

IMPACT OF FAKE NEWS: AN INDIAN ELECTORAL PERSPECTIVE

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INTRODUCTION

Fake news, misinformation, disinformation, is not a new phenomenon. It has co-existed with human civilization, to which history is evidence. However, with the advent and proliferation of the internet and social media coming of age, the extent of fake news in public sphere has magnified manifold. Considering India being a mobile first market, where majority of people identify smart phones as their main device for accessing online news and a considerable number using it only for accessing online news, more specifically through various kinds of social media², the crisis of fake news in India becomes more rampant.

This paradigm shift in the way people in India have begun to access news, placing more credibility to news on social media platforms than on the traditional sources and the fact that public opinion is of utmost importance, to determine who rules the country, has inspired political parties, politicians and their supporters to resort to and optimally use social media platforms for election campaigning and communication. The 2019 General Elections are a testimony to the fact, where social media platforms were favourably used not only to disseminate political agendas, ideologies, manifestos, publicity campaigns, so as to garner a favourable public opinion, but also undermine the position of the opposition.

If British Broadcasting Corporation (BBC) reports hold any veracity, WhatsApp in India has become a vehicle for misinformation and propaganda. For the 2019 general elections, the Bharatiya Janata Party and the opposition, the Congress party, both took to spread false news or misinformation in an attempt to mislead the electorate and gain a favourable advantage.³ For instance, there was a message in circulation on WhatsApp, about the suicide bombing against the Indian security forces in Kashmir in 2019, where it was claimed that the leader of the Congress party had promised a huge amount of money to the perpetrator/accused and his family and in addition promised to release him and other terrorists languishing in prison. The people of the state voted for the Congress in the

¹Research Scholar, Alliance School of Law, Alliance University, Bangalore

² The Reuters Institute, India Digital News Report, 2019.

³ Kevin Ponniah, *WhatsApp: The 'Black Hole' of Fake News in India's Election*, BBC News (Apr. 6, 2019), <https://perma.cc/5YJS-ZH2A>

approaching elections.⁴ Another message doing rounds was how the Bharatiya Janata Party was “indulging in war mongering for electoral gains”⁵. Yet another interesting piece of misinformation was regarding a purported circular from the Election Commission of India, (ECI) which stated that Non-Resident Indian (NRI)s who held an Indian Passport could vote online.⁶ Innumerable such instances of fake news on social media, inciting national, religious, or any other sentiment, during elections, came to light, with the intent to gain traction and to undermine the image of the opposition, in order to gain a favourable advantage in elections.

IMPACT, PERILS & DEFINITION OF FAKE NEWS

The big question then is, how does fake news affect or make an impact on elections? The answer to the corollary lies in the basic concepts of motivated reasoning and confirmation bias, apart from the obvious facts, that social media has easy access and outreach, as it is inclusive, which abridges the gap between the political parties and the electorate and moreover bypasses the regulatory regime and critics, which otherwise traditional media is subjected too⁷.

The concept of motivated reasoning describes our affinity to believe in what we want to believe in more willingly, than what we don't want to believe in, while confirmation bias is an affinity to find, interpret and even remember information, that underpins our beliefs and then accept such information, in the exclusion of other information⁸. Therefore, any news in public domain, to which people have an affinity towards or which people want to believe in, shall be or is accepted easily, even if it is false/ fake. That is just how the menace of fake news spreads its fangs and influences the voting choices of people.

Even with the adulation and popularity that fake news has harvested, no Indian statute or regulatory guidelines have yet defined fake news or laid down the standards for defining it. Therefore, before any stance or legal action can be undertaken against occurrences of fake

⁴Snigdha Poonam & Samarth Bansal, *Misinformation Is Endangering India's Election*, The Atlantic (Apr. 1, 2019), <https://perma.cc/Y39M-KGWU>

⁵Anjana Pasricha, *Fake News Inundates India Social Media Ahead of Election*, Voice of America (Apr. 3, 2019), <https://perma.cc/798C-YMWE>

⁶Bharat Kancharla, *During the 2019 Lok Sabha elections, only about 150 cases of Fake News reported to Social Media Platforms by ECI*, FACTLY, (August, 2019) <https://factly.in/during-the-2019-lok-sabha-elections-only-about-150-cases-of-fake-news-reported-to-social-media-platforms-by-eci/>

⁷Anuradha Rao, *How did Social Media Impact India's 2019 General Election?*, ENGAGE, (December, 2019) <https://www.epw.in/engage/article/how-did-social-media-impact-india-2019-general-election>

⁸Jonathan Maloney, *Confirmation Bias & Motivated Reasoning*, INTELLIGENT SPECULATION, (April, 2019) <https://www.intelligentspeculation.com/blog/confirmation-bias-amp-motivated-reasoning>

news, it would be expedient to first amend the existing legal and regulatory framework, by inserting an appropriate definition of the term.

Interestingly, it has been experienced in other countries that a plain definition of the term fake news, as consisting of falsehood, may lead to an ambiguous, overreaching and an inefficacious definition, if applied to India, as in the case of Malaysia's Anti-Fake News Act, 2018, which defines fake news as “*news, information, data, and reports, which is or are wholly or partly false or in any other form capable of suggesting words or idea.*”⁹

The preceding definition would be a failure and would fall on its face, if applied in a democracy like India, where citizens are guaranteed freedom of speech and expression¹⁰ as a fundamental right, under the Indian Constitution, subject to reasonable restrictions¹¹, viz, i) in the interest of the sovereignty and integrity of India, ii) the security of the State, iii) friendly relations with foreign States, iv) public order, v) decency or morality, vi) or in relation to contempt of court, and v) defamation or incitement to an offence.

Speech in India then, may not only be restricted owing to its consequences, but also because of its substance, as the state patently, has an overarching interest in restricting speech, the direct consequence of which is violence. Interestingly, in case of obscenity or defamation, though violence is not a consequence, speech is restricted because of the value system of the state, as it is believed that it would erode public morality. Therefore, any restriction on speech must have an immediate correlation with a specific head set out in Article 19(2). The government otherwise cannot restrict speech merely in the ‘public interest’, or because it is ‘false’, neither of which are heads under Article 19(2). Therefore, appropriately defining the term fake news becomes of paramount importance, in order to evaluate its repercussions/consequences and to take cognizance of it.

In the case of France, the law against information manipulation or fake news, puts down the following criteria's to evaluate if a piece of information is fake news, viz, it must be evident, it should have been deliberately disseminated on a substantial scale, the direct consequence of which should be, disturbance of the peace and tranquillity or a compromise of the outcome of an election¹².

9 Sohini Chaterjee, Akshat Agarwal, *Regulating fake news in India is tough*, MINT, (July, 2018) <https://www.livemint.com/Opinion/ECLC6qtR9ij8nDz33xaCEN/Regulating-fake-news-in-India-is-tough.html>

10 INDIA CONST. art. 19 c. 1(a)

11 INDIA CONST. art. 19 c. 2

12Government of France, *Against Information Manipulation*, (December 7, 2018) <https://www.gouvernement.fr/en/against-information-manipulation>.

Although the definition appears to be robust and encompassing in its criteria, if looked at from the Indian perspective, only the last two criteria would fit in the Indian scheme of things. The first criteria would still be ambiguous, as it does not differentiate between undisruptive misinformation and confirmable misinformation, which may cause social harm or malign the reputation of an individual.

The line is slippery and not easy to draw, as the term fake news in itself is unstructured and shapeless and includes, though not limited to, unconfirmed content, manipulated videos, hoaxes, and even morphed pictures in the veil of memes.

However, after travelling the contours of fake news, it is ascertained that the following criteria should fall within the ambit of the definition of fake news, so as to serve its purpose, in the Indian scenario, viz

1. Any confirmable misinformation or disinformation,
2. Intentionally disseminated to the public at large, purporting to be true
3. With the potency to threaten life, public peace and tranquillity or national security or an outcome of an election.

RAMIFICATIONS OF FAKE NEWS

Since ours is a parliamentary democracy, the trite saying ‘‘democracy is for the people, of the people and by the people’ aptly applies. The will of the people is paramount which is expressed through their vote and becomes the basis of the authority of the government.¹³It then becomes of paramount importance that the people/voter should have access to true, correct, objective and unbiased information to be able to make a reasoned and rational choice, which is ultimately expressed through the ballot by means of a vote.

In context of Indian Democracy, fake news decimates all means to support the voters to make an informed and rational choice, by completely misinforming and misleading the voter with false, incorrect, biased and prejudiced information and in consequence retards and extinguishes the voter’s ability to make an informed and rational choice, thereby infringing the voter’s freedom of speech and expression and changing the complete complexion of the political landscape.

The hazards of fake news do not end there. Fake news further gives an undue advantage to the candidate disseminating fake news in political communication and propaganda, over the

¹³ People's Union of Civil Liberties vs. Union of India &Anr., (2003) AIR SC 2363

candidate not relying on it, hence vitiating an equal contesting ground, which is indeed a violation of the fundamental right to equality¹⁴.

To add to its serious effects, dissemination of fake news comes for a price and considering its nature, the money spent on it, is not revealed as an election expense, which is mandated by the Conduct of Election Rules, hence violating it.

EXISTING LEGAL FRAMEWORK

There are no specific provisions under Indian law that specifically deal with fake news. However, there are provisions available, dealing with it, in a piecemeal manner, falling under the Indian Penal Code, 1860, Criminal procedure Code, 1974 and The Information Technology Act, 2000, The Indian Telegraph Act, 1885 which is applicable both offline as well as online. However specific provisions dealing with it, in relation to elections fall under ‘The Representation of the People Act, 1951’ and guidelines issued by The Election Commission of India, from time to time, which are as follows:

1. SILENT PERIOD:

The Representation of the People Act, 1951, which governs the conduct of elections in India, prohibits advertising and campaigning on TV and other electronic media by candidates and political parties during the “silent period,” which is during the period of 48 hours ending with the hour fixed for conclusion of poll in a constituency¹⁵. However, individuals are not prohibited from expressing their private opinions during the silent period as per The Election Commission of India (ECI).¹⁶

Considering the increasing cases of fake news during elections, a committee was established by the ECI to review and suggest changes to the provision of silent-period. The committee submitted its report in January 2019¹⁷, proposing an extension of the scope of the forty-eight-hour ban to cover print media and “intermediaries” as defined in section 2(w) of the Information Technology Act.

14 INDIA CONST. art. 14

15 Representation of the People Act, No. 43 of 1951, § 126, <https://perma.cc/L7FX-SFMK>

¹⁶Kanchan Chaudhari, *We Can't Stop Individuals from Using Social Media 48 Hours before Polls, ECI Tells Bombay HC*, HINDUSTAN TIMES (Jan. 12, 2019), <https://perma.cc/GX7H-EL62>

¹⁷ Press Release, Election Commission, Report of the Committee on Section 126 of the Representation of the People Act, 1951 Submitted to the Commission (Jan. 10, 2019), <https://perma.cc/9Q5E-ZMBG>

2. MODEL CODE OF CONDUCT (MCC): The Model Code of Conduct (MCC)¹⁸ is a compilation of guidelines, issued by the ECI prior to the conduct of elections, to political parties and contesting candidates, to regulate their conduct, in connection with elections and ensure the elections are conducted in a free and fair manner.”¹⁹ The MCC comes into force from the date the “election schedule is announced and remains in force till the election results are announced.”²⁰

However, even though the MCC are not enforceable by law, some of its provisions may be enforced through corresponding provisions in other statutes such as the Indian Penal Code, 1860, Code of Criminal Procedure, 1973, and Representation of the People Act, 1951. To back the non-enforceability nature of MCC, the ECI proposes that the non-enforceable nature of MCC should be preserved; failing which elections may never be completed with judicial proceedings typically take a long period to conclude. Concurrently, the Standing Committee on Personnel, Public Grievances, Law and Justice, recommends making the MCC legally binding by making it a part of the Representation of Peoples Act, 1951, as already most provisions of the MCC are enforceable through corresponding provisions in other statutes, mentioned above.²¹

Prior to the 2019 general elections, the ECI published and issued the Manual on the Model Code of Conduct²² as guidance for political parties and candidates, including information on the Model Code, enabling law, instructions, and court decisions.²³ The Manual makes explicit mention of a Compendium of Instructions on Election Expenditure Monitoring (February, 2019)²⁴ and Instructions of the Commission with respect to use of Social Media in Election Campaigning.²⁵ Instructions on social media contain guidelines on “information to be given

¹⁸ Election Commission of India, Model Code for the Guidance of Political Parties and Candidates, <https://perma.cc/34BQ-WMTW>.

¹⁹ Roshni Sinha, *Model Code of Conduct and the 2019 General Elections*, PRS (Mar. 11, 2019), <https://perma.cc/63XM-TWSS>.

²⁰ Id.

²¹ Id.

²² Election Commission of India, Manual on Model Code of Conduct (Mar. 2019), <https://perma.cc/55KX-CW49>.

²³ Manual on Model Code of Conduct: About This File, Election Commission of India, <https://perma.cc/8E2R-3NGM>.

²⁴ Election Commission of India, Compendium of Instructions on Election Expenditure Monitoring (Feb. 2019), <https://perma.cc/Y54E-WNBA>.

²⁵ Letter from ECI to Chief Electoral Officers et al., Instructions of the Commission with respect to Use of Social Media in Election Campaigning, Letter No. 491/SM/2013/Communication (Oct. 25,

by candidates about their social media accounts,” precertification of political advertisements, and “expenditure on campaigning through the internet including social media websites.”²⁶

A. SOCIAL MEDIA ACCOUNT INFORMATION:

Rule 4A of the Conduct of Elections Rules, 1961, requires candidates or proposers of candidates to submit an affidavit (Form 26) at the time of filing their nomination papers.²⁷ Paragraph 3 of this Form requires the candidate to provide the ECI with his/her “email ID” and a list of any social media accounts.²⁸

B. SOCIAL MEDIA CONTENT PRE-CERTIFICATION:

The ECI requires pre-approval / pre-certification of political advertisements on social media and have directed for the establishment of a grievance cell and appointment of grievance officers.”²⁹

Pursuant to the order of the Supreme Court of India³⁰, requiring political parties, candidates, persons, to pre-certify the use of political advertisements on electronic media, including television channels and cable operators, the ECI issued detailed guidelines in this regard³¹, which are as under:

Every registered/national/state political party and every contesting candidate intending to issue advertisements on electronic media and/or television channels and/ or on cable network, will have to apply to the ECI for pre-certification of all political advertisements before their publication. Subsequently the ECI issued an order, dated 27.08.2012, subsequent to which Media Certification and Monitoring Committees at district and State levels were given the responsibilities of pre-certification of such advertisement along with other functions viz acting against Paid News etc.

The ECI issued another set of instructions in this regard according to which, as social media websites were also electronic media by definition, the Commission’s instructions relating to

²⁶Amogh Dhar Sharma, *How Far Can Political Parties in India Be Made Accountable for Their Digital Propaganda?*, SCROLL.IN (May 10, 2019), <https://perma.cc/64VU-LDA5>

²⁷ Conduct of Elections Rules, 1961, Rule 4A, <https://perma.cc/DA6U-J5T8>

²⁸Id., Form 26, para. 3, <https://perma.cc/23XQ-QVZ4>; Instructions of the Commission with respect to Use of Social Media in Election Campaigning.

²⁹ Sahana Udupa, Elonnai Hickok & Edward Anderson, *Can Extreme Speech Online Be Regulated Without Curbing Free Speech? This Series Finds Out*, SCROLL.IN (May 9, 2019), <https://perma.cc/G6TS-8QLF>.

³⁰ Ministry of Information & Broadcasting Vs M/s Gemini TV and Others (2004) 5 SCC 714

³¹ Letter from Election Commission of India to Chief Secretaries et al., Supreme Court Order Dated 13th April, 2004 for Pre-certification of Political Advertisement on Electronic Media, –Letter No. 491/MCMC/2018/Communication (Sept. 13, 2018) (re: applicability of 2004 directions throughout territory of India at all times), <https://perma.cc/U2MM-U862>.

pre-certification of advertisements would also apply mutatis mutandis to websites including social media websites and shall fall under the purview of pre-certification.”³²

3. EXPENDITURE OF SOCIAL MEDIA CONTENT TO BE DIVULGED

According to The Representation of the People Act, 1951, every candidate is “required to keep a separate and correct account of all expenditure relating to elections, incurred from the date of nomination, to the date of declaration of result, both dates inclusive.”³³ Pursuant to the Supreme Court of India judgement³⁴, the ECI required candidates and political parties to submit a statement of account of expenditure on elections to the ECI within a period of 75 days of assembly elections and 90 days of Lok Sabha elections. Interestingly in 2013 the ECI clarified all doubts by issuing another set of instructions³⁵, which clarified that the expenditure on social media was a part of the expenditure in connection with elections and that, candidates and political parties shall have to include all expenditure on campaigning, including expenditure on advertisements on social media, for maintaining a correct account of expenditure and for submitting the statement of expenditure.

Recently, apart from self-regulation and the Voluntary Code of Ethics adopted by social media platforms to tackle the problem of fake news, a new bill³⁶ has been introduced in the Lok Sabha and awaits assent.

CONCLUSION AND SUGGESTIONS

The effects of fake news can prove to be, not only prejudicial to the election process, but also be detrimental to the functioning of a democracy like India. Considering the gravity of the crisis and its extent of its penetration, not a single functionary or entity can be given the responsibility to tackle it. It needs a unified effort, thereby stakeholders involved, viz the lawmakers, the online intermediaries, and the citizens, all of them shall have to join hands and take collective responsibility and action, to tackle the crisis of fake news.

The first step in the author’s opinion, to address the menace of fake news, is to ensure that there is significant media literacy, including digital literacy. This would aid in promoting not only the skill set to browse the internet but also the competency to question and validate the veracity of the content on the internet.

³²Id

³³ Representation of the People Act, 1951, S.77(1)

³⁴ Common Cause v. Union of India, Writ Petition (Civ.) No. 13 of 2003.

³⁵ Instructions of the Commission with respect to Use of Social Media in Election campaigning.

³⁶ The Fake News (Prohibition) Bill, 2019.

On the other hand, tech platforms need to ensure the use of sophisticated algorithms to provide the public with correct, accurate, and truthful information in public domain and remove/delete/abandon fake information/propaganda on social media platforms, as soon as they are detected.

Concurrently, lawmakers need to look at appropriate legislative measures, a new law dealing with fake news or amendment of existing laws to that effect, so that it is made an independent criminal offense. More significantly, the need of the hour is to devise a strong and a proactive execution mechanism, where cases of fake news are identified and taken cognizance of at the earliest, within a given time frame.