

LIARS, SKEPTICS, CHEERLEADERS

Human Rights Implications of Post-Truth Disinformation from State Officials and Politicians

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ABSTRACT

In the following paper I will show how disinformation from state officials and politicians affects the right to access to information and political participation. Next to the more straightforward implications for political self-determination, I examine how active dissemination of lies by figures of epistemic authority does significantly affect trust patterns between citizens, increasing polarization, impeding dialogue and obstructing access to politically relevant information by gatekeeping knowledge. Examining mostly European Convention on Human Rights (ECHR) case law, I argue that the International Human Rights Law (IHRL) framework provides some argumentative basis for extending individuals' rights as epistemic and political agents towards a "right to truth spoken by politicians". However, challenges in balancing a possible restriction of lies and assessing the real effective harm that comes from them remain, potentially leading to a vacuum of rights protection for less visible long-term harm to individuals and public discourse. In order to have a real chance at tackling the harmful consequences of publicly told lies, reinstall trust in the public sphere and burst information bubbles, it will be necessary to shift narratives, foster information literacy and open discussion culture.

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1 INTRODUCTION

Knowing is crucial for everyday life. We need to know how to commute to work, what tax category we are in and what the cooking time for *al dente* pasta is. On a more political level, access to information is equally essential: In order to take part in the public sphere, we need certain knowledge: How is my country's crime rate or gender pay gap? What are my fellow citizens' political attitudes? And, ultimately, who should I vote for and whom should I protest?

After the 2016 US presidential and BREXIT campaigns, the intentional and strategic dissemination of false information in the public sphere has become a well-known and widespread phenomenon. Next to disinformation campaigns coming from foreign governments or private actors, the deliberate and systematic spread of falsehoods by high-ranking state officials and politicians repeatedly caught public attention. Consider for instance Viktor Orbán's allegations about George Soros and the EU¹, Boris Johnson's egregiously false BREXIT leave-campaign slogans² or Trump's and Bolsonaro's lies in the recent Covid-19 infodemic³.

The threat of such disinformation has been recognized for a while in the scholarly world. The issues of post-truth, why politicians lie and why we let them has recently been discussed from different disciplinary angles such as communication theory⁴, political epistemology⁵ and

¹ Gergely Szakacs and Jan Strupczewski, 'EU Commission Rebukes Hungary's New Media Campaign as "Fake News"' (Reuters, 19 February 2019) <www.reuters.com/article/us-hungary-eu-election-campaign-idUSKCN1Q81I0> accessed 15 June 2022; Jennifer Rankin, 'Brussels Accuses Orbán of Peddling Conspiracy Theory with Juncker Poster' (The Guardian, 19 February 2019) <<https://www.theguardian.com/world/2019/feb/19/brussels-orban-jean-claude-juncker-poster-george-soros-hungary>> accessed 15 June 2022

² Quassim Cassam, 'Bullshit, Post-truth, and Propaganda' in Elizabeth Edenberg and Michael Hannon (eds): Political Epistemology (OUP 2021) 52, 60; John Lichfield, 'Boris Johnson's £350M Claim is Devious and Bogus. Here's Why' (The Guardian, 18 September 2017) <<https://www.theguardian.com/commentisfree/2017/sep/18/boris-johnson-350-million-claim-bogus-foreign-secretary>> accessed 15 June 2022

³ BBC, 'Coronavirus: World Leaders' Posts Deleted Over Fake News' (BBC NEWS, 31 March 2020) <<https://www.bbc.com/news/technology-52106321>> accessed 15 June 2022

⁴ Cass R. Sunstein, On Rumors: How Falsehoods Spread, Why We Believe Them, What Can Be Done (2nd edn, Princeton UP 2014)

⁵ Elizabeth Edenberg and Michael Hannon (eds), Political Epistemology (OUP 2021)

law⁶. Considerable part of this research is linked to current affairs concerning disinformation campaigns as acts of international warfare and democratic disruption, the uprise of populist leadership, and information chaos and public health⁷. Research on the corresponding need to protect individuals from deceptions and their repercussions and provide them with epistemic rights as both “knowers and knowns”⁸ has been picking up pace as well⁹. Looking at the other side of the coin, human rights and constitutional law scholars exploring the limits of freedom of expression discuss a potential right to lie¹⁰.

Even given this increasing amount of coverage, the issue of disinformation from politicians and state officials requires more in-depth attention. A politico-epistemic environment in which public political figures – with epistemic authority and possibly information monopolies – deliberately distance themselves from the truth comes with a number of negative implications for democracy and its participants’ human rights. Besides providing the electorate false information on which they then base their (political) decisions, disinformation spread by politicians challenges the rights to access to information and the right to political participation, ultimately leading to political polarization, immobility, and damage to democratic discourse. Even though numerous states have upgraded their disinformation regulation policies in both soft and hard law, lying politicians often remain only indirectly or

⁶ Angela Condello and Tiziana Andina (eds), *Post-Truth, Philosophy and Law* (Routledge 2019)

⁷ See for example Étienne Brown, ‘Propaganda, Misinformation, and the Epistemic Value of Democracy’ [2018] 30 (3-4) *Critical Review* 194; Paul Rowinski, *Post-Truth, Post-Press, Post-Europe; Euroscepticism and the Crisis of Political Communication* (Springer International Publishing 2021); Rose Bernard and others, ‘Disinformation and Epidemics: Anticipating the Next Phase of Biowarfare’ [2021] 19 (1) *Health Security* 3

⁸ Mathias Risse, ‘The Fourth Generation of Human Rights: Epistemic Rights in Digital Lifeworlds’ [2021] 8 (2) *Moral Philosophy and Politics* 351, 354

⁹ Lani Watson, *The Right to Know: Epistemic Rights and Why We Need Them* (Routledge 2021); Mathias Risse, ‘The Fourth Generation of Human Rights: Epistemic Rights in Digital Lifeworlds’ [2021] 8 (2) *Moral Philosophy and Politics* 351

¹⁰ This analysis is prominently taking place in the US-American context, concerning the balance of First Amendment rights. See e.g. Jonathan D. Varat, ‘Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship’ [2006] 53 (3) *UCLA Law Review* 1107; Catherine J. Ross, *A Right to Lie?* (University of Pennsylvania Press 2021); William P. Marshall, ‘False Campaign Speech and the First Amendment’ [2004] 153 *University of Pennsylvania Law Review* 285

marginally addressed. Public efforts by legal professionals to hold politicians accountable for their lies have not shown break-through successes so far¹¹.

International human rights law (IHRL) as well lacks specific reference – needless to say, there is currently no such thing as a right to truth spoken by politicians and state officials. In the paper at hand, I attempt to make a case for this claim, by showing both avenues for protection under the current IHRL framework and arguments for the necessity of an expansion of rights. In doing so I aim at bridging the lack of interdisciplinarity noticeable in academic literature when it comes to connecting the complexities of the phenomenon of disinformation with what those mean for individuals as rights bearers. In order to tackle human rights concerns resulting from politicians spreading falsehoods in an efficient and holistic way, a black-letter-law analysis is not enough – human rights scholars need to be aware of the origins of post-truth disinformation and the full scale of their implication. The paper at hand therefore embeds the issue in an interdisciplinary framework of political science, philosophy of knowledge and communication theory, followed by a practical analysis of IHRL focused on European Convention on Human Rights (ECHR) case law on freedom of expression. In doing so, I attempt to answer the following questions: How does post-truth disinformation from state officials and politicians affect the right to access to information and political participation? What protection does IHRL offer and where are its limits?

This endeavor is structured as follows: The next chapter embeds disinformation in a broader context of current politico-epistemic distortions. Subsequently, I introduce a definitional framework of disinformation as a falsehood told with harmful intent, tying on to the bigger context of post-truth communication. Chapter 3 points out the concerning

¹¹ For instance, in the UK, the High Court dismissed a claim to prosecute Boris Johnson for misconduct in public office for his EU BREXIT slogan on giving the EU £350 a week. In 2021, German legal scholar Ferdinand von Schirach proposed an amendment of the European Charter of Fundamental Rights, including a right to truth spoken by politicians and state officials. See at BBC, ‘Brexit: Boris Johnson £350M Claim Case Thrown Out by Judges’ (BBC NEWS, 7 June 2019) < <https://www.bbc.com/news/uk-politics-48554853> > accessed 15 June 2022; Ferdinand von Schirach, *Jeder Mensch* (Luchterhand 2021)

implications of post-truth disinformation from state officials and politicians: I show that in a disinformed public sphere, deceived individuals are deprived of political self-determination. Furthermore, even when aware of the lies, intellectual arrogance and widespread testimonial skepticism can favor both polarization and disengagement. I argue that these phenomena come to the detriment of individuals' information access and political participation. The second part of the paper translates this problematic into a language of international human rights law, showing possible avenues for protection in the existing framework as well as respective challenges. The last chapter draws lessons from the previous analysis and issues some recommendations worth keeping in mind when regulating lies uttered by politicians.

2 DISINFORMATION – A SPECTRUM OF TRUTH AND FALSENESS

The following chapter is concerned with embedding disinformation in a broader context of current politico-epistemic distortions. Additionally, I provide definitional guidance, clarifying who the agents of disinformation are, how truth and falsehood can be classified in the first place and what makes a false statement an instance of disinformation. Finally, a link to so-called post-truth communication will be drawn.

2.1 Lying politicians as an instance of politico-epistemic trouble

As crucial as knowledge and information might be, in reality, (correct) information – as well as an epistemic skill-set to properly process it – is mostly no given good, but at some point has to be *acquired* in order to avoid the harms and disadvantages of ignorance and false information. What we know and how we know it is not a matter of abstract fact-allocations, but is thereby embedded in epistemic patterns of information gathering and processing. Such patterns, or *epistemological systems*, as Briana Toole explains, “are like *governing bodies* for knowledge-acquisition [...] [they] construct rules for the formation and revision of beliefs, stipulate what method of forming beliefs we ought to employ or avoid, indicate how we ought to weigh evidence, specify what standards a belief must meet to count as knowledge, and so on”¹². Importantly, epistemic systems determine if and how access to information, knowledge and truth is given; they “shape not just *what* we know, but *what we are in a position to know* [second emphasis added]”¹³.

¹² Briana Toole, ‘What Lies Beneath: The Epistemic Roots of White Supremacy’ in Elizabeth Edenberg and Michael Hannon (eds), *Political Epistemology* (OUP 2021) 80, 84

¹³ *ibid* 85

As a matter of fact, the reality we gather our information from is no neutral database, but is distorted in many different ways¹⁴. Propaganda, false information, political disagreement, epistemic oppression, polarization, epistemic bubbles and echo-chambers, conspiracy theories, instrumentalized skepticism, channeled by buzzwords like post-truth or “fake news” increasingly warp our politico-epistemic landscape¹⁵. As in our current “Information Age”, more and more knowledge is available in a fast and low-threshold way, we remain swamped with information – and disinformation. And while untrustful sources, information bubbles and information chaos might be as old as humankind, we are currently experiencing the further amplification of such politico-epistemic trouble due to the rise of fast-paced online information flows of information and communication technology (ICT). False information spreads so fast that keeping up with it (and tidying up after it) becomes a perpetual Sisyphus task. Bots, AI and algorithms further complicate the picture – as a Council of Europe report puts it, “the complexity and scale of information pollution in our digitally-connected world presents an unprecedented challenge”¹⁶. The epistemological system we end up with is one that makes it hard to distinguish between true and false, fact and emotion, real and fake, legitimate and illegitimate content or sources. Consequently, and somewhat ironically, in an age of information overflow, access to truth is still scarce¹⁷.

It is crucial to mention that information flows are not isolated, but always embedded in a broader, societal communication network. As Wardle and Derakshan point out, when a token of information is transmitted from one person to another, the exchange is not a neutral one, but

¹⁴ A terminological side note: I will be using the terms “information” or “fact” in a very broad notion here; I do not just mean objectively measurable hard facts (“water boils at 100° C”), but also unquantifiable soft facts like knowledge about social dynamics, understanding of political agendas etc.

¹⁵ Edenberg and Hannon (n5) 1

¹⁶ Claire Wardle and Hossein Derakshan (Council of Europe Report), ‘Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making’ (27 September 2017) DGI 09 10

¹⁷ There is some debate in scholarly discourse on how “new” phenomena of epistemic trouble actually are. Although I will not engage in this discussion here, I believe that most the mentioned phenomena, being somehow connected to and exacerbated by online information flows, are quite distinct to our time.

has an impact on both parties' belief systems and *reality of life* – conflicting accounts are “not pure information but a portrayal of the contending forces in the world”¹⁸. From this follows that epistemic systems are per default influenced by social, political and cultural dynamics. A faulty epistemic system does not only affect our knowledge-gathering as such, but takes a toll on public communal life as well, possibly opening up and establishing partisan and ideological rifts (hence *politico*-epistemic trouble).

The paper at hand is concerned with a specific form of epistemic trouble, namely the issue of “post-truth” disinformation uttered by politicians and state officials. Taking a look at the statistic, egregious lies, statements that have been later identified as false and claims or that were quite hard to believe in the first place have become an integral part of political campaigning. A key event for the global West was the US election campaigns of 2012, where “candidates were being more negative than ever, including resorting to outright deception”¹⁹. According to one study, “during the 2012 presidential election, Mitt Romney's claims were judged to be false 25% of the time, and Barack Obama's comments were judged to be false 15% of the time”²⁰. During the term of former President Trump, disinformation reached new levels of audacity – think about the infamous claim to have seen crowds of people in Jersey City applauding the fall of the Twin Towers or health-advice to inject disinfectant against Covid-19²¹. For Europe, the BREXIT referendum marked the beginning of an increasing disregard for the truth: Consider slogans propagated in the leave-campaign such as “We send the EU £350

¹⁸ James W. Carey, *Communication as Culture: Essays on Media and Society* (Routledge 2008) 16; Wardle and Derakshan (n16) 57

¹⁹ Jason Zenor, ‘A Reckless Disregard for the Truth: The Constitutional Right to Lie in Politics’ [2016] 38 (1) *Campbell Law Review* 41, 42-43

²⁰ *ibid* 44; relying on information from Politifact, ‘Mitt Romney's File’ <<http://www.politifact.com/personalities/mitt-romney/>> and Politifact, ‘Barack Obama's File’ <<http://www.politifact.com/personalities/barack-obama/>> accessed 15 June 2022

²¹ Cassam (n2) 60; Glenn Kessler, ‘Trump's Fuzzy Vision on the Sept. 11 Attacks’ (The Washington Post, 12 September 2019) <<https://www.washingtonpost.com/politics/2019/09/12/trumps-fuzzy-vision-sept-attacks/>> accessed 15 June 2022; Chris Cillizza, ‘Donald Trump's Incredibly Dangerous Musings on Disinfectants’ (CNN Politics, 24 April 2020) <<https://edition.cnn.com/2020/04/24/politics/donald-trump-disinfectant-uv-light/index.html>> accessed 15 June 2022

million a week – let’s fund our NHS instead”, or “Turkey (population 76 million) is joining the EU”²². In a wave of rising populism and Eurocriticism, others leaders soon followed up: to name just a few, Matteo Salvini in Italy and Viktor Orbán in Hungary repeatedly spread lies, preferably on immigration and the EU²³.

2.2 Who is lying? The agents of disinformation

When referring to “politicians and state officials” I mean both elected government representatives and those campaigning for office²⁴. Although digital platforms can act as amplifiers for the spread of false information, I will not limit my discussion on online disinformation²⁵; it is rather meant to include all forms of statements – whether from behind a rostrum, on government websites election campaign posters or in hastily written 4 a.m.-tweets²⁶. Even though the issue is prominent, government shadow operators and foreign-based disinformation campaigns as an act of international disinformation warfare are not part of the present discussion.

²² Cassam (n2) 60; Lichfield (n2)

²³ Giordano Mario ‘Ecco Perché Chiudo ‘Porti Alle Navi Delle Missioni Ue’ (Italian Ministry of Internal Affairs, 9 July 2018) <<https://www.interno.gov.it/it/stampa-e-comunicazione/interventi-e-interviste/interventi-e-interviste-raccolta-anni-precedenti/ecco-perche-chiudo-i-porti-navi-missioni-ue>> accessed 15 June 2022; Tweet by Matteo Salvini (Twitter, 5 June 2019) <<https://twitter.com/matteosalvinimi/status/1136148315366514688>> accessed 15 June 2022; Szakacs and Strupczewski (n1); Rankin (n1)

²⁴ It should be kept at the back of one’s head that whether a lie is told by an official government actor or a campaigning private individual can certainly have different implications. However, I believe those to be neglectable for the purpose of the present discussion. For the sake of linguistic simplicity, I will occasionally use the term “politicians” to refer to both elected and campaigning agents.

²⁵ For further reference on how state actors manipulate via ICT, see for example Samantha Bradshaw and Philip N Howard, ‘The Global Disinformation Order; 2019 Global Inventory of Organised Social Media Manipulation’ (2019) Computational Propaganda Research Project <<https://comprop.oii.ox.ac.uk/wp-content/uploads/sites/93/2019/09/CyberTroop-Report19.pdf>> accessed 15 June 2022

²⁶ When I use terms such as “political speech”, it is this broad conception of public, political statements I have in mind unless specified otherwise. Note that the reception and harm of a lie might be contingent on the platform and context in which it is uttered.

Politicians and state officials have a quite “unique position in the information ecosystem“ ²⁷ : Being “perceived as a source of accurate, reliable and relevant information[...]”²⁸, especially as elected leaders, they have a certain amount of epistemic credibility and authority, and might have information monopolies on certain topics (e.g. health data and pandemic statistics) ²⁹ . Consequently, “when official actors are involved, the sophistication, funding and potential impact of a message or campaign of systematic messages is far greater [...]”³⁰. The reception and interpretation of falsehoods might be influenced by the level of authority, popularity and overall influence the respective political agent has.

Considering agents of disinformation, it is important to note that politico-epistemic trouble does not originate from one source, but is most likely a product of a network of sharing and forwarding across different levels. Audiences, whether supporters or opponents, by receiving, interpreting and imparting disinformation and lies in different ways, in turn significantly influence political discourse as well. Furthermore, the “‘agent’ who creates a fabricated message might be different to the agent who produces that message—who might also be different from the ‘agent’ who distributes the message”³¹. What looks like an isolated lie told by an individual could be the product of a strand of information running through media companies, government shadow operators, social media platforms. In the latter case, non-human agents, bots and algorithms can be involved as well.

²⁷ Katie Pentney, ‘Tinker, Tailor, Twitter, Lie: Government Disinformation and Freedom of Expression in a Post-Truth Era’ [2022] 22 (2) Human Rights Law Review 1, 23; If such agents engage in disinformation, they engage in abuse of their perceived epistemic authority “[leading] to credibility excess, whereby unwarranted credibility is given to information from a perceived epistemic authority, even though it is in fact false or misleading”, Watson (n9) 52 referring to Miranda Fricker, *Epistemic Injustice: Power and the Ethics and Knowing* (OUP 2007) and José Medina, ‘The Relevance of Credibility Excess in a Proportional View of Epistemic Injustice: Differential Epistemic Authority and the Social Imaginary’ [2011] 25(1) Social Epistemology 15

²⁸ Watson (n9) 51

²⁹ *ibid* 51

³⁰ Wardle and Derakshan (n16) 29

³¹ *ibid* 6

2.3 What makes a lie? From falsehood to disinformation

One token of false information is not like the other. In their Council of Europe report, Claire Wardle and Hossein Derakhshan classify “information disorder” into three categories depending on falseness, motivation and intent³². First, the epistemic environment can be “polluted” by *malinformation*: genuine and truthful information, which is however designed to cause harm – consider for example Russian operators hacking the US Democratic National Committee or sharing information from former presidential candidate Hillary Clinton’s e-mails³³.

The counterpart to malinformation is *misinformation*, referring to false content that is shared by someone not knowing that it is false or misleading, often thinking that they are helping in sharing it³⁴. At this point, following Lee McIntyre’s classification of lies, it is useful to further discern between “uttering falsehoods” and “wilful ignorance”³⁵: in the former case, someone utters (or shares) falsehoods because they simply erroneously do so, as an intentional mistake. In the latter case, “we do not really know whether something is true, but we say it anyway, without bothering to take the time to find out whether our information is correct”³⁶.

Disinformation on the other hand refers to content that is *intentionally* false, inaccurate or misleading and designed to cause harm or follow a certain motivation (that might be to gain

³² Adding to the confusion, the terminology on information chaos used in policy and legal documents lacks consistency. The following definition focuses on the most important characteristics of disinformation which are present in most accounts. Moreover, although I do not further engage with this quarrel, it should be mentioned that frequently used terminology such as information “disorder”, “pollution”, “chaos” or even the term epistemic trouble I used above implies that there is a healthy information order – an assumption that might be questioned in the first place.

³³ Wardle and Derakhshan (n16) 20; Katelyn Polantz and Stephen Collinson, ‘12 Russians Indicted in Mueller Investigation’ (CNN Politics, 14 July 2018) <<https://edition.cnn.com/2018/07/13/politics/russia-investigation-indictments/index.html>> accessed 15 June 2022

³⁴ Wardle and Derakhshan (n16) 20

³⁵ Lee McIntyre, *Post-Truth* (The MIT Press 2018) 7

³⁶ *ibid* 7; This account on misinformation overlaps with the definition of bullshitting, as described below in 2.3.

money, political influence, or to create chaos in the public sphere)³⁷. Disinformation is thereby congruent with the intuitive definition of lying – when a falsehood is told with the intent to deceive³⁸.

This paper is concerned with instances of *disinformation*. Malinformation, even though indubitably harmful for public discourse, lacks the element of falseness, which makes the strategy of framing malinformation as a fundamental rights issue a different one than I deploy here. Misinformation on the other hand lacks the intentionality that makes a lie a lie indeed; while badly briefed or recklessly talking politicians are problematic, they likely don't directly infringe on their audience's epistemic rights by doing so. Nevertheless, since often misinformation is actually shared disinformation³⁹, it remains crucial for the present discussion when it comes to the public's reception and sharing of disinformation from politicians.

The above characterization of disinformation via a) falseness, and b) intent to harm, still leaves some room for speculation. There are many different ways of being purposefully untruthful; what is labelled a lie could indeed differ from case to case. At this point, it is useful to visualize that disinformation comes on a *spectrum* of falseness and harm. Wardle and Derakshan for instance mention 7 different forms of (mis- and) disinformation, listed here in ascending order of gravity:

- a) (satire or parody: not intentionally harmful but potentially misleading)
- b) false connection: when visuals, headlines or captions don't support the actual content
- c) misleading content: misleading use of information to frame and issue or individual
- d) false context: when genuine information is shared with false contextual information
- e) imposter content: when genuine sources are impersonated
- f) manipulated content: when genuine information or imagery is manipulated to deceive
- g) fabricated content: new content that is 100% false, made to deceive and cause harm⁴⁰

³⁷ Wardle and Derakshan (n16) 5; European Commission (EC) 'Communication: Tackling Online Disinformation: A European Approach' (26 March 2018) COM(2018)236 3

³⁸ McIntyre (n35) 8; I will indeed use the two terms interchangeably in this discussion.

³⁹ Wardle and Derakshan (n16) 29

⁴⁰ Wardle and Derakshan (n16) 6

Even though the report is predominantly dealing with online forms of information disorder, I believe this classification to be useful for emphasizing the nuances of “offline lies” as well. Information might be withheld, selectively displayed, put out of context or distorted by unbalanced emphasis on certain aspects (“spin”). As Katie Pentney notes, practices like labelling journalistic and media output as “fake news” technically meet the criteria of falseness and intentional harm as well⁴¹. Some instances, as misleading use of information and faulty contextualization seem to be common practice in political speech – it is probably too optimistic to hold that there are election campaigns without unrealistic promises and inaccurately framed opponents. Others, involving manipulation and lies made from scratch are less acceptable.

While keeping the many possible forms of disinformation in mind, the main concern for my purpose are “intentional lies about matters of public importance”⁴², “egregious false statements that are demonstrably contrary to well-known facts”⁴³. The paper at hand is mainly concerned with disinformation on *verifiable* information, not “[including] inadvertent errors, satire and parody, or clearly identified partisan news and commentary”⁴⁴. However, even if information is verifiable in principle, what is the truth and what is a lie can sometimes be relative. First, it must be kept in mind that truth and lie might be subject to cultural relativism; politicians in different geographical regions have different rhetorical styles, respectively their audiences might perceive the notions of lie and truth differently⁴⁵. Second, in the current political landscape, truth and falsehood does seem to be increasingly subjective and tied to political view. The next subchapter will give some insight in this so-called phenomenon of post-

⁴¹ Pentney (n27) 16

⁴²This wording is borrowed from Pentney (n27) 2

⁴³ James P Pfiffner, ‘The Lies of Donald Trump: A Taxonomy’ (2018) SSRN <papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3286278_code673337.pdf?abstractid=3286278&mirid=1> accessed 15 June 2022 1

⁴⁴High Representative of the Union for Foreign Affairs and Security Policy (HR/CSFP), ‘Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions; Action Plan Against Disinformation’ (5 December 2018) JOIN(2018)36 1

⁴⁵While this issue opens an interesting topic in itself, I will not engage in this debate here.

truth. Overall, the classifications I provided here are most likely not enough to determine truth and falsehood in a definitive way – to a certain extent, whether someone is lying or not has to be determined on a case-by-case basis, considering the specific circumstances.

2.4 Obsolete facts? From lies to post-truth

The Oxford Dictionary defines “post-truth” as “relating to circumstances in which people respond more to feelings and beliefs than to facts”⁴⁶. Truth is therefore not necessarily abandoned or meaningless, but subject to interpretation – “[facts] can always be shaded, selected, and presented within a political context that favors one interpretation of truth over another”⁴⁷. As Lee McIntyre convincingly puts it, “one gets the sense that post-truth is not so much a claim that truth *does not exist* as that *facts are subordinate to our political point of view*”⁴⁸. As a result, the whole information gathering process, standards of evidence and reasoning, along with the idea of objective truth, independent of emotion or partisan affiliation, end up distorted. As Angela Condello points out, post-truth communication “works at a double level”:

on the one hand, it produces consensus and legitimizes actions, choices, and judgments based on consensus. A typical example is Trump’s way of communicating via Twitter or other social networks. On the other hand, the consensus is so powerful that it de-legitimizes other forms of power, such as institutional or legal power. This allows for the creation of a different dimension in which the correspondence between language and reality is not verifiable, but is instead based on the authority and charisma of the individual that conveys the truth.⁴⁹

⁴⁶ Oxford Learner’s Dictionaries, ‘Post-Truth’ (Oxford Learner’s Dictionaries)<<https://www.oxfordlearnersdictionaries.com/us/definition/english/post-truth?q=post+truth>> accessed 15 June 2022

⁴⁷ McIntyre (n35) 6

⁴⁸ *ibid* 11

⁴⁹ Angela Condello, ‘After the Ordeal: Law and the Age of Post-Truth’ in Angela Condello and Tiziana Andina (eds), *Post-Truth, Philosophy and Law* (Routledge 2019) 21, 23

As a corollary, first, identity-based affiliation can trump facts and group dynamics begin to affect perception of truth and acceptance of standards of evidence. Second, the establishment of an alternate reality via bending the truth at one's liking becomes a political display of power: getting caught lying does not seem to go to the detriment of politicians' career at all – to the eerie contrary, it can be symbol of superiority over the opposition, to create reality, to create facts. Such dynamics open a gateway for authoritarian leaders: As Robert Chesney and Daniel Keats Citron write, “If the public loses faith in what they hear and see and truth becomes a matter of opinion, then power flows to those whose opinions are most prominent – empowering authorities along the way”⁵⁰. In this sense, post-truth lies are not meant to deceive individuals, but the liars are *meant to get caught*. Consider for example then Italian vice premier Matteo Salvini, who tweeted in 2019 that Italian ports were closed for refugees at a time they were actually open. Even if found out, the lie serves its purpose of reframing reality and marking political territory⁵¹.

Unluckily, human thinking is hardwired in a way that actually favors such knowledge-power dynamics – inherent cognitive biases such as assimilation biases (confirmation and disconfirmation biases) and popularity heuristics make us assign more credibility to those who we already agree with or those who are loudest⁵². As a result, in a feedback loop, the same tokens of supposedly true information are repeated over and over again, leading to “the failure of a group to update its beliefs in an accuracy-directed response to new information” and “[making] members [...] liable to converge on and resist correction of false, misleading, or unsupported claims circulated within it”⁵³. Affirmation for one's own group then goes hand in

⁵⁰ Robert Chesney and Daniel Keats Citron, ‘Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security’ [2019] 107 California Law Review 1786 cited in Pentney (n27) 19

⁵¹ Tweet by Matteo Salvini (Twitter, 18 March 2019) <<https://twitter.com/matteosalvinimi/status/1107755836259139585>> accessed 15 June 2022

⁵² Sunstein (n4) 25, 46; Elizabeth Anderson, ‘Epistemic Bubbles and Authoritarian Politics’ in Elizabeth Edenberg and Michael Hannon (eds), *Political Epistemology* (OUP 2021) 10, 12

⁵³ Anderson (n52) 10

hand with disapproval and distrust for those with differing opinions, favoring polarization and radicalization which in turn reinforces bubble dynamics. Regrettably, the bias is amplified by the way information spreads online: social media algorithms are programmed to show what one *wants* to hear and not necessarily what is true, with recommendations and endorsement shaping media consumption⁵⁴. In other words, “netizens tend to form self-contained groups which circulate precise information crafted precisely for those groups”⁵⁵; think about the British referendum once again, where leavers were mostly exposed to pro-BREXIT content⁵⁶.

At this point, also note that untrue statements do not necessarily have to be designed to cause specific harm, or to be explicitly biased by political group belongings in order to be harmful. Taking a deliberate step away from the truth is concerning in seemingly more harmless scenarios as well. Consider the following example: Former American President Donald Trump once stated that the tiles in his daughter’s nursery had been custom-made by Walt Disney. When the truth of this claim was questioned, he simply responded with “Who cares?”⁵⁷. Such statements open up a different facet on the concept of lying, as they seem to casually dismiss the importance of truth. Trumps words do not seem to fit the definition criteria for disinformation, but are rather an expression of a “lack of connection to a concern with truth – [an] indifference to how things really are”⁵⁸, coined with the term “bullshitting” by philosopher Harry Frankfurt. Trump had not much to gain from this lie, he just told it because he could. The playfulness of his statement directly translates into a display of power, with the bullshitter self-entitling themselves to a dissociation from facts and standards of evidence. Being carelessly

⁵⁴ Solomon Messing and Sean J. Westwood, ‘Selective Exposure in the Age of Social Media: Endorsements Trump Partisan Source Affiliation When Selecting News Online’ [2014] 41(8) Communication Research 1042, 1044-1045

⁵⁵ Condello (n49) 25

⁵⁶ *ibid* 25

⁵⁷ Matthew D’Ancona, *Post Truth: The New War on Truth and How to Fight Back* (Ebury Press 2017) 15 as cited in Cassam (n2) 58

⁵⁸ Harry G Frankfurt, *On Bullshit* (Princeton UP 2005) 33-34

indifferent is – to my mind – an even more radical form of distancing oneself from the truth than doing so with a particular motive in mind, making lying equally harmful whether the false information in question is about immigrant numbers and vaccine quotes or about something as trivial as nursery tiles. While the focus of the paper at hand is disinformation in the “traditional” sense, concerning politically salient topics, “softer” instances of spreading falsehoods such as bullshitting show how nuanced disregard for the truth can be and should be kept at the back of one’s head.

Recapitulating, while disinformation can be characterized as being false and intentionally harmful information, the phenomenon is complex and the various forms of disinformation are numerous. In current political discourse, disinformation seems to have a post-truistic trait – truth and falsehood are subject to political interpretation, altering the importance of facts, standards of evidence and ways of reasoning. Being connected to power-dynamics and group-affiliation, post-truth communication must be seen in a bigger scheme of political polarization and information bubbles.

At this point, doubts might remain. After all, politicians and official agents have been lying for millennia. Strategically modifying facts and selectively forwarding the right information to one’s audience might be what many consider an essential skill to even be successful in this profession. The question arising is the following: Isn’t lying in politics, however amplified by digital channels, just common practice, as it has always been? I do not have a definitive answer to this quarrel. I am not certain on whether politicians lying today produces more harm to individuals and society than it did 100 or 2000 years ago. I don’t know whether politicians are actually engaging in disinformation more, or whether we just are more aware of it now, if we are indeed moving *beyond* objective truth or if we have experience this supposed abandonment with every election cycle. However, whether the lies are indeed that distinctive to our time or not, they come with a number of concerning and complex repercussions for individuals as political and epistemic agents, which will be explored in the

next chapter. I argue that wrong information propagated by politicians and government officials is harmful both when individuals are unaware and aware of the deception, posing problems for political self-determination, increasing knowledge bubbles and skepticism towards others, ultimately leading to an epistemic environment where information is gatekept.

3 IMPLICATIONS OF POST-TRUTH DISINFORMATION

Some of the more obvious examples of harmful implications of post-truth disinformation in the political sphere simply stem from a deceived and unknowingly disinformed electorate. The immediate harmful consequences of such situations are concerning: Bolsonaro spreading information on Covid-19, for example advocating for treatment with the anti-malaria drug chloroquine, likely led to actual deaths⁵⁹. Rioters convinced that Trump won the 2020 election and went to attack Capitol Hill in January 2021 faced actual charges⁶⁰. Even under less dramatic circumstances, voters who are badly informed on important electoral matters can then suffer from underrepresented electorates and lacking self-determination. As Kristoffer Ahlstrom-Vij and Jennifer R. Steele simply put it, “if they lack sufficient knowledge on relevant political topics, that person’s political choices might fail to reflect what they truly want”⁶¹.

While these dangers of deception are certainly an important part of the damage from disinformation, the bulk of this chapter is not concerned with individuals being deceived while being unaware of it, but rather focuses on what happens if they are *aware* of the lies. I argue that disinformation in public sphere becomes especially dangerous when individuals know about the possibility of deception, leading to an environment of overall skepticism and distrust.

⁵⁹ Maria Carolina Marcello, ‘Brazil COVID-19 Inquiry Told of Bolsonaro’s Blind Faith in Chloroquine’ (Reuters, 4 May 2021) <<https://www.reuters.com/world/americas/brazil-covid-19-inquiry-told-bolsonaros-blind-faith-chloroquine-2021-05-04/>> accessed 15 June 2022

⁶⁰ Nik Popli and Julia Zorthian, ‘What Happened to the Jan. 6 Insurrectionists Arrested Since the Capitol Riot’ (Times, 6 January 2022) <<https://time.com/6133336/jan-6-capitol-riot-arrests-sentences/>> accessed 15 June 2022

⁶¹ Kristoffer Ahlstrom-Vij and Jennifer R Steele, ‘Policy, Ignorance and the Will of the People: The Case of “Good Immigrants”’ in Elizabeth Edenberg and Michael Hannon (eds), *Political Epistemology* (OUP 2021) 193; Zenor (n19) 48; Note that individuals mostly do not have a good understanding on political topics anyway (see, e.g. Michael X Delli Carpini and Scott Keeter, *What Americans Know about Politics and Why It Matters* (Yale University Press 1996)). To a certain extent individuals are also responsible for their own vices I don’t want to deny that. For an interesting account on epistemic duties see Jennifer Lackey, ‘When Should We Disagree About Politics?’ in Elizabeth Edenberg and Michael Hannon (eds), *Political Epistemology* (OUP 2021)

3.1 Trust no one – Knowledge bubbles and testimonial skepticism

When lies come to the surface and individuals become aware of the deception, there is two interrelated and possibly overlapping options for the disinformed public: the first one is to side with the epistemic authority and accept the lies. Especially in identity-expressive discourse, people often consciously and willfully stick to inaccurate statements for strategical partisan reasons: when shown unlabeled pictures of former presidents Obama's and Trump's inauguration ceremonies and asked which crowd showed more people, 15% of Trump voters pointed to Trumps significantly smaller crowd – it appears as if “[...] some partisans know the truth, but prefer partisan ‘cheerleading’ if they have nothing to gain from accuracy”⁶². While this is certainly an extreme example, it connects to what was said above on the power plays of post-truth communication as well – wrong information might fail to be corrected due to group dynamics and cognitive biases, trapping individuals in knowledge bubbles and echo chambers. The second possible reaction is skepticism – there might be plenty of good just not to trust political leaders anymore. And distrust towards politicians also means distrust towards the group they stand for, supporters, those sharing values and ideologies, those deceived by the lies and those cheering with them. Such skepticism can have worrying consequences for the public sphere.

In our daily lives, we get most of our knowledge from the testimony of others – be it professors, journalists, parents or peers. As Regina Rini notices in her discussion of “weaponized skepticism”,

much of our testimonial knowledge relies upon being able to trust strangers or acquaintances who haven't established an epistemic track record. In day-to-day life, we

62 Anderson (n52) 24, referring to Brian F Schaffner and Samantha Luks, ‘This is What Trump Voters Said When Asked to Compare His Inauguration Crowd with Obama's’ (The Washington Post 25 January 2017) < <https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/25/we-asked-people-which-inauguration-crowd-was-bigger-heres-what-they-said/> >; and John Bullock and others, ‘Partisan Bias in Factual Beliefs About Politics’ [2015] 10 Quarterly Journal of Political Science 519

don't interrogate the personal history of each testimony-giver; instead, we rely upon the belief that most people are reliable on most topics most of the time.⁶³

Relying on others as epistemic sources is both necessary and legitimate for information gathering; a radical skepticist position where nobody is ever trusted is simply impractical. Nevertheless, Rini convincingly argues that *testimonial skepticism* might be appropriate under certain circumstances. Drawing on the example of Russian interference with US-American social media, Rini describes online networks as a deeply manipulated epistemic environment: the involvement with a distorted epistemic environment, as well as the *awareness* of possibly being manipulated triggers a default-distrust towards others. Given these conditions, we cannot rely on most people being correct most of the time anymore; we are instead given good reasons to doubt each other as reliable vectors of knowledge⁶⁴.

Critical readers might dismiss this claim as banal – a certain level of distrust, including towards others – especially politicians – as epistemic sources is really nothing new. At this point it is important to further stress the scale of the issue. As mentioned in the introduction, epistemic systems are per default influenced by social, political and cultural dynamics, frictions and distortions. As mentioned above, a faulty epistemic system does not only affect our knowledge-gathering as such, but takes a toll on private and public communal life as well (say affecting one's personal relations or opening and establishing partisan rifts). In this sense, Rini notes that the distrust resulting from epistemic trouble is not restricted to others as sources of testimonial knowledge, but extends to doubts about others as fellow members of a community: "It is not *just* that citizens, increasingly unsure what to believe, are deprived of the benefits of knowledge transmission. Testimonial skepticism goes beyond this, to undermine citizens' trust in one another *as citizens*, not just as epistemic vectors"⁶⁵. This account shows that the level of

⁶³ Regina Rini, 'Weaponized Skepticism: An Analysis of Social Media Deception as Applied Political Epistemology' in Elizabeth Edenberg and Michael Hannon (eds), *Political Epistemology* (OUP 2021) 32, 42

⁶⁴ *ibid* 32, 44

⁶⁵ Rini (n63) 32, 33, 45; Anderson (n52) 11

skepticism is much more universal: it is not limited to the actual disseminator of disinformation, leading to distrust towards politics and the public sphere *as a whole* (also see 2.2 on the vague contours between agents of mis- and disinformation). The testimonial skepticism introduced earlier is therefore potentially quite wide (“If even the government is lying, then whom can I trust?”). Distrust in one’s fellow political agents thereby becomes a serious threat to democratic life. As Rini writes,

[b]y participating in defective testimonial chains, citizens become complicit in their own epistemic victimization. And once citizens come to realize this fact, they reasonably begin to distrust one another’s competence as co-participants in the collective epistemic projects that make democratic culture possible.⁶⁶

Whether cheerleaders or skeptics, when confronted with lies, individuals tend to engage in what Michael Lynch calls *intellectual arrogance* or the “psycho-social attitude that you have nothing to learn from anyone else about some subject or subjects because you know it all already”⁶⁷ – being stuck in knowledge bubbles and lacking overall trust does hardly seem to foster political dialogue. As a result, a feedback loop of polarization is set into motion once again, as it seems only reasonable for epistemic agents to trust “their group” more than outside sources⁶⁸. The next subchapter dives deeper into this claim and its implications for information gathering processes and their access to knowledge.

3.2 Access denied – Information gatekeeping and the argument from resources

Having more and more reason to be skeptical or intellectually arrogant about what others say, many previously relied on sources of testimonial knowledge cease to exist. This leaves the

⁶⁶ Rini (n63) 32-33; According to Rini, it is the political divisiveness following the skepticism that truly damages democratic discourse and can be weaponized in an international context (hence *weaponized* skepticism).

⁶⁷ Michael Lynch, ‘Political Disagreement, Arrogance, and the Pursuit of Truth’ in Elizabeth Edenberg and Michael Hannon (eds), *Political Epistemology* (OUP 2021) 250, 258

⁶⁸ See also Jeroen deRidder, ‘Deep Disagreements and Political Polarization’ in Elizabeth Edenberg and Michael Hannon (eds), *Political Epistemology* (OUP 2021) 231, 240, 245

epistemic agent in charge of identifying and replacing untrustworthy sources, spending energy on revising potentially false claims and doing their own research. Consequently, when looking through the disinformation chaos becomes increasingly fatigable or seemingly impossible, (political) disengagement seems like a naturally resulting problem. While for some, disengagement might result from pure frustration, I suggest that for many it might actually come from an involuntary lack of resources.

The reasoning behind this claim is as follows: the more knowledge sources individuals are skeptical about, the more *effortful* the gathering of decision-relevant information gets. Becoming or remaining properly informed under conditions of testimonial skepticism might require energy, time and a quite advanced epistemic skill-set that individuals might not be reasonable expected to put in, or worse, that they might just not have. The argumentation holds for polarized individuals stuck in information bubbles, whose access to information is obstructed by default.

With this argument from resources, I argue that access to information is increasingly gatekept in a post-truth environment: When considering time, money and skills as necessary resources to get access to information, issues of vulnerability and preexisting class, race and gender inequalities come into play; the less privileged have less access to such resources and are consequently less able to debunk disinformation and access politically relevant information. Especially online information sources, which are mostly free from traditional gatekeepers like money, are so distorted that they might end up impeding information acquisition rather than aiding it: 79% of participants of a 2017 BBC World Service poll responded to be concerned with the truthfulness of internet content⁶⁹.

These considerations give rise to concerns of so-called epistemic vulnerability and epistemic oppression, defined by Kristie Dotson as “a persistent and unwarranted infringement

⁶⁹ Rory Cellan-Jones, ‘Fake News Worries “are growing” Suggests BBC Poll’ (BBC NEWS, 22 September 2017) <<http://www.bbc.com/news/technology-41319683>> accessed 15 June 2022

on the ability to utilize persuasively shared epistemic resources that hinder one's contributions to knowledge production"⁷⁰. And when epistemic rights are unequally distributed, the debate ties back to the power dynamics of information discussed above, leaving the disinformed disempowered and immobilized in ignorance⁷¹.

Recapitulating, disinformation from politicians and state officials can have the effect of depriving the unknowingly disinformed electorate from real political choice. However, things are equally concerning when individuals are aware of the deception. Active dissemination of lies by figures of epistemic authority does not only affect trust towards the speaker, but also towards one's fellow citizens. Such widespread testimonial skepticism resulting from prevalent false information is increasing we-versus-them thought patterns, damaging democratic discourse, and making information access increasingly complicated. Knowledge end up being gatekept, creating worrisome epistemic power dynamics. I believe that these implications are serious enough to give rise to a number of human rights concerns regarding access to information and political participation. The following chapter analyzes how the existing IHRL framework can be used to protect individuals against disinformation, tentatively arguing for a right to truth spoken by politicians and state officials as well as showing its limits.

⁷⁰ Kristie Dotson, 'Conceptualizing Epistemic Oppression' [2014] 28(2) *Social Epistemology* 116

⁷¹ Such a claim is for example backed up by empirical data on how the affluent usually are better informed on public affairs, or connections between education level and susceptibility for conspiracy theories and populism. Thomas Christiano, 'The Basis of Political Equality' in Elizabeth Edenberg and Michael Hannon (eds), *Political Epistemology* (OUP 2021) 129; For further insight on epistemic vulnerability from a postcolonial and gender-perspective and a more legal perspective respective see e.g. Miranda Fricker, 'Epistemic Oppression and Epistemic Privilege' [1999] 29 *Canadian Journal of Philosophy* 191; Jeremy K. Kessler and David E. Pozen, 'The Search for an Egalitarian First Amendment' [2018] 118 *Colum. L. Rev.* 1953; and more generally Watson (n9) vii

4 HUMAN RIGHTS FRAMEWORK ANALYSIS

Translating the concerns raised in the previous chapters in the language of international human rights law is no easy endeavor; the existing human rights framework offers only a limited basis for protection and quickly shows its limits. As a matter of fact, disinformation is not a legal category and “[i]nternational case law on freedom of expression did not yet come to address specifically disinformation-related legal questions”⁷². Needless to say, there is currently no such thing as a right to truth spoken by politicians, neither there is a right to true and trustworthy information. However, as often the case with epistemic rights, a right to truth spoken by politicians could be seen as indirectly protected⁷³. In the following chapter, by drawing mostly on ECHR case law and other IHRL documents for support, I attempt to show how case law on freedom of expression supports such a right and what challenges there might be.

4.1 Freedom of expression and political participation – Arguing for a right to truth spoken by politicians

In the UN and ECHR human rights systems, access to information is granted under provisions on freedom of expression. For instance, Article 10 of the European Convention on Human Rights (ECHR) on access to information, freedom of speech and opinion explicitly include the freedoms to seek, receive and impart information⁷⁴. Since *Handyside v UK*, freedom of expression has repeatedly been seen as a pillar of democratic societies in the eyes of the European Court of Human Rights (ECtHR), as “[it] constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every

⁷² Policy Department for Citizens’ Rights and Constitutional Affairs Directorate-General for Internal Policies, ‘The Fight Against Disinformation and the Right to Freedom of Expression’ (requested by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) July 2021) 9, 15

⁷³ Watson (n9) 53-54

⁷⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) art 10

man”⁷⁵. Freedom of expression is therefore no isolated right, but holds significant political relevance as a “bedrock of any democratic system”⁷⁶.

The right to access to information has been protected by human rights instruments and judicial bodies in various instances. The general notion of the public’s “right to know” has most prominently been interpreted as concerning a free, open and rich media environment, with state obligations concerning “freedom of the press as a means of ensuring the public’s right to impartial information about world events, urging that the right to know must be viewed as a public, rather than private good”⁷⁷. Importantly as the Human Rights Committee (HRC) notes in General Comment 34 the peculiarities of online media and the way ICT has changed communication have to be taken into consideration as well⁷⁸. In canon ECHR case law such as *Sunday Times v UK*, the European Court of Human Rights (ECtHR) confirmed that freedom of press “guarantees not only the freedom of the press to inform the public, but also the right of the public to be properly informed”⁷⁹.

Besides concerning freedom of press and protection against media-interference, the right to know can be framed as the right to access otherwise non-accessible government-information. Such a right can be granted in cases of victims’ right to know the truth in case of mass atrocities and human rights violations or access to authority-held personal information, or in cases of threats to bodily integrity, such as environmental hazards and health risks⁸⁰. More

⁷⁵ *Handyside v UK* (7 December 1976) ECHR Application No 5493/72 para 49; The *Handyside* case concerns the banning of a sex education schoolbook on grounds of obscenity, which was however deemed as justified interference with freedom of expression by the ECtHR.

⁷⁶ *Bowman v United Kingdom* (19 February 1998) ECHR Application No 24839/94 para 42

⁷⁷ Watson (n9) 57; Also see *Handyside* (n75) paras 14-16; UN Human Rights Committee (HRC), ‘General comment No. 34 (2011) on article 19 of the International Covenant on Civil and Political Rights, freedoms of opinion and expression’ (12 September 2011) CCPR/C/GC/34 para 13

⁷⁸ HRC (n77) 15

⁷⁹ *Sunday Times v UK* (26 April 1979) ECHR Application No 6538/74 para 66; In *Sunday Times*, the Court ruled that a critical news article on a settlement scheme for children with birth defects did not fulfill the requirements for restriction.

⁸⁰ Eduardo Ferrer Mac-Gregor, ‘The Right to the Truth as an Autonomous Right Under the Inter-American Human Right System.’ [2016] 9 (1) Mexican Law Review 132 as cited in Watson (n9) 55; *Leander v Sweden* (26 March

recently, according to Pentney, the ECtHR showed “willingness” to see governments actively withholding information on Covid-19 or climate change impedes the access to information limb of freedom of expression⁸¹.

Importantly, in this context the Court stressed the connection between political self-determination and information access – in *Guerra and others v Italy* it held that in order to make informed choices, individuals might be dependent on government-information⁸². Access to information especially is intertwined with individuals’ capability to enjoy the right to political participation and free elections in particular, with those being dependent on “free communication of information and ideas about public and political issues between citizens”⁸³. Without such, citizens simply lack an important means to hold their leaders accountable; “without [access to information] the citizens of a democracy have but changed their kings”⁸⁴.

Importantly, the resulting state duties are both negative and positive, entailing cultivating an open public sphere with particular respect for any vulnerabilities: As far as press interference goes, the HRC notes that “[a]s a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media”⁸⁵. Notably, such state obligation also extends to private persons or entities⁸⁶. As Pentney notes, in *Dink v Turkey*, the court established a positive state obligation “an enabling

1987) ECHR Application No 9248/81; *Guerra and others v Italy* (19 February 1998) ECHR Application No 116/1996/735/932

⁸¹ Pentney (n27) 12; referring to *Magyar Helsinki Bizottság v Hungary* (8 November 2016) ECHR Application No 18030/11; and *Centre for Democracy and the Rule of Law v Ukraine* (26 March 2020) ECHR Application No10090/16.

⁸² *Guerra and others* (n80) 60

⁸³ UN Human Rights Committee (HRC), ‘General comment No. 25 (1996) on article 25 of the International Covenant on Civil and Political Rights, participation in public affairs and the right to vote’ (12 July 1996)

CCPR/C/21/Rev.1/Add.7 para 25; *Bowman* (n76) para 42; HRC (n77) 12

⁸⁴ Harold Cross, *The People’s Right to Know: Legal Access to Public Records and Proceedings* (Columbia University Press 1953) 1 as cited in Watson (n9) 58

⁸⁵ HRC (n77) 14

⁸⁶ *ibid* 7

environment by allowing for everyone to take part in public debate and express their thoughts and opinions free from fear even if such thoughts and opinions are contrary to those held by official authorities or a significant segment of the public and even if such opinions shock or disturb the public”⁸⁷. In General Comment 25 the HRC states that freedom of expression (amongst freedom of assembly and association) is an essential prerequisite for the right to vote and must be protected by positive measures tackling (traditional) challenges to knowledge acquisition such as illiteracy or language barriers⁸⁸.

I believe that from this framework it is beyond question that individuals as knowers are to be protected under IHRL. However, can such protection be extended to cover a right to truth spoken by politicians? Even though the IHRL instruments cited above do not address the issue of disinformation specifically, they nevertheless offer some help in addressing such a claim. The human rights framework on information access seeks to empower and protect individuals as knowers and recognizes the importance of an open information landscape for them as both epistemic and political agents. An environment of increased post-truth disinformation collides with this aim, since it does not constitute an environment of free communication and can majorly interfere with individuals’ political self-determination. Furthermore, information bubbles and individuals’ inability to trust one’s co-citizens as epistemic vectors *and* political agents do hardly constitute a setting where diverse and pluralist ideas can circulate and politically relevant information is accessible in an unbiased form⁸⁹. Additionally, the gatekeeping effect mentioned before of making knowledge gathering increasingly effortful might constitute an obstacle to access to information that is indeed on par with traditional

⁸⁷ Dink v Turkey (14 September 2010) ECHR Application No 2668/07 and others para 137 [translation] cited in Pentney (n27) 18

⁸⁸ HRC (n83) 12

⁸⁹ While I focus on access to information in connection with political participation, I certainly do not want to imply that citizens who have the status to actually partake in elections should be the sole bearers of a right to know.

gatekeepers like illiteracy and language barriers. A serious commitment to ensuring access to information to vulnerable groups would taking these effects into account as well⁹⁰.

Still, as Katie Pentney masterfully argues in her analysis of ECHR case law⁹¹, not all instances of government disinformation are equally contestable under freedom of expression provisions: When protecting freedom of expression and access to information, human rights instruments seem to be mostly concerned with the state as a *regulator*, either censoring or withholding relevant information. However, when politicians lie, they are not restricting information access in this sense, but they *actively* disseminate disinformation as a participant and speaker in the public sphere. Such speech

[...] does not impede the exchange of information of ideas (as is the case with censorship and withheld information), nor does it target or impair the messenger (as in false claims of ‘fake news’). Instead, it covers mainly new terrain: governments as participants in communicative processes, conveyors of information of public importance.⁹²

It must be admitted that this notion is significantly different than what the drafters of freedom of expression provisions had in mind for the scope of protection⁹³. However, keeping teleological interpretation methods and the “living instrument doctrine”⁹⁴ the ECtHR for example applies in mind, there is some argumentative basis for extending the right to know towards a right to truth spoken by politicians can be seen as a logical progression of ECHR case law.

⁹⁰ In *Öneryildiz v Turkey*, a case concerning a garbage-tip landslide destroying nearby slum dwellings, the applicants alleged “that the Government could not evade their obligations by requiring their poorest and, indeed, least educated citizens to obtain information about environmental matters of such significance” and therefore put an important emphasis on epistemic vulnerability. Despite agreeing with the applicants’ claim on information access, the ECtHR did not take the chance to further elaborate on the vulnerability issue. See *Öneryildiz v Turkey* (30 November 2004) ECHR Application No 48939/99 para 86

⁹¹ For the following analysis, I profited a lot from Katie Pentney’s thorough and convincing review of ECHR case law on freedom of expression. In order to give credit where credit is due, cases and arguments which came to my attention via Pentney’s work are clearly signaled as such in the text and references.

⁹² Pentney (n27) 21-22

⁹³ Pentney (n27) 22

⁹⁴ As first applied in *Tyrer v UK* (25 April 1978) ECHR Application No 5856/72

4.2 Censorship and effective harm – Challenges of a right to truth spoken by politicians

However, establishing a right to truth spoken can be a balancing act. Since sanctioning lies would mean to restrict politicians' active right to freedom of expression, the issue stands in the ancient crossfire between more expression and less expression. When it comes to political speech, the former approach is usually the favored one and high levels of protection against restriction are granted. When deciding on whether restriction of freedom of expression is permissible, "the Court cannot confine itself to considering the impugned court decisions in isolation; it must look at them in the light of the case as a whole, including the articles held against the applicant and the context in which they were written"⁹⁵. In doing so, the Court follows a three-part test: the restriction must be prescribed by law, follow a legitimate aim and be necessary in a democratic society⁹⁶.

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. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression set forth in Article 10 of the Convention.⁹⁷

While I certainly agree that the reasoning behind such an approach favoring less restriction – to prevent authorities from arbitrarily censoring "false" statements – is legitimate, the dangers of state interference with freedom of expression do not have to come to the detriment of truthfulness in public discourse. To look at the issue from another perspective, it might be time to question how much allowing falsehoods to circulate is actually following the "demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic

⁹⁵ *Lingens v Austria* (8 July 1986) ECHR Application No 9815/82 para 40

⁹⁶ ECHR art 10(2)

⁹⁷ *Salov v Ukraine* (6 September 2005) ECHR Application No 65518/01 para 113; also see Pentney (n27) 25; In the *Salov* case, Ukraine was found to be in breach of Article 10 for convicting a private individual for dissemination of false information on an electoral candidate.

society”⁹⁸. As Seana Shiffrin makes a similar point, “[d]eliberately insincere speech should not garner the same sort of respect because it does not participate, even at the fringe, in the same values as sincere or transparent speech. Moreover, if deliberate misrepresentations undercut the warrants we have to accept each other’s testimonial speech, then we have reason to think that deliberate misrepresentations interfere with the aims of free speech culture”⁹⁹. More recent IHRL documents mirror this dismissal of an either-or approach: as the UN 2017 *Joint Declaration of International Mechanisms on Freedom of Expression and ‘Fake News’, Disinformation and Propaganda* stresses,

the human right to impart information and ideas is not limited to “correct” statements, [...] the right also protects information and ideas that may shock, offend and disturb, and that prohibitions on disinformation may violate international human rights standards, while, at the same time, this does not justify the dissemination of knowingly or recklessly false statements by official or State actors. [...] State actors should not make, sponsor, encourage or further disseminate statements which they know or reasonably should know to be false (disinformation) or which demonstrate a reckless disregard for verifiable information (propaganda).¹⁰⁰

Balancing free speech and restriction of lies does not remain the only challenge. Coming back to *Salov*, as Pentney notes, the case nevertheless has “important *a contrario* potential”¹⁰¹ even though it did not come to restrict false information. *Salov* concerns a private individual disseminating falsehoods, with limited range of influence and unproven intent to deceive. If there was broader influence and proven intent, the Court’s decision might have been different¹⁰². It seems therefore that in a possible case before a human rights judicial body, what

⁹⁸ *Handyside* (n75) 49

⁹⁹ Seana V Shiffrin, *Speech Matters* (Princeton University Press 2014) 117

¹⁰⁰ The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE), Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and Access to Information ‘Joint Communication on Freedom of Expression and “Fake News” Disinformation and Propaganda’ (3 March 2017) FOM.GAL/3/17 preamble, 2.c

¹⁰¹ Pentney (n27) 27

¹⁰² Pentney (n27) 27

counts might be the real and effective harm resulting from the lie¹⁰³. Sometimes, such harm might be immediately visible and assessable, especially if false information leads to repercussions for more tangible rights¹⁰⁴: Think of connections with the right to health, especially visible during the Covid-19 or Ebola pandemics¹⁰⁵. Moreover, disinformation might be a gateway for actual illegal speech, discrimination and incitement, especially when it is targeted at particular groups and minorities. Lastly, especially in political campaigning, disinformative statements often take the shape of untrue information about other candidates, harming their reputation¹⁰⁶. In such cases, human rights provisions on the rights entangled with freedom of expression, for example on the right to health, prohibition on discrimination and defamation help arguing for a right to truth spoken by politicians.

However, not all instances of disinformation have immediate and visible repercussions for other rights – most falsehoods do not really constitute illegal content like defamation or incitement that would be unprotected by freedom of expression¹⁰⁷. In such cases, “the requisite causal connection between the government’s speech and harm

¹⁰³ Such a harm-based approach is for example applied in the US-landmark case *United States v Alvarez*, where the Supreme Court deemed knowingly lying as lawful under the First Amendment as long as it did not produce actual harm. *United States v. Alvarez* (2012) USSC 567 709

¹⁰⁴ In fact, under the ECHR freedom of expression is sometimes interpreted along an “abuse clause” (ECHR Article 17) when others’ rights are impacted by the speech. Hannes Cannie, and Dirk Voorhoof, ‘The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?’ [2011] 29 (1) Netherlands Quarterly of Human Rights 54, 58

¹⁰⁵ High Representative of the Union for Foreign Affairs and Security Policy, ‘Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions; Tackling COVID-19 Disinformation - Getting the Facts Right’ (6 June 2020); David P Fidler, ‘Disinformation and Disease: Social Media and the Ebola Epidemic in the Democratic Republic of the Congo’ (Council on Foreign Relations 20 August 2019) <<https://www.cfr.org/blog/disinformation-and-disease-social-media-and-ebola-epidemic-democratic-republic-congo>> accessed 15 June 2022

¹⁰⁶ As far as defamatory lies are concerned, in his concurring opinion in *Lindon, Otchakovsky-Laurens and July v France*, judge Loucaides argues that “the suppression of untrue defamatory statements, apart from protecting the dignity of individuals, discourages false speech and improves the overall quality of public debate through a chilling effect on irresponsible journalism. Moreover, such debates may be suppressed if the potential participants know that they will have no remedy in the event that false defamatory accusations are made against them. The prohibition of defamatory speech also eliminates misinformation in the mass media and effectively protects the right of the public to truthful information. Furthermore, false accusations concerning public officials, including candidates for public office, may drive capable persons away from government service, thus frustrating rather than furthering the political process”. *Lindon, Otchakovsky-Laurens and July v France* (2 October 2007) ECHR Applications Nos 21279/02 and 36448/02 concurring opinion

¹⁰⁷ Wardle and Derakshan (n16) 9

to its targets' choices and opportunities"¹⁰⁸ can be quite tangled. I believe this to be true especially for the more intricate instances of damage to individuals' access to information and the public sphere that happen when they are not technically deceived but (partly) aware of the lies (i.e. skepticism and information bubbles). Additionally, harm might be even more difficult to assess when the rights affected are cultural and social rights, such as freedom of religion or participation in cultural life. Unless there are tangible rights-breaches, a right to truth spoken by politicians might fail in the admissibility phase¹⁰⁹ – deep, long-term harms might face a vacuum of protection.

Lastly, the “verifiability” of the lie in question might also lead to challenges in assessing a potential right to truth spoken by politicians and state officials: In *Lingens v Austria*, the Court has pointed out that value judgements, not being “susceptible of proof”, should be protected more strongly than false facts¹¹⁰

Summing up, ECHR case law puts a strong emphasis on freedom of expression for a functioning democratic sphere and provides protection for individuals as knowers, giving some argumentative basis for the suggested right to truth spoken by politicians. However, a) the new perspective on the government as a speaker rather than a regulator, b) the high protection level of political speech and c) the absence of immediate harm pose challenges and call for a careful case by case assessment of each potential claim for a right to truth spoken by politicians. Unbalanced review might lead to a misleading inflation of the “democratic value” of false statements as well as a vacuum of rights protection for less visible long-term harm to individuals and public discourse.

While I made a case for restricting lies so far, worries about the active limb of freedom of expression and a potential “overrestriction” of supposedly false statements are valid and must

¹⁰⁸ Helen Norton, *The Government's Speech and the Constitution* (Cambridge University Press 2019) 8

¹⁰⁹ Also see Pentney (n27) 25

¹¹⁰ *Lingens* (n95) 46. In *Lingens*, the Court held that a defamation claim against a journalist criticizing a politician did constitute an interference with freedom of expression.

be taken into careful consideration when assessing whether to censor lies. As a matter of fact, various disinformation regulation schemes have been implemented all over the globe to create a lawful gateway to silence political opponents¹¹¹. Keeping this challenge and the findings of the previous chapters in mind, chapter 5 briefly engages with what possible cornerstones of regulating lies could be, providing guidance for both courts and policy makers.

¹¹¹ See for example recently adopted so-called Anti-Fake-News legislature in Malaysia, Singapore, the Philippines and Turkey.

5 DEBUNKING DISINFORMATION – LESSONS ON REGULATING LIES

When regulating an environment of information chaos, paternalistically establishing “one truth” that can be “safely” propagated to the electorate can quickly become a tool for censorship and repression. It is for this good reason that political speech and freedom of expression in general are highly protected in democratic societies. Therefore, in order to foster a healthy information environment and public sphere, disinformation spread by political agents should be regulated, but state interference must take place in a controlled and safeguarded way and must be balanced against freedom of expression in political speech.

In identifying disinformation and determining its regulation, three primary factors should be taken into account: the falseness of the statement, the intent of the speaker and the harm following from the lie. Whether a statement is untrue can be assessed by scientific, statistical or historical prove. Determining falseness can indeed be relatively straightforward in some cases; the BREXIT leave-campaign slogans for instance were simply wrong and contrary to the official numbers. However, as elaborated on above, in a post-truth environment, even claims on which there is extraordinarily strong scientific consensus (e.g. anthropogenic climate change) cause significant controversy as regards to their truthfulness. Such different perceptions of truth and standards of evidence can pose challenges to the legitimization of regulation. Overall, when engaging in fact-checking, policy makers should take precaution to ensure unbiased and trusted assessment, especially when outsourcing the task¹¹².

As far as intent is concerned, proving *deliberate* disinformation can be difficult – depending on the case, over proving that the speaker knew what they said was wrong, it might be enough to prove that they reasonably should have known so.

¹¹² AccessNow, Civil Liberties Union for Europe and European Digital Rights, ‘Informing the Disinformation Debate’ (24 October 2018) 10. For a list of fact-checking organizations, see Wardle and Derkashan (n16) 86.

When determining what instances of disinformation should be regulated, one way to approach the issue is to assess the harm resulting from the lie. In most cases, it will indeed be false statements on socio-politically salient topics that deceive the electorate and cause most damage to discourse. Circumstantial factors like the rank of the politician, their respective scope of influence, the platform and context in which the statement was uttered and whether the speaker had information monopoly on the propagated information should be taken into account when assessing the harm as well. The spread of falsehoods that could pose an immediate threat to the audience might be more vigorously regulated – think again of disinformation regarding health, on (say) vaccines or other pandemic protection measures. As mentioned earlier, the disadvantage of such a harm-based approach is that disinformation without *visible* negative short-term consequences falls under the radar, even though it might still contribute to damaging political discourse on the long run. Overall, regulation should be accompanied by safeguards, including thorough reviews of proportionality and necessity and should be deployed on a case by case basis, taking historical, social and political circumstance into account¹¹³.

As tackling disinformation involves action from many actors, policy targeting disinformation coming from state officials should involve multiple agents and duty-bearers in order to avoid responsibility shifting. Political parties monitoring election campaigns should impose and better enforce codes of conduct embracing truthful campaigning as a value. States should hold lying officials accountable, if adequate via warnings and impeachment procedures, provide ways of judicial remedy for those affected by the disinformation and supply necessary resources and to thoroughly carry out the assessment described above. EU regulation sets some promising standards regarding seeing the fight on disinformation as a coordinated multilevel and multistakeholder endeavor: the EU Action Plan on Disinformation for instance is based on

113 For more details see Camille François, Graphika and Berkman Klein, ‘Actors, Behaviors, Content: A Disinformation ABC; Highlighting Three Vectors of Viral Deception to Guide Industry & Regulatory Responses’ (20 September 2019) <https://science.house.gov/imo/media/doc/Francois%20Addendum%20to%20Testimony%20-%20ABC_Framework_2019_Sept_2019.pdf> accessed 15 June 2022

four pillars: “(i) improving the capabilities of Union institutions to detect, analyse and expose disinformation; (ii) strengthening coordinated and joint responses to disinformation; (iii) mobilising private sector to tackle disinformation; (iv) raising awareness and improving societal resilience”¹¹⁴.

For the special challenge that is online disinformation, technology companies should be obliged to keep their platforms clear of harmful lies. When regulating online content, blocking of content should be carefully deployed. Deprioritizing content or labelling it instead of removing it can have the advantage not erasing victims’ visibility and evidence, particularly in disinformation cases that involve incitement or violent speech towards certain groups ¹¹⁵. Banning politicians from platforms might not hold up to proportionality reviews.

Lastly, disinformation regulation, even if diligently and proportionately done, does not necessarily succeed in reestablishing trust between fellow citizens and fellow participants in the public sphere. Therefore, states should be under the positive obligation to equip individuals as knowers with tools on how to handle the information chaos, debunk lies and engage in constructive political dialogue with those of differing opinions. A by now frequently demanded policy measure is to increase (digital) media and information literacy in early education, aiming at how to access and consult diverse sources, increase awareness about existing politico-epistemic distortions and thereby decreasing susceptibility to deception¹¹⁶. In doing so states should be aware of the fact that information access is a matter of resources and take preexisting vulnerabilities of marginalized groups and minorities into account. Finally, building the necessary democratic resilience should be viewed as an interdisciplinary issue, demanding action in many policy areas and including measures not specifically targeted at disinformation.

¹¹⁴ HR/CSFP (n44) 5

¹¹⁵ Wardle and Derakshan (n16) 9; On content moderation and visibility see: Amanda Hess, ‘Why Women Aren’t Welcome on the Internet’ (Pacific Standard 6 January 2014) <<https://psmag.com/social-justice/women-arent-welcome-internet-72170>> accessed 15 June 2022

¹¹⁶ See for example EC (n37) 12

Consider once again recent EU legislation: the proposals for the Anti-SLAPP Directive and the Digital Services Act, the EU might be in the process of installing a framework that might not yet tackle disinformation coming from politicians directly, but nevertheless equips the public sphere with indirect protection mechanisms, providing a framework for content regulation and protecting those who seek truth.

6 CONCLUSION

When politicians are lying, the damage goes deep. Besides depriving the unknowingly disinformed electorate from real political choice, the dissemination of lies by figures of public and epistemic authority does not only affect the electorate's trust towards them, but also towards their fellow citizens. Such widespread testimonial skepticism is increasing polarization, impeding dialogue and making information access increasingly complicated, thereby gatekeeping knowledge and creating worrisome epistemic power dynamics. ECHR case law, keen on fostering freedom of expression for a functioning democratic sphere and protecting individuals as knowers, provides some argumentative basis for the suggested extension towards granting a right to truth spoken by politicians. However, challenges in balancing a possible restriction of lies and assessing the real effective harm that comes from them remain, potentially leading to a vacuum of rights protection for less visible long-term harm to individuals and public discourse. In order to have real chance at tackling the problems introduced above, lawsuits against lying politicians and fact-checking statements are not enough. In order to reinstall trust in the public sphere and burst information bubbles, we need to shift narratives, foster information literacy and open discussion culture.

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