Media and Freedom of Expression

Greyscales

Ukraine's Challenging Task in Combatting Disinformation
while Protecting Freedom of Expression

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After years of hybrid warfare, the Kyiv government is cracking down on pro-Russian media, whose owners it accuses of supporting the "People's Republics" in the east of the country. But its decision-making process is raising questions. How can Ukraine effectively defend itself against disinformation campaigns without setting dangerous precedents or disproportionately restricting freedom of expression?

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Ukraine has found itself under heavy pressure for many years after the Maidan Revolution, the illegal annexation of Crimea, and the war in eastern Ukraine that was to a large extent instigated by Russia. The international community was reminded of this in April 2021, when Russia temporarily massed more than 80,000 troops in Crimea and along its almost 2,300 kilometres-long border with Ukraine.[2] Belarusian units were also mobilised on Ukraine's northern border, just like a Russian military task force in Transnistria, a breakaway statelet from Moldova, where these troops officially serve as peacekeepers.[3] As a result, Ukraine found itself caught in a pincer grip – a situation that has changed little, despite the subsequent withdrawal of some Russian troops.

Far removed from the international headlines, however, reports about new victims of the conflict have been a steady monthly or even weekly occurance in Ukraine itself. Close to 3,400 civilians and over 4,400 Ukrainian military personnel have been killed since 2014. Moreover, the country has to bear the economic costs of the military operation in Donbas, amounting to some seven million US dollars a day.[4]

Ukraine is also the target of coordinated disinformation campaigns, which range from biased reporting to deliberate exaggeration or even outright fake news.[5] However, Russian state media are by far not the only actors involved here. Ukrainian media outlets and influential people with huge social media followings are also actively involved in deepening the strong polarisation that already exists in the country

via insinuation, exaggeration, and fake news.[6] Some of them also parrot Russian narratives about the conflict in the east of the country, claiming, for example, that the West is using Ukraine as a staging ground for invading Russia, or that the Kyiv government is dominated by fascists. It is also often implied that the annexation of Crimea and Moscow's intervention in Donbas in 2014 prevented a massacre of the Russian-speaking population by the Ukrainian army (which, of course, also includes large numbers of Russian-speaking Ukrainians).[7]

As part of this narrative, in April 2021, the word went round that a Ukrainian combat drone had killed a young boy in separatist-controlled territory in Donbas. Civil society fact-checking organisations soon ascertained that the events took place outside the direct combat zone and far beyond the range of Ukrainian drones. Witnesses at the scene reported an accident after a child found explosives stored by a local collector. A photo supposedly showing the boy had already appeared in 2014 to illustrate alleged civilian victims of the Ukrainian army. Other narratives claim that the US army is conducting experiments on the Ukrainian population in secret laboratories, and that men like George Soros and Bill Gates are secretly controlling the country.[8]

All this has changed the Ukrainian media space, which traditionally encompasses a broad spectrum of opinion with strong, independent research platforms, albeit also subject to oligarchic influence, especially in the TV market.[9] To some extent, the media has seen the emergence of parallel societies with fundamentally different

views on key political, social and economic issues. However, rifts in Ukrainian society are nothing new. Some explain this by Ukraine's supposed division into pro-Russian and pro-Western camps. And certainly, such a split is evident in the structures of political parties, the media, and discourse. This is particularly true with regard to the country's foreign policy orientation and the historical assessment of individuals and movements involved in the independence struggle of the 1920s to 1950s. This has led to a harsh tone prevailing between these two roughly drawn camps, with people generally talking over rather than to each other.[10]

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However, the media and academia are paying much less attention to the not inconsiderable group of people who do not clearly fall into one of these two camps. This is especially the case in central Ukraine, in the rough triangle formed between Kyiv and Kryvyi Rih in the south and Poltava a little further northeast. It is also echoed in nationwide polls, in which around 35 per cent regularly say they do not actively favour closer ties with either Russia or the EU.[11] Accordingly, many of them switch back and forth between different TV channels with different orientations, and just over half of the country's population says the internet is now their main source of information.[12] Unfortunately, this does not translate into true media literacy. Many people tend to retreat into apolitical and demobilising cynicism, while large numbers of Ukrainians also follow dubious online sources.[13]

Different Approaches to Combatting Disinformation

In this complex situation, Ukraine's government and the country's extremely active civil society have responded in a variety of ways to the challenges of the spread of disinformation in the information space. NGOs such as StopFake [14] and the Academy of Ukrainian Press have launched fact-checking initiatives in cooperation with international actors, along with a range of training and educational activities that aim to improve media literacy.[15] However, the problem is that these initiatives tend to be piecemeal rather than part of a holistic, coordinated approach and are often limited to younger target groups in larger cities. Meanwhile, oligarchic power structures in the media industry remain untouched – the TV market, which remains very important, still seriously lacks diversity in terms of independent journalism.[16]

The Ukrainian government is also pursuing a few "soft" approaches, notably through the establishment of a Russian-language, state-funded TV station for people in the non-government-controlled areas.[17] There are also plans to provide better equipment for the public broadcaster Suspilne, a serious and credible organisation that has been massively underfunded for years.[18] In March 2021, President Zelensky also announced the establishment of two public fact-checking centres to highlight disinformation and improve Ukrainians' media literacy.[19] However, it remains to be seen whether these institutions will be adequately resourced, and to which extent they will be accepted as credible sources.

Since 2014, however, the government has mostly pursued tougher ways when it came to fighting disinformation, which has also raised questions about freedom of expression and press freedom. Its actions include a ban on the distribution of 25 books published in Russia on the basis of historical narratives classified as propagandistic, as well as entry bans on Russian and certain international journalists whose activities allegedly undermine Ukraine's sovereignty and territorial integrity.[20] Since 2017, numerous Russian news sites and social media channels have also been inaccessible in Ukraine. This list was extended further in 2021.[21] More controversy arose in late 2019 and early 2020 with two ultimately unsuccessful bills drafted by the governing parliamentary majority and the Ministry of Culture, which would have

granted government agencies broad unilateral powers to identify and sanction fake news and narratives against Ukrainian territorial integrity.[22]

A Surprise Move by the President

A major turning point occurred on 2 February 2021 when President Volodymyr Zelensky, elected in 2019, issued a decree revoking the broadcasting licences of three pro-Russian TV stations – 112, ZIK and NewsOne – for five years, based on a 2014 sanctions law and a resolution by the National Security and Defence Council. By the next day, these three channels had disappeared from cable TV.[23] Together, they had previously occupied a 15 to 20 per cent share of the Ukrainian TV audience.[24] Shortly afterwards, the government also sought to have the broadcasters blocked on YouTube, but these efforts were ultimately unsuccessful, and the stations are still airing together online as "First Independent" to some 135,000 subscribers.[25]

Fight for territorial integrity: President Volodymyr Zelensky visits soldiers in eastern Ukraine. Since 2014, nearly 3,400 civilians and more than 4,400 Ukrainian military personnel have been killed in the conflict. Source: © Reuters.

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The government justified its action against these three channels, accusing their owner, Taras Kozak, of funding terrorism. According to Ukrainian media reports, Kozak engages in coal trade with the "People's Republics" in Donetsk and Luhansk.[26] The issue gained an explicitly political dimension due to the fact that Kozak is widely seen as a front man for the openly pro-Russian politician and Putin confidant Viktor Medvedchuk. Zelensky is competing for votes with Medvedchuk and his Opposition Platform – For Life party in southern and eastern Ukraine, as recently demonstrated in the local elections in October 2020.[27] Later, in May 2021, Medvedchuk was charged with treason and initially placed under house arrest.[28]

Shortly thereafter, the President and the Security and Defence Council imposed sanctions on the pro-Russian YouTube blogger Anatoliy Shariy and blocked the online newspaper Strana.ua, which is also regarded as pro-Russian. Their participation in the information war against Ukraine has been sufficiently proven in the eyes of the security services.[29] However, all channels and sites can still be reached, either directly on YouTube or via digital detours.

Mixed Reactions from Civil Society

President Zelensky's revocation of the licences of these three channels was greeted with a mixed reception in Ukraine. Some commentators agreed that the three channels repeatedly justified the Russian annexation of Crimea and blamed Ukraine for the war in the east of the country. In the eyes of these commentators, all of this is part of Russia's disinformation campaigns, which have been spreading demonstrably distorted, biased, or completely fabricated reports about alleged atrocities by the Ukrainian government since 2014. Therefore, they felt that the government was in the right given the importance of defending Ukraine's statehood.[30]

However, other observers argued strongly against the move, pointing out that the entire process was not reviewed by a court in advance and took place almost exclusively within the executive branch, which is dominated by the president.[31] And although the legal basis for Zelensky's decision dates back to 2014, this is the first time sanctions have actually been used against domestic media – a serious precedent that will now be available to future Ukrainian presidents as a more or less legitimate tool. In this context, the brief and very general explanatory memorandum to the decree was also criticised for failing to formulate clear standards for such consequential government action.[32]

And, ultimately, an alternative would have been available, that would have enjoyed greater procedural legitimacy: the National Council of Television and Radio Broadcasting, which is appointed equally by the president and parliament, could have applied to the courts for revoking broadcasting licences on the grounds of incitement to racial hatred and hate speech. The Council already attempted to use this method against the re-broadcasting of Russian TV shows in 2014. Furthermore, in August 2021 it requested cancelling the licence of the Ukrainian channel Nash, which is considered to be pro-Russian.[33] However, in view of the clear parliamentary majority enjoyed by Zelensky's party and the ongoing problems with judicial independence, it is also unlikely that this path would have been able to address the mentioned concerns.

In response to the shutdown of the TV stations, the pro-Russian camp immediately accused the president of trying to silence unwelcome voices of political rivals.[34] Such accusations are, of course, no surprise, but Zelensky also has to ask himself whether, in the eyes of more or less pro-Russian Ukrainians, his actions have not actively served the Kremlin's narrative that seeks to portray Ukraine as a repressive state towards its Russian-speaking population. This narrative is and remains false – despite some controversy, for instance, around the language issue, it should not be forgotten that Article 10 of the Ukrainian

constitution explicitly protects the use of the Russian language.[35] Nevertheless, the government's actions have certainly provided fuel for its critics. In this light, it seems questionable whether the shutdown of the three pro-Russian TV channels is an effective defence against disinformation campaigns and propaganda while protecting freedom of speech and the press – and even whether it was politically wise.

A Question of Defending Democracy?

It is worth pausing here for a moment. After all, such criticism is primarily based on liberal theories of discourse that assume a free and unhindered exchange of opinions in order to jointly formulate a solution in the interest of the common good. But hasn't history shown us that – in order to survive – liberal and democratic systems have to be able to recognise their enemies and ultimately fight back? Hasn't Zelensky's presidential decree sent a signal that Ukraine will actively resist the gradual undermining of its sovereignty, democracy, and statehood from within and without?

The answer is ambivalent: restrictions on freedom of expression and press freedom, even when they have the legitimate aim of combatting disinformation and hate speech, take place within a larger context. And this is precisely what is important in society's response to government actions. Can a narrative suggesting that the state is supressing dissent take root? Is a media ban flanked, for instance, with other measures that might be viewed as discriminatory? If so, this opens up a number of dangerous scenarios, including the radicalisation of sections of the population and the potential for political violence.[36] Or are such accusations of censorship unfounded because a government communicates its legitimate goals clearly and openly, involves social groups broadly and extensively, and chooses a transparent process involving independent oversight bodies when it comes to considering harsh measures such as curtailments of freedom of expression and press freedom? Lithuania provides an interesting example in this respect.

Can Lithuania Serve as a Model?

Since 2014, the Lithuanian government has temporarily revoked the broadcasting licences of Russian TV stations on several occasions for, in the eyes of the regulators and courts, deliberately disseminating misinformation – particularly about the events surrounding the killing of 13 Lithuanian protesters by the Soviet army in January 1991 – and for hate speech, by rebroadcasting a programme from Russian state TV.[37] What is most important here is the procedure established within Lithuanian law for such a harsh state intervention.

> **The broad involvement of civil society, independent institutions, and the judiciary severely hampers the possibility of politicised suppression of minority voices in Lithuania.**
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The country's chief media regulation authority is the Radio and Television Commission of Lithuania, which is accountable to parliament. It is independently financed by a small levy on the licence income of local broadcasters and consists of eleven members. Two are appointed by the president and three by parliament (one by the opposition) – so even with coordinated voting, the executive and legislative branches do not have a majority in the Commission. The Lithuanian Bishops' Conference, the Lithuanian Journalists' Association and Lithuanian Journalists' Union each appoint one additional member. Another three members are appointed by the Lithuanian Association of Artists.

If, on the basis of its own monitoring or a complaint, the Commission comes to the conclusion that a broadcaster is in breach of youth protection or hate speech rules, it can, following a prescribed process with clear deadlines, seek statements from all parties involved and file an application for temporary revocation of the broadcasting licence

Battle of narratives: Ukraine is the focus of disinformation campaigns. In February 2021, three TV channels with a pro-Russian orientation had their broadcasting licences revoked – not an uncontroversial measure. Source: © Vasily Fedosenko, Reuters.

with the Vilnius Regional Administrative Court. Appeals against the subsequent court decision can also be taken as high as the country's Supreme Administrative Court.[38] The broad involvement of civil society, independent institutions, and the judiciary severely hampers the possibility of politicised suppression of minority voices.

Impetus for Ukraine

If Ukraine were to seek similar ways to better legitimise measures against disinformation campaigns, forcefully advancing judicial reform must be the first order of business – because credible procedures require actors that are demonstrably independent. After making good progress since 2014, reforms to Ukraine's legal system have recently begun to stall. The judiciary has to remove corrupt actors and free itself from political influence. Specific proposals on how to achieve this are already available.[39]

Already today, Ukraine's strong civil society with its myriad of specialised NGOs is able to flank an independent judicial review process. In this way, an inclusive procedure involving independent state and civil society actors could maximise its legitimising effect while simultaneously being an effective way of preventing political abuse.

At the same time, the society-wide context has to be considered when it comes to the legitimisation of government action. As mentioned above, governments should use proportionate means to attain objectives on the basis of a transparent and reasoned communication. In this vein, Ukraine could emphasise debate, compromise, and incentives when it comes to controversial issues within society. For example, pursuing the quite legitimate goal of promoting the use of the Ukrainian language could be achieved through free, widely available educational programmes coupled with incentives and rewards for completing such

courses – be it free trips within the country to promote nationwide exchange, vouchers for further trainings, or lotteries.

The government could also create social platforms to promote open discussions about controversial historical debates relating to the independence movement of the 1920s to the 1950s and its role in the Second World War, rather than formulating official politics of memory in this area.[40] All of this would allow Ukraine to complement its strengths – pluralism, freedom, and an active civil society – with legitimate defence mechanisms against disinformation campaigns, should this be necessary as a last resort.

With all of this in mind, it is worth considering once more the big picture of the challenges facing Ukraine. Compared to Germany and other EU member states, this is a poor and very polarised country with immature political institutions, still carrying a heavy legacy from the Soviet era. Add to this a volatile and at times dangerous foreign and domestic threat environment that leaves very little room for mistakes. Against this background, European governments and civil society should work more closely both with each other and with Ukraine in order to accompany the country along its path – with support wherever needed and constructive criticism whenever required. They should also remember that the question of how far to take the fight against disinformation in critical situations can suddenly catch up with the open societies of the West, despite a growing distance to the shocks of Brexit and the 2016 US presidential election. Crisis or no crisis – what is clear is that media literacy, inclusion, and a healthy culture of debate are and remain the first and best remedies against all forms of disinformation – and to avoid getting lost within greyscales.

– translated from German –

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