Judge Arnfinn Bårdsen,
European Court of Human Rights

Thank you Mr speaker (M Joan Barata). I great you all good morning from Strasbourg, and I thank the organizers for inviting me.

Sanctions imposed on those that voice critique against the authorities will indeed have a "chilling effect" on the political debate, effectively undermining the very idea of democracy as a system of governance and paving the way for oppression and the abuse of power.

The UN Committee on Human Rights has stressed that in circumstances of public debate concerning public figures in the political domain and public institutions, the value of unrestricted expression is particularly hight. Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties.

Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the UN Committee on Human Rights has on numerous occasions expressed concern regarding laws on such matters as disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials.

The European Court of Human Rights has taken a similar approach in cases where the Court has been called to ascertain whether the domestic courts in sanctioning someone for defamation against a political figure, had struck a fair balance between, on the one hand, the applicant's right to freedom of expression under Article 10 of the Convention and, on the other, the plaintiff's right to the protection of his reputation in accordance with Article 8 of the Convention.

The Court has stressed that this is a matter of balancing. Thus, a tacit assumption by the domestic courts that interests relating to the protection of the honour and dignity of others, in particular of those vested with public powers, prevaile over freedom of expression in all circumstances, is not permitted (see *Tolmachev v. Russia*, § 51).

Moreover, the Court has emphasized that a broad spectrum of elements will have to be taken into account and weighted, based on the particular circumstances of the case.

One important element would be the role and status of the person making the impugned statement, since certain groups will enjoy an enhanced protection under Article 10 for the *benefit of democracy*.

One such group is the *press*. Thus, the Court has stated that although the press must not overstep certain bounds, its task is nevertheless to impart information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (*Bladet Tromsø and Stensaas v. Norway* [GC], §§ 59 and 62; *Pedersen and Baadsgaard v. Denmark* [GC], § 71; *Von Hannover v. Germany (no. 2)* [GC], § 102); *Couderc and Hachette Filipacchi Associés v. France* [GC] judgment, §§ 83 to 87.

Artists would also enjoy an enhanced protection under Article 10, as illustrated by *Dickinson v. Turkey* (application no. 25200/11), 2 February 2021. The case concerned Mr Dickinson's criminal conviction for insulting the then Turkish Prime Minister, Recep Tayyip Erdoğan, through a collage which had criticised Mr Erdoğan's political support for the occupation of Iraq. Mr Dickinson's work portrayed the Prime Minister's head glued to the body of a dog, which was held on a leash decorated with the colours of the American flag and had the following phrase pinned on its torso: "We Will not be Bush's Dog".
For this the applicant was placed in police custody, and he received a fine on the amount of 3 000 Euro.
The trial ourt considered that Mr Dickinson's work was such as to humiliate and insult the Prime Minister and represented an attack on his honour and reputation. The European Court of Human Right found this to be in violation of Article 10 of the Convention.

Moreover, freedom of expression is especially important for *elected representatives*, who represent their electorate, draw attention to their preoccupations and defend their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament call for the closest scrutiny (*Karácsony and Others v. Hungary* [GC], § 137; *Castells v. Spain*, § 42; *Piermont v. France*, § 76; *Jerusalem v. Austria*, § 36; *Otegi Mondragon v. Spain*, § 50; *Lacroix v. France*, § 40; *Szanyi v. Hungary*, § 30). The case of *Kılıçdaroğlu v. Turkey* (no. 16558/18), 27 October 2020, provides a recent illustration.

The status of the individual targeted by defamatory statements is indeed also one of the parameters taken into account by the Court in examining defamation cases. The Court considers that the "limits of acceptable criticism" are much wider as regards individuals with a public status than as regards private individuals (*Palomo Sánchez and Others v. Spain* [GC], § 71).

The Court has in this respect also been clear that politicians inevitably and knowingly lay themselves open to close scrutiny of their every word and deed by both journalists and the public at large; they must consequently display a greater degree of tolerance (§ 42; see also *Nadtoka v. Russia*, § 42).

Generally speaking, this principle of tolerance applies to all members of the political class, whether a Prime Minister (*Tuşalp v. Turkey*, § 45; *Axel Springer AG v. Germany (no. 2)*, § 67), a minister (*Turhan v. Turkey*, § 25), a mayor (*Brasilier v. France*, § 41), a political adviser (*Morar v.Romania*), a member of parliament (*Mladina d.d. Ljubljana v. Slovenia; Monica Macovei v. Romania*), or the head of a political party (*Oberschlick v. Austria (no. 2)*).

Indeed, the Court has stated that providing increased protection for heads of State and Government by means of a special law will not, as a rule, be in keeping with the spirit of the Convention (*Otegi Mondragon v. Spain*, § 55; *Pakdemirli v. Turkey*, § 52; *Artun and Güvener v. Turkey*, § 31; for foreign heads of State, see *Colombani and Others v. France*, § 67, see also *Otegi Mondragon v. Spain*, § 56 and *Stern Taulats and Roura Capellera v. Spain*, § 35).

Here, I turn as illustration to the case *Ersoy v. Turkey* (no 19165/19), 15 June 2021.

The case concerned the criminal conviction of a student – Mr Ersoy – on the basis of statements he had made about the then Prime Minister (Mr Recep Tayyip Erdoğan) in a public speech during a rally in support of students who had been placed in police custody for having protested against a visit by the then Prime Minister. In the speech he had called the then Prime Minister a "rabid dog" and his governance as "dictatorship".

In April 2016 a court ordered Mr Ersoy to pay a fine of about 2,524 Euros, finding that he had insulted the prime Minister. The European Court of Human Rights noted that Mr Ersoy had criticised the public authorities in general and the Prime Minister in particular, and had encouraged those attending the rally to continue their opposition struggle against the government.

In the context in which they were made, these remarks essentially expressed political criticisms, aimed especially at the Turkish Prime Minister. The Court reiterated that there was little scope under Article 10 of the Convention for restrictions on political speech or on debates on questions of public interest. It also pointed out that the limits of acceptable criticism were wider with regard to a politician, in that capacity, than with regard to a private individual. Politicians inevitably and knowingly laid themselves open to close scrutiny of

their every word and deed by both journalists and the public at large, and they had therefore to display a greater degree of tolerance.

In convicting Mr Ersoy, the domestic courts had relied on a provision in the Turkish Criminal Code, which afforded State officials a greater degree of protection than other persons with regard to the disclosure of information or opinions concerning them.

The Court reiterated its previous conclusion that providing increased protection by means of a special law on insults was not, as a rule, in keeping with the spirit of the Convention. The Court also found that that there was nothing in this case to justify the imposition of a criminal-law penalty, even if it was a fine. Such a sanction, by its very nature, would inevitably have a chilling effect.

It followed that there had been a violation of Article 10 of the Convention.

Turning now to the dissemination of deliberately false information, I believe we are in more uncharted waters. Moreover, we have to realize that when discussing this item, we will immediately be faced with a number of dilemmas and paradoxes. Allow me to make four rather general and slightly open observations, as an up-beat to your discussion.

Firstly: Freedom of expression is in principle not limited to "correct" information, it extends to information that may shock, offend and disturb people and governments – and also false information.

However, there might be reasons for accepting limitations, if – but only if – there is a legal basis for this, with the requisite clarity and foreseeability. In this area, there is a real risk of provisions being overly broad or vague.

Moreover, any limitation must pursue a legitimate aim (such as health or national security) and a restriction must also be deemed to be proportionate to the aim pursued.

Secondly: The notion of "deliberately false information" is in the current context extremely difficult – because it assumes that there is a "truth" in a more objective sense and that governmental bodies are in a position to define what that truth is. Indeed, in the context of democracy and free debate, such a monopoly on the "truth" is in principle untenable. There are widespread concern that sanctioning fake news could lead to censorship and the suppression of critical thinking and dissenting voices.

However, experience also shows that fake news can indeed be extremely dangerous to the democracy and the well-being of the nation. Just to mention three examples:

- Right to free and fair elections can suffer by targeted political advertising, easy access for far right and far left groups and the spread of public opinion thought social media that in sum blur the line between fact and fiction. We know from history that false information can be an effective tool for demagogues to seducing large parts of the population.

- The right to health can be jeopardized by the spread of false information. It has been submitted that 40% of health news shared online is fake, with vaccines being a big area of concern.

- The protection against discrimination may be threatened by fake or biased news that focuses on certain groups of society, such as migrants or ethnic minorities.

So, it is equally impossible to accept that there should be a virtually limitless right to disseminate false information. The freedom of expression will in this area, as in all other areas have to come along with a set of responsibilities, as emphasized in relation to a number of International Human Rights Instruments.

The European Court of Human Rights has in this respect on numerous occasions underlined that the particular safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism – that they are acting "in accordance with the tenets of responsible journalism" (*Axel Springer AG v. Germany* [GC], § 93; *Bladet Tromsø and Stensaas v. Norway* [GC], § 65; *Pedersen and Baadsgaard v. Denmark* [GC], § 78; *Fressoz and Roire v. France* [GC], § 54; *Stoll v. Switzerland* [GC], § 103; *Kasabova v. Bulgaria*, §§ 61 and 63-68; *Bédat v. Switzerland* [GC], § 50; *Pentikäinen v. Finland* [GC], § 90). For an indication by the Court that the same principle must apply to others who engage in public debate, see *Steel and Morris v. the United Kingdom*, § 90).

These considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed. In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and

involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance (*Stoll v. Switzerland* [GC], § 104).

Thirdly: False information can be met with different sorts of regulatory regimes other than criminal sanctions:

The least intrusive form is *information correction*. This does not directly interfere with the false or misleading information or the access to it; it simply reacts by forwarding the correct version. The idea is consistent with the ideology of the free flow of information in the 'marketplace of ideas' and is premised upon the assumption that individuals are rational enough to seek out truth when they come across a dubious content.

A more intrusive form of regulation to deal with fake news involves removing or blocking false content. Content removal or blocking has parallels to traditional means of censorship. Concerns are therefore raised regarding this method of regulatory intervention when it is employed in an overly broad manner.

Moreover, the alleged dissemination of fake news may lead to the revocation of broadcasting licenses, effectively silencing the broadcaster. Such a case, brought against Moldova, is currently pending before the Grand Chamber of the European Court of Human Rights.

Fourthly: Experience shows that faced with crisis, democracy, the rule of law and the respect for human rights come under pressure. Normally this pressure is unavoidable as a product of the crisis itself, and not the result of any bad faith on the part of the authorities. Thus, in times of crisis – be it the Covid-19 or any other crisis that we will be facing in the future – it is crucial to protect and support the authorities' ability to act adequately and timely. Indeed, the duty to protect the population from danger and decease is primordial, reflected also in a number of international human rights instruments.

However, and in contrast, in some instances one might fear that the crisis is used as a pretext, the ulterior aim being a different one then that of taking control over the crisis. In principle, this is indeed an unacceptable abuse of power incompatible with any human right's standard. However, there will often be a problem of proving that the measures taken, if they were in principle adequate, had an ulterior purpose of suppression of a critical opposition – a problem the European Court of Human Rights often has had to face in cases where the applicant submits that there is a violation, not only of Article 10 on the freedom of speech, but also of Article 18 of the Convention because of the abuse of governmental power.

Dear colleagues.

I will wrap up my intervention by recalling that in times of crisis there is not only a call for governmental action in order to deal with the crisis, but also an accentuated need for safeguards against abuse.

In this respect it is crucial that the prescribed avenues for political decision making are respected, and that the basic framework for the use of public power still apply, even in times of crisis.

Moreover, the domestic courts must perform an independent control of the other branches of State, in particular by continuing to work in accordance with well-established principles of legal method and judicial craftmanship. The courts cannot allow themselves to get carried away by the heat of the moment or popular demands but must protect the rule of law as a matter of legal duty.

And indeed, a free and independent press must continuously be *en guard* towards anything that can threaten its function as a "public watchdog".