



Fighting disinformation,
a necessity or ‘abuse of power’?

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Abstract

Since Russia's alleged interference in the 2016 United States elections, the topic of disinformation has gained a more prominent spot on the Dutch security agenda. As a result the Dutch Minister of the Interior and Kingdom Relations, Kajsa Ollongren, presented policy means to protect the Dutch society against disinformation. Ollongren argued that disinformation has the ability to "harm the public debate, democratic processes, and the open economy or national security" and therefore needed to be dealt with. Within the EU there is a general consensus on the spread of 'disinformation' forming a threat, and therefore needs to be combated by means of government regulations. This ought to be done whilst safeguarding the quality and stability of our democratic rule of law and that of our society, which includes freedom of expression. The analysis has proven that these requirements are not always met, as the Dutch strategy to combat disinformation has the potential to infringe on the freedom of expression. Therefore, it is important for checks and balances to be in place. Furthermore, the test of necessity, legality and proportionality should be applied, before limiting the freedom of expression, in order to prevent unnecessary infringement. By doing so, disinformation can be combated whilst minimizing the impact on the freedom of expression.

Abbreviation

BZK	Ministry of Interior and Kingdom Relations
D66	Democrats 66
ECHR	The European Convention on Human Right
EEAS	the European External Action Service
EU	European Union
EC	European Commission
ISP	Internet Service Provider
IViR	Institute for Information Law
MFF	Multiannual Financial Framework
NTD	Notice-and-take-down
PvdA	The Labour Party
RAS	Rapid Alert System
RRM	Rapid Response Mechanism
RAS	Rapid Alerts System
US	United States
VVD	People's party for Freedom and Democracy
VWS	The Ministry of Health, Welfare and Sport

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I INTRODUCTION

1.1. Orwellian Scares

Living in a society where the tentacles of government control reaches not only what we say or how we dress, but also how we think, and how we should feel, are quite often used as literary and cinematic tropes. Although clear definitions are lacking, references to ‘Orwellian’ societies, or ‘Kafkaesque’ situations, are commonly used metaphors to refer to dystopian societies where movement is largely controlled by the government. George Orwell’s classic novel *nineteen eighty-four* gives a nightmarish inside of how life looks like in Oceania, a totalitarian state where mass surveillance has reduced the private sphere to zero. Although prophetic in nature, history itself has given us ample examples of regimes practicing a strong form of surveillance and where it has become part of people's day-to-day life, of which China, recently, has grabbed global attention due to the implementation of the ‘social credit system’ (Creemers, 2018; Dai, 2018; van Gerven, 2018). One could easily read Orwellian tropes into this. The apparatus of surveillance methods almost does not come as a surprise, what else can one expect from a communist regime where the sense of individuality gets submerged, or is almost sacrificed to the community at large? One often believes that this narrative lies far away from ‘free’ democratic societies that uphold individual liberties and rights. If at all there is any infringement upon individual rights, such as the freedom of expression, this would always need to be justified. Can the infringement upon the freedom of expression, however, be legitimized when said to form a threat to our democratic societies?

1.2 Background

In April of 2018, the European Commission (hereinafter referred to as EC) published a notice to the European Parliament, expressing its concern over the rising threat of online disinformation.¹ These concerns were triggered by the allegations in regards to Russian disinformation campaigns during the 2016 United States presidential elections (hereinafter referred to as the US).² The European Union (hereinafter referred to as EU) is committed to protecting societies, citizens and freedoms against hybrid threats, as underlined in its Strategic Agenda. With the 2019 elections to the European Parliament around the corner, the EC therefore urged for measures to be taken.³

Russia's alleged interference illustrated how the digitalized world can bring along new challenges. The emergence of the Internet has impacted society in an unprecedented manner. The current technological infrastructure supports wireless communication that has allowed for information to be produced and spread in an instant, thereby transcending space. In addition, online avenues, such as Facebook and Twitter, have opened up for expressing our thoughts and sharing information. With that, disinformation can now be spread rapidly reaching a large audience instantaneous. As a result a relatively small group of internationally operating Internet platforms have the ability to have a major impact on local democratic processes. The European Commission expresses that this could lead to the public debate being influenced by the large-scaled, deliberate and systematic spread of disinformation, which could be considered a threat to democratic societies

Due to the current COVID-19 pandemic, pressure has been added on the EC's fight against disinformation. According to the European Commission the coronavirus pandemic has been accompanied by a massive wave of false or misleading information, including attempts by foreign actors to influence EU citizens and debates (European Commission, 2020). With regards to this matter the Vice-President for Values and Transparency of the EC, Věra Jourová, stated the following in a press release: "*Disinformation waves have hit Europe*

¹ In chapter 2.2 a comprehensive definition of disinformation has been given.

² "Joint Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions—Tackling Online Disinformation: A European Approach." European Commission, December 12, 2018, https://eeas.europa.eu/sites/eeas/files/action_plan_against_disinformation.pdf

³ *Ibid* (n1).

during the Coronavirus pandemic. They originated from within as well as outside the EU. To fight disinformation, we need to mobilize all relevant players from online platforms to public authorities, and support independent fact checkers and media. While online platforms have taken positive steps during the pandemic, they need to step up their efforts. Our actions are strongly embedded in fundamental rights, in particular freedom of expression and information.”

The EC therefore pleads for a joint action by all relevant actors in order to tackle all aspects of the ‘disinformation threat’. The ‘relevant actors’ mentioned in the note are: civil societies, all relevant institutional actors and the private actors (in particular online social media platforms, such as Facebook, Twitter and YouTube).⁴

1.3 Disinformation in the Netherlands

As a result of Russia’s alleged interference in the 2016 United States elections, the topic of disinformation also gained a spot on the Dutch security agenda. In October 2018, in a letter to the House of Representatives, the Dutch Minister of the Interior and Kingdom Relations, Kajsa Ollongren, presented policy means to protect the Dutch society against disinformation. Ollongren argued that disinformation has the ability to “harm the public debate, democratic processes and the open economy or national security” and therefore needed to be dealt with. In the letter to the House of Representatives, it was mentioned that despite the fear of foreign interference research had shown that there had been no indications that large-scale disinformation was spread by state actors in our Provincial States elections, nor in the European parliamentary elections. Nevertheless, it was argued that continued vigilances, extending beyond the context of elections, were necessary as disinformation could also pose a threat within social discussions or economic matters.

In order to tackle disinformation the policy means presented a strategy consisting three ‘spear heads’: (1) taking preventive actions in order to fight the impact and spreading of disinformation, (2) the reinforcement of the information position and the sharing of information in order to identify threats in a timely manner and (3) taking responsive actions on disinformation if considered necessary (Kamerstuk 30821, nr 74, 2018). In the letter

⁴Joint Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions—Tackling Online Disinformation: A European Approach,” European Commission, December 12, 2018, https://eeas.europa.eu/sites/eeas/files/action_plan_against_disinformation.pdf

Ollongren emphasized that the battle against disinformation will be dealt with whilst safeguarding the quality and stability of our democratic rule of law and that of our society, which includes freedom of expression.

Interestingly, a recent study has shown that Dutch citizens are less concerned about disinformation in comparison to other countries. Out of the forty surveyed countries the Netherlands came out as the very least concerned country. In addition, the survey showed that Dutch citizens, have more than average confidence and trust in the general news outlets. However, in regards to other news, for example news that can be found through search engines or on social media, Dutch citizens seem to have less trust. Despite the prior, the research does indicate that younger generations obtain much of their news via social media. (Newman et al., 2020). While the government feels the necessity to mollycoddle its citizens, it could be argued that general education has equipped citizens with the ability to differentiate falsity from truth.

1.4 Research Question

Based on the above, it can be said that within the EU there is a general consensus on the spread of ‘disinformation’ forming a threat, and therefore needs to be combated by means of government regulations. As mentioned, this ought to be done whilst safeguarding the quality and stability of our democratic rule of law and that of our society, which includes freedom of expression. In the policy means for the protection of Dutch society against disinformation, it is therefore emphasized that the Dutch Cabinet will stay away from assessing online content for its substance, if it can be labelled as ‘non-punishable’, as addressing disinformation is not a primary task for governmental institutions, but rather for non-governmental actors such as independent media, online platforms and scientists. However, when the “national security, public health, economic and/or political stability are threatened, or criminal boundaries are exceeded”, governmental interference can be legitimized (Kamerstuk 30821, nr 74, 2018).

How does one, however, decide what information should be classified as ‘disinformation’ and when does it pose a significant threat to our nation? Is it appropriate for the government to have such control over what is right or wrong? And what does this mean for the freedom of expression? Is it not part of the democratic process itself to decide for ourselves what we

believe or not? Are we not entering a form of censorship? In accordance with the latter, the following research question has been formulated:

What are the limitations to the freedom of expression in the context of the Dutch government interventions against online disinformation for national security purposes?

The limitation of freedom to expression is assessed by juxtaposing it against national security. Protecting national security requires an active approach by the government. We expect the government to act, which is also known as a positive right. Freedom of expression, however, is considered to be a negative right. The government is expected to abstain from interfering.

The following sub questions have been formulated by which the main research question will be answered:

1. What is disinformation?
2. What is freedom of expression and what does it entail in the Netherlands?
3. How can disinformation become a threat to national security?
4. What measures are being taken by the government?
5. What are the limitations to the freedom of expression?

1.5 Societal and Academic Relevance

1.5.1 Social relevance

On the 18th of June 2020 France's highest constitutional authority struck down the critical provisions of a law which would have forced social media platforms, such as Facebook, Twitter and YouTube, to remove hate speech (Conseil Constitutionnel, 2020). The law, which had been passed by the French Parliament a month prior, obligates online platforms to delete any hateful content within 24 hours. Failure to comply with the directive would result in fines, which could go up to 1.25 million euros. According to the ruling of the Constitutional Council, the law is believed to interfere with the freedom of speech in an excessive manner. France's Constitutional Council is saddled with the responsibility of reviewing legislation to determine whether it complies with the country's constitution. Based on the Council's review and ruling, the current draft law will make the administration a sole authority that decides on what illicit information is, without any interference by a judge. As a

result social media companies may take down more content than necessary in order to avoid being sanctioned. It was therefore argued that the provisions of the law infringe upon the freedom of expression and communication in an unnecessary, unsuitable, and disproportionate manner. The decision is considered to be a huge setback for President Emmanuel Macron, who had vowed to make France the leading country in the fight against online false and illicit information (Breedem, 2020)

The ruling has come in a time in which governments around the world, including the Netherlands, are seeking to regulate what is being shared on online platforms, in order to protect societies from harmful information (Breedem, 2020). It is interesting how within a fellow European country a law has been struck down by its highest authority, due to it infringing upon the freedom of expression and communication, all whilst the Netherlands, the European Union as a whole, and other countries are adopting rather similar approaches. Since France is part of the EU and, like the Netherlands, is governed by the ECHR it becomes the more relevant to take the plan of the Dutch government under the loop. Are we, perhaps, following the French way, or are we adopting a more balanced approach?

The EC, as well as minister Ollongren, have underlined the importance of freedom of expression, and how this is perceived as a core value within the EU. Both argued that online avenues have opened up for expressing our thoughts and can therefore be viewed as strengthening force to the freedom of expression, one of the core values of the EU. In a democracy it is important for citizens to have access to a diverse range of content. This is considered important due to the fact that this content can be used by citizens to form an opinion on political matters (European Commission, 2018). As a result citizens will be more well-informed whilst partaking in public debates. But what will the freedom of expression look like for us whilst countries battle the new threat of disinformation? Therefore, having a better understanding of this topic is of great social relevance, as the potential infringement of freedom of expression not only affects us on an individual level, but can also affect our democratic society as a whole

In addition, an increased amount of our communication on a day-to-day basis is taking place on digital platforms and this is only expected to grow since more people are getting access to the Internet. The EU Commission is committed to boost its digital infrastructure to 5G and has already invested 700 million Euros to accelerate the research in 5G-technology (European Commission, 2020). Additional efforts are being taken as the UN strives to bridge more

digital gaps across the world by the means of Sustainable Development Goals (SDG). Undoubtedly, this growth will increase the amount of information available on the Internet, out of which some may be classified as ‘disinformation’, out of which subsequently some may be considered a threat. In this context, it becomes more relevant to understand how the government may protect us against a perceived threat versus allowing us to express ourselves freely, a cornerstone of any democratic society.

1.5.2. Academic Relevance

Though many studies have been made on the theme of national security versus freedom of expression (Coliver, 1999; Dutta, Dutton & Law, 2010;), the letter by Dutch Minister dated in October 2019, allows for a very specific geographic analysis of recent relevance. As the fight against disinformation is a rather ‘new’ topic on countries political agenda, the current body of knowledge could be benefited with a case study on this matter. As countries worldwide are facing the threat of disinformation, knowledge on how to do so, whilst maintaining their core values such as freedom of expression, is of great importance. Overall this research aims to contribute to the existing body of literature on the boundaries of freedom of expression, in the fight against the threat of disinformation, with respect to the Dutch context.

1.6 Reading Guide

The first chapter of this thesis can be considered as the introductory part. It included a presentation of the main objectives, presented the research question and ended with a part explaining the academic and social relevance of the research. The following chapter will firstly zoom in on several important concepts, such as: disinformation, rule of law, proportionality and freedom of expression. Thereafter, the ‘chilling effect’ by Schauer (1978) and Solove (2006) will be presented. It will be explained how a surveillance society can ‘chill’ peoples rights of people, due to the threat of legal sanctions. Subsequently, the ‘pathetic dot theory’ by Lawrence Lessig (1998) will be introduced, to further explain how regulation and potential sanctioning can influence people's behaviour. The gathered literature will then be used to conduct an analysis on the policy plan to fight disinformation. Lastly, the conclusion will discuss the main findings, after which recommendations for potential further research will be provided.



II Theoretical Framework

Before moving any further, for the purpose of this research, this chapter will shed some light on several definitions and theories that will be used. In order to answer the main question “*What are the limitations to the freedom of expression in the context of government interventions against online disinformation for national security purposes?*”, one should understand what is meant with 'disinformation', as well as 'freedom of expression' and the 'rule of law'. Also, to gain better understanding on the possible effects that government interventions can have on the behaviour of entities and (subsequently) on freedom of expression, the conceptual framework will be followed up with several theories that may give us answers to this. We will look at Lessig’s model of regulation and the chilling effect theory from Schauer (1978), as well as Solve (2016). With regards to the ‘chilling effect theory’ it should be mentioned that it is an American theory. Since the American view on the freedom of speech is rather different from the European (and Dutch) one, the theory will be parted from its context and will be solely used for its substance.

2.2 Defining Core Concepts

2.2.1 Disinformation

In practice terms like ‘misinformation’, ‘disinformation’ and ‘fake news’ are widely used interchangeably. Within the European Union disinformation is described as “*verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm*”⁵. ‘Public harm’ can in this sense refer to disinformation affecting democratic processes, but can also refer to it threatening public goods such as security and the public health. It be can argued that even though the European Union has formulated a definition of disinformation, it does not provide a lot of knowledge on what content would be considered disinformation and what not, making the term rather ambiguous. However, as it is the definition that is being used within the European Union, it is what will be referred to when using the word ‘disinformation’,

⁵ Joint Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions—Tackling Online Disinformation: A European Approach,” European Commission, December 12, 2018, https://eeas.europa.eu/sites/eeas/files/action_plan_against_disinformation.pdf

2.2.2. Rule of Law

The United Nations defines the rule of law as the principle of governance that demands every individual, organizations (whether private or public), and the state as a whole, to be accountable to laws, which are proclaimed publicly, enforced equally and independently judged. And importantly, the laws must be in line with global human rights, standards, and norms. Before we can uphold the principles of law's supremacy, law's accountability, law's equality, separation of powers, and fairness in applying the law, specific measures must be in place. These measures will also ensure legal certainty, procedural and legal transparency, involvement in decision-making, and avoidance of arbitrariness (Un.org, n.d.).

The fundamental basis for stable global peace, security and politics, is the rule of law. This rule is necessary to achieve social and economic progress and development and is necessary to safeguard the right and fundamental freedoms of people. It is the key to curb corruption, restrain the abuse of power, establish a social contract between individuals and the state, and provide access to public services for the people.

Globally, the highest-ranking source for genuine and independent information about the rule of law is the World Justice Project (WJP) Rule of Law Index®. The body covers 128 nations and jurisdictions, getting data from national surveys of over 130,000 households and 4,000 legal experts and practitioners. The data is analysed in order to understand people's experience on the law, as well as their perception of the law. According to the index, the Netherlands emerges 5th among 128 countries, regarding the nation's overall rule of law score (WJP Rule of Law Index, 2020).

2.2.3. Proportionality

Proportionality can be described a principle, which puts restrictions on the power of authorities in order to establish balance between 'the means' on one side and 'the intended aim' on the other side. The principle requires that "the advantages, resulted from limiting the right, are not outweighed by the disadvantages to exercise the right." (European Commission, n.d.)

2.2.4. Freedom of expression in the Netherland

Article 7 of the Dutch Constitution, is the article by which our freedom of expression is protected. Due to the fact that the doctrine of 'monism' is in place in The Netherlands, rights

found international treaties are directly integrated into national law (Popelier,1997). These rights can therefore be invoked by anyone, with the European Court of Human Rights in Strasbourg as last resort for Dutch nationals to guarantee that fundamental rights are upheld by the respective States. With that, article 10 of the European Convention on Human Rights (ECHR), too, protects Dutch citizens in its freedom of expression.

The two articles state that no one needs prior permission in order to reveal their thoughts or feelings. This entails that individuals, groups and any type of media are free in the way they express themselves. It includes the protection of opinions that would be frowned upon by the government, or by the large majority of a population. Special attention is given to this matter, as article 10 of the ECHR specifically mentions that public authority may not interfere. Despite an expression being perceived as hurtful, shocking or disturbing, it may be “uttered”. The prior can also be referred to as the ‘prohibition of censorship’. The prohibition of censorship is of great importance, as it provides room to freely express criticism, including towards the government or other government agencies, which is important for the proper functioning of a democracy.

However, freedom of expression does have limits to it. As for one may not ignore the core values of the ECHR and in addition may not hate speech. These restrictions must be prescribed by law and therefore article 7 of the Dutch Constitution states that formal law can set limits on the content of expressions. "Law" in this context refers to: a national law or regulation established by the government and parliament. Article 10 of the ECHR provides additional information on the limitations of freedom expression, and states the following:

“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 in 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.”

2.3 Theory of Chilling Effect

Schauers (1978) chilling effect theory will be used to reveal how deterrence may occur when laws or regulations evoke a sense of fear, risk, or uncertainty. The theory will provide insights on how laws and regulations can influence people and what this may lead to.

2.3.1 Schauers Chilling Effect

In the year 1978, Schauer wrote an article titled “Fear, Risk, and the First Amendment: Unravelling the Chilling Effects Doctrine.” In the paper, he disclosed his theory of chilling effects, which was first articulated through a review of the First Amendment cases and related laws in the United States of America. According to Schauer, the United States Supreme Court was the first body to introduce the notions “chill” and “chilling effects” back in 1952 (Schauer, 1978: 685). However, it wasn’t until 1968 that the words became fully expounded. Since then, the notion of speech has developed from being merely an “emotive” discourse, to become a fully-fledged constitutional doctrine, i.e., the chilling effects doctrine (1978: 685). As a result a number of free speech decisions have been formed from the “chilling effects doctrine,” either explicitly or impliedly.

However, as Schauer explained, beneath the doctrine lies a theory. Schauer worked towards explaining the doctrine and the elements responsible for the theory of chilling effects. Schauer continues by saying that both the “chilling effects” doctrine, as well as the chilling effect theory supporting it, are formed from two fundamental propositions (1978: 687). As for the first proposition, he explains how uncertainty has been infused into, and surrounded every litigation or in fact the legal system as a whole. A little certainty exists in the legal process due to the interactions among various characters, such as the judges, lawyers, jurors, human witnesses, and the rules created by humans. Because of the uncertainty, there is room for errors and mistakes (1978: 687). The error could, however, occur in a civil context when a huge damage award is given to a non-deserved plaintiff, or in a criminal process with the innocent being convicted.

The second proposition suggests that there is more social disunity in the erroneous limit on speech, compared to an erroneous overextension of speech. Based on what Schauer wrote, this statement implies that nations, who recognize the importance of expression and liberty, need to err on the side of the values (1978: 688). In other words, the chilling effects theory

understands that uncertainty exists in the legal process. Therefore, governments should favour legal rules that support human rights and freedoms. Although Schauer discusses the chilling effect in relation to the American context, the concept of ‘chilling effect’ is applicable to several other contexts.

2.3.2 The Deterrence of Legal Activities

According to Schauer (1978), the chilling effect is essentially an ‘act’, or ‘form’ of, deterrence is. He argues that deterrence may occur when laws or regulations evoke a sense of fear, risk, and uncertainty. Thus, while the phenomenon of “chill” and “deterrence” differ, there is a close relationship between the two. As found in criminal law, deterrence is usually an intended objective, or goal of the law. For instance, a state is allowed to pass a criminal statute. Such a statute may entail severe punishments for homicide or other prohibitions regarding anti-social behaviours. Presumably, the new criminal prohibitions are intentionally created to curb homicide or assault. Therefore, somehow, the acts are “chilled”, which is a desirable consequence, according to Schauer (1978: 689). However, the prior mentioned ‘type of deterrence’ is not the focus of Schauer’s chilling effects. Instead, his theory of the chilling effects focuses on how legal activities are “chilled” by state actions or laws. In this regard, Schauer discusses the freedom of expression, which is protected by the constitution. However, he argues that it can be applied to a wide array of legal actions, which are legally protected and permissible – but can potentially be “chilled.” According to Schauer’s theory, the chilling effects take place when people who seek to attempt activities that are protected by our constitutional rights, are curbed from taking action due to government regulations, which are not explicitly aimed at the protected activity (1978: 693).

Here, ‘expression’ and one’s speech are the “chilled” legal action, which are protected by the constitution. Thus, it can be said that the theory of chilling effects is essentially about ‘indirect impacts’ and damages. Simply put, it’s a constitutional law that curbs an action, but deters an individual from performing another legal action. Schauer explains the indirect component of chilling effects with two examples. The first instance is the statute that considers hard-core pornography as criminal actions. However, the same statute stops an individual from publishing *Lady Chatterley’s lover* – a book written by D.H. Lawrence, a renowned English Novelist – due to the explicit descriptions of sexual intercourse, which is entirely legal (1978: 693). The second instance is a case where a potential defamation

lawsuit for releasing false statements stops an individual from publishing genuine stories or comments with facts (1978: 693).

While setting out his theory, Schauer emphasizes the freedom of speech and expression, which is understandable due to his legal background. Besides, the fundamental element supporting his account, lies the normative position, which posits that free speech and expression is a societal good. Therefore, the government restriction on the good must be discouraged. However, It's unnecessary to restrict the theory of chilling effects by Schauer to mere "speech and "expression.", as it can easily encompass all sorts of legal or "protected" activities" (1978: 691).

Schauer admits that not every form of "protected" speech or activities may be desirable. However, it's quite complicated to determine whether speech or an activity is "desirable". Generally, whether speech is desirable or not is determined by "societal consensus." Thus, Schauer focuses on constitutionally protected activities to maintain methodological pragmatism. He also expresses that the chilling effects of his theory is applicable beyond the scope of our constitutions, as well as activities outside of speech and expression.

2.3.3 Individual Focused

The chilling effect theory by Schauer focuses on how people are deterred or "chilled". Schauer explains how and why people might be stopped from "protected" or legal activities according to the law that interdicts other activities. Humans are reasonable and rational beings. In fact, we often entertain the reasoning process on whether we should engage in a specific activity or not, taking into account any legal rule or regulation that applies (Schauer, 1978). He further explains that the inherent uncertainty and possibility of error in the legal process results in a sort of fear form the core point. The fear usually contributes to the punishment, most notably when it is severe or comes with a reputational consequence. Also, it concerns the fear of error in which the punishment or any applicable cost is enforced by fear – a good example is when an innocent is punished erroneously (Schauer: 1978: 695-697). Such fear is essentially influenced by some factors. For instance, a complex factual case can result in further uncertainty. Consequently, it will lead to additional fear of erroneous punishment if the individual performs the action, even though they understand that the action is permissible and legal (1978: 696-697).

The benefit that an individual might get from performing an otherwise legal activity is another factor. In this regard, Schauer gave an example of a news editor who wants to publish for commercial reasons, despite knowing the possibility of a defamation lawsuit. Also, individual risk-aversion plays a crucial role. In the face of certain fear, limited benefits, and uncertainty, some people will be easily deterred from performing some legal actions. Furthermore, two other key factors were explained by Schauer. Firstly, the statutes, legal rules, and other legal issues that relate to a specific situation, can be vague. In addition, the rules may be uncertain in application, which can render people unable to determine whether an action is legal or not (1978: 700). The second factor is the cost needed to obtain legal or judicial determinations. Since we thrive in an imperfect legal system, whether you are innocent or not, you will incur charges financially (1978: 699-670). Consequently, it can result in the chilling effects of legal actions.

2.3.4 Solove's Surveillance Chilling Effects

Like Schauer, Solove (2006) is a legal scholar and a top privacy theorist, among other specializations. And like Schauer, he also seems concerned with the impact of surveillance and the modern information collection (Wright & Friedwald, 2013: 755). Solove's understanding of the chilling effects is built upon Schauer's theory, but complements the work by extending the scope and discussing the reach and usefulness of the theory extensively. Similar to Schauer, the theory developed by Solove focuses on individual entities and also approaches the chilling effects as legally permissible actions that are deterring. The major contribution of Solove to the chilling effects theory, is that he discussed how surveillance and comparable information practices might deter "protected" activities. Additionally, he showed how such chilling effects might influence individuals as well as society at large. In his work, he referenced the work of Schauer in many areas. Like Schauer he agrees that a form of deterrence of legal, permissible, or "protected" actions, is "key" to chilling effects.

Solove, however, argues that over the years courts have come to a realization that a series of government information collection through surveillance, can indeed deter several legal and "protected" actions. Such actions may include – but not limited to – freedom of speech and consumption of associations. Surveillance for criminal prosecutions is another obvious source of chilling effects, Solove writes, but that is not all. That aside, "chill" may even occur from "information gathering" that is not associated with any specific purpose or penalty.

Reason being, that the idea of data being collected can stop people from expressing themselves or saying certain things, due to the fear of falling into a blacklist or a database that might be used to incriminate them in the future (Solove, 2016).

An example given by Solove is the Federal Bureau of Investigation that seeks the IP address and identity of an anonymous, yet radical blogger. This was done through a secretive National Security Letter to the Internet Service Provider (ISP) of the blogger. Although the blogger was never prosecuted – perhaps because the freedom of expression protects the blogger’s speech - such an action might “chill” the blogger from activities and political expression. In addition, Solove cited another instance in which the state or police may hold excess power, and consequently, resulting in a sort of risk-based chilling effect on permissible and legalized activities. He discusses a case where a police officer possesses excess power that can stop people from performing an action. As a result, people may become “chilled” and choose not to attend political rallies or voice against popular views when necessary. These effects can also materialize due to surveillance. Such harm is usually called a “chilling effect.”

Without any doubt, these effects are prejudicial and can result in “decisional interference,” as called by Solove. This term refers to the interference with one's choices and decisions, including legal activities. Solove expresses a special concern for European issues regarding the impact of surveillance and self-determination in the public sphere, most notably when it comes to deterring the involvement of people in democratic debate and political activities (2006: 491). A vital contribution would be to connect the differing legal and privacy traditions, which Solove utilized to showcase the influence of surveillance-related chilling effects on individuals and society at large. And, more importantly, how it curbs people from contributing to the greater social good. Solove accepts that a specific amount of social conformity might not necessarily be harmful. Advisably, lawmakers should consider discouraging some criminal norms via criminal prohibition, for instance. However, within a free, diverse, and open democratic community, excessive social control and conformity, such as surveillance that deters involvement in legal activities, is never a welcome idea (2006: 492).

2.5 Lessig's Model of Regulations

Lessig's theory will be used to reveal how a government can influence peoples' freedom of expression through various constraints. The theory of Lessig will be used to give insights into the four types of constraints, which are; market, social norms, law and architecture. (Lessig, 1998: 663).

2.5.1 The Pathetic Dot Theory

Back in 1998, Lawrence Lessig published an article in which he introduced the Pathetic Dot Theory, otherwise known as the New Chicago theory. A year after, he documented the theory in his book titled "Code and Other Laws Cyberspace," which eventually became famous. The paper discusses the regulations placed on those who live in cyberspaces and the constraints that apply. According to Lessig's Model, the regulation for the "Pathetic Dot" was developed due to a combination of four major constraints. The constraints include the market, the norms, the law, and the architecture (or technical infrastructures). The pathetic dots represent the people's lives in questions. Since the dot accepts imbalance or regulation without any objections, it is considered as "pathetic." Sanctions, among other factors, are means through which the four types of limitations influence the pathetic dots. The sanctions can either be legal, or social (Lessig, 1998: Jansen, 2019).

2.5.2 Law

With the threat of sanctions, the law is able to limit a person's behavior. Conventionally, the state imposes the threat of sanctions using the laws created by the legislature. Concerning criminal law, sanctions are necessary for the purpose of restoring legal peace whenever deplorable actions disrupt it. Furthermore, it is salient to deter prospective offenders. For instance, contractual fines are enacted for the same purpose in private law. In social security law, the reduction of unemployment benefits is a good example of sanctions. As for international law, economic sanctions are used by the UN Security Council to ensure that the states adhere to any decision made by the union. Legal sanctioning is primarily used to announce specific conducts and impose penalties on individuals that fail to comply with norms of behaviour. As a result, deviation becomes rare. Thus, legal sanctioning is a social control method that helps optimize the liberty of the individual in several ways, without exceeding the mandatory legal framework (Lessig, 1998: 662-663).

2.5.3 Social Norms

This constraint utilizes societal sanctioning to regulate the behaviour of individuals. Societal sanctioning often includes expulsion, criticism, among others. With the societal norms, rules are imposed on individuals of society. The rules usually influence how each person should behave in society, as well as how to relate with others. Failure to comply with the rules may end up in social sanctioning. These rules are usually governed by the understandings of the majority within society. However, it is worth noting that the rules may not be strictly and absolutely required. Also, laws do not state social norms, but they are observable in real life. According to Lessig, social norms limit through stigma, which is imposed by society. Compared to what could have been expected, stigma is an unwanted separateness. It is considered as a peculiarity of an individual to their overall behaviour. When a person is stigmatized, he/she will hold the status of being “different” from the others (Lessig, 1998: 662-663).

2.5.4. ‘Code’ as Architecture

The limits on what users can do are imposed by the architecture of the code. According to Lessig (1999), while law sanctions apply after an event has occurred, architecture is used as a tool to prevent the event from happening in the first place. What Lessig meant by “Architecture” includes the attributes of the world, which may be “found or made.” He noted that facts, such as geography, technology, biology, among others, might limit human actions. Our freedoms may be limited due to constructions. And, in many ways, the constraints are sort of regulations. As the “code of cyberspace” or the structure of the Internet changes, it can influence the consequences, which according to Lessig, the Internet possesses. For instance, we are likely to experience changes in consequences in the possible actions of market and government as the laws or commerce influences the relative anonymity of cyberspace – such as cookies technology (Lessig, 1998: 662-663). A good example is the actual design of the Internet. It’s made in a way that any person who uses a browser to access a website will be doing so in a stateless transaction. This implies that the web server would not be able to determine the location of the person automatically. Thus, no record of a person who just enters the website at the last minute will be available.

While the stateless architecture helps protect the relative anonymity, there is a drawback. The disadvantage is that the web server will find it hard to monitor the desires of the users, such

as preferred items, among others. However, the early developer of the Internet came up with a solution. They developed a tech known as cookies. With technology, the website can track the items that user accesses on the site. What we should learn from the example is that small changes in the Internet architecture brings about a necessary consequence on the relative anonymity of network users. The consequence makes it less challenging for the websites to track the users' behaviour on the network. In other words, it has a relatively automatic means to recognize people and monitor their actions, at least on a specific website.

2.5.5 Market

Aside from sanctions, Lessig's theory explains the influence of markets and technical infrastructures. The two constraints do not impose sanctions. Instead, they establish limitations. Economics defines the market as a real or virtual setting, where the supply and demand of a specific good takes place. Lessig explains that price and price-related measures limit the market. When a good's price leads to a balance between the quantity demanded and quantity offered (otherwise known as the market equilibrium), it is referred to as the equilibrium price or the market price. Concerning the boundaries in the market, a boundary option could be about finding a specific product price – markets limit through the exacted price (Lessig, 1998: 662-663).

While the four constraints are different, they are dependent on one another. It's possible for a constraint to support or oppose another. For instance, law or social norms can be undermined by architecture or technology. Nevertheless, technology can still help the enactment of laws. So, while some sanctions and limitations support other constraints, others prevent the happening of some limitations. Although the existence of boundaries together is possible, they work differently. Likewise, the consequences of each limitation differ. Calling a sanction or boundary a regulator won't be out of context. In addition, it's safe to consider every regulator as a distinct modality of regulations. Considering that each modality is quite complex, the interactions among the four modalities can be challenging to explain. But right now, we understand that there is an interconnection among the modalities.



III Research design and Methodology

3.1. Method

In order to answer the research question, a qualitative content analysis will be conducted. Neuman (2014) describes a qualitative content analysis as a technique in which written content is the focus of the observation. The main goal of this research technique is to “provide knowledge and understanding of the phenomenon under study” (Hsieh and Shannon, 2005). Researchers therefore tend to turn to this method when in search of knowledge on the purposes, the messages and effects in written communication.

3.2. Case study and case selection

To capture the complexity of freedom of speech, a case-study research will be executed. This approach allows for the topic to be studied in a detailed manner in order to come to a richer and more extensive explanation on the limits of freedom of expression in the fight against disinformation (Neuman, 2014). In this research, the Netherlands is chosen as a case study. As a Dutch citizen the case of the Netherlands sparked immediate interest, as the potential infringement of freedom of expression, not only affects our democratic society as a whole, but will also affect citizens on an individual level. In addition, the topic of ‘disinformation’ is a ‘hot topic’ in our digitalized world and many governments have created space on their political agendas in order to tackle this threat. The European Commission has even insisted on a joint approach in order to fight ‘disinformation’, as the threat concerns many actors and has no borders. An in-depth case study on one of the policy development of member states, such as the Netherlands, can therefore be useful as this serves as an example for other ‘civil societies’ which tackle the threat of disinformation whilst not-infringing and respecting the freedom of expression.

In addition to the prior, the selection of the Dutch case was also motivated by the extensive research that has been conducted on behalf of the Dutch Ministry of the Interior and Kingdom Relations (BZK). Firstly, the University of Amsterdam was commissioned to conduct an extensive research on the politics of social media manipulation, resulting in an in-

depth ‘two hundred-paged’ report. In addition, the faculty of law of the University of Amsterdam was commissioned to conduct a research on ‘the spread of disinformation through Internet services and the regulation of political advertisements’. So even though the policy is still being formed, the Netherlands is situated in a phase at which there is a significant amount of information to work with, in order to conduct useful research on.

3.3. Data Collection

Within this research the written communication on the Dutch government’s intervention against online disinformation, will be analysed. This will be done in order to obtain knowledge and insights, on especially the potential ‘effects’ on the freedom of expression. The written communication will consist of a large range of Dutch government documents, such as written regulations, parliamentary inquiries, parliamentary papers and such. Due to the fact that the doctrine of ‘monism’ is in place in the Netherlands, in which rights found in international treaties such as the ECHR are directly integrated into national law, European laws and regulations regarding this matter will be taken into account.

Despite the potential practical limitations of time, it is believed that a significant amount of the written government communication on online disinformation will be included. Taken into account that the threat of disinformation is a relative ‘new’ and the policymaking in relation to the tackling of ‘disinformation’ is still in process, the amount of governmental documents on this matter is expected to still be ‘manageable’. The document will be extracted from Rijksoverheid.nl. All documents, which can be found under search term ‘disinformation’, will be collected. As the starting point of this matter is the day on which minister Ollongren directed her first letter to the House of Representatives, data will be collected from 2018 up until 2020. Thereafter, a first read of the documents will determine which document will be eliminated and the basis of their relevancy. A content analysis will then be conducted on the remaining documents.

As mentioned in the introduction the Dutch strategy to combat disinformation has three ‘spear heads’: (1) taking preventive actions in order to fight the impact and spreading of disinformation, (2) the reinforcement of the information position and the sharing of information in order to identify threats in a timely manner and (3) taking responsive actions on disinformation if considered necessary. Based on the documents, we will look into all the

measures that the government is intending to take. Then it will be determined under which of the three spearheads this can be placed. This qualitative method of coding aims to provide a complete overview of the Dutch strategy against disinformation and all of its facets.

3.4. Validity

The external validity is dedicated to the question whether the results of a research are generalizable (Bryman, 2012). In other words, to what extent the results from a specific study, can be applied to the world as a large. As mentioned, the fight against the threat of disinformation is a fight that is being combated all around the world. European member states and additional ‘civil societies’, ought to face this battle whilst taking into account and ensuring the freedom of expression. As these countries share not only the same threat, but also to a large extent share the same values on freedom of expression, an in-depth case study on the Netherlands, can be used by these other countries when making policy on this matter.



V ANALYSIS

The Dutch policy regarding the disinformation threat is divided in three action spearheads (Kamerstuk 30821, nr. 91, 2019): (1) prevention, (2) information position strengthening and (3) response (if required). The preventive strategy is designed to curb the influence and prevalence of disinformation. The information position strengthening refers to a timely understanding and interpretation of the possible dangers of sharing disinformation. Lastly, a response/reactionary strategy is applied when disinformation takes place, and becomes part of the action perspective. An analysis of the content has shown that each of the action spearheads are built upon several points of action. In table 1 an overview is provided of the Dutch strategy into countering disinformation.

<u>Action spearhead 1:</u> Prevention	<u>Action spearhead 2:</u> Reinforcing the information position	<u>Action spearhead 3:</u> Response
Strengthening resilience of citizens	Improving the information position	Fact checking
Increasing resilience of political office holders	Knowledge development	Refuting disinformation
Increasing transparency		Online manipulation and moderating content
Maintaining a pluriform media landscape		

Table 1. The Dutch strategy into countering disinformation

Within the further course of this chapter a two-step analysis will be performed. To maintain a clear overview, each of the action spearheads, will be discussed and analysed individually. On the basis of each individual detailed analysis, sub conclusions will be formulated.

Subsequently, the sub conclusion will be brought together in the final conclusion in order to answer the research question.

4.1 Strategy 1: Prevention - Overview (step-one)

4.1.1 Strengthening resilience of citizens

A key element of obtaining a healthy public debate is assuring that citizens are resilient to the influence of disinformation. When citizens have the ability to value content correctly, they are less prone to the effect of disinformation. According to the government it is the responsibility of citizens to value content for its truthfulness. However, in order to push the strengthening of its citizens' resilience, the Dutch government provides necessary means, which citizens can then use to value content (Kamerstuk 26643, nr. 549, 2018; Kamerstuk 35000-VIII, nr. 91, 2018). In addition, in 2018, at the request of the House of Representatives, an awareness campaign was launched. The core message which the government wanted to convey was, 'to always ask yourself whether content is reliable and truthful and when in doubt about this question to check whether the source is reliable'. The disinformation campaign was launched in light of the 2019 European Parliament elections, however, the Dutch government is planning on reusing the material during all future elections (Kamerstuk 30821, nr. 91, 2019).

In addition, to strengthen the resilience, the government is set to establish a 'media-wise' and digitally skilled population. Currently, a revision of the educational system of primary and secondary schools is taking place (Curriculum.nl, 2019; Rogers & Niederer, 2019)) Within the new curriculum relevant themes will be added such as 'media literacy', in which awareness will be raised on disinformation and the effect on democratic processes, and 'information skills', in which knowledge will be provided on finding content and being able to evaluate it. In addition, a variety of initiatives have been launched to strengthen the online resilience of adults, such as the 'Media Literacy Network'. Minister Ollongren, has stated that a subsidy will be granted to this Network in order to promote media literacy amongst (young) adults in the context of disinformation (Kamerstuk 26643, nr. 583, 2018).

4.1.2 Increasing resilience of political office holders

As local democracies have gained more importance, the chances of them being targeted by online threats and disinformation can potentially increase in order to influence regional or local decision-making. Therefore, the Ministry of Interior and Kingdom Relations (BZK) aims to strengthen the online resilience of local political officials regarding disinformation. Together with the organization 'Network of Resilient Governance, the BZK and VNG will be responsible for doing so. In addition, a game about disinformation has been developed by BZK, to train political officials. The game exposes officials to different disinformation content and educates them on how to act on them.

4.1.3 Increasing transparency

In the letter directed to the House of Representatives, minister Ollongren (2019) stated there are several ways in which Internet services can contribute in the fight against disinformation; it can tackle the automatic spread of disinformation by fake accounts, trolls and bots, or provide more insight on the operation of its algorithms. The latter can result in more transparency on online platforms and with that contributes to users being able see the content for its value. Subsequently, this will result in disinformation being less impactful as the changes of deception might decrease.

In regards to constructing additional regulation for online platforms, the Dutch government has not made a final decision, as it is stated that their thoughts on this matter will be discussed at a later point in 2020. However, minister Ollongren does argue that she does not see how additional regulations will contribute to the current system of self-regulation, which a number of online platforms have committed to. In her opinion self-regulation should remain the centre of focus. In addition, the principle of 'subsidiarity', 'proportionality' and freedom of expression should be taken into account (van Hoboken et al., 2019; Kamerstuk 26643, nr. 642, 2019). Therefore, the Dutch the government is more committed to improving online transparency in regards to the origin of disinformation and gaining insights on the means of dissemination of disinformation.

When discussing transparency, there seems to be a special focus on political advertisement, and advertisement on social issues. Due to online advertising and the concept of targeting, disinformation can be spread more rapidly, prominently and more efficiently. Due to targeting people are not exposed to the same advertisements.

The government argues that by creating more transparency regarding the latter insight can be gained on sources and with that may create a barrier to spread falseful advertisements. By means of a motion member of parliament Verhoeven (D66) and Kuiken (PvdA) called for an investigation on the ‘legal transparency obligations’ for political advertisement on online platforms (Kamerstuk 32761, nr. 145, 2019) An additional motion was filled by member of parliament Van der Molen (D66) and Asscher (PvdA), requesting that political advertisement can only be placed by Dutch sources which are established in the Netherlands (Kamerstuk 30821, nr.122, 2020)

Several online platforms, such as Google, Facebook, Twitter, Mozilla and Microsoft, have taken first steps in implementing the ‘European Code of Conduct against disinformation (van Hoboken et al., 2019; European Commission, 2019) The Code can be described as a form of self regulation, which has resulted in an improvement of the testing of advertisement placement and has improved the transparency by labelling them and storing them. In addition, the implementation of the code has improved their integrity by deleting accounts and dismantling networks. Minister Ollongren argues that positive improvements have been made, but more need to be done. She emphasized that there should be more collaboration in regards to the exchange of research data by scientist and independent fact-checkers (European Commission, 2019). In addition, the University of Amsterdam calls for a system in which researchers and watchdogs can gain access to social media data, including deleted data, in order to fulfil a monitoring task. Minister Ollongren (2019) has expressed her support for the latter (Kamerstuk 30821, nr. 74, 2019).

The European Code of Conduct against disinformation has a self-regulatory character. Meaning, that government organization have no legal authority to enforce the code on the online platforms (van Hoboken et al., 2019) Therefore, minister Ollongren, at the request of members of parliament (PvdA), spoke to experts on this matter in order to gain insights on what is would take to enforce the code. Platforms that have not signed the code will not be forced to do so.

4.1.4 Maintaining a pluriform media landscape

In order to limit the impactfulness of disinformation a pluriform media landscape is of great importance. A recent Media Monitor has shown that Dutch citizens consume news from a variety of sources and have an above-average trust in Dutch news outlets (Kamerstuk 22112,

nr. 20608, 2018). It is important to gain deeper insights on the reason why the Dutch have high trust in the news that is being offered, as this information can be used to maintain this confidence in the future.

4.1.5 Prevention - findings (step two)

Based on the above, one can find three out of the four constraints, as described by Lessig (1998). The first constraint that was found is the ‘constraint by law’. Lessig (1998) argues that due to the threat of being sanctioned, laws have the ability to limit a person’s behaviour.

Whilst discussing the possibilities on how transparency can be improved, the Dutch government is deliberating whether additional regulations ought to be set in place for online platforms. Minister Ollongren expressed, that in her opinion a system of self-regulation is more favourable, as regulating online platforms is not the primary task of the government. However, in regards to political advertisements on online platforms, regarding politics and social issues, the government does seem to believe that it may be necessary to get involved. As a result an investigation is being conducted on the possibility of enforcing ‘legal transparency obligations’ for online political advertisements (Kamerstuk 26643, nr. 642, 2019). Meaning, that online platforms will be obliged to be transparent about the advertisements on their platforms and its origin. However, it is not clear how the government is going to act if advertisements are found which they would label as harmful or as ‘disinformation’ and whether there will be consequences for the advertisers or the platform where it is displayed on. The same can be said for the government's plan regarding the ‘European Code of Conduct’ against disinformation, in which there is being called for a system where researchers, independent fact-checkers and watchdogs can gain access to social media data, including deleted data, in order to fulfil a monitoring task. However, the Code of Conduct against disinformation has a self-regulatory character, which has led Dutch members of parliament to call for a research on how the code can be enforced on the online platforms that signed it.

As Solove (2016) stated a “chill” may occur from “information gathering” that is not associated with any specific purpose or penalty. Solely the idea of data being collected can stop people from expressing themselves or saying certain things, due to the fear of falling into a blacklist or a database that might be used to incriminate or punish them in the future

(Solove, 2016). In addition, Schauer (1998) argued that deterrence may occur due to the sense of fear or risk, evoked by uncertainty, which can cause people to change their behaviour due to the risk of being sanctioned. It can therefore be said that the 'legal transparency obligations' may constrain people in their behaviour and expression. Furthermore, it should be mentioned that members of parliament Van der Molen (D66) and Asscher (PvdA), in addition, filed a motion requesting that political advertisements can only be placed by Dutch sources, which are established in the Netherlands. Meaning, that they favour a situation in which political advertisements from non-Dutch sources are not allowed. It can be questioned whether the preventative measures to improve transparency, are able to be executed without pushing the boundaries of freedom of expression and violating article 7 of the Dutch constitution and article 10 of the ECHR. Within these articles it is stated that no prior permission is needed in order to reveal thoughts or feelings. Individuals, groups and any type of media are free in the way they express themselves, which includes the protection of opinions that would be frowned upon by the government. In order to avoid censorship, article 10 of ECHR adds that authority may not interfere, despite an expression or content being perceived as hurtful, shocking or disturbing, it may be "uttered". It raises questions on how will be differentiated between the latter and 'disinformation', as the concept is rather inconclusive. With that comes a risk of unnecessary content being labelled as disinformation and the risk of people unnecessarily being constrained in their behaviour. As a result the people may feel 'chilled' in their speech and expression and with that will be hesitant in sharing their views or promoting and sharing political advertisements. In addition, the latter can be given an extra incentive, due to it being unclear what the repercussions will be of spreading 'disinformation'.

A second constraint that was found is the 'constraint by architecture'. As Lessig (1998) explained, that limits on what users can do, can be imposed by the architecture of the code. Within the Dutch 'preventative points of action', there were changes detected in the architecture of the 'code of cyberspace'. The mentioned plans in regards the potential enforcement of 'legal transparency obligations' for online political, as well as the plans regarding the Code of Conduct against disinformation, both change the architecture of the code of cyberspace. As Lessig had mentioned, small changes in the Internet's architecture have brought about necessary consequences on the relative anonymity of network users. With the arrival of cookies it is now less challenging for the website to track its users. In other words, it has a relatively automatic means to recognize people and monitor their actions.

Lessig argues that the decrease of anonymity and the feeling of being monitored due to changes in the online architecture can constrain people in their behaviour. It can therefore be said that the changes in architecture, which the 'Code of Conduct against disinformation' and the 'legal transparency obligations' bring about, may affect people's behaviour. As mentioned, the two measures have the potential to evoke uncertainty due the fact that data is collected without people knowing how it may potentially harm them later. (Solove, 2016). Deterrence can therefore occur due to the presence of risk and fear caused by uncertainty.

Lessig (1998) argues that constraint by social norms', utilizes societal sanctioning to regulate the behaviour of individuals. Societal sanctioning often includes expulsion and criticism. He added that social norms limit through stigma, imposed by society (Lessig, 1998).

Within the 'preventative points of action', it has been mentioned that the government is currently working on several measures to strengthen the resilience of citizens and with that establish a 'media-wise' and digitally skilled population. Therefore, primary and secondary schools will be adding relevant themes to the curriculum such as 'media literacy', in which awareness will be raised on disinformation and the effect on democratic processes, and knowledge will be provided on finding content and being able to evaluate it. In addition, the 'Media Literacy Network' has been launched and will be subsidised by the government, to promote media literacy amongst (young) adults.

However, education can contribute to the construction of our social norms. "Social norms" refer to the accepted behaviour that an individual is expected to conform to within a society. Therefore it is important that whilst educating people on disinformation, misinformation and fake news, a certain amount of subjectivity is preserved. People should not be 'indoctrinated' on what is right or wrong according to the government's perspective. This concern was raised after having analysed the research conducted by the University of Amsterdam, commissioned by the Dutch Ministry of the Interior and Kingdom Relations (BZK). Within this research a significant amount of media was called out for potentially providing disinformation or junknews, according to the beliefs that they uphold. In addition, non-mainstream ideas were labelled as conspiracies or junknews.

As Lessig stated, social norms limit through stigma, which is imposed by society. Compared to what could have been expected, stigma is an unwanted separateness. It is considered as a

peculiarity of an individual to their overall behaviour. When a person is stigmatized, he/she will hold the status of being “different” from the others (Lessig, 1998: 662-663). Therefore, subjectivity and neutrality should be preserved when educating people on the topics of disinformation, misinformation and fake news, as people should not fear to have a different or unpopular opinion. It could cause a constraint in behaviour, which could result in people being ‘chilled’ to express themselves freely. In addition different views and opinions also contribute to a pluriform media landscape, which the Dutch government aims to preserve.

4.1.6. Conclusion

In regards to the preventative points of action, it can be said that the measures may have a limiting effect on the freedom of expression. Even though the government argues that improving transparency will not infringe on the freedom of expression, there is no clear augmentation provided supporting this statement. However, based on the literature the contrary can be substantiated, as it has provided insight on how people's behaviour can be constrained resulting in a chilling effect of the freedom of expression. It can be argued the measures exceed the purpose and with that fail the necessity and proportionality tests under human rights law resulting in infringement on the freedom of expression. In regards to the opted measures to strengthen the resilience of citizens, it can be said that it can be of added value and indeed establish a ‘media-wise’ and digitally skilled population. However, when educating people on the concept of disinformation, the emphasis should lie on providing people with the tools to critically examine information themselves, rather than telling them what is right or wrong. Since stigmatization can prevent people from freely expressing themselves.

4.2. Strategy 2: Reinforcing the information position - Overview (step-one)

4.2.1 Improving the information position

In a press release, on June 10th 2020, the European Commission stated that during the Covid-19 pandemic, foreign state actors have spread disinformation campaigns to gain influence in the EU. According to the Commission it mainly concerned China and Russia. (European Commission, 2020) In order to tackle such a state threat, Ollongren states that

efforts are going to be made to improve information sharing and the information position of like-minded countries. If this is done on national and international level, timely insights can be obtained on potential threats.

In addition, it is of importance for governments to obtain a strong information position on the potential presence of disinformation. This is necessary so when required the government can respond to the threat. In the research conducted by the UvA it is recommended that the Dutch government should monitor the growth and mainstreaming of polarized media containing extreme content (Rogers & Niederer 2019). Ollongren (2019) expresses that she does understand the request and importance of monitoring such media, however, this task is not to be executed by the government as it may infringe upon the freedom of expression. Moreover, monitoring extremist content is a task reserved for intelligence services. However, other measures are mentioned which can contribute to the improvement of the information position. Several departments have combined forces to gain insight on the information flow of disinformation. The exchange of such information between like-minded parties should be made easier, by the means of which a shared view can be established regarding disinformation.

At European level, the StratCom Task Forces of the European External Action Service (EEAS), strives to protect European democracies and expose manipulation. This includes analysing disinformation trends, stories, methods and channels in the countries around the EU. As mentioned in the European Action Plan against disinformation, the government is positive about the professionalization and the adapted working method of the East StratCom Task Force. The Task Forces are currently being funded from the budget of the European Parliament. The EEAS, however, hopes for a fixed budget within the new Multiannual Financial Framework (MFF)

4.2.2. Knowledge development

In the run-up to the elections to the European Parliament in 2019, the European Commission and EEAS set up the Rapid Alert System (RAS). The purpose of the RAS enables the rapid reporting of disinformation campaigns between the European Commission, the EEAS and the European Member States. In practice, the RAS appears to be primarily a system for exchanging knowledge and best practices. In the meantime, the European Commission has

taken the initiative to work towards a RAS 2.0, with a greater focus on creating a collection point for research and analysis and StratComs best practices.

Other international partnerships also enable the possibility for countries to exchange knowledge. For example, the Netherlands is participating in the informal Integrity and Security Initiative together with Facebook, Google, Twitter, the German Federal Office for Information Security (Bundesamt für Sicherheit in der Informationstechnik) and a number of researchers. In addition, the Netherlands is affiliated with the information sharing network of the G7 Rapid Response Mechanism (RRM), an initiative to strengthen coordination between G7 countries in identifying, preventing and responding to threats to their democracies. In addition, there are bilateral contacts with other countries about tackling disinformation, for example during working visits by ministers.

4.2.3 Reinforcing the information position - Findings (Step-two)

After having analysed the points of action regarding ‘reinforcing the information position’, several constraints, as described by Lessig (1998), were found. A first constraint that was found is the ‘constraint by law or architecture’. As Lessig (1998) explained, limits on what users can do, can be imposed by the architecture of the code. When changes are being made in the architecture of the ‘code of cyberspace’, it can cause behavioural changes.

In order to improve its information position, a research conducted by the University of Amsterdam recommended that the Dutch government should monitor the growth and mainstreaming of polarized media, containing extreme content. In order to monitor such content, an architectural change of the code of cyberspace would be required. However, according to Solove, even a small change in the Internet architecture can bring about significant consequences on the relative anonymity of network users and possibly constrain their behaviour. This could result in positive outcomes, as it may prevent people from posting illegal content. However, it can also stop people from expressing themselves online due to being unsure if they fall under the category of content that is being tackled. Even though some members of parliament expressed their support for monitoring such content, Minister Ollongren herself expressed her concerns over the possible constraints in behaviour. It can be said that a “chill” can even occur due to people having the idea that their data is being

collected, which can stop them from expressing themselves. Ollongren added that by taking on such monitoring activities the government could infringe on the freedom of expression.

In order to improve its information position, without infringing on the freedom of expression, Minister Ollongren explained that several like-minded parties are combining forces in order to strengthen coordination in identifying, preventing and responding to threats. The RAS and the RRM are two examples of the latter. It can be said, that in general, sharing information and combining forces can be positive, as it can broaden ones perspective. However, within this context a strong front is formed of like-minded parties with the ability to monitor a large amount of content. It is therefore important that the labelling of information as ‘disinformation’ is executed carefully, as it is a rather inconclusive and ambiguous concept. With that comes a risk of unnecessary content being removed by default. In addition, the knowledge of being monitored can ‘chill’ people in their speech and expression.

4.2.4. Conclusion

In regards to the spearhead ‘reinforcing the information position’, it can be said that it has the potential to limit the reach of freedom of expression. Even though minister Ollongren argues that the initiatives, such as RAS and RRM, can be conducted without infringing on the freedom of expression, the analysis has illustrated that this is not a given. Therefore, it is important for checks and balances to be in place. In addition, the test of necessity, legality and proportionality should be applied before limiting the freedom of expression, in order to prevent unnecessary infringement. By doing so, disinformation can be combated whilst minimizing the impact on the freedom of expression.

4.3 Strategy 3: Response - Overview (step-one)

The third spearhead that is included in the Dutch strategy, is ‘response’. In a letter to the House of Representatives, minister Ollongren explained that the responsive measures concern all measures that ought to be taken when disinformation takes place (Kamerstuk 30821, nr. 91, 2019). An analysis of the content has shown that the response spearhead can be further specified into three sub-action points: fact-checking, refuting disinformation and online manipulation and moderation of content (ibid.).

4.3.1. Fact-checking

On behalf of the Ministry of Education, Culture and Science, the IViR conducted a research in which it emphasizes the importance of fact-checking within a democratic society, as it can verify the validity of content and with that act as a form of watchdog or accountability journalism (McGonagle, et al., 2018). With that, the latter can have a sensitizing or awareness-raising function. In regards to whom should conduct the fact-checking, the government has repeatedly emphasized that it will not perform any significant content evaluation concerning non-criminal content, as the governments and EU institutions are primarily not responsible for addressing disinformation. Instead, it is the duty of non-governmental organizations such as online platforms, academics, and independent media to take on this task. (Kamerstuk 30821, nr. 51, 2018; Kamerstuk 30821, nr. 91, 2019; McGonagle, et al., 2018). The Dutch government has therefore expressed its support for the plan of the European Commission to set up an independent European fact-check network, on which fact-checkers and scientists will be given the task to permanently monitor online disinformation, whilst respecting the privacy of users.

4.3.2. Refuting disinformation

In regards to the action point ‘fact-checking’, there seems to be an overall consensus that this task should be executed by non-governmental organisations (Kamerstuk 30821, nr. 51, 2018; Kamerstuk 30821, nr. 91, 2019; McGonagle, et al., 2018). However, an analysis of the second responsive action point, ‘refuting disinformation’, has shown that a different stand is taken. It is being argued that when “national security, public health, economic and/or political stability, are threatened, or criminal boundaries are exceeded”, governmental interference can be legitimized (Kamerstuk 30821, nr. 51, 2018; Kamerstuk 30821, nr. 91, 2019; McGonagle, et al., 2018). It is therefore said that in such cases it is necessary for the government to get

more actively getting involved. Several examples were found in which the Dutch government has gotten more actively involved. In both examples interference is legitimized due to it being perceived as a threat to the public safety and with gaining a place on the Dutch security agenda.

As disinformation surrounding the COVID-19 pandemic is said to form a significant threat to public health, the Dutch government also seems to take on a more ‘hands-on’ approach, (Kamerstuk 34970, nr. L, 2020). In a press release Josep Borrell, the High Representative/Vice-President of the European Commission, spoke on the threat of disinformation: *“Disinformation in times of the coronavirus can kill. We have a duty to protect our citizens by making them aware of false information, and expose the actors responsible for engaging in such practices. In today's technology-driven world, where warriors wield keyboards rather than swords and targeted influence operations and disinformation campaigns are a recognised weapon of state and non-state actors, the European Union is increasing its activities and capacities in this fight.”* (2020). As it threatens the health of people it becomes a security matter and with that interference of de government is legitimized. However, minister Ollongren emphasized the measures to combat COVID-19 and the disinformation surrounding it, should be proportionate, subsidiary and non-discriminatory. In addition, fundamental values, such as the rule of law, democracy, and human rights, must be respected (Kamerstuk 34970, nr. L, 2020; Kamerstuk 22112, nr. 20608, 2018; McGonagle, et al., 201).

In September 2019, Member of Parliament, Hayke Veldman (VVD, 2019) filed parliamentary questions due to his concerns over an anti-vaccination campaign set-up by homeopaths, and the ‘disinformation’ related to this matter. Veldman (2019) directed his questions to Paul Blokhuis, the State Secretary for Health, Welfare and Sport (hereafter referred to as VWS). In his response, Blokhuis stated that under the banner of the ‘vaccination alliance’ a think tank has been set up, which focuses on tackling incorrect information. The VWS facilitates the think tank by organizing meetings and contacting parties to exchange information and promote cooperation. The think-tank is committed to promote the ‘findability’ and availability of ‘good’ information and to contradict misinformation on (social) media. To support this cause, the National Institute for Public Health and the Environment, has improved the findability of the website of the national vaccination program, with the aim to improve the changes of parents not ending up on anti-

vaccination websites. Blokhuis added that by doing so, the number of visitors per month had grown by 172%.

4.3.3. Online manipulation and moderating content

Where in principle disinformation is not criminal content, hate speech and terrorist content are based on criminal law. It is important to distinguish this. However, in regards to online manipulation and moderating content, the Dutch government is investigating which of the existing legal and criminal options can be used when online manipulation occurs (Kamerstuk 30821, nr. 91, 2019). In addition, minister Ollongren (2019) stated that the International Issues Advisory Council is conducting a second investigation, in order to obtain a complete overview of the international regulations and developments of online content. It aims to obtain insights on the relation between the regulations whilst respecting democratic values and human rights. Furthermore, the Dutch government is closely monitoring development of the new Digital Service Act, which is part of the European Digital Strategy (Kamerstuk 30821, nr. 91, 2019), as it is currently investigating the role, responsibilities and liabilities of online platforms and other actors, in the fight against illegal, unlawful and harmful information (Kamerstuk 30821, nr. 91, 2019).

4.3.4. Strategy 3: Response - Analysis (step-two)

As explained by minister Ollongren, the responsive measures, concern all measures that ought to be taken when disinformation takes place. The findings will then be used to formulate a partial conclusion, which will contribute to answering the research question: *“What are the limitations to the freedom of expression in the context of government interventions against online disinformation for national security purposes?”*. After having analyzed the points of action regarding ‘response’, several constraints as described by Lessig (1998) were found.

When disinformation occurs, fact-checking is mentioned as being an important point of action (McGonagle, et al., 2018). The government however argued that the latter should be conducted by non-governmental organizations, as it is not the government's task to interfere in such activities. Therefore, the Dutch government supports the plan of the European Commission to set up an independent European fact-check network, on which fact-checkers

and scientists will be given the task to permanently monitor online disinformation, whilst respecting the privacy of users. However, scientist themselves can also disagree. For example, Norwegian scientists have published their findings in a research journal where they claim that a protein was artificially added to the virus strain. It illustrates that within the scientific community there are also disagreements. Therefore, it is necessary to have different viewpoints. Only history will tell which one was true. History has shown that a dissenting opinion, however small, can prove to be right/or wrong too (civil right movement, South-Africa Apartheid, slavery etc.). It can therefore be said that the term ‘fact checking’ is rather interesting as it raises questions on how the line will be drawn between facts and false information. The current COVID-19 pandemic has illustrated how initial ‘facts’ can be debunked due to new information and research. The fact-checking should therefore be conducted carefully as it should not lead to excessive information being removed, for it may infringe upon people's freedom of expression.

In regards to refuting disinformation, it is incorporated within the law that when “national security, public health, economic and/or political stability are threatened, or criminal boundaries are exceeded”, governmental interference can be legitimized (Kamerstuk 30821, nr. 51, 2018; Kamerstuk 30821, nr. 91, 2019; McGonagle, et al., 2018). An example was provided regarding an anti-vaccination campaign, setup by Dutch homeopaths. As the government considered this to form a threat to the public health, a proactive approach had been legitimized. As a result the ‘vaccination alliance’ was set up, focusing on tackling and actively debunking the anti-vaccination information. By doing so their social norm may gain popularity and with that change behavior. Due to the stigma that is being created, supporters of anti-vaccination may fear to express their opinion. It raises the question whether this is favorable.

An example of Lessig's constraints by law can be found in the battle against COVID-19 related disinformation. The COVID-19 pandemic and the disinformation associated with it, is another example of how the threat of disinformation can endanger public health. In order to tackle this threat the European Commission expressed that it is in favour of more regulation in order to constrain the spread of disinformation. However, minister Ollongren, recognised that it may result in people being ‘chilled’. Therefore regulations should be proportionate, subsidiary and non-discriminatory. In addition, fundamental values, such as the rule of law, democracy, and human rights, must to be respected

The point of action regarding online manipulation and moderating content, also illustrated how law can constrain behaviour (Lessig). Currently several investigations are being conducted in order to find out which of the already existing legal and criminal options can be used when online manipulation occurs. In addition, the Digital Service Act is investigating the role, responsibilities and liabilities of online platforms and other actors in the fight against illegal, unlawful and harmful information. The latter may call for new regulations. In regards to the question whether new laws and regulations should be constructed in order to combat the threat of disinformation, it can be argued that this may be quite difficult. Due to the term 'disinformation' being rather vague and ambiguous, media companies may be left rather clueless on what is allowed to be presented on its platforms and what not. Schaur (1978) stated that when laws or regulations evoke a sense of fear, risk, and uncertainty, deterrence may occur. Online platforms, as a result, might choose to remove an unnecessary amount of content to avoid penalties, which also infringes on the freedom of expression.

4.3.5. Conclusion

In regards to the response action, it can be said that some measures may have a limiting effect on the freedom of expression. Even though minister Ollongren argues that regulations should be proportionate, subsidiary and non-discriminator and should respect the rule of law and human rights. The analysis has proven that these requirements are not always met. In conclusion; fact-checking should be conducted carefully. When combating disinformation, the test of necessity, legality and proportionality should be applied. By doing so, disinformation can be tackled whilst respecting article 7 of the Dutch constitution and article 10 of the ECHR. This is important as it prohibits censorship and provides room to freely express criticism, including towards the government or other government agencies, which is important for the proper functioning of a democracy. Hence, it is very important to respect different viewpoints in order to prevent stigmatization, as this may 'chill' people in their freedom of expression.

V CONCLUSION

Within this thesis it has been examined how freedom of expression upholds itself, in the Dutch battle against disinformation. This resulted in an overview of the Dutch policy plan in its current state. By the means of a qualitative content analysis a number of key findings have been identified, which each in their own way contribute to answering the research question:

What are the limitations to the freedom of expression in the context of the Dutch government interventions against online disinformation for national security purposes?

In regards to the preventative points of action, three of Lessig's modalities of constraints have been identified: (1) law (2) architecture and (3) social norms. The constraints each provoke behavioural changes, which may cause a chilling effect on people's willingness to express themselves. Despite the government claiming that transparency measures would not infringe upon the freedom of expression, no sufficient substantiations for this claim has been found. A thorough analysis of the content has shown that some of the preventative measures exceed the purpose and with that fail the necessity and proportionality tests under the human rights law. Hence, infringing on the freedom of expression. In regards to strengthen the resilience of citizens, it is important to enable people to create an objective mindset instead of pushing a fixed narrative upon them. By keeping this in mind, whilst constructing educational programs, the chilling effect on freedom of expression can be avoided.

In regards to the spearhead 'reinforcing the information position', two of Lessig's modalities of constraints have been identified: (1) law and (2) architecture. The behavioural changes that they each provoke have proven to potentially result in a 'chilling effect'. Even though minister Ollongren argued that the initiatives, such as RAS and RRM, could be conducted without infringing on the freedom of expression, the analysis has illustrated that this is not a given. Therefore, it is important for checks and balances to be in place. In addition, the test of necessity, legality and proportionality should be applied before limiting the freedom of expression, in order to prevent unnecessary infringement. By doing so, disinformation can be combated whilst minimizing the impact on the freedom of expression.

Lastly, three of Lessig's modalities of constraints have been identified in the 'response' spearhead : (1) law (2) architecture and (3) social norms. The analysis had shown how these

constraints, each on their own, have the ability to cause behavioural changes and chill people in their speech and expression. Despite the fact that it was emphasized that regulations should be proportionate, subsidiary and non-discriminator and should respect the rule of law and human rights, the analysis has proven that these requirements were not always met. Lastly, it can be said that the government should be careful in actively tackling and debunking different viewpoints, even if they are not in line with what is socially accepted as being 'the norm', as stigmatization can chill ones freedom of expression. It should be remembered that different is not always bad.

One often considers the narrative of the Orwellian society as something that lies far away from 'free' democratic societies that uphold individual liberties and rights and cannot coincide. If at all there is any infringement upon individual rights, such as the freedom of expression, this would always need to be justified, is it not? However, the current battle against disinformation has proven otherwise. It can be argued that the Dutch policy plan to combat disinformation, shows more similarities with a Orwellian society than one would expect from a democratic country. And from a country of which studies have shown that their citizens are less prone to the effect of disinformation. It raises the question whether the measures complies with the principle of proportionality. Therefore, it is important for checks and balances to be in place, and in addition the test of necessity, legality and proportionality should be applied. By doing so, disinformation can be combated whilst respecting the freedom of expression.

"No," said the priest, "you don't have to accept everything as true, you only have to accept it when necessary."

Franz Kafka - The Trial

5.1 Policy recommendations

Having analysed the policy plan it would be recommend that the Dutch government provides more information on how it is planning to define the concept of disinformation. The fact that the term 'disinformation' is rather ambiguous and leaves room for own interpretation, has proven to be an important cause of the Dutch policy not aligning with the freedom of expression. The latter can be supported by Lessig who argued that when laws or regulations evoke a sense of fear, risk, and uncertainty, deterrence may occur. Therefore more research should be conducted on how to approach this issue.

A second recommendation would be for the government provide more explanations on how they believe to combat the threat of disinformation whilst making sure that the measures are proportionate, subsidiary, non-discriminatory and in addition respect our fundamental values, such as the rule of law and our human rights. In the policy it is mentioned multiple times that the latter is very important and should be respected, to then continue with presenting measures that do not align with these values.

5.1 Recommendations

As mentioned in the introductory chapter France's highest constitutional authority struck down the critical provisions of a law which would have forced social media platforms, such as Facebook, Twitter and YouTube, to remove hate speech. As mentioned the ruling of the Constitutional Council stated that the law is believed to interfere with the freedom of speech in an excessive manner. It was argued that the current draft law would make the administration a sole authority that decides on what illicit information is, without any interference by a judge. As a result social media companies may take down more content than necessary, in order to avoid being sanctioned. It was therefore argued that the provisions of the law infringe upon the freedom of expression and communication in an unnecessary, unsuitable, and disproportionate manner.

The ruling has come in a time in which governments around the world are seeking to regulate what is being shared on online platforms in order to protect societies from harmful information, the Netherlands being one of these countries (Breedem, 2020). It is rather interesting, how within a fellow European country a law has been struck down by its highest authority, due to it infringing upon the freedom of expression and communication, whilst the

Netherlands, the European Union as a whole, and possibly other countries are adopting rather similar approaches. Since France is part of the EU, and like the Netherlands is governed by the ECHR, it becomes the more relevant to take the French law under the loop.

Lastly, it was mentioned that the government is currently working on several measures to strengthen the resilience of citizens. As explained, one of the measures is to add relevant themes to the curriculum of primary and secondary schools, such as ‘media literacy’, in which the topic of disinformation will be discussed and awareness will be raised on the effect that it can have on democratic processes. In addition, knowledge will be provided on how to find content and how to evaluate it. However, education can contribute to the construction of our social norms. Therefore it is important that whilst educating people on disinformation, misinformation and fake news, a certain amount of subjectivity is preserved. People should not be ‘indoctrinated’ on what is right or wrong according to the government's perspective. This concern was raised after having analysed the research conducted by the University of Amsterdam, commissioned by the Dutch Ministry of the Interior and Kingdom Relations (BZK). Within this research a significant amount of media was called out for potentially providing disinformation or “junknews”, according to the beliefs that they uphold. In addition, non-mainstream ideas were labelled as conspiracies or junknews.

As explained in this research social norms limit through stigma, which is imposed by society and with that chill the freedom of expression. A research on this matter could be interesting in order to find out whether it can have a chilling effect on the freedom of expression.

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