



ADVOCATES FOR FREEDOM OF EXPRESSION COALITION-SOUTHEAST ASIA (AFEC-SEA)

“...freedom of expression is a fundamental human right since as human beings we yearn to express our own humanity.” -CEBU DECLARATION¹

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Hon. Sen. GRACE POE <gracepoe2013@gmail.com>

Chairperson

Senate Committee on Public Information and Mass Media

Senate of the Philippines

GSIS Building, Financial Center, Diokno Boulevard, Pasay City

AFEC-SEA
AND
CENTERLAW PHILIPPINES:

SENATE BILL NO. 1492 ON THE CRIMINALIZATION OF FAKE NEWS IS POTENTIALLY
UNCONSTITUTIONAL
AND
INCOMPATIBLE WITH THE PHILIPPINES' TREATY OBLIGATIONS
UNDER THE ICCPR

Dear Sen. Poe:

Greetings!

The Advocates for Freedom of Expression Coalition Southeast-Asia (AFEC-SEA) and its NGO-members lead by CenterLaw Philippines express *grave concern* over Senate Bill No. 1492 (SB 1492) or “*An Act Penalizing the Malicious Distribution of False News and Other Related Violations.*” It is the legal position of AFEC-SEA that SB 1492 is potentially unconstitutional and incompatible with the Philippines’ treaty obligation under Article 19 of the International Covenant on Civil and Political Rights (ICCPR), for the following reasons.

1. SB 1492 AS CURRENTLY WORDED IS OVERBROAD AND IS POTENTIALLY UNCONSTITUTIONAL, IF PASSED, FOR BEING INCONSISTENT WITH SECTION 4, ARTICLE III OF THE 1987 CONSTITUTION.

THE STATE MUST ENSURE THE RESPECT AND PROMOTION OF THE RIGHT TO FREEDOM OF EXPRESSION AS ENSHRINED IN THE 1987 CONSTITUTION AND AS PROVIDED BY INTERNATIONAL HUMAN RIGHTS LAW.

Section 4, Article III of the 1987 Constitution provides that:

“Section 4. No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.”

Further, Article 19(2) of the ICCPR provides that:

“2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

SB 1492, as currently worded, is overbroad and is potentially unconstitutional, if passed, for being inconsistent with Section 4, Article III of the 1987 Constitution. SB 1492, if passed, at its core is essentially a law that will abridge freedom of speech and of expression, in direct contravention of Section 4, Article III of the Constitution. Even if we disagree with fake news and hate it, nevertheless, it is a basic dictum of the right to freedom of expression that the antidote to speech that we hate is not less speech but more speech.¹ In the same vein, the antidote to fake news is not to criminalize fake news but rather to expose its falsity, and to present the truthful facts.

2. CRIMINALIZATION OF SPEECH IS INCOMPATIBLE WITH THE RIGHT TO FREEDOM OF EXPRESSION (FOE).

SB 1492, if passed, is criminalization of speech that is incompatible with the right to freedom of expression. Four Special Rapporteurs of different international organizations, including the United Nations Special Rapporteur on Freedom of Expression, stated in their **Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda** that:

- a. General prohibitions on the dissemination of information based on vague and ambiguous ideas, including “false news” or “non-objective information”, are incompatible with international standards for restrictions on freedom of expression, as set out in paragraph 1(a), and should be abolished.²

¹*Iglesia ni Cristo v. CA*, G.R. No. 119673, July 26, 1996.

² Par. 2a Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda [“Joint Declaration”]

These four Special Rapporteurs from the UN, Organization for Security and Cooperation in Europe (OSCE), Organization of American States (OAS), and the African Commission on Human and People's Rights (ACHPR), in cooperation with ARTICLE 19 and the Centre for Law and Democracy, took note of the prevalence of disinformation and propaganda in legacy and social media, and published their Joint Declaration to address this problem while taking prime consideration of international human rights standards.

In fact, the current Philippine criminal laws are enough, and even excessive, regulation against speech. The Philippines has criminal laws against libel, slander, incitement to sedition, and even offending religious feelings. These criminal laws are more than enough to address the concerns brought about by fake news. In fact, these criminal laws should already be considered as excessive as international human rights law encourage the decriminalization of speech-based offenses such as libel.

In *Adonis vs. The Philippines*,³ the United Nations Human Rights Committee stated that “States parties should consider the decriminalization of defamation and, in any case, the application of criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.”⁴ Rather than expanding criminal laws to include the criminalization of alleged “fake news,” the Philippines should rather consider decriminalizing libel consistent with the recommendation of the UN Human Rights Committee in *Adonis vs. The Philippines*.⁵

3. SELF-REGULATORY MECHANISMS BY NETIZENS, INTERNET USERS, INTERMEDIARIES AND MEDIA ORGANIZATIONS ARE A BETTER OPTION TO COUNTER FAKE NEWS.

There are self-regulatory mechanisms among media outlets and social media intermediaries to address the potential dangers of fake news. For instance, Facebook has a mechanism where users themselves can report posts as offensive. These posts are then evaluated with reference to the community standards of Facebook. Mark Zuckerberg in his Facebook post, dated 19 November 2016, addressed the growing concern about fake news. He stated that “[they] do not want to be arbiters of truth [them]selves, but instead rely on [their] community and trusted third parties.” He then outlined the projects of Facebook to address these concerns, such as stronger detection, easy reporting, third party verification, warnings, related articles quality and disrupting fake news economics.

In the local scene, VERA Files has a fact-checking mechanism.⁶ Through this system, VERA Files is able to fact-check false claims and detect the flip-flopping of politicians and public figures. The system shows promise on how local media outlets can develop internal means to detect fake news.

³*Alexander Adonis v. The Philippines*, Communication No. 1815/2008, U.N. Doc. CCPR/C/103/D/1815/2008/rev.1 (2012).

⁴ Par. 7.9, *Alexander Adonis v. The Philippines*, Communication No. 1815/2008, U.N. Doc. CCPR/C/103/D/1815/2008/rev.1 (2012).

⁵*Alexander Adonis v. The Philippines*, Communication No. 1815/2008, U.N. Doc. CCPR/C/103/D/1815/2008/rev.1 (2012).

⁶<http://verafiles.org/articles/what-you-want-know-about-vera-files-fact-check>

Local media outlets also usually have the “internal ombudsman” mechanism to monitor and ensure the compliance of media companies and practitioners to the highest of legal and journalistic standards. Twitter also responds to reports by users by suspending accounts that do not comply with their own community standards. YouTube also deletes *motu proprio* videos that are ostentatiously illegal such as child pornography and terrorist propaganda.

4. THE PHILIPPINES HAS THE DUTY TO PROMOTE AND PROTECT THE FREE MARKETPLACE OF IDEAS.

States have a positive obligation to promote a free, independent and diverse marketplace of ideas. While the dissemination of knowingly or recklessly false statements is not justified, the human right to information and ideas is not limited to what the State may deem as “correct” statements, but also speech that may “shock, offend and disturb.”⁷ In *Iglesia ni Cristo vs. CA*,⁸ former Chief Justice Reynato Puno emphatically stated:

“When the luxury of time permits, the marketplace of ideas demands that speech be met with more speech for it is the spark of opposite speech, the heat of colliding ideas that can fan the embers of truth.”

5. THERE SHOULD BE NO INTERMEDIARY LIABILITY FOR THIRD PARTY-CONTENT

SB 1492, if passed, will provide for criminal liability and/or intermediary liability for third-party content. We reiterate the Joint Declaration of the Four Special Rapporteurs that there should be no intermediary liability for any third-party content:

- b. Intermediaries should never be liable for any third party content relating to those services unless they specifically intervene in that content or refuse to obey an order adopted in accordance with due process guarantees by an independent, impartial, authoritative oversight body (such as a court) to remove it and they have the technical capacity to do that.⁹

6. WE MUST ADOPT A HUMAN-RIGHTS BASED, MULTI-STAKEHOLDER APPROACH IN ADDRESSING FAKE NEWS.

A human rights based approach is essential in addressing fake news. Further, the different stakeholders on speech and online communication- including intermediaries, media outlets, civil society and academia, should be participatory in the crafting of potential legislation to address fake news. These resources must be tapped to create a better understanding of the impact of fake news and their impact on the right to freedom of expression.

⁷Whereas Clause, Joint Declaration

⁸*Iglesia ni Cristo v. CA*, G.R. No. 119673, July 26, 1996.

⁹ Par. 1d Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda [“Joint Declaration”]

Consequently, AFEC-SEA *urgently calls* on the Philippine Senate *not to* pass SB 1492, to be consistent with the Philippines’ commitment to protect and uphold the right to freedom of expression as guaranteed under Section 4 Article III of the 1987 Constitution and under Article 19 of the International Covenant on Civil and Political Rights (“ICCPR”). Further, since freedom of expression is a fundamental human right, it is the duty of the Philippine Senate to protect such right. To echo the Cebu Declaration, “...*freedom of expression is a fundamental human right since as human beings we yearn to express our own humanity.*”¹⁰ AFEC-SEA fervently hopes that the Philippine Senate will seriously consider this Legal Position Paper.

Sincerely,

GILBERT T. ANDRES

Chairperson
AFEC-SEA

NOTE—AFEC-SEA is a regional NGO established by reason of the Cebu Declaration,¹¹ which was signed in Cebu, Philippines on 27 September 2015 by these NGO charter members:



¹⁰The Cebu Declaration or the “Cebu Declaration on the Right to Freedom of Expression as a Fundamental Human Right and its importance to the Southeast Asia Region” was signed in Cebu, Philippines on 27 September 2015 by 10 NGOs from five Southeast Asian countries (Philippines, Malaysia, Indonesia, Thailand, and Myanmar).

¹¹27 September 2015 “Cebu Declaration on the Right to Freedom of Expression as a Fundamental Human Right and its Importance to the Southeast Asia Region.”