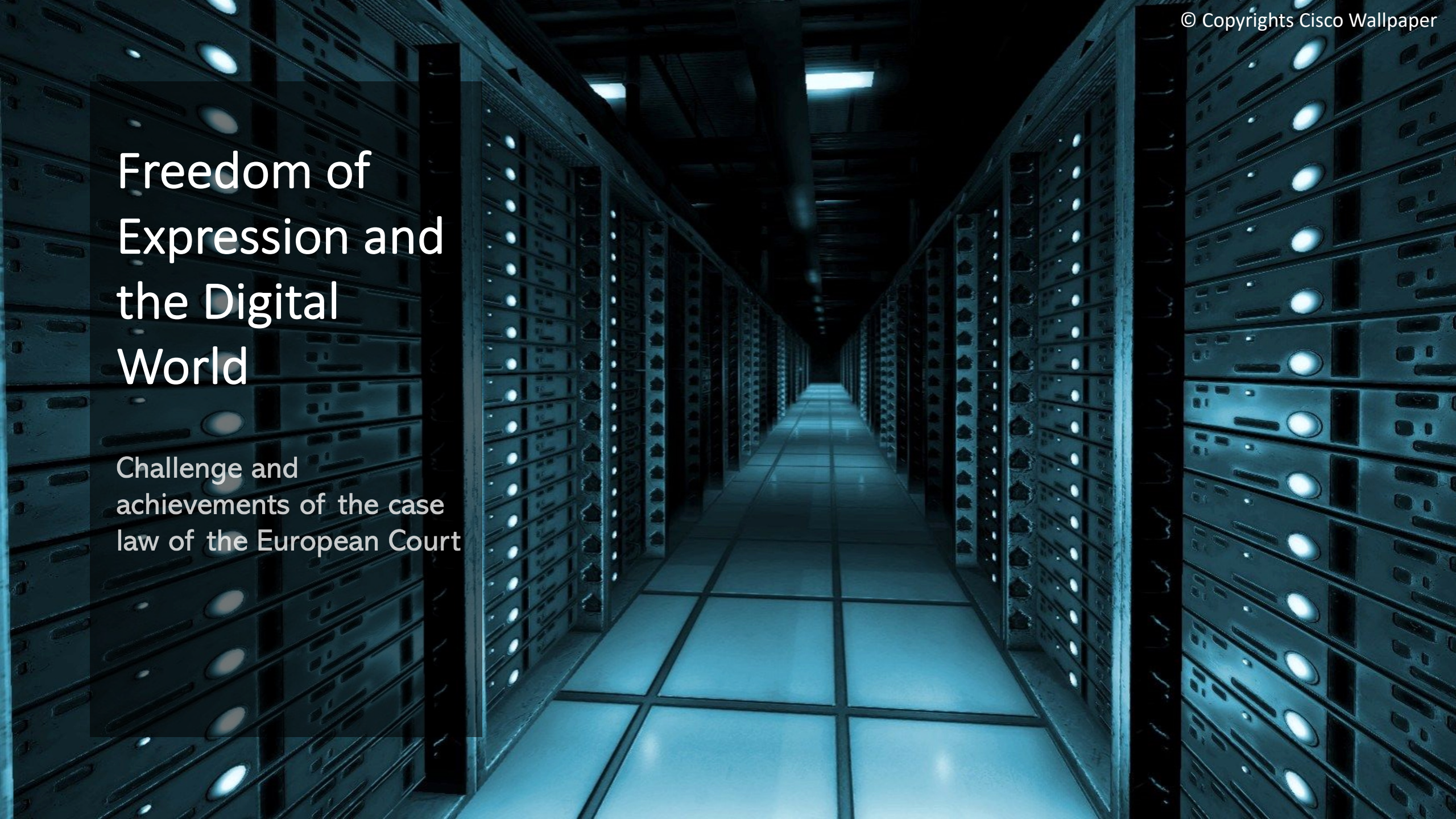
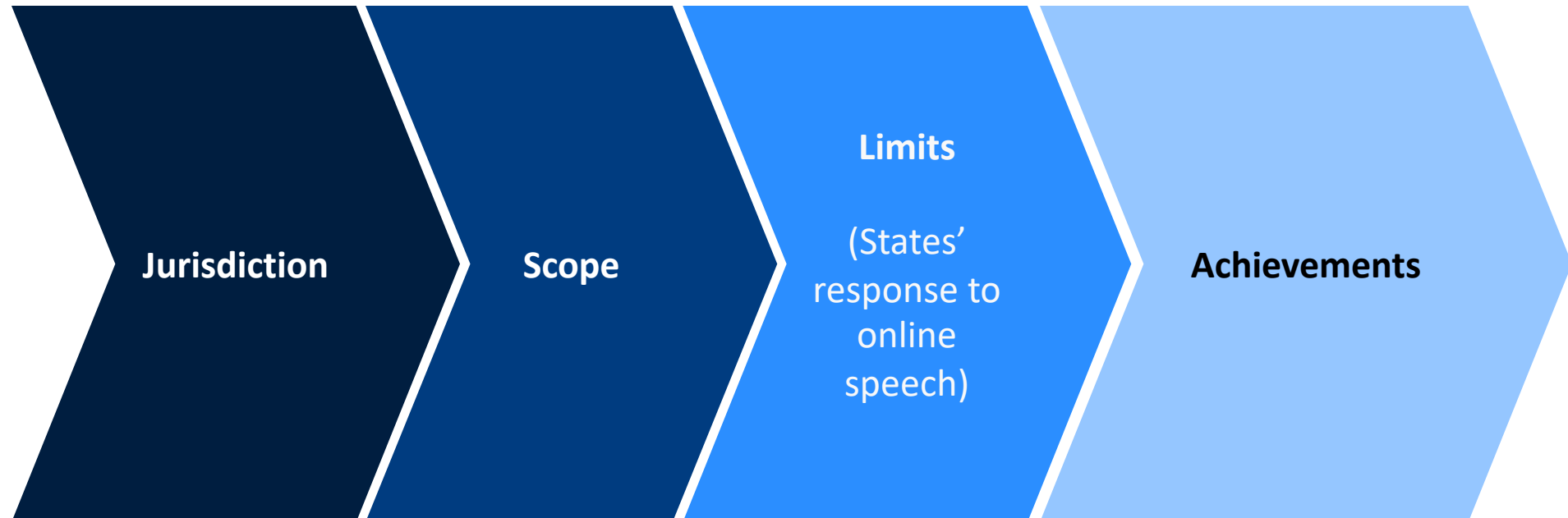


Freedom of Expression and the Digital World

Challenge and
achievements of the case
law of the European Court



CHALLENGES & ACHIEVEMENTS



JURISDICTION

ARTICLE 10 Freedom of expression

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and **regardless of frontiers**. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”



JURISDICTION

Quid of the positive obligation in the digital world?

Litigation is evolving in Council of Europe Member States:

- France: *Yahoo case* in the early 2000 (Paris High Court)
- Germany: *BND-case* (German Constitutional Court) and *Ramstein case* (German Administrative Supreme Court)

SCOPE

*Wider
Material
Scope*

- One leading principle: “what applies offline applies online” (HRC, 2012)
- BUT necessity to adapt acknowledge change:
“hate speech (...) can be disseminated as never before, worldwide, in a matter of seconds, and sometimes remain persistently available online.” (*Annen v Germany* (2015))



SCOPE

*Wider
Material
Scope*

- Internet as a platform of expressions:
 - Some hate speech fall outside the scope of Article 10 see *Belkacem v. Belgium*
 - New forms of expressions: liking a post or sharing hyperlink
- Internet as a source of information: **Access to internet as critical medium for human rights enjoyment and pluralism in a democratic society**



SCOPE

*Wider
Material
Scope*

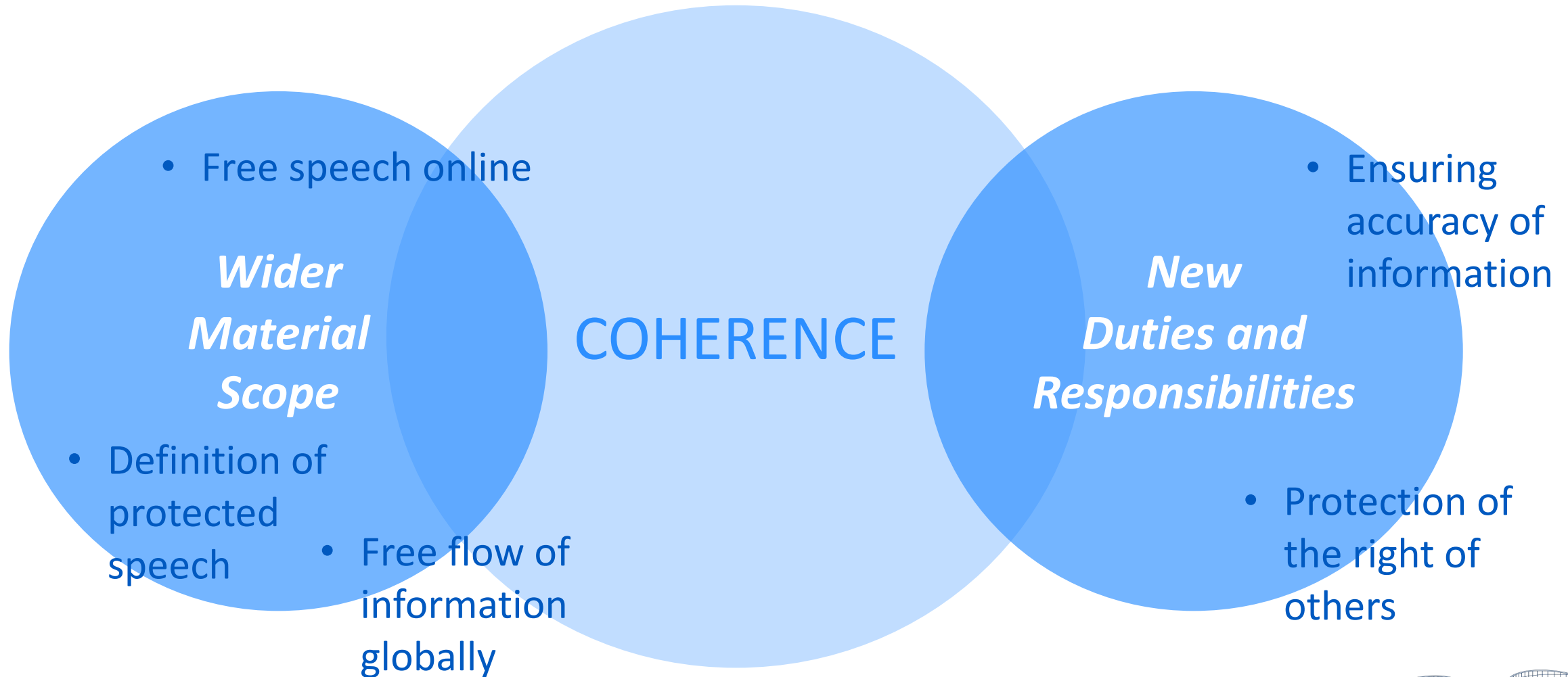
- One leading principle: **“what applies for offline applies online”**
- Internet as a source of information: **Access to internet as critical medium for human rights enjoyment and pluralism in a democratic society**
- Internet as a platform of expressions: **New forms of expressions: liking a post or sharing hyperlink**

*New
Duties and
Responsibilities*

- **Duty of the intermediaries: Striking the right balance in content removal**
- **Duty of journalists online: Ensuring the accuracy of information**
- **Duty of states to moderate in a human rights’ compliant manner**



SCOPE



- Global reach of media platform
- Ensuring diversity
- Balance of power

***Media
Concentration***

The new challenges of the digital world

Access

- Access should be a choice
 - Marginalisation of the offline world remains in the online world
 - Access must remain neutral



LIMITS

Article 10 paragraph 2

“2. The exercise of these freedoms, since it carries with it **duties and responsibilities**, may be subject to such formalities, conditions, restrictions or penalties as are **prescribed by law** and are **necessary 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.”



LIMITS

To regulate or not to regulate ?

Case by
case
solution

- Shall the Strasbourg follow the U.S. approach to Free Speech ?
- How to best preserve net neutrality and pluralism online ?

LIMITS

To regulate or
not to
regulate ?

Case-by-case solution

- Peculiar features of the internet require a case-by-case analysis
 - Amount of the information shared
 - Worldwide accessibility
 - Access to content result in users' choice \neq broadcasting

ACHIEVEMENTS

Preventing ex-ante content moderation

Protecting victim of hate speech

Ensuring safeguards for vulnerable internet-users



ACHIEVEMENTS

Preventing ex-ante content moderation

Protecting
victim of
hate speech

Ensuring
safeguards for
vulnerable
internet-users

Obligation of removal considers:

- the context and contents of the comments,
- the liability of the authors of the comments,
- the measures taken by the applicants and the conduct of the aggrieved party,
- the consequence for the aggrieved party and for the applicants.

Objective liability of the intermediary commonly perceived as too dissuasive and contrary to the Convention's standards.

ACHIEVEMENTS

Preventing
ex-ante
content
moderation

Protecting victim of hate speech

Ensuring
safeguards for
vulnerable
internet-users

Impact assessment considers

- Quantity of information shared on the specific issue
- Size of the network on which the information has been distributed
- Nature of the online speech: is it a like, a post, sharing existing content

ACHIEVEMENTS

Preventing
ex-ante
content
moderation

Protecting
victim of hate
speech

Ensuring safeguards for vulnerable internet-users

Users-centred approach

- ECtHR (2010) *Aleksey Ovchinnikov v. Russia*.
- ECtHR (2008) *K.U. v Finland*.

ACHIEVEMENTS

Overall, the Court's case-law aims at providing...

Solutions coherent with international standards

Guidance on domestic courts

Combined effort with the political work of the Council



WHAT'S LEFT TO TACKLE ?

Are we going too far in regulating the digital world ?

- Moderation is the exception not the rule
- Appraising States' threat assessment
- Learning to accept shocking speech
- Identifying the tipping point when free speech negatively impact pluralism and tolerance



Thank you for your attention

