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GENERAL REPORT

Freedom of Speech and the Regulation of Fake News

Oreste POLLICINO*

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Résumé

La désinformation n'est pas un produit de l'ère numérique. Les fausses nouvelles ont toujours circulé dans la société, comme le montre le cas du grand canular lunaire (*Great Moon Hoax*) en 1835. Toutefois, la circulation de contenus faux et inexacts sur internet, et notamment sur les réseaux sociaux, a amplifié – comme c'est généralement le cas dans le cyberspace – le phénomène. En effet, une inquiétude croissante quant aux risques potentiels pour le discours et les processus démocratiques est apparue ces dernières années. Par exemple, les récents conflits, notamment en Ukraine, ont souligné à quel point la désinformation dépasse largement la seule préoccupation des libertés individuelles ou des frontières nationales.

La désinformation est principalement liée au droit à la liberté d'expression, ce qui soulève des questions sur la tolérance des faux contenus dans une société démocratique, et par conséquent sur le degré de limitation de la liberté d'expression qui est constitutionnellement justifié dans ce cas. En premier lieu, la question n'est pas de savoir si la réglementation de la désinformation influence la liberté d'expression, mais les raisons de considérer qu'il s'agit d'un

* The rapporteur would like to thank Prof. Giovanni De Gregorio for his support.

défi à la liberté d'expression. Par conséquent, il faut considérer que la réponse à la désinformation implique de traiter du degré de protection de la liberté d'expression. Il s'agit d'une question à multiples facettes, puisque chaque système juridique adopte des paradigmes de protection différents, même s'ils partagent la même matrice libérale. En d'autres termes, il s'agit de comprendre les limites de la liberté d'expression et la mise en balance de ce droit avec des intérêts légitimes, ou la sauvegarde d'autres droits constitutionnels.

En outre, l'environnement numérique a souligné à quel point le marché des idées n'est pas libre, mais est façonné par des influences publiques et privées. Le concept de désinformation n'est pas seulement influencé par les acteurs publics, mais aussi par d'autres acteurs qui régissent le discours en ligne. Un élément inévitable de la discussion est le rôle clé des parties privées, en particulier des plateformes en ligne, dans l'écosystème actuel des nouvelles et de l'information. Le processus de modération du contenu contribue à établir des normes pour lutter contre la désinformation, ce qui accroît le pouvoir des plateformes en ligne de prendre des décisions sur des intérêts constitutionnels contradictoires.

Dans ce cadre, cet ouvrage propose une analyse constitutionnelle comparative de la relation entre la liberté d'expression et la désinformation, en s'appuyant sur des études menées en Belgique, au Canada, en Croatie, dans l'UE, en Finlande, en France, en Allemagne, en Hongrie, en Italie, au Japon, à Macao, en Roumanie, en Turquie, au Royaume-Uni, aux États-Unis et au Vietnam. La première partie de ce rapport fournira une analyse constitutionnelle de la relation entre la liberté d'expression et la désinformation. La deuxième partie soulignera comment la transformation du marché (numérique) des idées et la consolidation des médias sociaux en tant que gouverneurs du discours en ligne ont eu un impact sur la propagation de la désinformation en ligne. La troisième partie examinera comment la désinformation ne met pas seulement en cause les droits et libertés individuels, mais aussi les intérêts publics et les valeurs démocratiques, comme le démontrent notamment les cas du populisme, de la pandémie COVID-19, des guerres et des conflits. Enfin, la quatrième partie se concentrera sur les approches de la désinformation, en fournissant des pistes potentielles pour lutter contre la diffusion de faux contenus à l'ère numérique.

1. INTRODUCTION

Disinformation is not a product of the digital age. False news has always circulated across society, as demonstrated by the case of the 'Great Moon Hoax' in 1835. However, the circulation of false and inaccurate content on the Internet, and particularly on social media, has amplified the phenomenon, as is usually the case in cyberspace. The Pizzagate example is only one case that underlines how disinformation in the digital age has raised new critical

constitutional questions.¹ Growing concern about potential risks for democratic discourse and processes has emerged in recent years,² particularly in the wake of the Brexit referendum and the US presidential election, both in 2016.³ Democratic concerns about disinformation have soared back to the political forefront in the context of the Cambridge Analytica scandal and the COVID-19 pandemic.⁴ And recent conflicts, particularly in Ukraine, have underlined how disinformation is far beyond only a concern for individual freedoms or national borders.⁵

Disinformation is primarily connected with the right to freedom of expression, thus raising questions about the tolerance of false content in a democratic society,⁶ and consequently what degree of limits on freedom of speech can be constitutionally justified.⁷ Primarily, the question is not whether regulating disinformation influences freedom of expression but the reasons for considering it as a challenge for freedom of expression.⁸

There is no doubt that the Internet has significantly contributed to information pluralism,⁹ promoting exchange of information and opinions to unprecedented levels.¹⁰ Nevertheless, the great quantity of information may pose problems as to their substantive quality, trustworthiness and the reliability of sources, mitigating the benefits of a purely quantitative pluralistic information ecosystem, at the expense of a truly qualitative one. Although the rise of information pluralism

¹ C.R. Sunstein, *#Republic: Divided Democracy in the Age of Social Media* Princeton University Press, Princeton 2017.

² B. Martens and others, 'The Digital Transformation of News Media and the Rise of Disinformation and Fake News', JRC Digital Economy Working Paper no. 2, [2018], <https://ec.europa.eu/jrc/sites/jrcsh/files/jrc111529.pdf>.

³ J. Bayer and others, 'Disinformation and Propaganda – Impact on the Functioning of the Rule of Law in the EU and Its Member States', Study for the LIBE Committee, European Parliament, [2019], p. 15.

⁴ Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling COVID-19 disinformation – Getting the facts right, JOIN(2020) 8 final.

⁵ M. Susi and others (eds), 'Governing Information Flows During War: A Comparative Study of Content Governance and Media Policy Responses After Russia's Attack on Ukraine', GDHRNet Working Paper, [2022], p. 4, https://www.ssoar.info/ssoar/bitstream/handle/document/78580/ssoar-2022-susi_et_al-Governing_Information_Flows_During_War.pdf?sequence=5&isAllowed=y&lnkname=ssoar-2022-susi_et_al-Governing_Information_Flows_During_War.pdf.

⁶ G. Pitruzzella and O. Pollicino, *Disinformation and Hate Speech. A European Constitutional Perspective*, Bocconi University Press, Milan 2020.

⁷ O. Pollicino, 'The European Approach to Disinformation: Comparing Supranational and National Measures' in G. Comandé and M. Graziadei, *Annuario di diritto comparato 2020*, Edizioni editoriali scientifiche, [2020].

⁸ C.R. Sunstein, 'Falsehoods and the First Amendment', 33(2) *Harvard Journal of Law & Technology*, [2020], p. 388.

⁹ *Ahmet Yildirim v. Turkey*, no. 3111/10, §54, ECtHR.

¹⁰ *GS Media v. Sanoma Media Netherlands*, Case C-160/15, §45 ECLI:EU:C:2016:644.

is generally to be welcomed, the governance of the digital environment raises concerns in terms of the ‘quality’ of the information sources.

In this sense, the ‘marketplace of ideas’ has been exposed to a process of transformation in the digital age. Later we will discuss why this metaphor, and metaphors in comparative constitutional law in general, should be taken seriously, as demonstrated by the metaphor encapsulated in the dissenting opinion of Justice Holmes in *Abrams v. United States*.¹¹ According to Justice Holmes, although individuals try to support their positions by criticising opposing ideas, they must not be persuaded that their opinions are certain. Only the free exchange of ideas can confirm the accuracy of each position, creating a ‘free marketplace of ideas’. This metaphor leads to constitutional implications in terms of defining the boundaries between freedom of expression and falsehood. By adopting this liberal view, even falsehood has the possibility to contribute to the competition of ideas, and there should be no interferences by public powers. There is no need to regulate disinformation, since any approach aiming to tackle disinformation would affect the free competition of ideas that leads to the balance of these competing interests.

However, this view does not consider the possible failures of the marketplace of ideas. The digital environment has underlined how the marketplace of ideas is not free, but is shaped by public and private influences. In the eyes of the US Supreme Court, in *Reno v. ACLU*,¹² the Internet – the new free marketplace of ideas – offers new coordinates and spaces for the exercise of freedom of speech, where it is necessary to look through lenses and categories different from those that apply to traditional media. Hence, the use of the metaphor of the free marketplace of ideas can be considered as expressing a liberal approach towards new private actors such as online platforms.

The concept of disinformation is not only influenced by public actors, but also by other actors governing online speech. One inevitable element of this discussion is the key role of private parties, particularly online platforms, within the current news and information ecosystem. The process of content moderation contributes to setting standards for tackling disinformation, increasing the power of online platforms to make decisions on constitutional conflicting interests. The constant development of technology, embedding algorithmic systems and the risk of abuse of deep fakes, may be a threat to democracy and national security,¹³ causing fears for users’ privacy and autonomy, which are at the heart of the individual right to dignity.¹⁴ Fundamental rights and liberties have traditionally

¹¹ *Abrams v. United States* 250, U.S. 616 (1919).

¹² *Reno v. American Civil Liberties Union* 521 U.S. 844 (1997).

¹³ R. Chesney and D. Keats Citron, ‘Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security’, 107, *California Law Review*, [2018], p. 1753. For instance, California Assembly Bill No. 730, approved on 3 October 2019, establishes the illegality of circulation of doctored videos, images or audio of politicians during a 60-day pre-electoral period.

¹⁴ Population Census Decision, Judgment (Dec. 15, 1983), 1 BvR 209/83, BVerfGE 65, 1.

been devised vis-à-vis state powers and authorities; therefore, the traditional paradigm of fundamental rights proves hard to uphold against private parties.

As public actors increasingly rely on online platforms to perform monitoring and enforcement activities, sometimes delegating de facto to these platforms public functions, such as removing or blocking content, the role and actions of them raise constitutional questions. In the aftermath of the COVID-19 pandemic, this process of delegation has accelerated consistently. The need to ensure social distancing, as a tool to break the chain of infections, led individuals and institutions to turn to digital technologies for public services such as education, work and healthcare. Against this backdrop, online intermediaries and private digital firms acquired an increasingly central role, since the infrastructures and services offered by them covered a necessary instrumental function to ensure the continuance of everyday life.¹⁵ Moreover, public policy and governmental practices soon began to rely heavily on cooperation with these private actors, as well as on the exploitation of the technical apparatuses designed by online platforms.¹⁶

Besides, the marketplace of ideas metaphor does not consider the existence of alternative constitutional models for looking at the relationship between freedom of expression and falsehood. Against the backdrop of increasing fear for the relationship between disinformation and democratic discourse, and its subsequent impact on deliberative democracy, governments around the world have attempted to address this challenge by adopting different approaches.¹⁷ Laws, codes of practice, task forces and social media community standards are only some of the norms that have been shaped by the fight against disinformation. The Digital Services Act is a paradigmatic example of the approaches to online disinformation.¹⁸ Likewise, the new Strengthened European Code of Practice on Disinformation is an example of how strategies to address disinformation are no longer left only to hard law and self-regulation.¹⁹ However, some states have made no regulatory responses to disinformation, while others criminalised the spread of rumours and false content even before the challenges raised by online disinformation.

¹⁵ K.S. Rahman, 'The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept', 39, *Cardozo Law Review*, [2018], p. 1621.

¹⁶ J.M. Balkin, 'The Future of Free Expression in a Digital Age', 36(2), *Pepperdine Law Review*, [2009], p. 427.

¹⁷ O. Robinson, 'A Report on Antidisinformation Initiative', [2019], <https://comprop.oii.ox.ac.uk/wp-content/uploads/sites/93/2019/08/A-Report-of-Anti-Disinformation-Initiatives>; G. De Gregorio and E. Perotti, 'Tackling Disinformation around the World', [2019], <https://www.wan-ifra.org/reports/2019/05/03/public-affairs-media-policy-briefing-tackling-disinformation-around-the-world>.

¹⁸ 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.

¹⁹ Strengthened Code of Practice on Disinformation, [2022], <https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation>. See the special report on the EU by Giuseppe B. Abbamonte and Paula Gori, in this volume.

The central issue relates to the opportunity to impose restrictions on content designed to circulate online, and to introduce mechanisms for limiting this content. This raises questions on the ‘constitutional feasibility’ of a design aimed at repressing the phenomena of disinformation, considering their detrimental effects for users within a multitude of situations and contexts.

The response to disinformation entails dealing with the degree of protection of free speech. The decision to intervene to filter falsehoods online requires questioning whether, and to what extent, it is acceptable to enforce limitations on freedom of expression regarding falsehoods. This is a multifaceted question, since each legal system adopts a different paradigm of protection, even where they share a common liberal matrix, such as in the case of Europe and the US; in other words, it is a matter of understanding the limits of freedom of speech and the balancing of this right with legitimate interests or the safeguarding of other constitutional rights. Therefore, the principle of the rule of law cannot be neglected when defining the boundaries for addressing the fight against disinformation online.

Within this framework, this report provides a comparative constitutional analysis of the relationship between freedom of expression and disinformation. It examines the challenges of addressing disinformation, thus providing an overview for introducing the special reports. By relying on studies conducted in Belgium, Canada, Croatia, the European Union (EU), Finland, France, Germany, Hungary, Italy, Japan, Macau, Romania, Türkiye, the UK, the US and Vietnam, this report provides an overarching framework of the approaches adopted towards dealing with the spread of disinformation.

Section 2 of this report will provide a constitutional analysis of the relationship between freedom of expression and disinformation. It looks at how disinformation plays an important role for constitutional democracies while raising democratic concerns. Sections 3 and 4 underline how the transformation of the (digital) marketplace of ideas, and the consolidation of social media as governors of online speech, have impacted on the spread of online disinformation. Section 5 examines how disinformation is not only a question for individual rights and freedoms, but also for public interests and democratic values, as particularly demonstrated by cases of populism, the pandemic, wars and conflicts. Section 6 focuses on the approaches towards addressing disinformation, providing potential paths to address the spread of false content in the digital age.

2. FREEDOM OF EXPRESSION AND FALSEHOOD: A COMPARATIVE PERSPECTIVE

The initial observations above underline how the arguments that have recently appeared in the political debate, regarding the need to regulate speech, intermediaries and media actors, to combat the spread of fake news and hate

speech and their consequent harmful effects on public opinion, directly touch issues and concepts (above all, democracy and freedom) that are at the heart of constitutional law.

The relevance of the right to freedom of expression, and the crucial role of falsehood, were underlined in the seventeenth century by Milton,²⁰ and in the nineteenth century by Mill,²¹ supporting a liberal view considering that even falsehoods could contribute towards reaching the truth, especially avoiding the risk of knowledge's dogmatisation.²² Milton, in his *Aeropagitica*, lashed out against censorship of the press, citing the concept of truth and comparing knowledge to water, and the truth to a gushing fountain. What must be avoided, in this paradigm, is whatever can block the free flow of ideas that leads to progress towards truth. For Milton, censorship could thus affect that process of approaching the truth, by impeding or restricting the emergence of new ideas. According to Milton, the truth prevails in a free and open context of ideas. Therefore, those ideas cannot be subject to limitations ahead of time that can 'compete' in the battle against dogmas. But Milton's experience is emblematic: despite this strenuous opposition, he accepted the role of censor, based on the law he had so strongly challenged. This passage marks the connection between trust in the search for truth and the possibility of enforcing sanctions when, after appropriate investigations, it is possible to distinguish truth from falsehood, denying protection for the latter. Freedom of expression is thus enhanced by a conception based on the notion of truth; free and open flow is the key concept of this paradigm, which has not, however, become a true model of freedom of speech.

These liberal ideas protecting individuals against the interferences of public actors are still the core of the right to freedom of expression, as underlined in the twentieth century by Justice Holmes in his dissenting opinion in the aforementioned US Supreme Court decision *Abrams v. United States*.²³ Constitutional democracies tend to tolerate the political exchange of views as a precondition of pluralism, or, to use a neo-liberal metaphor, of the free marketplace of ideas. Although the spread of disinformation can produce serious consequences in the offline world, disinformation has still been considered an opportunity for promoting the exchange of ideas. This liberal view of free speech has also extended to Japan. As underlined by Mizutani, post-war Japanese constitutional jurisprudence has mainly been influenced by US constitutional jurisprudence.²⁴

²⁰ John Milton, *Aeropagitica*, London, 1644.

²¹ John S. Mill, *On Liberty*, John W. Parker and Son, West Strand, London 1859.

²² *Ibid.*

²³ *Abrams v. United States* 250 U.S. 616 (1919).

²⁴ See the special report on Japan by Eijiro Mizutani.

The question is where to draw the line, where free speech clashes with other constitutional interests deserving protection, such as dignity, as the answers to it are not unique. Even in liberal states, the spread of false content is usually considered a threat to dignity, as in the case of defamation, as demonstrated by the UK.²⁵ As underlined by Neuvonen, in Finland, the Supreme Court (KKO) considered false information in a *pakina* (short humorous newspaper story or causerie) as defamation.²⁶ Likewise, the spread of false content is usually considered a challenge for consumers, and limited as a misleading practice in advertising, and this view is shared not only in Europe – for instance, in the case of Italy, as also influenced by EU consumer law²⁷ – but also in the US.²⁸

Constitutional democracies have dealt with the issue of identification of the truth and, even before that, of the criteria necessary to define the truth and separate it from what can be identified as false. The cases of Hungary and Italy underline how, in a different democratic context, courts have addressed the boundaries between facts and opinions.²⁹ Also, in the case of media regulation in Romania, media outlets are required to distinguish between facts and opinions.³⁰ Likewise, there is not always agreement on the passive dimension of freedom of expression, or on the right to be informed, as well as on the role of media pluralism across public and private media. As underlined by Manetti, in the case of private media, the right to be informed is a metaphor that refers to the relevance of pluralistic information as a democratic value, even if it is important to underline the differences between the European and US models for regulating media pluralism, which are based on different conceptions of the role of public actors.³¹

This makes it necessary, for whoever intends to join this debate by going beyond a merely superficial analysis, to address the constitutional statute of freedom of expression. This is a complex paradigm which varies in different legal systems, despite the common liberal matrix that, for instance, characterises Europe and the US. In different contexts, the differences between legal systems entail more or less space for, and thus a different attitude towards, the circulation of content that does not fulfil a true interest in information. As underlined by Türk in her special report,³² French law does not protect disinformation under freedom of expression, but rather tends to exclude and combat it. Disinformation

²⁵ See the special report on the UK by Peter Coe.

²⁶ See the special report on Finland by Riku Neuvonen.

²⁷ See the special report on Italy by Michela Manetti.

²⁸ See the special report on the US by Leslie Gielow Jacobs.

²⁹ See the special reports on Hungary by Gábor Polyák, and on Italy by Michela Manetti.

³⁰ See the special report on Romania by Elena Lazăr and Nicolae-Dragoş Costescu.

³¹ See the special report on Italy by Michela Manetti.

³² See the special report on France by Pauline Türk.

is, therefore, repressed, and not protected under freedom of expression. This approach to freedom of expression is also rooted in German constitutional traditions, as underlined by Wagner.³³

The ways in which constitutional democracies answer the question on how to protect democracy from disinformation might differ, particularly when one looks at constitutional models on the other side of the Atlantic. Even constitutional democracies do not ensure the same degree of protection to the right to freedom of expression. For instance, a general trust in a vertical and negative paradigm of free speech is not entirely shared between them. Unlike the US, where a strict scrutiny test applies to limitations on the right to freedom of expression, as explained by Jacobs,³⁴ the protection of this fundamental right in Europe is subject to an express balancing with other fundamental rights, and may be subjected to (conflicting) legitimate interests.³⁵ Even if, as underlined by Abbamonte and Gori, freedom of expression is a critical value of the EU, freedom of expression is limited in order to protect other constitutional values.³⁶ It is not by chance that the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union (CFREU) both contain clauses for the abuse of rights, as a means to avoid granting absolute protection to one right and leading to the destruction of other fundamental rights, undermining de facto their constitutional relevance.³⁷

It is interesting to look at *United States v. Alvarez* as an example of how strategies against disinformation are shaped by the constitutional protection of free speech, and the concept of falsehood.³⁸ The case, which made it to the Supreme Court, was triggered by a false statement by the petitioner of having received a Medal of Honor, and his subsequently being charged under the Stolen Valor Act, a law that punishes whomever falsely claims the possession of medals or other military decorations. The Supreme Court was called on to judge the conformity of the charges with the First Amendment of the US Constitution. The case provided the occasion for the Supreme Court to revisit its arguments regarding the limits on freedom of expression admissible under the Constitution. For the Supreme Court, simple falsity is not sufficient to exclude the use of certain expressions from protection under the First Amendment. This characterisation, finding that falsity is never relevant per se, is also found, for example, in the context of defamation, a crime that punishes the use of false statements only if they are supported by the mental categories of intent or negligence, coinciding

³³ See the special report on Germany by Eva Ellen Wagner.

³⁴ See the special report on the US by Leslie Gielow Jacobs.

³⁵ Charter of Fundamental Rights of the European Union (2012) OJ C326/12 ('Charter'), Art. 52; European Convention on Human Rights (1950) ('ECHR'), Art. 10(2).

³⁶ See the special report on the EU by Giuseppe B. Abbamonte and Paula Gori.

³⁷ Charter, Art. 54; ECHR, Art. 17.

³⁸ See the special report on the US by Leslie Gielow Jacobs.

with the awareness of the falsity or the negligent omission of measures sufficient to reveal the falsity of the information. Precisely with regard to this case, the Supreme Court stresses that the existence of requirements beyond that of mere falsity serves to guarantee greater freedom of speech, not to restrict it. The charge was thus declared unconstitutional by the Supreme Court, including due to the absence of a causal connection between the limitation of freedom of speech and the interest of the state in protecting the integrity of the military honour system. The Supreme Court concluded that, '[t]he remedy for speech that is false is speech that is true'.

These different approaches are increasingly subject to comparison, with the advent of a means of communication – the Internet – that has allowed the connection of users and their ideas, opinions and expressions of thought, in various parts of the world. Discussions that involve activists on the Web, and from non-governmental organisations, often invoke the idea of self-regulation³⁹ – which tends to be recessive, in light of the unquestioned ability of public authorities to interfere with the functioning of Internet⁴⁰ – or the idea of supranational charters of rights.⁴¹

The existence of different approaches is hard to reconcile with the constitutional pluralism that characterises some areas, especially that of freedom of expression. The comparison with a different paradigm of protection of freedom of expression thus constitutes an indispensable and necessary step in recognising the criticalities linked to every plan that aims to regulate matters of disinformation. Taking as an example Europe, with the birth of the liberal state, and the guarantee of negative liberties, enshrined in basic charters, European constitutionalism has placed the freedom of expressing one's thoughts in a central position, making it one of the cornerstones of every democratic society and the distinctive feature of this model. The centrality of freedom of expression is due not only to the symbolic importance of this freedom, which has risen to be a distinctive trait of all democratic systems, but also its close connection with many of the rights and freedoms given constitutional protection. Conscious political participation, for example – both active and passive – assumes that citizen-voters have a store of knowledge, and, at the same time, requires citizen-candidates not to encounter obstacles to the exercise of freedom of speech. However, many other freedoms are based on the recognition of freedom of expression in a democratic society, such as freedom of research, freedom of association and religious freedom.

³⁹ D.R. Johnson and D. Post, 'Law and Borders: The Rise of Law in Cyberspace', 48(5), *Stanford Law Review*, [1996], p. 1371.

⁴⁰ J. Goldsmith and T. Wu, *Who Controls the Internet?*, OUP, New York 2006.

⁴¹ A. Segura-Serrano, 'Internet Regulation and the Role of International Law', 10, *Max Planck Yearbook of United Nations Law*, [2006], p. 191.

Nonetheless, the central position occupied by freedom to express thoughts should not lead to the belief that the field of application of this fundamental right cannot be subject to limitations or restrictions, due to the need to prevent abuses, or to balance its exercise with other rights which equally deserve constitutional protection. From the time of its solemn affirmation, found in the Declaration of the Rights of Man and of the Citizen of 1789,⁴² freedom of expression has had an intrinsically malleable nature, which can be inferred from its very formulation: ‘The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.’

This characteristic is not an isolated feature, but represents the essence of European freedom of expression. This essence was perfectly and fully expressed when the Member States of the Council of Europe adopted the European Convention on Human Rights as a common instrument for the protection of human rights. This instrument is divided into two levels – on the one hand, the solemn affirmation of freedom, and, on the other, the statement of a series of limitations that reflect the typical guarantees of the liberal state: the necessary establishment of a legislative foundation; respect for the criteria of proportionality (necessary in a democratic society); and the protection of constitutionally relevant interests. Besides, in some cases constitutional law allows the restriction of fundamental rights and freedoms, particularly in cases of emergencies and crises, such as in Türkiye.⁴³ Therefore, with respect to disinformation, the essential questions on its limitability first encompass whether, and to what extent, falsehoods may be granted protection under freedom of expression; and, second, whether dissemination of a falsehood with an intent to harm identified targets, or society at large, may be restricted or subject to sanctions.

The primary challenge for any kind of intervention on disinformation, whether *ex post* or *ex ante*, is that of defining its scope in a sufficiently clear yet neutral manner. Vague or overly broad definitions display the risk of overenforcement, thus causing a chilling effect on free speech, as well as deepening legal uncertainty; or, on the other hand, of making the law hardly enforceable in practice, and therefore ineffective.

This scenario leads to the question of whether there is any alternative reading of the possible relationship between public powers, regulation and truth, in the information society. A first tentative answer could include all information or news that shares a certain level of falsehood. Such information might be entirely made up, or only partially false. It is evident that the global nature of

⁴² The Declaration of the Rights of Man and of the Citizen of 1789.

⁴³ See the special report on Türkiye by Erdem Ilker Mutlu and Onur Uraz.

digital technologies, and the fact that virtually every Internet user can become a content creator, and spread and (especially) disseminate information (even if false), and the corresponding much greater potential impact of falsehoods on the Internet, are exponentially amplifying the urgent need to verify the sources of information in the post-truth digital era.

Nonetheless, the definition of ‘disinformation’ is not unambiguous. States have relied on previous laws such as those on defamation, or have extended the scope of previous legislation related to public alarm, and even introduced new definitions of disinformation. According to the European Commission’s High-Level Group on Fake News and Online Disinformation (HLEG), disinformation is ‘false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit. The risk of harm includes threats to democratic political processes and values, which can specifically target a variety of sectors, such as health, science, education, finance and more.’⁴⁴ Disinformation is a more adequate term than ‘fake news’, for at least two reasons: first, the problem is not limited specifically to news, but covers the spreading of false or misleading information more generally, including through fake accounts, videos and other fabricated media, and through advertising and other organised information operations; second, the term ‘fake news’ has been adopted by politicians to contest information that is against their interests.⁴⁵ ‘Disinformation’ has a broader meaning, which applies whenever inaccurate or manipulated content is spread intentionally.⁴⁶ Facebook see their responsibility as that of tackling devious speech, whether it is somewhat true – as is the case with cherry-picked statistics – or whether it consists of outright falsehoods such as those that led to the Pizzagate scandal.⁴⁷

Moreover, the HLEG has distinguished the notion of ‘disinformation’ from that of ‘misinformation’, i.e. ‘misleading or inaccurate information shared by people who do not recognise it as such’,⁴⁸ and excludes from the notion of disinformation all questions related to illegal forms of speech such as defamation, hate speech, incitement to violence, etc., and also issues related to the spread of parody and satire. According to the HLEG, problems of disinformation are driven, on the one hand, by actors, and, on the other hand, by manipulative uses of communication infrastructures: uses ‘that have been harnessed to produce,

⁴⁴ European Commission, ‘A multi-dimensional approach to disinformation, Final report of the High Level Expert Group on Fake News and Online Disinformation’ (12 March 2018), <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation>.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Facebook, ‘Facing Facts’ (23 May 2018), <https://newsroom.fb.com/news/2018/05/facing-facts-facebooks-fight-against-misinformation/>.

⁴⁸ Ibid.

circulate and amplify disinformation on a larger scale than previously, often in new ways that are still poorly mapped and understood.⁴⁹

Scholars have adopted different definitions of ‘disinformation’,⁵⁰ underlying a very complex interaction and collusion between hyper-partisan right-wing actors and ‘trolls’, on the one hand, and the mainstream media, on the other hand, highlighting the media’s tendency to gravitate toward sensationalism, the need for constant novelty, and the aim of achieving profits instead of professional ethical standards and civic responsibility.⁵¹ The networks of accounts involved can be large networks of fake accounts used by dedicated professionals to share high volumes of information, or smaller networks of carefully curated online personas.⁵² The goals of the creators and promoters of false amplifiers include the promotion or denigration of a specific cause or issue, the fostering of distrust in political institutions, or the general spread of confusion. Financial gain is rarely their ultimate goal. Misleading and sensational news are not isolated phenomena; they are characteristic of media strategies used to capture attention in an ecosystem characterised by attention scarcity. To understand and define how media use misleading and sensational news, it is critical to understand how content is generated, shared and further recirculated.

Online platforms, particularly social media, have played a role in providing new spaces for the sharing of disinformation. Scholars have recently emphasised the important role of the political context, in particular the specific contributions of the right-wing media ecosystem, to problems of disinformation in the US, even if they have argued that the role of technology platforms, bots and foreign spies has tended to be overemphasised.⁵³ Besides, platforms such as Meta and Google have acknowledged their role in the international context, and have made efforts to contribute to the fight against online disinformation, as demonstrated by the launch of the Meta third-party fact-checking programme in 2016.

The described framework underlines the multifaceted character of disinformation that requires public actors to deal with the complexities relating to the regulation of freedom of expression. The presence of a limited level of harm, coupled with a limited level of factual inaccuracy, presents regulatory issues which can often be satisfactorily addressed through existing laws, such as those on defamation. Contrastingly, devising ad hoc legal and regulatory

⁴⁹ Ibid.

⁵⁰ E.C. Tandoc and others, ‘Defining “Fake News”: A Typology of Scholarly Definitions’, 6(2), *Digital Journalism*, [2018], p. 137; B. Epstein, ‘Why It Is So Difficult to Regulate Disinformation Online’ in W.L. Bennett and S. Livingston (eds), *The Disinformation Age*, CUP, Cambridge 2020.

⁵¹ A. Marwick and R. Lewis, ‘Media Manipulation and Disinformation Online’, *Data & Society*, 15 May 2017, <https://datasociety.net/output/media-manipulation-and-disinfo-online/>.

⁵² Ibid., p. 8.

⁵³ Y. Benkler and others, *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics*, OUP, New York 2018.

remedies is urgently needed where factual inaccuracy and harm are coupled with the existence, on the part of one or more actors, of a diffuse intention to manipulate, fabricate and propagate false or deceitful information.

However, addressing disinformation is not only about the boundaries of freedom of expression. It also calls for thinking about how to deal with the exercise of power in the digital age. The regulation of disinformation needs to be contextualised in the broader evolution of the spaces where the right to freedom of expression is exercised in the digital age – particularly on social media.

3. THE DIGITAL FREE MARKETPLACE OF IDEAS

The Internet is a ‘new free marketplace of ideas’: this is the preferred metaphor of those who, within scholarly and public debate, take the view that the issue of fake news need not be addressed (and confronted) by public authorities (and public law). As underlined by Jacobs, the constitutional protection of free speech aims to facilitate representative democracy and promote individual autonomy. These values lead to the distinction between government regulations of speech, and speech regulations that are content-neutral.

Consequently, according to the marketplace of ideas paradigm, if it is true that, under the First Amendment, there is ‘no such thing as a false idea’ in the material world,⁵⁴ this is even truer in the digital world, thanks to the enhanced opportunity to express thoughts. In other words, public authorities should not have any role in dealing with the ever-growing phenomena of disinformation on the Internet, because users are (optimistically) supposed to have all the tools they need in order to select the most convincing ideas and true news, disregarding news that is unconvincing or fake.

This position underlines an expression of complete trust in the capacity for self-correction of the market. However, the real challenge is how such a process of verification should be conducted, according to the champions of the free market of ideas metaphor, since by definition scarcity of resources is an analogue and not a digital limit, with the result that there is no need to protect pluralism of information on the Internet. So that legal rules (and especially public law) should take a step back in the name of the alleged self-corrective capacity of the information market. Just as the economic market knows no test of product ‘validity’ but allows demand to drive supply, relying on the market to distinguish between viable and shoddy products, the best way of dealing with the phenomenon of disinformation in the information market is to secure the widest possible dissemination of all news, including news from contradictory and unreliable sources.

⁵⁴ *Gertz v. Welch*, 418 U.S. 323 (1974).

However, this thesis is not entirely convincing, as demonstrated by the constitutional tensions underlined by recent events such as the COVID-19 pandemic and the conflict in Ukraine. The limits of the free marketplace of ideas in the digital age relate primarily to at least three reasons: the scarcity of users' attention, the differing levels of protection of free speech across legal systems, and the limits of a neo-liberal metaphor of the free marketplace of ideas.

Firstly, while it may be the case that the problem of scarcity of technical resources does not affect the Internet, our attention and time continue to be scarce 'products'. In fact, while the amount of available information is growing, the 24 hours comprising a day cannot be extended. Against this background, when faced with this information overload, the temptation for users will be to search for news, information and ideas that enhance their previous thoughts and preferences, leading to the process of group polarisation.

The need to regulate pluralism becomes more pressing in markets characterised by scarcity of resources: it is here that those who occupy a dominant or oligopolistic position can influence or distort the functioning of the market. When the character of scarcity of a resource is lost, the scenario changes. Therefore, the issue of pluralism, today, does not appear to raise the same criticalities as it did in the past. In the information system, the advent of Internet allows small and large operators to emerge in a market framework that tends to be fragmented and varied. The advent of the Internet has not changed the condition of scarcity which does not regard the frequency of resources, but the attention of the user. The result seems to be that, quite paradoxically, despite (or perhaps precisely due to) the unlimited amount of information on the Internet, there is a less pluralistic exchange of different opinions than in traditional media, where the scarcity of sources is still an issue.

Secondly, it is reasonable to ask whether the marketplace of ideas metaphor is well suited to the scope (and limits) of protection of free speech on a global scale. For instance, the protection for freedom of expression in Europe is more limited than in the US. Regarding this issue, it is sufficient to compare the wording of the First Amendment of the US Constitution with Article 10 of the European Convention of Human Rights.⁵⁵ Besides, it is not simply a question of differences in scope, but also of differences in focus. While the First Amendment mainly addresses the active dimension of the right to freely express one's own thoughts, Article 10 of the Convention emphasises the passive dimension of the right to

⁵⁵ One should consider that the First Amendment of the US Constitution states that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances', while Article 10 of the European Convention of Human Rights states that '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.'

be pluralistically informed (as does Article 11 of the CFREU). In this respect, it could be argued that fake news is not constitutionally covered by the European vision of free speech. Or, to put it differently, the European courts would find it very difficult to accept the view of the US Supreme Court, according to which, as alluded to previously, ‘Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.’⁵⁶

Thirdly, metaphorical language fits in very well with legal reasoning, but it should be handled properly (and with care).⁵⁷ The word ‘metaphor’ implies knowledge transfer across domains (from the Greek *meta pherein*, to ‘carry over’), thus leading to the source domain and the target domain. The ‘free market of ideas’ metaphor carries over, from the source domain of economic activity to the target domain of speech, a systematic set of entailments that supersedes the limitations of the older free-speech model. In order to fully understand that metaphor, it is important not to forget the features of the source ‘market’ domain when Judge Holmes used the metaphor in 1919, and when the US Supreme Court subsequently adapted it to the Internet in 1997. Holmes wrote during a period of laissez-faire capitalism, in which both the liberal state and market competition were at their zeniths. If Judge Holmes was sceptical about any external verification of the truth, and removal of news proven to be false, the concept of a free market provided a meaningful alternative model for the notion that truth, just like economic well-being, could result from competition between (true and false) ideas and information. Similarly, when the US Supreme Court of 1997 borrowed the metaphor, referring to the Internet as the ‘new marketplace of ideas’, the economic market of the Web (during its period of genesis) was absolutely free, and was not in any way affected by dominant positions, never mind monopolies or oligopolies.

However, if these considerations would provide solid grounds to protect even false expressions, it is necessary to observe that even democratic states do not ensure the same degree of protection to the right to freedom of expression. Within this context, the metaphor of the free marketplace of ideas and the proposed test for the truth (competition in the absence of any public control) made perfect sense. By contrast, today the same metaphor seems to have been completely decontextualised, given that the economic market, as the source domain from which the metaphor has been taken, is far from free. Against this background, if disinformation is arguably the most significant and pervasive source of failure in the marketplace of ideas, one can surely not exclude the

⁵⁶ Ibid.

⁵⁷ A. Morelli and O. Pollicino, ‘Metaphors and Judicial Enforcement of Fundamental Rights’, 68(3), *American Journal of Comparative Law*, [2020], p. 616.

possibility of intervention by public authorities, because, in contrast to the US Supreme Court's definition of the Internet as the 'new free marketplace of ideas', the source domain of the relevant digital market is anything but a free market, being characterised by economic concentration and the strength of (a few) private operators. Nobody is advocating for a 'public tribunal of the true', or for enhancement of the liability regime of new (and old) social platforms. The only point that should be quite clearly made is that metaphors in digital law should (also) be managed with care. Otherwise, the concrete risk is of being lost in legal metaphors.

If these considerations would be enough to explain the constraints for democratic states when deciding to address falsehoods, the role of the digital environment as a channel for disseminating false content makes the entire picture even more intricate. The digital environment amplifies the challenges raised by disinformation, not only for the architectural characteristics of the Internet – a channel allowing people to communicate on a global scale with fewer barriers to entry to the market of ideas – but also for the role of online platforms, including social media. Indeed, today, addressing disinformation involves not just traditional media outlets, but also transnational actors such as social media, whose business and incentive models challenge traditional media regulation approaches. As observed by Balkin, in the information society, freedom of expression is like a triangle:⁵⁸ the regulation of speech no longer involves just the states and the speakers, but also multiple players outside the control of the state, such as social media companies. Unlike traditional media outlets, social media companies usually perform content moderation activities, implementing automated systems which can decide, in a heartbeat, whether to maintain or delete the vast amount of global online content.

4. THE ROLE OF ONLINE PLATFORMS

Disinformation would not have become such an issue if online platforms had not risen to become gatekeepers of the information society.⁵⁹ In particular, social media no longer limit their activities to hosting content, but actively monitor content for business (and opaque) purposes. As observed by Gillespie, content moderation is not an ancillary activity, but quite the opposite: it is essential for platforms, in order to ensure a safe environment where users

⁵⁸ J. Balkin, 'Free Speech Is a Triangle', 118, *Columbia Law Review*, [2018].

⁵⁹ K. Klontz, 'The New Governors: The People, Rules, and Processes Governing Online Speech', 131, *Harvard Law Review*, [2018], p. 1598; E.B. Laidlaw, 'A Framework for Identifying Internet Information Gatekeepers', 24(3), *International Review of Law, Computers & Technology*, [2012], p. 263; J.A. Zittrain, 'History of Online Gatekeeping', 19(2), *Harvard Journal of Law and Technology*, [2006], p. 253.

can freely share their content.⁶⁰ As a result, the interests of platforms are not just focused on facilitating the spread of opinions and ideas across the globe, but also on establishing a digital environment where users feel free to share information and data that can feed commercial networks and channels and, especially, attract profits from advertising. In other words, the activity of content moderation serves the function of attracting revenues by ensuring a healthy online community, protecting platforms' corporate image, and showing their commitment to ethical values.

The recent moves by Elon Musk, in the aftermath of his Twitter acquisition, have underlined the relevance of content moderation, not only for the business model of social media, but also for ensuring online trust and addressing the spread of harmful content, including disinformation and misinformation. This situation also underlines how the protection of free speech online is primarily driven by logic that is far from the traditional constitutional narratives coming from national authorities or courts. Notwithstanding several social media providers exploiting rhetorical statements advocating to represent a global community by enhancing free speech transnationally, online platforms increasingly focus their attention on content moderation. This responsibility comes from the need to avoid losing users' trust while also answering regulatory pressures. Therefore, on the one hand, social media providers commit to protecting free speech, while, on the other, moderating content regulating their communities for business purposes.

Furthermore, online platforms rely on automated technologies to cope with the amount of content loaded by users, the non-automated management of which would require enormous costs in terms of human, technological and financial resources. The increasing involvement of platforms in the organisation of content and the profiling of users' preferences, by using artificial intelligence technologies, has transformed the role of online platforms as hosting providers. If, on the one hand, content moderation constitutes an important resource for social media, on the other hand, the use of technologies (for example, machine learning) for moderating content on a global scale challenges the protection of freedom of expression in a digital environment that extends far beyond domestic boundaries.⁶¹ The information uploaded by users is processed by automated systems that define (or at least suggest to human moderators) content that must be removed within seconds, according to non-transparent standards, and without providing the user with access to any remedy against a specific decision.

In the case of disinformation, and even during the COVID-19 pandemic, social media, such as Meta and Twitter, have proposed voluntary measures

⁶⁰ T. Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media*, Yale University Press, New Haven 2018.

⁶¹ J.M. Balkin, 'Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation', *UC Davis Law Review*, [2018], p. 1149.

and policies to monitor and conduct fact-checking activities to address disinformation, and have been at the forefront in removing or signalling alleged false content.⁶² This voluntary fight against disinformation has also led to the adoption, in the US, of an executive order, as a reaction to Twitter's discretion in placing fact-checking labels on presidential tweets relating to mail-in ballots and election fraud.⁶³ However, the pandemic has underlined how the implementation of artificial intelligence in content moderation can contribute to spreading disinformation without human oversight. The decisions of Google and Facebook to limit the process of human moderation has affected the entire process of content moderation, with the result that different accounts and content have been suspended or removed even where there was no reason to remove them.⁶⁴ This situation not only affected users' rights, but also led to the spread of disinformation at a time when reliance on good health information was critical.⁶⁵

This legal uncertainty encourages online platforms to monitor and remove even lawful content, to limit any risk of being sanctioned for hosting unlawful third-party content. This situation, called collateral censorship,⁶⁶ occurs when private actors are entrusted with removing unlawful content when they become aware of its presence. Indeed, this obligation encourages online intermediaries to censor even content whose illicit nature is not clear, to avoid any economic sanctions. Such a system of liability indirectly entrusts online intermediaries with autonomously deciding whether to maintain and remove content, based on their risk of being held liable. Since online platforms are privately run, these actors will try to avoid the risks of being sanctioned for non-compliance. In other words, online intermediaries, as business actors, will likely focus on minimising this economic risk rather than adopting a human rights-based approach.

Therefore, the primary question is how to ensure that freedom of expression in the digital age is not driven by unaccountable logic and business interests.

⁶² J. Peters, 'Twitter introducing new labels for tweets with misleading COVID-19 information', *The Verge*, 11 May 2020, <https://www.theverge.com/2020/5/11/21254733/twitter-covid-19-misleading-information-label-warnings-misinformation>.

⁶³ Executive Order on Preventing Online Censorship, 28 May 2020, <https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/>.

⁶⁴ E. Dvoskin and N. Tiku, 'Facebook Sent Home Thousands of Human Moderators due to the Coronavirus. Now the Algorithms are in Charge', *The Washington Post*, 24 March 2020, <https://www.washingtonpost.com/technology/2020/03/23/facebook-moderators-coronavirus/>.

⁶⁵ T.R. Keller and R. Gillett, 'Why is it so hard to stop COVID-19 misinformation spreading on social media?', *The Conversation*, 13 April 2020, <https://theconversation.com/why-is-it-so-hard-to-stop-covid-19-misinformation-spreading-on-social-media-134396>.

⁶⁶ F.T. Wu, 'Collateral Censorship and the Limits of Intermediary Immunity', 87, *Notre Dame Law Review*, [2013], p. 293; S.F. Kreimer, 'Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link', 155, *University of Pennsylvania Law Review*, [2006], p. 11.

This is relevant when considering that the spread of online disinformation has not only raised questions for the protection of the right to freedom of expression, but also for public interests and democratic values.

5. DISINFORMATION, PUBLIC INTERESTS AND DEMOCRATIC VALUES

Undeniably, technology has improved opportunities to search, receive and impart information and ideas beyond the individual sphere. Nevertheless, serious concerns have been cast as to the effects that such information flow generates on public debates and democratic values.⁶⁷ Institutions such as the European Commission have recognised that disinformation is capable of undermining trust in institutions, and in the media – both traditional and digital outlets – and may harm democracy by affecting citizens’ ability to make informed decisions.⁶⁸ In fact, according to the HLEG report, ‘special attention should be paid to the threat represented by disinformation aimed at undermining the integrity of elections’,⁶⁹ as accurate information is necessary to ensure full enjoyment of the right to vote. The element of information in connection with the public sphere illustrates a number of relations that are typically recognised and protected in liberal constitutional orders.

The interplay between freedom of expression, the right to receive information and informed participation in a democracy is an example of the interdependency and ‘triangular’ nature of the relationship between democracy, the rule of law and fundamental rights.⁷⁰ The freedom of speech paradigm is wider than the notion of democracy solely understood in the frame of electoral and public deliberation processes, as it broadly embraces the notion of ‘democratic culture’.⁷¹ Nevertheless, the role of information, and the ability to freely express and receive it, remains undeniably essential during that time frame when citizens are called on to express their political views through the election of representatives. Factual information and knowledge are necessary to ensure the genuine ability of a citizen to take informed decisions, as well as to participate

⁶⁷ J.A. Tucker, ‘From Liberation to Turmoil: Social Media and Democracy’, 28(4), *Journal of Democracy*, [2017], p. 46.

⁶⁸ Communication from the Commission, ‘Tackling online disinformation: a European Approach’, COM/2018/236 final, 1, (‘Disinformation Communication’).

⁶⁹ European Commission, above n. 44, p. 12.

⁷⁰ S. Carrera and others, ‘The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism’, [2013], Centre for European Policy Studies, <https://www.ceps.eu/ceps-publications/triangular-relationship-between-fundamental-rights-democracy-and-rule-law-eu-towards-eu/>.

⁷¹ J.M. Balkin, ‘Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society’, 79(1), *New York University Law Review*, [2004].

in public debates.⁷² Accordingly, freedom of speech is not an end in itself, but is instrumental to the self-government and determination of a people.⁷³ In other words, disinformation not only touches upon the individual sphere, but also the collective dimension of democracy.

The consolidation of the digital marketplace of ideas has led politicians, political organisations and parties to communicate with citizens and exchange information in an unprecedented way. As free participation in the public sphere during electoral periods presupposes awareness of public policies, and their effects and alternatives,⁷⁴ the lack of freedom of information, or being subject to information that is systematically deceitful, may cause a distortion of the opinion-forming process, which might ultimately be reflected in the election ballot. Along these lines, if disinformation practices were to attain such a degree of intensity as to alter or misrepresent public discourse, the exercise of citizens' voting rights would be at risk in that this could, ultimately, lead to electoral results distorted by a perverted public discourse.⁷⁵ Elections call on the electorate to express political choices which then affect the polity. It follows that factual information and related public debates are necessary to ensure that the vote authentically expresses the electorate's views; and the heart of the problem lies in investigating the development of political ideas within the digital sphere, to understand whether and how disinformation practices may affect the informative process prior to electoral consultations. As explained by Trudel, courts have limited attempts to regulate freedom of expression, particularly in the electoral period, thus banning regulatory answers to the spread of disinformation, as underlined by the Canadian Supreme Court in 1992, and even in a recent decision by the Ontario Superior Court.⁷⁶ Likewise, courts have dealt with the spread of disinformation. In Hungary, the Constitutional Court has underlined that false statements are not always protected during elections.⁷⁷

In recent years, the massive spread of populist narratives has raised questions for constitutional democracies.⁷⁸ New (digital) populist narratives, manipulating information for political purposes, have populated digital spaces. By exploiting the opportunities of online platforms, populist voices have become a relevant part of both the public debate online and the political situation.⁷⁹ The success

⁷² J. Bayer and others, above n. 3.

⁷³ A. Meiklejohn, 'The First Amendment is an Absolute', *Supreme Court Review*, [1961], p. 245.

⁷⁴ Confirmed in a number of decisions of the ECtHR: see *LCB v. United Kingdom*, no. 23413/94, (1998), §§38–39 and *Roche v. United Kingdom*, no. 32555/96, (2006), §§165–66.

⁷⁵ J. Bayer and others, above n. 3.

⁷⁶ See the special report on Canada by Pierre Trudel.

⁷⁷ See the special report on Hungary by Gábor Polyák.

⁷⁸ T. Fournier, 'From Rhetoric to Action, A Constitutional Analysis of Populism', 20(3), *German Law Journal*, [2019], p. 362; N. Urbinati, *Me the People: How Populism Transforms Democracy*, Harvard University Press, Cambridge, Mass 2019.

⁷⁹ S. Engesser and others, 'Populism and Social Media: How Politicians Spread a Fragmented Ideology', 20(8), *Information, Communication & Society*, [2016], p. 1109.

of these movements is the result of the exploitation of the technological factor by populist movements; that, is of the phenomenon of digital populism,⁸⁰ in its multiple definitions of a political communication style, a political strategy framed within certain types of organisation, and an ideology.⁸¹ The cases of the Brexit referendum, and of the US elections, both in 2016, have provided examples of how populist movements have relied on digital technologies, and primarily online platforms, as instruments to spread their narratives.⁸²

Populist movements also use social media as a tool to challenge traditional media, by dismantling dissent and making the possibility to disagree difficult. This framework is also connected with the spread of disinformation. Social media have proven to be one of the primary fields where political parties promote their extremist theses, often overcoming the threshold of truthfulness of their statements.

It is worth underlining that, when relying on digital technologies, populist groups and leaders are exercising constitutional rights and liberties, and so are acting within the constitutional framework. Still, they exploit it for their purposes, shielding themselves behind democratic safeguards such as freedom of expression, to share opinions which inevitably undermine the same values that allow them to perform their activities. In other words, they exploit constitutional values to run their unconstitutional projects.⁸³ Besides, when they use social media, they also exercise other pluralist values like freedom of assembly and association, which allow everyone to participate in social and political life, including those minorities which populism aims to fight as a threat to the people's unity.

The digital environment has been the perfect place for the spread of populist narratives. The influence of the digital environment goes beyond even national populism, also extending to the field of international politics. The Cambridge Analytica scandal is a clear example of how even states can interfere in foreign presidential elections, by exploiting social media services to polarise and influence communities across the globe. Therefore, populism seems to be one of the prices democracies need to pay in order to tolerate pluralism. The case of digital populism provides a paradigmatic example of the complexity, for constitutional democracies, of protecting constitutional principles and, primarily, the rule of law, particularly to address the use of disinformation.

⁸⁰ J. Bartlett and others, *The New Face of Digital Populism*, Demos UK Digital Platforms 2011.

⁸¹ C. Rovira Kaltwasser and others, 'Populism: An Overview of the Concept and the State of the Art' in C. Rovira Kaltwasser and others, *The Oxford Handbook of Populism*, OUP, Oxford 2012.

⁸² T. Flew and P. Iosifidis, 'Populism, Globalisation and Social Media', 82(1), *The International Communication Gazette*, [2020], p. 7.

⁸³ P. Blokker, 'Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism', 15(3), *European Constitutional Law Review*, [2019], p. 519.

This issue has even extended to the COVID-19 pandemic, which has constituted an opportunity for populist movements to challenge the elite and spread false news. US President Donald Trump referred to the coronavirus as a ‘hoax’,⁸⁴ while Brazilian President Jair Bolsonaro described the virus a ‘fantasy’, and preventive measures as ‘hysterical’.⁸⁵ The spread of disinformation online has not stopped in times of pandemic. The health crisis is also an information crisis. Social media have been the site of numerous rumours and deep-seated accusations about the origin of the virus and other false information. Conspiracy theories around 5G, or false information about COVID-19 treatments, are only two examples of the health disinformation affecting public discourse in times of pandemic. This tendency is, most notably, well represented by the following two examples: the fight against the so-called ‘infodemic’,⁸⁶ i.e. the mass dissemination of misinformation and disinformation concerning the novel disease, the medical guidelines that followed and, subsequently, the risk-benefit ratio of anti-COVID-19 vaccines.

Information on the novel disease across the Web has been severely tampered with by the dissemination of fake news, especially disinformation and misinformation. Many scholars and the medical community, as well as governmental institutions and international organisations, have highlighted the serious damage caused by the distribution, across the Web, of content and materials containing false information with respect to the origins and seriousness of COVID-19, as well as on the effectiveness and necessity of precautionary measures such as social distancing and masks. In some cases, the population refused the suggestions of medical science, and many cases of vitamin D abuse and mass poisoning from methanol intake took place.⁸⁷ More recently, misinformation and disinformation have targeted and affected, on a worldwide basis, the vaccination campaigns, and have thus represented a serious threat to overcoming the pandemic. In some cases, lawmakers have adopted temporary measures to address the spread of online disinformation, such as in Romania,⁸⁸ and courts have reacted to the spread of disinformation, as shown

⁸⁴ L. Egan, ‘Trump Calls Coronavirus Democrats “New Hoax”’, *NBC News*, 29 April 2020, <https://www.nbcnews.com/politics/donald-trump/trump-calls-coronavirus-democrats-new-hoax-n1145721>.

⁸⁵ L. Paraguassu, ‘Brazil’s Bolsonaro Says Coronavirus is Not All the Media Makes It Out to Be’, *Reuters*, 10 March 2020, <https://www.reuters.com/article/us-brazil-bolsonaro-idUSKBN20X24P>; T. Phillips, ‘Brazil’s Jair Bolsonaro Says Coronavirus Crisis is a Media Trick’, *The Guardian*, 23 March 2020, <https://www.theguardian.com/world/2020/mar/23/brazils-jair-bolsonaro-says-coronavirus-crisis-is-a-media-trick>.

⁸⁶ R. Radu, ‘Fighting the “Infodemic”: Legal Responses to COVID-19 Disinformation’, 6(3), *Social Media & Society*, [2020], <https://journals.sagepub.com/doi/full/10.1177/2056305120948190>.

⁸⁷ F. Tagliabue and others, ‘The “Pandemic” of Disinformation in COVID-19’, 2, *SN Comprehensive Clinical Medicine*, [2020], p. 1287.

⁸⁸ See the special report on Romania by Elena Lazăr and Nicolae-Dragoş Costescu.

in Hungary.⁸⁹ In this last case, the spread of COVID-19 has led to amendments to the Criminal Code, on ‘fearmongering’, thus punishing the publication of false statements by imprisonment of one to five years. It is necessary that the individual intentionally publishes false content, and for it to lead to a specific harm that is relevant to COVID-19. Likewise, the Criminal Code also punishes the statement and dissemination of any untrue fact that can disturb public peace, with imprisonment of up to three years.

Even in the context of a global pandemic online platforms have been involved in the fight against disinformation. In the aftermath of the outbreak of COVID-19, social media, pressurised both by the government and by public opinion, took a more interventionist approach. Indeed, the pandemic caused content moderation practices, operated by online intermediaries, to enter a ‘state of emergency’.⁹⁰ The renewed interventionist approach was generally justified, on the one hand, by the need to combat an emerging and rapidly spreading threat, and, on the other, by the existence of clear-cut authoritative sources of information, such as the World Health Organization. Amongst others, Facebook has updated its policies, and its standards and conditions, by prohibiting a long list of claims: for instance, that vaccines are not effective at preventing the disease they are meant to protect against, or that it is safer to get the disease than to get the vaccine, or that vaccines are toxic, dangerous or cause autism.⁹¹

The cases of populism and the pandemic are not the only examples of the constitutional tensions raised by disinformation. The spread of false content online has also become a tool of war. The recent Russian invasion of Ukraine has brought to the fore the central role played by informational warfare in twenty-first century conflicts. Besides, this role in Russia’s defence and external action policies had already emerged during the 2014 conflict that led to the de facto annexation of Crimea by Russia, and was officially confirmed by the Russian Federation’s ‘Military Doctrine’, as approved on 25 December 2014,⁹² in which an explicit reference was made to the role of information in Russian warfare practices. It is not by chance that, in 2015, the EU instituted the East StratCom Task Force,⁹³ dedicated specifically to countering disinformation campaigns coming from the Kremlin.

In the aftermath of the attack initiated on 24 February 2022, information became a central terrain of war. At first, Russia tried to adopt a global

⁸⁹ See the special report on Hungary by Gábor Polyák.

⁹⁰ E. Douek, ‘Governing Online Speech: From “Posts-As-Trumps” to Proportionality and Probability’, 121(3), *Columbia Law Review*, [2021], p. 759.

⁹¹ G. Rosen, ‘An Update on Our Work to Keep People Informed and Limit Misinformation About COVID-19’, *Meta*, 16 April 2020, <https://about.fb.com/news/2020/04/covid-19-misinfo-update/#removing-more-false-claims>.

⁹² The Military Doctrine of Russian Federation (2015), <https://www.rusemb.org.uk/press/2029>.

⁹³ European Council meeting, 19 and 20 March 2015, <https://www.consilium.europa.eu/media/21888/european-council-conclusions-19-20-march-2015-en.pdf>.

disinformation strategy, aimed at spreading, at a domestic level as well as abroad, the propagandistic view of the invasion as a special operation, the goal of which was to defend russophone minorities in Ukraine, and to fight Zelensky's government, who were depicted as being Nazis. Russia also turned its focus towards its own domestic propaganda strategies, mainly by suffocating opposition voices, and by unilaterally spreading the government's views through the country's media outlets.

The implementation of such measures is particularly relevant for at least two reasons. First, the advent of the conflict has led to the rise of an unprecedented informational gap between Russia and the West. Digital media, and the resort to informational warfare, have indeed led the world to be divided into two poles, showing once more the polarising effect that social networks and social media can have within the infosphere. This gap has also been the reason for the banning of Russian media, such as Russia Today, in the EU.⁹⁴ Second, the war in Ukraine has proven the importance of private online platforms in the spread of (dis)information for propaganda- and war-related purposes. Although propaganda and disinformation have long played a critical role during times of war (think, for instance, of the Nazi regime during World War II), the online digital environment has inevitably exacerbated the importance of media outlets, and has given importance to the relationship between public powers and private digital platforms having a global reach.

Information has also played an increasingly crucial role through the intervention and action of social media influencers (so much so that some have spoken of the 'first TikTok war'),⁹⁵ and through Big Tech activism.⁹⁶ In fact, in a similar manner to what had already happened throughout the COVID-19 pandemic emergency, most social media and social network companies quickly responded to the spread of Russian disinformation in various ways: by stopping monetising or selling advertisements to Russian state media (Meta), by attempting to pause Russian advertisements in Ukraine (Twitter), and by creating an ad hoc monitoring team (YouTube).

This situation underlines how tackling disinformation is not only a matter of individual freedoms, but also of collective interests relating to the protection of democratic values. Even if freedom of expression is paramount for constitutional democracies, the balance of fundamental rights and public interests tends to take the strategy for tackling disinformation far from polarised approaches

⁹⁴ N. Lomas, 'EU's ban on Russia Today and Sputnik is now in effect', *TechCrunch*, 2 March 2022, <https://techcrunch.com/2022/03/02/eu-rt-sputnik-ban-live/>.

⁹⁵ C. Stokel-Walker, 'The first TikTok war: how are influencers in Russia and Ukraine responding?', *The Guardian*, 27 February 2022, <https://www.theguardian.com/media/2022/feb/26/social-media-influencers-russia-ukraine-tiktok-instagram>.

⁹⁶ S. Ranchordas and others, 'Big Tech War Activism', *Verfassungsblog*, 10 March 2022, <https://verfassungsblog.de/big-tech-war-activism/>.

focusing on self-regulation or censorship. Addressing the challenges raised by disinformation requires the transnational dimension of the digital age to be faced. In this case, the traditional boundaries of free speech are questioned by private actors operating in the digital environment, primarily online platforms. These actors have provided critical infrastructure to disseminate online speech and enforce public policies online. The power of platforms to govern online content raises constitutional questions that lead to different strategies for tackling the spread of disinformation.

6. COMPARATIVE APPROACHES IN TACKLING DISINFORMATION

The considerations on disinformation and democratic values underline the constitutional challenges raised by the spread of disinformation in the digital age. Still, the question of how to address disinformation requires dealing with the boundaries of freedom of expression, which are not equal on a global scale. At the same time, disinformation challenges collective interests, underlining how an absolute protection of the right to free speech, or general censorship, are not always long-term solutions for the free marketplace of ideas.

From the perspective of a constitutional scholar, the decision to intervene to filter fake news online evokes the adoption of a series of limitations that restrict freedom of speech within confines that are probably stricter than those codified by the liberal constitutions. In order to avoid the spread of falsehoods and lies online, and in the name of the protection of constitutional rights, the risk is of ending up indirectly limiting freedom. Regulating false content in the context of the information society can be insidious, not only because of the challenges of defining disinformation, but also since it requires states to deal with at least one regulatory dilemma: how, and to what extent, to regulate (false) speech. This is exactly the prerequisite that the liberal state is unable to stably guarantee over time.

It is not by chance that states around the world have adopted different approaches to countering disinformation. In some cases, task forces or expert groups providing reports, such as in Japan, have been the primary tools of addressing disinformation.⁹⁷ In other cases, discussions have led to the proposal of bills that have not been adopted, thus primarily leaving the questions raised by disinformation to public actors such as independent administrative authorities, as in the case of Italy.⁹⁸

⁹⁷ See the special report on Japan by Eijiro Mizutani.

⁹⁸ See the special report on Italy by Michela Manetti.

Nonetheless, these soft approaches have not been the only way of countering disinformation. The spread of false content has also been criminalised, for example in Vietnam.⁹⁹ In this case, as underlined by Dung Dang, the Law on Cybersecurity does not allow users to spread online information against the Socialist Republic of Vietnam, and on other matters such the distortion of history and revolutionary achievements.¹⁰⁰ In Türkiye, in October 2022, the Press Code and other Codes were amended. Among the amendments, there is a new criminal provision on the dissemination of false information to mislead the public, which is punishable with up to three years' imprisonment. Besides, social network media are required to provide information to judicial authorities about who has spread false information to mislead the public.

As already underlined, in some cases the spread of online disinformation has already been connected to crimes relating to hate speech – even in liberal models, such as Finland¹⁰¹ – or to the regulation of media outlets, such as in France.¹⁰² In some cases, the scope of media regulation has been extended to the fight against disinformation, as underlined by Mutlu and Uraz,¹⁰³ and there have been proposal to criminalise disinformation when it comes from foreign interferences, as explained by Neuvonen.¹⁰⁴

It is interesting to consider how states have addressed the spreading of false alarms in pre-online times, even before the spreading of online disinformation, as underlined in the case of Croatia.¹⁰⁵ The Act on Misdemeanours against Public Order and Peace criminalises the spread of false news that disturbs the order and peace of citizens, which is punishable with up to 30 days' imprisonment. As underlined by Škorić and Rittossa, either fabricating or spreading false news is sufficient for the existence of a misdemeanour, but there should also be a disturbance of public order and peace. In this case, falsity is presumed unless the opposite is proved. Also, other provisions criminalise the spread of false news, particularly in case of false alarms concerning information shared with the police or other public services, which can lead to imprisonment of up to three years.

In other cases, the spreading of false content producing public alarm has been criminalised in cases of crisis or natural disaster. As underlined by Neuwirth and Li, the Macao Civil Protection Law was adopted following 'Hato', one of the strongest typhoons to impact on Macau and Hong Kong in the past 50 years, which occurred in 2017.¹⁰⁶ Likewise, as explained by Costescu and

⁹⁹ See the special report on Vietnam by Tat Dung Dang.

¹⁰⁰ Ibid.

¹⁰¹ See the special report on Finland by Riku Neuvonen.

¹⁰² See the special report on France, by Pauline Türk.

¹⁰³ See the special report on Türkiye by Erdem Ilker Mutlu and Onur Uraz.

¹⁰⁴ See the special report on Finland by Riku Neuvonen.

¹⁰⁵ See the special report on Croatia by Marissabell Škorić and Dalida Rittossa.

¹⁰⁶ See the special report on Macao SAR by Rostam J. Neuwirth and Li Yi.

Lazăr, during the COVID-19 pandemic, temporary measures introduced by the Ministry of Interior in Romania led to the blocking of online content that officials considered to promote false information, or which could induce fear among the public.¹⁰⁷ Such legal instruments to address the spread of disinformation during the pandemic have also been introduced, for instance, in Vietnam.¹⁰⁸

The UK model, based on the duty of care, and online harm, is another example of a different approach towards addressing the spread of online disinformation.¹⁰⁹ The Online Safety Bill does not aim to address publishers or censor speech, but recognises the responsibility of online platforms, by introducing duties of care for harmful content. It also entrusts Ofcom (the UK's communications regulator) with the enforcement of this regulation, including the application of fines. As underlined by Coe, the Online Safety Bill has been the result of acute and increasing pressure to sanitise the digital environment and mitigate online harms, and this approach can incentive platforms to remove content that is legal or unharmed.¹¹⁰ A focus on online harm is also contained in the proposal, by the Canadian Commission for Democratic Expression, to protect the integrity of online exchanges.¹¹¹ The UK's Online Safety Bill leads to a potential departure from the traditional model based on the immunity of online intermediaries, and particularly the EU general ban on general monitoring, to which the UK system is no longer bound, after Brexit.

This trend has also been underlined by the adoption of the Network Enforcement Act (NetzDG) in Germany, and the law against disinformation in times of election, in France.¹¹² In June 2017 the German Bundestag passed the NetzDG,¹¹³ which became fully operational in January 2018. The NetzDG sets out to combat the spread of hate speech and false content, particularly by introducing transparency and redress mechanisms, even if this regulation does not add any new criminal offences, and only some of the criminal offences within the scope of the NetzDG concern disinformation.¹¹⁴ The NetzDG requires social networks with more than 2 million registered users in Germany to remove content that, in cases of 'manifestly unlawful content', require such removal within 24 hours. In other cases, online platforms have up to a week to assess unlawful content.

It should be noted that the NetzDG does not define 'fake news' or 'hate speech'. Nor does it introduce new legal categories; rather, it extends the application of existing provisions of the German Criminal Code. Secondly, by anticipating

¹⁰⁷ See the special report on Romania by Elena Lazăr and Nicolae-Dragoş Costescu.

¹⁰⁸ See the special report on Vietnam by Tat Dung Dang.

¹⁰⁹ See the special report on the UK by Peter Coe.

¹¹⁰ Ibid.

¹¹¹ See the special report on Canada by Pierre Trudel.

¹¹² See the special reports on Germany by Eva Ellen Wagner and on France by Pauline Türk.

¹¹³ Netzdurchsetzungsgesetz, Law of June 30, 2017, Federal Law Gazette I, 3352 ('NetzDG').

¹¹⁴ See the special report on Germany by Eva Ellen Wagner.

and inspiring the European strategy to address the spread of harmful content, the NetzDG introduces procedural safeguards, such as a periodic ‘transparency reporting obligation’, requiring the disclosure of social networks’ management of claims filed for illegal content.¹¹⁵ The controversial grounds of the NetzDG include its alleged incompatibility with the framework established by the e-Commerce Directive and the Digital Services Act, particularly the violation of fundamental rights – most notably freedom of expression.¹¹⁶ It is unclear whether the legal regime of online intermediaries in Europe allows Member States to specify the substance of an ‘expeditious’ time frame for removal of content, or whether the law purposely seeks to avoid a rigid deadline.¹¹⁷ Besides, the reference to swift removal, within 24 hours, of ‘manifestly illegal’ content, raises concerns, especially with regard to the risk of overenforcement in taking down flagged content, without considering the context.¹¹⁸

The French approach has been more specific, even if, as underlined by Türk, it has been influenced by the German approach.¹¹⁹ In March 2018, two related laws to combat the manipulation of information were proposed.¹²⁰ The Acts, an ordinary framework law, met significant opposition in the French National Assembly, facing two successive failures in the Senate. Eventually, they were approved in November 2018,¹²¹ promulgated upon the positive outcome of the preliminary constitutionality review. The legislation’s scope addresses attempts to deliberately manipulate information, targeting the very act of dissemination of false information rather than its author, and seeks to tackle the massive and rapid dissemination of false news in the digital sphere, including through social networks and media under the influence of a foreign state. The core pillars of the legislation provide the following: transparency duties on platforms;¹²² specification of powers for the Conseil supérieur de l’audiovisuel, which has now been replaced by l’Autorité de Régulation des Communication audiovisuelles, the French audiovisual regulatory authority;¹²³ provision of cooperation duties for platforms;¹²⁴ and promotion of media literacy within the educational framework.¹²⁵

¹¹⁵ NetzDG, Art. 1(1)(2).

¹¹⁶ W. Schulz, ‘Regulating Intermediaries to Protect Privacy Online – The Case of the German NetzDG’, HIIG Discussion Paper Series 2018-01, <https://www.hiig.de/wp-content/uploads/2018/07/SSRN-id3216572.pdf>.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ See the special report on France by Pauline Türk.

¹²⁰ Proposition de loi relative à la lutte contre les fausses informations, n° 799, 21 March 2018.

¹²¹ Loi organique n° 2018-1201 du 22 décembre 2018 relative à la lutte contre la manipulation de l’information; Loi n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l’information (‘Loi n° 2018-1202’).

¹²² Loi n° 2018-1202, Title I.

¹²³ Ibid., Title II.

¹²⁴ Ibid., Title III.

¹²⁵ Ibid., Title IV.

The most notable part of the law, for the purposes of this discussion, specifically targets the electoral period, i.e. the three-month period preceding an election. Despite the principle that freedom of expression enjoys a particularly wide margin during pre-electoral periods, as also underlined by the European Court of Human Rights,¹²⁶ the French legislation grants powers to expeditiously address allegedly harmful content, in order to protect the fairness of elections and the sincerity of votes. The procedure is urgency-based, requiring judicial authorities to act upon requests within 48 hours of their reporting. The judge will qualify the ‘false news’,¹²⁷ assessing whether it is: (1) obvious; (2) disseminated massively and artificially; and (3) leading to the disturbance of public peace or the sincerity of an election. Therefore, judges play a primary role in defining the truthfulness of contested information and the author’s intent to manipulate public opinion, and in ordering the deletion of such information if necessary, which they must do rapidly. As to the adequacy of this procedure, the Conseil d’Etat preliminarily considered that the remedy did not disproportionately restrict freedom of expression, in view of the general interest pursued.¹²⁸ This law has been enforced in a case of disinformation relating to a tweet by a member of the government which was accused of manipulating public opinion in a times of election.¹²⁹ This case is an example of the role of judges in making decisions on disinformation. The courts considered that the information was not disconnected with real facts and, therefore, this case did not qualify as a manifestly inaccurate or misleading allegation, as established by the law.

These cases provide comparative examples of how constitutional democracies have felt the need to react to the spread of online disinformation.

The regulatory fragmentation described above can be explained by focusing on how speech is protected across different legal systems. Tackling disinformation requires public actors to decide to what extent speech is protected and balanced with other constitutional rights and liberties, as well as how to pursue other (legitimate) interests. Whereas the need to protect freedom of expression could be a reasonable goal for many democratic states, this fundamental right also conflicts firmly with other constitutional interests in different contexts, especially when focusing on authoritarian and totalitarian regimes. Illiberal regimes might consider regulating disinformation as an opportunity to enhance their authority, rather than as a threat to the right to freedom of expression. Since authoritarian and totalitarian regimes are characterised by the predominance of a central authority which does not tolerate any interference,¹³⁰ these regimes

¹²⁶ *Kwiecien v. Poland*, no. 51744/99, ECHR.

¹²⁷ As defined in Art. 27 of Loi républicaine du 29 juillet 1881 sur la liberté de la presse.

¹²⁸ Conseil d’Etat, Avis délibéré par l’Assemblée Générale le 19 avril 2018.

¹²⁹ Tribunal de Grande Instance, 17 May 2019 n. 19/53935, *Vieu and Ouzoulias v. Twitter France*.

¹³⁰ T. Ginsburg and A. Simpsen (eds), *Constitutions in Authoritarian Regimes*, CUP, Cambridge 2014.

aim to suppress or control the degree of pluralism, to avoid that spark of dissent that triggers ideas undermining the stability of the central power. In this case, disinformation is not a threat but an opportunity for the central authority. By using the dissemination of false content as an excuse to protect legitimate interests (for example, national security), authoritarian and totalitarian regimes aim to foster their legal narrative to dismantle undesirable (and lawful) speech.¹³¹ For instance, the examples of Internet shutdowns or less intrusive forms of digital censorship have shown how governments implement these practices without providing explanations or relying on a general legal basis.¹³²

On the other side of the spectrum, protecting freedom of expression is vital for democratic states. The respect of fundamental rights and freedoms, especially freedom of expression, is at the core of the entire democratic system.¹³³ Without protecting equality, freedom of expression and freedom of assembly, it would not be possible to enjoy a democratic society. Therefore, one of the primary challenges for democratic states, when regulating disinformation, is pursuing the protection of freedom of expression (and other constitutional interests) while considering their legitimate interests to restrict such fundamental rights.

If these considerations would be enough to explain the constraints on addressing disinformation, the digital environment makes the entire picture even more intricate. Tackling disinformation not only involves the protection of the right to freedom of expression, but also the roles and responsibilities of online platforms in spreading disinformation. The lack of remedies to address disinformation is also the result of the constitutional limits in regulating online platforms. On the one hand, such platforms contribute to providing spaces for fostering freedom of expression; on the other hand, these actors govern online content, including online disinformation. Therefore, the fight against disinformation is a cross-border issue which raises questions about the collaboration between public actors and online platforms to enforce digital policies. This collaboration is also based on permanent task forces and round tables of experts, as in the cases of Belgium and Italy.¹³⁴

Constitutional democracies do not always agree about the need to regulate online platforms. In the US, the protection of online platforms is broad, since the constitutional ground for performing their business is based on the right to freedom of speech, as recognised by the First Amendment. In particular, in order

¹³¹ J. Clark and others, 'The Shifting Landscape of Global Internet Censorship', *Berkman Klein Center for Internet & Society Research Publication*, [2017], <https://dash.harvard.edu/handle/1/33084425>.

¹³² G. De Gregorio and N. Stremlau, 'Internet Shutdowns and the Limits of Law', 14, *International Journal of Communication*, [2020], p. 1.

¹³³ See, for instance, *Özgür Gündem v. Turkey*, no. 23144/93, §43, ECtHR; *Dink v. Turkey*, nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, §137, ECtHR.

¹³⁴ See the special reports on Belgium by Sarah Lambrecht and Elke Cloots, and on Italy by Michela Manetti.

to understand when a violation of the right to freedom of speech has occurred, the US Supreme Court applies a strict scrutiny test, according to which any such law should be narrowly tailored to serve a compelling state interest, as the cases of *Reno v. ACLU*,¹³⁵ at the end of the last century, and *Packingham v. North Carolina* have shown.¹³⁶ Still, the Communication Decency Act immunises online intermediaries, including modern online platforms, from liability for the moderation of users' content, particularly by showing how the US policy is still anchored to a digital liberal approach which considers the First Amendment to be the primary reference point for the algorithmic society.

Even from a European constitutional standpoint, the primary limitation can be found in the freedom to conduct business, as recognised by the CFREU, together with the European fundamental economic freedoms, especially the freedom to provide services.¹³⁷ This freedom constitutes a crucial barrier to disproportionate regulatory attempts involving platforms' activities. Each attempt to regulate online platforms should comply with the test established by the Charter.¹³⁸ Therefore, in order to restrict the freedoms of platforms, it is necessary that limitations comply with the principles of legality, legitimacy and proportionality. Moreover, regulatory attempts are not only blocked by economic freedoms, but also by the impact that regulation could have on the freedom of expression, privacy and data protection of users. Despite the differences between the two models on either side of the Atlantic, online platforms enjoy a 'constitutional safe area' whose boundaries can be limited only by restricting other fundamental rights, including freedom of speech.

In recent years, courts have addressed questions about the removal of political speech or the blocking of accounts of political figures. In the US, courts have primarily barred any attempt to make platforms responsible for the discretionary removal of content. In particular, the case of the removal and blocking of the former president of the United States,¹³⁹ or even the case of PragerU, about the dissemination of conservative ideas, can be considered paradigmatic examples of the constitutional protection enjoyed by online platforms. Contrastingly, in Europe courts have answered this question by extending constitutional values horizontally. Most notably, in Germany and in Italy, there have been cases in which courts have recognised that the discretionary removal of content by online platforms cannot be justified merely by a contractual relationship, but should take into account the protection of fundamental rights.¹⁴⁰

¹³⁵ *Reno v. American Civil Liberties Union* 521 U.S. 844 (1997).

¹³⁶ *Packingham v. North Carolina* 137 S. Ct. 1730 (2017).

¹³⁷ Charter, Art. 16. TFEU, Arts. 56–62.

¹³⁸ Charter, Art. 52.

¹³⁹ *Knight First Amendment Institute at Columbia University v. Trump* 302 F.Supp.3d 541 (S.D.N.Y. 2018).

¹⁴⁰ Tribunal of Rome, *CasaPound v. Facebook*, Order of 29 April 2020; Dresden Higher Regional Court, *Ein Prozent v. Facebook Ireland Ltd.*, Decision of 16 June 2020.

In particular, there are at least two relevant strategies in Europe. Firstly, the EU has primarily focused on addressing false content by providing policy guidelines, and by relying on co-regulatory solutions. The adoption of guidelines has also characterised the approaches of some Member States, particularly Belgium, as explained by Lambrecht and Cloots in their special report.¹⁴¹ Also, Japan has based its strategy on a report analysing the challenges raised by disinformation.¹⁴² Secondly, the EU has focused on increasing the degree of transparency and accountability in content moderation, also requiring very large online platforms to conduct systemic risk assessments.¹⁴³

Among the models for addressing disinformation in the digital age, it is important not only to focus on self-regulation or restrictive measures, but also on new procedural approaches. In this context, it is critical to mention the Digital Services Act and the co-regulatory model of the EU for addressing online disinformation. The Union has been at the forefront of platform regulation in recent years. While the US framework seems to be stuck in digital liberalism, on the other side of the Atlantic, the Union has slowly complemented its economic imprinting with a constitutional democratic strategy.¹⁴⁴ The Digital Services Act is a paradigmatic example of the shift of paradigm in the Union, towards more accountability of online platforms, to protect European democratic values.¹⁴⁵

Even before the launch of the Digital Services Act, the Code of Practice on Disinformation had fostered a self-regulatory approach, pushing social media to voluntarily increase transparency, and to set other proactive measures to address the spread of false content. Major platforms voluntarily committed to implementing a set of standards to tackle disinformation practices on their platforms. This approach had already underlined the intention to fight disinformation without regulating speech as much as the dynamics affecting its circulation. However, despite this new approach, the first version of the Code was not effective and aligned with European values. The Code was primarily based on a self-regulatory exercise driven by the free marketplace of ideas metaphor coming from the US constitutional framework. This approach was not new for the EU, which had already oriented its policy towards digital liberalism at the advent of the Internet, and is now looking at European values as critical parts of its strategy.¹⁴⁶

¹⁴¹ See the special report on Belgium by Sarah Lambrecht and Elke Cloots.

¹⁴² See the special report on Japan by Eijiro Mizutani.

¹⁴³ 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), Art. 26.

¹⁴⁴ G. De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society*, CUP, Cambridge 2022.

¹⁴⁵ Digital Services Act, above n. 143.

¹⁴⁶ G. De Gregorio, above n. 144.

The Democracy Action Plan then consolidated this approach, recognising the role of the Digital Services Act in the fight against disinformation.¹⁴⁷ The new legal framework will encourage the Commission to overhaul the Code of Practice on Disinformation into a co-regulatory framework of obligations and accountability of online platforms.¹⁴⁸ In this case, according to the Digital Services Act, codes of conduct could play an important role in tackling the amplification of false news through bots and fake accounts, and may be considered as an appropriate risk-mitigating measure by very large online platforms, even though the Code of Practice has already raised questions, as underlined by the Sounding Board on the Multistakeholder Forum on Disinformation.¹⁴⁹

The new Strengthened European Code of Practice has been the first co-regulatory exercise to tackle disinformation. Based on the first version, developed in 2018, the new Code has extended not only the number and type of signatories participating in the drafting, but also the quantity and quality of the commitments. As explained by Abbamonte and Gori, this process has played a critical role in providing a new model,¹⁵⁰ and the guidelines have been a point of reference for the entire process.¹⁵¹ The new Code has adopted a different methodology. It not only includes general commitments covering all its provisions, but also measures that allow concretisation of how signatories implement the commitments of the new Code of Practice. Besides, it includes new instruments to measure the effectiveness of the Code, which have been defined as the Qualitative Reporting Element (QRE) and Service Level Indicators (SLIs). While the first of these focuses primarily on reporting obligations by the signatories, the second provides quantitative information about the implementation of the measures. These instruments have also been enriched by the addition of structural indicators (SIs), which are diagonal instruments to measure the effectiveness of the Code across its different sections. The monitoring of the Code has also been fostered by the introduction of the Transparency Centre and the Task Force, which aim to ensure that the signatories have a space to address how the Code can deal with the challenges raised by disinformation, and to check the implementation of the measures in each section. In this case, the Digital Services Act will play a critical role in ensuring that the new Code turns into a co-regulatory instrument that is binding for the signatories.¹⁵²

¹⁴⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: On the European democracy action plan, COM(2020) 790 final.

¹⁴⁸ See the special report on the EU by Giuseppe B. Abbamonte and Paula Gori.

¹⁴⁹ Sounding Board of the Multistakeholder Forum on Disinformation Online, 2018.

¹⁵⁰ See the special report on the EU by Giuseppe B. Abbamonte and Paula Gori.

¹⁵¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Commission Guidance on Strengthening the Code of Practice on Disinformation, COM(2021) 262 final.

¹⁵² Digital Services Act, above n. 143, Art. 35.

Besides, the new Code will potentially play the role of providing risk mitigation measures for very large online platforms,¹⁵³ thus supporting their risk assessments.¹⁵⁴

Nonetheless, codes of conduct are only a small part of the jigsaw. Another important purpose of the Digital Services Act will be to increase transparency in the field of targeted advertising. The Digital Services Act recognises that advertising systems used by very large online platforms pose particular risks, for instance relating to the spread of disinformation which could impact on public health, public security, civil discourse, political participation and equality. Therefore, the Digital Services Act introduces the obligation for very large online platforms to provide public access to repositories of advertisements.¹⁵⁵ This new measure will allow more scrutiny and increase the accountability of online platforms. This measure will also provide more information about the targets of this advertising, allowing researchers, media and civil society organisations to scrutinise populist strategies hiding behind the opacity of online platforms.

Likewise, another important part of fighting disinformation relates to the role of trusted flaggers. The Digital Services Act requires online platforms to take the necessary technical and organisational measures to ensure that notices submitted by trusted flaggers are processed and decided upon with priority, and without delay.¹⁵⁶ This system opens the door for fact-checkers and other civil society organisations to become more involved in the process of content moderation and the reporting of online disinformation.

Besides, the new European approach also deals with extraordinary circumstances affecting public security or public health. In these cases, the Commission has the power to rely on crisis protocols to coordinate a rapid, collective and cross-border response, especially when online platforms are misused for the rapid spread of illegal content or disinformation, or where the need arises for rapid dissemination of reliable information.¹⁵⁷ In these cases, very large online platforms are required to adopt these protocols, although they are to be applied only temporarily, and should not lead platforms to a general obligation to monitor online content.

The European model provides an alternative path for tackling the spread of disinformation without regulating content. However, approaches to addressing disinformation are still fragmented, thus reflecting the constitutional differences among legal systems around the world, and even among Member States in Europe. National approaches to disinformation can create disparities and fragmentation in

¹⁵³ Ibid., Art. 27.

¹⁵⁴ Ibid., Art. 26.

¹⁵⁵ Ibid., Art. 30.

¹⁵⁶ Ibid., Art. 22.

¹⁵⁷ Ibid., Art. 36. See also Recital 91.

the internal market, thus raising questions about harmonisation.¹⁵⁸ In particular, the Digital Services Act does not define ‘illegal content’, but leaves this definition to Member States.¹⁵⁹ Some Member States, particularly Hungary and Lithuania, have already provided national definitions of disinformation, even criminalising the spread of false content. The criminalisation of disinformation at national level is a primary challenge for the Digital Services Act and its enforcement, for instance when it requires very large online platforms to assess risks relating to the spread of illegal content.¹⁶⁰ This approach not only influences the provision of services, but also broadly interferes with freedom of expression, considering the increasing legal uncertainty coming from national fragmentation.

The Digital Services Act could become a model for regulating online platforms moderating online speech. Nonetheless, it is only one example of how online disinformation is being addressed on a global scale. Specifically, in *Glawischnig-Piesczek v. Facebook*,¹⁶¹ the CJEU addressed the territorial scope of national orders concerning the removal of content, thus configuring the impact of EU law, especially freedom of expression, on a global scale. In this case, the Court also underlined the limits of the European approach, particularly considering other standards of protection on a global scale, as also underlined in *Google v. CNIL*.¹⁶² These cases underline how approaches to addressing disinformation are fragmented on a global scale, and are primarily linked to the constitutional protection of freedom of expression.

7. CONCLUSIONS

The spread of disinformation is a global concern. Most of the attention has been focused on tackling disinformation practices worldwide. State sovereignty is challenged by the eruption of a technology that breaks down regulatory fences and crosses borders, at times thwarting the attempts of each state to impose laws reflecting their own peculiar sensitivities. The case of disinformation represents one of the most important and emblematic examples of the constitutional nuances in the protection of free speech among legal systems on a global scale. The paradigms of freedom of expression imply different levels of protection of this right, and the Internet exposes these different sensitivities to more frequent and likely clashes.

¹⁵⁸ R. Ó Fathaigh, N. Helberger and N. Appelman, ‘The perils of legally defining disinformation’, 10(4), *Internet Policy Review*, [2021], <https://policyreview.info/articles/analysis/perils-legally-defining-disinformation>.

¹⁵⁹ Digital Services Act, above n. 143, Art. 2.

¹⁶⁰ *Ibid.*, Art. 34.

¹⁶¹ *Eva Glawischnig-Piesczek v. Facebook Ireland Limited*, Case C-18/18, ECLI:EU:C:2019:821.

¹⁶² *Google v. CNIL*, Case C-507/17, ECLI:EU:C:2019:772.

This intersection was certainly not impossible in the past: for example, the circulation of a periodical in a state other than where it was published, or the relative ability to affect another person's reputation outside of a specific jurisdiction. However, these cases were simply less frequent. The Internet allows each user to publish content that could nevertheless be found offensive and illegal in the system of another state. An emblematic case of the difficulties that can arise due to this ontological diversity in the paradigm of protection, when it is considered in the context of Internet, is offered by the *Yahoo! Licra* case.¹⁶³ This case has particularly underlined how, in the absence of a 'common' standard for the Internet, or international conventions that establish what level of protection to apply to online speech, the determination of these matters is de facto left to the discretion of the courts, which, although they certainly have greater 'proximity' to the questions raised from time to time, risk concentrating an almost legislative power in their own hands and generating uncertainty on the legal consequences of the conduct that individuals can follow on the Internet, and in the exercise of freedom of speech.

Besides, there is not a common definition of 'disinformation'. This is a primary challenge for the role of courts, which face challenges when making decisions in the absence of clear legal framework. The importance of providing a judicial stage of review is crucial to ensuring a fair assessment of cases and mediation between the voices involved. Judicial authorities are better placed to assess lawful expressions, and to carry out the necessary balancing between fundamental rights and competing interests, as well as providing some form of mediation between the parties involved. Measures to take down or block access to content, ordered by judicial authorities, may suffer imperfections, but constitute the most prominent safeguard against discretionary or hasty decisions taken either by platforms or by other non-independent bodies, whose roles and interests are not always clear. However, the lengthiness and costs of proceedings may cause obstructions to the law's effective application, while, on the other hand, 'flash judgments' also hinder the right to due process.

This situation also concerns the appropriateness of regulatory intervention in the digital sphere, and the forms that this may assume, which are far from being settled. Still, there is no one-size-fits-all solution, and no initiative is effectively free from criticism. All of the measures are responsive to fears of disinformation's influence on democratic discourse and processes. Legislative measures have been devised and drafted in a range of ways: pursuing different aims, addressing different targets, applying within different scopes, with varied degrees of intensity of intervention in the public sphere. While tension with freedom of expression is inherent to the regulatory dilemma, the appropriateness of responses is, in practice, a matter of nuance. Some jurisdictions have, indeed, taken a stance

¹⁶³ 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

with a view towards promoting greater responsibility for online intermediaries. These jurisdictions have opted to design their legislation in a way that addresses the owners of the digital infrastructure, i.e. Internet platforms, however defined, rather than the actual authors of online speech. This is the case of the German NetzDG, of the French law on manipulation of information, and of the Italian failed legislative initiative.

What appear to be widely supported internationally are the promotion of measures such as initiatives to support independent media and qualitative journalism, fact-checking activities, and important educational efforts promoting media and digital literacy. As already underlined in previous research, these measures certainly constitute less intrusive measures, relying on individual resilience to disinformation practices. However, these initiatives are long-term investments, whose concrete benefits may take time to emerge. Furthermore, for any of these measures to produce a meaningful impact, some degree of trust in public institutions, and in the media, must be restored. Accordingly, the promotion of open and free speech, reliant upon pluralistic values, to support information circulation on the Internet may contribute more to the democratisation of the digital public sphere than paternalistic or policing interventions would.

Any consideration in this field cannot ignore dealing with the platform conundrum; the role of online platforms, in terms of involvement and responsibilities, touches the very heart of the problem, just as much in the case of hard regulation as it does in the case of soft measures relying on their cooperation. The role of online platforms as digital enforcers of public policies leads to addressing disinformation not only through content regulation, but also through the introduction of procedural safeguards. Therefore, strategies to address disinformation need to address the role of online platforms, to ensure that market incentives do not infringe upon the public interest.

The spread of disinformation has underlined a tension between the need to protect the right to freedom of expression and the need to ensure that the same right does not become an excuse for limiting the protection of other conflicting constitutional values or public interests. It would not be enough to rely on traditional institutions such as courts, but it will be necessary to adopt a comprehensive approach which takes into account the role of all actors within the digital marketplace of ideas.