

RESPONDING TO “FAKE NEWS”: IS THERE AN ALTERNATIVE TO LAW AND REGULATION?

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the social media networks
themselves.²

is with the voter, as opposed to the terrible candidates on offer or the
corrupt system itself. This is the real reason for the current obsession

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elites are simply frustrated that their methods of propaganda no longer work as more and more people talk to each other online.³

But no one – let alone the government – should be able to decide what

question would be: for whom is it a deal out of it and why?⁴

The paper will engage to a limited degree with this notion, bearing in mind that the origin(s) of any word/phrase is usually contested and there is a distinction between the existence of a specific word/phrase vs. the phenomenon it seeks to capture.⁵

Definitions, however, evolve over time and a more robust definition is now needed to situate media literacy in the context of its importance for the education of students in a 21st century media culture. CML now uses this expanded definition: Media Literacy is a 21st century approach to education. It provides a framework to access, analyze, evaluate, create and participate with messages in a variety of forms from print to video to the Internet. Media literacy builds an understanding of the role of media in society as well as essential skills of inquiry and self-expression necessary for citizens of a democracy.¹⁵

Some give pride of place in the definitional stakes to Kellner and Critical media literacy is not an option within which CML is defined as:

[A]n educational response that expands the notion of literacy to include different forms of mass communication, popular culture, and new technologies. It deepens the potential of literacy education to critically analyze relationships between media and audiences, information, and power. Along with this mainstream analysis, alternative media production empowers students to create their own messages that can challenge media texts and narratives.¹⁶

[And]

The benefit of a critical media literacy approach is that audiences engage with and analyze dominant readings and codes within media and contribute to a b

Instead of taking a mediated image at face value, the reader can understand the history and the characteristics of the image and make meaning in various ways.¹⁷

As stated by Douglas Kellner in *Cultural Studies, Multiculturalism, and Media Culture*

resource for individuals and citizens in learning how to cope with a seductive cultural environment. Learning how to read, criticize, and resist sociocultural manipulation can help one empower oneself in relation to

I. THE LEGAL APPROACH

As has been alluded to, a general question is whether fake news is either a coherent notion and/or a really recent phenomenon? Thus, for example, the U.K. Ofcom Broadcasting Code Section 2.2 states that

¹⁹ There are increasing numbers of actual or proposed legal instruments relating to fake news, and a few are itemised below.²⁰

Perhaps the one that attracts the most attention is that adopted in Germany, the *Netzwerkdurchsetzungsgesetz* (Social Network Enforcement Law). Whilst mainly aimed at so- fake news (a.k.a. misinformation) is also implicated:

As for freedom of the press, it operates very well in Cyprus and needs no legal framework. Any legal framework would impose some form of restriction, which is no good thing, and will not eliminate or control fake The real problem is not the mainstream media but online platforms and social media which are the main sources of fake news and stirrers of public hysteria. Social media, in particular, have become agents of repression and intimidation, but can they be brought under control by legislation. It is an impossible task and Christodoulides [the Spokesperson] acknowledged there would always be fertile ground for fake news, propaganda and conspiracyalways be

Zimbabwean case involved the false news provision in Section 50(2)(a) of the Zimbabwean Law and Order (Maintenance) Act; the Ugandan case coincidentally also Article 50 involved the Uganda Penal Code. Both situations were the subject of extensive Written Comments by the international organisation Article 19, assessing the provision in the light of international and constitutional guarantees of freedom of expression.³³ The Zimbabwe provision states:

Section 50 (1) In this section picture, painting, drawing or other similar representation. (2) Any person who makes, publishes or reproduces any false statement, rumour or report which (a) is likely to cause fear, alarm or despondency among the public or any section of the public; or (b) is likely to disturb the public peace; shall be guilty of an offence and liable to imprisonment for a period not exceeding seven years, unless he satisfies the court that before making, publishing or reproducing, as the case may be, the statement, rumour or report he took reasonable measures to verify the accuracy thereof.³⁴

The Ugandan provision states:

(1) Any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace is guilty of a misdemeanour. (2) It shall be a defence to a charge under subsection (1) if the accused proves that, prior to publication, he took such measures to verify the accuracy of such statement, rumour or report as to lead him reasonably to believe that it was true.³⁵

These two Comments are (unsurprisingly) almost identical. Both state, for example, that:

[C]ourts around the world have consistently held that false statements are positively protected by guarantees of freedom of expression. The reasons for this are captured poetically in the following quotation by James Madison: Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth than, by

33. See Written Comments Submitted by Article 19, The International Centre Against Censorship, *Chavunduka v. Zimbabwe*, (2000) ZLR 1 [SC] (Zam.) (No. 2000 JOL 6540 (ZS)) <http://www.msu.ac.zw/elearning/material/1284026546zimbabwe-chavunduka-and-choto-v.-zimbabwe.pdf>.

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by Article 19, The International Centre Against Censorship, *Onyango-Pet. No. 15 of 1997 (Const. Ct. Uganda July 21, 2000)*, <https://www.article19.org/data/files/pdfs/cases/uganda-onyango-obbo-v.->

Comments for Ugandan Case]. Both were principally drafted by Toby Mendel.

34.

supra note 33.

35. Article

supra note 33.

Networks (NetzDG).⁴⁶

consider ruling out/deploying a (new) law. In this regard, Eugene Volokh has written that:

survey more than one in four of the children surveyed (across the full age range surveyed, 8

children had a limited understanding of the source of search results, assuming an authoritative human fact checker was involved in their

respondents were able to identify all three true new stories in a selection of six they were presented with, and 49% of respondents thought at least one

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C. The DCMS Inquiry in Detail

As already noted, the Digital Culture Media and Sport Select Committee (DCMS) launched an inquiry into fake news on 30 January 2017.⁵⁹ By this phrase, it said it meant widespread dissemination, through social media and the internet, and acceptance as fact.⁶⁰ It called for written submissions with a closing date of 3 March 2017. The Committee gave itself a wide- looking at ways to respond to the following questions:

shade into propaganda and li -23200i0700480051>73912 0 6112 0 6112 W(o)-

d propaganda and untruths.⁶³ Launching the Inquiry, the Chair of DCMS, Damian Collins MP, said,

The growing phenomenon of fake news is a threat to democracy and undermines confidence in the media in general. Just as major tech companies have accepted they have a social responsibility to combat piracy online and the illegal sharing of content, they also need to help address the spreading of fake news on social media platforms. Consumers should also be given new tools to help them assess the origin and likely veracity of news stories they read online. The Committee will be investigating these issues, as well as looking into the sources of fake news, what motivates people to spread it, and how it has been used around elections and other important political debates.⁶⁴

More than 70 written submissions have been received and continue to be published.⁶⁵ Oral evidence will be offered at future evidence sessions.⁶⁶ A random example, which highlights the scale of the phenomenon and what needs to happen to contain it, may be gleaned from the conclusion to one item of written evidence:

Fake news is a serious and complex problem that has complex societal causes and threatens to undermine democracy. There are no technological fixes and superficial measures that can overcome fake news culture. Challenging fake news culture requires legal, political, economic and media innovations that foster a culture of slow media, public service Internet platforms, fact checking, and new forms of political engagement and debate.⁶⁷

Conveniently, an analysis of the submissions to the fake news inquiry (at least up until June 2017) has been carried out.⁶⁸

63. *Id.*

64.

Security to give signals intelligence agency GCHQ a leading role in tackling propagandistic fake news instigated by other nations (2 submissions).⁷⁰

Thus, according to the submitted responses to the inquiry, the second most numerous group focused on increasing

-regulation that attention should be paid. For brand safety reasons, the ad industry has self-interest in policing its behavioural and programmatic advertising networks to identify and cut off advertisers that support fake news sites. Advertisers even the most disreputable are unlikely to want their advertising associated with content that, by its very nature (i.e., fake news), cannot be trusted.⁷²

D. Commission on Fake News and the Teaching of Critical Literacy Skills in Schools

As noted, the Commission on Fake News and the Teaching of Critical Literacy Skills in Schools is based on an August 2017 report, *Fake News and Critical Literacy – an Evidence Review*. Actually, the document is

research relating to critical literacy skills and teaching . . . [which] will

fall into several distinguishable categories:⁷³ The key points

Definitions

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century. For example, while researchers concluded that fake news was unlikely to have had a significant impact on the outcome of the 2016 US general election . . . academics and other commentators have suggested that deliberately misleading news stories have the potential to affect democracy . . . as well as public confidence in evidence-based governance . . . and trust in journalism.⁷⁷

The school environment

Schools are vital in supporting children and young people to discern truth effectively when searching for informationn

E. Other Initiatives

With regard to academic and other inputs into the discussion/debate,

Comments show, juristic analysis is still very pertinent, even if it ends up cautioning against adopting a naïve legal approach to the phenomenon.

The so-called non-legal approach urges that

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⁸⁴ Perhaps the key term

As

the APPG Report states,

An approach based on increasing regulation presents ethical and technological challenges, however, and commentators have equally questioned whether the responsibility for controlling fake news can, or indeed should, be addressed entirely by voluntary actions and initiatives

become

given for voluntary initiatives to emerge and take effect before a regulatory option is more thoroughly explored. *It is within this context that children and young people's critical literacy skills must be strengthened and updated (where necessary) to provide them with the tools they need to engage effectively with information they find online.*⁸⁵

From the point of view of the present author, what has jumped out from all the material presented on the digital critical media literacy approach is *own* evidence to the DCMS Inquiry.⁸⁶ This states,

[W]e recommend a renewed focus on media literacy in schools, *particularly around emotional self-management and digital 'emotional self-care'*. While applied mostly to the work of activists or researchers, the ability to distance oneself emotionally from material online, personal or political is important in constructing a better understanding of how to be a good digital citizen. Simple lessons relating to thinking before liking or sharing, how to avoid filter bubbles and understanding the threats posed by exposure to information are required now from a young age. Media literacy also needs to provide a basis for assessing the validity of sources, source bias, the role of journalism in society and how to differentiate between different forms of journalism: investigative, editorial or

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propagandistic. These are issues that predate and transcend fake news, but are no less important because of that.⁸⁷

Whilst some of the definitions of critical media literacy seem to this author as wildly vague and overly comprehensive, as well as difficult not only to concretize but to implement in any meaningful or sensible manner, the words in the above quote do seem to offer something which is meaningful and doable: to repeat, it is the advice vice manner,

APPENDIX

control measures by pressuring intermediaries to take action to restrict content;

Welcoming and encouraging civil society and media efforts aimed at identifying and raising awareness about deliberately false news stories, disinformation and propaganda;

Concerned about some measures taken by intermediaries to limit access to or the dissemination of digital content, including through automated processes, such as algorithms or digital recognition-based content removal systems, which are not transparent in nature, which fail to respect minimum due process standards and/or which unduly restrict access to or the dissemination of content;

Adopt, in Vienna, on 3 March 2017, the following Joint Declaration on Disinformation and Propaganda:

1. General Principles:

- a. States may only impose restrictions on the right to freedom of expression in accordance with the test for such restrictions under international law, namely that they be provided for by law, serve one of the legitimate interests recognised under international law, and be necessary and proportionate to protect that interest.
- b. Restrictions on freedom of expression may also be imposed, as long as they are consistent with the requirements noted in paragraph 1(a), to prohibit advocacy of hatred on protected grounds that constitutes incitement to violence, discrimination or hostility (in accordance with Article 20(2) of the *International Covenant on Civil and Political Rights*).
- c. The standards outlined in paragraphs 1(a) and (b) apply regardless of frontiers so as to limit restrictions not only within a jurisdiction but also those which affect media outlets and other communications systems operating from outside of the jurisdiction of a State as well as those reaching populations in States other than the State of origin.
- d. Intermediaries should never be liable for any third party content relating to those services unless they specifically intervene in that content or refuse to obey an order adopted in accordance with due

process guarantees by an independent, impartial, authoritative oversight body (such as a court) to remove it and they have the technical capacity to do that.

b.

- e. States should take measures to promote media and digital literacy, including by covering these topics as part of the regular school curriculum and by engaging with civil society and other stakeholders to raise awareness about these issues.
 - f. States should consider other measures to promote equality, non-discrimination, inter-cultural understanding and other democratic values, including with a view to addressing the negative effects of disinformation and propaganda.
4. Intermediaries
- a. Where intermediaries intend to take action to restrict third party content (such as deletion or moderation) which goes beyond legal requirements, they should adopt clear, pre-determined policies governing those actions. Those policies should be based on objectively justifiable criteria rather than ideological or political goals and should, where possible, be adopted after consultation with their users.
 - b. Intermediaries should take effective measures to ensure that their users can both easily access and understand any policies and practices, including terms of service, they have in place for actions covered by paragraph 4(a), including detailed information about how they are enforced, where relevant by making available clear, concise and easy to understand summaries of or explanatory guides to those policies and practices.
 - c. In taking actions covered by paragraph 4(a), intermediaries should respect minimum due process guarantees including by notifying users promptly when content which they created, uploaded or host may be subject to a content action and giving the user an opportunity to contest that action, subject only to legal or reasonable practical constraints, by scrutinising claims under such policies carefully before taking action and by applying measures consi

intermediaries for taking action either in relation to third party content or their own content.

- e. Intermediaries should support the research and development of appropriate technological solutions to disinformation and propaganda which users may apply on a voluntary basis. They should cooperate with initiatives that offer fact-checking services to users and review their advertising models to ensure that they do not adversely impact diversity of opinions and ideas.

5. Journalists and Media Outlets

- a. The media and journalists should, as appropriate, support effective systems of self regulation whether at the level of specific media sectors (such as press complaints bodies) or at the level of individual media outlets (ombudsmen or public editors) which include standards on striving for accuracy in the news, including by offering a right of correction and/or reply to address inaccurate statements in the media.

- b. Me0 g0 G[(Me)-3(0 g 792 reinTm0 0 1 174.02 0 g76.s9c)9(om)17(e,61 11.04 7 g0 G[(0.0000