Abstract panic: On fake news, fear and freedom in Southeast Asia

Lasse Schuldt

14.04.2020 doi: 10.17176/20200415-032701-0

What does it take to start a panic? An ancient Greek god just needed to shout into the midday's quiet. More recent culprits may have claimed that "There's a bomb!" at the train station. In the era of Covid-19, governments and people around the globe believe that "fake news" about the virus could trigger public anxiety. A German state minister of the interior thus demanded criminal responses. Hungary's government has taken steps to enable prosecutions.

In Southeast Asia, which is the world's most dynamic laboratory of fake news legislation, the corona crisis has put previously created laws to practice and sparked additional legislative activity. The professed goal is to prevent public panic. Recent enforcement actions, however, demonstrate the complete irrelevance of any panic indicators. A falsehood's panic potential is simply assumed. In short, an abstract panic threat is fought with very concrete measures: Arrests and criminal prosecutions. Cases from across Southeast Asia prove the trend, whereas two decisions in Singapore deserve particular attention.

Arrests, prosecutions and more laws

In March, an Indonesian woman was arrested after she claimed on Facebook that a person was being treated for the virus in the city of Surabaya. Five others were detained for spreading the apparently false information that a woman had died from Covid-19 at Jakarta's international airport. Police in Cambodia arrested a woman who shared a Facebook post, according to which a family in her province had the coronavirus. Several other people have been detained, including opposition politicians and supporters. Vietnam has introduced considerable fines for spreading false information that, among other alternatives, causes confusion among the people. Hundreds have been fined already. For instance, persons who shared posts claiming that a hospital was treating patients for the virus or that a returnee from China had contracted it, were punished accordingly. The cases listed here have in common that the competent authorities were not required to prove the actual likelihood of a public panic. Their very own perception of an abstract threat was sufficient.

The Malaysian government has recently published "fake news" samples for which investigations had been opened. The alleged falsehoods included claims that the defense ministry would seek the help of veterans, that hospitals and the health ministry were requesting donations, or that a specialist doctor had died of Covid-19. To increase governmental efficiency, an anti-falsehood quick response team has been formed. As Malaysia's Anti-Fake News Act of 2018 was finally repealed last December, criminal prosecutions are currently mostly based on Sec. 505(b) of the Penal Code, prohibiting statements conducing to public mischief, and on Sec. 233 of the Communications and Multimedia Act which criminalizes, among other alternatives, false communications when undertaken "with the intent to annoy, abuse, threaten or harass another person." No concrete threat to protected interests needs to be proven.

The Philippines have just enacted an ad-hoc anti-fake news law. On 24 March, Congress passed the "Bayanihan to Heal As One Act" (Republic Act No. 11469), giving the president emergency powers to handle the Covid-19 outbreak. Sec. 6(f) of the Act declares it punishable with imprisonment of two months or a fine to create, perpetrate or spread "false information regarding the COVID-19 crisis on social media and other platforms, such information having

no valid or beneficial effect on the population, and are clearly geared to promote chaos, panic, anarchy, fear, or confusion." Sec. 154 of the Revised Penal Code, which criminalizes the publication of false news that may "endanger the public order, or cause damage to the interest or credit of the State" is also used in conjunction with Sec. 6 of the Cybercrime Prevention Act to prosecute corona-related "fake news". A draft Anti-False Content Act introduced by Senate President Vicente Sotto III. is currently pending in the respective committee.

Philippine scholars have raised the question whether the provisions satisfy the "clear and present danger" test adopted by the Supreme Court of the Philippines (see, for example, *Chavez v. Gonzales*) to assess whether the prior restraint of free speech passes constitutional muster. It might be doubtful, however, whether the laws cited above constitute prior restraint. Rather, the constellation appears to concern the freedom from liability subsequent to publication, for which it may be sufficient to prove a substantial governmental interest. In addition, in *Chavez v. Gonzales*, then Chief-Justice Puno stated in passing (in footnote 53) that freedom from liability subsequent to publication applies to "innocent" discussions that "must be truthful, must concern something in which people in general take a healthy interest, and must not endanger some important social end that the government by law protects".

In practice, the Philippine police has arrested and charged dozens of people for sharing "fake news" on Covid-19. In one case, a mayor and two journalists were charged under the new Act for the spread of false information on an alleged first coronavirus case in Cavite city. The police's Cyber Crime Group was certain: "The unverified post has caused panic among citizens of the city."

The Thai government has declared an emergency since 26 March. A related Stipulation (in Thai) prohibits anyone from spreading false information about the Covid-19 situation in Thailand, creating public fear, and from distorting information in a manner that could create misunderstanding leading to disturbances of public order or good morals. Violations of this prohibition trigger criminal liability entailing a fine or imprisonment under the Computer Crime Act or the Emergency Decree on Public Administration in Emergency Situations. This comes in addition to existing anti-falsehood legislation in Sec. 14 of the Computer Crime Act, which had been declared constitutional by Thailand's Constitutional Court some years ago. Several persons have been arrested for spreading corona-related "fake news". One claimed that an infected patient had died, another posted a video of a person collapsing in public, along with the apparently false information that Covid-19 was the cause. Despite this alleged "infodemic", and except for a few occasional toilet paper shopping sprees, the Thai people have remained largely calm.

Panic in the eye of the beholder

The law and practice of fighting "fake news" in Southeast Asia thus exhibits a strong tendency to assume that damage to protected interests will occur, that people will be "confused", or that panic will ensue. Proof is not required. How a given number of recipients in fact think about or react to a piece of information is irrelevant. These findings appear to stand in contrast to the actual character of "fake news" as a discursive crime, comparable in this regard to defamation. As David Streckfuss (Truth on Trial in Thailand, 2010) has put it: "Other crimes are completed upon their commission; crimes of defamation are completed when the poison of subversion enters the mind of the audience. When someone is killed by another, it is murder. But discursive crimes need an audience before the crime can occur" (p. 23). Thus, the recipients' reaction should indeed be the key element to determine liability. In practice, it does not matter at all.

This is hardly surprising as courts and executive authorities do not have the time and resources to conduct empirical studies or opinion polls to determine the public mood in response to specific statements. Instead, they adopt an "objective" view, taking the perspective of a "rational observer", and substitute the people's real reaction with an assumption of what *should* be their response. Consequently, when courts are called to assess whether a breach of public peace

was likely to occur, they need "prophetic powers and loose logic [...] to predict what kinds of words might create such a breach" (Streckfuss, p. 53).

As for the crime of defamation, one might have developed a certain gut feeling about the kind of pejorative or insulting statements that could affect a person's reputation in society. But it appears to be an entirely different task to predict whether the distribution of a certain piece of false information "is likely to damage the maintenance of national security, public safety, national economic security or public infrastructure serving national's public interest or cause panic in the public" (Sec. 14(2), Computer Crime Act of Thailand).

Alas, this inherent problem of discursive crimes will remain unresolved. Courts will continue to assume and predict the course of events *ex post facto*, leading to the almost schizophrenic situation that, for instance, a public panic is likely in the abstract whereas the concrete *ex-post* evidence speaks to the contrary. To be sure, criminal law may indeed distinguish between abstract and concrete threats. But the insistence on an abstract likelihood of a panic certainly becomes less and less convincing the longer this predicted panic refuses to materialize as the people, stubbornly, stay calm and go about their business.

Singaporean attention to detail

In Singapore, two recent cases – though not corona-related – have shown that the country's High Court does not even have the power to make abstract impact assessments. The background: The Singaporean parliament enacted the Protection from Online Falsehoods and Manipulation Act (POFMA) last year. The law has been used several times since it came into effect in October. POFMA provides for various measures to prevent the communication of false statements. These include, *inter alia*, criminal liability, different forms of correction directions or the possibility to disable access to a certain online location. Ministers are empowered to issue specified orders to protect the security of Singapore, public health, safety, tranquility or finances, international relations, presidential or parliamentary elections or referenda, peaceful relations between different groups, or the public confidence in the performance of the duties and functions of the state. An addressee of a direction under Part 3 of the Act can apply to the respective Minister to vary or cancel it. If the Minister refuses, the addressee can appeal to the High Court (Sec. 17) by way of an originating summons.

The first two High Court decisions on POFMA correction directions (*Singapore Democratic Party v Attorney-General* and *The Online Citizen Pte Ltd v Attorney-General*), both from February, are highly instructive for a deeper understanding of the Singaporean anti-falsehood mechanism. It is particularly striking that the court may only set aside a direction on one of three grounds (Sec. 17(5)): The person did not communicate in Singapore the subject statement; the subject statement is not a statement of fact, or is a true statement of fact; or it is not technically possible to comply with the respective direction. Thus, the key question whether any of the enumerated public interests was, at least abstractly, affected is not for the High Court to be reviewed. Consequently, the competent Minister enjoys unfettered discretion in this regard.

This state of affairs led the judge in the SDP case to the awkwardly meticulous assessment of how to understand and interpret the subject statement in question ("a rising proportion of Singapore PMETs [professionals, managers, executives and technicians] getting retrenched"). Several different approaches are discussed in much detail before the thus consolidated meaning is compared to existing governmental data. The 53-pages judgment goes into great length to take the statement apart, analyze each of its elements, to come to the final verdict that it was false. The much more interesting question, however, namely what impact this statement could have had on public opinion – it was first published on the party's website and then referred to in two of the party's Facebook posts – remains entirely in the dark. To be sure, the High Court is barred by law from making such assessment.

But the two cases also raised the more fundamental question whether false statements of fact are protected by the constitutional guarantee of free

speech at all. The judge in the SDP case considered that the Minister's correction direction constituted a restriction of free speech. Consequently, he argued that the Minister should bear the burden to prove that the statement was false (SDP judgment, para. 37). The judge in The Online Citizen (TOC) case, however, disagreed with this finding. Not only did she find that the correction direction did not restrict free speech as the direction did not prevent the statement-maker from maintaining the original text (TOC judgment, para. 36). More categorically, she held that "the nature of the speech in question is not in the categories of speech covered by Art 14 [protecting free speech]" (TOC judgment, para. 35).

Thus, we arrive again at the very fundamental question whether anti-fake news laws actually constitute a restriction of free speech. As we have seen, the Philippine Supreme Court has put a strong emphasis on the truth, without however saying whether falsehoods are outright excluded from constitutional protection. In other Southeast Asian countries, the question appears to be unsettled as well.

Conclusion

Recent practice has shown that Southeast Asian anti-falsehood laws do not require measuring the public impact of individual statements. Executive and judicial authorities enjoy vast powers to make their own assessments. The consequences will become increasingly visible throughout the corona crisis. The war on "fake news" has found a major battleground.

ABOUT THE AUTHOR

Lasse Schuldt

Dr. Lasse Schuldt is Assistant Professor of Law at the Faculty of Law, Thammasat University, Bangkok.Dr. Lasse Schuldt is Assistant Professor of Law at the Faculty of Law, Thammasat University, Bangkok.

SUGGESTED CITATION

Schuldt, Lasse: Abstract panic: On fake news, fear and freedom in Southeast Asia, Verfassungsblog, 14.04.2020, doi: 10.17176/20200415-032701-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20200415-032701-0.