

The European Union Digital Single Market

Europe's Digital Transformation

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Opportunities and threats

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Introduction

The purpose of this chapter is to analyse the current legal content of the freedom of speech, as well as the opportunities and threats to the freedom of speech in the digital age. Representative national regulations for the Western hemisphere (EU member states and the United States) were analysed. The standard of the so determined “community of values” was confronted with the practice of selected countries (e.g., Poland, see Belavusau, 2013, pp. 16–31, 116–165).

The European law and legislative proposals were evaluated from the perspective of the opportunities and threats to the freedom of speech.

“Freedom of speech” is one of the Four Freedoms (Roosevelt, 1941)—it is a personal freedom, which is closely connected with political rights. It was proclaimed as a tool of resistance against absolute power for the establishment of fundamental human rights and democracy. It serves to realise the right to democracy and the rule of law, and it determines the space of human freedom to choose religion and beliefs, scientific research, and artistic expression. “Freedom of expression constitutes one of the essential foundations of such a (democratic—J.M.) society, one of the basic conditions for its progress and the development of every man” (see case *Handyside v. The United Kingdom*, ECHR 1976, 5493/72). The freedom of speech is a negative right; this means that the government—by law—cannot take action against the exerciser of this freedom.

This freedom also has a positive dimension. The state is obliged to protect freedom of expression from unauthorised interference by private actors in the exercise of freedom of expression by others (this is regulated by the horizontal application of the law). The state is also obliged to introduce positive measures, that is, to take measures for the free flow of information and ideas (“direct” positive measures).

The proclamation of the “freedom of speech” took place in opposition to the authority (religious and secular), which was protecting itself through anti-blasphemy laws.¹ The development of the freedom of speech proceeded from restricting the operations of anti-blasphemy laws, through their reduction to the sphere of religious crime, to the gradual elimination of repression.²

The freedom of speech is not absolute, there are several restrictions to it, which are supposed to protect, first, another person, and second, social groups and the society from violation of their rights (“he who uses a right injures no one”).³ The ECHR when resolving disputes concerning freedom of speech applies a three-part test: the restriction must be prescribed by law and meet the corresponding criteria of precision and accessibility; it must have a legitimate aim as provided in Article 10, paragraph 2, and it must be “necessary in a democratic society” (see Council of Europe Publishing, 2007); and the restriction must be “necessary” (Mendel, 2010, pp. 9–23).

Digitalisation has opened many doors for “speech”, reducing the barriers of human communication and transfer of thought. The right to freedom of speech includes the freedom to hold opinions (without interference) and to seek, receive, and impart information and ideas through any media, including the internet, regardless of frontiers. Digitalisation opens new possibilities of communication for human(s)—obtaining, transferring, and collecting information has become much easier. It creates the possibility of building a universal civil society—the information society (WSIS, 2003)—where the free flow of information facilitated by digitalisation can enable world cohesion.

The reality, however, is different from this ideal, or dream (Bischoff, 2021), as there are many barriers to communication. They are derived, in many cases, from the barriers to wealth and education, and are one source of digital exclusion. The existence of these barriers is a result of the limited effectiveness of efforts to realise social cohesion in the state/world dimension (Council of Europe, 1982). These barriers can also be erected consciously and deliberately by authoritarian regimes. Such regimes either temporarily prevent people from communicating or erect walls that restrict access to information or filter information.⁴

The exercise of the freedom of speech is a source of opportunity, while the restriction and/or abuse of the freedom of speech is a source of threat. Restricting and/or abusing the freedom of speech violates human rights, weakens/destroys democracy, and disrupts the functioning of civil society. The catalogue of activities restricting or abusing the freedom of speech is *relatively* fixed, what is subject to change is the frequency with which they are undertaken or their negative effects at a given time. Restricting the freedom of speech is a regular practice of authoritarian regimes. The negative consequences of the abuse of the freedom of speech through hate speech and disinformation are growing exponentially. Such abuses disrupt the functioning of democratic institutions (influencing behaviours, the decisions of citizens) and threaten the health and life of people.⁵

Digitalisation and the internet make it easier to communicate, as stated previously, but they also make it easier to limit or abuse the freedom of speech and make it more difficult to defend against these practices. The starting date of this “new era” is 1991 when the World Wide Web (the Web) went public. This date marks the beginning of an era of faster and easier communication, but also the rise of threats to freedom of expression and risks associated with abuse of the freedom of expression. The establishment of digital platforms acting as the communication medium created a gap in terms of the tools of protection of the freedom of

speech, on one hand, and from the abuse of rights by those who exercise the legal right on the other (both the “operator” of the platform and the “speaker”). Thirty years after the emergence of the Web, Donald Trump challenged hopes for a new dimension of freedom by using his accounts on social media to attack opponents and issue threats. The result of this awareness of the combination of opportunities and threats is contained in the European Action Plan for Democracy, which sets out a framework for the implementation of the freedom of expression and the discussion that accompanied the work on the plan.

Digital technology has added a new instrument to the toolbox of communication technology, without complementing the toolbox of the implementation of the freedom of speech with new instruments. Countries deal with the problem of verbal aggression in different ways, for example, in Germany, a ban on hate speech has been set up, and in India, a fight against “malicious information” has been undertaken. In a situation where the law imposes restrictions on states (in the United States, the First Amendment guarantees a right against government censorship), platforms have taken on the role of censors (this is possible because courts have ruled that platforms have a right to ban people from their products). Facebook, Twitter, Instagram, and YouTube all routinely remove posts deemed to violate the platforms’ standards on violence, sexual content, privacy, etc. The platforms also ban many users or entire topics. Twitter specifically labels posts that contain misleading or disputed claims.⁶ The reaction of some users of social media to platform censorship was to migrate to other platforms, such as Parler. However, the abusers of freedom have been disappointed in their hopes for binding the platforms; following the attack on the Capitol by Trump supporters, the Parler app was removed from the IOs App Store and Google Play.⁷ The restrictions are therefore imposed by private content providers and/or a hosting company.

This practice raises doubts from the perspective of the functioning of the freedom of speech. It is obvious that in a newspaper, the publisher decides what/whose “speech” it will print; this has been the case in the past and remains the case today. However, in the past, when deprived of the opportunity to publish an expression, one wishing to have a medium to disseminate information or views could simply start publishing one’s own newspaper. In the age of the internet, the monopoly by the big tech firms, known by the acronym GAFAM (Google/Alphabet, Apple, Facebook, Amazon, Microsoft), is in practice impossible to compete with.⁸

This chapter presents the case of Poland as an example of the feedback loop between the practices of (state) infringement and abuse of the freedom of speech (by the state and other actors) and the regression of democracy (norms and institutions). In Poland, the freedom of speech is, on the one hand, restricted (and these restrictions are an abuse of power) and, on the other hand, the state—or more precisely, media subordinate to the government—abuses the freedom of speech and tolerates abuse of it. The state does not take action as required by law in response to hate speech and disinformation. Hate speech and disinformation are instruments of the ruling party’s exercise and maintenance

of power. The unsatisfactory level of the implementation of the freedom of speech is further lowered by the progressive restriction of freedom of the media in Poland, as entities are taken over by the authorities. The Polish authorities treat criminal law as a protective umbrella against criticism from the citizens and the fourth estate—free media. The same authorities want to restrict freedom of scientific research and artistic expression. Unfortunately, these phenomena do not make the “Polish case” an exception among the countries of the Western hemisphere; a similar process is taking place in Hungary and Turkey (outside the Western hemisphere also in China, Belarus, and Russia).

1 The roots of the freedom of speech

“*Reddite ergo quae sunt caesaris, caesari; et quae sunt Dei, Deo*” (Matthew 22:21). It is difficult to overestimate the social revolution having this statement on its banner had for the formation of Western European civilisation. The effect is a civilisation in which “power” was divided. The power was divided into a temporal earthly realm belonging to a secular ruler and a spiritual eternal kingdom belonging to the spiritual superior. The different authorities drew their basis from separate legitimations. This fundamental character of freedom of expression for European socio-legal civilisation was pointed out by Benjamin Franklin, who stated, “Freedom of speech is a principal pillar of a free government: When this support is taken away, the constitution of a free society is dissolved” (Franklin, 1737).

This first division of power gave rise first to the rule of law and human rights and later to the tri-partition of power and democracy. It was a unique experience, geographically limited to the societies of Western Christianity and the states built within that cultural circle. Attempts to universalise the division(s) of power on a global or (all) European scale have encountered difficulties and experienced reversals towards unity.⁹ The Venice Commission (European Commission for Democracy through Law) assisted in the process of extending the area of the freedom of speech to the post-communist countries of Central and Eastern Europe by preparing opinions and reports (Venice Commission, 2016).

The division of power into the secular and the spiritual found expression, among other things, in the division of law and its guardian. The state authority, guarding the law, limited the defence—with the instruments of the state—of the rights of faith. The Church, perceiving the recurrence of political conflicts in the state, reservedly identified itself with the rulers—the earthly power, paying a high price for cases of unconditional support for the authorities. In this way, two orders emerged: one, in which the state with the instruments of law defends the values and norms of the system—in this order, freedom of speech is both a value and an instrument for defending values; and the other, in which the truths of faith are revealed and therefore unquestionable. Each of these rules has limitations, with internal fuses.

A particular experience of Western European civilisation was the genocide planned and executed by the Nazis. The factor that facilitated the Holocaust, the genocide of Roma and others, was their dehumanisation in

propaganda and hate speech in the public space (Rogalska and Urbańczyk, 2017, pp. 117–135). After World War II, it was recognised that to prevent further wars and genocide, it was necessary to prevent the re-creation of (new) *Der Stürmer* by legal instruments. However, the implementation of restrictions is not universal.

Subsequent international law regulations affirming the human right to freedom of speech introduced restrictions on how this freedom could be exercised. The original division of power into secular and ecclesiastical did not take place in the culture of Eastern Christianity even though the Gospel according to St. Matthew belongs to the common part of the canon of books of the Holy Scripture of Christianity. The unity of the “throne and the altar” in, among others, Russia persists to this day. This model influenced the societies and states under Russian political influence. Trofim Lysenko’s views (support of Lamarckism and rejection of Mendelian genetics) were officially inscribed in the canon of the orthodoxy of the communist state. Criticism of Lysenko’s views was tantamount to criticism of the party as it undermined the canon of party infallibility. Resistance of the laws of nature to the will of the party undermined the legitimacy of the party’s power. Józef Kukulka (political scientist, professor at the University of Warsaw) defended the party’s “revealed” claims against scientific reflection; the authorities in Poland considered critical analysis of social and economic reality to be the same attack as a strike or a political demonstration.

Among those with a sense of belonging to the Polish national group and who were also Catholics—subjects of the Russian Empire under the informal patronage of the Catholic Church—a marker of national belonging emerged in the form of the synonym “Pole = Catholic”. On the one hand, this promoted the construction of the nation as a community (imagined) and, on the other hand, it introduced internal divisions into the territorial group. The goals-interests, the identity of the Polish-Catholic, were different from their fellow inhabitants. Even without proof that this conflict was created by the tsarist secret service, its persistence facilitated the exercise of power and the pacification of the national liberation struggle. The consequences in the form of social conflict between nationally and religiously defined groups proved more durable than tsarist Russia. The conflicts prevented, for example, cooperation between Poles and Jews, for example, during the Paris Peace Conference. The conflict affected the entire history of the Second Polish Republic (1918–1939); its manifestations included the assassination (1922) of Gabriel Narutowicz, the first president of Poland, as “elected by minorities”, as well as excesses and disputes with other (Belarusian, Ukrainian, and Jewish) minorities. In the years 1939–1945, it reached a bloody dimension facilitated by war and occupation. After the war, there were eruptions of racial and religious hatred. The authorities used the formula “*divide et impera*”, and superiors of national-religious groups were reluctant to spread their umbrella over “strangers” attacked by “their own”.

The pro-democratic forces carrying out the political transformation after 1989 were looking for legitimacy for the changes on the part of the hierarchical Catholic Church, fearing the refusal of society to bear the costs of

the reforms. The Catholic Church hierarchy, ideologically averse to “atheistic socialism”, was also afraid of the “westernisation” of society (this process was called the “culture of death”). Under these circumstances, a “deal” was struck in which those in power obtained the support of the hierarchical Church¹⁰ for accession to the EU and the Council of Europe, and above all the absence of systemic opposition to reform. The other side received—to the extent relevant for consideration—the commitment of the state to protect “Christian values” in the public space, that is, the penalisation of blasphemy. The “alliance of the altar and the throne” was restored—formally, and even more strongly, in practice. The ecclesiastical hierarchy gained the right to grant imprimatur to promotions of public officials, in the army, police, fire departments, etc. The state authorities *contra legem* handed over to the Church hierarchy the archives of the communist secret police in the section on Catholic priests with their contents covering both collaborations with the communist authorities and criminal offences (including paedophilia).¹¹ Outside the control, there were transfers of public funds to the Catholic Church and transfers from the Catholic Church to people connected with it. This dimension of kleptocracy developed in conditions of restricted freedom of speech.

It was accompanied by restraint in building civil society—a community of citizens, in opposition to which the concept of a nation united by an ethnic-religious core gained support. Already in the first free elections in 1989 (such were the elections to the upper house of parliament) to the Senate in the Radom district, a fight took place between the candidates of the “democratic opposition” in which the candidate from “Lech Walesa’s list” was accused of not being a real Pole. In each subsequent parliamentary as well as presidential elections, the Polish origin of a candidate, identified with Catholicism, determined the circle of voters. In the campaigns, there were appeals to xenophobia, racism, etc. Hierarchical Catholic Church was openly involved in election campaigns; it was not forbidden for a political party to use the name “Catholic Electoral Action”, election propaganda was conducted in churches, and politicians appeared during masses. Some of the voters believed that their candidate-party programme had been sent by God, preaches revealed truths, and realises the divine plan. President Andrzej Duda was greeted by posters reading “blessed is the womb that carried you and the breasts that suckled you”. Populist political parties used and reinforced these sentiments, and the hierarchical Catholic Church did not explicitly recognise the acts of such worship as blasphemy.

In Poland, the process of abolishing the separation of State and Church (*separationis ecclesie et status*) is underway; those who create the law and those who apply it seek legitimacy for the law in religion. In Poland, freedom of expression is restricted by law. The forms and scope of the restrictions are varied. However, the restrictions themselves are illustrated, for example, by the obligation of schools to respect the “Christian system of values” in the process of education (Act of 14 December 2016 Education Law Dz.U.2001.1082), analogous obligations on both public and private media (Act of 29 December 1992 on radio and television Dz.U.2020.805), and,

above all, the inclusion of “offense of religious feelings” (Article 198 of the Penal Code) under criminal repression. It can be said that “Christianity”, or rather Catholicism, is the state religion in Poland (Cieślak, 2007, pp. 203–217). As a result, the division of power into secular and spiritual was *de facto* abolished in Poland. The state performs the *brachium saeculare* on behalf of the hierarchical Catholic Church, the state is the “secular arm” of this Church (Wójcik, 1967, pp. 105–142).

The assessment that freedom of speech is being violated in Poland is not exclusively the author’s own. A similar assessment was made by the European Parliament in the resolution of 16 September 2021 on media freedom and further deterioration of the rule of law in Poland (2021/2880(RSP)).

This departure from (Western) European civilisation is an openly proclaimed political slogan; in 1993, the vice prime minister of the Polish government (Henryk Goryszewski) officially stated: “It is not important whether Poland will have capitalism, freedom of speech, or prosperity—the most important thing is that Poland will be Catholic” (Goryszewski, 1993).

2 Freedom of expression—the norm and its limits

The freedom of speech has been affirmed in legal acts that form the foundation of human rights and set a universal standard for them. These acts are as follows: An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (English Bill of Rights, 1689), according to which “the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament”; Declaration of the Rights of Man and of the Citizen (Déclaration, 1789), in which Article XI states that “La libre communication des pensées et des opinions est un des droits les plus précieux de l’homme: tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l’abus de cette liberté dans les cas déterminés par la loi”; the First Amendment to the United States Constitution, co-creating the Bill of Rights (The US Bill of Rights, 1791), which stated that “Congress shall make no law . . . prohibiting the free exercise thereof, or abridging the freedom of speech, or the press”.

After World War II, states declared at the UN General Assembly a commitment to the “universal respect for and observance of human rights”, and among them the “freedom of speech”. The UN General Assembly—at its first session—declared, “Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated” (A/RES/59(1): Para. 1). This provision was subsequently incorporated into the Universal Declaration on Human Rights, the cornerstone of UN Bill of Rights (Article 19): “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers” (UDHR, 1948).

The Article 19 provision was further developed in Article 19 of the International Covenant on Civil and Political Rights (OHCHR, 1966):

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, or print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Freedom of speech and the legal framework for implementing it in the European space is defined by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention, 1950):

1. Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary for a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Analogous standards confirm, among others, the American Convention on Human Rights (Article 13), and the African Charter on Human and Peoples' Rights (Article 9). Article 11 of the Charter of Fundamental Rights of the European Union (Charter, 2012), in part mirroring the language of the Universal Declaration of Human Rights and the European Convention on Human Rights, provides that

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

In international fora, there is a growing awareness that all freedoms (and therefore freedom of speech) are an interdependence of duties and responsibilities. This interdependence of duties and responsibilities has been pointed out by the InterAction Council.¹² The Preamble to the Universal Declaration on Human Responsibilities pointed out the dangers of limiting oneself exclusively to rights, failing to see the interdependence of rights and duties or obligations:

whereas the exclusive insistence on rights can result in conflict, division, and endless dispute, and the neglect of human responsibilities can lead to lawlessness and chaos, *whereas* the rule of law and the promotion of human rights depend on the readiness of men and women to act justly.

(Declaration, 1997)

Oscar A. Sánchez¹³ during the work on the Declaration pointed out that

traditionally we have spoken of human rights, and indeed the world has gone a long way in their international recognition and protection since the Universal Declaration of Human Rights was adopted by the United Nations in 1948, it is time now to initiate an equally important quest for the acceptance of human duties or obligations.

(Sánchez, 1997)

The Declaration includes Article 14:

The freedom of the media to inform the public and to criticise institutions of society and governmental actions, which is essential for a just society, must be used with responsibility and discretion. Freedom of the media carries a special responsibility for accurate and truthful reporting. Sensational reporting that degrades the human person or dignity must at all times be avoided.

However, the Declaration remains a legal postulate, and despite the widespread and positive reaction to its content, no work has been undertaken to translate it into legal language. It seems that both the difficulty of agreeing based on a compromise between values (freedoms—duties/obligations) and the fear that pointing to interdependence may be a factor facilitating—“justifying”—the violation of freedoms may stand in the way.

3 Threats to the freedom of speech and threats derived from it (implementation and abuse)

Governments were quick to state that the internet is a major media and communication platform. Consequently, “on the one hand, the infrastructure that requires protective measures and, on the other hand, content made available that necessitates regulation” (Mujić et al., 2012, p. 6). Governments wanted

to counter the dissemination of illegal or unwanted content: concerned, particularly, by the availability of terrorist propaganda, racist content, hate speech, as well as state secrets. However, the measures taken are not producing the desired results. This is determined by a set of different factors. The paradox is that within the “West”, there is a consensus on “how” to interfere in freedom of speech and there are fundamental differences regarding the permissibility of such interference by the powers, but there is no consensus on “whether” to interfere. This implies a consensus about secondary regulation (application of the law) and a lack of consensus about primary regulation (law-making).

This difference of opinion “between the values” realised by law was already indicated by Thomas Jefferson (a US Founding Father): “Were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter” (Jefferson, 1787).

However, even among those permitting legal rationing of speech, positions vary and are independent of the attitude towards “speech” itself. Many among the most prominent legal authorities see a greater danger in restricting freedom of speech than in the words themselves. Justice Oliver Wendell Holmes Jr. emphasised the importance of toleration for dissident political speech:

If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.

(US v. Schwimmer, 1929)

Justice Holmes—with generations of defenders of freedom of speech—thus followed the path set by Voltaire.¹⁴

Another barrier preventing the adoption of regulations above the limits (and therefore adequate for the internet era) are the various “criteria of harm”; differences based upon cultural, moral, religious, and historical differences; and constitutional values. While the internet enables the rapid and wide dissemination of information, this feature is also a source of danger, as dangerous information may be disseminated. The ECHR pointed out:

[T]he internet is an information and communication tool particularly distinct from the printed media, in particular as regards the capacity to store and transmit information. The electronic network serving billions of users worldwide is not and potentially cannot be subject to the same regulations and control. The risk of harm posed by content and communications on the internet to the exercise and enjoyment of human rights and freedoms, . . . is certainly higher than that posed by the press.

(ECHR, 2011)

Relatively quick action was taken to limit the undesirable effects of the internet. The Communications Decency Act (CDA, it was another name used

for Title V of the Telecommunications Act of 1996) prohibited “the knowing transmission of obscene or indecent messages” to minors. However, just one year later, the Supreme Court found the regulation potentially dangerous because the regulation created a “chilling effect” on speech (*Reno v. American*, 1997).

Easier access to pornography for minors is of course not the only undesirable effect of the internet (Kahn, 2009). Since then, no lasting solution to reconcile competing values has been developed. The barriers to consensus are illustrated by the statement of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in the Report to the UN Commission on Human Rights:

The new technologies and, in particular, the internet, are inherently democratic, provide the public and individuals with access to information, and sources and enable all to participate actively in the communication process. The Special Rapporteur also believes that action by States to impose excessive regulations on the use of these technologies and, again particularly the internet, because control, regulation, and denial of access are necessary to preserve the moral fabric and cultural identity of societies is paternalistic. These regulations presume to protect people from themselves and as such, are inherently incompatible with the principles of the worth and dignity of each individual.

(Report, 1998)

4 The law against the abuse of the freedom of speech: the law against hate speech and disinformation—judicial protection of the hate speech and “Freedom to lie”/ “anti-truth law”

In the set of legal regulations (both acts contained in constitutions and acts having a legal basis in constitutions) affirming freedom of speech in feedback with legal restrictions against, among others, hate speech and disinformation, two general models stand out. These are “European” and “American” models (see, Abrams, 2017).

A. The law against hate speech and disinformation

The “European” model is grounded in the memory that hate speech preceded hate crimes (Versteeg, 2017). Awareness of this sequence of events has also been accepted in the “American” model. In *Virginia v. Black* (2003), the US Supreme Court deemed constitutional part of a Virginia statute outlawing the public burning of a cross if done with an intent to intimidate, noting that such expression “has a long and pernicious history as a signal of impending violence”.

This sequence of events was recognised as a paradigm in the Preamble of the UNESCO Constitution:

That since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed. . . . That the great and terrible war which has now ended was a war made possible by the denial of the democratic principles of the dignity, equality, and mutual respect of men, and by the propagation, in their place, through ignorance and prejudice, of the doctrine of the inequality of men and races.

(UNESCO Constitution, 1945)

Based on this statement,

UNESCO Member States have committed themselves to . . . the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern; . . . that the peace must therefore be founded, if it is not to fail, upon the intellectual and moral solidarity of mankind.

(UNESCO Constitution, 1945)

Remembrance of the victims and the crime is directly reflected by prohibitions on speech that might be interpreted as Holocaust denial. Such bans are in place in Austria, Belgium, Canada, the Czech Republic, France, Germany, Hungary, Israel, Liechtenstein, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Russia, Slovakia, Switzerland, and Romania (Lechtholz-Zey, 2010). The legislation criminalising the denial of the Armenian genocide in some countries is modelled on this ban.

For the EU member states, the regulatory reference is the European Union's Framework Decision on Racism and Xenophobia, which states that denying or grossly trivialising "crimes of genocide" should be made "punishable" (Framework Decision, 2008, pp. 55–58). However, no legal standard has emerged; in some countries (the United Kingdom, Denmark, Italy, and Sweden), the Holocaust denial laws have been rejected, and in Spain, the Constitutional Court declared the Genocide Denial Act unconstitutional (Grzebyk, 2020).

Unfortunately, memory has not proved to be an effective barrier against a return to the past. The weakness of the barrier in Rwanda alone contributed to the murder of 500,000–2,000,000 fellow Tutsis by their Hutu neighbours (Guichaoua, 2020, pp. 125–141; Meierhenrich, 2020, pp. 72–82). In Rwanda, genocide had (for a long time) a synonym in the local language, *gutsembatsemba*, "a verb, used when talking about parasites or mad dogs, things that had to be eradicated, and about Tutsis, also known as *inyenzi*—cockroaches—something else to be wiped out" (Mukasanga, 2020).

The genocide in Rwanda was, unfortunately, not the only genocide after World War II. The dehumanisation of the Tutsi was, unfortunately, not the only case of dehumanisation of a group of people that preceded the crime of genocide.

The awareness of the feedback loop of hate speech and hate crimes was confirmed by the attempt to establish the Press-Control Agency in Bosnia. The agency was to be used to stop what they described as poisonous propaganda. Simon Haselock (spokesman in Bosnia for the civilian operations of the peace-keeping force) said: “Basically there’s a tradition here of propaganda in the class of Goebbels” (Shennon, 1998, p. A8)

The awareness of this interdependence was shared by the US State Department. A State Department official who insisted on anonymity said: “There are obvious free-speech concerns, but we need to put in place something to deal with the abuses of the media—the hate, the racial epithets and ethnic slurs” (Shennon, 1998, p. A8).

In the “European” model, the law sets limits on the exercise of freedom of speech, with freedom of speech carried out within the law. The fundamental difference between the United States and other democratic countries concerning freedom of speech is expressed in the legal protection of hate speech (see *Beauharnais v. Illinois*, 1952).^{15,16} Canada follows the “European” model. The Canadian Charter of Rights and Freedoms protects “fundamental freedoms”, including freedom of expression (The Constitution Act, 1982, 1982). However, Section 1 of the Charter permits laws that impose “reasonable” limits upon those freedoms. Section 1 has been used to impose restrictions on hate speech (*R v. Keegstra*, 3 S.C.R. 697 Supreme Court of Canada, 1990). The Criminal Code of Canada forbids “hate propaganda”, including advocating genocide Criminal Code (1985). Canada’s approach is “freedom with responsibility”.

The EU continues its efforts to enable citizens to exercise their freedom of speech to improve the functioning of democracy. At the same time, it does not remain indifferent to new threats to freedom of speech and democracy (such as election interference, the spread of manipulative information, and threats against journalists).¹⁷ The European Democracy Action Plan (EC Plan, 2020) aims to implement these values. In the framework of the Plan, actions are taken concerning (1) free and fair elections—work is in progress on regulations ensuring transparency of “political advertising” and to protect elections and electoral infrastructure against cyberattacks; (2) media freedom and pluralism—the EU wants to protect media freedom (freedom of speech), inter alia, to curb the abusive use of lawsuits against public participation; (3) countering disinformation—the EU continues to defend against disinformation, for countering foreign interference in its information space and disinformation. The EU has already been fighting disinformation since 2015. The first tool (innovative self-regulatory tool) was the Code of Practice on Disinformation.¹⁸ In 2019, the EU implemented the Action Plan against disinformation. Subsequent elections in the EU member states and the COVID-19 crisis confirmed the validity of the actions taken and the choice of methods and means of implementation; at the same time, they pointed to the need for improvement.

Two acts are currently in the legislative process in the EU. The first one is the Regulation on a Single Market for Digital Services (Digital Services Act, DSA). The DSA aims at “ensuring a safe and accountable online environment” (DSA, 2020). This Act also seeks to improve the mechanisms for the removal of illegal content and the effective protection of users’ fundamental rights online, including the freedom of speech.

In parallel with the work on the DSA, there is also work carried out on the Digital Markets Act, DMA (2020). It aims to ensure a higher degree of competition in the European Digital Markets by preventing large companies from abusing their market power and by allowing new players to enter the market.

The Commission’s intentions are ambitious. However, the final effects are difficult to predict. Apart from the unpredictable reactions of anti-systemic movements (see the case of ACTA), the fulfilment of plans may be hindered by persisting differences in the positions not only between the EU and the United States but also within the EU. Differences in positions between EU members have been confirmed by, for example, the Action brought on 24 May 2019 in *Republic of Poland v. European Parliament and Council of the European Union* (Case C-401/19). Poland raises a plea against the contested provisions of Directive 2019/790, alleging infringement of the right to freedom of expression and information guaranteed by Article 11 of the Charter of Fundamental Rights of the European Union:

The Republic of Poland claims specifically that the imposition on online content-sharing service providers of the obligation to make best efforts to ensure the unavailability of specific works and other subject matter for which the rightsholders have provided the service providers with the relevant and necessary information . . . and the imposition on online content-sharing service providers of the obligation to make best efforts to prevent the future uploads of protected works or other subject-matters for which the rightsholders have lodged a sufficiently substantiated notice . . . make it necessary for the service providers—to avoid liability—to carry out prior automatic verification (filtering) of content uploaded online by users, and therefore make it necessary to introduce preventive control mechanisms. Such mechanisms undermine the essence of the right to freedom of expression and information and do not comply with the requirement that limitations imposed on that right be proportional and necessary.

(Case C-401/19)

The dispute is ongoing, and not only the Council and Parliament but also Spain, France, and Portugal have spoken out against Poland’s position. In the opinion of the Advocate General Henrika Saugmandsgaarda:

[T]he limitation on the exercise of the right to freedom of expression and information resulting from the contested provisions, as interpreted in this Opinion, satisfies all of the conditions laid down in Article 52(1) of the Charter. In my view, that limitation is therefore compatible with

the Charter. Consequently, the action brought by the Republic of Poland must, in my view, be dismissed.

(Opinion, 2021)

While noting the difficulties and controversies, what cannot be forgotten is what unites the pro-democracy social actors of the western hemisphere. The need to create a law for the “digital age” is not denied, as confirmed by the parallel work carried out in the EU and the United States. The European threat assessment and the need for change were confirmed by the Report of the US House Judiciary Committee (Report, 2020).

B. Judicial protection of hate speech and the “freedom to lie”

The “American” model is neither a simple formula for the implementation of the First Amendment nor did it originate once. Free speech is not absolute—US law does recognise a number of important restrictions to free speech. These include obscenity, fraud, child pornography, harassment, incitement to illegal conduct and imminent lawless action, true threats, and commercial speech such as advertising, copyright, or patent rights. For a long time, there were many restrictions to free speech. This was in part due to different societal norms. Particularly in terms of sexual morality, the First Amendment to the United States Constitution is broad in scope and protects not only freedom of speech but also religion,¹⁹ press, assembly, and the right to petition the government for US Congress interference. The First Amendment also protects the right to receive information. However, a fundamental component of the freedom of expression is the right to free speech. Over time, however, the Supreme Court extended this protection to other forms of governmental power, from the federal to local and across all three branches: legislative, executive, and judicial. The government, whenever it attempts to regulate the content of speech, is required to provide substantial justification for interfering with the right to free speech. However, the government may prohibit speech that is likely to cause a breach of the peace or cause violence.²⁰

Justice Scalia wrote, in the case *R.A.V. v. City of St. Paul*:

A State may choose to prohibit only that obscenity which is the most patently offensive in its prurience—i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive political messages. And the Federal Government can criminalize only those threats of violence that are directed against the President, since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President.

(*R.A.V. v. City of St. Paul* (1992))

The First Amendment was evoked by the Senate as the basis of a reservation to Article 20 of the International Covenant on Civil and Political Rights (ICCPR) made at the time of ratification of the Convention (in 1992). United States has made reservations “(1) That Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States” (U.S. Reservations, 1992).

Hate speech is also “protected” by the First Amendment in the United States, as decided in *R.A.V. v. City of St. Paul* (1992) in which the Supreme Court ruled that hate speech is permissible (except in the case of imminent violence).

The “American” model also extends the protection of the law to lying (Norton, 2012); the US Supreme Court so ruled (majority 6:3) in the case *United States v. Xavier Alvarez* (2012).²¹ The Supreme Court decision attempted to distinguish other situations, such as fraud or defamation (libel/slander) cases, where the false statement has a causal link to some identified harm.

The exercise of the right to lie, the use of lies, has important (negative, in my opinion) consequences for the functioning of democracy. In the case *Rickert v. Washington* (2007), the Court says that the state cannot impose fines on a candidate for telling deliberate lies about his or her opponent. The (bad) consequence of the judicial umbrella over the right to lie has, it seems, exceeded the protagonists’ imaginations. Hilary Clinton’s opponents during the 2016 presidential campaign disseminated online information that the candidate, her campaign manager, and the (Democratic) political elite were sexually abusing children, kidnapping and trafficking them in the United States (Wendling, 2016). The location of this alleged paedophilia and Satanic ritual abuse allegedly practiced was a pizzeria called Comet Ping Pong. Elements of “Pizzagate” were included in various conspiracy theories (“The Storm”, “new Pizzagate”) spread by bloggers “QAnon” and “FBIAnon”. In reaction to the alleged crimes, a man named Edgar Madison Weich from North Carolina arrived in Washington, DC, on 4 December 2016, entered the pizzeria, and fired several shots as he attempted to free the supposed captives. Involved in the creation and dissemination of the conspiracy theory Weich had bought into was, among others, Michael Flynn. After Trump won the presidential election, Flynn became the US National Security Advisor (Rosenberg, 2016). Many tweets about “Pizzagate” came from the Czech Republic, Cyprus, and Vietnam, and it turned out that some of the most frequent retweeters were bots. Disinformation targeting Hilary Clinton and Democratic political elites was intended to influence voters during the presidential election push (Reuters, 2016). Their immediate effect was putting the safety (health and life) of those falsely accused at risk.

Freedom of speech under the First Amendment is invoked not only by “ordinary people” but also by politicians in response to censorship of speech in the performance of their duties. Relatively recently, the City Council in River Falls, WI, censured a member for calling an opponent of wearing masks during the coronavirus pandemic “a rancid tub of ignorant contagion” and the

City Council in St. Cloud, MN, censured one of its own for saying that compulsory masks were like requiring that “Covid-positive people wear some sort of identification badge, maybe like a bright yellow star”. And litigation on this issue will come before the US Supreme Court (in the case *Wilson v. Houston*).

The view that the government is also entitled to free speech was expressed by the US Court of Appeals for the Fifth Circuit, in New Orleans, in which Judge W. Eugene Davis wrote:

The Supreme Court has long stressed the importance of allowing elected officials to speak on matters of public concern. . . . A reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim. The US Supreme Court may embrace that view, based partly on decisions holding that the government is generally free to speak as it wishes.

(*Wilson v. Houston*, 2020)

This will deepen the differences between the understanding of freedom of speech in the United States and Europe.²² This allows the government *praeter legem* to treat “speech” (information and assessment) as a weapon. By citing this kind of weapon, the government oversteps the bounds of substantive or procedural competence. Such actions (exercise of freedom of speech) have no basis in law. Indeed, this exercise of freedom of speech by the government implies the right of the government to speak outside the law-making or law-enforcement process (Lewis, 1986).

This is just one possible outcome of the exercise (abuse?) of the freedom of speech. Perhaps, however, the element that fosters the climate in which conspiracy theories are created and disseminated is post-truth (McInyre, 2018). It not only functions in political life but also shapes attitudes towards science and knowledge with a scientific basis, for example, vaccines or Darwin’s theory (“intelligent design”). Abuses of freedom of speech not only threaten democracy and its institutions but also society and individuals.

The First Amendment doesn’t address or prevent censorship imposed by private individuals and private businesses²³:

Courts have refused to find that Facebook and other social media providers are state actors for purposes of being subject to constitutional claims. . . . That provision provides civil immunity to Facebook and “interactive computer service” providers like it who take action to “restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable”.

(Hudson, 2021)

The Ohio court wrote that Section 230 of the Communications Decency Act provides an “overarching impediment” to Orders’ claims (Hudson, 2021).

In response to the threats posed by the abuse of freedom of speech in the digital age, “private companies” providers or/and hosting companies have acted in defence of this freedom. The actions of these companies are a copy of the actions of newspaper publishers, a copy adapted to the challenges and conditions of the current era. At the same time, and importantly, the response to cross-border abuses of free speech is adequate because it is cross-border.

For example, companies prevent/restrict the dissemination of illegal content. Facebook and Instagram remove, among other things, content containing hate speech, violent extremism, and misinformation. The procedure is two-instance—a person dissatisfied with the decision can appeal to the board (composed of people external to Facebook)²⁴ and this decision is final (Yurieff, 2020).

Facebook and its subsidiary, Instagram, banned the ex-US president’s account from posting for at least the remainder of his term and potentially “indefinitely” after a mob of his supporters stormed the US Capitol to protest the election results.

However, the practices of companies (governments) raise questions/concerns. Will protection against abuse of the law (e.g., by hate speech and disinformation) not be used to restrict freedom of speech, that is, to limit democracy? One of the barriers to law-making and its implementation is citizens’ lack of trust in democracy and its institutions. Failures in the establishment of legal regulations of the digital era (Stop Online Piracy Act [SOPA], Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act [PIPA], and Anti-Counterfeiting Trade Agreement [ACTA]) illustrate the inability of “democracy” to act, to face the challenges that are the subject of consideration in this chapter. The recalled (and rejected) draft acts and agreement were meant to protect in the “digital era” what has been/is always protected; to implement the old law in the new conditions. Many people are seduced by the vision of “digital space” as an emanation of the Old West. Digital migrants and settlers want to live in the new territory as free people—outside the law and the state (its norms and institutions). Their slogans are taken up by counter-system and populist parties such as the Piratpartiet (Sweden) or Piratenpartei (Germany).

These models (“European” and “American”) are, wrongly, seen as based on different legitimacies and antinomic. This perception of the relationship between the two models is based on simplification. In both cases, the basis of regulation is a common system of values; however, they differ in the level of fear of abuse of the law by the government and in the belief in the ability of “free people”, citizens, to be guided in their lives by morality and law (having morality as its basis). The content of the government’s “speech” protected under the umbrella of US law is a degrading, deprecating assessment of man. Evaluation of human beings “replaces” evaluation–criticism of their actions, deeds. In Europe, the memory that such government “free speech” preceded Auschwitz remains intact. In America, the memory of the vitality of its democracy and its ability to defend itself against violence and political extremism prevails. The Americans are convinced that American democracy and human rights are up to the next challenge,

that the defence of the freedom of speech (as a value) is an acceptable price to pay for the consequences of the abuse of freedom of speech that indirectly resulted in the Oklahoma City attack, the attack on the Capitol, etc. Americans are afraid of a Leviathan—government—that restricts free speech. Europeans are unsure of democracy's ability to defend democracy itself. In Europe, for many years, the exclusive broadcaster of radio and television was the public broadcaster (which still has a privileged position in the market), and it is the state that fights against “hate speech” and disinformation. In the United States, radio and TV operate within the free market, while the state recognises that hate speech and disinformation are protected by the right to free speech.

In spaces on both sides of the Atlantic, the law provides a dynamic balance of values, and differences have not prevented the establishment of a transatlantic community of values. The challenge for diversity in a community of values, for a community of values that connects across differences, is digitisation, communication without borders. A response to these challenges is being formulated.

C. The “anti-truth law”

It is a truism to say that information management is one of the instruments of power. In democratic states, freedom of expression (like all human rights) is protected by, among other things, the separation and balance of powers. This does not always stop attacks on the right to expression, but it allows the human rights of the individual to emerge victorious from attacks on them.²⁵ In non-democratic states, the division and balance of power either do not exist or its norms and institutions do not function.

Authoritarian regimes manage information by, among other things, fighting truth with the instruments of “law” and the institutions of the state. They fight the truth about the present and the past. The fight against the truth about the past serves to give the authoritarian regime the appearance of a defender of the nation and to rally the nation around power in a “friend v. enemy”²⁶ conflict. In their struggle against the truth about the past, authoritarian regimes use the mechanism, *sui generis*, of motivated forgetting. Motivated forgetting may concern the memory of any “unwanted” fact, such as the memory of wrongs suffered²⁷ or crimes committed.²⁸ It is thus a collective partial or complete loss of memory—retrograde amnesia.

Such a practice took place in democratic countries that, striving for social unity, used the practice of memory inhibition. For many years in (West) Germany, it was considered that the goals of *Innere Führung* could be achieved without returning to the past.²⁹

However, authoritarian regimes went further in violating the freedom of speech. The spectrum of practices of these regimes in violating freedom of expression includes the institutionalised restriction of the right to information, dissemination of lies, and suppression of (punishment for) the truth. The object of such practices is information relating to both the past and the present.

The differences between authoritarian regimes (between non-democratic states and states of hybrid democracy) come down to the methods used. In China, Russia, and Belarus, the government uses brute force; in Poland, Hungary, and Turkey, brute force and repression are used less frequently or camouflaged. This difference is related to membership in the institutions of the (Western) security community and the benefits derived from this membership (EU, NATO).

Kaczyński, Orbán, Erdoğan neither invented xenophobes and nationalists nor descended from them. They took over the slogans and included people with such views in the circle of voters and co-rulers, defending the electoral majority. They act according to the formula “on the right there are only walls”, defending power. In subsequent elections (which are free but not fair), they created an electoral majority with their participation. They have allowed homophobic, Nazi, racist, anti-Semitic, and nationalist views into the public debate. If in France an electoral majority supported in the presidential election Jacques Chirac’s decision to refuse to debate with Le Pen, then in Poland, Hungary, and Turkey the same electoral majority accepts cohabitation with the far-right (and alt-right) parties.

Kaczyński took over “public” television, radio, and paper press (Telewizja Polska, Polskie Radio, Orlen group of publishers) for the ownership of the party. The takeovers took place *praeter legem* or *contra legem*. Media managed by Kaczyński keep silent about the truth and spread lies and hatred. These media disseminate sensitive information about the sexual orientation, private lives, etc. of opposition members. Such information is illegally provided by prosecutors’ offices, courts, police, and other “state” institutions.

At the same time, the government restricts the activity of free media: financially supporting only its own media, fighting against free media with the instruments of a police state, or taking them over (Kozłowska, 2021).

This is not an exhaustive list of actions taken. In Poland, senior officials of the Ministry of Justice (including judges and prosecutors) have disseminated false or confidential personal data about judges and prosecutors opposing violations of the law. This information, which was evident hate speech, was disseminated through electronic media. The discovery of the facts of this lawbreaking did not lead to the punishment of the offenders.

Kaczyński (as deputy prime minister for security affairs) called on nationalist militias to use force against participants in peaceful protests in a speech in government media, calling it the “defence of churches”.

The fight against the truth is being waged in Poland on many fronts. After Kaczyński³⁰ gained power, the exposition in the Museum of the Second World War in Gdansk was changed, the message of the exposition was changed. The depicted horror of war, warning against (any) war, was replaced by exposing heroism in war.

The research of the extermination of Jews during World War II, among others, the publications of Jan Gross on the “crime in Jedwabne” (Gross, 2001) and immediately after (Reszka, 2019)—apart from shock, shame, and

apologies from the society and its representatives and the Catholic Church—triggered an attack of nationalist-right circles on historians and journalists. The ruling PiS (Law and Justice) party collaborated with these circles. They decided to use the Institute of National Remembrance (IPN) and criminal law to attack the truth.

IPN was established by the Act of 1998 (Dz.U. 2021 poz. 177). Article 55 (new Articles 55a, 55b) of the Act criminalises (Dz.U. 2018, poz. 369) historical denial of crimes committed against Poles or Polish citizens by Nazi or communist authorities, crimes against peace or humanity, war crimes, and political repression. Holocaust denial is not explicitly mentioned, but it is implicitly criminalised.

In 2018, Article 55a was added to the Act by way of an amendment. The article was purportedly intended to defend the “good name” of Poland and its people against unfounded accusations of complicity in the Holocaust. This amendment was withdrawn by the authorities. Eventually, defamation of Poland and the Polish people through (unfounded?) accusations of complicity in the Holocaust, under Article 55a, was changed to a civil offence that can be tried in civil courts.

After this amendment, IPN, following the example of Orwell’s Ministry of Truth, was to subject historians, journalists, etc. to criminal repression if the truth about the past revealed by them contradicted the national myth. Kaczyński, under pressure from Poland’s allies (mainly the United States), resigned from this instrument of the fight against the truth. However, the concession to the truth has proved temporary. With public money, attacks on historians continue (Tokarska-Bakir, 2019, p. 22) and civil lawsuits are brought against them.³¹ The government, defending its electoral majority, maintains an alliance with the nationalists.

Kaczyński attacks free media using the SLAPP³² strategy. Hundreds of lawsuits are filed against journalists and publishers (EC, 2020). The threat of a lawsuit is intended to evoke a chilling effect (Pech, 2021). The costs of each lost case, and there are hundreds of them, are borne by the public treasury.

Conclusions

There is no doubt about the positive impact of digitisation on the exercise and dissemination of freedom of speech. That is why the threats and “bad practices” of implementation of freedom of speech in the era of digitisation are all the more sharply visible.

The dream that one of the effects of digitisation is the proliferation of the freedom of speech, and that this basic freedom will be used by everyone, regardless of frontiers, turns out to be—maybe only for the time being—an illusion. Many people do not have access to digitisation and this digital gap reflects differences in both wealth and education. At the same time, insufficient international cooperation limits the opportunities for digitisation in the sphere

of the freedom of speech for socio-economic progress; deeper international cooperation could reduce social divergence (Burwell, 2021).

Authoritarian regimes use digitisation to restrict freedom of speech, failing in their duties to facilitate the exercise of the freedom of speech. These regimes have gained a new tool to control the society and violate human rights. Digitisation also facilitates practices that abuse freedom of speech, such as the spread of hate speech and disinformation; both authoritarian regimes and individuals benefit from this.

Digitisation has revealed shortcomings in the toolkit for implementing freedom of speech and responding to its abuse, but this is neither the *fault* of digitalisation nor does it make a person (entitled to exercise freedom of speech) defenceless against threats. Here again, international cooperation, based on the principles of the UN Charter and the International Bill of Human Rights, is one of the necessary conditions for an adequate response to undesirable practices.³³

Notes

- 1 The decriminalisation of blasphemy did not happen quickly throughout the western hemisphere. As late as the 17th century, blasphemy was still punishable in the English colonies in America. A 1646 Massachusetts law, for example, punished persons who denied the immortality of the soul. In 1612, a Virginia governor declared the death penalty for a person who denied the Trinity under Virginia's *Laws Divine, Moral and Martial*.
- 2 Paradoxically, the ECHR found that the defaming of Muhammad is not protected by the freedom of speech; see European Court of Human Rights "E.S. v. Austria", ECHR 360(2018).
- 3 The norm "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others" was formulated by John Stuart Mill (Mill, 1989, p. 13).
- 4 One such tool is "Golden Shield", which the Chinese government uses to filter out information from the Web it deems inappropriate.
- 5 President Biden has called for a Summit of Democracies in 2021, with disinformation on the agenda. The United States and Europe should use this meeting to compare their approaches to the dangers some online content presents to our democracies and to work with other democracies to find a common way forward. The Summit programme includes this remark about the challenges: It is becoming increasingly difficult to tell facts from fiction and technological advances are making it harder to trust even what we see with our own eyes. Election interference is by no means a new phenomenon, and the use of disinformation to change the opinions of voters or sway the outcome of elections is a strategy as old as democracy itself. But recent years have seen an exponential increase of attention directed towards foreign disinformation campaigns, primarily spurred on by the Russian intervention in the 2016 US presidential election. A form of artificial intelligence and synthetic media—so-called 'Deepfakes'—might take this global threat to election integrity to a dangerous new level" (see more in Waldemarsson, 2020).
- 6 Steffen Seibert, Chancellor Merkel's spokesman, said—after Twitter blocked Trump's account—that the operators of social media platforms "bear great responsibility for political communication not being poisoned by hatred, by lies and by incitement to violence" (AP, 2021).
- 7 You can see in this a new form of implementation of the property right "no money, no voice" (Sanders, 2003, p. 68; Liebling, 1960, p. 109).

- 8 GAFAM combined possesses an unparalleled collection of user data which is the most extensive in the world. It is also in a unique position to evaluate this data by means of algorithms and to determine what information is presented to the users of their services. Moreover, these companies have at their disposal comparatively large financial resources (their combined market capitalisation is about US\$7.2 trillion, while the EU has a nominal GDP of about US\$17.4 trillion; see European Parliament, 2021).
- 9 The concept has its origins in Athens.
- 10 However, many Catholic circles strongly opposed it; for example, the organised and strong circles around Radio Maryja.
- 11 The Catholic Church in Poland has never disclosed these archival records, nor have they been disclosed in criminal proceedings for, among other things, crimes involving paedophilia.
- 12 The Council includes, among others, 25 former heads of state and government. Former ministers, religious leaders, and many leading politicians and intellectuals also participated in the work on the Declaration.
- 13 Member of the Council, former president of Costa Rica.
- 14 Voltaire was considered a pioneer on this path by Evelyn B. Hall, who characterised his position with the (prescribed) sentence: “I disapprove of what you say, but I will defend to the death your right to say it” (Hall, 1906, p. 199).
- 15 The US Supreme Court concluded that Beuharnais’ speech amounted to libel and was therefore beyond constitutional protection (343 US 250 (1952)).
- 16 That’s because US constitutional tradition treats hate speech as the advocacy of racist or sexist ideas. They may be repellent, but because they count as ideas, they get full First Amendment protection.
- 17 “The digital revolution is transforming European democracies. People can more easily participate in the decision-making process, while politicians directly reach out to their voters. The rapid growth of online communication and campaigning has brought new possibilities but also difficulties. To keep up with the digital revolution, the EU needs to upgrade its rules to fit the new digital world” (Factsheet, 2020).
- 18 The provisions of the Code of Practice on Disinformation and the practice of their implementation are being developed by the Commission (see Guidance, 2021).
- 19 US law considers religious freedom a fundamental right that should not be violated except under exceedingly rare conditions. In Europe, by contrast, the freedom to believe may be protected, but the freedom to manifest your religion publicly has much less scope.
- 20 Freedom of speech does not include the right: to incite actions that would harm others (e.g., “[S]hout[ing] ‘fire’ in a crowded theater”); *Schenck v. United States*, 249 U.S. 47 (1919) (U.S. Courts, n.d.).
- 21 Xavier Alvarez was prosecuted for falsely claiming to have been awarded the Medal of Honor (USA).
- 22 Justice Antonin Scalia in *Block opinion* wrote: “We know of no case, in which the First Amendment has been held to be implicated by governmental action consisting of no more than governmental criticism of the speech’s content” (*Block v. Meese*, 793 F.2d 1303 (D.C. Cir. 1986)).
- 23 But the government cannot order private censorship any more than it can censor directly.
- 24 The board includes Helle Thorning-Schmidt, former prime minister of Denmark; Alan Rusbridger, former editor-in-chief of *The Guardian*; and Tawakkol Karman, a Nobel Peace Prize laureate; professors, lawyers, and experts in areas such as freedom of expression, digital rights, and internet censorship.
- 25 The freedom of speech and the free press *won* during the Vietnam War (*The Washington Post*) and the attack on fair elections was rebuffed (Watergate).

- 26 This is in line with Carl Schmitt's concept of "the political" (Frye, 1966, pp. 818–830). The collectivisation of friendship and enmity is for Schmitt the essence of politics; and so, it is for his followers.
- 27 The Germans "forgot" about the female victims of wartime rape by soldiers and mass prostitution after the fall of the *Third Reich*.
- 28 The French "forgot" about Vichy's involvement in the Holocaust.
- 29 This was only changed by the "historians' dispute" ("Historikerstreit") (Kracht, 2010). The dispute was initiated in 1986 by Habermas (1986).
- 30 "Kaczyński" (Orbán, Erdoğan) is used here as a generic term, the name—in a specific country—of a hybrid democracy with a party of a cult of personality plus additional attributes of the clientelistic party (Gunther and Diamond, 2003, pp. 167–199).
- 31 Reduta Dobrego Imienia (Reduta of the Good Name), financed, among others, with public funds and supported Filomena Leszczyńska's lawsuit against historians Barbara Engelking and Jan Grabowski. She accused them of wrongly accusing in their book (Engelking and Grabowski, 2016) Edward Malinowski (a village leader from the village of Malinówka) of collaboration during the war and of helping to murder Jews. The Court of Appeal ruled that historians are not obliged to apologise to the family for their findings (Kula and Lyon-Caen, 2021).
- 32 "Strategic Lawsuits against Public Participation".
- 33 US President Joe Biden has called for a Summit of Democracies in 2021, with disinformation on the agenda.

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