

REGULATORY RESPONSES TO THE MENACE OF FAKE NEWS- PART 3

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This part of the paper analyzes the double-sided perspectives to false speech regulations, firstly from the perspective of protection for speakers with a reference to John Mill's principles, and secondly, from the perspective of protection for listeners with a reference to Kant's principles. Further, this part of the paper will enumerate upon recent global developments to curtail fake news and lastly, the paper will provide a conclusion with suggestions and findings.

John Stuart Mill and Immanuel Kant's philosophy to regulate false speech

The importance of protecting false speech and protecting free speech are so closely intertwined that often they have been the center of philosophical deliberations. Many philosophers have extensively deliberated upon; protection of false speech, regulation of false speech and its ancillary effect on free speech, and what is important in encouraging public discourse- protection for the speakers or protection for the listeners. However, the most renowned of these philosophical deliberations are the philosophies of John Stuart Mill, who propounded protection for speakers, and Immanuel Kant who propounded for protection for listeners.

John Stuart Mill was not so much in favour of regulating false speech, instead in 'On Liberty' he argued for protecting false speech.¹ He propounded that false speech is important in enabling people to discover the truth in a free and open public discourse.² He believed that ideological truth does not occur naturally, they must be discovered through debate in public discourse.³ According to him, false speech is not completely worthless, it holds a certain value, as it

¹See John Stuart Mill, On Liberty, reprinted in *ON LIBERTY, UTILITARIANISM AND OTHER ESSAYS* 5, 15, 18-54 (Mark Philip & Frederick Rosen eds., 2015).

²See *id.*

³ *Id.*

encourages people to investigate the claims, the ultimate result of which is the discovery of complete truth.⁴ Censorship of speeches making deliberate false claims and erroneous speeches will hamper the discovery of truth, he believed.⁵ Only with a constant debate of defending and expressing truth, can the vigor of truth be maintained.⁶ Henceforth, by such an approach both free speech and false speech can provide a “clearer perception and livelier impression of truth, produced by its collision with error.”⁷

On the other hand, Immanuel Kant analyzed the moral restrictions concerning intentionally made false claims.⁸ He propounded that every lie made, diluted listener’s ability to act freely and reasonably thus dampening their poise, and hence was extremely injurious.⁹ He believed that speakers by lying hinder with the listener’s right to get a true and precise knowledge of facts and therefore deviating their capability to form informed opinions based on true and precise facts.¹⁰ He also believed that lies decrease the credibility of speakers and henceforth sowing distrust among people to trust less of each other’s contentions.¹¹ Based on the policies of both Mill and Kant, the marketplace of ideas thrives on the idea that people will not be able to magnify their knowledge if they are disallowed to affirm and check/verify their ideas against that of others.¹² Also, an efficient marketplace of ideas is one which presupposes that both truths can be discovered and participants in the public discourse are trying to disclose the final truth with good intentions.¹³

⁴ Id. at 19–21, 35.

⁵ See *id.*

⁶ See *id.* at 35, see also Christoph Bezemek, *The Epistemic Neutrality of the “Marketplace of Ideas”*: Milton, Mill, Brandeis, and Holmes on Falsehood and Freedom of Speech, 14 FIRST AMEND. L. REV. 159, 166 (2015), see also Manzi, *supra* note 38 at 2626.

⁷ See Mill, *supra* note 147, at 19.

⁸ See Immanuel Kant, *On a Supposed Right to Lie Because of Philanthropic Concerns*, reprinted in ETHICAL PHILOSOPHY 162 (James W. Ellington trans., 2d ed. 1994).

⁹ See *id.* at 163–65.

¹⁰ Id.; see Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1114 (2006).

¹¹ See Kant, *supra* note 154, at 163–64.

¹² See Post, *supra* note 36, see also Daniela C. Manzi, *supra* note 38 at 2627.

¹³ See Annie C. Hundley, *Fake News and the First Amendment: How False Political Speech Kills the Marketplace of Ideas*, 92 TUL. L. REV. 497, 502–03 (2017); see also Mill, *supra* note 147, at 21; see also Shiffrin, *supra* note 79; see also Manzi, *supra* note 38 at 2627.

Global developments in law to curb Fake News

The unprecedented level of harm fake news is causing to the global society is not unknown to the world and with absenteeism of regulations to curb it is likely to continue to do so. Several countries around the world, therefore, are enacting laws to regulate the fake news menace. However, the majority of these attempts are turning out to be either too casual thus failing to even scratch the tip of the iceberg or being too extreme and having chilling effects on free speech thus facing enough criticism either from the judiciary or people. The freedom of expression and free press theory are so closely intertwined that often they are used synonymously.¹⁴ This is careworn of John Stuart Mill's theory of *Liberty*, which propounded that allowing all speech in society, would help the society in searching and perfecting truth which will triumph over false ideas in the marketplace of ideas.¹⁵ Modernly however this theory fails, as it is based on the assumption that truth will always trump irrespective of other factors which ascertain whether an individual will accept an idea as true or not.¹⁶ The theory neglects the other factors responsible for ascertaining truth such as availability of true ideas, the reach of a false idea, rational minds, psychological inclination, etc. Thus the scholars have disassociated the free expression doctrine from the truth-seeking-justifications in the marketplace of ideas.¹⁷ This part henceforth will analyze the regulatory responses adopted by various countries to curtail fake news and their drawbacks.

The various responses countries had been undertaking to curtail the menace of fake news can be summarized into four broad categories,¹⁸ namely: (a) strengthening the already existing laws most of which are predated to pre-internet era; (b) enacting new specifically drafted legislatures, some of which are either too narrowly drafted or too broadly drafted wherefore having the

¹⁴see Butler, *supra* note 26 at 423.

¹⁵ Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 445, 448 (2012), see also Butler, *supra* note 26 at 423.

¹⁶See Ingber, *supra* note 96.

¹⁷See Butler, *supra* note 26 at 423.

¹⁸Peter Roudik, *Initiatives to Counter Fake News: Comparative Summary*, Law Library, Library of Congress, (2019), <https://www.loc.gov/law/help/fake-news/compsum.php>

potential to chill free speech; (c) establishing fact-checking or myth refuting organisations;¹⁹ (d) increasing media literacy and educating people to differentiate between fake news and real news. The countries have either adopted anyone abovementioned method to curtail fake news or a combination of one or two of these methods.

Malaysia

Though Malaysia has witnessed lesser chaos due to fake news, they have adopted a threefold approach to stop the menace of fake news before it gets too big to be controlled. Malaysia despite enacting special legislation to curtail fake news, have established fact verifying website and also initiated digital literacy programs.²⁰The ‘Malaysia Communications and Multimedia Commission (MCMC)’ is responsible to maintain the fact-checking website namely *Sebenarnya.my*, together with the government, its officers including ministers, and several other govt. departments and agencies.²¹ The basic purpose of this website is to refute or verify false news or information concerning the government prevalent in the information ecosystem.²² However, this autonomous exercise of powers by the government leaves room for abuse and suppression of free speech, and thus has been severely criticized by people basically for two reasons.²³ Firstly, due to the belief that the government lacked the capacity to verify false political issues as most of the time the issues concerned them and secondly this was discretionary and autonomous in nature henceforth must be facilitated by non-government bodies, independent journalists which will increase the trust among people.²⁴ Also, the MCMC further organised several programs to increase digital literacy among people in 2017 which reached 1.5 million people of Malaysia.²⁵

¹⁹Julie Posetti et al., JOURNALISM, ‘FAKE NEWS’ & DISINFORMATION, Handbook for Journalism Education and Training, UNESCO Series on Journalism Education, (Cherilyn Ireton and Julie Posetti eds., 2018) ISBN: 978-92-3-100281-6, available at-
https://en.unesco.org/sites/default/files/journalism_fake_news_disinformation_print_friendly_0.pdf

²⁰See Yatid, *supra* note 65, at 67.

²¹See *id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵Razak Ahmad et al., *Anti-fake news portal extends reach with app and social media*, **The Star Online**, (March 7, 2018, 12:00 AM), <https://www.thestar.com.my/news/nation/2018/03/07/antifake-news-portal-extends-reach-with-app-and-social-media/>

Also the Malaysian Parliament in 2018, swiftly passed the notorious ‘Anti Fake News Act’ just before the general elections, which was extensively criticized and considered to be a means to curtail freedom of expression and escape criticism especially in regard to the recently occurred 1MDB scandal.²⁶ Moreover, the act has further drawn attention due to its excessively broad ambiguous definition of fake news which imposes crooked high fines on every person who creates, publishes, or shares any fake news.²⁷ The act states-

“Any person who, by any means, maliciously creates, offers, publishes, prints, distributes, circulates or disseminates any fake news or publication containing fake news commits an offence and shall, on conviction, be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding six years or to both, and in the case of a continuing offence, to a further fine not exceeding three thousand ringgit for every day during which the offence continues after conviction”²⁸

The act fails to distinguish between deliberate false claims made with malicious intention and erroneous speech made by Bonafide speakers. Also, it has been argued by many that the enactment was completely unnecessary as there already existed several laws, which were though similarly authoritative and obsolete were being utilized to curtail fake news, such as Printing Press and Publication Act 1984, Communications and Multimedia Act 1998, Sedition Act 1948, Defamation Act 1957 and Penal Code of Malaysia.²⁹

Germany

For smooth conduction of its federal elections, that is without any influence of fake news alike the 2016 U.S presidential elections, Germany enacted the ‘Network Enforcement Act 2017’³⁰

²⁶ Hannah Beech, *As Malaysia Moves to Ban ‘Fake News,’ Worries About Who Decides the Truth*, The New York Times, (April 2, 2018), <https://www.nytimes.com/2018/04/02/world/asia/malaysia-fake-news-law.html>.

²⁷ Harris Zainul, *No Silver Bullet for Fake News in Malaysia*, THE DIPLOMAT (Jan. 12, 2019), <https://perma.cc/ZUC9-LN2D>, see also David Hutt, *The Real Problem with Malaysia’s Fake News Law*, THE DIPLOMAT (Apr. 2018), <https://thediplomat.com/2018/04/the-real-problem-with-malysias-fake-news-law/>

²⁸ Anti-Fake News Act 2018 (Act 803), Section 4(1). Available at- <https://perma.cc/E7JL-RGK3>

²⁹ See Yatid, *supra* note 65, at 68.

³⁰ Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken [Netzwerkdurchsetzungsgesetz] [NetzDG] [Act to Improve the Enforcement of Rights on Social Networks] [Network Enforcement Act] [NetzDG],

also often called the Facebook Act.³¹ Though this fear of fake news and whether it had any ill effects on the democratic role of elections cannot be verified with evidence,³² the government acted swiftly and strengthened the several other existing laws to curtail fake news despite enacting specialized legislation.³³

In Germany, a civilian or a politician or any other person whose reputation has been damaged due to the dissemination of fake news can seek remedy either under criminal law for defamation or under civil law for libel.³⁴ The German Penal Code provides punishment for defamation committed in public spaces ranging from three months of imprisonment or fine to five years of imprisonment or fine.³⁵ Social media platforms though mostly held to be as public spaces can however also be treated as a private space, that is when the group in which the information is shared is a closed group with limited numbers of participants.³⁶ Furthermore, the request of the victim is necessarily required to initiate the defamation proceedings, whether intentional or erroneous, against the accused.³⁷ Also, the public prosecutor will only initiate the proceedings only when the matter appears to be in the best public interest.³⁸ Nevertheless, the victim of fake news in addition to a remedy available under criminal law can also avail the remedy under the civil law for libel and henceforth request a preliminary injunction.³⁹

Sept. 1, 2017, BUNDESGESETZBLATT [BGBL.] [FEDERAL LAW GAZETTE] I at 3352, <http://www.gesetzeim-internet.de/netzdg/NetzDG.pdf>, English translation available at- <http://perma.cc/J86HGTY4>

³¹See Posetti, *supra* note 165, at 34.

³³ Id.

³⁴ Id.

³⁵ STRAFGESETZBUCH [STGB] [CRIMINAL CODE], Nov. 13, 199, BGBL. I at 3322, as amended, §§ 186, 187, <http://www.gesetze-im-internet.de/stgb/StGB.pdf>, English translation available at- http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.pdf, see Id. § 186, see Id. § 187, see Id. § 188.

³⁶See Posetti, *supra* note 165, at 36.

³⁷ See *supra* note 181, § 194, para. 1.

³⁸STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BGBL. I at 1074, 1319, as amended, §§ 374, 376, <http://www.gesetze-im-internet.de/stpo/StPO.pdf>, English translation available at- <https://perma.cc/9TLR-A3VD>

³⁹ ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Dec. 5, 2005, BGBL. I at 3202; BGBL. 2006 I at 431; BGBL 2007 I at 1781, as amended, §§ 935, 940, <http://www.gesetze-im-internet.de/zpo/ZPO.pdf>, English translation available at- <http://perma.cc/9TLR-A3VD>

The ‘Telemedia Act’ of Germany,⁴⁰ further provides for information to be verified by the journalists before its transmission, however not only this condition is not mandatory, as must be done depending on the type of content and its truthfulness, also it can only be expected to be abided by those who may agree to be bound by it.⁴¹ Which unlikely happens in cases involving social media platforms or persons using it as a medium to disseminate.⁴²

The insufficiency of social media platforms to curtail the fake news menace and the negligent behavior of host providers on acting upon complaints of fake news led to enactment of the Network Enforcement Act.⁴³ The act however does not create any additional liabilities and only provides for the imposition of heavy fines (up to €50 million) on social media platforms for inobservance of the prevalent laws.⁴⁴ Furthermore, the scope of the act is restricted and only regulates social media handles and no other platforms, or messaging services.⁴⁵ Also, the act obligates the social media networks to delete illegal content within twenty-four hours of reporting by the complainant,⁴⁶ however, if it appears necessary to verify the veracity of the content reported the platforms may take additional seven days which may further be extended if the need arises. Also, the platforms receiving more than 100 complaints are required to furnish publication of yearly annual reports including information of complaint received, type, the frequency of its reported, measures took on it, etc., in the Federal Gazette.⁴⁷

⁴⁰Telemediengesetz [TMG] [Telemedia Act], Feb. 26, 2007, BGBl. I at 179, as amended, § 1, para. 1, <http://www.gesetze-im-internet.de/tmg/TMG.pdf>, English translation available at- <http://perma.cc/77GL-8FJN>

⁴¹Staatsvertrag für Rundfunk und Telemedien [Rundfunkstaatsvertrag] [RSfV] [Interstate Treaty on Broadcasting and Telemedia] [Interstate Broadcasting Treaty], Aug. 31, 1991, as amended, art. 54, para. 2, <http://perma.cc/U5GH-BE8V>, English translation available at- <http://perma.cc/7LF3-5D2W>

⁴²See Posetti, *supra* note 165, at 37.

⁴³ BT-Drs. 18/12356, at 1, <http://dip21.bundestag.de/dip21/btd/18/123/1812356.pdf>, English translation available at- <http://ec.europa.eu/growth/toolsdatabases/tris/en/index.cfm/search/?trisaction=search.detail&year=2017&num=127&dLang=EN>

⁴⁴Jenny Gesley, *Germany: Social Media Platforms to Be Held Accountable for Hosted Content Under “Facebook Act”*, GLOBAL LEGAL MONITOR (July 11, 2017), <http://www.loc.gov/law/foreign-news/article/germany-social-media-platforms-to-be-held-accountable-for-hosted-content-under-facebook-act/>

⁴⁵ Network Enforcement Act, § 1, para. 1, sentences 2, 3.

⁴⁶ Id. § 3, para. 2, no. 2.

⁴⁷ Id. § 2, para. 1.

Though the act appeared to be a promising tool to tackle fake news has also been severely criticized for its chilling effects on free speech and thus often been regarded as unconstitutional.⁴⁸

Japan

Instances of fake news in Japan originating or sourced from out of Japan sources have been relatively less, this has been mainly due to the difficulty in understanding the Japanese language faced by foreigners.⁴⁹ Japan has adopted four measures to curtail the dissemination of fake news in their boundaries which are;⁵⁰ (a) Broadcasting Act, (b) Implementation of provisions of penal code, (c) Election Law, (d) the Internet Provider law.

The Broadcasting Act obligates the broadcaster to ensure that the programs must be broadcasted with a precise state of facts & information, and ensure that no facts should be distortedly reported.⁵¹ Further, the act lays down for establishing a ‘deliberate body for broadcast programs’, for ensuring that the programs broadcasted are appropriate,⁵² the body will function in coordination with the broadcaster and ensure that plan chalked out by the broadcaster regarding program content, standards, editing requirements are adhered to.⁵³ Further, the act obligates the broadcaster to investigate any complaint made in regard to the factual accuracy of the programs within three months from the date of the complaint, and on finding that the assertions were true, must either within two days either correct it with broadcasting another program or either revoke

⁴⁸For a summary of the criticism, see Georg Nolte, *Hate-Speech, Fake-News, das »Netzwerkdurchsetzungsgesetz« und Vielfaltsicherung durch Suchmaschinen* [Hate Speech, Fake News, the "Network Enforcement Act" and Assuring Diversity Through Search Engines], 61 ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT [ZUM] 552, 554 (2017).

⁴⁹藤代裕之 [Hiroyuki Fujii],

フェイクニュースへの危機感が乏しい日本政府、問題は若者より中高年のリテラシー [Japanese Government Lacks the Sense of Impending Crisis of Fake News, At Issue Is News Literacy of Middle-aged and Older, Not Young People], YAHOO JAPAN NEWS (June 21, 2018), <https://news.yahoo.co.jp/byline/fujisiro/20180621-00086295/>, see also Posetti, *supra* note 165, at 52.

⁵⁰See Posetti, *supra* note 165, at 53-55.

⁵¹ Broadcasting Act, Act No. 132 of 1950, amended by Act No. 96 of 2014, art. 4, para. 1, item 3, available at <http://www.japaneselawtranslation.go.jp/law/detail/?printID=&ft=2&re=02&dn=1&yo=broadcasting&ia=03>

⁵² Id. art. 6, para. 1.

⁵³ Id. art. 6, para. 3.

the previous one.⁵⁴Also, the acts provide for taking the same measures for self-discovery of such inconsistencies.⁵⁵The failure to undertake such measures will lead to incurring of fine amounting up to 500,000 yen.⁵⁶

Also, further the Penal Code of Japan makes a person liable for punishment of up to three years or a fine of 500,000 yen for falsely defaming a person publicly.⁵⁷The act also penalizes stating of false claims which may damage the reputation of one's business and create obstructions in carrying of business with ease.⁵⁸Public Offices Election Act, also provides several categories of punishments, ranging from two years to four years of imprisonment or fine of 300,000 yen to up to 1 million yen, for publishing false information to tarnish the image of a candidate or prospective candidate.⁵⁹

The Limited Liability of Internet Provides Act, instead of setting out the liabilities of the internet providers, lays down instances when the providers won't be liable. Which is just as peculiar as holding ear from the other side of the head. The act exempts the provider from liability where it undertook actions, on its own knowledge of information, to prevent dissemination of false information which might infringe someone's rights.⁶⁰ The act obligates the provider to enquire from the sender about the veracity of the information complained about by the aggrieved, on not receiving a reply refuting the claims of the aggrieved within seven days, the provider stands free of liability.⁶¹The duration of awaiting for a reply from the sender is only two days where the implications involve an election candidate.⁶²

Indonesia

⁵⁴ Id. art. 9, para. 1.

⁵⁵ Id. art. 9, para. 2.

⁵⁶ Id. art. 186, para. 1.

⁵⁷ PENAL CODE, Act No. 45 of 1907, amended by Act No. 72 of 2017, art. 230. English translation available at-
<http://www.japaneselawtranslation.go.jp/law/detail/?printID=&ft=2&re=02&dn=1&yo=penal&ia=03&ph=>

⁵⁸ PENAL CODE, Act No. 45 of 1907, also see supra note 165 at 54.

⁵⁹ Public Offices Election Act, art. 235-5, also see art. 235, para. 1, 2.

⁶⁰ Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Senders, Act No. 137 of 2001, amended by Act No. 10 of 2013, art. 3, para. 2, item 1.

⁶¹ Id. art. 3, para. 2, item 2.

⁶² Id. art. 3-2, item 1.

In the absence of a specific law to regulate fake news, Indonesia adopted a multi-dimensional approach to curb fake news. Firstly, the establishment of 'National Cyber and Encryption Agency' which will work to facilitate identifying and removing of false content from the internet by keeping robust surveillance on sites believed to disseminate fake news and report them automatically.⁶³ To increase digital literacy among people its Communications Ministry also initiated to organize weekly programs to educate people to better identify fake news and differentiate it from true news.⁶⁴ Arresting of several alleged frequent perpetrators of spreading fake news further supported the cause.⁶⁵ Also, consistent efforts by various social groups and individual volunteers to spread knowledge regarding fake news became a great ally measure to combat fake news.⁶⁶ For instance, with the help of social group Masyarakat Anti Fitnah Indonesia (Mafindo), the spirit to curb fake news could gain momentum and reached 17 countries of Indonesia.⁶⁷

France

Alike every other jurisdiction, France also enacted the law against fake news in 2018, to protect the elections from purposefully disseminated fake news by companies of Russian links and other extremist groups.⁶⁸ The law substantially vests powers on the independent broadcasting authority, to suspend the license of any media organization, having foreign links, on reasonable

⁶³Safrin La Batu, *Govt. deploys artificial intelligence to combat internet hoaxes*, The Jakarta Post, (Jan. 31, 2018, 3:26 PM), <https://www.thejakartapost.com/news/2018/01/31/govt-deploys-artificial-intelligence-to-combat-internet-hoaxes.html> ; see also Safrin La Batu, *Nine social media, messaging apps agree to combat fake news*, The Jakarta Post, (Jan. 31, 2018, 4:19 PM), <https://www.thejakartapost.com/news/2018/01/31/nine-social-media-messaging-apps-agree-to-combat-fake-news.html> ; see also Kanupriya Kapoor, *Indonesia's new cyber agency looks to recruit staff of hundreds*, Reuters, (January. 5, 2018, 6:03 PM), <https://www.reuters.com/article/us-indonesia-cyber/indonesias-new-cyber-agency-looks-to-recruit-staff-of-hundreds-idUSKBN1EU15X>.

⁶⁴ Kate Lamb, *Indonesian government to hold a weekly 'fake news' briefings*, The Guardian, (September. 27, 2018, 4:22 PM), <https://www.theguardian.com/world/2018/sep/27/indonesian-government-to-hold-weekly-fake-news-briefings>

⁶⁵ Kate Lamb, *Muslim Cyber Army: a 'fake news' operation designed to derail Indonesia's Leader*, The Guardian, (March. 13, 2018, 4:40 PM), <https://www.theguardian.com/world/2018/mar/13/muslim-cyber-army-a-fake-news-operation-designed-to-bring-down-indonesias-leader> , see also Yatid, *supra* note 65, at 65.

⁶⁶See Yatid, *supra* note 65, at 65.

⁶⁷ Alfred Chua, *The Big Read: In the war against fake news, public needs to get in the trenches*, TODAY, (March. 24, 2018), <https://www.todayonline.com/singapore/big-read-war-against-fake-news-public-needs-get-trenches>

⁶⁸ Zachary Young, *French Parliament passes law against 'fake news'*, POLITICO, (June. 4, 2018, 12:44 PM), <https://www.politico.eu/article/french-parliament-passes-law-against-fake-news/>

suspicion of spreading fake news during the campaigning of national elections.⁶⁹ The act also obligates the social media platforms to provide the information of the users paying to disseminate the content, and the amount they spend, also they must allow flagging/marketing of stories which appears false to-by the users.⁷⁰ The act further requires the platforms to make public of the actions undertaken by them to curtail fake news.⁷¹ The act also provides an additional ailment to people to ask a judge to get removed any false content within 48 hours, if it has been widely disseminated.⁷² Furthermore, the act completely prohibits the sharing of any false news starting before three months from elections to till the elections are conducted.⁷³

France's anti-fake news law has also faced severe criticism from free speech scholars alike every other anti-fake news law of the world. However, it had been repeatedly assured by President Macron, that the law is a tool to protect the spirit of democracy and its essential institutions and not a measure to suppress free speech.⁷⁴ However the leader of 'National Rally', Marine Le Pen argued that the act was less of an attempt in good faith to curtail fake news, and will lead to indirect censorship which will cause the infantilizing of the people of France.⁷⁵ It was further criticized by Jean-Luc Mélenchon, of the France Unbowed who called it a desperate effort to regulate information and the media, who condemned for its stifling effect on freedom of expression.⁷⁶

The act also appears impractical to many, who based their assertion on the insignificant amount of time provided to a judge to decide for removing the alleged false content.⁷⁷ It is argued that either it will lead to overflow of claims with judges which will ultimately lead to improper

⁶⁹ Pascal Emmanuel Gobry, *France's 'Fake News' Law Won't Work*, *Bloomberg Opinion*, (February. 14, 2018, 10:14 PM), <https://www.bloomberg.com/opinion/articles/2018-02-14/fake-news-france-s-proposed-law-won-t-work>

⁷⁰ Ciara Nugent, *France Is Voting on a Law Banning Fake News. Here's How it Could Work*, *TIME*, (June. 7, 2018, 1:09 PM), <https://time.com/5304611/france-fake-news-law-macron/>

⁷¹ Jack Edmond, *Potential responses to the threat of 'fake news' in a digitalised media environment*, <https://www.otago.ac.nz/law/otago710994.pdf>

⁷² *Id.*

⁷³ *See* Nugent, *supra* note 216.

⁷⁴ *See id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *See* Edmond, *supra* note. 217, at 17.

dismissal of claims by utilizing a narrow scope of the act, or improper deciding of cases in a hurried manner, which might lead to dismissal or removal of legitimize content.⁷⁸ Also, the impractical application of the law became clear on analyzing the cases which for instance took months to verify the veracity of the content.⁷⁹ However, though, the act is narrowly drafted, for content to be considered as fake the malicious intention of the author must be established, also it must further be established that the act could disrupt public harmony or caused grave public harmony.⁸⁰

Brazil

Meanwhile, since the Brazilian fake news act or ‘Brazilian Law on Freedom, Responsibility, and Transparency on the Internet’ is awaiting approval of the National Congress’s lower chamber, it has been severely criticized. The law fails to properly define as to what amounts to fake news and thus appears ambiguous with regard to the scope of the act.⁸¹ Fake news is defined with too broad legal conjectures in the bill- as any false content or deceptive content having the potential to harm both individuals or institutions,⁸² and is henceforth negligent towards erroneous speech or satire or humorous content having less harmful potential. Due to this grave ambiguity in the basic essential structure of the act, there exists a scope for abuse of power by the government to decide on discretion as to what content is harmful and therefore use it for political gains.⁸³ The bill fails to address the real issue regarding fake news, that is the network of legitimized people by it is disseminated, and rather focus on the content itself. Though this bill tries to address this, however failed in doing so and instead did a great categorical error. The bill prohibits the creating of automated bots without prior notifying of purpose. This though may appear insignificant can be problematic for a person using bot like username or a gaming name for aid

⁷⁸ Id.

⁷⁹ See Nugent, *supra* note 216; see also Jon Henley, *Emmanuel Macron files complaint over Le Pen debate ‘defamation’*, The Guardian, (May. 4, 2017, 18:51), <https://www.theguardian.com/world/2017/may/04/emmanuel-macron-files-complaint-over-marine-le-pen-debate-remark>

⁸⁰ See Edmond, *supra* note, 217, at 18.

⁸¹ Raphael Tsavkko Garcia, *Brazil’s “fake news” bill won’t solve its misinformation problem*, MIT Technology Review, (September. 10, 2020), <https://www.technologyreview.com/2020/09/10/1008254/brazil-fake-news-bill-misinformation-opinion/>

⁸² See *id*; see also Bill No. 2630, 2020 (Fake News Bill), <https://www25.senado.leg.br/web/atividade/materias/-/materia/141944>

⁸³ See Garcia, *supra* note. 227.

to freely express without revealing their identity.⁸⁴ Furthermore, the bill empowers the social media handles, on complaints of non-observance of fake news laws or suspicion of being bots, to collect the personal ids of the users, which has severely been criticized by many as an act of surveillance and threat to privacy.⁸⁵The bill ignores the probability of such a complaint being motivated out of personal malice or political rivalry.⁸⁶

The act is further observing in nature and provides to keep surveillance on the messages shared to 1000 users within a duration of 15 days. This will obligate the platforms to store messages of any user, who shared the message to 1000 people without an intention to misinform or harm.⁸⁷ Furthermore this act in contrast to the *Marco Civil bill* according to which the platforms were not liable for the content publish on them, however with the passage of the fake news bill, the social media platforms will be liable for every content published on them, which might result removing of content which might appear slightly displeasing to the then government.⁸⁸ Further, the article 9 of the bill directs the handles to reduce the number of allowed participants in groups, which has been believed to stifle innovation as people are dependent on peer to peer group apps to easily communicate.⁸⁹ Also, article 37 obligates the social media platform to provide access to their user database to the Brazilian Government staff, which will provide fragile private information in the hands of the government which can lead to a severe threat to an individual.⁹⁰ The act also is extraterritorial in the jurisdiction and hence applicable to people outside Brazil.⁹¹

India

⁸⁴ See Supra note 228.

⁸⁵Katitza Rodriguez and Seth Schoen, 5 Serious Flaws in the New Brazilian “Fake News” Bill that Will Undermine Human Rights [UPDATED], EFF, (June. 29, 2020), available at- <https://www.eff.org/deeplinks/2020/06/5-serious-flaws-new-brazilian-fake-news-bill-will-undermine-human-rights> , also see Garcia, supra note. 227

⁸⁶ See Garcia, supra note, 227.

⁸⁷See *id.*

⁸⁸ *Id.*

⁸⁹See Rodriguez and Schoen, supra note 231.

⁹⁰*Id.*, see also art 37 supra note 228.

⁹¹See Rodriguez and Schoen, supra note 231; see also art 1 para 1 & 2 supra note228.

India is like several other countries who are yet to legislate a law to regulate fake news. However, the country in the absence of specialized legislation had been tackling the menace of fake news with various provisions of the Indian Penal Code and of Information Technology Act. Section 505 of the code,⁹² punishes an individual with imprisonment of up to 6 years or fine or both, who mischievously disseminates incorrect information which induces fear or alarm among the public and causes a person to commit an offence against the state or public harmony. Reliance to curb fake news has also been placed on preceding section 504 of the code⁹³, which prohibits spreading of information with an intention to provoke public disharmony and commission of an offence against the public peace or any other offence.⁹⁴ The section prescribes a punishment of up to 2 years or fine or both.⁹⁵

Also, section 66D of the Information Technology Act, 2000⁹⁶, has appeared beneficial in curtailing misinformation. The section punishes personification of a third person by using computer resources, with an intention to cheat or defraud, with imprisonment of up to 3 years or fine or both⁹⁷. Furthermore, section 54⁹⁸ of the Disaster Management Act, also prohibits the dissemination of fake news or false alarms regarding a disaster, its magnitude, etc., and provides for a punishment of up to 1 year or fine or both. However, the scope of the act is only limited to fake news regarding disasters and does not prohibit fake news in general.⁹⁹

China

⁹²Indian Penal Code, 1860, § 505.

⁹³Indian Penal Code, 1860, § 504.

⁹⁴Vedant Tapadia and Mridushi Damani, *THE PLAGUE OF FAKE NEWS AND THE LEGISLATIVE ARMOUR AROUND IT*, Supremo Amicus, ISSN 2456-9704.

⁹⁵See *supra* note 239.

⁹⁶Information Technology Act, 2000, §66D Punishment for cheating by personation by using computer resource., *inserted vide* Information Technology (Amendment) Act 2008.

⁹⁷ *Id.*

⁹⁸ Disaster Management Act, 2005, § 54.

⁹⁹See *id.*; see also Vedanta, *supra* note 240.

Measures adopted by China to curb fake news or rumors as the government commonly calls it remain the most severely criticized laws globally. China made a major amendment to its criminal law in 2015 to curtail fake news.¹⁰⁰ Paragraph 2 of article 291a of China's Criminal law, prohibits spreading of false information which might cause grave harm to public order and can cause unrest or fear alarm among the public,¹⁰¹ and prescribes a punishment of imprisonment of three years, which may be extended to seven years if the harm caused is grave in nature.¹⁰² Paragraph 2 of article 12 of Cybersecurity law, further bars certain categories of action having the potential to disrupt public order and economic and social conditions of the country to be conducted online, which includes manufacturing and dissemination of fake news.¹⁰³ Such categories are further subjected to penalties in correspondence to various local laws and regulations made by other relevant authorities, states Article 70.¹⁰⁴ Further, the act prohibits social media handles providing a platform for the publication of information or instant messaging services, to provide services to users without identity authentication.¹⁰⁵ The failure to keep a record of the real names of users and to rectify the same on authoritative orders makes the platforms liable for administrative actions such as revocation of licenses, suspension/ ban of websites, and fine of 50,000 up to 500,000 yuan.¹⁰⁶ The act further imposes fine ranging from 10,000 to 100,000 yuan on users failing to provide real identity details to the platforms.¹⁰⁷

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The Administrative Measures on Internet Information Services,¹⁰⁸ further obligates the social media and other similar service providers, to identify fake news disseminated on their platforms, keep a record of them and report it to the appropriate authorities.¹⁰⁹ Also, they create a similar obligation like cybersecurity law, on the service providers, and prohibits them to publish,

¹⁰⁰ Ninth Amendment to the PRC Criminal Law (adopted by the National People's Congress (NPC) Standing Committee on Aug. 29, 2015, effective Nov. 1, 2015), available at- <https://perma.cc/JZL6-XV2K>, English translation available at Westlaw China (by subscription).

¹⁰¹ Id.

¹⁰² Id. art. 32.

¹⁰³ PRC Cybersecurity Law (adopted by the NPC Standing Committee on Nov. 7, 2016, effective June 1, 2017), <https://perma.cc/3HAP-D6MZ> (In Chinese)

¹⁰⁴ Id. art. 70.

¹⁰⁵ Id. art. 24.

¹⁰⁶ Id. art. 61.

¹⁰⁷ Id.

¹⁰⁸ State Council, Administrative Measures on Internet Information Services (Sept. 25, 2000, effective on the same day), http://www.gov.cn/gongbao/content/2000/content_60531.htm (in Chinese)

¹⁰⁹ Id. art. 16.

reproduce, produce content which may disrupt public harmony and lead to societal instability or unrest.¹¹⁰ Also, provisions on Administration of Internet News Information Services,¹¹¹ makes it mandatory for every organization providing news services with any medium, such as blogs, messaging services, or social media accounts, to obtain a prior license for doing so and operate within the prescribed limit of the licenses.¹¹² On violation of this, the providers are liable to pay fine of 10,000 to up to 30,000 yuan.¹¹³

Further, the act obligates the providers to republish, reprint news of authentic state-affiliated media houses only, as it is argued and further provided, this ensures tracing of sources and verify the veracity of the information due to an indication of original authors, titles, etc.¹¹⁴ The failure to abide by the provision and to rectify the same on authoritative orders makes the platforms liable for administrative actions such as revocation of licenses, suspension/ ban of websites, fine of 5000 up to 30,000 yuan, and criminal prosecution.¹¹⁵ The measures further prohibit the publishing of news prohibited by local administrative regulations and laws, violation of which attracts both administrative actions and fines.¹¹⁶ Also on the identification of fake news, the providers are obligated to report it to the authorities, keep a record of it and delete it.¹¹⁷ The requirement to register real names of the users, alike cybersecurity law, is also prescribed here.¹¹⁸ China has the most robust system to tackle the fake news, however, has severely faced criticism due to its high disregard for freedom of expression and freedom of press. According to some, it is other factors which are fueling the fake news menace in China, such as lack of freedom of expression, societal insecurity, commercialization of information market.¹¹⁹ These attempts have been argued as an attempt to stifle criticism and limit public knowledge.¹²⁰

¹¹⁰ Id. art. 15.

¹¹¹ Cyber Administration of China, Provisions on Administration of Internet News Information Services (May 2, 2017, effective June 1, 2017) art. 1, available at- http://www.cac.gov.cn/2017-05/02/c_1120902760.htm

¹¹² Id. art. 5.

¹¹³ Id. art. 22.

¹¹⁴ Id. art. 15(1).

¹¹⁵ Id. art. 24.

¹¹⁶ Id. art. 16(1), art. 25.

¹¹⁷ Id. art. 16(2).

¹¹⁸ Id. art. 13(1).

¹¹⁹ Maria Repnikova, China's Lessons for Fighting Fake News, FOREIGN POLICY (Sept. 26, 2018), <https://foreignpolicy.com/2018/09/06/chinas-lessons-for-fighting-fake-news/#>

¹²⁰ Id.

Suggestions & Findings

After analyzing various approaches adopted by the countries to tackle fake news, it becomes clear that enacting only specialized regulations is not enough. Fake news can only be tackled with an interplay of both law and people. It becomes necessary to have specialized legislation to tackle fake news, as the laws which are being utilized to curtail fake news in the absence of specialised legislation are dated to the pre-internet era and hence often failed to curtail every aspect of fake news.

Furthermore, there arises a need to make social media liable for the content published on them. Social media have been immune from liability for the content shared on them in every jurisdiction, and thus, though acting as publishers, has not been performing the basic functions to keep a check on the content published. So unless social media is stripped of their immunity and vested with duties and liabilities to keep a check on inflammatory content, laws will not be able to efficiently work. Furthermore, though social media platforms have initiated self-check mechanisms to curtail fake news, they can't be completely relied upon as social media thrives to achieve capital gains and in some instances has restrained to act due to fear of the ruling government.¹²¹ Furthermore, though social media provides the ability to report content for its harmful content, it must also provide users the ability to tag or mark false news and must make public of the action undertaken regarding them.

Also, it becomes utterly necessary for increased public participation in curtailing fake news. It is evident that countries with high digital literacy, and countries which undertook mass scale drives to educate people to differentiate between false and true stories, have efficiently managed to curtail fake news. However, such digital literacy campaigns must reach all levels of society and should not be restricted to a particular class or category of society. Henceforth it is best to involve public participation in regulation as it will increase the trust in laws and government. For

¹²¹NH Web Desk, *Facebook's India staff opposed action on BJP-linked hate posts, saying it could hurt business prospects*, National Herald, (August. 16, 2020, 6:13 PM), available at- <https://www.nationalheraldindia.com/india/facebooks-india-staff-opposed-action-on-bjp-linked-hate-posts-saying-it-could-hurt-business-prospects>

instance, fact-checking websites or portals must have a two-way transparent functioning, as if they exist for the sole purpose of refuting claims and does not appear transparent and involve public participation, the public might grow skeptical and even start distrusting such portals. Therefore, unless all the three essential elements; that is specialised legislation, social media platforms, and people, work in synchronization fake news can't be curtailed.

Furthermore, most of the jurisdictions have done a categorical error in framing the legislation to curtail fake news. The countries should abandon the effort to define fake news generally and rather should adopt a precise definition of misinformation and disinformation. Only content disseminated intentionally with an intention to harm should be criminalized. This will ensure that legislation does not have any ancillary effect on the freedom of expression and does not regulate speech made out of error and without an intention to harm. Therefore, it is suggested that too broad and general definitions be avoided, to not chill true speech.

Also though the laws enacted have managed to somehow define the content to be regulated they have failed to address the core issue, which is the network of legitimized people who spread fake news. The best method to identify the network of people spreading fake news is by keeping a record of people using the platform. A record of the real identity of the users of networks will appear beneficial, however, such record should be only of real identity and no other vulnerable private information. Furthermore, laws must also be made for digital campaigning, digital advertising, and disclosure of sponsorship of paid content, and licensing of professional news organizations on social media. Disclosure of sources of the content will further make the social media transparent and help in verification of the authenticity of the news.

Conclusion

Fake news is not a novel concept, however, the rate by it is harming today's society is novel. Fake news possess a great threat to life, limb, the property of individuals, and democratic institutions. Several countries have been adopting measures to curtail fake news, however, the

sole concern of them has been on to protect democratic legitimacy and has neglected other grave harms it is capable of inflicting to life, limb & property of people. Unless such neglect is not disregarded fake news can't be efficiently tackled. Moreover, it becomes essential to demarcate a balance between the right to exercise freedom of speech and regulatory responses to fake news. Unless legislation is narrowly drafted, it will lead to self-censorship and fear among individuals to be held liable for the most innocent erroneous speeches, which will further stifle public discourse. Lastly, for fake news to be tackled, it is utmost necessary to have a synchronized interplay of laws, social media platforms, and people. Unless people realize their role in curtailing the menace of fake news, and act responsibly in public discourse, by verifying the veracity of the news they share on the social media, fake news can't be eliminated. However, this could only happen when they can verify the news from true counter sources which becomes difficult due to less availability of true sources since the information ecosystem is jam-packed with false news, this can only be avoided if the law and social media play their parts and provide true news /counterview news also and does not only provide trending news based on an algorithm.



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