



Action Report

Freedom of Speech, Expression and Personal Privacy – Fake News & Doxing Laws

On December 15, 2021, LAWASIA and the American Bar Association (ABA) coordinated a dialogue on the challenges legal communities face because of laws designed to prevent the spread of “fake news” and doxing and what bar associations might do to address those challenges. The discussion in this session, the second in a series of four dialogues, centered around the legitimate interests that such laws are intended to address, and the need for those interests to be balanced against the rights of individuals, both bar members and the public, for free speech and access to information.

A complex topic that could not be addressed in its entirety in 90 minutes, recommendations came in the form of guidance along three themes:

- **Transparency and inclusivity** in developing regulations that balance legitimate access to information with personal privacy and freedom of speech.
- **Narrowly focused regulations** with clear means of appeal.
- **Active citizenry** that monitors the application of laws and pushes back where needed.

Bar Associations have the necessary expertise and skills to assist in each of these areas.

Below is a summary of the present situation on these issues in a variety of countries in Asia shared during the session, followed by more specific recommendations from each panelist.



Basic definitions:

Fake News – the dissemination of false or misleading information with the aim of undermining people's confidence in data that an individual or government wants to suppress. Factual information and opinions have been improperly labeled as “fake news”, as well, with the aim of undermining people's confidence or consideration of it.

Doxing – the unauthorized disclosure of private/personal data with the intention of shaming or victimizing a person. It can also be used to cause or influence the conduct of the individual, such as stifling their public activities.

Legitimate Reasons for Adopting Fake News and Doxing Laws:

False information has led people to lose confidence in information available to them from reliable resources on a wide range of topics, including on the pandemic, elections, and the functioning of the judiciary. Doxing has caused individuals to suffer unmerited public shame, restricting their ability to move freely and express themselves, and threatened the health and safety of individuals and their families.

Welcome Remarks – LAWASIA and the ABA

In introductory remarks President Pang of LAWASIA noted many have expressed genuine concern about how harmful the spread of misinformation and misleading information has been during the pandemic and how doxing has hurt people and their families. She observed that laws adopted, although well-intended, have been used to suppress people who are speaking out or disclosing information that the public has a right to know, suggesting that the laws made need to be refined to strike the right balance between these interests. In her introductory remarks, President-Elect Enix-Ross reminded us that Democracy requires the sharing of ideas and holding the government accountable. False or deceptive information that undermines these processes, has been amplified by modern-day technology, including social media. Enix-Ross highlighted how elections and the rule of law have been impacted by these trends. Still, transparency of governments and preservation of the rule of law and individual rights are vital to consider in developing any laws to address misinformation and doxing.

Regional Overview:

Following the example of former U.S. President, Donald Trump, many authoritarian governments in Asia seized on the opportunity to label inconvenient truths as fake information and suppress it, under the guise of “protecting” the people. This has led to the formation of committees and government agencies charged with overseeing the control of “fake news”, to push forward the government's own agendas and manage opponents. The laws adopted have been overly broad, allowing application in an arbitrary fashion by government officials. They have resulted in prison sentences, but only for some, and restrictions on use of the internet, including abrupt shutdowns, deny the public access to information. Individual rights have not been protected in the laws' adoption or implementation.

International human rights obligations of many countries mandate the protection of freedom of expression, which includes people's rights to seek, receive and impart information of all kinds. Governments may only impose restrictions on these rights if they are clear and proportionate to achieve a legitimate purpose, such as public order, national security, public health and morals, and the rights of others.



Case Studies

Malaysia– An emergency law was adopted in one day, on March 11, 2021, without public commentary. It outlawed publication or dissemination of “fake news” on the pandemic or other emergencies in the country. Criminal liability was possible even for corporations. The law obliged citizens to allow police access to traffic data and computerized data upon request. Information only had to be wholly or partly false to trigger liability, without establishing a standard about what was false discretion lay entirely with the government. The decree that announced the law, has ended and, hence, many of the concerns about it have been resolved.

Thailand– A “fake news” order under the emergency decree was abruptly adopted without clear standards and failed to ensure the public could understand the restrictions it imposed. The order was also applied arbitrarily. Thanks to the Thai courts, along with outcries and advocacy against the order by embassies, civil society, U.N. agencies and media associations, the government decided to revoke the order for the present.

Cambodia– The laws applied in Cambodia are even more vague. One could be prosecuted for “incitement to commit a felony” by disseminating “fake news”. There are ongoing mass trials of persons charged with “incitement to commit a felony”, many of whom have connections with the political opposition to the government. People have been sent to prison for exercising their free speech rights.

Vietnam– A “fake news” law adopted in Vietnam in February of 2020 is similarly vague and increased administrative penalties for dissemination of “fake news” about COVID-19. Under this law, the government has exerted significant control over the media. Many are afraid to express themselves on the internet, as a result.

Presenters:

Mr. Phil Robertson, Deputy Director, Asia Division, Human Rights Watch, Bangkok

Mr. Robert Pang, SC, Barrister, Hong Kong SAR

Mr. Oliver Xavier Reyes, Professional Lecturer and Policy Officer, Philippinesa

Facilitator:

Mr. Steven Thiru, Vice President LawAsia and Managing Partner Messrs. Thiru and Sudhar Partnership, Malaysia

Opening Remarks:

Ms. Melissa Pang, President of LawAsia

Ms. Deborah Enix-Ross, President Elect of the ABA

Rapporteurs

Ms. Sara Sandford

Mr. Mustafa Aijazuddin

Situation in Hong Kong:

The government is considering a “fake news” law. While not ruling out criminal sanctions, officials have stated that criminalizing conduct would be considered as a last resort. Journalists are quite concerned however, because they have historically been quite outspoken and there is no assurance the “fake news” law would not be used to suppress the press.

The Hong Kong approach to doxing developed since the 2019 protests. A variety of people experienced doxing; the initial targets were primarily police accused of brutality against protestors. Instead of developing a legislative response, the Hong Kong government proceeded with a civil injunction which was issued against “Persons who unlawfully or willfully conduct themselves” in a fashion that discloses confidential and private information about another. The injunction was granted without dispute because no one wished to identify themselves as such a defendant to appeal the decision. The order was widely drawn up and then amended to require intent to harass, intimate or similarly aggressive behavior. With the injunction order now in place, any person found to be in violation of it can be held in contempt of court and fined or imprisoned, including people who help others to violate the order. The injunction stopped a lot of doxing of police officers. Doxing of judges and judicial officers led to another injunction. The doxing of private citizens has led to an amendment to the Privacy Ordinance allowing for up to five years in prison for doxing. It is unknown how the defenses built into the law and this new amendment will play out.

Other broad restrictions have developed over concerns about “fake news” and doxing, as well. Electors’ names and addresses may not be published in election registries. This allows for greater risk of voter fraud. An exception was created for journalists, allowing courts to grant access to such information for journalists, but even when access is granted, copying isn’t permitted. Similar limitations have been placed on such information as license plate numbers and company records, even if this information is necessary to enforce legitimate interests, for example, a creditor seeking financial information on a debtor. Transparency is essential and government officials should know that too.

It is the bar association’s role to remind the executive and legislative branches of the need to protect such legitimate interests. This is especially true now in Hong Kong, when there is no opposition holding office in the legislature.

Situation in Philippines:

Election misinformation and disinformation and trolls gave rise to serious concerns among the public and triggered a legislative response. These were highly organized “fake news” efforts, structured in part with paid and in part volunteer participants. The paid positions were for chief architects of disinformation, anonymous influencers who translated that information into viral posts and fake account operators who helped create the illusion of engagement and perception that the disinformation was widely adopted. The volunteer organizers were made up of a politicians’ fans and the public who took on those messages and shared them further.

A law was adopted in May 2020, that made it a crime to spread false information regarding the pandemic. Arrests were effected without warrant and people were charged, even after the emergency ended. That law has since expired, but cyber libel can still be asserted under the Cybercrime Prevention Act. The cybercrime law and traditional libel laws for off-line libel, which has been on the books since the 1930s, are materially different in two key ways: (1) the potential prison term (six years for cyber libel and six months for offline libel), and (2) prescriptive term for restricting defendant’s conduct (12-15 years was suggested by the trial court in one recent case, versus one year for ordinary libel);.

In the area of doxing, a law was adopted in 2012 regarding data privacy, which entitles individuals to seek the taking down of personal information that has been disclosed without their consent. It is quite narrow, however, in that it only applies to personal information about individuals, does not apply to the exercise of journalism or use for artistic or literary purposes and it only applies to personal information controllers and processors. Penalties can be for 1-5 years, but there have been no successful prosecutions to date.

The Philippines has another law imposing criminal penalties for gender-based online sexual harassment. Gender must be shown to be the basis for the crime. The prohibited conduct is defined as conduct targeted at a specific person that “causes or is likely to cause” another mental, emotional, or psychological distress, fear for the personal safety of an individual or acts of sexual harassment. Conduct can include sharing information about the victim or impersonating the person online, positing lies about the victim to harm their reputation or filing false abuse reports to online platforms.

New legislative proposals to address “fake news” and doxing were mentioned, but they are not likely to be adopted, at least anytime soon

Finally, it was noted that there are other legal bases to restrict “fake news” and doxing: (1) Tort claims under the 1949 Civil Code (Arts. 219-23, 26, 32-33, 2176 and 2180); and (2) the rights of intellectual property rights holder to enjoin conduct of persons misusing their copyrighted or trademarked information.

Summary of Specific Action Tips for Bar Associations

Offered by Mr. Robertson of Human Rights Watch, Asia Division

Doxing Laws: There must be a balance between the right to information v. right to privacy. Must be left to communities to figure out how to balance.

“Fake News” Laws: Move away from criminalizing this conduct, and use civil law, private rights of action by the affected parties instead.

It is important to both define what is meant by “fake news” and push back against these laws that the governments are enacting and challenge a law’s implementation when it is enacted. Bar associations could help with both of those efforts. They can also refer to the excellent work of UN Special Rapporteur on Human Rights on this topic for meaningful guidance under international law.

Offered by Mr. Pang of Hongkong SAR

As to both doxing and “fake news” laws, we need to be careful. Restrictions in both ways are derogations of free speech rights. A proper balance must be drawn because there are serious implications to overly broad laws. We need to ensure that everyone’s right to receive information and express themselves is protected and any restrictions are transparent. Consider use of narrowly defined injunctive relief instead of legislation.

Bar associations have a significant role to play in urging consideration of rule of law concerns – individual rights and access to information, when developing legislation and devising a means to address doxing and dissemination of false or misleading information through other approaches too. This can be challenging for bar associations, however, because concerns about rule of law can be misconstrued as political commentary.

Offered by Mr. Oliver Xavier Reyes of Philippines

Rather than “fake news” and doxing being addressed through comprehensive legislation that could be overly broad, the focus should be on private individuals seeking to protect their rights through the civil court system. Courts have proven particularly good at thoroughly investigating facts independently. Many existing laws covering libel, torts, and violation of privacy rights, could be used. Use of criminal law in this field presents too much risk of abuse. If such laws are adopted it is incumbent on the bar association to speak out, because when they intervene, it sends a signal to the legislature that this is a sincere concern.