

Freedom of Expression and Fake News in Nigeria: Examining the implications under the 1999 Constitution with Comparative Lessons

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Abstract

Before now, concerns regarding news focused on traditional media (typically newspapers and broadcasters) and the role they played in controlling public information and sentiment. In recent times, the focus has shifted to the distribution of news on the internet and social media thereby heralding the era of fake news with its consequences on public information. At its most basic, fake news is the distribution online of false information disguised as legitimate news stories; its motive being to influence the public's viewpoint or ideology over a particular issue. This paper examines the concept of freedom of expression under the 1999 Constitution with regard to spread of fake news by the social media through the internet. The paper also assesses the possibility of regulating fake news through legislation by making comparison with other jurisdictions. In doing this, the paper adopts doctrinal research methodology. It argues that, though, freedom of expression is entrenched and guaranteed by the Constitution and under International legal documents, there is no specific legal instrument providing against fake news or hate speech as a condition for the exercise of freedom of expression by the social media on the internet. This is a gap that should be filled with appropriate legislations. The paper therefore recommends amendment of the Constitution in this respect and concludes that tackling the menace of fake news in Nigeria requires amendment of existing laws on freedom of expression providing severe penalties against the media and individuals that post and spread fake news as obtains in other jurisdictions.

Keyword: Constitution, Right, Freedom of Expression, News

1. Introduction

Fake news is a social problem that threatens publics' believe in truthful information² and, ultimately, the ability of the press to serve its own role under the Constitution in presenting quality news to the people.³ Fake news refers to false and misleading stories or information posted to social media sites the authors know are false and are specifically intended to

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² T, Sabrina, 'As Fake News Spread Lies, More Readers Sharing at the Truth', *New York Times* (New York December 6, 2016)

³ Edward Baker, 'The Media That Citizens Need' [1998] (147) *University of Pennsylvania Law Review*, 317-349

mislead readers.⁴ As fake news threatens the right to freedom of expression guaranteed under the 1999 Constitution and other international human rights instruments, it is necessary to examine how fake news impact negatively on the right to disseminate information under the law. This is with a view to making the legislature see the need to enact a law specifically targeted at fake news. This law would make provisions that hold Internet Service Providers (ISPs) and websites like Facebook responsible for fake news that the websites provide. It will also drastically reduce if not totally eliminate the oversharing and spreading of fake news with its consequences on the democratic stability of the country; and it will create strict criminal and civil liability offences against internet companies that help spread fake news in Nigeria.

To do this, the paper is divided into six parts and adopts doctrinal methodology of research. Part one is the introduction while part two is the conceptual clarification of terms. Part three is the examination of the provisions of the 1999 Constitution, the international legal instruments and the extant laws of freedom of information, freedom of expression and rights to receive and impart information among other things. This is with a view to exploring the possibility of enacting a law against the spread of fake news in Nigeria. Part four is cross country study of legislations against fake news; while part five makes a proposal for a specific legal instrument against the spread of fake news in Nigeria. Part 6 is the conclusion with a recommendation.

2. Conceptual Clarification

In this part, the paper examines the concepts of news, fake, and fake news as they relate to the subject-matter of discourse. To the extent to which news media have received attention

⁴ Butler Andrea, 'Protecting the Democratic Role of the Press under the Constitution: A Legal Solution to Fake News' [2018] (96) (2) *Washington University Law Review*, 419, 420

much more in the social media, the emphasis has been on the reliability and truthfulness of the information received by the consumer. While the term ‘fake’ seems straight forward enough, upon closer inspection, it reveals a variety of meanings. In the art world, fake derives their value entirely from the originals they successfully mimic, specifically from the scarcity of the latter. In deed as Lowenthal puts it “the successful forging of an antiquity was sometimes regarded as a triumph of artistry.”⁵ Fake news then involves deception, not only of consumer but also of middle man. News on its part Jones Mark puts it is “the general information spread to reach the audience at any corner irrespective of its source and its truthfulness.”⁶ Contemporary fake news websites mimic the look and feel of mainstream sources to garner credibility while presenting fake news.

No longer is it reserved that news media aim to educate their viewers. Instead, it has come to be associated with (often anonymous) sources that spread falsehood by manipulating their consumers’ emotions and tapping into deeply held partisan beliefs. Indeed, legitimate concerns about trustworthiness of (putative) news sources, which originally motivated the introduction of the term ‘fake news’, are at risk of being drowned out by tactical usage of the phrase in order to cast aspersions on legitimate news organizations. On this account, Mathew Dentith defines ‘fake news’ as “an allegation that some story is misleading.”⁷ From this definition, ‘fake news’ would refer not to misleading nature of claim itself, but to an appeal to the allegedly misleading nature of the claim. That is, it would be a rhetorical device for undermining a given claim’s authoritative status by alleging that it lacks some

⁵ Lowenthal David, ‘Forging the Past’, in Mark Jones (ed.), In Fake: The Art of Deception. London, (The British Museum 1990),16-22

⁶ Jones Mark, ‘Why Fake’ in Mark Jones (ed.) The Art of Deception, London, (The British Museum 1990) 11-16

⁷ Dentith Mathew, *The Problem of Fake News*, (Public Reason 2017), 8

context or additional piece of information which, when revealed, undermines either its truth-value, or saliency to some broader claim.

However, any putative definition of ‘fake news’ must be situated in relation to the varied forms of public disinformation and distortions of communicative process. Surveying extant characterizations of fake news, a number of recurring themes can be readily identified. First, there is the recognition that the medium of Internet (and social media in particular) has been especially conducive to the creation and proliferation of fake news. Thus ‘fake news’ is sometimes explicitly defined as “the online publication” of false statements of fact,⁸ or it is noted that a “core feature of contemporary fake news is that it is widely circulated online.”⁹

3. The 1999 Constitution, International Legal Instruments and Extant Laws

The right to freedom of expression or speech provided in the Constitution¹⁰ of the Federal Republic of Nigeria is clear, complete and without limitations. The Constitution provides: “Every person shall be entitled to freedom of expression, including freedom to hold opinion and to receive and impart ideas and information without interference.”¹¹ However, the right to freedom of expression does not exist in vacuum. The tort of defamation can be instituted against a speech or expression that is false with monetary damages and a public apology awarded if the case is successful. Furthermore, a piece of news that is defamatory or libelous may be punished with imprisonment for two years under the Criminal Code.¹²

Where false news is made against the State, and this is seditious, the culprit could be

⁸ David Klein and Joshua Wueller, ‘Fake News: A legal Perspective’, [2017], *Journal of Internet Law*, <<https://ssrn.com/abstract=2958790>> Accessed March 8, 2017

⁹ Vian Bakir and Andrew McStay, *Digital Advertising*, London (Palgrave MacMillan 2016)

¹⁰ Constitution of the Federal Republic of Nigeria 1999 (as amended) Section 39(1)

¹¹ Ibid

¹² CCA Cap. 38 LFN 2004 Section 60

imprisoned upon conviction for two years.¹³ Municipally, Kaduna State is currently working on a law to combat fake news. However, despite all these sources of law there is lack of judicial authority on the subject matter.

Freedom of expression is a fundamental human right which is universally acclaimed and entrenched in the Constitution of many democratic nations, following Declaration of Human Rights by the United Nations.¹⁴ Other legal sources for freedom of expression can be found in the International Bill of Rights. First, African Charter on Human and Peoples Right¹⁵ provides: “Every individual shall the right to receive information.”¹⁶ Every individual shall have the right to express and disseminate his opinions within the law.”¹⁷ Second, Universal Declaration of Human Rights succinctly states that: “Everyone has the right to freedom of opinion and expression. This right includes freedom to hold opinion without interference, and to seek, receive and impart information and ideas through any media regardless of frontiers.”¹⁸ Third, International Covenant on Civil and Political Rights¹⁹ provides that:

- (1) Everyone shall have the right to hold opinion without interference.
- (2) Everyone shall have the right to freedom of expression, this shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
- (3) The exercise of this rights provided for in paragraph 2 carries with it special duties and responsibilities. It may be therefore subjected to certain restrictions, but these restrictions shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputation of others;

¹³ CCA Cap. 38 LFN 2004 Section 51

¹⁴ Universal Declaration of Human Rights (Paris 10 December 1948) General Assembly Resolution 217 A, <<http://www.un.org/en/ga/search/view-doc.asp?symbol>> Accessed August 20 2017

¹⁵ African Charter on Human and Peoples Right (Nairobi 27, 1981) entered into force (October 21, 1986)

¹⁶ Ibid Article 9(1)

¹⁷ Ibid Article 9(2)

¹⁸ (n 13) Article 19

¹⁹ International Covenant on Civil and Political Rights (Adopted by UN General Assembly December 19, 1966)

(b) For the protection of national security or public order, or of public health or morals.²⁰

Beyond the International Bill of Rights, the European Convention on Human Rights provides for right to freedom of expression and right to hold opinion without interference within the law.²¹ The sudden rise of digital media has helped disrupt the ideals of freedom of expression enshrined in these International legal instruments. Due to the diffusion of digital technologies, access to news has become easier and cheaper than ever in history and news consumption has grown. The dilemma with the digital dissemination of information is how to legally deal with consequence of infractions associated with the social media without infringing on freedom of information and press freedom. A lot of disinformation in the public space at present come from social media and the traditional press more responsible. The traditional press is bound by local laws and easily be sued and held accountable. This is not so with the social media unless there would be specific legal framework or law to deal with it. But how best to legally do that without infringing on fundamental freedoms of expression enshrined in the national Constitutions and International legal instruments on human rights remains a hurdle to cross. That is, how would it be possible to provide legal framework to deal with the problem of spread of fake news by the social media through the Internet without substantially infringing on fundamental rights, especially the freedom of expression guaranteed by the Constitution and international human right documents.

Free speech and right to freedom of expression norms online would seem to make countering fake news difficult having regard to the provisions of the Constitution and

²⁰ Ibid. Article 19 (1)(2)&(3)

²¹ European Convention on Human Right 1950 Article 10

Articles of the international human right instruments. Early on, the Internet was seen as a true market place of ideas, unencumbered by legal restrictions, antiquated social norms, fabricated stories and falsehood. Today, the ideal of Internet is overtaken by people who engage in dangerous propaganda to instil fear, anger and hate without limit; perhaps hiding under the right to freedom of expression and to hold opinions contained under the Constitution and international legal instruments. It for this reason that John Perry Barlow called the Internet “a world where anyone, anywhere may express his or her belief, no matter how singular and dangerous, without fear of being coerced into silence or conformity.”²²

4. Comparative Lessons from other Jurisdictions

In the light of current efforts of the government of Nigeria to address the problems of spread of fake news in Nigeria, this paper examines some countries experience with a view to proposing a legal framework that will address the problems of spread of fake news in Nigeria. As some countries have enacted laws to tackle the menace of fake news, it would be necessary to replicate the practice of these countries in Nigeria in view of the dangers of fake news, hate speech and dangerous propaganda that threatens social, economic and political stability as well as the unity of Nigeria.

United States of America

The First Amendment of the United States Constitution protects freedom of expression and free speech.²³ The Amendment states: “Congress shall make no law respecting an

²² John Perry Barlow, ‘A Declaration of the Independence of Cyberspace: A History of Protecting Freedom where Law and Technology Collide’, *Electronic Frontier Foundation*, <<http://www.elf.org/about/history>>, (1996) Accessed May 9, 2018

²³ Donald O. Blonder et al, *The Webster’s Dictionary of English Language* (International Edition) (Lexicon Publication Inc. 1995) B - 6

establishment of ... or abridging the freedom of speech, or the press ...”²⁴ The Constitution protects right of citizens to freely exchange ideas and point of view regardless of whether they are controversial or false. Censorship as well as prior restraint, which is a government action prohibiting speech or other expression before it can take place, are generally unconstitutional. This implies that fake news cannot be bound. Nonetheless, individuals which are the subject of fake news have several legal recourses. They may bring an action for defamation or other speech-related torts. However, making of false statements are protected under the First Amendment of the United States Constitution. In *United States v Alvarez*²⁵ the Supreme Court declared the Stolen Valor Act unconstitutional and overturned a conviction of a man who was prosecuted for lying about his service and medal awards in the Marines. The plurality opinion by Justice Kennedy held that the Act, which prohibited lying about military service, was content-based restriction on speech, which must either pass strict scrutiny or fail Constitutional muster.²⁶ Kennedy was generally skeptical of the State’s ability to punish the category of false speech, but even if it could, Kennedy wrote, stopping the lies we tell each other does not rise to the level of a compelling State interest.²⁷

Generally, the First Amendment of the Constitution of the United States does not permit the State to restrict categories of speech because of the effects such censorship can have on the market place of ideas. Thus in *R. A. V. v City of St Paul*²⁸ a case that involved State restrictions on hate speech, the Court said that the ‘rationale of the general prohibition (of

²⁴ First Amendment of United States Constitution, November 3, 1791

²⁵ (2012) 567 U.S. 709, 723

²⁶ Ibid. 722-23

²⁷ Ibid. 717-23

²⁸ (1992) 505 U.S. 377

content discrimination)... is that content discrimination raises the specter that the Government may effectively derive certain ideas or viewpoints from the market place”²⁹ and in *Board of Education v Pico*³⁰ the Court responded to an attempt by a school board to censor public school libraries by noting that the “Constitution does not permit the official suppression of ideas... To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned...”³¹ Also in *Police Department v Mosley*³² the Court made the connection between content neutrality and the market place of ideas explicit:

Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open,’³³ quoting *New York Times Co. v Sullivan*.³⁴

This makes clear that the market place of ideas (Internet) sits behind the First Amendment’s hands-off doctrines. It is this laissez-faire approach that makes regulating fake news so difficult. Any attempt to stop fake news, the argument goes, inhibits a public sphere that is supposed to be robust, active, and free of government intervention.

Germany

²⁹ Ibid 387-88

³⁰ (1982) 457 U.S. 852

³¹ Ibid 870-71

³² (1972) 408 U.S. 92

³³ Ibid 95-96

³⁴ (1964) 376 U.S. 254, 270

In Germany, the Social Network Enforcement Act³⁵ is aimed at “hate speech” and “fake news” (generally known as misinformation). It states:

From October 2017, Facebook, YouTube, and other sites with more than two million users in Germany must take down posts containing hate speech or other criminal material within 24 hours and content that is not obviously unlawful must be assessed within seven days. Failure to comply will result in a 5 million euros penalty, which could rise to 50 million euros depending on the severity of the offence.³⁶ Section 3 of the Act provides for handling of complaints about unlawful content and states:

- (1) The provider of a social network shall maintain an effective and transparent procedure for handling complaints about unlawful content in accordance with subsections (2) and (3). The provider shall supply users with an easily recognizable, directly accessible and permanently available procedure for submitting complaints about unlawful content.
- (2) The procedure shall ensure that the provider of the social network:
 1. Takes immediate note of the complaint and checks whether the content reported in the complaint is unlawful and subject to removal or whether access to the content must be blocked;
 2. Removes or blocks access to content that is manifestly unlawful within 24 hours of receiving the complaint;
 3. Removes or blocks access to all unlawful content immediately, this generally being within 7 days of receiving the complaint; the 7-day time limit may be exceeded if
 - (a) The decision regarding the unlawfulness of the content is dependent on the falsity of a factual allegation or is clearly dependent on other factual circumstances; in such cases, the social network can give the user an opportunity to respond to the complaint before the decision is rendered;
 - (b) The social network refers the decision regarding unlawfulness to a recognized self-regulation institution pursuant to subsections (6) to (8) within 7 days of receiving the complaint and agree to accept the decision of that institution.
 4. In the case of removal, retains the content as evidence and stores it for this purpose within the scope of Directives 2000/31/EC and 2010/13/EU for a period of ten weeks;
 5. Immediately notifies the person submitting the complaint and the user about any decision, while also providing them with reasons for the decision.

The procedure shall ensure that each complaint, along with the measure taken to redress the situation, is documented within the scope of Directives 2000/31/EC and 2010/13/EU.

³⁵ Social Media Network Enforcement Act 2017

³⁶ Joe Miller, Germany Votes for 50 million Euro Social Media Fines (BBC June 30, 2017 <<https://www.bbc.co.uk/news/technology-40444354>> Accessed July 30, 2018

The handling of complaints shall be monitored via monthly checks by the social network's management. Any organizational deficiencies in dealing with incoming complaints shall be immediately rectified. The social network's management shall offer the persons tasked with the processing of complaints training courses and support programmes delivered in German language on a regular basis, this being no less than once every six months.

In effect, the Social Media Network Act of Germany imposes fines such as 50 million euros (US\$ 53 Million on social media companies if they fail to remove obviously illegal content within 24 hours upon receiving complaint. For offensive online materials that require further assessment, the Act compels companies to block the offending content within seven days, failing which a fine will be imposed. The Act mandates the establishment of a Local Point of contact for transnational technology companies to cooperate with local law enforcement authorities on takedown requests.

In the Philippines, the Fake News (Prohibition) Act³⁷ impose fines ranging from P100, 000 (US\$1, 950) to P5million (US\$97, 587) and 1 to 5 years of imprisonment.³⁸ Also Malaysia and Kenya have enacted laws that criminalize the dissemination of fake news.³⁹ Though these Statutes criminalize the dissemination of fake news, human and Internet rights activists have criticized the legislations as having the potential to stifle authentic and reasonable free speech by encouraging social media platforms to disproportionately and arbitrarily delete and repress posts as a deterrent as well as through threat of substantial fine and imprisonment.

³⁷ No. 1492 2017 Section 28

³⁸ Foreign Agents Registration Act, The United States Department of Justice, < <http://www.fara.gov/>.> Accessed November 28, 2017

³⁹ Malaysia, Fake News Act, 2018; Kenya, Computer Misuse and Cybercrimes Act, 2018

5. Proposal for Legal Framework on Fake News in Nigeria

Given the array of different measures and the depth to which fake news affects Nigeria and Nigerians, any serious effort to tackle the issue must involve enactment of proactive social media law both at the national and State levels. In addition, there is need to beef up existing legislations not only by introducing new provisions but also by issuing guidelines to aid their implementation, and stepping up enforcement mechanisms. Such mechanisms include creating the “Police Multimedia Bureau” whose major function would be tracking fake news posts and prosecuting those who spread fake news. This Bureau may be made similar to Anti-Terrorist Squad of the Nigerian Army and Anti-Bomb Detection and Disposal Unit of the Nigerian Police. The need for proactive legal framework and mechanism to checkmate the spread of fake news in Nigeria cannot be overemphasized. Online smear campaigns and hate speech had threatened the unity of Nigeria. Hate speech and smear campaigns had affected electoral process and candidates’ standing in elections since 2011. In 2018 hate speech such as Quit Notice to the Igbos to leave the North on or before October 30 2018 generated tensions that threatened the unity of the country. Fake news and hate speech about the ill-health and possible death of Chief Executives held swear before and during the 2015 general elections in Nigeria. These are evidence of fake news and smear campaigns which are aided by online “fake news factories” created by social media and politically motivated to cause chaos and instability to undermine the peace, progress and unity of the country.

The importance of cross-country study in any research is to find a practice or regime that may suit the particular country's condition without undermining its peculiar background. Hence, where the findings can suit a particular situation like in the instance case of fake news, the practice or the regime of the foreign country can be adopted in the country. Therefore following the example of Germany, fighting against the spread of fake news in Nigeria needs the enactment of a law titled: "Social Media Network (Enforcement) Act, 2019." The process may begin with "A Bill for An Act to Combat Fake News in Nigeria and for related matters." This should be done at both National and State levels, following the example of Kaduna State. The laws shall mandate individuals and social media companies to remove obviously illegal content within 24 hours upon receiving complaint. For offensive online material that requires further assessment, the Act of the National Assembly or Laws of the States shall compel companies to block the offending content within 7 days, failing which a fine ranging from N200,000,000 (Two Hundred Million Naira) or imprisonment for 10 years or both shall be imposed. The Act and the laws shall also mandate establishment of a local point of contact for transnational technology companies to cooperate with the Police Multimedia Bureau and other law enforcement authorities on takedown requests. In any case, if the offender is a public official, fine and period of imprisonment will be doubled. Offenders will be disqualified from holding any public office. If these proposed legal frameworks and mechanisms are established and effectively implemented and enforced, the menace of fake news and hate speeches will be curbed in Nigeria.

6. Conclusion and Recommendation

Conclusion

This paper examined key issues in the domain of online disinformation called “fake news”. It examined the sequences of online fake news and its dangerous consequences on the peace and unity of Nigeria. The paper made cross-country study of legal regimes that are used to handle the problems of fake news. The paper found that in a world characterized by decreasing trust in the Internet and increased inability of end users to single out news that are reliable and worthy of their attention, the need for legislation to address the issue is crucial. Crucial since no traditional form of policy without law-making can succeed bearing the characteristics of social media and online news. The series of measures contemplated in the paper thus, focus in particular on examining the right to freedom of expression under the 1999 Constitution of the Federal Republic of Nigeria and International Bill of Rights in international human right documents. The finding is that while the right to freedom of expression and to hold opinions exist under these legal instruments, they have limitations and are subject to laws.

Since the freedom of expression and the right to hold opinions in any media without interference is not without limitations and are subject to laws, the paper therefore makes a case for enacting laws at both the National and State levels to criminalized fake news and hate speech in the Internet through social media as obtained in other jurisdictions studied in this work. In addition, this paper reached the conclusion that the proposed legal measures to address the spread of fake news would not be sufficient without a policy mix. This is necessary in order to promote a more sustainable evolution of the online news market devoid of fake news characteristics.

Recommendation

In addition to making proactive legislations, Nigeria government can introduce and implement fact-checking of counter fake news websites. An information verification to counter fake news and the “Lift the Block” website can also be introduced to fight disinformation from the social media.

Regulatory measures such as identity management in registration of online domain is recommended. This is a policy framework that require individuals who wish to open an online platform aimed at publishing or disseminating information to the public to notify divisional police through certified email, and provide the name of the platform, URL, name and surname of the administrator and tax number.

It also recommended that a balance between freedom of expression and the right to be properly informed be made as this will ensure the promotion of responsible behavior in conveying information to end users. Introduction of a proactive media policy aimed at promoting pluralism and improving the exposure of diverse content to end users is recommended as well.

Empowerment of end users through media literacy initiatives, to discourage them from sharing non-verified content is recommended.