

**Title:** A PRIMER ON THE REGULATION OF FAKE NEWS IN ASIA-PACIFIC<sup>+</sup>

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## A PRIMER ON THE REGULATION OF FAKE NEWS IN ASIA-PACIFIC<sup>+</sup>

*Kashish Makkar\**

### ABSTRACT

Fake news has been one of the primary methods employed in the digital age to disenfranchise people of their human rights. The Asia-Pacific region, with 60% of the world's population which is increasingly logging on to the internet, limited digital literacy, and deep ethnic, racial, and communal fault lines, is especially vulnerable to this assault on human rights. A regulation of false information is often suggested as the mechanism to deal with this crisis. However, regulation of false information itself presents one of the most perplexing challenges for nation-states. It cannot be left unchecked due to its human rights implications, and it cannot be over-regulated again due to its implications on free speech – a fundamental human right. There is a limited understanding across the Asia-Pacific nation-states on how to regulate this menace. This limited understanding is evident in jurisdictions still struggling to find solutions to preliminary issues such as defining the kind of speech that requires regulation to who should be the regulator, and from whether there should be any sanctions to what should be the nature of these sanctions. In this paper, I analyze the models of regulation that four major Asia-Pacific

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countries have employed to regulate fake news in their jurisdictions. This paper serves as a guide for researchers and regulators to learn from the prevalent practices in regulation of fake news as they currently exist, and understand the efficiencies and concerns associated with these practices.

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## I. INTRODUCTION

From making public protests strife with hate and violence to rigging national elections across jurisdictions, and from instilling fear in communities that lead to mob lynching to stoking ethnic divisions that led to one of the largest refugee crisis in the World – fake news is the common culprit in disenfranchising people of their human rights in the 21<sup>st</sup> century. The impact of fake news is directly measured in terms of the number of people reading and believing such information. The number of users exposed to the news, and the extent to which they will subject their critical outlook to the news determines its success. The Asia-Pacific region accounts for 60% of the world’s population, and this population is increasingly logging on to the internet. By some accounts, it constitutes a majority of the internet users in the world. A significant portion of this majority lives in nation-states that are still categorized as ‘developing’. Digital literacy, that equips the population to have a critical outlook to false information, has still not developed in these nations on account of the limited capacity of these nation-states to invest in it. Finally, almost all nation states in the Asia Pacific also have deep racial, ethnic, and communal fault lines. Therefore, the Asia Pacific region is sitting on a time-bomb where its population is being continuously exposed to fake news that has the potential to worsen the

resentment in communities. This has already led to one of the world's largest refugee crisis already, and many other such crisis could be in the off-ing.

But, despite understanding this nature of fake news and its repercussions, there is limited understanding across the Asia-Pacific on how to regulate this menace. A part of the failure in reaching this understanding can be attributed to the concerns that arise when any kind of speech is sought to be regulated: Does fake news present the necessary justification to censure certain kinds of speech? What forms of speech will be targeted in the first place? What forms of censure will be proportional? Should there be liability based on the consequences of speech, or speech *per se*? Who should be the regulator? Wouldn't the regulator extend a free pass to fake news favorable to them?

In this paper, I will highlight the human rights concerns that proliferation of fake news presents and how regulators in Asia-Pacific have approached the issue of its regulation. The regulation of fake news, as highlighted above, itself presents challenges to the fundamental human right of free speech and expression. Therefore, this paper serves as a guide for researchers, legislators, policy professionals, and regulators in jurisdictions other than the ones examined in this paper, to learn from the prevalent practices in regulation of fake news and the kind of approaches they could adopt for their jurisdictions. Different jurisdictions analyzed in this paper approach the issue of regulation in their *sui generis* method. Some encounter the human rights concerns presented by fake news by supplementing speech, others create more human rights concerns in regulating fake news. This paper will serve as a guide to the regulators to see the efficiencies, inefficiencies, human rights promotive and human rights regressive techniques that are available at the state's disposal, and which combination of them could best suit their interests.

To that end, contextualizing the need for this discussion, I begin in the second chapter by highlighting how a proliferation of fake news threatens specific human rights – recognized in international human rights conventions. In this chapter, the human rights concerns arising out of regulation of fake news will also be highlighted. In this regard, the conflict in regulating fake news vis-à-vis ensuring the right of free speech of individuals is specifically undertaken. Having understood the human rights concerns presented both by proliferation and regulation of fake news, we begin the process to understand how different jurisdictions in Asia-Pacific approach the issue of regulation of fake news. But, in order to understand how a phenomenon

is regulated, it is important to first define the phenomenon itself. Therefore, in the third chapter, we look at how to define ‘fake news’ and examine the international best practices employed by social media companies, policies suggested by supranational organizations, and literature produced by intergovernmental organizations on the subject.

Having defined the phenomenon that should be the subject of regulation, we look at how jurisdictions in Asia-Pacific regulate the phenomenon in the status quo. For this analysis, four major jurisdictions in the Asia Pacific, namely Japan, Malaysia, Australia, and India have been selected. These jurisdictions have been selected as news media in these nations remains largely free of governmental control. While there may be laws that allow for certain content censorship in these jurisdictions, the press or social media – the two primary carriers of fake news today – collectively referred to as news media, are not subject to state control directly. The analysis carried out in this chapter forms the core of this paper. It puts in perspective the different regulatory models employed by the four jurisdictions to regulate the phenomenon. The analysis in this chapter on regulatory models is divided in two categories based on the Yale Law Information Society’s categorization of regulatory models of fake news as ‘Coercive’ and ‘Facilitative’ – where regulations restricting speech are put in the first category, and regulations improving speech or supplementing it with positive actions falls into the latter.

Finally, in the concluding chapter, “the way forward” for researchers, legislators, policy professionals & regulators is discussed in order to guide them for their proposed model of regulation of fake news. The model for online content regulation proposed by the Special Rapporteur on the Promotion & Protection of Freedom of Opinion & Expression of the UN Human Rights Council is also discussed to provide a wholistic perspective of regulation to the readers, and in appropriately deciding the method of regulation suited for their jurisdiction.

## II. HUMAN RIGHTS CONCERNS ARISING FROM FAKE NEWS IN THE ASIA-PACIFIC

The ethnic cleansing of Rohingya Muslims in Myanmar – one of the gravest human rights crisis of the 21<sup>st</sup> century<sup>1</sup> – finds its origins in hate in the form of ‘fake news’ that was spread

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<sup>1</sup> UN Human Rights Council, ‘Report of the independent international fact-finding mission on Myanmar’ (2018) A/HRC/39/64.

on social media.<sup>2</sup> Myanmar, a country with a population of around 53 million people,<sup>3</sup> is one of the least developed countries in the Asia-Pacific. However, out of its 53 million population, close to 20 million use Facebook.<sup>4</sup> The platform is so widely used that most users in Myanmar confuse it with the Internet.<sup>5</sup> The military in Myanmar exploited this wide reach of Facebook, and ran a systematic campaign on Facebook that stretched back a decade and targeted the country's mostly Muslim Rohingya minority group.<sup>6</sup> It cannot be denied that there were ethnic and religious tensions between the Buddhist majority population of Myanmar and Muslim minority population located in its Rakhine State.<sup>7</sup> But, Facebook became a medium that whipped up the anger and instigated ethnic violence in the country. The campaign involved hundreds of military personnel creating troll accounts, news and celebrity pages on Facebook and then flooding them with incendiary comments and posts targeting the minority group.<sup>8</sup> These accounts and pages flooded Facebook with their hatred. Some of these accounts portrayed Islam as a global threat to Buddhism, others shared a false story about the rape of a Buddhist woman by a Muslim man to create communal divide in the country.<sup>9</sup>

Following this, a number of Rohingya Muslims were attacked, raped, murdered and forced to leave the country by the Buddhist majority population.<sup>10</sup> At the same time, the ruling military, composed of the Buddhist majority, also used the hate it had spread against the minority to attack the civilians on their own, with total immunity.<sup>11</sup> Their attacks on the minority were legitimized to the population, and no accountability was sought whatsoever. As a result of this

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<sup>2</sup> Alexandra Stevenson, 'Facebook Admits It Was Used to Incite Violence in Myanmar' (*The New York Times*, 6 November 2018) <<https://www.nytimes.com/2018/11/06/technology/myanmar-facebook.html>> accessed 7 July 2020.

<sup>3</sup> UN Statistical Division, 'Population and Vital Statistics Report' (2020) ST/ESA/STAT/SER.A/266.

<sup>4</sup> Megan Specia and Paul Mozur, 'A War of Words Puts Facebook at the Center of Myanmar's Rohingya Crisis' (*The New York Times*, 27 October 2017) <<https://www.nytimes.com/2017/10/27/world/asia/myanmar-government-facebook-rohingya.html>> accessed 7 July 2020.

<sup>5</sup> *ibid.*

<sup>6</sup> Paul Mozur, 'A Genocide Incited on Facebook, With Posts From Myanmar's Military' (*The New York Times*, 15 October 2018) <<https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html>> accessed 7 July 2020.

<sup>7</sup> Anthony Ware and Costas Laoutides, *Myanmar's 'Rohingya' Conflict* (OUP 2018).

<sup>8</sup> Paul Mozur, 'A Genocide Incited on Facebook, With Posts From Myanmar's Military' (*The New York Times*, 15 October 2018) <<https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html>> accessed 7 July 2020.

<sup>9</sup> *ibid.*

<sup>10</sup> *ibid.*

<sup>11</sup> UN Human Rights Council, 'Report of the independent international fact-finding mission on Myanmar' (2018) A/HRC/39/64.

violence, more than 43,000 persons were reported missing and presumed dead.<sup>12</sup> More than 700,000 Rohingya left Myanmar in the space of a year<sup>13</sup> – creating one of the world’s largest refugee crisis.

In different parts of India, in 2017, a news of certain child kidnappers or organ harvesters operating in a local area was circulated with certain specific details.<sup>14</sup> As a result, a frenzy was created in the community against anyone visiting their town. If any person from outside the community was then encountered by the community, the person was attacked by the vigilantes, and more often than not murdered.<sup>15</sup> For instance, in July 2018, post the circulation of a message that certain child kidnappers were operating in the Singrauli district in Madhya Pradesh in India, a mentally-challenged tribal woman was lynched to death by the community.<sup>16</sup> More than 20 such deaths have been reported till date, in different states, due to the apprehended dangers perceived by the community. In the recent riots in Delhi in February, a number of outbreaks of violence have been attributed to fake news that fueled hatred in one religious community against the other<sup>17</sup> – in the backdrop of a legislative amendment that had already sparked communal tensions in the country.

Similarly, in Hong Kong, in the ongoing protests against the Fugitive Offenders Amendment Bill proposed by the Hong Kong Government, it has been reported that fake rumors on both sides have stoked increased divisions.<sup>18</sup> Amongst the protestors, the rumors guised as ‘news’ demonize the police and government in a manner that radicalizes the protestors. For instance,

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<sup>12</sup> Sigal Samuel, ‘Facebook is reckoning with its role in “a textbook example of ethnic cleansing”’ (*Vox*, 7 February 2019) <<https://www.vox.com/future-perfect/2019/2/7/18214351/facebook-myanmar-rohingya-muslims>> accessed 7 July 2020.

<sup>13</sup> *ibid.*

<sup>14</sup> ‘India WhatsApp ‘child kidnap’ rumours claim two more victims’ (*BBC News*, 11 June 2018) <<https://www.bbc.com/news/world-asia-india-44435127>> accessed 7 July 2020.

<sup>15</sup> Elyse Samuels, ‘How misinformation on WhatsApp led to a mob killing in India’ (*The Washington Post*, 21 February 2020) <<https://www.washingtonpost.com/politics/2020/02/21/how-misinformation-whatsapp-led-deathly-mob-lynching-india/>> accessed 7 July 2020.

<sup>16</sup> ‘Twelve Arrested for Lynching Woman in MP’ (*The Wire*, 23 July 2018) <<https://thewire.in/society/twelve-arrested-for-lynching-woman-in-mp>> accessed 7 July 2020.

<sup>17</sup> Anvit Srivastava, ‘Delhi riots: Police crack down on fake messages, 40 accounts suspended’ (*Hindustan Times*, 2 March 2020) <<https://www.hindustantimes.com/delhi-news/delhi-riots-police-crack-down-on-fake-messages-40-accounts-suspended/story-NmxTCWbzTu2NXpQ9PdibcK.html>> accessed 7 July 2020.

<sup>18</sup> Linda Lew, ‘Hong Kong protests and ‘fake news’: in the psychological war for hearts and minds, disinformation becomes a weapon used by both sides’ (*South China Morning Post*, 14 October 2019) <<https://www.scmp.com/news/hong-kong/society/article/3032734/fake-news-and-hong-kong-protests-psychological-war-hearts>> accessed 7 July 2020.



one disputed story that spread online involved the death of 15-year-old Chan Yin-lam.<sup>19</sup> Police have called her death an apparent suicide, but the fake news spread during the protests claimed that Hong Kong's police, city officials or the Chinese government killed the girl for participating in protests.<sup>20</sup> Pro-establishment camps tend to push narratives describing demonstrators as angry rioters, terrorists and "cockroaches" who seek to destabilize the city.<sup>21</sup> They pass on rumors garbed as news that these protestors are doing the bidding of foreign agents. Such false information heightens the tensions between two sides, and stokes the already existing differences. Violent clashes between the protestors and the police in Hong Kong during the protests have been attributed to these divisions.<sup>22</sup>

In Australia, during the 2019 elections, a news story about the Labor Party supporting a 'death tax' became viral.<sup>23</sup> Australian Prime Minister Scott Morrison called a federal election on 10 April 2019. Soon enough, a campaign claiming that the opposition would introduce a 40% inheritance tax began on social media.<sup>24</sup> The creators of the news took a very limited recommendation from Labor Party's Andrew Leigh's 2006 paper that suggested that Australia should reconsider its position on inheritance taxes.<sup>25</sup> But, the fake news instead suggested that Labor Party wants to introduce a 40% inheritance taxes.<sup>26</sup> The claim was repeated by mainstream politicians from the ruling Liberal party. This claim spread widely across social media: early on through Facebook messenger where individuals copied and pasted warnings about Labor's plans, or adjusted the theme into their own words. The posts were like chain letters, including directions to share the message "with all your friends." Neither did Mr. Leigh mention anywhere that 40% should be the rate for the inheritance tax, nor that the Labor Party,

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<sup>19</sup> Shelly Banjo and Natalie Lung, 'How Fake News and Rumours Are Stoking Division in Hong Kong' (*Bloomberg Quint*, 13 November 2019) <<https://www.bloombergquint.com/politics/how-fake-news-is-stoking-violence-and-anger-in-hong-kong>> accessed 7 July 2020.

<sup>20</sup> *ibid.*

<sup>21</sup> *ibid.*

<sup>22</sup> Linda Lew (n 18).

<sup>23</sup> Katherine Murphy, Christopher Knaus and Nick Evershed, 'It felt like a big tide': how the death tax lie infected Australia's election campaign' (*The Guardian*, 7 June 2019) <<https://www.theguardian.com/australia-news/2019/jun/08/it-felt-like-a-big-tide-how-the-death-tax-lie-infected-australias-election-campaign>> accessed 7 July 2020.

<sup>24</sup> Danny Tran, Michael Workman and Lachlan Moffet Gray, 'Federal election 2019: 'Death taxes' scare campaign continues to be promoted but Labor says it's fake news' (*ABC News*, 9 May 2019) <<https://www.abc.net.au/news/2019-05-09/money-pumped-into-federal-election-death-tax-scare-campaign/11092802?nw=0>> accessed 7 July 2020.

<sup>25</sup> Anne Kruger, 'How a 'zombie rumour' about taxes spread in Australia' (*First Draft*, 11 June 2019) <<https://firstdraftnews.org/latest/how-a-zombie-rumour-about-taxes-spread-in-australia/>> accessed 7 July 2020.

<sup>26</sup> *ibid.*

if elected, will levy such a tax.<sup>27</sup> However, this information was spread rapidly in Australia, especially to sway voters. This was particularly dangerous in the context of electoral decision making as “the prospect of inheritance taxes is politically toxic in Australia. The country stopped taxing people’s estates after they die in the 1970s. None of the major political parties support its reintroduction.”<sup>28</sup>

In Myanmar fake news led to a human rights crisis that threatened the right to life and liberty of a religious and ethnic minority of the country.<sup>29</sup> Moreover, the inhumane treatment meted out to them also stripped them of their dignity.<sup>30</sup> In India, fake news again led to a risk to the right to life of people, and threatened the right of free movement within the country.<sup>31</sup> In the cases where it led to communal riots, it threatened the right of freedom of religion of the citizens of the country.<sup>32</sup> In China, fake news threatened the viability of the exercise of a right of association as a method to demand further rights.<sup>33</sup> In Australia, it threatened the prospect of a healthy democratic exercise altogether. The free expression of the will of people, i.e. voting in elections, was sought to be influenced by false information.<sup>34</sup> All of the rights mentioned above are fundamental human rights recognised in the ICCPR & ICESCR. Therefore, fake news presents real challenges to human rights in the Asia-Pacific. As a result, it clearly needs regulation. However, this regulation is not straightforward. Instead, the regulation too presents significant human rights concerns.

For instance, in Malaysia, a specific law was designed to regulate fake news. The Anti-Fake News Act 2018 was passed by the government of former Prime Minister Najib Razak just weeks before the 2018 elections – purportedly to regulate the spread of fake news.<sup>35</sup> However, it was noted that the law defined ‘fake news’ very vaguely, and therefore, was intended to target government’s critics. This was soon confirmed. On March 21, 2018, the deputy

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<sup>27</sup> Danny Tran (n 24).

<sup>28</sup> Anne Kruger (n 25).

<sup>29</sup> International Covenant on Civil and Political Rights 999 UNTS 171, art 6.

<sup>30</sup> International Covenant on Civil and Political Rights 999 UNTS 171 art 10.

<sup>31</sup> Constitution of India, art 19(1)(d).

<sup>32</sup> International Covenant on Civil and Political Rights 999 UNTS 171 art 18; Constitution of India, art 25.

<sup>33</sup> International Covenant on Civil and Political Rights 999 UNTS 171, art 22.

<sup>34</sup> International Covenant on Civil and Political Rights 999 UNTS 171, art 25.

<sup>35</sup> Hannah Beech, ‘As Malaysia Moves to ban ‘Fake News’, Worries About Who Decides the Truth’ (*The New York Times*, 2 April 2018) <<https://www.nytimes.com/2018/04/02/world/asia/malaysia-fake-news-law.html>> accessed 7 July 2020.

communications minister stated that any news about 1MDB that has not been verified by the government is “fake news” and would be subject to government action.<sup>36</sup> The Prime Minister had been accused of embezzling hundreds of millions of dollars from 1MDB.<sup>37</sup> Therefore, anyone who criticised the Prime Minister for his embezzlements in the 1MDB could be charged under the law. As a result, the law, though proposed to target fake speech, was being employed to target and penalize any discussion of the corruption scandal involving the Prime Minister. This was a frontal attack on free speech in Malaysia, which is also a fundamental human right recognised under ICCPR.<sup>38</sup>

Therefore, while non-regulation of fake news presents significant human rights concerns, a broad regulation presents other human rights concerns such as stifling of free speech as well. Having understood the human rights concerns presented both by fake news and its regulation, it will now be appropriate to discuss how the jurisdictions in Asia-Pacific regulate fake news. But, before undertaking that analysis, it is very important to define the subject of regulation. A definition of the subject of regulation forms the basis for understanding the kind of regulation that is required for regulating a subject, and helps determine the ideal contours of such regulation. Therefore, before beginning with the analysis of regulations, in the next chapter, I will briefly discuss what is the subject of regulation in the first place.

### III. DEFINING ‘FAKE NEWS’

In 2017, Facebook released a white paper titled ‘Information Operations and Facebook’.<sup>39</sup> In the paper, in the context of information sharing on Facebook, it defined the terms ‘False News’ and ‘Disinformation’. The paper explained that Facebook will avoid the use of the term ‘fake news’, as “the term ‘fake news’ has emerged as a catch-all phrase to refer to everything from news articles that are factually incorrect to opinion pieces, parodies and sarcasm, hoaxes, rumors, memes, online abuse, and factual misstatements by public figures that are reported in otherwise accurate news pieces. The overuse and misuse of the term “fake news” can be

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<sup>36</sup> Hemananthani Sivanandam, ‘Unverified info on 1MDB is fake news, says deputy minister’ (*The Star*, 21 March 2018) <<https://www.thestar.com.my/news/nation/2018/03/21/unverified-info-on-1mdb/>> accessed 7 July 2020.

<sup>37</sup> Richard C. Paddock, ‘Malaysian Leader, Under Corruption Cloud, Will Meet With Trump’ (*The New York Times*, 9 September 2017) <<https://www.nytimes.com/2017/09/09/world/asia/malaysia-najib-razak-1mdb.html>> accessed 7 July 2020.

<sup>38</sup> International Covenant on Civil and Political Rights 999 UNTS 171, art 19.

<sup>39</sup> Facebook, *Information Operations and Facebook* (White Paper, Cm 1, 2017).

problematic because, without common definitions, we cannot understand or fully address these issues.”<sup>40</sup> It defined the term False News and Disinformation as:

- **False News:** News articles that purport to be factual, but which contain intentional misstatements of fact with the intention to arouse passions, attract viewership, or deceive.<sup>41</sup>
- **Disinformation:** Inaccurate or manipulated information/content that is spread intentionally. This can include false news, or it can involve more subtle methods, such as false flag operations, feeding inaccurate quotes or stories to innocent intermediaries, or knowingly amplifying biased or misleading information. Disinformation is distinct from **misinformation**, which is the inadvertent or unintentional spread of inaccurate information without malicious intent.<sup>42</sup>

In its 2018 handbook, titled “Journalism, Fake News and Disinformation”, UNESCO concurred with Facebook and recommended that the term ‘fake news’ not be used as it is vague, and therefore, inherently vulnerable.<sup>43</sup> It suggested that if the term fake news is used to regulate speech in the digital age, it could lead to bigger problems such as censoring of speech that people in power do not like. They noted that if the term ‘fake news’ is employed for regulation of false information on the internet, it could be “deployed as a weapon against the news industry, as a way of undermining reporting that people in power do not like.”<sup>44</sup> UNESCO also recommended that it is ‘disinformation’ and ‘misinformation’ that should be the subject of regulation.<sup>45</sup> In 2018, the UK government formed a Digital, Culture, Media and Sports Committee for an inquiry on disinformation and to address the potential for social media to be misused to sway elections.<sup>46</sup> This committee also largely echoed the concerns highlighted by other bodies, and proposed using the terms ‘misinformation’ and ‘disinformation’ instead.<sup>47</sup>

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<sup>40</sup> *ibid* [4].

<sup>41</sup> *ibid* [5].

<sup>42</sup> *ibid* [5].

<sup>43</sup> UNESCO, *Journalism, Fake News & Disinformation* (2018).

<sup>44</sup> *ibid* [43].

<sup>45</sup> *ibid* [44].

<sup>46</sup> Margi Murphy, ‘Government bans phrase ‘fake news’’ (*The Telegraph*, 23 October 2018) <<https://www.telegraph.co.uk/technology/2018/10/22/government-bans-phrase-fake-news/>> accessed 7 July 2020.

<sup>47</sup> Digital, Culture, Media and Sport Committee, *Disinformation and ‘fake news’: Interim Report* (HC 2017-19, 363).

The above discussion brings to fore the concerns in vaguely defining the subject of regulation, and prescribes that the terms ‘misinformation’ and ‘disinformation’ only be used as the subjects of regulation instead of the term ‘fake news’. But, more importantly, it brings to light the distinct nature of two subjects which we more often than not club as ‘fake news’: *first*, speech by persons who innocently spread false information (misinformation), and *second*, speech by persons who intentionally spread false information (disinformation). An understanding of ‘fake news’ in the above terms serves a very important goal. It clearly demarcates the subjects of regulation based on their intent in spreading ‘fake news’, and therefore, inherently builds in proportionality in regulation. As a result, any sincere attempt to meaningfully regulate fake news must necessarily, and only, refer to regulating misinformation and disinformation. Having understood the subject of regulation, we are now prepared to understand the mechanisms employed by the four Asia-Pacific jurisdictions to regulate fake news.

#### IV. FAKE NEWS REGULATORY MECHANISMS

The Yale Law Information Society’s report on ‘Fighting Fake News’ very interestingly characterizes the mechanisms employed by the State to regulate fake news as “positive” and “negative actions”.<sup>48</sup> Negative actions are necessarily the coercive mechanisms employed by the State that restrict speech as the method of regulating fake news. Positive actions do not restrict speech, in fact, these methods do not place any restrictions on speech whatsoever. These actions instead facilitate speech by making citizens aware of what they are seeing. Interestingly, it may be noted that the distinction between these positive and negative methods of regulating fake news essentially draw from a traditional debate on free speech – when certain elements of speech may be harmful. The debate pertains to different methods used in different jurisdictions to promise freedom of expression.

On the one hand, there is the American marketplace of ideas model that finds its origin in the works of John Milton & JS Mill which assures: that every kind of speech, harmful or not, must prevail. It asserts that “government has no power to restrict expression because of its message,

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<sup>48</sup> See, Sandra Baron and Rebecca Crootof, ‘Fighting Fake News- Workshop report’ (*Information Society Project at Yale Law School*) <[https://law.yale.edu/sites/default/files/area/center/isp/documents/fighting\\_fake\\_news\\_-\\_workshop\\_report.pdf](https://law.yale.edu/sites/default/files/area/center/isp/documents/fighting_fake_news_-_workshop_report.pdf)> accessed 7 July 2020.

its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfilment for each individual, [...] people are guaranteed the right to express any thought, free from government censorship.”<sup>49</sup> In the context of fake news, their stance remains similar, i.e., fake news is part of the price we pay for a free society.<sup>50</sup> It is part of the marketplace of ideas. The only way for democratic society to determine the best idea among many is to let ideas fight it out in the field. Good ideas, like the best products, will win out and bad ideas, like inferior, faulty, or poorly made products, will be tossed aside.<sup>51</sup> This model finds its legitimacy in jurisdictions such as the USA where their First Amendment to the Constitution provides an absolute guarantee to freedom of expression.

On the other hand, we have the Moderation model, that though ordinarily recognizes the freedom of expression for everyone but provides that the freedom can be restricted in order to protect rights of others. Under this model, restrictions may be placed on the freedom of expression by the state in order to protect rights of others, provided the restrictions comply with a three-step test: they should be, *first*, provided by law; *second*, pursue a legitimate purpose, and *third*, are necessary in a democratic society. Therefore, restrictions on speech which contains false information (i.e., fake news) maybe placed under this model, provided the restrictions qualify the three-step test.<sup>52</sup> This model finds its legitimacy under Article 19 of the ICCPR that guarantees freedom of expression.<sup>53</sup>

The negative actions or methods to regulating fake news are in consonance with the Moderation model, while the positive actions are in consonance with the American Marketplace of Ideas. The negative methods involve censoring speech containing fake news, while positive actions involve supplementing fake news with more information that help the citizenry have an informed outlook on what information is false. As an example, a coercive or negative action by the state would penalize anyone found spreading fake news in the form of banning their speech, or punishing the person making the speech. A positive or facilitative action by the state will not take any action against the false information, instead, it will provide with more

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<sup>49</sup> *Chicago Police Department v Mosley* 408 US 92, pg 96.

<sup>50</sup> Ari Ezra Waldman, ‘The Marketplace of Fake News’ 20 U. Pa. J. Const. L. 845 (2018) <<https://scholarship.law.upenn.edu/jcl/vol20/iss4/3>> accessed 7 July 2020.

<sup>51</sup> *ibid* pg. 848.

<sup>52</sup> Human Rights Committee, general comment No. 34 (2011) [22].

<sup>53</sup> International Covenant on Civil and Political Rights 999 UNTS 171, art 19(3).

information through the means available at its disposal to counter the false information. These actions could be in the form of a fact-checking service, for instance.

I will be using this distinction between negative and positive actions to characterize and categorize the regulations employed by the four Asia-Pacific jurisdictions in the paper, as well. *First*, I will highlight the coercive framework employed by the state, and *next*, the facilitative one. But, it is not only the State as an actor that plays a role to regulate fake news. The Media self-regulates fake news that gets circulated on or through its platforms as well. Therefore, in the *final* section of this chapter, I will also discuss how media self-regulation works in these Asia-Pacific Jurisdictions to curb the spread of fake news.

### **A. State's Coercive Regulatory Framework**

While the menace of fake news has increased multifold in the digital age, this problem is not novel. It may be noted that issues faced in regulation of fake news are not very different from the long-continued issues faced in regulating false content in general speech. To better understand this parallel, one may refer to the decision of the US Supreme Court in *USA v Alvarez*.<sup>54</sup> A federal law, the Stolen Valor Act 2005,<sup>55</sup> was passed in the US to stem instances where people falsely claimed to have earned the medal in an attempt to protect the valor of legitimate recipients.<sup>56</sup> The Act made lying about receiving military medals a federal offense. However, the USSC in *Alvarez* struck down the parts of the Act that criminalized false speech with respect to receiving military medals.<sup>57</sup> Four of the six justices ruling in favor of striking down the parts of the statute held that a statement's falsity is not enough to exclude speech from the protections assured to freedom of speech under the First Amendment to the US Constitution.<sup>58</sup>

Therefore, states have been attempting to regulate false content from a very long time. However, their approach has largely been consequential – in that, if the false content becomes the cause for annoyance to a person, enmity or hatred between communities, or perpetration of any other offence, only then those people who contributed to the generation of the content are penalized. But, fake news, as learnt in the previous chapter, is not only speech that is

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<sup>54</sup> *United States v Alvarez* 567 US 709 (USSC).

<sup>55</sup> Stolen Valor Act 2005 Pub. L. 109-437.

<sup>56</sup> Stolen Valor Act 2005, s 704(b).

<sup>57</sup> *Alvarez* (n 54) pg. 8.

<sup>58</sup> *Alvarez* (n 54) pg. 8.

‘disinformation’ but also includes ‘misinformation’. Moreover, on account of the fast-paced nature of the mediums used for spreading fake news in the digital age, the propensity of speech to cause harm not only increases multifold but the ability to trace the harm to the speech also reduces considerably.

As a result, even though on some counts the long-standing issue of regulation of false contents in regular speech is similar to the issue of regulation of fake news, regulation of fake news requires specialized mechanisms. A mere consequentialist approach to regulation of false speech in the digital age is ineffective. Establishing liability on the generators of fake news based on the reported harm caused in the society would always remain disproportional. This is both on account of difficulty in establishing the causal linkages between the harm and the fake news, and the difficulty in identifying whether the person behind the harm caused by a false information spread it intentionally or not, i.e., whether it was ‘misinformation’ or ‘disinformation’.

Recognizing these difficulties in regulating fake news from a strictly consequentialist perspective, modern nation states have designed both *per se* and preventive modes of regulation of fake news. A *per se* method of regulation does not require a proof of harm arising from fake news to regulate fake news. Instead, it regulates its spread and establishes liability merely upon the proof that a news is fake. It could be in the form of blocking the content upon publication, or criminalizing such content upon publication, or both. A preventive regulation, as the name suggests, instead of regulating fake news by establishing liability on the generators of such news seeks to prevent its spread itself. This is generally implemented through methods such as internet shutdowns *et al.*

It is important to note that while nation states have devised their own *per se* and preventive methods to regulate fake news, the consequential approach has not been done away with. All the three methods prevail together, and infact, all the three methods could be used by the state at the same time to regulate fake news.

### 1. Consequentialist Regulation

In Japan, obstruction of business by spreading fake news is punishable under the Penal Code. A person who damages the credit or obstructs the business of another by spreading false



rumors can be punished with imprisonment for a term not more than three years or a fine of not more than 500,000 yen.<sup>59</sup> Similarly, a person who defames another by alleging false facts or facts not important in the public interest can be punished with imprisonment for a term not more than three years or a fine of not more than 500,000 yen.<sup>60</sup> These provisions are consequentialist as they do not regulate false speech *per se*, but only regulate it if it obstructs the business or defames someone.

Remarkably, recognizing the menace of false information in the conduct of free and fair elections, Japan introduced certain provisions to regulate false information during elections through its Public Offices Election Act.<sup>61</sup> The Act penalizes the spread of false information by any person, however, the liability is only fastened if it can be proved that it was publicized to make a candidate win or lose elections.<sup>62</sup> Interestingly, the Act provides for a gradation in the offences with respect to the spread of false information. If any person publicizes false information about a candidate for the purpose of making the candidate win, the person is punishable by imprisonment for not more than two years or a fine of not more than 300,000 yen.<sup>63</sup> But, if any person publicizes false or distorted information about a candidate for the purpose of making the candidate lose, the person is punishable by imprisonment for not more than four years, or a fine of not more than 1 million yen.<sup>64</sup> Therefore, spreading of false information *per se* is not regulated, but only if it is done with the purpose of making a candidate win or lose, it attracts penal regulation – a consequentialist regulation.

In Malaysia, any seditious publication that is found to be likely to excite hatred against any Ruler, or is likely to lead to bodily injury, damage to property, promotes ill will or hatred amongst different classes, races, or religions can be blocked by the Malaysian Communications and Multimedia Commission [“MCMC”].<sup>65</sup> The circulation of this seditious content is also penalized. Any person printing, publishing, selling or distributing such content can be imprisoned for a term of three to seven years.<sup>66</sup> But, these provisions regulating seditious

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<sup>59</sup> Penal Code 1907 (Japan), art 233.

<sup>60</sup> Penal Code 1907 (Japan), art 230(1).

<sup>61</sup> Public Offices Election Act 1950 (Japan), art 235(5).

<sup>62</sup> Public Offices Election Act 1950 (Japan), art 235(5).

<sup>63</sup> Public Offices Election Act 1950 (Japan), art 235(1).

<sup>64</sup> Public Offices Election Act 1950 (Japan), art 235 (1).

<sup>65</sup> Sedition Act 1948 (Malaysia), s 10(1).

<sup>66</sup> Sedition Act 1948 (Malaysia), s 4(1).

content regulate the content irrespective of it being true or false. It does not specifically tackle false information, but false information can be tackled under it if it consequently promotes sedition as mentioned above.

Similarly, Malaysia also has provisions that penalize making of defamatory statements or publications. The provision penalizing defamation in the Malaysian Penal Code provides that any imputation, if intending to harm or knowingly harms the reputation of a person, is said to be defamatory.<sup>67</sup> The person making such an imputation can be subject to both fine, and imprisonment for a term not exceeding two years.<sup>68</sup> But, again, at par with the sedition law, this provision in the Malaysian law is not intended to regulate false information specifically. It would penalize any imputation so long as it harms the reputation of a person. But a person publishing false information can be penalized under it if it can be proven that the false information was intended to harm the reputation of the person subject of such news.

Australia does not have a specific law regulating the generation or spread of fake news. However, it penalizes publication of false information if the information is defamatory. In the reform of the national defamation laws in Australia, the states and territories produced a model provision on criminal defamation. All jurisdictions, except the Northern Territory and Victoria, adopted a version of the model provision.<sup>69</sup> The provision in the Crimes Act 1900 of New South Wales, for instance, penalizes a person publishing material defamatory of another living person if they know the matter is false; and is published with the intention of causing serious harm to the victim.<sup>70</sup> The maximum penalty for criminal defamation is 3 years' imprisonment or a fine not exceeding \$110,000, or both.<sup>71</sup> Similar offence exists for South Australia under s 257(1) of the Criminal Law Consolidation Act 1935;<sup>72</sup> for Western Australia under s 345(1) of the Criminal Code Act Compilation Act 1913;<sup>73</sup> for Queensland under s 365 of the Criminal Code 1899;<sup>74</sup> and for Tasmania under s 196(1) of the Criminal Code Act 1924.<sup>75</sup> In Western

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<sup>67</sup> Penal Code (Act 574) (Malaysia), s 499.

<sup>68</sup> Penal Code (Act 574) (Malaysia), s 500.

<sup>69</sup> Craig Burgess, 'Criminal Defamation in Australia: Time to Go or Stay?' (2013) 20(1) Murdoch University Law Review <<http://classic.austlii.edu.au/au/journals/MurdochULawRw/2013/1.pdf>> accessed 7 July 2020.

<sup>70</sup> Crimes Act 1900 (NSW, Australia), s 529(3).

<sup>71</sup> *ibid.*

<sup>72</sup> Criminal Law Consolidation Act 1935 (SA, Australia), s 257(1).

<sup>73</sup> Criminal Code Act Compilation Act 1913 (WA, Australia), s 345(1).

<sup>74</sup> Criminal Code 1899 (QLD, Australia), s 365.

<sup>75</sup> Criminal Code Act 1924 (TAS, Australia), s 196(1).

Australia, there is a special provision as well, contained in s 345(6), that provides for summary conviction that may extend up to 12 months' imprisonment or a fine of \$12,000.<sup>76</sup> Victoria is slightly different in that it requires the prosecution to not only prove that the accused had knowledge of the falsehood of the matter, but also that the accused had a malicious intent in publishing the alleged defamatory statement.<sup>77</sup> Australia's Federal Criminal Code of 1995 also penalizes the incitement of any offence under the Code, which covers almost every offence including homicide, hurt, theft, robbery *et al.*<sup>78</sup> To establish culpability under the provision, it is a prerequisite that the person must intend that the offence incited be committed.<sup>79</sup> While this provision can be used to prosecute anyone who incites someone to commit an offence using false information, there have been no recorded instances where the provision has been used as such in the digital age.

In India, there are no penal laws that specifically target consequences emerging from fake news. The Indian Penal Code criminalizes sedition to the effect that any person, through any modes of communication, who brings or attempts to bring hatred, contempt or excite disaffection towards the government can be imprisoned for life, penalized with a fine, or both.<sup>80</sup> This provision does not singularly focus on false information. Any communication that is seditious, true or false, is condemnable under the provision. Therefore, false information can be penalized under the provision, provided it is used for seditious purposes. While there are no publicly available records of conviction under this provision for spreading seditious false information, the police has booked certain people accused of spreading false information citing an alleged breach of the sedition law.<sup>81</sup> The Code also has a provision that penalizes defamatory publications by anyone intending to harm the reputation of a person.<sup>82</sup> The provision does not specifically target false information. However, if such information is defamatory, and is published with the intent to harm the reputation of someone, the person publishing it can be

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<sup>76</sup> Criminal Code Act Compilation Act 1913 (WA, Australia), s 345(6).

<sup>77</sup> Wrongs Act 1958 (VIC, Australia), s 10.

<sup>78</sup> Criminal Code Act 1995 (Australia), s 11.4(2).

<sup>79</sup> Criminal Code Act 1995 (Australia), s 11.4(2).

<sup>80</sup> Indian Penal Code 1860, s 124A.

<sup>81</sup> 'Shehla Rashid booked for sedition over J&K posts' (*Outlook*, 6 September 2019) <<https://www.outlookindia.com/newscroll/shehla-rashid-booked-for-sedition-over-jampk-posts/1613083>> accessed 7 July 2020.

<sup>82</sup> Indian Penal Code 1860, s 499.

penalized. Therefore, the provision can be used to penalize false information if it harms the reputation of the person.

Other provisions in the Indian Penal Code that can be used to regulate false information based on the consequences it produces include: s 153A of the Code that penalizes the promotion of enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony;<sup>83</sup> s 295A of the Code that penalizes anyone who, with deliberate and malicious intention, by words spoken or written insults or attempts to insult the religion or religious beliefs any citizen.<sup>84</sup> Both these provisions do not specifically target false information, but any speech through any medium that promotes enmity between different groups, or insults a religion is penalized. But, to the extent that false news produces these consequences, the people initiating such news or spreading it can be booked under the provisions. There have been reports of people being booked under these provisions for spreading fake news that was communally divisive and hurt the religious sentiments of people.<sup>85</sup> The penalty for the offence under these provisions can be in the form of imprisonment for a term not more than three years, or fine, or both. Similarly, s 504 of the Code penalizes any speech that insults anyone, and therefore, provokes them with the intention that such provocation leads any person to break public peace or commit an offence.<sup>86</sup> The Indian state of West Bengal has booked certain people under the provision for spreading fake news, recently.<sup>87</sup> The penalty for the offence can be in the form of imprisonment for a term not more than two years, or fine, or both.<sup>88</sup> Finally, s 505 of the Code can also be used to regulate false news. The provision penalizes certain speeches that alarm the public to the extent that an offence maybe committed by a person against the state, public tranquility, or is likely to incite a class or community of people to commit an offence against another class or community of people. Recently, in the Indian state of Rajasthan 13 people were booked under the provision

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<sup>83</sup> Indian Penal Code 1860, s 153A.

<sup>84</sup> Indian Penal Code 1860, s 295A.

<sup>85</sup> Nandita Saikia, 'Making Postcard News founder's arrest about fake news rather than communal hatred is risky' (*Scroll.in*, 31 march 2018) <<https://scroll.in/article/873904/making-postcard-news-founders-arrest-about-fake-news-rather-than-communal-hatred-is-risky>> accessed 7 July 2020.

<sup>86</sup> Indian Penal Code 1860, s 504.

<sup>87</sup> 'West Bengal plans new law to tackle fake news on social media' (*The Week*, 15 June 2018) <<https://www.theweek.in/news/india/2018/06/15/west-bengal-plans-new-law-to-tackle-fake-news-on-social-media.html>> accessed 7 July 2020.

<sup>88</sup> Indian Penal Code 1860, s 504.

for inciting hatred against a community over social media during the COVID crisis.<sup>89</sup> The penalty for the offence can be in the form of imprisonment for up to three years, or fine, or both.

Apart from regulating the person responsible under the relevant provisions based on the consequences of the fake news that they have spread, recently, the IT Minister of India even suggested that such consequential regulation should also bind the relevant platform. In Parliament, in response to a calling attention motion, the Minister mentioned that if social media platforms do not take adequate and prompt action to prevent the spread of incorrect information that is designed to instigate people to commit offences, they will be charged for abetment of the offence committed.<sup>90</sup> Under the Indian Information Technology Act 2000 as well, the intermediary or service provider platform is only granted a limited immunity from being held liable for third party illegal communications hosted by them.<sup>91</sup> Any abetment of these communications can be subject of liability. The IT Minister's remarks in Parliament hint that an ineffective regulation of false information on the platform could be charged as abetment. This is a novel response from the Indian government which has not been seen anywhere. Following this, the Indian Government issued a notice to Whatsapp warning that if they do not impose strict standards to regulate false content, they will be charged as an abettor to mob lynching – where the offence of homicide is committed due to instigation, and has seen an unfortunate spike in India. The spike has been significantly attributed to fake news in India. The penalty for abetment of an offence in India is the same as the penalty for the offence itself.<sup>92</sup> Apart from the above penalty, s 69A of the Information Technology Act also allows the Central Government to issue directions to block content on certain grounds, including to prevent incitement for the commission of a cognizable offense.<sup>93</sup>

## 2. Per Se Regulation

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<sup>89</sup> Jaykishan Sharma, '39 booked in Rajasthan for spreading Covid-19 rumours' (*Hindustan Times*, 24 March 2020) <<https://www.hindustantimes.com/india-news/39-booked-in-rajasthan-for-spreading-covid-19-rumours/story-AEZrjr4V3iXtw3aTzRiNdM.html>> accessed 7 July 2020.

<sup>90</sup> Nikhil Pahwa, 'Govt of India says law of abetment applies to social media platforms if they do not act on large scale misuse' (*Medianama*, 27 July 2018) <<https://www.medianama.com/2018/07/223-govt-law-abetment-social-media-fake-news/>> accessed 7 July 2020.

<sup>91</sup> Information Technology Act 2000 (India), s 79.

<sup>92</sup> Indian Penal Code 1860, s 109.

<sup>93</sup> Information Technology Act 2000 (India), s 69(1).

There are laws in Japan that regulate fake news *per se* as well. Japan's Broadcasting Act 1950 regulates broadcasters and establishes a system to keep broadcasting programs from distorting the facts. Among other things, broadcasters must ensure that *reporting must not distort the facts*.<sup>94</sup> In cases where the content of a broadcast is not factual, and the individual who was the subject of such broadcast, or any of his relatives, complains within three months of the date of the broadcast, the broadcaster must, without delay, investigate whether the information broadcast was factual.<sup>95</sup> If it finds that the matters were not factual, it must, within two days of the day of making this finding, broadcast a correction or revocation using an appropriate method through the same broadcasting equipment used in the challenged broadcast.<sup>96</sup> In the instance where the broadcaster itself finds that the content is not factual, it has to undertake the same obligations as mentioned above.<sup>97</sup> As recently as June 2020, media proprietors *Fuji TV* and *Sankei Shimbun* apologized for publishing and airing falsified data about surveys that they had conducted in compliance with the above provisions.<sup>98</sup>

Malaysia was one of the few jurisdictions to lead the charge on a *per se* regulation of fake news by enacting a special statute against it. The Malaysian Parliament passed the Anti-Fake News Act 2018 in April 2018.<sup>99</sup> It defined fake news as, “*include(ing) any news, information, data and reports, which is or are wholly or partly false, whether in the form of features, visuals or audio recordings or in any other form capable of suggesting words or ideas.*”<sup>100</sup> The 2018 Act also had extraterritorial application whereby any person (regardless of his nationality) can be held liable and dealt with as if the offence is committed within Malaysia, provided they publish fake news concerning Malaysia or any Malaysian citizen.<sup>101</sup> The 2018 Act categorized offences relating to fake news. In the first category, any act of “creating, offering, publishing, printing, distributing, circulating, or disseminating any fake news or publication containing fake news” was deemed as an offence. However, knowledge of commission of such offence was

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<sup>94</sup> Broadcasting Act 1950 (Japan), art 4(1)(iii).

<sup>95</sup> Broadcasting Act 1950 (Japan), art 9(1).

<sup>96</sup> *ibid.*

<sup>97</sup> Broadcasting Act 1950 (Japan), art 9(2).

<sup>98</sup> Jiji, ‘Media giants Fuji TV and Sankei Shimbun apologize for fake opinion polls’ *The Japan Times* (Japan, 20 June 2020) <<https://www.japantimes.co.jp/news/2020/06/20/national/media-giants-fuji-tv-sankei-shimbun-spotlight-fake-opinion-polls/>> accessed 7 July 2020.

<sup>99</sup> Gulizar Hacıyakupoglu, ‘Malaysia’s Elections and the Anti-Fake News Act’ *The Diplomat* (26 April 2018) <<https://thediplomat.com/2018/04/malysias-elections-and-the-anti-fake-news-act/>> accessed 7 July 2020.

<sup>100</sup> Anti-Fake News Act 2018 (Malaysia), s 2.

<sup>101</sup> Anti-Fake News Act 2018 (Malaysia), s 3.

imperative for prosecution. If one did not know or was unaware that the information he shares online is false, then he shall not be guilty of an offence under this category.<sup>102</sup> The offences falling in this category carried a maximum fine of RM500, 000 or ten years imprisonment.<sup>103</sup> In the second category, any person who rendered financial assistance to facilitate the offence in the first category, whether directly or indirectly, could also be found guilty.<sup>104</sup> The 2018 Act also imposed a duty upon the publishers to remove any publication containing fake news, and a failure to do so on their part is also penalized.<sup>105</sup> The Act also empowered the courts to direct the police or the MCMC to take any necessary measures to remove a publication of false information.<sup>106</sup> There were certain protections enshrined within the 2018 Act for those whose speech was subjected to regulation. For instance, if anyone receiving the order for removal of their publication believes that the alleged fake news publication does not amount to fake news, he may make an application to the Court to set aside such order.<sup>107</sup> But, this protection was very limited: in that, if the removal order was obtained by the government relating to a publication which is prejudicial to public order or national security – no such application could have been made.<sup>108</sup> Therefore, the government had unchecked discretion to get marked certain information as fake news prejudicial to public order, and the same could not be challenged at all.

Since such broad and discretionary powers were vested in the government, commentators and human rights groups argued that the 2018 Act – more than a measure of regulating fake news – was a method to stifle criticism of the administration. They specifically criticized the vague and overly broad definition of ‘fake news’ in the Act, and the unchecked powers vested in the government to take down content.<sup>109</sup> As a result, in 2019, the newly elected lower house of the Malaysian Parliament, with a change in the government, voted to repeal the Act.<sup>110</sup> The Act could not be repealed in the first attempt as its repeal was blocked by the senate, but in the

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<sup>102</sup> Anti-Fake News Act 2018 (Malaysia), s 4.

<sup>103</sup> *ibid.*

<sup>104</sup> Anti-Fake News Act 2018 (Malaysia), s 5.

<sup>105</sup> Anti-Fake News Act 2018 (Malaysia), s 6.

<sup>106</sup> Anti-Fake News Act 2018 (Malaysia), s 9.

<sup>107</sup> Anti-Fake News Act 2018 (Malaysia), s 7.

<sup>108</sup> Anti-Fake News Act 2018 (Malaysia), s 8(3).

<sup>109</sup> ‘Malaysia: Drop Proposed ‘Fake News’ Law’ (*Human Rights Watch*, 29 March 2018) <<https://www.hrw.org/news/2018/03/29/malaysia-drop-proposed-fake-news-law>> accessed 7 July 2020.

<sup>110</sup> ‘Malaysia parliament scraps law criminalising fake news’ (*Aljazeera*, 10 October 2019) <<https://www.aljazeera.com/news/2019/10/malaysia-parliament-scraps-law-criminalising-fake-news-191010024414267.html>> accessed 7 July 2020.

second attempt the repeal was successful. Therefore, the Act is currently not in force.<sup>111</sup> However, in the time it was operational, in just the first month of its enactment, a Danish citizen was prosecuted under the Act for maliciously publishing fake news.<sup>112</sup> The Danish citizen made false claims, in the form of a YouTube video, about the length of time it took police in Kuala Lumpur to respond to a shooting incident. He was sentenced to a week's jail and fined RM10,000.<sup>113</sup>

But, the 2018 Act is not the only legislation that empowered the Malaysian government to *per se* regulate fake news. The Communications and Multimedia Act 1998 also empowers the government to penalize the dissemination of fake news. Section 233 of the 1998 Act penalizes any person who uses any network facility to spread false information.<sup>114</sup> It reads:

“(1) A person who—  
(a) by means of any network facilities or network service or applications service knowingly—  
    (i) makes, creates or solicits; and  
    (ii) initiates the transmission of,  
any comment, request, suggestion or other communication which is obscene, indecent, **false**, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person; or  
[...]  
**commits an offence.**  
[...]  
(3) A person who commits an offence under this section shall, on conviction, be **liable to a fine not exceeding fifty thousand ringgit** or to **imprisonment for a term not exceeding one year** or to **both** and shall also be liable to a further fine of one

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<sup>111</sup> *ibid.*

<sup>112</sup> Camila Domonske, ‘Danish Man Is First Person Sentenced Under Malaysia's Anti-Fake-News Law’ *npr* (30 April 2018) <<https://www.npr.org/sections/thetwo-way/2018/04/30/607068241/danish-man-is-first-person-convicted-under-malysias-anti-fake-news-law>> accessed 7 July 2020.

<sup>113</sup> *ibid.*

<sup>114</sup> Malaysia Communications and Multimedia Act 1998, s 233.



thousand ringgit for every day during which the offence is continued after conviction.”<sup>115</sup> [Emphases supplied]

Section 211 of the 1998 Act is also similarly worded, but it is more specific in the sense that it specifically penalizes the content applications service providers or content application users if they spread false information through the content on these application services.<sup>116</sup> A content application service is any service that provides content in the form of texts, photos, videos etc. over a network. Section 211 reads:

“(1) No content applications **service provider, or other person using** a content applications service, shall provide content which is indecent, obscene, **false** (emphasis mine), menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person.

(2) A person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to **a fine not exceeding fifty thousand ringgit** or to **imprisonment for a term not exceeding one year** or to both and shall also be liable to a further fine of one thousand ringgit for every day or part of a day during which the offence is continued after conviction.”<sup>117</sup> [Emphases Supplied]

Therefore, while s 233 penalizes creation and initial transmission of false information generally over the networks, s 211 specifically penalizes providing false content over an application. In as recently as January 2020, the MCMC arrested people for spreading fake news about the coronavirus and prosecuted them under Section 233 of the CMA.<sup>118</sup> But, it must be noted that both s 233 & 211 do not penalize *any* spreading of false information. The intent of the person

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<sup>115</sup> Malaysia Communications and Multimedia Act 1998, s 233.

<sup>116</sup> Malaysia Communications and Multimedia Act 1998, s 211.

<sup>117</sup> *ibid.*

<sup>118</sup> ‘Malaysia arrests five for spreading fake news about coronavirus’ *South China Morning Post* (29 January 2020) <<https://www.scmp.com/news/asia/southeast-asia/article/3048132/malaysia-arrests-five-spreading-fake-news-about>> accessed 7 July 2020.

spreading false information to spread such information is key to impose penalty under these provisions.

Finally, the 1998 Act also establishes the MCMC, the statutory authority responsible for enforcing the 1998 Act.<sup>119</sup> It also has the powers to regulate all matters relating to communications and multimedia activities not provided for in the communications and multimedia laws,<sup>120</sup> including to supervise and monitor communications and multimedia activities.<sup>121</sup> Utilizing this power, the MCMC recently took a step to curb dissemination of false content online through online advisory warnings, especially towards group administrators of mobile apps such as WhatsApp.<sup>122</sup> It issued a list of Do's and Don'ts for group administrators, and has clarified that such administrators can be penalized if they fail to monitor the spread of fake news in their groups.<sup>123</sup> Whatsapp group administrators are equated to publishers of false information,<sup>124</sup> and actions can be taken against them under the 1998 Act for both promoting or failing in containing the dissemination of false content.<sup>125</sup>

Apart from the 1998 Act, the Malaysian Government also has the Printing Presses and Publications Act 1984 at its disposal to penalize fake news *per se*. The Act was amended in 1987 to penalize any publication of false news. Specifically, s 8A was inserted in the 1984 Act to provide:

“8A. Offence to publish false news

(1) Where in any publication there is **maliciously** published any **false news**, the printer, publisher, editor and the writer thereof shall be guilty of an offence and shall, on conviction, be liable to **imprisonment for a term not exceeding three years** or to a fine not exceeding twenty thousand ringgit or to both.”<sup>126</sup>

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<sup>119</sup> Malaysia Communications and Multimedia Act 1998, s 3(1)(c).

<sup>120</sup> Malaysia Communications and Multimedia Act 1998, s 16(1)(c).

<sup>121</sup> Malaysia Communications and Multimedia Act 1998, s 16(1)(e).

<sup>122</sup> ‘Malaysia Threatens To Jail WhatsApp Group Admins Over Spread Of Fake News’ (Vice, 28 April 2017) <[https://www.vice.com/en\\_asia/article/qkqndm/malaysia-threatens-to-jail-whatsapp-group-admins-over-spread-of-fake-news](https://www.vice.com/en_asia/article/qkqndm/malaysia-threatens-to-jail-whatsapp-group-admins-over-spread-of-fake-news)> accessed 7 July 2020.

<sup>123</sup> *ibid.*

<sup>124</sup> Evidence Act 1950 (Malaysia), s 114A.

<sup>125</sup> Malaysia Communications and Multimedia Act 1998, s 233.

<sup>126</sup> Printing Presses and Publications Act 1984 (Malaysia), s 8A(1).

It must be noted that a malicious intent to publish false news is a pre-requisite for prosecution under the 1984 Act. Now, while the scope of this Act is conventionally understood to be limited to publications such as newspapers, periodicals, etc. The definition of publications in the 1984 Act is extremely wide, it includes:

- “(a) a document, newspaper, book and periodical;
- (b) all written or printed matter and everything whether of a nature familiar to written or printed matter or not containing any visible representation;
- (c) anything which by its form, shape or in any manner is capable of suggesting words or ideas; and
- (d) an audio recording;”<sup>127</sup>

The 1984 Act, therefore, could apply to publications of any nature and penalize fake news in any of the means mentioned above. However, it would not include publications through electronic media – for that falls into the domain of the 1998 Act.<sup>128</sup> Therefore, Malaysia currently has in its arsenal two laws to regulate fake news *per se*: The Communications & Multimedia Act 1998, and the Printing Presses & Publications Act 1984.

In Australia, there are no static set of laws or regulations that govern the regulation of false information *per se*. However, recognizing the impact that fake news could have on its elections, the Australian Government also introduced certain amendments to its electoral processes that could *per se* regulate fake news. One such amendment requires that any electoral communications via any mode of communication be authorized, and details of the person making such communications be disclosed in the communication.<sup>129</sup> Following this, the Australian Election Commission [“AEC”] created a formal set of protocols for social media companies to deal with political ads that do not fulfil the above criteria, and therefore, impact its electoral processes. The relevant document, sent to social media companies, makes it clear that the AEC expects these companies to “respond to its notifications of illegal ads by either

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<sup>127</sup> Printing Presses and Publications Act 1984 (Malaysia), s 2.

<sup>128</sup> ‘No Plans To Amend Act To Control Internet Media’ *Bernama.com* (July 29, 2006) <<https://web.archive.org/web/20070929091421/http://www.bernama.com.my/bernama/v3/news.php?id=211180>> accessed 7 July 2020.

<sup>129</sup> Kelly Buchanan, ‘Government Responses to Disinformation on Social Media Platforms: Australia’ (*Library of Congress*, September 2019) <<https://www.loc.gov/law/help/social-media-disinformation/australia.php>> accessed 7 July 2020.

removing or blocking the post, or by passing on the details of the creator of the ad to the AEC.”<sup>130</sup> The AEC employs the threat of an injunction against the relevant company or the responsible user in the event of noncompliance on their part. The AEC has stated that Twitter and Facebook have been broadly complying with the above protocols prescribed.<sup>131</sup> This is the extent of *per se* regulation of fake news that exists in Australia currently which is limited to the scope of electoral communications.

In India, there are no static set of laws that govern or regulate the spread of fake news *per se*. The Indian government is planning to introduce Information Technology (Intermediary Guidelines) Rules.<sup>132</sup> These rules impose stricter due diligence conditions on social media platforms to not host or publish information that is harmful. However, the draft rules do not specify false information as ‘harmful’ or content that will be regulated *per se*.<sup>133</sup> Instead, only harmful information will be expected to be regulated by the platforms under the rules. Therefore, the approach in the proposed rules is also consequential and not *per se*. But, since the guidelines have still not been finalized, there could be some hope that the Indian government regulates false news *per se*.

It is interesting to note that prior to 2015, the Indian Information Technology Act 2000 had a specific provision that penalized anyone who would send false information with the purpose of causing annoyance, inconvenience, ill will, obstruction, danger, hatred *et al.* However, the Indian Supreme Court in 2015 in *Shreya Singhal v Union of India* struck down the provision as being restrictive of free speech in India.<sup>134</sup> The Court reasoned that the vague and arbitrary terms used in the provision led to its misuse of both personal and political nature.<sup>135</sup> Several criminal cases were instituted against innocuous instances of online speech, including political commentary and humor.<sup>136</sup> Therefore, this is the reason why India currently does not have a

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<sup>130</sup> Pat McGrath, ‘Facebook Probed by Australian Electoral Commission over Mysterious Political Ads’ *ABC News* (Feb. 25, 2019) <<https://perma.cc/KKW3-SZFA>> accessed 7 July 2020.

<sup>131</sup> *ibid.*

<sup>132</sup> Surabhi Agarwal, ‘Revised IT intermediary rules in 2 weeks after law ministry's nod’ *The Economic Times* (4 February 2020) <<https://economictimes.indiatimes.com/tech/internet/revised-it-intermediary-rules-in-2-weeks-after-law-ministrys-nod/articleshow/73921179.cms?from=mdr>> accessed 7 July 2020.

<sup>133</sup> The Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018 (India), r 3(2).

<sup>134</sup> *Shreya Singhal v. Union of India* (2013) 12 SCC 73.

<sup>135</sup> *ibid* [82].

<sup>136</sup> ‘Section 66A: Seven instances of alleged abuse on social media’ *Indian Express* (24 March 2015) <<http://indianexpress.com/article/india/india-others/section-66-a-instances-of-alleged-abuse-on-social-media/>> accessed 7 July 2020.

law on regulating fake news *per se*. However, it is even more interesting to note that despite the Court striking down the section, there have been repeated instances of the police booking people under the provision.<sup>137</sup> But, these only lead to harassment as no trial can be done on the basis of a charging provision which has been declared unconstitutional.

### 3. Preventive Regulation

There are no coercive methods currently prescribed under Japanese Law, or any other methods that empower the Japanese Government to censor or prevent speech in order to prevent the spread of fake news. There are no reported internet shutdowns in Japan undertaken to regulate false speech, or otherwise.

In Malaysia, the Printing Presses and Publications Act 1984 provides that a printing press must only run with a license from the government. Any person running a printing press without such a license can be penalized, and sentenced to imprisonment for a term not exceeding three years, and fine of RM20,000 .<sup>138</sup> The licenses under the 1984 Act are granted at the discretion of a Minister of the Malaysian Government.<sup>139</sup> The relevant government minister also has the “absolute discretion” to prohibit the printing, importation, sale, distribution, or possession of a publication that contains anything that is, or is likely to be, prejudicial to “public order, morality, security, or which is likely to alarm public opinion, or which is or is likely to be prejudicial to public interest or national interest.”<sup>140</sup> The government has at its disposal total discretion to prohibit and prevent the spread of fake news by directly restricting any circulation of a publication that it deems as “likely to be prejudicial to public interest”.<sup>141</sup> However, it must be noted that the 1984 Act does not extend to publications in the electronic medium – the primary carrier of fake news. Therefore, it might prove effective only for conventional publications and not for the current menace. There have been no reports of employment of internet shutdowns to regulate the spread of fake news in Malaysia, so far.

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<sup>137</sup> Gopal Sathe, ‘The Supreme Court Struck Down Section 66A of the IT Act in 2015, Why Are Cops Still Using It to Make Arrests?’ *Huffington Post* (16 October 2018) <[https://www.huffingtonpost.in/2018/10/15/the-supreme-court-struck-down-section-66a-of-the-it-act-in-2015-why-are-cops-still-using-it-to-make-arrests\\_a\\_23561703/](https://www.huffingtonpost.in/2018/10/15/the-supreme-court-struck-down-section-66a-of-the-it-act-in-2015-why-are-cops-still-using-it-to-make-arrests_a_23561703/)> accessed 7 July 2020.

<sup>138</sup> Printing Presses and Publications Act 1984 (Malaysia), s 5.

<sup>139</sup> Printing Presses and Publications Act 1984 (Malaysia), s 3(3).

<sup>140</sup> Printing Presses and Publications Act 1984 (Malaysia), s 7(1).

<sup>141</sup> *ibid.*

Though Australia does not have preventive methods that censor fake news or prevent its spread, it adopted a very unique model that keeps a check on the generation of fake news itself. The Parliament of Australia passed the Foreign Influence Transparency Scheme Act 2018 in June 2018.<sup>142</sup> The Act imposes registration and disclosure obligations for entities who have arrangements with foreign principals and undertake communications activity on behalf of such foreign principals in Australia for the purpose of political or governmental influence; or produce information or material on behalf of a foreign principal for the purpose of being communicated or distributed to the public.<sup>143</sup> The disclosure obligations include the party undertaking the communication to disclose who is undertaking the activity, on whose behalf (i.e. the foreign principal) the activity is being undertaken, and that the activity is being undertaken on their behalf.<sup>144</sup> The communications or information activity covered under the Act includes any communication over any platform. Such rules though do not regulate the current spectrum of fake news, but instead disincentivize further creation of such news. A non-compliance with the regime is penalized in the form of a fine of 60 penalty units in Australia. It must be noted that this regime can only disincentivize false information arising on behalf of foreign principals through their established agencies in Australia. However, fake news is created in more covert ways than the above by foreign principals, and one cannot discount the role of domestic agencies to create and spread false information. Therefore, though *sui generis*, it is not effective to prevent the menace.

Following this preventive stand, in order to prevent the spread of fake news in its elections, the Australian government also introduced several amendments to its electoral process. The most relevant to prevent the spread of false information in this regard is the requirement to get all the electoral communications or advertising authorized.<sup>145</sup> Prior to these amendments, the law was somewhat unclear as to the extent that social media posts required authorization.<sup>146</sup> However, the amendments are specifically targeted to capture all modes of communication,

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<sup>142</sup> 'Turnbull government shrinks Foreign Influence Transparency Scheme register' *The Conversation* (8 June 2018) <<https://theconversation.com/turnbull-government-shrinks-foreign-influence-transparency-scheme-register-98001>> accessed 7 July 2020.

<sup>143</sup> Foreign Influence Transparency Scheme Act 2018 (Australia), s 13.

<sup>144</sup> Foreign Influence Transparency Scheme Act 2018 (Australia), s 11.

<sup>145</sup> Lucy Battersby, 'Voters Asked to Dob in Illegal Political Ads Appearing on Social Media' *The Sydney Morning Herald* (18 February 2019) <<https://www.smh.com.au/business/the-economy/voters-asked-to-dob-in-illegal-political-ads-appearing-on-social-media-20190218-p50yij.html>> accessed 7 July 2020.

<sup>146</sup> Kelly Buchanan, 'Government Responses to Disinformation on Social Media Platforms: Australia' (*Library of Congress*, September 2019) <<https://www.loc.gov/law/help/social-media-disinformation/australia.php>> accessed 7 July 2020.

and explicitly include social media. Post authorization, any electoral communication made must disclose the authorization particulars on the communications. These particulars include details of the person making the communication and their city. The Australian government also established the Electoral Integrity Assurance Taskforce which specifically has within its mandate safeguarding elections from disinformation.<sup>147</sup> The agency is made up of representatives from a range of government agencies, including Australian Federal Police, Attorney-General's Department, Department of Finance etc.<sup>148</sup> Its primary role is to assist the AEC in preventing cyber threats from manipulating Australia's democratic processes.<sup>149</sup> It helps the AEC procure evidence against disinformation campaigns, assists in the investigation and prosecutes the offenders through a one-stop method as all departments responsible for these processes have been made a part of the task force.<sup>150</sup> But, it must be noted that these regulations can disincentivize the creation of fake news only to an extent. False information is created in more covert ways than as "electoral communication", to which these regulations apply. Therefore, they cannot be said to be extremely effective when it comes to preventing fake news from impacting electoral processes.

India is one of the most infamous jurisdictions known for invoking preventive measures to avoid a law and order situation. The most commonly resorted measure to prevent the spread of fake news in India is an internet shutdown. Though the government does not say in so many words that it is imposing an internet shutdown to prevent the spread of fake news, but 134 Internet shutdowns were ordered in 2018 to prevent violence from rumors circulated online.<sup>151</sup> Recently, in the wake of CAA protests, internet was shut down in Firozabad to prevent spread

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<sup>147</sup> Will Zielbell, 'Australia forms task force to guard elections from cyber attacks' *Reuters* (9 June 2018) <<https://www.reuters.com/article/us-australia-security-elections/australia-forms-task-force-to-guard-elections-from-cyber-attacks-idUSKCN1J506D>> accessed 7 July 2020.

<sup>148</sup> 'Electoral Integrity Assurance Taskforce' (*Australian Election Commission*) <<https://www.aec.gov.au/elections/electoral-advertising/electoral-integrity.htm>> accessed 7 July 2020.

<sup>149</sup> *ibid.*

<sup>150</sup> *See*, 'Sydney man charged over by-election spam emails' (*Australian Federal Police*, 3 July 2020) <<https://www.afp.gov.au/news-media/media-releases/sydney-man-charged-over-election-spam-emails>> accessed 7 July 2020; 'AEC statement: Disinformation emails' (*Australian Election Commission*, 3 July 2020) <<https://www.aec.gov.au/media/2020/07-03b.htm>> accessed 7 July 2020.

<sup>151</sup> *See*, 'Maharashtra bandh today: Internet services suspended in Pune district' *Livemint.com* (9 August 2018) <<https://www.livemint.com/Politics/NH4L0C5NDCz2tpdIrNyiQJ/Maharashtra-badh-today-Internet-services-suspended-in-Pune.html>> accessed 7 July 2020; 'Maratha Quota Stir: Internet Services Suspended in Pune District' *The Wire* (9 August 2018) <<https://thewire.in/caste/maratha-quota-stir-internet-services-suspended-in-pune-district>> accessed 7 July 2020; Matt Burgess, 'To Fight Fake News on WhatsApp, India Is Turning Off the Internet' *Wired* (18 October 2018) <<https://perma.cc/Q9J6-KW3P>> accessed 7 July 2020.

of misinformation.<sup>152</sup> Similarly, in June 2019, internet was shut down in Aligarh after a child was murdered, to prevent the spread of rumors and fake news.<sup>153</sup> Traditionally, internet shutdowns were imposed in India under s 144 of the Criminal Procedure Code which empowers the Magistrate having jurisdiction over an area to pass such orders, as may be necessary in apprehension of danger, abstaining public from certain acts.<sup>154</sup> However, this provision was very vague and did not clearly empower the Magistrate to impose an internet shutdown. Therefore, the government in 2017 introduced the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules,<sup>155</sup> and institutionalized the mechanism to impose internet shutdowns.

These rules empower the government to shut down telecom services, including internet, in the “interest of public safety” or during “public emergency”.<sup>156</sup> Under the rules, the Home Secretary to the Government of India or the relevant state government can authorize such a blackout. The only check on this authority is a post facto one: within five days of issuing such directions, a review committee shall decide if the necessary circumstances did exist for an internet shutdown to be ordered.<sup>157</sup> This committee is chaired by the Cabinet Secretary – or the Chief Secretary in case of a state government – the secretary to the Department of Legal Affairs and the secretary to the Department of Telecommunications.<sup>158</sup> Post the enactment of these rules, in 2019 alone, the powers under these rules have been invoked 106 times,<sup>159</sup> with the most remarkable one being the blackout in Kashmir where the internet remained shut for 213 days.<sup>160</sup> These disproportionate number of shutdowns have been made possible only on account of the extremely weak framework of these rules. *First*, the decision for a shutdown is merely subject to a post facto review under Rule 6 of the 2017 rules. *Second*, a post facto review is merely supposed to check whether the shutdown was invoked under the right circumstances.

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<sup>152</sup> ‘Anti-CAA stir: Internet services suspended in UP’s Prayagraj, Firozabad’ *Business Standard* (22 December 2019) <[https://www.business-standard.com/article/news-ani/anti-kaa-stir-internet-services-suspended-in-up-s-prayagraj-firozabad-119122200799\\_1.html](https://www.business-standard.com/article/news-ani/anti-kaa-stir-internet-services-suspended-in-up-s-prayagraj-firozabad-119122200799_1.html)> accessed 7 July 2020.

<sup>153</sup> Anuja Jaiswal, Aligarh girl’s murder: Internet suspended to curb rumour-mongering’ *Times of India* (11 June 2019) <<https://timesofindia.indiatimes.com/city/agra/aligarh-girls-murder-internet-suspended-to-curb-rumour-mongering/articleshow/69731060.cms>> accessed 7 July 2020.

<sup>154</sup> The Code Of Criminal Procedure 1973 (India), s 144.

<sup>155</sup> Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules 2017 (India).

<sup>156</sup> *ibid.*

<sup>157</sup> Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, r 5.

<sup>158</sup> *ibid.*

<sup>159</sup> *See*, ‘Internetshutdowns.in’ <<https://internetshutdowns.in/>> accessed 7 July 2020.

<sup>160</sup> *ibid.*



No consequences – either civil, administrative, or penal – have been prescribed under the rules for imposing a shutdown which fails the review.<sup>161</sup> *Third*, and most important, the review committee is not a judicial committee. Therefore, it is not independent. It is composed of secretarial officers – albeit from different departments – who decide on the exercise of power of another secretarial officer. All are top officers of the government.<sup>162</sup> There are no real checks and balances. This is reflected in the shutdowns in 2019 – more than 100 – where not even one has been held to be improper.

In order to ensure that fake news does not interfere with Indian electoral processes, the Election Commission of India, similar to Australia, also introduced certain measures to disincentivize the creation & spread of fake news. While these measures do not prevent fake news from entering the system at par with shutdowns, they focus on creating mechanisms which hinder the generation of fake news itself. Some of these measures include: a mandatory filing by all the candidates with respect to their email and social media accounts before the ECI;<sup>163</sup> pre-certification of electoral ads to be run by candidates or political parties on any platform;<sup>164</sup> and keeping an account of the social media expenditure incurred by the candidates.<sup>165</sup> The enforcement of these mechanisms remains highly suspect in India on account of the limited regulatory and enforcement powers exercised by the ECI<sup>166</sup> despite being vested with such powers.<sup>167</sup> Even if the ECI were to enforce these provisions strictly, the same critique as the Australian mechanisms apply to these mechanisms as well. Fake news during elections spreads in more covert ways than official communications that these guidelines seek to regulate.

## **B. State’s Facilitative Framework**

Permitting government to regulate speech generally presents a risk that it could have a chilling effect on certain kinds of public discourse which oppose the government, and therefore, grant

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<sup>161</sup> Kashish Makkar, ‘Internet shutdowns are sinister’ *The Telegraph Online* (5 January 2020) <<https://www.telegraphindia.com/opinion/internet-shutdowns-are-sinister/cid/1733261>> accessed 7 July 2020.

<sup>162</sup> *ibid.*

<sup>163</sup> Conduct of Elections Rules 1961 (India), Form 26, para. 3.

<sup>164</sup> 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, 2013).

<sup>165</sup> *Ibid.*

<sup>166</sup> *See*, S.R. Chowdhury & Mridula Chari, ‘The Silent Army: 10 reasons why public trust in the Election Commission stands eroded’ (*Scroll.in*, 22 May 2019), <<https://scroll.in/article/924268/the-silent-army-10-reasons-why-public-trust-in-the-election-commission-stands-eroded>> accessed 7 July 2020.

<sup>167</sup> Constitution of India 1950, art 324.

the government too much power to control speech in areas of public concern. As a result, another approach to regulating fake news that has increasingly occupied space in both developing and developed countries is using government funding or other economic incentives to indirectly promote legitimate news and information outlets. These initiatives include governments working together with media corporations and platforms by developing community standards for these platforms to promote legitimate information on them. Other initiatives include the government setting up fact-checking initiatives, subsidizing independent fact-checking institutions etc. There have been a number of such initiatives in the Asia Pacific too.

In Japan, the government has proposed the setting up of a public-private team to fight fake news.<sup>168</sup> The proposal calls for the establishment of a joint team comprising of members of the government and social media service operators. The proposal was included in a draft paper compiled by the Japanese internal affairs ministry. This team will examine the actual situation regarding regulation of fake news in Japan.<sup>169</sup> IT firms would be asked to disclose their standards for removing fake news through artificial intelligence or other technologies and set up systems to deal with complaints. This system is one where community standards of using the platforms for different kind of speeches will be developed together with the government.<sup>170</sup> It must be noted that this system is merely a proposal currently, and its functioning in practice is yet to be seen. There are a number of private fact-checking initiatives in Japan. However, the government does not run or lend support to any of such initiatives.

In Malaysia, the government established an effective fact-checking platform on its own as a method to counter fake news. The MCMC launched the “sebenarnya.my” portal to enable the public to “check on the authenticity of news spread through social websites.”<sup>171</sup> In March 2018, the MCMC made this portal available as a smartphone app too. The portal remains active and publishes various fact-checking articles and statements in response to information being circulated online. News – whether online or print - is collected, analyzed and confirmed and

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<sup>168</sup> Jiji, ‘Japanese panel wants to establish team to fight fake news, with help from U.S. tech giants’ *The Japan Times* (30 November 2019) <<https://www.japantimes.co.jp/news/2019/11/30/business/japan-fake-news-gafa/>> accessed 7 July 2020.

<sup>169</sup> *ibid.*

<sup>170</sup> *ibid.*

<sup>171</sup> ‘SEBENARNYA.MY portal launched for checking validity of news’ *The Star* (14 March 2017) <<https://www.thestar.com.my/news/nation/2017/03/14/sebenarnya-portal/>> accessed 7 July 2020.

published on the portal for public information. False news which goes viral online is processed through the same mechanism, and debunked on the platform. In the process of analyzing and confirming a particular news, the MCMC collaborates with relevant ministries in-charge. This ensures that news genuinely comes from the right authority. This is a remarkable initiative of the government, where it plays a proactive role to ensure its citizens receive genuine content.<sup>172</sup> Apart from this, the MCMC regularly hold fake news awareness programs through its strategic partners and conducts awareness campaigns through public service announcements broadcast on television and radio.<sup>173</sup>

In Australia, prior to the 2019 federal elections, the AEC launched a social media advertising campaign, called “Stop and Consider”, to encourage voters to “carefully check the source of electoral communication they see or hear”.<sup>174</sup> The initiative involved advertising on social media as well as on the AEC website. It may be noted that despite this campaign, the AEC possesses no real power to ensure that no false information is let out in electoral communications.<sup>175</sup> Therefore, the campaign remained limited to an informational guide for citizens to stay protected from disinformation.

In India, the government has set up a fact check website which identifies misinformation related to the government’s policies under the aegis of Press Information Bureau (‘PIB’)<sup>176</sup> – the nodal agency of the Indian government to disseminate government information to public. It both operates a *suo motu* model that tracks misinformation online across different platforms, and also encourages people to report government related fake news. It checks the information it tracks or those reported to it and releases its verdicts on whether the information is false, and if so, the reasons for why it is false. However, it must be noted that its scope of operations is limited to information regarding the government.<sup>177</sup> For instance, on 24 July 2020, PIB

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<sup>172</sup> Mahyuddin Daud & Sonny Zulhuda, ‘Regulating the spread of false content online in Malaysia: Issues, challenges and the way forward’ *International Journal of Business and Society*, Vol. 21 S1, 2020, 32-48.

<sup>173</sup> ‘Sebenarnya.my Launches Smartphone App’ *The Sun Daily* (20 March 2018) <<https://www.thesundaily.my/archive/sebenarnyamy-launches-smartphone-app-MUARCH534018>> accessed 7 July 2020.

<sup>174</sup> ‘Stop and Consider campaign’ (*Australian Election Commission*) <<https://www.aec.gov.au/elections/electoral-advertising/files/stop-and-consider-external-flyer.pdf>> accessed 7 July 2020.

<sup>175</sup> The Commonwealth Electoral Act (Australia) 1918.

<sup>176</sup> ‘PIB establishes checking unit to combat fake news against government on social media’ *The Economic Times* (28 November 2019) <<https://economictimes.indiatimes.com/tech/internet/pib-establishes-checking-unit-to-combat-fake-news-against-government-on-social-media/articleshow/72279066.cms>> accessed 7 July 2020.

<sup>177</sup> ‘Functions- Press Information Bureau’ (*Press Information Bureau*) <[https://pib.gov.in/Content/29\\_5\\_Functions.aspx](https://pib.gov.in/Content/29_5_Functions.aspx)> accessed 7 July 2020.

debunked a viral message on Twitter claiming that an Indian Airforce jet has been shot down. It also clarified that the images in the message used were from a previous date.<sup>178</sup>

### C. Media Self-Regulation

Both coercive and facilitative mechanisms discussed in this chapter, until now, were state administered. One of the primary problems associated with a state regulation of fake news is that it may not be bereft of bias. A determination of falsity of an information involves the separation of opinions, facts and the truth. Harmless discussions or purely satirical texts could be conceived as false, and subjected to censure. Moreover, it could also lead to situations such as selective prosecutions. For instance, if a fake news has been proliferated that favors the ruling dispensation,<sup>179</sup> it is unlikely that people spreading such news would be prosecuted. Or, for instance, it is unlikely that the State would arm its fact-checking mechanisms against the false information it itself spreads. But, if it harms its image, both coercive and facilitative mechanisms to regulate speech would be encouraged. Therefore, with any state-centric regulation, there will always be a limitation that the state would not proceed against its own actors spreading fake news. Considering this inherent limitation in state-centric regulations, often media self-regulation is also suggested as a viable approach for regulation of false information. This approach relies upon media's initiative and capability to self-regulate creation or spread of false information. This reliance is based on the assumption that businesses are becoming increasingly cognizant and recognizing their human rights obligations. Therefore, they will take an active role in regulating a proliferation of fake news – since it endangers the enjoyment of a number of human rights, as discussed in chapter two.

Some of the initiatives taken up by media in this regard include: in India, the News Broadcasting & Standards Authority – an authority set up by the News Broadcasters Association, a voluntary association of major Indian national news broadcasters – regularly takes actions on any broadcast of fake news.<sup>180</sup> They have prescribed a Code of Ethics, and

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<sup>178</sup> Twitter post by @PIBFactCheck on 24 July 2020 <<https://twitter.com/PIBFactCheck/status/1286609326795186176?s=20>> accessed 7 July 2020.

<sup>179</sup> See, 'China Attacks Hong Kong Protesters With Fake Social Posts' (*Wired*, 19 August 2019) <<https://www.wired.com/story/china-twitter-facebook-hong-kong-protests-disinformation/>> accessed 7 July 2020.

<sup>180</sup> 'News Broadcasting Standards Authority' (IBF) <<http://www.ibfindia.com/news-broadcasting-standards-authority-nbsa>> accessed 7 July 2020.

any violation of it is taken up by the NBSA. In 2017, NBSA fined Zee News a sum of Rs 1 Lakh for airing a program which involved misrepresentation of facts.<sup>181</sup> In Japan, the Broadcasting Ethics & Program Improvement Organization, an NGO has been set up to improve the quality of broadcasting and promote higher ethical standards while ensuring freedom of speech and expression.<sup>182</sup> The NGO has an agreement with each broadcaster to define the scope of authority vested in different committees run by it.<sup>183</sup> This makes its actions effective by requiring cooperation and compliance from the broadcasters. The NGO runs a committee called the Committee for the Investigation of Broadcasting Ethics that investigates any false content aired by the broadcasters.<sup>184</sup> It acts both on the basis of complaints received by viewers, and can also act on its own. Based on one such investigations in 2018, Nippon Television Network was asked to suspend a segment on foreign festivals in a popular variety show following revelations that some of the events were fake.<sup>185</sup> The BPO also demanded that Nippon TV deliver a follow-up report on its findings after conducting an internal investigation.<sup>186</sup> Malaysia also has a similar voluntary association of broadcasters that operates under the auspices of the MCMC.<sup>187</sup> While there is a Content Code, enacted under the Communications & Multimedia Act 1998, that regulates the conduct of broadcaster – the compliance with it is voluntary.<sup>188</sup>

Similarly, Facebook has set up its own measures across the world where it has partnered with independent third-party fact-checking organizations.<sup>189</sup> Upon receiving the reports from the Facebook community, and its own signals that rely upon artificial intelligence to check the content, they send stories to these organizations. If the fact-checking organizations identify a

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<sup>181</sup> ‘Zee News fined Rs 1 lakh for calling poet Gauhar Raza ‘anti-national’ (Scroll.in, 02 September 2017) <<https://scroll.in/latest/849365/zee-news-fined-rs-1-lakh-for-calling-poet-gauhar-raza-anti-national>> accessed 7 July 2020.

<sup>182</sup> ‘About BPO’ (Broadcasting Ethics & Program Improvement Organization) <[https://www.bpo.gr.jp/?page\\_id=1092](https://www.bpo.gr.jp/?page_id=1092)> accessed 7 July 2020.

<sup>183</sup> *ibid.*

<sup>184</sup> *ibid.*

<sup>185</sup> ‘Nippon TV apologises for fake Thai ‘festival’ (Bangkok Post, 17 November 2018) <<https://www.bangkokpost.com/thailand/general/1577594/nippon-tv-faked-festivals-on-show>> accessed 7 July 2020.

<sup>186</sup> *ibid.*

<sup>187</sup> ‘History & Mission’ (Communications and Media Content Forum of Malaysia) <<http://cmcf.my/history-mission>> accessed 7 July 2020.

<sup>188</sup> The Malaysian Communications & Multimedia Content Code, s 6.1.

<sup>189</sup> ‘Working to Stop Misinformation and False News’ (Facebook, 7 April 2017) <<https://www.facebook.com/facebookmedia/blog/working-to-stop-misinformation-and-false-news>> accessed 7 July 2020.

story as false, it gets flagged as disputed.<sup>190</sup> Stories that have been disputed also appear lower in News Feed. Other social media companies also have now set up effective methods that allow people to report fake news, and they take actions based on them.

While businesses self-regulating themselves and acting against fake news sounds encouraging, it cannot ever substitute state regulation. Polarizing content that is largely based on false information drives up the revenues of social media platforms. At key points in the 2016 US election campaign, the top 20 fake news stories generated 8,711,000 shares, reactions, and comments on Facebook.<sup>191</sup> Putting this in perspective, the top 20 real stories only garnered 7,367,000 shares, reactions, and comments.<sup>192</sup> The increasing reactions are reflective of the greater amount of time spent by users on their platforms that translates to revenues. Though there is evidence that removal of false information would not hamper those revenues,<sup>193</sup> it is still a voluntary obligation that is taken up by businesses. In 2019, when the Indian News Broadcasters Association moved against a channel's unethical conduct on a communal issue, and asked it to issue an apology, its editor-in-chief quit the Association with his channel. He later set up his own association with his colleagues as a parallel to the News Broadcasters Association, and has since been operating outside its jurisdiction.<sup>194</sup>

These instances indicate how Media self-regulation, being totally voluntary, cannot ever be relied upon as 'the' system to regulate fake news. Moreover, while we often impute suspect motives to governments that they would not prosecute false information benefitting them, there is nothing to suggest that media will. Broadcasters and social media platforms face the same constraints as the governments in separating opinions, facts and truth. Therefore, these decisions cannot also be assumed to be bereft of bias. As a result, a media self-regulation only replaces bias from the government with bias from corporations. Finally, while a state censorship can be addressed as a violation of human rights, and it can be held accountable for

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<sup>190</sup> *ibid.*

<sup>191</sup> Lorelei Mihala, 'Fake news': What's the best way to tame the beast?' (*BBC News*, 14 July 2017) <<https://www.bbc.com/news/business-40575479>> accessed 7 July 2020.

<sup>192</sup> *ibid.*

<sup>193</sup> John Shinal, 'Facebook's fight to kill fake news may hurt its profit margin' (CNBC, 1 November 2017) <<https://www.cnn.com/2017/11/01/facebook-says-costs-will-rise-to-go-after-fake-news.html>> accessed 7 July 2020.

<sup>194</sup> 'What Happens When You Complain to a Broadcast Standards Authority about Republic TV?' (*The Wire*, 01 February 2020) <<https://thewire.in/media/what-happens-when-you-complain-to-a-standards-authority-about-republic-tv>> accessed 7 July 2020.

it. It is extremely difficult to place the same obligation on a private corporation. But, again, it cannot be discounted that media corporations, driven by profits, would not engage in such a conduct in the first place as it would hamper their reputation. Yet, due to the concerns highlighted above, they are not the most effective form of regulation. But, media self-regulation can definitely complement the state-centric regulation of fake news, and fill the gaps where the state is not as pro-active as it should be. For instance, it can act upon people's complaints against state sponsored fake news and regulate such content that state would not. Therefore, making the regulation of fake news a tad bit more comprehensive.

## V. THE WAY FORWARD

Regulation of fake news presents one of the most perplexing challenges for nation-states across the world. It cannot be left unchecked due to its human rights implications, and it cannot be over-regulated again due to its human rights concerns. Therefore, the appropriate regulation has to balance a lot of factors to make it truly effective and comprehensive. Countries in the Asia-Pacific, due to their large populations, their developing status, and their deeply embedded fault lines, are in a vulnerable situation when it comes to the challenges presented by fake news. As a result, in this paper, different approaches employed by four major jurisdictions in the Asia-Pacific to the regulation of 'false information' were discussed. In this paper, the problems presented by false information, from the perspective of regulation, were highlighted for the first time in an Asia-Pacific context. Next, specific analysis of four major jurisdictions in the Asia-Pacific was undertaken – in order to understand how these countries are regulating false information in the status quo. The four jurisdictions analyzed in the paper have extreme variations when it comes to regulation of fake news on account of the unique challenges they face due to the problem. For instance, for India, due to its over-burdened judicial system a large extent of regulation of speech containing fake news is handled by the executive part of its government. In Malaysia, due to its developing status and deep ethnic divisions, the country has been especially active to regulate any false information that comes up through all and any means at its disposal. Comparing this to developed jurisdictions such as Japan or Australia, which value freedom of speech more than the potential consequences it could have, no preventive regulations, apart from awareness campaigns or regulations addressed to ensure that fake news does not hamper their electoral process, have been designed to contain the spread of false information as such. Only a consequential regulation of speech that holds the perpetrators liable on the basis of any real consequences of their speech is considered sufficient.

But, India or Malaysia, being proactive on the front of regulation, have also emerged as one of the jurisdictions that have arbitrarily restricted free speech, or more importantly, speech that could have held their governments accountable. Therefore, this paper does not seek to recommend one model of regulation adopted by a country over the other. It recognizes that regulation is indeed a product of the circumstances of the respective jurisdictions. The jurisdictions discussed in this paper, and the respective regulations enacted by them, depict a cross-section of the spectrum of regulation of fake news that exists around the world. The models of regulation discussed in this paper are supposed to serve as primers for regulators in other jurisdictions – for them to weigh the various efficiencies and concerns associated with each method of regulation.

However, discussing the way forward for potential regulators solely based on the jurisdictional experiences would not be just without highlighting the normative code for regulation of fake news under International Human Rights Covenants. Under the ICCPR,<sup>195</sup> and as recently recommended by the Special Rapporteur on the Promotion & Protection of the Right to Freedom of Opinion & Expression to the UN Human Rights Council in the context of online hate speech:<sup>196</sup> any regulation of speech, fake news for our purposes, can only be done when it fulfils certain conditions. *First*, the restriction or regulation must be done through laws that are precise, public and transparent. There cannot be unbound discretion to regulate speech, moreover, any such regulation must be done only by independent tribunals or courts and not the government.<sup>197</sup> *Second*, the regulation must be justified to respect the right of others, public order or health.<sup>198</sup> And *third*, it must be the least restrictive means to achieve the aim of the restriction.<sup>199</sup>

Therefore, while regulators may use the regulations adopted by the four jurisdictions to weigh the efficiencies & concerns presented by them, they must also keep the above normative code in mind in applying the regulations to their own jurisdictions. This is important in order to ensure that in containing a challenge to human rights presented by a problem, does not go onto violate other human rights while tackling the problem.

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<sup>195</sup> International Covenant on Civil and Political Rights 999 UNTS 171, art 19(3).

<sup>196</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression 9 October 2019 A/74/486.

<sup>197</sup> *ibid* [6], [31].

<sup>198</sup> *ibid* [6], [39].

<sup>199</sup> *Ibid* [6], [34].