

FAKE NEWS, SOCIAL MEDIA AND ROLE OF JUDICIARY

***Priya Singh**

Abstract

Fake news is one of the burning issues in India which can be attributed to the technological advances. While dissemination of fake news is itself a menace, the corollary harms associated with the dissemination of 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 role of judiciary has been minimal till today since there has been no major case of fake news in India but the judiciary can play an important role by interpreting the existing laws in a manner so as to strike a balance between an individual's right to speech and expression and curbing fake news and information.

I. Introduction

Man is different from other creations of the God as having an unusual stretch of 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, the 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, in the hope of generating attention and revenue, opportunists started creating misleading or fake news articles intentionally.

Fake news is very hard 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

*Institute of Law & Research

¹ John Allen Riggins, "Law Student Unleashes Bombshell Allegation You Won't Believe!: "Fake News" As Commercial Speech" 52 *WFLR* 1311 (2017).

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 the civil society as well as 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 role of judiciary in curbing the menace of fake news. This paper will try to address the pressing questions such as: How to solve the problem of jurisdiction in online medium? Can the judiciary take suo-moto action in fake news cases? How has 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?

II. Imprudent Use of Free Speech

Fake news has the ability to spread more quickly than ever before. The most salient dangers associated with ‘fake news’ that we ignorantly spread, is the fact that it devalues and delegitimizes voices of expertise, authoritative institutions, and the concept of objective data—all of which undermines society’s ability to engage in rational discourse based upon shared facts.³ True news stories are expensive to create; news requires research and reporting, as well as institutional structures including editors and fact checkers to support the writing process.⁴

One major disincentive associated with the publication of fake news is that once the people have read a fake news, subsequent rebuttal of it with the real news might not have the impact, which it could have had, had it been published earlier. It is also to be borne in mind that once a 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 online mode of publication

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-protectedspeech>. (Visited on October 2, 2020).

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 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.

Fake news created for the purpose of inciting communal violence can be seen from the following. In March 2017, a video went viral which was accompanied with an identical piece of text claiming that the young girl shown 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 burnt alive because she refused to wear a Burkha. AltNews⁷ found that it was in reality a two-year-old mob lynching video from Guatemala, which was maliciously being passed off as a Hindu woman being lynched.⁸ On April 10, 2017, AajTak posted a news repeatedly on its official Facebook page about a ‘recently’ issued ‘fatwa’ in Saudi Arabia that stated, “men can eat their wives if they are hungry.” Ironically, India Today’s website ‘DailyO’ itself reported it to be fake back then on October 29, 2015.⁹ A fake news about a non-existent interview of Arundhati Roy ignited a Twitter war between the supporters of BJP MP and Actor Parsesh Rawal and those who denounced him for advocating violence. “70 lakh Indian soldiers cannot defeat Azadi gang in Kashmir” was the statement attributed to Arundhati Roy. It became a hot topic for prime time debates on Republic TV and CNN News 18. 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,

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).

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 that information which is false 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 a 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 true but in reality, it is false. Journalists often misinform the public because of the pressure to publish first. When whole of the story is not disclosed and only few facts are disclosed then 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, created specifically to mislead and deceive its heavily social media audience and emphasize revenue over accuracy, has been a constant part of American reality.

In USA, on November 9, 1874 the Herald published a front-page article claiming that the animals had escaped from the Central Park Zoo and were frenzying through the city.¹⁵ Rival

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).

papers throughout the United States quickly and unanimously denounced the hoax. The New-York Times, while admitting that the “animals in the Central Park are confined in the flimsiest cages ever seen,” described the article as an intensely stupid and unfeeling hoax” and printed letters from readers claiming to have been terrified by the story.¹⁶ On Sunday, December 4, 2016, a shooting incident occurred at a pizza shop in north-western Washington D.C. during the middle of the day. The pizza shop (called Comet Ping Pong), got involved in a strange situation due false tweets widely spread on the net claiming that the pizza shop was the base for a pedophile sex ring. The tweets claimed that the Democratic presidential candidate Hillary Clinton, a former Secretary of State, and members of her campaign were involved in the business going on in the pizza shop. Although the news was fake, the operators of the pizza shop and surrounding businesses said that they are frightened by more and more confrontations with people who believed the fake news.¹⁷

III. Laws regarding Fake News in India and abroad

At the international level, the preamble¹⁸ of Universal Declaration of Human Rights (UDHR), 1945 and also article 19¹⁹ of UDHR provide freedom of speech. Article 19 of International Covenant on Civil and Political Rights (ICCPR), 1976 has the similar provision.

Several countries including Singapore, Germany, Bangladesh, Belarus, Russia, Malaysia, France and European Union etc. have passed legislations to curb fake news. Stringent punishments have been imposed under these legislations for spreading false news. However, these laws have been immensely criticised for having the potential to be misused to stifle free speech and target whistleblowers. The most stringent punishment against the spread of fake news has been provided by the law of Singapore under which if a “malicious actor” shares false information, the penalty is a fine of up to \$37,000 or five years in prison. The punishment jumps to \$74,000 and a potential 10-year jail term if the falsehood was shared using “an inauthentic online account or a bot.”

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.”

In India, the freedom of speech is guaranteed under article 19(1)(a) of the Constitution of India which provides that all citizens shall have the right to freedom of speech and expression. Article 19(2) provides eight reasonable restrictions²⁰ on the freedom of speech. These restrictions are exclusive of each other.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” and any action including spread of fake news provoking such killings would be covered under Section 153A of the IPC, entailing a jail term of three years.²² To punish fake news *via* a claim other than fraud or defamation would require a direct causal link between the speech in question and the harm that resulted.²³

The Information Technology Act, 2000, imposes a limited liability on intermediaries, such as search engine giant Google, for providing a platform to any objectionable content. While exempting intermediaries from liability for any third party content, Section 79 (3) (b) of the IT Act imposes an obligation on them to remove any such content pursuant to takedown notices by law enforcement agencies. This section was challenged in *Shreya Singhal v. Union of India*,²⁴ wherein a two Judge Bench of Supreme Court held that:²⁵

section 79 is valid subject to Section 79(3)(b) being read down to mean that an intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Article 19(2) are going to be committed then fails to expeditiously remove or disable access to such material.

²⁰ Sovereignty and integrity of India, the security of the state, 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 the October 16 and 17, 1949. The Constituent Assembly was pleased with the incorporation of the freedom of speech and expression; conflict arose regarding the clause (2) of the article that provided for restrictions to the freedom of speech. 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 USA even where rights were restricted and the restrictions were put in by the Supreme Court case 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\(A\)\)](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 *WFLR Online* 12 (2017).

²⁴ (2015) 5 SCC 1.

²⁵ *Id.* at 181.

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 very frequent 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 those journalists who were involved in generating and disseminating fake news. However, the guidelines were criticised and were termed by journalists as well as the Opposition as an attempt to “muzzle” the free press. In less than a day, the guidelines were withdrawn upon the directions of the Prime Minister Narendra Modi.

IV. Role of Judiciary

The role of judiciary in fighting fake news is as important as the legislature. The purpose of courts is to adjudicate, interpret and to protect the fundamental rights of the individuals. For protecting the freedom of speech and fighting fake news, the duty of the legislature is to make laws and the duty of the courts is to see that the law is reasonable and does not violate the fundamental freedom of speech. There has been no major case on social media that has been decided by the Supreme Court of India, but various high courts have taken concrete steps by punishing those who spread false information and have time to time rejected their

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.”

pleas of not guilty. Punishing fake news and information is the need of the hour as it has cost the life of many. While adjudicating cases related to social media, the courts face a lot of hurdles in reaching a conclusion. Some problems relate to jurisdiction, offender being outside 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:**

One of the preliminary issues, which 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. Technological speed of transmission of information across the boundaries tends to blur the borders between states. The cyberspace has thus become a borderless environment. Therefore, there can possibly be two situations which 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. Jurisdiction becomes a concern of international law when a State, in its eagerness to promote its sovereign interests abroad, adopts laws that govern matters of not purely domestic concern.²⁹ So, it is the duty of the courts to satisfy itself before hearing the matter that it has pecuniary, subject-matter as well as 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

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

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

³⁰ Section. 4 Extension of Code to extra-territorial offences. —The provisions of this Code apply also 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).

court cannot be held to have been excluded.³¹ A foreigner committing an offence in India will be amenable to the Indian law and will be punishable under this section, although he may not be physically present in India at the time of the offence³² and ignorance of law is not an offence. 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 system or computer network.³³ Thus, any information or fake publication in online medium, which is accessible in India would be punished if it leads to any offence.

Section 187 of CrPC also gives powers to a Magistrate of the First Class to try a matter where any person whether in or outside India has committed any offence punishable under any existing Indian law provided the courts have a reason to believe that the person is within the local jurisdiction of the court. 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 both in electronic as well as print media.

- **Law of Extradition:**

In India, the Extradition Act, 1962, provides a procedure for extradition of offenders or accused from another country to India. Extradition means surrender of a person accused or convicted of an offence, by one state to another under some arrangement. Such person may be citizen of any country. Extradition of offenders is applicable in cases where the

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), the provisions of this Act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality.

(2) For the purposes of sub-section (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.

punishment for the 'extradition offence' is not less than 1 year. India has signed 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 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 very easy to catch an offender. Another problem related to Whatsapp is the feature of "end-to-end encryption" of messages which if decrypted would seriously undermine the privacy issues of the individuals. 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 major 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 is applicable when the victim suffers injury or losses and require rehabilitation and also when the accused remains unidentified or unknown. In all other cases, the courts have plenary jurisdiction under section 482 of CrPC and 151 of CPC.

- ***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. Guahati High Court took

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.

suo-moto cognizance of the lynching by the villagers of two youth- Nilotpal Das and Abhiji Nath. The Court asked the government as well as the police as to 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 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 effectively deal with mob lynchings. 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 views that are the unfavourable towards the majority. The government restriction is more like a content neutral restriction since the government targets the vehicle of speech rather than the content of speech.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,

³⁶ Gauhati High Court takes suo moto cognizance of lynchings of youth mistaken as a child lifters, *available at: <https://www.livelaw.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. Kornhauer 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).

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 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.⁴³ The involvement of third party checkers increases trust in 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 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 the ingredients of section 500 of the IPC are satisfied. In India, defamation is both a civil wrong and 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. United States*,⁴⁷ which was adopted in *Kedar Nath Singh v. State of Bihar*,⁴⁸ which considers whether speech

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.

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.

The law of free speech in India is essentially criminal law. The prospect of being arrested and of spending a few nights in police custody is an incredible disincentive against saying anything, which might be considered even remotely anti-national.⁴⁹ We have ample laws to fight back fake news but what we lack is 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 some violence, then such an act should be punished under the appropriate laws. But, when there is fake news, which is created solely for the purpose of entertainment or for the purpose of earning revenue such as satires and parodies, then in such a situation, arrest would not be a plausible solution. The major thing the courts should keep in mind is the ill motive behind the fake news. Protection has been accorded to 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 does harm. It deprives a person of his liberty. It carries with it a profound negative social impact on the prisoner as well as 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

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

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

⁵¹ *Ibid.*

resort requires the enforcement agencies to exercise reserve when turning to criminal law, not only where it comes to litigation, but also in respect of criminal procedure and the imposition of punishment should be avoided if possible.⁵² Sanctions should not be more severe than necessary and custodial sanctions are to 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. In the opinion of the Magistrate, there should be a sufficient ground for proceeding against the person informed against. It is the *sine qua non* for instituting proceedings under sections 107 and 108 of CrPC.⁵⁴ After forming opinion that there is a sufficient ground for proceeding under section 107, the Executive Magistrate will be guided by the information received by him which may be from any source public or private.⁵⁵ What is reasonably sufficient to satisfy a Magistrate, must depend on the particular situation. The approach of the Magistrate from case to case must be highly empirical and not esoteric.⁵⁶

Forwarding social media posts is equal to endorsement. The Madras High Court while rejecting anticipatory bail plea of journalist turned BJP leader S. V. Shekher who allegedly shared a derogatory Facebook post on women journalists, has observed 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. If we go by the case then one can land in jail, if we ignorantly forward or share any message that may cause ruckus according to the Madras High Court. 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 right in rejecting the bail plea, but the principle

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.

enunciated therein cannot be made applicable to each and every act of sharing posts by a common man. Strict liability cannot be attached in these types of cases, otherwise there would be enormous increase in litigation and 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. Similar judgment was delivered by the Delhi High Court in *Raghav Chadha v. State*,⁵⁹ where 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 on being devoid of merit. Then the petitioner approached the Supreme Court challenging the High Court's decision, which was again dismissed by the Supreme Court.

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 for *ex parte* injunction as prayed in the application under order 39 R. 1 & 2 CPC has been made out. The balance of convenience lies in the favour of the plaintiff. Irreparable loss is likely to be caused if her rights, interest and reputation is not immediately protected.

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."

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 similar news was again published in 'Nirala Weekly' wherein it was mentioned that he was a pickpocket and was looting the people.


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 law making task with the legislature.

V. 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 on the ground that they compromise with the freedom of speech. On one hand, there is a necessity of preserving the liberties that underlie freedom of speech and on the other, there is a necessity of preserving 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 basic inalienable right of an individual should not be restricted on flimsy grounds. The courts have to see that there is a proximity between 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 criminalization of offences. Further, recourse to the rule of strict liability should be taken only when the situation is so adverse that without punishment justice cannot be done. Apart from the courts, the government and the legislature have to build a strong legal system as well as a strong Cyber Crime Cells with latest technologies and experts in the field of technology that can help in identifying 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 hoax and what is not. However, distinguishing fake news from real news is not an easy task. Even the most literate cannot easily discover the truth behind fake news. Discovering the truth and individual assessment of the information is necessary on part of the 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

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

minority views or unfavourable views in the garb of restricting fake news. It is also believed that the more the 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 journalist, a social media CEO, a consumer of news, legislator, policy makers, the software engineers, content distributors, the content creators etc. should work in synergy to fight back fake news. Flagging of fake news content by the content creators, software engineers and the website handlers is a better way of curbing the menace of fake news.



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