

DEMOS

**FREE
AND FAIR
ELECTION LAW IN
THE AGE OF AI**

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ABOUT THIS PAPER

This paper is part of Demos's strategic focus area on '*Trustworthy Technology*', working to build bridges between politicians, technical experts, and citizens to explore solutions, improve trust, and create policy to ensure our technologies benefit society. This paper is the culmination of a collaboration between Demos Digital - Demos Digital policy research team - and the Hogan Lovells Public Law & Policy and Pro Bono teams. Together we investigated implications of AI-enabled disinformation and fake content for impacting democratic processes, and the potential obligations of states to uphold human rights to free and fair elections and freedom of expression as articulated by the European Convention on Human Rights (ECHR) in response to these threats.

1. INTRODUCTION

As the world went to the polls during 2024, we saw generative AI deployed in an attempt to sow confusion and disrupt democratic processes. For example, in the US, deepfake audio of President Biden was deployed to spread confusion about the presidential primaries. In India and South Africa, AI-generated election endorsements mimicked the identities of politicians, both living and dead.

While the scale of impact that AI-enabled mis-/disinformation and fake content had on elections globally was less than many expected, we are still coming to understand the distributed impacts of AI on democracy.¹ The AI incidents observed during the 2024 elections may be harbingers of what's to come with increasingly capable and accessible AI systems, and they shined a light on the importance of building democratic resilience to disinformation more generally. At Demos, we have outlined practical steps policy makers and tech companies could take to mitigate these harms from fake and misleading content.²

As part of a joint programme of work with Demos, another paper published recently by the Public Law & Policy and Pro Bono teams at international law firm Hogan Lovells explores a possibility which has received less attention: whether the threat AI generated fake content could present to elections might interfere with the rights guaranteed by the European Convention on Human Rights (ECHR).³ The paper's analysis is also relevant to understanding potential state obligations for protecting against mis-/disinformation more generally. This brief discusses the findings of Hogan Lovells's research, and Demos's recommendations for further action by policymakers.

1 Stockwell, S. (2024). AI-Enabled Influence Operations: Threat Analysis of the 2024 UK and European Elections. <https://cetas.turing.ac.uk/publications/ai-enabled-influence-operations-threat-analysis-2024-uk-and-european-elections>

2 Seger, E. (May 2024). Generative AI and Democracy: Impacts and Interventions. <https://demos.co.uk/research/generative-ai-and-democracy-impacts-and-interventions/>

3 AI and Democracy Impacts of Generative AI on the human right to free and fair elections (January 2025). Hogan Lovells. <https://www.hoganlovells.com/en/news/hogan-lovell-publihes-report-on-the-impact-of-generative-ai-on-the-right-to-free-and-fair-elections>

2. HOW AI CAN AFFECT ELECTIONS

Experts have identified a range of threats that generative AI might pose to democratic processes. UN Special Rapporteurs, for example, have called on countries to do more to ensure that misinformation, disinformation and the marginalisation of civic spaces do not adversely affect the ability of citizens to vote in elections.

2.1 DEEPPAKES, ELECTION INTERFERENCE, AND HARASSMENT

Much of this discussion has centred on artificially generated images, video, and audio, also known as 'deepfakes'. Here, a major concern has been that deepfakes may influence voters' beliefs by spreading false or misleading information – whether unintentionally (known as 'misinformation') or intentionally as part of an effort to deceive ('disinformation').

Deepfake content may be used to **convince people that politicians have said and done things they have not, sow confusion, and heighten distrust** in political actors and the wider media environment. A Trustwatch survey conducted by Demos during the UK elections found that 62% of respondents from a nationally representative sample were less trusting of online media content as a result of the existence of deepfakes and generative AI.

AI generated content might also **affect citizens' access to polling**. A deepfake of an election official or a politician could be used to provide inaccurate information about polling in order to reduce turnout of targeted demographics. A prime example here is the audio deepfake of Joe Biden spread in January 2024 telling New Hampshire voters not to turn out for the presidential primaries but to save their votes for the general November elections.⁴ The voice told voters: "your vote makes a difference in November, not this Tuesday." For voters lacking a clear understanding of US presidential election procedures, the fake Biden audio could come across as a convincing argument for staying home for the primaries conveyed by a trusted source.

⁴ Elliott, V., & Kelly, M. (2024, January 23). The Biden Deepfake Robocall Is Only the Beginning. WIRED. Retrieved April 12, 2024, from <https://www.wired.com/story/biden-robocall-deepfake-danger/>

However, it is **very difficult to establish the impact of mis- and disinformation on voter behaviour**: There is no way to reliably measure how a voter would or would not have acted, or how influence operations may have interacted with other factors at play. Likewise, it is practically impossible to establish whether a *lack* of government action to safeguard against election interference — including those using AI — has had a direct effect in failing to uphold free and fair elections.

Deepfakes can also be used for **intimidation or harassment to dissuade candidates from standing for election**, as in instances where women in politics have been made the subjects of violent, non-consensual deepfake pornography. The production of revenge porn and child sexual abuse material is the most prevalent misuse case for image generation tools. The UK Parliament's Women and Equalities Committee has launched an inquiry into how such non-consensual intimate image abuse, including deepfake abuse, might be tackled.⁵ And, as noted by the OECD⁶ and the Carnegie Endowment for International Peace,⁷ generative AI is disproportionately used to engage in gendered disinformation⁸ and abuse campaigns against female politicians from minority groups. Such abusive material can have the demonstrable effect of dissuading people from standing for office — or persuading them to step down from office — in an attempt to avoid abuse against themselves and their families.⁹ A recent report¹⁰ by 50:50 Parliament and Compassion in Politics, sponsored by Hogan Lovells, used data gathered from a number of outgoing MPs who spoke about a growing mental health crisis among Parliamentarians, which has been exacerbated in part by a spike in threats directed towards elected officials (and especially towards female and Black MPs). The result is a silencing effect as women disengage from politics and/or avoid visible, political roles to avoid being targeted.¹¹ Therefore, this effect of abusive deepfake material may be far easier to track, compared to the effects of AI-generated mis- and disinformation on voter behaviours.

2.2 HOW HAS THE UK RESPONDED?

Whilst the impacts of false or misleading AI generated content appear to have been limited in the UK so far, several concerning cases have arisen. During the 2024 General Election, for instance, the Labour MP Wes Streeting was targeted by two deepfakes which appeared to be designed to reduce his popularity amongst Labour voters: a doctored video which suggested Streeting called fellow MP Diane Abbott a “silly woman”, and a second in which he is shown telling a voter that he did not care about Palestinians dying in Gaza.¹² Similarly Sir Keir Starmer, the now-Prime Minister, was the subject of a deepfaked clip during 2024's Rochdale by-election which falsely implied that Starmer had called Labour voters “beyond thick”.¹³ These instances illustrate how generative AI may be deployed to deceive voters about candidates and shape

5 UK Parliament, 20 November 2024 - Tackling non-consensual intimate image abuse - Oral evidence (2024, November 20). <https://committees.parliament.uk/event/22032>

6 Caira, C., Russo, L., & Aranda, L. (2023, March 8). Artificially Inequitable? AI and closing the gender gap. OECD AI Policy Observatory. Retrieved from <https://oecd.ai/en/wonk/closing-the-gender-gap>

7 di Meco, L., & Brechenmacher, S. (2020, November 30). Tackling Online Abuse and Disinformation Targeting Women in Politics. Carnegie Endowment for International Peace. Retrieved from <https://carnegieendowment.org/2020/11/30/tackling-online-abuse-and-disinformation-targeting-women-in-politics-pub-83331>

8 Judson, E., Atay, A., Krasodomski-Jones, A., Lasko-Skinner, R., & Smith, J. (2020). Engendering Hate: The Contours of State-Aligned Gendered Disinformation Online. DEMOS. Retrieved from <https://demos.co.uk/wp-content/uploads/2020/10/Engendering-Hate-Report-FINAL.pdf>

9 Shames, S. L. (2014). The Rational Non-Candidate: A Theory of Candidate Deterrence. Doctoral dissertation, Harvard University. <https://dash.harvard.edu/handle/1/12271801>

10 Compassion in Politics & 50:50 Parliament (October 2024). Reset: A blueprint for a 21st Century Parliament. https://5050parliament.co.uk/wp-content/uploads/2024/11/State_of_Britain_2023_DIGITAL.pdf

11 Shames, S. L. (2014). The Rational Non-Candidate: A Theory of Candidate Deterrence. Doctoral dissertation, Harvard University. <https://dash.harvard.edu/handle/1/12271801>

12 Marianna Spring (2024, June 7), 'Labour's Wes Streeting among victims of deepfake smear network on X', BBC News. <https://www.bbc.co.uk/news/articles/cg33x9jm02ko>

13 Marianna Spring (2024, June 7), 'Labour's Wes Streeting among victims of deepfake smear network on X', BBC News. <https://www.bbc.co.uk/news/articles/cg33x9jm02ko>

electoral outcomes. While they appear to have been limited in number during the 2024 General Election, such AI-generated content could be deployed at a much greater scale in the future.

In response to concerns about AI's electoral impacts, the UK Electoral Commission has published new advice for voters "on how to engage with campaign material and to think critically about material they see and hear". Likewise, the UK Cabinet Office has published guidance for electoral candidates outlining "mitigations to disrupt the impact of disinformation campaigns, which are increasingly being created using generative AI". Ofcom, the UK's communications and telecoms regulator, is also exploring policy measures which may be taken to reduce harms caused by deceptive deepfakes.¹⁴ Ofcom's explorations have included consultations and drafts of codes on illegal harms and children's safety online, which Ofcom is required to issue under the Online Safety Act (OSA) 2023.¹⁵

On the legislative side, the UK has started to take positive steps to prevent deepfake enabled abuse and election interference. The OSA already criminalises the sharing of deep fake intimate images without consent. The OSA also makes it a criminal offence for a person to send a message that the person knows to be false, if that message is intended to cause "non-trivial psychological or physical harm" (Section 179),¹⁶ which could in some circumstances encompass digital election interference. Meanwhile, attempts at election interference via disinformation may, if carried on on behalf of a 'foreign power', be prosecuted under the National Security Act 2023, regardless of the technologies used.¹⁷

A proposed amendment to the recent Criminal Justice Bill would have criminalised the creation of any such deep fake images irrespective of intent to distribute. However the Criminal Justice Bill was dropped in the parliamentary wash up after the announcement of the July 4 elections and there are no proposals by the current Government to introduce similar reforms.

¹⁴ Ofcom (2024, July 23), Deepfake Defences: Mitigating the Harms of Deceptive Deepfakes, Discussion paper. <https://www.ofcom.org.uk/siteassets/resources/documents/consultations/discussion-papers/deepfake-defences/deepfake-defences.pdf?v=370754>

¹⁵ Ofcom (2023, November 9), Consultation: Protecting people from illegal harms online. <https://www.ofcom.org.uk/online-safety/illegal-and-harmful-content/protecting-people-from-illegal-content-online/>

¹⁶ UK Government (2024, January 31), Online Safety Act 2023. <https://www.legislation.gov.uk/ukpga/2023/50/section/179> Stepney, E S. & Lally, C. (2024, April 25), Disinformation: sources, spread and impact, UK Parliament Post POSTnote 719. <https://researchbriefings.files.parliament.uk/documents/POST-PN-0719/POST-PN-0719.pdf>

¹⁷ UK Government (2023, December 20), National Security Act 2023. <https://www.legislation.gov.uk/ukpga/2023/32/part/1/crossheading/foreign-interference>; Home Office (2024, August 19), 'Foreign interference: National Security Bill factsheet'. <https://www.gov.uk/government/publications/national-security-bill-factsheets/foreign-interference-national-security-bill-factsheet>

3. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Besides domestic law, the UK is a signatory to the ECHR and the UK's compliance with the ECHR is overseen, ultimately, by the European Court of Human Rights. It is therefore important to ask whether, even in the absence of domestic legislation to this effect, the UK and other ECHR signatory states may be subject to legal obligations to intervene to protect the integrity of their electoral systems from the potential impacts of generative AI, as a consequence of the ECHR. It is an issue which has not previously been litigated before the European Court of Human Rights.

In what follows, we walk you through a high-level summary of Hogan Lovells' legal assessment.

3.1 HOW THE ECHR WORKS

States which have signed the ECHR are legally obliged to uphold the human rights it outlines. These obligations can be separated into two kinds: positive and negative.

- **Negative obligations:** states must not to violate the human rights listed
- **Positive obligations:** states must take measures to secure the human rights listed

A high bar of evidence must be met to establish that a state is in legal breach of its obligation to secure human rights. **To demonstrate a breach of human rights, "victim" status needs to be established as a "direct effect" of action or inaction by the state.**¹⁸

¹⁸ Precedent: (Dimitras and Others v. Greece (dec.)), 2017, §§ 30-32) - The Court has held that the inability to receive the results of opinion polls on voting intentions over a period of two weeks prior to an election did not affect voters sufficiently "directly" for them to claim to be "victims" of a violation of Article 3 of Protocol No. 1, within the meaning of Article 34 of the Convention

Hogan Lovells’s analysis focuses primarily on states’ positive obligation to ensure free and fair elections (as outlined in Article 3 of Protocol 1 to the ECHR) and how this might relate to generative AI. It also explores how policies seeking to secure free and fair elections must be balanced with states’ obligations regarding freedom of expression (Article 10 of the Convention), and identifies practical challenges applicants might face when seeking to present rights-based arguments before the European Court of Human Rights.

3.2 THE RIGHT TO FREE AND FAIR ELECTIONS

Article 3 of Protocol No. 1 (A3P1): Right to Free and Fair Elections

“The High Contracting Parties Undertake to hold free elections and reasonable intervals by secret ballot, under conditions which will ensure free expression of the option of the people in the choice of the legislature.”

Based on the European Court of Human Rights’ case law, the right to free and fair elections relies on two pillars:¹⁹

- An **‘active aspect’** describing the citizen’s right to vote.
- A **‘passive aspect’** describing the citizen’s right to stand for election.

A state will violate the ECHR if it infringes on these rights unlawfully or if it fails in its ‘positive obligation’ to secure them (by holding democratic elections and ensuring their citizens can participate as voters and candidates).

The extent of that positive obligation is not clear from the ECHR’s text; instead, this principle has been developed through successive legal judgments. The Court has at various times found states to be under *positive* obligations to safeguard elections which go beyond merely holding the ballot. These positive obligations have included requirements for making reasonable adjustments to ensure disabled voters can vote.²⁰

The Court also uses additional external sources as an aid in determining the scope of the right to free and fair elections – in particular, the work of the Venice Commission which publishes the Code of Good Practice in Electoral Matters (hereafter referred to as the ‘Code’). Though not legally-binding in its own right, the Code has been given great weight in a number of Court judgments and could be described as ‘soft law’.

A3P1 is supplemented by the general prohibition of discrimination outlined in Article 1 of Protocol 12 of the ECHR, which requires the rights enshrined by the ECHR to be made available without discrimination: *“on any ground such as sex, race, colour, language, religion, political or other opinion, national or social, origin, association with a national minority, property, birth or other status.”*

¹⁹ European Court of Human Rights. Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights. Retrieved from https://ks.echr.coe.int/documents/d/echr-ks/guide_art_3_protocol_1_eng

²⁰ Toplak and Mrak v. Slovenia, no. 34591/19, 26 October 2021 [117]

3.3 THE RIGHT TO FREEDOM OF EXPRESSION

Article 10: Freedom of Expression

“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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”

There is a close relationship between the human right to free and fair elections and the human right to freedom of expression. Freedom of expression has been recognised as an essential element of any electoral system which complies with the right to free and fair elections. A free flow of opinions and decision-guiding information among citizens is needed for democracies to function well.

With respect to Article 10, States are subject to a ‘negative’ obligation not to unlawfully restrict the freedom of expression, as well as to a ‘positive’ obligation to ensure the judicial system prevents private actors from unlawfully restricting that freedom. That positive obligation is, however, limited: there is no positive obligation upon states to collect and disseminate information of their own volition; nor to intervene in private relationships where doing so would infringe other ECHR rights.

4. LEGAL FINDINGS

FINDINGS SUMMARY

The Hogan Lovells legal analysis of ECHR State obligations to safeguard elections from detrimental impacts of generative AI yielded 4 key takeaways. These are expanded upon in sections 4.1. And 4.1.

- There is no case law which currently suggests that states must intervene to protect voters from the impacts of mis- and disinformation enabled by generative AI. However, the ECHR is a 'living document', and so the law could develop in this direction in the future.
- Even if a positive obligation were to exist, it would likely be difficult to prove in court that a state was in breach of such an obligation.
- The ECHR does not, in principle, prevent states from taking action to address the impacts of mis- or disinformation enabled generative AI.
- Any such intervention must not endanger other ECHR rights such as Freedom of Expression, though some interference can be justified in order to protect electoral rights.

4.1 IS THERE A POSITIVE OBLIGATION TO INTERVENE TO PREVENT AI UNDERMINING ELECTIONS?

Most cases relating to the right to free and fair elections have concerned alleged breaches of states' *negative* obligations: instances where states have been found to have prevented free and fair elections from occurring, or to have interfered with people's ability to vote or stand for office. Existing legal precedent and guidance say little about the extent of contracting states' obligation to take *positive* steps to protect citizens from external threats.

To the extent that case law or the Code do suggest that states should protect the electorate from external threats, the threats referred to are direct threats to the voting procedure itself which might pressure or prevent voters from casting their votes as they wish. Such direct threats can include attempts to harass or intimidate voters as they attend the ballot box, for instance. There is no mention of the more indirect processes by which voters' voting intentions are shaped, such as through the consumption of campaign material or news media. As such, **existing guidance and case law does not currently suggest there would be any positive obligation for states to regulate mis- or disinformation generally — whether distributed by AI or otherwise — in order to safeguard the quality of the information which voters use form their opinions.**

On the other hand, there are some reasons to think that **States may have a positive obligation to investigate credible allegations that an election has been interfered with via online mis- or disinformation though instances of *direct, explicit attempts at manipulate voter behaviour*** - like by feeding voters false information about voting locations or by abusing specific candidates to dissuade them from standing for office. The Court has in the past recognised some circumstances where states are required to intervene to ensure the robustness of the electoral process. It has found, for example, that states must ensure state-run media organisations provide pluralistic coverage of elections, such that coverage is opened up to different viewpoints.²¹ The Code also requires that states must actively safeguard against instances of voter coercion, intimidation, and ballot-stuffing.

However, even if an applicant successfully argues that a positive obligation to safeguard elections from the impacts of generative AI existed, it is likely to be extremely challenging to convince the Court that the positive obligation has been violated. An alleged breach must be supported by concrete evidence that the complainant is the "victim" of a violation by a signatory state. Impacts of mis- or disinformation on voter behaviour may be difficult to measure, even in hindsight, in a way that would meet the Court's standards for evidence. Assessing their effects on voters requires considering a counterfactual scenario: would a given voter have voted differently had the false or misleading information not been present? Furthermore, the Court is less willing to opine on questions which are fundamentally political rather than judicial in nature.

Overall, it seems unlikely that obligations imposed on states under the ECHR would currently extend to positive obligations to protect voters from the impacts of mis/disinformation facilitated by generative AI or otherwise. The ECHR is, however, a 'living document', and so the law could develop in this direction in the future. Some previous judgments of the Court, addressing circumstances that are arguably analogous, could provide a potential basis for future strategic litigation in this space.

Furthermore, the ECHR also does not prevent states from taking action to mitigate harm from mis- or dis-information, so long as interventions do not endanger other rights.

21 The Communist Party of Russia and others v. Russia, no. 29400/05, 19 June 2012 [111]

4.2 HOW DOES THE RIGHT TO FREE AND FAIR ELECTIONS INTERACT WITH THE RIGHT TO FREEDOM OF EXPRESSION?

While the Right to Freedom of Expression and the Right to Free and Fair Elections are mutually-reinforcing, they can also come into conflict. Measures intended to safeguard the integrity of an electoral system may – directly or indirectly – amount to restrictions on individuals’ freedom of expression.

The Court has previously found that policy measures intended to safeguard the electoral process have in fact amounted to unlawful restrictions on individuals’ freedom of expression, in circumstances where they are not prescribed by law, do not pursue a legitimate aim, or are disproportionate to their objective.

On the other hand, the Court has signalled that some interference with the freedom of expression can be justified in order to protect A3P1 rights (rights to free and fair elections). The Court has acknowledged, for example, that safeguarding the freedom of expression of the electorate requires opinions and information of all kinds to be permitted to circulate freely in the period preceding an election, and that state intervention to ensure this free discourse may be legitimate.

As such, while policy responses to the impact of generative AI on elections could constitute restrictions on individuals’ freedom of expression, interventions could in principle be compatible with the ECHR if done to preserve the free circulation of decision-relevant and democratically enriching information. Based on previous cases, it is likely that **the Court will take a nuanced approach in assessing whether such restrictions are lawful under the ECHR, and decisions about the balance of these rights will likely depend on the specific circumstances of the case.**

It is difficult to predict the factors which the Court would take into account when attempting to balance Freedom of Expression with the Right to Free and Fair Elections in relation to AI. Some factors might include:

- Whether the information being spread is true - though the ECHR does not expressly require that that information should be true in order to benefit from protection.
- Whether the users of generative AI *know* that the information being propagated is untrue, or have the intention of distorting political debate.
- Whether the information is intended to intimidate or harass a particular minority group.

Overall, while the right to freedom of expression does not necessarily prevent states from intervening to safeguard elections from mis- and dis-information (AI-enabled or otherwise), it must be taken into account.

5. RECOMMENDATIONS FOR INTERVENTION

While there does not currently seem to be a legal obligation under the ECHR for states to intervene to prevent AI from affecting elections, the ECHR may evolve with new case law and as our understanding of human rights and the protections they offer continue to develop. Demos **urges states to look beyond the current legal minimum for upholding human rights to free and fair elections, and take proactive steps to defend elections from misuses of AI.**

To guide future action, we at Demos present a series of recommendations for policymakers to help mitigate the detrimental impact of AI on elections. Any legislation we mention is UK specific. These proposed interventions will need to be balanced with freedom of expression considerations, the 'how' of which we discuss in the final section.

A. Reduce instances of deceptive AI-enabled disinformation

- Establish responsible standards for the use of generative AI by political parties during election campaigns as proposed by Demos²² and the Alan Turing Institute.²³
- Require social media platforms to label artificially generated content in so far as is technically feasible.
- Clarify and grant enforcement powers to regulatory bodies such as:
 - Enabling the Electoral Commission to notify the public about false or misleading content and to serve takedown requests to online platforms, for particularly egregious cases e.g. blatant attempts to intimidate candidates or to mislead voters on polling times and locations.

²² Philson & Curtis Open (2024, April 29). Letter calling for UK political parties to safeguard election integrity in era of AI. <https://demos.co.uk/research/open-letter-to-uk-political-parties-to-safeguard-the-next-general-election-from-generative-ai/>

²³ Stockwell et al. (2024, November 13). AI-Enabled Influence Operations: Safeguarding Future Elections. <https://cetas.turing.ac.uk/publications/ai-enabled-influence-operations-safeguarding-future-elections>

- Enabling Ofcom to introduce fines for platforms that are found to lack sufficient moderation policies for false or misleading content that relates to elections or electoral candidates, or which fail to adequately enforce such policies.
- Clarify if and how election interference using AI generated material is covered by the law on False Communications Offences, as set out in Section 179 of the Online Safety Act 2023.

B. Strengthen societal resilience to AI-enabled mis- and dis-information

- Review and update election silence rules to ensure political parties and trusted news media can deny and debunk deep fake content whenever it emerges.
- Run public awareness campaigns about the prevalence of deepfakes and how to locate reliable election information.
- Support real time research on AI impacts during elections in order to counter false narratives efficiently
- Support research which documents the production and spread of false or misleading AI generated content by expanding the research funding available to civil society organisations and academics who work on these issues.

C. Defend access to polling

- Ensure accurate polling information is readily and easily accessible online and through visible advertisement.
- Actively scan for and loudly counter false information about polling time, location, and requirements being spread by deepfakes.
- Require generative AI providers to redirect queries about election information to official government sources.

D. Defend the ability of candidates to freely stand for election

- Criminalise the use of deepfakes to produce and distribute non-consensual pornographic content.
- Amend the Criminal Injuries Compensation Scheme to ensure that victims of online abuse are able to claim compensation.
- Require search engine providers to exclude and/or downrank AI generated non-consensual intimate imagery in their ranking algorithms.

6. BALANCING INTERVENTION WITH THE RIGHT TO FREEDOM OF EXPRESSION

As Hogan Lovells's analysis shows, any policy response to mitigate harms from dis-/ mis-information must be balanced carefully with the human right to freedom of expression, amongst other considerations. Policymakers must, for example, be mindful of the risk of creating content moderation regimes which become censorious and/or which disproportionately affect minority communities.

It is difficult to predict the specific factors which the Court would take into account when attempting to balance Freedom of Expression with the Right to Free and Fair Elections as each case will be highly context specific.

The best approach is to apply the **proportionality principle** which often forms the basis of evaluating human rights claims. When the legality of restrictions on a human right such as the Right to Freedom of Expression are being questioned, the proportionality test is used to determine whether the restrictions are **appropriate** and **necessary** in order to achieve a **legitimate** aim.²⁴

Below are some of the considerations that might be applied according to the proportionality principle:²⁵

- Why are a person's rights being restricted?
- What is the problem being addressed by the restriction on someone's rights?
- Will the restriction lead to a reduction in the problem?

²⁴ The British Institute of Human Rights, 'The Principle of Proportionality'. <https://www.bih.org.uk/get-informed/legislation-explainers/what-is-proportionality>

²⁵ Equality and Human Rights Impact Assessment, 'The proportionality principle explained'. <https://eqhria.scottishhumanrights.com/eqhriatrainingproportionality.html>

- Does that restriction involve a blanket policy or does it allow for different cases to be treated differently?
- Does a less restrictive alternative exist?
- Has sufficient regard been paid to the rights and interests of those affected?
- Do safeguards exist against error or abuse?

For example, any efforts to criminalise the act of spreading false or misleading digital information about electoral processes must ensure they do not unduly restrict the right to freedom of expression, which protects speech regardless of its veracity. Such a policy would require a clear demonstration that it would be effective, and stringent safeguards against error or abuse. Proportionality is one of the key tests the Court would apply if it was asked to rule on the compatibility with the ECHR of a new government policy or new legislation aimed to curtail election interference using generative AI.

7. CONCLUSION

Whilst Hogan Lovells' analysis indicates that there is no legal obligation to intervene to prevent AI from affecting elections, we at Demos strongly encourage policymakers to explore ways to do so. In accordance with the proportionality principle, these must be balanced carefully with the Right to Freedom of Expression, amongst other considerations.

For this reason, we at Demos **urge states to look beyond the legal minimum for upholding human rights to free and fair elections.** Even where the letter of the law may not require a response on a human rights basis, states should strive to go above and beyond to uphold the spirit of the law. To preserve the integrity of democratic institutions for all citizens, states **must take proactive steps to defend elections from misuses and abuses of AI and from disinformation more generally.**

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