



## Trends in the Regulation of Hate Speech and Fake News: A Threat to Free Speech?

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### ABSTRACT

The Information and Communication Technology (ICT) revolution heralding the emergence and dominance of social media has always been viewed as a turning point in free speech and communication. Indeed, the social media ordinarily represents the freedom of all people to speech and information. But then, there is also the side of the social media that has been often ignored; that it serves as platform for all and sundry to express themselves with little, if any regulation or legal consequences. This as a result has led to global explosion of hate speech and fake news. Hate speech normally lead to tension and holds in it, the potential for national or even international crisis of untold proportions. It also has the likelihood to scare people away from expressing themselves for fear of hate-filled responses and becoming a source of fake news. Using doctrinal as well as comparative methodologies, this paper appraises the trend between states of passing laws or proposing laws to regulate hate speech and fake news; it also appraises the contents of such laws from different countries with the aim of identifying how they may be used to suppress free speech under the guise of regulating hate speech and fake news. It argues that the alarming trend of hate speech and fake news presented an opportunity for leaders across the globe to curb free speech. The paper concludes that the advancement in ICT helped in a great deal to advance free speech; it may as well, because of the spread of hate speech and fake news, lead to a reverse of that success story.

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### 1. Introduction

Free speech has become synonymous with democratic societies as an essential enabler for discussing varied views. This underscores the need to protect and promote freedom of expression among all and sundry to develop democratic foundations.<sup>1</sup> Free speech is founded in the natural human yearning for self-actualization, and societal involvement

<sup>1</sup> Tsesis, A. (2015). Free Speech Constitutionalism. *U. Ill. L. Rev.*, 3(1), 1015, p. 1016.

aimed at developing “the whole culture” culminating into a firm society.<sup>2</sup> Hence, advancements in information and communication technology (ICT), especially the internet and social media platforms such as Facebook, Twitter, YouTube, and the like, all of which facilitated and eased communication, presented the perfect prospect for such a notion to thrive unhindered. The gigantic benefits of such advancements notwithstanding, they have also been used to peddle hate speech and fake news at an unprecedented level.

Considering the negative consequences of fake news and hate speech, several nations have resorted to legislations aimed at regulating the use of social media. However, considering the intents behind some of these domestic legislations, and their contents, there is room for concern that they are tailored towards curtailing the freedom of expression. In such circumstances, fighting the scourge of hate speech and fake news online would have provided the perfect opportunity to gag not only the media, but even private individuals from expressing themselves. This paper therefore examines the contents of recent anti-fake news and hate speech legislations in some countries to see how they may affect free speech. It also attempts to analyse how this developing trend globally portends dire consequences to the freedom of expression.

## 2. The Freedom of Expression or Free Speech

In a democratic setting, contending entitlements are tested through continuous discourse which promotes the procurement of varied contribution aimed at shaping political conclusions: Free speech facilitates such a process. As a result, democratic societies are beholden to protect personal freedom of expression: at the same time, the society is bound to encourage values of equality designed to prevent against impairing others' security and self-esteem. Consequently, to ensure parity, governments are generally deprived of the authority to regard the speech of equally positioned individuals contrarily.<sup>3</sup> The promotion of individual freedom and democratic heterogeneity therefore underlie the need for all and sundry to freely express their thoughts.

Thus, the concept of free speech originates from the framework of a broader notion of freedom and parity preserved as core human aspiring values. The primary purpose of establishing democratic societies may therefore be seen in the need to articulate guidelines aimed at achieving these aspirations.<sup>4</sup> As a result, legal instruments, be they national or international have been endorsed primary to facilitate and ensure the enjoyment of this right. This is good for the individual as well as the society for it identifies the need for all persons to explore their inimitable life strategy, which may be reflected in our expressions, devoid of unwarranted fetters.<sup>5</sup>

Restraints on freedoms, if any, should be reasonably planned towards the common good, deprived of subjective favouritisms in the direction of any set of people. In many societies, the freedom of expression is essential, not only for historical purposes, but also to aid in moving away from undesirable historical antecedents. It promotes a commitment towards the advancement of equality and human rights, as it serves as a

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<sup>2</sup> Emerson, T. I. (1970). *The system of freedom of expression*, New York: Random House Trade, p. 6-7.

<sup>3</sup> Tseis, A. (2009). Dignity and Speech: The Regulation of Hate Speech in a Democracy. *Wake Forest L. Rev.*, 44(1), 497-532, p. 497-8.

<sup>4</sup> Tseis, (2015), p. 4.

<sup>5</sup> Wilkinson III, J. H. (2012). *Cosmic constitutional theory: why Americans are losing their inalienable right to self-governance*. Oxford: Oxford University Press; p. 4.

vent to persons dedicated to societal transformation; it is an indispensable tool for nurturing communal discourse around issues which hitherto were unmentionable.<sup>6</sup> Because of the equality of all human beings, disagreements are inevitable on almost all aspects of social life; the freedom of expression is an essential predicate for all individuals to express their distinct views leading to concessions for the common good.<sup>7</sup>

Free speech is therefore an essential element of any society dedicated to the common good as opposed to a few. A diverse civilization is not expected to express itself in agreement: hence the need to protect varied persons' resolve to scrutinize notions alike as within the society they all belong to. This explains the protection of the individual's right to freedom of expression under domestic constitutions and bills of rights and international legal instruments to ensure a global framework towards global fortification.<sup>8</sup>

### 3. Hate Speech

Hatred and hateful expressions have several appearances and cuts across all regions and civilizations. It may be exemplified along racial ranks, zealotry, offensive and malevolent depiction of specific faiths or their adherents; it may be expressed on the internet or via mainstream media.<sup>9</sup> Hate speech is a terminology which appears understandable to majority of people, but the explanations offered are widely dissimilar. Speaking generally therefore, people seem to appreciate what is meant by hate speech, but when asked to designate it, the consensus disappears.<sup>10</sup> This might be due to differences in cultural, social and educational backgrounds, or other underlying factors including predisposition. Consequently, where accusations of hate speech are labelled against certain expressions, varying views emerge on the propriety of such accusations. Though it is clearly impossible to have unanimity along ethnic, social, or even religious lines on hateful expressions, it is important that reasonable and objectively discerning individuals view it as one.

Finding a definition of what amounts to hate speech therefore, is literally the intersection of multifaceted incongruities. On the one hand, because of its global implications, there is the ambition to proffer communal characterizations and to advance assessments capable of demonstrating common indices pointing at what may or may not amount to hate speech. In as much as such an approach enhances synchronized actions, strict descriptions are clearly not feasible, and could easily be counterproductive. Attempts

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<sup>6</sup> Goldstein, R. J., & Feldman, S. M. (2010). Free Expression and Democracy in America: A History. *The American Historical Review*, 115(3), 829; p. 830.

<sup>7</sup> Schauer, F. (2012). The Political Risks (If Any) of Breaking the Law. *Journal of Legal Analysis*, 4(1), 83-101; p. 97.

<sup>8</sup> Most democratic nations guarantee the right to freedom of expression as inalienable right among others. (e.g. the UNDHHR article 19, the ICCPR art. 19, the ICESCR art. 19, the ECHR art. 10, the African Charter on Human and Peoples' Rights art. 9, the First Amendment of the US constitution, section 16 of the South African constitution 1996, section 39 of the Nigerian Constitution 1999, Article 19 of the Indian constitution, Chapter III, Article 21 of the Japanese constitution, Czech Charter of Fundamental Rights and Basic Freedoms art 17, the French Declaration of the Rights of Man and of the Citizen 1789, art. 11).

<sup>9</sup> OHCHR. (2013). Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred, (January), 15. Retrieved from [http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat\\_draft\\_outcome.pdf](http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf). [Accessed 21/5/2018]; p. 3.

<sup>10</sup> Gagliardone, I., Gal, D., Alves, T., & Martinez, G. (2015). Countering Online Hate Speech. UNESCO Series on Internet Freedom. Paris: The United Nations Educational, Scientific and Cultural Organization. <https://doi.org/978-92-3-100105-5>; p.55.

have been made at providing more fitting or clear definitions such as “dangerous speech”, denoting language performances having substantial likelihood of magnifying or intensifying crisis among different groups; or “fear speech”, highlighting potentially stirring expressions.<sup>11</sup> The problem with these definitions is that they tend to focus on the outcome of such hate speeches and entrusting the resultant violence to state institutions. Then again, elucidations of hate speech should accentuate the reverence of human dignity, while at the same time bolstering the victims of such expressions to request for respect in addition to being safeguarded. This approach eventually inserts the targeted groups or individuals, as opposed to the government or alternative players, at the focus of real actions.<sup>12</sup> The European Commission defined hateful speech as: “publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin”.<sup>13</sup> The definition also covers cases of dissemination of materials on these issues. Practically, hateful expressions in the form of ridicule, spoken threat, pestering, harassment, and bodily confrontation or violence are experienced at very high and alarming degrees across the globe, including Europe.<sup>14</sup> Indeed, globally, several skirmishes have historically had some elements of hate and provocation against ethnic or faith-based groups.<sup>15</sup>

Hate speech presents one of the thorny challenges faced by the broadminded conception of free speech. It is a fundamental precept of the freedom of expression that the speech of all individuals must be treated and protected equally by governments. Hate speech however presents a social abrasion because it imperils the civil liberties and security of other citizens who also are also entitled to protection.<sup>16</sup> Hateful expressions are mostly motivated and carried out on grounds of race, prejudice, and national, tribal, or faith-based discrimination, in addition to sexual alignment. Importantly though, the obscurity offered over the internet heightens the spread of such expressions, with more frequency on social networks, by unidentified individuals, occasionally through anonymous communications. Facebook serves as the leading platform for hateful expressions online, trailed by YouTube and Twitter.<sup>17</sup>

#### **4. Fake News**

The lingo ‘fake news’ presents a novel platform for persistent deliberations in relation to reporting practices and integrity, state regulation, preconceived information and suppression. It underscores the place and function of social media and the internet in contemporary public domain. It has become one of the most famous terms in universal lexicon, yet it’s true connotation remains distorted to possible meaninglessness. It is frequently applied as a smear flung at the media or partisan adversaries. It is often used interchangeably with such expressions as “propaganda, disinformation, and misleading information”,<sup>18</sup> the application and understanding of which can be relative, thus

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<sup>11</sup> Ibid. p. 53.

<sup>12</sup> Ibid. p. 54.

<sup>13</sup> The Council of the European Union. (2008). Council Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by means of Criminal Law (2008/913/JHA). Brussels: Official Journal of the European Union. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008F0913&from=EN> (Accessed 22/06/2018);

<sup>14</sup> Emore Final Comparative Report (2017); p. 8.

<sup>15</sup> OHCHR, (2013); p. 7.

<sup>16</sup> Tseis, (2009); p. 497.

<sup>17</sup> Emore (2017); p. 7-8.

<sup>18</sup> WiltonPark, (2017); p. 2.

hindering consensus. As a result, it has become difficult to arrive at a harmonized meaning of 'fake news', or if the term is suitable, bearing in mind that it is used under several contexts. Notwithstanding, the term "fake news" and its upshots may be viewed as the modern-day depiction of news items or information seemingly untrue or erroneous yet designated as realistic or accurate. Because the community supposes, correctly so, that the information they get from news outlets was professionally collected and confirmed by an impartial correspondent, it is expected that such neutrality be reflected in news reporting. Thus, sentiments or points of view should be clearly disclosed and identified as such. Consequently, fake news is not restricted to false stories from unknown or unverifiable sources: it includes deliberately biased, or clothed reporting from reliable media.<sup>19</sup>

It is noteworthy though, that the expression 'fake news' has of recent become an instrument used by politicians to discredit critical information or assessments by the medias.<sup>20</sup> Along the same line, certain media outlets might be partial or discriminatory in reporting facts as it pertains to their beliefs or ideals. In such situations, whether it amounts to fake news will depend on the perspective of the listener, and to a large extent, if the audience were misinformed. Be it from the presentation or the material of the news, where the audience or readers are cuckolded due to the appearance or appeal of the story or the real erroneousness of information, it fits into contemporary understanding of fake news. This trend has been intensified with the advancement in ICT guaranteeing little control over dissemination of information that can easily reach millions irrespective of its accuracy. For example, fake or false information once presented on social media may be shared by innocently or ignorantly believing individuals millions of times, thereby strengthening its appeal and credibility. In certain situations, however, individuals share these pieces of information not necessarily because they were ignorant of its veracity, but simply because it appeals to their sentiments, or it serves some personal drive. Accordingly, it has become even more problematic for individuals and the global community at large to discern 'fake news' from genuine stories online. To complicate matters, whereas 'fake news' and 'substitute details' were hitherto restricted to the tabloids, contemporary reality pinpoint to their acceptance and manipulation at the uppermost heights of politics, producing ethical crisis of sorts, with universal reach. Though fake news spreads fast and easily online, its effects offline might be huge, leading to moves by governments to proscribe it.

## 5. The Need for Regulation

Bearing in mind the negative effects of fake news and hate speech, coupled with their potential to unleash chaos and violence which may affect the security and welfare of individuals and states alike, there seems to be the need to regulate such behaviours. Consequently, over the years, there have been calls from within states, and at the international level, for states to regulate incidents of hate speech and fake news. Pursuant to a newspaper publication considered hateful against migrants for instance, the United Nations (UN) High Commissioner for Human Rights called on the United

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<sup>19</sup> Farsetta, D., & Price, D. (2006). Fake TV News: Widespread and Undisclosed: A Multimedia Report on Television Newsrooms' use of Material Provided by PR Firms on Behalf of Paying Clients. Madison, USA. Retrieved from [www.prwatch.org](http://www.prwatch.org) (Accessed 22/06/2018).

<sup>20</sup> BBC News. (2017). Donald Trump aide accuses BBC of "fake news." Retrieved June 21, 2018, from <https://www.bbc.com/news/av/world.../donald-trump-aide-accuses-bbc-of-fake-news%0A> [Accessed 21/06/2018].

Kingdom government to deal with sensationalist hate speech.<sup>21</sup> Again, heralding the International Day for the Elimination of Racial Discrimination, the UN human rights' topmost officer prompted all state authorities across the globe to leave up to their legal responsibility of stopping hate speech. He also called on private individuals to universally, stand up for the right of all human beings.<sup>22</sup> On the national front, individuals and groups have called on governments to proscribe hate speech and fake news to prevent the possible effects it may have on security and peaceful coexistence. A typical example is the call by a Nigerian lawyer for the government to proscribe hateful expressions because it is dangerous and threatens the peaceful existence of the states.<sup>23</sup> In 2006, after a thorough study into the use of Video News Reporting (VNRs) by US television stations, the Centre for Media and Democracy recommended more stringent policies on how media outfits present publicity videos disguised as news items.<sup>24</sup> Again, pursuant to an in-depth study of hate speech and crimes in Europe, it was recommended that notwithstanding the relevance of other methods of fighting hate speech, legal regulation – precisely penal proscriptions, are desirable, even if it is for symbolic purposes.<sup>25</sup> As result, several countries have either enacted laws meant to curb the scourge of fake news and hate speech or are considering such measures.

On the other hand, there have also been several expressions against regulation, especially with respect to fake news. The fear is that any attempt to regulate fake news may have the effect of eroding the freedom of expression. Indeed, attempts to regulate speech is seen as a deliberate attempt by certain regimes to clamp down on free speech, opposition, and the mass medias.<sup>26</sup> Moreover, there is also the fear that some punitive legislations introduced by states to regulate hate speech and fake news might be too broad, ambiguous, or inadequate, thereby open to ill use and abuse. The application of such legislations is also a point of worry for human rights activists, especially in states where institutions are not well developed and independent to ensure equitable and fair enforcements.<sup>27</sup> To others, legislating against fake news will only amount to superficial scrabbling of the profounder complications reflecting human prejudice and failure to find mutual positions on issues we have differences on. Thus, enacting laws to counter fake news could shadow its hullabaloo for a while; it will however, have a hypothetically unsettling consequence on free speech.<sup>28</sup> Simple or swift solutions to the problem of fake news are therefore not feasible. It would therefore, be better if attention is focused towards the fundamental problems with the aim of addressing it in all its ramifications, rather than proposing indicative solutions.

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<sup>21</sup> OHCHR. (2015). UN Human Rights Chief Urges U.K. to Tackle Tabloid Hate Speech, After Migrants Called "Cockroaches." Retrieved June 22, 2018, from <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15885> [Accessed 22/06/2018].

<sup>22</sup> UN News. (2017). Ahead of International Day, UN Rights Chief Urges Governments to Target Hate Speech, Crimes. Retrieved June 22, 2018, from <https://news.un.org/en/story/2017/03/553552-ahead-international-day-un-rights-chief-urges-governments-target-hate-speech> [Accessed 22/06/2018].

<sup>23</sup> Unachukwu, J. A. (2017, September 12). 'Criminalize Hate Speech, Preserve Press Freedom.' *The Nation*. Lagos. Retrieved from <http://thenationonlineng.net/criminalise-hate-speech-preserve-press-freedom/> [Accessed 22/06/2018].

<sup>24</sup> Farsetta, D., & Price, D. (2006); p. 27.

<sup>25</sup> Emore, (2017); p. 8.

<sup>26</sup> WiltonPark, (2017); p. 5.

<sup>27</sup> OHCHR, (2013).

<sup>28</sup> Reventlow, N. J. (2017). 'Fake news' highlights much bigger problems at play. Retrieved June 22, 2018, from <https://medium.com/.../fake-news-highlights-much-bigger-problems-at-play-9e419e4a>. [Accessed 22/06/2018]; p. 2.

## 6. Trends on Regulations of Hate Speech and Fake News

At international and national levels, several instruments ranging from punitive laws, to code of conducts have been enacted over the years to address the problem of hate speech and fake news. These instruments, legal or quasi-legal in nature, vary from state to state, though there might be some points of convergence or even similarities among some. Essentially, they all attempted to solve the problem of hate speech and fake news, especially online, considering the speed with which it spreads and the possible effects it may have.

At the international level, the United Nations High Commissioner for Human rights, concerned about the menace of hateful expressions and their consequences, organized several workshops across the globe with the aim to arrive at a common understanding of the issues involved. The workshops also explored the judicial, legislative, and policy forms across the regions of the world to see how states deal with the problem.<sup>29</sup> At the end of several workshops attended by experts from Asia to Africa, Europe, and the Americas, the Rabat Plan of Action was adopted.<sup>30</sup>

The plan of action, concluded “that expression labelled as “hate speech” can be restricted under articles 18 and 19 of the International Covenant on Civil and Political Rights on different grounds, including respect for the rights of others, public order or sometimes national security”.<sup>31</sup> Accordingly, all nations have a responsibility to proscribe hateful or inciteful expressions under article 20 (2) of the ICCPR. The Plan of action also recommended the adoption of all-inclusive laws aimed at preventing and punishing hateful expressions. The Rabat Plan of Action is therefore, an amplification of what was already prohibited under the ICCPR nearly fifty years ago. Along the same line, a Joint declaration was issued by the UN special Rapporteur on freedom of opinion and expression, and other regional bodies, recognizing the negative effects of fake news on individuals and collective security.<sup>32</sup> Though worried about the effect of regulating fake news on the freedom of expression, the declaration recognized that such freedom may be curtailed in line with article 20 of the ICCPR.

The European Union had also taken measures to tackle hateful and similar expressions both online and offline. One of such measures is the Council Framework Decision of 2008.<sup>33</sup> Among other things, the instrument obligated states to proscribe hateful expressions, the spreading of such expressions, and openly disregarding, trivializing, or refuting hateful crimes.<sup>34</sup> This and similar measures lead to the adoption of a code of conduct by major Information Technology (IT) companies.<sup>35</sup> By the code of conduct, the IT companies agreed to put mechanisms in place aimed at reviewing public complaints regarding hateful expressions online, for their possible removal.

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<sup>29</sup> OHCHR (2013).

<sup>30</sup> Annexed to (OHCHR, 2013)

<sup>31</sup> Ibid. p. 8.

<sup>32</sup> UN OHCHR. (2017). Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda (FOM.GAL/3/17). Geneva. Retrieved from <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21287...%0A> [Accessed 25/06/2018].

<sup>33</sup> The Council of the European Union (2008).

<sup>34</sup> Ibid. art.1.

<sup>35</sup> See Code of Conduct on Countering Illegal Hate Speech Online, presented by the EU Commission On the 31 May 2016, with Facebook, Microsoft<sup>l</sup>, Twitter and YouTube: later joined by Instagram. [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=54300](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54300) (Accessed 26/06/2018)

On the national front, several countries have enacted laws proscribing hate speech and fake news; at the same time, many others are either in the process of enacting such laws or have indicated moves towards that. Prominent among such legislations is Germany's "NetzDG" which came into force on 1<sup>st</sup> October 2017, though compliance was deferred to 1<sup>st</sup> January 2018.<sup>36</sup> Specifically, the German law applies to social media companies having more than two million users. The law requires such companies to delete hateful expressions, fake news and illegal contents on their sites within 24 hours or 7 days of receiving notice of such contents.<sup>37</sup> Social media companies are also required to publish detailed half yearly reports about actions taken pursuant to complaints where they have received more than 100 complaints in a year.<sup>38</sup>

In addition, social media companies should facilitate the complaining process by providing user friendly and enduring procedures, give notifications to both the complainant and the user on its decisions and reasons for such decisions. Notwithstanding the detailed and precise provisions of the German law, several criticisms have been labelled against it for being perilous, defective, weakens free speech, and sets a dangerous model for other states to follow in confining speech online.<sup>39</sup> Responding to the criticisms, the German Government justified the law, stating that it was a necessary response to an alarming spread of detestable expressions, fake news, spiteful gossip, and defamations.<sup>40</sup> In addition, the law does not essentially establish new classes of prohibited publications. It aimed to implement 22 laws relating to online contents and to make big social media bodies in charge of implementation.<sup>41</sup>

Proponents of the German law pointed to the need to protect minorities as enshrined in the German constitution, and to ensure the rule of law online. This position is emboldened by the overwhelming public support for the legislation,<sup>42</sup> indicating that criticisms were mostly from the social media platforms, publicists, and human rights organisations.<sup>43</sup> This raises the question whether popular public support is enough justification for legislations which may curtail human rights. It would be contradictory to argue that the law is based on the need to protect minorities, while at the same time, citing popular public support.

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<sup>36</sup> BBC News. (2018). Germany Starts Enforcing Hate Speech Law. Retrieved June 26, 2018, from <https://www.bbc.com/news/technology-42510868%0A> [Accessed 26/06/2018].

<sup>37</sup> Bundestag, T. Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act) (2017). Germany; Ss. 1 (2).

<sup>38</sup> Ibid. s. 2 (1).

<sup>39</sup> Human Rights Watch. (2018). Germany: Flawed Social Media Law. Berlin. Retrieved from <https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law> [Accessed 26/06/2018].

<sup>40</sup> Government of Germany. (2017). Answers to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in regard to the Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act), provided by the Federal Government of. Berlin: OHCHR. Retrieved from <https://www.ohchr.org/Documents/Issues/Opinion/.../GermanyReply9Aug2017.pdf%0A> [Accessed 26/06/2018].

<sup>41</sup> Heidi Tworek. (2019). An Analysis of Germany's NetzDG Law. Retrieved 31/05/2019, from [https://www.ivir.nl/publicaties/download/NetzDG\\_Tworek\\_Leerssen\\_April\\_2019.pdf](https://www.ivir.nl/publicaties/download/NetzDG_Tworek_Leerssen_April_2019.pdf).

<sup>42</sup> Anisa Holmes. (2018). 87% of Germans Approve of Social Media Regulation Law. Retrieved 31/05/2019, from <https://daliaresearch.com/blog-germans-approve-of-social-media-regulation-law/>.

<sup>43</sup> Kristen Chick and Sara Miller Llana. (2018). Is Germany's bold new law a way to clean up the internet or is it stifling free expression? Retrieved 31/05/2019, from <https://www.csmonitor.com/World/Europe/2018/0408/Is-Germany-s-bold-new-law-a-way-to-clean-up-the-internet-or-is-it-stifling-free-expression>.



Similarly popular among national legislations against hate speech and fake news is the Malaysian Anti-Fake News Act.<sup>44</sup> The law which was published in April 2018, defines fake news as: "... any news, information, data, and reports, which is or are wholly or partly false, whether in the form of features, visuals or audio recordings or in any other form capable of suggesting words or ideas;".<sup>45</sup> The law applies to both online and conventional publications and re-publications, which might cover sharing on social media platforms.<sup>46</sup> The extra-territorial application of the law to persons outside Malaysia so long as the fake news affects Malaysia or a Malaysian citizen is perhaps, one of its most controversial provisions.<sup>47</sup> Under the Act, malicious creation, offering, publishing, printing, distributing, circulating, or disseminating fake news carries a fine of RM 500, 000, or six years imprisonment, or both, in addition to a fine of RM 3000 daily for continuous publication. The court may also order the issuance of an apology and the removal of such publications.<sup>48</sup>

As one of the pioneers of penal legislations specifically on fake news, the law drew criticisms from several sectors of the international human rights movements. It was described as a nebulously worded legislation aimed at outlawing free speech.<sup>49</sup> The law was widely viewed as a move to stifle free speech especially in relation to criticizing government as some said it was only meant to protect then Prime Minister, Najib Razak.<sup>50</sup> The government justified the legislation on the need to curb the dissemination of false and malicious stories, adding that the law will protect both the government and opposition as it will be administered by the judiciary.

Despite explanations by the then government, there was public outcry over the law which was believed to give the government unprecedented powers over free speech: which power can be easily abused. It was on this ground that the opposition party during Malaysia's 2018 elections promised to repeal the law; a position staunchly defended by Prime Minister Tun Dr Mahathir Mohamad.<sup>51</sup> Agreeing with critics on the law, Dr Mahathir insisted that though fake news could have devastating effects, the government and people must find a way of dealing with it. He pointed out how governments can easily take advantage of such laws to curtail free speech. In his words, "*When you have a law to prevent people from airing views, then we are afraid that the government itself may abuse it, as has happened in the past... We do not want any government, whether this or the next one, to abuse such law.... It (fake news) may be difficult to handle, but we can accept the challenge and will handle it.*"<sup>52</sup>

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<sup>44</sup> The Parliament of Malaysia. Anti-Fake News Act 2018, Pub. L. No. 803 (2018). Malaysia: Laws of Malaysia. Retrieved from [www.federalgazette.agc.gov.my/.../20180411\\_803\\_BI\\_WJW010830\\_BI.pdf](http://www.federalgazette.agc.gov.my/.../20180411_803_BI_WJW010830_BI.pdf) [Accessed 26/06/2018].

<sup>45</sup> Ibid. s. 2.

<sup>46</sup> S. 2 (a) & (b).

<sup>47</sup> Ibid. s. 3.

<sup>48</sup> S. 4 (1) & (2), S. 7

<sup>49</sup> Amnesty International. (2018). Malaysia: "Fake News" Bill Hastily Approved Amid Outcry. Retrieved from: <https://bit.ly/2MerzGx>. [Accessed 22/6/2018].

<sup>50</sup> Lourdes, M. (2018). Malaysia's anti-fake news law raises media censorship fears. Retrieved June 26, 2018, from <https://edition.cnn.com/2018/03/30/asia/malaysia-anti-fake-news-bill-intl/index.html> [Accessed 26/06/2018].

<sup>51</sup> The Star Online. (2019). Dr M: Malaysia stands firm over repeal of Anti-Fake News Act, Retrieved 31/05/2019, from <https://www.thestar.com.my/news/nation/2019/04/09/dr-m-malaysia-stands-firm-over-repeal-of-anti-fake-news-act/>.

<sup>52</sup> Ibid.

In China, the country's Cyberspace Administration maintained that online media should not disseminate any news taken from social media sites without approval. "It is forbidden to use hearsay to create news or use conjecture and imagination to distort the facts".<sup>53</sup> It requires all echelons of Internet management to seriously accomplish their administrative obligations regarding internet content, reinforce regulation and detection, strictly review and deal with fake and unverifiable news. Government in China, is known for deleting contents on social media platforms, insisting on the necessity of such measures to protect the rights and interests of nationals, and to encourage vigorous growth of the internet.<sup>54</sup> Under this system, social media operators must remove what is considered rumour, and the authors may face jail terms of up to 3 years, in addition to suspension of their accounts.<sup>55</sup> The Chinese system has therefore been described as one of the most wide-ranging attempts to selectively expurgate free speech ever applied.<sup>56</sup>

In Italy, a 2017 proposed anti-fake news law aimed at criminalizing the posting or sharing of contents considered 'false, exaggerated or tendentious news'. Offenders may face a fine of up to 5000 Euros, and a jail term where the news could lead to crime or violence. On failure of the Bill to pass through parliament, the government introduced operational protocols aimed at curbing fake news, under which citizens may report cases of fake news to the cyber police which may review such stories.<sup>57</sup>

In Kenya, publishing fake news is punishable under a recent law, with both fine and imprisonment of between two and ten years. In defining false publications, the law applies to one who "intentionally publishes false, misleading or fictitious data or misinforms with intent that the data shall be considered or acted upon as authentic, with or without any financial gain...".<sup>58</sup> It covers issues of both hate speech and fake news.

In Tanzania, the government issued new regulations it said was meant to protect the nation from lies. The move aimed at fighting fake news, involve the payment of the equivalent of \$920 by bloggers as license fee for placement of content online. It would also entail a fine of \$ 2000 and a jail term of up to one year.<sup>59</sup> In Uganda, the government proposed an anti-gossip tax which targets social media users in the country, to check gossip and lies.<sup>60</sup> A member of parliament in Indonesia had threatened to shut down Facebook if it fails to crackdown on fake news as the country approaches election.<sup>61</sup> Other nations from France, to Philippines, India, Nigeria, Russia, Sweden, Jordan and

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<sup>53</sup> Reuters. (2016). China says to crackdown on fake news from social media. Retrieved June 22, 2018, from <https://www.reuters.com/article/us-china-internet-idUSKCN0ZK06N%0A> [Accessed 27/06/2018].

<sup>54</sup> Tambini, D. (2017). Fake News: Public Policy Responses (Media Policy Project No. Media Policy Brief 20). London. Retrieved from [http://eprints.lse.ac.uk/73015/1/LSE\\_MPP\\_Policy\\_Brief\\_20\\_-\\_Fake\\_news\\_final.pdf](http://eprints.lse.ac.uk/73015/1/LSE_MPP_Policy_Brief_20_-_Fake_news_final.pdf) [Accessed 22/06/2018].

<sup>55</sup> Ibid. p. 13.

<sup>56</sup> Gary King, Jennifer Pan, Margaret E. Roberts. (2013). How Censorship in China Allows Government Criticism but Silences Collective Expression. *American Political Science Review*, 107, 2, p. 326.

<sup>57</sup> Kaye, D. (2018). Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (OL ITA 1/2018). Geneva: OHCHR; p. 1-2. Retrieved from <https://www.ohchr.org/Documents/Issues/opinion/Legislation/OL-ITA-1-2018.pdf%0A> [Accessed 27/06/2018].

<sup>58</sup> The Parliament of Kenya. Computer Misuse and Cybercrimes Act (2018); art. 22 & 23. Kenya: The National Council for Law Reporting.

<sup>59</sup> Olewe, D. (2018). Kenya, Uganda and Tanzania in "anti-fake news campaign." Retrieved from <https://www.bbc.com/news/world-africa-44137769%0A> [Accessed 27/06/2018]

<sup>60</sup> Ibid.

<sup>61</sup> The star online. (2018, April 4). Indonesia threatens to ban Facebook over fake news. Wednesday, 4th April. Retrieved from <https://www.thestar.com.my/business/business-news/2018/04/04/indonesia-threatens-to-ban-facebook-over-fake-news/> [Accessed 27/06/2018].

many others have either enacted or muted the idea of enacting laws aimed at regulating hate speech and fake news especially on the social media.<sup>62</sup>

Therefore, several governments across all regions of the globe have proscribed the spreading and sharing of fake news and hate speeches. Such prohibitions are often widely applied against all categories of users ranging from the everyday social media users to important dissidents or opposition, and the press.

## 7. The Impact of Regulation on Free Speech

Hate speech and fake news online defines the juncture of numerous strains: it reflects the manifestations of incongruities among diverse groups traversing societies. Nothing reveals the real effects of the revolution in ICT which could come along with both prospects and trials, like the menace of fake news and hate speech. It indicates intricate harmonization between the freedom of expression and the protection of human dignity.<sup>63</sup> This has led nations to recommend legal limitations which may negatively affect free speech. The exact impact of these regulations on free speech will depend on the background of the person examining the laws. For instance, analysis from the USA seem to be more dogmatic about the inviolability of free speech, as the jurisprudence from the USA generally promotes the idea that speech, including hateful and false expressions are protected.<sup>64</sup> This however, is not a unanimously supported position as some, even in the USA promote the understanding that free speech may be derogated from to protect other democratic values such as equality.<sup>65</sup>

Be that as it may, the global scamper to regulate hate speech and fake news are bound to result in certain consequences for free speech.<sup>66</sup> While it is true that some countries would make strained efforts to ensure minimum derogation from the freedom of expression,<sup>67</sup> others may take advantage of the situation to silent dissent, opposition, and the media.<sup>68</sup> On the other hand, even those who may not be interested in silencing some voices cannot avoid placing some restrictions on the freedom of expression to curtail hateful expression and fake news. The laws and policies fashioned by several countries to fight hate speech and fake news might have varying effect on the freedom of expression depending on the contents of the laws and the enforcement mechanisms.<sup>69</sup> For instance, under the German law, contents might be deleted which some would consider an infringement of their freedom of expression, especially where it is not clearly

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<sup>62</sup> See, Reuters, Macron plans law to fight 'fake news' in 2018, January 4, 2018, <https://www.reuters.com/article/us-france-macron/macron-plans-law-to-fight-fake-news-in-2018-idUSKBN1ES1L> [Accessed 27/06/2018]; Grant Gross, Countries Consider Penalties for Spreading 'Fake News', <https://www.internetsociety.org/blog/2018/04/countries-consider-penalties-spreading-fake-news/> [Accessed 27/06/2018]; John Henley, Global crackdown on fake news raises censorship concerns, The Guardian, 24 April 2018, <https://www.theguardian.com/media/2018/apr/24/global-crackdown-on-fake-news-raises-censorship-concerns> [Accessed 27/06/2018].

<sup>63</sup> Gagliardone et al. (2015), p. 7.

<sup>64</sup> Tseis (2009), p. 498-9.

<sup>65</sup> Ronald J Krotoszynski Jr. (2005). I'd Like to Teach the World to Sing (In Perfect Harmony): International Judicial Dialogue and the Muses-Reflections of the Perils and the Promise of International Judicial Dialogue. Mich. L. Rev, 104, 1321, p.1326.

<sup>66</sup> Sarah Joseph. (2012). Social Media, Political Change, and Human Rights, B. C. Int'l & Comp. L. Rev., 35, p.145.

<sup>67</sup> Heidi Tworek. (2019), p.11.

<sup>68</sup> WiltonPark (2017), p. 6.

<sup>69</sup> WiltonPark (2017), p. 9.

illegal.<sup>70</sup> This is reflected in cases where individuals had their statements deleted or their accounts suspended for what they considered protest but viewed as hateful statements.<sup>71</sup> As a result, social media platforms are seen to have been subjected to censorship.<sup>72</sup>

Therefore, even where the laws are not overbearingly restrictive, placing the burden of determining the desirability or otherwise of contents on the social media companies is bound to have multiple effects on the freedom of expression.<sup>73</sup> First, because of the huge fines involved, these companies are bound to be more concerned about the revenue they will lose if they are found wanting.<sup>74</sup> They are more likely to delete contents that might not actually have violated the law just to avoid the possibility of penalty. Therefore, the circumstances under which the social media operators decide whether to delete content or not motivate clampdown on debatably legitimate expression.<sup>75</sup> This is even more disturbing when considered from the perspective that even judicial bodies, with all their expertise and experience find these decisions challenging because they require reasoned and informed assessment.<sup>76</sup> Flowing from this is the fact that the decisions of the social media companies are not subject to judicial review which literally translates into having an unrestricted censorship.<sup>77</sup>

As a result, individuals may have their expressions censored, and their accounts blocked without recourse to any judicial process. Invariably, their freedom of expression has been left in the hands of non-judicial and privately paid individuals.<sup>78</sup> On this aspect, the Malaysian law on fake news might be said to have established better checks on both government and the social media companies as it incorporates the judicial process.<sup>79</sup> On the other hand, people having their statements censored and deleted will have the effect of restricting their expressive nature because they will be forced to subconsciously consider the possibility of having their expressions or even their social media accounts deleted. These worries are even more serious under the Chinese, and Ugandan legal regimes which specifically target false stories or rumours.<sup>80</sup> The effect is that the space and freedom enjoyed by individuals on social media networks are gradually being eroded by often vaguely worded laws and policies which are chaotically enforced by profit driven private individuals.<sup>81</sup> In addition, such moves might also have the effect of

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<sup>70</sup> Carmen Moldovan. (2015). Brief Considerations on the German Constitutional Approach of the Freedom of Expression. *AUDJ*, 11, 2, p.36-44.

<sup>71</sup> The Economist. (2018). Germany is Silencing "hate Speech" But Cannot Define it. Retrieved June 28, 2018, from <https://www.economist.com/.../germany-is-silencing-hate-speech-but-cannot-define-it%0A> [Accessed 28/06/2018].

<sup>72</sup> DeNardis, L., & Hackl, A. M. (2015). Internet governance by social media platforms. *Telecommunications Policy*. <http://dx.doi.org/10.1016/j.telpol.2015.04.003i>.

<sup>73</sup> Sarah Joseph. (2012). P. 148.

<sup>74</sup> Ben-David, Anat & Matamoros-Fernandez, Ariadna. (2016). Hate speech and covert discrimination on social media: Monitoring the Facebook pages of extreme-right political parties in Spain. *International Journal of Communication*, 10, pp. 1167-1193.

<sup>75</sup> Human Rights Watch. (2018). Germany: Flawed Social Media Law. Berlin. Retrieved from <https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law> [Accessed 26/06/2018].

<sup>76</sup> Ed Forrest and Yong Cao. (2010). Opinions, Recommendations and Endorsements: The New Regulatory Framework for Social Media. *Journal of Business and Policy Research*, 5, 2, p. 88 – 99.

<sup>77</sup> Tarleton Gillespie. (2017). Governance of and by platforms, *SAGE Handbook of Social Media*, edited by Jean Burgess, Thomas Poell, and Alice Marwick.

<sup>78</sup> *Ibid.*

<sup>79</sup> The Parliament of Malaysia (2018), s. 6-8.

<sup>80</sup> Gary King, Jennifer Pan, Margaret E. Roberts. (2013). P. 332.

<sup>81</sup> Tarleton Gillespie. (2017). P. 211.

discouraging individuals from using such social medias, especially after an unfair experience which gives no room for appeal.

Looking at the other side of the problem however, the proliferation of hate speech and fake news on social media may on its own have the negative effect of driving people off such platforms, hence restricting or diminishing their freedom of expression.<sup>82</sup> For example, individuals who have been bullied, harassed, insulted, or intimidated online are less likely to freely express themselves on these mediums again.<sup>83</sup> In fact, this is the essence of online incitements, hate speech, and false or fake negative stories – to prevent the opponent from airing his/her own point of view.<sup>84</sup>

Restricting free speech to regulate hate speech is less controversial as several international human rights instruments, including the UN Human Rights Council have called for such regulation.<sup>85</sup> In this way, regulating hate speech on social media, even where it restricts free speech is considered an integral part of the international protection of human rights.<sup>86</sup> The regulation of fake news, as may also be seen from the trends discussed above may have straining effects on free speech as it requires what may amount to censorship of news and expressions. Consequently, whether some of the measures taken in these laws would be interpreted as censorship or not will depend on the country under review. It is more likely that western countries like Germany where censorship is prohibited by the basic law would more readily find these provisions illegal.<sup>87</sup> It is also more restricting on free speech because there is clear difficulty in defining what amounts to fake news, as well as in verifying the authenticity of statements.

Several national courts have found legislations aimed at proscribing fake news inconsistent with the freedom of expression. Some of these include the decision by a Zambian court which invalidated section 67 of the country's penal code law. The law broadly mandated the media to authenticate the truth of all information, be it theirs or from sources before going to press. In its ruling, the court found that the law was suppressive and an inhibition to free speech.<sup>88</sup> Just recently, the East African Court of Justice invalidated a decision by the Tanzanian government which banned a local newspaper for publishing a seditious story pursuant to an extant law. The court found that the action of the government contravened the country's constitution, the ICCPR, and the African Charter on Human and peoples' Rights on freedom of expression.<sup>89</sup>

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<sup>82</sup> Mainack Mondal, Leandro Araújo Silva, and Fabrício Benevenuto. (2017). A Measurement Study of Hate Speech in Social Media. In Proceedings of HT '17, Prague, Czech Republic, July 04-07, 2017, 10 pages. <https://doi.org/http://dx.doi.org/10.1145/3078714.3078723>

<sup>83</sup> Paulina Wu. (2015). Impossible to Regulate? Social Media, Terrorists, and the Role for the U.N. *Chi. J. Int'l L.*, 16, 281.

<sup>84</sup> K. Gelber & L. J. McNamara, (2016). Evidencing the harms of hate speech. *Social Identities*, 22, 3, p. 324-341.

<sup>85</sup> See the ICCPR art. 19 & 20; the International Convention on the Elimination of All Forms of Racial Discrimination – ICERD (1969), art. 4; the Convention on the Prevention and Punishment of the Crime of Genocide (1951), see also, (UN News, 2017).

<sup>86</sup> Gagliardone et al. (2015), p. 20.

<sup>87</sup> Peter E. Quint. (1989). Free Speech and Private Law in German Constitutional Theory, *Md. L. Rev.* 48, 247, 250.

<sup>88</sup> Muchende, M. (2014). Marshal Muchende on Getting Zambia's "False News" Law Struck Down. Retrieved June 28, 2018, from <https://www.mediadefence.org/.../marshal-muchende-getting-zambias-false-news-law->[Accessed 28/06/2018].

<sup>89</sup> The East African Court of Justice. (2018). Court orders Tanzania Minister to Annul the Order Banning Publication of the Local Newspaper "Mseto" and Allow the Newspaper Resume Publication. Retrieved June 28, 2018, from <https://www.eac.int/press-releases/1135-court-orders-tanzania-minister-to-annul-the->

This however, does not mean that the freedom of expression has no limitations; there are always limitations to freedom especially when it affects the right of others or the peaceful coexistence of the society. This can be seen from the contents of international and domestic legal instruments on free speech which mostly guard against abuse of such rights.<sup>90</sup> Legitimate limitations are therefore allowed, depending on whether the courts will view them as needed restrictions against violating the rights of others or threats to the society.<sup>91</sup> Thus, both Austrian courts and the European Court of Human Rights (ECHR) unanimously upheld the conviction of an individual under Austrian law for disparaging religious doctrines, finding it as a legitimate restriction on free speech.<sup>92</sup> The Austrian court found among other issues, that “anyone who wished to exercise their rights under Article 10 of the Convention was subject to duties and responsibilities, such as refraining from making statements which hurt others without reason and therefore did not contribute to a debate of public interest.”<sup>93</sup> It remarked that “applicant’s statements were ... derogatory value judgments which exceeded the permissible limits.”<sup>94</sup> In yet another case, the ECHR also upheld the conviction of a radical religious group’s leader in Belgium based on statements that intended “to stir up hatred, discrimination and violence towards all non-Muslims.”<sup>95</sup> The court insisted that the protection of speech does not cover statements “incompatible with the values of tolerance, social peace and non-discrimination underlying the Convention.”<sup>96</sup>

As the nature and effects of fake news and hate speech unfolds, few doubts may be entertained on the effect they portend to society and on individual rights. As discussed above, one of the aims of hate speech and fake news online is to prevent others from expressing their own views on social issues.<sup>97</sup> The nature of harm caused by hate speech and fake news could be multifarious depending on the approach one takes to it. It could be constitutive or consequential,<sup>98</sup> it may also be “individual harms including psychological distress and risk of destruction to one’s self-esteem, and social harms such as restrictions on freedom of movement and association”.<sup>99</sup> Notwithstanding the harms of fake news and hate speech to individuals and societies, the concerns are not so straightforward as it could go either way.<sup>100</sup>

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order-banning-publication-of-the-local-newspaper-mseto-and-allow-the-newspaper-resume-publication  
[Accessed 28/06/2018].

<sup>90</sup> See the Inter-American Declaration on the Rights and Duties of Man, Adopted 2<sup>nd</sup> May 1948, by OAS Res. XXI, art. XXVIII. Also, UDHR, art. 30. ICCPR, art.19 (3).

<sup>91</sup> Dinah Shelton. (2010). Balancing Rights and responsibilities: Human Rights Jurisprudence on Regulating the Content of Speech, in Human Rights: Limitations and Proliferation 211 (Peter Wahlgren ed., 55 Scandinavian Studies in Law), 214.

<sup>92</sup> ECHR, Case of E.S. V. Austria, (Application no. 38450/12), Judgement, Strasbourg, 25<sup>th</sup> October 2018, (Final judgement, 18/03/2019). Retrieved June 6, 2019, from <http://hudoc.echr.coe.int/eng?i=001-187188>.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> ECHR, Case of Belkacem v. Belgium (application no. 34367/14), ECHR 253 (2017), 20.07.2017.

<sup>96</sup> Ibid.

<sup>97</sup> Maitra, I., & McGowan, M. K. (Eds.). (2012). Speech and harm: Controversies over free speech. Oxford University Press on Demand. P 7-8.

<sup>98</sup> Ibid. P. 6.

<sup>99</sup> K. Gelber & L. J. McNamara. (2016). Evidencing the harms of hate speech. *Social Identities*, 22, 3, 324-341. 325.

<sup>100</sup> Tarlach McGonagle. (2017). “Fake news”: False fears or real concerns? *Netherlands Quarterly of Human Rights*, 35, 4, p.203-209.

As noted by the UN High Commissioner for human rights, regulating free speech within the confines of the law and international human rights standards “does not mean attacking free speech or silencing controversial ideas or criticism... it is rather a recognition that the right to freedom of expression carries with its special duties and responsibilities”.<sup>101</sup>

## 8. Conclusion

The freedom of expression, just like other values in society is subject to regulation by states to ensure a balanced society for all. While recognizing the importance of free speech especially as a facilitator of lively, multi-layered public interest discussions, it is necessary that it be regulated to protect human dignity and peaceful coexistence. It is also necessary to regulate hate speech and fake news to encourage free speech from those who would otherwise be shut down by hateful expressions and fake news. However, overbroad and overbearing regulatory policies undermine the freedom of all people to express themselves. This is essential in promoting self-satisfaction and a sense of self-worth in all human beings. The national laws meant to prohibit hate speech are generally diverse, some extremely narrow or ambiguous, unfocused, and widely unenforced; hence, ineffective. Though some national legislations and policies are clearly less restrictive than others, there are genuine fears of governments exploiting the need to regulate hate speech and fake news to achieve ulterior objectives. The hurried way national laws and policies are drafted to fight fake news and hate speech is mostly reflected in the vague, and mostly broad definitions which exposes them to abuse. On the other hand, most measures aimed at regulating hate speech and fake news online entrust too much unsupervised power in private social media companies. Because these companies are threatened by huge fines if they are found wanting, and because they are profit driven, the likelihood of biased decisions against users is high. Consequently, there is the need for governments to get more actively involved in the decision whether to delete contents or not. Notwithstanding the need for speedy decisions, affected individuals should have access to second consideration by means of an appeal process.

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<sup>101</sup> UN News (2017).

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**Conflict of Interest Statement:**

The author(s) declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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