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Steven ERLANGER

Anyway, thank you. There are lots of legal issues that come up about the digital world, about how news is done, about how people's information is followed. I think we are lucky to have Anne-Thida Norodom here, who is a Professor of Public Law and works on these issues.

Anne-Thida NORODOM

First of all, I would like to thank Thierry de Montbrial for inviting me to this conference. It is an honour to be on this panel.

While preparing this talk, I was surprised by the fact that, in the end, fake news or post-truth theories do not particularly affect me because, I must confess, I do not use social media. That may seem odd for someone who works on digital technology. I hope I have not lost all credibility. Nevertheless, I do not use social media because I do not trust them, which falls within our panel's topic. But that view is not shared by 51% of Americans, who, according to a 2017 report by the Reuters agency, get all their news on social media. The fact that I do not feel directly concerned by this phenomenon does not mean I am not interested in it. My contribution will be to highlight the issue's legal aspects.

Several questions on existing law arise here. Is existing law enough? Should new rules be written up to regulate this new phenomenon? How can the balance be kept between regulating fake news, protecting free speech and safeguarding freedom of information?

The law has various ways of responding to new phenomena. First, it must attempt to define it in relation to existing rules, existing categories, decide whom to sanction, if anyone, and, if the solutions are not enough, look into the phenomenon's causes, always with an eye to deciding what form the legal solutions must take. I would like to discuss four points here.

The first one is, can fake news be legally defined? The first thing a legal expert does when looking at a phenomenon is consider the facts and try to legally frame them, in other words, fit them into existing legal categories. This allows the corresponding legal status to be defined.

What characterises fake news is lies. The law must be able to define them. It does not sanction lies *per se*, but can do so depending on the context or if certain elements are added.

Several things in French or European Union law could qualify as fake news. Here are some examples. The offence of false information involves spreading lies or fake news. This offence already exists in French law. It is criminally sanctioned. It seldom is, but that could become more common in the new context. Bringing a libel suit and invoking the right to online reputation—e-reputation, mentioned in the new European regulation on protection of personal data—is an adaptation of defamation in the digital context. The right to privacy, attacks on the nation's vital interests or false advertising could also qualify as fake news.

So we see that existing law can cover fake news. But some people think it falls short, that there are too many loopholes, in particular because it cannot sanction all those who spread fake news because the phenomenon is so broad.

Who should be sanctioned? I see two types of authors.

First, there are the online platform operators you just mentioned. A digital platform involves many digital players. They could be search engines, social media or sales platforms. So the definition is very broad. The choice of definition is important in order to determine their obligations and the applicable regime of responsibility.

There are several examples. If the online platform is merely considered a host, in the sense of European directives, then it can be said that its liability is limited because hosts are supposed to be neutral, to have a technical, automatic, passive behaviour that justifies a lighter regime of responsibility. Likewise, if they are only considered providers of technical services, they will have no overall obligation to monitor content, even if governments can require certain precautions with regard to the content they disseminate. On the other hand, if online platforms are considered data processors, as the European Union Court of Justice deems Google's search engine to be, for example, they must be required to meet certain obligations with regard to fairness and transparency, or even an obligation to respect "the right to be forgotten", for example. Similarly, if online platforms are considered content providers, in other words authors and publishers, again, greater responsibility will be enforced, as an editorial responsibility.

The question, then, is how to define these digital platforms. Are they publishers or merely technical operators? The problem with giving private operators control of content is that, in the end, we will have private players controlling the digital public order, which leads us to also ponder the idea of sovereignty in the digital age.

The authors of fake news can also be sanctioned, which prompts us to think about requiring them to take more responsibility. But that raises several issues. First is the matter of anonymity. How can the authors of fake news be identified? It is not always easy. Second are two legal issues. How can their status be defined? What is the difference between a blogger and a journalist, for example? They neither have the same obligations nor are subject to the same legal regime. The other issue is extraterritoriality. Which country's law applies, given the Internet's ubiquity and immediacy?

Again, we see that the law can offer solutions, but some people think they fall short.

An attempt could be made to address the phenomenon's causes. I see two: the financial gains made from fake news, and a deeper cause, distrust of institutions and the governing class. How can law fight against the financial gains? The business model of free access, the backbone of a big part of the Internet system, must be addressed. It is by no means certain that charging for information will guarantee greater trust in the media. As for distrust of the governing class, trust can be restored by sanctioning those responsible, effectively protecting victims and creating new legal instruments.

My last point is this: what is the best way to regulate fake news? There are two solutions: either "soft-law" instruments, co-regulation and self-regulation by private players, or a legally binding instrument. The question today is whether we need a new international convention, which I think would be hard to draw up.

In conclusion, I would like to make two remarks. First, it seems to me that we must be very careful about creating new rules to regulate at any price a new technological phenomenon. The new proposals are interesting, but based on the idea that fake news is a new phenomenon because of the technological environment. On the contrary, to me this seems like a change of degree rather than of nature. In that case, existing law is certainly partly sufficient.

Thank you.

Steven ERLANGER

I have one question for you, if I may, and maybe it is a naïve question. Is there a complication or a difference between the Napoleonic Code and the common law on these issues, or are these issues so global that no one has come to grips with them?

Anne-Thida NORODOM

I think there are issues common to all States. That is why we have international negotiating bodies, for example on cyberattacks, in the framework of the United Nations' GGE. Meanwhile, governments are trying to manage digital



activities themselves. As I said earlier, what is at stake is sovereignty in the digital age, the idea that States can protect their laws, protect their values, by justifying the application of their national law to digital activities, knowing that American companies basically have a monopoly on those activities, which would justify the application of American law.