

# Wisdom of the Crowd: Multistakeholder perspectives on the fake news debate

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## ABOUT THE IPO



The Internet Policy Observatory (IPO) is a project at the Annenberg School for Communication at the University of Pennsylvania. The overarching goal of the program is to deepen the reservoir of researchers and advocates in regions where Internet freedom is threatened or curtailed and to support the production of innovative, high-quality, and impactful internet policy research. The IPO facilitates collaboration between research and advocacy communities, builds research mentorships between emerging and established scholars, and engages in trainings to build capacity for more impactful digital rights research and advocacy.

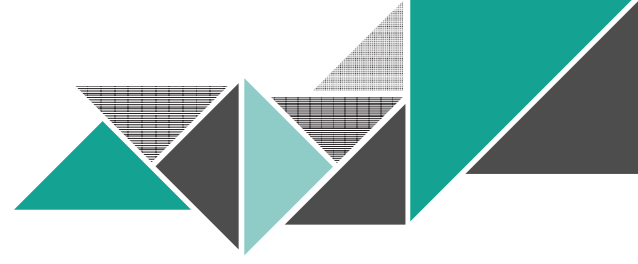
Through the IPO's three-pronged approach, the program seeks to *educate* a network of advocates and researchers, *produce* high-impact, locally-relevant research in furtherance of Internet freedom objectives, and help *connect* researchers and mentors to foster collaboration, mobilization, and increase research impact.

## ACKNOWLEDGEMENTS

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## ABOUT THE DATACTIVE IDEAS LAB

The DATACTIVE Ideas Lab is a research & consultancy firm registered in the Netherlands (KvK-nummer 69570132), taking a critical look at the datafication and platformization of society, the governance of internet infrastructure, and people's empowerment. It is a spin-off of the DATACTIVE project at the University of Amsterdam (European Research Council grant no. 639379). For more information, visit <https://stefaniamilan.net/consultancy> and contact [info@stefaniamilan.net](mailto:info@stefaniamilan.net). The research "Content Regulation on and by Platforms: Rethinking Internet Governance vis-à-vis the Platformization of the Web" (Principal Investigator Stefania Milan) was supported by a grant of the Internet Policy Observatory, Annenberg School of Communication at the University of Pennsylvania, as part of the Joint Digital Rights and Internet Freedom Research/Advocacy Projects call 2017. Contact: [s.milan@uva.nl](mailto:s.milan@uva.nl) and [vidushimarda@gmail.com](mailto:vidushimarda@gmail.com).



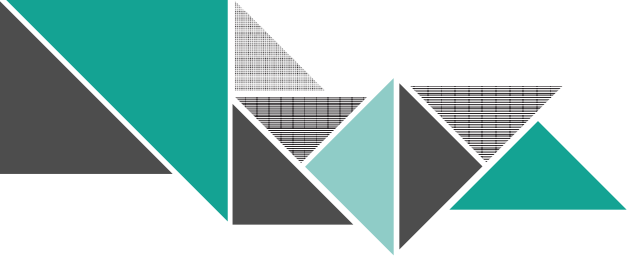
Social media platforms are increasingly accused of shaping public debate and engineering people's behavior in ways that might undermine the democratic process. In order to vitalize a much-needed multistakeholder dialogue on corrective measures against the spread of false information, this project has undertaken a truncated multistakeholder consultation, addressing experts from academia, civil society, governments and the industry to assess diverging perspectives on institutional proposals, legislative responses, and self-regulation resolutions that have sprung up around the world. It also asks what new challenges platform moderation and related "fake news" issues pose to what might be called the "procedural fitness" of the current multistakeholder internet governance system. Finally, it suggests recommendations for architectural changes that could promote constructive and inclusive debate on the topic.

Social media platforms are under cross-fire. Their self-attributed role in nurturing a healthy public sphere has been endangered by a number of recent scandals exposing questionable advertising and data re-use practices. In the aftermath of the 2016 US Presidential election, the "fake news" controversy put various social media platforms in the public pillory. More recently, the *Cambridge Analytica* case drove attention to controversial user targeting practices supported by social media companies. The advent of the "post-truth world"<sup>1</sup> has been greeted with an array of alarmed statements, temporary remedies and clumsy solutions: to date, however, none to them has been able to solve the conundrum. Truth be told, social media users, governments and industry all seem to be groping in the dark. Not only are we short of effective fixes to a simultaneously socio-political and techno-legal problem that is a moving target, we also lack the governance mechanisms to find shared solutions. Existent internet governance, industry regulation and self-regulation instruments have proven inadequate to promote a much-needed dialogue that involves all parties with a stake in the issue. The puzzle is to find the solution to a difficult question: *how can we regulate the private/public space of social media without infringing on human rights?*

Fake news and the data-driven revenue they produce—in the form of clicks and advertising at the core of the so-called "attention economy"—have re-ignited a much-needed debate on the role of commercial actors in shaping public discourse. Many politicians, experts, and those within the general public advocate for dubious content regulation measures. Proposed solutions range from governmental regulation<sup>2</sup> to private intervention,<sup>3</sup> and include "fact checking"<sup>4</sup> by third parties, algorithmic curation,<sup>5</sup> or literacy programs.<sup>6</sup> A recent law by the German Parliament, (*Netzwerkdurchsetzungsgesetz* or Network Enforcement

Act, abbreviated in *NetzDG*), promises to fine social media companies that fail to take down from their platforms hate speech or fake news within 24 hours; the German digital trade association *Bitkom* has dubbed it a "permanent mechanism of censorship".<sup>7</sup> Content regulation on and by social media platforms, we argue, might turn out to be the wrong fix for the problem: adopted in the spur of the moment and with little or no prior consultation with stakeholders, these measures risk infringing users' freedom of information and association as well as their right to privacy. We are left with a number of pressing questions, which are also difficult to answer: Who is to decide what is "true" on social media? Are Facebook and its siblings merely neutral "pipes" or are they also producers and distributors of content that should be subject to existing regulation of the press? What does algorithmic content regulation mean for human rights and freedom of expression? Can content regulation measures turn into a kind of dragnet legislation that ultimately hinders freedom of speech?

As fake news has become to many a serious "threat to our lifestyle online",<sup>8</sup> it has brought a great deal of attention to issues of media policy and regulation that are traditionally of low interest to the public.<sup>9</sup> Citizens, no matter their expertise or lack thereof, are more and more interested in the functioning of algorithms and the tactics of political communication in the age of the "platformization of the web". Platforms have become "the dominant infrastructural and economic model of the social web".<sup>10</sup> They increasingly raise concerns about the exercise of human rights on the internet and the implications of false information for national sovereignty and democratic participation. They interrogate the role of private actors in shaping our online life and acting as the arbiters of truth. They proclaim their lost trust in both governments and the industry to protect their data and their



rights.<sup>11</sup> Meanwhile, experts engaged in these policy debates fail to examine current governance structures to understand whether they are well equipped to address these pressing issues. In fact, current mechanisms in industry regulation and internet governance do not seem to be apt for the task. How can we make sure the voice, preferences and rights of users are taken into account by private and public actors? How can they be encouraged to act upon citizen concerns? The widely celebrated multistakeholder decision-making model, whereby all those affected by an issue are entitled to have a voice, should be tested to determine whether it can be mobilized to be more constructive. It may face a crisis of “procedural fitness” to address issues and policies at stake in the fake news debate—such as the Terms of Service (ToS) in force in privatized spaces such as social media platforms. More questions thus emerge: Can content regulation on and by platforms be informed by multistakeholder perspectives? Do current internet governance frameworks and processes find relevance in the age of platforms? Do multistakeholder decision-making, and civil society participation in particular, provide adequate oversight for private agreements?

This paper seeks to experiment with multistakeholder perspectives as a way of enriching the global debate on misinformation and content regulatory issues. It queries a variety of experts and resources for ways of tackling the problem of content moderation on private platforms, using fake news as a case study. In particular, two dozen experts from academia, the organized civil society, the government and the industry sectors have been interviewed. Further, this paper presents a legal analysis which investigates how three major countries in distinct regions of the world—Brazil, Germany and India—have sought to deal with the problem of fake news. Through these interviews and analysis, the paper explores the current trends in content regulation of social media services and asks whether the rise in popularity and functionalities of private platforms is accompanied by new approaches to governance and the development of adequate safeguards. Based on this evidence, this paper offers a distilled set of recommendations for stakeholders to effectively address the conundrum of fake news and content regulation through governance mechanisms that are inclusive, deliberative, and reflect the complexity of the issue at hand.

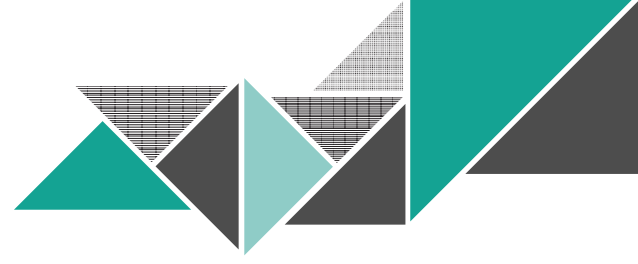
## METHODS AND DATA

Data for this paper was obtained triangulating three social science methods: i) a jurisdictional analysis of the latest legislative and quasi-legislative developments in the matter of solutions to fake news in three countries,

namely Brazil, Germany and India; ii) twenty in-depth qualitative interviews with experts selected for their role and/or position in relation to the fake news controversy; iii) participant observation in a number of settings where a multistakeholder dialogue on this subject matter emerged, including RightsCon (Brussels, March 2017), the Internet Governance Forum (IGF, Geneva, December 2017), and the Computing, Privacy and Data Protection conference (Brussels, January 2018); iv) desk research addressing a variety of popular sources, including news articles and specialized blog posts. In view of addressing the issue from a multistakeholder perspective, interviewees have been selected to cover four stakeholder groups, namely academia, civil society, government and policy-makers, and the industry, including both platform operators, journalists and software developers. Each stakeholder group was served a distinct questionnaire. Interview transcripts were then qualitatively analyzed by means of discourse analysis. As we encountered consistent difficulties in speaking on-the-record with representatives of governmental bodies and the industry, our sample privileges the sectors of the organized civil society and academia. In order to counterbalance this bias, we also surveyed a selection of official documents and quotes to the press by both governmental and industry representatives.

## FAKE NEWS AND THEIR CONSEQUENCES: A SHORT CHRONICLE OF A LONG BATTLE OF AND OVER NARRATIVES

The phrase “fake news” has been used in a plethora of contexts, and it now stands in for a variety of different phenomena, from propaganda to audacious politicking. While various definitions have emerged, it is clear that fake news as a concept consistently overlaps with false or misleading information (“misinformation”), and also with false information purposely spread to deceive people (“disinformation”).<sup>12</sup> Lazer *et al.* argue that fake news is “fabricated information that mimics news media content in form but not in organizational process or intent”.<sup>13</sup> According to the Ethical Journalism Network, fake news consists of “information deliberately fabricated and published with the intention to deceive and mislead others into believing falsehoods or doubting verifiable facts”.<sup>14</sup> Perily distinguishes four types of fake news according to whether they are exploited as satire, as a profit mechanism, as propaganda, or as reckless reporting.<sup>15</sup> We believe, however, that fake



news is better understood as a **battle of and over narratives**. It is a clash *of* narratives as it contrasts “information about geopolitical viewpoints that are not conformant with the perceived interests of the security apparatus in the state where the alleged fake news is spread”.<sup>16</sup> Think for example of the way the notion of fake news is regularly evoked by US President Donald Trump, and the many citizen efforts at debunking distorted information mobilized for political purposes. But it is also a battle over narratives because it constitutes a semantic locus where distinct visions of the world, competing understandings of citizen agency, and divergent definitions of what constitutes truth are confronted. In this respect, the fake news controversy has put under strain some of the central tenets of liberal democracies: the nature of its “rule of the majority” based on the healthy exchange of distinct views and preferences; the notions of political freedom of citizens seen as autonomous thinkers able to freely exercise their judgement without state interference and empowered to actively participate in civic life, and the idea that (fair, objective and independent) information is a key ingredient of democratic participation.

## AN OLD PROBLEM IN A NEW DIGITAL ENVIRONMENT

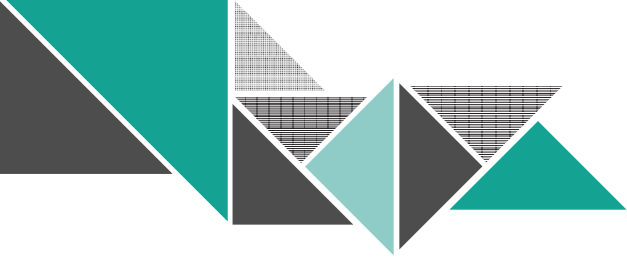
The term “fake news” gained traction in the aftermath of the US 2016 Presidential election, when Facebook was at the receiving end of scathing criticism for the circulation of fake news on its platform.<sup>17</sup> Its use became so widespread to deserve the nomination as 2016 “word of the year” by the Australian Macquarie Dictionary, on the ground that “it captures an interesting evolution in the creation of deceptive content”.<sup>18</sup> However, if we look at the battle of narratives they promote, fake news is essentially just “good old lies,” which have been a part of the fabric of strategic communications throughout the last century<sup>19</sup>. It is thus important to **historicize** the notion of fake news, connecting it to the evolution of misinformation and propaganda, as well as the various attempts at regulating and controlling emergent technologies and therefore, indirectly, the democratic process. The expression was popularized in the first half of 1900s, to describe the evolution of propaganda techniques in major world conflicts. An analysis of Google Ngrams Viewer data, tracking the popularity of strings of words in books published over the last two centuries, shows how this very same phrase started to be in used to describe propaganda during World War I, probably reflecting the expansion of propaganda research during this time.<sup>20</sup>

There is, however, a major difference between present-day fake news and the propaganda of fake news in the

analogue age: the technological environment that supports the distribution of information and many social relationships today has revolutionized how information can spread. Social media has become a key pathway to news: a 2017 Pew Research survey showed how US adults are as likely to get news from social media as they are from direct visits to news websites.<sup>21</sup> And the business model of social media allows for “the use of personal data to target the information to those audiences most susceptible to it”.<sup>22</sup> In other words, **while misinformation is not new, the means through which it circulates and the rapid pace that it is shared are altogether novel**. As one interviewed expert explained, “traditionally, if you were a manipulator and you wanted to propagandize, you had to find a medium from which you could spread your message without it being obvious. A way to launder propaganda. [On social media], it looks organized and authentic. You are laundering misinformation and disinformation through an apparatus that makes it look authentic”.<sup>23</sup> We can identify at least two dimensions of the problem, deeply interwoven: the technological, which has to do with the mechanisms of platforms, and the social, 5. Which relates to how trust and belief systems are formed and how partisan divisions among social groups play out.

The harms arising out of fake news are widely debated. The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, David Kaye, has repeatedly expressed concern about the potential of disinformation and propaganda to “mislead a population, as well as to interfere with the public’s right to know and the right of individuals to seek and receive, as well as to impart, information and ideas of all kinds, regardless of frontiers, protected under international legal guarantees of the rights to freedom of expression and to hold opinions”.<sup>24</sup> However, the assumption that fake news significantly undermines democracy is not a matter of agreement. Economists Hunt and Gentzkow, who studied the possible impact of fake news on voting patterns in the 2016 US Presidential election, concluded that fake news on social media was not as influential as we are led to believe, with television remaining the dominant source of political news and information: “for fake news to have changed the outcome of the election, a single fake article would need to have had the same persuasive effect as 36 television campaign ads”.<sup>25</sup>

Nonetheless, the spread of misinformation and disinformation can have dramatic consequences. Studies have shown that on Twitter false information, especially when political, is retweeted more rapidly and widely than true information.<sup>26</sup> During the 2014 Indonesian presidential election, Muslim moderate President Joko Widodo was subject to smear campaigns on social media, portraying him to be a Chinese-



Christian Communist—a dangerous proposition given the fact that precedent points to grave violence in the context of religious affiliation. Widodo was eventually forced to produce his marriage certificate on Facebook to contain the spread of these allegations.<sup>27</sup> Again, in Indonesia in 2017, Widodo's close aide, Basuki Tjahaja Purnama or "Ahok" was the target of an organized online political campaign run by "fake news factories", accusing him of blasphemy against Islam, effective enough to pressure authorities to put him on trial.<sup>28</sup> In November 2017 in India, false information spread on WhatsApp about a salt shortage caused widespread panic and stampedes in grocery shops in at least four Indian states, leading to the death of a woman.<sup>29</sup>

## A SWIFT STEP TOWARDS REGULATION

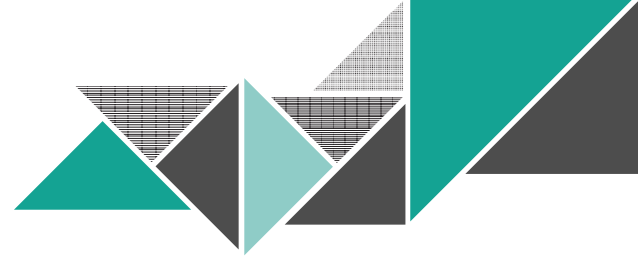
While the exact contours of the impact of fake news are still little understood, the move towards regulation has been far swifter. The most debated of such moves is probably the German regulation intended to control the spread of hate speech and fake news online (the aforementioned *NetzDG*), in force since 1 January 2018.<sup>30</sup> In early 2018, French President Emmanuel Macron also promised to impose transparency obligations regarding sponsored content on social media and to give the media watchdog *Conseil Supérieur de l'Audiovisuel* the power to impose heavy fines on outlets spreading lies or rumors.<sup>31</sup> In March 2017, in the run-up to the general election, the government of Malaysia rushed an "Anti-Fake News Bill" into Parliament, allegedly aimed at curtailing political speech. If passed, it would punish perpetrators of "fake news" with up to ten years in prison and the equivalent of USD \$128,000 fine; publishers would be required to immediately remove the item "after knowing or having reasonable grounds to believe that such publication contains fake news".<sup>32</sup> In China, authorities have been aggressively regulating content on social media platforms for many years, making publishers responsible for ensuring that a wide range of content is proactively deleted, failing which those responsible could be handed jail terms up to three years.<sup>33</sup> However, seemingly in response to the global rise of fake news and regulatory solutions proposed in democratic countries, the Chinese military recently set up an online portal where citizens can report instances of "misinformation" and "fake news" about the military.<sup>34</sup> This same strategy is mirrored across the world in Italy, where the Postal Police recently launched a portal to report hoaxes and fake news,<sup>35</sup> just a few months after the proposal of a draft law criminalizing fake news.<sup>36</sup>

Because these initiatives by the legislative and/or executive powers pose dangers in the extent to which they place enormous trust and power in either governments or individuals as arbiters of truth and taste, it is useful to increase multistakeholder perspectives that can modulate and improve discourse. The move towards content regulation by governments has been **criticized** by experts from across disciplines. While the spread of misinformation, leading to erosion of trust in the democratic process, indeed is a problem that needs fixing, history has shown that government regulation of this nature is usually instrumentalized by authorities in power to suppress dissent, silence opposition, manufacture consent,<sup>37</sup> and undermine international standards of freedom of expression.<sup>38</sup> Experts have also pointed out that the move towards governmental regulation of content can lead to systematic state-led surveillance and censorship, which could significantly undermine democracy.<sup>39</sup> It is also critical to note that using the blanket term "fake news" can, and has, been used by governments to undermine legitimate news, independent journalists, and newsrooms when the content in question is inconvenient or uncomfortable for those in power<sup>40</sup>—in other words, to engage in the battle of narratives mentioned above. To make things worse, governments themselves often delegate regulatory and police functions traditionally considered a matter of public law to private platforms.<sup>41</sup>

Not only governments are in the dark with respect to the underlying problems and the best solutions to adopt; the public seems equally confused. According to a 2016 Pew survey, 45 percent of US adults believe that governments, politicians and elected officials are responsible for fixing the fake news problem. Similar percentages, however, attribute responsibility to the public (43 percent), social media and search engines (42 percent).<sup>42</sup>

## THE "NEW GOVERNORS"

More emphasis on multistakeholder perspectives can provide pushback against governmental regulation of online content and bring into focus **the roles and responsibilities of private platforms**. Their active role as content curators, lawyer Kate Klonick argues, merits treating them as the "new governors", that is to say as systems of governance operating outside traditional frameworks for free speech. "Now responsible for shaping and allowing participation in our new digital and democratic culture", these new governors "have little direct accountability to their users" and their speech moderation practices are opaque.<sup>43</sup> In this respect, *The Economist* magazine has recently encouraged the industry, and Facebook in particular, to take action to



“rebuild trust” among the user base, acknowledging that “if the industry does not come up with a joint solution, a government clampdown will become inevitable”.<sup>44</sup>

The dominance of these platforms as a source of information and their role in shaping public discourse have led to an increasingly strong push to treat social media platforms as media companies and to subject them to the existing press laws, adapted to fit the contours of a new technology—an example is the German *NetzDG*.<sup>45</sup> This is particularly relevant, as social media platforms have very often resisted terming themselves as media companies in a bid to circumvent regulation, and tend to rebrand themselves as technology companies or platforms alone, as a way of positioning themselves as neutral technology-driven facilitators of online content creation and dissemination.<sup>46</sup> However, in light of the non-neutral, value-laden choices that these algorithmically curated platforms make on behalf of users, understandings of editorial decision-making and responsibility need to be re-evaluated.<sup>47</sup> The decisions that algorithms make are designed by human engineers, from the choice of training data and feature selection, to the definition of “success” for the algorithms that undergird these platforms.<sup>48</sup>

**Business models** underlying private platforms are another important piece of the puzzle. Social media are advertisement-driven companies and thus have the “incentive to promote material that grabs attention and to sell ads to anyone”.<sup>49</sup> Incentivizing enticing content, prolonging time spent on their platforms, and encouraging user engagement is baked right into the business models, aimed at “keeping users glued to their screens, collecting data about their behavior and convincing advertisers to pay billions of dollars to reach them with targeted ads”.<sup>50</sup> These platforms thus organically generate an enabling environment for alarming, sensationalist media designed to trigger clickbait behavior. This might mean that traditional methods of working against propaganda and misinformation, such as ethical codes for journalists, media laws and mass education, are no longer sufficient.<sup>51</sup>

The ideal mechanism to deal with the problematic distribution of content on platforms is still a matter of debate also within the industry itself, which largely proceeds by trial and error. Both Facebook and Google were amongst the first to work on tweaking their advertisement business model by prohibiting fake news sites to use their advertisement services.<sup>52</sup> In order to avoid pushback for being the final arbiter of truth, Facebook swiftly outsourced fact-checking to third party organizations, which would be prompted by users reporting fake news stories. Similarly, Twitter revisited its community

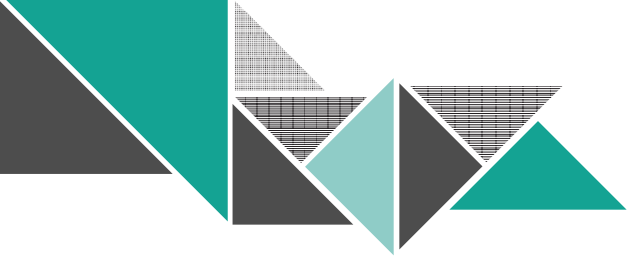
guidelines pertaining to hateful speech and reporting abuse on its platform to discourage the spread of hateful content.<sup>53</sup>

In the absence of a clear understanding of fake news and the contours of its consequences, regulations being suggested by governing bodies around the world risk being **inconsistent with international human rights law**. These efforts are also “yet another reminder of the insidious malleability of the concept of ‘fake news,’ which has become a term often used to refer to news that is critical of those in power, rather than news that is deliberately false”.<sup>54</sup> Human Rights Watch has denounced the German law as inconsistent with the country’s obligation to respect free speech, because it “can lead to unaccountable, overbroad censorship” and it creates “ ‘no accountability’ zones, where government pressure to censor evades judicial scrutiny”.<sup>55</sup> This view is shared by the UN Special Rapporteur on Freedom of Opinion and Expression, who raised concerns about the implementation of the law and its potential overreach.<sup>56</sup> In addition, the law “sets a dangerous precedent for other governments looking to restrict speech online by forcing companies to censor on the government’s behalf”; Russia, the Philippines and Singapore have already indicated the *NetzDG* as a positive example.<sup>57</sup>

To make things worse, users are ultimately made responsible for authorizing data collection in a model dubbed “privacy self-management”.<sup>58</sup> However, the Terms of Service, which constitute actual contracts between users and platform operators, fail to provide users with relevant information to make informed decisions. An analysis of the ToS of fifty online platforms revealed that ToS generally lack specific information on aspects considered important to human rights, such as the promotion of the rights to privacy and freedom of expression. ToS tend to be awash with technical and legal terms and difficult to comprehend, and there is an average of three binding documents per platform. While 52 percent of operators proclaim they may remove content without any notice, 36 percent of the sample ignores the issue all-together, suggesting companies prefer not to disclose their policies to users.<sup>59</sup> Yet, the obligation to respect human rights does not belong to the state alone, as the UN Guiding Principles on Business and Human Rights remind us.<sup>60</sup>

## THE GOVERNANCE DEFICIENCY

While the debate drifts organically to a conversation about the perils of content regulation online and its potentially damaging effects on internationally recognized human rights, the discussion of how fixes to fake news are arrived at lingers in the background. We argue that



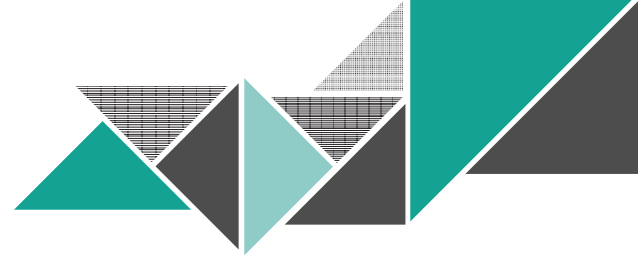
the issue of “fake news” questions and jeopardizes the multistakeholder governance model. The increased role for tech companies, law enforcement and algorithms in regulating access to information does not resonate with established multistakeholder decision-making mechanisms. As evidenced above, users have little to no say in the content of companies’ ToS, which, despite renewed efforts by the industry, remain largely unintelligible to most users. The government and private sector each seem to engage with the issue and potential solutions through a number of stand-alone trial runs, rarely talking to each other or building collaborative mechanisms. These individual attempts, whether governmental or company policy, are often siloed, and reactive to particular crises or media events, rather than long-term in scope and based on comprehensive research. Governmental representatives often demonstrate in public statements and proposed policies that they do not understand how social media platforms function well enough to sufficiently regulate them.<sup>61</sup> While the multistakeholder model is variably considered apt to manage critical infrastructure such as the internet naming system and internet standards<sup>62</sup>, regulating fake news is treated as a different matter altogether. To date, no arenas or mechanisms provide for a substantive multistakeholder debate on fake news, online content regulation and their threats to democracy.

Existent multistakeholder internet governance fora intermittently engage with the issue of fake news at the level of content, questioning solutions and raising concerns, but **fail to address the issue of procedural fitness of the decision-making model itself**. For example, at the 2017 United Nations’ Internet Governance Forum (IGF), a multistakeholder forum for policy dialogue where stakeholders meet annually “on an equal basis and through an open and inclusive process”, misinformation and content regulation was included in the program, but the particular mechanisms through which stakeholders could seek to influence the moderation policies of private actors were not questioned.<sup>63</sup> Meanwhile, the IGF Dynamic Coalition on Platform Responsibility—an informal, issue-specific group set up in 2013 to produce “model contractual provisions, which can be incorporated in ToS in order to provide intelligible and solid mechanisms to protect platform-users’ human rights and foster platform providers’ responsibility”—has published a valid set of recommendations on Terms of Service and human rights, addressing the rights to privacy, freedom of expression and due process (December 2017). The section on **due diligence** standards in content regulation considers the consequences of overzealous content regulation:

“Although there are no rules to determine, in general terms, what kind of speech should or should not be allowed in private online platforms, certain platforms should be seen more as “public spaces” to the extent that occupy an important role in the public sphere (...) As a general rule, any restriction on the kind of content permitted on a particular platform should be clearly stated and communicated within the ToS. In addition, platforms should provide effective mechanisms aimed at signalling and requesting the removal of content that is forbidden under the applicable legitimate laws (e.g. illegal content such as child pornography as well as other kinds of undesirable content, such as hate speech, spam or malware). However, such mechanisms shall be **necessary and proportionate** to their purpose. It is of utmost importance that the rules and procedures imposing such restrictions are not formulated in a way that might affect potentially legitimate content, as they would otherwise constitute a basis for censorship. To this end, content restriction requests pertaining to unlawful content shall specify the legal basis for the assertion that the content is unlawful; the Internet identifier and description of the allegedly unlawful content; and the procedure to be followed in order to challenge the removal of the content” (pp. 237-238).<sup>64</sup>

However, neither the IGF nor the Dynamic Coalition have the teeth to enforce suggestions in this time of frenzied reactions by state actors. Thus, if we are to find effective, shared and rights-respecting solutions to fake news, there is a crucial need to better understand what governance model could facilitate a dutiful, regular exchange between stakeholders, in a way in which even users—typically the softest voice—can be heard. The multistakeholder model seems less than adequately equipped to address the regulation of private/public actors like social media platforms. Yet, this problem appears to be consistently evaded by the supporters of multistakeholder governance, including IGF participants. And with the exclusion of annual events like RightsCon<sup>65</sup>, there is a lack of policy fora and decision-making mechanisms where the industry, sovereign when it comes to crafting and enforcing ToS, interacts with users and digital rights advocates to hear concerns and petitions. It is especially hard to identify any existing governance model in which users and civil society groups could be empowered to bind private actors performing certain public functions to respect human rights within their ToS. Thus, it is the purpose of this paper to explore a variety of stakeholder perceptions in order to determine the governance capabilities for such a complicated set of issues.





## REGULATING FAKE NEWS: A JURISDICTIONAL ANALYSIS

To situate these questions in a larger context, we now move to the jurisdictional analysis of how national governments in Germany, India, and Brazil have perceived and reacted to fake news. Although not the first to implement anti-fake news legislation, these countries have been selected because of their centrality and leadership role in the respective regions and for being large, established democracies with (variably) strong rule of law. Democratic countries were privileged in this analysis in order to better understand how democratic governments are carrying out and justifying restrictions to freedom of expression within the context of misinformation and disinformation.<sup>66</sup>

### GERMANY

In Germany, the *NetzDG*, which stands for “The Act to Improve the Enforcement of Law in Social Networks” came into full force on January 1, 2018.<sup>67</sup> It seeks to regulate the spread of content on social media platforms, which have over two million users in Germany. Under the Act, platforms are required to maintain effective and transparent procedures for handling complaints about unlawful content through which users can flag problematic content. If such content is deemed to be unlawful, it is to be subsequently removed by the platform within 24 hours to a maximum of seven days, with some extended flexibility for more complex cases. The Act is confined to social networks only, i.e. those platforms where content of any kind can be shared freely and made public, and not to media platforms such as LinkedIn and WhatsApp which instead permit interpersonal communication and dissemination of specific types of content. Despite concerns around the chilling effect of such a law on freedom of expression, the German government has repeatedly contended that while freedom of expression is an important facet of German democracy, it ends where criminal law begins.<sup>68</sup>

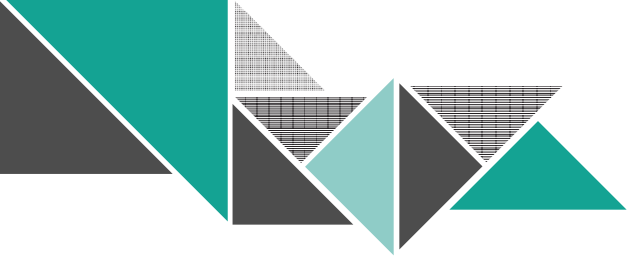
The *NetzDG* holds platforms responsible for looking into the legality of content. Platforms can outsource decision-making to a recognized “self-regulation institution”, but regardless of how the decision is made, the complainant and user must be immediately notified regarding the decision and provided with an explanation. Platforms are also obliged to retain deleted content for at least ten weeks for evidence provision and review purposes, in addition to publishing yearly reports of deleted content with reasons for the same.

Failing to comply with deadlines, procedures, or reporting, platforms can be subject to heavy fines, after the question of legality of content is decided on by a court ruling. While the maximum penalty for platforms is capped at 50 million euros, there is a tiered model for fines, which has been updated by the Federal Office of Justice since the law’s enactment. First, platforms with over 20 million German users (to date, only Facebook) are to be fined between 2.5-40 million euros. Next, platforms with between 4-20 million German users (e.g., Youtube and Instagram) are to be fined 1-25 million euros; lastly, platforms with 2-4 million German users such as Twitter are to be fined 250,000-15 million euros. Individual employees can be fined up to 400,000 euros in cases of severe or repeated mishandling.

This makes it far more difficult for platforms to be deliberate in their ascertainment of legally acceptable content: the fear of being subject to hefty fines encourages over-compliance. According to Human Rights Watch, hosting companies will have to make difficult determinations of free speech violations “under conditions that encourage suppression of arguably lawful speech. Even courts can find these determinations challenging, as they require a nuanced understanding of context, culture, and law. Faced with short review periods and the risk of steep fines, companies have little incentive to err on the side of free expression”. This proclivity towards caution might have a chilling effect on speech. Further, the law does not provide for “judicial oversight or judicial remedy should a cautious corporate decision violate a person’s right to speak or access information”.<sup>69</sup> In other words, platforms are put in the position to be the arbiters of the truth and of law, either because of political pressure or the possibility of monetary fines.

The lack of transparency surrounding Facebook’s take-down policies exacerbates the shortcomings listed above. The company has traditionally moderated content in an opaque fashion.<sup>70</sup> This will only be more amplified in the future, as Facebook CEO Mark Zuckerberg, in a hearing at the US Congress, hailed “AI tools” as the solution to fake news, misinformation, and hate speech on the platform, without clarifying what standards these tools will adhere to.<sup>71</sup> In this respect, the *NetzDG* does not address the possible impact of these tools—a crucial consideration for addressing content removal in the future.

The *NetzDG* has been met by extensive opposition both nationally and internationally. According to the Social Media Law Bulletin, amendments have already been proposed to help users whose content has been erroneously deleted and to set up an independent entity to take over the role of



deciding what constitutes hate speech from companies.<sup>72</sup> It is worth noting that the European Union has preferred a different approach altogether, namely the promotion of self-regulation through a memorandum of understanding with platform operators. The Communication of the European Parliament on “Tackling Illegal Content Online: Towards an enhanced responsibility of online platforms” (September 28, 2017) comprises a set of non-binding guidelines which seek a unified and calibrated response by platforms, governments, and stakeholders and attempts to prevent a fractured liability landscape that would result from individual EU Member States setting their own terms for the regulation of online content.<sup>73</sup>

## INDIA

In India, the platform WhatsApp, which counts 160 million Indians as part of its customer base,<sup>74</sup> has been identified by policymakers as the primary vehicle responsible for the spread of (mis) information.<sup>75</sup> The most bizarre instance of WhatsApp-spread fake news occurred shortly after the government announced the demonetization of existing notes in November 2016. A rumor that India’s new banknotes were equipped with a GPS-chip to combat the country’s black economy caused panic across the country, and the story had to finally be clarified by the Reserve Bank of India.<sup>76</sup>

The Indian government has historically cracked down on WhatsApp groups and content exchanged on chats in the context of national security, particularly in the northernmost region of Kashmir, the sovereignty over which is still under dispute.<sup>77</sup> Measures to maintain public order, and contain “rumors” have included shutting down mobile Internet in some parts of India.<sup>78</sup> In addition to having groups mandatorily register with the government, previous notices from the Indian government have also sought to hold administrators of groups liable for content shared on these mediums.<sup>79</sup>

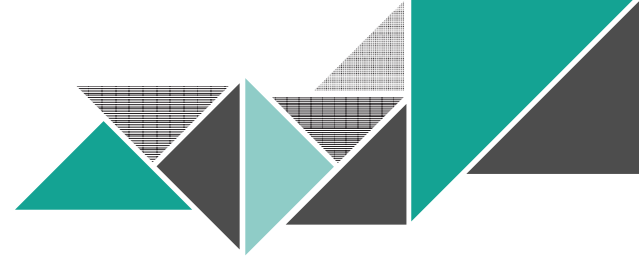
In April 2018, India’s Union Ministry of Information and Broadcasting announced in a press release<sup>80</sup> the amendment of the Guidelines for Accreditation of Journalists, a move to ensure that journalists accused of reporting fake news would lose press credentials until all complaints against them were verified.<sup>81</sup> Following severe backlash across the nation, the Prime Minister ordered a withdrawal of this press release. The Ministry has since stated that it is in the process of working with journalists to “fight the menace of ‘fake news’ and uphold ethical journalism”.<sup>82</sup>

The Indian approach is unique insofar as it is multi-pronged. While the clampdown on WhatsApp is largely due to the ubiquitous presence of the messaging app, shutdowns on specific platforms beyond WhatsApp, including Facebook and Twitter, have been deployed in the past as a way to contain rumors and public alarm.<sup>83</sup> Wider restrictions on journalists as discussed above are a knee-jerk reaction largely attributed to impending elections in the country. This approach is also far more ad-hoc, and less formal than the German example discussed above and the Brazilian example discussed next.

## BRAZIL

In December 2017, the Brazilian government established the “Consultative Council on Internet and Elections” under the Superior Electoral Court to monitor and/or block “false news” stories on social media ahead of the presidential elections scheduled for October 2018. The Council is composed of representatives of the judiciary, the army, the ministries of justice and of science and technology, the national intelligence agency and the federal police, the nongovernmental organization SaferNet devoted to fight online crime and researchers from the private university Getúlio Vargas.<sup>84</sup> According to one of the experts interviewed, the Council “operated for a couple of months and produced a messy set of regulations for political communication online” operating “under very heavy pressure to produce silver bullets that could solve the issue of fake news instantly. Part of that was external pressure from society and the media”.<sup>85</sup> This external pressure is easy to discern—a BBC World Service survey of 18 countries in 2017 showed that Brazilians were most worried about fake news.<sup>86</sup>

While the Council’s stated role is to monitor content on social media, there is little clarity on social media platforms’ responsibilities and compliance requirements. Amongst the solutions envisaged by the Council, one concerns “automated and human solutions provided by platforms to remove content online”. Another solution suggested is to enable fact-checking agencies and also the traditional media to contribute to individual decisions on fake news and false information. As one interviewee opined, “There is little described about transparency and accountability mechanisms envisaged for the activities of the tech industry, fact-checkers and traditional media”.<sup>87</sup> This is particularly treacherous in a country where the press has been ranked “partly free” by Freedom House (as of 2017), where internet penetration is below 60 percent and the ownership of traditional media is highly concentrated.<sup>88</sup> Furthermore, Brazilian politicians and governing bodies have a legacy of



proposing problematic measures as solutions to combating fake news, including prison sentences and asset-freezing. Additionally, the 2017 electoral reform, through the law no. 13.488, regulates electoral campaigning online. Among other features, it “allowed sponsored ads on social media platforms and search engines as long as the service was bought from the platform where the ad was to be broadcasted”.<sup>89</sup>

The Brazilian Federal Police have also expressed their intention to monitor the spread of online political content deemed to be false and punish those guilty of dissemination of such content.<sup>90</sup> This intended control applies not only for content on social media platforms but includes all political content online. The legal basis for assumption of such power is questionable and concerning, deriving from a pre-internet censorship law that was framed and implemented during military dictatorship rule in Brazil.

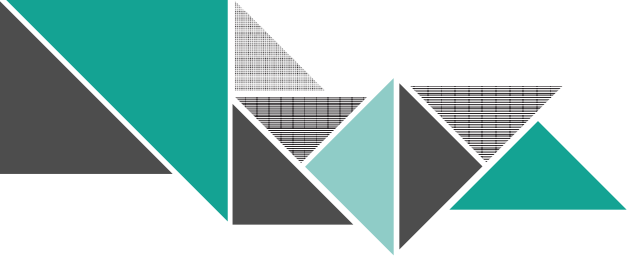
## A COMPARATIVE VIEW

These three cases focus on curbing the spread of fake news and increasing government oversight of content online: in other words, “fake news is misunderstood as a problem of illegal content (...) to be removed from the internet”.<sup>91</sup> However, the methods and strategies deployed to achieve this control are varied.

In terms of liability, the German law is squarely focused on **penalizing social media companies** for failure to curb the spread of fake news on their platforms. As an interviewed expert argued, it “delegates censorship functions to private corporations which is even worse than governmental censorship”.<sup>92</sup> According to a civil society representative, this had made the situation worse, as “it has actually fallen on users quite a bit too. When I go to Twitter, I don’t have the option of reporting a tweet under the ToS alone, it automatically goes to the option to reporting it under the German law”.<sup>93</sup> However, in India, solutions emphasize **penalizing the individual**, from WhatsApp group administrators to journalists accused of reporting fake news. The Brazilian model is closer to the Indian approach, as it seeks to punish those guilty of the dissemination of false information. The responsibility of platforms and liability of social media companies is most aggressively articulated in the German case, whereas the other two cases do not position the platforms as responsible actors within the policy solutions. While the Indian government has begun to confront companies like Facebook on the question of data privacy and protection more formally, the same has not followed in regard to regulation of content on these platforms.

Another important point of divergence is the form of approaches to **mitigation**, i.e. approaches to containing the potential spread and repercussions of fake news. Germany’s approach is through legislation, with detailed roles, rules, and responsibilities, although, according to an expert interviewed, “the German response, bluntly put, is just delete a lot of bad stuff and then all will be fine”.<sup>94</sup> The Brazilian approach includes the formation of a consultative council within the Superior Electoral Court. Although it includes also members from the civil society, this body is far less formal and, as a consequence, would continue to define the rules and responsibilities associated with platform engagement and support on an ongoing basis. The Indian experience has been particularly unique—while administrative and governmental efforts in the form of notices, punitive orders, and press releases are more frequent, they either do not hold muster for long (as was demonstrated in the case of press releases issued by the Ministry of Information and Broadcasting) or are eventually rejected by Courts.<sup>95</sup> In addition, a common practice to curb the spread of ‘rumors’ online has been to entirely shut off mobile internet services for a sensitive period of time, or in sensitive areas, with a substantial number of complete **internet shutdowns**.

Finally, the three countries share two major policy shortcomings. First, although all three of our cases are established democracies, there remains a great deal of political and legal ambiguity concerning what constitutes “fake news”—which reveals the proclivity to use the term loosely, and more importantly, politically conveniently. This is particularly worrisome in relation to the duty of the state to promote and protect human rights and freedom of expression. When oversight is sloppy and accountability mechanisms are minimal, measures like those described above naturally lend themselves to abuse by individuals and groups, as well as enterprises willing to overly censor content in order to avoid heavy fines. Secondly, legislators in the three countries reveal a limited understanding of the role of algorithms and automation in the personalization of content on social media as well as a content regulation remedy. As a result, the proposed solutions fail to consider key aspects in the processes through which fake news are spread and legitimated. This general lack of knowledge about how social media algorithms function also leads to simple and shortsighted solutions in the face of an ever-evolving and increasingly complex digital ecosystem populated by a variety of actors engaged in the distribution of information and misinformation, including trolls, social bots, or accounts that are automatically run by software mimicking real users.<sup>96</sup>



## TOWARDS INCREASED ATTENTION TO MULTISTAKEHOLDER PERSPECTIVES ON APPROACHES TO ONLINE CONTENT REGULATION?

Our approach was to query stakeholders on their views on these proposed policy solutions as well as their view on the proper governance mechanisms to debate and respond to misinformation online. According to one expert interviewed, “we are confronted with a new wave of governmental involvement in a media that was more or less free from government control. The question is now what type of control is acceptable for a democratic and free society”.<sup>97</sup> Answering such a complex question becomes particularly challenging in the absence of appropriate spaces and mechanisms promoting a multistakeholder exchange of ideas. Responding to this challenge, within this section we sought to create this “imaginary” dialogue between stakeholders, by presenting, comparing, and analyzing the views of two dozen experts from the civil society, academia, government institutions and the industry. Areas of concern include the nature of the problem, the adequacy of current regulatory responses and potential alternatives, and the consequences of the fake news controversy for policy and governance more in general.

### SOCIAL VS. TECHNICAL

For most of our experts, fake news is not a technical issue: rather, it is a **social problem exacerbated by technology** (according to one expert, “driven by people but made worse by technology”),<sup>98</sup> and as such it combines both social and technical aspects.<sup>99</sup> The two are deeply entwined: “without the tech the social problem would be small. Without the social problem, the tech wouldn’t be problematic”.<sup>100</sup> The “effects of technology have made it more pronounced (...) But ultimately it’s a problem that we can’t lay at the feet of the technology because how we use technology is largely within our control”.<sup>101</sup> It is “a matter of education (as enabling qualified ICT literacy), law (as a means to protect fundamental rights of internet users), and technology (as a way of assuring the transparency of algorithms and development of systems that protect privacy by design and default”.<sup>102</sup> Its causes are to be found largely in the social realm, and have to do with people’s attitudes towards information, their relation to sources and platforms, and their digital literacy (or the lack thereof), but also the way trust and belief systems are fashioned in a digital environment.

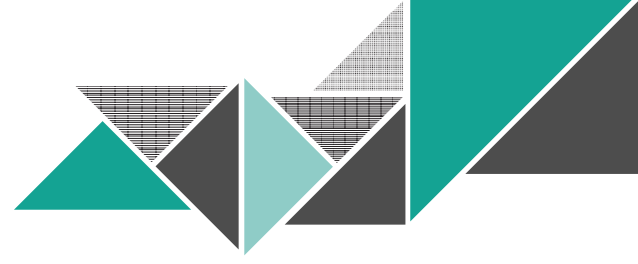
At the same time, the problem of fake news involves a key **economic** dimension, as it is fueled by the “click economy” driven by advertisement-based business models which monetize users’ attention. In this perspective, fake news is merely a way to gain people’s attention and increase the sharing and spread of content. Consequently, propositions that seek to “solve” the problem of fake news should holistically address these three aspects. Technical fixes alone can only contain the way in which fake news travels, while regulatory fixes tend to merely assign blame and penalize those deemed responsible. Neither of these responses comprehensively deal with the complicated ways in which information is consumed and shared in digital spaces from economic, social, technical, and political perspectives. This shared belief that policy responses need to address a multitude of phenomena related to how fake news is spread and consumed underlines our point that an interdisciplinary range of experts should be consulted and involved in governance around the subject.

Many of the experts interviewed from North America commonly echoed the belief that the “fake news problem” does not exist, but that the only real problem is the collective hysteria around the issue, spreading from government officials to the media to their audiences. As many of these interviewees predicted that the hype around this issue will not last, they caution that proposed “solutions” should be postponed until there has been time to better understand the issue and determine if it is indeed an issue that can be addressed through technical, legal or policy levers.

### REGULATORY INNOVATION TO COUNTER FAKE NEWS

According to the stakeholders interviewed for this project, most of the current measures to deal with fake news, especially top-down government regulation, are questionably effective and severely problematic when it comes to the potential effects on human rights. Additionally, many experts commented on how the fake news controversy brings to the surface and magnifies the tensions between national jurisdictions and a technology which is transnational in nature. There is broad consensus that current normative responses, “broad strokes government regulation”, “technological solutionism”<sup>103</sup> and/or “platform deletionism”<sup>104</sup> are the wrong way to go. Three main reasons emerged for criticizing these policy responses:

- The experts agreed that most of the solutions proposed thus far are likely to be **infeasible**. For example, the proposed US “Honest Ads Act”,



whereby each ad would have to display who paid for it, is likely to be very difficult to implement. In addition, national regulation is usually toothless when problems originate beyond national borders (e.g., Russian servers and ads are impossible to regulate from the US). In addition, the divergence in visions and the political tensions between countries might make joint measures across national borders impossible to achieve. Furthermore, national socio-cultural contexts differ (e.g., Western vs. non-Western), “so what is legally allowed or forbidden is one country is different in another country”.<sup>105</sup>

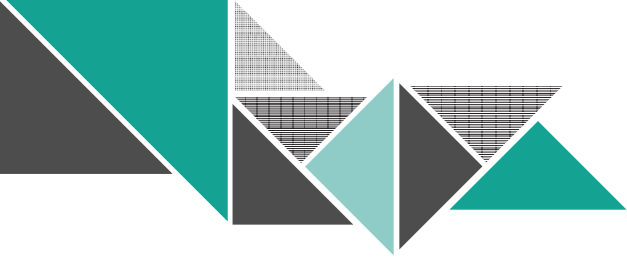
- Policymakers and “governments **do not understand technology** well enough (...) they are not going to be responsive enough because they are not on the battle lines dealing and moderating the content as it comes in”.<sup>106</sup>
- There is the risk of doing too much damage by **over-regulation and over-enforcement**. For example, according to an institutional representative, “when you start to have categories of content that are not allowed, there is always going to be the tendency to expand them”.<sup>107</sup> These decisions are very contentious by definition. In addition, an interviewee from the organized civil society pointed out, content regulation “can become weaponized by different groups against each other”.<sup>108</sup> Authoritarian governments, at minimum, might be tempted by the instrumentalization of online content regulation legislation. Over-regulation might also have the unwanted effect of curbing competition, as “regulation only adds more compliance costs that the new entrants have to pay to legitimately compete with existing dominant platforms”.<sup>109</sup> Finally, over-regulation might jeopardize the very same nature of the medium: “if what we see on the internet are just the comments that platforms have tacitly approved, it will kill the social significance of the internet as we know it”.<sup>110</sup>

While there was rough consensus among our experts on what constitute inappropriate regulatory approaches, there is a spectrum of what they consider appropriate regulatory mechanisms and/or innovative solutions. Our experts suggest acting at the level of existing power relations and the broad political economy of information and political communication. More specifically, the following patterns emerged from the interviews:

- **Existing legal frameworks** are sufficient to address the issue of fake news, and the exact extent to which they are relevant bears closer scrutiny. Many observed how “a lot of the time legislators

are so busy pushing through new initiatives that they are not focusing on the opportunities to enforce already existing laws that may just as well be the remedy”.<sup>111</sup> Instead, those interviewed largely agreed that legislators should first consider what tools they already have at their disposal. Examples of legislation that might apply include “anti-defamation, electoral laws about what can be discussed during election periods, laws on foreign interference and propaganda”,<sup>112</sup> but also existing regulation on the advertising market.

- **A soft approach** (e.g., guidelines, norms...) is to be preferred to “hard” laws; communication and cooperation across national borders should be encouraged, also in recognition of the impracticality of certain government solutions constrained by national borders. However, such a soft approach should refrain from “pushing social media platforms into “voluntarily” policing content”.<sup>113</sup> “Flexible protocols would allow within a certain corridor a peaceful coexistence among different national jurisdictions”; this, however, requires “a high level of tolerance and mutual recognition of the national differences”.<sup>114</sup>
- **Platform self-regulation** is the most appropriate regulatory approach according to experts who also expressed their skepticism about whether fake news is a problem (and were largely based in North America). The trust in self-regulation emerges from the belief that platforms want to service users in the best possible way, and will thus find an approach to regulation that is agreeable to users in the long run, through amending community guidelines and/or ToS, to eventually reach an equilibrium organically. According to one of these experts, however, self-regulation should not result in “social media companies becoming privatized law-enforcers”.<sup>115</sup>
- **Fact-checking** is considered potentially effective, especially when conducted by third parties, such as civil society organizations, civic projects, non-partisan watchdogs, think tanks and universities, trusted media organizations, or by “open APIs tracing back how information is shared in a social networks”.<sup>116</sup> However, according to one expert interviewed, “fact checking is just a fashionable word for old school journalism”.<sup>117</sup> The number of fact-checking institutions worldwide has increased by 239 percent since 2014<sup>118</sup>, which “indicates that citizens are already participating in solving the problem”.<sup>119</sup> However, fact-checking should be exercised with caution, as it “won’t work on things which are bad journalism, or bad ways of relating to politics, but don’t fit into this neat little box of ‘this is

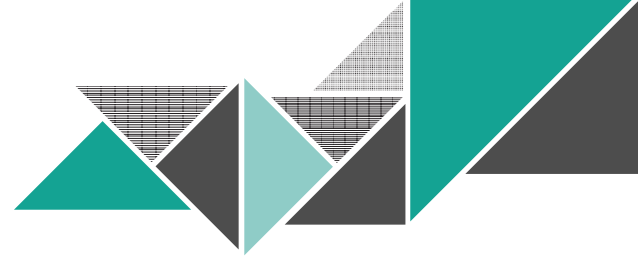


a lie’”.<sup>120</sup> The idea was also expressed that the core problem is the lack of faith in the political process, and that this faith needs to be re-established before thinking about fixing misinformation specifically.

- **Regulating the advertising market** and the way the “click economy” generates value are powerful measures in the hands of both platform operators and governments. Many experts believe that working towards constructing a healthier economy around online advertisements would improve the quality of political communication and of information circulated, and should be the primary goal of governments.<sup>121</sup> Examples include regulating the use of personal data for targeted advertising, e.g. by “limiting the maximum amount of advertisement in social media feeds similar to the limits in broadcasting”, and transparency measures “over which messages are targeted to which audiences”.<sup>122</sup>
- Few experts entertained the idea that **governments** could have a role to play in regulating fake news per se and emphasized that such regulation should be deliberate and carefully thought out. A pro-government perspective, however, does not automatically entail a pro-regulatory one. There is a counter-discourse that foresees another role for state institutions and regional bodies such as the European Union: that of re-establishing confidence into government institutions as a whole, as a prerequisite to a healthier digital public sphere.
- A **neutral third party**, such as independent courts or a professional “clearing house”,<sup>123</sup> as suggested by one expert, are key players to decide “what is just harmful and what is really illegal”, and to avoid “another form of censorship where a lot of controversial content risks being eliminated”. Decisions like this cannot be left to governments or companies; the latter, in particular, would be tempted to “take out everything that is critical” to avoid paying fines imposed by governments.<sup>124</sup> The involvement of third party checkers would also increase trust in platforms.<sup>125</sup>
- **Empowering users** is a recurrent theme from the interviews. It entails, for example, “listening to the users, seeing what their concern is and using that to change their community guidelines”.<sup>126</sup> It means “giving people the power to control what speech they hear and what they receive, rather than blocking people from speaking in the first place”. The assumption is that “the closer to the user the solution is, and the more within the control of the user, the less likely that it is inadvertently going to

have human rights spillover effects”.<sup>127</sup> In addition, assuming that users are powerless, as tends to be the case for much of the public discourse and legislation, is considered patronizing by many of the experts.<sup>128</sup> Interviewees noted that community reporting and/or policing has been in place for a long time in many online spaces such as Reddit and Wikipedia, and these kinds of user communities can empower individuals to develop community standards to deal with misinformation. Further, one expert argued that civic projects, startups and civil society organizations uncovering fake news, as well as media projects in under-served languages, need to receive adequate public funding in order to better combat misinformation in a variety of socio-political contexts.<sup>129</sup> Related to this, many experts encouraged media education and literacy programs within both formal and informal education settings.<sup>130</sup>

- **Transparency** was noted as a key factor in promoting a healthy approach to fake news, especially given that, according to one expert, “platforms already have their own sets of proprietary rules for moderating content and they make none of them transparent”.<sup>131</sup> The focus of the debate at the government level should shift from content regulation on platforms to more demands for transparency from platform operators on how they operate, how information is circulated, and what kind of content is removed. One interviewee specially called for government institutions to “mandat[e] more transparency from social networks over the spread of information”.<sup>132</sup> According to these experts, it is in the platforms best interests to autonomously decide to practice greater transparency when it comes to data collection and the steps being taken to combat fake news. Transparency should concern the tools used by platforms to regulate content, such as spam and keyword filtering, which tend to be “very imprecise and don’t allow for a sufficient level of granularity”, as well as community guidelines (“forward consent”).<sup>133</sup> If platforms make efforts to become more transparent, it is likely that there will be fewer calls for more formalized regulations around their content regulation practices. Finally, algorithmic transparency, inspired by the principles of science and traditional journalism, otherwise “you are making a knowledge claim in public but not telling people how you came up with that. Show your work, show the algorithm, the data, the code, or at the very least a description of those things”.<sup>134</sup> The Facebook Newsfeed FYI blog goes in this direction.



- **Multistakeholder mechanisms** derived from internet governance, rather than top-down initiatives, should form the baseline of any intervention. Norms, in particular, should take the form of “global principles” to be developed in a multistakeholder fashion “to guide all stakeholders including platforms, governments, standard development communities and civil society”.<sup>135</sup> The next section will more thoroughly delve into these ideas.

## AFTER FAKE NEWS: WHAT IS THE FUTURE FOR MULTISTAKEHOLDER GOVERNANCE?

As privatized infrastructure on the internet continues to dominate and alter the norms that have driven internet governance thus far, there is a need to take stock of how these changes may impact a variety of stakeholders, their role within governance structures, and the multistakeholder model itself. For this reason, we asked experts to specifically think through these issues and how multistakeholder structures could be strengthened within this debate. As noted above, the debate around fake news has contributed to raising public awareness about issues of media policy and governance. The experts interviewed suggested that this interest should be leveraged, and recognized that only a bottom-up, multistakeholder dialogue can produce effective, shared and lasting solutions that respect the rights of users. However, in current discourse, there seems to be only a tenuous link between the fake news debate and internet governance at large. Connecting the dots, our experts were invited to reflect on the governance challenges associated with the fake news controversy. The following areas for analysis were observed:

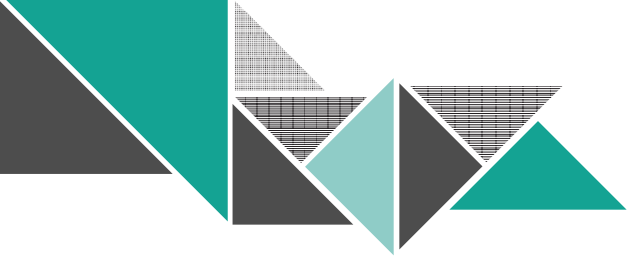
- There are **limited opportunities** for citizens, and individual users above all, to have a say in the fake news controversy, beyond raising concern and expressing public outrage. Platform operators autonomously set the rules for participation, which leaves users with little to no chances to make their voice heard outside of representational mechanisms within democratic political structures. As the only outlet for public participation, political processes are generally long-term, messy, and not applicable to users in non-democratic contexts.
- Current internet governance mechanisms are **no longer fit** for the challenge, due to the privatized nature of social media platform operations and the increased use of private contracting and self-regulation. The multistakeholder model in theory

presupposes a balanced playing field in which all stakeholders have equal opportunities to contribute to the debate and governance outcomes. However, it has become clear in many debates, beyond content regulation, that power and influence in these fora are weighted towards those actors with greater resources and those companies who control the platforms and architectures of the internet. This is a source of concern especially for those experts interviewed from academia and civil society.

- Multistakeholder participation is also made **more complex** by the fake news issue. In particular, the constituency of civil society, which is traditionally internally very diverse, has proven to be even more fragmented when it comes to discussing fixes to fake news, with distinct civil society organizations representing different social groups who might be more or less affected by a particular policy solution. These divisions in turn might jeopardize the ability of civil society at large to influence decision-making at various levels.
- **Unequal power relations** between stakeholders constitute a problematic aspect of participatory governance, exacerbated by the quasi-monopolistic power of big platform operators. While “it’s still better than doing things behind closed doors”, often “it is in the end just governments and big platforms and to make things appear more egalitarian you bring in some little NGOs or some academics”.<sup>136</sup>

The following solutions were proposed:

- According to the experts interviewed, the multistakeholder approach is the only viable approach to addressing fake news, as the complexity of the issues at stake call for shared solutions. In particular, the experts emphasized that it is the responsibility of social media corporations to engage in multistakeholder dialogues, or as one expert articulated, they “have to put themselves into the context of the multistakeholder approach, opening up any decision affecting user rights to the scrutiny of other stakeholders”.<sup>137</sup> This move could result in a flexible, coordinated response, which is to be preferred to “constitutional” solutionism.
- The multistakeholder community mobilized around internet governance should work to advance and develop forms of “collaborative governance” able to “broaden” the practice “from the few places where it exists at present”.<sup>138</sup>
- Participatory governance in the realm of the digital should be redesigned in view of **tilting the balance of power towards the user**. As civil



society representation is “the weakest element in the multistakeholder model”, experts urged those already engaging in internet governance spaces to “look for mechanisms to find new forms of meaningful representation for civil society and users”, “avoid the situation where the voice of the users is captured by special interest groups”, “enable civil society organizations to play a role”, and “find the right balance between representative democracy and participative democracy in cyberspace”.<sup>139</sup>

- As policymakers might have insufficient familiarity with the inner workings of platforms, a “higher level of **interaction between lawmakers and code makers**” is recommended. These kinds of interactions and attempts towards policymaker education could help lawmakers understand “what can be done and what is impossible”<sup>140</sup> as well as the actual technical implications of any proposed corrective measures, and even imagining alternative solutions.
- A multistakeholder exchange could produce protocols or **guidelines** that are flexible, adaptive, and can be widely applied across sectors. These efforts can also help with learning processes and spreading best practices across disciplines and jurisdictions.<sup>141</sup> In addition, any approach needs to take into account the specific needs and preferences of many different publics who have a stake in the issue, and this approach “is of the utmost importance in some non-Western contexts”.<sup>142</sup>
- Amongst the existent policy fora, the IGF in particular has a role to play, for example by providing shared documents that can inform decision-making at the government level.
- Academia, as part of civil society, can help by “**creating awareness**, raise the level of sensibility among stakeholders, preparing the stakeholders so that they understand better what are the positions of others (...) As more or less service providers, academics demonstrate various options, but they are not decision makers”.<sup>143</sup>

## RECOMMENDATIONS FOR A BALANCED APPROACH TO FAKE NEWS

Building on our empirical data, we have compiled a set of recommendations on how to implement a balanced approach to fake news, with particular attention to online content regulation. The recommendations are

specific to distinct stakeholder groups, in recognition of the distinct roles each stakeholder group can play in the process.

### INTRODUCTION

The following recommendations intend to encourage a responsible, coordinated reaction to the issue of “fake news”. They put forward measures to make sure that any proposed remedy follows three principles: i) it puts users in the driver seat, foregrounding their needs and preferences; ii) it respects human rights and promotes their enjoyment *also on* social media platforms; iii) it is the result of (at least rough) consensus amongst all parties with a stake in the process.

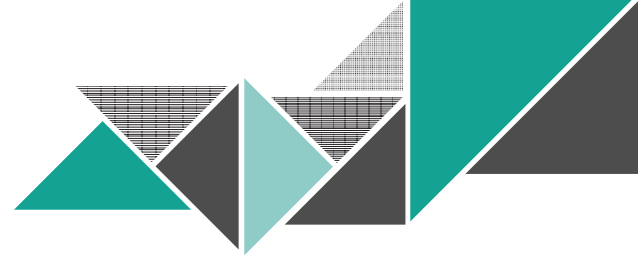
Our starting point is the user, which we consider to be at the core of the process; other players include state entities, whose duty it is to promote the respect of human rights; platform operators and other private actors such as newsrooms, public education institutions, and organized civil society, including but not limited to digital rights and digital literacy organizations.

These recommendations are to be seen as complementary to other guidelines that affect the operations of the social media industry, and in particular the *UN Guiding Principles on Business and Human Rights* and the *Recommendations on Terms of Service and Human Rights* of the IGF Dynamic Coalition on Platform Responsibility.

### GOVERNMENTS AND REGULATORS

- Any attempt to restrict the freedom of expression must be in adherence with international human rights guidelines and must not restrict legitimate speech.
- Restrictions on freedom of expression should pursue a legitimate aim and be necessary and proportionate to the end goal that they purport to serve. They should be accompanied by adequate redress mechanisms. Any restrictions beyond these constitute over-regulation of content.
- Before pursuing novel, hasty solutions, governments should assess whether pre-existing laws or guidelines could be applied to the digital environment and/or social media corporations.
- Whenever possible, guidelines and “soft





approaches,” which are more easy to adapt over time to reflect technological innovation, are to be preferred to constitutional solutions.

- Governments must not exert pressure on private platforms to censor legitimate speech in the name of curbing fake news, misinformation or hate speech. Instead, they should encourage open and accountable channels of communication with platform operators.
- Rather than placing regulatory responsibility in the hands of private actors, governments should demand transparency from social media platforms, requiring them to be open about their handling of user data and their efforts to curb misinformation or hate speech.
- Regulators and law enforcement should also embrace transparency and release regular reports about their demands to social media platforms, in particular with respect to “notice and take down” requests following court orders.
- Corrective measures should be sufficiently robust to meet the challenges of rapidly evolving technologies.
- Governments should consider the promotion of competition as a way to ensure a better service for the users. Laws setting high regulatory bars in content policing might contribute to consolidating the power of major platforms, making it difficult for smaller companies to break into the market.
- Policymakers, law enforcement and local administrations should receive adequate and up-to-date training to be empowered to understand the mechanisms and the challenges of platforms and online speech.
- Governments should invest in news and digital literacy programs targeting diverse age groups, from school children to adults and the elderly. Schools, libraries, civil society organizations as well as the industry are natural partners in such an endeavor. Literacy programs should be tailored to different needs and adequately funded.

## PLATFORMS OPERATORS

- Platform operators should refine their business models to explicitly take into account their corporate responsibility obligations, in light of existing human rights law and the *UN Guiding Principles on Business and Human Rights*.
- Platform operators should empower their users to make informed choices about their participation,

providing adequate, accessible and up-to-date information and educating them on the ways in which their experience on the platform is curated. Users must be able to opt out and take their personal data with them.

- Private platforms should adapt their Community Guidelines and Terms of Services on international human rights law and state-of-the-art legislation when it comes to the matter of data protection and user rights more in general.
- Platform operators must build a legacy and practice of transparency with respect to the platform’s functioning, with the end goal of enhancing public scrutiny and accountability for their actions. Areas of accountability should range from algorithmic curation to revenue from advertisements. Examples of accountability mechanisms include the publication of transparency reports/evidence regarding privacy breaches, third party data re-use, and the occurrence of “fake news,” among other issues.
- Platform operators should consider setting up national, independent ethics boards in the countries where they operate, to provide expert oversight in order to facilitate the analysis of the ethical implications of business models and data re-use practices, in accordance with national and international law.
- Platform operators should consider funding news and digital literacy programs, in cooperation with other stakeholders and civil society in particular.

## ORGANIZED CIVIL SOCIETY

- Organized civil society should exert consistent pressure on, and work with technology companies to enhance transparency and accountability of platforms.
- Organized civil society should embrace its role as watchdog for governments as well as platform operators that erode freedom of expression by placing unreasonable restrictions on legitimate speech.
- Organized civil society should engage with consumers and users in order to better inform them about the information they consume, encouraging and enabling them to take a critical stance towards their “information diets”.
- Organized civil society, and digital rights organizations in particular, should support efforts to run periodic independent assessments of



the operations of private platforms, including independent “audits” of the algorithms supporting content curation on social media platforms.

- Organized civil society should take an active role in fostering news and digital literacy amongst citizens and users of social media platforms.

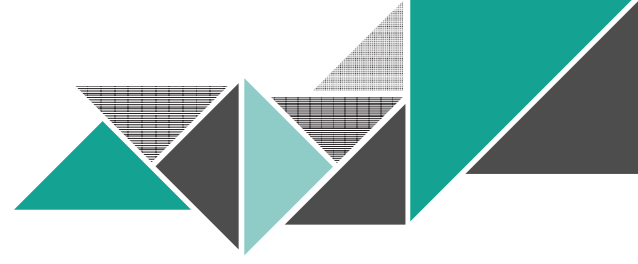
## IN CONCLUSION

This project set out with the intent of taking stock of the current debate on online content regulation, taking fake news as a case study. It also sought to determine the governance capabilities at our disposal to address such a complicated set of issues at the intersection of the social, technological and legal realms. To this end, we undertook a truncated multistakeholder consultation involving twenty experts from four stakeholder groups, namely academia, civil society, governments and the industry. We also analyzed how three large democracies—Brazil, Germany and India—have responded to the problem of online disinformation through a mix of jurisdictional and other means. We concluded by offering a set of recommendations for a balanced approach to fake news, which foreground an active role for users and the imperative to protect human rights and their enjoyment *also on* social media platforms. Amongst the proposed measures, we wish to emphasize the **enormous potential of media and technology literacy programs**: they could help users, on the one hand, to familiarize themselves with the workings of platforms that play such an important role in their lives, and, on the other, to take a critical approach to information consumed online and its sources.

While we, too, agree that a multistakeholder involvement is the only way to go if we are to find concerted solutions that are implementable, resilient to time and acceptable to all stakeholders, we raised the problem of the procedural fitness of the multistakeholder model. As it is currently implemented, this model presents multiple shortcomings, not least the power unbalances existing between stakeholders and the inability to shape the rules at work in privately-owned platforms. However, **the current excitement around fake news provides a great opportunity to rethink the multistakeholder model**, and to include in the effort users who normally remain distant from policy arenas. We believe this is also a good time to encourage the industry to open up to the inputs of other stakeholders, and the organized civil society in particular.

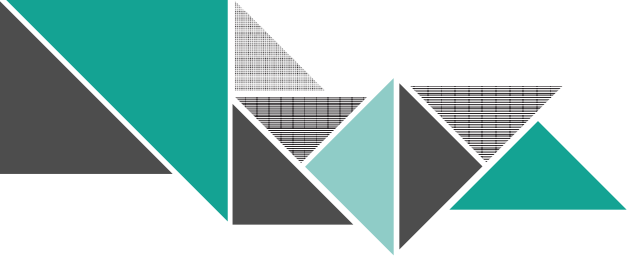
The research *Content Regulation on and by Platforms: Rethinking Internet Governance vis-à-vis the Platformization of the Web* (Principal Investigator Stefania Milan) was supported by a grant of the Internet Policy Observatory, Annenberg School of Communication at the University of Pennsylvania, as part of the *Joint Digital Rights and Internet Freedom Research/Advocacy Projects call 2017*. Contact: s.milan@uva.nl and vidushimarda@gmail.com. The authors thank Ms. Alexandra Deem (University of Amsterdam) for her assistance with data collection and Mr. Sergio Barbosa dos Santos Silva (Universidade de Coimbra) for helping with references.

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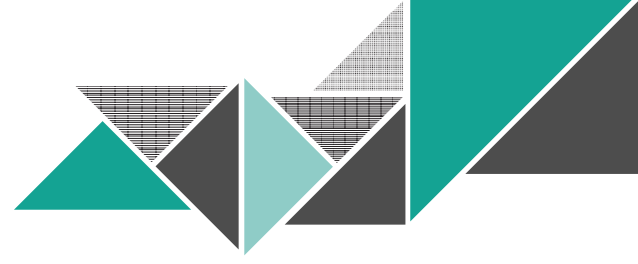


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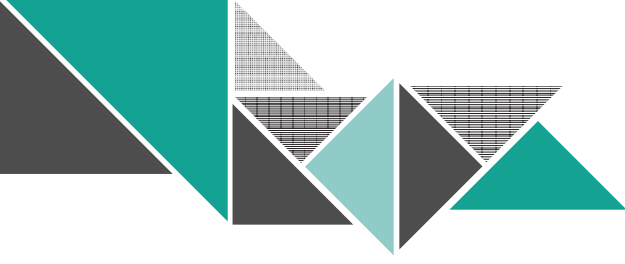
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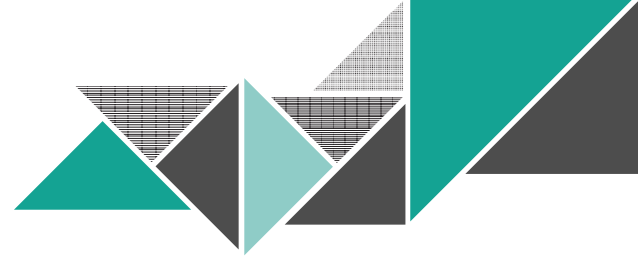
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  97. Interview with representative of academia, February 14 2018.
  98. Interview with representative of academia, February 9 2018.
  99. A couple of interviewees likened the current fake news controversy to the advent of the printing press, where the Catholic Church monopolized the ability to publish although the technology has the potential to democratize knowledge and communications. There, the problem was not the technology itself, but the people or the institution trying to capture that technology.
  100. Interview with civil society representative, March 14 2018.
  101. Interview with civil society representative, February 9 2018.
  102. Interview with institutional representative, April 24 2018.
  103. Interview with representative of academia, February 9 2018.
  104. Interview with representative of academia, February 16 2018.
  105. Interview with representative of academia, February 14 2018.
  106. Interview with civil society representative, February 9 2018.
  107. Interview with institutional representative, February 13 2018.
  108. Interview with civil society representative, February 10 2018.
  109. Interview with representative of academia, February 16 2018.
  110. Interview with representative of academia and civil society, February 17 2018.
  111. Interview with institutional representative, January 30 2018.
  112. Interview with civil society representative, February 9 2018.
  113. Interview with institutional representative, March 7 2018.
  114. Interview with representative of academia, February 14 2018.
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  116. Interview with institutional representative, March 7 2018.
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  118. See <https://reporterslab.org/fact-checking-triples-over-four-years/>.
  119. Interview with industry representative, March 7 2018.
  120. Interview with representatives from academia, February 16 2018.
  121. Interview with representative of academia, February 16 2018.
  122. Interview with institutional representative, March 7 2018.
  123. Interview with representative of academia, February 16 2018.
  124. Interview with representative of academia, February 14 2018.
  125. Interview with civil society representative, March 14 2018.
  126. Interview with representative of academia, February 16 2018.
  127. Interview with civil society representative, February 3 2018.



128. Interview with civil society representative, February 3 2018.
129. Interview with institutional representative, March 7 2018.
130. Interview with representative of academia, February 16 2018.
131. Interview with civil society representative, February 21 2018.
132. Interview with institutional representative, March 7 2018.
133. Interview with civil society representative, February 21 2018.
134. Interview with representative of academia, February 9 2018.
135. Interview with civil society representative, February 15 2018.
136. Interview with representative of academia, February 16 2018.
137. Interview with representative of academia, February 14 2018.
138. The Collaborative Governance Project of the Internet Society goes in this direction: through a mix of training, norm development and the promotion of academic research on the topic, it seeks at 'expand the global knowledge and use of collaborative governance processes to solve problems and develop norms'. See <https://www.internetsociety.org/collaborativegovernance/>.
139. Interview with representative of academia, February 14 2018.
140. Interview with representative of academia, February 14 2018.
141. Interview with institutional representative, March 7 2018.
142. Interview with representative of academia, February 16 2018.
143. Interview with representative of academia, February 14 2018.



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