

**THE STAKE OF THE FAKE:
LAW AND COMMUNICATION IN A POST-TRUTH SOCIETY**

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*“During times of universal deceit, telling the truth becomes a revolutionary act.”
(George Orwell)*

ABSTRACT: *This paper proposes a logical approach of the notion of fake news in the wider context of conceptual pairs such as news and information, knowledge and truth, trust and manipulation, or regulation and control. The perspective chosen by the authors is based on their professional experience as jurist and communication specialist, and the purpose of the analysis is to answer some fundamental questions in the contemporary information society: What are the stakes of producing and disseminating false news? Should the states control the spreading of information? Where is the limit beyond which the restriction of freedom of expression becomes censorship? Is there any kind of protection against fake news required for the Internet users?*

KEYWORDS: *fake news, information, logical approach, legal analysis, communication*
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**1. LAW AND COMMUNICATION IN A POST-TRUTH SOCIETY.
THE TRAGEDY OF A TRADEOFF.**

Nearly a century ago, on January 30, 1926, Nikola Tesla gave a shocking interview to the Collier's American magazine. Among other bizarre ideas for those times, such as a "new sexual order" (dominated by educated and emancipated women in leadership positions), electric trains, unmanned airplanes, pocket phones, or the use of "green" energy, Tesla also predicted wireless technology: "When wireless is perfectly applied, the whole earth will be converted into a huge brain, which, in fact, it is, all things being particles of a real and rhythmic whole." (www.tfcbooks.com)

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An idea that was so ridiculous for Tesla's time has actually turned into reality in less than a century. In fact, after just a few decades, proto-internet has emerged - the first form of interconnection of knowledge in a gigantic global brain. "A revolution has begun"¹, was the conclusion of the first discussion through the first network of four computers connected to each other, the so-called "ARPANET", in 1969. In 1990, when the most common way to access the Internet, World Wide The Web - the famous "www" or simply the "web" (www.historia.ro) was invented, the Internet enthusiasts anticipated a new world, of free expression, a space of borderless communication, free of censorship and constraints, a huge leap for humanity and its most precious values.

Today we are cautioned that freedom is a two-edged sword, that the risks of uncensored communication outweigh the benefits of free speech and that the Internet user needs protection - against fake news, pornography, racism and xenophobia, counterfeit products, terrorism and other traps, where they can fall through unlimited communication. Undoubtedly, the Internet is an invention that has changed the face of the world. When compared to inventing the print, the Internet is for some nothing else but the natural course of technological and social evolution. Yet, others sees it as a true Pandora's box, a danger maybe too late to be avoided, but whose effects may be limited. How? By whom? With what legitimacy?

Whether we are Internet enthusiasts or a pessimistic skeptics, and even if we choose the undecided position of the moderate, whether we like it or not, we all have to think about the above questions. Otherwise, this "brave new world" of all will become the colony of the few who are aware of the importance of these questions and especially of the answers we will choose as humanity.

From its invention in the 1990s to 2014, the global network we call the "web" has remained faithful to its initial mission, to being an open space, a territory of diversity and freedom. Most experts believe that its openness is what ensures its safety, accessibility, innovative and competitive potential. Especially after Google's and Facebook's reorganization in 2014, any website aspiring for significant traffic depends on Search and Social traffic. For smaller businesses, it becomes unprofitable to maintain independent websites; it makes much more sense to promote themselves through social networks. It is estimated that most of the small ecommerce websites will either go bankrupt in the near future or they will be bought by Amazon. Most Internet users do not want or have time to access all of the sites listed as results of a search, so traditional search engines like Google are no longer interested in being simple bridges between people and websites. 70% of Internet traffic is already controlled by three of the most influential companies in the world, true technological giants. This is why some believe that the Internet has begun to die, leaving place for the "Trinet" - the Internet dominated by the three technological giants mentioned above - Google, Facebook and Amazon.²

Most websites offer today free content in exchange for personal data. With each click, we voluntarily hand over a part of our personality, intelligence and knowledge to the

¹"Yet a revolution had begun" - see <http://metropotam.ro/La-zi/Internet-cum-a-inceput-totul-ARPANET-art7920882845/>

²Specifically, what is predicted is the " death of the web" - *id est* of traditional browsers, by developing new virtual spaces for creating and sharing data. The Web may die like most other technologies do: simply by becoming less attractive than newer technologies. See: <https://staltz.com/the-web-began-dying-in-2014-heres-how.html> Last accessed: 2018/09/19.

owners of a huge database. Apparently, we have free access to information, but the price might be sacrificing freedom: "The Web and the Internet have represented freedom: efficient and unsupervised exchange of information between people of all nations. In the Trinet, we will have even more vivid exchange of information between people, but we will sacrifice freedom. Many of us will wake up to the tragedy of this tradeoff only once it is reality."³

Attempts to regulate virtual space have been taking place for many years. Some are benign, like the legislative initiative of some states to provide free Internet for all their citizens⁴, some frightening, such as incriminating the use of Skype in Ethiopia or the translation of "forbidden" books in Thailand⁵. Certainly, as long as the fundamental values of the democratic society - such as the right to information or freedom of speech - are under discussion, it is imperative for the Law to engage itself in debating these global social dilemmas. It has to impartially evaluate the advantages and risks of borderless communication and provide lines of conduct based on authentic values, realistic solutions and appropriate rules. Through this paper, we will try to make a contribution to this inexhaustible subject, using - on the one hand - the professional skills of a jurist and, respectively, a communication specialist of the authors, and - on the other hand, the specific tools of a science that transcend and fundamentals all other sciences: the logic, also called the science of accurate thinking. We will not omit at any point the general picture of the society in which we live and communicate: a society that may or may not be labeled as "post-truth", but which certainly cannot ignore the impact of new technologies. Our approach will be based on a logical approach of the „fake news” notion, in the wider context of concepts such as news and information, knowledge and truth, trust and manipulation, regulation and control, freedom and discernment. Many times, the values we cherish fall into mutual collision⁶ (Gorea, 2018) and we are forced to choose, compromise, or tragically trade some sacred values in favor of others.⁷ (Hanselmann & Tanner, 2008)

2. NEWS AND INFORMATION. FROM SEARCH TO SUGGEST

The Internet and data digitization have allowed huge access to information exchange over the past decades. Everyone agrees that humanity has gone into a new phase. Just as the industrial revolution has completely changed human society, the digital revolution has brought irreversible changes to our self-consciousness. "The information era" is actually the same thing as the "information society". (Todoroi, 2013) In 2018, even these

³ *Idem.*

⁴ For example, the Wi-Fi4EU programme, launched in 2017 by the European Commission, which aims to offer free Wi-Fi to all citizens of the European Union. For details: <https://ec.europa.eu/digital-single-market/en/policies/wifi4eu-free-wi-fi-europeans> Last accessed: 2018/09/26.

⁵ For details and more examples, see: <https://playtech.ro/2016/internetul-si-legea-activitati-online-care-te-ar-putea-baga-la-inchisoare/>

⁶ About colliding values values and their legal interpretation, see also Brîndușa Gorea (2018), ...*And Justice for All. Legal interpretation on democratic values*, in „Curentul Juridic – Juridical Current”, 2018, Vol. 72, No. 1, pp. 13-26; Available online: http://revcurentjur.ro/old/arhiva/attachments_201801/recjurid181_1F.pdf

⁷ See also: Martin Hanselmann, Carmen Tanner, *Taboos and conflicts in decision making: Sacred values, decision difficulty, and emotions*, in „Judgment and Decision Making”, vol. 3, no. 1, January 2008, pp. 51-63. Available online: <https://www.sas.upenn.edu/~baron/journal/bb5.pdf> . Last accessed: 2018/09/29.

revolutionary concepts are considered to be outdated - today we are talking about the "knowledge era" and the "knowledge-based society."

Google's declared mission is "to organize the world's information and make it universally accessible and useful."⁸ For many years, the company has played an important role in indexing web information. On the other hand, his executive director, co-founder of the company himself, stated in 2014 that this mission (dating from its establishment in 1998) is outdated and needs to be redefined - of course, on same altruistic principles and social considerations. Faced with the EU's pressures to respect the "right to be forgotten" and anti-monopoly policy, Google had to reinvent itself, but it knew how to do it in a smart manner, for its own benefit. In short, the company no longer sees itself as a player on the information search market, but has migrated "from search to suggest". What the "I'm Feeling Lucky" button really means is a massive reorientation of Google to Artificial Intelligence, which tends to replace the human effort of selecting available information with its own "suggestions", based on complex computational algorithms. The web itself (the browser territory, made up of websites) is actually removed from the user's path to information, and the goal is to be no other intermediate between the cloud where the information is stored and the end-user. In other words, Google's goal is to gather as much quality information as possible in order to achieve its new mission - to develop Artificial Intelligence. If Websites provide neutral information, Artificial Intelligence provides us with personalized and individually relevant information.

In 2014 also began the reorientation of the other high tech giant - Facebook, which - through its classical social networking, as well as products such as Messenger, WhatsApp or Instagram - has established a dominant position on the Internet. Its mission also changed, from the times when it was no more than a social network. Facebook is among the most profitable companies in the world, and the goal of providing an effective communication channel between people suffers an important correction brought by online advertising. Which, the more personalized, the more effective it is. Political advertising has especially become a sophisticated and powerful cyber industry in recent years.

The web's inventor himself, Sir Tim Berners-Lee, points out that there is evidence that, in the 2016 US election campaign, about 50,000 customized, targeted electoral advertising campaigns were "served" daily on Facebook; people or groups were given different, sometimes contradictory information. "Is this democratic?", rhetorically Asks Berners-Lee, who thinks that the web he created - "an open platform that allows anyone and everywhere to share information, access opportunities and collaborate beyond geographical and cultural boundaries" - no longer resembles the web we have today.⁹

The meanings can be deeper than we imagine; we may not feel so lucky as we realize that we are giving more and more control, more and more freedom of choice, in favor of gigantic private affairs that do not owe us and guarantee us nothing.

The concept of "fake news" has already attracted enormous public attention and an impressive amount of analyzes, comments, researches and opinions. Already, talking about fake news "is complicated", as it is not just about news anymore, but about the

⁸ Our mission is to organize the world's information and make it universally accessible and useful. A se vedea: <https://www.google.com/about/> . Last accessed: 2018/09/15.

⁹ www.theguardian.com/technology/2017/mar/11/tim-berners-lee-web-inventor-save-internet . Last accessed: 2018/09/16.

whole "informational ecosystem"¹⁰, that makes another intricate, controversial and endemic concept to thrive – the concept of "post-truth".

In most cases, the production and dissemination of fake news is done with a precise purpose, the dissemination of this type of information being, ultimately, the means of achieving a goal. In the specific slang of the Internet, the vectors of this process are called "trolls" - people who are launching, provoking or engaging in virtual exchanges of ideas, often under anonymity or under a false identity, for propaganda, manipulative or just malicious purposes.¹¹ Today we are talking about true trolls factories or farms, industries that create professional trolls, paid to spread fake news or to create, through their comments, inflamed situations in the online community.¹² Even from the point of view of situational logic¹³ (Gorea, 2016), communication now seems to be closer to manipulated interaction and supervision than to the transmission of information by messages.

The inventor of the Web saw in it a multilateral space for publishing and consuming information, directly from one person to another, peer to peer, without any dependence from a third party. But he warns us, almost three decades after his brilliant invention, that we have lost control of our virtual data, that false information is too easy to spread on the Web, and that we need to do something: first of all, to bring the Web back into the hands of people, from the hands of entities motivated by greed or political interests.¹⁴

3. KNOWLEDGE AND TRUTH. THIS IS FOR EVERYONE

The fact that we have stepped into the "knowledge era" or founded a "knowledge-based society" is as argumentable and disputable as the one that we live in a "post-truth" age or society. Beyond semantic tricks and illusions, it is a fact that the Internet has made us aware of new stakes – intangible and abstract ones, but as real as they get. If *scientia est potentia* (knowledge is power - Sir Francis Bacon), today, the meaning of *scientia* has moved away from "wisdom" to become almost similar to "information" or "data." E-economy, e-commerce is based on recognizing the importance of knowledge, as an intangible good or active, but which creates material / financial value.

Knowledge is subjective, but it can be objectified by reference to truth, understood in the sense of consistency with reality. The premise, the necessary (but not sufficient) condition for an authentic knowledge is that the information on which it is based is true, authentic, real. It is also necessary that the cognitive processes through which the information is processed to be logically correct, coherent and correlated. In order to establish the truth (which is the very purpose of judicial trials), Law calls for a rigorous

¹⁰ <https://firstdraftnews.org/fake-news-complicated/> . Last accessed: 2018/09/29.

¹¹ For more information, see: Gheorghe Piperea, *Troli, postaci și hateri. Și luni de fiere*, available online on www.juridice.ro/433943/troli-postaci-si-hateri-si-luni-de-fiere.html . Last accessed: 2018/09/20.

¹² www.stopfake.org/en/tag/troll-farms/ . Last accessed: 2018/09/21.

¹³ On the concept of "situational logic" and its utility in Law, see Brîndușa Gorea (2016), *Logical landmarks of legal interpretation (Repere logice ale interpretării în drept)*, Bucharest: The Romanian Academy Publishing House pp. 55-57.

¹⁴ <https://www.theguardian.com/technology/2017/mar/11/tim-berners-lee-web-inventor-save-internet> . Last accessed: 2018/09/16.

system of evidence, including strict rules of administration and interpretation.¹⁵ (Gorea, 2016) In the field of Law, truth has a special meaning - it is true only what can be proven.

To admit that we have stepped into the "post-truth" era is to give up the concordance of knowledge with reality, preserving only its component of conviction or opinion. For information to become knowledge, it must be approached not only syntactically but also semantically. This is the step that Artificial Intelligence has already done, and we do not believe it will stop here. Knowledge also requires creation, heuristic, extrapolation. The true potential, as well as the true risk of IA must be sought here. The stake of the fake in the digital era is beyond the distinction between mistaken (false) and untrue (fake); it can be the Power itself.

The inventor of the web space started from the premise that this is for everyone; today he tells us clearly: „We must fight against government overreach in surveillance laws, including through the courts if necessary. We must push back against misinformation by encouraging gatekeepers such as Google and Facebook to continue their efforts to combat the problem, while avoiding the creation of any central bodies to decide what is <true> or not.”¹⁶

Numerous cyber-space analysts advocate maintaining an open web, as a digital context in which social life can take place, and no organization, company or government can have the last word on what is allowed and what is prohibited.¹⁷ Web space must be kept as ment by its creator: accessible, neutral and democratic. In the last few years, we have witnessed not only the tendency to seize and manipulate virtual space, but also a strong resistance movement of the online community. After all, virtual space is the contribution of millions of users and "netizens"¹⁸. Nigerians fought for online freedom of expression, there were mass protests in Cameroon over Internet shutdown, and in India and the European Union there is a huge support for the idea of net neutrality.¹⁹

4. TRUST AND MANIPULATION. TROLL PRINCESS OF THE MAINSTREAM MEDIA

Power, in the Baconian sense of *potentia*, is still based on information or knowledge - today, as in all the history of humanity (including its traditional weapons - misinformation and manipulation). The difference is in its subtlety. If we used to know who holds the economic, political, financial, and military power, how did they get it, by what means do they keep it, who is the enemy, and so on, today's confusion and obscurity seems to have installed among those do not own it.

Jenna Abrams is one of the most prominent pro-Trump overseas activists, with over 70,000 followers on Twitter, repeatedly quoted by the US press in 2014-2017. A true celebrity and - in a way specific to the age we live - a real vector of information-power.

¹⁵ Brîndușa Gorea (2016), *Logical landmarks of legal interpretation (Repere logice ale interpretării în drept)*, pp. 203-250.

¹⁶ www.theguardian.com/technology/2017/mar/11/tim-berners-lee-web-inventor-save-internet Last accessed: 2018/09/16.

¹⁷ <https://staltz.com/a-plan-to-rescue-the-web-from-the-internet.html> . Last accessed: 2018/09/16.

¹⁸ Cititeznes of the net (internet slang).

¹⁹ www.theguardian.com/technology/2017/mar/11/tim-berners-lee-web-inventor-save-internet . Last accessed: 2018/09/16.

Just - as it turned out after an extensive journalistic investigation²⁰, Jenna Abrams does not exist. At all. She is a fictitious personality created by the "Russian troll factory".

The invasion of fake identities is only one of the contemporary methods of fighting for supremacy. We already talk about so-called *deepfake* - videos of the same political discourse, but modified in dozens of variants, so as to meet the aspirations of any electoral segment. In August 2018, the French Foreign and Home Affairs Ministers published a Report on the manipulation of information, misinformation and their risks for democracy²¹ (J.-B. Jeangène Vilmer, 2018). The authors' warning is that this kind of "atomization" of information leads to the weakening of traditional media, almost to its extinction.

The above-cited Report also proposes solutions based on French experience, which the authors believe it is relevant, considering that the misinformation of Emmanuel Macron's recent presidential campaign failed (unlike the Brexit referendum or the US presidential election). One of the explanations given by the Report to the French success is that the state institutions and the media have worked together, so they have forced social networks (Facebook, Twitter, Instagram) to delete thousands of fake accounts. On the other hand, they helped citizens to identify propaganda publications and misinformation campaigns.

Besides the risks to democracy, fake news and manipulation of information in the virtual space also have the most real and concrete effects on individuals, sometimes lethal ones. In May-June 2018, dozens of people were lynched in India after false information was circulated about them. In Ukraine, the soldiers on the Donbass front were located and killed by a diabolical disinformation method: their relatives were notified by SMS about the death of the dear one, so that - by trying to contact him by telephone - they unwittingly revealed, through the GSM signal, the victim's location, which was immediately bombed.²²

A silent war broke out between the high tech giants of the Internet and the rest of the online media, in which Google and Facebook serve users their own news, rather than directing traffic to media sites, and the latter denounce the techno-technicians' control over the news consumption and withdraw their support.

Between Google and Facebook, on the other hand, it seems that an armistice has been signed, that benefits both great rivals of digital technology; they have divided their online sphere of influence - the first company focusing on the area of Knowledge and Artificial Intelligence, and the second on online socialization. Unfortunately, for Internet users, who before 2014 benefited from their competition, with the division of domination areas over the web, they are widowed by the diversity of options.²³

Professor Charlie Beckett, a media and communication specialist at the London School of Economics and Political Science (LSE), says it's good to have diversity, media

²⁰ www.thedailybeast.com/jenna-abrams-russias-clown-troll-princess-duped-the-mainstream-media-and-the-world . Last accessed: 2018/09/29.

²¹ J.-B. Jeangène Vilmer, A. Escorcía, M. Guillaume, J. Herrera, *Information Manipulation: A Challenge for Our Democracies*, report by the Policy Planning Staff (CAPS) of the Ministry for Europe and Foreign Affairs and the Institute for Strategic Research (IRSEM) of the Ministry for the Armed Forces, Paris, August 2018. Available online: https://www.diplomatie.gouv.fr/IMG/pdf/information_manipulation_rvb_cle838736.pdf. Last accessed: 2018/09/16.

²² <https://pressone.ro/sectiuni/dezinformarea-online-poate-falsifica-orice/> . Last accessed: 2018/09/22.

²³ <https://staltz.com/the-web-began-dying-in-2014-heres-how.html> Last accessed: 2018/09/13.

pluralism is welcome, and it's beneficial to have criticism of traditional media. But the countless pages of propaganda and fake news that suffocate the traditional media system is a cancer that swiftly spreads, the stakes being not even commercial, but ideological.²⁴

5. REGULATION AND CONTROL. WALLED GARDENS AND GOLDEN GATEKEEPERS

A "walled garden" designates a closed ecosystem in which all operations are controlled by its operator. A historical example is the telecommunications industry in the 1970s, when only the phones manufactured by Bell's telecom operator could be connected to this network. A more recent example is Apple, which controls the entire iOS ecosystem through its own applications. In the field of digital marketing, you are considered to have reached the level of a "walled garden" when you can force your customers to only use your offer.²⁵ The proof of how lucrative is such a closed ecosystem is the efforts Google (and other competitors) are doing for the "appleification" of their own business (for example, through the Chrome Web Store, which is a closed garden, just like the App Store).²⁶

Such a garden is a paradise that keeps you captive. It organizes your life, eases your efforts, and often relieves you of the burden of decisions. Can this idea be extrapolated to social life? Is a closed, controlled (but safe and enjoyable) social space preferable to one of freedom (possibly wild and chaotic)? In the case of a positive answer to the first question, who should be the guardians of the social paradise gates? And if we opt for lack of regulation and external control, can we rely on self-regulation and self-control? Or who can we trust to delegate the mission to simplify our lives, while keeping us safe from the enemies of free choosing?

Although fake news is not a recent phenomenon²⁷, until recently, information received on traditional media channels (written press, radio and television) was received with confidence. The very concept of "press freedom" was based on trust, derived from the assumption that these traditional institutions function as gatekeepers, filtering informational content, and leaving only verified and valid (true) information to its receivers. Despite the objections - based on the fact that these "information intermediaries" sometimes acted as guardians of particular interests, to the detriment of the public interest - the general degree of trust in traditional media institutions was very high.

The emergence of the Internet has overshadowed the existing media channels and created new "information intermediaries" such as Facebook, Google and others, in which the general public seems to have the same confidence. At least, it had at first, until alarm signals on the dissemination of false information, extremist or hateful discourses, inducing

²⁴ Cited here: www.theguardian.com/technology/2016/dec/04/google-democracy-truth-internet-search-facebook . Last accessed: 2018/09/16.

²⁵ <https://medium.com/mediarithmics-what-is/what-is-a-walled-garden-and-why-it-is-the-strategy-of-google-facebook-and-amazon-ads-platform-296ddeb784b1> Last accessed: 2018/09/16.

²⁶ <https://staltz.com/the-web-began-dying-in-2014-heres-how.html> Last accessed: 2018/09/16.

²⁷ See, for instance: <https://theconversation.com/the-fake-news-that-sealed-the-fate-of-antony-and-cleopatra-71287> or <https://www.nybooks.com/daily/2017/02/13/the-true-history-of-fake-news/> . Last accessed: 2018/09/16.

violence, discrimination, etc. Who labels this content as undesirable? The simple answer is: the common sense (and the willingness to believe) of each receiver of the information.

The more complicated reality is that the information receiver does not always have common sense, maturity (see manipulation of children or mentally / emotionally unstable ones), or the lucidity to discern between information that can be trusted and false information – in its somewhat benign sense of mistaken, or in its malignant sense of forgery for manipulator purposes.²⁸ Despite this, our belief is that the mutations that traditional journalism has suffered through the impact of new technologies require a transfer of responsibility: filtering and verifying information is now, to a large extent, the duty of the receiving public.

The role of guarantor of trust in a media institution (which is an intermediary of information) - including the task of condemning / labeling as undesirable a certain informational content - has been assumed by states, governments, and public authorities in general. These are the ones that grant and withdraw, for example, broadcast licenses, impose media conduct rules and, if necessary, apply sanctions. The past five years have seen a shift from widespread acceptance of a principle of limited liability for internet companies to increasing calls for intermediaries to be more active as mediating gatekeepers.²⁹ (UNESCO, 2017)

The question is: to what extent can we trust the public authorities in the fact that their attempts to limit the freedom of expression are justified by the sole purpose of protecting the public interest? Where is the border between such honest and useful legal measures, on the one hand, and censorship or manipulation of information in their own interest, on the other? Who can we entrust with the golden role of knowledge gatekeepers?

Personal data has become a precious asset because computer technology allows complex strategic analyzes of this type of information to predict individual and group behaviors, attitudes, and actions. For many information society transactions, a key feature is to obtain, without consent or even without awareness, personal data that allow different manipulative actions. The traditional pattern of information transmission and repetition is transfigured into a studied surveillance and manipulation model.

Laws, such as the electoral ones, can be simply bypassed when you have a wealth of personal data and a strong information distribution network that allows personalized, targeted campaigns. Fake news is just part of the problem, since such psychological-based approaches, created from the personal data of hundreds of millions of voters, are simply irrefutable. "These companies have found a way to transgress 150 years of legislation that we have created to make the election process fair and open," says Martin Moore of Kings College in London.³⁰ Micro-targeted propaganda, legal in the UK and many other countries, may have influenced both the vote for Brexit and Donald Trump's victory in the US elections. We cannot really know precisely, as the way our personal data is used remains obscure, but we can easily understand how personal data is used to influence our choices if we think about how the Internet is serving us customized adds, search suggestions and, of course, news in line with our past interests. "Through the lenses of a

²⁸ See above, 2nd paragraph.

²⁹ UNESCO. 2018. *World Trends in Freedom of Expression and Media Development: 2017/2018 Global Report*, Paris, p. 25. Available online: en.unesco.org/worldmedia-trends-2017 Last accessed: 2018/09/15.

³⁰ Cited here: www.theguardian.com/technology/2016/dec/04/google-democracy-truth-internet-search-facebook Last accessed: 2018/09/16.

changing political economy of communications, extending beyond the state are new trends of para-censorship and surveillance-like modalities. These data-driven dynamics reduce the ability of individuals to shape and take control of their information environments, and concentrate increasing power in the hands of governments and large internet and media corporation intermediaries, as well as governments.”³¹ (UNESCO, 2017)

The current social, political and technological context is very different from the 20th century and continues to change. Traditional concepts of "necessity" or "proportionality" in the limitation of fundamental rights should be reviewed as applicable to huge private-funded information platforms that go beyond national borders, governmental decision, and even human control capability (the decision-making process being often automated). The traditional practice of regulating and enforcing legal rules needs to be revised as it seems to be outdated, at least in the area of free expression. Decisions on the creation and dissemination of information in the public space can no longer be formally regulated by laws aligned with international human rights standards, but should be seen as subsumed in "service agreements" between states and private information intermediaries.

Basically, the nowadays questions are:

- (1) If the states *ought / should* regulate the virtual (informational) space;
- (2) In the case of a positive answer to the first question, if the states *can* regulate the virtual (informational) space.

A recent report (2018) by UNESCO, entitled "Global Trends in Freedom of Expression and Media Development," asks whether what was considered "the technology of freedom" in the 1980s³², should now be seen as "the technology of control". Indeed, those who own the information, own the control, and it is not accidental that we are talking today about a data-based society. Between global corporate players, developers and technological progress holders, and traditional national states, or coalition of states - who should have control over information? In our view, we are currently witnessing an "overflow" of global communications, which has completely exceeded national boundaries and regulatory capacity of state authorities.

However, national authorities perceive the impact of the Internet and transnational information has on their citizens, as well as on the policies they are trying to promote. Consequently, states are trying to regain jurisdiction and control over freedom of expression on the Internet.

According to the above-mentioned Report, there are two types of approach in this regard:

- (1) Self-regulation, through consultations with governments, of companies operating on a global scale and beyond the traditional regulatory possibilities; this is the tendency of the largest part of the world;
- (2) The reaffirmation of state sovereignty, coupled with the effort to control traditional media institutions, as well as online platforms; this trend is manifested in some states, by the fact that Internet providers are detained or controlled by the government, or are in the

³¹UNESCO. 2018. *World Trends in Freedom of Expression and Media Development: 2017/2018 Global Report*, Paris, p. 26. Available online: en.unesco.org/worldmedia-trends-2017. Last accessed: 2018/09/16.

³²*Technologies of freedom* – the term was used by Ithiel de Sola Pool, former professor of political science at M.I.T. University, in the work of the same name, published in 1983, to designate information technology.

hands of businessmen close to the government, and tracking the source of the data is mandatory.

In both types of approach, some governments have empowered strong regulators to remove websites as well as maintain the capability of closing down the entire Internet.

6. FREEDOM AND DISCRIMINATION. CHOICE IS FREEDOM

For now, just over a third of the world's population has access to the Internet. For many of us, however, it has become the air we breathe: it surrounds us, we use it, and we do not question it. Of all the technological revolutions that humanity has recorded, the digital one has the greatest potential to become truly global.

The overwhelming information traffic this virtual world hosts comes with good and bad. When there are dozens of variants of the same message, hundreds or thousands of contradictory information about one topic or another, how can you identify the authentic, original one? A mixture of discouragement and idleness can cause us, in the end, to no longer care what the truth is. Hence the idea of a "post-truth" society, which - even if it is an exaggeration - draws attention to a real social phenomenon that will continue to expand.

"The Internet is among the few things people have built that they don't truly understand" are the first words of a book written by Eric Schmidt, Google's executive president. (Schmidts & Cohen, 2013, p. 9). "It is at once intangible and in a constant state of mutation, growing larger and more complex with each passing second. [...] The Internet is the largest experiment involving anarchy in history. Hundreds of millions of people are, each minute, creating and consuming an untold amount of digital content in an online world that is not truly bound by terrestrial laws. This new capacity for free expression and free movement of information has generated the rich virtual landscape we know today".

Whether we accept it or not to label it as a "post-truth", society is changing rapidly under the impact of new technologies and we will all be forced to adapt. The authors of this article are convinced that mankind has the necessary discernment to distinguish the true from the false, and will also find the methods to do so in the virtual space. Moreover, there is a potential in these risks: to become wiser people and more responsible citizens.

There has always been an interest of the authorities for what people *know*, but especially for what they *think*. The traditional enemy of free expression is censorship - whose purpose is to prevent the spread of undesirable ideas. In 1960, in Turkey, the radio presenter of the Turkey - Scotland football match had a gun at his head throughout the live broadcast. It happened shortly after a group of soldiers forcefully took control of the Turkish government, imposing an informational blockade to prevent coordinated action against them. The risk of canceling the football match was too high, because of the public protests that would have followed; on the other hand, there was a risk that the sports presenter will make live political comments and dynamite the newly acquired political power. So the Turkish junta decided to assume a calculated risk.³³ It is a telling example of what traditional censorship meant in a world where information outbreaks were limited and controllable.

³³www.wired.com/story/free-speech-issue-tech-turmoil-new-censorship/?CNDID=50121752 . Last accessed: 2018/09/30.

Nevertheless, that world has faded. Humankind lives the "golden age" of free speech. Media is no longer a difficult and expensive business that can be intimidated, influenced or bought. When anyone can create a Twitter account in seconds, when they can stream live video on YouTube, when any person can have their own "media channel," the censure can no longer be the brutal blocking of this disproportionate dynamics of free expression.

The most effective form of today's censorship is a certain type of attention capture and confidence gaining, through complicated and obscure algorithms, often created directly with Artificial Intelligence. In the 21st century, the power to spread ideas, to have audiences, is no longer limited by access to expensive, centralized infrastructure, but by the ability to capture and direct attention. As long as overwhelming attention is captured by a few digital platforms, traditional censorship should not worry us the most, but the way information ("content") is delivered - targeted, personalized, screen by screen. Although social networks seem to be public spaces, where masses of people have similar and simultaneous experiences, in reality we have to deal with countless sets of private conversations that take place without our knowledge. "The ghost of the public sphere is fragmented and submerged in billions of individual capillaries."³⁴

The notion of censorship is commonly associated with totalitarian regimes. It should not be confused with a certain form of control that states can and must exercise on information for legitimate purposes, such as the protection of human rights or the safeguarding of public interest. An extreme right troll, for example, shouldn't (and couldn't) be blocked on the Internet, but the algorithms that ensure its public attention can and should be controlled.³⁵

Ultimately, however, the ability to discriminate between truth and falsehood, between good and evil, is the true freedom we are endowed with as intelligent species. Neither states nor other public or private entities should be able to hold the power to tell us what is true or false.

After all, if I *choose* to believe, fake news becomes *real news*, and regulation must not interfere with private decision-making. The idea of a paternalist state, which checks our information before it makes it available to us, is outdated and anachronistic. This questions the very role of the Law itself, because if the state is not paternalistic, the right is not interventionist.

Each of us should be able to choose where we get the information from, at what costs and how we use it. Choice is freedom.

7. FROM CONCEPTS TO CONCEPTIONS. THE STAKE OF THE FAKE

Over the last few years, technological progress has created both the unpredictability and the new potential for the traditional media. Both expression and censorship have increased. The social context has changed - both for the journalist's freedom of expression and for his or her independence and even physical security.³⁶ In today's media landscape,

³⁴ *Ibidem*

³⁵ As the Twitter platform did with Tim "Baked Alaska" Gionet extremist.

³⁶ UNESCO. 2018. *World Trends in Freedom of Expression and Media Development: 2017/2018 Global Report*, Paris, pp. 130-171. Available online: en.unesco.org/worldmedia-trends-2017. Last accessed: 2018/09/16.

traditional media institutions are overshadowed by the online press, on which it is almost entirely dependent for information gathering.

With the emergence and development of social media, nothing will be the same. Traditional information intermediaries (written press, radio and television) can no longer be the guardians of the public interest in the information matter. The new "gatekeepers" of knowledge are the technological giants, private entities that do not reveal their algorithms and real interests and which - despite the authorities' attempts - are unlikely to be truly controlled. Some would say that traditional media has already lost the war in front of online media. It may be so, but it is more likely that we must accept the way in which "technological freedom" has changed the face of the world and, as individuals and society, we adjust our *conceptions*, starting right from our *concepts*.

With the relativism of the latter we have been confronted for a long time. We have become accustomed to them, most recently post-modernism. It has brought, in its day, new, shocking, innovative, aggressive, destructive, revolutionary, progressive ideas and concepts. Perhaps the "post-truth age" is only a label of the difficulties encountered once again by changing humanity, in search of landmarks and values.

In the virtual environment, fake news can spread like a wild fire, especially when there is interest and persistence in disseminating them. Online space allows for a proper social life, even if not physical. Colonialism, monopoly and enslavement as well as pluralism, diversity, freedom and democracy can be found here. The digital world is not good or bad in itself; it is just an artificial environment that humanity has created for authentic experiences. It remains to adapt to this "brave new world" and - as true explorers - to learn to keep away from its dangers, assimilating its benefits.

There is a growing appetite for seductive news, which is convenient and so pleasing, that the degree of truth they contain matters little. Challenged by the ABC News television channel to support his claims that millions of people voted illegally in the US elections, President Donald Trump placed second the importance of truth, saying with serenity: "It is important that there are millions of people who *believe* me when I say that".

Former US National Security Agency consultant Edward Snowden, whose disclosure of US spying on mass has come to the fore in the world, proposes a solution that makes much more sense than censorship: critical thinking and telling the truth. Otherwise, some companies, such as Google or Facebook, may use the pretext of fake news to censor certain posts or information from some users; practically, they could use their power to silence any information they disagree with. "We have to practice and spread the idea that critical thinking now counts more than ever, considering that lies seem to be very popular," says Snowden.³⁷

Freedom always comes with risks, benefits and responsibilities³⁸ (Chiriac & Blaj, 2018), and technological freedom is no exception. We believe that Law itself is able to adapt, to find new checks and balances, when traditional regulatory and law enforcement

³⁷www.activenews.ro/externe/Fostul-consultant-NSA-Edward-Snowden-Raspunsul-la-fenomenul-%E2%80%9EFake-news-NU-este-cenzura-ci-ADEVARUL-Gandirea-critica-e-mai-importanta-ca-oricand-141228

³⁸About freedom, responsibility and liability, see also: Lucian Chiriac, Sonia Bianca Blaj (2018), *The philosophy of the society rights in the application of penalties in implementing the criminal law*, in "Judicial Current / Curentul Juridic", 2018, vol. 73, no. 2, pp. 87-94, available online on: http://revcurentjur.ro/old/arhiva/attachments_201802/recjurid182_9F.pdf. Last accessed on 2018/09/30.

mechanisms prove to be outdated by social realities. Fundamental landmarks, such as respect for fundamental human rights, can guide us in this odyssey of reinventing the Law. The essential values of humanity - freedom, truth, good, justice, dignity - are the same; what has changed has been the social context, doubling our traditional civilization with the new digital civilization.

As we have already accepted that freedom of the press, free expression in general, must be limited by the idea of necessity and proportionality, as we have found, at least in principle, legislative solutions for this, we can reasonably hope to find the right balance between the revived values of technological freedom.

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