

## “FAKE NEWS” IN TIMES OF CRISIS IN THE CONTEXT OF ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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### Summary

*Internet and social networks have significantly contributed to the realization of freedom of expression. However, they have also made it easier and faster than ever before to spread disinformation, misinformation, propaganda and fake news. Although these phenomena are not new, the impact they have had in recent years on political processes in democratic societies (e.g. the 2016 U.S. presidential election and Brexit) and on human behavior during the COVID-19 pandemic, has drawn attention to this issue. The aim of this paper is to highlight the problem of fake news as a human rights issue in the context of Art. 10 of the European Convention on Human Rights, which guarantees freedom of expression.*

*The paper provides a terminological and historical overview of the term fake news and related concepts. It also provides an overview of Art. 10 of the European Convention on Human Rights and clarifies the situations and conditions under which the restrictions on the freedom of expression are justified on the basis of Art. 10(2). The authors also provide an insight into the relevant case law of the European Court of Human Rights.*

**Keywords:** *fake news; freedom of expression; human rights; Art. 10 of the European Convention on Human Rights; European Court of Human Rights.*

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## 1 INTRODUCTION

Fake news can appear in the form of harmless jokes and satire, politically motivated propaganda, fake news motivated by hatred towards a certain social group, whose goal is to create an atmosphere of intolerance and violence, or fake news published with the aim of gaining certain financial benefits. Regardless of the motives, fake news can have different consequences at individual and societal levels. The global health crisis caused by the COVID-19 pandemic, the earthquakes in the Republic of Croatia in 2020, and other emergencies, show that the impact of fake news on both people's behavior and the successful management of crises can be pronounced.

This paper considers the phenomenon of fake news as a human rights issue, especially in the context of conditions for restricting freedom of expression on the basis of Art. 10(2) of the 1950 European Convention on Human Rights (hereinafter: ECHR).<sup>1</sup> The examination of the justification and conditions under which freedom of expression could be restricted in the case of publication of fake news is complicated by the complexity and heterogeneity of the concept of fake news. Several scientific disciplines offer different conceptual and operational definitions of the term and scrutinize the motives, spread, effects, and consequences of fake news in different ways.

By presenting the definitions of fake news and a distinction between fake news and other related concepts, and providing an insight into the relevant case law of the European Court of Human Rights (hereinafter: ECtHR), we attempt to answer the question of how to deal with the consequences of fake news and how to strike a balance between the protection of freedom of expression and the protection of other Convention rights and legitimate interests.

## 2 FAKE NEWS - HISTORY AND DEFINITIONAL DILEMMAS

As long as there is news, there is also misinformation, disinformation, propaganda, fake news, and similar phenomena that influence the attitudes and behavior of people around the world. For example, in ancient Rome, in order to damage Mark Antony's reputation Octavian distributed coins with slogans depicting Mark Antony as a drunkard and Cleopatra's puppet.<sup>2</sup> In 1475 a false story that a Christian baby had been tortured and murdered by the Jewish community in Trent led to the murder of fifteen Jewish people.<sup>3</sup> The Orson Welles' 1938 radio adaptation of the drama *The War of the Worlds* took the form of a live news report of a Martian attack and terrified an estimated one million people.<sup>4</sup>

1 The text of the Convention as amended by Protocols Nos. 11, 14 and 15 and supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, Accessed 18 April 2021, [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf).

2 Carol A. Watson, "Information literacy in a fake/false news world: An overview of the characteristics of fake news and its historical development", *International Journal of Legal Information* 46, No. 2 (2018): 94.

3 Watson, *Information literacy in a fake/false news world: An overview of the characteristics of fake news and its historical development*, 94.

4 For more details, see: Edson C. Tandoc Jr., Zheng Wei Lim and Richard Ling, "Defining "fake

The specific term fake news was first used in the English-speaking world about 125 years ago.<sup>5</sup> However, the term has only become popular in recent years, especially after the 2016 U.S. presidential election. The Pizzagate affair<sup>6</sup> and fake news about Pope Francis' endorsement of Donald Trump for president are some of the most well-known recent examples of fake news.<sup>7</sup> The increasing prevalence of fake news due to the development of information and communications technologies that enable rapid dissemination and the growing influence of fake news on people's attitudes and behavior has contributed to scholarly interest in studying this phenomenon.

There is a disagreement in theory not only about what content is considered fake news and what should be excluded, but also what term should be used to describe this phenomenon.<sup>8</sup> Accordingly, some authors often refer to fake news as rumor, misinformation and disinformation.<sup>9</sup> The term fake news is not unambiguous, and numerous dilemmas and problems arise when trying to define and distinguish it from other similar terms. The accepted definition of fake news can play an important role when it comes to the issue of restricting freedom of expression. Sardo warns that "definitions that are too broad, vague, and ambiguous are open to abuse, and this could jeopardize freedom of expression".<sup>10</sup>

Instead of using the term fake news, which is considered to have political connotation, Wardle and Derakhshan use the term information disorder, and believe that there are three different types of information disorder: "mis-, dis- and mal-information".<sup>11</sup> According to these authors, fake news, i.e. information disorder, is a broader term that encompasses these three types. In the case of "mis-information", it is a situation "when false information is shared, but no harm is meant".<sup>12</sup> "Dis-information is when false information is knowingly shared to cause harm" and "mal-information is when genuine information is shared to cause harm, often by moving information designed to stay private into the public sphere".<sup>13</sup> Misinformation and disinformation are defined by some other authors similarly to Wardle and Derakhshan.<sup>14</sup>

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- news": A typology of scholarly definitions", *Digital Journalism* 6, No. 2 (2018): 138.
- 5 Watson, *Information literacy in a fake/false news world: An overview of the characteristics of fake news and its historical development*, 94.
  - 6 Watson, *Information literacy in a fake/false news world: An overview of the characteristics of fake news and its historical development*, 96.
  - 7 Tandoc, Lim and Ling, *Defining "fake news": A typology of scholarly definitions*, 137.
  - 8 For more details, see: Maria D. Molina *et al.*, "Fake news" is not simply false information: A concept explication and taxonomy of online content", *American Behavioral Scientist* 65, No. 2 (2021): 184.
  - 9 Md Sayeed Al-Zaman, "COVID-19-related social media fake news in India", *Journalism and Media* 2, No. (2021): 101.
  - 10 Alessio Sardo, "Categories, balancing, and fake news: The jurisprudence of the European Court of Human Rights", *Canadian Journal of Law & Jurisprudence* 33, No. 2 (2020): 436.
  - 11 Claire Wardle and Hossein Derakhshan, *Information Disorder: Toward an interdisciplinary framework for research and policy making* (Strasbourg: Council of Europe, 2017), 5.
  - 12 Wardle and Derakhshan, *Information Disorder*; 5.
  - 13 Wardle and Derakhshan, *Information Disorder*; 5.
  - 14 For similar definitions see e.g. Tandoc, Lim and Ling, *Defining "fake news": A typology of scholarly definitions*, 140, and Brian G. Southwell, Emily A. Thorson and Laura Sheble, "The persistence and peril of misinformation", *American Scientist* 105, No. 6 (2017): 368-369.

McGonagle defines fake news "as disinformation that is presented as, or is likely to be perceived as, news", i.e. "as information that has been deliberately fabricated and disseminated with the intention to deceive and mislead others into believing falsehoods or doubting verifiable facts".<sup>15</sup> This definition of fake news includes two main elements: it is information intentionally fabricated and published to mislead others, and it is published in the form that others might perceive as news. Rini in its definition also includes an element of intention to deceive the public and the publication of false claims in a news-like form. Thus, Rini believes that a "fake news story is one that purports to describe events in the real world, typically by mimicking the conventions of traditional media reportage, yet is known by its creators to be significantly false, and is transmitted with the two goals of being widely re-transmitted and of deceiving at least some of its audience".<sup>16</sup>

Baade on the other hand believes that "fake news items are lies – that is, deliberately false factual statements, distributed *via* news channels".<sup>17</sup> He believes that the term "fake news is an umbrella term" that encompasses both "fake news in the strict sense and fake news in a wider sense".<sup>18</sup> According to Baade, "news items that are intentionally fabricated" are "fake news in the strict sense (false news), regardless of their author's ultimate intention".<sup>19</sup> Also some information may be presented in such a way as to influence the opinion of the recipients and that is "fake news in a wider sense (distorted news)".<sup>20</sup> Unlike previous authors, Baade argues that the term fake news encompasses news items that are intentionally fabricated regardless of the motive of their author. Pepp *et al.* also believe that neither deceptive intentions on the part of creators nor deceived beliefs on the part of recipients are essential to fake news.<sup>21</sup> According to them, fake news "is the broad spread of stories treated by those who spread them as having been produced by standard journalistic practices, but that have not in fact been produced by such practices".<sup>22</sup> Lazer *et al.* define fake news in a similar way, saying "that fake news is fabricated information that mimics news media content in form but not in organizational process or intent".<sup>23</sup> Hence, according to these authors, fake news is any news that is created and published without applying the rules of journalistic ethics and editorial standards to ensure veracity, accuracy and impartiality.

Most of these definitions agree that the essential elements of fake news are that it is false or fictitious information disseminated in a form that resembles real news.

15 Tarlach McGonagle, "Fake news": False fears or real concerns?", *Netherlands Quarterly of Human Rights* 35, No. 4 (2017): 203.

16 Regina Rini, "Fake news and partisan epistemology", *Kennedy Institute of Ethics Journal* 27, No. 2 (2017): E-45.

17 Bjørnstjern Baade, "Fake news and international law", *The European Journal of International Law* 29, No. 4 (2019): 1358.

18 Baade, *Fake news and international law*, 1358-1359.

19 Baade, *Fake news and international law*, 1358.

20 Baade, *Fake news and international law*, 1359.

21 Jessica Pepp, Eliot Michaelson and Rachel Katharine Sterken, "What's new about fake news?", *Journal of Ethics and Social Philosophy* 16, No. 2 (2019): 67.

22 Pepp, Michaelson and Sterken, *What's new about fake news?*, 69.

23 David M. J. Lazer et al., "The science of fake news", *Science* 359, No. 6380 (2018): 1094.

This is confirmed by Tandoc et al. who analyzed 34 academic articles in which the term fake news was used between 2003 and 2017. They concluded that the common element of the definitions of fake news is "that fake news appropriates the look and feel of real news".<sup>24</sup> However, fake news occurs in different forms, has varying degrees of veracity and varying degrees to which the creator of fake news intends to mislead readers.<sup>25</sup>

Different authors also offer different typologies regarding fake news. According to Tandoc et al., previous studies have operationalized fake news in six ways: as "satire, parody, fabrication, manipulation, propaganda, and advertising".<sup>26</sup> Similarly, Wardle has created a typology of seven forms of mis- and disinformation: "satire or parody", "misleading content", "imposter content", "fabricated content", "false connection", "false content" and "manipulated content".<sup>27</sup> Sardo believes that the category of fake news does not include "several categories that are not harmful, such as satire, (subjective) value-judgments, and urban legends".<sup>28</sup> Allcott and Gentzkow similarly argue that their definition of fake news excludes "unintentional reporting mistakes", "rumors that do not originate from a particular news article", "conspiracy theories", "satire that is unlikely to be misconstrued as factual", "false statements by politicians" and "reports that are slanted or misleading but not outright false".<sup>29</sup>

For the purposes of this paper, we define the term fake news as publishing either completely false information or information that has not been verified by using news media's editorial standards and processes, in a form that resembles real news, regardless of the motive of the creator or the origin of information. This definition in no way implies *a priori* that fake news publications that fall into this category should be restricted or banned, or that such publications are fully protected by freedom of expression.

### **3 PREVALENCE OF FAKE NEWS, ITS CONSEQUENCES AND HUMAN RIGHTS IN TIMES OF CRISIS**

The Internet has played a key role in prevalence of fake news. Anonymity, insufficient regulation, and the ability of almost anyone with Internet access to publish and share information available to a large number of people have led to the rapid spread of fake news. It is a paradox that the most advanced information period in human history is sometimes referred to as the "post-truth era."<sup>30</sup> In addition to

24 Tandoc, Lim and Ling, *Defining "fake news"*, 147.

25 Tandoc, Lim and Ling, *Defining "fake news"*, 147.

26 Tandoc, Lim and Ling, *Defining "fake news"*, 141.

27 Claire Wardle, "Fake News. It's Complicated", *First draft*, Accessed 18 April 2021, <https://medium.com/1st-draft/fake-news-its-complicated-d0f773766c79>.

28 Sardo, *Categories, balancing, and fake news: The jurisprudence of the European Court of Human Rights*, 454.

29 Hunt Allcott and Matthew Gentzkow, "Social media and fake news in 2016 election", *Journal of Economic Perspective* 31, No. 2 (2017): 214.

30 Antun Biloš, "Izazovi internetskog informacijskog prostora: kako stanovnici Republike Hrvatske doživljavaju problem lažnih vijesti?", *CroDiM: International Journal of Marketing*

the term "post-truth era," the term infodemic is increasingly being used to describe the circumstances in which we live from an informational perspective. This term is defined as "an overabundance of information - some accurate and some not - that makes it hard for people to find trustworthy sources and reliable guidance when they need it".<sup>31</sup>

People are inundated daily with a vast amount of different information, from a variety of sources, whose truthfulness and reliability are difficult to assess. According to data from the Flash Eurobarometer as of February 2018, about 80% of respondents in Europe are exposed to fake news "several times a month or more", and 37% of responses fall into "the everyday/almost everyday group".<sup>32</sup> The study of COVID-19-related infodemic reports published between December 31, 2019, and April 5, 2020, involved an analysis of "2,311 reports related to COVID-19 infodemic in 25 languages from 87 countries". According to this study, "[o]f the 2,276 reports for which text ratings were available, 1,856 claims were false (82%), 204 were correct (9%), 176 were misleading (8%), and 31 were not proven (1%)".<sup>33</sup> Research on the speed of news spread conducted by Vosoughi et al. in 2018 showed that fake news spreads faster and further than real news. They examined the differential spread of all verified real and fake news shared on Twitter from 2006 to 2017. This research showed that truth rarely reached more than 1,000 people, while the top 1% of fake news cascades routinely reached between 1,000 and 100,000 people.<sup>34</sup>

Fake news items can affect people's attitudes and behaviors in different ways, even in situations where such consequences are not foreseen or targeted. The acceptance of attitudes or behaviors based on fake news among larger groups of people can lead to negative consequences for human health, social harmony and political life.<sup>35</sup> Some of the effects of fake news on individuals include confusion and deception, influence exerted on attitudes and opinions, potential influence on political decisions, and threatening people's safety.<sup>36</sup> In general, fake news can cause people to think and behave differently than they would if they were properly informed. Waldman notes that publishing fake news corrodes public discourse by creating the necessary circumstances for narratives of false equivalency.<sup>37</sup> For example, when the

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*Science* 3, No. 1 (2020): 169.

- 31 Md Saiful Islam et al., "COVID-19-related infodemic and its impact on public health: A global social media analysis", *American Journal of Tropical Medicine and Hygiene* 103, No. 4 (2020): 1621.
- 32 European Commission. Flash Eurobarometer 464: Fake News and Disinformation Online. Available online: <https://op.europa.eu/en/publication-detail/-/publication/2d79b85a-4cea-11e8-be1d-01aa75ed71a1/language-en> (accessed on 2 December 2020), as cited in Julio Emilio Marco-Franco et al., "COVID-19, Fake news, and vaccines: Should regulation be implemented?", *International Journal of Environmental Research and Public Health* 18, No. 2 (2021): 2, <https://doi.org/10.3390/ijerph18020744>.
- 33 Islam et al., *COVID-19-related infodemic and its impact on public health*, 1621-1622.
- 34 Soroush Vosoughi, Deb Roy and Sinan Aral, "The spread of true and false news online", *Science* 359, No. 6380 (2018): 1148.
- 35 Southwell, Thorson and Sheble, *The persistence and peril of misinformation*, 368.
- 36 Biloš, *Izazovi internetskog informacijskog prostora*, 169.
- 37 Ari Ezra Waldman, "The marketplace of fake news", *University of Pennsylvania Journal of*

media gives equal space to scientists who support vaccination and to people who deny the positive effects of vaccination, the public can be left with the impression that these two ideas are equivalent and equally represented among scientists.

Research has shown that fake news and misinformation can have detrimental effects on public health. In the context of a pandemic, fake news operates by promoting fraudulent practices that increase the spread of the virus and result in poor physical and mental health outcomes, by limiting the dissemination of accurate and timely information from trusted sources, and by compromising short-term containment efforts as well as long-term recovery efforts.<sup>38</sup> Since the start of the COVID-19 vaccination campaign, there have been problems with the publication of fake news and anti-vaccination conspiracy theories, which affect people's willingness to get vaccinated. A study on the effects of anti-vaccine conspiracy theories on vaccination intentions found that once the idea of a conspiracy was mentioned, even strong counterarguments fail to lead to behavioral action.<sup>39</sup> Publishing fake news can even have fatal consequences. For example, the fake news that the "consumption of highly concentrated alcohol could disinfect the body and kill the virus" resulted in approximately 800 deaths, 5,876 hospitalizations, and 60 cases of complete blindness after the consumption of methanol as a cure for COVID-19.<sup>40</sup>

The negative effects of fake news are particularly pronounced in crisis situations when they can lead to violence, discrimination, damage to other people's property, distrust of institutions and official statistics, and an irrational accumulation of food and hygiene items, which may potentially disrupt the market. A trivial example is the purchase and shortage of toilet paper at the beginning of the coronavirus pandemic.<sup>41</sup> Another example is conspiracy theory stating that a 5G mobile network is causing the symptoms of COVID-19 which led to people setting fire to at least 50 telephone masts in the United Kingdom.<sup>42</sup> During the 2019 Ebola virus disease outbreak in the Democratic Republic of Congo, misinformation was associated with "violence, mistrust, social disturbances, and targeted attacks on healthcare providers", while during the SARS epidemic in 2002-2003, "fear and anxiety about contracting the disease caused social stigma against Asian people".<sup>43</sup>

The speed at which fake news spreads and its impact on the emotions and reactions of large numbers of people is now a threat to democracy itself, the electoral process and the exercise of human rights. Some authors even believe that disinformation appears as a form of interference in sovereignty and weakens peaceful

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*Constitutional Law* 20, No. 4 (2018): 850-851.

38 Kris Hartley and Minh Khuong Vu, "Fighting fake news in the COVID-19 era: policy insights from an equilibrium model", *Policy Sciences* 53, No. 4 (2020): 738.

39 Daniel Jolley and Karen M. Douglas, "The effects of anti-vaccine conspiracy theories on vaccination intentions", *Plos One* 9, No. 2 (2014): 7.

40 Islam et al., *COVID-19-related infodemic and its impact on public health*, 1624.

41 Islam et al., *COVID-19-related infodemic and its impact on public health*, 1627.

42 Sander van der Linden, Jon Roosenbeek and Josh Compton, "Inoculating against fake news about COVID-19", *Frontiers in Psychology* 11 (October 2020): 1-2, <https://doi.org/10.3389/fpsyg.2020.566790>.

43 Islam et al., *COVID-19-related infodemic and its impact on public health*, 1621.

coexistence and justice and that it can potentially threaten global peace and security.<sup>44</sup> In any case, the combination of social media and advancing technology has enabled the production of disinformation on a scale that threatens the right of individuals to receive and share ideas.<sup>45</sup> Spreading of fake news results in conflicting interests related to the exercise of human rights that would not have occurred, or at least not to such extent, if individuals had not been exposed to fake news that negatively affected their attitudes, opinions and behaviors.

#### **4 FAKE NEWS AND ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

As mentioned above, the aim of this paper is to highlight the problem of fake news as a human rights issue,<sup>46</sup> particularly in the context of Art. 10 of the ECHR, which guarantees the freedom of expression. It aims to identify how far the national laws of the Council of Europe Member States can go to fight against fake news, especially in times of crisis. It is expected that in the coming years, the ECtHR will play "a fundamental role in supervising the filtering and take-down practices prescribed by the Contracting States, hopefully preventing gross violations of Art. 10 by striking down illegitimate measures."<sup>47</sup> The term "fake news" was first mentioned by the ECtHR on its own initiative in its 2019 *Brzeziński v. Poland* judgment,<sup>48</sup> which drew some criticism due to the aforementioned controversy surrounding the term.<sup>49</sup> Regardless of whether or not the ECtHR continues to refer to the term "fake news" as such in its further practice, the phenomenon of fake news is likely to remain in its given definition, regardless of the terminology used.<sup>50</sup> It is therefore necessary

44 Chema Suárez Serrano, "From bullets to fake news: Disinformation as a weapon of mass distraction. What solutions does International Law provide?", *The Spanish Yearbook of International Law* 24, No. 129 (2020): 131.

45 Fernando Nuñez, "Disinformation legislation and freedom of expression", *UC Irvine Law Review* 10, No. 2 (2020): 784.

46 See at a general level the Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda, The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression, and the AChPR Special Rapporteur on Freedom of Expression and Access to Information, 3 March 2017, Accessed 10 January 2022, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21287&LangID=E>.

47 Sardo, *Categories, balancing, and fake news*, 446.

48 Judgment of 25 July 2019, *Brzeziński v. Poland*, App. no. 47542/07, para. 35.

49 See e.g. Ronan Ó Fathaigh, "Brzeziński v. Poland: Fine over 'false' information during election campaign violated Article 10", *Strasbourg Observers*, 8 August 2019, Accessed 10 January 2022, <https://strasbourgobservers.com/2019/08/08/brzezinski-v-poland-fine-over-false-information-during-election-campaign-violated-article-10/> and Ethan Shattock, "Should the ECtHR Invoke Article 17 for Disinformation Cases?", *EJIL: Talk!: Blog of the European Journal of International Law*, 26 March 2021, Accessed 10 January 2022, [https://www.ejiltalk.org/should-the-ecthr-invoke-article-17-for-disinformation-cases/?utm\\_source=mailpoet&utm\\_medium=email&utm\\_campaign=ejil-talk-newsletter-post-title\\_2](https://www.ejiltalk.org/should-the-ecthr-invoke-article-17-for-disinformation-cases/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2).

50 See Irini Katsirea, "Fake news": reconsidering the value of untruthful expression in the face of regulatory uncertainty, *Journal of Media Law* 10, No. 2 (2019): 3, DOI:



to situate it within the Court's general practice in applying Art. 10 of the ECHR, particularly in its aspects of freedom of the media and expression on the Internet. To do this, it is first necessary to examine whether fake news is in principle covered by freedom of expression provided for in Art. 10(1) of the ECHR, and secondly, to examine the conditions for restricting fake news under the ECHR, especially in the context of its Art. 10(2).

#### **4.1 Fake News as an Expression Protected by Article 10(1) of The European Convention on Human Rights**

The place of the right to freedom of expression in the corpus of internationally recognized human rights<sup>51</sup> is particularly emphasized. The right to freedom of expression is referred to, *inter alia*, as "the touchstone or cornerstone of all rights",<sup>52</sup> as "the cornerstone of democracy and the means of ensuring respect for all other human rights",<sup>53</sup> and as "the critical measure of a pluralistic and tolerant society and the key to participatory rights in its political life".<sup>54</sup> It is also referred to as "one of the cardinal rights" guaranteed by the ECHR and as "one of the fundamental values of the Council of Europe".<sup>55</sup> The justifications for guaranteeing freedom of expression range from the fact that it is a means of obtaining the truth to the fact that it is a means of achieving individual autonomy and a prerequisite for the proper functioning of democracy.<sup>56</sup>

As early as 1976, in the case of *Handyside v. UK*, the ECtHR took a very clear position on the need for a broad interpretation of the right to freedom of expression as laid down in Art. 10 of the ECHR. According to the Court, the right to freedom of expression "is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of

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10.1080/17577632.2019.1573569, McGonagle, *Fake news": False fears or real concerns?*, 209, and Björnstjern Baade, "Don't Call a Spade a Shovel – Crucial Subtleties in the Definition of Fake News and Disinformation", *Verfassungsblog*, 14 April 2020, I., Accessed 10 January 2022, <https://verfassungsblog.de/dont-call-a-spade-a-shovel/>.

51 See e.g. Art. 19 of the Universal Declaration on Human Rights of 1948, GA Resolution 217 A, 10 December 1948, Art. 19 of the International Covenant on Civil and Political Rights of 1966, U.N.T.S., Vol. 999, 171, Art. 13 of the American Convention on Human Rights of 1969, U.N.T.S., Vol. 1144, 123, and Art. 9 of the African Charter on Human and Peoples' Rights of 1981, U.N.T.S., Vol. 1520, 217.

52 Dominic McGoldrick, "Thought, Expression, Association, and Assembly", in *International Human Rights Law*, 3<sup>rd</sup> ed., eds. Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (Oxford: Oxford University Press, 2018), 217.

53 Nicola Wenzel, "Opinion and Expression, Freedom of, International Protection", April 2014, *Max Planck Encyclopedias of Public International Law*, Oxford Public International Law, Accessed 10 January 2022, <https://opil.ouplaw.com/home/mpi1>, para. 1.

54 Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice*, 2<sup>nd</sup> ed. (Cambridge: Cambridge University Press, 2016), 390.

55 David Harris et al., *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights*, 4<sup>th</sup> ed. (Oxford: Oxford University Press, 2018), 592.

56 See Wenzel, *Opinion and Expression, Freedom of, International Protection*, paras. 2-6.

that pluralism, tolerance and broadmindedness without which there is no 'democratic society'".<sup>57</sup> This is in line with the aforementioned rationale for guaranteeing freedom of expression, according to which the remedy for unwanted speech is more speech,<sup>58</sup> but also with freedom of expression referred to as a prerequisite for the proper functioning of democracy.

The obligations of the States Parties to the ECHR under Art. 10 are not only negative in the sense that they must refrain only from unlawful interference with the right to freedom of expression, but also positive in the sense that they must also take all necessary measures to ensure freedom of expression of private individuals.<sup>59</sup> According to the ECtHR, States Parties are obliged to create a favorable environment for all interested parties to participate in public debates and to allow them to express their ideas and opinions without fear, even if those ideas and opinions are at odds with those held by the authorities or a substantial section of the public, or even if they are irritating or shocking to the latter.<sup>60</sup> According to McGonagle, these positive obligations require of states, *inter alia*, "to guarantee pluralism in the media ecosystem, including by supporting independent and investigative media and other media actors such as fact-checking organizations" and arguably "to promote media, information and news literacy as life skills in order to enable their citizens to analyze and critically evaluate the substance, provenance and relevance of media and news content".<sup>61</sup>

In the context of the phenomenon of fake news, the aspect of freedom of expression is particularly important in relation to freedom of the media and, in particular, freedom of expression on the Internet.

Despite the absence of explicit protection of media freedom in international law,<sup>62</sup> specific standards for journalists and their expression have been developed based on the practice of the implementing bodies of international human rights treaties. For example, the ECtHR has developed the concept that the press and broadcasters<sup>63</sup> are "public watchdogs" whose role is to provide "information and ideas on matters of public interest".<sup>64</sup> Journalists therefore have, *inter alia*, the right not to disclose confidential sources of information because "sources may be deterred from assisting the press in informing the public on matters of public interest".<sup>65</sup> The fundamental premise on which these standards are based is the responsibility of journalists to "act in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism".<sup>66</sup> On the one hand, this means

57 Judgment of 7 December 1976, *Handyside v. UK*, App. no. 5493/72, para. 49.

58 Wenzel, *Opinion and Expression, Freedom of, International Protection*, para. 15.

59 Wenzel, *Opinion and Expression, Freedom of, International Protection*, 27.

60 Judgment of 14 September 2010, *Dink v. Turkey*, App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, para. 137.

61 McGonagle, *Fake news*, 207.

62 The only exception in this respect is the Art. 11 Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, 391-407.

63 See Judgment of 23 September 1994, *Jersild v. Denmark*, App. no. 15890/89, para. 31.

64 Judgment of 26 November 1991, *Observer and Guardian v. UK*, App. no. 13585/88, para. 59(b) and *Jersild v. Denmark*, para. 31.

65 Judgment (Grand Chamber) of 27 March 1996, *Goodwin v. UK*, App. no. 17488/90.

66 Judgment (Grand Chamber) of 17 December 2004, *Pedersen and Baadsgard v Denmark*, App.

that journalists' freedom of expression "is not unrestricted and nor should journalists operate in an ethical vacuum",<sup>67</sup> but on the other hand, this kind of responsibility "is not the same as having an obligation to tell the truth".<sup>68</sup> False or inaccurate reporting can occur even when a journalist is acting in good faith.<sup>69</sup>

The Internet is recognized as an important tool for the realization of the right to freedom of expression, but also as a phenomenon that poses significant challenges.<sup>70</sup> One of the main challenges in this area is whether the standards that apply to journalists in relation to freedom of expression also apply to actors appearing and expressing themselves through different types of online platforms. The practice of the ECtHR, as well as trends in the international community in general,<sup>71</sup> seem to be moving in principle towards some kind of broadening of the definitions of media and journalists, including actors expressing themselves online, but assuming that these are issues of public interest. For example, the case of *Rebechenko v. Russia* was about a blogger who posted a video on his YouTube channel in which he mockingly criticized the statements of a politician and the head of an NGO about the situation in eastern Ukraine and relations between Russia and Ukraine. The Court concluded that "[i]n these circumstances, the interference must be examined on the basis of the same principles applied when assessing the role of a free press in ensuring the proper functioning of a democratic society".<sup>72</sup> On the basis of the aforementioned, it can be concluded that non-traditional media actors who engage in discussions on issues of public interest are subject to similar standards as traditional media. This means that they are not obliged to tell the truth, but merely to act in good faith.

Statements which, according to the definition given earlier, could be described as fake news after all that has been said, fall in principle under the protection of Art. 10(1) of the ECHR, like any other form of expression. In its judgment in the case of *Salov v. Ukraine*, the ECtHR explicitly stressed that "Article 10 of the Convention as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful". Otherwise, it "would deprive persons of the right to express their views and opinions about statements

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no. 49017/99, para. 78.

67 Katsirea, *Fake news*, 13.

68 McGonagle, *Fake news*, 208.

69 McGonagle, *Fake news*, 208.

70 See Judgment of 5 November 2011, *Editorial Board of Pravoye Delo and Shtetel v. Ukraine*, App. no. 33014/05, paras. 30, 63 and Human Rights Committee General Comment 34 (Article 19: Freedoms of opinion and expression), CCPR/C/GC/34, 12 September 2011, para. 15.

71 See e.g. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, UN Doc. A/HRC/4/27 2, January 2007, para. 80, Recommendation No. R (2000) 7 of the Committee of Ministers to Member States on the right of journalists not to disclose their sources of information (Adopted by the Committee of Ministers on 8 March 2000 at the 701<sup>st</sup> meeting of the Ministers' Deputies), Appendix and Recommendation CM/Rec(2011)7 of the Committee of Ministers to Member States on a new notion of media (Adopted by the Committee of Ministers on 21 September 2011 at the 1121<sup>st</sup> meeting of the Ministers' Deputies), Appendix, para. 41.

72 Judgment of 16 April 2019, *Rebechenko v. Russia*, App. no. 10257/17, para. 25. See also Judgment of 22 April 2010, *Fatullayev v. Azerbaijan*, App. no. 40984/07, para. 95.

made in the mass media."<sup>73</sup> However, as with any other type of expression, fake news is subject to the restrictions provided for primarily in Art. 10(2) of the ECHR, which will be discussed below.

#### **4.2 Fake News as an Expression Subject to Restrictions Under Article 10(2) of The European Convention on Human Rights**

As noted above, fake news is in principle protected by the right to freedom of expression. However, the right to freedom of expression is not an absolute right but belongs, together with e.g. the right to privacy, to the so-called qualified rights, which are subject to certain restrictions.<sup>74</sup> Because it entails "duties and responsibilities", a restriction on freedom of expression according to Art. 10(2) of the ECHR must: 1) be prescribed by law, 2) have a legitimate aim (e.g. the protection of public safety, health or the rights of others), and 3) be necessary in a democratic society. The ECtHR interprets the adjective "necessary" as implying the existence of a "pressing social need", and in examining the said presumption of the restriction on freedom of expression, it undertakes the task of "considering the interference complained of in the light of the case as a whole and determining whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient' and whether it was 'proportionate to the legitimate aim pursued'".<sup>75</sup> In the case of a conflict between the right to freedom of expression and some legitimate interest, such as public security, or another protected right, such as the right to privacy, "the Court *strikes a balance*, deciding which right or interest takes priority over the other, and specifying under which conditions the relation of precedence holds".<sup>76</sup>

In its practice of assessing the permissibility of restrictions on freedom of expression under Art. 10(2),<sup>77</sup> the ECtHR has developed two distinctions that are important to the issue of fake news.

One of these distinctions is the distinction between facts and value judgments. As early as 1986, in the case of *Lingens v. Austria*, the Court concluded that a "careful distinction" should be drawn between the two, since "[t]he existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof." The requirement of proof in the case of value judgments is, according to the Court, "impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10".<sup>78</sup> In this Court's distinction, Katsirea notes "the

73 Judgment of 6 September 2005, *Salov v. Ukraine*, App. no. 65518/01, para. 113.

74 Bantekas and Oette, *International Human Rights Law and Practice*, 75.

75 Judgment (Grand Chamber) of 22 October 2007, *Lindon, Otchakovsky-Laurens and July v. France*, App. nos. 21279/02 and 36448/02, para. 45.

76 See Sardo, *Categories, balancing, and fake news*, 438.

77 The application of Art. 17 on the abuse of rights guaranteed by the ECHR in the context of false expression is reserved for the cases of negation or revision of clearly established historical facts such as the Holocaust and is not generally suitable and desirable in the context of fake news. See e.g. Decision of 24 June 2003, *Garaudy v. France*, App. no. 65831/01 and Judgment (Grand Chamber) of 15 October 2015, *Perinçek v. Switzerland*, App. no. 27510/08, paras. 209-212. See also Shattock, *Should the ECtHR Invoke Article 17 for Disinformation Cases?*

78 Judgment (Plenary) of 8 July 1986, *Lingens v. Austria*, App. no. 9815/82, para. 46. For

idea that there is something particularly harmful to a false statement of fact", which is manifested in the fact that "a false statement makes a claim to authority".<sup>79</sup> In the context of fake news, Baade also emphasizes the need to legally distinguish between false statements and distorted or misleading statements, "which are in themselves factually correct, but presented in a way that makes it likely that false conclusions are drawn from them".<sup>80</sup> By their nature, distorted or misleading statements are opinions – "[y]ou can argue that the selection and presentation of facts are inappropriate, but you cannot prove them to be false".<sup>81</sup> It is therefore difficult to expect that, unlike false statements, where it is possible that in certain cases the restriction will be justified, restricting distorted or misleading statements in individual States Parties to the ECHR will withstand the scrutiny of the ECtHR in the application of Art. 10(2).

Another important distinction developed by the ECtHR in its practice of assessing the admissibility of restrictions on freedom of expression under Art. 10(2) of the ECHR is the one between political and non-political speech, with commercial speech as a distinct category.<sup>82</sup> The Court gives much greater level of protection to political speech<sup>83</sup> in comparison to non-political<sup>84</sup> and especially commercial speech.<sup>85</sup> Here, a question logically arises as to which of the above categories fake news should be put into. This is a very complex issue given the nature of such expression. Katsirea detects in this regard that "[p]ublishers of 'fake news' do not seek to address matters of political or public debate but to skew debate by spreading fabricated stories at the cost of potential confusion and misinformation of the public with intent to commercial or political profit".<sup>86</sup> What is particularly problematic in this context of the dichotomy between political and commercial speech is that the contemporary phenomenon of fake news is often just an incidental reference to political and social topics, while the main goal of releasing such content is actually to attract advertisers.<sup>87</sup> When establishing the limiting assumptions of Art. 10(2), should such expression be therefore evaluated more leniently as political expression with regard to its subject matter or more strictly as commercial expression with regard to its motive? The bad impact of this kind of expression on the quality of public debate could be taken as an argument for categorizing fake news into commercial speech.<sup>88</sup> It would not be the first time that

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exceptions see Judgment of 9 January 2018, *GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland*, App. no. 18597/13, para. 68, and Judgment (Grand Chamber) of 23 April 2015, *Morice v. France*, App. no. 29369/10, para. 126.

79 Katsirea, *Fake news*, 14.

80 Baade, *Don't Call a Spade a Shovel*, III.

81 Baade, *Don't Call a Spade a Shovel*, III.

82 See Wenzel, *Opinion and Expression, Freedom of International Protection*, paras. 6 and 16.

83 See *Lingens v. Austria*, para. 42 and Judgment of 23 May 1991, *Oberschlick v. Austria*, App. no. 11662/85, paras. 58-59.

84 See Judgment of 25 November 1996, *Wingrove v. UK*, App. no. 17419/90, para. 58.

85 See Judgment of 20 November 1989, *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, App. no. 10572/83, para. 33. See also Sardo, *Categories, balancing, and fake news: The jurisprudence of the European Court of Human Rights*, 441.

86 Katsirea, *Fake news*, 17-18.

87 Katsirea, *Fake news*, 16.

88 Katsirea, *Fake news*, 18. See also McGonagle, *Fake news*, 204, and Sardo, *Categories*,

the ECtHR has made exceptions to the principle of political expression by which it recognizes a wider margin of appreciation to States Parties to the Convention.<sup>89</sup> But on the other hand, due to its interference in the political and public spheres, fake news is much more complex than classic commercial speech, such as misleading advertising, which is usually easily verified.<sup>90</sup> Therefore, a key factor in assessing the assumptions for restricting fake news should be the element of contribution to public debate, and by its nature it will gravitate to political expression. This does not mean, however, that fake news will not "fail" any of the other elements of the justification for restrictions, such as acting "in bad faith", disproportionately endangering public safety or colliding with other protected rights such as the right to privacy.

It is not excluded that, in addition to the above traditional distinctions, the ECtHR will not open some new distinctions in future cases that will to a greater or lesser extent touch on the phenomenon of fake news. As possible distinctions, Sardo cites e.g. a distinction between different types of websites according to their primary content (e.g. political, business or arts-based) or their size and influence (e.g. highly-ranked and small websites), and between audio-visual services (e.g. BBC), on-demand services (e.g. Netflix) or user-generated social media (e.g. Twitter).<sup>91</sup> Regardless of whether the Court will conceptualize such or similar distinctions through its practice, these characteristics of the media in question will certainly have to be taken into account when resolving a specific case following Art. 10(2) of the ECHR.

Based on all the above, it can be concluded that despite the prescribed restrictions from Art. 10(2) of the Convention, the ECtHR has developed in its practice a robust system for examining them to protect abuses of that provision and strongly protect the right to freedom of expression as a basis for the proper functioning of democracy. This system is also well prepared for cases of complaints regarding restrictions on fake news, but such cases will certainly require a special approach when using these well-established mechanisms of the Court, and possibly the introduction of some new distinctions, such as distinguishing between different types of websites.

## 5 CONCLUSION

Extremely complex phenomenon of fake news influences people's behavior and attitudes, political processes, and the realization of human rights, and can have numerous consequences at individual and societal levels. Consequently, this phenomenon is viewed from different aspects and defined in different ways. But most authors agree that the essential elements of fake news are that it is false or fictional information spread in a news-like form. However, there is still disagreement about the scope and typology of this phenomenon. All these difficulties in defining the term itself lead to difficulties in considering a possible restriction on or protection of

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*balancing, and fake news*, 445-446.

89 See Judgment of 22 April 2013, *Animal Defenders International v. the UK*, App. no. 48876/08, para. 123, and Judgment of 11 December 2008, *TV Vest As & Rogaland Pensjonistparti v. Norway*, App. no. 21132/05, para. 67.

90 Katsirea, *Fake news*, 18.

91 Sardo, *Categories, balancing, and fake news*, 454-455.

freedom of expression in the event of the publication of fake news.

Today, fake news is covered by freedom of expression in its broad interpretation according to ECtHR practice, while the assessment of the legality of possible restrictions on this type of expression under the ECHR depends on a number of factors. A predominantly commercial character of e.g. fabricated Internet sites created for profit could steer the Court towards assessing the case of restricting fake news with a wider margin of appreciation, while the pressing social need factor could steer the Court towards broad protection of freedom of expression. It should be borne in mind that each ECtHR judgment is linked to a specific factual situation, so that the final outcome is also related to the issue of collision with other protected interests, such as national security and public safety, and other protected rights, such as the right to privacy. As for the cases of the spread of fake news in times of crisis such as the ones connected with the COVID-19 pandemic or earthquakes that struck the Republic of Croatia in 2020, the Court would certainly assess "the extent to which untruthful allegations could pose a serious threat to public order" on the one hand, and a factor of contribution to a debate of public interest on the other.<sup>92</sup> It should certainly be emphasized that any restriction on freedom of expression is prone to abuse and States Parties to the ECHR should be extremely careful in their legal regulation in the context of restrictions on fake news. Excessive restrictions would mean "entrusting governments or technology corporations without an editorial culture with drawing the lines between truth and falsity, thus jeopardizing the integrity of democracy with the very means that are meant to uphold it".<sup>93</sup> It is crucial to avoid the risk of censorship and ideological impositions of national governments in cases where restrictions are imposed. The key lies in careful balancing between protecting freedom of expression and other human rights and legitimate interests in implementing Art. 10 in times of crisis.

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92 Katsirea, *Fake news*, 20-21.

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*Sažetak*

## **FAKE NEWS U KRIZNIM VREMENIMA U KONTEKSTU ČLANKA 10. EUROPSKE KONVENCIJE O LJUDSKIM PRAVIMA**

Internet i društvene mreže uvelike su pridonijeli ostvarivanju slobode izražavanja. No, olakšali su i ubrzali širenje dezinformacija, propagande i lažnih vijesti. Iako ovi fenomeni nisu novi, utjecaj koji su posljednjih godina imali na političke procese u demokratskim društvima (npr. na predsjedničke izbore u SAD-u 2016. i Brexit) i na ljudsko ponašanje tijekom pandemije bolesti COVID-19, skrenuli su pozornost na ovo pitanje. Cilj je ovog rada upozoriti na problem lažnih vijesti (*fake news*) u kontekstu čl. 10. Europske konvencije o ljudskim pravima koji jamči slobodu izražavanja.

U radu se daje terminološki i povijesni pregled pojma *fake news* i srodnih pojmova. Zatim se daje pregled čl. 10. Europske konvencije o ljudskim pravima i pojašnjavaju situacije i uvjeti pod kojima su ograničenja prava na slobodu izražavanja opravdana na temelju njena čl. 10., st. 2. Autori pružaju uvid i u relevantnu praksu Europskog suda za ljudska prava.

***Ključne riječi:*** *fake news; sloboda izražavanja; ljudska prava; čl. 10. Europske konvencije o ljudskim pravima; Europski sud za ljudska prava.*

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