



A REAL CHALLENGE FOR LIBERAL DEMOCRACIES: “FAKE NEWS” OR DOMESTIC REGULATIONS TO COUNTER FAKE NEWS?

*Liberal Demokrasiler İçin Esas Sorun: “Sahte Haber” mi Yoksa Sahte Haberle
Mücadeleye Yönelik Ulusal Düzenlemeler mi?*

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ABSTRACT

This article aims to identify the greater threat to liberal democracies: “fake news” or domestic regulations intended to combat “fake news”. First, it assesses the impact of fake news on elections by analysing the 2016 US Presidential election in which the world faced the modern version of fake news for the first time and the 2019 EU Parliament election in which a non-regulatory initiative was launched to challenge fake news. Then, it evaluates the impact of regulations on free speech by reviewing liberal democracies’ pioneering regulatory frameworks intended to combat fake news: French Law no. 2018-1202, Germany’s *Netzwerkdurchsetzungsgesetz*, and UK’s Online Harms White Paper. It argues that, while damage to the functioning of democracy caused by fake news during election periods has not been as great as was feared, since fake news has several, highly politicised meanings, legal frameworks tend to over-regulate, which may violate the freedom of expression according to the case-law of the European Court of Human Rights (ECtHR). The article concludes that enhancing media literacy and non-regulatory efforts globally would contribute much more to prevent the impacts of fake news and to protect freedom of expression than legislative frameworks could, and that adopting regulatory frameworks to tackle the online dissemination of fake news should be reconsidered.

Keywords: Fake news, disinformation, freedom of speech, media literacy, non-regulatory efforts.

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ÖZ

Bu makalede, “sahte haber”in mi yoksa sahte haberle mücadeleye yönelik ulusal düzenlemelerin mi liberal demokrasiler için daha büyük bir tehdit oluşturduğu incelenmektedir. Makalede öncelikle sahte haberin seçimler üzerindeki etkisi ele alınmakta, bu kapsamda dijital platformlardan yayılan sahte haberle seçimin yönlendirildiği iddialarının gölgesinde yapılan 2016 ABD Başkanlık seçimi ve sahte haber tehdidinin farkındalığı ile önleyici tedbirlerin alındığı 2019 AB Parlamentosu seçimi değerlendirilmektedir. Ardından, liberal demokrasilerin sahte haberle mücadeleye yönelik ulusal düzenlemelerinin ifade özgürlüğü üzerindeki etkisi irdelenmekte, yasama faaliyetlerine öncülük eden Almanya, Fransa ve Birleşik Krallık’ın bu alandaki kanunları incelenmektedir. Makalede, seçim dönemlerinde sahte haberin demokrasinin işleyişine verdiği zararın korkulduğu kadar büyük olmamasına rağmen sahte haberin çeşitli anlamlar içeren ve önemli ölçüde politize edilmiş bir kavram olduğu da dikkate alınarak ulusal kanunların çevrim içi ifadeyi aşırı düzenleme eğiliminde olduğu ve bu durumun Avrupa İnsan Hakları Mahkemesi (AİHM) içtihadına göre de ifade özgürlüğüne yönelik ihlallere yol açabileceği savunulmaktadır. Makalede, medya okuryazarlığının ve küresel düzeydeki iş birliklerinin artırılmasının sahte haberin olumsuz etkilerini önlemeye ve ifade özgürlüğünü korumaya ulusal düzenlemelerin yapabileceğinden çok daha fazla katkıda bulunacağı ve sahte haberin çevrim içi ortamda yayılmasıyla mücadelede yasama yoluna başvurmanın devletler tarafından yeniden gözden geçirilmesi gerektiği sonucuna varılmaktadır.

Anahtar Kelimeler: Sahte haber, dezenformasyon, sosyal medya, ifade özgürlüğü, medya okuryazarlığı.

INTRODUCTION

The long-standing phenomenon of “fake news¹” gained prominence after BuzzFeed revealed commercial fabrication on Facebook of news stories about the 2016 US Presidential election. Shortly before the election, the BuzzFeed’s author Craig Silverman and his colleague Lawrence Alexander identified more than a hundred fake news websites, which were pulling in huge numbers on Facebook, being run from a small town of Macedonia to make money via social media advertising². Subsequently, it was alleged that Russia sought to sway votes in several other countries as well as the USA by taking advantage of the speed and convenience brought by advanced Information and Communication Technology (ICT) in the dissemination of information which has sparked worldwide concerns about the threat to democracy³. As a result, recent years have seen the adoption of new regulatory frameworks to counter fake news spreading via online platforms in many countries, even the more liberal ones. For instance, France adopted Law no. 2018-1202 on the fight against the manipulation of information in 2018⁴, which allows for foreign government-controlled radio and television networks that broadcast disinformation to be curtailed or temporarily suspended ahead of vital elections. It imposes important requirements for transparency on online platform providers as well⁵. Germany’s *Netzwerkdurchsetzungsgesetz* (Network Law Enforcement Act, hereafter *NetzDG*), which targets hate speech in particular but also fake news, was enacted in 2017⁶. The UK Government published its *Online Harms White*

¹ Fake news, which simply means fabricating deceptive information to manipulate public opinion, is generally accepted as being at least as old as written media. See Marsden, C., Meyer, T. and Brown I. (2020). “Platform Values and Democratic Elections: How Can the Law Regulate Digital Disinformation?”, *Computer Law & Security Review*, Vol. 36, p. 2.

² Silverman, C. and Alexander, L. (3 November 2016). “How Teens In The Balkans Are Duping Trump Supporters With Fake News”, *BuzzFeed News*, <https://www.buzzfeednews.com/article/craigsilverman/how-macedonia-became-a-global-hub-for-pro-trump-misinfo> (Accessed 31 May 2021).

³ Miere, J. L. (5 September 2017). “Russia Election Hacking: Countries Where the Kremlin Has Allegedly Sought to Sway Votes”, *Newsweek*, <https://www.newsweek.com/russia-election-hacking-france-us-606314> (Accessed 4 June 2021). The report claims Russia interfered with elections in the USA, the UK, Germany, France and the Ukraine, among others.

⁴ Loi n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l’information [Law No. 2018-1202 of 22 December 2018 concerning the Fight against Information Manipulation].

⁵ Craufurd Smith, R. (2019). “Fake News, French Law and Democratic Legitimacy: Lessons for the United Kingdom?”, *Journal of Media Law*, Vol. 11, No: 1, p. 52-53.

⁶ *NetzDG – Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken [Network Law Enforcement Act] 2017.*

Paper in 2019, which sets out its purpose as being to establish a regulatory framework for minimising the spread of “online harm” on social media, including disinformation⁷.

The contemporary importance of the issue has also motivated scholars and a very active research community. So far, the literature on this topic – in whichever context it is considered – mainly focuses on the detrimental effects of fake news in liberal democracies⁸, but rarely considers the destructive impact of regulation on free speech⁹. However, the trend of proposing or passing laws to regulate fake news tends to create an environment that constrains the freedom of expression, which is the backbone of liberal democracies. This article, therefore, set out to critically analyse the effect of regulations aimed at curbing fake news on the free speech and will help to address the research gap.

What exactly constitutes fake news is ambiguous, and there is no single, agreed-upon definition¹⁰. It is shown by the fact that some regulatory frameworks function only during a pre-election period, while others apply more (or all) of the time. Besides, different motivations drive fake news – economic, political – affecting different actors¹¹. The term has been further blurred by the expressions of populist politicians who employ it to describe any information provided by outlets that do not endorse their partisan positions¹². So, the starting point of this article is to review the various understandings of fake news to better analyse their effects on legislative process. Better knowledge is also required

⁷ *Online Harms White Paper*, <https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper> (Accessed 5 June 2021).

⁸ See Kraski, R. (2017). “Combating Fake News in Social Media: US and German Legal Approaches”, *St. John’s Law Review*, Vol. 91, No: 4, p. 923; Marsden, C., Meyer, T. and Brown I. (2020); Craufurd Smith, R. (2019); Podger, A. (2019). “Fake News: Could Self-Regulation of Media Help to Protect the Public? The Experience of the Australian Press Council”, *Public Integrity*, Vol. 21, No: 1, p. 1; See also Hansen, I. and Darren J. L. (2019), “Doxing Democracy: Influencing Elections via Cyber Voter Interference”, *Contemporary Politics*, Vol. 25, No: 2, p. 150.

⁹ See Katsirea, I. (2018). “‘Fake News’: Reconsidering the Value of Untruthful Expression in the Face of Regulatory Uncertainty”, *Journal of Media Law*, Vol. 10, No: 2, p. 159; Calvert, C. and others (2018). “Fake News and the First Amendment: Reconciling a Disconnect between Theory and Doctrine”, *University of Cincinnati Law Review*, Vol. 86, No: 1, p. 99.

¹⁰ Calvert, C. and others (2018). p. 102.

¹¹ Morgan, S. (2018). “Fake News, Disinformation, Manipulation and Online Tactics to Undermine Democracy”, *Journal of Cyber Policy*, Vol. 3, No: 1, p. 40.

¹² Molina, M. D. and others (2019). “‘Fake News’ Is Not Simply False Information: A Concept Explication and Taxonomy of Online Content”, *American Behavioral Scientist*, Vol. 65, No: 2, p. 182.

to accurately evaluate the damage wreaked by fabricated news on democracy. The second section questions the impact of fake news on the 2016 US Presidential election (it was alleged to have directed voter preferences by manipulating public opinion) and the 2019 election to the EU Parliament (which took place against a background of various non-regulatory measures against fake news). Examining the facts and figures in each case will enable us to compare “to regulate” with “not to regulate”. For analysing the impact of regulations on free speech, the third section reviews the pioneering regulatory frameworks of liberal democracies: Germany’s *Netzwerkdurchsetzungsgesetz*, French Law no. 2018-1202, and UK’s Online Harms White Paper. Finally, based on recently adopted regulations, the last section discusses possible responses of the European Court of Human Rights (ECtHR) to interferences with Article 10 of the European Convention on Human Rights (ECHR)¹³. Summing up, the article concludes that due to the ambiguous and blurry nature of this phenomenon, domestic regulations to counter fake news have tended to curtail freedom of speech and suggests that the spread of fake news should be tackled by promoting media literacy and non-regulatory efforts globally rather than introducing legal frameworks that target “fake news”.

I. VARIOUS UNDERSTANDINGS OF “FAKE NEWS”

The concept of fake news has gained considerable attention worldwide, evolving historically from satire into a widely debated internet phenomenon¹⁴. While scholars first used the term to describe information that embraced traditional news formats for satirical comment, more recently, it has been used mainly to identify stories in the style of traditional news intended to deliberately misinform¹⁵, spread and empowered through the internet. Widely accessible, inexpensive, and

¹³ The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

¹⁴ Tandoc, E. C., Lim, Z. W. and Ling, R. (2018). “Defining ‘Fake News’: A Typology of Scholarly Definitions”, *Digital Journalism*, Vol. 6, No: 2, p. 138; Wardle, C. and Derakhshan, H. (2017). “Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making”, Council of Europe, DGI(2017)09 16, <https://rm.coe.int/Report-D/09000016807bf5f6> (Accessed 31 May 2021); Humprecht, E. (2019). “Where ‘Fake News’ Flourishes: A Comparison across Four Western Democracies”, *Information, Communication & Society*, Vol. 22, No: 13, p. 1974.

¹⁵ Waisbord, S. (2018). “Truth Is What Happens to News”, *Journalism Studies*, Vol. 19, No: 3, p. 1866.

advanced editing and publishing technology has made the production and distribution of fake news easier than ever for anyone. Moreover, social media platforms have facilitated the speed of dissemination by transforming information consumption from the private to the public sphere¹⁶. Craig Silverman, who tracked the roots of many hoax stories, described "fake news" as "completely false information that was created and spread for profit"¹⁷. Recently, massive quantities of fabricated content have been distributed online, specifically on social media, during elections held in several countries¹⁸. Some prominent examples from the 2016 US Presidential election are stories such as "Pope backs Trump", "FBI agent suspected in Hillary email leaks found dead" and "Hillary sold weapons to ISIS", all of which went viral on Facebook¹⁹. These fabricated stories originated either on websites that deliberately publish deceptive articles and try to conceal their nature by resembling mainstream media outlets in appearance, content and even name (e.g. denverguardian.com), on partisan news websites producing a combination of highly biased news and disinformation, or on satirical websites generating content that can be misunderstood for factual news²⁰. Links to these stories were then shared through social media platforms by social bots, either to increase page-views (i.e. profit) or to influence voters' decisions, and finally social media algorithms seeking to strengthen "confirmation bias" – "filter-bubbles" and "echo chambers"²¹ – further helped to disseminate fake news²².

By virtue of its notorious popularity, fake news was named "word of the year" by the Macquarie Dictionary in 2016 and Collins' Dictionary in 2017²³; it has been meticulously investigated by scholars as well.

¹⁶ Wardle, C. and Derakhshan, H. (2017). p. 11–12.

¹⁷ "I Helped Popularize The Term 'Fake News' And Now I Cringe Whenever I Hear It" (31 December 2017). *BuzzFeed News*, <https://www.buzzfeednews.com/article/craigsilverman/i-helped-popularize-the-term-fake-news-and-now-i-crige> (Accessed 21 June 2021).

¹⁸ Waisbord, S. (2018). p. 1866.

¹⁹ Hansen, I. and Darren J. L. (2019). p. 158.

²⁰ Humprecht, E. (2019). p. 1974; Allcott, H. and Gentzkow, M. (2017). "Social Media and Fake News in the 2016 Election", *Journal of Economic Perspectives*, Vol. 31, No: 2, p. 213–214.

²¹ Filter bubbles and echo chambers are products of artificial intelligence seeking to surround users with like-minded people and information that fits their existing beliefs.

²² Molina, M. D. and others (2019). p. 12.

²³ Macquarie Dictionary, <https://www.macquariedictionary.com.au/resources/view/word/of/the/year/2016> (Accessed 20 June 2021); Collins 2017 Word of the Year Shortlist - New on the Blog - Word Lover's Blog - Collins Dictionary, <https://www.collinsdictionary.com/word-lovers-blog/new/collins-2017-word-of-the-year-shortlist,396,HCb.html> (Accessed 20 June 2021).

However, the complexity and scale of information distortion in the digital realm challenges the drawing of a line between forms of inaccurate information, and thereby determining exactly what news is “fake”. In fact, there is little consensus on definitions. In their 2018 study, Tandoc and others examined how fake news was defined in 34 academic articles produced between 2003 and 2017, and found the term applied to news parody, political satire, manipulation, news propaganda, fabrication and advertising²⁴.

The debate begins with whether satirical material can be fake news. Some scholars argue that satire should not be considered as such since it is unlikely to be mistaken as factual, and is not generated to inform people²⁵. Others argue that it should not be excluded because, even though satire is legal speech, it is possible to take it for the truth²⁶. Another controversy stems from the presence of “intention” when creating fake news. While some scholars argue that its creator must intend deception if a story is to be deemed “fake news²⁷”, others claim that even if the misleading content is unintentionally created, it is still an example of inaccurate information²⁸. The first of these standpoints defines fake news as news stories that could mislead audiences and are intentionally and verifiably false²⁹. This definition admits satirical content as well as fabricated stories, but excludes conspiracy theories, rumours and unintentional misreporting that is misleading, but not necessarily false, and treats misreporting in mainstream media as outside the scope of “fake news”, while the second standpoint does not. But in our digitalised world should the mainstream media be regarded as generating fake news? Well, at least politically it seems so: when, on 11 January 2017 in a press conference Jim Acosta from CNN raised his hand to ask a question – the day after CNN and BuzzFeed News had reported on the existence of the Steele dossier – Trump denounced him with the words “I’m not going to give you a question, you are fake news.” He called BuzzFeed a “failing pile of garbage”, as well. Thus, he redefined the term to mean

²⁴ See Tandoc, E. C., Lim, Z. W. and Ling, R. (2018).

²⁵ Allcott, H. and Gentzkow, M. (2017). p. 214.

²⁶ O Klein, D. and Wueller, J. R. (2018). “Fake News: A Legal Perspective”, *Australasian Policing*, Vol. 20, No: 2, p. 6.

²⁷ Ibid; Allcott, H. and Gentzkow, M. (2017). p. 213–214.

²⁸ Benkler, Y., Faris, R. and Roberts, H. (2018). *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics*, New York: Oxford University Press, p. 360.

²⁹ Allcott, H. and Gentzkow, M. (2017). p. 213.

news reports he did not like³⁰. His tactic to try to nullify disliked news reports has been recognised and adopted eagerly by political movements across the world³¹.

While the fake news experienced in 2016 and beyond tried to intentionally deceive people by imitating real news but did not attack journalism, using the term to discredit the press has added an additional tool to use against democracy. Katsirea refers to this tool a "weapon against traditional media³²". Indeed, "fake news" is now a phrase employed by many populist leaders around the world to legitimise censorship of the media. More recently, Trump directed similar tactics against social media companies (SMCs) as he might have realised the potential power of social media platforms in forming and disseminating public opinion during the 2020 US Presidential election. After Twitter tagged one of his tweets with a fact-checking warning and evaluated it as "false information", Trump accused SMCs of interfering in the upcoming election and threatened to regulate them strongly, or even close down platforms that do not fulfil standards for ideological balance³³.

Owing to all these complexities, some scholars suggest that "disinformation" should be used instead of "fake news", to eliminate improper uses³⁴. The Council of Europe (CoE), in its comprehensive report on information disorder, also preferred "disinformation", regarding "fake news" as inadequate to describe the complex nature of

³⁰ See Silverman, C. (2017).

³¹ For political movements that have denounced news reports as fake news see Friedman, U. (23 December 2017). "The Real-World Consequences of 'Fake News'", *The Atlantic*, <https://www.theatlantic.com/international/archive/2017/12/trump-world-fake-news/548888/> (Accessed 25 June 2021).

³² Katsirea, I. (2018). p. 162.

³³ See Bennett, J. T. (27 May 2020). "Trump Accuses Twitter of Interfering in Election after Fact-Checking His Tweets for First Time", *The Independent*, <https://www.independent.co.uk/news/world/americas/us-politics/twitter-donald-trump-fact-check-warning-label-tweets-mail-in-voting-murder-a9533871.html> (Accessed 1 July 2021); McCarthy, T. (27 May 2020). "Trump Threatens Social Media after Twitter Puts Warning on His False Claims", *The Guardian*, <https://www.theguardian.com/us-news/2020/may/27/trump-twitter-social-media-threat-conservatives> (Accessed 1 July 2021).

³⁴ See Wardle, C. (16 February 2017). "Fake News. It's Complicated", *First Draft*, <https://firstdraftnews.org/443/latest/fake-news-complicated/> (Accessed 26 June 2021); Jaurisch, J. and others (15 November 2019). "Tackling Disinformation: Going Beyond Content Moderation", *Institut Montaigne Blog*, <https://www.institutmontaigne.org/en/blog/tackling-disinformation-going-beyond-content-moderation> (Accessed 6 June 2021); See also Bradshaw, S. and Howard, P. N. (2018). "The Global Organization of Social Media Disinformation Campaigns", *Journal of International Affairs*, Vol. 71, No: 1, p. 23.

information pollution, and because “fake news” has become a tool for politicians around the world to tarnish unwelcome coverage by news organisations³⁵.

However, regardless of how it is conceptualised, to distinguish “fake news” from both other forms of inaccurate information and truthful news would be an essential starting point, to acquire a reasonable definition of the term. Which of the following constitutes fake news? The story published on a satirical website concerning Pope Francis’s endorsement of Trump’s Presidential candidacy, which went viral after sharing on Facebook? A significantly misleading headline as in the the *Sun*’s headline “Queen backs Brexit”, which suggested that Elizabeth II had breached her constitutional obligation to stay neutral in political matters, although the text explained that Queen had commented on the EU at a lunch at Windsor Castle in 2011 but stated no position on Brexit? An intentionally fabricated story that was disseminated from a now-defunct website with the headline “FBI agent suspected in Hillary email leaks found dead in apparent murder-suicide³⁶”?

Since “fake news” is one but not the only form of information disorder in our digitally connected world, it is important to develop categories that differentiate various types of content such as fabricated stories produced intentionally “in the guise of news”; unintentional errors contained in news releases; deceptive, but not blatantly untrue news stories; false statements not “in the guise of news”; and conspiracy theories whose accuracy is hard to prove but believed true by their creators³⁷. This article could build on this categorisation to answer the question in the previous paragraph.

Claire Wardle identifies seven genres of inaccurate information that span the wide variety of problematic online content, ranging from the mildest – satire and parody – to fully-fledged fabricated content. Her classification is based on the strength of the intention to deceive. Under this classification, “satire or parody” does not intend to cause harm but could fool the reader; “misleading content” is the misleading use of information to frame an issue or individual; “impostor content”

³⁵ Wardle, C. and Derakhshan, H. (2017). p. 5.

³⁶ Allcott, H. and Gentzkow, M. (2017). p. 213–214.

³⁷ Ibid. p. 214.

impersonates sources not responsible for the content; "fabricated content" is totally false information intended to deceive and do harm; "false connection" occurs if headlines, visuals or captions do not endorse the content; "false context" is as it sounds; and, finally, "manipulated content" exists when information or imagery is manipulated to deceive³⁸. Relying on Wardle's study, CoE introduced a conceptual framework for examining information disorder and identified three types – mis-, dis- and malinformation – that categorise the disorder according to its factual content (if any) and intent to cause harm. As explained in the accompanying CoE report, "disinformation" is *when false information is knowingly shared to cause harm* and different from the other two types since "misinformation" is *when false information is shared, but no harm is meant* and "malinformation" is *when genuine information is shared to cause harm, often by moving information designed to stay private into the public sphere*³⁹.

As becomes visible from the discussion so far, although fake news is an old phenomenon the online version that emerged in 2016 has brought complexities to the term. Various actors, interests and motives come together to create, produce and distribute fake news via online platforms, and multifaceted and rigorous assessment is required to interpret this sophisticated network of relationships. The arguments presented in this section demonstrate that "fake news" is an immature concept, around which heated debates continue to swirl. While Wardle's classification of inaccurate information and CoE's categories of information disorder built on it, contribute notably towards a reasonable definition of the term, building consensus around an ideal definition seems unlikely, at least in the near future, because of the term's political involvement. As the article will discuss in Section 3, the ambiguity of the term also shows itself in how domestic regulations try to handle the issue. However, before analysing those regulations, for a reasonable comparison between "to regulate" and "not to regulate" the article will first try to establish the damage to democracy caused by fake news through two instances.

II. IMPACT OF FAKE NEWS ON TWO PROMINENT ELECTIONS

In this section, the article provides data from previous studies that will help to comment on the extent of damage to the functioning of

³⁸ See Wardle, C. (2017).

³⁹ Wardle, C. and Derakhshan, H. (2017). p. 5.

democracy caused by fake news during the 2016 US Presidential election and the 2019 EU Parliament election. The 2016 US Presidential election may have been the first time the world faced the modern version of fake news, and indeed, there is enough data and social network analysis on which to base comments. Conversely, the 2019 EU Parliamentary election was well-prepared for the possible threats of fabricated news in the wake of BuzzFeed's revelations of commercial exploitation of fake news on Facebook and allegations of Russian interference in elections in several countries, including the USA, the UK, Germany and France, which led the EU to take some non-regulatory steps to discourage similar incidents. The article will discuss in subsection 2.2 whether these steps were adequate to counter fake news.

A. 2016 US PRESIDENTIAL ELECTION

Many politicians in liberal democracies believe that fake news could distort the functioning of democracy, that the vast numbers of people who rely on social media for their news could be deceived, particularly at election time⁴⁰. Behind this view is some research carried out following the 2016 election. Craig Silverman illustrated that, during the last three months of the Presidential campaign, some fake election news on Facebook generated broader public attention than the top stories from established news organisations such as the Huffington Post or *The New York Times*⁴¹. Furthermore, according to a survey conducted by Pew Research Center among a national sample of 1,002 adults living in the continental United States, 64% of US adults agree that "fake news" creates much doubt about the basic truths of contemporary issues and events⁴². In their study "Social Media and Fake News in the 2016 Election", Hunt Allcott and Matthew Gentzkow illustrated that on Facebook, 115 fabricated pro-Trump stories had been shared a total of 30

⁴⁰ Reuters (18 November 2016). "Barack Obama: Fake News Is a Threat to Democracy – Video", *The Guardian*, <https://www.theguardian.com/media/video/2016/nov/18/barack-obama-fake-news-is-a-threat-to-democracy-video> (Accessed 10 July 2021); Der Spiegel (13 December 2016). "Fake News: CDU-Politiker fordern Strafverschärfung" *Der Spiegel – Politik*, <https://www.spiegel.de/politik/deutschland/fake-news-unionspolitiker-wollen-strafverschaeerfung-bei-gefaelschten-nachrichten-a-1125611.html> (Accessed 10 July 2021).

⁴¹ Silverman, C. (16 November 2016). "This Analysis Shows How Viral Fake Election News Stories Outperformed Real News On Facebook", *BuzzFeed News*, <https://www.buzzfeednews.com/article/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook> (Accessed 10 July 2021).

⁴² Barthel, M., Mitchell, A. and Holcomb, J. (2016). "Many Americans Believe Fake News Is Sowing Confusion", Pew Research Center, p. 1.

million times, and 41 fabricated pro-Clinton stories shared a total of 7.6 million times before the election. Moreover, 159 million visits were made during the election month to a series of fake news pages (0.64 per US adult)⁴³. Such data has prompted concerns about increasing partisanship and the widespread use of social media, specifically fears that filter bubbles and echo chambers could exacerbate disinformation⁴⁴.

Social media platforms are built on profit-maximising architecture in which content is targeted by applying machine-learning tools to users' profiles to maximise users' interaction with social media and thus advertising revenues⁴⁵. However, as a consequence, this mechanism has segregated users into diverse groups based on characteristics, for instance their religious or political affiliation. This in turn has proliferated filter bubbles and echo chambers which offer safe havens for sharing ideas and beliefs with others without substantial confrontation or division by enabling people to interact with others who share similar world views⁴⁶. Since agents who produce fake news target groups that they think are more likely to be receptive to the story, it is probable the story will be shared by the initial recipient. According to Miriam Metzger and the others, it is a strong possibility that people trust information coming from somebody they know, even though its authenticity might be doubtful⁴⁷. Thus, once fake news is injected into an interest group, it disseminates quickly and easily without meeting many challenges⁴⁸.

In contrast, studies aiming to assess the impact of filter bubbles and echo chambers in shaping voters' preferences suggest that moral panic over the fake news threat disseminating in the social media may be exaggerated for several reasons. First, it is likely that people who are engaged in politics online will double-check dubious content they find on the Web or social media, meaning that these people search online for confirmation or refutation, allowing filter bubbles to pop and echo

⁴³ Allcott, H. and Gentzkow, M. (2017). p. 212.

⁴⁴ Guess, A. M., Nyhan, B. and Reifler, J. (2020). "Exposure to Untrustworthy Websites in the 2016 US Election", *Nature Human Behaviour*, Vol. 4, No: 5, p. 472.

⁴⁵ Pariser, E. (2012). *The Filter Bubble: What the Internet Is Hiding from You*, London: Penguin Books, p. 35.

⁴⁶ Flaxman, S., Goel, S. and Rao, J. M. (2016). "Filter Bubbles, Echo Chambers, and Online News Consumption", *Public Opinion Quarterly*, Vol. 80, No: S1, p. 299.

⁴⁷ Metzger, M. J., Flanagin, A. J. and Medders, R. B. (2010). "Social and Heuristic Approaches to Credibility Evaluation Online", *Journal of Communication*, Vol. 60, No: 3, p. 414-415.

⁴⁸ Wardle, C. and Derakhshan, H. (2017). p. 51.

chambers to split⁴⁹. Besides, Allcott and Gentzkow demonstrated that although social media was a significant source of political information, it was not the dominant one. Television maintained its supremacy over social media in shaping public opinion in the 2016 election. Their study also showed that the impact of exposure to fake news in social media did not last long since less than 20% of respondents recalled “fake news⁵⁰”. Moreover, the consumers of untrustworthy content, such as fake news and conspiracy theories, are usually a small number of people with extreme political views. Indeed, a considerable body of scientific study suggests a limited consumption of fake news, mainly among extremists⁵¹. Andrew M. Guess and others reported in their study “Exposure to untrustworthy websites in the 2016 US election” that 62% of the visits to untrustworthy websites came from the 20% of Americans with the most conservative information diets⁵². More specifically, Allcott and Gentzkow illustrated less than 10% of the US adult population had believed fake news during the 2016 election⁵³. These percentages may still seem high, but given that the abuse of online platforms for disseminating fake news was first revealed in the 2016 election, this rate might be expected to fall in more recent elections as media literacy has improved and politicians and social activists have forced social media providers to take more responsibility in tackling disinformation online since then.

Media literacy offers consumers a set of skills, including critical thinking and active inquiry, to respond to material that appears before them in the digital texts they read, the television shows they watch and their social media feeds⁵⁴. Like fake news, media literacy is not a new concept either. Nevertheless, since online platforms have boosted

⁴⁹ Dutton, W. H. (2017). “Fake News, Echo Chambers and Filter Bubbles Are an Exaggerated Threat. Here’s Why”, *World Economic Forum*, <https://www.weforum.org/agenda/2017/05/fake-news-echo-chambers-and-filter-bubbles-are-an-exaggerated-threat-heres-why/> (Accessed 13 July 2021).

⁵⁰ Allcott, H. and Gentzkow, M. (2017). p. 223.

⁵¹ See Quattrocchi, W. (14 January 2016). “How Does Misinformation Spread Online?”, *World Economic Forum*, <https://www.weforum.org/agenda/2016/01/q-a-walter-quattrocchi-digital-wildfires/> (Accessed 13 July 2021); Krasodomski-Jones, A. (2017). “Talking To Ourselves? Political Debate Online and the Echo Chamber Effect”, *Demos*, p. 8, <https://demos.co.uk/project/talking-to-ourselves/> (Accessed 13 July 2021); Guess, A. M., Nyhan, B. and Reifler, J. (2020). p. 7.

⁵² Guess, A. M., Nyhan, B. and Reifler, J. (2020). p. 11.

⁵³ Allcott, H. and Gentzkow, M. (2017). p. 226.

⁵⁴ Cherner, T. S. and Curry, K. (2019). “Preparing Pre-Service Teachers to Teach Media Literacy: A Response to ‘Fake News’”, *Journal of Media Literacy Education*, Vol. 11, No: 1, p. 1.

the dissemination of disinformation, efforts to educate people to build media- (especially social media-) consciousness have become a priority agenda for the twenty-first century. In this respect, teaching how social algorithms generate echo chambers and filter bubbles ought to reduce the number of social media users falling for fake news by increasing awareness.

Moreover, in the wake of the 2016 election, social media platforms have launched various initiatives to alleviate the reactions to their past inactivity and to avoid regulations that might place uncomfortable obligations on them⁵⁵. Since then, they have provided a variety of user tools to weaken the intensity of echo chambers and filter bubbles. For instance, Facebook has developed a "related-articles" feature that shows diverse perspectives on a story⁵⁶. The platform also put into service the "Perspectives" tool during elections in the UK and France, which enabled users to compare parties' or candidates' positions by clicking on an article related to the elections⁵⁷. Furthermore, social media platforms have cooperated with fact-checking organisations to provide warnings about content that is deemed suspicious and have also reduced the financial incentives to generate "fake news" content⁵⁸. Last but not least, some news outlets from mainstream media have added new features to their online outlets to direct people to alternative perspectives: the *Wall Street Journal* established "Blue Feed, Red Feed" to exhibit "how reality may differ for different Facebook users⁵⁹"; BuzzFeed created "Outside Your Bubble" to gather views from across the Web and to convert them into a neutral form⁶⁰; the *Guardian* developed "Burst Your Bubble" to

⁵⁵ Katsirea, I. (2018). p. 160.

⁵⁶ Constine, J. (25 April 2017). "Facebook Shows Related Articles and Fact Checkers before You Open Links", *TechCrunch*, https://techcrunch.com/2017/04/25/facebook-shows-related-articles-and-fact-checkers-before-you-openlinks/?guccounter=1&guce_referrer=aHR0cHM6Ly-93d3cuZ29vZ2xlMmNvbS8&guce_referrer_sig=AQAAALpQ7pmWzXAJXgY35t4Tc3X-ld-jQX2wajnbjMsY3uLTbt2-CPwIVFA5WI9TiwTuIzkQpEMeRlyhRf3x1a03gCw_0b652XGnS-DpwDYVBYF3h2ESrJfS6ZHRPr9UW9pD0ArnKx8dwhdHbBT-f2gIN6o2G8eqiwPu9ktAY-tNELyyGvk (Accessed 18 July 2021).

⁵⁷ McGregor, J. (31 May 2017). "Facebook Wades Into Another Election", *Forbes*, <https://www.forbes.com/sites/jaymcgregor/2017/05/31/facebook-wades-into-another-election/> (Accessed 18 July 2021).

⁵⁸ Katsirea, I. (2018). p. 160.

⁵⁹ Keegan, J. (last updated 19 August 2019). "Blue Feed, Red Feed", *Wall Street Journal*, <https://graphics.wsj.com/blue-feed-red-feed/> (Accessed 18 July 2021).

⁶⁰ Smith, B. (17 February 2017). "Helping You See Outside Your Bubble", *BuzzFeed*, <https://www.buzzfeed.com/bensmith/helping-you-see-outside-your-bubble> (Accessed 18 July 2021).

provide their liberal audience conservative articles that they think worth reading⁶¹.

The article will assess whether all these efforts have been effective in tackling fake news, after reviewing data for the 2019 EU Parliament election, in the following subsection.

B. 2019 EU PARLIAMENT ELECTION

The allegations about Russian interference in prominent elections across the world through disseminating fake news led the EU to take action to reduce the impact of fake news on voter preferences ahead of the 2019 election for the EU Parliament. In contrast to the USA, the EU was not caught off guard in its 2019 election; it had launched a non-regulatory initiative to challenge online disinformation and had taken a series of steps to avoid the recurrence of previous incidents during the 2019 election. In April 2018, the “Communication on tackling online disinformation: a European approach” was issued to outline self-regulatory tools for SMCs to fight online disinformation, including tools to promote quality journalism, support for an independent network of fact-checkers and a Code of Practice that will apply across the EU covering online disinformation.⁶² In October 2018, Facebook, Twitter, Google, Mozilla, trade associations representing the advertising industry and advertisers, and a trade association representing online platforms signed the Code of Practice, which puts forward self-regulating standards that signatories agree to be bound by⁶³. Following the Code of Practice, Facebook, Twitter and Google reported actions to enhance monitoring of ad placements, to tackle fake accounts and use of malware (notably, bots), and to ensure transparency of political and issue-based advertising on a monthly basis from January to May 2019 when the election was held. The European Commission published the first of these monthly reports⁶⁴, then in October 2019 the annual self-assessment

⁶¹ “Burst Your Bubble: The Guardian’s Weekly Guide to Conservative Articles Worth Reading to Expand Your Thinking”, *The Guardian*, <https://www.theguardian.com/us-news/series/burst-your-bubble> (Accessed 18 July 2021).

⁶² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2018 [COM(2018) 236 final].

⁶³ “Code of Practice on Disinformation | Shaping Europe’s Digital Future”, <https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation> (Accessed 15 July 2021).

⁶⁴ For monthly reports see *ibid*.

reports of all the signatories to the Code of Practice on Disinformation with its own assessments⁶⁵. According to the Commission, even though further steps are still essential, signatories demonstrated extensive effort to demonstrate their commitment to the Code. The Commission also claimed comprehensive progress in tackling disinformation online, compared to the pre-Code period⁶⁶.

The assessments of the Commission were confirmed by scholars. In "The Limited Reach of Fake News on Twitter during 2019 European Elections" that was published six months after the election, Matteo Cinelli and others analysed information consumption on Twitter during the electoral campaign by investigating the communication patterns of mainstream media, politicians, people from showbiz, fake news resources and many others. The researchers studied more than 400,000 tweets posted by 863 accounts and found their interaction mostly confined within the same class and that political discussion hardly ever crossed national frontiers, which obviously refutes potential claims of foreign electoral interference. Furthermore, they did not report any evidence of an organised network of accounts to spread disinformation. Instead, other actors tend to disregard sources of disinformation, and therefore play a generally positive role in online political debate⁶⁷. Cinelli and others concluded that Twitter's policies to combat the dissemination of disinformation, i.e. prohibiting or removing fraudulent accounts, had been effective and could assist in maintaining Twittersphere credibility⁶⁸.

To recall, the data in subsection 2.1 indicates that, once placed on social media platforms, fake news disseminated dramatically in the 2016 US Presidential election and large numbers of people were exposed to it. For the 2019 EU Parliament election, however, the analysis by Cinelli and others suggests that the efforts of the EU and signatories to the Code

⁶⁵ For the annual reports of signatories see "Annual Self-Assessment Reports of Signatories to the Code of Practice on Disinformation 2019", *Shaping Europe's digital future – European Commission*, 29 October 2019, <https://ec.europa.eu/digital-single-market/en/news/annual-self-assessment-reports-signatories-code-practice-disinformation-2019> (Accessed 16 July 2021).

⁶⁶ "Last Intermediate Results of the EU Code of Practice against Disinformation", *Shaping Europe's digital future – European Commission*, 14 June 2019, <https://ec.europa.eu/digital-single-market/en/news/last-intermediate-results-eu-code-practice-against-disinformation> (Accessed 16 July 2021).

⁶⁷ Cinelli, M. and others (2020). "The Limited Reach of Fake News on Twitter during 2019 European Elections", *PLOS ONE*, Vol. 15, No: 6, p. 1.

⁶⁸ *Ibid.* p. 10.

of Practice on Disinformation were effective, since no major incident has been reported so far.

It is apparent that many attempts have been made via provider initiatives and self-regulation to protect users from fake news and its impact on voter preferences. Needless to say, if all online actors were to join in, these efforts could develop further and fewer people would be misled. However, despite all the awareness created, those who are inclined to believe fabricated news might do so, not because these efforts are inadequate, but because these individuals have particular behavioural patterns, such as preferring the opinions of their own peer group, instead of seeking truth independently. Nevertheless, it is risky to completely ignore the possibility that regular exposure to fabricated stories could have a negative effect on political attitudes, perhaps through intensified cynicism and alienation, particularly if not subdued partially by consuming reliable news⁶⁹. Especially during election periods, the risk posed to social integrity by polarisation must not be underestimated. Moreover, even if fake news has little or no impact on election results, the growing dissemination of fake news might aggravate social complications in the long term. It often takes money and time to refute fabricated stories, as well⁷⁰. So, can regulatory frameworks to oppose fake news help to eliminate these issues or do they cause more serious problems, such as stifling free speech? In the next section, the article will look for an answer to this question.

III. LEGISLATIVE FRAMEWORKS TO COUNTER FAKE NEWS IN THREE LIBERAL DEMOCRACIES

In recent years, the spreading of misleading and false information via social media, particularly during the run-up to elections, has become a concern in Europe and some countries have adopted laws to fight it. Germany was the first, enacting the NetzDG in 2017. France adopted Law no. 2018-1202 in 2018 and the UK put forward proposals via the *Online Harms White Paper* in 2019. These developments indicate the rising importance given to the topic by liberal democracies, as well as

⁶⁹ Balmas, M. (2014). "When Fake News Becomes Real: Combined Exposure to Multiple News Sources and Political Attitudes of Inefficacy, Alienation, and Cynicism", *Communication Research*, Vol. 41, No: 3, p. 430.

⁷⁰ Katsirea, I. (2018). p. 170.

courses of action that other states might pursue⁷¹. The following analysis will help us understand the orientation of three key leading legislative frameworks aiming to tackle fake news and assess how effective they are at minimising the propagation of fake news through social media.

A. FRANCE

France, like the USA, faced a surge of fake stories, a widening of caustic debate among web users, a torrent of cyber threats and "junk email" during the final days of the 2017 Presidential election campaign⁷². As in the US election, behind the disinformation were more general political motives as well as a wish to interfere in the election; and, of course, profit⁷³. In March 2017, incumbent President François Hollande accused Russia of attempting to manipulate public opinion and vigorously led a fight against cyber attacks on the election⁷⁴. Although the fake stories targeted Emmanuel Macron's campaign, he managed to win the election⁷⁵, and in no time Law no. 2018-1202 on the "fight against the manipulation of information" was adopted despite strong criticism from scholars, media watchdogs and journalists.

In fact, unlike Germany and England, France already had substantial civil and criminal provisions in force to prevent false information from being published: the Press Law of 1881⁷⁶ includes a provision that makes the printing, disseminating or reproducing of "false news" or "articles fabricated, falsified or falsely attributed to others" in bad faith, to disrupt public peace, subject to a fine of up to €45,000, or €135,000 if it aims to harm army morale or war effort (Article 27). These provisions were extended to online communications by Article 6 of the Law of 21 June 2004⁷⁷. The French Electoral Code also contains specific measures regarding disinformation: Article L.97 contains the offence of using

⁷¹ "A Study on the Regulation of 'Fake News' in the European Union", Maastricht Centre for European Law, 2018, Master Working Paper 2018/8, p. 19.

⁷² Hansen, I. and Darren, J. L. (2019). p. 161.

⁷³ Scott, M. (4 May 2017). "In French Elections, Alt-Right Messages and Memes Don't Translate", *The New York Times*, <https://www.nytimes.com/2017/05/04/technology/french-elections-alt-right-fake-news-le-pen-macron.html> (Accessed 28 July 2021).

⁷⁴ Cohen-Grillet, P. (17 March 2017). "French Election Faces High Cyber Threat", *EUobserver*, <https://euobserver.com/eu-election/137285> (Accessed 28 July 2021); Hansen, I. and Darren J. L. (2019). p. 161.

⁷⁵ Craufurd Smith, R. (2019). p. 73.

⁷⁶ Loi du 29 juillet 1881 sur la liberté de la presse [Law of 29 July 1881 on freedom of the press].

⁷⁷ Craufurd Smith, R. (2019). p. 55.

“false news, calumnies, or other fraudulent means” to manipulate voting or cause voters to refrain from voting. Anyone found guilty can be sentenced to one year in prison or €15,000 in fines⁷⁸. Moreover, in the six months prior to an election, Article L.52-1 bans advertisements for electoral propaganda purposes in the press and through all means of audiovisual communication⁷⁹. Despite such extensive regulation, the existing provisions were deemed unfit to address the propagation of fake news by digital tools, in particular through social media platforms and mass media-driven by foreign countries⁸⁰. Since the creators of the false information are usually not identifiable in social networks, a new regulation is needed, which will concentrate on the hosts rather than the creators of the material⁸¹.

The new law passed in November 2018⁸². It uses the term “false information”, which deals solely with the falsity of the information, its material content⁸³. Employing this term thus allowed the French parliament to deal separately with direct and hidden intentions, taking into account the context and the person or organisation against whom the law is directed⁸⁴. The law enables judges, within 48 hours, to halt the dissemination of false information during election campaigns if it is manifestly incorrect, being propagated intentionally on a large scale and may constitute a breach of the peace or affect the result of the election (Article 1). The law stipulates that fair, clear and transparent information must be given to social media users on how their personal data is used (Article 1). It introduces a “duty of cooperation” – similar to the EU’s code of conduct – for digital platforms, forcing them to implement measures to counter false information and make public the measures taken (Article 11). During election campaigns, digital platforms must report who has sponsored content, providing the sponsor’s name and the amount paid. Platforms achieving hits per day that exceed a defined

⁷⁸ Code Electoral [Electoral Code] – Article L.97.

⁷⁹ Code Electoral [Electoral Code] – Article L.52-1.

⁸⁰ “Against Information Manipulation”, Gouvernement.fr, updated to 3 July 2020, <https://www.gouvernement.fr/en/against-information-manipulation> (Accessed 29 July 2021).

⁸¹ Craufurd Smith, R. (2019). p. 55–56.

⁸² Loi n° 2018-1202.

⁸³ Unlike “disinformation”, which refers to the dissemination of false information with the intention of causing public harm or making profit. “Disinformation” does not appear in the law.

⁸⁴ Craufurd Smith, R. (2019). p. 57–58.

threshold must publish their algorithms and have a legal representative in France⁸⁵. Lastly, the law authorises the national broadcasting body to suspend television channels controlled by or under the influence of a foreign state where they *deliberately disseminate false information which might impact the credibility of the vote* (Article 10). Those who breach the law can be sentenced to one year in prison or €75,000 in fines (Article 1).

The law was severely criticised for failing to provide a precise and technical definition of "false information", so increasing legal uncertainty that could lead to arbitrary implementation. The law was also opposed for giving judges power to determine whether content is capable of disrupting an election that has not yet taken place and for not requiring a sufficient lapse of time before this power could be exercised. Last but not least, it was complained about the provisions to take off the air a media service that is owned or controlled by a foreign state⁸⁶. How the law will be applied during an election has not been tested since it was adopted⁸⁷. However, given that laws existed to cover manipulation of information, one might think that the field has become over-regulated with the latest law, and might not offer reasonable breathing-space for anti-government views.

B. GERMANY

The German internet law, NetzDG, was enacted in 2017 to address the perception that SMCs had been ineffective and slow to counteract catastrophic amounts of hate crime, fake news and online abuse⁸⁸. The law aims to place a legal obligation on SMCs to take prompt action to remove illegal content from the internet⁸⁹. It provides social media

⁸⁵ Jones, K. (6 November 2019). "Online Disinformation and Political Discourse: Applying a Human Rights Framework", *Chatham House Report 24*, <https://www.chathamhouse.org/publication/online-disinformation-and-political-discourse-applying-human-rights-framework> (Accessed 5 July 2021).

⁸⁶ Maastricht Centre for European Law (2018). p. 21–22.

⁸⁷ There has been no major election since the law was adopted; local elections that took place in March 2020 under pandemic conditions do not provide a data set sufficiently reliable to review the implementation of the law.

⁸⁸ Echikson, W. and Knodt, O. (2018). "Germany's NetzDG: A Key Test for Combatting Online Hate", *Social Science Research Network*, SSRN Scholarly Paper ID 3300636 1, <https://papers.ssrn.com/abstract=3300636> (Accessed 22 July 2021).

⁸⁹ Claussen, V. (24 October 2018). "Fighting Hate Speech and Fake News. The Network Enforcement Act (NetzDG) in Germany in the Context of European Legislation", *MediaLaws – Law and Policy of the Media in a Comparative Perspective*, p. 117, <http://www.medialaws.eu/rivista/fighting-hate-speech-and-fake-news-the-network-enforcement-act-netzdg-in-germany-in-the-context-of-european-legislation/> (Accessed 22 July 2021).

users or German authorities an opportunity to report content that they consider to be unlawful and require it to be taken down or blocked from the social media site⁹⁰.

The law applies only to SMCs that have at least two million registered users (Article 1); obliges them to take down content violating specific provisions of the German Criminal Code⁹¹, within 24 hours if the content is “clearly illegal”, or 7 days if the illegality of the content is not immediately obvious (Article 3); and provides German users with an accessible and efficient notice and take-down procedure (Article 3). In addition, to promote transparency, the law obliges SMCs to report every six months on take-downs and user complaints, and sets a complaints procedure in place where users can report content that has not been removed (Article 2); and envisages heavy fines, of up to €50 million, on SMCs failing to delete illegal content rapidly (Article 4).

Scholars have found the law constitutionally alarming and warned authorities about over-blocking, and content being taken down “in case of doubt”. As every single user of a social network can report the others’ content as illegal, this could result in over-reporting, denunciation and restrict the freedom of speech⁹². Indeed, the law seems problematic, since it constrains freedom of expression in many ways. The NetzDG treats the obligation of SMCs to take down material ahead of protecting free speech; it does not emphasise the significance of freedom of speech, and no penalty can be levied on SMCs for over-moderation. It should also be noted that SMCs handle the complaints, and each independently decides whether the content is illegal, as it is not required to consult any judicial body over the decision. Although SMCs are obliged to train their employees in the processing of complaints, it is unclear how far such preparation could qualify employees to take legal decisions. Since complaints and the documentation requirements must be processed quickly, it is questionable whether the decisions are always accurate⁹³.

⁹⁰ Kasakowskij, T. and others (2020). “Network Enforcement as Denunciation Endorsement? A Critical Study on Legal Enforcement in Social Media”, *Telematics and Informatics*, Vol. 46, p. 3.

⁹¹ According to Article 1 of the NetzDG, illegal content is content covered by subsection 1, which cites §§86, 86a, 89a, 91, 100a, 111, 126, 129 to 129b, 130, 131, 140, 166, 184b in conjunction with 184d, 185 to 187, 201a, 241 and 269 of the Criminal Code, and which is not justified. Among the offences that resemble the dissemination of fake news are intentional defamation (Art. 187), treasonous forgery (Art. 100a) and forgery of data (Art. 269).

⁹² Kasakowskij, T. and others (2020). p. 1.

⁹³ *Ibid.* p. 3.

Such accuracy is made less likely because the NetzDG does not define the term "fake news"⁹⁴. Besides, when considering the discussion in Section 1 of how controversial the term is, deciding what amounts to fake news and verifying the authenticity of statements is clearly difficult even when guidance is provided⁹⁵. Even if the content is correctly determined to be "fake news", this does not mean that it can be considered illegal in every case. A fabricated article may be untruthful, but not unlawful⁹⁶. NetzDG regulates what is considered to be "illegal content" under the criminal law⁹⁷, so that fabricated news that does not breach one of the German Criminal Code provisions to which the NetzDG refers cannot be identified as illegal and should not be subject to the NetzDG.

At this point, while it is quite difficult to make sense of all these issues, even for experts, it is open to question how successful social media workers might be. Since SMCs are not obliged to present reports that detail the type of content that has been taken down, it is not possible to assess how the law in practice will affect different types of speech⁹⁸. Naturally this also applies to total removals by all SMCs; thus, how far NetzDG will constrain fake news remains uncertain. Hence it does not seem feasible to assess the law's success in preventing fake news in an equation with so many unknowns, at least in the short term. On the other hand, there are already some signs that over-blocking is occurring: German courts have ruled that Facebook took down material unjustifiably in some cases⁹⁹.

C. UK

The UK is currently considering regulatory measures to counter the dissemination of malicious material online, including disinformation. The Government released a White Paper in April 2019¹⁰⁰, which recommends obliging technology companies to sign up to a set of Codes of Practice that essentially will regulate content on their websites. The

⁹⁴ Katsirea, I. (2018). p. 180.

⁹⁵ Santuraki, S. U. (2019). "Trends in the Regulation of Hate Speech and Fake News: A Threat to Free Speech?", *Hasanuddin Law Review*, Vol. 5, No: 2, p. 152.

⁹⁶ Katsirea, I. (2018). p. 180.

⁹⁷ Kasakowskij, T. and others (2020). p. 3.

⁹⁸ O'Regan, C. (2018). "Hate Speech Online: An (Intractable) Contemporary Challenge?", *Current Legal Problems*, Vol. 71, No: 1, p. 427.

⁹⁹ LG Berlin, 31 O 21/18, 23/3/2018; LG Hamburg 324 O 51/18, 30/4/2018.

¹⁰⁰ *Online Harms White Paper*.

Codes of Practice also place on technology companies responsibilities to control the content on their platforms that go far beyond typical “notice and take down” obligations. They are expected to take proactive measures to prevent content from being posted and, before anyone has notified it, to employ automated tools such as content recognition algorithms and automated filtering technologies to identify dubious material. New statutory duty of care will be placed on companies, which will be supervised by a new, independent, regulatory body that will be entitled to fine and impose sanctions on senior executives. It will also have the authority both to disrupt business activities of non-compliant companies through placing obligations on ancillary services such as payment providers and search engines, and to order the blocking of Internet Service Providers (ISP)¹⁰¹.

Unlike NetzDG, the White Paper covers a wide range of companies that offer a wide range of services and platforms, and a breadth of online harms ranging from illegal content and activity to behaviours that are unacceptable but not necessarily illegal such as posting terrorist content or violent content, hate crime, pornography, child sexual exploitation, intimidation, disinformation, “trolling” and excessive screen time¹⁰². Such extensive scope, both of content type and of measures against online harms, along with the blurriness of what the regulator is going to be asked to enforce, triggers concerns about freedom of expression¹⁰³. Too broad a definition of online harms can create serious problems, and make the law vulnerable to abuses, especially when applied against unwelcome political debate, rather than fake news. To protect itself from such criticisms the UK Government, in line with recommendations in an Interim Report that a Committee of the Department for Digital, Culture, Media and Sport (DCMS) published in July 2018¹⁰⁴, preferred to use “disinformation” rather than “fake news”, on the grounds that the term “fake news” tends to overly broad regulation and can fail to adequately identify what is problematic about particular content¹⁰⁵. The Report

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Theil, S. (2019). “The Online Harms White Paper: Comparing the UK and German Approaches to Regulation” *Journal of Media Law*, Vol. 11, No: 1, p. 43.

¹⁰⁴ *Disinformation and “Fake News”*: Interim Report, Digital, Culture, Media and Sport Committee – House of Commons, 2018, <https://publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/363/36302.htm> (Accessed 25 July 2021).

¹⁰⁵ *Disinformation and “Fake News”*: Final Report, House of Commons Digital, Culture, Media

described disinformation as *the deliberate creation and sharing of false and/or manipulated information that is intended to deceive and mislead audiences, either for the purposes of causing harm, or for political, personal or financial gain*¹⁰⁶. Unlike German practice, drawing a frame around what the law will regard as disinformation should help the companies that will be responsible for policing online platforms.

The White Paper includes safeguards such as transparency, complaints procedures and accountability as well¹⁰⁷. In the Initial consultation response to the *Online Harms White Paper*, the Secretaries of State for the DCMS and the Home Office also assured us that the legislation would contain safeguards to protect users' freedom of expression online by setting clear responsibilities for both the new regulator and site operators¹⁰⁸. But can these safeguards be sufficient on their own to protect freedom of expression? For several reasons, perhaps not. First, the safeguards might not be sufficient in themselves, or implemented effectively, since the extensive scope of the online harms to be covered could well make the regulator's job impossible. Second, the technical measures that technology firms are supposed to use to trap disinformation have shortcomings which cast doubt on the safeguards' potential effectiveness. Companies are expected to use artificial intelligence that filters information at superhuman speeds, detects and blocks content that is considered objectionable by societal standards or illegal under law, and use it to delete content¹⁰⁹. However, algorithmic tools employed for filtering content are highly limited in what they can do and are not yet mature enough to distinguish between legal and illegal content. They have difficulties in addressing a wide variety of contextual, cultural and linguistic particularities¹¹⁰. To illustrate, these tools do not

and Sport Committee, 2019, HC 1791 7, <https://publications.parliament.uk/pa/cm201719/cmselect/cmcomeds/1791/1791.pdf> (Accessed 25 July 2021).

¹⁰⁶ *Disinformation and "Fake News": Interim Report* (2018).

¹⁰⁷ *Online Harms White Paper*.

¹⁰⁸ "Online Harms White Paper – Initial Consultation Response", GOV.UK, 12 February 2020, <https://www.gov.uk/government/consultations/online-harms-white-paper/public-feedback/online-harms-white-paper-initial-consultation-response> (Accessed 24 July 2021).

¹⁰⁹ "Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression", UN General Assembly, 2018, A/HRC/38/35 12, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/096/72/PDF/G1809672.pdf?OpenElement> (Accessed 27 July 2021).

¹¹⁰ "Report on the Implementation of the Action Plan Against Disinformation", European Commission, 2019, JOIN(2019) 12 final 18, https://eeas.europa.eu/sites/eeas/files/joint_report_on_disinformation.pdf (Accessed 5 July 2021).

have the understanding to differentiate satire, parody, jokes and irony. Since content's illegality frequently depends on its context, automating the process makes legal assessment quite challenging. Besides, the legal assessment relies on the information having some factual basis, so extrinsic information must be investigated to reach a reliable decision.

In the light of these objections, it seems likely that proactive measures would have serious consequences for freedom of speech. When considering the heavy sanctions that could be imposed for non-compliance, companies will tend to block questionable content to avoid being fined. For this reason, the UK proposal seems likely to promote an aggressive deletion strategy, resulting in over-blocking. The same goes for its German counterpart since non-compliance with the NetzDG may also mean a heavy fine. However, because the British version proposes to require technology companies to take proactive measures going beyond "notice and take down" obligations, more content is likely to be targeted. The French law seems moderate compared to the British proposal and German law because its provisions only apply during election periods. However, its effects on freedom of expression might be just as detrimental as those of the others since it has significant potential to silence political debate when the heat is on. In summary, all three domestic regulations appear to have serious free speech issues. So, in the section below, the article will address what the ECtHR's possible responses might be to potential issues that might arise from implementing these laws.

IV. IS FAKE NEWS PROTECTED UNDER ARTICLE 10 OF THE ECHR?

As protected by Article 10 of the ECHR, freedom of expression constitutes a fundamental basis for a democratic society for three reasons. First, freedom of expression is seen as vital to the proper functioning of the democratic process, enabling the public to learn about government actions and public policies and participate in public debate without fear of punishment. Second, it promotes self-improvement and autonomy, letting people discover how best to direct their lives and express their individuality. Third, it allows for rigorous testing of theories and "factual" statements, contributing to the development of science and human well-being¹¹¹.

¹¹¹ Harris, D. J. and others (2018). *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, Fourth Edition, New York: Oxford University Press, p. 613-614.

In principle, the protection granted by Article 10 applies to any speech, regardless of its content, propagated by any person, group or type of media and the ECtHR is reluctant to make exceptions from the protection of freedom of expression that apply to categories¹¹². Such an exception arises under the doctrine of "abuse of law" in Article 17, in which the ECHR is invoked to justify suppressing basic democratic principles and the enjoyment by others of their rights¹¹³. The ECtHR ruled in *Chauvy and others v France* that there is a "category of clearly established historical facts – such as the Holocaust – whose negation or revision was removed from the protection of Article 10 by Article 17"¹¹⁴. The Court has shown zero tolerance for denial or trivialisation of the Holocaust¹¹⁵. The only "clearly established historical fact" it has so far accepted is the Holocaust, and it noted in *Perinçek v Switzerland* that Article 17 ECHR should only be employed in "exceptional" circumstances¹¹⁶. The Court has avoided taking a role in arbitrating the underlying historical issue, which was part of the ongoing public debate, by stating "historical research is by definition subject to controversy and dispute and does not really lend itself to definitive conclusions or the assertion of objective and absolute truths"¹¹⁷. Accordingly, it decided that refusing to characterise the massacres committed against the Armenians in 1915 as genocide was a political speech made in the public interest and found that the criminal prosecution of Perinçek in Switzerland was in breach of Article 10¹¹⁸. Although fake news is usually about current events rather than historical facts, the reasoning that the ECtHR drew here shows that in general, the Court is reluctant to serve as the arbiter of facts¹¹⁹.

Moreover, the Court's assessments indicate that in political speech or issues of public interest Article 10(2) leaves little room for restrictions on freedom of expression. When an individual participates in a public

¹¹² Ibid. p. 613.

¹¹³ "Guide on Article 17 of the European Convention on Human Rights – Prohibition of Abuse of Rights" 6, https://www.echr.coe.int/Documents/Guide_Art_17_ENG.pdf (Accessed: 5 July 2021).

¹¹⁴ *Chauvy and others/France*, 64915/01, 29/6/2004, § 69; *Lehideux and Isorni/France*, 55/1997/839/1045, 23/9/1998, §§ 47, 55; *Monnat/Switzerland*, 73604/01, 21/9/2006, § 57.

¹¹⁵ Benedek, W. and Kettemann, M. C. (2013). *Freedom of Expression and the Internet*, Strasbourg: Council of Europe Publishing, p. 85.

¹¹⁶ *Perinçek/Switzerland*, 27510/08, 15/10/2015, § 114.

¹¹⁷ Ibid. § 117.

¹¹⁸ Ibid. § 167.

¹¹⁹ Katsirea, I. (2018). p. 178.

discussion on a matter of general interest, the Court permits a degree of exaggeration¹²⁰, even provocation or somewhat immoderate comments to be made within certain limits concerning – *inter alia* – respect for the rights of others¹²¹. In *Brzeziński v Poland*¹²², the ECtHR held that the Polish authorities had curtailed the freedom of expression of Zenon Brzeziński, a candidate running for local elections, when he was held responsible for propagating false information in an election booklet he produced. The Court found the tone of that booklet, which discussed poor local water and sewage systems and criticised corrupt relations between local authorities and a water company, within the limits of admissible exaggeration or provocation. In its view, the booklet fell into the context of a discussion on matters that were prominent for the local community. While the “false information” in this case was disseminated through hand-to-hand distribution rather than via social media, the case is significant since it reflects the perspective of the ECtHR on untruthful speech, particularly the claims about rival candidates that are usually made during elections. From this point of view, the Court could not affirm the national courts’ requirement that Brzeziński proves the accuracy of his claims¹²³. This case also reveals that rules like the one in the Polish electoral law that gave judges 24 hours to assess whether “untrue information” had been published and to issue an order prohibiting the distribution of it, were found problematic by the ECtHR, which considers it infeasible to decide whether a political statement is false in such a short period. As a matter of fact, the ECtHR stated that the national courts had been unable to establish the grounds on which they found the applicant’s statements “fake”, “malicious”, and “exceed[ing] the permissible forms of electoral propaganda¹²⁴.”

Furthermore, the Court also includes satire and criticism under the protection of Article 10, since these are elements of tolerance, pluralism and broad-mindedness without which there is no “democratic society¹²⁵.” For this reason, it becomes even more difficult to envisage the ECtHR

¹²⁰ *Renaud/France*, 13290/07, 25/2/2010, § 38.

¹²¹ *Willem/France*, 10883/05, 16/7/2009, § 33.

¹²² *Brzeziński/Pologne*, 47542/07, 25/7/2019.

¹²³ Press Release Issued by the Registrar of the ECtHR – Judgment *Brzezinski v. Poland - Violation of Freedom of Expression in an Election Context*, <http://hudoc.echr.coe.int/eng-press?i=003-6468351-8521719> (Accessed 5 July 2021).

¹²⁴ *Ibid.*

¹²⁵ *Handyside/UK* [Plenary], 5493/72, 7/12/1976, § 49.

endorsing domestic regulations by State parties that envisage broad restrictions on information disorder. While it is clear that "fake news" is much more concentrated in election periods, it is circulated at other times. Fake stories cover a plethora of subjects ranging from harmless to profoundly dangerous: from dubious and vivid "true crime" articles to stories of racial unrest in the midst of Black Lives Matter protests; from fake announcements of political concerts to allegations of clandestine murders – often by or of celebrities – in the headlines, for extra viral boosting¹²⁶. Obviously, the ECtHR does not protect all types of speech to the same extent. So, not all such stories could qualify as political expression and take advantage of its high degree of protection. In the *Raëlien Suisse* case, the ECtHR considered the information on a poster campaign, aimed at attracting people to the cause of the Raëlien Movement, an association that believes life on Earth was created by extraterrestrials. It classified this as "quasi-commercial" and extended to national authorities a wide margin of appreciation to restrict such speech¹²⁷. Yet in *Hertel v Switzerland* the Court ruled that banning the dissemination of scientific opinions that microwave ovens present carcinogenic risk infringed Article 10 and did not find the debated claims purely commercial since they touched on the discussion of public health¹²⁸. On the basis of the last two judgments, one can infer the following about the ECtHR's point of view on fake news sites: although the margin of appreciation afforded to national authorities might be wider for fabricated websites established for profit, the ECtHR also evaluates whether there is a pressing social need to curtail their activities.

Finally, the ECtHR may also find the domestic regulations targeting fake news problematic: in the first place, under the "rule of law test" when considering whether the law provides adequate safeguards against arbitrary interference with the freedom of expression and whether its provisions are sufficiently precise; before coming to the "democratic necessity test" in which it assesses whether there is a pressing social need to restrict free speech¹²⁹. All in all, the case law discussed above reveals

¹²⁶ Ball, J. (2017). *Post-Truth: How Bullshit Conquered the World*, London: Biteback Publishing.

¹²⁷ *Mouvement Raëlien Suisse/Switzerland* [GC], 16354/06, 13/7/2012, § 62.

¹²⁸ *Hertel/ Switzerland*, 59/1997/843/1049, 25/8/1998, § 47.

¹²⁹ Greer, S. (1997). "The Exceptions to Articles 8 to 11 of the European Convention on Human Rights", Council of Europe Publishing, Human Rights Files No. 15, p. 8–9, [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15\(1997\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf) (Accessed 11 August 2021).

that State parties should carefully consider the effects of their steps on freedom of expression while setting strategies in the fight against fake news, and should promote non-regulatory tools to help minimise the impact of filter bubbles and echo chambers that facilitate fake news and to improve media literacy, to educate the community to identify fakes.

CONCLUSION

The purpose of the article was to identify whether “fake news” or domestic regulations intended to combat “fake news” pose a more significant threat to freedom of expression. It shows that, although fake news has a long history, its nature is hard to define owing to the multifaceted conceptualisations associated with it and the sophisticated network of relationships in our digitally connected world. The academic community has attributed various meanings to the term, which embrace fully fabricated stories at one pole and satire at the other. Moreover, the term has also been used politically by world leaders to devalue unwelcomed reports by mainstream media. Since agreeing upon a global definition of the term seems impossible, at least in the short run, it is quite possible that legislative frameworks would lead to over-regulation, to the detriment of free speech. However, the ingenious dissemination of fake news from social media platforms forces policymakers to act. This article has found by analysing the 2016 US Presidential election and the 2019 election to the EU Parliament that damage to the functioning of democracy caused by fake news during election periods has not been as great as was feared and could be reduced by promoting media literacy, and by joint, non-regulatory efforts by legislators, social media platforms and ancillary services, such as the EU attempted in the 2019 election.

The article also examined pioneering legislative frameworks introduced or proposed by three liberal democracies – France, Germany and the UK – and confirmed that the ambiguity of the term fake news shows itself in how the domestic regulations conceptualise the term and set the scope, method and obligations of the legislation. However, although these initiatives address the issue from different perspectives, the French law (by giving the government opportunity to control the media) and the German and British laws (by imposing duties on technology companies they are not equipped to handle and envisaging severe sanctions in the event of failure, which would tend to encourage

over-blocking) would seriously violate the freedom of expression. Moreover, the case law of the ECtHR suggests that the Court would rule in favour of freedom of expression when assessing cases that might arise from the implementation of these laws. The Court is reluctant to serve as an arbiter of the facts, and provides substantial protection to political speech and to matters of the general interest; it even assesses whether a pressing social need might justify commercially motivated speech. Besides, the ambiguity of the term fake news may cause domestic regulations designed to counter it to be inconsistent and unclear, which would certainly create a significant issue in the "rule of law" test.

Taken together, these findings suggest that enhancing media literacy and non-regulatory efforts globally would contribute much more than introducing legislative frameworks, to prevent the impacts of fake news and to protect freedom of expression. The insights gained from this article may help us reconsider the eagerness to adopt legal frameworks to fight the dissemination of fake news online. However, its findings are limited since the exact impact of fake news on voter preferences in both the elections studied are not known, and the domestic legislation discussed here has not been fully implemented yet. Consequently, further studies need to be carried out with future data sets to validate the article's findings. There is, therefore, a definite need for further academic research to track the nature of the challenge that fake news presents to liberal democracies.

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