

Fake News, Social Media And Role Of Judiciary

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Abstract

Fake news is one of the burning issues in India, which can be attributed to technological advances. While disseminating fake news is itself a menace, the corollary harms associated with disseminating such news are multifarious. Laws to curb fake news are scattered, insufficient and indirect. The Information Technology Act, 2000, is itself deficient as it does not have any direct provision for imposing liability on the content creators and the intermediaries. The Parliament, therefore, needs to make amends in the existing laws. The judiciary role has been minimal until today since there has been no significant case of fake news in India. However, the judiciary can play an essential role by interpreting the existing laws in a manner to strike a balance between an individual's right to speech and expression and curbing fake news and information.

1. INTRODUCTION

Man is different from other creations of God as having an unusual stretch of the imagination and the ability to put it in words. Freedom to speak what one desires is an essential element of liberty. Without free speech, one might not be able to claim those entitlements, which are necessary for a dignified life. In recent times, society has become more complex and dynamic with the development of technology which has been reflected in the variety of techniques used in communication and information exchange. Social media and the internet service is the new 'Avatar' of free speech. Amidst this technological development, opportunists started creating misleading or fake news articles intentionally in the hope of generating attention and revenue.

Fake news is tough to define. This is because of the variety of purposes for which it is created. It is often political in appearance yet commercial in purpose.¹ The relevance and urgency to address the problem of fake news arose when in the name of cow protection, the so-called 'Gaurakshaks' caused the lynchings of many people. These incidents occurred because of the spread of false information on WhatsApp that the victims had either eaten beef or were transporting beef.² The need to address the problem is the pressing demand of civil society and the victims of fake news to punish the creators and the disseminators of fake news. The paper will focus on the demerits of fake news, misinformation or half information, and the judiciary's role in curbing the menace of fake news. This paper will try to address the pressing questions such as: How to solve the problem of the jurisdiction in online medium? Can the judiciary take suo-moto action in fake news cases? How have the courts tried to address the problem of fake news? Are the laws sufficient? Should the Supreme Court adopt strict scrutiny in fake news cases? Should the punishments be stricter? Does stricter punishment not lead to over-criminalization in fake news cases?

Imprudent Use of Free Speech

Fake news can now spread at a faster rate than ever before. One of the most serious risks associated with the 'fake news' that we unwittingly spread is that it devalues and delegitimizes expert voices, authoritative institutions, and the concept of objective data, all of which undermine society's ability to engage in rational discourse based on shared facts.³ True news stories are costly to produce; they necessitate extensive research and reporting, as well as institutional institutions that support the writing process, such as editors and fact-checkers.⁴

One major disincentive associated with the publication of fake news is that once the people have read a piece of fake news, a subsequent rebuttal of it with the real news might not have had the impact it could have had if it been published earlier. It is also to be borne in mind that once a piece of news is published in the online medium and subsequently erased, it does not guarantee that the news does not exist anywhere anymore. Activities such as copying, downloading and taking screenshots of the fake news are the issues associated with the online mode of publication of information. This information cannot also be removed from the memories of the people who saw it. Another corollary harm of dissemination of fake news is consequential violence. For instance, the "most tragic incident" occurred in Bangladesh in 2012 after a photograph showing a burnt Quran was posted on the Facebook site of a Buddhist youth.⁵ Homes and temples were set to fire in the Cox's Bazar district by an angry crowd. Many families were forced to flee from that area. A curfew was imposed, and security forces were deployed.⁶ It was later found that the youth had nothing to do with the incident. Lynching incidents in India are also examples of such violence.

The following are examples of fake news intended to incite communal violence. In March 2017, a video and accompanying text went viral, claiming that the young girl in the video is a Marwadi girl who was married to a Muslim boy in Andhra Pradesh and that the girl was beaten up and burned alive because she refused to wear a Burkha. AltNews⁷ discovered that the video was actually a two-year-old mob lynching video from Guatemala that was being misrepresented as a Hindu woman being lynched.⁸ On April 10, 2017, Aaj Tak shared on its official Facebook page a piece of news about a 'recently' issued 'fatwa' in Saudi Arabia that stated, "men can eat their wives if they are hungry." Ironically, on October 29, 2015, India Today's website "DailyO" reported it to be a hoax.⁹ A fake story about a non-existent interview with Arundhati Roy sparked a Twitter war between Paresh Rawal's supporters and those who accused him of advocating violence. Arundhati Roy was quoted as saying, "70 lakh Indian soldiers cannot defeat the Azadi gang in Kashmir." It was a hot topic on Republic TV and CNN News 18 during prime time debates. The 'source' of this Facebook post was a right-wing fake news site, postcard news, which ran a story with the same headline on May 17, 2017.¹⁰ Roy clarified, "its crap, have not been to Srinagar recently. Have not made any statements about Kashmir except what I wrote in Outlook last year."¹¹

Fake news can be characterized as commercial¹² and non-commercial.¹³ It can have various facets such as misinformation, disinformation and half news. Disinformation is false information, and the one who is disseminating it knows it to be false. Thus, it is a deliberate and intentional lie. Disinformation also spreads when two individual facts, when joined together, make up very different news. For instance, in July 2014, NDTV reported that "Senior Advocate U. U. Lalit who famously represented Amit Shah in Tulsi Prajapati encounter case, has now been appointed as a judge of the Supreme Court."¹⁴ It gives an impression that he was appointed as a judge in the Supreme Court as a reward by BJP. Misinformation spreads when the one spreading it believes it to be accurate, but in reality, it is false. Journalists often misinform the public because of the pressure to publish first. When

the whole story is not disclosed, and only a few facts are disclosed, it is known as half information. It can also have adverse consequences, as in the case of misinformation and disinformation.

The problem of fake news is a global phenomenon. Fake news, propaganda-laden content, manufactured especially to mislead and confuse a largely social media audience and place a premium on revenue over veracity or accuracy, has long been a part of American reality.

The Herald published a front-page article in the United States on November 9, 1874, claiming that the animals had escaped from the Central Park Zoo and were frenzying through the city.¹⁵ The hoax was quickly and unanimously denounced by rival newspapers across the United States. While admitting that the "animals in Central Park are confined in the flimsiest cages ever seen," the New York Times described the article as "an intensely stupid and unfeeling hoax" and published letters from readers who claimed to be terrified by the narrative.¹⁶ On Sunday, December 4, 2016, a shooting occurred in the middle of the day at a pizza shop in north-western Washington, D.C. Due to false tweets widely circulated on the internet claiming that the pizza shop was the base for a paedophile sex ring, the pizza shop (dubbed as Comet Ping Pong) became embroiled in an unusual situation. According to the tweets, Democratic presidential candidate Hillary Clinton, a former Secretary of State, and members of her campaign were involved in the pizza shop business. Despite the fact that the news was false, the owners of the pizza shop and surrounding businesses said they are becoming increasingly concerned about confrontations with people who believe the false information.¹⁷

Laws regarding Fake News in India and abroad

On a global scale, the preamble¹⁸ of the Universal Declaration of Human Rights (UDHR), 1945, as well as article 19¹⁹ of the UDHR, guarantee freedom of expression. A similar provision can be found in Article 19 of the 1976 International Covenant on Civil and Political Rights (ICCPR).

Several countries, including Singapore, Germany, Bangladesh, Belarus, Russia, Malaysia, France and European Union etc., have passed legislation to curb fake news. Stringent punishments have been imposed under these legislations for spreading false news. However, these laws have been immensely criticized for having the potential to be misused to stifle free speech and target whistleblowers. Singapore's law has the harshest penalties for spreading fake news, with a fine of up to \$37,000 or five years in prison if a "malicious actor" shares false information. If the falsehood was spread using "an inauthentic online account or a bot," the penalty would increase to \$74,000 and a potential 10-year prison sentence.

Freedom of speech is protected in India under Article 19(1)(a) of the Indian Constitution, which states that all citizens have the right to free speech and expression. Article 19(2) imposes eight reasonable limitations or restrictions²⁰ on freedom of expression. These limitations are mutually exclusive.²¹

The people spreading fake news *viz.*, the content creators and the content distributors are generally punished under Sections 124A, 153A, 153B, 420, 469, 500, and 505 of the Indian Penal Code, 1860. The Gujarat government has recently announced that lynchings would now be considered a "serious offence". Any action, including the spread of fake news provoking such killings, would be covered under Section 153A of the IPC, entailing three years of jail term.²² A direct causal relationship between both the speech in question and the

injury it produced would be required to use a claim other than fraud or defamation to penalise a fake news.²³

The Information Technology Act of 2000 imposes a limited liability on intermediaries like Google, the world's largest search engine, for providing a platform to any undesirable content. While the IT Act exempts intermediaries from liability for third-party content, Section 79 (3) (b) requires them to remove any such content in response to takedown demands from law enforcement agencies. This clause was challenged in *Shreya Singhal v. Union of India*²⁴, where a two-judge Supreme Court bench ruled that it was unconstitutional and held that:²⁵

Section 79 is valid if Section 79(3)(b) is read down to indicate that if an intermediary receives real information of criminal activities related to Article 19(2) from a court order or is alerted by the appropriate government, department or its agency, that unlawful acts relating to Article 19(2) are going to be committed then fails to remove or disable access to such material expeditiously.

However, mere discussion or even advocacy of a particular cause cannot be prohibited. The Court recently has declared section 66-A of the IT Act unconstitutional, which made annoying, inconvenient or insulting posts on Facebook criminally punishable.²⁶ Nariman, J., stated, “mere discussion or even advocacy of a particular cause howsoever unpopular, cannot be prohibited by law.”

Section 144 of the Code of Criminal Procedure (CrPC), 1973, gives the Magistrate the power to order internet shutdown. However, internet shutdowns in India have been widespread, which itself is controversial as it abridges the fundamental right to free speech and expression. Similarly, section 482 of CrPC gives inherent powers to the High Courts to give any order to secure the ends of justice.²⁷ Sections 107 and 108 of the CrPC are also relevant in this respect. Section 151 of the Code of Civil Procedure also confers on all the civil courts to give any order necessary to secure the ends of justice.²⁸

In April 2018, Smriti Irani, Minister of Information and Broadcasting, issued directives to punish journalists for generating and disseminating fake news. However, the guidelines were criticised and were termed by journalists and the Opposition as an attempt to “muzzle” the free press. In less than a day, the guidelines were withdrawn upon the directions of Prime Minister Narendra Modi.

Role of Judiciary

The role of the judiciary in fighting fake news is as important as the legislature. The purpose of courts is to adjudicate, interpret and protect the fundamental rights of individuals. To protect the freedom of speech and fight fake news, the legislature has to make laws, and the courts must see that the law is reasonable and does not violate the fundamental freedom of speech. There has been no significant case on social media that the Supreme Court of India has decided, but various high courts have taken concrete steps by punishing those who spread false information and have, time to time, rejected their pleas of not guilty. Punishing fake news and information is the need of the hour as it has cost many lives. While adjudicating cases related to social media, the courts face many hurdles in concluding. Some problems relate to jurisdiction, the offender being outside the jurisdiction, technical difficulties involved in social media etc. This paper shall now discuss these problems one by one in a detailed manner.

- *Issue of jurisdiction:*

The jurisdiction under section 4 is comprehensive to the extent that no valid machinery is set up under any Act for the trial of any particular case, the jurisdiction of the ordinary criminal

One of the preliminary issues the courts face is regarding the jurisdiction over a matter when the source of fake news can be traced to outside the jurisdiction of Indian courts. The technological speed of transmission of information across the boundaries tends to blur the borders between states. Cyberspace has thus become a borderless environment. Therefore, there can possibly be two situations that would require jurisdictional clarification: firstly, when the source of fake news can be traced to one state and its effect can be seen in another state; secondly, when the source of fake news can be traced to outside the territory of India, i.e., in another country. When a State creates rules that control matters that are not exclusively domestic in nature in order to promote its sovereign interests overseas, jurisdiction becomes a problem of international law.²⁹ So, the courts must satisfy themselves before hearing that it has pecuniary, subject-matter, and territorial jurisdiction. In the first situation, the jurisdiction issue of courts is solved under section 179 of CrPC, which provides that the “offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued.” As regards the second situation, section 4 of the IPC deals with the extra-territorial jurisdiction of the courts to try the offences committed under IPC.³⁰ court cannot be held to have been excluded.³¹ A foreigner committing an offence in India will be amenable to Indian law and will be punishable under this section. However, he may not be physically present in India when the offence³² and ignorance of the law are not offences. Further, section 75 of the IT Act provides that the Act shall apply to any offence or contravention committed outside India by any person irrespective of his nationality if the contravention involves a computer, computer network or a computer system.³³ Thus, any information or fake publication in an online medium accessible in India would be punished if it leads to any offence.

Section 187 of the CrPC also grants a Magistrate of the First Class the authority to consider a case in which any person, whether in or outside India, has committed an offence punishable under any existing Indian law, if the courts have grounds to believe the individual is within the court's local jurisdiction. Section 179 of CrPC, as mentioned above, is also relevant in deciding the jurisdictional matter. Section 179 thus contains the ‘effects test’.³⁴ Section 182 Of CrPC, which provides that “any offence which includes cheating may, if the deception is practised by means of letters or telecommunication messages, be inquired into or tried by any Court within whose local jurisdiction such letters or messages were sent or were received” is further an extension of effects doctrine.

Thus, in India, the courts have extra-territorial jurisdiction in dealing with fake news in electronic and print media.

- *Law of Extradition:*

In India, the Extradition Act, 1962, provides a procedure for the extradition of offenders or accused from another country to India. Extradition means surrendering a person accused or convicted of an offence by one state to another under some arrangement. Such a person maybe a citizen of any country. Extradition of offenders is applicable in cases where the punishment for the 'extradition offence' is not less than 1 year. India has signed an extradition treaty with 42 countries. These countries are obliged to accede to the request made by India. While in other cases, the countries are not obliged to surrender the ‘fugitive offender’, but they can do so on a reciprocal basis. In this case, there are fewer chances that the offender

is surrendered to India, and this might pose a problem in doing justice by the courts. The First-class Judicial Magistrate prepares the order and is sent to the other country through the Ministry of External affairs.

- *When the offender is 'Unknown.'*

The courts, while hearing the matter face a very grave problem when the offender is unknown or cannot be traced. It happens very frequently in social media cases because it is easy to delete data in the online medium after committing an offence by way of disseminating any fake news. Softwares like Ccleaner and Data wipe are widely used by these offenders to remove the traces of messages. It is also easy to change or make a fake IP address on a mobile Virtual Private Network (VPN).³⁵ If the IP address is not changed, then it is straightforward to catch an offender. Another problem related to Whatsapp is the feature of "end-to-end encryption" of messages that would seriously undermine the privacy issues of the individuals if decrypted. Further, it takes a very long time to find out the originator in the online medium by the cyber cells, and during that period, relief to the victim becomes an urgent necessity. The primary objective of law enforcement agencies is to do justice. For this purpose, section 357A was introduced in CrPC by the Criminal Law (Amendment) Act, 2009. It mandates the State Governments in coordination with Central Government to prepare a scheme for victim's compensation. This section applies when the victim suffers injury or losses and requires rehabilitation and when the accused remains unidentified or unknown. The courts have plenary jurisdiction under section 482 of CrPC and 151 of CPC in all other cases.

- *Suo-moto cognizance of offences:*

The Supreme Court and the High Courts have the power to take *Suo-moto* cognizance in the exercise of plenary jurisdiction by virtue of article 32s and 226. Gauhati High Court took *suo-moto* cognizance of the lynching by the villagers of two youth- Nilotpal Das and Abhijeet Nath. The Court asked the government and the police what effective measures have been taken to arrest the wrongdoers.³⁶ The judges directed the police and the government to inform about the action taken against the wrongdoers. In July 2018, the Supreme Court took cognizance of the mob lynchings triggered by the spread of fake news over social media, which led to more than 40 deaths. The Apex Court asked the Parliament to consider enacting a new law to deal with mob lynchings effectively. In the wake of these incidents, the Supreme Court delivered the *Tehseen Poonawala*³⁷ judgment wherein it gave directions to the governments to appoint nodal officers to prevent any further lynching incidents.

Similarly, in cases of contempt of courts, every court, be it Supreme Court, High Courts or lower courts, have the power to punish the offender for its contempt.³⁸ The courts can take *suo-moto* cognizance in cases of contempt. Recently, the Delhi High Court has issued a notice for 'Criminal Contempt,' to author Vivek Agnihotri for he tweeted something inappropriate regarding the *Gautam Navlakha Judgment*. He claimed links between Justice Muralidhar's wife and Gautam Navlakha (Urban Naxal as claimed by the Author).³⁹ Justice Muralidhar issued the contempt notice.

- *Balancing of Conflicting interests:*

Government restriction on free speech might lead to a possibility that the majority may suppress minority viewpoints or unfavourable views towards the majority. The government restriction is more like a content-neutral restriction since the government targets the vehicle of speech rather than speech content.⁴⁰ The Supreme Court should be concerned with whether

the government is seeking to restrict speech simply because it does not agree with the message, even when the speech is commercial.⁴¹ A neutral third party, such as independent courts or a professional “clearing house”, are key players to decide as to “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”.⁴² Governments and companies cannot make such decisions; the latter, in particular, would be inclined to “take out anything that is critical” to avoid paying fines imposed by governments.⁴³ Third-party checkers boost trust and confidence in such platforms.⁴⁴

The Supreme Court of India in *Tata Press Ltd. v. Mahanagar Telephone Ltd.*,⁴⁵ concluded that “commercial speech is a part of the freedom of speech and expression guaranteed under article 19(1)(a) of the Constitution.” This judgment added a new dimension to the freedom of speech and expression. The ruling clarified that all commercial advertisement would receive protection under article 19(1)(a) and would be subject to article 19(2) of the Constitution of India. Thus, any information or news that is false can be restricted only under article 19 (2).

In India, fake news can only be restricted under Article 19(2) and nowhere else. While in the US, the restrictions on free speech have been imposed by judicial decisions. The restriction must be narrowly tailored to ensure that it does not exceed what is necessary to accomplish the government’s end.⁴⁶ This is true for both commercial and non-commercial speech.

In defamation cases in India, a person can be convicted over the falsity of the statement. Truth is an exception. So, defamation in any form, whether in printed or electronic form, can be punished if section 500 of the IPC ingredients are satisfied. In India, defamation is both a civil wrong and a criminal offence. The Supreme Court of India has also restricted free speech on the ground that it incites violence.

The Supreme Court of India has adopted the test laid down in *Schenck v. the United States*,⁴⁷ which was adopted in *Kedar Nath Singh v. the State of Bihar*,⁴⁸ which considers whether speech creates a “clear and present danger” to public order or, in other words, tendency to incite imminent violence. So, any fake news that incites violence should be punished, and it includes the offence of sedition.

In India, the law of free speech is primarily criminal law. The threat of getting detained and spending a few nights in police detention is a powerful deterrent to saying anything that could be construed as even vaguely anti-national.⁴⁹ We have ample laws to fight back fake news, but we lack safeguards while dealing with fake news cases. This is because once an FIR is lodged, arrest becomes the nearest possibility. It, therefore, becomes pertinent for the courts to be cautious when it involves the most essential and cherished liberty of an individual. When the offence involved is grave or fake news leads to violence, such an act should be punished under the appropriate laws.

Nevertheless, when there is fake news created solely for entertainment or to earn revenue such as satires and parodies, then arrest would not be a plausible solution in such a situation. The primary thing the courts should keep in mind is the ill motive behind the fake news. Protection has been accorded to a false speech by the courts until it is not made with an ill motive.⁵⁰ The Court has stressed that there are other ways to counter false speech, rather than criminally punishing the speaker.⁵¹

Punishment in the form of imprisonment may sometimes do well, but it always harms. It deprives a person of his liberty. It carries with it a profound negative social impact on the prisoner and his family, even if he is imprisoned for a short period of time. He might lose contact with his family and friends, lose his employment, social or community services etc. Imprisonment cannot be the only way to curb false news. Punishment should be the one that

can mitigate the adverse consequences of the offence rather than imprisonment. However, it does not mean that gross violation of human rights can be overlooked. Wherever it is possible to avoid imprisonment, it should be done.

The purpose of criminal law is that that it should be invoked not as a rule but as an exception. This is why the courts should lean in favour of the rule of last resort. The principle of last resort requires the enforcement agencies to exercise reserve when turning to criminal law, not only regarding litigation but also regarding the criminal procedure, and the imposition of punishment should be avoided if possible.⁵² Sanctions should not be more severe than necessary and custodial sanctions should be handed down only when there is no alternative.⁵³ Sections 107 and 108 of CrPC are such provisions in the Indian law that require that a person need not be punished at the first instance. According to the Magistrate, there should be adequate grounds to proceed against the individual who has been informed. It is the *sine qua non* for instituting proceedings under sections 107 and 108 of CrPC.⁵⁴ The Executive Magistrate will be directed by the information he receives, which can come from any public or private source, after forming the conclusion that there is adequate reason for proceeding under section 107.⁵⁵ What is sufficient to satisfy a Magistrate must depend on the particular situation. The approach of the Magistrate from case to the case must be highly empirical and not esoteric.⁵⁶

The act of forwarding a social media post is the same as endorsing it. While dismissing the anticipatory bail application of journalist turned BJP politician S. V. Shekher, who reportedly shared a disparaging Facebook message about women journalists, the Madras High Court noted that "sharing or forwarding a message in social media is equal to accepting and endorsing the message."⁵⁷ This case was filed against the BJP leader under sections 504, 505 (1) (c), 509 of IPC and Section 4 of the Tamil Nadu Prohibition of Women Harassment Act 2002. According to the Madras High Court, if we go by the case, one can land in jail if we ignorantly forward or share any message that may cause a ruckus. The Court further observed, "Law is same to everyone and people should not lose faith in our judiciary. Mistakes and crimes are not same. Only children can make mistakes which can be pardoned, if the same is done by elderly people, it becomes an offence."⁵⁸ The Supreme Court also denied the bail to the appellant in this case. Even though the Court was correct in rejecting the bail plea, but the principle enunciated therein cannot be made applicable to each and every act of sharing posts by an ordinary person. Strict liability cannot be attached in these cases; otherwise, there would be an enormous increase in litigation. The burden on the courts will shift from important cases to these petty offences and might have a stifling effect on the criminal justice system. The Delhi High Court delivered a similar judgment in *Raghav Chadha v. State*,⁵⁹. The petitioner challenged the summon issued by the trial court in a defamation case for retweeting AAP neta's objectionable tweet. The single bench of the Delhi High Court held that "a retweet in essence brings the content of the original tweet into the immediate attention of the followers of the users who retweet."⁶⁰ Thus, the Court dismissed the petition as being devoid of merit. Then the petitioner approached the Supreme Court challenging the High Court's decision, which the Supreme Court again dismissed.

The Delhi High Court in *Sasikala Pushpa v. Facebook India*,⁶¹ passed an injunction against four SNSs (Facebook, Whatsapp, Twitter, YouTube) to take down Rajya Sabha MP Sasikala's morphed photos and videos that she alleged were morphed and threatened to tarnish her image in public. The Court observed:⁶² A prima facie case has been established for an ex parte injunction, as requested in the application under orders 39 R. 1 & 2 CPC. The

plaintiff has the advantage in terms of convenience. If her rights, interests, and reputation are not swiftly safeguarded, irreparable harm will very certainly result.

In the *Publisher and Editor of Divya Himachal v. Prakash Chand*,⁶³, the Himachal Pradesh High Court has observed that “Publication of false news cannot be regarded as a public service, but a disservice to the public. Publication of very bit of a news does not serve public interest.”

Very recently, in May 2020, the Supreme Court of India refused to review its order dismissing a writ petition seeking framing of guidelines to curb the spread of fake news through media of any kind.⁶⁴ This reflects that the judiciary is more inclined towards the hands-off approach by leaving the legislature's law-making task.

2. CONCLUSION

Freedom of speech has never been free in India; indeed, it can never be free. Rights and duties run parallel to each other, which forces us to respect each other's rights. However, restrictions on fake news have always been criticized because they compromise the freedom of speech. On the one hand, there is a necessity to preserve the liberties that underlie freedom of speech, and on the other, there is a necessity to preserve the public interest. It is for the courts to scrutinize every case before it with due deliberation. The freedom of speech and expression, which is regarded as a fundamental, inalienable right of an individual, should not be restricted on flimsy grounds. The courts have to see that there is proximity between the restriction imposed on fake news and the object sought to be achieved. The decision should be left to the courts, which act as a neutral body. The courts have plenary jurisdiction whereby they can order anything that is in the interest of justice. The courts should stick to the principle of last resort in the criminalization of offences.

Further, recourse to the rule of strict liability should be taken only when the situation is so adverse that justice cannot be done without punishment. Apart from the courts, the government and the legislature have to build a solid legal system and robust Cyber Crime Cells with the latest technologies and experts in technology that can help identify the real culprits behind the offence. It is not only the judiciary that has to play an active role; the consumers should also make independent assessment periodically to determine what is a hoax and what is not. However, distinguishing fake news from real news is not an easy task. Even the most literate cannot quickly discover the truth behind fake news. Discovering the truth and individual assessment of the information is necessary on civil society before taking any stand on the news while handling social media accounts. Another solution to fight back fake news is Government regulation of fake news. However, this solution is the most contentious solution that can be proposed. There can be a possibility that the government might want to suppress minority views or unfavorable views in the garb of restricting fake news. It is also believed that the more laws, the lesser the freedom. Therefore, punishing fake news creators or disseminators as the case may be should be the last resort. Further, in fighting fake news, a multi-stakeholder approach is required where every member of the civil society, be it a journalist, a social media CEO, a consumer of news, legislator, policymakers, the software engineers, content distributors, content creators etc. should work in synergy to fight back fake news. Flagging of fake news content by content creators, software engineers, and website handlers is a better way of curbing the menace of fake news.

ENDNOTES:

- ¹ John Allen Riggins, “Law Student Unleashes Bombshell Allegation You Won’t Believe!: “Fake News” As Commercial Speech” 52 *WFLR* 1311 (2017).
- ² A report by the data-based news organisation India Spend found that “Muslims were the target of 51% of violence centred on bovine issues over nearly eight years (2010 to 2017) – and they comprised 84% of 25 Indians killed in 60 incidents,” *available at*: <http://archive.indiaspend.com/cover-story/86-dead-in-cow-related-violence-since-2010-are-muslim-97-attacks-after-2014-2014> (Visited on October 1, 2020).
- ³ Fighting Fake News- Workshop Report- Yale Law School, 3 *available at*: <https://law.yale.edu/fighting-fake-news-workshop-report> (Visited on September 27, 2020).
- ⁴ Noah Feldman, “Fake News May Not Be Protected Speech ” 69 *HLJ* 1409 (2018), *available at*: <https://www.bloomberg.com/view/articles/2016-11-23/fake-news-may-not-be-protected-speech>. (Visited on October 2, 2020).
- ⁵ Bangladesh rampage over Facebook Koran image, *available at*: <https://www.bbc.com/news/world-asia-19780692> (Visited on September 24, 2020).
- ⁶ *Ibid.*
- ⁷ An independent platform to expose fake news founded by Mr Pratik Sinha.
- ⁸ Guatemalan mob lynching video passed off as one of Marwadi woman being burnt alive by a Muslim mob, *available at*: <https://www.altnews.in/right-wingers-pass-off-guatemalan-mob-lynching-video-one-marwadi-woman-burnt-alive-muslim-mob/> (Visited on October 27, 2020).
- ⁹ India Today’s AajTak runs a fatwa as a news that was declared fake by India Today’s DailyO 18 months ago, *available at*: <https://www.altnews.in/india-todays-aaj-tak-runs-fatwa-news-declared-fake-india-todays-dailyo-18-months-ago/> (Visited on October 26, 2020).
- ¹⁰ How Fake News Triggered Republic TV, TV18, BJP MP's Attacks on Arundhati Roy, *available at*: <https://thewire.in/media/paresh-rawal-arundhati-roy-fake-news-kashmir> (Visited on October 27, 2020).
- ¹¹ *Ibid.*
- ¹² Commercial speech is any speech that involves a commercial transaction, and fake commercial speech or news can be understood as intentionally misleading content which has been created for the primary purpose of generating revenue.
- ¹³ The non-commercial speech includes political speech, religious speech, social or communal speech etc., which has the purposes of generating revenue, inciting violence, inciting hatred against the government, defaming or committing fraud etc.
- ¹⁴ Lawyer Uday Lalit, Who Represented Amit Shah, Jayalalithaa, recommended for Supreme Court, *available at*: https://www.google.co.in/search?ei=wTIEXKrwEqCOvQSxmKzwCA&q=uu+lalit+who+represented+amit+shah+appointed+as+judge+of+sc+NDTV&oq=uu+lalit+who+represented+amit+shah+appointed+as+judge+of+sc+NDTV&gs_l=psy-ab.3...19979.26630..26980...0.0..0.175.3473.0j26.....0....1..gws-wiz.....0i71.dRwRSHQ5i5o# (Visited on October 2, 2020).
- ¹⁵ The Central Park Zoo Escape, *available at*: http://hoaxes.org/text/display/the_central_park_zoo_escape_text/ (Visited on November

1, 2020).

¹⁶*Ibid.*

¹⁷ A Tweeted Lie Triggers an Incident, *available at*:<https://www.marubeni.com/en/insight/potomac/backnumber/19.html> (Visited on November 1, 2020).

¹⁸ “Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech... has been proclaimed as the highest aspiration of the common people.”

¹⁹ “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

²⁰ Sovereignty and integrity of India, the state's security, friendly relations with foreign states, public order, decency or morality, contempt of Court, defamation and incitement to an offence.

²¹ Article 19 of the Constitution of India was debated on December 1 and 2, 1948 and October 16 and 17, 1949. The Constituent Assembly was pleased with incorporating the freedom of speech and expression; conflict arose regarding clause (2) of the article that provided restrictions on speech freedom. Many members of the Assembly argued that the restrictions resulted in the rights being compromised and negated. Members who considered the restrictions as desirable said that nowhere in the world are ‘rights’ ever absolute. Reference was made to the USA even where rights were restricted, and the Supreme Court case put restrictions by case.

²² Gujarat govt. brings mob lynching under IPC Section 153A, *available at*: <https://indianexpress.com/article/cities/ahmedabad/gujarat-govt-brings-mob-lynching-under-ipc-section-153a-5358534/> Gujarat govt brings mob lynching under IPC Section 153(A) (Visited on October 3, 2020).

²³ Clay Calvert, “Fake News, Free Speech, & the Third-Person Effect: I'm No Fool, but Others Are” 7 *WFLROnline* 12 (2017).

²⁴ (2015) 5 SCC 1.

²⁵ *Id.* at 181.

²⁶ *Id.* at 5.

²⁷ Code of Criminal Procedure, 1973, s. 482. “Saving of inherent powers of High Court: Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.”

²⁸ Code of Civil Procedure, 1908, s. 151. “Saving of inherent powers of the court.— Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

²⁹ Extra-territorial Jurisdiction and Social Media Offences, 1 *available at*: http://shodhganga.inflibnet.ac.in/bitstream/10603/122738/1/11/11_chapter%203.pdf (Visited on September 25, 2020).

³⁰ Section. 4 Extension of Code to extra-territorial offences. —The provisions of this Code also apply to any offence committed by—

- (1) any citizen of India in any place without and beyond India;
- (2) any person on any ship or aircraft registered in India wherever it may be;
- (3) any person in any place without and beyond India committing offence targeting a computer resource located in India. (Sub-section 3 was added by the IT Amendment

Act, 2008).

³¹ *Bhim Sen v. State of Uttar Pradesh*, AIR 1955 SC 435.

³² *Mobarik Ali v. State of Bombay*, AIR 1957 SC 857.

³³ Information Technology Act, 2000, s. 75. “Act to apply for offence or contravention committed outside India:

(1) Subject to the provisions of sub-section (2), this Act's provisions shall also apply to any offence or contravention committed outside India by any person irrespective of his nationality.

(2) For the purposes of subsection (1), this Act shall apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.”

³⁴ See *UJEF et LICRA v. Yahoo! Inc. et Yahoo France*, Tribunal de Grande Instance de Paris, No RG:00/0538, May 22, 2000, and November 22, 2000

³⁵ VPN is a type of private network that enables the sharing of data in a point-to-point private link. It helps maintain secrecy and privacy. It is highly used by corporations and organizations involved in businesses. It is used to protect web traffic from censorship, snooping and interference.

³⁶ Gauhati High Court takes suo moto cognizance of lynchings of youth mistaken as child-lifters, *available at*: <https://www.liveweb.in/gauhati-hc-takes-suo-motu-cognizance-of-lynching-of-youth-mistaken-as-child-lifters-read-orders/> (Visited on October 3, 2020).

³⁷ (2018) 9 SCC 501.

³⁸ Supreme Court has the power to punish for its contempt under article 129 of the Constitution of India, the High courts have the power to punish for its contempt under article 215 of the Constitution of India, and the Contempt of courts act, 1961 deals with the contempt jurisdiction of lower courts.

³⁹ Delhi High Court issues ‘Criminal Contempt of Court’ notice to Vivek Agnihotri for a Tweet, *available at*: <http://thegoaspotlight.com/delhi-high-court-issues-criminal-contempt-of-court-notice-to-vivek-agnihotri-for-a-tweet/> (Visited on October 3, 2020). In his tweets, Agnihotri highlighted the relationship of Usha Ramanathan with organisations like Amnesty International, which are currently under investigations for FEMA violations.

⁴⁰ See Lewis A. Kornhauser and Lawrence G. Sager, “Unpacking the Court” 96 *YLJ* 82, 108-09 (1986).

⁴¹ *Sorell v. IMS Health, Inc.*, 564 US 552 at 565 (2011).

⁴² Vidushi Marda and Stefania Milan, “Wisdom of Crowd: Multi-stakeholder perspectives on fake news” a report by the Internet Policy Observatory at the Annenberg School, University of Pennsylvania, 12, *available at*: http://globalnetpolicy.org/wp-content/uploads/2018/05/Fake-News-Report_Final.pdf (Visited on October 4, 2020).

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ (1995) 5 SCC 139, See also *Indian Express Newspaper (Bombay) Ltd. v. Union of India*, (1985) 1 SCC 641.⁴⁶ *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*, 447 US 557 at 564 (1980).⁴⁷ 249 US 47 (1919).

⁴⁸ 1962 SCR Supl. (2) 769.

⁴⁹ Abhinav Chandrachud, *Republic of Rhetoric: Free Speech and the Constitution of India* 16 (Penguin RandomHouse India Private Limited, Gurugram, 2017).

⁵⁰ See *the United States v. Alvarez*, 132S.Ct. 2537 (2012).

⁵¹ *Ibid.*

⁵² J.W. Ouwerkerk, “Criminalisation as a Last Resort: A National Principle under the

Pressure of Europeanisation?” 3 *NJECL* 228–241 at 229, 230 (2012).

⁵³ *Ibid.*

⁵⁴ *C.S Reddy v. State of A.P.*, 1973 Cri LJ 1713 at 1714.

⁵⁵ *Babaji Sahoo v. State of Orissa*, 1989 Cri LJ 1872 (Ori).

⁵⁶ R.V. Kelkar, *Criminal Procedure* 776 (EBC Publishing (p) Ltd., Lucknow, 6th edn, 2014).

⁵⁷ CRL. OP No.12229 of 2018, available at: <https://www.livelaw.in/forwarding-social-media-posts-equal-to-endorsing-it-madras-hc-denies-anticipatory-bail-to-bjp-leader-s-ve-shekher/> (Visited on October 4, 2020).

⁵⁸ *Id.* at 21.

⁵⁹ 2017 SCC OnLine Del 11191.

⁶⁰ *Id.*, para 25.

⁶¹ CS (OS) 510/2016.

⁶² *Id.* at 2.

⁶³ 2017 SCC OnLine HP 2474 at para 46. In this case, some defamatory news about a barber (Prakash Chand) in a shop and its prices were published in 'Divya Himachal Daily'. Then, a piece of similar news was again published in 'Nirala Weekly' wherein it was mentioned that he was a pickpocket and was looting the people.

⁶⁴ *Anuja Kapur v. Union of India*, R.P.(C) No. 1154/2019