

“Fake news”: False fears or real concerns?

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“Fake news” has become a much-used and much-hyped term in the so-called “post-truth” era that we now live in. It is also much-maligned: it is often blamed for having a disruptive impact on the outcomes of elections and referenda and for skewing democratic public debate, with the 2016 US Presidential elections and Brexit referendum often cited as examples. “Fake news” has also been flagged for fuelling propaganda and “hate speech” and even violence. “Pizzagate” is an infamous example of exceptional circumstances in which a false news story had a central role in a shooting incident. In December 2016, a man in Washington D.C. took it upon himself to “self-investigate” a story (a completely unfounded conspiracy theory) that the Hillary Clinton campaign team was running a paedophile ring from the premises of a pizzeria. Shots were fired and he was arrested and charged with assault and related offences.¹

Given all this bad press, it is perhaps little wonder that “fake news” has become a major preoccupation for international organisations, national law- and policy-makers, the media and media actors, civil society and academia. But what exactly is “fake news” and what is all the fuss about? In addressing these questions, this column will also consider historical and contemporary perspectives on the term and its relationship with human rights.

Definitional dilemmas

“Fake news” is information that has been deliberately fabricated and disseminated with the intention to deceive and mislead others into believing falsehoods or doubting verifiable facts;² it is disinformation that is presented as, or is likely to be perceived as, news. Unlike many other

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1. See further, Alan Yuhas, “Pizzagate’ Gunman Pleads Guilty as Conspiracy Theorist Apologizes over Case’ The Guardian (25 March 2017) <<https://www.theguardian.com/us-news/2017/mar/25/comet-ping-pong-alex-jones>> last accessed 23 September 2017.
 2. The first prong of this definition has been borrowed, almost verbatim, from the Ethical Journalism Network. See <<http://ethicaljournalismnetwork.org/tag/fake-news>> last accessed 23 September 2017.

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types of information, news plays a particular role in democratic societies: it is a key source of accurate information about political and societal affairs, which informs public opinion-making and deliberative processes. If news is “fake”, it misinforms the public and democratic debate is polluted at the source.

“Fake news” is a very catchy term. It trips off the tongue. The economy and simplicity of the two-word combination make it a real buzz-word and a great sound-bite. It instantly conjures up a variety of meanings and can thus be used very flexibly. But therein lies the rub. Behind the apparent simplicity of the term lurks a potentially vast range of qualitatively different types of expression. It *could* cover anything from playful hoaxes to belligerent propaganda or incitement to violence. This is not only unhelpful from a legal perspective, it is highly problematic. Calls to regulate or criminalise “fake news”, which are often prompted by one or more high-profile incident(s) involving extreme forms of “fake news”, tend to overlook the variation behind the term. Concern about particular sub-sets of “fake news” should not inform law-making in respect of a more generic whole. Hard cases make bad law and an entire village should not be burned to roast a pig.

Another problem arising from the absence of clear definitions is that national laws criminalising “fake” or “false” news are susceptible to mis-use and abuse through arbitrary interpretation and enforcement. Free speech NGOs like ARTICLE 19 report that such laws are often used by governments across the world to stifle independent and critical media, thereby creating a chilling effect on freedom of expression and public debate.

It is therefore essential that we stand back from the term and distinguish between the types of expression which it purportedly covers. Clear-sighted, critical judgment is called for because whereas some of the types of expression in question may be harmful, many of them certainly are not. Accordingly, some of them may be subject to the recognised limitations to freedom of expression under international human rights law, whereas others will enjoy robust levels of protection. For instance, false stories and conspiracy theories presented as news and which constitute racist expression, incitement to hatred or Holocaust denial will not benefit from protection.³ Far- and extreme-right-wing groups are frequently associated with this kind of “fake news”, with Breitbart News having achieved particular notoriety. Satire, on the other hand, does enjoy protection as it “is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate”.⁴

Various attempts have been made to unpack the term “fake news” into its component parts. Some are more convincing and more rigorous than others. The infographic, ‘Beyond ‘Fake News’ - 10 Types of Misleading News’, produced by the European Association for Viewers Interests (EAVI), has deservedly received wide attention and positive acclaim.⁵ The infographic is detailed, layered and thoughtful. First, it prises open the term by identifying ten categories of misleading news. It then explores the (likely) motivation behind each category and their (likely) impact. The ten types of misleading news are: propaganda, clickbait, sponsored content, satire and hoax, error, partisan content, conspiracy theory, pseudoscience, misinformation and bogus content. The different types of motivation are listed as: money, politics/power, humour/fun, passion and [the aim

3. *Garaudy v France* App no 65831/01 ECHR 2003-IX (extracts).

4. *Vereinigung Bildender Künstler v Austria* App no 68354/01 (ECHR, 25 January 2007) para 33.

5. Available at: <<https://eavi.eu/beyond-fake-news-10-types-misleading-info/>> last accessed 23 September 2017. EAVI is an international non-profit organisation.

to] (mis)inform. Impact is measured on a scale of neutral-low-medium-high. It is worth recalling that the European Court of Human Rights typically includes these focuses – content, intent and impact – in its contextual assessment of cases involving interferences with the right to freedom of expression.

Historical evolution

For all the current hype around the term, “fake news” is by no means a new phenomenon. It is as old as the hills. The press, particularly the partisan press, has always peddled biased opinions and on occasion, stories that lack factual grounding. Whether and to what extent biased and fictitious reporting should be regulated is a perennial question that concerns the public watchdog role of the media in a democratic society. How much room should the watchdog be given to roam or how tight should the leash be? It is a question that centrally involves both law and ethics and there are no conclusive answers.

Spoofs and hoaxes can dupe the public, sometimes with dramatic results, as in the aforementioned “Pizzagate” example. Such hoaxes are devoid of redeeming value for public debate or society. But hoaxes are not always (intended to be) detrimental to public debate. Misappropriation or misinformation can also serve as strategies to stimulate public debate. The famous example of “Bye, Bye, Belgium” is arguably a case in point.⁶ In December 2006, RTBF, the French-language public service broadcaster in Belgium, interrupted regular television programming with a breaking news report about the splitting-up of Belgium as a federal state. Some members of the public, as well as some politicians and diplomats, were taken in by the report that Flanders had made a declaration of independence. Described by the broadcaster as “docu-fiction”, the report proved very divisive. Its critics described it as an irresponsible action for a public service broadcaster. Its defenders, on the other hand, contended that it triggered an important debate, not only about the sensitive political question of Flemish independence, but also about journalistic ethics governing news reporting. In 2010, a similar, high-profile hoax was broadcast in Georgia. The pro-government *Imedi TV* station broadcast a fabricated report about a Russian invasion of Georgia. Tensions between Russia and Georgia at the time rendered the story plausible in the eyes of many viewers and considerable panic ensued.⁷ Subsequent debate focused on whether the broadcast was a public relations (or even propaganda) stunt or a controversial technique for triggering public debate.

“Fake news” has also been deployed by States as a weapon in information and ideological warfare on the international plane, alongside the jamming of broadcast signals and, in recent years, the blocking of websites. This became a major preoccupation for the United Nations (UN) in the early days of the organisation with the onset of the Cold War. The problem was framed in terms of the threat posed to friendly relations between peoples and States by the systematic diffusion of deliberately false or distorted reports. This essentially boiled down to State-sponsored propaganda, disseminated by States or (puppet) news agencies. At the time, one school of thought felt that it

6. For more information, see ‘Viewers Fooled by Belgium ‘Split’’ (BBC, 14 December 2006) <<http://news.bbc.co.uk/2/hi/europe/6178671.stm>>; A L and P Marlet, ‘Bye Bye Belgium: en 2006, le Docu-fiction de la RTBF Créait un Électrochoc’ (RTBF, 12 December 2016) <https://www.rtbf.be/info/medias/detail_bye-bye-belgium-en-2006-le-docu-fiction-de-la-rtbf-creait-un-electrochoc?id=9479103> last accessed 23 September 2017.

7. For more information, see ‘Bogus TV Report of Russian Invasion Panics Georgia’ (BBC, 14 March 2010) (incl link to video clip) <<http://news.bbc.co.uk/2/hi/europe/8566571.stm>>.

would be legitimate to limit the right to freedom of expression in order to counter such false reporting. Wording that provided for such a limitation on the right was included in the UN's Draft Convention on Freedom of Information (1948) and was proposed for inclusion in the International Covenant on Civil and Political Rights (ICCPR). The 1948 Draft Convention was ultimately never opened for signature or ratification and the proposed text for the ICCPR did not survive the drafting process. The drafters of the European Convention on Human Rights also considered the UN's language, but they too opted not to incorporate it. Similar language did, however, make it into the little-known UN Convention on the International Right of Correction, which remains in force today, but it has enjoyed little take-up by States and is largely ineffectual.⁸

The present surge of "fake news" must be considered in a different context, however. It presents a number of features that distinguish it from its earlier incarnations. The context is an utterly changed and still evolving media and news ecosystem, which has been driven by the advent and rapid development of the Internet. Among the game-changing factors are: the sophistication with which fake news is being produced; the scale on which it is being produced, and the speed and effectiveness with which it is being disseminated. Technology has made it easy for a wide range of actors to create content, including fake news, in a variety of formats – text, photos, videos, infographs, memes, bots, gifs, etc. and to disseminate it swiftly and globally.

Internet intermediaries, such as search engines and social media network operators, perform key gatekeeping functions in the media ecosystem.⁹ They determine the availability, accessibility and prominence of content and thus wield enormous power over the dissemination of fake news. This explains why their role is coming under increased scrutiny and why they are being put under increasing pressure to prevent and/or stop the flow of "fake news". It also explains why the controversial German Act to Improve Enforcement of the Law in Social Networks¹⁰ places so much emphasis on social media platforms' obligations to promptly deal with, and to report complaints about, unlawful content (which could include particular types of "fake news", insofar as they are covered by existing provisions in German criminal law).¹¹ The Act has been criticised for its likely chilling effect on free speech.¹²

Another upshot of developments in the media ecosystem is that it is now more difficult than ever before to verify the accuracy of content, to ascertain the identity of the content-producers and to figure out whether/which vested interests have shaped the production or

8. For further details and analysis, see Tarlach McGonagle, 'The Development of Freedom of Expression and Information within the UN: Leaps and Bounds or Fits and Starts?' in T McGonagle and Y Donders (eds), *The United Nations and Freedom of Expression and Information: Critical Perspectives* (Cambridge University Press 2015) 10-19.

9. See further: Patrick Leerksen, 'Cut Out By The Middle Man: The Free Speech Implications Of Social Network Blocking and Banning In The EU' (2015) 6 JIPITEC.

10. Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act)/Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz – NetzDG), 1 September 2017, *Bundesgesetzblatt, Jahrgang 2017, Teil I, Nr. 61, 7 September 2017* (entry into force: 1 October 2017). The author is grateful to Jasmin Hohmann, research intern at IViR, for checking some technical and terminological details of the German-language version of the Act.

11. See further: Staff and Agencies, 'Germany approves plans to fine social media firms up to €50m', *The Guardian* (30 June 2017), available at: < <https://www.theguardian.com/media/2017/jun/30/germany-approves-plans-to-fine-social-media-firms-up-to-50m> > last accessed 2 October 2017.

12. See, for example, 'Germany: The Act to Improve Enforcement of the Law in Social Networks', *Legal Analysis* (Article 19, August 2017), available at: < <https://www.article19.org/data/files/medialibrary/38860/170901-Legal-Analysis-German-NetzDG-Act.pdf> > last accessed 2 October 2017.

dissemination of the content. The lack of transparency surrounding the algorithmic processes that influence search results and (personalised) recommendations adds to these difficulties.

At first glance, these seem to be primarily problems for individuals trying to make sense of the swirl of information and news on the internet. On more careful probing, it becomes clear that States' positive obligations to guarantee the right to freedom of expression are also implicated. The European Court of Human Rights (ECHR) has affirmed that States have an obligation under the European Convention on Human Rights (ECHR) "to create a favourable environment for participation in public debate by everyone . . .".¹³ This obligation requires States to guarantee pluralism in the media ecosystem, including by supporting independent and investigative media and other media actors such as fact-checking organisations; preventing excessive concentrations of media ownership, and increasing transparency of media ownership and control. It arguably also requires States to promote media, information and news literacy as life skills in order to enable their citizens to analyse and critically evaluate the substance, provenance and relevance of media and news content.

This approach, centring on the positive obligations of States Parties to the ECHR, also resonates with the Joint Declaration on "Fake News", Disinformation and Propaganda that was adopted by the International Specialised Mandates on Freedom of Expression and/or the Media in March 2017.¹⁴ The Joint Declaration is part of annual series; each Joint Declaration examines different topics relating to freedom of expression and/or the media. These Joint Declarations are not legally-binding, but owing to their collective endorsement by the specialised mandates, they are regarded as very persuasive interpretations of existing international human rights law on the topics they address.¹⁵ The 2017 Joint Declaration is the most explicit and detailed international text addressing "fake news" in recent years. It puts much store by the need for "fake news" to be dealt with in the context of an enabling environment for free expression. It also includes pertinent focuses on the roles and responsibilities of States, Internet intermediaries, journalists and media outlets and other stakeholders in responding to "fake news". It is noteworthy that the specialised mandates use the term within scare quotes, indicating a certain reluctance to embrace the term, perhaps, or at least to underline its contested nature. It is also telling that the Joint Declaration does not address "fake news" exclusively: it positions the term on a continuum with other types of disinformation, thereby contextualising it further.

13. *Dink v Turkey* App nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (ECHR, 14 September 2010) para 137. For analysis, see Tarlach McGonagle, 'Positive Obligations Concerning Freedom of Expression: Mere Potential or Real Power?' in Onur Andreotti (ed), *Journalism at Risk: Threats, Challenges and Perspectives* (Council of Europe Publishing 2015) 9-35.

14. The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, 'Joint Declaration on "Fake News", Disinformation and Propaganda' (3 March 2017).

15. For analysis, see Toby Mendel, 'The UN Special Rapporteur on Freedom of Opinion and Expression: Progressive Development of International Standards Relating to Freedom of Expression' in T McGonagle and Y Donders (eds), *The United Nations and Freedom of Expression and Information: Critical Perspectives* (Cambridge University Press 2015) 251-257.

Freedom of expression, “fake news” and the quest for truth

In his book, *Areopagitica*, published in 1644, John Milton posed his famous rhetorical question: “Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?” The point is often made that history teems with examples in which Truth has been trumped by Falsehood. But our focus should perhaps be less on the inherent resilience and fortitude of Truth, and more on the conditions of a “free and open encounter”. Rational appeal alone is not enough to win the battle for hearts and minds. There has to be equality of arms in public debate if truth is to have a fair chance to prevail.

One of the most enduring rationales for freedom of expression is the argument from truth. This argument is all about the value – for individuals and society alike – of the search for truth. It is all about the development and contestation of ideas in order to reach a higher level of knowledge and understanding and to make fewer errors. Even if truth itself proves elusive, the process that leads towards it is a goal in itself and it must be safeguarded.

The European Court of Human Rights stresses in its case-law that while everyone – including bloggers, whistle-blowers, academics, members of civil society organisations, etc. - should be able to participate in public debate, it is particularly important for journalists and the media to be able to do so because of their ability to spread information and ideas widely, and thereby contribute to public opinion-making. They have the task of imparting information and ideas on matters of public interest, which the public has a right to receive. Journalists, the media and a growing range of other actors can also act as public watchdogs, by bringing information to light and by exposing wrongdoing and corruption by those in power.

The protection afforded by Article 10 ECHR is not limited to truthful information. Nor is it limited to factual information. It also covers opinions. Facts and opinions or value judgments are not the same: the existence of facts can be demonstrated, but it is not possible to prove the truth of opinions or value judgments. A requirement to prove the truth of a value judgment infringes the right to freedom of opinion. A value judgment should, however, have adequate factual basis, as even a value judgment without any factual basis to support it may be excessive.

In any case, everyone who exercises the right to freedom of expression has certain duties and responsibilities, the scope of which varies in different contexts. Journalists and the media must not cross certain lines, in particular in respect of the reputation and rights of others. In principle, they are expected to act in good faith in order to provide accurate and reliable information to the public in accordance with the ethics of journalism. This is not the same as having an obligation to tell the truth. Erroneous or untrue reporting can occur even when journalists act in good faith. For instance, sometimes reporting is based on incomplete or inaccurate information, despite the best efforts of the journalist to be thorough and precise. As Carl Bernstein – whose reporting with Bob Woodward for *The Washington Post* broke the Watergate scandal – has put it, the primary task of the journalist is to seek out “the best obtainable version of the truth”.¹⁶

Concluding cautionary notes

Fake, false, fraudulent, dishonest, bogus, scam, hoax, phoney, phoney-baloney... there is no shortage of emotively-charged terms to disparage, question and refute the truthfulness of content or content-producers. These terms can be uttered in an instant, but their sting can be long-lasting,

16. Carl Bernstein, ‘The Idiot Culture: Reflections of Post-Watergate Journalism’ *The New Republic* (8 June 1992) 22, 24.

particularly when they target journalists and the media, for whom honesty and accuracy are the tools of their trade.

This point calls for attention for something sinister and cynical about the current surge in usage of the term “fake news” in public discourse by public figures and in particular by those who hold positions of authority. Politicians, government ministers – and even prime ministers and presidents – sometimes use the term to undermine the reputation and credibility of individual journalists, individual media organisations and the media generally. Donald Trump’s ongoing vilification of the “fake news media” – a net which he has cast very widely to include reputable media organisations – is a case in point.¹⁷ This is a witch-hunt – pointing fingers and crying “witch” in the expectation that such incriminations will lead to public distrust and opprobrium. It also contributes to a climate of hostility and aggression towards journalists and the media.

Such verbal violence against journalists and the media is a very dangerous development for any democratic society. Recognising this, the Council of Europe’s Committee of Ministers has stated forcefully that: “State officials and public figures should not undermine or attack the integrity of journalists and other media actors, for example on the basis of their gender or ethnic identity, or by accusing them of disseminating propaganda, and thereby jeopardise their safety”.¹⁸ In the same vein, the UN High Commissioner for Human Rights, Zeid Ra’ad Al Hussein, has questioned whether President Trump’s targeting of individual journalists with accusations of propagating “fake news” “[is not] an incitement for others to attack journalists?” He has also described President Trump’s “demonization of the press” (in the US) as “poisonous” because of the consequences it has elsewhere.¹⁹

In conclusion, it is tempting to dismiss “fake news” as a fake concept. The scope of the term is unclear and there is little coherence among the different types of expression that it potentially encompasses. This means that it is of very limited use as an umbrella term. But it would be prudent not to dismiss the term outright, for it is not going to go away in a hurry. It is very much a live issue on the agendas of the Council of Europe, the European Union and the OSCE. Moreover, accusations of peddling “fake news” can stigmatize and undermine critical media and erode public trust and confidence in the Fourth Estate. These are very good reasons to avoid the term (or at least to keep it within scare quotes) and ignore the false fears it evokes. Instead, the focus needs to be on how to tackle the real concerns lurking behind the term.

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17. Joel Simon, ‘Trump is Damaging Press Freedom in the US and Abroad’ *The New York Times* (25 February 2017) <<https://www.nytimes.com/2017/02/25/opinion/trump-is-damaging-press-freedom-in-the-us-and-abroad.html?mcubz=3>> last accessed 23 September 2017.

18. Guidelines in Appendix to Recommendation CM/Rec(2016)4 of the Committee of Ministers to Member States on the Protection of Journalism and Safety of Journalists and Other Media Actors (13 April 2016) para 15.

19. Statement of the UN High Commissioner for Human Rights (30 August 2017) <<http://www.unmultimedia.org/avlibrary/asset/1958/1958570/>> last accessed 23 September 2017.