Constitutional protection of lies?

Fake news, freedom of expression and democratic procedures

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1. Introduction

Since the 2016 US presidential campaign, the world has been using the expression 'fake news' for the kind of propaganda that deliberately, and in the broadest possible way, spreads misinformation, primarily through Internet platforms and social networking sites. One of the best-known examples was 'Pizzagate', a story spread about the Democratic presidential nominee, Hillary Clinton, that she ran a child trafficking network from a pizzeria in Washington, DC. The restaurant's owner and staff received death threats and someone came to the pizzeria armed with a gun to help the children and fired it in the restaurant.[1] It was also revealed that a community nicknamed as the 'Macedonian teenagers' was making a living by producing and distributing fake news aimed at the American public from Veles, a poor town in Macedonia.[2]

The appearance of lies in the media is, of course, by no means a recent phenomenon.[3] Falsehoods were deliberately spread in the ancient, medievil and modern ages,[4] obscuring our view of human history. In the age of the Internet and, in particular, of social media, however, the quantity and speed of propagation of such falsehoods has reached new levels, and have begun to noticeably alter the quality of the public sphere. To date it has been seemingly impossible to take effective legal action against fake news on online platforms. On these platforms, the competition is for the attention of the audience, the users, measured in the number of seconds each user spends viewing specific content,[5] which has led to a race to create the most exciting, most interesting and most viral content, even at the cost of lying.

Communication on online platforms has had a profound effect on political culture and democratic procedures in general; one that in many respects is negative, not only because of the possibility of spreading lies but also because the debates in public life are becoming a lot less vigorous. Platform providers have an economic interest in fostering this increasingly intense and thus increasingly superficial public space.[6] However, the mass dissemination of lies is hardly in the interests of democratic publicity, and it is questionable how far it is compatible with the traditional philosophical underpinnings of freedom of expression. If freedom of expression is considered to be an instrument of community-based, democratic decision-making, the deliberate disclosure of lies can hardly serve this purpose. Technological advances, however, have allowed the birth of a new generation of lies – such as the appearance of counterfeit, so-called deep fake videos, where the face of one real person is replaced with that of another, misrepresenting the latter as if they had said or done something they did not. A public figure can appear to say anything in this way, in any embarrassing situation, and the recording will have enough persuasive force.[7] Soon no more real original footage will be necessary.

In this study, I examine the extent to which the protection of untrue statements under freedom of expression can be supported. Whatever the answer to this question is, it can only be the first step in the fight against lies. The scope of such protection can vary widely, depending on whether we generally allow the prohibition of lies, or, on the contrary, identify situations in which, for whatever reason, falsehood is protected by the freedom of speech. In section 2, I review the traditional justifications for the freedom of expression with a view to protecting false claims, and in section 3, I present the current possibilities for legal action against falsehoods by examining the limitations of freedom of expression. Sections 4 and 5 deal with the media regulations and measures for regulating platforms, which complement the rules which set boundaries on the freedom of speech, and in section 6, I assess the arguments for protecting or banning false claims, being aware of both philosophical justifications and the legal doctrine, along with the existing regulations. Section 7 serves to draw some general conclusions.

2. The search for truth as a rationale for the protection of free speech

2.1 John Milton

The first of a series of philosophical foundations for justifying the widespread protection of freedom of expression was the group of justifications that considered the protection of law to be necessary to achieve the goal of 'seeking the truth'. John Milton, the great English poet and statesman, and the first modern theoretician of free speech, advocated free speech because restricting it might obstruct God's will and love, preventing the flourishing of the 'free and knowing spirit'.[8] Milton firmly believed in the power of truth and that man, using God's gifts, has the ability to find the truth in the debate of differing views:

> *Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties …. And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter.*[9]

Before identifying him as a forerunner of modern liberalism, let us not forget that Milton approached freedom of speech from a theological perspective and did not separate the discovery of truth from the intentions of divine providence.[10] Faith in the triumph of truth thus extends to the hope of finding one's way through the weightiest ideological issues. 'Truth' in this sense means complete, objective truth that captures the order of the universe – a self-evident and justifiable ambition in the seventeenth century.

2.2 John Stuart Mill

More than two centuries after Milton, John Stuart Mill, the liberal English philosopher, laid down the classic foundations of freedom of speech, which are still cited very frequently today, in his essay *On Liberty*.[11] For Mill, truth is a fundamental value that is recognisable, and its recognition is a prerequisite for social development. Nobody is infallible and thus we can never be absolutely certain that what we think to be the truth is indeed the truth. Limitation of free speech is therefore impermissible, because a restricted opinion might contain the truth.[12] As such, tolerance of varying opinions is necessary, even when they contradict a genuinely true position, because in the absence of constant debate such a view becomes the unchallenged truth and will be accepted only out of habit, becoming petrified, 'dead dogma'. Moreover, before being recognised, the truth must suffer repeated persecution, and, although it is a pious lie that truth prevails despite all persecution, 'in the course of ages there will generally be found persons to rediscover it … until it has made such head as to withstand all subsequent attempts to suppress it'.[13] Hence, free debate also serves the truth that has already been recognised. Beyond this useful function, free speech also belongs to the domain of the individual's freedom, and, as such, it cannot be restricted unless its practice harms others.[14]

Mill's theory assumes that the publication of a possibly true opinion is of the greatest societal importance in all circumstances. However, we may easily envisage situations in which the protection of other interests would seem to be more important than the declaration of the potential truth. Mill probably overvalues the role of public debate in society, since, even if there is complete freedom, only a fraction of the people participate in it. For the majority, expressing their opinion is not important at all, and they do not necessarily care which opinion prevails in

a given debate. They perhaps do not even care what the 'truth' is. Even participants in a debate do not necessarily formulate or modify their opinion based on reason or proper consideration of arguments and counter-arguments. Short-term interests, such as, for example, the protection of public peace and public order, may override the aim of discovering the truth, because in most cases that will be a long and not necessarily successful process.[15]

In addition, as Paul Wragg points out, there is no automatic connection between truthfulness and democratic advance; moreover, there is no 'right to speak the truth', at least in a general sense.[16] Disclosure of the truth is, in several cases, expressly prohibited, for example, when it comes to issues of national security, public security or even the right to privacy.

2.3 Oliver Wendell Holmes

Further developments of Mill's theory are discernible in *Abrams v the United States*, a landmark free speech decision of the US Supreme Court.[17] It was not the judgment itself but the dissenting opinion of the legendary Supreme Court judge Justice Oliver W Holmes that became a legal classic. According to Holmes, 'the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market'.[18]

The 'marketplace of ideas' metaphor, based on Mill's theory but coined by Justice Holmes and used by the Court in their deliberations, had a great effect on the development of the right to freedom of speech in the US. The Supreme Court would go on to cite this analogy when overturning a number of regulations and court decisions that would have allowed state infringement of freedom of speech, quoting the unrestrictability of the 'market'. According to this view, the only possible way of reaching the truth is through the creation of a free marketplace of ideas, the principal potential enemy of which is the state (the government). There are, however, also grounds for criticising Justice Holmes's view. In his analysis, the concept of truth is highly relative and the truth is the view that emerges victorious from market competition.

Notably, Justice Holmes did not speak of a 'marketplace of facts' but of a 'marketplace of ideas'. The deliberate disclosure of false facts indeed does not enhance the quality of democratic processes and, in general, also fails to contribute to finding the truth. Even if we accept Mill's assumption about the beneficial effects of lies in the truth-seeking process, it can still be argued that if false statements are equally likely to emerge in the 'marketplace of ideas', that market would easily be distorted. As Ari Waldman points out, the marketplace of ideas is not the same as a marketplace of facts – the latter cannot exist because facts are either true or not, their quality not being determined by market competition. Justice Holmes's theory, then, applied to ideas, and should not be extended to facts.[19]

2.4 Distinguishing between facts and opinions

If we accept that factual assertions and thoughts (opinions) should be afforded different degrees of protection, that is, that a false statement must be protected to a lesser degree than a false, unsubstantiated opinion, then clearly it is essential to be able to distinguish between them. Typically, this is the way in which certain states protect freedom of expression and provide stronger protection for opinions, where courts and authorities try to avoid statements on the content, validity and correctness of opinions. However, in many cases, false factual claims remain unprotected. One of the fundamental issues in defamation law is the separation of facts and opinions and the different ways they are treated.[20]

Statements that are capable of being taken in evidence (that is, they may be objectively true or false) may be considered as fact. Conversely, opinions, even if they have an objectively verifiable factual basis, are necessarily subjective and cannot be the taken in evidence in a legal proceeding. To say that Martin Luther King was arrested seven times in Montgomery,[21] is a factual statement: it is either true or false. To say that an actor is 'hideously ugly',[22] is a subjective opinion and cannot be taken in evidence. To describe an historian as 'Jew-bashing',[23] is an opinion based on a factual assertion, the factual basis of which can be objectively judged, but an opinion formed on the basis of it is subjective and may therefore be justified or unfounded. Even so, in many cases, it is difficult to decide the category into which a statement should be placed.

In some cases, judging whether a statement is of a factual nature may also be subjective, as the following anecdote shows. Leo Szilard was a Hungarian-born

physicist and inventor who conceived of the nuclear chain reaction in 1933, patented the idea of a nuclear reactor, and participated in the Manhattan Project that built the atomic bomb. According to Hans Christian von Baeyer, 'The physicist Leo Szilard announced to Hans Bethe that he was thinking of keeping a diary: "I don't intend to publish. I am merely going to record the facts for the information of God." Bethe asked him: "Don't you think God knows the facts?" Szilárd replied: "God knows the facts, but not this version of the facts."'[24] The lesson of the story goes much further than capturing a spirited exchange between two great scientists during a break in the design of the atomic bomb. The investigative public affairs journalist, protected to the greatest extent by the freedom of expression, cannot seek more than an approximate reconstruction of the truth (a story). The journalist (like the historian) does no more than follow elaborate professional procedures in order to get as close to the truth as possible with a view to it being published.[25] In the words of Carl Bernstein, whose work uncovered the Watergate case, the journalist's primary task was to find the 'best obtainable version of the truth'.[26] This is not the same as the objective, complete truth.

2.5 Interpreting the search for 'truth'

With the search for 'truth' as one of the goals of freedom of speech, we can no longer be as ambitious as Milton was in his day. Pontius Pilate's question to Jesus Christ can be taken as a forerunner of the cynicism of the modern age. When Pilate asks Jesus, '*Quid est veritas*?', 'What is the truth?',[27] he does not even expect an answer, but questions the existence of objective truth. However, from our point of view, it is also right to work towards a 'technical' notion of truth in terms of freedom of expression if we expect courts to judge the truth content of a statement. Courts must make such judgements whenever they have to decide on the legality of publicly disclosed factual statements. However, a judge cannot decide, for example, on issues of religious or philosophical truths, and the law may not require them to. A judge cannot decide whether there is life after death, even though to state that there is (or that there is not) is a factual statement. We act correctly when we interpret the task of seeking justice in the context of disputes in public affairs, and sometimes in private matters between people. In this sense, the categories of 'fact' or 'truth' cannot be used in a metaphysical or ontological sense when exploring the extent and limits of freedom of speech. These boundaries are narrowed down to very practical, technically used terms that support the judgement of public affairs and the resolution of public disputes. Of course, religious and ideological issues can also be discussed in public life, but they can never be judged by state authorities or the courts. The tasks of regulation and law enforcement in this regard are to safeguard and protect democratic procedures, broadly interpreted, including any debate, discussion, newspaper article or commentary on social media that is involved in public affairs debates. However, as Carl Bernstein pointed out, even in these cases, the aim cannot be to find the objective truth, because neither the journalist nor the court are capable of this; their task is rather to come as close to the truth as possible. The proponents of two political parties will never agree on which of their respective presidents or prime ministers has led the government better, and their debate cannot be resolved objectively even though it is a matter of fact that can be decided, in principle. It is not possible, however, to judge or decide this in legal proceedings.

When the search for truth is interpreted as supporting democratic processes, this type of justifications for freedom of speech closely approaches another kind: democratic justifications. Justifications of freedom of speech of this kind hold that freedom of expression is a means to take decisions in public affairs. An essay by Alexander Meiklejohn, which had a profound influence on American legal thinking and jurisprudence, argues that the primary purpose and meaning of the right to free speech is to involve the citizen in debating and deciding on public affairs. Hence, the essence of law is the establishment of democratic (self) government.[28] According to Eric Barendt, any speech that is political (affecting public affairs) which potentially contributes to the formation of public opinion covers a wide range of topics that an intelligent citizen may view as a public affair.[29]

Contemporary court cases and constitutional court decisions on free speech most often apply this theory, giving special protection to disputes in public affairs. If we accept that the purpose of public affairs debates is to get closer to the truths of public affairs then the two theories merge, in essence.[30] If we also return to Justice Holmes for a moment, we can see that he did not actually relativise the concept of truth, but applied it in a narrower, technical sense. Public affairs must be decided by majority decision or by means of a system of representation, and the correctness and 'truth' of the decision will not be objectively judged. Who could say with complete objectivity that

Hillary Clinton would have been a better president than Donald Trump? This is not possible, but the important question of who should be the President of the US still had to be decided somehow. The decision supported Trump's 'truth', as it had convinced more people (or, more precisely, collected more electoral votes). No one has the opportunity – by legal means – to question the 'truth' of this decision. Justice Holmes thus referred not to the universal truth but to pragmatically interpreted truths, and, in the latter case, 'market' competition is quite conceivable and even necessary.[31]

3. Punishing lies by enforcing the limits of free speech

3.1 General prohibition of lying

Within the framework of the protection of freedom of expression, in the current doctrine, lying may not be prohibited in general. Ferenc Deák, the great Hungarian statesman and Minister of Justice of Hungary in the nineteenth century, would be disappointed to learn of this. According to an anecdote, he allegedly once said when drafting Hungary's first press act that 'If it was up to me, the Press Law would consist of a single sentence, saying: "Lies are forbidden."' While modern press and media laws can impose numerous restrictions on the media, they may not prohibit lies.

This does not mean that false factual statements cannot be broadly limited or subject to *ex post* sanctions. The US Supreme Court has repeatedly pointed out that false claims cannot be protected by freedom of expression.[32] On the other hand, in *United States v Alvarez*,[33] the Supreme Court held that the falsehood of a statement is not enough, by itself, to exclude speech from First Amendment protection.[34] In this case, one Xavier Alvarez stated at a Metropolitan Water District public board meeting, when introducing himself, that he had served 25 years in the Navy and earned the Congressional Medal of Honour. Under the Stolen Valor Act 2005, this misrepresentation qualified as a crime. The judgment in the *Alvarez* case divided the court. The decision adopted, in the ratio of 6:3, was in favour of freedom of expression. Most judges argue that punishing injustice deters free debate, and 'some false statements are inevitable if there is to be an open and vigorous expression of views'.[35] The government has not demonstrated and could not prove why counter speech against a false allegation, such as public ridicule, is not sufficient to remedy the harm caused.

This does not mean that it is not permissible in certain situations to prohibit false factual statements, but that a general prohibition is understood to be unconstitutional under the American freedom of speech doctrine. In England, a bill similar to the US Stolen Valor Act, the Awards for Valour (Protection) Bill, has been debated in Parliament but has not yet been approved by the House of Lords.[36]

3.2 Protection of one's reputation

One of the most important areas of the legal protection of human personality is defamation law and the protection of reputation and honour, which seeks to prevent unfavourable and unjust changes to an individual's image and evaluation by society. These regulations aim to prevent an opinion published in the public sphere concerning an individual from tarnishing the "image" of an individual without proper grounds for it, especially when it is based upon false statements. The approaches taken by individual states to this question differ noticeably, but the common point of departure in Western legal systems is the strong protection afforded to debates on public affairs and as such the weaker protection of the personality rights of public figures when compared to the protection of the freedom of speech.

The boundaries of the protection of the personality rights of public figures have primarily been shaped by court decisions. The most illuminating example of this is *New York Times v Sullivan*,[37] in which the US Supreme Court set a new standard in protecting the freedom of debate on public affairs. According to this decision, elected public officials may only successfully sue a publisher for the publication of a statement that is related to their office and which harms their reputation if they can show that the publisher acted in bad faith; that is, the publisher knew the statement to be false or did not know of its falsehood because they proceeded with reckless disregard in the course of verifying the statement.[38]

Thus, according to the *New York Times* ruling, serious negligence (which is, of course, difficult to prove) is sufficient to establish an infringement, while the *Alvarez* decision also protects intentional lies. If the *Alvarez* decision was based on the possibility of speaking out against lies, it also admits the possibility of slandering public figures, as Cass Sunstein, who

sees the tension between these two decisions, points out.[39] (He does not say, however, that the nature of the harm caused by the injustice is different in the two cases: slander violates one's personality rights, while bragging about honours violates the more abstract public interest and public order.)

In addition to the tort of libel, the tort of the 'intentional infliction of emotional distress' may also be utilised for the protection of one's personality, although the US Supreme Court's decision significantly narrowed the opportunity for this to be applied to public figures. According to the judgment in *Hustler Magazine v Falwell*,[40] it would be in breach of the First Amendment to establish legal liability for statements on public figures only because their disclosure was intended to insult the person concerned, or because the statement was disclosed with other harmful intent. The insult and the outrage themselves do not provide sufficient foundation for restricting the freedom of speech. Delivering the judgment of the Court, Chief Justice Rehnquist explained that 'False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas'.[41] The distinction between factual beliefs and opinions is thus a fundamental issue in the delimitation of freedom of expression, and the restriction of false statements of fact may be stricter than that of abusive opinions.

In UK law, the statutory and common law rules of defamation are mixed. The exemption from liability as defined by statute was extended by the judgment handed down in *Reynolds v Times Newspapers*.[42] According to this, the protection of the freedom of speech must be expanded, subject to certain conditions, to cover those events when the disclosing party publishes false allegations in matters of public interest. This provides far weaker protection to debates on public affairs than the *New York Times* rule, and it necessitates a case-by-case assessment of the circumstances in which the disclosure was made. In *Jameel*,[43] the House of Lords established that a disputed publication must not only be related to public affairs, but 'it should also be responsible and fair'.[44] In *Flood v Times Newspapers*,[45] the Supreme Court established that if the press reports on a lawsuit and adheres to the criteria of 'responsible journalism', the disclosure of false claims may also be considered lawful.

The Defamation Act 2013 triggered a major change in the regulation. The Act guarantees exemption for allegations published on matters of public interest. The precondition of this exemption is that the allegation must be made on a matter of public interest, and also that the disclosing party must reasonably believe that disclosure is in the public interest.[46] The protection of 'honest opinion'[47] also serves the public interest, in spite of the fact that this protection is not conditional upon the fact that the opinion should relate to a matter of public interest. 'Honest opinion' as a ground for exemption may only be applied if the opinion is based on factual information, the reality of which can be proved, and the disclosing party acted in good faith.

The European Court of Human Rights (ECtHR) has attempted to formulate common European principles in respect of this question. The Strasbourg Court's first judgment favouring the openness of public debate over the enforceability of personality rights was passed in *Lingens v Austria*.[48] The ECtHR decided that, on the one hand, the demonstration of the truth cannot be demanded in relation to value judgements and, on the other hand, that the threshold of tolerance of prominent politicians with regard to defamatory statements must be much higher than that of other individuals.

3.3 Genocide denials

The EU Council's Framework Decision on combating racism and xenophobia[49] places a universal prohibition on the denial of crimes against humanity, war crimes and genocides. Most Member States of the EU introduced laws prohibiting the denial of the crimes against humanity committed by the Nazis, or the questioning of these crimes or watering down their importance.[50]

In countries where the denial of the Holocaust is illegal, prosecution pursuant to these rules is not deemed by the Strasbourg Court to be a violation of the freedom of speech. In *Witzsch v Germany*,[51] the ECtHR considered the application inadmissible because the opinion of the applicant was excluded from the protection of the freedom of speech by Article 17 of the European Convention on Human Rights. This position of the Court was confirmed by other decisions in which the application of a complainant prosecuted for Holocaust denial was again considered inadmissible by the Court.[52] *Lehideaux and Isorni v France*[53] made it clear, however, that the Court excludes only the denial of the facts of the Holocaust from the protection of freedom of speech; other historical facts do not

benefit from this preferential treatment. This means that the standards of general hate speech laws can be lowered in the case of Holocaust denial.

According to the argument of the ECtHR in *Perinçek*, denial of the Holocaust can be punishable without fulfilling the 'incitement' or 'stirring up' element, based on its generally racist and anti-Semitic nature:

> *For the Court, the justification for making its [the Holocaust's] denial a criminal offence lies not so much in that it is a clearly established historical fact but in that, in view of the historical context in the States concerned … [I]ts denial, even if dressed up as impartial historical research, must invariably be seen as connoting an antidemocratic ideology and anti-Semitism.*[54]

According to the Grand Chamber, however, the denial of the Armenian genocide generally does not have this effect.[55] If false statements are incitement to hatred against certain social groups, they can be punished by rules that prohibit hate speech,[56] but the inaccuracy of factual statements is not sufficient in itself for them to be sanctioned.

The US approach is that sanctioning the denial of genocide, or specifically sanctioning the denial of the Holocaust, is incompatible with freedom of expression.[57] The UK has also failed to comply with the EU requirement set out in the 2008 Framework Decision, and does not prohibit denial of the Holocaust per se. This was made possible by the Framework Decision itself, which stated that the Member States were not obliged to undermine their own constitutional traditions and fundamental principles and rules relating to freedom of association, freedom of the press and freedom of expression, and the measures deriving from the Framework Decision could take that into account.[58]

Most EU Member States have not made use of this loophole, but at the same time it can be argued that the ban on denying the Holocaust or even other genocides goes beyond the European doctrine of freedom of expression: it deviates from other restrictions on public speech that prohibit hate speech. It serves to preserve the memory of a tragic series of tremendous historical events, both as a real restriction and a symbolic one, enforced through criminal law.[59] While the general prohibition of hate in most European states presupposes that the hateful statement has some effect (an increase in hate, danger to the offended community), denial of the Holocaust can be punished even if it has no such effect.

The explanation lies in the unique treatment of the special situation. Therefore, when American authors cite this example as an illustration of the European concept of freedom of expression – usually in fearful tones at such severe restriction of freedom – in fact, they are focusing on a peripheral aspect of freedom of expression in Europe, and one that will not become a 'slippery slope', by leading to further restrictions on public communication. Therefore, this very specific type of restriction, while sanctioning an untrue fact by itself for being untrue, does not bring us any closer to the reassuring legal settlement of the fake news issue.

3.4 Election campaigns and political advertising

A number of specific rules apply to statements made during election campaigns. These can serve two purposes. On the one hand, communication in the campaign enjoys robust protection: political speech is the most closely guarded core of freedom of expression, and what is spoken in a campaign is as closely linked to the functioning of democracy and democratic procedures as can be. On the other hand, these procedures must also be protected so that no candidate or party distorts the democratic decision-making process and ultimately damages the democratic order. It is no coincidence that the fake news problem has become most evident during election campaigns (the 2016 US presidential election, the 2019 European elections and so on).

Many European countries have legal restrictions on the publication of political advertisements relating to their volume, the equitable distribution of media space, the number of advertisers or the amount of money that can be spent on them. The main purpose of these limitations is to ensure a level playing field to the detriment of parties and candidates with greater financial resources for the benefit of others with fewer.

The UK's Communications Act 2003 prohibits the broadcasting of political advertisements on television and radio. During the campaign period, each political party is given broadcast time to present its position. Publication of political party programmes is overseen by Ofcom, which also determines the length of broadcast time available.[60]

Another reason for a general prohibition (or restriction in other countries) on political advertising may be to spare voters from having to confront false claims. In *Animal Defenders International*, Lord Bingham made this clear. In his view, voters have a right to 'be protected against the potential harm of partial political advertising'. This perception implicitly rejects Mill's approach to the benefits of false claims,[61] and is contrary to the US doctrine of freedom of expression. Furthermore, the focus of regulation on broadcasting and its strict regulation is somewhat outdated, given the growing importance of online communication.

The speeches of campaigners may also be subject to restrictions. The UK Representation of the People Act 1983 prohibits the making of false statements with the intent to influence the outcome of the election. Anyone who does so with respect to a candidate or his/her conduct commits an offence unless they can prove that they believed the allegations were true, and that there was a reasonable basis for this.[62] The good faith practice of individual rights during the campaign, including the prohibition of deliberate lies, may be required under the European freedom of speech doctrine. A similar ban in the US would probably be unconstitutional.[63] In any case, the dangers arising from the latest technologies have already prompted legislation: California's Election Code punishes candidates making, distributing, and publishing *deep fake* videos during election campaigns.[64]

3.5 Regulation of commercial communication and consumer protection

In the words of Justice Powell, commercial speech is an expression that is 'related solely to the economic interests of the speaker and its audience'.[65] Today's legal systems identify the interests underlying the protection of commercial communication in a broader context than from the point of view of freedom of speech, and thus they also provide broad protection to such expressions.

In *Valentine v Chrestensen*,[66] the US Supreme Court had no qualms about considering commercial communication to be outside the purview of the freedom of speech. The change was brought about by the decision taken in *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council*.[67] From the opinion written by Justice Blackmun, it becomes clear that the judicial body placed great emphasis on the interests of consumers and society relating to the free flow of information. As an advertisement does not exclusively serve the interests of the advertiser but may equally serve the interests of the addressee, genuine and fair commercial communication enjoys protection. In that case, the Court held, as a general rule, that 'untruthful speech, commercial or otherwise, has never been protected for its own sake',[68] that is to say, other arguments must be put forward in order to justify the protection. False and misleading claims made for commercial purposes should not be given constitutional protection.

This withholding of protection for false claims made for commercial purposes also derives from European consumer protection rules.[69] In the UK, such a ban is introduced by the Consumer Protection from Unfair Trading Regulations Act 2008,[70] and fraud is generally prohibited by criminal law; see, for example, the Fraud Act 2006.[71] The BCAP Code (Code of Broadcast Advertising) sets out the rules for advertising in broadcasting, while the CAP Code (Code for Non-Broadcast Advertising and Direct and Promotional Marketing) contains rules for non-broadcast advertising. The basic principle of these Codes with regard to advertising is that their content should be 'legal, decent, honest and truthful'. Codes approved and supervised by the Advertising Standards Authority cover not political but commercial advertising.

The ECtHR, in *Markt Intern and Beerman v Germany*,[72] declared for the first time that advertisements serving purely commercial interests, rather than participating in debates in the public sphere, are also to be awarded the protection of the freedom of speech.[73] Nevertheless, this protection is of a lower order than that granted to 'political speech'. However, a commercial communication may also relate to the debate on public affairs, and in that case a different standard is to be applied to it. According to *Barthold v Germany*,[74] a discussion of 24-hour veterinary care is also a public matter. The issue of abortion is clearly a public matter, and therefore the prohibition of publicity relating to abortion contravenes the ECHR.[75]

The disclosure of the unfair market practices engaged in by a courier service is a public matter, and thus an article published in the form of an advertisement is entitled to the protection of the freedom of expression.[76] A warning on the potential risk of cancer contained in an article published on microwave ovens is the reflection of an opinion in a public discussion

and as such, despite the lack of conclusive scientific proof, its disclosure is permitted and cannot conflict with any provisions of competition law.[77] At the same time, unfair conduct or the publication of false statements are not allowed in advertisements, even in respect of matters of public interest.[78]

The *Mouvement Raëlien Suisse v Switzerland* case[79] touched on the issue of advertising with religious or ideological content. The poster that the applicant intended to put out was not purely religious, but in any event contained an ideology: it depicted extra-terrestrial beings and flying saucers, which were intended to generate publicity for the applicant association. The philosophy of the association was anti-God and anti-religion, with the idea of promoting a new world order based on individual intelligence instead of the democracy of equality, to be supported by the introduction of human cloning. The Swiss authorities prohibited the placement of the advertisement because of the immoral nature of the advertising. According to the Strasbourg court, however, it was closer in content to commercial than to political advertising.[80] Based on the discretion of the States Parties, the ECtHR did not consider the prohibition to be an infringement of freedom of expression. The publication of advertisements with untrue content may therefore be subject to restrictions beyond consumer protection law.

4. The media regulation toolbox

4.1 The principle of media pluralism

The regulation of broadcasting and on-demand audio-visual and radio media services seeks to remedy, through indirect means, distortions in public communication caused by the publication of inaccuracies. Generally speaking, these tools try to accommodate as many different statements and opinions as possible in the debate on public affairs, in accordance with Mill's 'more speech' principle.

In line with the theoretical requirement on media pluralism, the entire media market should collectively cater for the diversity of opinions and available content, and establish balance between them.[81] This requirement primarily imposes tasks on the state in respect of the regulation of the media market, and in practice such regulation mainly concerns traditional television and radio broadcasting.

4.2 The right of reply

Based on the right of reply, access to the content of a media service provider is granted by the legislator not based on an external condition but in response to content published previously by the service provider. Article 28 of the AVMS Directive[82] prescribes that EU Member States should introduce national legal regulations with regard to television broadcasting that ensure adequate legal remedies for those whose reputation have been infringed through false statements. Such regulations are known Europe-wide and typically impose obligations on the printed and online press alike.[83]

There is no generally applicable right of reply in the media in the UK. This does not mean, however, that in some issues there are no regulations that are very similar or have similar results. Section I(iii) of the IPSO Code, (IPSO being the self-regulatory body investigating complaints against the print and online press) recommends that 'a fair opportunity to reply to significant inaccuracies should be given when reasonably called for'. While section 5 of the BBC's Producers' Guidelines contain no legal obligations but rather media ethics requirements, they deal with the issue of the right of reply in detail.

Indirect recognition of the right of reply is also suggested by the common law rules that make the limits of the defamation of public figures, the tort of defamation, much narrower than before. The *Reynolds* case is significant in this context[84] in which the judgment of the House of Lords laid down approximate criteria for 'responsible journalism', compliance with which may exempt the press from liability even if it publishes a false defamatory claim. In the light of those criteria, the grant of relief must also take into account whether the applicant was given an opportunity to state his position or whether the article or information published contained their views on the matter. Section 4(6) of Defamation Act 2013 abolished the *Reynolds* rule as a common law liability exemption, but the criteria specified therein may be taken into account in the exercise of judicial discretion and in the application of statutory provisions.

The compatibility of the right of reply and Article 10 of the Convention has been confirmed in several decisions of the ECtHR.[85] In *Melnychuk v Ukraine*,[86] the Court established that the right of reply constituted a part of the freedom of speech of the applicant. That is, rather than limiting the freedom of

the press of the publisher of the newspaper carrying the injurious content, the opposite is true: The right is an instrument that enables the complainant to effectively exercise their freedom of speech in the forum where the complainant has been attacked. In *Kaperzynski v Poland*,[87] the ECtHR held:

> *The Court is of the view that a legal obligation to publish a rectification or a reply may be seen as a normal element of the legal framework governing the exercise of the freedom of expression by the print media. … Indeed, the Court has already held that the right of reply, as an important element of freedom of expression, falls within the scope of Article 10 of the Convention. This flows from the need not only to be able to contest untruthful information, but also to ensure a plurality of opinions, especially on matters of general interest such as literary and political debate.*[88]

The first major decision by the US Supreme Court concerning a right of reply law was *Red Lion Broadcasting v FCC*.[89] It examined the constitutionality of the Federal Communications Commission's fairness doctrine, which required that some discussion of public issues must be presented on broadcast channels, and that each side of those issues must be given fair coverage. It contained a specific right of reply element: If, during the presentation of a controversial issue, an attack was made – 'upon the honesty, character, integrity or like personal qualities of an identified person or group' – the attacked person must be given an opportunity to reply. The same obligation applied if a political candidate's views were endorsed or opposed, which entailed the broadcaster giving the opposing candidate or the opponents of the endorsed candidate the opportunity to respond. The Supreme Court unanimously upheld the regulations.

It came as a surprise in the light of *Red Lion* that, only five years later, the Court – again unanimously – struck down a piece of Florida legislation that required the printed press to give the right of reply to candidates for political office who were assailed over their personal character or official record.[90] The Court ruled in favour of the autonomous press:

> *[T]he implementation of a remedy such as an enforceable right of access necessarily … brings about a confrontation with the express provisions of the First Amendment. … Compelling editors or publishers to publish that which 'reason' tells them should not be published' is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding [the newspaper] to publish specified matter. … [T]he Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.*[91]

Many commentators celebrated the *Miami Herald* decision as a victory for press freedom, and blamed the Court for the serious mistake it made in *Red Lion*.[92] They argued that a free media market, even with its considerable failings, is always better than one that is regulated by the state. Other authors celebrate *Red Lion*, and hold that *Miami Herald* was wrong. For them, ensuring that people are presented with a wide range of views about public issues is necessary to make democracy work, and this aim can justify state intervention.[93]

4.3 The obligation of impartial news coverage

The regulation promoting media pluralism includes the requirement for impartial news coverage, on the basis of which public affairs need to be reported impartially in programmes providing information on them. Regulation may apply to television and radio broadcasters, and it has been implemented in several states in Europe.[94]

Under the UK's Communications Act 2003,[95] it is mandatory for all broadcasters to present, in an impartial, accurate and fair manner, the public policy issues covered by each programme. The general statutory obligation is detailed in Chapter 5 of the Broadcasting Code issued by Ofcom. Ofcom also requires media service providers to meet the 'due diligence' requirement to correct misrepresentations made in their programmes.[96]

Those who argue against maintaining this rule say that since the former scarcity of information has been eliminated, and hence, in this new media world, everyone can obtain information from countless sources, the earlier regulatory models have become redundant or, one might say, anachronistic. By contrast, as Steven Barnett notes, for as long as television journalism can be differentiated from Internet journalism, there is no reason to stop having media-specific rules.[97] Mike Feintuck argues that the earlier assumption, suggesting that in a free and unrestricted media market a diversity of opinions would automatically appear and hence impartiality would be created, has proven unfounded.[98] As Richard Sambrook puts it, '[i]f the words "impartiality" and "objectivity" have lost their meanings, we need

to reinvent them or find alternative norms to ground journalism and help it serve its public purpose – providing people with the information they need to be free and self-governing'.[99]

5. The regulation of online platforms

5.1 Platform regulation in the European Union

False claims are spreading across different online platforms at an unprecedented rate and at the same time to a massive extent. Fraudulent information is being distributed on social media platforms which consciously focuses on electoral campaigning, for political reasons (political parties with conflicting interests, other states acting against a particular state and so on). For a while, the platforms defended themselves by saying they were neutral players in this communication.[100] In fact, they are actively able to shape the communication on their interface, and they have an economic interest in its vigour and intensity, that is, the spread of false news is not clearly contrary to their interests.[101] Under EU law, 'online platforms' are so-called hosting providers, whose liability for infringing content which appears on their interfaces is limited, but by no means excluded.[102]

According to the Directive on electronic commerce, if these platforms provide only technical services when they make available, store or transmit the content of others (much like a printing house or a newspaper stand), then it would seem unjustified to hold them liable for the violations of others, as long as they are unaware of the violation. However, according to the European approach, gatekeepers may be held liable for their own failure to act after becoming aware of a violation (if they fail to remove the infringing material). The Directive requires intermediaries to remove such materials after they become aware of their infringing nature.[103] In addition, the Directive also stipulates that intermediaries may not be subject to a general monitoring obligation to identify illegal activities (Article 15).

This system of legal responsibility should not necessarily be considered outdated, but something has certainly changed since 2000 when the Directive was enacted: there are fewer reasons to believe that today's online platforms remain passive with regard to content and perform nothing more than storage and transmission. While content is still produced by users or other independent actors, the gatekeepers select from and organise, promote or reduce the ranking of such content, and may even delete it or make it unavailable within the system.

This notice and takedown procedure applies to the fake news that appears on the platforms, but the prospect of removal is reserved for fake news that is illegal under the legal system of the state in question (defamation, terrorist propaganda, denial of genocide and so on). Generally speaking, false claims are not subject to the removal obligation as they are not illegal. Similarly, even if a piece of content is infringing but no one reports it to the platform, there is no obligation to remove it.

The notion of 'illegal' raises an important issue, as the obligation of removal is independent of the outcome of an eventual court or official procedure that may establish the violation, and the storage provider is required to take action before a decision is passed (provided that a legal procedure is initiated at all). This means that the provider has to decide on the issue of illegality on its own, and its decision is free from any legal guarantee (even though it may have an impact on freedom of speech). This rule may encourage the provider concerned to remove content to escape liability, even in highly questionable situations. It would be comforting (but probably inadequate, considering the speed of communication) if the liability of an intermediary could not be established unless the illegal nature of the content it has not removed is established by a court.[104]

Although continuous, proactive monitoring of infringing content is not mandatory for platforms, the European Court of Justice opened up a loophole for it in *Glawischnig-Piesczek v Facebook Ireland*.[105] The decision in that case required the platform to delete defamatory statements that have been reported once and have been removed but which reappear. Likewise, the hosting provider may be obliged to 'remove information which it stores, the content of which is identical to the content of information which was previously declared to be unlawful, or to block access to that'. This is only possible through the use of artificial intelligence, the use of which is encouraged by this decision and even implicitly made mandatory. If we place that decision in a broader context, it seems that platforms are required to act proactively against unlawful fake news (or any unlawful content), even subject to the continued exclusion of monitoring obligations. The legality of the content is determined by algorithms, which would seem quite risky for freedom of speech.[106]

5.2 Platform regulation in the United States

In the US, platforms are granted virtually complete immunity when it comes to infringing content produced by others. In US legal literature, the term 'proxy censorship'[107] or 'collateral censorship'[108] is used to describe a situation when the law restricts freedom of speech by regulating the activities of gatekeepers, thereby requiring the intermediaries to do the 'dirty work'. Seth Kreimer offers a thorough, logical and easy-to-follow description of these arguments: Proxy censorship constitutes a restrictive interference with the freedom of speech if a government requires a platform to decide what is legal or illegal without providing any formal procedural guarantee. A comforting remedy for the lack of guarantees would be a situation where gatekeepers were not obliged to make such decisions, meaning that they are exempted from liability by the regulation.[109]

Section 230 of the US Communications Decency Act 1996 allows for 'Good Samaritan' protection for the providers of 'interactive computer services'.[110] However, the protection is not complete and unconditional. The Act relies on judicial case law to establish when a platform becomes a 'publisher' or 'speaker', thereby losing its immunity. The law does not provide immunity in the event of a federal crime being committed, intellectual property rights being violated, or websites promoting the trafficking of human beings for sexual exploitation.[111]

5.3 Platform regulation in EU Member States

Some European legislatures consider the obligation of removal set forth in Article 14 of the Directive on electronic commerce to be insufficient, and they impose additional obligations on platform providers. The corresponding Act in German law (effective as of 1 January 2018) is an excellent example of this trend.[112] According to the applicable provisions, all platform providers within the scope of the Act (that is, platform providers with over two million users from Germany) must remove all user content that commits certain criminal offences specified by the Act. Such offences include defamation, incitement to hatred, denial of the Holocaust and scaremongering.[113] Manifestly unlawful pieces of content must be removed within 24 hours after receipt of a notice, while any 'ordinary' unlawful content must be removed within seven days.[114] If a platform fails to remove a given piece of content, it may be subject to a fine of up to €50 million (theoretically, in cases of severe and multiple violations).[115]

Some argue that this regulation is inconsistent with the Directive on electronic commerce, as it provides for a general exception, instead of ad hoc exceptions, from the free movement of services. In addition, the Directive requires urgency as a condition of applying the exception, but the German Act does not refer to specific pieces of content, meaning that it cannot meet that requirement.[116] This piece of German legislation has been widely criticised for limiting the freedom of speech,[117] even though it does not go much further than the EU Directive itself; it simply refines the provisions of the Directive, lays down the applicable procedural rules and sets harsh sanctions for platforms which violate it. Nonetheless, the rules are followed in practice, and Facebook seems eager to perform its obligation to remove objectionable content.[118] The German regulation shows how difficult it is to apply general pieces of legislation and platform-specific rules simultaneously, and it demonstrates how governments seek to have social media platforms act as judges of user-generated content.

France has adopted regulations similar to the German law, which require platforms to remove hate speech posts within 24 hours of being notified.[119] Similar regulations are being prepared by the UK, requiring platforms to fulfil their 'duty of care'.[120] A White Paper published on this would require service providers to prevent content which can cause the most serious harm (for example, content supporting terrorism and child sexual exploitation) from being published on their platform and, in the case of other harmful content, it would prescribe immediate, transparent and effective action. All these obligations would be monitored by an independent regulatory body, which could impose severe sanctions (such as fines, blocking of service, prosecution of senior officials and so on).

5.4 Recommendations and soft law initiatives at European level

European jurisdictions allow actions against fake news, defined as action on the grounds of defamation or violating the prohibition of hate speech or scaremongering, while platforms, being hosting service providers, can be required to remove infringing content. However, these measures in and of themselves seem inadequate to deal with such

threats in a reassuring manner. Concerns of this nature have been addressed by the EU in various documents since 2017. All of these documents have made recommendations for platform providers on how to take measures against fake news most effectively, focusing primarily on self-regulation while refraining from introducing new and mandatory legal provisions. Furthermore, they do not seek to reform the principles of hosting service providers' liability as defined in the Directive on electronic commerce, so platform providers are not expected to exercise comprehensive preliminary control or monitoring. While countries are expected to meet more stringent requirements, those requirements focus on supervising the platform providers' operations more closely and expanding Internet-related awareness-raising programmes rather than introducing stricter liability rules for platforms.

The communication on tackling illegal content online introduces a requirement for platforms to take action against violations in a proactive manner and even in the absence of a notice, even though the platforms are still exempted from liability.[121] The recommendation that follows the communication reaffirms the requirement to apply proportionate proactive measures in appropriate cases, which permits the use of automated tools to identify illegal content.[122]

In Europe, the High Level Expert Group on Fake News and Online Disinformation published a Report in March 2018.[123] The Report defines disinformation as 'false, inaccurate, or misleading information designed, presented and promoted for profit or to intentionally cause public harm'.[124] While this definition might be accurate, the Report refrains from raising the issue of government regulation, and it is limited to providing a review of the resources and measures that are available to social media platforms and which they may apply voluntarily. Based on the Report of the High Level Expert Group, the European Commission published a Communication on tackling online disinformation with unusual urgency in April 2018.[125] While this document reaffirms the primacy of means that are applied voluntarily by platform providers, it also displays restraint when it comes to compelling the service providers concerned to cooperate (in a forum convened by the Commission). If the impact of voluntary undertakings falls short of the expected level, the necessity of actions of a regulatory nature might arise.[126] A Code of Practice laying down the obligations to be undertaken voluntarily by platform providers was published in October 2018.[127]

Following the European Parliament elections of spring 2019, the Committee and the High Representative of the Union for Foreign Affairs and Security Policy assessed the Platforms' compliance with the Commission's Code of Practice and the Action Plan issued in autumn 2018.[128] According to the document:

> *in the run-up to the European elections, the coordinated EU approach helped to ensure stronger preparedness and coordination in the fight against disinformation. The preliminary analysis shows that it contributed to expose disinformation attempts and to preserve the integrity of the elections, while protecting freedom of expression … However, there is no room for complacency.*

5.5 Private regulation by platforms

It is difficult to halt the spread of fake news by means of legal regulation. It also seems unlikely that the rules and regulations applied by the platforms themselves could provide a comprehensive and comforting solution to this problem, because, as Paul Bernal has pointed out, the spread of scare stories, insults and bad-spirited gossip is not a fault but an inevitable consequence of the features of their systems.[129] However, negative PR could be detrimental to a platform, so platforms inevitably try to tackle the spread of fake news, and even surpass their legal obligations requiring them to do so. Measures taken in this regard might include raising tariffs for or reducing the prominence in the news feed of sites that present false and fictitious statements as news.[130] Other options could be to increase transparency in connection to paid advertisements and sponsored content, so that users are aware who paid for the dissemination of a given piece of content.[131]

It has also been suggested that social media platforms should recruit fact-checkers to verify pieces of content and either designate pieces of fake news as such or, alternatively, inform the platforms of such news, so that they could demote the ranking of such websites or even ban them.[132] Ironically, designating a piece of news as fake (as Facebook attempted to do) only increased the popularity and reinforced the credibility of the false information among users.[133] The activities of fact-checkers are indeed quite similar to news editing, and this increases the similarities between social and traditional media even further.

Essentially, the Report by the High Level Expert Group on Fake News and Online Disinformation builds its

strategy against fake news on the basis of reinforcing the private regulation performed by social media platforms.[134] The Report suggests that platforms give more and more options for their users to personalise the service they receive. Other suggested measures such as that a platform should recommend additional news from reliable sources to its users in addition to popular topics, that it should give more visibility to reliable news sources[135] and that users should be enabled to exercise their right to respond to allegations would increase the similarities between platform moderators and traditional news editors, as well as between social media platforms and traditional news media.

The Communication published by the European Commission in April 2018 takes a similar approach. Essentially, it seeks to encourage private regulation by platforms while pointing out that the introduction of legal obligations might follow if private regulation fails to deliver the desired outcome (even though the indirect liability regime established by the Directive on electronic commerce would not be changed).[136] In a sense, this document represents a milestone in EU media regulation. It does not simply encourage self-regulation (which is not an absolute novelty in media policy), where a non-governmental organisation, which does not form part of the regulated media landscape itself, supervises the operation of the media, but it reinforces private regulation (that is, the regulation of content by the platforms themselves) by also suggesting the possibility of obliging social media platforms to implement such regulations.

In this approach, platforms must decide on the permissibility of various content themselves – and even decide whether to go beyond the provisions of the Directive on electronic commerce. By taking this step, a government would hand over almost all regulatory responsibilities to social media platforms while retaining only the control of this rather peculiar supervisory regime. This model appears not only in various documents of the EU, but also in regulatory initiatives taken by certain Member States, the first example being the law of Germany noted above, where regulation is not directed at illegal content as such but requires social media platforms to take action, while also serving as a basis for government intervention should the statutory procedures be violated or the expected results (that is the speedy removal of content violating the Criminal Code) not be delivered.

6. Protecting falsehood – pros and cons

Given the theoretical justifications for freedom of expression and the legal doctrine based on them, the question arises as to whether it is possible to prohibit false claims more widely than at present or, conversely, would it be better to extend the constitutional protection of freedom of speech to lies? So far, we have noted significant differences between the theory of law and the doctrine which is actually applied in practice. Would it be worthwhile for the doctrine to approach theory? In order to judge this, let us return to the theoretical considerations discussed in section 2 for the protection of lies.

6.1 'Let truth and falsehood grapple'

Contrary to Milton, we can hardly believe today that truth always prevails over lies in open combat. We even doubt it when we use 'truth' not in an objective, metaphysical sense, but only in the 'technical' sense used in democratic processes, in debates on public affairs, and we look at it in any case as a superior position in debates that need to be decided in the interest of the smooth operation of democratic societies. Such a triumphant position may, in principle, be right or wrong, but its nature cannot be objectively demonstrated (see point 2.5). The fake news scandals and lies spreading on large online platforms are indeed capable of disrupting democratic processes. We do not believe that presenting the reality is necessarily an effective antidote to deliberate and widespread lies, in their most dangerous form, originating from political parties or foreign secret services rather than from simple citizens involved in the debate. Therefore, the fight against fake news has become not only a legal issue but also a national security issue for states. This also jeopardises the smooth functioning of platforms if states that are alarmed by the spread of fake news move towards stricter regulation.

6.2 'Dead dogmas'

Mill's suggestion that it is good for an already recognised truth to be challenged again and again to delay its becoming a dead dogma is also an unconvincing argument in the world of online platforms for protecting false claims. On the one hand, if truth is really used in a technical sense – and I have argued so far that modern freedom of speech doctrine

can do little else – then most of the time these truths have no time to fossilise, since their validity is shorter by definition. On the other hand, the theory does not take deliberately and massively spread lies into account, against which truth necessarily starts at a disadvantage. Mill's theory is too abstract and general.[137] While he is right that 'living truth' is better than a petrified one, it hardly discourages any state from trying to limit false statements that obstruct the formation of democratic will by excluding them from the scope of freedom of expression.

6.3 'More speech'

'More speech' as an antidote to lies is also of doubtful efficiency. As Sunstein points out, banning false claims often increases their impact, speed of propagation, curiosity value and attractiveness.[138] The best antidote to Holocaust denial, according to US doctrine, is not prohibition but challenge in public and defeat in open debate.[139] But are all false statements worthy of being disclosed to the public? Are the allegations which deny the Holocaust worthy of open debate in every country and everywhere? Is Alvarez's lie about his honours an allegation, the protection of which is important to preserve the freedom of public debate and to protect democratic procedures?[140] Can we be sure that it would be worth fighting more for such claims while at the same time abandoning regulation? The European doctrine on freedom of expression responds in the negative.

The 'more speech' theory is no longer applicable in the age of online platforms. When everyone, or almost everyone, can speak, the individual's voice is unobtrusive. With two billion Facebook users speaking, very few of them will have any impact on public affairs debates. Multiple speeches on such a scale do not clearly serve the purpose of unearthing truths. This is due to the specific operational features of the platforms. More speech gives rise to more lies, which spread rapidly, making it even more difficult to distinguish falsehood from reality. On the platforms, lies and truth, the fake news pages and accurate, in-depth reports, are presented in the same way and format. Platforms do not perform the gatekeeping (editorial) role that traditional media do, nor do they attempt to filter out false claims. Their personalised services also make it difficult for a user to encounter content that is unattractive to them, so if someone gets caught in a mire of gossip, the platforms will not compensate for it with other, well-founded and verified content.[141]

6.4 'The marketplace of ideas'

We have found that Justice Holmes's metaphor for the marketplace of ideas can be incorporated into the modern doctrine of freedom of expression if it is interpreted as truly about thinking; that is, ideas and not facts (see section 2.3). Holmes' theory, therefore, does not provide protection for false factual statements that are propagated in the knowledge of their inaccuracy. Only opinions are thus involved in 'market competition'. However, this interpretation is confused by the explicit reference to Holmes's opinion, which speaks of a 'test of truth': 'the ultimate good desired is better reached by free trade in ideas … the best test of truth is the power of the thought to get itself accepted in the competition of the market'.[142] The 'truth' of a thought presupposes its objective determinability, meaning that it is only a matter of fact. The contradiction can be resolved if we use 'truth' in the narrow sense necessary to resolve public disputes, but do not go further.

6.5 Serving democracy

Sunstein is not convinced by arguments against restricting the disclosure of false claims which raise the possibility of erroneous positions being taken or the truth potentially being suppressed.[143] The question of whether or not it is necessary to prohibit false claims in a democracy also raises wider issues. On the one hand, all forms of state arbitrariness are reprehensible and scope for it must be narrowed. The nightmare of an Orwellian Ministry of Truth[144] is contrary to democracy – state authorities cannot decide on the issue of falsehood. On the other hand, disruption of public debate and democratic procedures is incompatible with democracy, and action against such phenomena is permissible. These two aspects are difficult to reconcile and this forces individual legal systems to continuously balance the freedom of expression and the other interests at stake between these two polar extremes (state arbitrariness or total lack of restrictions).

The rules of the public sphere in an age dominated by online platforms do not necessarily follow earlier rules and legal approaches which were developed for and applied to traditional media. But recognising this gives only theoretical support for legal action against false claims, because a general ban on such falsehoods is still unthinkable, even in European countries. The European doctrine does not recognise the value of false claims, but they are unavoidable to some

extent in public debate, and their general prohibition would limit the possibility of public debate,[145] and the mass of fake communications published online would make it very difficult to enforce such a prohibition, even in the event of a general ban. According to Daniela Manzi, options for restricting speech against the phenomenon of fake news are unconstitutional, while other possible solutions not aimed directly at speech (such as attempts to increase media awareness, ideas to increase the transparency of platforms and the intention to strengthen consumer rights) would be ineffective.[146]

7. Summary

The current doctrine of freedom of expression in Europe does not exclude the prohibition of the disclosure of inaccuracies, thus they cannot claim universal constitutional protection. False statements may be limited in some cases, but their general prohibition is difficult to imagine. At the same time, they are a serious and massively problematic issue for public communication and public affairs, especially on major online platforms. The platforms themselves are experimenting with different tools, which is strongly encouraged by the states. Suggestions for regulation have been found either contrary to the principles of freedom of expression or, presumably, ineffective. For the time being, states seem to accept that without the help of the platforms themselves they are unable to regulate the public sphere and are consciously handing over to the platforms their former exclusive state responsibilities and thus the setting of the boundaries of freedom of speech. This represents the failure of previous regulatory approaches and portends a particular elitism in online communication: conscious citizens interested in public life, who may even be willing to pay for in-depth information, will have precedence over those who are the potential targets for mass lies since they use the World Wide Web without background knowledge, material and financial resources or media literacy. There will be knowledgeable, thorough and accurate citizens who can distinguish between reality and injustice, and there will be the rest. Just like in the traditional media world before the Internet.

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