 *Science* 374; Andrew Guess, Jonathan Nagler and Joshua Tucker, 'Less Than You Think: Prevalence and Predictors of Fake News Dissemination on Facebook' (2019) 5 *Science Advances* eaau4586; Andrew M Guess, Brendan Nyhan and Jason Reifler, 'Exposure to Untrustworthy Websites in the 2016 US Election' (2020) 4 *Nature Human Behaviour* 472; Jennifer Allen and others, 'Evaluating the Fake News Problem at the Scale of the Information Ecosystem' (2020) 6 *Science Advances* eaay3539. For a literature review in this connection, see João Pedro Baptista and Anabela Gradim, 'Understanding Fake News Consumption: A Review' (2020) 9 *Social Sciences* 185.

[38] See generally Andreas Jungherr and Ralph Schroeder, 'Disinformation and the Structural Transformations of the Public Arena: Addressing the Actual Challenges to Democracy' (2021) 7 *Social Media + Society* 1; Sacha Altay, Manon Berriche and Alberto Acerbi, 'Misinformation on Misinformation: Conceptual and Methodological Challenges' (2023) 9 *Social Media + Society* 1.

[39] See Chris Tenove, 'Protecting Democracy from Disinformation: Normative Threats and Policy Responses' (2020) 25 *International Journal of Press/Politics* 517; Spencer McKay and Chris Tenove, 'Disinformation as a Threat to Deliberative Democracy' (2020) 74 *Political Research Quarterly* 703.

since democracy itself is a notoriously ambiguous concept.[40] Any regulatory measures introduced based on a global claim that online disinformation threatens democracy are, by the same token, bound to remain controversial.

Be that as it may, it would be disingenuous for any competent debater (those who see online disinformation as a limited problem inclusive) to claim that the problem of disinformation does not exist. Online political disinformation in particular is a real problem albeit the extent of its actual effects may vary across jurisdictions.[41] It is no wonder then that there appears to be a growing consensus that such disinformation should be regulated somehow, even just for the sake of preventing what may be seen as a limited problem from getting worse.

Many commentators nonetheless remain sceptical about whether online disinformation in general and online political disinformation in particular can be regulated in a democratic society without undermining freedom of expression.[42] Notably, the International Specialised Mandates on Freedom of Expression and the Media have also taken the view that general or ambiguous laws on disinformation or 'fake news', not least prohibitions on the dissemination of 'falsehoods' or 'non-objective' information, are incompatible with international standards on freedom of

[40] John Boswell and Jack Corbett, 'Democracy, Interpretation and the "Problem" of Conceptual Ambiguity: Reflections on the V-Dem Project's Struggles with Operationalizing Deliberative Democracy' (2021) 53 *Polity* 239. See also John T Ishiyama, Tatyana Kelman and Anna Pechenina, 'Models of Democracy' in John T Ishiyama and Marijke Breuning (eds), *21st Century Political Science: A Reference Handbook* (SAGE Publications 2011).

[41] Edda Humprecht, 'Where 'Fake News' Flourishes: A Comparison Across Four Western Democracies (2019) 22 *Information, Communication & Society* 1973; Edda Humprecht, Frank Esser and Peter Van Aelst, 'Resilience to Online Disinformation: A Framework for Cross-National Comparative Research' (2020) 25 *International Journal of Press/Politics* 493. For further evidence suggesting that the problem indeed exists, see Hunt Allcott and Matthew Gentzkow, 'Social Media and Fake News in the 2016 Election' (2017) 31 *Journal of Economic Perspectives* 211; Fabian Zimmermann and Matthias Kohring, 'Mistrust, Disinforming News, and Vote Choice: A Panel Survey on the Origins and Consequences of Believing Disinformation in the 2017 German Parliamentary Election Open Materials' (2020) 37 *Political Communication* 215. See also Judit Bayer and others, *Disinformation and Propaganda – Impact on the Functioning of the Rule of Law in the EU and its Member States* (European Union 2019) 39–50.

[42] See, for example, Irini Katsirea, '"Fake News": Reconsidering the Value of Untruthful Expression in the Face of Regulatory Uncertainty' (2018) 10 *Journal of Media Law* 159; Jeremy Horder, 'Online Free Speech and the Suppression of False Political Claims' (2021) 8 *Journal of International and Comparative Law* 15; Alain Strowel and Jean De Meyere, 'The Digital Services Act: Transparency as an Efficient Tool to Curb the Spread of Disinformation on Online Platforms?' (2023) 14 *JIPITEC* 66, para 10.

expression.[43] This view is particularly difficult to dismiss out of hand with respect to political disinformation, not only because there is little scope for regulatory restrictions on political expression or on debate on matters of public interest but also because the concept of disinformation itself continues to suffer from a lack of shared understanding. Political disinformation could prove even more difficult to regulate in the context of political elections as the ECtHR considers that 'it is particularly important in the period preceding an election that opinions and information of *all kinds* are permitted to circulate freely.'[44]

All in all, given that democracy depends on freedom of expression, not least freedom of political expression, the major policy challenge revolves around how to design a regulatory framework that is not only effective in tackling the problem envisaged but also one that upholds democracy by paying due regard to freedom of expression on the Internet. Unless they are properly circumscribed within the available little scope, any regulatory restrictions on the free flow of political information on the Internet run the risk of undermining democracy instead of protecting it. If the claim that online political disinformation threatens democracy is anything to go by, this means that both the regulation and the non-regulation of the phenomenon of political disinformation potentially threaten democracy in equal measure. And therein lies the nub of the conundrum.

[43] United Nations Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe Representative on Freedom of the Media, Organization of American States Special Rapporteur on Freedom of Expression, and African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, 'Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda' (adopted 3 March 2017), para 2(a); United Nations Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe Representative on Freedom of the Media, and Organization of American States Special Rapporteur on Freedom of Expression, 'Joint Declaration on Freedom of Expression and Elections in the Digital Age' (adopted 30 April 2020), para 1(a) (iii)(3).

[44] *Bowman v the United Kingdom* (n 22), para 42 (emphasis added). See Elizabeth F Judge and Amir M Korhani, 'Disinformation, Digital Information Equality, and Electoral Integrity' (2020) 19 *Election Law Journal* 240, 240, echoing this view. See also generally Daniela C Manzi, 'Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News' (2019) 87 *Fordham Law Review* 2623; Jason Pielemeier, 'Disentangling Disinformation: What Makes Regulating Disinformation So Difficult?' (2020) 2020 *Utah Law Review* 917; Ben Epstein, 'Why it is so Difficult to Regulate Disinformation Online' in W Lance Bennett and Steven L Livingston (eds), *The Disinformation Age: Politics, Technology, and Disruptive Communication in the United States* (Cambridge University Press 2020).

1.3 Scope of the Exploration

Two conceptual issues that define the scope of the present exploration of the regulatory conundrum in view are worth clarifying at the outset. The reader could benefit from some clarity in this connection, since the scope of the exploration must be delimited somehow in accordance with the dictates of the economics of time management.

To begin with, it is worth acknowledging that the concept of regulation has no universal definition.[45] It should therefore be clarified at the outset that this monograph considers only the possibility of regulating the phenomenon of political disinformation by way of coercive legal norms adopted through the apparatus of the state.[46] This monograph, in other words, does not concern itself with regulation at international, regional or supranational (not least at the EU) level but rather focuses only on public regulation at national level. Nor is this monograph intended to be a comparative study of different jurisdictions. Rather, as further explained below, this monograph builds upon international legal norms that apply at national level.

It goes without saying that a comparative study of emerging attempts at regulating online disinformation could provide useful insights into the compatibility with freedom of expression of different regulatory approaches. Even so, this monograph does not restrict its exploration to specific national jurisdictions but instead adopts a more holistic approach by examining the regulatory conundrum in view through the lens of internationally accepted standards. A notable advantage of focusing on international law rather than on national law is that a state may not invoke the provisions of its national law as justification for its failure to perform its obligations under international law.[47] By the same token, notwithstanding any existing national legislation, states are required (or at least expected) to comply with relevant international standards.

45 Christel Koop and Martin Lodge, 'What is Regulation? An Interdisciplinary Concept Analysis' (2017) 11 *Regulation & Governance* 108. See also generally Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World' (2001) 54 *Current Legal Problems* 103; Christine Parker and John Braithwaite, 'Regulation' in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press 2005); Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press 2007); Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press 2012).

46 cf Philip Selznick, 'Focusing Organizational Research on Regulation' in Roger G Noll (ed), *Regulatory Policy and the Social Sciences* (University of California Press 1985) 363, defining regulation as 'sustained and focused control exercised by a public agency, on the basis of a legislative mandate, over activities that are socially valued'.

47 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), art 27.

This monograph thus promises to be useful not only to states that may be covered in a comparative study of emerging regulatory measures but also to states that have yet to adopt such measures. Indeed, even though it is not meant to be a comparative study, this monograph is not necessarily oblivious to existing regulatory attempts. The monograph in fact considers and, as and when deemed necessary to buttress the analysis, explicitly refers to some of the existing regulatory measures. In any event, those who may be particularly oriented towards comparative research need not despair. As intimated above, there is already a considerable amount of studies on emerging attempts at regulating online disinformation around the world to which they could turn.[48]

The task of establishing whether and how the phenomenon of political disinformation can be regulated in a democratic society without undermining freedom of expression also calls for some clarity as to the nature of the democratic society that one has in mind. Such clarity is all the more important here, not only because this monograph does not focus on any specific democratic system at national level but also because (as already noted above) democracy itself is a notoriously ambiguous concept. It should therefore be noted at the outset that the democratic society envisaged here, whatever its other features, is one characterised by the legal protection of individual freedom in the form of fundamental rights. This monograph does not, therefore, delve into the various conceptions of democracy that figure in political science but instead builds upon relevant international legal norms that establish a link between freedom and democracy. To be more specific, the monograph uses the human rights system of the Council of Europe as the main case study.

The human rights system of the Council of Europe appears to be fit for purpose not only because it entrenches a clear link between freedom and democracy but also because it appears to be admissive of different models of democracy. This monograph thus builds upon the link that the human rights system of the Council of Europe establishes between freedom and democracy to explore the regulatory conundrum in view within the framework of a democratic society, irrespective of any other features of democracy itself. More specifically, within the legal framework of the Council of Europe, it is internationally accepted that freedom and democracy are interdependent and mutually reinforcing concepts. The law thus entrenches a 'dual' link between freedom and democracy.

First, the concept of a democratic society prevails throughout the ECHR,[49] the primary treaty designed to protect fundamental rights, democracy and the rule of law under the supervision of the Council of Europe. The preamble to the ECHR also explicitly reaffirms that the contracting states share a common belief that freedom is best

48 See n 31 above and accompanying text.
49 *Lingens v Austria* (n 30), para 42.

maintained by 'an effective' political democracy. This suggests that the ECHR is admissive of different models of democracy provided that they are deemed effective in securing freedom.[50] The member states of the Council of Europe are therefore required to maintain some form of democracy in order to ensure the observance of the commitments they have undertaken by signing up to the ECHR.[51] What this means, in other words, is that it is legally axiomatic that democracy, however conceptualised, is the only system of government that is capable of securing freedom under the ECHR.

Second, all member states of the Council of Europe share a common belief that an effective or genuine political democracy depends on freedom.[52] The freedom thus envisaged, as already noted, must be protected in the form of legal rights. As a prerequisite for joining the organisation, therefore, '[e]very member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms' as set forth in the ECHR.[53] This explains why all 46 current member states of the Council of Europe have signed up to the ECHR. This is also consistent with existing case law. As already noted above, it is settled law that freedom of expression, freedom of assembly and association, and electoral freedom in particular constitute the very foundation stones upon which the existence of a democratic society rests. It is therefore legally axiomatic that the existence of a democratic society depends on freedom.

Given the prominence of the role that the EU has played so far in devising legal strategies against online disinformation, those who are oriented towards EU law may be justified in wondering why this monograph does not focus on the EU legal framework. However, as already noted above, the monograph takes cognisance of existing regulatory efforts, including those at the EU level. If anything, considering that all EU member states are also member states of the Council of Europe, the monograph in fact pays particular attention to regulatory efforts at the EU level. This holds true even though, given time and space constraints, explicit reference to those regulatory efforts is but sketchy. In any event, a notable advantage of the selected case study is that (notwithstanding Russia's exclusion from the organisation on 16 March 2022[54]) the Council of Europe is the continent's leading human rights

50 See also generally Steven Greer, 'Constitutionalizing Adjudication under the European Convention on Human Rights' (2003) 23 *Oxford Journal of Legal Studies* 405; Rory O'Connell, *Law, Democracy and the European Court of Human Rights* (Cambridge University Press 2020).

51 See ECHR, art 1.

52 Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949), preamble.

53 Ibid, art 3.

54 Committee of Ministers of the Council of Europe, 'Resolution CM/Res(2022)2 on the Cessation of the Membership of the Russian Federation to the Council of Europe (adopted at the 1428ter meeting of the Ministers' Deputies, 16 March 2022).

organisation, currently consisting not only of all 27 member states of the EU but also of 19 non-EU member states. The human rights system instituted by the ECHR in fact stands out as the most influential human rights system in Europe and beyond, serving as a model for national and other regional human rights systems alike.[55]

It is no wonder then that even the Treaty on European Union requires the EU to respect, as general principles of EU law, the fundamental rights enshrined in the ECHR.[56] The Charter of Fundamental Rights of the European Union (CFREU) also explicitly provides that the rights set forth therein, insofar as they correspond to the rights guaranteed by the ECHR, shall (without prejudice to EU law providing more extensive protection) have the same meaning and scope as those set forth in the ECHR.[57] When implementing and interpreting the rules of EU law that affect fundamental rights, therefore, the institutions, bodies, offices and agencies of the EU and the member states alike must respect the relevant rights set forth in the ECHR.[58] The Court of Justice of the European Union (CJEU), the judicial body that oversees the uniform application and interpretation of EU law, has repeatedly underlined that the freedom of expression enshrined in article 11 of the CFREU in particular has the same meaning and scope as the freedom of expression enshrined in article 10 of the ECHR, as interpreted by the case law of the ECtHR.[59] This further substantiates the contention that the EU is no exception to the claim that this monograph, notwithstanding its focus on the human rights system of the Council of Europe, promises to be useful to all jurisdictions that embrace democracy.

55 R St J Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Kluwer Academic Publishers 1993) xi; Erik Voeten, 'Borrowing and Nonborrowing among International Courts' (2010) 39 *Journal of Legal Studies* 547. See, for example, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 American Convention on Human Rights)* Advisory Opinion OC-5/85 (IACtHR, 13 November 1985), para 46; *Konaté v Burkina Faso* App no 004/2013 (ACtHPR, 2 December 2014).

56 Consolidated Version of the Treaty on European Union [2012] OJ C 326/13, art 6(3). See Case C-274/99 P *Bernard Connolly v Commission of the European Communities* [2001] ECLI:EU:C:2001:127, paras 37 and 38.

57 CFREU (n 11), art 52(3). See also Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17.

58 CFREU, art 51(1).

59 Case C-547/14 *Philip Morris Brands SARL and others v The Secretary of State for Health* [2016] ECLI:EU:C:2016:325, para 147; Case C-345/17 *Sergejs Buivids v Datu valsts inspekcija* [2019) ECLI:EU:C:2019:122, para 65; Case C-401/19 *Poland v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:297, para 44; Case C-280/21 *P.I. v Migracijos departamentas prie Lietuvos Respublikos vidaus reikalų ministerijos* [2023] ECLI:EU:C:2023:13, para 23.

1.4 Questions for Consideration

That this monograph considers two main questions has already been intimated. These are 'whether' and 'how' the phenomenon of political disinformation can be regulated in a democratic society without undermining freedom of expression. Without taking away from these questions, it is also important to have a certain degree of conceptual clarity in order to lay a solid foundation for the analysis. At a minimum, we should have a clear conception not only of freedom in general but also of freedom of expression in particular. This would in turn help establish whether at all the law protects as part of freedom of expression the act of communicating political disinformation, whether offline or online.

In all, therefore, this monograph considers five distinct albeit logically connected questions. First, what is freedom in general? Second, what is freedom of expression as a specific type of freedom? Third, does the law protect as part of freedom of expression the act of communicating political disinformation? Fourth, can the state regulate the phenomenon of political disinformation without undermining freedom of expression? Fifth, if so, how can the state regulate the phenomenon of political disinformation without undermining freedom of expression?

1.5 Existing Knowledge and Grey Areas

The letter of the ECHR addresses some of the foregoing questions, at least indirectly. There is also a large volume of relevant case law of the ECtHR and of the former European Commission of Human Rights (ECnHR), which ceased to function in 1998.[60] As the ECtHR has reiterated on many occasions, its judgments serve not only to decide the cases that are brought before it but also to elucidate, safeguard and develop the rules instituted by the ECHR, thereby providing more general guidance on the observance of the commitments undertaken by the states parties thereto.[61] Additionally, there is an ever-growing body of literature on online disinformation in general and online political disinformation in particular. It could therefore be useful to provide an overview of existing legal knowledge and the present state of the art to validate, in the grand scheme of things, the questions that fall for consideration.

60 Protocol no 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby (adopted 11 May 1994, entered into force 1 November 1998).

61 *Ireland v the United Kingdom* App no 5310/71 (ECtHR, 18 January 1978), para 154; *Jeronovičs v Latvia* App no 44898/10 (ECtHR, 5 July 2016), para 109; *Nagmetov v Russia* App no 35589/08 (ECtHR, 30 March 2017), para 64.

1.5.1 Conceptualising Freedom

There has been much talk of late about freedom on the Internet, including about how such freedom contributes to the exercise and enjoyment of fundamental rights.[62] Notably, Freedom House has been publishing an annual report on *Freedom on the Net* since 2009 wherein it ranks countries around the world as 'free', 'partly free' or 'not free'.[63] We have already noted that the institutions of the Council of Europe also see the Internet as a place where people exercise various types of freedom enshrined in the ECHR as fundamental rights. But there has been little clarity thus far as to what exactly freedom is in this context.

Indeed, freedom means different things to different people. It is no wonder then that, for centuries, there has been a lively debate in political philosophy about how freedom should be conceptualised. In *Leviathan*, for example, Thomas Hobbes conceptualises freedom as non-frustration.[64] Much recent philosophical works, however, focus on exploring whether freedom should be understood as non-interference in accordance with the liberal political philosophy of Isaiah Berlin or as non-domination as championed by Quentin Skinner and Philip Pettit in neo-republican political theory.[65] Christian List and Laura Valentini have also more recently put forward a conception of freedom as independence.[66] Each of these conceptions of freedom offers its own analytical and normative insights into the breadth and depth of freedom. There is, however, a dearth of scholarship exploring whether the various types of freedom enshrined in the ECHR and other relevant legal instruments should be conceptualised as non-frustration, as non-interference, as non-domination or as independence.

62 See generally Alec Ross, 'Internet Freedom: Historic Roots and the Road Forward' (2010) 30 *SAIS Review* 3; Hillary Rodham Clinton, 'Internet Freedom and Human Rights' (2012) 28 *Issues in Science and Technology* 45; Madeline Carr, 'Internet Freedom, Human Rights and Power' (2013) 67 *Australian Journal of International Affairs* 621; Tkacheva and others (n 5); Daniel Joyce, 'Internet Freedom and Human Rights' (2015) 26 *EJIL* 493; Shanthi Kalathil, 'Interred with Its Bones: The Death of Internet Freedom' (2015) 12 *ISJLP* 77.

63 Tetyana Lokot and Mariëlle Wijermars, 'The Politics of Internet Freedom Rankings' (2023) 12 *Internet Policy Review* 1.

64 Thomas Hobbes, *Leviathan or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil* (London 1651), ch 21. See also generally Thomas Hobbes, *Philosophicall Rudiments concerning Government and Society or a Dissertation concerning Man in his Severall Habitudes and Respects, as the Member of a Society, First Secular, and Then Sacred* (London 1651); Thomas Hobbes, *The Elements of Law, Natural and Politic* (Ferdinand Tönnies ed, Simpkin, Marshall and Co 1889).

65 Christian List and Laura Valentini, 'Freedom as Independence' (2016) 126 *Ethics* 1043, 1043.

66 Ibid.

The first question that falls for consideration in this monograph aims to fill this apparent scholarship gap. More specifically, the question seeks to provide a conceptual framework for analysing freedom in general. The rationale for seeking such a general conception of freedom, notwithstanding this monograph's focus on the interplay between political disinformation and freedom of expression, has already been intimated. First, at least for the present purpose, freedom of expression cannot be adequately analysed in isolation from other types of freedom, since fundamental rights are interrelated and interdependent. As noted above, freedom of expression and the right to free elections in particular are so interrelated and interdependent that the latter is worthless absent freedom of expression on matters of political significance.

Second, as a corollary to the foregoing, existing case law tends to confirm that the phenomenon of political disinformation does not only directly engage freedom of expression but also potentially affects many other fundamental rights, not least the right to free elections. Although the concept of political disinformation itself continues to suffer from a lack of shared understanding, existing case law suggests that political disinformation as generally understood could detract from electoral freedom by undermining the 'integrity of the electoral process' and 'the reputation of candidates'.[67] Many commentators also claim that political disinformation, as they conceive of it, 'could undermine public confidence in the electoral process and...the ability of voters to participate meaningfully in the electoral process.'[68] It could therefore be useful to construct a general conception of freedom in order to be able to examine these claims from a vantage point.

1.5.2 Conceptualising Freedom of Expression

Recall that paragraph 1 of article 10 of the ECHR provides that freedom of expression includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority. The expression 'without interference' resonates with the Berlinian conception of freedom as non-interference.

[67] See, for example, *Brzeziński v Polan*d (n 24), para 35; *Staniszewski v Poland* (n 24), para 47.

[68] Judge and Korhani (n 44) 240. See also Jacob Rowbottom, 'Lies, Manipulation and Elections – Controlling False Campaign Statements' (2012) 32 *Oxford Journal of Legal Studies* 507, 511–19; Iva Nenadić, 'Unpacking the "European Approach" to Tackling Challenges of Disinformation and Political Manipulation' (2019) 8 *Internet Policy Review* 1, 5–6; Yasmin Dawood, 'Protecting Elections from Disinformation: A Multifaceted Public-Private Approach to Social Media and Democratic Speech' (2020) 16 *Ohio State Technology Law Journal* 639; Tawanna D Lee, 'Combating Fake News with "Reasonable Standards"' (2021) 43 *Hastings Communications and Entertainment Law Journal* 81, 81.

For Pettit, however, freedom of expression should ideally be conceptualised as non-domination.[69] Pettit thus sees as inferior both the Hobbesian conception of freedom as non-frustration and the Berlinian conception as non-interference. Some commentators have also observed, albeit parenthetically only, that articles 8 to 11 of the ECHR 'arguably' echo the republican conception of freedom as non-domination.[70] But others maintain that none of the competing negative philosophical conceptions of freedom is superior to the others.[71] It therefore remains debatable whether article 10 of the ECHR protects freedom of expression as non-frustration, as non-interference, as non-domination or indeed as independence.

The second question that falls for consideration in this monograph aims to construct a clear conception of freedom of expression as a specific type of freedom. By drawing upon relevant insights provided by a specific philosophical conception of freedom, the analysis in this connection contributes to the understanding of the meaning of freedom of expression as a fundamental right protected by law. This also helps lay a solid foundation for conducting the analysis on the interplay between the phenomenon of political disinformation and freedom of expression.

1.5.3 Political Disinformation and Freedom of Expression

Recall, again, that article 10 of the ECHR protects freedom to receive information and freedom to impart information as specific elements of freedom of expression. Article 10 does not, however, specify the epistemic quality of the information that one may impart to another. A question that arises in turn is whether at all article 10 of the ECHR or indeed any corresponding legal provision at national or international level protects as part of freedom of expression the act of communicating political disinformation. To address this question, we must be able to explain in the first place what is meant by political disinformation as a specific category of information. Only then can we credibly speak about whether or not the dissemination of such disinformation, whether offline or online, is protected as part of freedom of expression.

69 Philip Pettit, 'Two Concepts of Free Speech' in Jennifer Lackey (ed), *Academic Freedom* (Oxford University Press 2018). See also Philip Pettit, 'Enfranchising Silence: An Argument for Freedom of Speech' in Tom Campbell and Wojciech Sadurski (eds), *Freedom of Communication* (Dartmouth 1994), reprinted in Philip Pettit, *Rules, Reasons, and Norms: Selected Essays* (Oxford University Press 2002).

70 Eoin Daly and Tom Hickey, *The Political Theory of the Irish Constitution: Republicanism and the Basic Law* (Manchester University Press 2015) 71; Eoin Daly, 'Freedom as Non-Domination in the Jurisprudence of Constitutional Rights' (2015) 28 *Canadian Journal of Law & Jurisprudence* 289, 302.

71 See, for example, Alexei Gloukhov, 'Non-Priority of the Freedom Principles: Non-Frustration, Non-Interference, Non-Domination' (2016) 15 *Review of Contemporary Philosophy* 108.

We have already noted in this connection that the case law of the ECtHR draws a distinction between different categories of expression and affords the highest level of protection to political expression.[72] Some have, however, observed that the ECtHR does not follow this categorisation of expression with consistency.[73] Importantly, existing scholarship suggests that there is no neat line between political expression and other categories of expression.[74] Moreover, there is no single definition of the term 'disinformation' itself; neither in literature nor in existing regulatory measures. What can be garnered from seminal policy documents in Europe is that disinformation is generally understood as false or misleading information that is deliberately created and/or disseminated as such and that may cause harm.[75] But the neologism 'fake news' is also widely used to describe such information and other related types of information considered undesirable.[76] Even the ECtHR itself has used the term 'fake news' in at least one of its judgments to refer to false information that the state may legitimately regulate to avert the distortion of election results.[77] This does not appear to help matters.

As the definitional uncertainty lingers on, the sustained association of disinformation with false information in the ongoing policy discourse raises the question as to whether the freedom to impart information enshrined in article 10 of the ECHR includes freedom to impart disinformation. The case law of the ECtHR recognises that there are 'duties and responsibilities' inherent in the exercise of

72 *Wingrove v the United Kingdom* (n 30), para 58; *Mouvement raëlien suisse v Switzerland* (n 30), para 61. See also other cases cited in ns 29 and 30 above and accompanying text.

73 See. for example, Lorna Woods, 'Digital Freedom of Expression in the EU' in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar 2017) 400.

74 TM Scanlon, 'Freedom of Expression and Categories of Expression' (1979) 40 *University of Pittsburgh Law Review* 519, reprinted in TM Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (Cambridge University Press 2003); Richard A Posner, 'Free Speech in an Economic Perspective' (1986) 20 *Suffolk University Law Review* 1, 10; Christopher Phiri, 'Criminal Defamation Put to the Test: A Law and Economics Perspective' (2021) 9 *University of Baltimore Journal of Media Law and Ethics* 49, 61.

75 European Commission, 'Tackling Online Disinformation' (n 32) 3–4; European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Action Plan Against Disinformation' (n 32) 1; European Commission, 'European Democracy Action Plan' (n 32) 18; Recommendation CM/Rec(2022)11 (n 2), appendix, para 4; Committee of Ministers of the Council of Europe, 'Recommendation CM/Rec(2022)12 of the Committee of Ministers to Member States on Electoral Communication and Media Coverage of Election Campaigns' (adopted at the 1431st meeting of the Ministers' Deputies, 6 April 2022) (Recommendation CM/Rec(2022)12), appendix, para 7.

76 Claire Wardle and Hossein Derakhshan, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making* (Council of Europe Publishing 2017) 20; High Level Expert Group on Fake News and Online Disinformation (n 4) 10; Doublet (n 31) 5.

77 *Brzeziński v Poland* (n 24), para 35.

freedom of expression in keeping with the actual wording of paragraph 2 of article 10. With respect to the media in particular, these duties and responsibilities require inter alia that journalists should act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.[78] Significantly, the ECtHR considers that 'the same principle must apply to others who engage in public debate.'[79] This suggests that everyone who engages in public debate, including so-called 'citizen journalists',[80] has duties and responsibilities to provide accurate and reliable information to the public.

But any such duties and responsibilities are not readily reconcilable, if at all, with the ECtHR's other pronouncements. To begin with, the ECtHR considers that a person 'clearly involved in a public debate on an important issue is required to fulfil a no more demanding standard than that of due diligence as in such circumstances an obligation to prove the factual statements may deprive him or her of the protection afforded by Article 10' of the ECHR.[81] In the ECtHR's view, a legal requirement to prove the truth of a value judgment over and above a proportionate requirement to prove that there exists a sufficient factual basis for an impugned statement, in any event, infringes freedom of opinion, which is an essential part of the freedom of

78 *Fressoz and Roire v France* App no 29183/95 (ECtHR [GC], 21 January 1999), para 54; *Bladet Tromsø and Stensaas v Norway* App no 21980/93 (ECtHR [GC], 20 May 1999), para 65; *McVicar v the United Kingdom* App no 46311/99 (ECtHR, 7 May 2002), para 73; *Pedersen and Baadsgaard v Denmark* App no 49017/99 (ECtHR [GC], 17 December 2004), para 78; *Steel and Morris v the United Kingdom* App no 68416/01 (ECtHR, 15 February 2005), para 90; *Stoll v Switzerland* App no 69698/01 (ECtHR [GC], 10 December 2007), para 103; *Alithia Publishing Company Ltd and Constantinides v Cyprus* App no 17550/03 (ECtHR, 22 May 2008), para 65; *Kasabova v Bulgaria* App no 22385/03 (ECtHR, 19 April 2011), para 63; *Axel Springer AG v Germany* App no 39954/08 (ECtHR [GC], 7 February 2012), para 93; *Błaja News Sp. z o. o. v Poland* App no 59545/10 (ECtHR, 26 November 2013), para 51; *Armellini and others v Austria* App no 14134/07 (ECtHR, 16 April 2015), para 41; *Pentikäinen v Finland* App no 11882/10 (ECtHR [GC], 20 October 2015), para 90; *Bédat v Switzerland* App no 56925/08 (ECtHR [GC], 29 March 2016), para 50; *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECtHR [GC], 8 November 2016), para 159; *Orlovskaya Iskra v Russia* (n 22), para 109; *NIT S.R.L. v the Republic of Moldova* App no 28470/12 (ECtHR [GC], 5 April 2022), para 180.

79 *Steel and Morris v the United Kingdom* (n 78), para 90; *Marcinkevičius v Lithuania* App no 24919/20 (ECtHR, 15 November 2022), para 91. See also *Braun v Poland* App no 30162/10 (ECtHR, 4 November 2014), para 47; *Magyar Helsinki Bizottság v Hungary* (n 78), para 159; *Wojczuk v Poland* App no 52969/13 (ECtHR, 9 December 2021), paras 102–03.

80 See *Cengiz and others v Turkey* (n 14), para 52.

81 *Monica Macovei v Romania* App no 53028/14 (ECtHR, 28 July 2020), para 75; *Wojczuk v Poland* (n 79), para 74.

expression enshrined in article 10.[82] But the ECtHR itself also acknowledges that it may be difficult in practice to distinguish between assertions of fact and value judgments.[83] The ECtHR further maintains that article 10 'as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful.'[84] Furthermore, the ECtHR opines that 'a certain degree of hyperbole and exaggeration is to be tolerated, and even expected.'[85] When considered together, these pronouncements make it rather difficult to ascertain how far the duties and responsibilities envisaged in paragraph 2 of article 10 may go.

The identity of relevant communicators or so-called 'speakers' that must bear any duties and responsibilities to provide accurate and reliable information in cyberspace is also another grey area.[86] Do foreign state actors and other non-citizen purveyors of disinformation living abroad count as communicators who are entitled to enjoy the freedom of expression that the law guarantees?[87] What about pseudonymous and anonymous communicators (for example, those who use bots to disseminate disinformation)? And what about operators of online platforms such as search engines, news aggregation services, video-sharing services and social media? Granted, article 10 of the ECHR states that freedom of expression applies regardless of frontiers.[88] Beyond that, however, the text of the ECHR is silent on these topical

82 *Lingens v Austria* (n 30), para 46; *Oberschlick v Austria (no 1)* App no 11662/85 (ECtHR, 23 May 1991), para 63; *Dalban v Romania* App no 28114/95 (ECtHR [GC], 28 September 1999), para 49; *Morice v France* App no 29369/10 (ECtHR [GC], 23 April 2015), para 126; *Mika v Greece* App no 10347/10 (ECtHR, 19 December 2013), para 31; *Monica Macovei v Romania* (n 81), para 75; *Stancu and others v Romania* App no 22953/16 (ECtHR, 18 October 2022), para 119; *Khural and Zeynalov v Azerbaijan (no 1)* App no 55069/11 (ECtHR, 6 October 2022), para 43; *Khural and Zeynalov v Azerbaijan (no 2)* App no 383/12 (ECtHR, 19 January 2023), para 47. See further *De Haes and Gijsels v Belgium* App no 19983/92 (ECtHR, 24 February 1997), para 42; *Lewandowska-Malec v Poland* App no 39660/07 (ECtHR, 18 September 2012), paras 63 and 65.

83 *Scharsach and News Verlagsgesellschaft mbH v Austria* App no 39394/98 (ECtHR, 13 November 2003), para 40; *Wojczuk v Poland* (n 79), para 73. See, for example, *Pedersen and Baadsgaard v Denmark* (n 78), para 76.

84 *Salov v Ukraine* (n 30), para 113.

85 *Steel and Morris v the United Kingdom* (n 78), para 90.

86 See Tim Wu, 'Machine Speech' (2013) 161 *University of Pennsylvania Law Review* 1495; James Grimmelmann, 'Speech Engines' (2014) 98 *Minnesota Law Review* 868; Neil M Richards, 'Why Data Privacy Law is (Mostly) Constitutional' (2015) 56 *William & Mary Law Review* 1501, 1524–28; Leslie Kendrick, 'Are Speech Rights for Speakers?' (2017) 103 *Virginia Law Review* 1767, 1801–02.

87 With respect to concerns about foreign state actors, see generally Kathleen Hall Jamieson, *Cyberwar: How Russian Hackers and Trolls Helped Elect a President — What We Don't, Can't, and Do Know* (Oxford University Press 2018); Tenove (n 39); McKay and Tenove (n 39); Judge and Korhani (n 44).

88 See *Ahmet Yildirim v Turkey* (n 15), para 67; *Cengiz and others v Turkey* (n 14), para 65. See also *Ekin Association v France* App no 39288/98 (ECtHR, 17 July 2001), para 62.

issues. Even existing case law bearing upon the legal responsibilities of online platform operators with respect to user-generated content does not appear to provide guidance with obvious consistency.[89]

The third question that falls for consideration in this monograph aims to shed some light on whether and, if so, the extent to which the act of imparting political disinformation falls within the scope of freedom of expression properly understood. Importantly, the conception of freedom that the monograph adopts helps identify the sort of information that could normatively fall outside the scope of freedom of expression and thus that may be regarded as 'unprotected' political disinformation. The monograph also draws upon that conception of freedom to provide some normative insights into how those who may be held to account for disseminating such disinformation could be identified.

1.5.4 The Case for Regulating Political Disinformation

The law is admissive of regulatory restrictions on the exercise of options related to all the three types of freedom constituting political space. Paragraphs 2 of both articles 10 and 11 of the ECHR in particular explicitly empower the state to impose limits on the scope of freedom of expression and freedom of assembly and association, respectively. The relevant proviso is that any such restriction must be prescribed by law, pursue at least one of the legitimate aims enumerated in those paragraphs and be necessary in a democratic society for the attainment of the legitimate aim in view.

P1–3 to the ECHR on the other hand does not contain an explicit limitation clause. It simply provides that the contracting states shall 'hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.' Even so, the former ECnHR and the ECtHR have clarified that the right to free elections implies two individual rights, namely the right to vote and the right to stand for election, both of which are subject to 'implied' limitations.[90] Any restriction on these rights must

[89] Compare and contrast the holdings in the following cases. *Delfi AS v Estonia* (n 13); *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016); *Pihl v Sweden* App no 74742/14 (ECtHR [dec], 9 March 2017); *Magyar Jeti Zrt v Hungary* (n 14); *Jezior v Poland* App no 31955/11 (ECtHR, 4 June 2020).

[90] *W, X, Y and Z v Belgium* Apps nos 6745-6746/76 (ECnHR, 30 May 1975); *Mathieu-Mohin and Clerfayt v Belgium* (n 22), paras 48–51; *Ždanoka v Latvia* App no 58278/00 (ECtHR [GC] 16 March 2006), para 102; *Kalda v Estonia (no 2)* App no 14581/20 (ECtHR, 6 December 2022), para 37.

similarly be prescribed by law, pursue a legitimate aim and be justifiable in a democratic society.[91]

It should be noted, however, that the ECtHR considers that the concept of 'implied limitations' under P1–3 allows the state wider discretion, or what the ECtHR would describe as a wider 'margin of appreciation',[92] to impose restrictions on electoral rights than do the stricter tenor of articles 8 to 11 of the ECHR. In examining compliance with P1–3, therefore, the ECtHR focuses 'mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people.'[93] In effect, the right to free elections enjoys less protection than other political rights enshrined in the ECHR, particularly those set forth in articles 8 to 11 inclusive. The rationale for this differentiation is, however, something of a mystery. As already noted, the ECtHR itself has repeatedly stated in its case law that the right to free elections and freedom of expression, particularly freedom of political debate, do not only constitute the bedrock of a democratic system but also operate to reinforce each other. One would therefore naturally expect that these rights would enjoy the same degree of protection, not least in a democratic society.[94]

The doctrine of the margin of appreciation, in any event, engenders a great deal of legal uncertainty.[95] It should therefore come as no surprise that the UN Human Rights Committee (UNHRC) has rejected this doctrine.[96] However, even leaving aside this doctrine, the principle of proportionality also creates room for judicial speculation as it is up to individual judges to determine what they 'think' is proportionate in a particular case.[97] Quite apart from the general requirements that restrictions should be law-based and non-arbitrary, therefore, it is difficult to ascertain how far the state can go in imposing restrictions on acts of expression

91 *Mathieu-Mohin and Clerfayt v Belgium* (n 22), para 52; *Melnychenko v Ukraine* App no 17707/02 (ECtHR, 19 October 2004), para 54.

92 See also *Vo v France* App no 53924/00 (ECtHR [GC], 8 July 2004), para 82, using the expression 'considerable discretion'.

93 *Ždanoka v Latvia* (n 90), para 115. See also *Kalda v Estonia (no 2)* (n 90), para 39.

94 See also generally Alain Zysset, 'Freedom of Expression, the Right to Vote, and Proportionality at the European Court of Human Rights: An Internal Critique' (2019) 17 *International Journal of Constitutional Law* 230.

95 For a detailed examination of this doctrine, see generally George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705.

96 *Ilmari Länsman et al v Finland* Comm no 511/1992 (UNHRC, 26 October 1994), para 9.4. See also United Nations Human Rights Committee, 'General Comment no 34, Article 19: Freedoms of Opinion and Expression' (adopted at the 102nd session, 11–29 July 2011), para 36.

97 See also Gehan Gunatilleke, 'Justifying Limitations on the Freedom of Expression' (2021) 22 *Human Rights Review* 91, 94–100; Grégoire Webber, 'Proportionality and Limitations on Freedom of Speech' in Adrienne Stone and Frederick Schauer (eds), *The Oxford Handbook of Freedom of Speech* (Oxford University Press 2021) 179–91.

without falling foul of the provisions of the ECHR. This is all the more so with respect to restrictions on political communication, since there is little scope for restrictions on the free flow of political information. It thus remains largely unclear whether the state can regulate the phenomenon of political disinformation without taking away from freedom of expression.

Be that as it may, it would appear that all fundamental rights, including freedom of expression itself, demand more than just freedom from interference by public authority.[98] Indeed, in addition to paragraph 2 of article 10 of the ECHR which explicitly empowers the state to impose restrictions on acts of expression with a view to (among other aims) protecting the 'rights of others', member states of the Council of Europe have a general positive obligation under article 1 of the ECHR to 'secure to everyone within their jurisdiction the rights and freedoms' enshrined in the ECHR. But existing case law is rather complex and does not appear to provide concrete guidance as to what exactly may warrant regulatory interference by public authority as a matter of obligation.[99] The ECtHR itself considers that the boundaries between the state's positive and negative obligations under the ECHR 'do not lend themselves to precise definition' and thus must be determined on a case-by-case basis.[100]

Whether the state can legitimately claim to have a positive duty to regulate the phenomenon of political disinformation even in the face of its negative duty (that is, the duty of non-interference) is therefore still an open question. In any event, insofar as emerging regulatory measures continue to be informed by ambiguous and empirically deficient narratives, such as the predominant claim that disinformation threatens democracy, the case for regulation remains weak. Fears that such measures could undermine freedom of expression and thus democracy itself are also reinforced. It could therefore be worthwhile to explore other possibilities of circumscribing and narrowly tailoring any regulatory measures, by pursuing more

98 Tarlach McGonagle, 'Positive Obligations Concerning Freedom of Expression: Mere Potential or Real Power?' in Onur Andreotti (ed), *Journalism at Risk: Threats, Challenges and Perspectives* (Council of Europe Publishing 2015); Aleksandra Kuczerawy, 'The Power of Positive Thinking: Intermediary Liability and the Effective Enjoyment of the Right to Freedom of Expression' (2017) 8 *JIPITEC* 226, 229–31; Jacob Rowbottom, 'Positive Protection for Speech and Substantive Political Equality' in Andrew T Kenyon and Andrew Scott (eds), *Positive Free Speech: Rationales, Methods and Implications* (Hart Publishing 2020).

99 See generally Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004); Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2012); Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Cambridge University Press 2017).

100 *Verein Gegen Tierfabriken Schweiz (VgT) v Switzerland (no 2)* App no 32772/02 (ECtHR [GC], 30 June 2009), para 82; *Mouvement raëlien suisse v Switzerland* (n 30), para 50.

specific objectives. Consider the following, for example.

First, there is little clarity as to whether at all the dissemination of political disinformation, whether offline or online, can be reconciled with the recipient's freedom to receive information as a specific element of freedom of expression. Apart from the right of access to information held by public authorities, which is also subject to certain conditions, the ECtHR considers that there is no independent right under article 10 of the ECHR to receive information absent a willing communicator.[101] In its view, freedom to receive information does not generally impose a positive obligation but rather prohibits the state from restricting a person from receiving information which others may be or are willing to impart to him or her.[102] Existing case law does not, however, appear to provide clear guidance as to whether it would be justifiable in a democratic society to impose restrictions on the dissemination of political disinformation in order to secure freedom to receive information as such.

Second, the ECtHR considers that freedom of expression and the right to free elections may come into conflict, particularly in the period preceding or during an election. It thus opines that it may be necessary to impose restrictions upon certain acts of expression with a view to securing the 'free expression of the opinion of the people in the choice of the legislature' pursuant to P1–3.[103] As noted above, the ECtHR is specifically receptive to restrictions aimed at protecting 'the integrity of the electoral process' and 'the reputation of candidates' in political elections. But recall that the ECtHR also considers that freedom of expression is one of the preconditions for free elections and that it is particularly important in the context of elections that all kinds of opinions and information circulate freely.[104] Although P1–3 generally applies only to elections to 'the legislature',[105] this principle applies with equal force to national and local elections insofar as it relates to freedom of expression.[106] Given that 'all kinds' of information may include 'false' information according to the ECtHR's own case law, it remains debatable whether at all the state

101 Existing case law suggests that there is also a 'negative right' not to express oneself. See *Gillberg v Sweden* App no 41723/06 (ECtHR [GC], 3 April 2012), para 86; *Wanner v Germany* App no 26892/12 (ECtHR, 23 October 2018), paras 38 and 44.

102 *Magyar Helsinki Bizottság v Hungary* (n 78), para 156.

103 *Bowman v the United Kingdom* (n 22), para 43.

104 Ibid, para 42.

105 *Boškoski v the former Yugoslav Republic of Macedonia* App no 11676/04 (ECtHR [dec], 2 September 2004); *Brito Da Silva Guerra and Sousa Magno v Portugal* Apps nos 26712/06 and 26720/06 (ECtHR [dec], 17 June 2008); *Xuereb v Malta* App no 52492/99 (ECtHR [dec], 15 June 2000); *Salleras Llinares v Spain* App no 52226/99 (ECtHR [dec], 12 October 2000); *Malarde v France* App no 46813/99 (ECtHR [dec], 5 September 2000).

106 *Staniszewski v Poland* (n 24), para 47; *Kwiecień v Poland* App no 51744/99 (ECtHR, 9 January 2007), para 48.

can regulate the phenomenon of political disinformation in order to secure the right to free elections without undermining freedom of expression. It is also unclear how the ECtHR understands the concept of 'the integrity of the electoral process' and how the same fits into the grounds enumerated in paragraph 2 of article 10 of the ECHR upon which the state could impose restrictions on certain acts of expression.

The fourth question that falls for consideration in this monograph aims to shed some light on these grey areas. More specifically, the monograph considers whether it would be necessary and thus justifiable in a democratic society to regulate the phenomenon of political disinformation in order to secure the exercise and enjoyment of specific types of freedom protected as fundamental rights, not least freedom to receive information and electoral freedom. The monograph draws upon the philosophical conception of freedom that it adopts to guide the analysis in this connection.

1.5.5 Policy Implications

Existing regulatory approaches to disinformation can be divided into two broad categories. Jack Balkin describes these as the 'old school' and the 'new school' regulatory approaches.[107] The old school, or traditional, regulatory approach targets publishers or communicators of information. There appears to be a growing consensus that this approach alone may not be effective in tackling the phenomenon of online disinformation. This consensus can be partly attributed to the fact that purveyors of online disinformation may be too many, anonymous, pseudonymous and/or overseas, and tend to publish so quickly that any attempts at prior restraint may prove futile.[108] Additionally, many commentators believe that regulatory measures that target individual online publishers or communicators are likely to be ineffective because incumbent politicians may be purveyors or beneficiaries of political disinformation and thus may use their political influence to prevent the effective implementation of regulatory measures, or may use any regulatory measures to gag their political opponents, journalists and even dissentient citizens.[109]

Under the new school regulatory approach on the other hand public regulators target online platform operators. They do so either by regulating online platform operators directly or by coercing or co-opting them into regulating disinformation on their behalf. This regulatory approach may also take the form of what is now better known as 'co-regulation' or 'regulated self-regulation', that is, industry self-

[107] Jack M Balkin, 'Old-School/New-School Speech Regulation' (2014) 127 *Harvard Law Review* 2296.

[108] Balkin, 'Old-School/New-School' (n 107) 2338; Jack M Balkin, 'Free Speech is a Triangle' (2018) 118 *Columbia Law Review* 2011, 2020.

[109] Tenove (n 39) 519. See also generally Pielemeier (n 44); Epstein (n 44).

regulation with a mandate and/or some oversight by the state or other public regulator.[110] A typical example of such a new school regulatory approach is the one that the EU has adopted. The EU Code of Practice on Disinformation, which was first adopted in 2018 by operators of major online platforms and players in the advertising industry and subsequently revised and 'strengthened' in 2022 at the urging of EU authorities,[111] which even threatened the signatories with more stringent regulation if their expectations were not met,[112] is not in reality a self-regulatory instrument.[113] Indeed, the Code of Practice on Disinformation is now an integral part of a broader EU regulatory framework, which includes the DSA (and, if and when adopted, the Regulation on the Transparency and Targeting of Political Advertising).[114]

The DSA in particular requires online platform operators to remove alleged illegal content upon receiving notice thereof or else run the risk of being held liable.[115] The concept of 'illegal content' as defined by the DSA is so broad that it appears to capture content which may be properly characterised as disinformation, however disinformation itself may be defined.[116] Additionally, the DSA requires online platform operators to regulate disinformation on their own initiative. It does so in particular by imposing what it terms 'due diligence' obligations on operators of 'very large online platforms' (that is, 'online platforms and online search engines which have a number of average monthly active recipients of the service in the [EU] equal to or higher than 45 million'[117]) to assess and mitigate systematic risks, including both actual and foreseeable risks that may arise not only from the dissemination of illegal content as such but also disinformation in general and other harmful content.[118] In selecting the appropriate mitigation measures, online platform operators 'can' take into account 'industry best practices, including as established through self-regulatory cooperation, such as codes of conduct, and should take into

110 Recommendation CM/Rec(2022)11 (n 2), appendix, para 4; Recommendation CM/Rec(2022)12 (n 75), appendix, para 7.

111 Strengthened Code of Practice on Disinformation 2022.

112 European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Action Plan Against Disinformation' (n 32) 9; European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Report on the implementation of the Action Plan Against Disinformation' (Communication) JOIN/2019/12 final, 5; European Commission, 'European Commission Guidance on Strengthening the Code of Practice on Disinformation' (Communication) COM(2021) 262 final.

113 Tenove (n 39) 530.

114 DSA, art 45 and recitals 89, 104 and 106. See also Strengthened Code of Practice on Disinformation 2022, preamble, paras (h)–(j) and part III.

115 DSA, arts 6, 8 and 16.

116 Ibid, art 3(h) and recital 12. See also Fathaigh, Helberger and Appelman (n 31) 7–11.

117 DSA, art 33(1).

118 Ibid, arts 34 and 35, and recitals 2, 9 and 80–83.

account the guidelines from the [European] Commission.'[119]

The DSA specifically refers to the 2022 edition of the Code of Practice on Disinformation as one of the so-called 'self-regulatory' instruments already established at the EU level whose legal basis is now the DSA itself.[120] Notably, although the mere fact of participating in and implementing the Code of Practice on Disinformation may not amount to compliance, a refusal without 'proper explanation' by an online platform operator of the European Commission's invitation to participate in the application of the code could be taken into consideration when determining whether an online platform operator under investigation has infringed any of the due diligence obligations set forth in the DSA.[121] Moreover, at least once a year, operators of large online platforms shall be subject, at their own expense, to independent audits with a view to assessing their compliance, not only with the due diligence obligations set forth in the DSA but also with any commitments undertaken pursuant to the Code of Practice on Disinformation.[122] This serves only to reaffirm that the Code of Practice on Disinformation is not a self-regulatory instrument properly so called. Participation by operators of 'very' large online platforms is not voluntary but coerced, since there are direct legal consequences that may attend a failure to participate in the code.

Although the new school regulatory approach, particularly the 'delegated' or 'private' censorship model adopted by the EU, appears to have many supporters,[123] the dangers inherent in it are rather obvious. First, in attempting to satisfy the demands by public authorities, online platform operators may engage in collateral censorship,[124] otherwise known as censorship by proxy.[125] When the state or any other public regulator imposes a legal obligation on online platform operators to make judgments about what user-generated content should be regarded as

[119] Ibid, recital 89.
[120] Ibid, art 45 and recital 106.
[121] Ibid, recital 104,
[122] Ibid, art 37 and recitals 92–93.
[123] See, for example, Paul-Jasper Dittrich, 'Tackling the Spread of Disinformation: Why a Co-Regulatory Approach is the Right Way Forward for the EU' (Bertelsmann Stiftung Policy Paper, 12 December 2019); Chris Marsden, Trisha Meyer and Ian Brown, 'Platform Values and Democratic Elections: How can the Law Regulate Digital Disinformation?' (2020) 36 *Computer Law & Security Review* 105373; Flavia Durach, Alina Bârgăoanu and Cătălina Nastasiu, 'Tackling Disinformation: EU Regulation of the Digital Space' (2020) 20 *Romanian Journal of European Affairs* 5; Mahyuddin Daud and Ida Madieha Abd Ghani Azmi, 'Digital Disinformation and the Need for Internet Co-Regulation in Malaysia' (2021) 29 *Pertanika Journal of Social Science & Humanities* 169.
[124] Michael I Meyerson, 'Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media' (1995) 71 *Notre Dame Law Review* 79, 118.
[125] Seth F Kreimer, 'Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link' (2006) 155 *University of Pennsylvania Law Review* 11, 16.

disinformation with a view to blocking or otherwise interfering with the circulation of such content, whether the same is considered illegal or not, online platform operators would naturally err on the side of caution.[126] They would thus block or otherwise interfere with user-generated content, including lawful and socially valuable content, in order to avoid legal liability. Second, new school regulation gives rise to the related problem of prior censorship, otherwise known as prior restraint on publication.[127] This occurs when online platform operators, using company functionaries or artificial intelligence (AI) algorithms, block the publication of certain content or remove it momentarily following publication, before the target audience accesses the content.

It is also worth recalling that online platform operators tend to 'privately' punish those who post content which they find objectionable even in the absence of any regulatory obligations to interfere with user-generated content. Indeed, it is an open secret that online platform operators engage in all manner of private censorship in the name of exercising their own rights, not only by interfering with user-generated content as such but also by deplatforming (that is, banning or excluding from a platform) some of the users they accuse of posting objectionable content.[128] Such private censorship, which is euphemistically described as 'content moderation', is in fact not a mere ancillary aspect of what online platform operators do.[129] Rather, it constitutes the very means by which online platform operators protect and advance their own interests (economic or otherwise). The new school regulatory approach could thus serve only to exacerbate the pre-existing problems of both digital censorship and digital prior restraint.

Interestingly, unlike other human rights instruments that explicitly prohibit prior

[126] Kreimer (n 125) 28–29; Felix T Wu, 'Collateral Censorship and the Limits of Intermediary Immunity' (2011) 87 *Notre Dame Law Review* 293, 300–01; Balkin, 'Old-School/New-School'(n 107) 2309; Jack M Balkin, 'Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation' (2018) 51 *University of California Davis Law Review* 1149; 1176; Balkin, 'Free Speech is a Triangle' (n 108) 2016–17.

[127] Balkin, 'Free Speech in the Algorithmic Society' (n 126) 1177–79; Balkin, 'Old-School/New-School' (n 107) 2299, 2309–10 and 2318–20; Balkin, 'Free Speech is a Triangle' (n 108) 2017–19.

[128] See generally Giovanni De Gregorio, 'From Constitutional Freedoms to the Power of the Platforms: Protecting Fundamental Rights Online in the Algorithmic Society' (2019) 11 *European Journal of Legal Studies* 65; Giovanni De Gregorio, 'Democratising Online Content Moderation: A Constitutional Framework' (2020) 36 *Computer Law & Security Review* 105374; Giovanni De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society* (Cambridge University Press 2022); Andras Koltay, 'The Protection of Freedom of Expression from Social Media Platforms' (2022) 73 *Mercer Law Review* 523.

[129] Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (Yale University Press 2018) 21.

censorship,[130] article 10 of the ECHR does not as such prohibit the imposition of prior restraint on publication. The ECtHR nonetheless considers that the dangers inherent in such restraint are such that they call for 'the most careful scrutiny' by the court.[131] In any case, it seems obvious that the state cannot effectively regulate the phenomenon of political disinformation unless by somehow enlisting the 'help' of online platform operators. But how, if at all, the state can do so without promoting collateral and prior censorship of user-generated information content on the Internet is still an open question.

The fifth and last question that falls for consideration in this monograph aims to confront the foregoing misgivings about both the old school and the new school regulatory approaches to the phenomenon of political disinformation. Importantly, the monograph draws upon the normative insights offered by the philosophical conception of freedom that it constructs to scrutinise the compatibility of these regulatory approaches with freedom of expression. The monograph thus provides its own policy insights into how, if at all, the phenomenon of political disinformation can be regulated in a democratic society whilst preserving freedom of expression.

1.6 Outline of the Argument

It should now be obvious from the foregoing discussion that this monograph adopts an interdisciplinary approach to the problem under consideration, blending the fields of human rights law and political philosophy. The monograph thus builds primarily upon the relevant sources of law within the legal framework of the human rights system of the Council of Europe. It relies mainly on primary sources, including relevant provisions of the ECHR and of relevant protocols thereto, and the case law of the ECtHR and the former ECnHR interpreting those provisions. As already intimated above, recourse to sources from other notable jurisdictions is had only for the purpose of buttressing the analysis or otherwise confronting some major discrepancies in relevant international standards. The monograph also draws some inspiration from existing secondary sources such as policy documents and scholarly works bearing upon the questions that fall for consideration, as and when deemed necessary. It particularly relies heavily on cross-disciplinary works from the field of political philosophy for both analytical and normative insights. This interdisciplinary

[130] See, notably, ACHR (n 11), art 13(2).

[131] *Observer and Guardian v the United Kingdom* (n 26), para 60; *The Sunday Times v the United Kingdom (no 2)* App no 13166/87 (ECtHR, 26 November 1991), para 51; *Association Ekin v France* App no 39288/98 (ECtHR, 17 July 2001), para 56; *RTVB v Belgium* App no 50084/06 (ECtHR, 29 March 2011), para 105; *Anatoliy Yeremenko v Ukraine* App no 22287/08 (ECtHR, 15 September 2022), para 55. See also *Bodalev v Russia* App no 67200/12 (ECtHR, 6 September 2022), para 103.

approach should come as no surprise. It is a truism that fundamental rights are both inspired by political philosophy and interpreted in the light of philosophical ideas.[132]

Naturally, the chapters that follow are organised sequentially according to the questions that fall for consideration. Each chapter necessarily builds upon the chapter that precedes it. All the chapters are thus logically connected. Nevertheless, bearing in mind that not everyone may have the time or the interest to read the whole volume (even though doing so is imperative if one is to fully appreciate how the argument develops), a deliberate attempt is made to present each chapter in such a way that the reader can follow the argument even without reading the preceding chapter or chapters, as appropriate. Each chapter thus occasionally echoes some of the pieces of information provided in the preceding chapter or chapters, as appropriate.

Chapter 2 begins to develop a conceptual framework for the exploration of the regulatory conundrum in view. The chapter uses existing axiomatic legal knowledge to test the plausibility of different philosophical conceptions of freedom on a reflective equilibrium with a view to constructing a conception that would provide the most plausible understanding of freedom from a legal standpoint.[133] More specifically, the chapter examines four main conceptions of freedom that figure in political philosophy, namely freedom as non-frustration, freedom as non-interference, freedom as non-domination and freedom as independence. It tests the plausibility of each of these conceptions of freedom in turn using as a touchstone some axiomatic common attributes of the three types of archetypical political freedom constituting political space, namely freedom of expression, freedom of assembly and association, and electoral freedom. Subject to some notable modifications, Pettit's account of the republican conception of freedom as non-domination emerges as the most plausible conception of freedom. The chapter thus formulates a modified account of the republican conception of freedom. It conceptualises freedom as the entitlement or right to do or otherwise enjoy whatever the law permits in accordance with the principle of equal rights.

Chapter 3 narrows the focus to freedom of expression as a specific type of freedom. The chapter builds upon the conception of freedom constructed in chapter 2 to shed some light, at a more granular level, on what freedom of expression is. Paying due regard to the relevant law, this enables the chapter to construct its own republican conception of freedom of expression. It conceptualises freedom of expression as consisting broadly in freedom of thought, freedom to receive information and freedom to impart information. The subsequent chapters use this conception as a normative benchmark to explore the interplay between the phenomenon of political disinformation and freedom of expression and, in turn, to

[132] Daly and Hickey (n 70) 55.

[133] For details on reflective equilibrium as a methodological approach, see John Rawls, *A Theory of Justice* (Belknap Press of Harvard University Press 1971).

establish whether and how the state can regulate the phenomenon of political disinformation in a democratic society without undermining freedom of expression.

Chapter 4 puts to the test the scope of the freedom of expression constructed in chapter 3. It considers whether the act of communicating political disinformation in particular falls within the ambit of that freedom. To this end, the chapter begins by conceptualising disinformation in general and political disinformation in particular. It conceptualises disinformation as misleading information that is communicated with intent to mislead and that may cause harm. By extrapolation, the chapter conceptualises political disinformation as misleading information relating to a matter of public interest that is communicated with intent to mislead the public and that may cause harm. The chapter then proceeds to consider whether the act of communicating political disinformation thus conceptualised falls within the ambit of freedom of expression. The analysis of the relevant law in the light of the normative insights provided by the principle of equal rights that this monograph adopts suggests that freedom of expression as conceptualised in chapter 3 cannot possibly include a legal right to communicate political disinformation.

Chapter 5 considers whether, in any event, the state can regulate the phenomenon of political disinformation without undermining freedom of expression. The chapter focuses primarily on the construction of paragraph 2 of article 10 of the ECHR, which permits the regulation of expressive activity subject to certain conditions. More specifically, the chapter considers whether, in keeping with the principle of equal rights, any need to protect specific fundamental rights, such as freedom to receive information under paragraph 1 of article 10 of the ECHR and the right to free elections under P1–3, could justify the regulation of the phenomenon of political disinformation under paragraph 2 of article 10. The analysis of the relevant law in the light of the principle of equal rights suggests that the state can, and has a duty to, regulate the phenomenon of political disinformation in a holistic manner and without necessarily taking away from freedom of expression.

Chapter 6 concludes the exploration by considering the policy implications of the foregoing findings. The chapter considers in particular how the state can regulate the phenomenon of political disinformation without undermining freedom of expression. More specifically, the chapter scrutinises the compatibility with freedom of expression of both the old school and new school regulatory approaches. It accordingly explores the possibility of regulating the phenomenon of political disinformation by targeting communicators of political disinformation and online platform operators, respectively. The chapter's analysis of the relevant law in the light of the principle of equal rights suggests that the state can regulate the phenomenon of political disinformation in a holistic manner, whilst preserving freedom of expression, in particular by providing for a suitable combination of correction and sanction mechanisms.

1.7 Conclusion

There is a growing consensus as concerns the need to regulate disinformation, not least online disinformation. Thus far, however, disinformation has generally proved difficult to regulate. Online disinformation of a political nature in particular engenders a regulatory conundrum. Some claim that online political disinformation threatens democracy. Others claim that regulatory measures aimed at tackling such disinformation threaten democracy by undermining one of its essential features, namely freedom of expression. This latter claim is particularly difficult to dismiss out of hand, since the law generally places a premium on the free flow of political information irrespective of its putative lack of epistemic value. Even so, in this disinformation age, every democratic society cannot but take a decision on whether and, if so, how to regulate the phenomenon of political disinformation.

Many scholars have already had a say on the regulatory conundrum envisaged here. There is, however, a glaring lack of scholarship exploring how various conceptions of freedom in political philosophy could help inform policies aimed a tackling this common problem facing democratic societies around the world. This monograph attempts to fill this scholarship gap. Given its philosophical underpinnings and holistic approach to the problem under consideration, notwithstanding its focus on the human rights system of the Council of Europe, the monograph promises to be useful to all jurisdictions that embrace democracy.

2 Conceptualising Freedom

2.1 Introduction

Everyone needs some freedom. When people speak about freedom, they normally conceive of freedom either in a non-specific way or in a specific way.[1] When people speak about freedom in a non-specific way, they have in mind freedom in an overall sense, without focusing on any specific thing or specific set of things that one is free to do or otherwise enjoy. One may say, for example, that slaves have no freedom, without specifying the thing or set of things that slaves are not free to do or enjoy. When people speak about freedom in a specific way on the other hand, they have in mind a specific thing or set of things that one is free to do or enjoy. One may say, for example, that slaves have no freedom to choose their own abode, their own garments or their own diet.

This chapter explores the concept of freedom in an overall sense but with a focus on a specific type of freedom, namely political freedom, otherwise known as civil or social liberty. As already intimated, the question that falls for consideration is the following. What is freedom in general? Or, to be more specific, what does it mean to be free in a civil or political society?

It goes without saying that this question is often taken for granted in constitutional jurisprudence. Our case study readily testifies to this fact. As noted in chapter 1, the ECHR protects as fundamental rights different types of freedom. But the ECHR itself stops short of defining freedom with exactitude. In the same vein, the ECtHR has been pronouncing upon alleged violations of different types of freedom enshrined in the ECHR without taking the trouble to declare what exactly freedom is.

To be clear, this is not mere pedantry. A judicial body can hardly correctly or consistently interpret a law that protects freedom unless those charged with such interpretative responsibility are guided by a clear conception of freedom. Nor can one make credible substantive claims about any type of freedom unless one knows what freedom is. By the same token, we cannot authoritatively speak about whether or how the phenomenon of political disinformation can be regulated in a democratic

[1] Ian Carter, *A Measure of Freedom* (Oxford University Press 1999) 11–14.

society without undermining freedom of expression before explaining what we mean by freedom. It is therefore essential for us to sketch a specific conception of freedom that will operate as a guide in the chapters that follow.

In a bid to construct a conception of freedom that would provide a plausible understanding of political freedom from a legal standpoint, this chapter builds upon existing philosophical conceptions of freedom. For this purpose, the chapter considers four different conceptions of freedom that figure in recent scholarship in the field of political philosophy, namely freedom as non-frustration, freedom as non-interference, freedom as non-domination and freedom as independence. There are, it is true, other ways in which freedom can be conceptualised and even taxonomised.[2] But the selected conceptions appear to be particularly useful from a legal standpoint and thus promise to provide relevant insights that would enable us to construct a suitable conception of freedom for the present purpose.

Methodologically, this chapter uses as benchmarks some axiomatic common attributes of three interrelated types of freedom, namely freedom of expression, freedom of assembly and association, and electoral freedom.[3] As already intimated in chapter 1, it is settled law and thus legally axiomatic that this set of freedom has at least two common attributes. First, although the law protects the exercise and enjoyment of certain options without any qualification,[4] freedom understood in an overall sense is admissive of law-based and socially justifiable restrictions or qualifications on the exercise and enjoyment of certain options that could otherwise be associated with freedom. Second, all the three types of freedom within this set are inextricably linked to democracy as a system of government. These legal axioms

[2] See, for example, Gerald C MacCallum, 'Negative and Positive Freedom' (1967) 76 *Philosophical Review* 312; Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press 1969) 118–72; Robert Nozick, *Anarchy, State and Utopia* (Blackwell 1974); Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000), ch 3; Horacio Spector, 'Four Conceptions of Freedom' (2010) 38 *Political Theory* 780; Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press 2011); Christian List and Laura Valentini, 'Freedom as Independence' (2016) 126 *Ethics* 1043, 1047–49.

[3] This methodological approach, as noted in ch 1 hereof, is known as reflective equilibrium. See John Rawls, *A Theory of Justice* (Belknap Press of Harvard University Press 1971).

[4] So-called 'absolute' or 'non-derogable' rights—including the right to life (ECHR, art 2), freedom from torture, inhuman or degrading treatment or punishment (ECHR, art 3), freedom from slavery or servitude and from forced or compulsory labour (ECHR, art 4) and freedom from punishment without law (ECHR, art 7)—are generally protected without qualification. For some details in this connection, see Audrey Lebret, 'COVID-19 Pandemic and Derogation to Human Rights' (2020) 7 *Journal of Law and the Biosciences* 1, 5–6. Also, as argued in ch 3 hereof, one element of freedom of expression (ECHR, art 10), namely freedom of thought, does not generally admit of legal restrictions.

also appear to comport with the spirit of the law or 'the *perceived intention* of the law',[5] in particular what ordinary people might think the law ought to be or what Norman Finkel calls 'common-sense justice'.[6]

This chapter thus proceeds on the premise that a plausible conception of freedom in an overall sense must, at a minimum, satisfy two axioms: it must admit of some restrictions on the exercise or enjoyment of certain options, and it must establish a link between freedom and democracy. Using these axioms as benchmarks for judgment, the remainder of the chapter is accordingly organised as follows. Sections 2.2 to 2.5 inclusive consider in turn whether freedom can be conceptualised as non-frustration, as non-interference, as non-domination or as independence. Section 2.6 pieces up the findings and concludes.

2.2 Freedom as Non-Frustration

'No one has written with greater influence on the topic of liberty or freedom than [Thomas] Hobbes.'[7] During his lifetime, Hobbes produced three major works of political philosophy in which he recorded his conception of freedom, namely *The Elements of Law* in 1640; the original Latin edition of *De Cive* in 1642, with the English edition appearing in 1651; and the original English edition of *Leviathan* in 1651, with the revised Latin edition published in 1668.[8] A number of edited editions of all the three volumes have since appeared over the years.[9] This chapter draws upon the first complete edition of *The Elements of Law*, subjoining extracts from Hobbes's unprinted manuscripts, published posthumously in 1889,[10] and the original English

5 Stephen M Garcia, Patricia Chen and Matthew T Gordon, 'The Letter Versus the Spirit of the Law: A Lay Perspective on Culpability' (2014) 9 *Judgment and Decision Making* 479, 479.

6 Norman J Finkel, *Commonsense Justice: Jurors' Notions of the Law* (Harvard University Press 1995) 2; Norman J Finkel, 'Commonsense Justice, Culpability, and Punishment' (1999) 28 *Hofstra Law Review* 669, 669.

7 Philip Pettit, 'Liberty and Leviathan' (2005) 4 *Politics, Philosophy & Economics* 131, 131.

8 Quentin Skinner, *Hobbes and Republican Liberty* (Cambridge University Press 2008) xv.

9 Some popular editions include, for example, Thomas Hobbes, *Human Nature and De Corpore Politico: The Elements of Law, Natural and Politic* (JCA Gaskin ed, Oxford University Press 1994); Thomas Hobbes, *On the Citizen* (Richard Tuck and Michael Silverthorne eds, Cambridge University Press 1998); Thomas Hobbes, *Leviathan* (JCA Gaskin ed, Oxford University Press 1998); Thomas Hobbes, *Leviathan*: *With Selected Variants from the Latin Edition of 1668* (Edwin Curley ed, Hackett Publishing 1994).

10 Thomas Hobbes, *The Elements of Law, Natural and Politic* (Ferdinand Tönnies ed, Simpkin, Marshall and Co 1889).

editions of *De Cive*[11] and *Leviathan*[12] both published in 1651. The chapter also refers to some excerpts from Hobbes's exchanges with bishop John Bramhall regarding Hobbes's conception of freedom.[13] It should also be noted that Hobbes's conception of freedom is designated 'freedom as non-frustration' for ease of reference only.[14] Hobbes himself does not use such nomenclature in his philosophical works.[15]

2.2.1 Elements of Freedom as Non-Frustration

Hobbes's conception of freedom draws a distinction between natural liberty, which refers to freedom in the state of nature, and civil or political liberty, which describes individual freedom in a nation state or (as Hobbes himself prefers to call it) a commonwealth. Although Hobbes does not use the term 'natural liberty' consistently in his works, a close reading thereof suggests that Hobbes had in mind a distinct notion of freedom applicable to the sphere of nature bereft of any system of human laws.[16] His notion of political liberty on the other hand applies under a system of laws within a state. Hobbes nonetheless maintains that individuals must, and in fact do, retain some natural liberty even under a system of laws. Thus, what distinguishes his conception of natural liberty from that of political liberty is the following. Natural liberty applies both in the state of nature and under a system of laws, whereas political liberty applies only under a system of laws within a state.

In all his three volumes, Hobbes contends that all individuals are by nature equal and have the right to all things.[17] By the same token, all individuals without exception

11 Thomas Hobbes, *Philosophicall Rudiments concerning Government and Society or a Dissertation concerning Man in his Severall Habitudes and Respects, as the Member of a Society, First Secular, and Then Sacred* (London 1651) (*De Cive*).

12 Thomas Hobbes, *Leviathan or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil* (London 1651).

13 Thomas Hobbes and John Bramhall, *Hobbes and Bramhall on Freedom and Necessity* (Vere Chappell ed, Cambridge University Press 1999).

14 This nomenclature has been adopted from existing scholarship. See in particular Philip Pettit, 'The Instability of Freedom as Noninterference: The Case of Isaiah Berlin' (2011) 121 *Ethics* 693; Alexei Gloukhov, 'Non-Priority of the Freedom Principles: Non-Frustration, Non-Interference, Non-Domination' (2016) 15 *Review of Contemporary Philosophy* 108.

15 Several other terms have been used to describe Hobbes's conception of freedom. See, for example, Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1997) 37; Skinner, *Hobbes and Republican Liberty* (n 8); Spector (n 2), using the term 'non-interference'. See also Pettit, 'Liberty and Leviathan' (n 7), describing Hobbes's conception of freedom as one that equates freedom with 'non-commitment', 'non-obligation' and 'non-obstruction'.

16 See in particular Hobbes, *The Elements of Law* (n 10), pt 1, ch 14; Hobbes, *De Cive* (n 11), ch 1; Hobbes, *Leviathan* (n 12), chs 13–14.

17 Hobbes, *The Elements of Law* (n 10), pt 1, ch 14; Hobbes, *De Cive* (n 11), ch 1; Hobbes, *Leviathan* (n 12), ch 13.

are free by nature and any obligation upon an individual may arise only from some act of his own.[18] Even so-called 'natural laws' or the dictates of reason, Hobbes maintains, are but conclusions or theorems of prudent conduct for the individual's own self-conservation and self-defence; they are not commands akin to laws in an organised society that can give rise to 'obligations' in the proper sense of the word.[19] The state of nature is therefore a stateless and lawless sphere in which the notions of right and wrong, or indeed justice and injustice, have no place, for '[w]here there is no common Power, there is no Law; where no Law, no Injustice.'[20]

The term 'natural liberty' figures in *The Elements of Law*.[21] Hobbes does not, however, strictly speaking define natural liberty in that volume. Instead, he merely describes it as the 'blameless' liberty 'of using our own natural power and ability'[22] or the liberty that nature has given every man to govern 'himself by his own will and power'.[23] Hobbes sets forth his definition of natural liberty for the first time in chapter 9 of *De Cive*. Indeed, Hobbes even claims that, to his knowledge, no writer before *De Cive* had ever fully defined liberty.[24] In keeping with his contention that all men are free by nature, Hobbes then defines freedom purely in negative terms, declaring pointedly that liberty 'is nothing else but *an absence of the lets…and hindrances of motion*'.[25] Such hindrances or impediments, according to Hobbes, are of two types, namely absolute and arbitrary.

Absolute impediments are external and purely physicalist. In this sense, everyone who is neither fettered nor imprisoned is free.[26] Interestingly, freedom in this sense is an all-encompassing concept that does not apply only to individuals. According to Hobbes, even water contained in a vessel can be said to be unfree 'because the vessel hinders it from running out'.[27] In that instance, the water can be made free either by breaking the vessel or by spilling the water out of the vessel. Hobbes echoes these sentiments both in chapters 14 and 21 of *Leviathan*, stressing that liberty or freedom according to the proper signification of the word is the absence of external opposition or impediments to motion which opposition or impediments may affect rational, irrational and inanimate creatures alike.[28] Insofar

18 Hobbes, *Leviathan* (n 12) 111.
19 Ibid, 80.
20 Ibid, 63.
21 Hobbes, *The Elements of Law* (n 10) 73, 110 and 180.
22 Ibid, 71.
23 Ibid, 79.
24 Hobbes, *De Cive* (n 11) 140.
25 Ibid.
26 Ibid, 141.
27 Ibid, 140.
28 Hobbes, *Leviathan* (n 12) 64 and 107.

as it applies to individuals, therefore, Hobbesian natural liberty essentially refers to physical liberty or, simply, freedom from chains and prison.[29]

Hobbes also underscores the distinction between freedom and power. According to him, the question of freedom does not arise when the impediment to motion is in the constitution of the creature itself, such as when a stone lies still or when a man cannot move out of his bed due to sickness.[30] In those instances, the stone and the sick man do not lack the freedom, but lack the power, to move.[31] According to Hobbes's rendition, what distinguishes inanimate creatures from animate creatures is that the latter are able to form 'wills' whilst the former are not.[32] On this account, an individual is free if he has both the power and the will to enact a particular option and there are no physical hindrances to the enactment of that option. A free man, as Hobbes himself puts it in *Leviathan*, '*is he, that in those things, which by his strength and wit he is able to do, is not hindered to…[do] what he has a will to*.'[33] Hobbes maintains this assertion in his exchanges with Bramhall, declaring thus: 'a free agent is he that can do if he will and forbear if he will; and that liberty is the absence of external impediments.'[34]

Notably, what matters for Hobbesian freedom in this physical sense is not the availability of all possible options but the availability of preferred options, that is, those things that one has a will to do. Unpreferred options are irrelevant.[35] Thus, when one shuts the door to a tennis court with a view to preventing another from using the court, the question of freedom does not arise unless the latter has the will to play tennis. In Hobbes's own words, 'it is no impediment to him that the door is shut till he…[has] a will to play.'[36] By the same token, if doors were options, one would enjoy Hobbesian freedom provided the door that one desires to walk through is open; it would not matter that all other doors were closed. John Stuart Mill espouses this view in his 1859 seminal contribution *On Liberty*. He declares that 'liberty consists in doing what one desires'.[37]

Hobbes further stresses that fear and necessity to act in a particular manner do not take away the ability to form a will. Thus, an unfettered man in a ship 'may cast himself into the Sea, if he will'.[38] Similarly, a seaman who throws his goods into the sea for fear that the ship might otherwise sink does so 'very willingly', for he 'may

29 Ibid, 64 and 109.
30 Ibid, 107.
31 Ibid.
32 Hobbes and Bramhall (n 13) xviii.
33 Hobbes, *Leviathan* (n 12) 108.
34 Hobbes and Bramhall (n 13) 39.
35 Pettit, 'The Instability of Freedom as Noninterference' (n 14) 697.
36 Hobbes and Bramhall (n 13) 91.
37 John Stuart Mill, *On Liberty* (John W Parker and Son 1859) 173.
38 Hobbes, *De Cive* (n 11) 141.

refuse to do it if he will'.[39] The choice to throw away his goods, though induced by fear, is nonetheless his free will. His action should thus be taken to be of one who had been free to choose otherwise.[40] By the same token, when an armed robber challenges his victim to choose between his money or his life, the victim is free to choose either option.[41] In short, for Hobbes, all that one needs to be free in the proper sense of the word is the physical possibility to enact a preferred option or will.[42] And a will can be formed only in respect of those things that one has the power or strength and wit to do at the material time.

A will to act or omit to act in a particular manner is what eventuates in what Hobbes terms 'arbitrary' impediments to motion. Hobbes contends that voluntary bodily motions, or motions that proceed from a will, have interior beginnings; they begin with deliberation in the mind.[43] Deliberation begins when one embarks on a train of thoughts in order to decide whether or not to act in a particular manner. It is 'de-liberation' because it ultimately puts an end to the natural liberty that one has of acting or not acting according to his own appetite or aversion once one has formed his will.[44] Every deliberation ends when that whereof one deliberates is either done or thought impossible to do.[45] Until then, the individual retains the natural liberty of doing or omitting according to his own appetite or aversion.[46] In other words, deliberation lasts so long as the action being deliberated upon is within one's power: so long as one has the liberty to do or not to do that which is being deliberated upon.[47] The last appetite or aversion in deliberation (the appetite, or aversion, 'immediately adhering to the action, or to the omission thereof') is what Hobbes calls the 'will'.[48] Interestingly, Hobbes considers that even animals that deliberate, not least brute beasts, 'must necessarily also have *will*.'[49]

It would, however, appear that Hobbes does not consider that choice-based impediments to motion in the aftermath of deliberation are of any political significance. Indeed, Hobbes notes that the object of one's desire or appetite, and of hate or aversion, depends on what one subjectively considers desirable or good, and

39 Hobbes, *Leviathan* (n 12) 108.
40 Ibid.
41 Philip Pettit, 'Agency-Freedom and Option-Freedom' (2003) 15 *Journal of Theoretical Politics* 387, 390.
42 See also generally Carter (n 1); Hillel Steiner, *An Essay on Rights* (Blackwell 1994); Michael Taylor, *Community, Anarchy and Liberty* (Cambridge University Press 1982).
43 See Hobbes, *The Elements of Law* (n 10), pt 1, ch 12; Hobbes, *Leviathan* (n 12), ch 6.
44 Hobbes, *Leviathan* (n 12) 28.
45 Ibid.
46 Ibid.
47 Hobbes, *The Elements of Law* (n 10) 61.
48 Hobbes, *Leviathan* (n 12) 28. See also Hobbes, *The Elements of Law* (n 10) 61–62; Hobbes and Bramhall (n 13) 97.
49 Hobbes, *Leviathan* (n 12) 28.

undesirable or evil, respectively. In Hobbes's view, there is no object of human appetite or aversion that is simply and absolutely good or evil; nor is there a common rule of good and evil that can 'be taken from the nature of the objects themselves'.[50] Hobbes adds that even the rules of good and evil in a commonwealth are subjectively determined by the person who represents the commonwealth or by an arbitrator or a judge whose judgment of good and evil individuals have themselves voluntarily undertaken to abide by in the event of a disagreement.[51]

In view of the foregoing, Hobbes's conception of freedom in the proper sense of the word, both in the state of nature and in a commonwealth, does not include freedom from self 'de-liberation' or what Hobbes calls arbitrary impediments to motion in *De Cive*. As already noted, Hobbes underscores in *Leviathan* that the natural liberty of individuals, according to the proper signification of the word, is simply freedom from physical chains and prison.[52] This is the only form of natural liberty that Hobbes considers in chapter 21 of *Leviathan* as part of his conception of individual liberty in a commonwealth. Indeed, Hobbes's conception of political freedom in a commonwealth or what he calls 'civil liberty' corresponds to his notion of natural liberty as freedom from absolute impediments to motion rather than to the notion of natural liberty as freedom from arbitrary impediments.

The only difference between Hobbes's notions of natural liberty and civil or political liberty in a state or commonwealth is that the impediments to the former are physical, whereas those affecting the latter are non-physical. Hobbes considers that an individual in a commonwealth may lose his natural liberty not only through physical chains and imprisonment but also through artificial chains, namely laws. Hobbes sees all human laws as artificial chains or bonds that take away the natural liberty of those at whom they are targeted. On this account, political freedom or the liberty of individuals in a commonwealth is simply freedom from laws. Accordingly, after defining natural liberty in chapter 9 of *De Cive*, Hobbes declares that 'all other liberty is an exemption from the …[laws] of the City, and proper only to those that bear Rule.'[53] Hobbes reiterates this position in chapter 21 of *Leviathan*, asserting that we may see freedom either 'in the proper sense' as corporal liberty, that is, freedom from chains and prison or as an exemption from laws.[54] Thus, according to Hobbes, the greatest liberty of individuals in a commonwealth depends 'on the Silence of the Law.'[55]

50 Ibid, 24.
51 Ibid.
52 Ibid, 64 and 109.
53 Hobbes, *De Cive* (n 11) 142.
54 Hobbes, *Leviathan* (n 12) 109.
55 Ibid, 113.

Another 17th century English theorist Robert Filmer shares these sentiments. He declares thus: 'True liberty is for every man to do what he list, or to live as he please, and not to be tied to any laws.'[56] According to Filmer, every law or command is 'a diminution of some part of popular liberty; for it is no law except it restrain liberty'.[57] Jeremy Bentham also echoes these sentiments in his 19th century text. He contends that 'no liberty can be given to one man but in proportion as it is taken from another' and thus that '[a]ll coercive laws…and in particular all laws creative of liberty, are, as far as they go, abrogative of liberty'.[58] Therefore, Bentham considers that '[l]iberty, as against the coercion of the law, may…be given by the…repeal of the coercing law'.[59]

One may wonder why both Hobbes and Bentham see laws as a source of unfreedom. Indeed, although one commentator describes Bentham as Hobbes's chief spokesman in classical liberalism,[60] there are certain respects in which the duo appears to disagree. For example, unlike Hobbes who contends that all men are free by nature, Bentham dismisses the suggestion that men are born free, describing it as 'miserable nonsense'.[61] Even so, Hobbes and Bentham provide the same explanation as to why they see laws as a source of unfreedom. Both Hobbes and Bentham see laws this way because, according to them, laws invariably give rise to obligations. Thus, in the *Elements of Law*, Hobbes observes that 'where liberty ceaseth, there beginneth obligation.'[62] Hobbes echoes this stand in *Leviathan*, claiming that obligation and liberty, like law and right, 'in one and the same matter are inconsistent.'[63] Bentham follows suit, maintaining that 'all laws by which rights are created or confirmed' detract from liberty, for every right has 'a correspondent obligation'.[64]

Therefore, unlike deliberation which takes away from freedom only after one has acted upon the last appetite or choice, Hobbes posits that an individual may lose freedom in advance of action by contracting an obligation to another. In keeping with his contention that all men are by nature equal and free from obligation,[65] Hobbes considers that all obligations arise from some voluntary commitment, that is, from entering into some form of a contract or covenant.[66] Thus, according to Hobbes, every commonwealth is founded on a covenant or social contract made by 'every

56 Robert Filmer, *Patriarcha and Other Political Works of Sir Robert Filmer* (Peter Laslett ed, Basil Blackwell 1949) 224.
57 Ibid, 217.
58 Jeremy Bentham, *The Works of Jeremy Bentham* (vol 2, John Bowring ed, William Tait 1843) 503.
59 Ibid.
60 Spector (n 2) 784.
61 Bentham (n 58) 498.
62 Hobbes, *The Elements of Law* (n 10) 78.
63 Hobbes, *Leviathan* (n 12) 44.
64 Bentham (n 58) 503.
65 Hobbes, *Leviathan* (n 12) 111.
66 Pettit, 'Liberty and Leviathan' (n 7) 134–35.

man with every man'.[67] As the operative term of that covenant, everyone in a commonwealth is presumed to have said to everyone else as follows: '*I Authorise and give up my Right of Governing my Self to this Man, or to this Assembly of men, on this condition, that thou give up, thy Right to him, and Authorise all his Actions in like manner.*'[68]

All the individuals concerned thus submit their wills to the sovereign (the man or assembly of men referred to in the covenant), thereby reducing 'all their wills, by plurality of voices, unto one will'.[69] The underlying obligation to obey the commands or laws issued by the sovereign thus derive either from those (or equivalent) words or from the end for which commonwealths are instituted, namely the peace of the individuals themselves and their defence against common enemies.[70] This submission of wills to the sovereign is binding on all individuals in a commonwealth because it is not a mere gratuitous act but one in exchange for the guarantee of common peace and security.[71] Given the variability and incongruence of individual appetites and wills, Hobbes considers that the fate of individuals in the state of nature is perpetual 'war of every man against every man.'[72] That is why, according to Hobbes, the institution of a commonwealth is for the common benefit of all the individuals concerned.

Hobbes insists that individuals in a commonwealth must retain their natural liberty insofar as that liberty is consistent with the purpose of the commonwealth, that is, common peace and security.[73] It nonetheless behoves the individuals in whom the sovereign power vests from time to time to make their own judgment as to the specific matters that ought to be regulated by law, subject only to the maintenance of certain inalienable 'natural' rights. The freedom of individuals in a commonwealth thus consists '*only* in those things which, in regulating their actions, the… [sovereign has pretermitted]: such as…the Liberty to buy, and sell, and otherwise contract with one another; to choose their own...[abode], their own diet, their own trade of life, and institute their children as they themselves think fit; …[and] the like.'[74]

On this account, the extent to which individuals enjoy freedom in a commonwealth does not depend on any specific form of government. In Hobbes's on words, whether the government is monarchical, aristocratic or democratic, 'the

67 Hobbes, *Leviathan* (n 12) 87.
68 Ibid.
69 Ibid.
70 Ibid, 111.
71 Ibid, 87.
72 Ibid, 62. See also Hobbes, *De Cive* (n 11), ch 1.
73 Hobbes, *The Elements of Law* (n 10) 110.
74 Hobbes, *Leviathan* (n 12) 109 (emphasis added).

[freedom] is still the same.'[75] The greatest freedom of individuals under any form of government, Hobbes maintains, depends 'on the silence of the law', for it is only in those cases where the state has prescribed no rule that an individual enjoys freedom to do, or to forbear, according to his own discretion.[76] Indeed, Hobbes himself joins a 16th century absolutist Jean Bodin in arguing for a single and indivisible sovereign, contending that an absolute monarchy in which laws are handed down by one man is the best form of government at securing the purpose for which commonwealths or states are established.[77]

2.2.2 Plausibility of Freedom as Non-Frustration

How compatible is the Hobbesian conception of freedom with our legal axioms? At first blush, the physical element of the Hobbesian conception of freedom as non-frustration appears to resonate with the right to liberty and security of the person which, in our case study, is enshrined in article 5 of the ECHR. Indeed, the ECtHR considers that article 5 'contemplates the physical liberty of the person' or 'individual liberty in its classic sense'.[78] We must recall, however, that a deprivation of physical liberty under that provision 'may take *numerous* other forms' in addition to 'the classic case of detention following arrest or conviction'.[79] It is, in any event, quite obvious that physical motion is not the only option that the law protects as part of freedom understood in an overall sense. When an individual is fettered or imprisoned, any concern about freedom of expression, freedom of assembly or association, or electoral freedom in particular is of secondary importance only.

It should also be obvious from the foregoing discussion that the Hobbesian conception of freedom cannot pass muster when examined through the lens of our two normative benchmarks. The law, it is true, protects individuals from frustration of their choices. But we also know that states may, and in fact do, enact laws that may frustrate certain choices without falling foul of their obligations under the ECHR. Even article 5 of the ECHR itself explicitly allows for the deprivation of 'natural' physical liberty in specific cases provided that any such deprivation of liberty is effectuated 'in accordance with a procedure prescribed by law'.[80] The

75 Ibid, 110.
76 Ibid, 113.
77 Ibid, ch 19. See also generally Jean Bodin, *Six Books of the Commonwealth* (MJ Tooley ed, Basil Blackwell 1967).
78 *Engel and others v the Netherlands* Apps nos 5100/71 and 4 others (ECtHR, 8 June 1976), para 58; *Creangă v Romania* App no 29226/03 (ECtHR [GC], 23 February 2012), para 84; *de Tommaso v Italy* App no 43395/09 (ECtHR [GC], 23 February 2017), para 80.
79 *Guzzardi v Italy* App no 7367/76 (ECtHR, 6 November 1980), para 95 (emphasis added).
80 ECHR, art 5(1).

ECtHR has repeatedly guided that the aim of article 5 is not to prohibit the deprivation of natural liberty in absolute terms but only to ensure that no one is dispossessed or deprived of his natural physical liberty 'in an *arbitrary* fashion'.[81] We have seen in chapter 1 that the ECtHR adopts a similar approach when determining whether there has been a violation of freedom of expression, freedom of assembly or association, or electoral freedom. It would therefore be legally incorrect to say that every frustration of an individual's choice is a violation of freedom understood in an overall sense. Hobbes's freedom as an exemption from laws is, by the same token, implausible for the present purpose.

Both the physical and non-physical elements of Hobbes's conception of freedom as non-frustration are also irreconcilable with our axiomatic knowledge about freedom within the context of a democratic society. Hobbes tells us that the system of government that a nation state adopts has no direct bearing upon the exercise or enjoyment of freedom as he conceives of it. Yet, as we have seen in chapter 1, it is settled law that there is an inextricable link between freedom and democracy as a system of government. It is thus implausible in a democratic society to conceptualise freedom as 'non-frustration' in the Hobbesian sense of the word.

2.3 Freedom as Non-Interference

Contemporary scholarship credits to Isaiah Berlin the conception of freedom as non-interference, particularly to Berlin's essay on *Two Concepts of Liberty* as revised in the introduction to his *Four Essays on Liberty*.[82] Originally presented during Berlin's inaugural lecture as Chichele Professor of Social and Political Theory at Oxford, the essay on *Two Concepts of Liberty* was first published by Clarendon Press in 1958. Later, in 1969, the essay was republished along with three other essays in *Four Essays on Liberty*. In the introduction to *Four Essays on Liberty*, Berlin makes a detailed commentary on his conception of freedom and, importantly, corrects what he describes as 'a genuine error in the original version of *Two Concepts of Liberty*'.[83] This chapter draws upon the version that appears in *Four Essays on Liberty* as read together with the commentary.[84]

81 *Engel and others v the Netherlands* (n 78), para 58; *Creangă v Romania* (n 78), para 84 (emphasis added).
82 Berlin (n 2).
83 Ibid, xxxviii.
84 For an edited edition, see Isaiah Berlin, *Liberty: Incorporating Four Essays on Liberty* (Henry Hardy ed, Oxford University Press 2002).

2.3.1 Elements of Freedom as Non-Interference

What distinguishes Berlin's conception of freedom as non-interference from Hobbesian freedom as non-frustration? Indeed, Berlin himself does not appear to recognise Hobbes as an antagonist.[85] Like Hobbes, Berlin sees freedom as a negative (as opposed to a positive) concept. Berlin in fact quotes with approval Hobbes's definition of a 'free man'.[86] All indications are that the Berlinian conception of freedom as non-interference is largely inspired by Hobbes's political philosophy. Freedom in the fundamental sense, so says Berlin in the commentary, 'is freedom from chains, from imprisonment, from enslavement by others. The rest is extension of this sense, or else metaphor.'[87]

Berlin's freedom in what he terms 'the fundamental sense' is more or less Hobbesian natural or physical liberty. In Berlin's own words, to be free in this sense means not to be 'interfered with by others. The wider the area of non-interference the wider' the freedom one enjoys.[88] Freedom in Berlin's extended or metaphorical sense of the word is essentially freedom from laws or what Hobbes calls artificial chains. In Berlin's own words, '[l]aw is *always* a fetter, even if it protects you from being bound in chains that are heavier than those of the law, say some more repressive law or custom, or arbitrary despotism or chaos.'[89] Again, this echoes more or less Hobbesian political liberty or freedom as an exemption from laws. There are, however, some subtle but significant points of divergence between Hobbesian and Berlinian freedom.

To begin with, Berlin does not emphasise the physical aspect of his conception of freedom or what he calls freedom 'in the fundamental sense', at least not as much as Hobbes does. Negative liberty, as Berlin conceives of it, involves more than just freedom from physical chains and prison. Unlike Hobbes who claims that fear and freedom are consistent, Berlin sees coercion (for example, a challenge to 'choose' your money or your life at gunpoint) as a source of unfreedom.[90] To coerce an individual, so says Berlin, 'is to deprive him of freedom'.[91] In Berlin's view, coercion, interference and unfreedom are synonyms. Coercion, as Berlin understands it, refers to the deliberate albeit not necessarily ill-intended 'interference of other human beings within the area in which' a man could otherwise act.[92] All coercion, insofar as it interferes with the availability of options in such an area, is 'bad as such,

85 Pettit, 'The Instability of Freedom as Noninterference' (n 14) 695.
86 Berlin (n 2) 123.
87 Ibid, lvi.
88 Ibid, 123.
89 Ibid (emphasis added).
90 Pettit, *Republicanism* (n 15) 17.
91 Berlin (n 2) 121.
92 Ibid, 122.

although it may have to be applied to prevent other, greater evils; while *non-interference*, which is *the opposite of coercion*, is good as such, although it is not the only good.'[93]

Like Hobbes, Berlin draws a distinction between interference by other human beings and the lack of power or ability to act. A man's inability 'to jump more than ten feet in the air', to run due to lameness, to read due to blindness, or to 'understand the darker pages of Hegel' has nothing to do with coercion, and cannot therefore give rise to the question of freedom as Berlin conceives of it.[94] Berlin further underscores the distinction between freedom and the conditions for its exercise.[95] A poor man's inability to buy bread, to pay for a journey round the world or to prosecute a lawsuit 'would not naturally be described as a lack of freedom, least of all political freedom.'[96] The question of freedom as non-interference arises only when 'other human beings, *directly or indirectly, with or without the intention* of doing so' interfere with the area in which one could otherwise act.[97]

Berlin makes an important clarification in the commentary on *Two Concepts of Liberty*. He is gracious enough to admit that he had made a mistake in the original version of that essay to have spoken of 'liberty as the absence of obstacles to the fulfilment of a man's desires.'[98] Berlin underscores that a man loses his social or political freedom not only when the exercise of his choices is deliberately frustrated by others but also when certain options from which he could otherwise choose are made unavailable 'as a result, intended or unintended, of alterable human practices, of the operation of human agencies'.[99] It is therefore Berlin's considered view that freedom demands more than just 'the absence of frustration'; it demands 'the absence of obstacles to possible choices and activities—absence of obstructions on roads along which a man can decide to walk.'[100] A man's 'freedom ultimately depends not on whether' he wishes 'to walk at all, or how far, but on how many doors are open, how open they are, upon their relative importance in [his]…life'.[101] Thus, Berlin considers that 'not all doors are of equal importance'.[102] He, however, insists that the degree of a man's freedom as non-interference is 'a function of what doors, and how many, are open to him; upon what prospects they open; and how

93 Ibid, 128 (emphasis added).
94 Ibid, 122–23.
95 Ibid, liii.
96 Ibid, 122–23.
97 Ibid, 123.
98 Ibid, xxxviii.
99 Ibid, xl.
100 Ibid, xxxix.
101 Ibid.
102 Ibid, xlviii.

open they are.'[103] In short, freedom as non-interference requires the availability of all relevant options, whether preferred or unpreferred.

By implication, Berlin rejects as counterintuitive Hobbes's and Mill's suggestion that desire-satisfaction would be sufficient for the attainment of freedom. Berlin's concern here is the absurdity of associating freedom with adaptation.[104] As Berlin himself puts it, 'if to be free—negatively—is simply not to be prevented by other persons from doing whatever one wishes, then one of the ways of attaining such freedom is by extinguishing one's wishes.'[105] A man cannot make himself free in the Berlinian sense by cautiously selecting only those options whose exercise other human beings are disinclined from interfering with. For 'to teach a man that, if he cannot get what he wants, he must learn to want only what he can get, may contribute to his happiness or his security; but it will not increase his civil or political freedom.'[106] A prisoner, knowing that he is not legally permitted to live outside prison, cannot give himself freedom simply by 'coming to want to stay in prison.'[107] Nor can a man make himself free by coming to want to walk through a particular door because he is aware that any other door would be closed by others.

Thus, Berlin sees as a misconception 'the identification of freedom with activity as such.'[108] A man enjoys freedom, as Berlin conceives of it, when he has 'the right to walk through open doors' even if he prefers 'not to do so, but to sit still and vegetate'.[109] Freedom as such 'is the *opportunity to act, not the action itself*; the possibility of action, not necessarily...[the] dynamic realization of it.'[110] According to Berlin, '[a] man need not know how he will use his freedom; he just wants to remove the yoke.'[111] Freedom as non-interference, therefore, 'is simply the *area* within which a man can act unobstructed by others.'[112] Such freedom consists in the absence of obstacles, not only to actual but also to potential choices or activities.[113]

As concerns the relation between freedom and the law, Berlin maintains his initial position as contained in the original version of *Two Concepts of Liberty*. He reiterates in the commentary his approval of Bentham's view that every law curtails 'some liberty, although it may be a means to increasing another.'[114] According to Berlin, '[e]ven a law which enacts that no one shall coerce anyone in a given sphere,

103 Ibid.
104 Pettit, 'The Instability of Freedom as Noninterference' (n 14) 699–700.
105 Berlin (n 2) xxxviii.
106 Ibid, xxxix.
107 Pettit, 'The Instability of Freedom as Noninterference' (n 14) 700.
108 Berlin (n 2) xlii.
109 Ibid.
110 Ibid (emphasis added).
111 Ibid, xliii.
112 Ibid, 122 (emphasis added).
113 Ibid, xl.
114 Ibid, xlix.

while it obviously increases the freedom of the majority, is an infraction of the freedom of potential bullies and policemen.'[115] Whilst acknowledging that such a law may be highly desirable, Berlin insists that an infraction remains an infraction.[116] Thus, for Berlin (like for Bentham and other liberal thinkers) all laws are abrogative of freedom and are bad as such, although they may be applied as a necessary evil to prevent greater evils.

Indeed, Berlin acknowledges that 'the area of men's free action must be limited by law.'[117] Following Hobbes's line of argument, Berlin contends that an unlimited area of non-interference or what Hobbes calls natural liberty would lead to an undesirable condition of 'social chaos in which men's minimum needs would not be satisfied; or else the liberties of the weak would be suppressed by the strong.'[118] According to Berlin, men are so interdependent that the freedom of some depends 'on the restraint of others'.[119] Berlin underscores that freedom as non-interference is 'not the only goal of men.'[120] He thus maintains that every political society must curtail some freedom 'in the interests of other values and, indeed, of freedom itself.'[121]

Berlin nonetheless underscores that freedom should not be confused with other values. Notably, he cites as an example of such confusion Mill's central argument in *On Liberty* which seeks to establish a connection between the discovery of truth or the growth of human genius through unhindered freedom of self-expression and liberty in general.[122] Berlin believes that these two goals may come into conflict.[123] According to him, 'nothing is gained by a confusion of terms…. Everything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience.'[124] A law that seeks to promote any of these or other values will nonetheless take away from freedom as non-interference.

The upshot of Berlin's argument is that freedom as non-interference can be fully attained only in a lawless sphere in which individuals can act according to their own discretion, without fear of legal sanctions. In Berlin's own words, 'there ought to exist a certain minimum area of personal freedom which must on no account be violated'.[125] Berlin thus considers that 'a frontier must be drawn between the area of private life and that of public authority.'[126] But Berlin himself leaves open the

115 Ibid.
116 Ibid.
117 Ibid, 124.
118 Ibid, 123.
119 Ibid, 124.
120 Ibid, 125.
121 Ibid, 123–24.
122 Mill (n 37).
123 Berlin (n 2) 128.
124 Ibid, 125.
125 Ibid, 124.
126 Ibid.

question as to where exactly that frontier is to be drawn. The answer to that question, according to him, is a matter for argument and haggling.[127] In any event, the measure of Berlinian freedom as non-interference depends on where the frontier is drawn; on how far government interferes with an individual's private life, not on who governs.

Like Hobbesian freedom, therefore, freedom as non-interference does not depend on any form of government. In Berlin's own words, 'liberty in this sense is not incompatible with some kinds of autocracy, or at any rate with the absence of self-government'; 'there is no necessary connexion between individual liberty and democratic rule'.[128] On this account, 'a liberal-minded despot…may be unjust, or encourage the wildest inequalities, care little for order, or virtue, or knowledge' but may allow 'his subjects a large measure of personal freedom' as non-interference.[129] A democratic government on the other hand may deprive citizens of a larger measure of freedom as non-interference in the name of promoting other values. Some sympathisers of Berlinian freedom acknowledge the existence of a strong positive correlation between democracy and civil liberty but maintain that this does not imply causation.[130]

2.3.2 Plausibility of Freedom as Non-Interference

The main difference between Hobbesian freedom as non-frustration and Berlinian freedom as non-interference is that the former demands the absence of human interference with the fulfilment of one's actual desires or preferred options, whereas the latter demands the absence of human interference with options generally, both preferred and unpreferred. Freedom as non-interference somewhat resonates with the protection that the ECHR affords to individuals. In particular, the ECtHR considers that freedom of expression,[131] freedom of assembly,[132] and freedom of

[127] Ibid.
[128] Ibid, 129–30.
[129] Ibid, 129.
[130] See, for example, Jason Brennan, 'Democracy and Freedom' in David Schmidtz and Carmen E Pavel (eds), *The Oxford Handbook of Freedom* (Oxford University Press 2018).
[131] See, for example, *Nikula v Finland* App no 31611/96 (ECtHR, 21 March 2002), para 54; *Karsai v Hungary* App no 5380/07 (ECtHR, 1 December 2009), para 36; *Financial Times Ltd and others v the United Kingdom* App no 821/03 (ECtHR, 15 December 2009), para 59; *Margulev v Russia* App no 15449/09 (ECtHR, 8 October 2019), para 42.
[132] See, for example, *Bączkowski and others v Poland* App no 1543/06 (ECtHR, 3 May 2007), paras 66–68; *Balçık and others v Turkey* App no 25/02 (ECtHR, 29 November 2007), para 41; *Nurettin Aldemir and others v Turkey* Apps nos 32124/02 and 6 others (ECtHR, 18 December 2007), para 34; *Nemtsov v Russia* App no 1774/11 (ECtHR, 31 July 2014), paras 77–78; *Zakharov and Varzhabetyan v Russia* Apps nos 35880/14 and 75926/17 (ECtHR, 13 October 2020), para 90; *Navalnyy and Gunko v Russia* App no 75186/12 (ECtHR, 10 November 2020), para 88.

association[133] can be violated not only by actual obstacles to the exercise of chosen options as such but also by the mere dissuasive or 'chilling effect' of measures adopted by the state, that is, measures which could discourage people from choosing certain options in the future.

But just how does the conception of freedom as non-interference fare when examined through the lens of our two axioms? Perhaps what significantly undermines Berlin's conception of freedom is the fact that Berlin himself shies away from providing any meaningful policy guidance as to where the frontier between what he calls 'the area of private life' and that of public authority should be drawn. To his credit, Mill does attempt to provide such guidance by formulating what is now popularly known as the harm principle. Mill contends '[t]hat the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.'[134] However, as Berlin observes, 'Mill's strenuous effort to mark the distinction between the spheres of private and social life breaks down under examination. Virtually all Mill's critics have pointed out that everything that I do may have results which will harm other human beings.'[135]

The gist of Berlin's argument is that to be free is simply to be left alone. Indeed, although he criticises Mill on certain accounts, Berlin quotes with approval Mill's claim that '[t]he only freedom which deserves the name, is that of pursuing our own good in our own way'.[136] But we know that, contrary to what liberals tell us, political freedom understood in an overall sense does not necessarily consist in being left alone. States can, and in fact do, make laws that interfere with the range of options from which individuals may choose without violating that freedom as we know it. The tenor of the relevant provisions of the ECHR and the case law of the ECtHR interpreting those provisions are unequivocal in this regard. It would thus be legally incompetent to argue, as do Berlin and other liberals, that every law is an infraction of freedom. By the same token, the conception of freedom as non-interference fails to satisfy our first axiom.

Insofar as it attempts to dissociate freedom from democracy, the conception of freedom as non-interference, like Hobbesian freedom as non-frustration, is also diametrically opposed to what we know about political freedom generally and freedom of expression, freedom of assembly and association, and electoral freedom in particular. Such freedom, according to settled law, is indissociable from democracy. It follows that the conception of freedom as non-interference also fails to satisfy our second axiom.

133 *Adana TAYAD v Turkey* App no 59835/10 (ECtHR, 21 July 2020), para 36.
134 Mill (n 37) 22.
135 See Berlin (n 2) 155.
136 Mill (n 37) 27. See Berlin (n 2) 127.

2.4 Freedom as Non-Domination

The conception of freedom as non-domination, also known as the republican conception of freedom, derives from the Roman and neo-Roman republican tradition traceable as far back as to the writings of a Greek historian Polybius of Megalopolis (200–118 BC). This conception of freedom, according to Quentin Skinner's and Philip Pettit's historical accounts of the republican tradition, prevailed in medieval, in the Renaissance writings of Machiavelli and other republican thinkers, as well as in later republican movements, particularly in the English republic during the 1640s and 1650s and during the American revolution.[137] Skinner and Pettit see Hobbes as 'the most formidable enemy' of the republican conception of freedom,[138] charging that Hobbes and his liberal followers staged a *coup d'état* against the republican conception of freedom without anyone 'noticing the usurpation that had taken place'.[139] Berlin implicitly admits the charge, describing his own preferred conception of liberal freedom as being 'comparatively' modern.[140]

Both Skinner and Pettit, like classical liberals, generally portray freedom as a negative rather than as a positive concept.[141] There is, however, one material respect in which these two major champions of contemporary republican thought differ. For Skinner, republican freedom means both non-domination and non-interference.[142] For Pettit on the other hand, republican freedom means non-domination, pure and simple.[143] Since we have already considered the defining characteristics of non-interference, the discussion that follows focuses only on republican freedom considered purely as non-domination.

[137] See generally Quentin Skinner, *The Foundations of Modern Political Thought* (Cambridge University Press 1978); Quentin Skinner, 'Machiavelli on the Maintenance of Liberty' (1983) 18 *Politics* 3; Quentin Skinner, 'The Idea of Negative Liberty: Philosophical and Historical Perspectives' in Richard Rorty, JB Schneewind and Quentin Skinner (eds), *Philosophy in History: Essays on the Historiography of Philosophy* (Cambridge University Press 1984); Quentin Skinner, *Reason and Rhetoric in the Philosophy of Hobbes* (Cambridge University Press 1996); Quentin Skinner, *Liberty before Liberalism* (Cambridge University Press 1997); Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (WW Norton & Company 2014), ch 1.

[138] Skinner, *Hobbes and Republican Liberty* (n 8) xiv.

[139] Pettit, *Republicanism* (n 15) 50.

[140] Berlin (n 2) 129.

[141] See generally Skinner, 'The Idea of Negative Liberty' (n 137); Philip Pettit, 'A Definition of Negative Liberty' (1989) 2 *Ratio* 153; Quentin Skinner, 'The Republican Ideal of Political Liberty' in Gisela Bock, Quentin Skinner and Maurizio Viroli (eds), *Machiavelli and Republicanism* (Cambridge University Press 1990); Philip Pettit, 'Negative Liberty, Liberal and Republican' (1993) 1 *European Journal of Philosophy* 15.

[142] Philip Pettit, 'Keeping Republican Freedom Simple: On a Difference with Quentin Skinner' (2002) 30 *Political Theory* 339, 342.

[143] Ibid.

2.4.1 Elements of Freedom as Non-Domination

Skinner, Pettit and other contemporary advocates of the conception of freedom as non-domination tend to agree that 'the main figures in the republican tradition were not concerned primarily with liberty in the positive sense of democratic participation but rather with liberty in a sense opposed to interference.'[144] Pettit, however, contends that the republican emphasis on non-interference derives not from a belief in freedom as non-interference as such but in freedom as non-domination.[145] Whilst defining domination by reference to interference, Pettit insists that there is a distinction between the two concepts.[146] Domination, as Pettit defines it, 'is subjection to an arbitrary power of interference on the part of another—a *dominus* or master—even another who chooses not actually to exercise that power.'[147] Pettit identifies three main ways in which one may interfere with another in an arbitrary or dominating way, namely by removing, replacing or misrepresenting options.[148]

Like Hobbes, Pettit recognises that there exists a nexus between the internal mental process of deliberation and the external exercise of freedom. Pettit thus distinguishes and connects three different ideals of freedom, namely psychological freedom or freedom in the will or, simply, free will; ethical freedom or freedom of the will; and political freedom or freedom for the will.[149] Psychological freedom consists in one's psychological ability to deliberate before arriving at a choice. The process of deliberation, as Hobbes has already told us, involves weighing the pros and cons of available options. The ultimate choice that one arrives at reflects one's will which, ideally, should be one's free will. Psychological freedom is a precondition for both ethical freedom and political freedom. It is therefore presumed that everyone possesses some psychological freedom or what Hobbes prefers to call free will.

Ethical freedom consists in an individual's ethical virtue or skill to exercise his deliberative ability in a reliable manner. Possessing psychological freedom or deliberative ability is one thing, exercising that ability in a skilful and reliable manner to realise ethical freedom is another. The latter, in any event, presupposes

144 Pettit, *Republicanism* (n 15) 31.
145 Ibid.
146 Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 50.
147 Pettit, 'Keeping Republican Freedom Simple' (n 142) 340.
148 Pettit, *On the People's Terms* (n 146) 46–64.
149 Philip Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Oxford University Press 2001); Philip Pettit, 'Freedom: Psychological, Ethical, and Political' (2015) 18 *Critical Review of International Social and Political Philosophy* 375. cf Harry G Frankfurt, *The Importance of What We Care About: Philosophical Essays* (Cambridge University Press 1988), specifically the essay on 'Freedom of the Will and the Concept of a Person'.

the existence of the former but not vice versa. Pettit and Michael Smith argue that ethical freedom requires 'orthonomy' as opposed to 'autonomy' or self-rule.[150] To be ethically free, in other words, is to be orthonomous. To be orthonomous, or to achieve orthonomy, an individual must be reliable not only in accessing evidence as to the facts about the options that are available to him but also in arriving at a reasoned choice informed by those facts and in acting in fidelity to that reasoned choice.[151] Ethical freedom, to put it differently, consists in one's ability to make choices that have a reasoned basis in relevant facts and to act accordingly.

Republican political freedom on the other hand consists in the political protection from arbitrary interference that an individual enjoys in exercising his options. Thus, like ethical freedom, political freedom requires psychological freedom or free will. But ethical freedom is not a requirement for political freedom or vice versa: one 'can be ethically free and politically vulnerable or politically free and ethically lacking.'[152] In Pettit's view, the state should concern itself only with the protection of political freedom. Pettit thus underlines that the state should refrain from making any attempts at nurturing either the psychological freedom or the ethical freedom of its people.[153]

Like Berlin, Pettit acknowledges that political freedom may be undermined by both intentional and non-intentional interference by other human beings. Unlike Berlin, however, Pettit also recognises as freedom-undermining factors whose existence may not necessarily be attributed to other human beings 'such as poverty, ill health, handicap or lack of talent'.[154] For Pettit, political freedom understood as non-domination will be made effective through the reduction of such non-intentional obstacles to the exercise of options.[155] Pettit nonetheless considers that non-intentional obstacles, whether attributable to other human beings or not, do not themselves count as forms of arbitrary or dominating interference.[156] Therefore, Pettit's 'formal' albeit not necessarily 'effective' political freedom is opposed only to intentional interference by other human beings. Understood in this formal sense, political freedom as non-domination has two main distinctive features. First, such freedom may be lost not only when there is interference but also when there is 'domination without interference'. Second, there can be interference without any loss of freedom, that is, when there is 'interference without domination'.

150 Philip Pettit and Michael Smith, 'Freedom in Belief and Desire' (1996) 93 *Journal of Philosophy* 429.
151 Pettit, 'Freedom: Psychological, Ethical, and Political' (n 149) 380.
152 Ibid, 387.
153 Ibid, 376.
154 Pettit, 'Keeping Republican Freedom Simple' (n 142) 343.
155 Ibid.
156 Ibid. See also Pettit, *Republicanism* (n 15) 52–53.

Consider how domination causes a loss of republican freedom in the absence of interference. For republicans, freedom cannot be attained unless the non-interference that one enjoys is robust and resilient. To be politically free in the republican sense, in other words, one must enjoy non-interference 'not only in the actual world but also in a range of possible worlds.'[157] Freedom in this sense is freedom from the possession (rather than the actual exercise) by another of the power of interference. By demanding the absence of possible or potential interference rather than a mere reduction of the probability of interference, republican freedom also demands the absence of actual interference by default. Some sympathisers of liberal freedom, most notably Ian Carter and Matthew Kramer, have attempted to show that the conception of freedom as non-interference captures both actual and possible interference when measuring overall freedom. However, their argument accounts for possible interference only in proportion to the conditional probability of such interference becoming actual.[158]

Republicans on the other hand insist that freedom must be so robust as to capture as sources of unfreedom the mere possibility of interference occurring, even if actual interference may be highly improbable.[159] However improbable it may be, so republicans contend, arbitrary interference in the absence of relevant protection remains accessible to everyone and thus everyone represents a dominating presence in the lives of others: everyone depends on the good will of others and lives, in effect, at the mercy of others.[160] In other words, the concern for republicans is not to make interference improbable but to make it inaccessible, or at least to make its accessibility so costly that the interferer does not enjoy impunity *ex post*.

To put it metaphorically, freedom as non-domination does not just require that doors should be open but also that there should be no powerful doorkeepers.[161] This contrasts with liberal freedom as non-interference which can be attained even by ingratiating oneself with the doorkeeper to be allowed to walk through the door. To illustrate the point further, consider the metaphor from horse riding that Pettit uses.[162] A horse rider may give the horse free rein, allowing it to move in its own desired

[157] Ian Carter and Ronen Shnayderman, 'The Impossibility of "Freedom as Independence"' (2019) 17 *Political Studies Review* 136, 136–37.

[158] Carter (n 1), sec 8.6; Matthew Kramer, *The Quality of Freedom* (Oxford University Press 2003), ch 2. See also Robert Goodin and Frank Jackson, 'Freedom from Fear' (2007) 35 *Philosophy and Public Affairs* 249.

[159] Pettit, *Republicanism* (n 15) 74 and 88; Quentin Skinner, 'Freedom as the Absence of Arbitrary Power' in Cécile Laborde and John Maynor (eds), *Republicanism and Political Theory* (Blackwell Publishing 2008) 96–97; Philip Pettit, 'Freedom and Probability: A Comment on Goodin and Jackson' (2008) 36 *Philosophy and Public Affairs* 206.

[160] Philip Pettit, 'Republican Liberty, Contestatory Democracy' in Ian Shapiro and Casiano Hacker-Cordon (eds), *Democracy's Value* (Cambridge University Press 1999) 165.

[161] Pettit, 'The Instability of Freedom as Noninterference' (n 14) 693.

[162] Pettit, *Just Freedom* (n 137) 1–2.

direction, and yet the horse cannot be said to be free in the republican sense. The horse is not free because it remains at the mercy of the rider as the rider retains the power of control; he can pull on the reins at will. In short, republican freedom cannot be equated with free rein; free rein is insufficient for the attainment of republican freedom.

Republicans thus counterpose freedom with slavery. To enjoy republican political freedom is not to be a slave, to be one's own master, not to be subject to the arbitrary will of another. In the words of Algernon Sidney, writing in the 17th century, freedom 'solely consists in an independency upon the Will of another, and by the name of Slave we understand a Man, who can neither dispose of his Person nor Goods, but enjoys all at the will of his Master'.[163] Or, as John Trenchard and John Adams put it in their 18th century *Cato's Letters*, freedom 'is to live upon one's own Terms; Slavery is to live at the …[mere] Mercy of another'.[164] Although he is sometimes characterised as a liberal theorist, John Locke also adopts this republican way of thinking in his 17th century *Two Treatises of Civil Government*. According to Locke, a free man is he who is not 'subject to the inconstant, uncertain, unknown, arbitrary will of another man'.[165]

The self-mastery that republicans speak about requires more than just non-interference. A lucky slave might as well escape interference, for example, by eschewing doing anything the master does not want him to do or by ingratiating himself with the master, or even when the master is just a kindly, non-interfering person. But on a republican account, 'he is a slave who serves the best and gentlest man in the world, as well as he who serves the worst'.[166] For as long as the master retains the power to interfere, the possibility of interference remains intact and, by the same token, the master dominates the slave. In particular, provided the master knows that he can interfere with the slave and the slave knows that his master can interfere with him, the slave will always be careful not to make choices that may be unacceptable to his master.[167] This mutual awareness induces fear in the slave that the master may interfere to stop his actions *ex ante* or avenge his actions *ex post*, thereby limiting the range of options from which the slave can choose in practice.[168]

Thus, although republicans portray freedom as a negative concept, there is a sense in which their conception of freedom can be equated with positive

163 Algernon Sidney, *Discourses Concerning Government* (2nd edn, London 1704) 9.
164 John Trenchard and John Adams, *Cato's Letters* (vol II, London 1723) 77.
165 John Locke, *Two Treatises of Civil Government* (Thomas Hollis ed, London 1764) 213.
166 Sidney (n 163) 319.
167 Spector (n 2) 798.
168 See Skinner, 'Freedom as the Absence of Arbitrary Power' (n 159) 99, recognising 'the predicament in which slaves find themselves once they begin to reflect on their servitude.'

freedom.[169] Every dominated individual, according to the republican rendition, is internally or psychologically constrained merely by virtue of the relationship of domination. To use the words of Baron de Montesquieu, republican freedom depends on 'that tranquillity of spirit which comes from the opinion each one has of his *security*', and to enjoy freedom in this sense 'the government must be such that one citizen cannot *fear* another citizen.'[170] In short, quite apart from potential interference, whether or not one is aware of it, republican freedom requires the absence of such psychological constraints on the range of options from which the individual may choose without fearing interference or a penalty.[171] This is a radical departure from the two liberal conceptions of freedom considered above which focus only on external interference.

All in all, therefore, republican freedom denotes the status that a person enjoys in relation to others. Ideally, republicans contend, freedom must have an objective as well as a subjective side.[172] First, to enjoy the status of a free person, one must be objectively protected against arbitrary interference by others. Second, the status of a free person requires that the existence of such objective protection should be intersubjective, that is, it should be subjectively registered as a matter of shared awareness among the members of the society. Everyone must be aware that everyone is objectively protected against arbitrary interference, and everyone must be aware that this is a matter of common awareness. In other words, everyone's status as a free person must be salient and manifest to everyone. Only then, so says Pettit, 'can you walk tall among your fellows, conscious of sharing in the general recognition that no one can push you around—as no one can push anyone around—and expect to escape censure or penalty.'[173]

But what exactly actualises the objective and subjective status freedom that republicans speak about? It is in response to this question that republicans invoke the interference-without-domination motif. What gives security or republican freedom is the social or legal status of being a *civis,* or a citizen; being someone who, together with others, is equally protected by law. As the status of a citizen is created by law, republicans claim, so is freedom. In Pettit's words, it is 'good laws' that give citizens freedom as non-domination—that protect citizens 'against the resources or

169 Spector (n 2) 798.

170 Montesquieu, *The Spirit of the Laws* (Anne M Cohler, Basia Carolyn Miller and Harold Samuel Stone eds, Cambridge University Press 1989) 157 (emphasis added).

171 See Eric Nelson, 'Liberty: One Concept Too Many?' (2005) 33 *Political Theory* 63, 73, observing that Skinner's republican negative liberty recognises 'the psychological impact of dependence itself…as a constraint on action.'

172 See Pettit, *Republicanism* (n 15) 70–73; Pettit, *On the People's Terms* (n 146) 83–87; Philip Pettit, 'Criminalization in Republican Theory' in RA Duff and others (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press 2014) 138; Pettit, *Just Freedom* (n 137) 57–58.

173 Pettit, *Just Freedom* (n 137) 57.

dominium of those who would otherwise have arbitrary power over them—without themselves introducing any new dominating force: without introducing the domination that can go with governmental *imperium*' or public power.[174] Libertas or freedom in this sense 'signifies in the first place the status of an individual as such, whereas civitas [or citizenship] denotes primarily the status of an individual in relation to the community.' [175] Thus, as Wirszubski succinctly puts it, 'full libertas is coterminous with civitas.'[176]

Republicans do not take issue with the liberal stand to the effect that laws necessarily involve interference. Pettit in particular claims that there can be interference without domination 'when the interference is not arbitrary and does not represent a form of domination: when it is controlled by the interests and opinions of those affected, being required to serve those interests in a way that conforms with those opinions.'[177] Therefore, according to Pettit, it is not all laws but only those that track the 'common interests of citizens' and that are applied 'in a manner that conforms to the opinions received among the citizenry' that constitute non-mastering or non-dominating interference.[178] It is such laws, so says Pettit, that create the political freedom that citizens enjoy.[179] Laws, on this account, are creative or constitutive rather than abrogative of freedom.[180]

Interestingly, this claim finds considerable support in the writings of many influential thinkers of past centuries. In his 17th century text, for example, James Harrington dismisses Hobbes's 'liberty from the laws' and instead adopts what he terms 'liberty or immunity by the laws'.[181] John Locke follows suit, declaring that '*where there is no law, there is no freedom*'.[182] According to Locke, '*the end of law is* not to abolish or restrain, but *to preserve and enlarge freedom*'.[183] William Blackstone echoes these sentiments in his 18th century treatise on the common law of England. He declares that 'laws, when prudently framed, are by no means

174 Pettit, *Republicanism* (n 15) 36.
175 CH Wirszubski, *Libertas as a Political Idea at Rome during the Late Republic and Early Principate* (Oxford University Press 1950) 3–4.
176 Ibid, 3.
177 Pettit, *Republicanism* (n 15) 35.
178 Ibid.
179 Ibid, 36.
180 See Philip Pettit, 'Law and Liberty' in Samantha Besson and José Luis Martí (eds), *Legal Republicanism: National and International Perspectives* (Oxford University Press 2009).
181 James Harrington, *The Commonwealth of Oceana and a System of Politics* (JGA Pocock ed, Cambridge University Press 1992) 20.
182 Locke (n 165) 242.
183 Ibid.

subversive but rather introductive of liberty'.[184] Immanuel Kant also defends this republican way of thinking in one of his works published later in the 18th century. He contends that citizens of a commonwealth have three attributes, namely 'lawful' freedom, civil equality and civil independence.[185] Writing in the 19th century, a liberal theorist Benjamin Constant similarly described liberty, as he saw it in England, France and the United States, as 'the right to be subjected only to the laws', not to be subject to the 'arbitrary will of one or more individuals.'[186]

The French Declaration of the Rights of Man and of the Citizen of 1791, the subject of Bentham's ridicule in *Anarchical Fallacies*, also espouses a socially-oriented and law-based definition of freedom in a political society. Article 4 thereof declares that '[l]iberty consists in being able to do anything that does not harm others' and, 'thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights.'[187] The bounds thus envisaged, article 4 further declares, 'may be determined *only* by Law.'[188] This clearly echoes the republican conception of law-based, equal status freedom which (as republicans understand it) is a defining attribute of the concept of citizenship.

Importantly, republicans insist that laws should protect each citizen not only against private domination in horizontal relations with other citizens and against public domination in vertical relations with the state, but also that citizens as a collective people comprising the state should be protected from foreign or external domination by other states and international bodies or agencies.[189] According to this republican way of thinking, domination of a collective people, or a state, necessarily involves domination of the individual citizens comprising that state. As an 18th century republican Richard Price puts it in his writings, 'a country that is subject to the legislature of another country in which it has no voice, and over which it has

184 William Blackstone, *Commentaries on the Laws of England: In Four Books* (vol I, 16th edn, John Tylor Coleridge ed, London 1825) 126.

185 Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor trans/ed, Cambridge University Press 1991) 125. See also Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009) 42–43, arguing that Kant embraces the republican conception of freedom as non-domination. However, Pettit considers that, although both Kant and Rousseau remain faithful to the ideal of equal status freedom, their way of thinking about citizenship and the state is as inimical to republican freedom as classical liberalism. See Philip Pettit, 'Two Republican Traditions' in Andreas Niederberger and Philipp Schink, *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press 2013).

186 Benjamin Constant, *Constant: Political Writings* (Biancamaria Fontana trans/ed, Cambridge University Press 1988) 310.

187 Declaration of the Rights of Man and of the Citizen 1789, art 4.

188 Ibid (emphasis added). For Bentham's criticism of this definition of freedom, see Bentham (n 58) 505–06.

189 Pettit, *Just Freedom* (n 137).

no…[control], is in a state of slavery.'[190] Such slavery, according to Price, 'is worse, on several accounts, than any slavery of private men to one another, or of kingdoms to despots within themselves.'[191] Therefore, if citizens are to enjoy republican freedom, the state that protects citizens against private domination must not only be internally non-dominating; the state itself must also be free or externally undominated. The republican freedom that states enjoy is what is commonly known as sovereignty.

To guard citizens against private domination, according to the republican conception of freedom, state interference through coercive laws is a matter of necessity. Even so, Pettit insists that such interference must track 'the avowable common interests—and only the avowable common interests—of those who live under the law'.[192] The guiding criteria for identifying such common interests, so it appears, derive from the egalitarian ideal or the equal status accorded to citizens. Therefore, only options that are co-enjoyable, that is, options that are both co-exercisable and co-satisfying ought to be protected by law. An option is both co-exercisable and co-satisfying if all citizens can exercise it concurrently without undermining any citizen's enjoyment of the standard reward attendant to the exercise of that option. Pettit considers that some co-exercisable options that may not otherwise be co-satisfying can be made co-satisfying by introducing suitable rules of law.[193] For example, whilst it may not be co-satisfying for everyone in an assembly to speak when everyone else is speaking, all members of the assembly can enjoy equal status freedom to speak under *Robert's Rules of Order*.[194]

To guard against public domination, citizens must share equally in controlling the government that runs the state, ensuring that any interference is consistent with non-dominating laws. This, according to Pettit and other republicans, requires a distinctive form of political democracy characterised not only by periodic elections but also by both a mixed constitution and a contestatory citizenry.[195] A mixed constitution is a legal arrangement in which the power to make and administer laws is shared among mutually checking and popularly controlled, representative public bodies. And a contestatory citizenry is a vigilant citizenry that continually exposes public officials, both elected and appointed, to popular influence and control. Whilst acknowledging that modern constitutional or democratic monarchies can also deliver

190 Richard Price, *Political Writings* (DO Thomas ed, Cambridge University Press 1991) 30.
191 Ibid.
192 Pettit, 'Keeping Republican Freedom Simple' (n 142) 345.
193 See Pettit, *On the People's Terms* (n 146) 101; Pettit, *Just Freedom* (n 137) 62–69.
194 Henry M Robert, *Robert's Rules of Order* (12th edn, Daniel H Honemann and others eds, PublicAffairs 2020).
195 Pettit, *On the People's Terms* (n 146); Pettit, *Just Freedom* (n 137). See also generally Adrian Oldfield, *Citizenship and Community: Civic Republicanism and the Modern World* (Routledge 1990).

republican freedom, republicans do not therefore agree with Hobbes, Berlin or other theorists who claim that political freedom can be attained under an absolute monarchical or despotic government. Price in particular considers that any 'liberty' that private citizens may be allowed to exercise under such a government would be nothing but 'an indulgence or connivance derived from the spirit of the times, or from an accidental mildness in the administration.'[196]

To guard against foreign or external domination by other states and international agencies, to attain sovereignty, democratic states must participate on an equal footing in making rules of international law. Just as the republican ideal of individual freedom requires guarding citizens against domination both with and without interference, the republican ideal of sovereignty also requires guarding democratic states against domination by other states or international bodies with or without interference. Republicans consider that a state can be dominated by the mere presence of other states that can interfere at will and with impunity in its internal affairs either by removing or otherwise replacing the options that the state may secure to its citizens. Such interference may, for example, be actualised through military, economic or political intervention. International law should therefore be used to protect options that are both co-exercisable and co-satisfying from the standpoint of the peoples across the states concerned. To prevent international agencies charged with the implementation of international law from dominating any state or its people, the decisions of those agencies must be contestable and controllable by all the states concerned in a way analogous to a democratic system within a nation state.

It should also be noted that republicans claim that, in both national and international relations, laws should be supplemented by social norms or customary practice in securing freedom as non-domination. In the words of Pettit, to be truly effective, the laws of the state must 'work in synergy with norms that are established, or that come to be established, in the realm of civil society. The laws must give support to the norms and the norms must give support to the laws.'[197] Pettit echoes these sentiments with respect to international law and international customary practice in relations between states.[198] He further argues that, like laws, any such social norms or customs can be effective in securing freedom as non-domination only when they are so well established that, as a matter of common awareness, every member of the national or international community expects the patterns of behaviour at issue to attract the approval of other members, thereby reinforcing every member's conformity to those patterns of behaviour. Indeed, as Machiavelli observes, 'there

196 Price (n 190) 26.
197 Pettit, *Republicanism* (n 15) 242. See also Pettit, *Just Freedom* (n 137) 58–60.
198 Pettit, *Just Freedom* (n 137), ch 6.
198 Pettit, *Republicanism* (n 15) 242.

are no laws or rules sufficient to restrain a universal corruption. Because just as good morals, if they are to be maintained, have need of the laws, so the laws, if they are to be observed, have need of good morals.'[199] In short, the 'social norms that support laws, doubling the objective and subjective security that the laws underwrite, consist by most accounts in patterns of behaviour that people expect to be approved of for displaying and disapproved of for not displaying.'[200]

However, as already intimated above, republicans do recognise that neither laws alone nor laws supplemented by social norms can completely remove the possibility of interference *ex ante*. What they see as a source of unfreedom is the possession rather than the exercise by others of arbitrary power of interference, or what Pettit sometimes calls 'alien' or 'alienating control' on the part of others.[201] This occurs when one can interfere in an arbitrary manner or at will *and* with impunity by removing, replacing or otherwise misrepresenting the options from which another may choose. The central purpose of laws as supplemented by social norms in the republican conception of freedom is to remove the possibility of interference with impunity rather than to make interference completely impossible.[202] Provided that the interferer does not enjoy impunity, republicans do not see as freedom-defeating interference committed in violation of the law.[203]

It is also interesting to note that republicans see political democracy, specifically its distinctive features of a mixed constitution and a contestatory citizenry, not as an end in itself but as a means to the ultimate end, namely freedom. To use the words of Blackstone, freedom 'is the very end and scope of the constitution'.[204] Although they do not necessarily see freedom as the only value in life, republicans claim that freedom in this sense 'is a gateway good, suited to guide the governments that people form and sustain.'[205] Pettit puts forward a spirited argument in this connection. According to him, if governments followed the normative guidance that the

[199] Nicollò Machiavelli, *Machiavelli: The Chief Works and Others* (vol 1, Allan H Gilbert trans, Duke University Press 1989) 241.

[200] Pettit, *Just Freedom* (n 137) 58. See also Harrison P Frye, 'Freedom Without Law' (2018) 17 *Politics, Philosophy & Economics* 298, arguing that social norms, like laws, can protect freedom.

[201] Philip Pettit, 'Republican Freedom: Three Axioms, Four Theorems' in Cécile Laborde and John Maynor (eds), *Republicanism and Political Theory* (Blackwell Publishing 2008) 102; Skinner, 'Freedom as the Absence of Arbitrary Power' (n 159) 99–100.

[202] See generally Philip Pettit, 'Freedom as Antipower' (1996) 106 *Ethics* 576; Pettit, *Republicanism* (n 15).

[203] Carter and Shnayderman (n 157) 140.

[204] Blackstone (n 184) 6.

[205] Pettit, *On the People's Terms* (n 146) 3. See also Pettit, *Just Freedom* (n 137) xix; Philip Pettit, 'Freedom as Nondomination' in Toby Buckle (ed), *What is Freedom? Conversations with Historians, Philosophers, and Activists* (Oxford University Press 2021) 102.

republican ideal of freedom provides, states would be more effective in tackling various problems facing human societies today, including in the areas of social justice, political democracy and globalised sovereignty.[206] Like Blackstone and other Enlightenment republican writers, Pettit goes so far as to argue that freedom as understood in republican political theory is the only good governments need worry about.[207]

2.4.2 Plausibility of Freedom as Non-Domination

From a legal standpoint, Pettit and other contemporary theorists who share his republican way of thinking about freedom put forward a more persuasive conception of political freedom than their liberal counterparts from both the Hobbesian and the Berlinian camps. First, we have seen that interference with the exercise of options that could otherwise be associated with freedom is compatible with the republican conception of freedom provided that such interference is law-based and non-arbitrary. Republicans see political freedom not as a natural phenomenon but as a creation of the law. This is in keeping with our first axiom, according to which, in creating freedom, the law may impose restrictions on the range of options from which individuals may choose. Second, the republican conception of freedom establishes a clear link between freedom and democracy. This, too, is in tandem with our second axiom. As noted in chapter 1, the preamble to the ECHR also echoes this republican way of thinking, reaffirming that fundamental freedoms 'are the foundation of justice and peace in the world and are best maintained…by an effective political democracy'.

Importantly, the republican conception of freedom also appears to comport with common-sense justice. Ordinary people cannot be guaranteed of being able to exercise and enjoy both preferred and unpreferred options, as suggested by Berlin, unless they are protected not only in their vertical relations with state actors but also in their horizontal relations with other private actors. It is only when ordinary people are so protected that they can truly feel free. Any arbitrary interference with one's range of options, regardless of the source of such interference, can thus be properly seen as a source of unfreedom in keeping with the republican ideal of freedom. From the victim's perspective, arbitrary interference is arbitrary interference regardless of its source. Indeed, it defies common sense to suggest, as liberal theorists do, that political freedom consists primarily in being free from state interference or coercion. The state cannot possibly perform is public functions without interfering with or

[206] Pettit, *Just Freedom* (n 137).

[207] Pettit, 'Freedom as Nondomination' (n 205) 101. See, for example, Thomas Paine, *Common Sense* (John Carter 1776) 6–7, arguing that freedom is 'the design and end' of government.

coercing its people. It follows that, as republicans suggest, we should be concerned about arbitrary interference and not about interference as such.

There are, however, at least two issues that we must confront before we can consider adopting the republican way of thinking about freedom. First, whilst republican theorists argue that democracy is not an end in itself but a means of securing freedom, the case law of the ECtHR tends to place more emphasis on the claim that political freedom is a cornerstone of democracy, thereby portraying such freedom as an instrument for democracy and not vice versa. Democratic participation, as we have seen, is important in the republican conception of freedom. Its importance, however, derives from the fact that republicans see such participation as a means of furthering freedom; it does not derive from any definitional connection between democratic participation and freedom as such. But why does the case law of the ECtHR (departing, as it may appear, from the affirmation made in the preamble to the ECHR) suggests that we need freedom to protect democracy and not the other way round?

Contemporary republicans suggest that the growing support for democracy as a form of government is what has led policymakers and judicial bodies to adopt this populist position which presents freedom in positive terms, suggesting that freedom consists in democratic participation or self-rule. Pettit in particular suggests that it is the 18th century Genevan philosopher Jean-Jacques Rousseau who is responsible for giving currency to this populist view.[208] Indeed, many writers support this populist conception of freedom. An influential 20th century political philosopher Alexander Meiklejohn, for example, adopts it in his advocacy for absolute 'freedom' of political expression.[209] In a more recent contribution, Eric Barendt similarly asserts that citizens' participation in a democracy is 'probably the most easily understandable, and certainly the most fashionable, free speech theory in modern Western democracies.'[210] Randal Marlin follows suit, contending that such participation 'is possibly the most powerful argument for an uncompromising protection of freedom of expression.'[211]

We must recall, however, that even republicans themselves see freedom as an ecumenical ideal with instrumental value. As already noted, republicans see political freedom as a good whose realisation is instrumental to the realisation of other goods, including goods related to democracy. The apparent difference between what we know about political freedom from the case law of the ECtHR and the traditional

[208] Pettit, *Republicanism* (n 15) 30.

[209] Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (Harper & Bros 1948) 8; Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) 1961 *Supreme Court Review* 245.

[210] Eric Barendt, *Freedom of Speech* (2nd edn, Oxford University Press 2005) 18.

[211] Randal Marlin, *Propaganda and the Ethics of Persuasion* (2nd edn, Broadview Press 2013) 239.

republican way of thinking is therefore not wholly irreconcilable. Republican freedom may be used to safeguard democracy even though republicans see an effective political democracy primarily as an institution for safeguarding freedom as they conceive of it and not vice versa. Indeed, at least for Pettit, it is only in a society where individuals have freedom of expression, freedom of assembly and association, and electoral freedom (specifically, the rights 'to stand for office, combine in parties, promote their policies and expose other parties, including the governing party, to criticism between and at the time of elections') 'that they can hope to continue to share equally in a system of independent influence over government.'[212] This appears to confirm that even republicans see as a bedrock of the type of democracy that they advocate the freedom that enables democratic participation.

The second issue relates to a more general criticism often levelled against the republican conception of freedom. It would appear that the Achilles heel of the conception of freedom as non-domination consists in the 'unsuitable' choice of the term 'non-domination' and the attendant claim that freedom as such can be attained if and only if every relevant interference, to use Pettit's words, is 'forced to track the avowed or readily avowable interests' of all those it affects.[213] Virtually all Pettit's critics have pointed out that this formulation is untenable because no human society plausibly exists in which the interests of all its members can be satisfied in public decision-making. Perhaps the correct formulation should be that citizens ought to be afforded an equal opportunity to participate, directly or through their supposed representatives, in all public decisions that may affect their interests.

Pettit himself acknowledges the problem inherent in his own formulation. He attempts to address it through what he terms the 'tough luck test' which, according to him, 'requires that the government should support and protect its people on the basis of such equally shared control that if a collective decision goes against you, then you have reason to view this as tough luck, even by the most demanding local criteria, and not as the sign of a malign will working against you or your kind.'[214] But, obviously, unless the claim is that one can be forced to be free by obeying a law or other collective decision that one disapproves of, any such 'tough luck' cannot be equated with freedom. If anything, the act of obeying the law itself, whether one approves or disapproves of the law in question, cannot be equated with freedom. According to Skinner's compelling historical account, even traditional republican writers 'never deal in such paradoxes' as Pettit's claim that

[212] Pettit, *On the People's Terms* (n 146) 201.
[213] Pettit, 'Keeping Republican Freedom Simple' (n 142) 341–42.
[214] Pettit, *Just Freedom* (n 137) xxvi.

'the act of obeying the law to which you have given your consent is "entirely consistent with freedom"'.[215]

If political freedom is created by law, then a line must be drawn between such freedom and other types of freedom or what Hobbes calls 'natural' liberty. In creating political freedom, the law itself may impose restrictions or conditions on the exercise or enjoyment of certain options which we may naturally see as part of our freedom. It would therefore be disingenuous for anyone to claim that everyone will always consider the law to be consistent with his own interests. Individual preferences must on occasion yield to those of the community for the sake of the common good, even though affected individuals will naturally feel dominated. What is important, as the ECtHR points out, is to recognise that even democracy itself does not 'simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.'[216]

2.5 Freedom as Independence

In a 2016 thought-provoking contribution to the debate on social or political freedom, Christian List and Laura Valentini advocate a conception of freedom as independence. It should be pointed out, however, that this conception of freedom is not entirely new. The essence of the conception of freedom as independence, as List and Valentini present it in their 2016 contribution, has been captured in the authors' own previous works.[217] Moreover, List and Valentini acknowledge in that contribution that the term 'freedom as independence' has been used in other previous works, 'especially with reference to Kant's conception of freedom or republican nondomination.'[218] But this is not to say that their contribution is a replication of the republican conception of freedom as outlined above. On the contrary, List and Valentini advocate a radical departure from the republican conception of freedom, particularly as championed by Pettit in contemporary political theory.

[215] Skinner, *Liberty before Liberalism* (n 137) 83.

[216] *Young, James and Webster v the United Kingdom* Apps nos 7601/76 and 7806/77 (ECtHR, 13 August 1981), para 63.

[217] See Christian List, 'The Impossibility of a Paretian Republican' (2004) 20 *Economics and Philosophy* 1, Christian List, 'Republican Freedom and the Rule of Law' (2006) 5 *Politics, Philosophy & Economics* 201; Laura Valentini, *Justice in a Globalized World: A Normative Framework* (Oxford University Press 2011) 162–64.

[218] List and Valentini (n 2) 1044. See Laura Valentini, 'Kant, Ripstein and the Circle of Freedom' (2012) 20 *European Journal of Philosophy* 450; Arthur Ripstein, 'Form and Matter in Kantian Political Philosophy: A Reply' (2012) 20 *European Journal of Philosophy* 487; Alan MSJ Coffee, 'Freedom as Independence: Mary Wollstonecraft and the Grand Blessing of Life' (2014) 29 *Hypatia: A Journal of Feminist Philosophy* 908.

2.5.1 Elements of Freedom as Independence

In developing their conception of freedom, List and Valentini proceed on the assumption that any plausible conception of freedom must satisfy two desiderata. The first, the 'functional-role desideratum', holds that a plausible conception should capture as sources of unfreedom all actual and possible constraints on action 'that stand in need of justification.'[219] According to List and Valentini, however, 'only constraints that fall within human control are in principle susceptible to justification'.[220] The second desideratum, 'ordinary-language plausibility', requires that a plausible conception of freedom should display 'an adequate level of fidelity to ordinary-language use.'[221] List and Valentini, however, add that the functional-role desideratum should be prioritised over ordinary-language plausibility because 'linguistic intuitions about freedom and unfreedom are somewhat unstable'.[222]

Relying on these desiderata, List and Valentini contend that the republican conception of freedom as non-domination should be revised by dropping the interference-without-domination motif whilst retaining the domination-without-interference motif only. They, in other words, advocate a compromise between the liberal conception of freedom as non-interference and the republican conception as non-domination. Like republicans, but unlike liberals, List and Valentini argue that freedom requires robustness, that is, guaranteed or protected non-interference. They thus adopt the republican domination-without-interference motif. Like liberals, but unlike republicans, List and Valentini posit that freedom should be defined without drawing a distinction between justifiable and non-justifiable forms of interference. They accordingly drop the republican interference-without-domination motif. List and Valentini thus define freedom 'as the robust absence of constraints simpliciter, not only of arbitrary constraints.'[223] This is what they call freedom as independence.

List and Valentini's reasoning in adopting the domination-without-interference motif mimics the republican way of thinking. In fact, in justifying their advocacy for a robust conception of freedom, List and Valentini adopt the paradigm of republican

[219] List and Valentini (n 2) 1049. See also SI Benn and WL Weinstein, 'Being Free to Act, and Being a Free Man' (1971) 80 *Mind* 194, 199; SI Benn, *A Theory of Freedom* (Cambridge University Press 1988); David Miller, 'Constraints on Freedom' (1993) 94 *Ethics* 66, 72.

[220] List and Valentini (n 2) 1050.

[221] Ibid, 1051.

[222] Ibid.

[223] Ibid, 1044.

unfreedom involving a slave with a non-interfering master.[224] Of particular interest for the present purpose is how such robustness is to be ensured. In this connection, List and Valentini claim that their conception of freedom is versatile in that it can pick out different forms of possible freedom-undermining interference (both conditional and unconditional, including legal, political and custom-related interference) and admit of different levels of robustness.[225]

According to List and Valentini, what causes one 'to be robustly shielded from interference makes no difference to the truth of the claim that they are free to perform some action.'[226] This means, for example, that a Mafia could contribute to the robustness of one's freedom as independence. List and Valentini, however, acknowledge that the protection offered by a Mafia is not guaranteed. They thus see as more robust and guaranteed the protection offered by the state through the rule of law.[227] In other words, List and Valentini believe that laws can sometimes promote freedom as independence. They nonetheless insist that all forms of human interference, whether law-based or not, undermine freedom as they conceive of it.[228]

This insistence, of course, resonates with the liberal way of thinking. It is therefore the main reason why List and Valentini drop the interference-without-domination motif associated with republican freedom. The gist of their argument, however, is that the definition of freedom should not be moralised. They contend in this connection that the interference-without-domination motif fails to satisfy their two desiderata because it moralises the definition of freedom. The moralisation that List and Valentini speak about consists in the republican claim that non-dominating interference does not undermine freedom.

List and Valentini acknowledge that democratically controlled interference, or what republicans call non-arbitrary interference, might be perfectly justifiable and even desirable. They, however, maintain that all relevant constraints on action, whether non-arbitrary or not, are a source of unfreedom. If non-arbitrary constraints were not to be regarded as freedom-restricting, List and Valentini argue, 'then a justly imprisoned criminal, a justly taxed anarchist, and an addict forced by a legitimate state into rehabilitation for his own good' would be considered to be

[224] See also Alexander Bryan, 'Freedom as Non-domination, Robustness, and Distant Threats' (2021) 24 *Ethical Theory and Moral Practice* 889. cf Gerald F Gaus, 'Backwards into the Future: Neorepublicanism as a Postsocialist Critique of Market Society' (2003) 20 *Social Philosophy and Policy* 59; Goodin and Jackson (n 158); Paul Sagar, 'Liberty, Nondomination, Markets' (2019) 81 *Review of Politics* 409; Carter and Shnayderman (n 157).

[225] List and Valentini (n 2) 1070–72.

[226] Ibid, 1071.

[227] Ibid, 1071–72. See also List, 'Republican Freedom and the Rule of Law' (n 217).

[228] List and Valentini (n 2) 1072.

free.[229] This, according to List and Valentini, would go against both their functional-role and ordinary-language plausibility desiderata.

Interestingly, Pettit does not see his account of republican freedom as a moralised one. He maintains that non-arbitrary interference through democratically constituted laws does not compromise but constitute the freedom that citizens enjoy by protecting them against potential interference by others. Whilst acknowledging that non-arbitrary interference may be morally acceptable, Pettit insists that the term 'non-arbitrary' in his conception of freedom 'is defined by reference to whether as a matter of fact the interference is subject to adequate checking.'[230] Interference is non-arbitrary in this sense if, being checked, it is forced to track the common avowable interests of all citizens independently of any moral criterion.[231]

In rebuttal, List and Valentini argue that no democratic society plausibly exists in which the state can make decisions without compromising the interests of some individuals. In their view, if interference counts as arbitrary whenever 'it compromises some citizens' interests, then practically every democratic decision—absent unanimity—will involve some domination.'[232] Accordingly, List and Valentini argue, every law that is not approved by a unanimous decision of all citizens must count as arbitrary and thus dominating.[233] List and Valentini make out a strong case here, suggesting that the very freedom which republicans speak about by advocating democratically constituted laws is implausible because democratic decisions are typically majoritarian in nature and thus dominating on dissenting minorities.[234]

2.5.2 Plausibility of Freedom as Independence

List and Valentini have certainly contributed to the clarification of the robustness requirement related to the domination-without-interference motif of republican freedom.[235] Their argument in favour of a non-moralised conception of freedom is also somewhat strong. This is particularly so when that argument is applied to a democratic society in which the majority tends to override the wishes of the minority when making political decisions. It is therefore true that there is a sense in which the

[229] Ibid, 1059.
[230] Pettit, 'Republican Freedom' (n 201) 117.
[231] Ibid. See also Pettit, *A Theory of Freedom* (n 149) 156–60.
[232] List and Valentini (n 2) 1062.
[233] Ibid.
[234] See also Thomas W Simpson, 'The Impossibility of Republican Freedom' (2017) 45 *Philosophy & Public Affairs* 27. cf Sean Ingham and Frank Lovett, 'Republican Freedom, Popular Control, and Collective Action' (2019) 63 *American Journal of Political Science* 774.
[235] Carter and Shnayderman (n 157) 144.

minority will feel dominated by the majority in such a system. To say otherwise is to embrace the corollary that one can be forced to be free, a counterintuitive result which not even republicans themselves would be willing to accept.[236] Indeed, republicans (like liberals, such as Mill[237]) are averse to the tyranny of the majority as it goes against the very non-domination ideal they advocate.[238]

Be that as it may, List and Valentini's assertion that every public decision that goes against one's preferences must count as arbitrary is legally untenable. Only capricious or whimsical decisions which are not based on a properly framed law, or which are otherwise unjustifiable in a democratic society, have been held to be arbitrary by courts, including the ECtHR. Even what List and Valentini call moralisation appears to be an integral part of any plausible conception of political freedom in an overall sense. It is axiomatic, as we already know, that not every form of interference that stands in need of justification is a violation of political freedom. Like other judicial bodies around the world, the ECtHR does in fact conduct justificatory appraisals, drawing a distinction between permissible and impermissible forms of interference, before finding any interference to be a violation of the relevant provisions of the ECHR. A plausible conception of political freedom in an overall sense cannot, therefore, be so robust as to satisfy List and Valentini's functional-role desideratum.

Indeed, it is unlikely that that desideratum would ever be satisfied whilst maintaining the robustness requirement absent any further qualification. Unless one is physically fettered or imprisoned, it is almost always possible for one to interfere with another. This holds true even when the law prohibits such interference as individuals can, and in fact do, disobey laws. As Hobbes observes, laws have no power to protect anyone 'without a Sword in the hands of a man, or men, to cause those laws to be put in execution.'[239] Thus, Hobbes analogises laws with weak bonds that may 'be made to hold, by the danger, though not by the difficulty of breaking them.'[240] Republicans say much the same when they qualify the robustness requirement by admitting 'interference without impunity'. In short, freedom would be virtually non-existent if we were to see as a source of unfreedom every possible form of human interference. It would therefore be correct to conclude, as do Ian Carter and Ronen Shnayderman, that freedom as independence is an impossible ideal.[241]

List and Valentini also say little about the axiomatic link between freedom and

[236] Michael David Harbour, 'Non-Domination and Pure Negative Liberty' (2011) 11 *Politics, Philosophy & Economics* 186.
[237] Mill (n 37) 13.
[238] Pettit, *On the People's Term*s (n 146) 211–13.
[239] Hobbes, *Leviathan* (n 12) 109.
[240] Ibid.
[241] Carter and Shnayderman (n 157).

democracy. They do, however, suggest that democracy may undermine freedom as they conceive of it.[242] We have seen that, in keeping with their functional-role desideratum, List and Valentini see legal constraints on action (like all other forms of human interference) as sources of unfreedom, because all such constraints stand in need of justification.[243] For List and Valentini, like for liberals, it makes no difference whether laws are democratically constituted or not; all coercive laws stand in need of justification and are thus abrogative of freedom. But, as we know, this runs counter to settled law, according to which a legal restriction on the range of options from which the individual could otherwise choose does not amount to a violation of freedom provided that that restriction is justifiable in a democratic society.

2.6 Conclusion

The questions 'What is freedom?' and 'What institutional arrangements best maintains freedom?' are quite distinct. This distinction may hold perfectly when considering what Hobbes calls 'natural liberty', which does not fall within the purview of the law, since such freedom does not derive from any institutional arrangements. When it is protected in the form of legal rights, however, freedom cannot exist independently of the power that promulgates and enforces those rights. Such freedom must be understood with reference to the institutional arrangements that constitutes it, maintains it and restores it in the event of an infraction.[244] Whether there is a violation of political freedom or not does not depend on one's preferences on a given occasion. Rather, it depends on what the law provides.

It follows that, contrary to what advocates of the conceptions of freedom as non-frustration, freedom as non-interference and freedom as independence tell us, the law is not merely a necessary evil for the protection of political freedom. It is the law itself that constitutes political freedom. The republican conception of freedom as non-domination echoes this position insofar as it depicts freedom as a creation of the law. This is also in keeping with our first axiom, according to which the law may, in creating civil or political freedom, impose restrictions on the exercise or enjoyment of certain options that could otherwise be associated with one's 'natural liberty'. Political freedom thus consists only in legally protected options.

Be that as it may, defining political freedom strictly in negative terms (particularly in the terms championed by Hobbes, Berlin, Pettit and Skinner, or List and Valentini) appears to be unsuitable for the present purpose. As we have seen, the possibility of constraints on action can hardly be eliminated even by law. What

[242] List and Valentini (n 2) 1062.
[243] Ibid, 1057.
[244] Pettit, 'Negative Liberty, Liberal and Republican' (n 141) 17.

matters from a legal standpoint is that the law should guarantee legal redress in the event of an infraction. Or, to use the republican formulation, the law should guarantee that there shall be no arbitrary interference with impunity. Given that it is not a natural phenomenon but a creation of the law, political freedom properly understood is the entitlement or right to do or otherwise enjoy whatever the law permits.[245] Despite being couched in positive terms, this definition of freedom also captures what political philosophers call negative liberty in that one may be legally entitled to enjoy non-interference in a given sphere if the law so permits by outlawing or otherwise penalising interference. Freedom in this sense thus depends on the protection that the law, possibly supplemented by social norms, provides.

But just what sort of options does, or should, the law protect or permit? Recall that any restriction on the exercise or enjoyment of options that could otherwise be associated with freedom must not only be prescribed by law but must also be justifiable in a democratic society. We have also noted in chapter 1 that, to be considered justifiable in a democratic society, any such restriction must inter alia pursue an aim that is or can be legally recognised as 'legitimate'. It is therefore difficult, if not impossible, to ascertain whether a particular option is or should be protected as part of political freedom generally unless we have a conception of freedom that establishes a link between freedom and democracy. Our second axiom likewise demands such a conception of freedom.

Existing legal provisions do indeed identify some of the 'legitimate' interests whose protection may warrant interference with the range of permissible options. However, as explained further in chapter 5 hereof, the legitimate interests enumerated in existing provisions tend to be so ambiguous that they allow policymakers and judges wide discretion, thereby giving rise to legal uncertainty and a high risk of abuse of discretionary power. With reference to the present case study in particular, we have seen in chapter 1 that the so-called 'margin of appreciation' which the ECtHR affords member states of the Council of Europe engenders a great deal of uncertainty as to the sort of options whose exercise the law could legitimately interfere with.

Could any of the four conceptions of freedom considered in this chapter help ameliorate such uncertainty? Recall that liberals, from both the Hobbesian and the Berlinian camps, stop short of establishing any link between their conceptions of freedom and democracy. Instead, they 'see freedom simply as an attribute of individuals without reference to institutionally entrenched rules' that constitute and secure freedom.[246] We have also seen that List and Valentini adopt the same approach in developing their conception of freedom as independence. It would

[245] Blackstone (n 184) 6.
[246] Carter (n 1) 238.

therefore appear that only the republican conception of freedom as non-domination establishes a clear and credible link between freedom and democracy.

According to republicans, freedom is created by democratically constituted laws and it is only democratically constituted laws that can guarantee robust and resilient non-interference.[247] This, as we know, echoes the affirmation made in the preamble to the ECHR to the effect that freedom is best maintained by an effective political democracy. Although the foregoing analysis suggests that the conception of freedom as non-domination fails to live up to the non-domination ideal as republicans (particularly, Pettit) formulate it, the egalitarian ideal or the principle of equal rights in which republicans ground their conception of freedom does not only provide normative insights that appear to comport with common-sense justice but is also largely consistent with 'black-letter law' or the 'law on the books'.[248] First, in keeping with our second axiom, the republican conception of freedom establishes a clear link between freedom and democracy.

Second, the republican principle of equal rights, according to which freedom consists in the protected equal status that citizens ought to enjoy, is consistent with the case law of the ECtHR. This holds true at least insofar as the principle of equal rights serves to ensure the equal participation of citizens in democratic processes, not least through freedom of expression, freedom of assembly and association, and electoral freedom. As the case law of the ECtHR suggests, this means that, at least as a guiding principle, all citizens must enjoy freedom to participate on an equal footing in the government of their country.

Third, the republican claim that the principle of equal rights requires that any interference with one's options, whether by removal, replacement or misrepresentation of options, should be non-arbitrary somewhat echoes the law. We have noted in chapter 1 that the relevant provisions of the ECHR and of other international instruments as read together with relevant case law require that any interference with the exercise or enjoyment of options should be non-arbitrary in that it should be both law-based and reasonably justifiable in a democratic society.

Fourth, the republican conception of freedom, provides some normative guidance on how political equality could be pursued. More specifically, as we now know, the republican principle of equal rights requires that legally permissible options should be co-enjoyable in that they should be both co-exercisable and co-satisfying.

All in all, if we substitute the term 'non-domination' with the term 'non-arbitrary interference', the latter being interference that is law-based and justifiable in a democratic society on the basis of equal rights, the republican ideal of freedom as

[247] Ibid.
[248] Finkel, *Commonsense Justice* (n 6) 2; Finkel, 'Commonsense Justice, Culpability, and Punishment' (n 6) 669.

championed by Pettit in neo-republican political philosophy does not only fully satisfy our legal axioms but also provides compelling normative insights. It would therefore appear that we can safely adopt this republican way of thinking about freedom subject to the foregoing modifications. A democratic society on this account can be equated with an egalitarian society, that is, a society founded on the principle that people should be afforded equal rights.[249] Thus, a major normative takeaway as we proceed to the next chapter of our exploration is that only options that cohere with the principle of equal rights should be protected by law as part of freedom.

[249] See also David Beetham, 'Linking Democracy and Human Rights' (1997) 9 *Peace Review* 351; David Beetham, *Democracy and Human Rights* (Polity 1999), portraying popular control and political equality as the defining characteristics of democracy.

3 Conceptualising Freedom of Expression

3.1 Introduction

Freedom, as we now conceive of it, is the right to do or otherwise enjoy whatever the law permits in accordance with the principle of equal rights. The import of this republican-inspired way of thinking about freedom is that freedom requires affirmative legal protection, not just the absence of frustration or of interference by public authority.[1] What this means, in other words, is that the exercise and enjoyment of options that form part of freedom must be secured by law in the form of legal rights. The rights thus protected are entitlements or claims upon a political society: the society, through the apparatus of the state, must provide a system of remedies to which people may resort to obtain the benefits to which they are entitled or be compensated for any loss suffered in the event of an infraction.[2]

This general conception of freedom does not, however, tell us much about the various rights that constitute freedom. We already know that freedom itself comes in different, more or less, specific types. These include, among many others, the three types of freedom whose common axiomatic attributes we have drawn upon in chapter 2 to construct our conception of freedom, namely freedom of expression, freedom of assembly and association, and electoral freedom. This chapter thus puts to the test the plausibility of the conception of freedom constructed in chapter 2 by applying it to one type of freedom, namely freedom of expression. As already intimated, the question that falls for consideration is the following. What is freedom of expression as a specific type of freedom?

It goes without saying that the answer to this question would vary depending on the conception of freedom that one adopts. Liberal theorists, for example, would likely contend that every act that counts as a form of expression should be regarded

1 See also TM Scanlon, 'Freedom of Expression and Categories of Expression' (1979) 40 *University of Pittsburgh Law Review* 519, 527, reprinted in TM Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (Cambridge University Press 2003) 92, asserting that 'freedom of expression adequately understood requires affirmative protection for expression, not just the absence of interference.'

2 Louis Henkin, *The Age of Rights* (Columbia University Press 1990) 3.

as part of freedom of expression.[3] Our commitment to the republican way of thinking on the other hand demands that we examine the relevant law to establish what freedom of expression is. In any event, one would be misguided to claim that a given act or omission undermines freedom of expression unless one knows what freedom of expression is. It is therefore essential for us to clarify what we mean by freedom of expression before we speak about whether and, if so, how the phenomenon of political disinformation can be regulated in a democratic society without undermining freedom of expression.

Fortunately, within the framework of the present case study, the text of the ECHR as read together with relevant case law already provides some useful indications as regards the types of options that may fall within the ambit of freedom of expression. This chapter does not therefore seek to reinvent the wheel. Rather, the chapter seeks only to elucidate the law in the light of the conceptual insights captured in chapter 2. To this end, the remainder of the chapter is organised as follows. Section 3.2 examines the relevant law through the lens of the conception of freedom constructed in chapter 2 with a view to identifying the main elements of freedom of expression. Sections 3.3, 3.4 and 3.5 elaborate upon each of those elements in turn. Section 3.6 concludes.

3.2 Elements of Freedom of Expression

The terms 'freedom of expression' and 'freedom of speech' are often used interchangeably in scholarship and in constitutional jurisprudence alike.[4] As this chapter establishes, however, this terminology can be misleading to the uninitiated. Interestingly, some national constitutions, for example, the First Amendment to the US Constitution 1787,[5] explicitly protect only freedom of speech and make no mention of freedom of expression. This is in stark contrast to the texts of article 10 of the ECHR and corresponding provisions of other major international human rights instruments; these explicitly protect freedom of expression and make no mention of freedom of speech. More curiously, these instruments also protect freedom of

3 See generally Philip Pettit, 'Two Concepts of Free Speech' in Jennifer Lackey (ed), *Academic Freedom* (Oxford University Press 2018).

4 Lorna Woods, 'Digital Freedom of Expression in the EU' in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar 2017) 395. See, for example, Eric Barendt, 'Freedom of Expression' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 893, asserting that there is no difference between freedom of expression and freedom of speech.

5 Constitution of the United States 1787. The First Amendment provides, in relevant part, that 'Congress shall make no law…abridging the freedom of speech, or of the press.'

opinion, freedom of thought and/or freedom to receive information either in addition to or as part of freedom of expression.

Article 19 of the ICCPR, for example, guarantees two separate rights.[6] Paragraphs 1 and 2 thereof provide that everyone shall have the right to hold opinions without interference and the right to freedom of expression, respectively. Paragraph 2 elaborates that freedom of expression includes 'freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media' of one's choice. In a similar vein, paragraphs 1 and 2 of article 9 of the African Charter on Human and Peoples' Rights (ACHPR) 1981 provide, respectively, that every individual shall have the right to receive information and the right to express and disseminate opinions within the law.[7]

Paragraph 1 of article 13 of the American Convention on Human Rights (ACHR) 1969 on the other hand protects freedom of thought and expression as a composite right, which includes 'freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.'[8] Article 19 of the UDHR similarly depicts freedom of opinion and expression as a composite right, which includes 'freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'[9] As already noted in chapter 1, paragraph 1 of article 10 of the ECHR is couched in similar terms. It provides that everyone has the right to freedom of expression, which shall include 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.' Paragraph 1 of article 11 of the CFREU replicates this phraseology.[10]

The ECHR, the focal point of the present exploration, is therefore by no means the odd one out. Like the corresponding provisions of the UDHR, the ACHR and the CFREU, article 10 of the ECHR depicts freedom of expression as a composite right with several elements. Maintaining the order in which they appear, the main elements of freedom of expression as enshrined in article 10 of the ECHR include

6 For details on the application of this article, see United Nations Human Rights Committee, 'General Comment no 34, Article 19: Freedom of Opinion and Expression' (adopted at the 102nd session, 11–29 July 2011) (General Comment no 34).

7 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986).

8 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978).

9 UDHR, art 19.

10 As noted in ch 1 hereof, according to art 52(3) of the CFREU, the freedom of expression enshrined in art 11 has the same meaning and scope as the freedom of expression enshrined in art 10 of the ECHR. See also *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* App no 45036/98 (ECtHR [GC], 30 June 2005), paras 155–56.

freedom to hold opinions, freedom to receive information and ideas, and freedom to impart information and ideas. Whether this should be seen as a pecking order is still an open question. In any event, there is a glaring discrepancy between on the one hand the ECHR, the UDHR, the ACHR and the CFREU, which depict freedom of expression as a composite right with several elements, and on the other hand the ICCPR and the ACHPR, which depict freedom of expression as a related but distinct right from some of those elements.

Be that as it may, and notwithstanding any other discrepancies in interpretative jurisprudence across jurisdictions, the general understanding of freedom of expression appears to be in material respects consistent with the conception of freedom that we espouse. As a general proposition, the mere fact that an option may be seen as a form of expression does not mean that that option enjoys legal protection. The law, in other words, does not protect 'acts' of expression as such; it protects 'freedom' of expression.[11] Since freedom, as we now conceive of it, is the right to do or enjoy whatever the law permits, the law itself may impose restrictions on the exercise or enjoyment of certain acts of expression. The options thus duly restricted in accordance with the principle of equal rights cannot be seen as part of freedom of expression properly understood.

By the same token, a legal restriction imposed on an act of expression may not necessarily amount to a restriction on freedom of expression. What this means, in other words, is that not every interference with expressive activity is abrogative of freedom of expression. Only interference with legally protected options falls foul of that freedom. This explains why judicial bodies around the world, both at national and international level, do not find violations of freedom of expression in some cases, even where there has been an indisputable interference with expressive activity. It is therefore paradoxical that judicial bodies sometimes claim to have found what they term an 'interference with freedom of expression' before proceeding to make a finding of non-violation of that freedom. In such cases, what is interfered with is a specific act of expression or expressive activity in general as opposed to freedom of expression.

As already noted in chapter 1, paragraph 2 of article 10 of the ECHR (like paragraph 3 of article 19 of the ICCPR) explicitly provides that the exercise of freedom of expression, 'since it carries with it duties and responsibilities', may be subject to certain formalities, conditions, restrictions or penalties. The relevant proviso is that any such formalities, conditions, restrictions or penalties must be prescribed by law, pursue a legitimate aim recognised by law and be necessary in a democratic society for the attainment of the legitimate aim in view. Article 9 of the ACHPR is even more

[11] See also Harry Melkonian, *Freedom of Speech and Society: A Social Approach to Freedom of Expression* (Cambria Press 2012) 4–5.

explicit in this connection as it guarantees the right to express and disseminate opinions only 'within the law'. Indeed, all major international human rights instruments are equally admissive of restrictions on expressive activity subject to materially the same so-called 'three-part' test.[12] The same, or at least similar, position subsists virtually in all jurisdictions that embrace democracy.[13] This holds true even in the US legal system, which is widely seen as the archetypical 'liberal' system.

As Justice Holmes put it over a century ago, the First Amendment, 'while prohibiting legislation against free speech as such *cannot have been, and obviously was not, intended to give immunity for every possible use of language*.'[14] Indeed, it is 'a fundamental principle, long established, that the freedom of speech and of the press which is secured by the [US] Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.'[15] Laws on defamation, pornography, sedition, incitement to violence, hate speech, copyright, trade secrets, privacy and perjury, for example, impose restrictions on expressive activity but are generally regarded as being consistent with the law on freedom of expression. It is therefore undeniable that law-based and non-arbitrary interference with expressive activity is consistent with the freedom of expression that the law guarantees.

There are, it must be acknowledged, some studies whose findings suggest that both the text of the ECHR and the case law of the ECtHR tend to reinforce some liberal conception of freedom and model of democracy.[16] As elaborated in chapter 5 hereof, this is somewhat true, especially in view of the drafting history of the ECHR. Those who sympathise with liberalism could also attempt to seek solace in the wording of article 10 of the ECHR and contend that paragraph 1 thereof echoes the liberal conception of freedom as non-interference insofar as it protects the exercise and enjoyment of freedom of expression 'without interference by public authority'.

12 Christopher Phiri, 'Defamation of the President of Zambia: Contextualising the Decriminalisation Debate' (2021) 36 *Southern African Public Law* 1, 10.

13 Grégoire Webber, 'Proportionality and Limitations on Freedom of Speech' in Adrienne Stone and Frederick Schauer (eds), *The Oxford Handbook of Freedom of Speech* (Oxford University Press 2021) 176–79.

14 *Frohwerk v United States* 249 US 204, 206 (1919) (emphasis added). For a detailed analysis of this holding, see generally Frederick Schauer, 'Every Possible Use of Language?' in Geoffrey R Stone and Lee C Bollinger, *The Free Speech Century* (Oxford University Press 2018).

15 *Gitlow v New York* 268 US 652, 666 (1925).

16 See, for example, Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Cambridge University Press 2017) 343; Rory O'Connell, *Law, Democracy and the European Court of Human Rights* (Cambridge University Press 2020).

A closer reading of the text of the ECHR and the jurisprudence of the ECtHR, however, confirms that even the expression 'without interference by public authority' does not necessarily mean that the law protects freedom of expression as 'non-interference' in the Berlinian or other 'liberal' sense of the word.

First, we have seen in chapter 2 that republicans also define freedom by reference to non-interference but are opposed only to arbitrary interference. Even freedom of expression is not freedom from interference as such. Under paragraph 2 of article 10 of the ECHR in particular, the state may interfere with expressive activity by imposing law-based restrictions on certain options without violating the freedom of expression defined in paragraph 1 thereof. This is consistent with the republican, not with the liberal, conception of freedom. As noted in chapter 2, law-based and non-arbitrary interference does not count as a source of unfreedom in republican political theory. Indeed, a central thesis in republican political theory is that freedom consists in being protected from arbitrary interference as opposed to interference as such.[17]

Second, the law on freedom of expression echoes the republican conception of freedom insofar as republicans advocate more than just freedom from interference by public authority. The law, in other words, requires that freedom of expression should be resilient and robust. This robustness requirement necessarily demands interference by public authority in order to guard people against arbitrary interference by other individuals or private parties in horizontal relations. Republicans, as we now know, are averse to arbitrary interference, whether by the state or by a private party.[18] They would thus see arbitrary interference as a threat to freedom of expression regardless of the source of such interference.[19] Article 1 of the ECHR echoes this stand. It explicitly enjoins the states concerned to 'secure to everyone within their jurisdiction the rights and freedoms' enshrined in the ECHR. As concerns freedom of expression in particular, the ECtHR underscores in its case law that the genuine, effective guarantee of freedom of expression under article 10

[17] Philip Pettit, 'Freedom as Nondomination' in Toby Buckle (ed), *What is Freedom? Conversations with Historians, Philosophers, and Activists* (Oxford University Press 2021) 100.

[18] See also David Watkins, 'Institutionalizing Freedom as Non-Domination: Democracy and the Role of the State' (2015) 47 *Polity* 508, 513.

[19] See generally Pettit, 'Two Concepts of Free Speech' (n 3); Suzanne Whitten, *A Republican Theory of Free Speech* (Palgrave Macmillan 2022).

of the ECHR does not depend merely on the state's duty of non-interference but 'may' require positive measures of protection.[20]

All in all, the exercise and enjoyment of freedom of expression depend on the observance by the state of two types of general duties.[21] To use Philip Pettit's republican formulation, *mutatis mutandis*, the state has the following general duties.[22] First, the state has a positive duty, that is, the duty to guard its people against arbitrary interference in their horizontal relations with one another, thereby ensuring social justice. Second, the state has a negative duty, that is, the duty to guard against itself practising any form of arbitrary interference in the sphere of vertical relations between the state and the people, thereby delivering political legitimacy. Although it considers that the boundaries between the state's positive and negative duties do not lend themselves to precise definition,[23] the ECtHR has on a number of occasions provided some guidance as regards the circumstances that may necessitate the adoption by the state of positive measures aimed at securing freedom of expression.[24] The fact that

20 *Özgür Gündem v Turkey* App no 23144/93 (ECtHR, 16 March 2000), para 43; *Appleby and others v the United Kingdom* App no 44306/98 (ECtHR, 6 May 2003), para 39; *Khurshid Mustafa and Tarzibachi v Sweden* App no 23883/06 (ECtHR, 16 December 2008), para 32; *Verein Gegen Tierfabriken Schweiz (VgT) v Switzerland (no 2)* App no 32772/02 (ECtHR [GC], 30 June 2009), para 80; *Dink v Turkey* Apps nos 2668/07 and 4 others (ECtHR, 14 September 2010), para 106; *Palomo Sánchez and others v Spain* Apps nos 28955/06 and 3 others (ECtHR [GC], 12 September 2011), para 59; *Huseynova v Azerbaijan* App no 10653/10 (ECtHR, 13 April 2017), para 120; *Gaši and others v Serbia* App no 24738/19 (ECtHR, 6 September 2022), para 77.

21 See Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) 224, asserting that 'all basic rights involve some positive obligations.' See also generally Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2012); Tarlach McGonagle, 'Positive Obligations Concerning Freedom of Expression: Mere Potential or Real Power?' in Onur Andreotti (ed), *Journalism at Risk: Threats, Challenges and Perspectives* (Council of Europe Publishing 2015); Lavrysen (n 15); Jacob Rowbottom, 'Positive Protection for Speech and Substantive Political Equality' in Andrew T Kenyon and Andrew Scott (eds), *Positive Free Speech: Rationales, Methods and Implications* (Hart Publishing 2020).

22 Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 3; Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (WW Norton & Company 2014) 6.

23 *Verein Gegen Tierfabriken Schweiz (VgT) v Switzerland (no 2)* (n 20), para 82; *Mouvement raëlien suisse v Switzerland* App no 16354/06 (ECtHR [GC], 13 July 2012), para 50.

24 See, for example, *Fuentes Bobo v Spain* App no 39293/98 (ECtHR, 29 February 2000), para 38; *Özgür Gündem v Turkey* (n 20), paras 42–43; *Appleby and others v the United Kingdom* (n 20), paras 42–43 and 47–49; *Dink v Turkey* (n 20), paras 106–08 and 137–38; *Palomo Sánchez and others v Spain* (n 20), paras 58–62; *Verein Gegen Tierfabriken Schweiz (VgT) v Switzerland (no 2)* (n 20), paras 79–82. See also Aleksandra Kuczerawy, 'The Power of Positive Thinking: Intermediary Liability and the Effective Enjoyment of the Right to Freedom of Expression' (2017) 8 *JIPITEC* 226, 229–31.

both the text of the ECtHR and the case law of the ECtHR confirm that the state may impose restrictions on expressive activity, in any event, vindicates the contention that not all acts of expression are protected as part of freedom of expression. Indeed, the state has a positive duty to impose restrictions on expressive activity whenever it is necessary to do so in order to protect the freedom or rights of its people.

Having said that, it is not the aim of this chapter to delve into the niceties of the nature of restrictions that the law envisages. A more focused examination of permissible restrictions within the context of the present exploration is conducted in the subsequent chapters. Suffice it to say at this point that paragraph 1 of article 10 suggests that, even with permissible restrictions in mind, the law on freedom of expression protects more than just acts of 'expression' in the strict, natural sense of the word. As already noted above, that paragraph explicitly states that freedom of expression includes freedom to hold opinions, freedom to receive information and ideas, and freedom to impart information and ideas. It would, however, appear that freedom of expression should be understood as consisting broadly in freedom of thought, freedom to receive information and freedom to impart information.

3.3 Freedom of Thought

Paragraph 1 of article 10 of the ECHR, like paragraph 1 of article 11 of the CFREU and article 19 of the UDHR, depicts freedom to hold opinions as one of the elements of freedom of expression. As noted above, however, article 19 of the ICCPR presents the right to hold opinions as a separate right from freedom of expression. Meanwhile, article 13 of the ACHR makes no explicit mention of the right or freedom to hold opinions; instead, it protects freedom of thought as a component of freedom of expression. Similarly, the ACHPR makes no mention of freedom to hold opinions but paragraph 2 of article 9 thereof guarantees the right to express and disseminate opinions as a distinct right. These discrepancies suggest that freedom to hold opinions, freedom of thought, and the right to express and disseminate opinions are distinct types of freedom, although they are all somehow related to freedom of expression.

The right to express and disseminate opinions as enshrined in the ACHPR appears to fall squarely within the ambit of freedom to impart information, which is considered in section 3.5 below. But it is less obvious how freedom to hold opinions and freedom of thought can be distinguished from each other, if at all. It is particularly curious why the ACHR depicts freedom of thought as a component part of freedom of expression, whereas both article 9 of the ECHR and article 18 of the ICCPR present the same freedom—together with freedom of conscience and religion or belief—as a separate right from the freedom to hold opinions enshrined in articles 10 and 19, respectively. What is the difference between freedom to hold opinions and freedom of thought, if any? And how do these freedoms relate to freedom of

expression, if at all?

Both the text of the ECHR and existing case law hardly provide clear answers to these questions. A closer reading of the text of the ECHR in the light of the preparatory works, however, suggests that the freedom to hold opinions referred to in paragraph 1 of article 10 cannot be separated from the freedom of thought that is enshrined in article 9 of the ECHR.[25] Whether one uses the word 'thought' to refer to the process or the product of thinking, it is a truism that one cannot form or hold an opinion without thinking. Thinking, broadly understood, encompasses a wide range of mental activities such as intrapersonal deliberation, desiring, wishing, imagining, believing, reflecting, reasoning, cogitating, remembering, questioning and sensing.[26] Holding an opinion invariably involves at least some of these mental activities. It should therefore come as no surprise that even during the negotiations of the text of the ICCPR a question was raised as to whether there was any distinction between the freedom of thought that is now enshrined in article 18 thereof and the right to hold opinions enshrined in paragraph 1 of article 19.[27] One can only wonder why the drafters of both the ECHR and the ICCPR ultimately decided to set forth freedom of thought and freedom to hold opinions in separate articles of those instruments given that the latter is but one of the components of the former.

But why does the law concern itself with the protection of unexpressed thoughts and opinions, anyway? Indeed, we have seen in chapter 2 that Pettit draws a distinction between political freedom on the one hand and both psychological freedom or free will, which denotes the deliberative ability that every human being is presumed to possess by virtue of being human, and ethical freedom, which sets some human beings apart from other human beings in terms of their ethical virtue or skill to exercise their deliberative ability in a reasoned and reliable manner, on the other hand. Pettit, as already noted, further underscores that whilst the state should be charged with a concern for political freedom, it is even *more* important that the state should not be 'assigned the task of nurturing freedom in any other sense.'[28] Thomas Hobbes similarly draws a distinction between the intrapersonal deliberation from which the internal 'will' to exercise political freedom proceeds and the external exercise of that freedom. John Rawls, too, appears to distinguish political freedom from freedom of thought

[25] See also Arjen Van Rijn, 'Freedom of Expression (Article 10)' in Pieter van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (5th edn, Intersentia 2018) 778.

[26] Lucas Swaine, 'Freedom of Thought as a Basic Liberty' (2018) 46 *Political Theory* 405, 411.

[27] See European Commission of Human Rights, 'Preparatory Work on Article 9 of the European Convention on Human Rights' (Strasbourg, 16 August 1956) (Preparatory Work on Article 9) 20.

[28] Philip Pettit, 'Freedom: Psychological, Ethical, and Political' (2015) 18 *Critical Review of International Social and Political Philosophy* 375, 376.

insofar as he speaks about 'equal political liberties *and* freedom of thought'.[29]

It would therefore appear that there is a general consensus among leading political theorists that unexpressed thoughts are a private matter, belonging as they do to the realm of the mind. In fact, thinking itself is akin to breathing. To be devoid of thought is 'to suffer exile from the fellowship of mankind' or 'not to exist as a social being, in a normal, human sense of the word.'[30] Even if the state were to imprison people for expressing certain thoughts, nothing would stop people from entertaining those thoughts whilst behind bars. This perhaps also explains why the ECtHR suggests that ordering someone to 'retract' their opinion by issuing an apology is 'not necessary' in a democratic society.[31] It is a truism that a forced apology cannot as such change one's opinion. Indeed, it has not yet been discovered 'how to make man *unknow* his knowledge, or *unthink* his thoughts.'[32] Nor can one's thoughts, however egregious they may be, harm others unless those thoughts have somehow been acted upon or otherwise expressed.

Fortunately, the law also appears to take cognisance of the personal nature of unexpressed thoughts (opinions inclusive). Article 9 of the ECHR, like article 18 of the ICCPR,[33] distinguishes freedom of thought, conscience and religion from freedom to manifest one's religion or beliefs. It does not permit any restrictions on freedom of thought or conscience, or indeed on freedom to adopt a religion or any other belief of one's choice, but leaves open the possibility of imposing certain 'lawful' restrictions on the external manifestations of religion or beliefs. The case law of the former ECnHR and the ECtHR alike recognises the inviolability of the sphere of religious creeds and other personal beliefs, or the *forum internum*, whilst acknowledging that article 9 of the ECHR does not always guarantee the right to behave in the public sphere in a way dictated by those beliefs.[34]

Thus, neither freedom of thought, conscience and religion or belief in general

29 John Rawls, *Political Liberalism* (Columbia University Press 1996) 334 (emphasis added).

30 Swaine (n 26) 406.

31 *Kazakov v Russia* App no 1758/02 (ECtHR, 18 December 2008), para 30; *Marcinkevičius v Lithuania* App no 24919/20 (ECtHR, 15 November 2022), para 94. cf *Cihan Öztürk v Turkey* App no 17095/03 (ECtHR, 9 June 2009), para 33, adopting the view that an apology could be a suitable sanction.

32 Thomas Paine, *The Rights of Man* (2nd edn, Carlisle 1792), pt I, 73.

33 See United Nations Human Rights Committee, 'General Comment no 22: Article 18 (Freedom of Thought, Conscience or Religion)' (adopted at the 1247th meeting, 20 July 1993) (General Comment no 22), para 3.

34 *Arrowsmith v the United Kingdom* App no 7050/75 (ECnHR, 12 October 1978); *C v the United Kingdom* App no 10358/83 (ECnHR, 15 December 1983); *Zaoui v Switzerland* App no 41615/98 (ECtHR, 18 January 2001); *Porter v the United Kingdom* App no 15814/02 (ECtHR, 8 April 2003); *Skugar and others v Russia* App no 40010/04 (ECtHR, 3 December 2009).

nor freedom to hold opinions in particular may be restricted by law, at least not as concerns all persons of sound mind. With respect to the former, restrictions may be imposed only on the external expression or manifestation of religious and other beliefs, subject to the conditions set forth in paragraph 2 of article 9. And given that unexpressed opinions are but a specific type of thoughts, it is equally not allowed to impose legal restrictions on the 'holding' of opinions as such; only the external expression thereof may be restricted under the conditions set forth in paragraph 2 of article 10 of the ECHR.[35] The UNHRC also underscores that the freedom of thought, conscience, religion and belief set forth in article 18 of the ICCPR is protected unconditionally, as is the right of everyone to hold opinions enshrined in paragraph 1 of article 19.[36]

That said, the unconditional protection of freedom of thought (freedom to hold opinions inclusive) does not still explain why unexpressed thoughts generally or unexpressed opinions in particular should be protected by law. It would appear that the need for legal protection emanates from the nexus that exists between human thoughts and political freedom. Indeed, the ECtHR itself considers that, like freedom of expression (which includes freedom to hold opinions) as enshrined in article 10, freedom of thought, conscience and religion as enshrined in article 9 is also one of the foundations of a democratic society within the meaning of the ECHR.[37] This should come as no surprise. As noted in chapter 1, human thoughts are largely influenced by the stimuli and information that enter the mind from the external world.[38] The nexus between the *forum internum* and political freedom has further been alluded to in chapter 2. It has been noted in that chapter that both Hobbes and Pettit recognise that the exercise of civil or political freedom presupposes that human beings have the ability to think and in turn to make choices to act or to forbear.

In any event, all social or political interactions between human beings imply and involve thoughts of some kind.[39] Political freedom is thus inconceivable in the absence of thoughts. Indeed, it would be an insult to mankind to suggest that people

35 See also Ben Vermeulen, 'Freedom of Thought, Conscience and Religion (Article 9)' in van Dijk and others (eds) (n 25) 752.

36 General Comment no 22 (n 33), para 3. See also General Comment no 34 (n 6), para 9. For relevant case law in this connection, see generally *Mpaka-Nsusu v Zaire* Comm no 157/1983 (UNHRC, 26 March 1986); *Mika Miha v Equatorial Guinea* Comm no 414/1990 (UNHRC, 8 July 1994); *Faurisson v France* Comm no 550/93 (UNHRC, 8 November 1996); *Kang v Republic of Korea* Comm no 878/1999 (UNHRC, 15 July 2003).

37 See, for example, *Buscarini and others v San Marino* App no 24645/94 (ECtHR [GC], 18 February 1999), para 34; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993), para 31.

38 Manuel Castells, 'Democracy in the Age of the Internet' (2011) 6 *Transfer*: *Journal of Contemporary Culture* 96, 96.

39 Swaine (n 26) 406.

exercise political freedom without thinking. Any meaningful exercise of political freedom depends on thinking which, in Pettit's republican view, implies two types of interconnected albeit non-political freedom, namely psychological freedom and ethical freedom. By the same token, one cannot be politically free if others attempt to control one's inner thoughts or moral consciousness through manipulative or coercive means. This is likely the reason why Pettit underlines that the state should not involve itself in the business of nurturing either the psychological or the ethical freedom of the people. The republican egalitarian ideal, in any event, demands that the state abstains from attempting to dictate what thoughts people should or should not entertain.[40] On this account, the state has an absolute obligation to refrain from using its coercive power to require people to hold or not to hold certain opinions.[41] People should be able to think on their own and form their own political opinions.

There is also a legitimate public interest in protecting people from being made to express their thoughts or opinions against their free will. The coerced expression of one's thoughts or opinions is the antithesis of freedom of expression understood as a legal right. Any such coercion would render the resultant act of expression an obligation rather than an entitlement or a right. Thus, although the ECtHR considers that the 'negative right' not to express oneself under article 10 of the ECHR may be invoked only on a case-by-case basis,[42] freedom of expression understood in the republican sense necessarily includes a general right not to express oneself.

This view finds further support in the preparatory work on article 9, according to which the drafters sought to protect people 'not only from 'confessions' imposed for reasons of State, but also from those abominable "methods of police enquiry or judicial process which rob the suspected or accused person of control of his intellectual faculties and of his conscience"'.[43] It is therefore clear that the drafters also had in mind not only the 'positive right' to manifest or express one's thoughts, when one has the will to do so but also the 'negative right' not to express oneself. The phrase 'to hold opinions' used in paragraph 1 of article 10 of the ECHR itself suggests that the first element of freedom of expression seeks to protect the right to hold rather than to express one's opinions. Even the UNHRC considers that, in accordance with paragraph 2 of article 18 and article 17 of the ICCPR, 'no one can be compelled to reveal his thoughts or adherence to a religion or belief',[44] and that

40 See also Preparatory Work on Article 9 (n 27) 19; European Commission of Human Rights, 'Preparatory Work on Article 10 of the European Convention on Human Rights' (Strasbourg, 17 August 1956) 21.

41 See *Kang v Republic of Korea* (n 36).

42 *Gillberg v Sweden* App no 41723/06 (ECtHR [GC], 3 April 2012), para 86; *Semir Güzel v Turkey* App no 29483/09 (ECtHR, 13 September 2016), para 27; *Wanner v Germany* App no 26892/12 (ECtHR, 23 October 2018), para 39.

43 Preparatory Work on Article 9 (n 27) 3–4.

44 General Comment no 22 (n 33), para 3.

the right to hold opinions enshrined in paragraph 1 of article 19 'necessarily includes freedom not to express one's opinion'.[45]

All in all, one can hardly conceive of any political freedom whose exercise does not involve thinking.[46] Whilst it is true that people do not express all their thoughts, and should not even be compelled to express their thoughts, every act of expression by human beings in particular presupposes some form of thinking. Thinking can thus be seen as a precondition for the exercise and enjoyment of expressive activity. This perhaps explains why article 10 of the ECHR mentions freedom to hold opinions, a component of freedom of thought, ahead of freedom to impart information and ideas as an element of freedom of expression. It goes without saying that one cannot be expected to impart information or ideas to others without thinking or holding an opinion in the first place. The affirmative legal protection of freedom of thought in general and freedom to hold opinions in particular is thus necessary to ensure that people are able to think and form their own opinions without undue interference, knowing that (as a matter of right) they may express some of those opinions should they themselves choose to do so.

3.4 Freedom to Receive Information

Paragraph 1 of article 10 of the ECHR mentions freedom to receive information and ideas as the second element of freedom of expression. To be sure, people generally have the natural ability to think and express their thoughts even when they have not received any information or ideas from others. But it is also true that it can be quite difficult to properly inform one's thoughts in the absence of relevant information or ideas from others.[47] The formation of opinions in particular largely depends on access to relevant information. Indeed, we have seen in this connection that Pettit's ethical freedom largely depends on the possibility to gather relevant information, to be able to exercise one's deliberative ability in a reasoned and reliable manner.

The ECtHR, too, considers that the gathering of information is an essential preparatory step not only in the journalistic or public watchdog activities of imparting information to the public but also in other activities creating a forum for,

45 General Comment no 34 (n 6), para 10.
46 Swaine (n 26) 416.
47 Ibid, 415.

or constituting an essential element of, public debate.[48] Like freedom of thought in general and freedom to hold opinions in particular, freedom to receive information can thus be seen as a precondition for the exercise of freedom to impart information. This perhaps explains why freedom to receive information and ideas, like freedom to hold opinions, also precedes freedom to impart information and ideas on the list of the elements of freedom of expression contained in paragraph 1 of article 10 of the ECHR.

We should recall at the outset that people often use legal entities, not only to receive but also to impart information. The ECtHR takes full cognisance of this fact. It thus considers that the freedom to receive and to impart information and ideas enshrined in article 10 of the ECHR can be invoked by natural persons and by legal persons alike.[49] This makes sense because legal persons operate only as vehicles through which people receive and impart information or ideas. In any event, legal persons as artificial creatures of the law cannot act on their own behalf; it is only natural persons who can act on their behalf, and it is natural persons who ultimately stand to benefit from the acts of receiving and imparting information or ideas.

But what exactly does 'freedom to receive information and ideas' entail? The ECtHR has previously found it 'unnecessary' to give a precise definition of the terms 'information' and 'ideas'.[50] However, according to the Committee of Ministers of the Council of Europe, the term 'information' refers to 'any statement of fact, opinion or idea in the form of text, sound and/or picture'.[51] The ECtHR appears to

48 *Dammann v Switzerland* App no 77551/01 (ECtHR, 25 April 2006), para 52; *Társaság a Szabadságjogokért v Hungary* App no 37374/05 (ECtHR, 14 April 2009), paras 27–28; *Shapovalov v Ukraine* App no 45835/05 (ECtHR, 31 July 2012), para 68; *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria* App no 39534/07 (ECtHR, 28 November 2013), para 36; *Roşiianu v Romania* App no 27329/06 (ECtHR, 24 June 2014), para 63; *Guseva v Bulgaria* App no 6987/07 (ECtHR, 17 February 2015), para 37; *Pentikäinen v Finland* App no 11882/10 (ECtHR [GC], 20 October 2015), para 83; *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECtHR [GC], 8 November 2016), paras 130 and 166; *Selmani and others v the former Yugoslav Republic of Macedonia* App no 67259/14 (ECtHR, 9 February 2017), para 61; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* App no 931/13 (ECtHR [GC], 27 June 2017), para 128; *Szurovecz v Hungary* App no 15428/16 (ECtHR, 8 October 2019), para 52; *Mándli and others v Hungary* App no 63164/16 (ECtHR, 26 May 2020), para 45; *Timur Sharipov v Russia* App no 15758/13 (ECtHR, 13 September 2022), para 25.

49 *Autronic AG v Switzerland* App no 12726/87 (ECtHR, 22 May 1990), para 47; *Casado Coca v Spain* App no 15450/89 (ECtHR, 24 February 1994), para 35; *Ulusoy and others v Turkey* App no 34797/03 (ECtHR, 3 May 2007), para 28.

50 *Groppera Radio AG and others v Switzerland* (ECtHR, 28 March 1990), para 55.

51 Committee of Ministers of the Council of Europe, 'Recommendation No R (2000) 7 of the Committee of Ministers to Member States on the Right of Journalists not to Disclose their Sources of Information' (adopted at the 701st meeting of the Ministers' Deputies, 8 March 2000), appendix.

espouse this definition.[52] It would therefore appear that information should be understood broadly as any object of knowledge,[53] whether in the form of facts, opinions or ideas. On this account, ideas are but one of the forms in which information may be presented. The reference to ideas in article 10 of the ECHR is thus superfluous, since information also includes ideas.

According to the ECtHR, freedom to receive information thus broadly understood 'basically prohibits a government from restricting a person from receiving information that others *wish* or *may be willing* to impart to him'.[54] In the ECtHR's view, people in their passive role as recipients of information 'must be permitted to *receive* a variety of messages, to *choose* between them and *reach their own opinions* on the various views expressed, for what sets [a] democratic society apart is this plurality of ideas and information.'[55] Freedom to receive information, in other words, is the freedom of potential audiences or recipients of information. Article 10 of the ECHR as read together with relevant case law confirms that recipients have rights independently of imparters or communicators of information. Potential recipients are entitled to receive information from others, whereas potential communicators are entitled to impart or communicate information to others.

To illustrate, consider the case of an interested recipient of information from a willing communicator resident in a foreign state. In the event of an arbitrary interference by the authorities in the interested recipient's state, the interested recipient may be able to claim his entitlement to receive information in a domestic court. As an outsider on the other hand, the willing communicator may not be able to assert a right to impart information in the state of the interested recipient or indeed in his home state. The interested recipient would be able to assert his right independently of the willing communicator because freedom to receive information applies regardless of frontiers. This also explains why, as already noted in chapter 1, the ECtHR considers that blocking access to the Internet may run counter to the actual wording of paragraph 1 of article 10 of the ECHR, according to which freedom of expression applies 'regardless of

52 *Sanoma Uitgevers BV v the Netherlands* App no 38224/03 (ECtHR [GC], 14 September 2010), para 44; *Standard Verlagsgesellschaft mbH v Austria (no 3)* App no 39378/15 (ECtHR, 7 December 2021), paras 70–71.

53 Loukis G Loucaides, *Essays on the Developing Law of Human Rights* (Martinus Nijhoff Publishers 1995) 7.

54 *Leander v Sweden* App no 9248/81 (ECtHR, 26 March 1987), para 74; *Gaskin v the United Kingdom* App no 10454/83 (ECtHR, 7 July 1989), para 52; *Guerra and others v Italy* App no 14967/89 (ECtHR [GC], 9 February 1998), para 53; *Magyar Helsinki Bizottság v Hungary* (n 48), para 156 (emphasis added).

55 *Çetin and others v Turkey* Apps nos 40153/98 and 40160/98 (ECtHR, 13 February 2003), para 64 (emphasis added).

frontiers'.[56] A state that blocks access to the Internet necessarily restricts its citizens from accessing the information that people from other states post on the Internet.

By the same token, the ECtHR also considers that preventing a company from receiving a broadcast transmission from abroad is an interference that must pass muster under article 10 of the ECHR on account of freedom to receive information.[57] A national court's judgment upholding a decision by a landlord to prevent his tenants from installing a satellite dish within the demised premises has similarly been held to be an interference that must be scrutinised in the light of the tenants' freedom to receive information.[58] A court injunction restraining corporate entities from sensitising pregnant women about abortion services provided abroad, too, has been held to be an interference not only with the corporate applicant's exercise of the option to impart information but also with the prospective enjoyment by women of the exercise of that option by receiving such information in the event of being pregnant.[59]

The ECtHR tends to place greater emphasis on the role of journalists and other public watchdogs in making freedom to receive information a reality. It thus applies article 10 of the ECHR to the activity of gathering information by journalists, an activity which, as noted above, the ECtHR sees as an essential preparatory step in the work of journalists as public watchdogs in a democratic society.[60] The ECtHR also recognises that non-governmental organisations, academic researchers, authors of literature, bloggers and popular users of social media who draw attention to matters of public interest exercise the same function as public watchdogs and should thus enjoy special protection under article 10 of the ECHR.[61] The desire to protect freedom to receive, rather than freedom to impart, information is the main reason why the ECtHR considers that journalists and such other public watchdogs should be afforded a high level of protection under article 10 of the ECHR.

Indeed, the ECtHR underlines that not only do public watchdogs and the media have the task of imparting 'information and ideas; the public also has a right to

56 *Ahmet Yildirim v Turkey* App no 3111/10 (ECtHR, 18 December 2012), para 67; *Cengiz and others v Turkey* Apps nos 48226/10 and 14027/11 (ECtHR, 1 December 2015), para 65. See also *Ekin Association v France* App no 39288/98 (ECtHR, 17 July 2001), para 62.

57 *Autronic AG v Switzerland* (n 49), para 47.

58 *Khurshid Mustafa and Tarzibachi v Sweden* (n 20), para 34.

59 *Open Door Counselling Ltd and Dublin Well Woman Centre Ltd v Ireland* Apps nos 14234/88 and 14235/88 (ECtHR, 29 October 1992), para 55.

60 See n 48 above and accompanying text.

61 *Társaság a Szabadságjogokért v Hungary* (n 48), paras 26–28; *Animal Defenders International v the United Kingdom* App no 48876/08 (ECtHR [GC], 22 April 2013), paras 103–04; *Magyar Helsinki Bizottság v Hungary* (n 48), paras 166–68; *Medžlis Islamske Zajednice Brčko and others v Bosnia and Herzegovina* App no 17224/11 (ECtHR [GC], 27 June 2017), para 86; *Cangi v Turkey* App no 24973/15 (ECtHR, 29 January 2019), para 35; *Assotsiatsiya NGO Golos and others v Russia* App no 41055/12 (ECtHR, 16 November 2021), para 76; *Timur Sharipov v Russia* (n 48), para 25.

receive them.' [62] Therefore, according to the ECtHR, article 10 does not protect only the right of public watchdogs and the media 'to inform the public, but also the right of the public to be properly informed',[63] not least to be so informed about different perspectives on matters of general interest.[64] This also explains why, as noted in chapter 1, the special protection afforded to journalist is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information.[65] The right of the public to receive information and thus to be properly informed, as opposed to freedom to impart information as such, further explains why the ECtHR considers that the same principle must apply to everyone who engages in public

62 *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979), para 65; *The Sunday Times v the United Kingdom (no 2)* App no 13166/87 (ECtHR, 26 November 1991), para 50; *Bladet Tromsø and Stensaas v Norway* App no 21980/93 (ECtHR [GC], 20 May 1999), paras 59 and 62; *News Verlags GmbH & CoKG v Austria* App no 31457/96 (ECtHR, 11 January 2000), para 56; *Pedersen and Baadsgaard v Denmark* App no 49017/99 (ECtHR [GC], 17 December 2004), para 71; *Dupuis and others v France* App no 1914/02 (ECtHR, 7 June 2007), para 35; *Campos Dâmaso v Portugal* App no 17107/05 (ECtHR, 24 April 2008), para 31; *Axel Springer AG v Germany* App no 39954/08 (ECtHR [GC], 7 February 2012), para 79; *Kaperzyński v Poland* App no 43206/07 (ECtHR, 3 April 2012), para 56; *Erla Hlynsdóttir v Iceland (no 3)* App no 54145/10 (ECtHR, 2 June 2015), para 62; *Bédat v Switzerland* App no 56925/08 (ECtHR [GC], 29 March 2016), para 51; *Magyar Helsinki Bizottság v Hungary* (n 48), para 165; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* (n 48), para 126.

63 *The Sunday Times v the United Kingdom (no 1)* (n 62), para 66. See also *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986), para 41; *Thorgeir Thorgeirson v Iceland* App no 13778/88 (ECtHR, 25 June 1992), para 63; *Jersild v Denmark* App no 15890/89 (ECtHR [GC], 23 September 1994), para 31; *Colombani and others v France* App no 51279/99 (ECtHR, 25 June 2002), paras 55 and 64; *Ukrainian Media Group v Ukraine* App no 72713/01 (ECtHR, 29 March 2005), para 38.

64 *Erdoğdu and İnce v Turkey* Apps nos 25067/94 and 25068/94 (ECtHR [GC], 8 July 1999), para 52; *Sener v Turkey* App no 26680/95 (ECtHR, 18 July 2000), para 45. See also *Çetin and others v Turkey* (n 55), para 64.

65 *Fressoz and Roire v France* App no 29183/95(ECtHR [GC], 21 January 1999), para 54; *Bladet Tromsø and Stensaas v Norway* (n 62), para 65; *McVicar v the United Kingdom* App no 46311/99 (ECtHR, 7 May 2002), para 73; *Pedersen and Baadsgaard v Denmark* (n 62), para 78; *Steel and Morris v the United Kingdom* App no 68416/01 (ECtHR, 15 February 2005), para 90; *Stoll v Switzerland* App no 69698/01 (ECtHR [GC], 10 December 2007), para 103; *Alithia Publishing Company Ltd and Constantinides v Cyprus* App no 17550/03 (ECtHR, 22 May 2008), para 65; *Kasabova v Bulgaria* App no 22385/03 (ECtHR, 19 April 2011), para 63; *Axel Springer AG v Germany* (n 62), para 93; *Błaja News Sp. z o. o. v Poland* App no 59545/10 (ECtHR, 26 November 2013), para 51; *Armellini and others v Austria* App no 14134/07 (ECtHR, 16 April 2015), para 41; *Pentikäinen v Finland* (n 48), para 90; *Bédat v Switzerland* (n 62), para 50; *Magyar Helsinki Bizottság v Hungary* (n 48), para 159; *Orlovskaya Iskra v Russia* App no 42911/08 (ECtHR, 21 February 2017), para 109; *NIT S.R.L. v the Republic of Moldova* App no 28470/12 (ECtHR [GC], 5 April 2022), para 180.

debate.[66]

This principle chimes well with the republican ideal of freedom. Inaccurate or otherwise unreliable information could undermine the principle of equal rights, since those who are not properly informed cannot make informed choices. It should therefore come as no surprise that, following the case law of the former ECnHR,[67] the ECtHR considers that freedom of expression within the scope of article 10 of the ECHR includes the right of reply, that is, the right to contest incorrect or misleading information made accessible to the public through the media. In the ECtHR's view, this right 'flows from the need not only to be able to contest untruthful information, but also to ensure a plurality of opinions, especially in matters of general interest such as literary and political debate', thereby advancing the right of the public to be properly informed.[68] By the same token, a positive duty may arise under article 1 as read together with article 10 of the ECHR for the state to take measures aimed at preventing a private party from interfering with the freedom of individuals to receive information.[69]

The principle of equal rights further requires that individuals should have equal access to information relating to matters of government. As James Madison points out, '[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce, or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives'.[70] Therefore, although the ECtHR considers that article 10 of the ECHR does not impose a general positive obligation on anybody (not even on public bodies) to collect and impart information to interested recipients,[71] republican freedom demands the broadest possible right of access to information held by the state or public bodies. To use the words of Pettit, subject only 'to a time embargo in certain sensitive areas, there ought to be provision

66 *Steel and Morris v the United Kingdom* (n 65), para 90; *Marcinkevičius v Lithuania* (n 31), para 91. See also *Braun v Poland* App no 30162/10 (ECtHR, 4 November 2014), para 47; *Magyar Helsinki Bizottság v Hungary* (n 48), para 159; *Wojczuk v Poland* App no 52969/13 (ECtHR, 9 December 2021), paras 102–03.

67 *Ediciones Tiempo S.A. v Spain* App no 13010/87 (ECnHR, 12 July 1989).

68 *Melnychuk v Ukraine* App no 28743/03 (ECtHR, 5 July 2005), para 2; *Kaperzyński v Poland* (n 62), para 66; *Marunić v Croatia* App no 51706/11 (ECtHR, 28 March 2017), para 50; *Eker v Turkey* App no 24016/05 (ECtHR, 24 October 2017), para 43; *NIT S.R.L. v the Republic of Moldova* (n 65), para 200.

69 See *Khurshid Mustafa and Tarzibachi v Sweden* (n 20), paras 30–35.

70 James Madison, *The Complete Madison: His Basic Writings* (Saul K Padover ed, Harper & Bros 1971) 337.

71 See n 54 above and accompanying text.

for members of the public, including the press, documentary information on the data and arguments that carry weight in decisions by public bodies.'[72]

Existing case law in the present case study does not, however, appear to fully comport with this republican stand. The right of access to state-held information, as a specific component of freedom of expression, has been the subject of gradual clarification in the case law of the former ECnHR and the ECtHR.[73] As a general rule, the ECtHR now considers that freedom of expression as enshrined in article 10 of the ECHR does not confer upon the individual a right of access to information held by a public body or indeed oblige the state to impart such information to the individual.[74] By way of exception, such a right or obligation may arise under specific circumstances, namely where disclosure of the information in question has been imposed by a judicial order that has gained legal force; and where access to the information in question is so instrumental for the individual's exercise of the right to receive and impart information that its denial would constitute an interference with that right.[75]

The ECtHR uses four different criteria to determine whether and the extent to which a denial of access to state-held information constitutes an interference with freedom of expression.[76] First, the purpose of the information request must be to enable the person making the request to exercise his freedom to receive and impart information to others. Second, the nature of the information sought must satisfy a 'public-interest test' to warrant disclosure under the ECHR, for example, where disclosure is needed to ensure transparency in the conduct of public affairs or where the information in question otherwise concerns a matter of general interest. Third, the person seeking information must have assumed the special role of receiving and imparting information to the public. Fourth, the information request must not generally require the authorities to prepare or gather information that is not ready or available. The ECtHR applies these four criteria cumulatively. Accordingly, no obligation and thus no right of access to state-held information arises if any of these

72 Philip Pettit, 'Democracy, Electoral and Contestatory' (2000) 42 *Nomos* 105, 130; Philip Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Oxford University Press 2001) 169. See also Bernard Manin, *The Principles of Representative Government* (Cambridge University Press 1997) 167–68.

73 See *Magyar Helsinki Bizottság v Hungary* (n 48), paras 126–33. See also *Cangi v Turkey* (n 61), paras 30–31.

74 *Magyar Helsinki Bizottság v Hungary* (n 48), para 156; *Saure v Germany (no 2)* App no 6091/16 (ECtHR, 28 March 2023), para 36.

75 *Magyar Helsinki Bizottság v Hungary* (n 48), para 156; *Rovshan Hajiyev v Azerbaijan* Apps nos 19925/12 and 47532/13 (ECtHR, 9 December 2021), para 44; *Saure v Germany (no 2)* (n 74), para 36.

76 *Magyar Helsinki Bizottság v Hungary* (n 48), paras 157–70; *Rovshan Hajiyev v Azerbaijan* (n 75), paras 45–48.

criteria has not been satisfied.[77]

This interpretation of the law is intriguing though. Granted, the state must flesh out the right of access to state-held information by adopting appropriate legislative provisions.[78] But the existence of that right as an essential component of freedom of expression is quite palpable. It is therefore unclear why the ECtHR has settled for a restrictive interpretation of the state's positive duty to provide information when it is requested to do so by those subject to its rule.[79] To be fair, article 10 of the ECHR does not make explicit mention of the right to 'seek' information. Article 10 can, to that extent, thus be contrasted with corresponding provisions of other instruments (such as article 19 of the ICCPR and article 13 of the ACHR) which explicitly recognise as part of freedom of expression the right to seek information. The freedom to receive information enshrined in article 10 nonetheless also implies the right to seek information.

To be sure, there circumstances in which one can hardly receive information without actively seeking it somehow. Freedom to receive information may thus be elusive in the absence of freedom to seek information. This is particularly true when it comes to information that may portray the government in a bad light, as government officials would naturally attempt to conceal it from the public. It is no wonder then that, as the ECtHR itself acknowledges, there is a common understanding between the bodies and institutions of the Council of Europe that paragraph 1 of article 10 of the ECHR 'could reasonably be considered as already comprising "freedom to seek information".'[80] It is therefore something of a mystery as to why the ECtHR continues to see the right of access to state-held information as an exception rather than as a general rule. This is all the more so when one considers the fact that other major human rights systems do recognise that freedom of expression includes a general right of access to state-held information, subject only to permissible restrictions that may be imposed under certain circumstances.

The freedom of expression that is enshrined in paragraph 2 of article 19 of the ICCPR, for example, has been interpreted as embracing a general right of access to

77 See, for example, *Center for Democracy and the Rule of Law v Ukraine* App no 75865/11 (ECtHR, 3 March 2020), paras 49 and 54–59, dismissing the application on the ground that first of the four criteria had not been satisfied. See also *Saure v Germany* App no 6106/16 (ECtHR [dec], 19 October 2021), paras 34–39.

78 Barendt (n 4) 899–900.

79 See also Wouter Hins and Dirk Voorhoof, 'Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights' (2007) 3 *European Constitutional Law Review* 114, 114. Interestingly, in *Houchins v KQED* 438 US 1, 16 (1978), the US Supreme Court also ruled by a 4–3 majority opinion that the First Amendment to the US Constitution does 'not guarantee the public a right of access to information generated or controlled by government.'

80 *Magyar Helsinki Bizottság v Hungary* (n 48), para 136.

information held by public bodies.[81] Article 13 of the ACHR has similarly been interpreted as protecting the right of all individuals to receive state-held information, giving rise to the attendant positive duty of the state to provide information, subject only to the exceptions envisaged in that provision. In the exact words of the Inter-American Court of Human Rights (IACtHR), the freedom of thought and expression enshrined in article 13 of the ACHR 'includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State.'[82] The African Commission on Human and Peoples' Rights (ACnHPR) likewise considers that the state has a positive obligation under article 9 of the ACHPR to secure to every person not only the right to access information held by public bodies but also the right to access information held by semi-private bodies 'that may assist in the exercise or protection of any right'.[83]

It goes without saying that freedom to receive information is particularly important when the information in question relates to a matter of public interest. By the same token, the assertion that it would be 'odd' to recognise as part of freedom of expression a right that entitles individuals 'to acquire information from authorities reluctant to supply it' cannot be maintained on the republican account that we espouse.[84] True, individuals should not be compelled to express themselves or to impart information to others. But the same cannot be said of the state or public bodies in a democratic society. The rights related to freedom of expression inure to the benefit of individuals, not the state or public bodies as such. For its part, the state has only duties to ensure that those rights are both adequately secured and respected. Subject to restrictions envisaged by law, the state's duty to secure the right of individuals to receive information necessarily includes an obligation to allow individuals to enjoy unhindered access to information held by public bodies, which is essentially public information. As the ACnHPR once put it, public bodies 'hold

81 *Gauthier v Canada* Comm no 633/1995 (UNHRC, 5 May 1999), paras 13.3–13.5; *Toktakunov v Kyrgyzstan* Comm no 1470/2006 (UNHRC, 28 March 2011), paras 6.3 and 7.4; *Rafael Rodríguez Castañeda v Mexico* Comm no 2202/2012 (UNHRC, 29 August 2013), paras 7.6–7.7. See also General Comment no 34 (n 6), para 18.

82 *Claude Reyes et al v Chile* Series C no 151 (IACtHR, 19 September 2006), para 77. For a commentary on this case, see Eduardo Andrés Bertoni, 'The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards' (2009) 3 *EHRLR* 332, 347–48.

83 African Commission on Human and Peoples' Rights, 'Declaration of Principles on Freedom of Expression and Access to Information in Africa' (adopted at the 65th ordinary session, 21 October–10 November 2019), principle 26.

84 Barendt (n 4) 899.

information not for themselves but as custodians of the public good'.[85]

All in all, notwithstanding extant discrepancies in the depth and breadth of the right of access to state-held information across jurisdictions, the importance of freedom to receive information in general cannot be overemphasised. Indeed, some prominent scholars have gone so far as to suggest that freedom of expression consists only in the rights of recipients of information, and that those who impart information to others assert expression rights not on their own behalf but on behalf of recipients and society as a whole.[86] Although such an argument would run counter to the actual wording of article 10 of the ECHR and of corresponding provisions of other instruments, it is undeniable, as the ECtHR itself acknowledges,[87] that the act of seeking and receiving information often precedes both the formation and the expression of personal opinions.[88] This is particularly true with respect to the very expression of political opinions upon which the ECtHR places a premium. Citizens cannot meaningfully form political opinions unless they have wide access to information about government operations and about matters of public interest in general.[89]

3.5 Freedom to Impart Information

Freedom of expression is most commonly associated with the right to express oneself or, more generally, freedom to impart information. However, as already noted, freedom to impart information (and ideas) is only one of the elements of freedom of expression as enshrined in article 10 of the ECHR and corresponding provisions of other instruments. It is worth underlining that freedom to impart information, whether in the form of facts, opinions or ideas, is concerned only with the

85 African Commission on Human and Peoples' Rights, 'Declaration of Principles on Freedom of Expression in Africa' (adopted at the 32nd Session, 17–23 October 2002), para IV. This declaration has since been superseded by the 2019 declaration cited in n 83 above.

86 See, for example, Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (Harper & Bros 1948) 22–27; Richard A Posner, 'Free Speech in an Economic Perspective' (1986) 20 *Suffolk University Law Review* 1, 9 and 49–50; Thomas Scanlon, 'A Theory of Freedom of Expression' (1972) 1 *Philosophy & Public Affairs* 204; Larry Alexander, *Is There a Right of Freedom of Expression*? (Cambridge University Press 2005) 8–9. cf Lawrence Byard Solum, 'Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech (1988–89) 83 *Northwestern University Law Review* 54, 79; Leslie Kendrick, 'Are Speech Rights for Speakers?' (2017) 103 *Virginia Law Review* 1767, arguing that those who impart information to others also have their own expression rights.

87 See, for example, ns 48 and 55 above and accompanying text.

88 Van Rijn (n 25) 778.

89 See Cheryl Ann Bishop, *Access to Information as a Human Right* (LFB Scholarly Publishing 2012) 204–08.

communication of information to one or more persons, hence the term 'impart'. Self-talk, talking to yourself when no one else can see or hear you, no matter how beneficial it may be from a psychological perspective,[90] is not the province of freedom of expression. Expressing your anger by screaming in the middle of nowhere, when no one else can see or hear you, equally has nothing to do with freedom of expression understood as a civil or political right.

Therefore, although it is possible to express oneself in non-communicative ways, freedom to impart information is concerned only with communicative expression. To stress this point, some prefer to substitute the term 'freedom of expression' with the term 'freedom of communication',[91] describing the former as being misleadingly broad and overinclusive.[92] But this is not a place to attempt to amend the terminology that the law uses. The point can be made by simply underlining that the freedom of expression that the law protects is intrinsically a social freedom, consisting not only of a right to communicate with others but also a right to receive communication from others, to properly inform one's thoughts and choices.

It is further worth recalling that, as with freedom to receive information, people can also use media companies or other associations to impart information to others. By the same token, natural persons and legal persons alike can invoke not only freedom to receive information but also freedom to impart information.[93] Another related point worth recalling is that the effective protection of freedom to impart information, like that of freedom to receive information, requires the state to adopt positive measures of protection even in the sphere of relations between private individuals.[94] It is no wonder then that the ECtHR already recognises that the freedom of expression enshrined in article 10 of the ECHR requires the state to take appropriate measures in order 'to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions

90 See, for example, Gary Lupyan and Daniel Swingley, 'Self-Directed Speech Affects Visual Search Performance' (2012) 65 *Quarterly Journal of Experimental Psychology* 1068.

91 See, for example, Tom Campbell and Wojciech Sadurski (eds), *Freedom of Communication* (Dartmouth 1994); Kay Mathiesen, 'Fake News and the Limits of Freedom of Speech' in Carl Fox and Joe Saunders (eds), *Media Ethics, Free Speech, and the Requirements of Democracy* (Routledge 2019) 169.

92 Frederick Schauer, 'What is Speech? The Question of Coverage' in Stone and Schauer (eds) (n 13) 161–62. See also generally Solum (n 86).

93 *Autronic AG v Switzerland* (n 49), para 47; *Casado Coca v Spain* (n 49), para 35; *Ulusoy and others v Turkey* (n 49), para 28.

94 See ns 17–24 above and accompanying text.

and ideas without fear'.[95] By the same token, the ECtHR considers that freedom to impart information implies the right to anonymity, that is, the right to engage in anonymous communication in order to avoid possible reprisals or attracting unwanted attention.[96] We have already noted in the preceding section that freedom to impart information also requires the state to guarantee the right of reply, to enable people to contest incorrect or misleading information published in the media which could infringe their rights.[97] Such positive measures, as noted in section 3.2 above, are consistent with the republican freedom that we espouse, since that freedom depends on positive legal protection—notwithstanding the state's negative duty, or the duty of non-arbitrary interference.

As noted in section 3.3 above, moreover, the law on freedom of expression can be invoked by those who may elect not to express themselves and those who may be wrongly accused of holding certain views which they have not in fact expressed. The case law of both the ECtHR and the former ECnHR in this connection suggests that freedom of expression may, by necessary implication, include a 'negative right' not to be compelled to express oneself.[98] This is in keeping with our definition of freedom, according to which freedom consists in rights rather than in obligations. Wrongly attributing to someone statements they have never made and ordering them to pay damages could also indirectly stifle that individual's freedom of expression contrary to article 10 of the ECHR.[99]

It should be obvious from the foregoing discussion that freedom to impart information as enshrined in article 10 of the ECHR consists only in the rights of willing communicators. In principle, this freedom is so freestanding that it can be asserted even if the target audience is unwilling to receive the information in question. The ECtHR underlines in this connection that, subject to paragraph 2 of

95 *Dink v Turkey* (n 20), para 137; *Huseynova v Azerbaijan* (n 20), para 120; *Gaši and others v Serbia* (n 20), para 78. See also *Khadija Ismayilova v Azerbaijan* Apps nos 65286/13 and 57270/14 (ECtHR, 10 January 2019), para 158.

96 *Delfi AS v Estonia* App no 64569/09 (ECtHR [GC], 16 June 2015), para 147; *Standard Verlagsgesellschaft mbH v Austria (no 3)* (n 52), para 76. Even the First Amendment to the US Constitution has been interpreted as protecting a right to anonymous speech and association. See *McIntyre v Ohio Elections Commission* 514 US 334 (1995); *Watchtower Bible & Tract Society of New York Inc v Village of Stratton* 536 US 150 (2002); *NAACP v State of Alabama ex rel Patterson* 357 US 449 (1958).

97 *Ediciones Tiempo S.A. v Spain* (n 67); *Melnychuk v Ukraine* (n 68), para 2; *Kaperzyński v Poland* (n 62), para 66; *Marunić v Croatia* (n 68), para 50; *Eker v Turkey* (n 68), para 43; *NIT S.R.L. v the Republic of Moldova* (n 65), para 200.

98 *K v Austria* App no 16002/90 (ECnHR, 13 October 1992), para 45; *Strohal v Austria* App no 20871/92 (ECnHR, 7 April 1994); *Gillberg v Sweden* (n 42), para 86; *Semir Güzel v Turkey* (n 42), para 27; *Wanner v Germany* (n 42), para 39.

99 *Stojanović v Croatia* App no 23160/09 (ECtHR, 19 September 2013), para 39. See also *Müdür Duman v Turkey* App no 15450/03 (ECtHR, 6 October 2015), para 30; *Wojczuk v Poland* (n 66), para 41.

article 10, freedom to impart information 'is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.'[100] In the ECtHR's view, '[s]uch are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".'[101]

The significance of this element of freedom of expression cannot therefore be overemphasised. In the words of John Bury, thinking or holding opinions is of little value, 'unsatisfactory and even painful to the thinker himself, if he is not permitted to communicate his thoughts to others, and it is obviously of no value to his neighbours.'[102] Pettit similarly considers that this element of freedom of expression 'is a necessary means of exercising popular control and influence over laws and institutions' and that it must therefore 'be protected in the name of political legitimacy.'[103] Unless the right to exercise voice in matters of government is adequately protected, so says Pettit, people's silence 'can always be taken to reflect their lack of freedom' in general.[104] Both freedom of thought (freedom to hold opinions inclusive) and freedom to receive information, in any event, become largely devoid of substance when people are not free to communicate their thoughts and the information they receive from others.

It is no wonder then that the ECtHR considers that freedom of expression is not only one of the essential foundations of a democratic society but also constitutes one of the basic conditions for the progress of such a society and for each individual's

100 *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976), para 49. See also *Oberschlick v Austria (no 1)* App no 11662/85 (ECtHR, 23 May 1991), para 57; *Observer and Guardian v the United Kingdom* App no 13585/88 (ECtHR, 26 November 1991), para 59; *United Communist Party of Turkey and others v Turkey* App no 13392/92 (ECtHR [GC], 30 January 1998), para 43; *Pedersen and Baadsgaard v Denmark* (n 62), para 71; *Standard Verlagsgesellschaft mbH v Austria (no 3)* (n 52), para 83; *Karuyev v Russia* App no 4161/13 (ECtHR, 18 January 2022), para 17; *Bodalev v Russia* App no 67200/12 (ECtHR, 6 September 2022), para 96 .

101 *Handyside v the United Kingdom* (n 100), para 49; *Oberschlick v Austria (no 1)* (n 100), para 57; *Standard Verlagsgesellschaft mbH v Austria (no 3)* (n 52), para 83; *Karuyev v Russia* (n 100), para 17.

102 John Bagnell Bury, *A History of Freedom of Thought* (Henry Holt and Company 1913) 7.

103 Whitten (n 18) 95.

104 Pettit, *On the People's Terms* (n 22) 201–02. cf Philip Pettit, 'Enfranchising Silence: An Argument for Freedom of Speech' in Campbell and Sadurski (eds) (n 91), reprinted in Philip Pettit, *Rules, Reasons, and Norms: Selected Essays* (Oxford University Press 2002) 367–77.

self-fulfilment.[105] This reasoning echoes the republican way of thinking about freedom, according to which freedom is a gateway good and should (by the same token) be protected not for its own sake but for the sake of the goods thereby produced, whereas democratic participation should be understood only as a means of securing individual freedom in general.[106]

It should therefore come as no surprise that the ECtHR adopts a generous interpretation as regards the range of options or forms of conduct that fall under the banner of freedom to impart information. This freedom, according to the ECtHR, applies not only to the substance of the information communicated but also to the form in which the information is communicated to the recipient.[107] In the ECtHR's view, any restriction imposed on the means of communication 'necessarily interferes with the right to receive and impart information.'[108]

As concerns the substance of expression, freedom to impart information does not only apply to certain types of information or indeed only to information of a political nature.[109] It also applies to artistic expression, including, for example, in the form of paintings[110] and plays.[111] In this connection, the ECtHR is of the view that '[t]hose who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions' and thus play an essential role in the functioning of a democratic system.[112] The ECtHR further considers that freedom to impart information also applies to information of a commercial nature.[113] Following the former ECnHR in this regard, the ECtHR is of the view that article 10 of the ECHR applies even to

[105] *Handyside v the United Kingdom* (n 100), para 49; *Oberschlick v Austria (no 1)* (n 100), para 57; *Stoll v Switzerland* (n 65), para 101; *Animal Defenders International v the United Kingdom* (n 61), para 100; *Morice v France* App no 29369/10 (ECtHR [GC], 23 April 2015), para 124; *Standard Verlagsgesellschaft mbH v Austria (no 3)* (n 52), para 83; *Karuyev v Russia* (n 100), para 17; *NIT S.R.L. v the Republic of Moldova* (n 65), para 177; *Bumbeș v Romania* App no 18079/15 (ECtHR, 3 May 2022), para 62.

[106] Pettit, *On the People's Terms* (n 22); Pettit, *Just Freedom* (n 22); Pettit, 'Freedom as Nondomination' (n 17) 100.

[107] *Oberschlick v Austria (no 1)* (n 100), para 57; *De Haes and Gijsels v Belgium* App no 19983/92 (ECtHR, 24 February 1997), para 48; *Palomo Sánchez and others v Spain* (n 20), para 53; *Semir Güzel v Turkey* (n 42), para 27; *Karuyev v Russia* (n 100), para 17.

[108] *Autronic AG v Switzerland* (n 49), para 47. See also *Ulusoy and Others v Turkey* (n 49), para 28.

[109] *Casado Coca v Spain* (n 49), para 35.

[110] *Müller and others v Switzerland* App no 10737/84 (ECtHR, 24 May 1988), para 27.

[111] *Ulusoy and Others v Turkey* (n 49), paras 28–29.

[112] *Murat Vural v Turkey* App no 9540/07 (ECtHR, 21 October 2014), para 45.

[113] *markt intern Verlag GmbH and Klaus Beermann v Germany* App no 10572/83 (ECtHR, 20 November 1989), para 26; *Casado Coca v Spain* (n 49), paras 35–36; *Mouvement raëlien suisse v Switzerland* (n 23), para 61; *Sekmadienis Ltd v Lithuania* App no 69317/14 (ECtHR, 30 January 2018), para 73.

light music and commercials transmitted by cable.[114]

As to the forms of expression, the ECtHR considers that '*all* means of expression are included in the ambit' of article 10 of the ECHR.[115] Indeed, the protection afforded by article 10 is not limited to spoken or written words as information is 'also capable of being communicated by non-verbal means of expression or through a person's conduct.'[116] A survey of the case law of the ECtHR and the former ECnHR confirms that article 10 has been applied 'not only to the more common forms of expression such as speeches and written texts, but also to other and less obvious media through which people sometimes choose to convey their opinions, messages, ideas and criticisms'.[117] Therefore, although it is fashionable to use the terms 'freedom of expression' and 'freedom of speech' interchangeably, the uninitiated may find this terminology confusing.

Speech, it is true, can be a specific form of expression. But even if speech were to be so broadly understood as to include all oral and written forms of expression, some forms of expression would still not be accounted for. As already noted above, even the ECtHR has categorically stated that the protection afforded by article 10 of the ECHR cannot be 'limited to spoken or written word[s], for ideas and opinions are also capable of being communicated by non-verbal means of expression or through a person's conduct.'[118] The term 'freedom of speech' can thus be misleadingly underinclusive.[119] This is further substantiated by the fact that, even in the common law world where this term is mostly used, courts have always been willing, in appropriate cases, to apply 'freedom of speech' to all forms of communication, not just to speech as such.[120]

To elaborate, recall that the ECtHR already recognises that people can communicate or express themselves through art. We have also seen in this connection that both the ICCPR and the ACHR explicitly recognise art as a form of expression within the scope of freedom of expression. The case law of the ECtHR in this regard is therefore in consonance with the position in other major human rights systems. The ECtHR considers that photographs can also serve important communicative purposes, as they impart information directly, and has on a number of occasions underlined that freedom of expression can be exercised through the

114 *Groppera Radio AG and others v Switzerland* (n 50), paras 54–55; *Casado Coca v Spain* (n 49), para 35.
115 *Murat Vural v Turkey* (n 112), para 52 (emphasis added).
116 *Karuyev v Russia* (n 100), para 18.
117 *Murat Vural v Turkey* (n 112), para 44; *Semir Güzel v Turkey* (n 42), para 27.
118 *Bodalev v Russia* (n 100), para 96.
119 Schauer, 'What is Speech?' (n 92) 160.
120 Barendt (n 4) 893.

publication of photographs[121] and photomontages.[122] For the ECtHR, even the anonymous sharing by voters through a mobile application of photographs of their invalid ballots can be a legitimate way of exercising freedom of expression.[123]

In a similar vein, the former ECnHR noted some decades ago that freedom of expression may include a right to express ideas by the way one dresses.[124] The ECtHR has also recognised as a form of political expression the wearing in public of a red star symbolising the international workers' movement, holding more generally that the display of such vestimentary symbols may be protected as part of freedom of expression.[125] The wearing by a prisoner of an Easter lily has equally been recognised as a way of expressing one's political views.[126] By the same token, the ECtHR considers that the display of a symbol or flag associated with a political movement or other entity is capable of expressing identification with ideas or representing them and may thus be protected as part of freedom to impart information.[127]

It is also trite law that people can exercise their freedom to impart information through conduct, including in the form of protest.[128] Examples of such non-verbal protest which the ECtHR has already recognised as specific forms of expression within the ambit of article 10 of the ECHR abound. These include blowing a hunting horn and engaging in hallooing to disrupt a fox hunt,[129] physically impeding a grouse shoot and the extension of a motorway,[130] sitting on a public road leading to a naval base,[131] displaying dirty clothes in public,[132] detaching a ribbon from a wreath laid

[121] *Von Hannover v Germany* App no 59320/00 (ECtHR, 24 June 2004), para 59; *Verlagsgruppe News GmbH v Austria (no 2)* App no 10520/02 (ECtHR, 14 December 2006), para 29; *Ashby Donald and others v France* App no 36769/08 (ECtHR, 10 January 2013), para 34; *Dupate v Latvia* App no 18068/11 (ECtHR, 19 November 2020), para 47. See also *Axel Springer AG v Germany* (n 62).

[122] *Société de conception de presse et d'édition et Ponson v France* App no 26935/05 (ECtHR, 5 March 2009).

[123] *Magyar Kétfarkú Kutya Párt v Hungary* App no 201/17 (ECtHR [GC], 20 January 2020), para 86.

[124] *Stevens v the United Kingdom* File no 11674/85 (ECnHR, 3 March 1986), para 2.

[125] *Vajnai v Hungary* App no 33629/06 (ECtHR, 8 July 2008), para 47; *Fratanoló v Hungary* App no 29459/10 (ECtHR, 3 November 2011), para 24.

[126] *Donaldson v the United Kingdom* App no 56975/09 (ECtHR, 25 January 2011), para 20.

[127] *Fáber v Hungary* App no 40721/08 (ECtHR, 24 July 2012), para 36.

[128] *Taranenko v Russia* App no 19554/05 (ECtHR, 15 May 2014), para 70; *Karastelev and others v Russia* App no 16435/10 (ECtHR, 6 October 2020), para 88; *Bodalev v Russia* (n 100), para 96.

[129] *Hashman and Harrup v the United Kingdom* App no 25594/94, (ECtHR [GC], 25 November 1999), para 28.

[130] *Steel and others v the United Kingdom* App no 24838/94 (ECtHR, 23 September 1998), para 92.

[131] *Lucas v the United Kingdom* App no 39013/02 (ECtHR, 18 March 2003).

[132] *Tatár and Fáber v Hungary* Apps nos 26005/08 and 26160/08 (ECtHR, 12 June 2012),

by a head of state,[133] burning a national flag and a picture of a president of the country,[134] pouring paint on statues of historical figures,[135] spitting on a photograph of a politician,[136] frying eggs and sausages over the 'eternal flame' at a war memorial,[137] and setting fire to an upside-down photograph of a royal couple.[138] Even public nudity[139] and the act of installing genital-shaped sculptures on the stairs of a government office[140] have been held to constitute specific forms of expression whose legal acceptability must be examined through the lens of freedom of expression. As a means of expressing protest, a boycott is also covered under article 10 of the ECHR, as is a call for a boycott aimed at expressing protest.[141] The act of defiance towards public authority by ignoring warnings from a government superintendent has similarly been held to be a form of political expression.[142] The ECtHR has gone so far as to explicitly recognise silence as a specific form of expression within the ambit of article 10 of the ECHR.[143]

It should also be noted that some forms of expression can be both verbal and non-verbal. A performance by a band against a president and in response to a political process, for example, has been held to constitute a mixture of conduct and verbal expression, amounting to artistic and political expression within the scope of article 10 of the ECHR.[144] The use of political party slogans, accompanied by the burning of a picture of the President of Russia and of the Russian flag, has also been held to constitute 'a form of expressing an opinion in respect of an issue of major public interest, namely the presence of Russian troops on the territory of

paras 36 and 40.

133 *Shvydika v Ukraine* App no 17888/12 (ECtHR, 30 October 2014), paras 8, 37 and 38.

134 *Christian Democratic People's Party v Moldova (no 2)* App no 25196/04 (ECtHR, 2 February 2010), paras 9 and 27.

135 *Murat Vural v Turkey* (n 112), paras 54–56; *Ibrahimov and Mammadov v Azerbaijan* Apps nos 63571/16 and 5 others (ECtHR, 13 February 2020), paras 166–67.

136 *Karuyev v Russia* (n 100), para 20.

137 *Sinkova v Ukraine* App no 39496/11 (ECtHR, 27 February 2018), paras 7 and 100.

138 *Stern Taulats and Roura Capellera v Spain* Apps nos 51168/15 and 51186/15 (ECtHR, 13 March 2018), paras 6 and 25.

139 *Gough v the United Kingdom* App no 49327/11 (ECtHR, 28 October 2014), para 150.

140 *Mătăsaru v the Republic of Moldova* Apps nos 69714/16 and 71685/16) (ECtHR, 15 January 2019), paras 7 and 35.

141 *Baldassi and others v France* Apps nos 15271/16 and 6 others (ECtHR, 11 June 2020), para 63.

142 *Semir Güzel v Turkey* (n 42), para 29.

143 *Kudrevičius and others v Lithuania* App no 37553/05 (ECtHR [GC], 15 October 2015), para 144; *Bumbeș v Romania* (n 105), para 98; *Peradze and others v Georgia* App no 5631/16 (ECtHR, 15 December 2022), para 35. See also Pettit, 'Enfranchising Silence' (n 104).

144 *Maria Alekhina and others v Russia* App no 38004/12 (ECtHR, 17 July 2018), paras 205–06.

Moldova.'[145] Similarly, the act of spraying graffiti on a statue of a former president of Azerbaijan has been held to constitute a mixture of conduct and verbal expression, amounting to a form of political expression meriting judicial scrutiny under article 10 of the ECHR.[146]

All in all, in determining whether a given act amounts to a form of expression that may enjoy legal protection, the ECtHR examines the nature of the act in question from two perspectives.[147] First, it examines the expressive character of the act from an objective point of view. In principle, all acts of expression that are communicative in nature trigger the application of article 10 of the ECHR. Second, the ECtHR examines the subjective purpose or intention of the person performing the act in question. In principle, all acts of expression that are intended to communicate information trigger the application of article 10 of the ECHR. The ECtHR considers that, in any event, the assessment of whether an impugned act qualifies as a form of expression within the meaning of article 10 should not be restrictive but inclusive.[148] This does not, however, detract from the fact that, in keeping with the conception of freedom that we adopt, not all acts of expression or communication enjoy legal protection as part of freedom of expression.

3.6 Conclusion

The foregoing discussion confirms that freedom of expression as enshrined in the ECHR and in other similar instruments largely echoes the republican way of thinking about freedom. To begin with, consistent with the republican claim to the effect that freedom is an ecumenical value and a gateway good, the analysis in this chapter suggests that freedom of expression is a multifunctional and multifaceted right. This finding diverges from the prevailing theories of freedom of expression that seek to justify freedom of expression by reference only to some of its specific functions, such as the promotion of democracy, individual autonomy or the discovery of truth. Importantly, the freedom of expression that we are speaking about is not a natural phenomenon but a creation of the law. Freedom of expression is therefore a term of art. First, the freedom of expression that the law creates does not only apply to acts of expression. Second, the law does not protect all acts of expression as part of freedom of expression. This chapter does not, however, claim to have identified all the specific legal rights that constitute freedom of expression. Suffice it to say that, for heuristic purposes, the various rights constituting freedom of expression can be

[145] *Christian Democratic People's Party v Moldova (no 2)* (n 134), paras 9 and 27.
[146] *Ibrahimov and Mammadov v Azerbaijan* (n 135), paras 166–67.
[147] See *Murat Vural v Turkey* (n 112), para 54; *Semir Güzel v Turkey* (n 42), para 28; *Karuyev v Russia* (n 100), para 19.
[148] *Murat Vural v Turkey* (n 112), para 52; *Semir Güzel v Turkey* (n 42), para 27.

viewed from two different perspectives, namely the communicator's perspective and the recipient's perspective.

From the communicator's perspective, freedom of expression consists in the rights of the individual as a potential communicator. Everyone, as a potential communicator, has the right to engage in mental activities without any power dictating what thoughts one should or should not entertain and without being compelled to communicate one's thoughts (including beliefs, desires, ideas, opinions, questions, wishes, etc) or otherwise to express oneself. This right applies without any qualification. Everyone also has the right to communicate one's thoughts and other information in one's possession. This right may be exercised not only in the form of oral and written communication but also through any act that one may use to communicate one's thoughts or any other information. Additionally, everyone has the right to communicate with others through any available means of communication. The right to communicate with others presupposes the existence of a communication environment in which people can communicate their thoughts or other information without fear. By the same token, the right to communicate with others implies the right to anonymity, that is, the right to engage in anonymous communication in order to avoid possible reprisals or attracting unwanted attention. The right to communicate with others also requires the state to guarantee the right of reply, to enable people to contest incorrect or misleading information published in the media which infringes or threatens to infringe their rights. The individual may exercise and enforce any of these and other rights of communicators either alone or in association with others, or indeed through a legal entity.

From the recipient's perspective, freedom of expression consists in the rights of the individual as a potential recipient of communication. Everyone, acting alone or in association with others, or indeed through a legal entity, has the right to receive information, from willing communicators. The point of this right is to enable people to receive information which they can rely on in exercising their freedom of thought and thus in making their choices, political or otherwise. This explains why the ECtHR considers that freedom to receive information implies the right to be properly informed, a right which is also protected by the guarantee of the right of reply. The right to receive information and thus to be properly informed inures to the benefit of active and passive recipients alike, that is, those who actively seek information from others and those who may passively receive information by virtue of being members of the community in which the information in question is communicated to the public. By the same token, the right to receive information also implies a right to actively seek information from those who may be willing to provide it. Additionally, those who actively seek information from the state or public bodies have a right to receive such information, irrespective of whether or not those bodies are willing to provide the information sought. The breadth and depth of the right of access to state-

held information, however, vary across jurisdictions. In any event, the foregoing rights and any other rights of recipients of information from communicators makes freedom of expression intrinsically a social freedom.

With the exception of the right to engage in mental activities, or freedom of thought, that enjoys unqualified protection, the scope of the rights of both communicators and recipients of communication may be restricted by law. In keeping with the republican conception of freedom that we adopt, non-arbitrary restrictions on the rights of communicators and recipients alike do not detract from freedom of expression. As already noted in the previous chapters, it is generally accepted that an interference with expressive activity may be considered non-arbitrary if it is prescribed by law, pursues a legitimate aim recognised by law and is necessary in a democratic society for the attainment of the legitimate aim in view. It is, however, worth recalling that, on the republican account that we adopt, the only legitimate aim that the law should recognise in this connection is that of securing freedom in accordance with the principle of equal rights. Any options thus duly restricted are not part of the rights protected by law and cannot therefore be seen as part of freedom of expression properly understood.

4 Political Disinformation and Freedom of Expression

4.1 Introduction

Freedom of expression, as we now conceive of it, does not only involve acts of expression. It also includes freedom of thought and freedom to receive information, whether in the form of facts, opinions or ideas. Importantly, the concept of expression itself is so broad that it includes any act that is objectively capable of communicating, or subjectively intended by its agent to communicate, to one or more persons some information.[1] This explains why relevant statutory provisions do not generally provide an exhaustive list of acts of expression that fall within the ambit of freedom of expression. Even so, understood as a legal right rather than as a natural phenomenon, freedom of expression is not limitless. A philosophical problem that arises in turn is how to determine the limits of that freedom. Statutory guarantees in and of themselves are generally not helpful in guiding a judge to the resolution of a dispute about the outer boundaries of freedom of expression.[2] The guarantee contained in article 10 of the ECHR is no exception.

This chapter thus puts to the test the scope of the conception of freedom of expression constructed in chapter 3 vis-à-vis the phenomenon of political disinformation. As already intimated, the question that falls for consideration is the following. Does the law protect as part of freedom of expression the act of communicating political disinformation? It goes without saying that we cannot tackle this question in a principled rather than in an *ad hoc* manner without having recourse to the underlying rationale for freedom of expression.[3] It is therefore worth

1 cf Thomas Scanlon, 'A Theory of Freedom of Expression' (1972) 1 *Philosophy & Public Affairs* 204, 206, defining an act of expression as 'any act that is intended by its agent to communicate to one or more persons some proposition or attitude.'

2 Grégoire Webber, 'Proportionality and Limitations on Freedom of Speech' in Adrienne Stone and Frederick Schauer (eds), *The Oxford Handbook of Freedom of Speech* (Oxford University Press 2021) 176.

3 Wojciech Sadurski, *Freedom of Speech and Its Limits* (Kluwer Academic Publishers 1999) 1; Frederick Schauer, 'What is Speech? The Question of Coverage' in Stone and Schauer (eds) (n 2) 165.

recalling at the outset that the conception of freedom of expression that we espouse does not restrict the justification of that freedom to any specific function. Freedom of expression, as we conceive of it, is a multifunctional and multifaceted right and thus an ecumenical value.

On this republican account, the law protects acts of expression not for their own sake but for the sake of the goods that are thereby produced,[4] although one need not provide an exhaustive list of those goods. What this means, in other words, is that all acts of expression that cohere with the republican ideal of freedom or the principle of equal rights qualify for protection as part of freedom of expression. Any act of expression that does not cohere with the principle of equal rights on the other hand does not qualify for legal protection.

Be that as it may, the significance of the question that falls for consideration in this chapter pervades the dichotomy between the liberal and the republican ways of thinking about freedom. Granted, liberal thinkers insist that any legal restriction on the range of options from which individuals may choose is an infraction of freedom irrespective of any normative justification therefor. To repeat the words of John Stuart Mill in this connection, the 'only freedom which deserves the name, is that of pursuing our own good in our own way'.[5] In the same vein, Isaiah Berlin joins Jeremy Bentham in recognising 'the liberty of doing mischief',[6] arguing that a law that justifiably prohibits coercion in a given sphere is nonetheless 'an infraction of the freedom of potential bullies and policemen.'[7] But even the most ardent, card-carrying liberal theorists are not committed to an unqualified right to engage in expressive activity.[8]

Although he stops short of providing any meaningful normative guidance within his conception of freedom as non-interference, Berlin himself recognises that 'the area of men's free action must be limited by law'.[9] Thomas Hobbes is even more unequivocal in his advocacy for state censorship of expression. In instituting the state, so says Hobbes, people authorise the man or men upon whom they confer their sovereign power to exercise a number of 'rights' in order to ensure that they 'live peaceably amongst themselves, and [that they] be protected against other men.'[10]

4 Philip Pettit, 'Freedom as Nondomination' in Toby Buckle (ed), *What is Freedom? Conversations with Historians, Philosophers, and Activists* (Oxford University Press 2021) 102.

5 John Stuart Mill, *On Liberty* (John W Parker and Son 1859) 27.

6 Jeremy Bentham, *The Works of Jeremy Bentham* (vol 2, John Bowring ed, William Tait 1843) 505.

7 Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press 1969) xlix.

8 Sadurski (n 3) 1.

9 Berlin (n 7) 124.

10 Thomas Hobbes, *Leviathan or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil* (London 1651) 88.

One of the rights of the sovereign, according to Hobbes, is 'to be Judge of what Opinions and Doctrines are averse, and what conducing to peace; and consequently, on what occasions, how far…, and what men are to be trusted with…in speaking to Multitudes of people; and who shall examine the Doctrines of all books before they be published.'[11]

Hobbes's absolutist way of thinking does not, of course, comport with the republican conception of freedom that we espouse, according to which equal status freedom depends not only on the rule of law but also on the twin democratic institutional ideals of a mixed constitution and a contestatory citizenry.[12] But the point being underlined is that there is a consensus among leading political thinkers that there must be some limits on the range of acts of expression that individuals can freely exercise. The choice of the principle that should guide how those limits are to be determined is the only bone of contention. In any event, the fact that existing provisions on freedom of expression leave to another day the determination of the outer boundaries of that freedom makes it essential for us to establish whether the act of communicating political disinformation in particular can be regarded as part of freedom of expression. The analysis in this connection will prove particularly useful in the chapters that follow when considering whether and, if so, how the phenomenon of political disinformation can be regulated in a democratic society without undermining freedom of expression.

Given that the regulatory conundrum with which we are concerned can be largely attributed to the definitional uncertainties alluded to in chapter 1, it is imperative to begin by shedding some light on what is meant by disinformation in general and political disinformation in particular. Accordingly, building upon the insights captured in chapters 2 and 3, the remainder of this chapter is organised as follows. Section 4.2 conceptualises disinformation in general. Section 4.3 proceeds to conceptualise political disinformation as a specific category of disinformation. Section 4.4 in turn considers whether, in the light of the conception of freedom that we espouse and paying due regard to the law within the framework of the present case study, the act of communicating political disinformation can be regarded as part of freedom of expression. Section 4.5 concludes.

11 Ibid, 91.

12 Philip Pettit, 'Two Republican Traditions' in Andreas Niederberger and Philipp Schink, *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press 2013) 170.

4.2 Disinformation as Information

Disinformation is information.[13] Information scientists discriminate disinformation from other types of information primarily based on its epistemic quality or lack thereof. Otherwise, disinformation is also a type of information. Like other types of information, disinformation can be communicated both offline and online. Therefore, online disinformation can be communicated in textual, graphical/pictorial, audio or video format, or in any possible combination of these formats. Moreover, purveyors of disinformation may use different information channels to communicate disinformation online. These include in particular the open Web (professional news websites, 'junk news' websites, etc), social media (Facebook, Instagram, Twitter, YouTube, LinkedIn, Reddit, VK, Forum Board, etc) and messaging platforms (WhatsApp, Telegram, Signal, Line, WeChat, e-mail, etc).[14]

But what exactly sets disinformation apart from other types of information? Indeed, as noted in chapter 1, there have already been numerous attempts at defining disinformation as a specific type of information. But the task of defining this phenomenon has thus far proved difficult.[15] Perhaps the definitions that are likely to significantly influence public regulatory responses to the phenomenon of disinformation in Europe and beyond are those adopted by the European Commission, in collaboration with the High Representative of the Union for Foreign Affairs and Security Policy, and the Committee of Ministers of the Council of Europe.

For its part, the European Commission sees disinformation as 'verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and [that] may cause public harm'.[16] In its view, disinformation 'does *not* include reporting errors, satire and parody, or

[13] James H Fetzer, 'Information: Does it Have to Be True?' (2004) 14 *Minds and Machines* 223; Natascha A Karlova and Karen E Fisher, 'A Social Diffusion Model of Misinformation and Disinformation for Understanding Human Information Behavior' (2013) 18 *Information Research* 1; Don Fallis, 'The Varieties of Disinformation' in Luciano Floridi and Phyllis Illari (eds), *The Philosophy of Information Quality* (Springer 2014); Don Fallis, 'What is Disinformation?' (2015) 63 *Library Trends* 401. cf Fred I Dretske, *Knowledge and the Flow of Information* (MIT Press 1981); Luciano Floridi, 'Is Semantic Information Meaningful Data?' (2005) 70 *Philosophy and Phenomenological Research* 351.

[14] Emerson T Brooking, Alyssa Kann and Max Rizzuto, 'Dichotomies of Disinformation' (DFRLab, 5 February 2020) <https://github.com/DFRLab/Dichotomies-of-Disinformation/blob/master/README.md> accessed 20 October 2023.

[15] Giovanni De Gregorio, 'Disinformation' in Luca Belli, Nicolo Zingales and Yasmin Curzi (eds), *Glossary of Platform Law and Policy Terms* (FGV Direito Rio 2021) 119.

[16] European Commission, 'Tackling Online Disinformation: A European Approach' (Communication) COM (2018) 236 final, 3–4; European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Action Plan Against Disinformation' (Communication) JOIN(2018) 36 final, 1. See also European Commission, 'European Democracy Action Plan' (Communication) COM(2020) 790 final, 18.

clearly identified partisan news and commentary.'[17] The European Commission thus distinguishes disinformation from misinformation, defining the latter as 'false or misleading content shared without harmful intent though the effects can still be harmful'.[18]

Interestingly, these definitions somewhat diverge from those put forward in an independent expert report published earlier in 2018 under the auspices of the European Commission. The report by the European Commission's High-Level Expert Group on *Fake News and Online Disinformation* defines disinformation as 'false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit', distinguishing it from misinformation which it defines as 'misleading or inaccurate information shared by people who do not recognize it as such'.[19] It would therefore appear that the European Commission does not fully endorse the definitions, or at least the choice of words used in the definitions, by its High-Level Expert Group.

It is also surprising to note that the 2022 EU Code of Practice on Disinformation, which (as already noted in chapter 1) was developed at the urging and under the guidance of the European Commission,[20] conflates disinformation with other phenomena, including misinformation, information influence operations and foreign interference in the information space. According to the European Commission itself 'information influence operation refers to coordinated efforts by either domestic or foreign actors to influence a target audience using a range of deceptive means, including suppressing independent information sources in combination with disinformation', whereas 'foreign interference in the information space, often carried out as part of a broader hybrid operation, can be understood as coercive and deceptive efforts to disrupt the free formation and expression of individuals' political will by a foreign state actor or its agents'.[21] The Code of Practice on Disinformation cites, apparently with approval, the European Commission's definitions of all four phenomena, namely disinformation, misinformation, information influence operations and foreign interference in the information space.[22] At the same time, however, the code also underlines that the term disinformation as used therein 'is

17 European Commission, 'Tackling Online Disinformation' (n 16) 4; European Commission and High Representative of the Union for Foreign Affairs and Security Policy (n 16) 1 (emphasis added).

18 European Commission, 'European Democracy Action Plan' (n 16) 18.

19 High Level Expert Group on Fake News and Online Disinformation, *Report to the European Commission on a Multi-Dimensional Approach to Disinformation* (European Union 2018) 10.

20 European Commission, 'European Commission Guidance on Strengthening the Code of Practice on Disinformation' (Communication) COM(2021) 262 final.

21 European Commission, 'European Democracy Action Plan' (n 16) 18.

22 Strengthened Code of Practice on Disinformation 2022, preamble, para (a).

considered to include misinformation, disinformation, information influence operations and foreign interference in the information space'.[23] It follows that even the title of the code is misleading. In reality, the code does not only apply to disinformation as defined in EU policy documents.

The Council of Europe faces similar definitional uncertainties. The Council of Europe's oft-cited independent expert report on *Information Disorder* of 2017 identifies three types of 'information disorder', namely disinformation, misinformation and malinformation.[24] The report defines disinformation as 'information that is false and deliberately created to harm a person, social group, organization or country' and misinformation as 'information that is false, but not created with the intention of causing harm.'[25] Malinformation on the other hand is defined as 'information that is based on reality, used to inflict harm on a person, organization or country'.[26] The authors of the report regret that much of the discourse on 'fake news' conflates these three phenomena.[27]

On the other hand, in its 2022 recommendations in the field of media and information society, the Committee of Ministers of the Council of Europe provides a definition of disinformation which is more similar to the European Commission's definition than that put forward in the Council of Europe's independent expert report of 2017. The Committee of Ministers defines disinformation as 'verifiably false, inaccurate or misleading information deliberately created and disseminated to cause harm or pursue economic or political gain by deceiving the public.'[28] This suggests that the Committee of Ministers does not fully endorse the definition, or at least the choice of words used, in the 2017 expert report.

It is also interesting to note that, like the authors of that report, Irene Khan adopts purely falsity-based definitions of both disinformation and misinformation in her 2021 UN Special Rapporteur's report on the Promotion and Protection of the Right to Freedom of Opinion and Expression. She defines disinformation simply 'as false

23 Ibid (footnotes omitted).

24 Claire Wardle and Hossein Derakhshan, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making* (Council of Europe Publishing 2017) 20.

25 Ibid. cf Yves-Marie Doublet, *Disinformation and Electoral Campaigns* (Council of Europe Publishing 2019) 5.

26 Wardle and Derakhshan (n 24) 20.

27 Ibid.

28 Committee of Ministers of the Council of Europe, 'Recommendation CM/Rec(2022)11 of the Committee of Ministers to Member States on Principles for Media and Communication Governance' (adopted at the 1431st meeting of the Ministers' Deputies, 6 April 2022), appendix, para 4; Committee of Ministers of the Council of Europe, 'Recommendation CM/Rec(2022)12 of the Committee of Ministers to Member States on Electoral Communication and Media Coverage of Election Campaigns' (adopted at the 1431st meeting of the Ministers' Deputies, 6 April 2022), appendix, para 7.

information that is disseminated intentionally to cause serious social harm and misinformation as the dissemination of false information unknowingly.'[29] But this is only a side note.

The main point being underlined is that existing definitions do not provide a clear or indeed the same account of the specific characteristics that set disinformation apart from other similar types of information.[30] Worse still, existing definitions are irreconcilable and some of them appear to be self-contradictory. Even leaving aside the question of the communicator's intent, false information (verifiably so or otherwise), inaccurate information and misleading information are different types of information. As elaborated below, false information may not be misleading. Equally, misleading information may not be false. Inaccurate information (for example, verbal information imbued with grammatical errors), too, may neither be false nor misleading.

It would appear that, wittingly or unwittingly, all contributors to the policy debate on disinformation are in fact concerned about the dissemination of misleading information as opposed to the dissemination of false or inaccurate information as such. False or inaccurate information does not appear to be a cause for public concern unless only in cases where such information is also misleading. It would therefore appear that, at least for public policy purposes, disinformation should be understood as misleading information that is communicated with intent to mislead and that may cause harm.

4.2.1 Misleading Information

Disinformation is often equated with untrue or false information. Although theoretical and philosophical accounts, like most of the foregoing definitions, tend to treat misinformation and disinformation as two distinct phenomena,[31] the emphasis on falsity has seen many commentators use the terms misinformation and

[29] Irene Khan, 'Disinformation and Freedom of Opinion and Expression: Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (A/HRC/47/25, 13 April 2021), para 15.

[30] Ronan Ó Fathaigh, Natali Helberger and Naomi Appelman, 'The Perils of Legally Defining Disinformation' (2021) 10 *Internet Policy Review* 1, 3–7.

[31] See, for example, Fred I Dretske, 'Précis of Knowledge and the Flow of Information' (1983) 6 *The Behavioral and Brain Sciences* 55; Luciano Floridi, *The Philosophy of Information* (Oxford University Press 2011); Karlova and Fisher (n 13); Fallis, 'The Varieties of Disinformation' (n 13); Fallis, 'What is Disinformation?' (n 13); Sille Obelitz Søe, 'Algorithmic Detection of Misinformation and Disinformation: Gricean Perspectives' (2018) 74 *Journal of Documentation* 309; Sille Obelitz Søe, 'A Unified Account of Information, Misinformation, and Disinformation' (2021) 198 *Synthese* 5929.

disinformation as synonyms.[32] Even some of those who use the terms 'disinformation' and 'fake news' interchangeably claim that, at a minimum, both terms should be understood as referring to 'false statements made by people who do not actually believe what they assert' and 'who may even actively disbelieve those statements.'[33] The general assumption, therefore, is that falsity is the main defining characteristic of disinformation. But this assumption appears to be somewhat flawed.

A statement or any other act of expression used in human communication, according to Paul Grice's perspicacious philosophy, 'cannot be guaranteed as fully intelligible unless an explication or analysis of its meaning has been provided'.[34] What is literally true can implicate something false, and what is literally false can implicate something true.[35] Indeed, information need not even be false or constitute a false statement of fact to pose a serious threat to society. Perhaps the most potentially dangerous information takes the forms of doctored videos and deepfakes, and yet none of these can be neatly characterised either as false statements of fact or indeed as false statements of opinion.

Doctored videos are real videos which have been altered to make them seem as if the people depicted therein 'are doing or saying something other than what they did, or differently from how they did it. A doctored video might show people supporting a cause that they abhor, committing a crime, showing disloyalty to their country, acting inappropriately when they did nothing of the kind, or being inebriated

[32] See, for example, Emily Thorson, 'Belief Echoes: The Persistent Effects of Corrected Misinformation' (2016) 33 *Political Communication* 460; Kalina Bontcheva and Julie Posetti (eds), *Balancing Act: Countering Digital Disinformation While Respecting Freedom of Expression* (International Telecommunication Union 2020).

[33] Alvin I Goldman and Daniel Baker, 'Free Speech, Fake News, and Democracy' (2019) 18 *First Amendment Law Review* 66, 75. See also Kai Shu and others, 'Combating Disinformation in a Social Media Age' (2020) 10 *WIREs Data Mining and Knowledge Discovery* e1385; Giovanni Pitruzzella and Oreste Pollicino, *Disinformation and Hate Speech: A European Constitutional Perspective* (Bocconi University Press 2020) 27–29; Oreste Pollicino, Giovanni De Gregorio and Laura Somaini, 'The European Regulatory Conundrum to Face the Rise and Amplification of False Content Online' in Giuliana Ziccardi Capaldo (ed), *The Global Community Yearbook of International Law and Jurisprudence 2019* (Oxford University Press 2020). cf Irini Katsirea, '"Fake News": Reconsidering the Value of Untruthful Expression in the Face of Regulatory Uncertainty' (2018) 10 *Journal of Media Law* 159.

[34] H Paul Grice, 'Logic and Conversation' in Peter Cole and Jerry L Morgan (eds), *Syntax and Semantics, Volume 3: Speech Acts* (Academic Press 1975) 42, reprinted in H Paul Grice, *Studies in the Way of Words* (Harvard University Press 1989).

[35] See generally Søe, 'Algorithmic Detection of Misinformation and Disinformation' (n 31); Søe, 'A Unified Account of Information, Misinformation, and Disinformation' (n 31).

or otherwise impaired.'[36] Deepfakes, that is, synthetic images or videos created using AI or machine learning 'in which people might be shown doing or saying something that they never did or said',[37] tend to be particularly difficult to distinguish from reliable online content. To be sure, as Cass Sunstein points out, 'neither deepfakes nor doctored videos make a literal statement that is false. They do not literally say, "up is down" or "two plus two equals six." But their effects are identical to those of [misleading] false statements: they display something, with respect to people or events, that is not true.'[38]

A falsity-based definition of disinformation also fails to explain why (as the European Commission and many others suggest) satire, parody and 'clearly identified partisan news and commentary' should not be regarded as disinformation. Even the ECtHR sees satire as a legitimate form of artistic expression and social commentary within the scope of article 10 of the ECHR. Whilst acknowledging that 'by its inherent features of *exaggeration* and *distortion of reality*', satire 'naturally aims to provoke and agitate',[39] the ECtHR maintains that satirical forms of expression 'play a very important role in open discussion of matters of public concern, an *indispensable* feature of a democratic society'.[40] Thus, in its view. 'any interference with the right of an artist – or anyone else – to use this means of expression should be examined with particular care'.[41] The ECtHR's recognition that 'a certain degree of hyperbole and exaggeration' should be expected and tolerated further substantiates the contention that we must be concerned about something more serious than just falsity as such.[42]

36 Cass R Sunstein, *Liars: Falsehoods and Free Speech in an Age of Deception* (Oxford University Press 2021) 115.

37 Ibid. See Cristian Vaccari and Andrew Chadwick, 'Deepfakes and Disinformation: Exploring the Impact of Synthetic Political Video on Deception, Uncertainty, and Trust in News' (2020) 6 *Social Media + Society* 1.

38 Sunstein (n 36) 41.

39 *Vereinigung Bildender Künstler v Austria* App no 8354/01 (ECtHR, 25 January 2007), para 33; *Alves da Silva v Portugal* App no 41665/07 (ECtHR, 20 October 2009), para 27; *Tuşalp v Turkey* Apps nos 32131/08 and 41617/08 (ECtHR, 21 February 2012), para 48; *Eon v France* App no 26118/10 (ECtHR, 14 March 2013), para 61; *Welsh and Silva Canha v Portugal* App no 16812/11 (ECtHR, 17 September 2013), para 29; *Ziembiński v Poland (no 2)* App no 1799/07 (ECtHR, 5 July 2016), para 45; *Handzhiyski v Bulgaria* App no 10783/14 (ECtHR, 6 April 2021), para 51 (emphasis added).

40 *Eon v France* (n 39), para 61 (emphasis added). See also *Alves da Silva v Portugal* (n 39), para 29.

41 *Vereinigung Bildender Künstler v Austria* (n 39), para 33; *Alves da Silva v Portugal* (n 39), para 27; *Tuşalp v Turkey* (n 39), para 48; *Eon v France* (n 39), para 61; *Welsh and Silva Canha v Portugal* (n 39), para 29; *Ziembiński v Poland (no 2)* (n 39), para 45; *Handzhiyski v Bulgaria* (n 39), para 51.

42 *Steel and Morris v the United Kingdom* App no 68416/01 (ECtHR, 15 February 2005), para 90. See also *Perna v Italy* App no 48898/99 (ECtHR [GC], 6 May 2003), para 39; *Anatoliy Yeremenko v Ukraine* App no 22287/08 (ECtHR, 15 September 2022), para 41;

Grice's philosophy of communication, in any event, provides a compelling case against a falsity based-definition of disinformation. In *Meaning*, Grice draws a distinction between natural meaning and non-natural meaning.[43] He contends that natural meaning, what a given statement or act of expression literally means in communication, is only a starting point in meaning-making. On this account, non-natural meaning, the message that the communicator intends to communicate, is what ultimately matters. Thus, in *Utterer's Meaning, Sentence-Meaning, and Word-Meaning,* Grice posits that we must distinguish between what the communicator says on one hand and what the communicator implicates (implies, indicates, suggests, etc) on the other hand.[44] Here, Grice adds, we must also take into account the fact that what the communicator means on a given occasion 'may be either *conventionally* implicated (implicated by virtue of the meaning of some word or phrase which he has used) or *non-conventionally* implicated (in which case the specification of the implicature falls outside the specification of the conventional meaning of the words used).'[45]

The pragmatic meaning of a statement or any other act of expression used in human communication thus depends on the communicator's intent and the social context in which the communication occurs.[46] In other words, 'in saying something a person has a certain intention, and the act of communicating succeeds only if that intention is recognized by the hearer.'[47] What one says does not necessarily determine what one means. If John 'says "I'm going to pay you back for that," he could be making a promise or issuing a threat.'[48] If John were issuing a threat, it would be erroneous for a third party to subsequently claim that John made a false promise. The lesson from this example is that we are liable to make mistakes about other people's true intentions unless we properly contextualise their acts of expression before making any final judgments about them.[49]

All in all, as Grice concludes in *Logic and Conversation*, since 'the truth of a

Khural and Zeynalov v Azerbaijan (no 2) App no 383/12 (ECtHR, 19 January 2023), para 49.

43 H Paul Grice, 'Meaning' (1957) 66 *Philosophical Review* 377, reprinted in Grice, *Studies in the Way of Words* (n 34).

44 H Paul Grice, 'Utterer's Meaning, Sentence-Meaning, and Word-Meaning' (1968) 4 *Foundations of Language* 225, 225.

45 Ibid.

46 Per Linell, *Approaching Dialogue: Talk, Interaction and Contexts in Dialogical Perspectives* (John Benjamins Publishing 1998) 3.

47 Kent Bach and Robert M Harnish, *Linguistic Communication and Speech Acts* (MIT Press 1979) 3.

48 Ibid.

49 Roger W Shuy, 'Discourse Analysis in the Legal Context' in Deborah Tannen, Heidi E Hamilton and Deborah Schiffrin (eds), *The Handbook of Discourse Analysis* (2nd edn, John Wiley & Sons 2015) 824.

conversational implicatum is not required by the truth of what is said (what is said may be true—what is implicated may be false), the implicature is not carried by what is said, but only by the saying of what is said, or by 'putting it that way.''[50] We cannot know what someone means unless we know what he intends. Nor can we know what someone intends unless we know what he means.[51] It is, of course, undeniable that no science or DNA evidence can reach into the mind of an individual to determine with certainty what he was actually thinking or intending at the time of communication.[52] But intentions can be, and are often, inferred from context. Judicial bodies around the world routinely establish individuals' intentions before making findings of liability in both civil and criminal cases.[53] It is, in any event, neither useful nor desirable to place reliance on falsity as a criterion for distinguishing disinformation from the good and reliable information that we all strive for. False information becomes a matter of public concern only when it is liable to cause harm by virtue of being misleading or deceptive, in particular when it is liable to create beliefs that are divorced from reality.[54]

Importantly, a definition of disinformation that focuses on misleadingness has certain virtues that a falsity-based definition clearly lacks. First, defining disinformation by reference to misleadingness accounts for the fact that information (for example, a half-truth, true information with a false implicature, 'true disinformation',[55] a doctored video, a deepfake or other deliberately decontextualised information) need not be false or constitute a false statement of fact to be misleading and thus to cause harm.[56] A falsity-based definition on the other hand fails to adequately capture as disinformation such information even though it can mislead people and thus cause harm. Indeed, even in the context of elections, it is not false statements as such or ''outright lies' but misleading claims, particularly about matters of central importance to a campaign, that can do more to distort

50 Grice, 'Logic and Conversation' (n 34) 58.

51 Donald Davidson, 'Truth and Meaning' (1967) 17 *Synthese* 304, 313; reprinted in Jack Kulas, James H Fetzer and Terry L Rankin (eds), *Philosophy, Language, and Artificial Intelligence: Resources for Processing Natural Language* (Kluwer Academic Publishers 1988) 102.

52 Shuy (n 49) 827.

53 Ibid.

54 Fallis, 'What is Disinformation?' (n 13) 406; Søe, 'Algorithmic Detection of Misinformation and Disinformation' (n 31) 322.

55 Søe, 'Algorithmic Detection of Misinformation and Disinformation' (n 31) 322–24.

56 Fallis, 'What is Disinformation?' (n 13); James Edwin Mahon, 'The Definition of Lying and Deception' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter edn, 2016) <https://plato.stanford.edu/archives/win2016/entries/lying-definition/> accessed 20 October 2023.

political debate.'[57] Second, false information with a true implicature (for example, parody, satire, jokes or irony) is characteristically non-misleading and thus falls outside the scope of disinformation defined by reference to misleadingness. A falsity-based definition on the other hand would capture as disinformation such characteristically harmless content.

We should therefore take with a pinch of salt existing works that define disinformation by reference to falsity. Whilst it is true that false information may also be misleading, it is obvious that academics and policymakers alike are in fact concerned about misleading information because it is likely to cause harm by deceiving or misleading people. If anything, false information can easily be detected as such unless it has some percentage of truth in it. The emphasis on falsity in existing definitions perhaps explains why, as noted in chapter 1, some commentators downplay concerns about online disinformation as some empirical studies suggest that the real-life effects of 'disinformation', as they define it, are not as serious as they are often portrayed.[58] Any meaningful policy discourse on disinformation should focus on misleading information as opposed to false information as such.

4.2.2 Intent to Mislead

Even if everyone were agreed that disinformation should be defined by reference to misleadingness as opposed to falsity, the misleadingness of a given piece of information would not be sufficient to distinguish it from other types of information. In particular, the attribute of misleadingness in and of itself would not explain why the European Commission and many other commentators exclude from their definitions of disinformation reporting errors or what is more generally known as misinformation. Virtually all existing definitions suggest that both disinformation and misinformation could be misleading, although the latter is communicated without any intent to mislead. Indeed, as already noted, the European Commission describes misinformation as 'false or *misleading* content *shared without harmful intent though the effects can still be harmful*', for example, 'when people share false information with friends and family *in good faith*'.[59] The reference to potential harmful effects here further substantiates the contention that disinformation should

[57] Jeremy Horder, *Criminal Fraud and Election Disinformation: Law and Politics* (Oxford University Press 2022) 58.

[58] See generally Andreas Jungherr and Ralph Schroeder, 'Disinformation and the Structural Transformations of the Public Arena: Addressing the Actual Challenges to Democracy' (2021) 7 *Social Media + Society* 1; Sacha Altay, Manon Berriche and Alberto Acerbi, 'Misinformation on Misinformation: Conceptual and Methodological Challenges' (2023) 9 *Social Media + Society* 1.

[59] European Commission, 'European Democracy Action Plan' (n 16) 18 (emphasis added).

be defined by reference to misleadingness, since false but non-misleading information is unlikely to have any harmful effects. But this is only a side note.

The main point being underlined is that the attribute of misleadingness is not sufficient to distinguish disinformation from misinformation. Existing definitions, including those referred to above, suggest that the main characteristic that distinguishes the two phenomena is the communicator's intent or lack thereof to mislead. Communicators of disinformation, it is generally believed, intend to mislead or deceive recipients. Communicators of misinformation on the other hand, it is generally believed, communicate potentially misleading information without any intent to mislead.

An intent-based definition of disinformation finds support in Grice's philosophy, according to which the pragmatic meaning of any act of expression in human communication depends on the communicator's intent as may be inferred from the relevant communication context. The conception of freedom that we espouse would likewise demand an intent-based definition if disinformation is to be distinguished from other types of information. On Philip Pettit's account of republican freedom in particular, misleading information would not be a major cause for concern if communicators of such information had no intent to mislead others. Republicans, as noted in chapter 2, are not averse to interference as such but to arbitrary interference. And Pettit underscores that, to qualify as arbitrary, interference must be '*more or less intentional* in character', or must 'be at least the sort of action in the doing of which we can *sensibly allege negligence*'.[60] On this account, arbitrary interference 'cannot occur by accident, for example, as when I fall in your path or happen to compete with you for scarce goods'.[61]

Pettit provides a compelling rationale for taking this stand. According to him, if non-intentional forms of interference were also to count as arbitrary interference, there would be no distinction between the general desirability of protecting 'people against the natural effects of chance and incapacity and scarcity' and the primary duty of the state to protect people 'against the things that they may *try* to do to one another'.[62] Therefore, whilst acknowledging the possible negative effects on freedom of certain natural and social phenomena, Pettit insists that 'any ideal of freedom ought to regard interpersonal restrictions on a person's freedom as more serious than the impersonal restrictions that arise non-intentionally from the natural order or from the way things are socially organized.'[63] In short, an intent-based

60 Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1997) 52 (emphasis added). See also David Miller, *Market, State and Community* (Oxford University Press 1990) 35.

61 Pettit, *Republicanism* (n 60) 52.

62 Ibid, 53 (emphasis added).

63 Philip Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Oxford University Press 2001) 132.

definition of disinformation is not only consistent with Grice's philosophy of communication but also chimes well with the conception of freedom that we espouse.

True, as already noted, no one may know another person's thoughts in the absence of an honest disclosure. For this reason, it might be necessary to infer the communicator's intent to mislead from the context in which the communication occurs. The relevant intent may be established, for example, by demonstrating that the communicator knew or ought to have known at the time of communication that the information in question was misleading. In other words, the intent to mislead may be justifiably imputed where it can be shown that the communicator acted in bad faith or with 'actual malice' by communicating misleading information with knowledge that it was misleading or with reckless disregard of its misleadingness.[64] On this account, even those who knowingly use misleading information as clickbait for personal financial gain would be presumed to have the relevant intent to mislead.

It should be acknowledged that there are some commentators, perhaps including some sympathisers of the republican conception of freedom,[65] who may be opposed to an intent-based definition of disinformation.[66] These may argue that the policy debate should instead focus on the effects of misleading information in general rather than on the intentions of communicators. Indeed, even in the absence of any intent to mislead, some people are more likely to be misled than others. For example, overt satire and parody may nonetheless mislead and thus cause harm to people who lack media and information literacy.[67] Existing research also suggests that conservatives, right-wingers, the elderly and less educated people are more likely to be misled by misleading information regardless of the communicator's intent.[68]

As already noted, it is generally legally untenable for the state to restrict the dissemination of satirical and other jocular or exaggerated content in the name of protecting gullible citizens who might take such content literally. But we cannot deny that misleading information 'can mislead people whether it results from an honest mistake, negligence, unconscious bias, or (as in the case of disinformation) intentional deception'.[69] One could thus argue that it is undesirable to distinguish disinformation from misinformation, since both phenomena are potentially harmful. This argument might be particularly appealing in the largely borderless and

64 cf *New York Times Co v Sullivan* 376 US 254, 279–80 (1964).

65 See, for example, Suzanne Whitten, *A Republican Theory of Free Speech* (Palgrave Macmillan 2022).

66 See generally Bontcheva and Posetti (eds), *Balancing Act* (n 32).

67 Kalina Bontcheva and Julie Posetti, 'Introduction' in Bontcheva and Posetti (eds), *Balancing Act* (n 32) 23.

68 João Pedro Baptista and Anabela Gradim, 'Understanding Fake News Consumption: A Review' (2020) 9 *Social Sciences* 185.

69 Fallis, 'The Varieties of Disinformation' (n 13) 136.

technology-driven world of the Internet.[70]

First, as noted in chapter 1, it may be difficult or even impossible to trace the creator of online content. The creator may be anonymous, pseudonymous and/or even abroad. Indeed, reports about coordinated campaigns, including by foreign state actors, aimed at influencing voters by disseminating misleading information using bots and sock puppet social media accounts have been a major source of concern for many commentators.[71] As noted in chapter 3, whilst it acknowledges that the ECHR does not guarantee an absolute right to anonymity, the ECtHR recognises anonymity as a legitimate means of exercising freedom of expression. In the ECtHR's own words, anonymity can be an effective 'means of avoiding reprisals or unwanted attention' and can thus promote 'the free flow of opinions, ideas and information in an important manner, including, notably, on the Internet'.[72] One could therefore argue that an intent-based definition would enable purveyors of misleading online content to elude national regulatory authorities,[73] not only by virtue of being foreign actors or pseudonymous but also by exploiting the right to anonymity.

Second, in the world of the Internet, the intent to deceive or mislead can easily 'disappear'. Disinformation is often 'aimed primarily at the public for the purpose of onward dissemination, relying on its potential to trigger virality, using third parties to serve as peer-to-peer intermediaries to reach a bigger audience.'[74] Therefore, people may share misleading information online 'with the belief that it is accurate, genuinely true, and non-misleading (or simply without realizing that it is misleading)'.[75] This means that people who may actually be responsible for making misleading information go viral may not have any intent to mislead.

Third, misleading information may be spread and amplified not only organically, in particular by people who believe it, but also artificially through the use of digital technologies such as bots and recommender systems.[76] The recommender systems thus envisaged may include both fully and partially automated systems used by

70 The Internet world is 'borderless' in the sense that there is no central authority that controls the Internet's infrastructure or the flow of information on the World Wide Web. See Gregory P Magarian, 'The Internet and Social Media' in Stone and Schauer (eds) (n 2) 351. cf Jack Goldsmith and Tim Wu, *Who Controls the Internet? Illusions of a Borderless World* (Oxford University Press 2006).

71 See generally Bontcheva and Posetti (eds), *Balancing Act* (n 32).

72 *Delfi AS v Estonia* App no 64569/09 (ECtHR [GC], 16 June 2015), para 147; *Standard Verlagsgesellschaft mbH v Austria (no 3)* App no 39378/15 (ECtHR 7 December 2021), para 76.

73 Magarian (n 70) 356.

74 Diana Maynard and others, 'Research Context and Gaps' in Bontcheva and Posetti (eds), *Balancing Act* (n 32) 53.

75 Søe, 'Algorithmic Detection of Misinformation and Disinformation' (n 31) 322.

76 Bontcheva and Posetti, 'Introduction' in Bontcheva and Posetti (eds), *Balancing Act* (n 32) 19.

online platform operators to suggest in their online interfaces specific information to users or to prioritise the information displayed, including as a result of searches initiated by users or by otherwise determining the relative order or prominence of the information displayed.[77] An intent-based definition would therefore not account for the role played by digital technologies in the dissemination of misleading information. The intent to mislead could, of course, be attributed to those who use such technologies. But that could open another Pandora's box.

All these points are valid and we must take them into account in chapter 6 when considering the policy implications of our definition of disinformation. But it is still necessary for the present purpose to make a distinction between accidentally misleading information termed 'misinformation' and intentionally misleading information termed 'disinformation'. Any legal responses to misleading information targeted at communicators as such would generally demand an intent-based, or at least a negligence-based, discrimination of such information from other types of information.[78] Indeed, depending on how one uses it, virtually every type of information is potentially harmful. By the same token, even Mill's harm principle, according to which 'the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others',[79] may not (without more) be a sufficient basis upon which the state could seek to impose a restriction on the dissemination of misleading information.

Some of those who advocate an effects-based definition, too, acknowledge that drawing a distinction between disinformation and misinformation based on the intent of the agent producing or sharing misleading information is necessary when considering appropriate responses to each phenomenon.[80] Any legal sanctions imposed on communicators of misleading information would normally require an element of fault on the part of the communicator. Indeed, like natural disasters and other accidents, the accidental sharing or communication of misleading information cannot be completely avoided no matter how careful people may try to be.

An intent-based definition of disinformation would also be required if we were to distinguish potentially misleading information whose communication enjoys legal protection as part of freedom of expression and misleading information whose communication may be legitimately restricted by law. As alluded to in chapter 1, the ECtHR considers in this connection that, unless one is intentionally trying to deceive or mislead others, freedom of expression as enshrined in article 10 of the ECHR

77 DSA, art 3(s).

78 See also Elizabeth F Judge and Amir M Korhani, 'Disinformation, Digital Information Equality, and Electoral Integrity' (2020) 19 *Election Law Journal* 240.

79 Mill, *On Liberty* (n 5) 22.

80 Bontcheva and Posetti, 'Introduction' in Bontcheva and Posetti (eds), *Balancing Act* (n 32) 18.

includes a right to discuss and disseminate information received even if it is 'strongly' suspected that such information might not be truthful.[81]

Recall, moreover, that journalists and everyone else involved in public debate enjoy full legal protection even when they 'accidently' communicate inaccurate or misleading information, provided they are acting with due diligence and in good faith in order to provide accurate and reliable information. To repeat the ECtHR's own words, 'if an applicant is clearly involved in a public debate on an important issue he should not be required to fulfil a more demanding standard than that of due diligence. In such circumstances, the obligation to prove the factual statements may deprive the applicant of the protection afforded by Article 10.'[82] It would therefore be otiose, at least for the present purpose, to discriminate disinformation from other types of information unless we can show that disinformation is more than just misleading information.

4.2.3 Potential to Cause Harm

Both misinformation and disinformation, as already noted, can cause direct harm by misleading people 'about important topics, such as investment opportunities, medical treatments, or political candidates'.[83] There should be no qualms about that. To use Pettit's terminology, misleading information directly undermines ethical freedom or freedom of the will.[84] Ethical freedom, as noted in chapter 2, depends on orthonomy. Orthonomy consists in one's ability to make choices that have a reasoned basis in relevant facts and to act accordingly. When one is misled, one cannot reason or act in fidelity to relevant facts hence risks acting in a manner that could be harmful to oneself or indeed to others. Misleading information can thus cause harm not only to the recipients of such information but also to the public at large, for example, by undermining democratic and policymaking processes or the protection of public health, the environment and public security.[85]

Be that as it may, there is something even more unsettling about disinformation

81 *Salov v Ukraine* App no 65518/01 (ECtHR, 6 September 2005), para 113.

82 *Makraduli v the former Yugoslav Republic of Macedonia* Apps nos 64659/11 and 24133/13 (ECtHR, 19 July 2018), para 75; *Monica Macovei v Romania* App no 53028/14 (ECtHR, 28 July 2020), para 75; *Wojczuk v Poland* App no 52969/13 (ECtHR, 9 December 2021), para 74; *Udovychenko v Ukraine* App no 46396/14 (ECtHR, 23 March 2023), para 44. See also ns 164–66 below and accompanying text.

83 Fallis, 'What is Disinformation?' (n 13) 402.

84 Philip Pettit and Michael Smith, 'Freedom in Belief and Desire' (1996) 93 *Journal of Philosophy* 429; Philip Pettit, 'Freedom: Psychological, Ethical, and Political' (2015) 18 *Critical Review of International Social and Political Philosophy* 375.

85 European Commission, 'Tackling Online Disinformation' (n 16) 3–4; European Commission and High Representative of the Union for Foreign Affairs and Security Policy (n 16) 1.

(misleading information communicated with intent to mislead) that further distinguishes it from misinformation (misleading information communicated by accident, without any intent to mislead). Quite apart from its inherent ability to cause direct harm by misleading people about their options, disinformation can cause indirect harm by eroding people's trust in information shared by others, including through the media.[86] It is now an open secret that purveyors of disinformation do not always want people to believe them. Sometimes, they just want to erode people's trust in public discourse and democratic processes by polluting the information environment with misleading information, making it difficult for people to distinguish 'peaches' (high-quality, reliable information) from 'lemons' (low-quality, misleading information).[87] Indeed, it has been observed that disinformation campaigns propagated by Russian state actors in other states are primarily intended 'to get people to distrust [the] information that they receive from the media.'[88]

Therefore, whilst the short-term goal may be to get people to believe specific pieces of misleading information, the ultimate goal or at least the indirect effect of disinformation may be to create distrust among people, thereby inhibiting their 'ability to effectively share information with one another.'[89] The more people distrust the information they receive, the less likely they will trust reliable information, and the less informed they will be.[90] The need to identify strategies for dealing with the problem of disinformation is therefore particularly pressing.[91] This is all the more so in political and commercial advertising contexts, where people often have incentives to make deliberate attempts at misleading or deceiving others in order to promote their own ideological and economic interests.[92]

It is worth underlining that disinformation need not mislead someone to cause indirect harm. Disinformation, in other words, is not a 'success' term.[93] Merely by

86 Paul S Piper, 'Web Hoaxes, Counterfeit Sites, and other Spurious Information on the Internet' in Anne P Mintz (ed), *Web of Deception: Misinformation on the Internet* (Information Today 2002); James H Fetzer, 'Disinformation: The Use of False Information' (2004) 14 *Minds and Machines* 231, 231.

87 George A Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 *Quarterly Journal of Economics* 488.

88 Kay Mathiesen, 'Fake News and the Limits of Freedom of Speech' in Carl Fox and Joe Saunders (eds), *Media Ethics, Free Speech, and the Requirements of Democracy* (Routledge 2019) 168. See also generally Richard Stengel, *Information Wars: How We Lost the Global Battle Against Disinformation and What We Can Do About It* (Atlantic Monthly Press 2019). For empirical evidence in this connection, see Vaccari and Chadwick (n 37).

89 Fallis, 'What is Disinformation?' (n 13) 402.

90 Mathiesen (n 88) 168.

91 Fallis, 'What is Disinformation?' (n 13) 402.

92 Fetzer, 'Disinformation' (n 86) 231.

93 Fallis, 'What is Disinformation?' (n 13) 406.

virtue of its propensity to mislead, disinformation always puts people at risk of suffering epistemic harm and other types of harm that may result from lack of knowledge or reliable information.[94] The more people create disinformation, the more people are likely to receive misleading information. This holds true irrespective of whether such information is shared as disinformation, by the creators themselves or their witting agents, or as misinformation, by those who honestly but mistakenly believe it to be accurate and non-misleading information. In short, disinformation can cause distrust among people even where it does not mislead anyone. This is all the more reason why every society should naturally seek to identify and deter the spread of disinformation.[95]

4.3 Political Disinformation as Political Expression

One of the three main elements of freedom of expression identified in chapter 3 is freedom to impart information. Given that disinformation is information, the act of communicating disinformation in general and political disinformation in particular is a form of expression within the meaning of article 10 of the ECHR and other provisions that guarantee freedom of expression. This holds true irrespective of whether the communication takes place offline or online, since the law on freedom of expression applies both offline and online. But recall that the law draws a distinction between political and non-political forms of expression. It is therefore important for the present purpose to understand what exactly makes an act of expression political in nature before turning to consider the meaning of political disinformation as a specific form of political expression.

4.3.1 Distinctiveness of Political Expression

Freedom of political expression, as we now know, has a special place in a political democracy. Republicans in particular contend that such freedom does not only enable democratic participation but also ultimately contributes to the protection of freedom in general.[96] Thus, as noted in chapter 2, Pettit underlines that freedom of political expression both between and at the time of elections should never be compromised if people are to exercise popular influence and control over the exercise of public power, including over the enactment of laws, to ensure that

94 Ibid.
95 Ibid.
96 Pettit, 'Freedom as Nondomination' (n 4) 100.

government promotes rather than undermines their freedom.[97] In short, republican theory teaches us that the law must guard jealously freedom of political expression for the sake of freedom in general.

True to this republican lesson, the law places a premium on acts of expression by which people in a democratic society receive and impart to one another information of a political nature. As noted in chapter 1, the ECtHR in particular maintains that 'there is little scope' under article 10 of the ECHR 'for restrictions on freedom of expression in the area of political speech or debate – where freedom of expression is of the utmost importance…– or in matters of public interest'.[98] The ECtHR thus 'attaches the *highest importance* to the freedom of expression in the context of political debate and considers that *very strong reasons* are required to justify restrictions on political speech.'[99] Virtually all jurisdictions that embrace democracy espouse this view, at least to some extent.[100]

Existing case law suggests that there are at least two main reasons why acts of political expression are guarded so jealously. First, as noted in chapter 1, the ECtHR considers that 'freedom of political debate is at the very core of the concept of a democratic society' that prevails throughout the ECHR.[101] Second, in the ECtHR's view, 'broad restrictions on political speech in individual cases would *undoubtedly* affect respect for the freedom of expression in general in the State concerned.'[102] This echoes the republican stand to the effect that democratic participation should not be seen as an end in itself but as a means of securing freedom in general.

97 Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 201. See also generally Philip Pettit, 'Three Conceptions of Democratic Control' (2008) 15 *Constellations* 46.

98 *Lindon, Otchakovsky-Laurens and July v France* Apps nos 21279/02 and 36448/02 (ECtHR [GC], 22 October 2007), para 46; *Otegi Mondragon v Spain* App no 2034/07 (ECtHR, 15 March 2011), para 50.

99 *Feldek v Slovakia* App no 29032/95 (ECtHR, 12 July 2001), para 83 (emphasis added).

100 See, for example, *New York Times Co v Sullivan* (n 64) 279–80; *Ricardo Canese v Paraguay* Series C no 111 (IACtHR, 31 August 2004), para 103; *Bodrozic v Serbia and Montenegro* Comm no 1180/2003 (UNHRC, 31 October 2005), para 7.2. See also United Nations Human Rights Committee, 'General Comment no 34, Article 19: Freedoms of Opinion and Expression' (adopted at the 102nd session, 11–29 July 2011), para 38; African Commission on Human and Peoples' Rights, 'Declaration of Principles on Freedom of Expression and Access to Information in Africa' (adopted at the 65th ordinary session, 21 October–10 November 2019), principle 21(1)(b). For a comparative discussion in this connection, see Giovanni De Gregorio and Catalina Goanta, 'The Influencer Republic: Monetizing Political Speech on Social Media' (2022) 23 *German Law Journal* 204, 212–19.

101 *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986), para 42.

102 *Feldek v Slovakia* (n 99), para 83; *Krasulya v Russia* App no 12365/03 (ECtHR, 22 February 2007), para 38; *Bumbeș v Romania* App no 18079/15 (ECtHR, 3 May 2022), para 92 (emphasis added). See also *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR [GC], 8 July 1999), para 61.

Be that as it may, it remains largely unclear as to what exactly distinguishes political expression from other categories of expression. Even existing scholarly attempts at defining political expression are characterised by imprecision. According to Robert Bork, for example, an act of expression or 'speech that is *explicitly* political' includes 'criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any governmental unit in the country.'[103] This definition thus suggests that there is speech that is 'implicitly' political but stops short of elaborating upon the scope thereof.

Thomas Scanlon similarly assumes, for the sake of argument, that the adjective 'political' should 'be interpreted narrowly as meaning, roughly, "having to do with the electoral process and the activities of government."'[104] He then goes on to argue that some forms of expression that have already been recognised by the US Supreme Court as being political in nature would not be captured by that definition 'unless "political" is understood in a very broad sense in which *any important* and *controversial question* counts as a "political issue."'[105]

In his advocacy for an absolute conception of freedom of speech under the First Amendment to the US Constitution, Alexander Meiklejohn also proffers what (at first blush) might appear to be a narrow rationale for that freedom. He contends that freedom of expression or speech is justified by the need 'to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.'[106] Meiklejohn's conception of freedom of speech thus encompasses only what may be seen as archetypical political expression, since it is concerned only with acts of expression that could affect how people vote in political elections.[107]

However, Meiklejohn himself considers that 'there are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, [and] sensitivity to human values…which, so far as possible, a ballot should express' and that should, therefore, suffer no abridgement.[108] He goes on to list as examples of those forms of thought and

[103] Robert H Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 *Indiana Law Journal* 1, 29 (emphasis added).

[104] TM Scanlon, 'Freedom of Expression and Categories of Expression' (1979) 40 *University of Pittsburgh Law Review* 519, 537.

[105] Ibid, 538–39 (emphasis added).

[106] Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (Harper & Bros 1948) 88.

[107] Richard A Posner, 'Free Speech in an Economic Perspective' (1986) 20 *Suffolk University Law Review* 1, 11.

[108] Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) 1961 *Supreme Court Review* 245, 256.

expression education 'in all its phases', the 'achievements of philosophy and the sciences in creating knowledge and understanding of men and their world', 'literature and the arts', and 'public discussions of public issues, together with the spreading of information and opinion bearing on those issues'.[109] Therefore, although Meiklejohn describes it as constituting only examples of what may be seen as forms of political expression, this list itself covers an ambiguously broad range of various forms of expression.

Eric Barendt contends that it would even be wrong to look for precision or to confine the definition of political expression to 'communications which directly concern the conduct of government or which seek to influence electoral choices.'[110] According to him, 'too much precision' would result in arbitrary discrimination of certain acts of expression based on content.[111] In his view, political expression or (as he prefers to call it) 'speech' should be understood to include 'all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about'.[112] Like other definitions, therefore, Barendt's definition is not only broad but also strikingly imprecise and ambiguous. It is particularly unclear what Barendt means by an 'intelligent citizen' and whether, to his mind, freedom of political expression should be the preserve of an intelligent citizen. But this is only a side note.

The main point being underlined is that it is neither possible nor desirable to draw a hard and fast distinction between political expression and other categories of expression. Indeed, as intimated in chapter 1, fundamental rights instruments generally guarantee freedom of expression without drawing any such distinction. The ECHR is no exception. Therefore, the partitioning of acts of expression into such categories as political, commercial and artistic expression is purely a brainchild of judicial construction. The ECtHR suggests that an act of expression may be political 'both in its content and in the kind of terms employed.'[113] Beyond that, however, existing case law does not appear to prescribe hard and fast rules for distinguishing political content from commercial or indeed artistic content.

As noted in chapter 3, the ECtHR itself considers that a musical performance in response to a political process also qualifies as a form of political expression.[114] It is also not unusual for other artistic works such as novels, films, paintings,

[109] Ibid, 256–57.
[110] Eric Barendt, *Freedom of Speech* (2nd edn, Oxford University Press 2005) 161.
[111] Ibid.
[112] Ibid, 162.
[113] *Ceylan v Turkey* App no 23556/94 (ECtHR [GC], 8 July 1999), para 33; *TV Vest As & Rogaland Pensjonistparti v Norway* App no 21132/05 (ECtHR, 11 December 2008), para 64.
[114] See, for example, *Maria Alekhina and others v Russia* App no 38004/12 (ECtHR, 17 July 2018), paras 205–06.

poems, plays and satire to carry 'explicit' political content.[115] Moreover, existing case law suggests that a commercial reflecting 'controversial opinions pertaining to modern society in general and also lying at the heart of various political debates' could fall within the category of political expression.[116] The ECtHR thus sometimes uses the term 'political advertising' to refer to 'advertising on matters of broader public interest',[117] not just archetypical political advertising concerning political elections.

Importantly, although the ECtHR considers that, like political expression, debate on matters of public interest must also be accorded special protection, it remains largely unclear how (if at all) political expression can be distinguished from the broader category of expression on matters of public interest.[118] It goes without saying that political matters are matters of public interest. Indeed, pre-empting any need to draw a distinction between political expression and expression on matters of public interest, the ECtHR 'observes that there is no warrant in its case-law for distinguishing…between political discussion and discussion of other matters of public concern.'[119]

The US Supreme Court similarly affords the highest level of protection not only to 'the free discussion of governmental affairs', in particular 'discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes',[120] but also to a broader notion of 'speech on public issues', including 'any matter of political, social, or other concern to the community'.[121] This is so even though the court itself acknowledges that 'the boundaries of what constitutes speech on matters of public concern are not well defined'.[122]

All in all, it would appear that all matters of public interest are essentially political matters as they concern a political society at large rather than purely

115 Lorna Woods, 'Digital Freedom of Expression in the EU' in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar 2017) 400–01.

116 *VgT Verein gegen Tierfabriken v Switzerland* App no 24699/94 (ECtHR, 28 June 2001), para 57. See also *Verein Gegen Tierfabriken Schweiz (VgT) v Switzerland (no 2)* App no 32772/02 (ECtHR [GC], 30 June 2009).

117 *Animal Defenders International v the United Kingdom* App no 48876/08 (ECtHR [GC], 22 April 2013), para 99.

118 See *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* App no 931/13 (ECtHR [GC], 27 June 2017), para 171.

119 *Thorgeir Thorgeirson v Iceland* App no 13778/88 (ECtHR, 25 June 1992), para 64.

120 *Mills v Alabama* 384 US 214, 218–19 (1966).

121 *Snyder v Phelps* 562 US 443, 444 (2011).

122 Ibid. See also Posner (n 107) 10; Christopher Phiri, 'Criminal Defamation Put to the Test: A Law and Economics Perspective' (2021) 9 *University of Baltimore Journal of Media Law & Ethics* 49, 61.

individual interests. Political expression can thus be properly understood as any act of expression relating to a matter of public interest. Public interest, as the ECtHR explains, 'ordinarily relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about.'[123] In short, public interest is about whatever matters to the public at large.

The import of this broad definition is that courts must conduct a case-by-case assessment to determine whether or not a given act of expression concerns a matter of public interest and thus qualifies as political expression. In principle, whether or not an act of expression is political should depend on a broader assessment of both the subject matter of communication and the context in which the communication occurs.[124] This suggestion does not, of course, resolve the uncertainty associated with judicial discretion. But it does provide a principled approach to the exercise of that discretion.

4.3.2 Distinctiveness of Political Disinformation

Whilst definitions of disinformation in general abound, definitions of political disinformation in particular are rather scanty. This should come as no surprise, since a general definition of disinformation can be simply extrapolated to specific categories of disinformation. Emerson Brooking and others, for example, begin by defining disinformation as 'false or misleading information, spread with the intention to deceive' and then proceed to define political disinformation simply as 'disinformation with a political or politically adjacent end.'[125] According to them, this definition 'captures disinformation spread in the course of an election, protest, or military operation' and 'the widespread phenomenon of political "clickbait" disseminated for personal financial gain.'[126] These are useful examples of political disinformation but the definition itself tells us nothing as concerns what exactly is 'political' about political disinformation.

123 *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* (n 118), para 171.

124 *Tønsbergs Blad A.S. and Haukom v Norway* App no 510/04 (ECtHR, 1 March 2007), para 87; *Björk Eiðsdóttir v Iceland* App no 46443/09 (ECtHR, 10 July 2012), para 67; *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECtHR [GC], 10 November 2015), para 102; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* (n 118), para 170.

125 Brooking, Kann and Rizzuto (n 14).

126 Ibid.

Perhaps a more useful definition would have to provide some indication as to what makes a given piece of disinformation qualify as political in nature. Recall that disinformation, as we define it, is misleading information that is communicated with intent to mislead and that may cause harm. Therefore, in keeping with our definition of political expression, we can by extrapolation define political disinformation as misleading information relating to a matter of public interest that is communicated with intent to mislead the public and that may cause harm.

Assuming our broad understanding of the concept of public interest is well received, this definition of political disinformation excludes disinformation relating to purely private and personal matters (such as disinformation about the private affairs of private citizens) but captures any piece of disinformation relating to any matter in which the public may legitimately take an interest. It does not therefore only capture disinformation about such matters as political elections, candidates in political elections, partisan politics or the conduct of public affairs by public officials, whether elected or appointed. Even disinformation about a pandemic, otherwise known as medical disinformation,[127] disinformation about climate change[128] and disinformation about any other matter of public interest also qualify as political disinformation.

4.4 Political Disinformation and Freedom of Expression

A basic presumption in human communication is that there is asymmetric information between communicators and recipients of information.[129] Indeed, as Per Linell observes, **'**if everybody possessed the same information, there would be little point in communicating. In addition, many dialogues are built upon complementary, rather than symmetrical, roles of participation. Complementarity is in fact characteristic of dialogue and communication in general; parties communicate from different positions and yet achieve some degree of shared understanding in and through their interaction.'[130] Therefore, according to Grice, everyone who engages

[127] David Robert Grimes, 'Medical Disinformation and the Unviable Nature of COVID-19 Conspiracy Theories' (2021) 16 *PLoS ONE* e0245900; Kamil Mamak, 'Do We Need the Criminalization of Medical Fake News?' (2021) 24 *Medicine, Health Care and Philosophy* 235.

[128] James Weinstein, 'Climate Change Disinformation, Citizen Competence, and the First Amendment' (2018) 89 *University of Colorado Law Review* 341; Stephan Lewandowsky, 'Climate Change Disinformation and How to Combat It' (2021) 42 *Annual Review of Public Health* 1.

[129] Per Linell and Thomas Luckmann, 'Asymmetries in Dialogue: Some Conceptual Preliminaries' in Ivana Marková and Klaus Foppa (eds), *Asymmetries in Dialogue* (Harvester Wheatsheaf 1991); Linell (n 46) 14.

[130] Linell (n 46) 14.

in communication should adhere to the cooperative principle. The cooperative principle holds thus: 'Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged.'[131]

Building upon Immanuel Kant's ethics,[132] the Gricean cooperative principle more specifically requires that every participant in human communication should, at a minimum, observe four supermaxims, namely the maxim of quantity, the maxim of quality, the maxim of relation and the maxim of manner.[133] The maxim of quantity relates to the amount of information to be provided and consists of two submaxims. These require, respectively, that every participant should: first, make his contribution as informative as is required for the purpose of the exchange at issue; and, second, not make his contribution more informative than is required. The maxim of quality relates to the reliability of the information to be provided. It also consists of two submaxims which require, respectively, that a participant should not say: first, what he believes to be false; or, second, that for which he lacks adequate evidence. The maxim of relation relates to the relevance of the information to be provided. It simply requires every participant to provide information that is relevant to the purpose of the exchange at issue. The last maxim, the maxim of manner, requires every participant to be perspicuous and includes several submaxims. These require inter alia that every participant should avoid obscurity, ambiguity and prolixity, and should be brief, orderly and the like.

Republican political theory somewhat echoes these supermaxims insofar as it argues for civility in public discourse. In the republican lexicon, civility refers to standards of behaviour that serve the ideals of public discourse, thereby promoting a sense of citizenship and shared community among the people. Rules of civility, such as those associated with the Gricean cooperative principle, 'encourage taking the well-being of every member of the community equally into account in public discourse, and treating every participant in the conversation as a fellow-citizen, whose interests deserve respect, and whose views merit careful consideration.'[134]

131 Grice, 'Logic and Conversation' (n 34) 45.

132 Grice himself does not specify which of Kant's works he draws upon. But it would appear that he draws upon Kant's moral philosophy, the gist of which is that there is a 'categorical imperative', namely that human beings have certain moral obligations. See Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary Gregor trans/ed, Cambridge University Press 1998). See also Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor trans/ed, Cambridge University Press 1991), categorising and expounding the moral obligations.

133 Grice, 'Logic and Conversation' (n 34) 45–47. See also Matthew A Benton, 'Gricean Quality' (2016) 50 *Nous* 689, defending the Gricean maxim of quality on epistemic grounds.

134 MNS Sellers, *Republican Legal Theory: The History, Constitution and Purposes of Law in a Free State* (Palgrave Macmillan 2003) 65.

Civil public discourse thus leverages every individual's insights whilst 'moderating self-interested mistakes and confusion.'[135]

Civility is particularly important because any effective exercise by the people of both electoral and contestatory control over government as specific means of protecting freedom largely depends on undistorted public discourse. It is such discourse that equips people with the necessary information for electoral decision-making and contestation against freedom-undermining public decisions.[136] Republicans thus support the cause of what is now popularly known as deliberative democracy insofar as it empowers citizens to influence and, where necessary, contest public decisions that bear upon their freedom.[137]

If the Gricean cooperative principle or the republican ideal of civility were always observed in practice, the problem of disinformation would be non-existent. Strict adherence to the cooperative principle or civility is, however, possible only in utopia. Ours is an imperfect world. Participants in communication often violate the Gricean cooperative principle and the republican ideal of civility alike. Capitalising on information asymmetries in particular, some participants make deliberate attempts at misleading others, disregarding the maxim of quality and providing information which they know or believe has a false conventional or nonconventional implicature. That is why we are faced with the problem of disinformation in general and political disinformation in particular. Even Grice himself recognises that people are liable to mislead one another when they quietly or unostentatiously violate a maxim of the cooperative principle.[138]

It would therefore appear that both the Gricean cooperative principle and the republican ideal of civility in public discourse would argue against according legal protection to the act of communicating political disinformation. But that tells us nothing about whether or not the law in fact protects that act as part of freedom of expression. It is therefore still necessary for us to consider whether there is such a thing as 'freedom to impart political disinformation'. Given that, in keeping with Grice's philosophy and the republican ideal of civility, freedom of expression, as we conceive of it, is a relational ideal, the discussion would be incomplete if we overlooked the rights of those at whom political disinformation is targeted or the interests of society at large. We must therefore at least also consider the rights of recipients of political disinformation.

135 Ibid.
136 Philip Pettit, 'Democracy, Electoral and Contestatory' (2000) 42 *Nomos* 105.
137 Philip Pettit, 'Deliberative Democracy, the Discursive Dilemma, and Republican Theory' in James S Fishkin and Peter Laslett (eds), *Debating Deliberative Democracy* (Blackwell Publishing 2003).
138 Grice, 'Logic and Conversation' (n 34) 49.

4.4.1 Rights of Communicators

We have already established that the act of communicating political disinformation, whether offline or online, is a form of political expression. But we also know that some acts of expression do not qualify for legal protection. Indeed, people can express themselves in a myriad of ways some of which cannot possibly fall within the scope of freedom of expression. In particular, it would appear that our conception of freedom of expression would not countenance the protection of the act of communicating political disinformation as part of freedom of expression. This is so not least because political disinformation, as we now conceive of it, is a direct threat not only to freedom of expression itself but to freedom in general.

Recall that freedom understood in the republican sense can be undermined by arbitrary interference, that is, intentional interference that may be actualised by removing, replacing or misrepresenting options.[139] Misrepresentation in particular involves removing, replacing or adding an option in an individual's cognitive perception of things, and each of these three misrepresentation techniques may be actualised either through deception or through manipulation.[140] Being an active attempt at deceiving or misleading others, the act of communicating political disinformation is necessarily an attempt at misrepresenting options in the recipient's cognitive perception of things. It is therefore a form of intentional and thus arbitrary interference and, by the same token, cannot qualify for legal protection as part of any type of freedom in republican political theory.

Indeed, it would appear that even theories that seek to justify freedom of expression by reference to its specific functions would not countenance a legal right to communicate political disinformation. Although it is neither possible nor necessary for the present purpose to delve into all existing theories of freedom of expression,[141] we can substantiate this claim by briefly referring to the three most prominent theories in existing scholarship.[142] These include the 'self-government theory', which seeks to justify the protection of freedom of expression as a way of promoting citizens' participation in democratic processes; the 'search for truth theory', which seeks to justify the protection of freedom of expression purely on epistemic grounds; and the 'autonomy theory', which seeks to justify the protection of freedom of expression as a way of promoting individual autonomy.

As noted in chapter 2, some theorists claim that the argument from citizens' participation in a democracy is 'the most powerful', 'the most easily understandable, and certainly the most fashionable' theory of freedom of expression in modern

139 See Pettit, *On the People's Terms* (n 97) 50–56.
140 Ibid.
141 See Stone and Schauer (eds) (n 2), part I.
142 Schauer (n 3) 167–68.

Western democracies.[143] These theorists contend that people should have freedom to engage in acts of expression that contribute to self-government in general and to securing an informed electorate in particular. According to Meiklejohn, the most influential proponent of this conception of freedom of expression, what 'is essential is not that everyone shall speak, but that everything worth saying shall be said.'[144] Meiklejohn thus agrees with justice Holmes that the legal guarantee of freedom of expression, properly understood, would not protect a man who misleads people by *falsely* and *deliberately* shouting 'Fire!' in a crowded theatre, thereby causing unnecessary panic.[145]

This makes it clear that Meiklejohn would not consider the act of communicating political disinformation as being worth of legal protection. Political disinformation does not, in any event, represent anybody's 'voice', since even those who communicate it themselves do not believe the claims implicated in such disinformation.[146] No one can therefore legitimately claim a right to communicate political disinformation on the basis of the right to self-government. In the context of political elections in particular, political disinformation aimed at misleading voters about their electoral options in fact threatens the right to self-government.

Other theorists claim that Mill's search for truth theory is 'the best-known' and 'the most influential' justification for freedom of expression.[147] As a utilitarian himself influenced by Bentham, Mill defends the protection of freedom of expression purely on epistemic grounds. He contends that freedom of expression is justified insofar as it contributes to the discovery of truth, in the form of knowledge, which in turn leads to the ultimate good, namely human happiness.[148] Thus, in *On Liberty*, Mill rejects the suppression of thoughts and opinions that society may perceive to be false or otherwise unacceptable. Apparently drawing upon John Milton's 1644 seminal text *Areopagitica*'[149] Mill offers three main justifications for his argument against the suppression of opinions, that is to say, that a suppressed opinion could be true, could be false but contain an element of truth, or could contribute to the clarification and understanding of a dogmatic belief that could

143 Barendt (n 110) 18; Randal Marlin, *Propaganda and the Ethics of Persuasion* (2nd edn, Broadview Press 2013) 239.

144 Meiklejohn, *Free Speech and its Relation to Self-Government* (n 106) 25.

145 Ibid, 41–42. See *Schenck v United States* 249 US 47, 52 (1919), holding that '[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.'

146 See also Mathiesen (n 88) 174–75.

147 Mathiesen (n 88) 173; Christopher Macleod, 'Mill on the Liberty of Thought and Discussion' in Stone and Schauer (eds) (n 2) 3.

148 John Stuart Mill, *Utilitarianism* (Parker, Son and Bourn 1863).

149 John Milton, *Areopagitica; A speech of Mr. John Milton for the Liberty of Unlicenc'd Printing, to the Parlament of England* (London 1644).

otherwise 'be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct' of individuals.[150] He thus echoes Milton's call to let perceived 'truth' and falsehood grapple 'in a free and open encounter',[151] or in what is now better known as the 'free marketplace of ideas',[152] in the hope that actual 'truth' would ultimately emerge victorious.

The truth justification for freedom of expression does not therefore appear to be accommodative of a right to impart political disinformation. First, this justification does not defend acts of expression that would not contribute to the discovery of truth.[153] Whilst it is true that misleading information in general may be debunked, political disinformation in particular is specially designed to undermine the very justification for freedom of expression offered by Milton and Mill, namely the discovery of truth. Second, the truth justification discriminates between statements of opinion and statements of fact, thus leaving room for restrictions on the latter, not least when a statement of fact is both untrue and misleading.[154] Although, as the ECtHR recognises, it may be difficult on occasion to distinguish between statements of fact and statements of opinion or value judgments,[155] political disinformation as such does not reflect anybody's opinion, since even communicators of political disinformation themselves do not believe the content they share with others.

On the other hand, as alluded to in chapter 2, the promotion of autonomy as a justification for freedom of expression can be contrasted with orthonomy or what Pettit otherwise calls ethical freedom or freedom of the will.[156] There are, it must be acknowledged, rival conceptions of autonomy itself. As generally understood, however, individual autonomy refers to 'the capacity to be one's own person, to live one's life according to reasons and motives that are taken as one's own and not the product of manipulative or distorting external forces, to be in this way

[150] Mill, *On Liberty* (n 5) 95.
[151] Milton (n 149) 35.
[152] cf Jill Gordon, 'John Stuart Mill and the "Marketplace of Ideas"' (1997) 23 *Social Theory and Practice* 235, arguing that the 'marketplace of ideas' metaphor is inconsistent with Mill's core argument in *On Liberty*.
[153] William P Marshall, 'The Truth Justification for Freedom of Speech' in Stone and Schauer (eds) (n 2) 47.
[154] Peter Niesen, 'Speech, Truth and Liberty: Bentham to John Stuart Mill' (2019) 18 *Journal of Bentham Studies* 1. See also Macleod (n 147).
[155] *Scharsach and News Verlagsgesellschaft mbH v Austria* App no 39394/98 (ECtHR, 13 November 2003), para 40; *Wojczuk v Poland* (n 82), para 73. See, for example, *Pedersen and Baadsgaard v Denmark* App no 49017/99 (ECtHR [GC], 17 December 2004), para 76. See also Jeffrey L Kirchmeier, 'The Illusion of the Fact-Opinion Distinction in Defamation Law' (1988–89) 39 *Case Western Reserve Law Review* 867.
[156] Pettit and Smith (n 84); Pettit, 'Freedom: Psychological, Ethical, and Political' (n 84).

independent.'[157] An act of expression 'can relate to autonomy in two ways: as itself an exercise of autonomy or as an informational resource arguably essential for meaningful exercise of autonomy',[158] respectively corresponding to the interests of communicators and recipients of information.

Whilst narrower and purely 'liberal' versions of this conception of freedom of expression tend to focus on the autonomy or self-expression of communicators, more credible conceptions are relational in nature. They are relational in that they do not only seek to promote self-expression as such but to promote social conditions necessary for the development and exercise of autonomy by all citizens, thereby allowing for the imposition of limits on autonomy-undermining acts of expression.[159] On this account of autonomy, the value of freedom of expression 'lies principally in how it enables our minds and thoughts to be illuminated by the minds and thoughts of others'.[160]

Political disinformation, as we define it, is not designed to illuminate anyone's mind or thoughts. If anything, given that it does not represent a direct expression of the communicator's mind or thoughts, the act of communicating political disinformation does not even qualify as a form of self-expression. Purveyors of political disinformation themselves, as already noted, do not believe the information that they want others to believe. There is therefore no basis upon which one would see the act of communicating political disinformation as a way of exercising individual autonomy. In keeping with the Kantian single categorical imperative, a relational conception of autonomy must adhere more or less to the Kantian principle of autonomy: 'choose only in such a way that the maxims of your choice are also included as universal law in the same volition.'[161] It goes without saying that no sensible human being would want to live in a society where the law guarantees everyone a right to spread misleading information with intent to mislead others in the name of promoting individual autonomy. Indeed, following Kant, Seana Shiffrin goes so far as to argue that intentional falsehoods or lies, even in the absence of any deception, do not at all merit legal protection as part of

[157] John Christman, 'Autonomy in Moral and Political Philosophy' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall edn, 2020) <https://plato.stanford.edu/archives/fall2020/entries/autonomy-moral/> accessed 20 October 2023.

[158] C Edwin Baker, 'Harm, Liberty, and Free Speech' (1997) 70 *Southern California Law Review* 979, 980.

[159] Catriona Mackenzie and Denise Meyerson, 'Autonomy and Free Speech' in Stone and Schauer (eds) (n 2).

[160] Schauer (n 3) 167.

[161] Kant, *Groundwork of the Metaphysics of Morals* (n 132) 47.

freedom of expression.[162]

Within the framework of our case study, the law also echoes the foregoing theoretical insights. Paragraph 2 of article 10 of the ECHR, like paragraph 3 of the ICCPR, in particular, declares (and unequivocally so) that the exercise of freedom of expression 'carries with it duties and responsibilities'. Consistent with the republican way of thinking about freedom of expression as a right whose scope is to be determined by law, the paragraph goes on to state that the exercise of freedom of expression may therefore 'be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society' for the protection of the interests enumerated therein.

To be sure, the protection that article 10 of the ECHR affords to acts of expression is highly contextual and by no means without limits.[163] Whether a given act of expression is protected as part of freedom of expression is dependent not only on the nature of the expressive option at issue but also on the relevant context in which that option is exercised. Indeed, the very regulatory conundrum that we seek to demystify in this monograph emanates from the broader scope of protection that the law affords to acts of expression in the political context in comparison to other contexts. When properly considered, the 'duties and responsibilities' envisaged in article 10 compellingly argue against any such thing as freedom of expression that inures to the benefit of those who communicate political disinformation.

True, the general 'duties and responsibilities' attendant to the exercise of freedom of expression are neither fully nor clearly defined by law. But the case law of the ECtHR does specify some of the 'duties and responsibilities' of those who engage in public debate in general and in acts of political expression in particular. Recall in this connection that, according to the ECtHR, by reason of the 'duties and responsibilities' inherent in the exercise of freedom of expression, article 10 of the ECHR protects the right of journalists to impart information on matters of general interest 'subject to the proviso that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the

[162] Seana Valentine Shiffrin, *Speech Matters: On Lying, Morality, and the Law* (Princeton University Press 2014). See Immanuel Kant, *Grounding for the Metaphysics of Morals: With on a Supposed Right to Lie Because of Philanthropic Concerns* (James W Ellington trans, 3rd edn, Hackett Publishing 1993). cf Helen Norton, 'Lies and the Constitution' (2013) 2012 *The Supreme Court Review* 161, 164–68, arguing for the legal protection of 'some' lies.

[163] See also generally Therese Enarsson and Markus Naarttijärvi, 'Is it all Part of the Game? Victim Differentiation and the Normative Protection of Victims of Online Antagonism under the European Convention on Human Rights' (2016) 22 *International Review of Victimology* 123; Therese Enarsson and Simon Lindgren, 'Free Speech or Hate Speech? A Legal Analysis of the Discourse about Roma on Twitter' (2019) 28 *Information & Communications Technology Law* 1.

ethics of journalism' or, in other words, 'in accordance with the tenets of responsible journalism'.[164] Whilst recognising that non-journalists are not bound by some of the article 10 duties and responsibilities to the same extent as professional journalists who are bound by the ethics of journalism,[165] the ECtHR further maintains that the general 'duties and responsibilities' to act in good faith in order to provide accurate and reliable information and to verify factual statements when such statements are at issue apply not only to professional journalists but to everyone who engages in public debate.[166]

Political disinformation, as we define it, is neither accurate nor reliable information. Nor can those who communicate political disinformation credibly claim to be acting in good faith in order to provide accurate and reliable information as required by the case law of the ECtHR. It also goes without saying that, at least as we see it, political disinformation goes beyond the degree of 'hyperbole and exaggeration' that the ECtHR or any other responsible judicial body would be willing to 'tolerate',[167] since it is specifically designed to mislead or deceive people about important matters of public interest. Indeed, as the ECtHR observes with reference to the expression of religious opinions and beliefs, the 'duties and responsibilities' that govern the exercise of freedom of expression include a duty '*to*

[164] *NIT S.R.L. v the Republic of Moldova* App no 28470/12 (ECtHR [GC], 5 April 2022), para 180. See also *Fressoz and Roire v France* App no 29183/95 (ECtHR [GC], 21 January 1999), para 54; *Bladet Tromsø and Stensaas v Norway* App no 21980/93 (ECtHR [GC], 20 May 1999), para 65; *McVicar v the United Kingdom* App no 46311/99 (ECtHR, 7 May 2002), para 73; *Pedersen and Baadsgaard v Denmark* (n 155), para 78; *Steel and Morris v the United Kingdom* (n 42), para 90; *Stoll v Switzerland* App no 69698/01 (ECtHR [GC], 10 December 2007), para 103; *Alithia Publishing Company Ltd and Constantinides v Cyprus* App no 17550/03 (ECtHR, 22 May 2008), para 65; *Kasabova v Bulgaria* App no 22385/03 (ECtHR, 19 April 2011), para 63; *Axel Springer AG v Germany* App no 39954/08 (ECtHR [GC], 7 February 2012), para 93; *Błaja News Sp. z o. o. v Poland* App no 59545/10 (ECtHR, 26 November 2013), para 51; *Armellini and others v Austria* App no 14134/07 (ECtHR, 16 April 2015), para 41; *Pentikäinen v Finland* App no 11882/10 (ECtHR [GC], 20 October 2015), para 90; *Bédat v Switzerland* App no 56925/08 (ECtHR [GC], 29 March 2016), para 50; *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECtHR [GC], 8 November 2016), para 159; *Orlovskaya Iskra v Russia* App no 42911/08 (ECtHR, 21 February 2017), para 109.

[165] *Stoll v Switzerland* (n 164), para 102; *Wojczuk v Poland* (n 82), para 102.

[166] *Steel and Morris v the United Kingdom* (n 42), para 90; *Marcinkevičius v Lithuania* App no 24919/20 (ECtHR, 15 November 2022), para 91. See also *Braun v Poland* App no 30162/10 (ECtHR, 4 November 2014), para 47; *Magyar Helsinki Bizottság v Hungary* (n 164), para 159; *Wojczuk v Poland* (n 82), paras 102–03; *Drozd v Poland* App no 15158/19 (ECtHR, 6 April 2023), para 60.

[167] *Prager and Oberschlick v Austria* App no 15974/90 (ECtHR, 26 April 1995), para 38; *Bladet Tromsø and Stensaas v Norway* (n 164), para 59; *Steel and Morris v the United Kingdom* (n 42), para 90; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016), para 55.

avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and *which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.*'[168] Political disinformation typifies the forms of expression that are likely to undermine rather than contribute to public debate capable of furthering progress in human affairs.

Interestingly, it would appear that the CJEU also shares the foregoing sentiments. In a case involving a journalist who was found to have been reporting 'in a manner which was biased and contrary to the journalistic principles of social responsibility, harm minimisation, truth, impartiality and justice, *in order to manipulate Russian public opinion through disinformation techniques*', the CJEU held that the journalist concerned could not maintain a claim for violation of his right to freedom of expression based on the measures adopted by the Council of the European Union aimed at restricting such conduct.[169] This appears to confirm that, like the ECtHR, the CJEU would also not recognise any such thing as a right to communicate political disinformation.

All in all, despite being a form of expression, the act of communicating political disinformation is not only a violation of the Gricean cooperative principle and the republican ideals of equality and civility in public discourse; it is also a blatant violation of the 'duties and responsibilities' inherent in the legal guarantee of freedom of expression. The act of communicating political disinformation cannot, therefore, be properly regarded as part of the freedom of expression that the law guarantees. This holds true even when other notable theories of freedom of expression are duly considered.

4.4.2 Rights of Recipients

The act of communicating political disinformation appears to be even more clearly incompatible with the republican ideal of freedom when the rights of the public at large are factored in. Indeed, the act of communicating certain forms of political disinformation, such as disinformation seeking to stir up hatred or violence, could amount to what is known as an 'abuse of rights' under article 17 of the ECHR.[170] In such cases, the ECtHR would reject as inadmissible an application on account of freedom of expression and would thus not even engage in an analysis of whether an

168 *Otto-Preminger-Institut v Austria* App no 13470/87 (ECtHR, 20 September 1994), para 49 (emphasis added).

169 Case T-262/15 *Dmitrii Konstantinovich Kiselev v Council of the European Union* [2017] ECLI:EU:T:2017:392, paras 98 and 112 (emphasis added).

170 *Perinçek v Switzerland* App no 27510/08 (ECtHR [GC], 15 October 2015), paras 115 and 230; *Molnar v Romania* App no 16637/06 (ECtHR [dec], 23 October 2012), para 23; *Belkacem v Belgium* App no 34367/14 (ECtHR [dec], 27 June 2017), paras 32–37; *Lilliendahl v Iceland* App no 29297/18 (ECtHR [dec], 12 May 2020), para 25.

interference by the state with the act of communicating such disinformation is justified under paragraph 2 of article 10 of the ECHR.

Such cases, it is true, may be considered as 'exceptional' in the sense that the task of deciding whether a given piece of information constitutes political disinformation generally calls for a meticulous analysis of the information in question in its relevant communication context. This is all the more so because the ECtHR itself underlines that article 17 is applicable only exceptionally and 'in extreme cases' and should, in cases concerning article 10 in particular, be resorted to only 'if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention'.[171]

In any event, we need not rely on article 17 of the ECHR to show that the act of communicating political disinformation is generally incompatible with freedom, including freedom of expression itself. We have already noted in chapter 2 that freedom to receive information as a specific element of freedom of expression inures to the benefit of both active and passive recipients of information. Recall, moreover, that the involvement of recipients makes freedom of expression inherently a social freedom and thus a relational ideal. It is a relational ideal in that it presupposes the existence, and thus includes the rights, of both communicators and recipients of information.[172] One cannot exercise freedom to impart information in the absence of a recipient. Nor can one enjoy freedom to receive information in the absence of a communicator. Communicators and recipients are interdependent and must therefore be afforded equal protection.

As already noted in chapter 3, freedom to receive reliable information is not only indispensable for the formation of public opinion and for the exercise of freedom to impart information but also represents the very means by which we get to know our options. The significance of this freedom as a specific element of freedom of expression cannot therefore be overstated. We all want to know and weigh all our options before making our choices. This holds true with respect to both political and purely personal choices. Those who lack reliable information are 'doomed to be always victims of those who know; victims of deceit and distortion of facts; victims

[171] *Perinçek v Switzerland* (n 170), para 114; *Lilliendahl v Iceland* (n 170), para 25; *Wojczuk v Poland* (n 82), para 43. See also *German Communist Party (KPD) v Germany* App no 250/57 (ECnHR, 20 July 1957); *Ždanoka v Latvia* App no 58278/00 (ECtHR [GC], 16 March 2006), paras 99–100.

[172] cf Susan J Brison, 'Relational Autonomy and Freedom of Expression' in Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press 2000) 280; Susan Williams, *Truth, Autonomy, and Speech: Feminist Theory and the First Amendment* (NYU Press 2004), espousing a relational conception of autonomy as a rationale for freedom of expression.

of irrationality', since a person who is not properly informed cannot think correctly.[173]

It is worth recalling that the legal protection of political freedom in general presupposes that man, as a rational being, is capable of making choices based on reason or logic. Importantly, as an old aphorism goes, knowledge is power. Knowledge certainly means reliable information,[174] not misinformation, let alone disinformation. By the same token, as the IACtHR observes in one of its seminal judgments, 'it can be said that a society that is not well informed is not a society that is truly free.'[175] It therefore goes without saying that, even from the recipient's perspective, the act of communicating political disinformation cannot possibly be protected as part of any type of political freedom properly understood. The normative insights from our conception of freedom reinforce this stand.

Recall that, in keeping with the egalitarian ideal or the equal status accorded to citizens in republican theory, only options that are co-enjoyable, that is, options that are both co-exercisable and co-satisfying, ought to be protected by the law.[176] The option of communicating political disinformation is, of course, co-exercisable in the sense that citizens may exercise it concurrently. But it is certainly not co-satisfying as it is directly designed to negate the right of other citizens to be properly informed about their options. Thus, on the republican account that we adopt, the act of communicating political disinformation is an attempt at undermining not only the orthonomy or ethical freedom of recipients but also the very egalitarian ideal upon which political freedom is predicated. Indeed, the republican egalitarian ideal itself presupposes information equality among the citizenry, for it is only through such equality that every citizen can make informed and thus 'satisfying' choices.[177]

It is also worth recalling that the prevailing, albeit narrower, conceptions of freedom of expression are no less concerned about the interests of recipients of information. As noted in chapter 3, those who seek to justify the protection of freedom of expression by reference to its contribution to democracy or self-government go so far as to suggest that communicators have no expression rights of their own but are allowed to assert such rights in the interest of recipients and society

[173] Loukis G Loucaides, *Essays on the Developing Law of Human Rights* (Martinus Nijhoff Publishers 1995) 3.

[174] Ibid, 4.

[175] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 American Convention on Human Rights)* Advisory Opinion OC-5/85 (IACtHR, 13 November 1985), para 70.

[176] Pettit, *On the People's Terms* (n 97) 101; Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (WW Norton & Company 2014) 62–69.

[177] For a discussion of the concept of information equality and how political disinformation could undermine it, see generally Judge and Korhani (n 78).

as a whole.[178] On this account, communicators of political disinformation would not at all be able to claim legal protection, since they seek to undermine rather than to advance the rights of recipients and society as a whole.[179] When considered from the recipient's perspective, the search for truth theory also rules out any justification for the protection of the act of communicating political disinformation as that act diminishes the recipient's chances of discovering truth.[180] By the same token, relational conceptions of individual autonomy would not condone the act of communicating political disinformation, since that act is a direct attempt at undermining the autonomy of the recipient.[181]

In keeping with the foregoing discussion, the wording of article 10 of the ECHR itself does not by any manner of means suggest that freedom to impart information should take precedence over freedom to receive information or vice versa. As already noted in chapter 3, even the ECtHR considers that freedom of expression as enshrined in article 10 includes, among other rights, 'the right of the public to be *properly informed'*,[182] not least to be properly informed of different perspectives on matters of general interest.[183] The ECtHR underlines that the right of the public to be properly informed is so essential a right in a democratic society that it can even extend to certain aspects of the private life of public figures.[184] This clearly argues against any attempt at protecting purveyors of political disinformation. It is no wonder then that, as noted above, the CJEU also appears to recognise that the public must be protected from those who attempt to manipulate public opinion through disinformation techniques.[185]

It also goes without saying that the act of communicating political disinformation cannot be reconciled with freedom of thought in general or freedom of opinion in particular, which is also an element of the freedom of expression enshrined in article

178 Meiklejohn, *Free Speech and its Relation to Self-Government* (n 106) 22–27. See also Posner (n 107) 9 and 49–50; Scanlon, 'A Theory of Freedom of Expression' (n 1); Larry Alexander, *Is There a Right of Freedom of Expression*? (Cambridge University Press 2005) 8–9.

179 See also Mathiesen (n 88) 174–75.

180 Ibid, 174.

181 Ibid, 172.

182 *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR 26 April 1979), para 66 (emphasis added). See also *Lingens v Austria* (n 101), para 41; *Thorgeir Thorgeirson v Iceland* (n 119), para 63; *Jersild v Denmark* App no 15890/89 (ECtHR [GC], 23 September 1994), para 31; *Colombani and others v France* App no 51279/99 (ECtHR, 25 June 2002), paras 55 and 64; *Ukrainian Media Group v Ukraine* App no 72713/01 (ECtHR, 29 March 2005), para 38.

183 *Erdoğdu and İnce v Turkey* Apps nos 25067/94 and 25068/94 (ECtHR [GC], 8 July 1999), para 52; *Sener v Turkey* App no 26680/95 (ECtHR, 18 July 2000), para 45.

184 *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* (n 118), para 169.

185 *Dmitrii Konstantinovich Kiselev v Council of the European Union* (n 169), paras 98 and 112.

10 of the ECHR. This is so not only because people who are ill-informed cannot think correctly but because purveyors of political disinformation themselves do not intend to inform anyone. Rather, as we now know, purveyors of political disinformation engage in a deliberate attempt at manipulating the thoughts and opinions of recipients by disinforming them.[186] All in all, like all prominent theoretical accounts, the law on freedom of expression suggests that the act of communicating political disinformation serves no purpose other than to threaten the freedom or rights of recipients and the public at large.

4.5 Conclusion

A survey of existing scholarship suggests that the interplay between the phenomenon of political disinformation and the exercise of freedom of expression has thus far proved difficult to grasp, apparently due to perennial definitional uncertainties. This chapter thus seeks to establish whether at all the law protects as part of freedom of expression the act of communicating political disinformation. To this end, the chapter begins by providing some conceptual clarity with respect to political disinformation as a specific form of expression and in turn builds upon the conception of freedom in general and of freedom of expression in particular constructed in chapters 2 and 3, respectively, to answer the question. Overall, the analysis turns out to be quite telling. The main findings are worth recapitulating, for ease of reference, as we proceed to the next chapter of our exploration.

As concerns the nature of political disinformation as a specific form of expression, the following takeaways are worth highlighting. First, properly understood, disinformation is misleading information that is communicated with intent to mislead and that may cause harm. Second, given that disinformation is information (notwithstanding the attribute of misleadingness), the act of communicating political disinformation is a form of political expression. Third, adequately understood, political expression includes any act of expression relating to a matter of public interest. Public interest is about whatever matters to the public at large. Fourth, by extrapolation, political disinformation can be defined as misleading information relating to a matter of public interest that is communicated with intent to mislead the public and that may cause harm. This definition captures not only disinformation bearing upon the exercise of legislative, judicial and executive powers of the state at any level of government; it captures any piece of disinformation relating to any matter in which the public may legitimately take an interest.

Turning to the question as to whether the law protects as part of freedom of expression the act of communicating political disinformation, the law and all major

[186] See also Khan (n 29), paras 33–36.

theoretical accounts provide a resounding negative answer. This is so primarily because, despite being a form of expression, the act of communicating political disinformation, whether offline or online, is a direct attempt at undermining one of the elements of freedom of expression, namely freedom to receive information in general and the right of recipients to be properly informed in particular. Indeed, it would be absurd if any legal right were to be interpreted as implying for the state or private actors a right to engage in any activity that is directly aimed at undermining any of the rights that the law itself guarantees. Legal rights by their very nature impose limits on what the state and individuals alike may do.[187] Freedom to receive information, as a legal right, in particular imposes limits on the types of information that those who seek to impart information to others may communicate. It follows that no one can claim to have a legal right to deliberately undermine the right of the public to be properly informed in the name of exercising one's own right to impart information to others.

After all, Bentham is right in saying that every right has 'a correspondent obligation'.[188] Or, to use the words of Hobbes, 'where liberty ceaseth, there beginneth obligation.'[189] Perhaps the only mistake that these leading political theorists make in this connection is that of thinking that the rights that freedom entails can exist independently of duties. In reality, it would appear that there can be no rights without corresponding duties. This explains why even those who engage in acts of political expression owe a duty to active and passive recipients of information alike, to act in good faith in order to provide reliable information and to verify factual statements when such statements are at issue. Although professional journalists may be held to a higher standard as they are required to act in accordance with the ethics of journalism, this duty necessarily applies without exception. The principle of equal rights demands as much.

187 Scanlon, 'Freedom of Expression and Categories of Expression' (n 104) 519.
188 Bentham (n 6) 503.
189 Thomas Hobbes, *The Elements of Law, Natural and Politic* (Ferdinand Tönnies ed, Simpkin, Marshall and Co 1889) 78.

5 The Case for Regulating Political Disinformation

5.1 Introduction

Political disinformation, as we now conceive of it, includes any misleading information relating to a matter of public interest that is communicated with intent to mislead the public and that may cause harm. Broadly understood, therefore, political disinformation is a direct threat not only to freedom of expression but to freedom in general. The prevailing narrative that disinformation threatens democracy thus serves only to vindicate the republican contention that freedom is an ecumenical value and a gateway good: a good that promises to bring other goods in its train.[1] As noted in chapter 2, democracy itself is but one of the many goods whose realisation depends on freedom. Indeed, we now know that it is legally axiomatic that there can be no democracy without freedom, not least freedom of expression, freedom of assembly and association, and electoral freedom.

The claim that disinformation threatens democracy thus appears to be a roundabout way of saying that disinformation threatens freedom. It would appear that any negative impact of disinformation on democracy (irrespective of how democracy itself is conceptualised) is a direct result of the effects of disinformation, particularly political disinformation, on the freedom of individuals. Those who propagate the narrative that political disinformation threatens democracy also tend to forget to tell us why we need democracy in the first place. Indeed, true to the republican way of thinking about freedom that we espouse, democracy appears to be socially or politically desirable only insofar as it contributes to the protection of freedom.[2] On this republican account, democracy is not an end in itself but a means to an end, namely freedom.

Importantly, it makes a difference whether one focuses on freedom or on the

1 Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 3; Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (WW Norton & Company 2014) xix; Philip Pettit, 'Freedom as Nondomination' in Toby Buckle (ed), *What is Freedom? Conversations with Historians, Philosophers, and Activists* (Oxford University Press 2021) 102.

2 Pettit, 'Freedom as Nondomination' (n 1) 100.

goods that freedom promises to bring in its train. Those who focus on the latter tend to create avoidable tension between different values that all democratic societies strive for. Under the prevailing theories of freedom of expression, for example, we are asked to make a hard choice between promoting democracy, individual autonomy and the discovery of truth whenever one of these values appears to conflict with another. In reality, however, freedom of expression itself is 'the matrix, the indispensable condition, of nearly every other form of freedom.'[3] Without freedom to seek, receive and impart information in particular, other fundamental rights are largely illusory. The prevailing theories of freedom of expression are thus problematic, not only because of the tension they tend to create between core social values but also because none of the values they seek to promote can fully justify the guarantee of freedom of expression.[4]

Insofar as they seek to subordinate freedom to other values, the prevailing theories of freedom of expression are reminiscent of the liberal political philosophy of Thomas Hobbes. As we have seen in chapter 2, Hobbes focuses on the preservation of peace rather than on the preservation of freedom, thereby subordinating freedom to peace. It is in the name of preserving peace that Hobbes advocates state censorship of the press and the imposition of unbridled restrictions on expressive activity at the whims and caprices of a monarch.[5] Hobbes does not appear to recognise that, as the preamble to the ECHR reaffirms, freedom is the foundation of justice and peace in the world.[6] Nor does Hobbes appear to recognise that peace cannot be an end in itself. What is the use of peace without freedom, anyway? It seems obvious that, like democracy, peace is politically desirable only insofar as it contributes to the preservation of freedom.

Interestingly, Hobbes's advocacy for absolute public power has prompted one commentator to argue that Hobbes should be seen neither as a liberal writer nor as a precursor of liberal ideas.[7] This observation does not, however, appear to be wholly accurate. Granted, it is obvious that contemporary liberals value freedom more than Hobbes does. But the liberal conception of freedom as non-interference by public authority cannot be disassociated from Hobbesian philosophy. We have seen in chapter 2 that Isiah Berlin himself, the leading champion of that conception of

3 *Palko v Connecticut* 302 US 319, 327 (1937).

4 See also Lawrence Byard Solum, 'Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech (1988–89) 83 *Northwestern University Law Review* 54, 85.

5 Thomas Hobbes, *Leviathan or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil* (London 1651) 88.

6 See also UDHR, preamble.

7 Norberto Bobbio, *Thomas Hobbes and the Natural Law Tradition* (Daniela Gobetti trans, University of Chicago Press 1993) 69–70.

freedom in its contemporary form, clearly draws upon Hobbesian ideas.[8] Indeed, both the Hobbesian and the Berlinian conceptions of 'liberal' freedom can be distinguished from the republican ideal of freedom that we adopt primarily because both Hobbes and Berlin see political freedom simply as freedom from laws. This simplistic way of thinking is the main reason why classical liberal thinkers tend to create avoidable tension not only between freedom and other values but also between different types of freedom itself.[9] When properly understood in the republican sense as consisting in equal rights established by law, freedom cannot come into conflict with itself or indeed with other values that contribute to freedom.

The freedom that we are speaking about has inherent limits. These limits are to be determined by law based on the principle of equal rights. The freedom that we are speaking about must therefore be distinguished from Hobbesian natural liberty, that is, the 'blameless' liberty 'of using our own natural power and ability',[10] or the liberty that nature has given every man to govern 'himself by his own will and power'.[11] What we are speaking about is political liberty, otherwise known as civil or social liberty. It is political, civil or social liberty in the sense that it is not guaranteed to an individual in abstract but in relation to other members of the society. The liberty or freedom that we are speaking about, in other words, is a relational ideal and hence cannot be guaranteed to anyone unless everyone, regardless of social standing, is legally obliged to respect the rights of others. Therefore, as the ECtHR observes in one of its seminal judgments, even when called upon to determine the limits of freedom of expression in relation to any other type of freedom or social value, courts are 'faced *not* with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted'.[12]

Importantly, the freedom that we are speaking about is an ecumenical value and a gateway good. All other common interests that unify communities under a single government, such as common interests in defence, security, health, education and emergency relief, do not only promote freedom but also depend on freedom. If a government of the state is desirable, as we can assume it is (since otherwise people

8 See also MNS Sellers, *Republican Legal Theory: The History, Constitution and Purposes of Law in a Free State* (Palgrave Macmillan 2003) 81–82, observing that 'Berlin adapted his vocabulary from Thomas Hobbes' and 'made Hobbesian views popular'.

9 Owen M Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Routledge 2018).

10 Thomas Hobbes, *The Elements of Law, Natural and Politic* (Ferdinand Tönnies ed, Simpkin, Marshall and Co 1889) 71.

11 Ibid, 79.

12 *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979), para 65 (emphasis added).

would opt to remain in the state of nature),[13] therefore, that government ought to take its guidance from the freedom of the people subject to its rule: the government must pursue other common interests not for their own sake but for the sake of the freedom of the people.[14] On this republican account, the state has no purpose other than to create an enabling environment for freedom or equal rights.[15]

Indeed, as William Blackstone reminds us, freedom 'is the very end and scope of the constitution'.[16] When properly constructed, therefore, all laws in any legal system serve only to secure freedom or equal rights.[17] This claim also finds support in the French Declaration of the Rights of Man and of the Citizen of 1789, according to which the 'aim of every political association is the preservation of the natural and imprescriptible rights of man.'[18] Although the declaration itself refers to 'natural rights', article 4 thereof explains that freedom in a political society as opposed to freedom in the state of nature 'consists in being able to do anything that does not harm others'. The article then goes on to clarify that the natural rights envisaged are to be preserved by law, declaring that 'the exercise of the natural rights of every man has *no bounds other* than those that ensure to the other members of society the enjoyment of these *same rights*', and that '[t]hese bounds may be determined only by Law.'[19]

The logic is rather simple. Let rights be guaranteed to everyone in equal measure and everyone will be able to decide what to do with those rights in order to attain self-fulfilment. This means that when the freedom that consists in equal rights is secure, the *res publica* or the common good is secure in consequence. By the same token, the modern state must be republican in the sense that it must find its sole

13 Philip Pettit, 'Minority Claims under Two Conceptions of Democracy' in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press 2000) 205.

14 Thomas Paine, *Dissertation on the First-Principles of Government* (English Press 1795) 25; Philip Pettit, 'Republican Theory and Criminal Punishment' (1997) 9 *Utilitas* 59, 66.

15 Paine, *Dissertation on the First-Principles of Government* (n 14) 25.

16 William Blackstone, *Commentaries on the Laws of England: In Four Books* (vol I, 16th edn, John Tylor Coleridge ed, London 1825) 6.

17 Paine, *Dissertation on the First-Principles of Government* (n 14) 25. See also Philip Pettit, 'Criminalization in Republican Theory' in RA Duff and others (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press 2014) 139; Pettit, *Just Freedom* (n 1), chs 3–6, illustrating how various fields of law, including international law, should contribute to the protection of freedom.

18 Declaration of the Rights of Man and of the Citizen 1789, art 2.

19 Ibid, art 4 (emphasis added).

support on a free people.[20] Machiavelli says much the same in *The Prince*, observing that 'a city used to living free may be held more easily by means of its own citizens than in any other mode, if one wants to preserve it.'[21] In short, as Thomas Paine puts it in *Common Sense*, freedom 'is the design and end of government'.[22] Or, to use the words of Philip Pettit, as far as government or politics is concerned, freedom is 'the only good we need worry about, so expansive are its implications.'[23]

In addressing the problem of political disinformation, therefore, this chapter focuses on freedom rather than on other values. The question that falls for consideration is the following. Can the state regulate the phenomenon of political disinformation without undermining freedom of expression? It should be noted at the outset that a state that acts through a government that makes freedom its sole object has no rights in relation to its citizens; it has only duties.[24] Therefore, even though we have already established in chapter 4 that the act of communicating political disinformation does not as such qualify for legal protection, any recourse to the coercive power of the state can be justified only by reference to the duty of the state to secure the freedom of its people. This means that whether the state can regulate the phenomenon of political disinformation without undermining freedom of expression depends solely on whether the state has a duty (as opposed to a right) to regulate that phenomenon.

Put differently, therefore, this chapter seeks to establish whether the state has a duty to regulate the phenomenon of political disinformation. To this end, the remainder of the chapter is organised as follows. Section 5.2 identifies and elaborates upon the theoretical and legal basis of the duties of the state with respect to freedom in general. In keeping with the case study and interdisciplinary methods adopted in this monograph, the section examines the relevant law through the lens of the republican conception of freedom that we espouse. In the same vein, sections 5.3 and 5.4 consider in turn whether the state has a duty to regulate the phenomenon of political disinformation in order to protect people from the freedom-undermining effects of such disinformation in general and in the context of political elections in particular. Section 5.5 concludes.

20 Miguel Vatter, 'Republics Are a Species of State: Machiavelli and the Genealogy of the Modern State' (2014) 81 *Social Research* 217, 236. See also P-H Teitgen, 'Introduction to the European Convention on Human Rights' in R St J Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Kluwer Academic Publishers 1993) 3–4; Philip Pettit, 'Statehood and Justice' (2022) 59 *Society* 140.

21 Nicollò Machiavelli, *The Prince* (Harvey C Mansfield trans, 2nd edn, University of Chicago Press 1998) 20.

22 Thomas Paine, *Common Sense* (John Carter 1776) 6–7.

23 Pettit, 'Freedom as Nondomination' (n 1) 101.

24 Thomas Paine, *The Rights of Man* (2nd edn, Carlisle 1792), pt II, 31. cf Hobbes, *Leviathan* (n 5) 88.

5.2 Freedom and the Duties of the State

The influence of the liberal conception of freedom as non-interference in the framing of existing guarantees of freedom is self-evident. Many fundamental rights set forth in both national and international instruments are couched in classical liberal terms.[25] Indeed, conventional wisdom has it that modern constitutions 'have been developed with a view to limiting governmental powers', that is, with a view to 'shielding individuals from interference by public authorities.'[26] Any deviation from this vertical dimension to the horizontal dimension is therefore generally seen not as the rule but as the exception.[27] To date, this unholy alliance between liberal political philosophy and public law remains a major source of confusion in constitutional jurisprudence.[28] Despite all evidence to the contrary, many commentators still believe that most constitutional rights simply protect the individual from state interference. This belief has been given the most prominent expression in US constitutional jurisprudence through what has become to be known as the state action doctrine.

As generally understood, the state action doctrine holds that the US Constitution, with the exception of the Thirteenth Amendment thereto, binds state actors to the exclusion of non-state actors.[29] Therefore, based on this doctrine, many US scholars claim that even the freedom of speech that is enshrined in the First Amendment to the US Constitution applies '*only* in situations involving state action to suppress, restrain, compel, or punish citizens for engaging in protected speech.'[30] But this way of thinking about freedom appears to be somewhat flawed.[31] True, as a matter of legal procedure, an individual may not in principle maintain a direct legal action against another individual based on the First Amendment alone. But the very

25 Stephen P Marks, 'Emerging Human Rights: A New Generation for the 1980s' (1981) 33 *Rutgers Law Review* 435, 430. See also *Mathieu-Mohin and Clerfayt v Belgium* App no 9267/81 (ECtHR, 2 March 1987), para 50.

26 Giovanni De Gregorio, 'The Rise of Digital Constitutionalism in the European Union' (2021) 19 *International Journal of Constitutional Law* 41, 42; Giovanni De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society* (Cambridge University Press 2022) 3.

27 Ibid.

28 Christoph Beat Graber and Gunther Teubner, 'Art and Money: Constitutional Rights in the Private Sphere?' (1998) 18 *Oxford Journal of Legal Studies* 61, 63.

29 Stephen Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 *Michigan Law Review* 387, 388; Mason C Shefa, 'First Amendment 2.0: Revisiting Marsh and the Quasi-Public Forum in the Age of Social Media' (2018) 41 *University of Hawai'i Law Review* 159, 170–71.

30 Christopher Terry and others, 'Free Expression or Protected Speech? Looking for the Concept of State Action in News' (2020) 8 *University of Baltimore Journal of Media Law & Ethics* 102, 103 (emphasis added).

31 See generally Gardbaum (n 29).

freedom of speech which the First Amendment protects requires the state to take positive measures of protection.

Perhaps it is not by accident that the tenor of the First Amendment does not prohibit the US legislature from enacting laws designed to prevent violations of freedom of speech in horizontal relations but rather merely provides, in relevant part, that 'Congress shall make no law…abridging the freedom of speech, or of the press.' This appears to be an implicit recognition that Congress has a positive duty to enact laws, albeit only with a view to preserving rather than abridging freedom of speech and of the press. Indeed, taken literally and in isolation, the First Amendment is hardly meaningful as it does not explain what freedom of speech or of the press is. The wording of the First Amendment itself suggest that someone must make, or at least must have already made, laws elaborating upon the meaning and scope of that freedom. By the same token, the First Amendment cannot be interpreted in abstract. It must be contextualised in the broader legal framework that governs its application in practice.

It goes without saying that the US government regulates expressive activity even in the face of the state action doctrine. As already noted in chapter 3, the US Supreme Court recognises as 'a fundamental principle, long established, that the freedom of speech and of the press which is secured by the [US] Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.'[32] The Supreme Court thus acknowledges the need to protect people from freedom-undermining acts of expression. Indeed, as noted in chapter 3, it is a truism that Congress has already enacted various pieces of legislation, limiting the nature of expressive activity that falls within the ambit of the freedom that the First Amendment protects. More perspicacious research into the horizontal effect of the fundamental rights secured by the US Constitution also confirms that the US 'position is in fact far more horizontal' than the state action doctrine tends to suggest.[33]

To be clear, the state action doctrine is something of a 'conceptual disaster' in that it defies 'common-sense justice' insofar as it suggests that only state actors have a duty to respect fundamental rights.[34] It is no wonder then that US federal courts,

[32] *Gitlow v New York* 268 US 652, 666 (1925). See also *Frohwerk v United States* 249 US 204, 206 (1919).

[33] Gardbaum (n 29) 389.

[34] Charles L Black, 'The Supreme Court, 1966 Term – Foreword: "State Action," Equal Protection, and California's Proposition 14' (1967) 81 *Harvard Law Review* 69, 95; Norman J Finkel, *Commonsense Justice: Jurors' Notions of the Law* (Harvard University Press 1995) 2; Norman J Finkel, 'Commonsense Justice, Culpability, and Punishment' (1999) 28 *Hofstra Law Review* 669, 669.

including the US Supreme Court itself, have found ways of circumventing this doctrine, not least by treating certain private actors as state actors, in order to give effect to constitutional rights in horizontal relations.[35] As far as violations of fundamental rights are concerned, any distinction between state action and private action becomes relevant only when determining the limits of public power. But any such distinction need not take away from the positive duty of the state to give effect to all fundamental rights both in vertical relations, between state actors and private actors, and in horizontal relations, between private actors *inter se*.

By the same token, the so-called doctrine of 'horizontal effect' is flawed insofar as it suggests that only certain rights should apply in horizontal relations. Why, for example, as the case law of the CJEU suggests, should courts give horizontal effect to the right to not be discriminated against and the right to paid annual leave in the context of private employment relations,[36] and the right to privacy with respect to the processing of personal data by a private operator of an Internet search engine,[37] but not to the rights related to freedom of expression? There appears to be no compelling justification for such discrimination between fundamental rights. As Mark Tushnet points out, 'if horizontality is understood as a response to the threat to liberty posed by concentrated private power, the solution is to require that all private actors conform to the norms applicable to governmental actors.'[38]

The fact that the fundamental rights set forth in national constitutions and international instruments are primarily addressed to state actors should not therefore be seen as precluding their application to relations between individuals. Rather, it should be seen only as a recognition that it is state actors that must allocate among

35 See Gardbaum (n 29) 412–14; Shefa (n 29) 171. See also *Knight First Amendment Institute at Columbia University v Trump* 928 F.3d 226 (2nd Cir 2019); *Davison v Randall* 912 F 3d 666 (4th Cir 2019). cf *Campbell v Reisch* 986 F 3d 822 (8th Cir 2021). For details concerning this emerging string of cases, see generally Joseph A D'Antonio, 'Whose Forum is it Anyway: Individual Government Officials and their Authority to Create Public Forums on Social Media' (2019) 69 *Duke Law Journal* 701; Edoardo Celeste, 'Digital Punishment: Social Media Exclusion and the Constitutionalising Role of National Courts' (2021) 35 *International Review of Law, Computers & Technology* 162, 170–72.

36 Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* [2018] ECLI:EU:C:2018:257, paras 77–82; Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* [2018] ECLI:EU:C:2018:871, paras 85–92

37 Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2014] ECLI:EU:C:2014:317, para 58. See also Case C-507/17 *Google LLC, successor in law to Google Inc. v Commission nationale de l'informatique et des libertés (CNIL)* [2019] ECLI:EU:C:2019:772.

38 Mark Tushnet, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' (2003) 1 *International Journal of Constitutional Law* 79, 92.

individuals the duties that correspond to those rights in an egalitarian manner,[39] in particular through the adoption and implementation of laws. This recognition is significant but only insofar as it serves to regulate state actors, to ensure that they use the public power with which they are entrusted for no purpose other than to create an enabling environment for freedom or equal rights. On this republican account, the state has a duty to give both vertical and horizontal effect to all fundamental rights to the extent that it is necessary to do so in order to guarantee the exercise and enjoyment of those rights on an equal footing. Any effective guarantee of 'lawful' freedom or equal rights, whilst also correlative with a *qualified* duty of non-interference by public authority, thus requires positive state action in the first place. This holds true with respect to all civil or political rights irrespective of how one classifies them.[40]

As noted in chapter 2, all fundamental rights constituting the freedom that the individual can claim by virtue of being a member of an organised political society are civil or political rights.[41] Civil or political rights do not therefore only include those rights that are often classified as 'civil and political' rights but also those that are often classified as 'economic and social' rights. In keeping with the republican way of thinking about freedom that we adopt, the exercise and even the mere presence of the power of private *dominium* or the *imperium* of the state can undermine any of these rights.[42] By the same token, all guarantees of fundamental rights or freedom implicate both positive and negative duties on the part of the state.

5.2.1 The Positive Duty

The positive duty can easily be deduced from the *raison d'être* of the republican state. Creating an environment that enables the exercise and enjoyment of freedom or equal rights entails not only creating a space where risks of violations of rights from any source whatsoever are minimised and well managed but also ensuring that people are well equipped with the necessary resources for the effective exercise and enjoyment of their rights. This involves at least two broad positive steps.

First, the state must enact laws that clearly establish the rights of its people. As we now know, it is 'good laws' that define and secure equal rights or freedom in an organised political society. Good laws, as Pettit tells us, are those laws that protect people 'against the resources or *dominium* of those who would otherwise have

39 Julia Villotti, 'The Horizontal Effect of EU Fundamental Rights - AMS and Beyond' (2016) 71 *Zeitschrift fur Offentliches Recht (ZoR): Journal of Public Law* 241, 264.

40 Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013).

41 See also Paine, *The Rights of Man* (n 24), pt I, 31.

42 Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1997); Philip Pettit, *On the People's Terms* (n 1).

arbitrary power over them—without themselves introducing any new dominating force: without introducing the domination that can go with governmental *imperium*' or public power.[43] The laws thus envisaged include not only mere declarations of fundamental rights in a constitutional statute but all laws that contribute to the protection of the individual from arbitrary interference with the exercise and enjoyment of legally protected options, irrespective of the source of such interference.

Indeed, it is a truism 'that the protection of the individual from attacks on his liberties by other private individuals constitutes one of the normal functions of the law, particularly civil and criminal law, and an essential task of the executive and judicial authorities.'[44] In fact, historically, 'this function of the law was in operation and had reached a certain degree of stability even before the rights of the individual vis-à-vis the State were proclaimed, or means of defence against agents acting on behalf of the State were instituted.'[45] Violations of individual rights, by private actors (including individuals and other private agencies) and by state actors alike, are normally 'punished by penalties or by the obligation to make reparations or by other civil sanctions.'[46]

The right to life, for example, is protected by the law that criminalises homicide and the right to private property by the law that criminalises theft and other forms of interference with property. A mere constitutional declaration of the right to life would be meaningless if individuals were free to kill one another. Equally, a mere constitutional declaration of the right to property would be meaningless if individuals were free to steal or otherwise interfere with the enjoyment of one another's property.

These examples serve only to confirm that every modern political society already recognises that, over and above mere declarations of rights, the state has a primary duty to enact laws aimed at securing the rights of those subject to its rule. It should therefore come as no surprise that, within our case study, the contracting states undertake to 'secure to everyone within their jurisdiction the rights and freedoms defined in' the ECHR.[47] The fact that this duty is explicitly stated not only in article 1 of the ECHR but also in the preliminary provisions of other similar international instruments cannot be a mere fortunate stroke of serendipity.[48]

Second, over and above the adoption of laws that establish freedom or equal

43 Pettit, *Republicanism* (n 42) 36.

44 Phedon Vegleris, 'Twenty Years' Experience of the Convention and Future Prospects' in AH Robertson (ed), *Privacy and Human Rights* (Manchester University Press 1973) 382.

45 Ibid, 382–83. See also Jan De Meyer, 'The Right to Respect for Private and Family Life, Home and Communications in Relations Between Individuals, and the Resulting Obligations for States Parties to the Convention' in Robertson (ed) (n 44) 273.

46 De Meyer (n 44) 273.

47 ECHR, art 1.

48 See, for example, ICCPR, arts 2 and 3; ACHR, arts 1 and 2.

rights, the state must take necessary measures to implement those laws in order to give effect to the rights established by law. As Hobbes reminds us, laws themselves are but weak bonds that may 'be made to hold, by the danger, though not by the difficulty of breaking them.'[49] Private individuals and state actors alike can, and often do, interfere with the exercise and enjoyment of the rights or freedoms proclaimed in both national and international instruments. Perhaps the only qualitative difference between private infringements and those perpetrated by state actors 'is that the private individual, unless he manages to establish a *de facto* government, can never legally remove or impair any of these rights or freedoms, either generally or individually.'[50] Hobbes is therefore right in saying that laws as such have no power to protect the individual 'without a Sword in the hands of a man, or men, to cause those laws to be put in execution.'[51] This also echoes the republican ideal of freedom that we espouse, according to which the effective and resilient protection of freedom depends on democratic institutional arrangements that constitutes freedom, maintains it and restores it in the event of an infraction.[52]

The fact that the ECtHR recognises that the ECHR 'is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective' should therefore come as no surprise.[53] Article 13 of the ECHR, according to which everyone whose rights as set forth in the ECHR has been violated must 'have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity', says much the same. The state must take necessary measures to give effect to the rights established by law. To use the ECtHR's own words, 'where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress'.[54] This holds true irrespective of whether an alleged violation is to be attributed to a state actor or to a private actor. The right to an effective remedy must always be guaranteed. Moreover, as noted in chapter

49 Hobbes, *Leviathan* (n 5) 109.

50 Vegleris (n 44) 382.

51 Hobbes, *Leviathan* (n 5) 109.

52 See also Quincy Wright, 'Relationship Between Different Categories of Human Rights' in UNESCO (ed), *Human Rights: Comments and Interpretations* (UNESCO 1948) 135.

53 *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979), para 24; *Artico v Italy* App no 6694/74 (ECtHR, 13 May 1980), para 33; *Centro Europa 7 S.r.l. and Di Stefano v Italy* App no 38433/09 (ECtHR [GC], 7 June 2012), para 138. See also *Steel and Morris v the United Kingdom* App no 68416/01 (ECtHR, 15 February 2005), para 59; *Vistiņš and Perepjolkins v Latvia* App no 71243/01 (ECtHR [GC], 25 October 2012), para 114; *Korotyuk v Ukraine* App no 74663/17 (ECtHR, 19 January 2023), para 45. See further Jean-Paul Costa, 'The European Court of Human Rights: Consistency of its Case-Law and Positive Obligations' (2008) 26 *Netherlands Quarterly of Human Rights* 449, 453.

54 *Leander v Sweden* App no 9248/81 (ECtHR, 26 March 1987), para 77.

2, the formal protection that the law affords will be made more effective in securing freedom 'through the reduction of nonintentional obstacles to the enjoyment of uninterfered-with choice: obstacles such as poverty, ill health, handicap or lack of talent, or obstacles that are unintended effects of what others do'.[55]

For ease of reference, we can perceive no more than two divisions of the public power through which government performs the positive duty of the state envisaged here, namely that of enacting laws that establish the rights of the individual and that of administering or implementing those laws.[56] The proper exercise of these two divisions of public power constitutes the very *raison d'être* of the legislative, executive and judicial branches of government and thus of the state itself. It should be acknowledged that the satisfactory performance of the positive duty thus envisaged 'requires institutional capacities that may be beyond the reach of some societies. For example, the courts and the judiciary may be insufficiently developed, law enforcement may be unreliable, and capacities for public administration may be lacking.'[57] But the state is still required to use its public power and available resources for no purpose other than to secure the rights of its people, regardless of how one chooses to classify those rights. To insist that government officials must vegetate and allow citizens to undermine the rights of one another, as if they were still in the state of nature, in the name of promoting so-called 'freedom as non-interference' by public authority is to defy logic. Being a necessary institution, the state 'necessarily has a power of interfering with people: it cannot operate without being able to tax, legislate and penalise the governed.'[58]

The ECtHR's holding to the effect that the primary obligation of the state with respect to 'the majority of the civil and political rights' enshrined in the ECHR, including the rights related to freedom of expression, is 'one of abstention or non-interference' is therefore counterintuitive.[59] In reality, the primary obligation or duty of the state is positive in nature, that is, the duty to take positive measures aimed at securing the freedom or rights of everyone subject to its rule, including by providing necessary resources to make those rights practical and effective.[60] It is no wonder then that the UNHRC underlines that article 2 of the ICCPR requires all states parties to the ICCPR to 'adopt legislative, judicial, administrative, educative and other

55 Philip Pettit, 'Keeping Republican Freedom Simple: On a Difference with Quentin Skinner' (2002) 30 *Political Theory* 339, 343.

56 Paine, *The Rights of Man* (n 24), pt II, 39.

57 Charles R Beitz, *The Idea of Human Rights* (Oxford University Press 2009) 36.

58 Philip Pettit, 'Deliberative Democracy, the Discursive Dilemma, and Republican Theory' in James S Fishkin and Peter Laslett (eds), *Debating Deliberative Democracy* (Blackwell Publishing 2003) 152.

59 *Mathieu-Mohin and Clerfayt v Belgium* (n 25), para 50. See also *Rabczewska v Poland* App no 8257/13 (ECtHR, 15 September 2022), para 49.

60 Philip Pettit, 'Democracy, Electoral and Contestatory' (2000) 42 *Nomos* 105, 112.

appropriate measures in order to fulfil' both their negative and positive duties 'to respect and ensure' the rights set forth in the ICCPR.[61] The UNHRC thus 'believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large.'[62] Unfortunately, apparently because it prioritises the negative duty, despite its continued attempts at developing the so-called 'doctrine of positive obligations',[63] the ECtHR has yet to provide concrete guidance on the nature of the positive duty of the state under the ECHR.

To be fair, the mere recognition that the state has a duty to take necessary measures aimed at securing the rights enshrined in the ECHR has on occasion enabled the ECtHR to scrutinise state conduct in ways that are unimaginable under the classical liberal conception of freedom.[64] In particular, as already noted in chapter 3, the ECtHR has repeatedly held that the genuine, effective guarantee of freedom of expression does not only depend on the negative duty of the state but 'may' also require positive measures of protection, even in the sphere of relations between private individuals.[65] The ECtHR thus recognises that infringements of freedom of expression in private relations may occur in various circumstances and that the state has a positive obligation under article 10 of the ECHR 'to create a favourable environment for participation in public debate by all the persons concerned, enabling

61 United Nations Human Rights Committee, 'General Comment no 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (adopted at the 2187th meeting, 29 March 2004), para 7.

62 Ibid.

63 See generally Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004); Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2012); Tarlach McGonagle, 'Positive Obligations Concerning Freedom of Expression: Mere Potential or Real Power?' in Onur Andreotti (ed), *Journalism at Risk: Threats, Challenges and Perspectives* (Council of Europe Publishing 2015); Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Cambridge University Press 2017).

64 Lavrysen (n 63) 343.

65 *Özgür Gündem v Turkey* App no 23144/93 (ECtHR, 16 March 2000), para 43; *Appleby and others v the United Kingdom* App no 44306/98 (ECtHR, 6 May 2003), para 39; *Khurshid Mustafa and Tarzibachi v Sweden* App no 23883/06 (ECtHR, 16 December 2008), para 32; *Verein Gegen Tierfabriken Schweiz (VgT) v Switzerland (no 2)* App no 32772/02 (ECtHR [GC], 30 June 2009), para 80; *Dink v Turkey* Apps nos 2668/07 and 4 others (ECtHR, 14 September 2010), para 106; *Palomo Sánchez and others v Spain* Apps nos 28955/06 and 3 others (ECtHR [GC], 12 September 2011), para 59; *Remuszko v Poland* App no 1562/10 (ECtHR, 16 July 2013), para 62; *Huseynova v Azerbaijan* App no 10653/10 (ECtHR, 13 April 2017), para 120; *Gaši and others v Serbia* App no 24738/19 (ECtHR, 6 September 2022), para 77.

them to express their opinions and ideas without fear'.[66] The Committee of Ministers of the Council of Europe similarly sees the state not as an enemy but as the ultimate guarantor of pluralism.[67] It thus considers that the state has 'a positive obligation to put in place an appropriate legislative and policy framework to that end.'[68]

Examples of private infringements of freedom of expression envisaged in existing case law include where a private employer dismisses an employee on account of the employee's expressive activity,[69] where a private actor attacks and intimidates a journalist to prevent the journalist from imparting information to the public,[70] and where a private media operator refuses to publish a paid advertisement on behalf of a private party.[71] The ECtHR also specifically recognises, at least in what it considers to be appropriate circumstances, that the state has a positive duty to 'ensure, through its law and practice, that the public has access…to impartial and *accurate* information and a range of opinion and comment'.[72]

The dichotomy that the ECtHR draws between positive and negative obligations is, however, still deeply rooted in the negative, 'liberal-like' conception of freedom as non-interference by the state or public authority. It thus continues to portray so-called 'negative obligations' as the rule and 'positive obligations' as the exception.[73] Significantly, the ECtHR has openly announced that it 'does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals *inter se*.'[74] In its view, the boundaries between the state's positive and negative obligations under the ECHR 'do not lend themselves to precise definition'

66 *Dink v Turkey* (n 65), para 137; *Huseynova v Azerbaijan* (n 65), para 120; *Gaši and others v Serbia* (n 65), para 78. See also *Khadija Ismayilova v Azerbaijan* Apps nos 65286/13 and 57270/14 (ECtHR, 10 January 2019), para 158.

67 Committee of Ministers of the Council of Europe, 'Recommendation CM/Rec(2018)1[1] of the Committee of Ministers to Member States on Media Pluralism and Transparency of Media Ownership' (adopted at the 1309th meeting of the Ministers' Deputies, 7 March 2018), appendix, para 2.1.

68 Ibid.

69 *Fuentes Bobo v Spain* App no 39293/98 (ECtHR, 29 February 2000), para 38; *Palomo Sánchez and others v Spain* (n 65), para 60.

70 *Özgür Gündem v Turkey* (n 65), paras 42-43; *Dink v Turkey* (n 65), para 137.

71 *Vgt Verein Gegen Tierfabriken v Switzerland* App no 24699/94 (ECtHR, 28 June 2001); *Remuszko v Poland* (n 65).

72 *Manole and others v Moldova* App no 13936/02 (ECtHR, 17 September 2009), para 107 (emphasis added). See also *NIT S.R.L. v the Republic of Moldova* App no 28470/12 (ECtHR [GC], 5 April 2022), para 192.

73 Lavrysen (n 63) 343.

74 *VgT Verein gegen Tierfabriken v Switzerland* (n 71), para 46.

and thus must be determined on a case-by-case basis.[75] The result of these pronouncements is, of course, legal uncertainty.

5.2.2 The Negative Duty

The republican insistence on the equal legal status of a free people requires that no citizen whatsoever should be given more rights than others.[76] What this means is that the law must afford people equal protection in their horizontal relations with one another,[77] thereby ensuring equality before the law. But, make no mistake, republicans are not naive. As noted in chapter 2, republicans also take full cognisance of the risk that even a system of law that serves people well in guarding them against arbitrary interference in horizontal relations might 'fail to protect them in the public sphere against the very government that shapes and sustains the system.'[78] That is why republicans have always insisted that the protection of freedom or equal rights demands both equality before and equality over the law. Equality over the law means that there should be no monarch or elite who can 'tailor the law to their own particular will or taste. Such equality [serves to] protect people in their vertical relations with the state, or the government that runs the state, ensuring that they have equal control in the shaping of the law.'[79] A republic 'is nothing more and nothing less than a community organized around these ideas of equality before and equality over the law.'[80]

Indeed, there will be no point in using the law to protect people against arbitrary interference in horizontal relations if those who enact and implement the law can interfere with the people according to their own whims and caprices. The negative duty of the state, or the duty of the state to guard against itself practising what republicans call public 'domination'—thereby achieving political legitimacy,[81] or what liberal thinkers would call the duty of 'non-interference' by public authority, thus arises as a corollary of the positive duty outlined above. What this means in practice is that the negative duty does not take precedence over the positive duty. Nor is the positive duty a mere exception to the negative duty. Rather, as already

75 *Verein Gegen Tierfabriken Schweiz (VgT) v Switzerland (no 2)* (n 65), para 82; *Mouvement raëlien suisse v Switzerland* App no 16354/06 (ECtHR [GC], 13 July 2012), para 50; *Remuszko v Poland* (n 65), para 63. See also *Von Hannover v Germany (no 2)* Apps nos 40660/08 and 60641/08 (ECtHR [GC], 7 February 2012), para 99; *Rabczewska v Poland* (n 59), para 50.

76 Pettit, *Just Freedom* (n 1) 6.

77 Ibid.

78 Pettit, 'Criminalization in Republican Theory' (n 17) 139.

79 Pettit, *Just Freedom* (n 1) 6.

80 Ibid.

81 Pettit, *On the People's Terms* (n 1) 3.

noted above, the negative duty serves only to regulate the exercise of public power in the performance of the positive duty so as to guard people against *arbitrary* interference by public authority. The need to ensure the observance of the negative duty of the state is what turns out to demand a mixed constitution and popular controls over government: in effect, a distinctive form of democracy.[82] As we now know, the exercise of these controls also depends on affirmative legal protection of equal rights or freedom, particularly freedom of expression, freedom of assembly and association, and electoral freedom.

The negative duty that we a speaking about is thus a qualified one. Indeed, it goes without saying that the performance of the positive duty discussed above often entails some form of interference by public authority, in particular by punishing or imposing legal liability on those who infringe the rights of others or by otherwise introducing regulatory and policy measures aimed at securing equal rights. Contrary to the liberal claim that interference as such is the antithesis of freedom, therefore, what is antithetical to freedom is not interference as such but arbitrary interference. What this means in practice is that the state can interfere with people without breaching its negative duty. As noted in the previous chapters, the only proviso is that any such interference must be non-arbitrary in the sense that it must be prescribed by law in accordance with the principle of equal rights. This confirms, and incontrovertibly so, that not all forms of interference by public authority constitute a violation of the freedom that the law protects. Any violation of freedom resulting from interference by public authority occurs only in cases where the impugned interference is arbitrary.

Interestingly, apparently due to the influence of the liberal conception of freedom as non-interference, it would appear that even the drafters of the ECHR themselves did not fully appreciate the nature of the state's negative duty under the ECHR. The drafters set as their primary task the identification of fundamental rights or freedoms which were 'by definition already present' in the national law of each of the member states of the Council of Europe and which 'would be protected by the Council of Europe's system of collective enforcement.'[83] In the exact words of one of the leading participants in the drafting process, the drafters 'agreed without difficulty that the collective enforcement should extend *solely* to rights and freedoms: (a) which imposed on the States *only* obligations "not to do things," which would thus be susceptible to immediate sanction by a court; and (b) which were so fundamental that human dignity and democracy were inconceivable if they were not respected'.[84]

The drafters took the view that so-called 'economic and social' rights did not satisfy these criteria, since the realisation thereof would require state action and

[82] Ibid. See also Pettit, 'Criminalization in Republican Theory' (n 17) 139.
[83] Teitgen (n 20) 3 and 10.
[84] Ibid,10.

resources, thus requiring the state 'to do things'. For this reason, the drafters agreed that those rights 'should be excluded, at least to begin with.'[85] The enshrinement of freedom of expression and freedom of assembly and association in articles 10 and 11 of the original text of the ECHR, among other rights, thus confirms that the drafters were of the view that the rights related to these freedoms satisfied the two criteria. That the tenor of paragraph 1 of article 10 of the ECHR echoes the first of these two criteria should therefore come as no surprise.

As we already know, paragraph 1 of article 10 of the ECHR describes freedom of expression as consisting in freedom to hold opinions and to receive and impart information 'without interference by public authority'. This formulation reaffirms the negative duty of the state or, to use the words of the drafters, the duty 'not to do things' that would amount to arbitrary interference with expressive activity. Article 10 does not therefore create a new negative duty but merely reaffirms, for purposes of collective enforcement, a duty which by definition is already present in the national law of each of the contracting states. Although there may be discrepancies in terms of the extent to which this duty is recognised both in law and in practice, this is consistent with our conception of freedom, according to which the primary duty of the state is to preserve or secure rather than to undermine the rights of the individual. It is obvious that there would virtually be no rights or freedom if, in constituting government and giving it power, the law stopped short of regulating and restraining the power so given.[86]

But the drafters of the ECHR appear to have been misguided in holding the view that the rights related to freedom of expression, freedom of assembly and association, and other political rights enshrined in the original text of the ECHR were inherently different from so-called 'economic and social' rights in terms of the correlative duties of the state. In reality, all rights require both the state and private actors 'not to do certain things' that may undermine those rights. Unfortunately, as already noted above, the drafting history of the ECHR is still haunting us to date. The ECtHR continues to prioritise the negative duty with respect to the majority of the rights enshrined in the ECHR. The classification of rights based on the distinction envisaged by the drafters of the ECHR has even been given formal recognition through the adoption of a separate treaty, the European Social Charter 1961,[87] which provides for so-called 'social and economic rights' as a counterpart to the ECHR, which enshrines some (not all) civil or political rights.

The debate over the perceived distinction between these categories of rights was also a primary consideration in dividing the rights declared in the UDHR into two separate treaties, namely the ICCPR and the International Covenant on Economic,

85 Ibid.
86 See also Paine, *The Rights of Man* (n 24), pt II, 33–34.
87 European Social Charter (adopted 18 October 1961, entered into force 26 February 1965).

Social and Cultural Rights (ICESCR) 1966.[88] It is therefore generally believed that even the rights related to freedom of expression and other fundamental freedoms enshrined in the ICCPR impose a negative duty on the state, whereas the rights enshrined in the ICESCR impose a positive duty in that they require the state to take action.[89] But this, too, is a half-truth at best. The negative duty, like the positive duty, applies to all fundamental rights irrespective of how one classifies them.

5.3 Regulating Political Disinformation in General

So much for an overview of the general duties of the state. We now have a foundation upon which we can build to establish whether the positive duty in particular requires the state to regulate the phenomenon of political disinformation even in the face of the negative duty with respect to freedom of expression. Two of our findings in chapter 4 in this connection are worth recalling at the outset. First, we have already established that political disinformation is a direct threat to one of the elements of freedom of expression, namely freedom to receive information or, more specifically, the right of the public to be properly informed. Second, given that the right of the public to be properly informed is a precondition for the enjoyment of freedom in general, we have further established that political disinformation is a threat not only to freedom of expression but to freedom in general. These two findings provide a good starting point but are not necessarily dispositive of the question as to whether the state has a duty to regulate the phenomenon of political disinformation.

Although the traditional commitment of liberal theory to state minimalism has become compromised by the pursuit of egalitarian objectives which necessarily require the exercise of public power, including through curbs on expression,[90] both witting and unwitting disciples of liberalism remain sceptical about entrusting the state with the responsibility of regulating acts of expression. For these thinkers, the content of an act of expression itself, however emotive it may be, is beside the point. The question that matters for them is whether we can trust the state to put strictures in place.[91] As noted in chapter 1, many commentators are concerned that any public regulation of the phenomenon of political disinformation in particular could undermine one of the elements of freedom of expression, namely freedom to impart information.

Some may thus go so far as to argue that the phenomenon of political

88 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976). See Shelton and Gould (n 40) 564. See also Beitz (n 57) 25–26.

89 Silvia Borelli, 'Positive Obligations of States and the Protection of Human Rights' (2006) 15 *Interights Bulletin* 1.

90 Fiss (n 9) 4.

91 See, for example, Andrew Doyle, *Free Speech and Why it Matters* (Constable 2021).

disinformation creates a conflict between the rights of communicators and those of recipients of political information. In our worldview, however, no such conflict exists. Any perception of conflict stems from the lack of appreciation of the basic fact that freedom to impart information, like other civil rights, has inherent limits. Even the question as to whether we can trust the state to put strictures in place stems from the lack of appreciation of this basic fact.

Indeed, the law already entrusts the state with the responsibility of determining the limits of the rights of both communicators and recipients of information. As already noted in the previous chapters, although paragraph 1 of article 10 of the ECHR is couched in negative terms, paragraph 2 thereof explicitly provides that the exercise of freedom of expression 'carries with it duties and responsibilities' and may therefore be subject to formalities, conditions, restrictions or penalties. Thus, the law already explicitly empowers the state to interfere with expressive activity by imposing formalities, conditions, restrictions or penalties on those who engage in such activity. The only proviso under paragraph 2 of article 10 of the ECHR is that any such interference must be 'prescribed by law' and be 'necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

On the republican account that we adopt, however, there is only one aim the pursuit of which could necessitate any law-based interference with expressive activity, namely that of protecting the freedom or rights of individuals. On this account, the state can be said to have a positive duty to regulate the phenomenon of political disinformation by law only if it can be shown that such regulation is necessary in a democratic society for the protection of the freedom or rights of individuals.

5.3.1 Regulation by Law

In republican political theory, as in constitutional jurisprudence, any restriction by the state of the range of options that people may exercise or otherwise enjoy must be prescribed by law. But what is law, anyway? This question might appear mundane at first blush. But it is not. As noted in chapter 2, the legal status of a free person under the republican ideal of freedom implies two sets of requirements, one of which is objective and the other subjective.[92] First, the law must provide the individual with

[92] Pettit, *Republicanism* (n 42) 70–73; Pettit, *On the People's Terms* (n 1) 83–87; Pettit, 'Criminalization in Republican Theory' (n 17) 138; Pettit, *Just Freedom* (n 1) 57–58.

objective security against arbitrary interference by others, be they private or state actors.

Second, such objective security as provided by law must be registered as a matter of general, intersubjective awareness among all members of the political society. Everyone must be aware that everyone is protected by law and everyone must be aware that this is a matter of common awareness. This is important not least because, unless and until the protection that the law affords to everyone in equal measure has become a matter of common awareness, the weak would still feel obliged 'to kowtow or bend the knee to the powerful, …to fawn on them and curry their [favour], to live at their mercy and beg their grace and [favour].'[93]

To satisfy these two requirements, the law must not only be crafted in such a way that everyone can easily understand it but must also be accessible to everyone concerned. This republican conception of law chimes well with the case law of the ECtHR. The ECtHR considers that the term 'law' in the expressions 'in accordance with the law' and 'prescribed by law' used in articles 8 to 11 of the ECHR must be understood in a substantive rather than in a formal sense. In the ECtHR's view, law includes both statutory law (which also encompasses 'enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament') and judge-made law, that is, law as declared or interpreted by the courts of competent jurisdiction.[94] Importantly, the ECtHR underlines that the expression 'prescribed by law' in paragraph 2 of article 10 of the ECHR does not only require that a restriction on expression should have a legal basis in national law but also refers to the quality of the norm in question.[95] To qualify as 'law', so says the ECtHR, the norm in question 'should be *accessible* to the person concerned and *foreseeable* as to its effects'.[96]

The requirement of foreseeability corresponds to the objective requirement of republican freedom. In this connection, the ECtHR considers that a norm cannot be regarded as law within the meaning of paragraph 2 of article 10 of the ECtHR unless it is formulated with sufficient precision to enable the persons concerned to regulate

93 José Luis Martí and Philip Pettit, *A Political Philosophy in Public Life: Civic Republicanism in Zapateros Spain* (Princeton University Press 2010) 38.

94 *NIT S.R.L. v the Republic of Moldova* (n 72), para 157.

95 *Rotaru v Romania* App no 28341/95 (ECtHR [GC], 4 May 2000), para 52; *VgT Verein gegen Tierfabriken v Switzerland* (n 71), para 52; *Maestri v Italy* App no 39748/98 (ECtHR [GC], 17 February 2004), para 30; *Delfi AS v Estonia* App no 64569/09 (ECtHR [GC], 16 June 2015), para 120; *Perinçek v Switzerland* App no 27510/08 (ECtHR [GC], 15 October 2015), para 131; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* App no 931/13 (ECtHR [GC], 27 June 2017), para 142; *NIT S.R.L. v the Republic of Moldova* (n 72), para 158.

96 Ibid (emphasis added).

their conduct.[97] More specifically, the persons expected to comply with the norm in question must be able, if necessary with appropriate legal advice, to foresee the consequences that may attend a given action.[98] Here, the ECtHR recognises the need for people to be certain about the nature of any options whose exercise is restricted by law. This serves to provide objective security not only against arbitrary interference by public officials who interpret and implement the law, by restricting their discretion; it also provides objective security against arbitrary interference in the sphere of horizontal relations between individuals, by restricting what individuals may lawfully do to one another. The ECtHR nonetheless recognises that it may be neither desirable nor possible to attain absolute precision in the framing of laws, not least in fields in which the prevailing circumstances may evolve with time. It thus considers that the need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are justifiably couched in terms which are somewhat vague and whose interpretation and application are questions of practice.[99]

The requirement of accessibility on the other hand corresponds to the subjective requirement of republican freedom. As already noted, the ECtHR considers that, in addition to the requirement of foreseeability, the law must be accessible to everyone whose conduct the law seeks to regulate. The requirement of accessibility thus ensures that, in keeping with the subjective element of republican freedom, the existence of the law is registered as a matter of common awareness among those whose conduct the law seeks to regulate. As one would expect, the ECHR itself does not prescribe any specific requirements as to the degree of publicity that must be given to a particular legal provision in order to satisfy the requirement of accessibility.[100] It is therefore up to the state to determine the appropriate means of ensuring that the law is easily accessible to the citizenry.

All in all, it would appear that neither of these requirements can prevent the state from regulating the phenomenon of political disinformation. It goes without saying that the requirement of accessibility is particularly easy to satisfy. Indeed, many states already publish and make available various pieces of legislation in the national legislation databases, sources of information easily accessible not only to those at whom the law is targeted but also to members of the general public, including

97 *Rotaru v Romania* (n 95), para 55; *VgT Verein gegen Tierfabriken v Switzerland* (n 71), para 55; *Maestri v Italy* (n 95), para 30; *Lindon, Otchakovsky-Laurens and July v France* Apps nos 21279/02 and 36448/02 (ECtHR [GC], 22 October 2007), para 41; *Delfi AS v Estonia* (n 95), para 121; *Perinçek v Switzerland* (n 95), para 133; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* (n 95), para 143; *NIT S.R.L. v the Republic of Moldova* (n 72), para 159.

98 Ibid.

99 Ibid.

100 *Špaček, s.r.o., v the Czech Republic* App no 26449/95 (ECtHR, 9 November 1999), para 57; *NIT S.R.L. v the Republic of Moldova* (n 72), para 163.

foreigners living abroad. Even the requirement of foreseeability is not insurmountable. We already know in this connection that regulatory measures need not target only those whose conduct may be socially undesirable. For example, provisions governing the right of reply may target providers of communications media not because the providers themselves are at fault but to enable individuals to protect their rights by refuting misleading information which concerns them, thereby also ensuring that the public receives information from a plurality of sources. As noted in chapter 3, the ECtHR has on many occasions upheld the 'lawfulness' of such provisions, holding that the right of reply is in fact an integral part of freedom of expression.[101]

Importantly, our definition of disinformation in general and political disinformation in particular is apt to satisfy the qualitative requirements of the concept of law. More specifically, provisions targeted only at those who communicate misleading political information with intent to mislead would satisfy the requirement of foreseeability.[102] The risk of misapplication of such provisions cannot, of course, be completely eliminated. This is normally the case with many legal provisions, and also explains why the ECtHR does not generally expect absolute legal certainty. Still, the element of intent in our definition of disinformation would ensure a reasonable degree of legal certainty. Those who seek to communicate political information would rest assured that there is a low risk of being held legally liable for doing so unless they are 100 per cent sure that the information they seek to communicate is misleading.[103] This would also operate as an incentive for those who may seek to communicate misleading political information for a purpose other than to mislead the public to indicate that other purpose, directly or otherwise.

5.3.2 Aim of Regulation

In a political society where freedom is the design and end of government, no right can be legitimately restricted or otherwise interfered with by public authority unless on account of another right. Such rights-based interferences have at least three notable virtues. First, they do not admit of interferences on ambiguous grounds which thus allow policymakers and judges wide discretion, thereby giving rise to legal uncertainty and a high risk of abuse of discretionary power. The legal

[101] *Melnychuk v Ukraine* App no 28743/03 (ECtHR, 5 July 2005), para 2; *Kaperzyński v Poland* App no 43206/07 (ECtHR, 3 April 2012), para 66; *Marunić v Croatia* App no 51706/11 (ECtHR, 28 March 2017), para 50; *Eker v Turkey* App no 24016/05 (ECtHR, 24 October 2017), para 43; *NIT S.R.L. v the Republic of Moldova* (n 72), para 200.

[102] See also, *mutatis mutandis*, Jeremy Horder, *Criminal Fraud and Election Disinformation: Law and Politics* (Oxford University Press 2022) 146.

[103] See also, *mutatis mutandis*, Cass R Sunstein, *Liars: Falsehoods and Free Speech in an Age of Deception* (Oxford University Press 2021) 60.

uncertainty and risk of abuse of power that we are speaking about can be readily illustrated by the fact that the ECtHR sometimes accepts interferences with expressive activity on grounds other than those which are specifically enumerated in paragraph 2 of article 10 of the ECHR,[104] whereas on other occasions the same court insists that paragraph 2 provides an exhaustive list of the legitimate aims which the state may invoke to justify an interference with expressive activity.[105] Instead of focusing on the aim of 'maintaining the authority and impartiality of the judiciary', for example, a rights-based interference would simply focus on the protection of the right to a fair trial if indeed the authority and impartiality of the judiciary were threatened by the exercise of a given option.

Second, rights-based interferences do not generally admit of objectionable paternalistic interferences with people's rights: they only involve limiting some people's rights for the sake of other people's rights. These interferences can thus be properly seen as attempts at preventing harm or securing 'a benefit for some agents who are threatened by the actions or omissions of others—they are protective, not paternalistic.'[106] Indeed, the paradigmatic case of paternalistic interference in which the state imposes a restriction on individual rights under the pretext that the restriction is good for the individual is perhaps an insult to the individual's capacity to make his own choices.[107] Any such paternalistic interference may be justifiable only under exceptional circumstances, in particular 'when the subjects of the interference are unable to choose for themselves and when there is good reason to believe that they would authorize the interference if they were in a position to do so.'[108] Under certain circumstances, for example, 'interference to prevent a young girl from consenting to some form of genital cutting might be genuinely paternalistic. But reflection about the circumstances under which this would be true only illustrates how unusual it is, considered as a case of interference' with the sole aim of protecting the rights of the individual.[109]

Third, rights-based interferences merely reflect the fact that freedom is not limitless. As we already know, article 10 of the ECHR (like article 19 of the ICCPR) in particular explicitly declares that the exercise of freedom of expression 'carries with it duties and responsibilities' on the basis of which the state may impose

[104] *Demuth v Switzerland* App no 38743/97 (ECtHR, 5 November 2002), para 37; *Wojczuk v Poland* App no 52969/13 (ECtHR, 9 December 2021), para 2 of the joint dissenting opinion of judges Felici and Ktistakis; *NIT S.R.L. v the Republic of Moldova* (n 72), para 174.

[105] *Catan and others v Moldova and Russia* Apps nos 43370/04, 8252/05 and 18454/06 (ECtHR [GC], 19 October 2012), para 140; *OOO Memo v Russia* App no 2840/10 (ECtHR, 15 March 2022), para 37.

[106] Beitz (n 57) 84.

[107] Ibid.

[108] Ibid.

[109] Ibid, n 24.

formalities, conditions, restrictions or penalties on the exercise and enjoyment of certain expressive options. If anything, there appears to be only one overarching duty or responsibility which every member of a political society owes to other members, namely the duty to respect the rights of others. This appears to be the only duty that is inherent in the exercise of any type of freedom or right secured by law. By the same token, at least on the republican account that we adopt, this duty constitutes the sole basis upon which the state could legitimately restrict the range of options from which the individual may freely choose.

Fortunately, the duty that we are speaking about is already recognised by both national and international instruments insofar as these permit the imposition of legal restrictions on the exercise of certain options in the interest of 'the rights of others'. On the republican account that we adopt, the other interests enumerated in paragraph 2 of article 10 of the ECHR, in paragraph 3 of article 19 of the ICCPR and in other corresponding provisions are superfluous. All those interests can be reduced to one: they are all designed to enable the state to secure the rights of its people. Indeed, as already noted above, the rights of the individual should have no limits other than those that ensure to the other members of society the enjoyment of those same rights.[110] This is perhaps what John Stuart Mill should be understood to mean by his otherwise sweeping claim that 'the *only* purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.'[111]

The logic behind the rights-based interferences that we are advocating, as already noted, is very easy for everyone to understand. Rights and duties are two sides of the same coin. It follows that a declaration of rights is, by necessary implication, a declaration of duties. I have no rights unless you, regardless of who you are, have a duty to respect my rights. Equally, you have no rights unless I, regardless of who I am, have a duty to respect your rights. In short, as Paine puts it, 'whatever is my right as a man, is also the right of another; and it becomes my duty to guarantee, as well as to possess.'[112] This should also explain why the right of the public to be properly informed in particular naturally engenders a corresponding duty, namely the duty to communicate reliable rather than misleading information.

It goes without saying that the right to be properly informed cannot be guaranteed unless everyone who communicates information to the public respects the duty to provide reliable information. This also explains why, as already noted in the previous chapters, the ECtHR considers that the duty of journalists to act in good faith in order

[110] Declaration of the Rights of Man and of the Citizen 1789, art 4.
[111] John Stuart Mill, *On Liberty* (John W Parker and Son 1859) 22 (emphasis added).
[112] Paine, *The Rights of Man* (n 24), pt I, 67. See also Onora O'Neill, 'The Dark Side of Human Rights' (2005) 81 *International Affairs* 427, 428.

to provide accurate and reliable information[113] should apply to everyone who engages in public debate,[114] even though non-journalists may not necessarily be held to the same standard as professional journalists who are expected to act in accordance with the ethics of journalism. The declaration of freedom to receive information as an element of freedom of expression would be meaningless if people were allowed to intentionally disseminate misleading information, as do purveyors of political disinformation.

A law that imposes restrictions or penalties on purveyors of political disinformation would thus merely reaffirm and give effect to the duty to provide reliable information, a duty which is inherent in the legal guarantee of freedom of expression itself, being a necessary corollary of freedom to receive information or, more specifically, the right of the public to be properly informed. This holds true even though, as a matter of legal procedure, article 10 of the ECHR and corresponding provisions of national and other international instruments may not confer upon one individual a direct right of action to enforce this duty against another individual. The declaration of freedom to receive information as an element of freedom of expression itself imposes limits on what both the state and individuals may do.[115] Any lack of a direct right of action against those whose conduct goes beyond the limits imposed by that declaration is but a regulatory gap, requiring appropriate regulatory action.

The enactment of a law merely designed to fill such a gap would not detract from anybody's freedom. On the contrary, such a law would serve to protect freedom to

[113] *Fressoz and Roire v France* App no 29183/95 (ECtHR [GC], 21 January 1999), para 54; *Bladet Tromsø and Stensaas v Norway* App no 21980/93 (ECtHR [GC], 20 May 1999), para 65; *McVicar v the United Kingdom* App no 46311/99 (ECtHR, 7 May 2002), para 73; *Pedersen and Baadsgaard v Denmark* App no 49017/99 (ECtHR [GC], 17 December 2004), para 78; *Steel and Morris v the United Kingdom* (n 53), para 90; *Stoll v Switzerland* App no 69698/01 (ECtHR [GC], 10 December 2007), para 103; *Alithia Publishing Company Ltd and Constantinides v Cyprus* App no 17550/03 (ECtHR, 22 May 2008), para 65; *Kasabova v Bulgaria* App no 22385/03 (ECtHR, 19 April 2011), para 63; *Axel Springer AG v Germany* App no 39954/08 (ECtHR [GC], 7 February 2012), para 93; *Błaja News Sp. z o. o. v Poland* App no 59545/10 (ECtHR, 26 November 2013), para 51; *Armellini and others v Austria* App no 14134/07 (ECtHR, 16 April 2015), para 41; *Pentikäinen v Finland* App no 11882/10 (ECtHR [GC], 20 October 2015), para 90; *Bédat v Switzerland* App no 56925/08 (ECtHR [GC], 29 March 2016), para 50; *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECtHR [GC], 8 November 2016), para 159; *Orlovskaya Iskra v Russia* App no 42911/08 (ECtHR, 21 February 2017), para 109; *NIT S.R.L. v the Republic of Moldova* (n 72), para 180.

[114] *Steel and Morris v the United Kingdom* (n 53), para 90; *Marcinkevičius v Lithuania* App no 24919/20 (ECtHR, 15 November 2022), para 91. See also *Braun v Poland* App no 30162/10 (ECtHR, 4 November 2014), para 47; *Magyar Helsinki Bizottság v Hungary* (n 113), para 159; *Wojczuk v Poland* (n 104), paras 102–03.

[115] See also TM Scanlon, 'Freedom of Expression and Categories of Expression' (1979) 40 *University of Pittsburgh Law Review* 519, 519.

receive information and freedom in general. We already know that the exercise and enjoyment of freedom in general depends on access to proper information about one's viable options at any given time. Moreover, as intimated in chapter 4, freedom in general cannot be guaranteed unless everyone, including recipients of information and third parties who may be harmed by disinformed recipients, is adequately protected from those who may seek to take undue advantage of information asymmetries to mislead others. Quite apart from directly threatening the recipients' right to be informed and thus their freedom of thought and opinion, political disinformation threatens a wide range of other specific rights.[116] These include, among many others, personality rights (in particular, where political disinformation is defamatory), the right to life or health (in particular, where political disinformation relates to a pandemic) and electoral rights (in particular, where political disinformation relates to elections and candidates in political elections). This holds true regardless of whether purveyors of political disinformation themselves are state or private actors, or indeed domestic or foreign actors.

It is therefore surprising that many commentators still claim that freedom of expression is simply freedom from state interference. This way of thinking about freedom must be denounced because it tends to obfuscate the threats that private purveyors of political disinformation pose to the rights of others, particularly within the context of a democratic society. Recall that, even though freedom of expression can be properly seen as one of the cornerstones of democracy, democracy is not an end in itself. Democracy is justified only insofar as it is instrumentally useful in securing the design and end of government, namely freedom. To be useful in this way, democracy, whatever its other features, must include 'both the familiar ideal of giving people electoral control over government and the usually unarticulated ideal of giving them contestatory control as well: giving them the sort of control that comes from the *ability* to contest government decisions.'[117]

Indeed, the main argument for freedom of expression in the context of a democratic society is predicated on the need to give *kratos* to the *demos*: the need to give control over government to the people.[118] The idea of giving control over government to the people is in fact the most abstract idea of democracy with which no one would disagree.[119] Any human conduct that threatens to undermine the ability of people to exercise either electoral or contestatory control over government, as does the act of communicating political disinformation, is a threat to freedom

[116] See also Irene Khan, 'Disinformation and Freedom of Opinion and Expression: Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (A/HRC/47/25, 13 April 2021), paras 22–29 and 33–45.
[117] Pettit, 'Democracy, Electoral and Contestatory' (n 60) 105 (emphasis added).
[118] Philip Pettit, 'Three Conceptions of Democratic Control' (2008) 15 *Constellations* 46.
[119] Pettit, 'Minority Claims under Two Conceptions of Democracy' (n 13) 204.

because it creates room for government to use the apparatus of the state in an arbitrary manner and thus in violation of the negative duty of the state. This holds true regardless of how the perpetrator of such conduct is characterised.

Leaving aside the ideal of electoral control, which is considered separately in section 5.4 below, it should be obvious that the exercise of contestatory control over government depends on a well-informed citizenry. The price of liberty, so an old republican adage goes, is eternal vigilance.[120] Freedom cannot be guaranteed unless citizens, both individually and collectively, keep a watchful eye on the conduct of public officials, both elected and appointed, not only at the time of elections but at all times. Indeed, as Thomas Jefferson observes, a 'well-informed citizenry is the best defense against tyranny.'[121] Yet, as we now know, political disinformation may not only actually mislead people about matters of public interest; it can also erode people's trust in the political information they receive from others, thus making them less informed about the conduct of public affairs. Either way, political disinformation is apt to undermine the ability of people to timely and effectively participate in the conduct of public affairs, including by contesting arbitrary, freedom-undermining public decisions.

The lesson here is that the potential freedom-undermining effects of political disinformation do not generally depend on the nationality or the social status of the people who disseminate such disinformation. Whether disseminated by a private citizen, a trained journalist or any other domestic or foreign actor, political disinformation is a serious threat to freedom in general.[122] It would therefore be perilous for any modern society to underplay the effects of political disinformation even where the disseminators are characterised as private actors or non-journalists who are not expected to abide by the ethics of journalism. Fortunately, no one has a right to disseminate political disinformation. The limits of freedom to impart information can thus be delimited by law as far as the dissemination of political disinformation is concerned, at least with a view to protecting the rights of individuals.

[120] Pettit, *On the People's Terms* (n 1) 5.

[121] Quoted by Maria Hsia Chang and A James Gregor, *Political Populism in the Twenty-First Century: We the People* (Cambridge Scholars Publishing 2021) 139.

[122] For evidence suggesting that private citizens, like other domestic actors, could also play a major role in disinformation campaigns, see Duncan J Watts and David M Rothschild, 'Don't Blame the Election on Fake News. Blame it on the Media' *Columbia Journalism Review* (New York, 5 December 2017); Yochai Benkler, Robert Faris and Hal Roberts, *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics* (Oxford University Press 2018).

5.3.3 Necessity of Regulation

If, as we claim, the sole purpose of the state is to promote freedom or equal rights, then the government that runs the state would be guilt of dereliction of duty if it failed to take appropriate measures to protect the rights of the people. In view of the foregoing discussion, the need for the state to regulate the phenomenon of political disinformation is particularly self-evident. We have already noted in chapter 2 that the law is the primary means by which freedom can be robustly and resiliently protected. Other means of protection such as social norms may complement rather than operate as a substitute for the law. Any failure to regulate the phenomenon of political disinformation can thus be seen as a failure to protect not only the freedom of expression of recipients of political information but also the rights of many other people who may be harmed when the public is disinformed about matters of public interest.

In keeping with the republican ideal of freedom that we espouse, the mere possibility of arbitrary interference by purveyors of political disinformation is a threat to freedom.[123] Such interference, however improbable it may be, remains accessible to potential purveyors of political disinformation. This holds true even in societies where the problem of political disinformation may be less prevalent. The mere absence of legal protection leaves everyone at the mercy of others, since everyone must depend on the good will of others to be assured of being able to meaningfully exercise and enjoy any type of freedom that may be undermined by the dissemination of political disinformation. As already noted in chapter 4, even democratic participation as a means of protecting freedom in general presupposes the very information equality which purveyors of political disinformation intentionally attempt to undermine.[124]

Surprisingly, there are many people out there who still believe that it is unnecessary for the state to regulate the phenomenon of political disinformation. In particular, the liberal scepticism about entrusting the state with the responsibility of regulating acts of expression has seen many commentators advocate what they term 'the non-legal approach',[125] according to which the state should not holistically regulate the phenomenon of political disinformation but should instead encourage

[123] See Philip Pettit, *The Common Mind: An Essay on Psychology, Society, and Politics* (Oxford University Press 1996) 320–21; Pettit, *Republicanism* (n 42) 74 and 88; Quentin Skinner, 'Freedom as the Absence of Arbitrary Power' in Cécile Laborde and John Maynor (eds) *Republicanism and Political Theory* (Blackwell Publishing 2008) 96–97; Philip Pettit, 'Freedom and Probability: A Comment on Goodin and Jackson' (2008) 36 *Philosophy and Public Affairs* 206.

[124] See generally Elizabeth F Judge and Amir M Korhani, 'Disinformation, Digital Information Equality, and Electoral Integrity' (2020) 19 *Election Law Journal* 240.

[125] Horder, *Criminal Fraud and Election Disinformation* (n 102) 132.

education and 'counter-speech'. Of course, it is true that 'media and information literacy, including digital skills and critical thinking, is an essential part of citizenship in the new online environment and a precondition for informed participation in the political life of a country, either as voters or [as] politicians.'[126] Therefore, in performing its positive duty with respect to the right to education as enshrined in article 2 of Protocol 1 to the ECHR and other applicable provisions, the state should 'promote media and information literacy in school curricula, as part of lifelong learning cycles and through support schemes for the media, in particular for public service media and community media.'[127] But that alone or indeed combined with unregulated 'counter-speech' cannot be a solution to the problem of political disinformation.

No amount of education or media literacy can stop purveyors of disinformation from misleading people or at least creating general public distrust in online information, including news.[128] As noted in chapter 4, human communication is necessitated by the information asymmetries that exist between communicators and recipients of information.[129] In the face of information asymmetries, recipients of information**,** however educated they may be, may not be able to distinguish reliable political information from political disinformation. Information asymmetries could thus enable purveyors of disinformation to turn the so-called 'marketplace of ideas' into a 'market for lemons'.[130] Some forms of online political disinformation such as deepfakes, memes and doctored videos are particularly difficult to fact-check or otherwise disprove.[131] Purveyors of political disinformation can therefore always capitalise on information asymmetries to mislead or deceive others or at least to create general indeterminacy and cynicism about the reliability of the information people receive from others.

Even so-called 'counter-speech' cannot be guaranteed to have any meaningful

[126] Committee of Ministers of the Council of Europe, 'Recommendation CM/Rec(2022)12 of the Committee of Ministers to Member States on Electoral Communication and Media Coverage of Election Campaigns' (adopted at the 1431st meeting of the Ministers' Deputies, 6 April 2022) (Recommendation CM/Rec(2022)12), appendix, para 6.6.

[127] Ibid.

[128] Cristian Vaccari and Andrew Chadwick, 'Deepfakes and Disinformation: Exploring the Impact of Synthetic Political Video on Deception, Uncertainty, and Trust in News' (2020) 6 *Social Media + Society* 1.

[129] Per Linell and Thomas Luckmann, 'Asymmetries in Dialogue: Some Conceptual Preliminaries' in Ivana Marková and Klaus Foppa (eds), *Asymmetries in Dialogue* (Harvester Wheatsheaf 1991); Per Linell, *Approaching Dialogue: Talk, Interaction and Contexts in Dialogical Perspectives* (John Benjamins Publishing 1998) 14.

[130] George A Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 *Quarterly Journal of Economics* 488.

[131] Chris Tenove and Heidi JS Tworek, 'Online Disinformation and Harmful Speech: Dangers for Democratic Participation and Possible Policy Responses' (2019) 13 *Journal of Parliamentary and Political Law* 215, 217–18.

countervailing effect on political disinformation unless equal access to the 'marketplace of ideas' is secured by law. To be able to serve any meaningful purpose in this connection, the state must still regulate the 'marketplace of ideas', for example, through some form of a right of reply which would allow people equipped with relevant information or resources for fact-checking to rapidly debunk political disinformation. Policymakers should therefore resist the libertarian impulse that the cure for disinformation, or misinformation, is 'more speech' in an unregulated 'marketplace of ideas'. Indeed, existing scholarship has already exposed the implausibility of an unregulated 'marketplace of ideas',[132] not least in the online context.[133] Any such marketplace is, in any event, the antithesis of the republican ideal of equal status, legally protected freedom.[134]

Fortunately, the law on freedom of expression would not prevent the state from regulating the phenomenon of political disinformation. We already know that purveyors of disinformation as such are not entitled to any legal protection on account of freedom of expression or indeed on account of any other freedom. It should nonetheless be acknowledged that the mere fact that purveyors of political disinformation knowingly violate the duty to act in good faith and with an appropriate level of due diligence in order to provide accurate and reliable information does not absolve the state of its own duty to ensure that any regulatory interference with expressive activity is strictly necessary in a democratic society.[135] According to the case law of the ECtHR, a law-based interference that pursues a legitimate aim can be regarded as being 'necessary in a democratic society' within the meaning of paragraph 2 of article 10 of the ECtHR if it can be shown that there is a *pressing social need* for the law in question and that that law is *proportionate* to the legitimate aim pursued or, in other words, does not go

[132] Stanley Ingber, 'The Marketplace of Ideas: A Legitimizing Myth' (1984) 33 *Duke Law Journal* 1.

[133] See, for example, Philip M Napoli, 'What if More Speech is no Longer the Solution? First Amendment Theory meets Fake News and the Filter Bubble' (2018) 70 *Federal Communications Law Journal* 55, 59; Nathaniel Persily, *The Internet's Challenge to Democracy: Framing the Problem and Assessing Reforms* (Kofi Annan Foundation 2019) 16; Dawn Carla Nunziato, 'The Marketplace of Ideas Online' (2019) 94 *Notre Dame Law Review* 1519; Cass R Sunstein, 'Falsehoods and the First Amendment' (2020) 33 *Harvard Journal of Law & Technology* 387, 393.

[134] Philip Pettit, 'Two Concepts of Free Speech' in Jennifer Lackey (ed), *Academic Freedom* (Oxford University Press 2018); Suzanne Whitten, *A Republican Theory of Free Speech* (Palgrave Macmillan 2022) 95–97.

[135] *Thorgeir Thorgeirson v Iceland* App no 13778/88 (ECtHR, 25 June 1992), para 64; *Incal v Turkey* App no 22678/93 (ECtHR [GC], 9 June 1998), para 53.

beyond what is necessary to attain the legitimate aim pursued.[136]

That there exists a pressing social need for the state to regulate the phenomenon of political disinformation in order to protect the freedom or rights of individuals is undeniable. Empirical research also tends to confirm that misleading online content in particular is not only liable to create general public distrust in online news but often does succeed in misleading people, especially when the misleading content in question supports the recipient's ideological predispositions.[137] It is therefore no exaggeration to say that the phenomenon of political disinformation is a 'clear and present danger',[138] warranting an immediate and a holistic regulatory response. Indeed, the existence of a pressing social need to regulate disinformation in general and political disinformation in particular has always been recognised in democratic societies around the world. This is particularly evidenced by various forms of anti-false information laws that already exist. Such laws apply to disinformation in cases where false information is not only misleading but is also communicated with intent to mislead and may cause harm.

Thus, quite apart from recent attempts at addressing online disinformation (which is often 'erroneously' equated with false information) through both legal and non-legal means alluded to in chapter 1, many states have always regulated various forms of disinformation through various laws. These include received civil, criminal and administrative anti-false information laws that apply to disinformation either more generally (for example, laws governing the media, defamation and fraud) or in more specific contexts (for example, laws governing elections, commercial advertising and perjury).[139] Such laws have generally been accepted as being

[136] *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976), para 49; *Incal v Turkey* (n 135), para 52; *Stoll v Switzerland* (n 113), para 101; *Animal Defenders International v the United Kingdom* App no 48876/08 (ECtHR [GC], 22 April 2013), para 100; *Morice v France* App no 29369/10 (ECtHR [GC], 23 April 2015), para 124; *Delfi AS v Estonia* (n 95), paras 131–39; *Perinçek v Switzerland* (n 95), paras 196–97; *Karácsony and others v Hungary* Apps nos 42461/13 and 44357/13 (ECtHR [GC], 17 May 2016), para 132; *NIT S.R.L. v the Republic of Moldova* (n 72), para 177.

[137] Gallup and Knight Foundation, 'American Views 2020: Trust, Media and Democracy; A Deepening Divide' (Knight Foundation, 9 November 2020) 3–4 <https://knightfoundation.org/wp-content/uploads/2020/08/American-Views-2020-Trust-Media-and-Democracy.pdf> accessed 20 October 2023; Andrew M Guess and others, '"Fake News" May Have Limited Effects beyond Increasing Beliefs in False Claims' (2020) 1 *Harvard Kennedy School Misinformation Review* 1.

[138] Richard L Hasen, *Cheap Speech: How Disinformation Poisons our Politics – and How to Cure it* (Yale University Press 2022) 22.

[139] Peter Roudik and others, *Initiatives to Counter Fake News in Selected Countries: Argentina, Brazil, Canada, China, Egypt, France, Germany, Israel, Japan, Kenya, Malaysia, Nicaragua, Russia, Sweden, United Kingdom* (Law Library of Congress 2019); Tenove and Tworek (n 131) 223–24; Ronan Ó Fathaigh, Natali Helberger and Naomi Appelman, 'The Perils of Legally Defining Disinformation' (2021) 10 *Internet Policy Review* 1, 7–11.

necessary in a democratic society presumably because they contribute to the protection of the rights of individuals, at least insofar as they protect people from the freedom-undermining effects of misleading false information.[140]

Be that as it may, existing anti-false information laws are generally not tailored to tackle the complex phenomenon of political disinformation as we conceive of it. First, such laws tend to be both too narrow and too broad. They tend to be too narrow not only because some of them are designed to address false information only in specific contexts rather than false information relating to matters of broader public interest but also because, as we now know, political disinformation need not be false information. By the same token, various forms of disinformation that are not characterised by falsity may not fall within the scope of existing anti-false information laws. Existing anti-false information laws may also be too broad if they happen to restrict the communication of false but non-misleading information, which is characteristically harmless, and may thus fail the 'necessity test'.

Second, laws that were enacted prior to the digital age are generally inapt to confront the fast-evolving problem of online disinformation in general and online political disinformation in particular. For example, as elaborated in the next chapter, existing laws governing the right of reply generally apply only to traditional media, and yet both misinformation and disinformation is now mostly disseminated through online platforms.[141] Existing laws also fail to adequately address various forms of online political disinformation such as non-defamatory disinformation in the context of political election campaigns, disinformation which threatens public health and disinformation concerning climate change, particularly when such disinformation is disseminated using bots and sock puppet social media accounts and by foreign actors. In short, as intimated in chapters 1 and 4, technological developments and the emergence of online platforms in the 21st century have created a glaring regulatory gap.

All in all, it would appear that it is undeniable that there is a pressing social need to regulate the phenomenon of political disinformation. In the context of our case study, the right to an effective remedy enshrined in article 13 of the ECHR would also require the state to provide effective remedies for people whose rights may be violated through the dissemination of political disinformation, whether offline or

[140] See *United States v Alvarez* 567 US 709, 720–21 (2012), providing a rights-based justification for the offence of perjury. The same justification can be given in respect of other laws, at least insofar as they apply to disinformation.

[141] See generally Charles Danziger, 'The Right of Reply in the United States and Europe' (1986) 19 *New York University Journal of International Law and Politics* 171; András Koltay, 'The Right of Reply in a European Comparative Perspective' (2013) 54 *Acta Juridica Hungarica* 73; Felix Hempel, 'The Right of Reply Under the European Convention on Human Rights: An Analysis of Eker v. Turkey' (2018) 10 *Journal of Media Law* 17.

online.[142] It must be acknowledged, though, that the task of deciding on how exactly to regulate the phenomenon of political disinformation in a holistic rather than in a fragmented manner may be quite daunting. This is so not least because, as we already know, it is a settled principle of law that any restriction on the dissemination of political information calls for the most scrupulous judicial scrutiny of the proportionality of the restriction in question to the legitimate aim pursued.[143]

5.4 Regulating Political Disinformation in the Electoral Context

Good laws, non-arbitrary laws specially designed to advance freedom or equal rights, do not come like a bolt from the blue. They depend on an equal right, first, in the formation of the government that enacts laws and, second, in the choice of the legal norms by which everyone concerned is to be governed and judged.[144] Everyone must therefore have a right to participate, individually or through representatives, in the formation of all laws that bear upon one's freedom. In modern mass democracies, save for matters that may be properly determined only by popular referendum, this right can be exercised but by delegation, that is, by election and representation, thereby instituting representative government.[145] Under such a system of government, the 'right of voting for representatives is the primary right by which other rights are protected. To take away this right is to reduce a man to a state of slavery, for slavery consists in being subject to the will of another, and he that has not a vote in the election of representatives, is in this case.'[146] Other rights are, in any event, largely 'illusory if the right to vote is undermined.'[147]

The question as to whether one is ultimately on the winning or the losing side of an election is beside the point. Voting does not only allow the people as a whole to

[142] See also generally European Commission for Democracy through Law, 'Joint Report of the Venice Commission and of the Directorate of Information Society and Action Against Crime of the Directorate General of Human Rights and Rule of Law (DGI) on Digital Technologies and Elections' **(**Strasbourg, 24 June 2019**)**.

[143] See also *Radio France and others v France* App 53984/00 (ECtHR, 30 March 2004), para 34; *Monnat v Switzerland* App no 73604/01 (ECtHR, 21 September 2006), para 61; *RTBF v Belgium (no 2)* App no 417/15 (ECtHR, 13 December 2022), para 56.

[144] Paine, *Dissertation on the First-Principles of Government* (n 14) 25.

[145] Ibid. See generally Bernard Manin, *The Principles of Representative Government* (Cambridge University Press 1997).

[146] Paine, *Dissertation on the First-Principles of Government* (n 14) 19. See also Martin Agran and Carolyn Hughes, 'You Can't Vote—You're Mentally Incompetent: Denying Democracy to People with Severe Disabilities (2013) 38 *Research & Practice for Persons with Severe Disabilities* 58, 58; Carli Friedman, '"Every Vote Matters:" Experiences of People with Intellectual and Developmental Disabilities in the 2016 United States General Election' (2018) 14 *Review of Disability Studies* 1, 1.

[147] *Wesberry v Sanders* 376 US 1, 17 (1964).

express a popular opinion in the choice of political representatives, thereby creating representative public bodies that can deliberate and implement policies aimed at advancing overall freedom. It is also the only means by which every adult member of a body politic can meaningfully express his acceptance or rejection of would-be representatives on the basis of their actual or expected performance in advancing overall freedom. Voting thus allows everyone to become a contributing member of the political community, thereby achieving full citizenship.[148] In short, everyone's vote matters. Every vote must therefore have the possibility, irrespective of its perceived probability or improbability, of affecting the outcome of the election. Otherwise, the right to vote is devoid of substance.[149]

All in all, 'a popular, periodic electoral system, whatever its other features, holds out a good prospect for forcing government to track the common, perceived interests of the populace. It puts government under a constraint that ought to guard against arbitrariness in that respect', since those in government may not be re-elected if they display indifference to the common interests of the people.[150] Elected representatives can track those interests not only from indications of popular policy programmes based on previous election outcomes but also from both formal and informal, constant contestation of public decisions and public debate by the citizenry.[151] When adequately complemented by contestatory democratisation, therefore, electoral democratisation promises to make representative government accountable and freedom-friendly.

It goes without saying that the effectiveness of electoral democratisation as the primary means by which people voice their opinion in the choice of political representatives and hold those representatives to account for any failure to advance freedom depends on a vibrant political environment that provides voters with a clear and undistorted picture of the proposed policy programmes of the candidates competing for their vote. Those who attempt to manipulate public opinion or to discourage participation in elections, as do purveyors of political disinformation bearing upon elections, directly threaten the very primary right by which other rights are protected under a representative system of government, namely the right to vote. The need to regulate the phenomenon of political disinformation is therefore even more pressing in the context of elections.

Indeed, as the European Commission observes, election 'periods have proven to

148 Martin Agran, William MacLean and Katherine Anne Kitchen Andren, '"I Never Thought about It": Teaching People with Intellectual Disability to Vote' (2015) 50 *Education and Training in Autism and Developmental Disabilities* 388, 388.

149 *Riza and others v Bulgaria* Apps nos 48555/10 and 48377/10 (ECtHR, 13 October 2015), para 148.

150 Philip Pettit, 'Republican Liberty, Contestatory Democracy' in Ian Shapiro and Casiano Hacker-Cordon (eds), *Democracy's Value* (Cambridge University Press 1999) 173.

151 Iris Marion Young, *Inclusion and Democracy* (Oxford University Press 2000) 121–28.

be periods which are particularly prone to targeted disinformation. These attacks affect the integrity and fairness of the electoral process and citizens' trust in elected representatives and as such they challenge democracy itself.'[152] Although, as already noted above, this way of thinking itself is somewhat circuitous, it is undeniable that people are increasingly being 'exposed to disinformation online, making it more challenging to maintain the integrity of elections, ensure pluralistic media and protect the democratic process from manipulation.'[153] Political disinformation can thus negatively affect the electoral process, not only by distorting the political debate pertaining to elections and by diminishing public trust in election campaign information but, ultimately, also by making voters elect candidates they would not otherwise elect.[154] If political debate is distorted by disinformation campaigns, voters may lose trust in, and respect for, politicians. This may discourage voters not only from participating in political debate but also from voting, thereby reducing voter turnout.

If voters cannot trust politicians and election campaign information, political candidates become indistinguishable. This also means that elected public officials cannot be fully accountable for their conduct whilst in office. For example, a politician responsible for unpopular, freedom-undermining policies or some other wrongdoing may avoid the penalty at the ballot box if disinformation about himself or his competitor convinces enough people to re-elect him. If voters are persuaded by disinformation either to accept or to reject a candidate, or if voters vote for a candidate due to lack of proper information concerning the candidates competing for their vote, the election outcome may not accurately reflect the collective will of the people. Political disinformation can indeed change election outcomes, especially in closely contested elections. It is therefore sensible to say that political disinformation bearing upon elections may deprive the *demos* of the very *kratos* upon which a democratic system, whatever its other features, is predicated.

Although those who start from the premise that political disinformation threatens democracy tend to place greater emphasis on online political disinformation campaigns sponsored by foreign actors, the effects of political disinformation are potentially the same regardless of its source. The claim that political disinformation

[152] European Commission, 'Securing Free and Fair European Elections: A Contribution from the European Commission to the Leaders' Meeting in Salzburg on 19–20 September 2018' (Communication) COM(2018) 637 final, 1.

[153] Recommendation CM/Rec(2022)12 (n 126), preamble.

[154] See, *mutatis mutandis*, William P Marshall, 'False Campaign Speech and the First Amendment' (2004) 153 *University of Pennsylvania Law Review* 285, 293–96; Lee Goldman, 'False Campaign Advertising and the "Actual Malice" Standard' (2008) 82 *Tulane Law Review* 889, 895–97; Jacob Rowbottom, 'Lies, Manipulation and Elections – Controlling False Campaign Statements' (2012) 32 *Oxford Journal of Legal Studies* 507, 511–19.

threatens democracy would, of course, be even more forceful if those who propagate this narrative were able to prove that such disinformation distorts the opinion of the electorate to such an extent that it in fact changes election outcomes. But it is difficult in practice to provide conclusive evidence to that effect. Indeed, as noted in chapter 1, the lack of empirical evidence in this connection is the main reason why critics tend to dismiss the claim that disinformation threatens democracy as such.[155]

Fortunately, those of us who champion the cause of freedom, as opposed to democracy for its own sake, need no such evidence. In our world view, we begin with freedom. Democracy is subject to freedom, since its purpose is to promote freedom.[156] Freedom, even when exercised in association with others, is an individual entitlement. Election outcomes are protected only as a corollary of the protection afforded to the individual, since otherwise the physical exercise of electoral rights would be meaningless. That being the case, it suffices for the present purpose to focus on the potential effects of political disinformation on electoral freedom or rights rather than on democracy as such. Some insights from our case study in this connection could turn out to be useful.

Recall that, in terms of article 3 of Protocol 1 (P1–3) to the ECHR, every contracting state undertakes 'to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.' The tenor of P1–3 thus diverges from the purely negative conception of freedom championed by liberal theorists. P1–3 explicitly imposes a positive duty on the state to hold free elections and is silent on the negative duty, that is, the qualified duty of abstention or non-interference discussed above.[157] Even so, as noted in chapters 1 and 2, and consistent with our contention to the effect that all fundamental rights implicate both positive and negative duties, the ECtHR recognises that there are 'implied limitations' in P1–3 to which the state may give effect albeit only in a non-arbitrary manner.[158] In the ECtHR's judgment, however, the positive terms in which P1–3 is couched should be understood as signifying the following: first, that the contracting states 'give greater solemnity to the commitment undertaken' and, second, that 'the primary obligation in the field concerned is not one of abstention or non-interference, as with the

[155] See, for example, Andreas Jungherr and Ralph Schroeder, 'Disinformation and the Structural Transformations of the Public Arena: Addressing the Actual Challenges to Democracy' (2021) 7 *Social Media + Society* 1; Sacha Altay, Manon Berriche and Alberto Acerbi, 'Misinformation on Misinformation: Conceptual and Methodological Challenges' (2023) 9 *Social Media + Society* 1.

[156] Louis Henkin, *The Age of Rights* (Columbia University Press 1990) 108.

[157] *Davydov and others v Russia* App no 75947/11 (ECtHR, 30 May 2017), para 271.

[158] *Mathieu-Mohin and Clerfayt v Belgium* (n 25), para 52; *Melnychenko v Ukraine* App no 17707/02 (ECtHR, 19 October 2004), para 54; *Ždanoka v Latvia* App no 58278/00 (ECtHR [GC], 16 March 2006), paras 103–13.

majority of the civil and political rights, but one of adoption by the State of positive measures to "hold" democratic elections.'[159]

We have already noted in section 5.2 of this chapter that this holding is counterintuitive insofar as it suggests that the primary duty of the state with respect to other political rights is negative in nature. Nevertheless, both the phraseology of P1–3 and the case law of the ECtHR interpreting that provision echo what we have been saying all along, namely that the primary duty of the state with respect to all fundamental rights, whether one classifies them as political rights or otherwise, is to take positive measures aimed at creating an environment that enables the exercise and enjoyment of those rights on an equal footing. Even the ECtHR itself recognises that the duty of the state to hold free elections under P1–3 implies 'the principle of *equality of treatment of all citizens* in the exercise of their right to vote and their right to stand for election.'[160]

It should be acknowledged, though, that existing case law tends to place greater emphasis on democracy rather than on electoral freedom or the rights constituting that freedom. In particular, the ECtHR considers that P1–3 is of prime importance in the human rights system of the Council of Europe because it 'enshrines a principle that is characteristic of an effective political democracy'.[161] In the ECtHR's view, therefore, the main purpose of P1–3 is to establish and maintain 'the foundations of an effective and meaningful democracy governed by the rule of law'.[162] It should now be obvious that this way of thinking is problematic insofar as it portrays 'an effective and meaningful democracy governed by the rule of law', as opposed to freedom or equal rights, as an end in itself.

Fortunately, as already noted, the ECtHR also recognises that the 'free elections' envisaged in P1–3 imply two individual rights, namely the right to vote and the right to stand or run for election.[163] These rights are indeed a precondition for the establishment and maintenance of a representative system of government specially designed to advance freedom or equal rights through the rule of law. Importantly, the need for the state to regulate the phenomenon of political disinformation in the

159 *Mathieu-Mohin and Clerfayt v Belgium* (n 25), para 50.

160 Ibid, para 54 (emphasis added). See also *Communist Party of Russia and others v Russia* App no 29400/05 (ECtHR, 19 June 2012), para 107.

161 *Davydov and others v Russia* (n 157), para 271. See also *Mathieu-Mohin and Clerfayt v Belgium* (n 25), para 47.

162 *Hirst v the United Kingdom (no 2)* App no 74025/01 (ECtHR [GC], 6 October 2005), para 58; *Malisiewicz-Gąsior v Poland* App no 43797/98 (ECtHR, 6 April 2006), para 67; *Kudeshkina v Russia* App no 29492/05 (ECtHR, 26 February 2009), para 87; *Orlovskaya Iskra v Russia* (n 113), para 110; *Communist Party of Russia and others v Russia* (n 160), para 79; *Kalda v Estonia (no 2)* App no 14581/20 (ECtHR, 6 December 2022), para 38.

163 *Mathieu-Mohin and Clerfayt v Belgium* (n 25), paras 48–51; *Ždanoka v Latvia* (n 158), para 102; *Paksas v Lithuania* App no 34932/04 (ECtHR [GC], 6 January 2011), para 96; *Davydov and others v Russia* (n 157), para 271.

context of elections becomes clearer when one focuses on specific rights rather than on democracy or election outcomes as such.

5.4.1 Rights of Voters

Consider, for example, disinformation specifically intended to prevent voters from voting for their preferred candidates, such as disinformation about procedures for voter registration, about when, where or how to vote, or about a candidate's death or withdrawal from the race. Such disinformation could either prevent the affected recipient from voting altogether or render participation in the election a worthless or impossible option in the recipient's cognitive perception of things. In any event, disinformation that is specifically intended to prevent the individual from voting is a direct afront to the right to vote. It should therefore come as no surprise that many commentators contend that democratic states should, as some states already do, outlaw the dissemination of such disinformation.[164] Even the International Specialised Mandates on Freedom of Expression and the Media share this view. In their joint estimation, the state has a duty to 'adopt appropriately clear and proportionate laws that prohibit the dissemination of statements which are specifically designed to obstruct individuals' right to vote, such as by intentionally spreading incorrect information about where or when to vote.' [165]

We must recall, though, that the right to vote protects more than just the physical possibility of casting a vote. To be sure, voting cannot be understood as a mere box-ticking exercise.[166] Even the wording of P1–3 clearly indicates that the right to vote consists in the free expression of the opinion of the people. Although P1–3 itself

[164] See, for example, Judge and Korhani (n 124); Jeremy Horder, 'Criminal Law at the Limit: Countering False Claims in Elections and Referendums' (2021) 84 *Modern Law Review* 429; Jeremy Horder, 'Online Free Speech and the Suppression of False Political Claims (2021) 8 *Journal of International and Comparative Law* 15; Horder, *Criminal Fraud and Election Disinformation* (n 102); Hasen (n 138) 110–15.

[165] United Nations Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe Representative on Freedom of the Media, and Organization of American States Special Rapporteur on Freedom of Expression, 'Joint Declaration on Freedom of Expression and Elections in the Digital Age' (adopted 30 April 2020), para 1(c)(ii).

[166] Horder, 'Criminal Law at the Limit' (n 164) 432.

applies only to elections to 'the legislature',[167] this holds true with respect to political elections at all levels of government and with respect to national referenda.[168] We have already noted that political disinformation may undermine the free expression of the individual opinions of voters not only by actually misleading them about their electoral options but also by making them less informed about their options, particularly if voters cannot trust the electoral information they receive from politicians and other sources, or if voters are discouraged from engaging in political debate due to rampant circulation of political disinformation.

It is particularly objectionable in a society that respects equal rights for one citizen to use disinformation to persuade another citizen to vote for or against a particular candidate. The effect of such conduct is to rob the affected citizen of his vote and thus of his equal status as a citizen. When a citizen succeeds in subjecting another to his will in this way, that citizen can be said to have effectively exercised two votes: his own and that of the manipulated voter. In such circumstances, the harm caused 'is comparable to that of vote buying and voter fraud, where the practice taints the election even if it has no impact on the overall outcome.'[169] Political disinformation that actually persuades individuals to vote for candidates they would not otherwise vote for thus more or less reduces affected individuals to a state of slavery, since their electoral choices are subject to the will of another—in this instance, the will of purveyors of political disinformation. This holds true regardless of the overall outcome of elections or indeed the source of such disinformation. Domestic and foreign purveyors of political disinformation, be they private or state actors, alike can effectively rob individual citizens of their right to vote.

[167] Generally speaking, the scope of P1–3 does not cover presidential elections [*Boškoski v the former Yugoslav Republic of Macedonia* App no 11676/04 (ECtHR [dec], 2 September 2004); *Brito Da Silva Guerra and Sousa Magno v Portugal* Apps nos 26712/06 and 26720/06 (ECtHR [dec], 17 June 2008)], or local government elections; whether at municipality level [*Xuereb v Malta* App no 52492/99 (ECtHR [dec], 15 June 2000); *Salleras Llinares v Spain* App no 52226/99 (ECtHR [dec], 12 October 2000)] or regional level [*Malarde v France* App no 46813/99 (ECtHR [dec], 5 September 2000)]. However, depending on the constitutional structure of the state in question, the ECtHR considers that the notion of 'legislature' may include bodies that exercise legislative power other than the national parliament. P1–3 thus applies to elections to certain regional or provincial bodies [*Mathieu-Mohin and Clerfayt v Belgium* (n 25); *Py v France* App no 66289/01 (ECtHR, 11 January 2005); *Repetto Visentini v Italy* App no 42081/10 (ECtHR [dec], 9 March 2021); *Miniscalco v Italy* App no 55093/13 (ECtHR, 17 June 2021)] and to the European Parliament [*Matthews v the United Kingdom* App no 24833/94 (ECtHR [GC], 18 February 1999), paras 45–54; *Occhetto v Italy* App no 14507/07 (ECtHR [dec], 12 November 2013), para 42].

[168] See, by analogy, *Kwiecień v Poland* App no 51744/99 (ECtHR, 9 January 2007), para 48; *Magyar Kétfarkú Kutya Párt v Hungary* App no 201/17 (ECtHR [GC], 20 January 2020), para 100; *Staniszewski v Poland* App no 20422/15 (ECtHR, 14 October 2021), para 47.

[169] Rowbottom (n 154) 514.

It must be acknowledged, though, that there is something particularly unsettling about undue foreign interference in elections. The right to vote is not only an individual entitlement but is also one of the foundations of the republican ideal of sovereignty which, as noted in chapter 2, is one of the necessary conditions for freedom under a democratic system of government.[170] 'In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential,' not least because the policy programmes that elected officials pursue inevitably shape the people's destiny.[171] Therefore, although they may not necessarily amount to a violation of sovereignty under existing norms of international law,[172] disinformation campaigns sponsored by foreign state actors can usurp the sovereign will of the people. Foreign election disinformation campaigns are also repugnant because they violate 'the membership rules for political decision-making, that is, the idea that only members of a polity should participate in elections—not only with regard to voting but also with regard to financial contributions and other forms of electoral participation.'[173] They thus directly threaten the people's collective right of self-determination, a right which is protected under international law and codified in human rights treaties.[174] The realisation of this right depends on the effective protection of the right to vote against undue external interference.

To be sure, non-resident foreigners as outsiders have no right to participate in the elections of any modern nation state. They are entitled to participate in elections held in their own nation states. Any legal protection that the state may afford to foreign actors in this context is based on the freedom of the citizenry to receive information regardless of frontiers. Otherwise, allowing universal participation in elections 'would effectively undermine the existence of independent polities representing distinct peoples.'[175] Being the guardian of freedom, the state has a duty to protect people from foreigners who may attempt to undermine the people's collective will. The state would therefore be justified in prohibiting any form of undue foreign interference in elections, including undue interference through disinformation campaigns, in order to protect not only the individual right to vote

[170] Pettit, *Just Freedom* (n 1).

[171] *Buckley v Valeo* 424 US 1, 14–15 (1976). See also *Citizens United v Federal Election Commission* 558 US 310, 339 (2010).

[172] Jens David Ohlin, *Election Interference: International Law and the Future of Democracy* (Cambridge University Press 2020).

[173] Jens David Ohlin, 'Election Interference: A Unique Harm Requiring Unique Solutions' in Jens David Ohlin and Duncan B Hollis (eds), *Defending Democracies: Combating Foreign Election Interference in a Digital Age* (Oxford University Press 2021) 240.

[174] See, for example, ICCPR, art 1.

[175] Ohlin, 'Election Interference: A Unique Harm Requiring Unique Solutions' (n 173) 248.

but also the collective right of self-determination.[176] Indeed, some states already prohibit foreign interference in national elections.[177]

In any event, the state need not wait for empirical evidence as to the exact number of individuals whose electoral choices are actually affected by political disinformation in order to take appropriate regulatory action. It is the duty of the state to protect individual voters regardless of the overall outcome of elections. To guarantee effective rights in this context, the state must ensure that people are robustly and resiliently protected against arbitrary interference by potential purveyors of political disinformation. Arbitrary interference with the right to vote, however improbable it may be, remains accessible to everyone. In the absence of legal regulation, this leaves everyone at the mercy of others, since everyone must depend on the good will of others to be assured of being able to meaningfully exercise the right to vote and thus enjoy the collective right of self-determination.

Fortunately, even the ECtHR does not appear to be averse to the enactment of a law that is designed to restrict the act of communicating political disinformation in the context of election campaigns. The ECtHR recognises that a legislative provision that imposes a restriction on the dissemination of election campaign material containing 'untrue' information pursues the legitimate aim of protecting 'the integrity of the electoral process and thus the rights of the voters.'[178] As noted in chapter 4, it is clear from the case law in this connection that the ECtHR is not concerned about untrue or false information as such but is in fact concerned about political disinformation, that is, misleading information communicated with intent to mislead or deceive voters during elections.[179] In the ECtHR's judgment, therefore, a law that is designed to protect voters from such disinformation can be seen as a necessary restriction on expression for the purpose of protecting the 'rights of others' (in this instance, the right to vote) within the meaning of article 10 of the ECHR.

5.4.2 Rights of Candidates

Recall that the right to vote is inextricably linked to the right to run for election. By the same token, any arbitrary interference with the right to run for election, regardless of the source of such interference, is also likely to affect the right of voters to cast a meaningful vote for candidates of their choice.[180] Importantly, like the right to vote protects more than just the physical possibility of casting a vote, the right to run for

176 Ibid, 240.
177 Elections Modernization Act 2018, ss 212 and 282.4, amending Canada Elections Act 2000.
178 *Staniszewski v Poland* (n 168), para 47.
179 *Salov v Ukraine* App no 65518/01 (ECtHR, 6 September 2005), para 113.
180 See generally Christopher Phiri, 'The Right to Run for Election in Zambia: A Preserve of the "Educated" Class?' (2022) 66 *Journal of African Law* 419.

election does not only protect the possibility of a candidate's name appearing on the ballot paper. For the right to run for election to be effective, everyone running for election must have an equal opportunity to influence the popular vote based on genuine policy programme proposals. Political disinformation designed to increase or reduce the return of a candidate at the election, such as disinformation about the withdrawal of a candidate or about a candidate's character or conduct, thus undermines the principle of equality with respect to candidates. In our case study in particular, purveyors of such disinformation undermine the principle of equality that is inherent in the right to run for election enshrined in P1–3.

Some may object to the suggestion that political candidates should be afforded special protection over and above the protection that should be afforded to voters in this context.[181] This objection may appear persuasive at first blush, especially given that both national and international courts in jurisdictions that embrace democracy consider that freedom of expression requires that politicians should be more tolerant to criticism and verbal attacks than private citizens.[182] As noted in chapter 1, the ECtHR also underscores that 'free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system'.[183] Consistent with the foregoing analysis, the ECtHR's case law specifically reaffirms that the exercise of freedom of political debate in accordance with article 10 of the ECHR is one of the conditions necessary to 'ensure the free expression of the opinion of the people in the choice of the legislature' through political elections in accordance with P1–3.[184] The ECtHR thus attaches 'special' significance to the unhindered communication of political information in the context of election campaigns,[185] stressing that 'it is particularly important in the period preceding an election that opinions and information of *all*

[181] See, for example, (*mutatis mutandis*) Rowbottom (n 154) 510–11.

[182] See, for example, *Lingens v Austria* App no 9815/ 82 (ECtHR, 8 July 1986), para 42; *Milisavljević v Serbia* App no 50123/06 (ECtHR, 4 April 2017), para 34; *Makraduli v the former Yugoslav Republic of Macedonia* Apps nos 64659/11 and 24133/13 (ECtHR, 19 July 2018), paras 69–71; *Magyar Jeti Zrt v Hungary* App no 11257/16 (ECtHR, 4 December 2018), para 81; *Prunea v Romania* App no 47881/11 (ECtHR, 8 January 2019), para 30; *Khural and Zeynalov v Azerbaijan (no 1)* App no 55069/11 (ECtHR, 6 October 2022), para 41; *Khural and Zeynalov v Azerbaijan (no 2)* App no 383/12 (ECtHR, 19 January 2023), para 46. See also generally Christopher Phiri, 'Defamation of the President of Zambia: Contextualising the Decriminalisation Debate' (2021) 36 *Southern African Public Law* 1.

[183] *Bowman v the United Kingdom* App no 24839/94 (ECtHR [GC], 19 February 1998), para 42; *Orlovskaya Iskra v Russia* (n 113), para 110. See also *Lingens v Austria* (n 182), paras 41–42; *Mathieu-Mohin and Clerfayt v Belgium* (n 25), para 47.

[184] *Mathieu-Mohin and Clerfayt v Belgium* (n 25), para 54; *Orlovskaya Iskra v Russia* (n 113), para 110. See also *Magyar Kétfarkú Kutya Párt v Hungary* (n 168), para 100.

[185] *Kudeshkina v Russia* (n 162), para 87; *Orlovskaya Iskra v Russia* (n 113), para 110.

kinds are permitted to circulate freely.'[186] This makes sense because there can be no free elections 'without the free circulation of political opinions and information'.[187]

Even so, the ECtHR 'recognises the importance of protecting the integrity of the electoral process from false information that affect voting results, and the need to put in place the procedures to effectively protect the reputation of candidates.'[188] The ECtHR thus considers that a law that provides for a summary judicial procedure for legal redress against the dissemination of 'false information' or 'fake news' related to elections during the period of election campaigns, whether at local or at national level, should not be questioned from the standpoint of the ECHR.[189] In the ECtHR's view, such a law serves the legitimate purpose not only of ensuring the integrity and fairness of the electoral process but also that of protecting the 'reputation or rights of others' (in this instance, candidates in elections) within the meaning of paragraph 2 of article 10 of the ECHR.[190] Although the notions of 'the integrity' and 'fairness' of the electoral process as such are not specifically mentioned in paragraph 2, this confirms that the ECtHR would also uphold a law that is designed to regulate political disinformation that may undermine the 'reputation' or 'rights' of candidates in elections.

To be clear, political disinformation in this context may not only affect the right to reputation as such. It could also directly undermine the right to run for election. Disinformation about a candidate, depending on whether that disinformation puts the candidate in a positive or negative light, may manipulate voters either to vote or not to vote for that candidate. Therefore, although the right to reputation may be protected by national defamation laws and the right to privacy, which is also

[186] *Bowman v the United Kingdom* (n 183), para 42; *Kita v Poland* App no 57659/00 (ECtHR, 8 July 2008), para 37; *Orlovskaya Iskra v Russia* (n 113), para 110; *Staniszewski v Poland* (n 168), para 47.

[187] *United Communist Party of Turkey and others v Turkey* App no 19392/92 (ECtHR [GC], 30 January 1998), para 44; *Communist Party of Russia and others v Russia* (n 160), para 79.

[188] *Staniszewski v Poland* (n 168), para 47.

[189] *Kwiecień v Poland* (n 168), para 55; *Staniszewski v Poland* (n 168), para 54. See also *Brzeziński v Polan*d App no 47542/07 (ECtHR, 25 July 2019), para 35. For a discussion of this string of case law, see Adam Krzywoń, 'Summary Judicial Proceedings as a Measure for Electoral Disinformation: Defining the European Standard' (2021) 22 *German Law Journal* 673.

[190] *Kwiecień v Poland* (n 168), paras 41 and 55; *Kita v Poland* (n 186), paras 35 and 50; *Staniszewski v Poland* (n 168), paras 44 and 54. See also *Brzeziński v Polan*d (n 189), paras 47 and 35.

enshrined in article 8 of the ECHR,[191] election-specific legal safeguards may still be necessary to ensure that the right to run for election is not rendered ineffective or illusory by political disinformation campaigns. First, an ordinary action for defamation or violation of the right to privacy instituted during an official election campaign period may only be heard and determined long after the election. This means that both the law of defamation and the right to privacy may not be adequate to protect the rights of candidates for the specific purpose of elections. Second, political disinformation in this context need not be defamatory or constitute a violation of the right to privacy to mislead voters about a candidate. In particular, political disinformation that puts a candidate in a positive light may not only mislead voters but also rob other, genuine candidates of an equal opportunity to be elected. This holds true regardless of whether such disinformation is disseminated by the candidate concerned or by a third party.

A lack of adequate legal safeguards in this context thus leaves political candidates at the mercy of others, since they must depend on the good will of potential purveyors of disinformation to stand any reasonable chance of being elected. By the same token, political disinformation about candidates may discourage some individuals from vying for public office in the first place and thus from exercising the right to run for election at all, thereby also potentially depriving the citizenry of resourceful political leadership. This is a real possibility, especially in societies where election campaigns are often characterised by disinformation about the personal conduct or character of candidates. Indeed, empirical evidence suggests that women and other people from minority groups are often discouraged from running for public office because of lack of civility in politics, including through disinformation campaigns and other abusive ad hominem attacks.[192] Any effective and resilient guarantee of the right to run for election therefore depends on the adoption by the state of appropriate legal provisions aimed at protecting political candidates from political disinformation, at least during the period of official election campaigns.

191 *Von Hannover v Germany (no 2*) (n 75), paras 104–07; *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECtHR [GC], 10 November 2015), paras 90–93; *Khural and Zeynalov v Azerbaijan (no 1)* (n 182), para 39. See also Christopher Phiri, 'Criminal Defamation Put to the Test: A Law and Economics Perspective' (2021) 9 *University of Baltimore Journal of Media Law & Ethics* 49, 49–50.

192 Law Commission for England and Wales, 'Harmful Online Communications: The Criminal Offences*'* (Consultation Paper 248, 11 September 2020), paras 4.42–4.45; Committee on Standards in Public Life, 'Intimidation in Public Life: A Review by the Committee on Standards in Public Life' (17th Report CM 9543, December 2017). See also Nina Jankowicz, 'How Disinformation Became a New Threat to Women' *Coda Story* (11 December 2017) <https://www.codastory.com/disinformation/how-disinformation-became-a-new-threat-to-women/> accessed 20 October 2023.

5.5 Conclusion

The practical guarantee of freedom or equal rights is contingent upon both the state and individuals playing by democratically established rules.[193] In effect, everyone, whether acting for and on behalf of the state or in a private capacity, has a duty to respect the rights of others. Purveyors of political disinformation breach this duty, not by accident but by design. True, as noted in the previous chapters hereof, freedom to receive information as one of the elements of freedom of expression does not necessarily include an absolute right to always receive accurate or 'fact-checked' information. But freedom to receive information necessarily includes a right to be properly informed where possible. This right creates a corresponding duty that requires everyone who communicates political information to the public to act with an appropriate level of due diligence and in good faith in order to provide reliable information. 'In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players,' this duty 'takes on added importance.'[194]

It goes without saying that no single individual or association of individuals can legally enforce this duty absent appropriate laws adopted through the apparatus of the state. This chapter thus argues that the state, being the guardian of freedom, has a positive duty to adopt appropriate laws to give effect to the right of the public to be properly informed and the corresponding duty of everyone who engages in political communication to provide reliable information to the public, specifically by regulating the phenomenon of political disinformation in a holistic manner. Such regulation would serve to secure not only the right of the public to be properly informed but freedom in general. This should be obvious, especially given the fact that people can neither think correctly nor make free choices without reliable information. By way of illustration, this chapter elaborates upon how—over and above freedom to receive information as such—political disinformation in the context of elections could also directly undermine electoral freedom, including the rights of voters and candidates for public office. Given that these rights are basic features of democracy, however conceptualised, the case for regulation is even more compelling in the context of a democratic society.

Any failure to regulate the phenomenon of political disinformation is necessarily a failure to protect not only the freedom of recipients of political information but the freedom of the people as a whole. In keeping with the republican ideal of freedom that we espouse, the mere absence of legal protection leaves everyone at the mercy of others, since everyone must depend on the good will of others to be assured of

[193] *Bodalev v Russia* App no 67200/12 (ECtHR, 6 September 2022), para 1 of the joint dissenting opinion of judges Elósegui and Lobov.

[194] *Stoll v Switzerland* (n 113), para 104; *Magyar Jeti Zrt v Hungary* (n 182), para 64.

being able to enjoy any of the rights that may be undermined by the dissemination of political disinformation. Nothing would be gained by refraining from regulating the phenomenon of political disinformation in the name of promoting 'freedom' to impart information. No fundamental freedom is subordinate to another.[195] They are all interrelated and interdependent. It would therefore be perilous for any society that claims to value freedom to attempt to privilege the supposed freedom of communicators over the freedom of both individual recipients of political information and third parties who may be harmed by disinformed recipients.

In view of the foregoing, and given that there is no such thing as 'freedom to impart political disinformation', we can safely conclude that the state can indeed regulate the phenomenon of political disinformation without undermining freedom of expression. This conclusion is also substantiated by the fact that democratic societies around the world already have various laws that are at least indirectly applicable to certain forms of political disinformation. Perhaps the only question that remains debatable is how to ensure that all legal measures adopted by the state with a view to regulating the phenomenon of political disinformation in a holistic manner are crafted and administered in a way that is strictly necessary or proportionate to the legitimate aim of protecting the freedom or rights of individuals.

[195] See also *Rabczewska v Poland* (n 59), para 2 of the joint concurring opinion of judges Felici and Ktistakis.

6 Policy Implications

6.1 Introduction

The state, as we now conceive of it, is the guardian of freedom. On this republican account, there is no inevitable struggle between freedom and the exercise of public authority.[1] The former depends on the latter. Indeed, at least in our world view, the state must use its public authority for no purpose other than to create an enabling environment for freedom. By the same token, the state is duty bound to guard its people against the freedom-undermining effects of political disinformation. A protective intervention in this connection would not necessarily take away from anyone's freedom. It would take away from freedom only if the state's power became so extensive as to undermine the rule of law.[2] In regulating the phenomenon of political disinformation, therefore, the state must not overstep certain bounds. To be more specific, in discharging its regulatory duty, the state must not in any way detract from its negative duty, that is, the duty not to interfere with expressive activity in an arbitrary manner.

But just how is the observance of this negative duty to be ensured? Indeed, as we now know, whilst insisting that freedom should be the sole design and end of government, republicans have always 'concerned themselves mainly with how to stop the protective state becoming itself a threat to freedom, the focus being placed on the best checks and balances to introduce in public life.'[3] The checks and balances thus envisaged include all relevant constraints associated broadly with a mixed constitution and popular controls over government.[4] A mixed constitution, as noted in chapter 2, refers to a wide range of institutional arrangements by which the power to make and

1 cf John Stuart Mill, *On Liberty* (John W Parker and Son 1859) 7–8, asserting that the 'struggle between Liberty and Authority is the most conspicuous feature in the portions of history with which we are earliest familiar, particularly in that of Greece, Rome, and England.'

2 Philip Pettit, *The Common Mind: An Essay on Psychology, Society, and Politics* (Oxford University Press 1996) 320.

3 Ibid, 321.

4 Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012); Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (WW Norton & Company 2014). See also Adrian Oldfield, *Citizenship and Community: Civic Republicanism and the Modern World* (Routledge 1990).

administer laws is shared among mutually checking and popularly controlled, representative public bodies. Without prejudice to the requirement of popular controls over government alluded to in chapters 2 and 5, including both contestatory control and electoral control, any regulation of the phenomenon of political disinformation by the state would thus require policymakers to decide on the sort of democratic institutional arrangements under which the ensuing regulatory measures would be administered.

Even before considering the question of administration, however, there are other questions that policymakers must decide on. Some of those questions are characterised by such a high level of granularity that the appropriate answers would vary depending on the relevant context. This chapter does not, therefore, seek to discuss all possible provisions that the state could adopt in order to fulfil its regulatory duty. Rather, the chapter seeks only to provide a policy framework upon which policymakers could build in crafting relevant provisions. The chapter thus focuses only on the most basic and perhaps the most difficult policy issues. As already intimated, the main question that falls for consideration is the following. How can the state regulate the phenomenon of political disinformation without undermining freedom of expression?

It goes without saying that this question cannot be tackled in abstract. This chapter necessarily builds upon the case study and cross-disciplinary analysis conducted in the previous chapters. The remainder of the chapter is accordingly organised as follows. Section 6.2 identifies and problematises two possible approaches that the state could adopt in regulating the phenomenon of political disinformation. The section builds upon Jack Balkin's distinction between the old school and the new school regulatory approaches, targeting communicators directly and Internet intermediary or online platform operators, respectively.[5] Section 6.3 proceeds to identify more specific regulatory mechanisms that policymakers could adopt to circumvent the problems associated with the two regulatory approaches identified in section 6.2. Section 6.4 in turn considers the institutional arrangements under which the ensuing regulatory measures could be administered, to ensure both effective and non-arbitrary implementation and enforcement. Section 6.5 concludes.

6.2 Possible Regulatory Approaches

Political disinformation, as we define it, is misleading information relating to a matter of public interest that is communicated with intent to mislead the public and that may cause harm. Although regulatory measures need not affect only perpetrators of a repugnant act, political disinformation thus defined is suited for sanction-based

[5] Jack M Balkin, 'Old-School/New-School Speech Regulation' (2014) 127 *Harvard Law Review* 2296; Jack M Balkin, 'Free Speech is a Triangle' (2018) 118 *Columbia Law Review* 2011.

regulatory action because there are people responsible for it, namely those who communicate misleading political information with intent to mislead the public.[6] This definition also chimes well with the traditional, or old school, regulatory approach. State regulation of expressive activity typically involves two main players: the state itself as regulator and communicators as regulatees.[7] Article 10 of the ECHR (like article 19 of the ICCPR) fully admits of this state of affairs insofar as it explicitly provides that the exercise and enjoyment of expressive activity may be subject to such legal formalities, conditions, restrictions or penalties as are necessary in a democratic society for the protection of the rights of others.

The old school regulatory approach is, however, becoming inadequate at speed. We are rapidly moving into an age in which private online platform operators hold more collective power and influence than any territorial government over whether and how people communicate to the public. Indeed, it is now common knowledge that online platforms such as search engines, news aggregation services, video-sharing services and social media constitute 'an important part of people's everyday information and communication activities, including their media and news consumption habits'.[8] Even traditional media outlets have become heavily dependent on online 'platforms, with their content no longer being distributed exclusively through printed products, broadcasts, websites and media apps but also through the websites' and applications provided by online platform operators.[9] Additionally, online platform operators occupy a dominant position in online advertising, providing both advertising space and services.[10] It is therefore no exaggeration to say that online platforms constitute the most effective conduits for political disinformation.[11]

But to what extent, if at all, should online platform operators bear legal responsibility for user-generated political disinformation? Indeed, our definition of political disinformation captures only those to whom the relevant intent to mislead

6 Ben Epstein, 'Why it is so Difficult to Regulate Disinformation Online' in W Lance Bennett and Steven L Livingston (eds), *The Disinformation Age: Politics, Technology, and Disruptive Communication in the United States* (Cambridge University Press 2020) 195.

7 Balkin, 'Free Speech is a Triangle' (n 5) 2013.

8 Committee of Ministers of the Council of Europe, 'Recommendation CM/Rec(2022)11 of the Committee of Ministers to Member States on Principles for Media and Communication Governance' (adopted at the 1431st meeting of the Ministers' Deputies, 6 April 2022) (Recommendation CM/Rec(2022)11), preamble.

9 Ibid.

10 Ibid.

11 See also *Packingham v North Carolina* 137 S Ct 1730, 1737 (2017), holding that social media platforms 'can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.'

the public can be attributed. Consistent with the case law of the ECtHR,[12] therefore, online platform operators cannot be held liable for user-generated political disinformation merely for providing a medium of communication. Even so, it is an open secret that online platforms are neither passive nor neutral conduits for user-generated content. Online platform operators play 'an active curatorial or editorial role, including through the use of algorithmic systems, in the dissemination of content produced by the media and by others, and thus have a huge impact on the way people perceive the world and are exposed to [new] information'.[13] Operators of major online platforms in particular shape the genres, speed, curation and dissemination patterns of user-generated content in fast-evolving and often problematic ways.[14] They thus wield so much power over how user-generated content is circulated online that any effective regulation of the phenomenon of political disinformation would depend on how they exercise that power.

By the same token, any effective model of regulation would involve the imposition on at least all operators of major online platforms of legal responsibilities with respect to user-generated political disinformation. What remains debatable, though, is the legal basis upon which the state could introduce such responsibilities. The lingering policy debate in this connection revolves around the broader question as to whether, in view of the power they wield and exercise over the digital public sphere, online platform operators should be regarded as publishers like legacy mass media, as providers of public forums, as common carriers or, even more interestingly, as state actors.[15] This debate is most prominent in the US, primarily because the Communication Decency Act (CDA) 1996 affords online platform operators broad immunity from legal liability for unlawful content posted by users. Subject to certain limited exceptions related to federal criminal activity, electronic privacy laws and intellectual property protection, section 230 of the CDA explicitly

12 *Delfi AS v Estonia* App no 64569/09 (ECtHR [GC], 16 June 2015), paras 142–43; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016), para 69; *Jezior v Poland* App no 31955/11 (ECtHR, 4 June 2020), para 53.

13 Recommendation CM/Rec(2022)11 (n 8), preamble.

14 Spencer McKay and Chris Tenove, 'Disinformation as a Threat to Deliberative Democracy' (2020) 74 *Political Research Quarterly* 703, 705.

15 See generally Rebecca Tushnet, 'Power Without Responsibility: Intermediaries and the First Amendment' (2008) 76 *George Washington Law Review* 986; Adam Thierer, 'The Perils of Classifying Social Media Platforms as Public Utilities' (2013) 21 *CommLaw Conspectus* 249; Mason C Shefa, 'First Amendment 2.0: Revisiting Marsh and the Quasi-Public Forum in the Age of Social Media' (2018) 41 *University of Hawai'i Law Review* 159; Joseph A D'Antonio, 'Whose Forum is it Anyway: Individual Government Officials and their Authority to Create Public Forums on Social Media' (2019) 69 *Duke Law Journal* 701; Eugene Volokh, 'Treating Social Media Platforms Like Common Carriers?' (2021)1 *Journal of Free Speech Law* 377.

provides that '[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.'[16]

In the legal framework of the Council of Europe, by contrast, the answer to the question as to whether and, if so, under what circumstances online platform operators can be held responsible for user-generated content is less clear. Granted, with respect to traditional media, the ECtHR has made it clear that 'publishers, irrespective of whether they associate themselves with the content of their publications, play a full part in the exercise of freedom of expression by providing authors with a medium'.[17] The ECtHR also recognises that operators of publicly accessible online platforms cannot be regarded as 'publishers' of user-generated content in the traditional sense of the word, not least because such operators cannot be reasonably expected to edit user-generated content before publishing it in the same manner as do providers of traditional media. It thus considers that, because of the particular nature of the Internet, the 'duties and responsibilities' that are to be imposed on online platform operators for the purposes of article 10 of the ECHR 'may differ to some degree from those of a traditional publisher as regards third-party content.'[18]

Even so, the ECtHR 'does not lose sight of the ease, scope and speed of the dissemination of information on the Internet, and the persistence of the information once disclosed, which may considerably aggravate the effects of unlawful speech on the Internet compared to traditional media.'[19] It thus maintains that, like traditional publishers, online platform operators must 'under certain circumstances' assume duties and responsibilities for user-generated content.[20] Also, insofar as online

16 Communication Decency Act (CDA) 1996, s 230. For a more detailed discussion of this provision, see Andrew J Ceresney and others, 'Regulating Harmful Speech on Social Media: The Current Legal Landscape and Policy Proposals' in Lee C Bollinger and Geoffrey R Stone (eds), *Social Media, Freedom of Speech and the Future of Our Democracy* (Oxford University Press 2022) xxv–vii.

17 *Editions Plon v France* App no 58148/00 (ECtHR, 18 May 2004), para 22; *Andrushko v Russia* App no 4260/04 (ECtHR, 14 October 2010), para 42; *Orlovskaya Iskra v Russia* App no 42911/08 (ECtHR, 21 February 2017), para 96. See further *Öztürk v Turkey* App no 22479/93 (ECtHR [GC], 28 September 1999), para 49; *Magyar Kétfarkú Kutya Párt v Hungary* App no 201/17 (ECtHR [GC], 20 January 2020), para 87.

18 *Delfi AS v Estonia* (n 12), para 113; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* (n 12), para 62. See also *Orlovskaya Iskra v Russia* (n 17), para 109.

19 *Delfi AS v Estonia* (n 12), para 147; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* (n 12), para 77; *Standard Verlagsgesellschaft mbH v Austria (no 3)* App no 39378/15 (ECtHR, 7 December 2021), para 75. See also *Egill Einarsson v Iceland* App no 24703/15 (ECtHR, 7 November 2017), para 46; *Magyar Jeti Zrt v Hungary* App no 11257/16 (ECtHR, 4 December 2018), para 66.

20 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* (n 12), para 62; *Magyar Jeti Zrt v Hungary* (n 19), para 66.

platform operators provide a forum for the exercise of freedom of expression, enabling the public to impart information, the ECtHR analogises online platform operators with traditional publishers. It thus considers that the conduct of online platform operators should in that respect be assessed in the light of the principles applicable to the press.[21]

All in all, it would appear that the extent to which the state can impose legal responsibilities on online platform operators with respect to user-generated content under article 10 of the ECHR remains largely unclear. On the one hand, the ECtHR considers that online platform operators should not bear the same legal responsibilities as do traditional publishers. On the other hand, the same court analogises online platforms with the press. Such reasoning by analogy can indeed be useful in many cases.[22] But it can also be confusing on occasion. Perhaps our freedom or rights-centred approach to legal reasoning can help clarify the theoretical and legal basis upon, and thus the extent to, which the state may legitimately interfere with the operations of online platforms for regulatory purposes.

6.2.1 Rights of Online Platform Operators

It would appear that the rights that online platform operators exercise in relation to user-generated content are essentially ownership or proprietary rights.[23] On the republican account that we adopt, an online platform operator cannot, for example, claim a legal entitlement to deplatform a user (that is, to ban or exclude a user from a platform) unless by reference to the rights attendant to the ownership of the Internet communications infrastructure in question.[24] Content moderation or editorial decisions that online platform operators make with respect to user-generated content, such as decisions to block the publication of content, decisions to remove or disable access to content, decisions to restrict the visibility or monetisation of content and

21 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* (n 12) para 61; *Standard Verlagsgesellschaft mbH v Austria (no 3)* (n 19), para 67.

22 András Sajó and Clare Ryan, 'Judicial Reasoning and New Technologies: Framing, Newness, Fundamental Rights and the Internet' in Oreste Pollicino and Graziella Romeo (eds), *The Internet and Constitutional Law: The Protection of Fundamental Rights and Constitutional Adjudication in Europe* (Routledge 2016).

23 Pavel Slutskiy, 'Freedom of Expression, Social Media Censorship, and Property Rights' (2020) 48 *Tripodos* 53.

24 See generally Declan Mccullagah, 'Deplatforming is a Dangerous Game' (2019) 50 *Reason* 14; Richard Rogers, 'Deplatforming: Following Extreme Internet Celebrities to Telegram and Alternative Social Media' (2020) 35 *European Journal of Communication* 213.

decisions to attach labels to content,[25] too, have their legal basis in proprietary rights. This holds true even in cases where these decisions are made through the agency of proprietary algorithms, since it is online platform operators themselves that tweak and make 'deliberate choices about how their algorithms should operate, both for business reasons and for ideological ones (sometimes in response to public pressure).'[26]

Online platform operators, it is true, normally protect their proprietary interests by privately regulating the conduct of users through adhesion contracts variously called 'terms of service', 'rules', 'community standards', 'community guidelines', 'policies' and the like.[27] Users are required to accept the terms of these contracts, as revised from time to time, in exchange for the use or the continued use of a given platform. The relationship between online platform operators and users is thus contractual in nature. Even so, as already explained in chapter 5, all rules that govern legal relations should serve no purpose other than to secure freedom in the form of equal rights. It follows that even the rules of contract law that govern the relationship between online platform operators and users should serve no purpose other than to secure the freedom of the parties concerned. On this republican account, any contractual rights that online platform operators may legitimately claim with respect to the use of their Internet communications infrastructure should be seen not as an end in themselves but only as a specific means of securing the online platform operators' own proprietary freedom.

Any expression rights that online platform operators exercise with respect to user-generated content are only ancillary rights. Indeed, it would be paradoxical if

[25] See generally Andrew Chadwick, *The Hybrid Media System: Politics and Power* (Oxford University Press 2017); Sarah Myers West, 'Censored, Suspended, Shadowbanned: User Interpretations of Content Moderation on Social Media Platforms' (2018) 20 *New Media & Society* 4366; Kate Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech' (2018) 131 *Harvard Law Review* 1598; Rikke Frank Jørgensen and Lumi Zuleta, 'Private Governance of Freedom of Expression on Social Media Platforms: EU Content Regulation Through the Lens of Human Rights Standards' (2020) 41 *Nordicom Review* 51; Tarleton Gillespie and others, 'Expanding the Debate about Content Moderation: Scholarly Research Agendas for the Coming Policy Debates' (2020) 9 *Internet Policy Review* 1; Garrett Morrow and others, 'The Emerging Science of Content Labeling: Contextualizing Social Media Content Moderation (2022) 73 *Journal of the Association for Information Science and Technology* 1365.

[26] Ashutosh Bhagwat, 'Do Platforms Have Editorial Rights?' (2021) 1 *Journal of Free Speech Law* 97, 112.

[27] See generally Jacquelyn E Fradette, 'Online Terms of Service: A Shield for First Amendment Scrutiny of Government Action' (2013) 89 *Notre Dame Law Review* 947; Jamila Venturini and others, *Terms of Service and Human Rights: An Analysis of Online Platform Contracts* (2nd edn, Editora Revan 2016); Niva Elkin-Koren, Giovanni De Gregorio and Maayan Perel, 'Social Media as Contractual Networks: A Bottom Up Check on Content Moderation' (2022) 107 *Iowa Law Review* 987; João Pedro Quintais, Naomi Appelman and Ronan Ó Fathaigh, 'Using Terms and Conditions to apply Fundamental Rights to Content Moderation' (2023) 24 *German Law Journal* 881.

online platform operators had a right to interfere with or otherwise censor disfavoured user-generated content on account of their own freedom of expression. Properly understood, freedom of expression cannot possibly include a right to censor the expressive content of others.[28] This holds true even though online platform operators may constitutionally claim editorial rights under the banner of 'freedom of the press'.[29] At least insofar as it relates to the exercise of editorial control, freedom of the press should not be confused with freedom of expression. The press, it is true, exercises freedom of expression by imparting information to the public. As a component of freedom of the press, however, editorial control is not part of freedom of expression properly understood. Rather, editorial control is by definition a form of censorship. This perhaps explains why the First Amendment to the US Constitution protects 'the freedom of speech' and 'of the press' as distinct types of freedom.[30]

In any event, the editorial rights of online platform operators cannot be protected for their own sake, at least not on the republican account that we adopt. Indeed, even the ECtHR underlines that 'editorial discretion is not unbounded.'[31] Editorial discretion should be protected only insofar as it contributes to the guarantee of equal rights. Given that online platform operators do not generally have incentives to promote the freedom of expression of users unless only in ways that are consistent with the platform operators' own proprietary interests, which are principally economic in nature, it follows that any editorial rights that online platform operators may be legally entitled to exercise over user-generated content can still be properly seen as a specific means of protecting the online platform operators' own proprietary interests. It should therefore suffice for the present purpose to examine the interests of online platform operators through the lens of proprietary freedom.

On the republican account that we adopt, as with respect to all private property, the state has a duty to control the use of Internet communications infrastructure whenever it is necessary to do so in order to secure the freedom or rights of its people. By the same token, following from our analysis in chapter 5, the state has a duty to regulate the use of Internet communications infrastructure in order to protect people from online political disinformation. True, as noted above, some jurisdictions exempt online platform operators from legal responsibility for unlawful user-

[28] *NetChoice, LLC v Paxton* 49 F.4th 439 (5th Cir 2022). cf Ioanna Tourkochoriti, 'The Digital Services Act and the EU as the Global Regulator of the Internet' (2023) 24 *Chicago Journal of International Law* 129, 134, asserting that 'social media platforms' *own* right to freedom of speech covers how they allow users to express themselves.'

[29] Ceresney and others (n 16) xxviii.

[30] Melville B Nimmer, 'Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech' (1975) 26 *Hastings Law Journal* 639. cf Tourkochoriti (n 28) 134.

[31] *Index.hu Zrt v Hungary* App no 77940/17 (ECtHR, 7 September 2023), para 24.

generated content and instead hold users themselves responsible by means of civil and criminal law under the old school regulatory approach. Such jurisdictions, in other words, tend to privilege the proprietary rights of online platform operators over the rights of users and third parties who may be harmed by users. Although analogies can be problematic, this so-called 'liberal' regulatory approach,[32] the epitome of which is section 230 of the CDA, can be likened to a regime that gives private landowners control over people who visit the land in the hope that the owners will make socially optimal use of the land whilst also exempting the landowners from nuisance laws when visitors inflict harm on third parties.[33] Such a regulatory approach is, in any event, untenable on the republican account that we espouse.

The inadequacy of the so-called 'liberal' regulatory approach was already exposed in the US at the height of the COVID-19 pandemic. Given that there was no legal basis upon which they could require online platform operators to help contain the spread of COVID-19 disinformation and misinformation on major online platforms, particularly on Facebook, Twitter (now known as X) and YouTube, some US federal officials resorted to unlawful means of protecting people's lives. They started coercing online platform operators into censoring user-generated content. They did so not only by directing online platform operators to remove posts which the officials concerned regarded as medical 'misinformation' but also by requiring the online platform operators concerned to deplatform users that allegedly disseminated such misinformation and to restrict the visibility of disfavoured content whilst increasing the visibility of the officials' own preferred content.[34] This example serves only to reaffirm the inevitability of state interference with the operations of online platforms under any effective model of regulation.

To be clear, the argument is not that the state should privilege the rights of users or of third parties over the proprietary rights of online platform operators. Nor is the argument that the state should impose an impossible or a disproportionate legal burden on online platform operators.[35] Rather, the argument is that the state should regulate the conduct of all the parties concerned in a manner that guarantees equal rights. Even the question as to whether or not user-generated content should be attributed to online platform operators is not dispositive. In any event, the state has

32 Jeremy Horder, *Criminal Fraud and Election Disinformation: Law and Politics* (Oxford University Press 2022) 132.

33 Tushnet (n 15) 1008–09, n 96.

34 *Missouri v Biden* Case no 23-30445 (5th Cir 2023).

35 *Yaşar v Romania* App no 64863/13 (ECtHR, 26 November 2019), paras 50–51; *Căpăţînă v Romania* App no 911/16 (ECtHR, 28 February 2023), para 45. See also, by analogy, *Osman v the United Kingdom* 23452/94 (ECtHR [GC], 28 October 1998), para 116; *Appleby and others v the United Kingdom* App no 44306/98 (ECtHR, 6 May 2003), para 40; *Verein Gegen Tierfabriken Schweiz (VgT) v Switzerland (no 2)* App no 32772/02 (ECtHR [GC], 30 June 2009), para 81.

a duty to take appropriate regulatory action in order to secure the rights of all the parties concerned. Nor is there any conflict between the proprietary rights of online platform operators on the one hand and the rights of users and third parties who may be harmed on the other hand. The rights of members of an organised political society, as already noted in chapter 5, have inherent limits by virtue of the rights of other members of the society.[36] On this republican account, no one has a right to use their property or to conduct oneself in a manner that undermines the rights of others. By the same token, no right can come into conflict with another when the limits of every right are properly determined. The limits that we are speaking about, as we now know, can be determined only by law based on the principle of equal rights.[37]

This republican-inspired stand also finds support in the actual wording of article 1 of Protocol 1 (P1–1) to the ECHR, according to which the right to property as enshrined therein does not in any way impair the 'right' of the state 'to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.' In the ECtHR's view, P1–1 sets the state up as the 'sole' judge of the necessity for such laws and may, as regards 'the general interest', induce the legislature to control the use of property even in the area of dispositions *inter vivos* or by will.[38] It would therefore appear that the state can claim even broader discretionary power to regulate the use of Internet communications infrastructure under P1–1 than under the republican public power that we are advocating, which can be exercised only as a matter of duty rather than as a matter of right and for the sole purpose of securing equal rights.

Indeed, it would appear that every modern democratic society worthy of the name already recognises that it is the responsibility of the legislature to create incentives for providers of both offline and online communications media to conduct themselves in a manner that is consistent with the common interests of society.[39] The fact that there are already various pieces of legislation across jurisdictions that regulate the conduct and liability of both traditional media and online platform operators cannot be a mere fortunate stroke of serendipity. It should therefore be acceptable for us to proceed on the premise that, at least as a general proposition, the state wields legitimate power to regulate not only the conduct of communicators, under the old school regulatory approach, but also the use by online platform operators of Internet communications infrastructure, under the new school regulatory approach.

36 Declaration of the Rights of Man and of the Citizen 1789, art 4.
37 Ibid.
38 *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979), para 64. See also *Căpăţînă v Romania* (n 35), para 44.
39 Tushnet (n 15) 987.

6.2.2 Old School Regulation

Many states already regulate various forms of disinformation, including political disinformation, through the old school regulatory approach. As intimated in chapter 5, most existing anti-false information laws that apply to disinformation (specifically, in cases where false information is not only misleading but is also communicated with intent to mislead and may cause harm) target communicators. In Lithuania, for example, the Law on the Provision of Information to the Public 1996 explicitly prohibits the dissemination of disinformation,[40] although the law itself defines disinformation simply as 'intentionally disseminated false information'.[41] There are also many other Council of Europe and EU member states (such as Austria, Croatia, Cyprus, the Czech Republic, France, Greece, Hungary, Malta, Romania, Slovakia and Sweden) that criminalise the publication or dissemination of false news or information,[42] including false information which qualifies as disinformation as we define it. As a specific category of anti-false information laws, existing defamation laws, be they civil or criminal in nature, are also applicable to defamatory disinformation.

Interestingly, the old school regulatory approach appears even in legislative provisions that are specifically intended to address online false information.[43] The Singaporean Protection from Online Falsehoods and Manipulation Act (POFMA) 2019, for example, does not only target online platform operators but also directly criminalises the act of communicating a false statement of fact where the communicator either knows or has reason to believe that the statement in question is false and is likely to cause certain types of harm.[44] A statement is considered false within the meaning of the POFMA 'if it is false or misleading, whether wholly or in part, and whether on its own or in the context in which it appears.'[45] Therefore, the provisions of the POFMA diverge from the analysis conducted in chapter 4 hereof insofar as they conflate false information with misleading information. A person convicted of communicating a false statement of fact thus defined is liable to a fine

40 Law on the Provision of Information to the Public 1996, art 19(2).
41 Ibid, art 2(13).
42 Judit Bayer and others, *The Fight Against Disinformation and the Right to Freedom of Expression* (European Union 2021) 46–49; Ronan Ó Fathaigh, Natali Helberger and Naomi Appelman, 'The Perils of Legally Defining Disinformation' (2021) 10 *Internet Policy Review* 1, 7–11.
43 See Giovanni Pitruzzella and Oreste Pollicino, *Disinformation and Hate Speech: A European Constitutional Perspective* (Bocconi University Press 2020), ch 3; Oreste Pollicino, Giovanni De Gregorio and Laura Somaini, 'The European Regulatory Conundrum to Face the Rise and Amplification of False Content Online' in Giuliana Ziccardi Capaldo (ed), *The Global Community Yearbook of International Law and Jurisprudence 2019* (Oxford University Press 2020).
44 Protection from Online Falsehoods and Manipulation Act (POFMA) 2019, s 7.
45 Ibid, s 2.

and/or to imprisonment.[46] In addition, and irrespective of the communicator's criminal inculpability, a government minister may require any person who communicates a false statement of fact in Singapore to publish a correction notice, notifying the public that the statement in question is false, and/or to stop communicating the statement in question.[47] Failure to comply with any such 'correction' or 'stop communication' direction is yet another criminal offence.[48] It is also interesting to note that the POFMA criminalises the act of making or altering a bot with the intention of communicating, or of enabling another person to communicate, by means of the bot, a false statement of fact.[49] Even the offence of communicating a false statement itself attracts more severe penalties in cases where the statement in question is communicated using a bot or an inauthentic online account.[50]

Quite apart from provisions that apply more generally, there are various old school anti-false information provisions across jurisdictions that apply to disinformation only in specific contexts. In the United Kingdom (UK), for example, it is illegal under the Representation of the People Act 1983, before or during an election, to make or publish a false statement of fact in relation to a political candidate's personal character or conduct for the purpose of affecting the return of the candidate at the election.[51] The Polish Electoral Code 2011 similarly provides for a summary judicial procedure aimed at addressing the dissemination of false information in the specific context of political elections.[52] The provision in question, which has been in force at least since 1998,[53] confers upon a political candidate or a representative of the campaign committee concerned a right to make an application to a regional court seeking, among other possible reliefs, an injunction prohibiting the defendant from disseminating election campaign material containing false information.[54] The court must determine the matter and make appropriate orders

46 Ibid, s 7(2) and (3).
47 Ibid, ss 11 and 12.
48 Ibid, s 15.
49 Ibid, s 8.
50 Ibid, s 7(3).
51 Representation of the People Act 1983 (c 2), s 106. See *Woolas, R (on the application of) v The Speaker of the House of Commons* [2010] EWHC 3169 (Admin), para 87, explaining the purpose of this provision.
52 *Ustawa z dnia 5 stycznia 2011 r. Kodeks wyborczy* (Electoral Code), art 111. See *Staniszewski v Poland* App no 20422/15 (ECtHR, 14 October 2021), para 47. See also Adam Krzywoń, 'Summary Judicial Proceedings as a Measure for Electoral Disinformation: Defining the European Standard' (2021) 22 *German Law Journal* 673, 682–85.
53 *Kwiecień v Poland* App no 51744/99 (ECtHR, 9 January 2007), para 27; *Kita v Poland* App no 57659/00 (ECtHR, 8 July 2008), para 22; *Brzeziński v Polan*d App no 47542/07 (ECtHR, 25 July 2019), para 28.
54 Electoral Code 2011, art 111.

within 24 hours of receiving the application.[55]

Some of the existing provisions that apply to disinformation may be compatible with freedom of expression, depending not only on how they are framed but also on how they are interpreted and implemented in practice. For example, the ECtHR considers that the Polish provision on the summary judicial procedure referred to above is 'lawful' under article 10 of the ECHR but has also repeatedly found Poland to have violated freedom of expression when applying that provision in practice.[56] Defamation laws are also generally regarded as a necessary means of protecting personality rights, and yet some of them, not least criminal defamation laws, may be incompatible with freedom of expression.[57] In states such as Canada, Zimbabwe and Zambia, on the other hand, the national courts have found to be wholly incompatible with freedom of expression the provisions that used to criminalise the publication of false statements or false news.[58]

In any event, we already know that the choice of terminology renders existing anti-false information and related laws generally unsuitable for the purpose of tackling the complex phenomenon of political disinformation as we conceive of it. A suitable and comprehensive regulatory framework must at least target misleading information rather than false information or other types of information, whether such information is communicated offline or online. As explained in chapters 4 and 5, this appears to be inevitable if policymakers are to ensure that the measures adopted in the name of regulating the phenomenon of political disinformation do not fall short of or indeed go beyond what is necessary to protect the freedom of individuals in accordance with the principle of equal rights.

The regulatory measures thus envisaged need not target only purveyors of political disinformation. Provisions on the right of reply, for example, could not only directly affect operators of media outlets but also everyone who communicates misleading information to the public through any media, whether such information is to be characterised as disinformation or as misinformation. Even so, any penal sanctions should be imposed only on those who communicate political disinformation and, where appropriate, those who disregard non-penal regulatory measures (for example, media outlets that fail to comply with the provisions on the right of reply). The regulatory measures could, in any event, apply to political disinformation communicated both offline and online. In both contexts, any

55 Ibid.

56 *Kwiecień v Poland* (n 53); *Kita v Poland* (n 53); *Brzeziński v Poland* (n 53).

57 Christopher Phiri, 'Criminal Defamation Put to the Test: A Law and Economics Perspective' (2021) 9 *University of Baltimore Journal of Media Law & Ethics* 49; Christopher Phiri, 'Defamation of the President of Zambia: Contextualising the Decriminalisation Debate' (2021) 36 *Southern African Public Law* 1.

58 *R v Zundel* [1992] 2 SCR 731; *Chavunduka and others v Minister of Home Affairs and another* [2000] JOL 6540 (ZS); *Chipenzi and others v The People* [2014] ZMHC 112.

sanctions imposed on communicators should target the disease, not the symptom. The disease is political disinformation, not political misinformation.

To be clear, those who happen to share misleading political information created by others under a mistaken belief that it is accurate and non-misleading, or to highlight its misleadingness and warn others about it, or because they find it humorous or satirical, should not be penalised for doing so. Even those who might have good reason to suspect that a particular piece of political information received from others is both inaccurate and misleading should not be penalised unless the relevant intent to mislead can be established.[59] In short, a distinction must be made between purveyors of political disinformation on the one hand and those who communicate misleading political information in good faith and without any intent to mislead the public on the other hand. Any penal sanctions to be imposed on communicators should target the former, not the latter.

Be that as it may, the old school regulatory approach would come with its own challenges. To begin with, as noted in chapters 1 and 4, it may be difficult or even impossible to trace purveyors of online political disinformation. They may be anonymous or pseudonymous. How are these to be held accountable? Another challenge relates to foreign actors, that is, those who may be accused of communicating political disinformation from a foreign location. How are these to be regulated? A third challenge relates to the allocation of the responsibility of determining what constitutes political disinformation. Who should determine what constitutes political disinformation for regulatory purposes?

6.2.2.1 Anonymous/Pseudonymous Actors

The need to preserve the right to anonymity cannot be underplayed. As David Kaye points out in his 2015 UN Special Rapporteur's report on the Promotion and Protection of the Right to Freedom of Opinion and Expression, anonymity does not only enable individuals to protect their right to privacy but also enables 'journalists, civil society organizations, members of ethnic or religious groups, those persecuted because of their sexual orientation or gender identity, activists, scholars, artists and others' to exercise freedom of expression without fearing reprisals or attracting unwanted attention.[60] This is especially true with respect to freedom of expression on the Internet.[61] Indeed, even with respect to the online press, the ECtHR considers

[59] cf POFMA, s 7, prohibiting the communication of a 'false statement of fact' not only when one knows but also when one has 'reason to believe' that the statement is false.

[60] David Kaye, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (A/HRC/29/32, 22 May 2015), para 1.

[61] *Delfi AS v Estonia* (n 12), para 147; *Standard Verlagsgesellschaft mbH v Austria (no 3)* (n 19), para 76.

that a legal obligation imposed on a media company to disclose the identity of readers who post comments on its news website could not only deter Internet users 'from contributing to debate and therefore lead to a chilling effect among users posting in forums in general.'[62] In the ECtHR's view, such an obligation could also indirectly interfere with freedom of the press contrary to article 10 of the ECHR, since the commenters' anonymity could serve the interests of a media company.[63]

Fortunately, purveyors of political disinformation as such are not legally entitled to anonymity. Nor can they completely escape the long arm of the law.[64] First, as the ECtHR already recognises, the law (not least article 10 of the ECHR) does not guarantee an absolute right to anonymity.[65] Second, as the Committee of Ministers of the Council of Europe points out, the right to anonymity does not prevent states from taking measures or 'co-operating in order to trace those responsible for criminal acts, in accordance with national law, the…[ECHR] and other international agreements in the fields of justice and the police.'[66] Existing law thus leaves sufficient latitude for the state to regulate anonymous and pseudonymous communication, not least through the use of bots and sham, sock puppet social media accounts**.**

Indeed, as intimated above, some states have already adopted legislative provisions aimed at restricting the use of bots and sham online accounts to spread false information. A notable example is Singapore.[67] Our analysis does not, of course, comport with the regulatory measures contained in the Singaporean POFMA. But the point being underlined is that, whilst it is true that the possibility of anonymous communication should be preserved for the sake of freedom, nothing prevents the state from regulating the conduct of those who deliberately misrepresent their identity in order to spread political disinformation, thereby threatening the

62 *Standard Verlagsgesellschaft mbH v Austria (no 3)* (n 19), paras 74–80.

63 Ibid.

64 See, for example, Catherine Van de Heyning, 'The Boundaries of Jurisdiction in Cybercrime and Constitutional Protection: The European Perspective' in Pollicino and Romeo (eds) (n 22).

65 *Delfi AS v Estonia* (n 12), para 147; *Standard Verlagsgesellschaft mbH v Austria (no 3)* (n 19), para 75.

66 Committee of Ministers of the Council of Europe, 'Declaration on Freedom of Communication on the Internet' (adopted at the 840th meeting of the Ministers' Deputies, 28 May 2003), principle 7. See also Committee of Ministers of the Council of Europe, 'Recommendation CM/Rec(2014)6 of the Committee of Ministers to Member States on a Guide to Human Rights for Internet Users' (adopted at the 1197th meeting of the Ministers' Deputies, 16 April 2014), appendix, stating that 'you may choose not to disclose your identity online, for instance by using a pseudonym. However, you should be aware that measures can be taken, by national authorities, which might lead to your identity being revealed.'

67 POFMA, s 8.

rights of others.[68] Therefore, the question that we should zero in on in this connection is how exactly to regulate such bad actors without undermining the right to anonymity.

6.2.2.2 Foreign Actors

Quite apart from the general difficulty in establishing the true intent of online communicators, whether they use authentic or inauthentic online accounts, foreign actors may not be subject to the jurisdiction of their accusers and thus may have no opportunity to defend themselves. To be clear, the point is not that foreign actors as such have a right to impart political information. Rather, the point is that people have the right to receive political information regardless of its source.[69] What is at stake, then, is not the freedom of foreign actors but the freedom of recipients of political information. This is perhaps what article 10 of the ECHR and corresponding provisions of other legal instruments should be understood to mean insofar as these protect freedom of expression regardless of frontiers. Indeed, the state owes its duties only to people who are within (not outside) its jurisdiction.[70]

It goes without saying that the state wields legitimate power to restrict the dissemination of information from other jurisdictions, not least in cases where such information is clearly disseminated as part of a coordinated disinformation campaign aimed at undermining electoral rights or the collective right of self-determination.[71] But this does not mean that national authorities should treat as undue foreign interference all political information communicated from a foreign location and seek to prohibit or restrict the dissemination of such information solely on the basis of its source. That would be a blatant violation of freedom to receive information regardless of frontiers.[72] Indeed, in the absence of the possibility of foreign actors contesting the decisions by national authorities to restrict or prohibit the dissemination of political information by such actors, there is a particularly high risk

68 *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008), para 49; *Standard Verlagsgesellschaft mbH v Austria (no 3)* (n 19), para 91.

69 Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (Harper & Bros 1948) 60.

70 See ECHR, art 1.

71 Jens David Ohlin, *Election Interference: International Law and the Future of Democracy* (Cambridge University Press 2020); Jens David Ohlin, 'Election Interference: A Unique Harm Requiring Unique Solutions' in Jens David Ohlin and Duncan B Hollis (eds) *Defending Democracies: Combating Foreign Election Interference in a Digital Age* (Oxford University Press 2021).

72 *Ahmet Yildirim v Turkey* App no 3111/10 (ECtHR, 18 December 2012), para 67; *Cengiz and others v Turkey* Apps nos 48226/10 and 14027/11 (ECtHR, 1 December 2015), para 65. See also *Ekin Association v France* App no 39288/98 (ECtHR, 17 July 2001), para 62.

of arbitrariness resulting from the indeterminacy about what could be properly regarded as 'undue' foreign interference or meddling in elections.[73] It is therefore worth underlining that, although the specific regulatory techniques may vary depending on where the communicator is located, what should matter for regulatory purposes is not what jurisdiction political information comes from but whether such information can be properly regarded as political disinformation. Freedom to receive political information regardless of frontiers demands as much.

6.2.2.3 Arbiters of Political Disinformation

Whilst it is true that there may be no constitutional value in political disinformation,[74] liberal thinkers have always insisted that the state cannot be trusted with the responsibility of policing the veracity of political statements. The element of intent in our definition of disinformation would indeed ensure that any sanctions targeted at purveyors of political disinformation satisfy the rule of law requirement of foreseeability. But to deny that it would be highly perilous to empower a politician or the police to be the arbiter of what amounts to political disinformation is to be disingenuous.[75] In principle, only competent judicial authorities rather than other government agencies are in pole position to serve as reliable arbiters of lawful expression.[76]

6.2.3 New School Regulation

A survey of emerging legislative measures applicable to online disinformation reveals at least three possible new school regulatory models. Under one model, the state delegates to online platform operators the responsibility of regulating online expression by imposing legal obligations on online platform operators to censor disfavoured user-generated content. Under another model, the state empowers

73 Horder, *Criminal Fraud and Election Disinformation* (n 32) 42.

74 See, *mutatis mutandis*, *Garrison v Louisiana* 379 US 64, 75 (1964), holding that 'the knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection'; *Gertz v Robert Welch, Inc* 418 US 323, 340 (1974), holding that 'there is no constitutional value in false statements of fact'; *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc* 425 US 748, 771 (1976), holding that 'untruthful speech, commercial or otherwise, has never been protected for its own sake.' cf Helen Norton, 'Lies and the Constitution' (2013) 2012 *The Supreme Court Review* 161, 164–68, arguing for the legal protection of 'some' lies.

75 See, *mutatis mutandis*, *United States v Alvarez* 567 US 709 (2012) (Alito J, dissenting), opining inter alia that 'it is perilous to permit the state to be the arbiter of truth' in matters of public concern.

76 David Kaye, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (A/HRC/38/35, 6 April 2018), para 68.

administrative authorities (that is, government officials other than judicial officials) to censor disfavoured content by issuing specific orders to online platform operators to interfere with the communication of such content. Under a third model, the state empowers judicial authorities to sanction the censorship of disfavoured content by issuing specific orders to online platform operators to interfere with the communication of such content. Let us, for ease of reference, call these regulatory models the 'delegated censorship model', the 'administrative censorship model' and the 'judicial sanction model', respectively. It is worth underlining that this nomenclature is for ease of reference only. Online platform operators have a role to play under each of the three models. Also, these models are not mutually exclusive. The state may employ all, or any combination, of them.

6.2.3.1 Delegated Censorship Model

An example of the delegated censorship model can be found in the German Network Enforcement Act (NetzDG) 2017.[77] The NetzDG obliges operators of online platforms with at least 2 million registered users in Germany to remove or block access to 'illegal content' upon receiving a user complaint to that effect.[78] Content is deemed illegal for this purpose only where its communication constitutes a criminal offence under specific provisions of the German Criminal Code (StGB) 1871.[79] The NetzDG thus applies to disinformation albeit only to the extent that the relevant offences defined by the Criminal Code (such as insult, defamation, public incitement to crime, incitement to hatred or dissemination of depictions of violence) may be committed by disseminating disinformation through online platforms.[80]

Subject to certain exceptions, the online platform operators concerned must remove or block access to content within 24 hours of receiving a user complaint, where they determine that the content in question is 'manifestly illegal',[81] or within 7 days of receiving a user complaint, where they determine that the content in

[77] *Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken* (*Netzwerkdurchsetzungsgesetz - NetzDG*) 2017 (as amended in 2021).

[78] NetzDG, ss 1 and 3. See Imara McMillan, 'Enforcement Through the Network: The Network Enforcement Act and Article 10 of the European Convention on Human Rights (2019) 20 *Chicago Journal of International Law* 252, 259–61.

[79] *Strafgesetzbuch* (*StGB*) 1871. See NetzDG, s 1(3).

[80] See McMillan (n 78) 260–61. See also Letter from the Federal Government of Germany to the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, (9 August 2017) 1, referring to 'fake news', a term which is also often used to describe disinformation as defined in this monograph, as one of the concerns that the German legislature had in mind when adopting the text of the NetzDG.

[81] NetzDG, s 3(2)2.

question is 'merely illegal'.[82] In the event of removal, the online platform operators concerned must preserve the removed content for evidentiary purposes for a period of 10 weeks.[83] Failure to comply with the prescribed deadlines for the removal or the disabling of access to content, or any other related obligation, is a regulatory offence punishable with a fine.[84]

The delegated censorship model could be useful but the dangers inherent in it are self-evident. As noted in chapter 1, this regulatory model inevitably engenders what is now better known as the problem of collateral censorship or censorship by proxy as it has the effect of coercing online platform operators into censoring user-generated content or even deplatforming users perceived or accused of posting illegal content.[85] The threat inherent in the NetzDG in this connection is particularly obvious.[86] Suffice it to say that, being economic actors, online platform operators do not generally have the competence or the incentive to incur the costs of adjudicating upon legal disputes between users, let alone within the short timeframes prescribed by the NetzDG. By the same token, as a precaution to avoid penalties, the most prudent way of complying with the NetzDG is (at least generally speaking) to play it safe and simply remove or block access to any content that is alleged to be illegal upon receiving a user complaint, irrespective of whether the content in question is in fact illegal or not.[87] Such precautionary censorship is, of course, the antithesis of freedom of expression on the Internet, including the right to seek, receive and impart information.[88]

True, at first blush, the idea of allowing users to notify online platform operators of illegal content might appear empowering and thus attractive. But we must not

82 Ibid, s 3(2)3.

83 Ibid, s 3(2)4.

84 Ibid, s 4(1) and (2). See Letter from the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, to the Federal Government of Germany (OL DEU 1/2017, 1 June 2017) 3–4.

85 Michael I Meyerson, 'Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media' (1995) 71 *Notre Dame Law Review* 79, 118; Seth F Kreimer, 'Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link' (2006) 155 *University of Pennsylvania Law Review* 11, 16.

86 See also generally McMillan (n 78); Thomas Wischmeyer, '"What is Illegal Offline is also Illegal Online" – The German Network Enforcement Act 2017' in Bilyana Petkova and Tuomas Ojanen (eds), *Fundamental Rights Protection Online: The Future Regulation of Intermediaries* (Elgar 2019).

87 See Letter from the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, to the Federal Government of Germany (OL DEU 1/2017, 1 June 2017) 4. See also Irene Khan, 'Disinformation and Freedom of Opinion and Expression: Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (A/HRC/47/25, 13 April 2021), para 58.

88 Ibid.

forget that, given the variability of the individual preferences and ideological beliefs of members of online communities, disputes about what constitutes illegal content are inevitably rife.[89] The possibility of notifying online platform operators of alleged illegal content is therefore susceptible to abuse. Practically anyone can flag as illegal any content that one considers to be incongruent with one's own interests or ideological beliefs. By the same token, the delegated censorship model is apt to promote the removal by online platform operators of controversial but perfectly lawful and socially valuable content. It is therefore somewhat unfortunate that the German example is only the tip of the iceberg as regards the prevailing regulatory situation in Europe.

The NetzDG itself merely reinforces a pre-existing legal obligation imposed on online platform operators by section 10 of the Telemedia Act (TMG) 2007,[90] an Act which was introduced to implement the EU Directive on Electronic Commerce 2000 in Germany.[91] The provisions of article 14 of the Directive on Electronic Commerce on the liability of online platform operators for user-generated illegal content have since been replicated in article 6 of the DSA and thus shall be directly applicable in all EU member states with effect from 17 February 2024.[92] Significantly, as noted in chapter 1, the notice-and-action regime applicable to illegal content is only one of the ways by which the DSA applies to disinformation. The DSA also attempts to regulate disinformation in a rather sweeping manner by imposing on online platform operators what it terms 'due diligence' obligations.

Consider, first, the DSA's notice-and-action regime. A notable point in this connection is that, like the Directive on Electronic Commerce, the DSA does not impose a general obligation on online platform operators to monitor user-generated content or to actively seek facts or circumstances indicating illegal activity.[93] The CJEU has reaffirmed this position under the Directive on Electronic Commerce, opining that article 15(1) thereof also prohibited member states from imposing on online platform operators any such 'general' monitoring obligations but (implicitly) permitted the imposition of obligations to monitor user-generated content in

89 Kate Crawford and Tarleton Gillespie, 'What as a Flag for? Social Media Reporting Tools and the Vocabulary of Complaint' (2016) 18 *New Media & Society* 410; Jack Andersen and Sille Obelitz Søe, 'Communicative Actions We Live By: The Problem with Fact-Checking, Tagging or Flagging Fake News – The Case of Facebook' (2020) 35 *European Journal of Communication* 126.

90 *Telemediengesetz* (*TMG*) 2007.

91 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market ('Directive on Electronic Commerce') [2000] OJ L178/1. See Stefan Theil, 'The Online Harms White Paper: Comparing the UK and German Approaches to Regulation' (2019) 11 *Journal of Media Law* 41, 46.

92 DSA, art 93(2).

93 Ibid, art 8.

'specific' cases.[94] Thus, unlike section 230 of the CDA which affords online platform operators broad immunity from liability for user-generated content, the DSA exempts online platform operators from liability on condition that they do not have actual knowledge of the illegal content in question.[95] The DSA suggests that online platform operators may acquire actual knowledge of illegal content not only upon receiving a notice to that effect but also by carrying out 'voluntary own-initiative investigations'.[96]

As concerns notices in particular, the DSA (like the NetzDG) requires online platform operators to 'put mechanisms in place to allow any individual or entity to notify them of the presence on their service of specific items of information *that the individual or entity considers to be illegal content*.'[97] A notice given through any such mechanism is considered to give rise to actual knowledge in respect of the specific item of information concerned, provided the notice would allow 'a diligent provider of hosting services to identify the illegality of the relevant activity or information without a detailed legal examination.'[98] The DSA itself, however, stops short of defining the concept of 'a diligent provider' with exactitude or at all. In any event, upon acquiring actual knowledge of illegal content, online platform operators cannot claim exemption from liability unless they 'act expeditiously to remove or to disable access to the illegal content.'[99] The DSA further requires online platform operators to suspend or deplatform, 'for a reasonable period of time and after having issued a prior warning, [users] that frequently provide manifestly illegal content.'[100] To this end, again, the DSA leaves online platform operators themselves to make judgments not only about what 'a reasonable period of time' is but also about what constitutes 'manifestly illegal content'.

Significantly, the concept of 'illegal content' is so broad that it captures '*any information* that, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with [EU] law or the law of any Member State which is in compliance with [EU] law, *irrespective of the precise subject matter or nature of that law*'.[101] How exactly online platform operators, being private actors, are expected to make legal judgments about which laws of EU member states are 'in compliance' with EU law and which ones are not is for EU legislators to tell us. Suffice it to say that, as anticipated in chapter 1, the definition

94 Case C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited* [2019] ECLI:EU:C:2019:821, para 34.
95 DSA, art 6(1)(a).
96 Ibid, arts 7 and 16.
97 Ibid, art 16(1) (emphasis added).
98 Ibid, art 16(3).
99 Ibid, art 6(1)(b).
100 Ibid, art 23(1).
101 Ibid, art 3(h) (emphasis added). See also DSA, recital 12.

of 'illegal content' itself certainly captures various forms of alleged disinformation. Disinformation, as we know it, is in fact illegal content in EU member states and in other democratic states around the world, in particular not only by virtue of recently adopted legislative provisions but also by virtue of longstanding anti-false information laws.[102] This holds true even though the specific forms of disinformation that may fall within the scope of such laws and the sanctions to be imposed on those who communicate such disinformation, ranging from civil to criminal sanctions, tend to vary from one state to another.

In any event, it follows from the foregoing that the DSA leaves online platform operators with no choice but to remove or block access to alleged disinformation whenever a user submits a notice alleging that such information content qualifies as 'illegal content' under EU law or under the law of any EU member state, or else run the risk of being fined.[103] It is worth noting that the notice-and-action regime could also apply to content that may be rendered illegal in the future. Thus, even EU member states that currently regulate disinformation only incidentally, in particular through specific forms of anti-false information laws, could capitalise on the EU's notice-and-action regime and require online platform operators to remove or disable access to alleged disinformation more generally by simply adopting new provisions rendering disinformation illegal. The only relevant proviso is that any such provisions must be 'in compliance' with EU law.

To be fair, the DSA makes notable attempts at remedying the mischief that its own notice-and-action regime creates. As sophisticated as they may appear to be, however, the remedial provisions themselves are difficult to reconcile with the principle of equal rights. For example, the DSA itself recognises that the notice-and-action regime is susceptible to abuse and, therefore, that online platform operators are likely to be overburdened with legally unfounded notices of alleged illegal content. The DSA thus empowers national authorities to 'award' to certain entities the status of 'trusted flaggers', so that online platform operators should prioritise the removal or the disabling of access to content flagged by such entities.[104] But this does not appear to help matters. The fact that national authorities may trust these entities does not make them qualify as judges who can be trusted to make independent and reliable legal judgments about what constitutes illegal content. Indeed, nothing stops the national authorities concerned from using these so-called

[102] Pitruzzella and Pollicino (n 43), ch 3; Pollicino, De Gregorio and Somaini (n 43); Bayer and others (n 42) 46–49; Fathaigh, Helberger and Appelman (n 42) 7–11.

[103] DSA, arts 52, 74 and 76. See also Ian Cram, 'Keeping the Demos Out of Liberal Democracy? Participatory Politics, "Fake News", and the Online Speaker' (2019) 11 *Journal of Media Law* 113, 125; Marco Bassini, 'Fundamental Rights and Private Enforcement in the Digital Age' (2019) 25 *European Law Journal* 182, 192–95; Horder, *Criminal Fraud and Election Disinformation* (n 32) 84.

[104] DSA, art 22, and recitals 61 and 62.

'trusted flaggers' as their agents to silence critics of the powers that be.[105]

A similar observation can be made with respect to the so-called 'procedural safeguards' that the DSA introduces, apparently with a view to protecting users from arbitrary interference by online platform operators. These apparent safeguards include in particular provisions on the transparency of terms of service, a requirement to provide explanatory information to affected users when an online platform operator imposes a restriction on the use of its platform, a requirement to provide an internal complaint-handling system, a requirement to provide external out-of-court dispute resolution mechanisms, a requirement to suspend the processing of notices or complaints submitted by individuals or entities that 'frequently submit notices or complaints that are manifestly unfounded' and a provision allowing users to lodge a complaint against online platform operators with national administrative authorities alleging an infringement of the DSA.[106] The specific provisions that institute these apparent safeguards are fairly detailed, if not overly burdensome, and yet they remain inadequate as long as they leave in private hands or administrative authorities the fate of the individual's freedom of expression. In principle, a legal provision that authorises interference with expressive activity should be applied by a competent judicial body, not by administrative authorities, let alone private actors who are not subject to the transparency and accountability mechanisms offered by the twin democratic ideals of a mixed constitution and a contestatory citizenry.

Consider, in turn, the DSA's due diligence obligations. Like the notice-and-action regime, the due diligence obligations that the DSA imposes on operators of 'very' large online platforms could be useful but are by no means easier to reconcile with freedom of expression. In this connection, as intimated in chapter 1, the DSA requires large online platform operators to 'diligently' identify, analyse and assess any systemic risks in the EU stemming from the design, functioning and use of their Internet communications infrastructure and related systems, including algorithmic systems, with a view to mitigating those risks.[107] The systemic risks thus envisaged include, among others, any actual or foreseeable risks to the exercise of fundamental rights, civic discourse and electoral processes, public security, public health and the person's physical and mental well-being.[108] Importantly, these include not only risks that may arise from the dissemination of illegal content as such but also the societal risks that may arise from the dissemination of disinformation or other content.[109]

With respect to disinformation in particular, the online platform operators

[105] Riku Neuvonen, 'Between Public and Private: Freedom of Speech and Platform Regulation in Europe' (2023) 28 *European Public Law* 515, 529.
[106] DSA, arts 16 (2)–(6), 17, 20, 21, 23(2), 24 and 53.
[107] Ibid, arts 34 and 35, and recitals 79 and 84–86.
[108] Ibid, art 34, and recitals 2, 9 and 80–83.
[109] Ibid.

concerned are expected to mitigate any actual or foreseeable risks by, among other means, adhering to the EU Code of Practice on Disinformation, the latest version of which was adopted in June 2022.[110] However, it remains largely unclear how exactly the EU and its member states are to ascertain the online platform operators' compliance with the due diligence obligations relating to the risks posed by disinformation, apart from possibly relying on the annual audit reports which are to be prepared at the online platform operators' own expense.[111] This is all the more so not least because the DSA itself does not appear to provide a clear definition of the concept of systematic risks. In any event, like the notice-and-action regime, the due diligence obligations laid down by the DSA leave operators of large online platforms with no choice but to regulate disinformation on behalf of the EU and its member states, or else run the risk of being fined for non-compliance.[112] These sweeping obligations, to put it bluntly, do not only require but also encourage online platform operators to engage in all manner of censorship according to their own discretion.

The very Code of Practice on Disinformation which the DSA requires online platform operators to comply with in mitigating systematic risks promotes various forms of private censorship of alleged disinformation. For example, the online platform operators concerned commit to provide users with a functionality to flag 'harmful false and/or misleading information' that violates the online platform operators' own policies or terms of service.[113] In order to satisfy this commitment, the flagging functionality 'should lead to appropriate, proportionate and consistent follow-up actions, in full respect of the freedom of expression.'[114] The code itself does not, however, specify how online platform operators should ensure 'full respect of the freedom of expression' when acting upon flagged content. Instead, the code simply requires the relevant signatories to limit the spread of what they deem 'harmful false or misleading information', including by removing or restricting the visibility of such information content.[115] Other possible actions that the code envisages include content labelling and account suspensions or deplatforming.[116] In any event, the code leaves online platform operators themselves (possibly in collaboration with 'fact-checkers', who are also private actors) to determine what exactly constitutes 'harmful false or misleading information' for purposes of such censorship.

It is also interesting to note that the Code of Practice on Disinformation promotes

110 Ibid, art 45, and recitals 89, 104 and 106. See also Strengthened Code of Practice on Disinformation 2022, preamble, paras (h)–(j).
111 DSA, art 37 and recitals 92–93.
112 Ibid, arts 52, 74 and 76.
113 Strengthened Code of Practice on Disinformation 2022, commitment 23.
114 Ibid, commitment 23 (measure 23.1).
115 Ibid, commitment 18 (measure 18.2).
116 Ibid, commitment 24.

even stricter censorship in the specific contexts of commercial and paid political advertising. With regard to commercial advertising, the code requires relevant signatories to censor and demonetise advertising content, in particular, not only by refusing to publish advertisements they deem to contain disinformation but also by refraining from placing advertisements next to what they deem 'disinformation content' or in online 'places' that repeatedly publish such content.[117] The signatories may as well choose to remove, block or otherwise restrict the visibility of advertising content on pages and/or domains that disseminate what the signatories themselves deem 'harmful disinformation'.[118]

As concerns paid political advertising, the signatories 'commit to make political or issue ads clearly labelled and distinguishable as paid-for content in a way that allows users to understand that the content displayed contains political or issue advertising.'[119] The signatories undertake to ensure that these labelling and user-facing transparency requirements are satisfied before allowing the placement of such advertisements.[120] They may therefore refuse to publish a political advertisement if the sponsor of the advertisement does not disclose the information needed to fulfil the transparency requirements. They may also take measures to stop the dissemination of political advertisements that are published without labels and impose 'other account level penalties', such as suspensions or deplatforming, on sponsors of such advertisements.[121] To this end, the code requires the signatories to develop or provide existing functionalities to enable users to flag political advertisements that are not labelled as such.[122]

These examples should suffice to provide an indication of how problematic the EU Code of Practice on Disinformation itself is. What is particularly concerning is that, as noted in chapter 4, the term 'disinformation' as used in the code captures not only disinformation as we define it but also misinformation and other nebulous concepts, namely 'information influence operations' and 'foreign interference in the information space'.[123] Moreover, unlike the DSA's notice-and-action regime which promotes only the removal and disabling of access to disfavoured content and (under certain circumstances) deplatforming, the code promotes other forms of private censorship as well. Among these, deplatforming is perhaps the worst form of private censorship as it targets individual users as opposed to content as such, excluding affected users from a platform and thus preventing them from using the platform even for lawful purposes. But even demonetisation is a powerful tool that can be

[117] Ibid, commitment 1 (measure 1.1).
[118] Ibid, commitment 1 (SLI 1.1.1)
[119] Ibid, commitment 6.
[120] Ibid, commitment 7.
[121] Ibid, commitment 7 (measure 7.3).
[122] Ibid.
[123] Ibid, preamble, para (a).

used to censor and silence those who rely on the use of online platforms as a source of income.[124] Visibility restriction of content, which can be achieved either by demoting the content in ranking or in recommender systems or by limiting the accessibility of content by one or more users of a platform or blocking a user from a platform without the user being aware (otherwise known as 'shadow deplatforming' or 'shadow banning'),[125] can also have the same effect as deplatforming. Content labelling requirements, too, can lead to violative digital censorship.

To be clear, labelling requirements are generally problematic not only because they may necessitate prior censorship of content that may be deemed to qualify for labelling or indeed the subsequent penalties that online platform operators may impose on users who post such content without complying with the labelling requirements as envisaged by the EU Code of Practice on Disinformation. Even the very act of labelling user-generated content, for example, attaching a comment to the effect that the content is 'offensive', 'false' or 'misleading', can constitute digital censorship.[126] True, insofar as it entails a labeller attaching a comment to user-generated content, such labelling somewhat mimics the so-called 'more speech' or 'marketplace' solution to the problem of falsehood advocated by John Milton and his contemporary disciples.[127] It therefore comes as no surprise that one commentator contends that the practice of 'claim-shaming', by attaching labels to social media posts to the effect 'that a claim being made may be false or misleading, coupled with links to (supposedly) more reliable sources of information' should be seen as a 'solution that best exemplifies Justice Brandeis's famous claim that the best remedy to counter false speech is "more speech".'[128] In reality, however, such negative labels cannot be equated with 'more speech'.

To begin with, the labeller's comment changes the context in which the content is conveyed to the recipient. The label could thus discourage the recipient from reading or viewing the labelled content. Indeed, why would anyone waste time reading or viewing content that has already been adjudged false or misleading? Even assuming that, for whatever reason, the recipient still decided to read or view such content, the recipient would have to do so with the labeller's opinion in mind, thereby

[124] Giovanni De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society* (Cambridge University Press 2022) 176–77.

[125] DSA, recital 55.

[126] Kay Mathiesen, 'Fake News and the Limits of Freedom of Speech' in Carl Fox and Joe Saunders (eds), *Media Ethics, Free Speech, and the Requirements of Democracy* (Routledge 2019) 164.

[127] John Milton, *Areopagitica; A speech of Mr. John Milton for the Liberty of Unlicenc'd Printing, to the Parlament of England* (London 1644) 35.

[128] Horder, *Criminal Fraud and Election Disinformation* (n 32) 91. See *Whitney v California* 274 US 357, 377 (1927) (Brandeis J, concurring), holding that '[i]f there be time to expose through discussion…falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.'

potentially impeding the recipient's ability to make his own judgment about the reliability of the content. Worse still, the label itself could be misinformation or disinformation: it could be well-intentioned but nonetheless misleading, or it could be intended to make the recipient believe that the labelled content is inaccurate and unreliable when it is in fact accurate and reliable.

Not only that, negative labels are apt to induce self-censorship. No one would normally want to be associated with negative labels as these can be a serious dent on one's reputation. It is no wonder then that existing empirical research suggests that most people are reluctant to share stories that may be labelled 'fake news', even if the stories in question are congruent with their political views, because such negative labels can hurt one's reputation in a way that is difficult to fix.[129] In the same vein, the ECtHR considers that labelling a book as harmful to children can affect not only the author's 'ability to freely impart her ideas' but also the author's 'reputation as an established children's author' and is therefore 'liable to discourage her and other authors from publishing similar literature, thereby creating a chilling effect'.[130] Negative labels are thus liable to directly undermine not only freedom to impart information but also freedom to receive information.

Perhaps neutral labels that serve only to provide further information about the labelled content or to direct users to information that disputes the labelled content could be compatible with freedom of expression in certain cases. With respect to paid political advertising, for example, there appears to be an emerging consensus that the use of transparency labels could help voters 'better understand when they are being presented with a political advertisement on whose behalf that advertisement is being made, and how they are being targeted by an advertising service provider, so that voters are better placed to make informed choices.'[131] Political advertising can indeed be a vector of disinformation, not least where such advertising 'does not disclose its political nature, and where it is targeted.'[132] Transparency labels could thus help, albeit only indirectly, address the problem of online political disinformation in the context of paid political advertising.

Restrictions on the use by online platform operators of targeting and amplification techniques that involve the processing of personal data in this context could also indirectly contribute to the fight against political disinformation. As noted in chapter 4, online platform operators may themselves actively participate in disinformation campaigns using their digital technologies, not only by amplifying

[129] Sacha Altay, Anne-Sophie Hacquin and Hugo Mercier, 'Why do so Few People Share Fake News? It Hurts their Reputation' (2022) 24 *New Media & Society* 1303.

[130] *Macatė v Lithuania* App no 61435/19 (ECtHR [GC], 23 January 2023), paras 181–82.

[131] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the Transparency and Targeting of Political Advertising' (Communication) COM/2021/731 final, recital 4.

[132] Ibid.

the circulation, reach or visibility of paid content but also by directing tailored content to specific users or specific groups of users based on the processing of the affected users' personal data. This explains why, as intimated in chapter 1, building upon the EU Code of Practice on Disinformation and the DSA, the Proposed Regulation on the Transparency and Targeting of Political Advertising also seeks 'to support an open and fair political debate and free and fair elections or referendums and to combat disinformation and unlawful interference including from abroad'.[133] To this end, the proposal seeks to introduce not only legally binding transparency requirements but also restrictions on the use of targeting and amplification techniques based on the processing of personal data in the context of paid political advertising.

In the same vein, the Committee of Ministers of the Council of Europe considers that, as a general principle, online paid political advertising should be transparent.[134] It thus recommends that the states concerned 'should promote co-regulatory frameworks aimed at ensuring that political advertisements are clearly marked as such and identify the campaign leaders.'[135] As concerns targeted or microtargeted paid political advertising, the Committee calls upon the states concerned to consider the implications of such advertising for citizens' electoral freedom.[136] In this connection, the Committee recommends that the state concerned should 'ensure that the manner in which their data protection laws and policies are applied in the context of electoral campaigning and communication is in full compliance with the data protection requirements arising from the existing legal frameworks for privacy and data protection, including relevant international standards'.[137] The Committee thus suggests that, if properly framed, transparency labelling requirements and restrictions on the use of targeting and amplification techniques based on the processing of personal data in the context of paid political advertising may be compatible with international standards on freedom of expression.[138]

Be that as it may, the phenomenon of political disinformation is too complex to be regulated simply by requiring online platform operators to attach transparency

[133] Ibid. See also DSA, arts 25–27 and 38–39; Strengthened Code of Practice on Disinformation 2022, parts III and V (commitment 19).

[134] Committee of Ministers of the Council of Europe, 'Recommendation CM/Rec(2022)12 of the Committee of Ministers to Member States on Electoral Communication and Media Coverage of Election Campaigns' (adopted at the 1431st meeting of the Ministers' Deputies, 6 April 2022) (Recommendation CM/Rec(2022)12), appendix, para 2.1.

[135] Ibid.

[136] Ibid, appendix, para 5.1.

[137] Ibid.

[138] See also Tom Dobber, Ronan Ó Fathaigh and Frederik J Zuiderveen Borgesius, 'The Regulation of Online Political Micro-Targeting in Europe' (2019) 8 *Internet Policy Review* 1; Judit Bayer, 'Double Harm to Voters: Data-Driven Microtargeting and Democratic Public Discourse' (2020) 9 *Internet Policy Review* 1.

labels to paid political advertisements, even if such labels were to be complemented by restrictions on the use of targeting and amplification techniques. First, paid political advertising, however broadly defined, represents only a small portion of online content that may be a vector of political disinformation understood as disinformation relating to matters of broader public interest. Second, paid political advertising is statutorily prohibited in many European states.[139] This renders the introduction of transparency requirements, even at the EU level, less relevant in the states concerned. Whilst it is true that some of the existing prohibitions on paid political advertising may not apply to online platforms, and may even be inconsistent with freedom of expression,[140] the ECtHR is persuaded that certain prohibitions may be necessary and thus legally justified in a democratic society.[141] This is so not least because the use of paid political advertising may result in unequal access to the media, giving an unfair advantage to those parties or candidates that may purchase large amounts of advertising space.[142] Third, even where paid political advertising is allowed in the online context, the use of neutral transparency labels cannot in itself operate as a barrier to the publication or dissemination of disinformation in the form of paid political advertisements. Therefore, even in this narrow context, the phenomenon of political disinformation requires a regulatory solution that is more directly targeted at misleading political advertising rather than political advertising in general.

All in all, apart from 'neutral' content labels whose use may be justified under certain circumstances, the private censorship model of new school regulation is largely problematic. The use of *ex ante* regulatory techniques, regulatory techniques applied before or at the time of publication, is particularly difficult to reconcile with freedom of expression when the content at issue is merely alleged to be disinformation, whether such alleged disinformation is characterised as political disinformation or otherwise. Imposing a legal obligation on online platform operators to block the publication of disinformation could only exacerbate the problem of digital prior censorship or prior restraint on publication as any such obligation would incentivise online platform operators to over-block content in order to avoid liability. As noted in chapter 1, the ECtHR has made it clear that the dangers inherent in the imposition of prior restraint on publication are such that they call for

[139] *TV Vest As & Rogaland Pensjonistparti v Norway* App no 21132/05 (ECtHR, 11 December 2008), paras 24–25. See also Dobber, Fathaigh and Borgesius (n 138) 11–13.

[140] See, for example, *VgT Verein gegen Tierfabriken v Switzerland* App no 24699/94 (ECtHR, 28 June 2001); *TV Vest As & Rogaland Pensjonistparti v Norway* (n 139); *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland (no 2)* (n 35); *Erdoğan Gökçe v Turkey* App no 31736/04 (ECtHR, 14 October 2014).

[141] *Murphy v Ireland* App no 44179/98 (ECtHR, 10 July 2003); *Animal Defenders International v the United Kingdom* App no 48876/08 (ECtHR [GC], 22 April 2013).

[142] *Animal Defenders International v the United Kingdom* (n 141), para 117.

'the most careful scrutiny' by the court.[143] It would therefore appear that a legal obligation requiring online platform operators to block the publication of political disinformation, not least using algorithms, cannot pass muster under article 10 of the ECHR.

It must be acknowledged that, in cases where user-generated content takes 'the form of hate speech and direct threats to the physical integrity of individuals', the ECtHR considers that the state could be justified in imposing a duty of care on online platform operators, requiring them to take measures to remove such '*clearly unlawful*' content '*without delay, even without notice from the alleged victim or from third parties*'.[144] Such a duty of care might appear to be even more problematic than the notice-and-action regime. But it could be acceptable in exceptional cases, since operators of major online platforms tend to use software and algorithmic screening systems to automatically detect certain unlawful content, such as child pornography and hate speech, even before publication.[145] The exceptional cases thus envisaged should be specified by law and should affect only content that can easily be identified as 'indisputably' unlawful. Disinformation as such is, however, hardly ever indisputably unlawful. Its defining characteristics cannot generally be detected unless by analysing the content at issue in its relevant context. By the same token, even algorithms are generally inapt to detect disinformation: neither misleadingness nor intent to mislead can be detected through an automated system.[146]

In any event, a general legal obligation requiring online platform operators to interfere in any way with user-generated content in the name of regulating political disinformation is apt to undermine freedom of expression. First, any such obligation would not only legitimise but also exacerbate private censorship by promoting collateral censorship or even prior restraint on publication. We have already noted in chapter 1 that online platform operators engage in all manner of private censorship using the autonomous power which they exercise over users in their capacity as

143 *Observer and Guardian v the United Kingdom* App no 13585/88 (ECtHR, 26 November 1991), para 60; *The Sunday Times v the United Kingdom (no 2)* App no 13166/87 (ECtHR, 26 November 1991), para 51; *Association Ekin v France* App no 39288/98 (ECtHR, 17 July 2001), para 56; *RTVB v Belgium* App no 50084/06 (ECtHR, 29 March 2011), para 105; *Anatoliy Yeremenko v Ukraine* App no 22287/08 (ECtHR, 15 September 2022), para 55. See also *Bodalev v Russia* App no 67200/12 (ECtHR, 6 September 2022), para 103.

144 *Delfi AS v Estonia* (n 12), para 159; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* (n 12), para 91 (emphasis added). For an analysis of this case law, see Robert Spano, 'Intermediary Liability for Online User Comments under the European Convention on Human Rights' (2017) 17 *Human Rights Law Review* 665.

145 Klonick (n 25) 1636–37. See also *Jezior v Poland* (n 12), paras 6–7; *Standard Verlagsgesellschaft mbH v Austria (no 3)* (n 19), paras 8–12.

146 Sille Obelitz Søe, 'Algorithmic Detection of Misinformation and Disinformation: Gricean Perspectives' (2018) 74 *Journal of Documentation* 309.

owners of Internet communications infrastructure, even in the absence of delegated public power. Therefore, as Kaye advises in his 2018 UN Special Rapporteur's report on the Promotion and Protection of the Right to Freedom of Opinion and Expression, states should 'avoid delegating responsibility to companies as adjudicators of content, which empowers corporate judgment over human rights values to the detriment of users.'[147] Policymakers should in particular resist the temptation to abdicate their responsibilities by over-relying on online platform operators to regulate disinformation on their behalf. They should always bear in mind that, as the ECtHR underlines, the state on whose behalf they exercise public authority 'cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals'.[148]

Second, operators of major online platforms host too many users to be reasonably expected to monitor all user posts in order to identify political disinformation. The ECtHR also already recognises more generally that to hold that, by allowing unfiltered user-generated content, online platform operators should expect some of that content to be in breach of the law 'amounts to requiring excessive and impracticable forethought capable of undermining freedom…to impart information on the Internet.'[149] Indeed, even in the context of traditional media, where journalists can manually review all their publications, the ECtHR has repeatedly held that the 'punishment of a journalist for assisting in the dissemination of statements made by another person…would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.'[150] The punishment of online platform operators for user-generated content should therefore be envisaged in fewer and even more clearly defined exceptional cases.

Third, online platform operators cannot be trusted to make impartial or reliable judgments about what constitutes political disinformation. They have their own interests, commercial or otherwise, to serve. Nor are online platform operators judicial officials. To clothe them with the jurisdiction to make judgments about what constitutes political disinformation is to undermine the rule of law on freedom of expression and thus freedom of expression itself, since the scope of that freedom

147 David Kaye, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (A/HRC/38/35, 6 April 2018), para 68.

148 *Costello-Roberts v the United Kingdom* App no 13134/87 (ECtHR, 25 March 1993), para 27.

149 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* (n 12), para 82; *Pihl v Sweden* App no 74742/14 (ECtHR [dec], 9 March 2017), para 31; *Jezior v Poland* (n 12), para 58.

150 *Jersild v Denmark* App no 15890/89 (ECtHR [GC], 23 September 1994), para 35; *Thoma v Luxembourg* App no 38432/97 (ECtHR, 29 March 2001), para 62; *Novaya Gazeta and Milashina v Russia* App no 45083/06 (ECtHR, 3 October 2017), para 71; *Magyar Jeti Zrt v Hungary* (n 19), para 80; *Index.hu Zrt v Hungary* (n 31), paras 26 and 40.

must be determined only by law. Even the imposition on online platform operators of general legal obligations to respect fundamental rights without specifying how exactly such obligations are to be fulfilled, as does the DSA,[151] does not appear to help matters. The task of determining the scope of freedom of expression in particular normally involves complex questions of fact and law whose adjudication should be the preserve of competent judicial authorities.[152]

6.2.3.2 Administrative Censorship Model

The DSA adopts the administrative censorship model insofar as it requires online platform operators to act against one or more specific items of illegal content upon receiving an order to that effect from relevant national administrative authorities.[153] But Singaporean law contains a more concrete example of how this model could look like in practice. The POFMA empowers government ministers to instruct the relevant public authority to issue orders (generally termed 'directions') to online platform operators on how to deal with false statements of fact communicated in Singapore through online platforms.[154] The orders may require online platform operators to take a range of specific measures.

The orders in question may, for example, require an online platform operator not only to communicate (by means of its platform) a correction notice, notifying its users that the post in question is or contains a false statement of fact, but also to disable access to a post containing a false statement of fact, or indeed to block an online account used to communicate a false statement of fact, an online account used to carry out 'coordinated inauthentic behaviour' or an online account controlled by a bot.[155] Additionally, where a person or an online platform operator fails to comply with any such order, the minister concerned may direct the Info-communications Media Development Authority to order the online platform operator concerned 'to take reasonable steps to disable access by end-users in Singapore to the online location' where the content in question has been or is being communicated.[156] Failure to comply with any order is, in any event, an offence punishable with a fine and/or,

151 See in particular DSA, art 14(4).

152 David Kaye, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (A/HRC/38/35, 6 April 2018), para 17.

153 DSA, art 9. See also DSA, art 10.

154 See POFMA, pts 4 and 6.

155 Ibid. S 2 of the POFMA defines 'coordinated inauthentic behaviour' as 'any coordinated activity carried out using 2 or more online accounts, in order to mislead end-users in Singapore of any internet intermediary service as to any matter, but excludes any activity carried out using online accounts — (*a*) that are controlled by the same person; and (*b*) none of which is an inauthentic online account or is controlled by a bot'.

156 POFMA, ss 16, 28 and 43 (as read together with pt 5).

in the case of an individual, imprisonment.[157]

We have already noted that a model of regulation where government agencies other than judicial authorities become arbiters of lawful expression poses a serious threat to freedom of expression. It should be obvious from the foregoing overview that the POFMA's new school regulatory approach in this connection is particularly problematic. By definition, government ministers are not independent actors. They are politically inclined. One can only wonder how Singaporean policymakers somehow deemed it acceptable to give ministers what appears to be arbitrary power to censor online expression in the name of regulating online false information.[158] It goes without saying that the ministers will naturally be inclined to use this power to advance their own personal and political interests at the expense of freedom of expression.

6.2.3.3 Judicial Sanction Model

The DSA also adopts the judicial sanction model insofar as it requires online platform operators to act against one or more specific items of illegal content upon receiving an order to that effect from relevant national judicial authorities.[159] But French law contains a more concrete example of how this model could look like in practice. In 2018, France adopted two pieces of legislation aimed at addressing 'information manipulation', namely Organic Law 2018-1201 of 22 December 2018 on the Fight Against the Manipulation of Information (Law 2018-1201) and ordinary Law 2018-1202 of 22 December 2018 on the Fight Against the Manipulation of Information (Law 2018-1202).[160] Law 2018-1202 is the main law that contains substantive provisions against online information manipulation, whereas Law 2018-1201 simply incorporates Law 2018-1202 into pre-existing legislation.[161]

Law 2018-1202 takes aim at the spread of false information through online platforms whose activity exceeds 5 million users per month on French territory, particularly during the period of three months preceding general elections and thus

157 Ibid, ss 16, 27, 28, 42 and 43.

158 Kirsten Han, 'Big Brother's Regional Ripple Effect: Singapore's Recent "Fake News" Law which Gives Ministers the Right to Ban Content they Do not Like, May Encourage other Regimes in South-East Asia to Follow Suit' (2019) 48 *Index on Censorship* 67.

159 DSA, art 9. See also DSA, art 10.

160 *LOI organique n° 2018-1201 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information* (Law 2018-1201); *LOI n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information* (Law 2018-1202).

161 See Irene Couzigou, 'The French Legislation against Digital Information Manipulation in Electoral Campaigns: A Scope Limited by Freedom of Expression' (2021) 20 *Election Law Journal* 98. See also Pitruzzella and Pollicino (n 43) 115–19; Pollicino, De Gregorio and Somaini (n 43) 346–49; Krzywoń (n 52) 682–85.

also amends the French Electoral Code 1964.[162] It attempts to regulate the dissemination of false information during the said period not only through the private censorship model, in particular by introducing transparency requirements applicable to paid content related to debate on matters of general interest and by imposing a general duty on operators of large online platforms to implement measures to combat the dissemination of 'false information likely to disturb public order or alter the sincerity' of general elections,[163] but also by providing for the possibility of instituting interlocutory judicial proceedings to stop the dissemination of false information through online platforms.

More specifically, during the three months leading up to a general election, the Public Prosecutor's Office, any candidate, political party or group or any person having an interest in bringing proceedings, may file an application for interim measures to stop the dissemination through an online platform of inaccurate or misleading allegations or imputations of fact likely to 'alter the sincerity of the election'.[164] The interim measures are to be directed to the online platform operator concerned rather than to the user disseminating such allegations or imputations. Any application in this connection may, however, be made only where the allegations or imputations of fact in question are being disseminated deliberately, artificially or automatically and massively.[165] In addition to these three cumulative conditions, the Constitutional Council (the supreme constitutional court in France) considers that the allegations or imputations in question must be manifestly inaccurate or misleading, or else a court order interfering with the dissemination of such allegations or imputations would infringe freedom of expression.[166] The judge hearing the application for interim reliefs must rule on the application within 48 hours of receiving it.[167] In the event of an appeal, the appellate court must likewise rule on the appeal within 48 hours of receiving it.[168]

We have already intimated that a regulatory model where interference with user-generated content by online platform operators required by law is to be sanctioned by a judicial order is, at least on the republican account that we espouse, generally more freedom-friendly than the other two models considered above. The foregoing

[162] *Code électoral* 1964. See *Décret n° 2019-297 du 10 avril 2019 relatif aux obligations d'information des opérateurs de plateforme en ligne assurant la promotion de contenus d'information se rattachant à un débat d'intérêt général* (Decree no 2019-297 of 10 April 2019 Relating to Information Obligations of Online Platforms Operators Promoting Information Content Related to a General Interest Debate), art 1.

[163] Law 2018-1202, arts 1 and 11.

[164] Ibid, art 1.

[165] Ibid.

[166] *Conseil constitutionnel decision n° 2018-773 DC du 20 décembre 2018* (Constitutional Council Decision no 2018-773 DC of 20 December 2018), para 23.

[167] Law 2018-1202, art 1.

[168] Ibid.

example from French law in particular does not appear to pose any significant threat to freedom of expression, at least if we assume that French courts are impartial and independent. Indeed, given its limited scope of application, the French interlocutory procedure is in fact inadequate to confront the complex phenomenon of political disinformation. If anything, it would appear that the procedure is barely useful, even within the limited electoral context in which it applies. This is so not only because of the limited period during which the interlocutory proceedings may be instituted and the limited scope of content that may be the subject of such proceedings but also because of the four cumulative conditions that must be satisfied to obtain a judicial order. These conditions are particularly difficult to satisfy in practice.[169]

6.3 Choice of Regulatory Mechanisms

Any effective regulation of the phenomenon of political disinformation, whether under the old school or the new school regulatory approach, would require the state to impose some form of legal liability on those subject to regulation should they fail to comply with the regulatory measures. A distinction can be made in this connection between civil liability and criminal liability. Many scholars tend to prefer the former. This preference has seen the emergence of the *ultima ratio* principle, according to which any recourse to the criminal law should be had only as a last resort.[170]

Although this is not a suitable place to delve into the merits or demerits of this minimalist theory of criminalisation, the general disapproval or reprobation of criminal conduct and the intimidation that the criminal justice system evokes should provide an indication of some of the main reasons why many theorists discourage criminalisation unless it is really necessary. The intimidation that we are speaking about may derive not only from the direct involvement of the state in the prosecution of those accused of committing crimes or indeed the severity of the penalties that the courts may impose upon conviction. It may also derive from the propensity of government officials to criminalise and penalise 'with a view to political advantage, of police or prosecutors to be selective or discriminatory in the presumptive offenders they target, and of prison guards to take out their personal frustrations or prejudices in their treatment of inmates.'[171]

In republican political theory, the distinction between regulation by

[169] See also Pollicino, De Gregorio and Somaini (n 43) 348; Couzigou (n 161).

[170] See generally Douglas Husak, 'The Criminal Law as Last Resort' (2004) 24 *Oxford Journal of Legal Studies* 207; Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 *Ohio State Journal of Criminal Law* 521. See further Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2008).

[171] Philip Pettit, 'Criminalization in Republican Theory' in RA Duff and others (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press 2014) 142.

criminalisation and other forms of regulation is significant not on account of the *ultima ratio* principle but because, consistent with the legal principle of proportionality, republicans advocate a consequentialist approach to criminalisation.[172] Under this approach, the maximisation of individual freedom is the sole purpose of all regulation. This purpose, as we now know, can be achieved primarily by securing the equal status of individuals as citizens under the law. Certain conduct can thus be criminalised not as a last resort but in order to establish the protections that individuals can expect to enjoy against particularly egregious forms of arbitrary interference that other individuals may seek to practise against them.[173]

If we take, as we do, arbitrary interference to include all intentional (including more or less reckless and negligent) acts of removing options, of replacing options with penalised alternatives or of misrepresenting options in a deceptive or manipulative spirit, all acts of arbitrary interference in the enjoyment of the fundamental rights of others are offensive to the republican ideal of freedom.[174] But republicans still favour both parsimony in the use of the criminal law and proportionality in the pairing of penalties with offences.[175] Therefore, from a republican standpoint, every regulatory penalty, be it criminal or otherwise, should be designed to serve no purpose other than to undo or rectify the freedom-undermining effects of the repugnant republican act at which the penalty is targeted.[176]

This republican stand is consistent with the case law of the ECtHR. The ECtHR recognises the dominant position that public officials and state institutions occupy vis-à-vis the individual. Having regard to the existence of other means of intervention and refutation of inaccurate and misleading statements in particular, the ECtHR considers that the state must display restraint in resorting to criminal proceedings, especially in cases involving acts of political expression.[177] The ECtHR

[172] See generally John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford University Press 1990); Philip Pettit, 'Republican Theory and Criminal Punishment' (1997) 9 *Utilitas* 59; John Braithwaite and Philip Pettit, 'Republicanism and Restorative Justice: An Explanatory and Normative Connection' in Heather Strang and John Braithwaite (eds), *Restorative Justice: Philosophy to Practice* (Routledge 2016, first published 2000 by Ashgate Publishing); Pettit, 'Criminalization in Republican Theory' (n 171).

[173] Pettit, 'Criminalization in Republican Theory' (n 171) 139.

[174] Ibid, 143.

[175] Ibid,143 and 146.

[176] See generally Pettit, 'Republican Theory and Criminal Punishment' (n 172).

[177] *Castells v Spain* App no 11798/85 (ECtHR, 23 April 1992), para 46; *Incal v Turkey* App no 22678/93 (ECtHR [GC], 9 June 1998), para 54; *Lehideux and Isorni v France* (ECtHR [GC], 23 September 1998), para 57; *Öztürk v Turkey* (n 17), para 66; *Otegi Mondragon v Spain* App no 2034/07 (ECtHR, 15 March 2011), para 58; *Mor v France*

underlines that, in any event, the nature and severity of penalties imposed are important factors to take into consideration when assessing the proportionality of an interference in relation to any legitimate regulatory aim pursued under the ECHR.[178] Where the penalties imposed are criminal in nature, so says the ECtHR, 'they require particular justification.'[179]

The ECtHR thus examines 'with particular scrutiny the cases where sanctions imposed by the national authorities for non-violent conduct involve a prison sentence'.[180] But it does not lose sight of the fact that even relatively moderate fines of a criminal nature can have a considerable chilling effect.[181] On account of this potential effect, the ECtHR sees as an interference with expression the mere existence of a 'considerable' risk of criminal prosecution arising from a particular piece of legislation.[182] In short, like republican thinkers, the ECtHR appears to favour both parsimony in the use of the criminal law and proportionality in the pairing of penalties with offences.

The distinction between civil and criminal law is, however, not so clear-cut. In particular, it is debatable whether certain offences which are already recognised as such should be characterised as civil offences or as criminal offences. Some scholars, for example, draw a distinction between what may be termed 'traditional', 'real' or 'true' crimes (murder, rape, robbery, etc) on the one hand and what may be termed 'regulatory', 'administrative' or 'disciplinary' offences (the traffic offence of overspeeding or disregarding other traffic signs, a mere failure to act in accordance with professional ethics, etc) on the other hand.[183] But there are other scholars who see regulatory offences as an integral part of the criminal law.[184] This is an interesting debate. But this is not a place to take sides. Suffice it to say that, whichever side of the debate one may choose to associate with, a person found guilty of a regulatory

App no 28198/09 (ECtHR, 15 December 2011), para 61; *Morice v France* App no 29369/10 (ECtHR [GC], 23 April 2015), para 127; *Anatoliy Yeremenko v Ukraine* (n 143), para 89.

178 *Mor v France* (n 177), para 61; *Morice v France* (n 177), para 127; *Anatoliy Yeremenko v Ukraine* (n 143), para 89.

179 *Bodalev v Russia* (n 143), para 75(e); *Peradze and others v Georgia* App no 5631/16 (ECtHR, 15 December 2022), para 35.

180 *Peradze and others v Georgia* (n 179), para 35. See also *Kudrevičius and others v Lithuania* App no 37553/05 (ECtHR [GC], 15 October 2015), paras 143, 144 and 146; *Chernega and others v Ukraine* App no 74768/10 (ECtHR, 18 June 2019), para 221.

181 *Mor v France* (n 177), para 61; *Morice v France* (n 177), para 127; *Anatoliy Yeremenko v Ukraine* (n 143), para 89.

182 *Altuğ Taner Akçam v Turkey* App no 27520/07 (ECtHR, 25 October 2011), para 82.

183 Pettit, 'Criminalization in Republican Theory' (n 171) 144.

184 See, for example, Nicola Lacey, 'Criminalization as Regulation: The Role of Criminal Law' in Christine Parker and others (eds), *Regulating Law* (Oxford University Press 2004); Jeremy Horder, 'Criminal Law and Republican Liberty: Philip Pettit's Account' (2022) 16 *Criminal Law and Philosophy* 193.

offence does not generally acquire a criminal record and thus cannot be branded a criminal, at least not in legal parlance. This holds true even though some jurisdictions may authorise the use of adverse publicity against those who violate regulatory norms.

Several other noticeable differences that subsist in most jurisdictions between the norms and practices of enforcement relating to traditional crimes and regulatory offences have been highlighted in existing scholarship.[185] We need not rehash these. Suffice it to say that the distinction between traditional crimes and regulatory offences should not be based on the idea that the latter 'do not constitute a public wrong, or do not deserve moral condemnation.'[186] Rather, regulatory offences should be seen as constituting a repugnant republican act and thus a public wrong deserving of both moral condemnation and sanctions that aim to achieve more than just a balance between the costs and benefits of performing the act.[187] Regulatory offences should, in other words, operate to establish not only objective security but also intersubjective norms (common moral-cum-legal awareness of every individual's equal status) that should make people feel obliged to respect the rights of one another in keeping with the republican ideal of freedom.[188] On this account, both traditional crimes and regulatory offences are public wrongs.

Given that political disinformation as we define it implicates the public interest, a society that values freedom in general and freedom of expression in particular would thus aptly characterise as a public wrong the act of communicating political disinformation. Be that as it may, the presumption in favour of parsimony in the use of the criminal law that figures both in republican theory and in the case law of the ECtHR argues against an indiscriminate criminalisation of non-violent forms of political disinformation. The most repugnant forms of political disinformation, such as disinformation amounting to manifest 'hate speech', disinformation about when, where or how to vote in an election, and disinformation that clearly amounts to undue foreign interference in elections, can, of course, be criminalised. Indeed, as noted in chapter 5, some states already prohibit the dissemination of such egregious forms of disinformation and rightfully so.

Beyond that, however, the onus of proof in any arguments for criminalisation of the act of communicating political disinformation as such falls on those who defend criminalisation rather than on those of us who oppose it.[189] Therefore, without

185 See, for example, Daniel Ohana, 'Regulatory Offenses and Administrative Sanctions: Between Criminal and Administrative Law' in Markus D Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press 2014) 1064–66.

186 Mireille Hildebrandt, 'Justice and Police: Regulatory Offenses and the Criminal Law' (2009) 12 *New Criminal Law Review* 43, 64.

187 Ibid.

188 Ibid, 65.

189 Pettit, 'Criminalization in Republican Theory' (n 171) 143.

prejudice to received exceptions, the remainder of this chapter proceeds on the assumption that the phenomenon of political disinformation should generally be regulated through regulatory norms short of criminal prohibition. More specifically, it would appear that the state can regulate the phenomenon of political disinformation in a holistic manner and without necessarily taking away from freedom of expression by providing for a suitable combination of correction and sanction mechanisms.

6.3.1 Correction Mechanisms

The state should provide for appropriate mechanisms for rapid correction of misleading information communicated to the public through any media, including both traditional media outlets and online platforms. More specifically, the state should adopt two types of correction mechanisms. First, the state should adopt legislation providing for a comprehensive right of reply, otherwise known as the right of rectification or the right of correction. This right should afford any person, who is both individually and directly concerned by alleged misleading information communicated to the public through any media, a possibility to respond and require the media outlet or online platform operator concerned to take an appropriate corrective action. Second, in cases where no specific person is both individually and directly concerned by alleged misleading political information communicated to the public through any media, the state itself, acting through an independent public body, should be duty bound to require the media outlet or online platform operator concerned to take an appropriate corrective action.

It should be underlined at the outset that both correction mechanisms should target the quality of information, namely misleadingness, rather than the communicator's intent. This is important because, as noted in chapter 4, misleading information, regardless of the communicator's intent, is a threat not only to freedom of expression but to freedom in general. There should be no serious protestations against this suggestion even though both correction mechanisms would operate to correct both misinformation and disinformation. None of the two correction mechanisms is designed to punish anyone. Both mechanisms would merely serve to prevent or rectify, as far as possible, the freedom-undermining effects of disinformation and misinformation in general and political disinformation and political misinformation in particular. This would in turn help circumvent the downsides of our intent-based definition of political disinformation identified in chapter 4.

The right of reply appears to be the most suitable means of addressing the problem of misleading information in general. As noted in chapter 4, whether a given piece of information is misleading or not depends on the communication

context, not necessarily on falsity or inaccuracy. The Gricean philosophy of communication is instructive in this regard.[190] Persons who claim to be both individually and directly concerned by a particular piece of information are generally in the best position to understand the communication context and to make an informed judgment about whether or not the information in question is misleading. A person may claim to be individually and directly concerned if the disputed information refers to him implicitly or by name, or otherwise directly concerns him individually rather than the public at large.[191]

As the case law of the CJEU suggests, a person other than those to whom disputed information refers may claim to be both individually and directly concerned only if that information directly affects him by reason of certain attributes which are peculiar to him or by reason of circumstances in which he is distinguishable from other members of the public.[192] In the context of elections, for example, a political candidate may claim to be both individually and directly concerned not only by defamatory information but also misleading information which puts another candidate in a positive light and which could thus not only mislead voters but also rob him as a candidate of an equal opportunity to be elected. The exercise of the right of reply in this context would serve to protect candidates from misleading information which could otherwise undermine fair electoral competition and thus the right to run for election.

The suggestion that the state, through an independent public body, should be required to respond to misleading information, requiring the media outlet or online platform operator concerned to take an appropriate corrective action, should also be acceptable. As already noted in chapters 3 and 5, it is settled law that the right of reply itself is an integral part of freedom of expression as it is designed to protect not only personality rights but also the right of the public to receive information from a plurality of sources and thus to be properly informed. One could thus go so far as to 'argue that based on a public interest to guarantee a reliable media coverage and enhance public discourse, civil society organisations, knowledgeable individuals or others who could increase the public debate on a specific topic should also be able

190 H Paul Grice, 'Meaning' (1957) 66 *Philosophical Review* 377; H Paul Grice, 'Utterer's Meaning, Sentence-Meaning, and Word-Meaning' (1968) 4 *Foundations of Language* 225; H Paul Grice, 'Logic and Conversation' in Peter Cole and Jerry L Morgan (eds), *Syntax and Semantics, Volume 3: Speech Acts* (Academic Press 1975), reprinted in H Paul Grice, *Studies in the Way of Words* (Harvard University Press 1989).

191 cf Felix Hempel, 'The Right of Reply Under the European Convention on Human Rights: An Analysis of Eker v. Turkey' (2018) 10 *Journal of Media Law* 17, 36, arguing that the right of reply 'should only be available to those referred to in the statement in question in order to make it predictable and limit its potential 'chilling effect'.'

192 See, *mutatis mutandis*, Case 25/62 *Plaumann & Co v Commission of the European Economic Community* [1963] ECLI:EU:C:1963:17.

to exercise the right to reply even if a statement did not refer to them' or otherwise individually concerned them.[193] But it is obvious that the media cannot be reasonably expected to publish replies from every busybody. The state is in pole position to respond to misleading information which does not individually concern specific persons but relate to matters of public interest. In effect, by performing the suggested duty of responding to such misleading information, the state, acting through an independent public body, would be exercising the right of reply for and on behalf of the citizenry.

Fortunately, there is no shortage of examples of legal provisions governing the right of reply from which policymakers could draw some inspiration in crafting specific provisions on the suggested correction mechanisms. Indeed, although the ECHR does not explicitly guarantee the right of reply, the media laws of some European states, such as France and Germany, have provided for a right of reply at least since the 1800s.[194] Perhaps the only difficult policy question that should be considered is how the state could frame the right of reply and the duty of the state to respond to misleading political information in a manner that would effectively address the problem of political disinformation. Existing provisions somewhat already address the problem but could still benefit from some tailoring.

Consider, for example, the right of reply which member states of the EU, which are also member states of the Council of Europe, are required to guarantee pursuant to EU law. Article 28 of the Audiovisual Media Services Directive (AVMSD) 2010 provides that '[w]ithout prejudice to other provisions adopted by the Member States under civil, administrative or criminal law, any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies.'[195] Depending on how the states concerned have transposed this provision into national law, the right of reply envisaged in this provision could help address not only disinformation but also misinformation in general. But a mere fulfilment of the minimum requirements of article 28 would obviously be inadequate to confront the complex phenomenon of political disinformation.

First, political disinformation communicated through online media and indeed traditional media other than television falls outside the scope of the right of reply

193 Hempel (n 191) 34.

194 Charles Danziger, 'The Right of Reply in the United States and Europe' (1986) 19 *New York University Journal of International Law and Politics* 171.

195 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services (Audiovisual Media Services Directive) (codified version) [2010] OJ L95/1 (AVMSD).

provided for in article 28, since the provision applies only to assertions of incorrect facts made in a television programme. Ideally, the right of reply should apply to all media, including both traditional media and online platforms (or at least major social media platforms). Second, article 28 is inapt to address the phenomenon of political disinformation insofar as it stops short of catching baseless and misleading statements of opinion or value judgments. True, any requirement to prove the truth of a value judgment would be impossible to fulfil and thus would infringe freedom of opinion, which is also an essential element of freedom of expression.[196] But the exercise of the right of reply or the performance of the suggested public duty in respect of misleading value judgments would be compatible with freedom of opinion as none of these correction mechanisms would require anyone to prove the truth of a value judgment. Importantly, such broad correction mechanisms would also catch misleading information, such as deepfakes and doctored videos, which cannot neatly be classified either as value judgments or as statements of fact.

Fortunately, since the Committee of Ministers adopted its 1974 Resolution on the Right of Reply,[197] the Council of Europe has already been promoting the recognition by all its member states of a broader right of reply than that required by article 28 of the AVMSD. In its 1974 resolution, the Committee of Ministers took the view that it was 'desirable to provide the individual with adequate means of protection against the publication of information containing inaccurate facts about him, and to give him a remedy against the publication of information, *including facts and opinions*, that constitutes an intrusion in his private life or an attack on his dignity, honour or reputation, whether the information was conveyed to the public through the written press, radio, television or any other mass media of a periodical nature'.[198] The Committee of Ministers thus considered that the right of reply should apply in respect of *all* media.[199] More specifically, it recommended to member states that in relation to information concerning individuals published through *any* media, the individual concerned should, at a minimum, have 'an

196 *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986), para 46; *Oberschlick v Austria (no 1)* App no 11662/85 (ECtHR, 23 May 1991), para 63; *Dalban v Romania* App no 28114/95 (ECtHR [GC], 28 September 1999), para 49; *Morice v France* (n 177), para 126; *Mika v Greece* App no 10347/10 (ECtHR, 19 December 2013), para 31; *Stancu and others v Romania* App no 22953/16 (ECtHR, 18 October 2022), para 119; *Khural and Zeynalov v Azerbaijan (no 1)* App no 55069/11 (ECtHR, 6 October 2022), para 43; *Khural and Zeynalov v Azerbaijan (no 2)* App no 383/12 (ECtHR, 19 January 2023), para 47.

197 Committee of Ministers of the Council of Europe, 'Resolution (74) 26 on the Right of Reply – Position of the Individual in Relation to the Press (adopted at the 233rd meeting of the Ministers' Deputies, 2 July 1974) (Resolution (74) 26).

198 Ibid, preamble (emphasis added).

199 Ibid.

effective possibility for the correction, without undue delay, of *incorrect facts* relating to him which he has a justified interest in having corrected'.[200] Many other subsequent recommendations adopted by the Committee of Ministers and by the Parliamentary Assembly of the Council of Europe in the field of media and information society echo this call.[201]

It goes without saying that a right of reply applicable to all media as recommended by the Committee of Ministers would be better suited to address the phenomenon of political disinformation than a right of reply applicable only to television broadcasting as required by article 28 of the AVMSD. More importantly, in its 2004 Recommendation on the Right of Reply in the New Media Environment,[202] the Committee of Ministers goes further to take cognisance of the emergence of new media and related technological developments. It thus recommends that governments of the member states of the Council of Europe, which also include all member states of the EU, 'should examine and, if necessary, introduce in their domestic law or practice a right of reply or any other equivalent remedy, which allows a rapid correction of incorrect information in *online* or *off-line* media'.[203] Without prejudice to the possibility of adjusting to the particularities of each type of media the means of exercising the right, the Committee of Ministers more specifically recommends that 'any natural or legal person, irrespective of nationality or residence, should be given a right of reply or an equivalent remedy offering a possibility to react to any information in the media presenting inaccurate facts about him or her and *which affect his/her personal rights*.'[204]

[200] Ibid, para 1 (emphasis added).

[201] See, for example, Parliamentary Assembly of the Council of Europe, 'Recommendation 1215 (1993) on the Ethics of Journalism' (adopted at the 42nd sitting, 1 July 1993), para 5(i); Committee of Ministers of the Council of Europe, 'Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech"' (adopted at the 607th meeting of the Ministers' Deputies, 30 October 1997), appendix, principle 2; Committee of Ministers of the Council of Europe, 'Recommendation Rec (2003)13 of the Committee of Ministers to Member States on the Provision of Information through the Media in Relation to Criminal Proceedings' (adopted at the 848th meeting of the Ministers' Deputies, 10 July 2003), annex, principle 9; Committee of Ministers of the Council of Europe, 'Recommendation CM/Rec(2007)15 of the Committee of Ministers to Member States on Measures Concerning Media Coverage of Election Campaigns' (adopted at the 1010th meeting of the Ministers' Deputies, 7 November 2007), para 7; Parliamentary Assembly of the Council of Europe, 'Recommendation 2075 (2015) on Media Responsibility and Ethics in a Changing Media Environment' (adopted at the 24th sitting, 24 June 2015), para 2.1; Recommendation CM/Rec(2022)12 (n 134), appendix, para 6.1.

[202] Committee of Ministers of the Council of Europe, 'Recommendation Rec(2004)16[1] of the Committee of Ministers to Member States on the Right of Reply in the New Media Environment' (adopted at the 909th meeting of the Ministers' Deputies, 15 December 2004) (Recommendation Rec(2004)16[1]), preamble.

[203] Ibid (emphasis added).

[204] Ibid, para 1 (emphasis added).

This recommendation chimes well with the republican ideal of freedom not only because it is consistent with a rights-based response to the phenomena of disinformation and misinformation but also because it would help address both phenomena, both offline and online. Existing comparative research suggests that many European jurisdictions already have a right of reply which applies to all traditional media, going beyond the minimum requirement set by article 28 of the AVMSD.[205] A number of European states have even already extended the scope of the right of reply to online press products.[206] There, however, appears to be a dearth of scholarship exploring the possibility of extending the application of this right to online platforms. Indeed, it is doubtful that at the time of writing its 2004 recommendation the Committee of Ministers itself envisioned a right of reply that would be so broad as to apply to online platforms.[207] In any event, it is obvious that the right of reply cannot be effective in addressing the phenomenon of political disinformation unless it is extended to online platforms.

Like article 28 of the AVMSD, moreover, the recommendation by the Committee of Ministers also appears to be deficient insofar as it suggests that 'the dissemination of opinions and ideas should remain outside the scope' of the right of reply.[208] It should be acknowledged that, although there are states (for example, France) that guarantee the right of reply in respect of both statements of fact and statements of opinion or value judgments, existing comparative research suggests that current regulatory trends tend to conform to the recommendation by the Committee of Ministers. More specifically, comparative research suggests that most European states 'provide for the right of reply only in respect of statements of fact.' [209] Interestingly, in some of those states, only false and injurious statements may trigger the application of the right of reply, whereas in others false but non-injurious statements could also trigger the application of the right.[210] But, as we now know, this is problematic on several accounts. First, it is difficult in practice to draw a distinction between statements of fact and value judgments. Second, some forms of misleading information or disinformation, such as deepfakes and doctored videos, cannot even be neatly characterised either as statements of fact or as value judgments. Third, there is no compelling public interest in regulating the

[205] András Koltay, 'The Right of Reply in a European Comparative Perspective' (2013) 54 *Acta Juridica Hungarica* 73.
[206] Ibid, 80.
[207] Recommendation Rec(2004)16[1] (n 202) defines the term 'medium' as 'any means of communication for the periodic dissemination to the public of edited information, whether on-line or off-line, such as newspapers, periodicals, radio, television and web-based news services.'
[208] Recommendation Rec(2004)16[1] (n 202), preamble.
[209] Koltay (n 205) 88.
[210] Ibid.

communication of false but non-misleading information.

Fortunately, the ECtHR already recognises the potential harmful effects of baseless value judgments and thus considers that the dissemination of a statement constituting a value judgment without a sufficient factual basis can be legitimately restricted by law, even by criminal prohibition.[211] In the ECtHR's own words, 'where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient "factual basis" for the impugned statement: if there is not, that value judgment may prove excessive'.[212] As noted in chapters 1 and 4, the ECtHR also recognises that it is sometimes difficult to distinguish between assertions of fact and value judgments.[213] In the ECtHR's view, this makes it necessary to carefully examine the particular circumstances of each case and the general tone of the disputed statement before making any such distinction, 'bearing in mind that *assertions about matters of public interest may, on that basis, constitute value judgments rather than statements of fact*'.[214] Where a losing candidate in a political election claims that the election was rigged, for example, that candidate could be making either a false statement of fact with intent to mislead the public or a value judgment based on an honest belief that he would have won the election had it not been rigged.

The practical difficulties associated with extra-judicial attempts at drawing a distinction between value judgments and statements of fact perhaps explain why the text of the European Convention on Transfrontier Television 1989,[215] which also provides for a right of reply in the context of television broadcasting within the legal framework of the Council of Europe, does not restrict the applicability of the right of reply to assertions of fact. Article 8 thereof simply provides that 'every natural or legal person, regardless of nationality or place of residence, shall have the opportunity to exercise a right of reply or to seek other comparable legal or administrative remedies relating to programmes transmitted by a broadcaster within its jurisdiction'.[216] Under the Inter-American human rights system, the ACHR also guarantees a broader right of reply which applies not only to statements of fact but

[211] *Lingens v Austria* (n 196); *Oberschlick v Austria (no 1)* (n 196); *Otegi Mondragon v Spain* (n 177), para 54.

[212] *Morice v France* (n 177), para 126; *Khural and Zeynalov v Azerbaijan (no 1)* (n 196), para 43; *Stancu and others v Romania* (n 196), para 119; *RTBF v Belgium (no 2)* App no 417/15 (ECtHR, 13 December 2022), para 69.

[213] *Scharsach and News Verlagsgesellschaft mbH v Austria* App no 39394/98 (ECtHR, 13 November 2003), para 40; *Wojczuk v Poland* App no 52969/13 (ECtHR, 9 December 2021), para 73.

[214] *Morice v France* (n 177), para 126; *Stancu and others v Romania* (n 196), para 119 (emphasis added).

[215] European Convention on Transfrontier Television (adopted 5 May 1989, entered into force 1 May 1993).

[216] Ibid, art 8(1).

also to ideas. Article 14 thereof provides that 'anyone injured by *inaccurate* or *offensive statements* or *ideas* disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.'[217]

In the same vein, the case law of the former ECnHR as further developed by the ECtHR diverges from the Committee of Minister's attempt at excluding the dissemination of opinions and ideas from the scope of the right of reply. The former ECnHR first pronounced upon the right of reply under the ECHR in 1989.[218] According to its judgment, the rationale for the right of reply is twofold. First, this right affords 'everyone the possibility of protecting himself against certain *statements* or *opinions* disseminated by the mass media which are likely to be injurious to his private life, his honour or his dignity' in furtherance of the protection afforded by article 8 of the ECHR.[219] Second, regulations governing the right of reply 'safeguard the interest of the public in receiving information from a variety of sources and thereby…guarantee the fullest possible access to information' in furtherance of freedom of expression as enshrined in article 10 of the ECHR.[220] Therefore, according to the former ECnHR, whilst it is true that an obligation to publish a reply can be regarded as an interference by public authority with the publisher's editorial discretion, the right of reply constitutes a necessary guarantee of the very pluralism of information which must be respected in a democratic society.[221]

As already noted in chapters 3 and 5, the ECtHR also underlines that the right of reply is '*an important element of freedom of expression*' within the scope of article 10 of the ECHR.[222] In the ECtHR's view, the right of reply 'flows from the need not only to be able *to contest untruthful information*, but also *to ensure a plurality of opinions*, especially in matters of general interest such as literary and political debate.'[223] This echoes the two main functions of the right of reply which the former ECnHR announced in 1989. The latter function is particularly necessary for

217 ACHR, art 14(1) (emphasis added).
218 *Ediciones Tiempo S.A. v Spain* App no 13010/87 (ECnHR, 12 July 1989).
219 Ibid, para 1 (emphasis).
220 Ibid, para 2.
221 Ibid.
222 *Melnychuk v Ukraine* App no 28743/03 (ECtHR, 5 July 2005), para 2; *Kaperzyński v Poland* App no 43206/07 (ECtHR, 3 April 2012), para 66; *Marunić v Croatia* App no 51706/11 (ECtHR, 28 March 2017), para 50; *Eker v Turkey* App no 24016/05 (ECtHR, 24 October 2017), para 43; *NIT S.R.L. v the Republic of Moldova* App no 28470/12 (ECtHR [GC], 5 April 2022), para 200; *Eigirdas and VĮ "Demokratijos plėtros fondas" v Lithuania* Apps nos 84048/17 and 84051/17 (ECtHR, 12 September 2023), para 110 (emphasis added).
223 Ibid (emphasis added). For a more detailed discussion of the case law, see generally Hempel (n 191).

democratic decision-making but there is no order of priority between the two functions: they are both designed to protect the freedom or rights of individuals.[224] The ECtHR thus considers 'that a legal obligation to publish a rectification or a reply may be seen as a normal element of the legal framework governing the exercise of the freedom of expression by the print media' and 'cannot, as such, be regarded as excessive or unreasonable.'[225] This holds good even though, as a general rule, the ECtHR maintains that 'privately owned newspapers must be free to exercise editorial discretion in deciding whether to publish articles, comments and letters submitted by private individuals or even by their own staff reporters and journalists.'[226]

All in all, it would appear that a right of reply that affords affected persons a possibility to rectify misleading information communicated to the public, whether such information is presented in the form of a statement of fact or a statement of opinion or ideas, is not only consistent with freedom of expression but is also an integral part of that freedom.[227] The foregoing discussion also appears to confirm that the ECtHR would fully countenance the suggested correction mechanisms. The Inter-American human rights system would likewise readily admit of the suggested mechanisms as it already provides for a broad right of reply. Given extant discrepancies in terms of how freedom of expression is conceptualised, however, the position of the law might be less clear elsewhere. In the US, for example, the Supreme Court upheld the 'fairness doctrine', a species of the right of reply applicable to traditional broadcast media, in 1969 but later declared incompatible with freedom of the press a statutory right to reply to inaccurate information published in a newspaper.[228] In any event, these seemingly contradictory judgments do not negate the contention that the right of reply, when prudently framed, is fully compatible with freedom of expression properly understood. Not even the suggested direct involvement of the state would negate this stand provided the state is required

[224] cf Hempel (n 191) 35, asserting that 'achieving media pluralism should be seen as a subordinate goal of the right of reply in comparison to protecting the individual's rights.'

[225] *Kaperzyński v Poland* (n 222), para 66; *Rusu v Romania* App no 25721/04 (ECtHR, 8 March 2016), para 25; *Eigirdas and VĮ "Demokratijos plėtros fondas" v Lithuania* (n 222), para 110.

[226] *Saliyev v Russia* App no 35016/03 (ECtHR, 21 October 2010), para 52; *Remuszko v Poland* App no 1562/10 (ECtHR, 16 July 2013), para 79.

[227] See also John Hayes, 'The Right to Reply: A Conflict of Fundamental Rights' (2004) 37 *Columbia Journal of Law and Social Problems* 551, 574–75.

[228] *Red Lion Broadcasting Co v FCC* 395 US 367 (1969); *Miami Herald Publishing Co v Tornillo* 418 US 241 (1974). For a more general comparative discussion of the judicial understanding of freedom of expression in Europe and in the US, see Oreste Pollicino, 'European Judicial Dialogue and the Protection of Fundamental Rights in the New Digital Environment: An Attempt at Emancipation and Reconciliation' in Sonia Morano-Foadi and Lucy Vickers (eds), *Fundamental Rights in the EU: A Matter for Two Courts* (Hart Publishing 2015).

to act through an independent public body under the institutional arrangements outlined in section 6.4 below. Meanwhile, it could be useful to shed some more light on how these two correction mechanisms should operate in practice.

6.3.1.1 Purpose of Correction

In keeping with the republican ideal of freedom, the right of reply should be designed only to protect the rights of the individual, although not necessarily only privacy or personality rights such as those envisaged in article 8 of the ECHR. As already noted above, only persons who claim to be both individually and directly concerned by disputed information should be entitled to exercise the right of reply. In other words, although the right of reply also safeguards the interest of the public in receiving information from different sources, no individual should be entitled to exercise the right of reply solely in the name of protecting the public interest. This should help allay concerns about the possibility of a digital right of reply turning the Internet into an arena of 'statements and counterstatements' suited to a 'set of litigation pleadings than to a vibrant discussion medium'.[229]

Where no specific person or group of persons is entitled to exercise the right of reply, the state, acting through an independent public body, should step in and respond to misleading information relating to matters of public interest in a similar manner as would a private individual entitled to exercise the right of reply. The relevant independent public body should perform this duty only insofar as it is necessary to protect the rights of the public at large. The independent public body may act on its own initiative or upon receiving a report from members of the public or other relevant public officials. This means that the state must put in place necessary institutional arrangements that would: first, enable the designated independent public body to identify misleading information relating to matters of public interest made accessible to the public, whether offline or online; and, second, enable members of the public and, in appropriate cases, public officials to rapidly bring to the attention of the designated independent public body any misleading information relating to matters of public interest made accessible to the public, whether offline or online.

To avoid undermining the first function of the right of reply mentioned above, namely that of protecting the rights of the individuals who are referred to in, or otherwise individually and directly concern by, disputed information, the relevant independent public body should not be required to respond to misleading information which individually and directly concerns specific persons. Nor should the independent public body respond to such information, whether on its own initiative

[229] Graham Smith, *Internet Law and Regulation* (Sweet & Maxwell 2007) 345.

or upon receiving a report.

6.3.1.2 Information to be Corrected

To mitigate the possibility of overburdening the media with worthless requests for reply or equivalent responses by an independent public body, the availability of both correction mechanisms, both offline and online, should be tied to one common characteristic of both disinformation and misinformation. The right of reply should thus afford the individual a possibility to contest misleading information rather than inaccurate or false information as such. What this means is that the legal provisions governing the right of reply should require any person seeking to exercise the right of reply to demonstrate in the reply how the disputed information is misleading when understood in its relevant communication context. This would ensure that the right is both effective and sufficiently tailored to respond to harmful information.

As already noted, false or inaccurate information is unlikely to be harmful unless it is also misleading. It would therefore be unnecessary and thus disproportionate to require media outlets or online platform operators to publish or otherwise react to replies to every piece of inaccurate or false information. By the same token, where no specific person is entitled to exercise the right of reply, an independent public body should be required to respond only to misleading information relating to matters of public interest or, simply, misleading political information.

6.3.1.3 Choice of Corrective Action

The appropriate corrective action to be taken should in principle vary depending not only on whether the disputed information was made accessible to the public offline or online but also on the nature of the information in question. Even so, regardless of whether the disputed information was published offline or online, the request for correction itself should be addressed to the media outlet or online platform operator concerned within a reasonably short time from the date of publication and the media outlet or online platform operator concerned should publish the reply or, where applicable, response by an independent public body free of charge and without undue delay.[230] It could be necessary to prescribe a time frame within which the media outlet or online platform operator concerned should publish or otherwise react to a reply or response, particularly if the request relates to misleading information requiring immediate rectification such as information relating to elections during official election campaign periods. Moreover, the reply or response should always

[230] Recommendation Rec(2004)16[1] (n 202), paras 2 and 4.

'be given, as far as possible, the *same prominence* as was given to the contested information in order for it to reach the same public and with the same impact.'[231]

Both correction mechanisms are particularly appropriate remedies in the online environment due to the possibility of instant correction of misleading information and the technical ease with which replies or responses from persons concerned or an independent public body can be attached to such information.[232] Also, the publication of replies or responses on the Internet would not generally take up space for other publications.[233] Here, the person concerned or, where applicable, an independent public body could require the online platform operator concerned to deploy the best available technology to label the disputed information. The online platform operator could simply label the disputed information as such ('disputed') and attach or, provide a link to, 'alternative' information provided by the person exercising the right of reply or, where applicable, by an independent public body. To be effective, the label should be made prominent, possibly with the aid of algorithms, so as to draw the attention of Internet users, not least those who might have seen the information before the label was attached, to the fact that the information has been subject to a reply or response. This suggestion should not spark controversy.

Indeed, the suggested labelling requirement does not raise any concerns about prior restraint on publication, whether by public authority or by online platform operators. Nor does the requirement amount to private censorship. It requires no political judgment on the part of online platform operators, since the label would be attached at the instance of a user. True, where applicable, a label attached at the instance of an independent public body would require some form of political judgment on the part of public officials. But any concerns about the potential abuse of such power should be allayed by adhering to the institutional arrangements suggested in section 6.4 below. Moreover, unlike the pejorative and judgmental labels suggested by others such as 'this is fake', 'get the real facts', 'this is false' or 'this may be false or misleading',[234] the label 'disputed' is both neutral and nonpejorative. Nor is it a negative label that would induce those who seek to share information in good faith to self-censor. Those who happen to publish misleading information in good faith and without any intent to mislead would probably even be happy to be corrected. The reply or response accompanying the label would thus constitute 'more speech' properly so called, allowing recipients to make their own judgment about the veracity of the disputed information.

231 Ibid, para 3 (emphasis added).
232 Ibid, preamble.
233 Koltay (n 205) 88.
234 Pitruzzella and Pollicino (n 43) 48; Cass R Sunstein, *Liars: Falsehoods and Free Speech in an Age of Deception* (Oxford University Press 2021) 102; Horder, *Criminal Fraud and Election Disinformation* (n 32) 91.

As concerns disputed information published using anonymous or pseudonymous accounts, including bots, the state should require online platform operators to attach an additional label in order to draw the attention of Internet users to the fact that the disputed information has been posted using a bot or otherwise using an inauthentic account, so that such accounts cannot be confused with authentic accounts.[235] This additional label should be attached irrespective of whether the main label ('disputed') is to be attached at the instance of a person entitled to exercise the right of reply or, where applicable, at the instance of an independent public body. Such a transparency requirement appears to be a proportionate way of addressing political disinformation posted online anonymously or under a pseudonym, which is not indisputably unlawful.[236] Online platform operators could also be required to attach an additional transparency label when disputed information bearing upon elections in the context of an election campaign is disseminated using an account belonging to a foreign actor, to indicate that the disputed information originates from a foreign source.[237] This is important because misleading information disseminated by foreigners who masquerade as citizens is more likely to mislead voters than when such masqueraders are exposed as such.

In lieu of the foregoing labelling requirements, a person entitled to exercise the right of reply and, where applicable, an independent public body should have a possibility to require online platform operators to remove or to disable access to information which is not only misleading but also indisputably false. For example, an online post claiming that the person concerned, being a candidate in an election, has died or withdrawn from the race can be deleted without harming anyone whilst protecting equal competition between candidates, thereby affording effective protection to the right to run for election. This should be acceptable as there is nothing contestable about a political candidate merely debunking disinformation or misinformation about his purported death or withdrawal from the race. Where applicable, and without prejudice to any existing criminal provisions, an independent public body could also rightfully require online platform operators to remove or disable access to disinformation about when, where or how to vote in an election. Such a requirement would not violate anyone's rights. Nor should it be controversial given the primacy of the right to vote in a democratic society.

[235] See also Recommendation CM/Rec(2022)12 (n 134), appendix, para 4.3.
[236] David Kaye, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (A/HRC/29/32, 22 May 2015), para 48.
[237] Ohlin, 'Election Interference: A Unique Harm' (n 71) 252.

6.3.1.4 Means of Enforcement

Like any other regulatory mechanism, both correction mechanisms should be enforceable. This is necessary, since the law cannot maintain effective control of private conduct in the absence of relevant mechanisms for application and enforcement.[238] If the media outlet or online platform operator concerned refuses to publish a reply or response or otherwise fails to take an appropriate corrective action to the satisfaction of the person concerned or, where applicable, an independent public body, the person concerned or the independent public body should have a possibility to bring the dispute before a court with the jurisdiction to order the media outlet or online platform operator to publish the reply or response or to take an appropriate corrective action.[239] Here, the dispute should be determined through a summary procedure. The object of the proceedings should not be to determine the veracity of the disputed information but rather to expeditiously determine whether the formal conditions for the exercise of the right of reply or, where applicable, the suggested public power have been met. Any undue delay in making the determination would likely undermine the effectiveness of the right of reply or, where applicable, the public power to require the media outlet or online platform operator concerned to take an appropriate corrective action.

Any unreasonable refusal or neglect by the media outlet or online platform operator concerned to publish a reply or to take any other appropriate corrective action as requested by the person entitled to exercise the right of reply or, where applicable, by an independent public body, should attract a penalty in the form of a fine the maximum amount of which should be fixed by law, to ensure legal certainty.[240] Such liability, it must be acknowledged, is akin to liability under a notice-and-action regime in the online context, since it has the effect of requiring online platform operators to take the requested corrective action or else run the risk of being fined. Some could thus see it as an unacceptable interference with the editorial rights of online platform operators. Indeed, as one US court has pointed out, 'like strict liability, liability upon notice has a chilling effect'.[241] But the liability that we are advocating here is indispensable if both traditional media and online platform operators are to be given a compelling incentive to comply with the suggested correction mechanisms.

238 Emily L Sherwin, 'An Essay on Private Remedies' (1993) 6 *Canadian Journal of Law and Jurisprudence* 89, 92.

239 Recommendation Rec(2004)16[1] (n 202), para 8.

240 For a comparative discussion of the prevailing trends in this connection, see Koltay (n 205) 85–86. See also Sunstein (n 234) 102.

241 *Zeran v Am. Online, Inc* 129 F.3d 327, 333 (4th Cir 1997).

6.3.2 Sanction Mechanisms

The correction mechanisms suggested above would operate as a disincentive against the dissemination of disinformation in general, since purveyors of disinformation would know beforehand that someone is likely to debunk any disinformation they may attempt to spread. But some purveyors of disinformation may still try their luck and spread disinformation in the hope that no one will respond or that, even if someone does respond, some of the recipients would still believe the disinformation. Those who may disseminate misleading information by accident and in good faith (that is, misinformation) on the other hand would rest assured that they would not be punished for doing so but merely corrected. They may even be happy to be corrected and would likely apologise and retract or delete the misinformation after being corrected, thereby preventing the dispute from escalating. Some purveyors of disinformation, too, may feel so ashamed about being exposed that they may apologise and even pretend that they had communicated the disputed information by accident. But others may be too proud to apologise. They may insist that the disputed information is accurate and non-misleading. Some recipients may thus still believe purveyors of disinformation or may be left wondering whether to believe the disputed information or the disputing reply or response. In any event, the disputed information might have already caused a substantial amount of harm by the time corrective measures are taken.

For these reasons, the exercise of the right of reply and, where applicable, of the power vested in an independent public body to require media outlets and online platform operators to take any of the corrective measures suggested above, should apply without prejudice to received existing possibilities to institute civil or criminal proceedings against those who disseminate disinformation. The suggested correction mechanisms should not, for example, prevent an individual from instituting a civil action for defamation arising from the dissemination of defamatory disinformation. But it should also be possible for persons who are both individually and directly concerned by political disinformation and, where applicable, an independent public body, to institute civil proceedings against purveyors of political disinformation which is neither defamatory nor criminal in nature but nonetheless infringes or threatens to infringe the rights of individuals.

We have already noted in the previous chapters that the republican ideal of freedom requires the state to protect people from arbitrary interference, that is, intentional (including reckless and negligent) acts or omissions that threaten individual rights. The sanctions and any liability to be imposed in the proceedings that we are suggesting should therefore target purveyors of political disinformation themselves rather than the media or online platform operators. This suggestion is also consistent with existing case law. As intimated in section 6.2 of this chapter, it would appear that the reasoning of the ECtHR presupposes that the most appropriate

form of liability under article 10 of the ECHR would be direct liability of authors of political disinformation themselves.[242] This is so even though the ECtHR recognises that the state can be justified in imposing liability on online platform operators 'when user comments are *clearly unlawful* and have been *posted anonymously or under a pseudonym*, at least where no domestic mechanisms are in place to afford the injured party a real and effective opportunity to pursue the actual authors.'[243]

To avoid confusion with the EU's notice-and-action regime, affected states should clearly indicate in their regulatory measures that the suggested sanction mechanisms would not generally render all alleged misleading political information 'illegal content' under the DSA. This would ensure that, unless it is indisputably unlawful, alleged political disinformation is not subject to removal until an independent public court of competent jurisdiction determines that such information is indeed political disinformation. The liability or sanctions that we are suggesting should not, in any event, be confused with criminal prohibition. These sanctions are consistent with allowing people to communicate political disinformation provided that they are willing to pay the costs arising from doing so in the event of detection.[244]

Therefore, the idea is not to prohibit the act of communicating political disinformation. What we are advocating is more or less what Philip Pettit calls 'admission-cost' regulation the effect of which would be to make the option of communicating political disinformation less attractive.[245] Indeed, regulating the act of communicating political disinformation only on the basis of the deterrent effect of associated costs is similar to any other 'liability-rule' regime that allows the regulated act to be performed subject to the proviso that the perpetrator 'is willing to cover the price of admission.'[246]

The mere possibility of the state imposing penalties on purveyors of political disinformation would nonetheless effectively replace the option of 'communicating political disinformation' with the option of 'communicating political disinformation-with-the-threat-of-a-penalty'. This would in turn provide people with a measure of objective security against purveyors of political disinformation.[247] If properly designed not only to compensate victims but also to negate the utility of exercising the option, such penalties would also have the effect of establishing intersubjective norms that would make people feel obliged to refrain from exercising the option. It could therefore be useful to shed some more light on how the suggested sanction mechanisms should operate in practice in keeping with the principle of equal rights.

242 See also Spano (n 144) 679.
243 Ibid (emphasis added).
244 Pettit, 'Criminalization in Republican Theory' (n 171) 134.
245 Ibid.
246 Ibid. See Phiri, 'Criminal Defamation Put to the Test' (n 57) 51–54.
247 Pettit, 'Criminalization in Republican Theory' (n 171) 141.

6.3.2.1 Purpose of Sanctions

The ultimate purpose of the sanction mechanisms that we are suggesting should be to prevent, and provide remedies for, infringements of individual rights that may result from the dissemination of political disinformation. This would ensure that the regulatory measures serve a specific republican purpose, namely the protection of the freedom or rights of individuals. As noted in chapter 5, the rights at stake may include, among others, personality rights, the right to health, the right to life, electoral rights, and the right of the public to receive information and be properly informed and thus freedom of thought, which are also indispensable elements of freedom of expression. However, as noted above, although political disinformation could undermine the rights of members of the public in general, only persons who are both individually and directly concerned by political disinformation, that is, persons entitled to exercise the right of reply, should be entitled to institute proceedings on their own behalf. Where alleged political disinformation does not individually and directly concern any specific person but the public at large, an independent public body should have the power and duty to institute proceedings in the public interest.

The suggested involvement of a public body should be acceptable. To be sure, even leaving aside the criminal justice system, private remedies are not inevitable.[248] Nor is the provision of private remedies for all individuals who may be wronged always possible. The provision of private remedies for those members of the public whose rights may be infringed by purveyors of political disinformation which is not specifically targeted at them or otherwise individually concerns them is a clear case in point. Under such circumstances, only the state, being the guardian of freedom, is in pole position to enforce the duty of those who engage in public debate to provide reliable information, a duty which, as we already know, is a corollary of freedom to receive information in general and the right of the public to be properly informed in particular.[249]

In obtaining remedies on behalf of the public, the state, acting through an independent public body, should take a wholly prospective view, concerning itself only with the regulation of the act of communicating political disinformation and not with the position of specific persons whose rights might have been violated by purveyors of political disinformation.[250] The duty to provide reliable information should be enforced by penalising the act of communicating political disinformation

[248] See also Sherwin (n 238) 90.

[249] *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979), para 66; *Steel and Morris v the United Kingdom* App no 68416/01 (ECtHR, 15 February 2005), para 90; *Marcinkevičius v Lithuania* App no 24919/20 (ECtHR, 15 November 2022), para 91.

[250] Sherwin (n 238) 92.

through the imposition by the courts of competent jurisdiction of proportionate fines and other suitable sanctions designed to deter people from performing the act. The fines, once collected, would not only serve their protective purpose, through deterrence; they would also be applied to whatever public needs appear most urgent for the promotion of the freedom of the citizenry.[251] Given that the communicator's intent to mislead is generally difficult to prove, and notwithstanding the direct involvement of a public body in instituting enforcement proceedings, those who may seek to communicate political information in good faith would not generally refrain from doing so for fear of fines or other sanctions.

6.3.2.2 Burden of Proof

The possible chilling effect that may arise from the suggested 'old school' liability would be mitigated by requiring the claimant, that is, the person claiming to be both individually and directly concerned by disputed political information or, where applicable, an independent public body to prove all the three defining characteristics of political disinformation. First, the information in question must be misleading political information, that is, misleading information relating to a matter of public interest. Second, the communicator must have communicated the misleading political information in question with intent to mislead the public. Third, the communication of the information in question must have caused or at least threatened to cause harm by infringing or threatening to infringe the rights of the claimant or, where the proceedings are to be instituted by an independent public body, the rights of members of the public. A person who claims to be both individually and directly concerned by misleading political information should be required to show how the information in question has infringed or threatens to infringe his own rights. The designated independent public body on the other hand should be required to show how the misleading political information in question has infringed or threatens to infringe the rights of members of the public.

The element of intent is particularly important. It is therefore worth underlining that this element should be satisfied regardless of whether the proceedings are to be conducted *inter partes* or *ex parte*, in particular because the communicator is anonymous or abroad, before the communicator can be penalised in any way. The court should be satisfied, in the light of the communication context, that the communicator communicated the disputed information with intent to mislead the public on a matter of public interest. In other words, it should not matter whether or not the communicator is characterised as a foreign actor. As the case law of the ECtHR suggests, no one should be penalised for communicating misleading political

[251] Ibid.

information as such unless it can be shown that the communicator was deliberately trying to mislead others.[252] This is also consistent with the position taken by the Parliamentary Assembly of the Council of Europe to the effect 'that statements or allegations in the media, even if they prove to be inaccurate, should not be punishable, provided that they were made without knowledge of their inaccuracy, without conscious intention to cause harm and that their truthfulness was checked with proper diligence.'[253] The requirement of intent, as already noted in chapter 5, would also serve not only to ensure greater legal certainty and thus compliance with the foreseeability requirement of the rule of law but would further operate as an incentive for those who may seek to communicate misleading political information for a purpose other than to mislead the public to indicate that other purpose.

It goes without saying that it may not be easy to prove the communicator's intent. As noted in chapter 4, however, the communicator's intent can be established by analysing the disputed information in its relevant communication context. The intent to mislead can accordingly be inferred from the communicator's negligence or reckless disregard of the misleadingness of the disputed information (for example, where it can be shown that the communicator knowingly used misleading political information for commercial gain). This should not spark any serious controversy. As already noted in chapter 4, the task of discovering communicators' intentions is one of the normal functions of public courts around the world, not only in criminal cases but also in civil cases. For example, public courts 'constantly try to discover the intention of a statute, what a contract writer may have intended by the wording in that document, what makers of their last will and testaments intended to leave to their heirs, and what people intended by what they said in tape-recorded conversations.'[254] We should therefore be able to trust public courts to make reliable judgments about intentions even in the context of political communication.

6.3.2.3 Choice of Sanctions

The appropriate remedies that a person who claims to be both individually and directly concerned by political disinformation and, where applicable, an independent public body should obtain against purveyors of political disinformation may vary depending not only on the nature of the disinformation in question but also on the nature of the communicator. We have noted in chapter 5 that democratic societies

[252] *Salov v Ukraine* App no 65518/01 (ECtHR, 6 September 2005), para 113.

[253] Parliamentary Assembly of the Council of Europe, 'Resolution 2066 (2015) on Media Responsibility and Ethics in a Changing Media Environment' (adopted at the 24th sitting, 24 June 2015), para 6.

[254] Roger W Shuy, 'Discourse Analysis in the Legal Context' in Deborah Tannen, Heidi E Hamilton and Deborah Schiffrin (eds), *The Handbook of Discourse Analysis* (2nd edn, John Wiley & Sons 2015) 827.

around the world already provide some form of remedies against the publication of political disinformation that infringes personality rights.[255] We also know that, in the present case study, personality rights are protected by article 8 of the ECHR. Nevertheless, the right to an effective remedy enshrined in article 13 of the ECHR also requires the state to provide effective remedies for those whose rights other than personality rights may be infringed by purveyors of political disinformation.

Therefore, a person who is individually and directly concerned by political disinformation which does not necessarily infringe his personality rights should be entitled to bring an action, for compensation and other suitable remedies, against the person responsible for the dissemination of the disinformation in question. For example, in default of any other suitable remedies, a person, being a losing candidate in a political election, who claims that the winning candidate won the election through a successful but non-defamatory disinformation campaign should be entitled to bring an action not only for the nullification of the election result but also for possible disqualification of the 'winning' candidate from running for election for a fixed period of time. In a similar vein, an independent public body should be duty bound to seek appropriate remedies in cases where political disinformation does not individually and directly concern a specific person but relates to a matter of public interest. Also, it should be possible for a person who is individually and directly concerned by political disinformation and, where applicable, an independent public body to obtain a judicial order requiring an online platform operator to remove or disable access to political disinformation posted online.

As noted above, the state should not prohibit the use of bots or 'fake' accounts or otherwise require online platform operators to unmask anonymous or pseudonymous users unless for the purpose of specific criminal investigations or legal proceedings or for the purpose of exposing foreigners who masquerade as citizens. Nor should online platform operators be allowed to disclose the identity of anonymous users to a third party unless they are 'required by law or requested to do so by a judicial authority or other independent administrative authority whose decisions are subject to judicial review that has determined that the disclosure is consistent with applicable laws and standards, necessary in a democratic society and proportionate to the legitimate aim pursued.'[256]

In any event, courts should have the power to order an online platform operator to unmask anonymous or pseudonymous purveyors of political disinformation for

[255] See also Resolution (74) 26 (n 197), para 2; Recommendation Rec(2004)16[1] (n 202), preamble.

[256] Committee of Ministers of the Council of Europe, 'Recommendation CM/Rec(2018)2 of the Committee of Ministers to Member States on the Roles and Responsibilities of Internet Intermediaries' (adopted at the 1309th meeting of the Ministers' Deputies, 7 March 2018), appendix, para 2.4.1.

purposes of legal proceedings. The possibility to institute *ex parte* proceedings against anonymous/pseudonymous and foreign alleged purveyors of political disinformation should also be available, provided these are afforded a window of opportunity to contest any punitive court decisions. Such *ex parte* proceedings should be acceptable as they would merely reflect the anonymous or cross-jurisdictional nature of online communication. They should not therefore be seen as a violation of the right to a fair trial. Indeed, *ex parte* proceedings appear to be a reasonable means of holding accountable foreign and anonymous purveyors of political disinformation who may not be subject to the jurisdiction of the court that determines the matter.[257]

A person who is individually and directly concerned by political disinformation and, where applicable, an independent public body should have a possibility to obtain appropriate remedies against foreigners meddling in elections through the dissemination of political disinformation. For example, in the online context, the courts of competent jurisdiction could direct an online platform operator concerned not only to remove the violative content but also possibly to geoblock the foreign actor's account until after the election.[258] These and other remedies sought in relation to electoral political disinformation during official election campaigns should be available through a summary judicial procedure. Also, as already noted above, it should be possible in the context of elections to institute *ex parte* proceedings against foreign and anonymous purveyors of political disinformation.

6.4 Institutional Arrangements for Implementation

The correction and sanction mechanisms suggested above would, in keeping with the republican ideal of freedom, require the state to establish democratic institutional arrangements for effective and non-arbitrary application and enforcement. To be sure, the suggested regulatory mechanisms are not out of the ordinary. They would require the participation of all the three arms of government (the legislature, the executive and the judiciary), which are already established in all modern democratic states. The legislature would have to enact relevant legislation. The relevant legislation would have to include not only detailed provisions on the suggested correction mechanisms and civil sanctions but also clarify the composition and functions of an independent public body, albeit falling under the executive arm of government, that would be responsible for the application of the corrective measures and for the institution of enforcement proceedings in the public interest, in appropriate cases. Whether enforcement proceedings are to be instituted by private individuals or by an independent public body thus envisaged, the judiciary would

[257] See also Krzywoń (n 52) 685.
[258] See also Recommendation CM/Rec(2022)12 (n 134), appendix, para 1.8.

have to be on standby to hear the parties and render appropriate judgments. In short, the suggested regulatory mechanisms would not require policymakers to reinvent the wheel. But it could still be useful to shed some more light on the institutions that would play key roles in the application and enforcement of the suggested regulatory mechanisms in keeping with our freedom or rights-centred philosophy of government.

6.4.1 Independent Public Body

We have already said much about the role that the state, acting through an independent public body, should play in initiating corrective measures and in instituting enforcement proceedings. Some liberal theorists would perhaps reject this suggestion out of hand on the ground that the exercise of public authority is always a threat to what they term 'freedom as non-interference' by public authority. In our worldview, however, the suggested independent public body can interfere not as an enemy but rather as a friend of freedom. All we need are adequate institutional safeguards to ensure that, in discharging its public functions, the independent public body does not itself become a threat to freedom.

The republican ideal of freedom that we espouse in particular militates against any attempt at establishing a George Orwell's Ministry of Truth.[259] As one US court has pointed out, 'the state does not possess an independent right to determine truth and falsity in public issues'.[260] Although we are interested only in protecting people from misleading political information rather than from false information as such, the republican ideal of freedom that we espouse does not admit of any attempt at entrusting politicians or government ministers with the power to decide what constitutes misleading political information, including misleading false information, as does the Singaporean POFMA.[261] The argument in favour of ensuring that any public regulation of political disinformation is implemented through an independent public body is even stronger in the electoral context,[262] since politicians and other state actors are among the main instigators and vectors of electoral disinformation.[263]

All in all, it would be highly perilous to entrust politicians with the task of deciding on what constitutes misleading political information, whether for the purpose of the suggested corrective measures or, indeed, for the purpose of instituting judicial proceedings against alleged purveyors of political disinformation.

259 George Orwell, *Nineteen Eighty-Four* (Secker & Warburg 1949).
260 *State of Washington v 119 Vote No! Committee* 957 P 2nd 691, 698 (1998).
261 See also Horder, *Criminal Fraud and Election Disinformation* (n 32) 106–09.
262 Sunstein (n 234) 114.
263 Kalina Bontcheva and Julie Posetti, 'Introduction' in Kalina Bontcheva and Julie Posetti (eds), *Balancing Act: Countering Digital Disinformation While Respecting Freedom of Expression* (International Telecommunication Union 2020) 32.

First, politicians do not normally have the relevant expertise to make reliable judgments about what constitutes misleading information or political disinformation, broadly understood. Second, politicians cannot be expected to initiate corrective measures, let alone enforcement proceedings, against themselves. They would effectively exempt themselves from regulation. This would enable them to promote the dissemination of political disinformation which promotes their own political interests. Indeed, it is not unusual for politicians to rush to the media to refute lies that put them in a bad light whilst ignoring or even celebrating those that put them in a good light.[264] Third, and worst of all, politicians are likely to abuse their public power by invoking the suggested regulatory mechanisms against their political opponents and dissentient citizens in a bid to shut them up. The potential chilling effect of any attempt at empowering politicians to implement the suggested regulatory measures is thus easy to envision.[265]

Fortunately, the independent public body that we are suggesting here need not be anything akin to an Orwellian Ministry of Truth. The Orwellian nightmare can be avoided by establishing and maintaining a truly independent public body, staffed by experts devoid of any known partisan political biases. Even the task of operationalising such a body need not be too complicated. Indeed, some states have already made attempts at creating security and intelligence task forces and nonpartisan panels to address electoral disinformation, including potential foreign interference in elections.[266] Such coordinated and collaborative efforts between specialised government agencies could be particularly useful in addressing not only political disinformation in general but also criminal political disinformation. Ideally, the state should establish formal mechanisms for networking and collaboration between relevant public authorities to ensure a holistic perspective in the implementation of the suggested public correction and sanction mechanisms.[267]

A holistic and resilient solution to the problem of political disinformation would require the state to designate a specific independent body that would be on standby to implement the suggested regulatory measures as and when necessary, not only during elections. This is important because, as we have seen in chapters 4 and 5, political disinformation could threaten the most basic of rights even in times other than official election campaign periods. Disinformation about the global COVID-19 pandemic is but a case in point. Moreover, 'online communication has facilitated the

[264] Sunstein (n 234) 56.
[265] See also CJ Ciaramella, 'Don't Criminalize Election Lies' (2022) 54 *Reason* 9.
[266] Chris Tenove and Heidi JS Tworek, 'Online Disinformation and Harmful Speech: Dangers for Democratic Participation and Possible Policy Responses' (2019) 13 *Journal of Parliamentary and Political Law* 215, 224; Chris Tenove, 'Protecting Democracy from Disinformation: Normative Threats and Policy Responses' (2020) 25 *International Journal of Press/Politics* 517, 523.
[267] See, *mutatis mutandis*, Recommendation CM/Rec(2022)12 (n 134), appendix, para 1.5.

conditions for permanent political debates and campaigns, thus making it difficult to distinguish political communication in non-electoral periods from that in electoral periods'.[268] In any event, given the potential overlaps and indeterminacy that may result from any attempt at creating different bodies to deal with different sub-categories of political disinformation, it is advisable to designate a single body to implement the suggested regulatory measures. The suggested body should, without prejudice to the requirement of independence, be required to take appropriate measures as and when necessary, not only on its own initiative but also upon receiving alerts or intelligence briefings from other government agencies and upon receiving reports from members of the public.

The suggested body need not be an entirely new creation. Most democratic societies already have independent media regulatory bodies. For example, every member state of the EU is legally obligated to designate one or more national media regulatory bodies or authorities. Article 30 of the AVMSD specifically requires member states to ensure that these bodies or authorities 'are legally distinct from the government and functionally independent of their respective governments and of any other public or private body.'[269] Although the AVMSD is designed to promote the proper functioning of the EU's internal market and applies only to audiovisual media services, the functions of existing bodies could be extended to include the implementation of the suggested regulatory measures as part of their functions. For example, existing legislation that establishes these bodies could be amended by establishing within those bodies a special deliberative 'Committee on Public Information'. In any event, whether policymakers decide to take up this suggestion or to establish an entirely new body, the body tasked to implement the suggested regulatory measures should be independent both legally and in practice.

It goes without saying that the specific criteria for determining whether or not a body is so independent can be highly debatable. But we have no space here to delve into that debate. Suffice it to say that there is no shortage of studies from which policymakers could draw some inspiration in this connection.[270] Even the Council of Europe has been actively promoting the independence of audiovisual media regulators not only through policy recommendations but also by providing operational and capacity-building support to member states. The Committee of

[268] Ibid, preamble.

[269] AVMSD, art 30(1).

[270] See, for example, Wolfgang Schulz, Peggy Valcke and Kristina Irion (eds), *The Independence of the Media and its Regulatory Agencies: Shedding New Light on Formal and Actual Independence against the National Context* (Intellect 2013); Adriana Mutu, 'The Regulatory Independence of Audiovisual Media Regulators: A Cross-National Comparative Analysis' (2018) 33 *European Journal of Communication* 619; Maja Cappello (ed), *The Independence of Media Regulatory Authorities in Europe* (European Audiovisual Observatory 2019).

Ministers in particular has adopted several policy recommendations since 2000, specifying the minimum standards that the regulator must satisfy to be considered independent.[271] These relate to such aspects as the general legislative framework, the financial independence of the body, the independence of decisionmakers, the professional qualifications of decisionmakers, the accountability of decisionmakers and of the body, and the transparency of the body.

We can only emphasise that, to be fit for purpose, the suggested body should be composed of independent fundamental rights experts and independent media experts with relevant and up-to-date knowledge about investigative journalism and fact-checking.[272] Also, the body should be given the power to request and receive information not only from traditional media outlets and online platform operators but also from other government agencies (including other independent public bodies, such as the relevant electoral body) and members of the public insofar as this may be necessary for the performance of its functions.

6.4.2 Independent Public Courts

Even if the suggested independent body were established, the ultimate responsibility of guarding people against the freedom-undermining effects of political disinformation would still largely fall on the judiciary, that is, the system of courts that decides legal disputes and interprets and applies the law on behalf of the state. Of course, as Cass Sunstein points out, 'courts themselves are not infallible. Their fact-finding tools are hardly perfect, and they might well have biases of their own. In the worse cases, they are unduly sympathetic to political officials, which means that even if they will not do their bidding, they will usually rule as such officials like. If that is so, they are not truly independent.'[273] But this does not mean that we should do away with courts.

In a democratic society founded on the principle of equal rights under the rule of law in particular, courts or, more specifically, judges who preside over court proceedings are the ultimate guardians of freedom and constitutional values that

[271] Committee of Ministers of the Council of Europe, 'Recommendation Rec (2000) 23 of the Committee of Ministers to Member States on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector' (adopted at the 735th meeting of the Ministers' Deputies, 20 December 2000); Committee of Ministers of the Council of Europe, 'Declaration of the Committee of Ministers on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector' (adopted at the 1022nd meeting of the Ministers' Deputies, 26 March 2008); Committee of Ministers of the Council of Europe, 'Recommendation CM/Rec(2018)1[1] of the Committee of Ministers to Member States on Media Pluralism and Transparency of Media Ownership' (adopted at the 1309th meeting of the Ministers' Deputies, 7 March 2018).

[272] See, *mutatis mutandis*, Recommendation CM/Rec(2022)12 (n 134), appendix, para 1.9.

[273] Sunstein (n 234) 59.

support freedom. Indeed, as some have observed, judicial decisions may be imperfect but constitute the most prominent safeguard against hasty and aberrational 'decisions taken either by [operators of online] platforms or by other non-independent bodies, whose role and vested interests are far from evident.'[274] The legal framework governing judicial tenure and salaries, the professional norms that seek to insulate judges from partisan politics and the public fact-finding tools available in judicial proceedings in particular put judges in pole position not only to be independent of the dominant market and political forces but also to make impartial and reliable judgments, including judgments about possible communicators' intentions.

As concerns the suggested regulatory measures in particular, judges would have to interpret and apply the relevant provisions governing both correction and sanction mechanisms. First, as already noted, any dispute concerning the exercise of the right of reply and, where applicable, the power of an independent public body to require a media outlet or an online platform operator to take an appropriate corrective action should be resolved through summary court proceedings. Here, the court would have to make an appropriate order in favour of or against the person concerned or the independent public body and, where appropriate, impose a fine, as prescribed by law, on the media outlet or online platform operator concerned for any unreasonable refusal or neglect to publish a reply or to take any other appropriate corrective action as requested by the person concerned or the independent public body.

Second, notwithstanding any prior recourse to correction mechanisms, any person whose rights have been or a likely to be infringed by political disinformation which both individually and directly concerns him or her and, if applicable, where the independent public body claims that political disinformation has infringed or threatens to infringe the rights of members of the public, the person concerned or the independent public body may institute legal proceedings to obtain appropriate legal remedies against the communicator of the disinformation in question. It is only in such proceedings that the person concerned or the independent public body would have to prove all the defining characteristics of political disinformation, namely misleadingness, the communicator's intent to mislead the public and the harm suffered or likely to be suffered, that is, the infringement of individual rights suffered or likely to be suffered.

It is worth underlining that disputed political information should not generally be regarded as 'illegal content' unless and until an independent court of competent jurisdiction determines that it is indeed political disinformation. Kaye expresses a similar view in his 2018 UN Special Rapporteur's report on the Promotion and Protection of the Right to Freedom of Opinion and Expression with respect to online

[274] Pitruzzella and Pollicino (n 43) 132; Pollicino, De Gregorio and Somaini (n 43) 356.

information content. He recommends that states 'should only seek to restrict content pursuant to an order by an independent and impartial judicial authority, and in accordance with due process and standards of legality, necessity and legitimacy.'[275] This recommendation is also consistent with the Manila Principles on Intermediary Liability, according to which online content 'must not be required to be restricted without an order by a judicial authority'.[276]

6.5 Conclusion

Political disinformation, understood broadly as disinformation relating to matters of public interest, has been a major talking point at least since 2016.[277] Policymakers and academics alike have been arguing and haggling about how to regulate this phenomenon in the fast-evolving online communication environment whilst upholding the highly-prized freedom of expression on matters of public interest. Indeed, a number of states have already adopted anti-online disinformation laws of some kind. It remains to be seen whether these emerging regulatory measures will stand the test of time, especially given the evolving nature of digital technologies.

A counsel of prudence is that policymakers should avoid adopting regulatory measures in a fragmented manner or indeed on a trial and error basis. Such regulatory measures may not only result in a wastage of public resources but could also do more harm than good, as they are likely to have more adverse effects on fundamental rights and the broader communication environment than the phenomenon of political disinformation itself. Policymakers should in particular resist the temptation to overregulate or indeed to abdicate their responsibilities by over-relying on online platform operators to regulate disinformation on their behalf. Overregulation or the imposition of vague and broad obligations on online platform operators to regulate disinformation under the new school regulatory approach could also undermine the very coercive role of public regulation, since the criteria for measuring compliance may be difficult to ascertain.

True, the problem of political disinformation may not have a single solution. Public education, the use of transparency notices in the context of paid advertising, changes in algorithms, the development of a more journalistic culture within the management of online platforms, government pressures on foreign disinformation

[275] David Kaye, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (A/HRC/38/35, 6 April 2018), para 66.

[276] Electronic Frontier Foundation and others, 'Manila Principles on Intermediary Liability' (2014) <https://manilaprinciples.org/> accessed 20 October 2023.

[277] Deen Freelon and Chris Wells, "Disinformation as Political Communication" (2020) 37 *Political Communication* 145, 148.

actors and other non-legal solutions could all help ameliorate the problem.[278] Be that as it may, this chapter arguably puts forward a holistic regulatory solution that promises not only to pre-empt fragmented and overly broad regulatory measures but also to keep pace with the evolving nature of the problem of political disinformation in the online context. The suggested solution stems from a systematic and cross-disciplinary exploration of the problem conducted in the previous chapters. It is therefore important to appreciate the broader context from which the suggested solution emanates. In any event, the suggested solution is rather simple. It is two-pronged. The first prong consists of rapid correction mechanisms and the second sanction mechanisms. If properly implemented under the institutional arrangements suggested in this chapter, these regulatory mechanisms would protect rather than threaten freedom of expression. The chapter provides a reasonably detailed account as to how both mechanisms could be employed in practice.

In sum, the appropriate corrective measures should be taken by the media outlet or online platform operator concerned either at the request of a person who claims to be both individually and directly concerned by misleading information or, where alleged misleading political information does not individually and directly concern a specific person but the public at large, at the request of the state, acting through an independent public body. Both correction mechanisms would only require policymakers to amend existing provisions on the right of reply (or in jurisdictions where existing legislation does not already provide for the right of reply, to adopt relevant provisions) as suggested in this chapter.

The sanction mechanisms on the other hand should be targeted directly at purveyors of the forms of political disinformation which are not already adequately regulated under received, pre-existing civil and criminal provisions. These mechanisms would require policymakers to adopt relevant legislative provisions that would enable persons who claim to be both individually and directly concerned by political disinformation or, where alleged political disinformation does not individually and directly concern a specific person but the public at large, the state, acting through an independent public body, to institute civil proceedings against purveyors of political disinformation to obtain appropriate remedies. In this connection, this chapter suggests that only independent public courts should be empowered to make appropriate orders and impose proportionate penalties on purveyors of political disinformation.

Given that freedom of expression includes freedom to receive reliable information, and given that freedom to receive reliable information is a precondition for the exercise and enjoyment of freedom or equal rights in a political society, any political society that values freedom of expression and freedom in

[278] Bollinger and Stone (n 16) xvii.

general should seriously consider these two regulatory mechanisms. Any political society that embraces, wittingly or unwittingly, the republican philosophy of government insofar as that philosophy teaches us that freedom is an ecumenical value and a gateway good, and therefore that freedom is the only good the state must concern itself with, should, in any event, regulate the phenomenon of political disinformation in a holistic manner. Any failure to do so would be a dereliction of duty on the part of the government that runs the state. This is not to say that the suggested regulatory measures or any other measures that policymakers may choose to adopt would eliminate the problem of political disinformation. The problem of political disinformation has always been, and will always be, with us. But that is no excuse for any failure by government to adopt appropriate regulatory measures.

A republican lesson underpinning this monograph is that free persons are persons who 'can command respect from those with whom they deal, not being subject to their arbitrary interference.'[279] The suggestion to empower persons to correct misleading information which both individually and directly concerns them, through the exercise of the right of reply, coupled with the right to seek appropriate legal remedies against those who intentionally disseminate such information, particularly where such information constitutes political disinformation, reflects this republican lesson. These mechanisms would not only establish objective legal norms. They would also serve to establish intersubjective norms, making everyone aware that everyone is aware that no one can costlessly attempt to undermine the rights of another by disseminating political disinformation, thereby making it possible for everyone to command respect from those with whom they deal in the sphere of public communication. The suggestion to require the state, acting through an independent public body, to do that which persons who are both individually and directly concerned by political disinformation would do with respect to political disinformation which concerns the public at large rather than specific persons would serve the same two republican functions, namely that of providing objective security and that of establishing intersubjective legal norms.

[279] José Luis Martí and Philip Pettit, *A Political Philosophy in Public Life: Civic Republicanism in Zapateros Spain* (Princeton University Press 2010) 38.

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