

MUSHROOMING LIKE CORONAVIRUS? TACKLING THE MENACE OF FAKE NEWS BY WAY OF AN EPISTEMIC, LEGAL & REGULATORY DISCOURSE

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Fake news is a topic that we all know well, and that continues to play a prominent role in the social harms besieging the globe today. From the recent storming of the Capitol Hill in the United States to the siege of Red fort over Farm-laws in India, online disinformation via social media platforms was the main driving force catapulting the protestors far and wide. In the backdrop of such social harms, this Research Article examines the epistemic, legal and regulatory discourse surrounding the disinformation bubble in India and asks for the deployment of 'Lessing's Decentred Regulatory Model' – the potential Framework solution to regulate social media platforms in order to curb the menace of 'fake news'.

KEY-WORDS: FAKE NEWS, EPISTEMOLOGY, FOUCAULT, CONSTITUTION OF INDIA,

INFORMATION REGULATION, SOCIAL MEDIA PLATFORMS, REGULATORY HARBOUR MODEL

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I. INTRODUCTION

On January 6, hours after Donald’s Trump false representations via Social Media Platforms (‘SMP’), armed and angry mob of supporters stormed the Capitol Hill and tangled with the Police just as Joe Biden’s presidential win was about to be validated in the United States.² Pro-trump supporters crashed barricades and masquerade into the halls of Capitol building, smashing windows and brawling with police officers.³ This was considered as the worst security breach in the U.S History.⁴ Twitter responded by announcing⁵ a 12 hour suspension of President’s Donald

² Neil Vigdor, ‘Today’s Rampage at the Capitol, As It Happened’ (*Nytimes.com*, 2021) <<https://www.nytimes.com/live/2021/01/06/us/washington-dc-protests#mitt-romney-says-trump-incited-an-insurrection-at-the-capitol>> accessed 21 February 2021.

³ Ibid.

⁴ ‘US Capitol Hill Siege, Explained: What Happened, Who Was Involved And Is Trump To Blame?’ (*The Indian Express*, 2021) (<<https://indianexpress.com/article/explained/us-capitol-hill-siege-explained-7136632/>> accessed 21 February 2021).

⁵ <<https://twitter.com/TwitterSafety/status/1346970431039934464>> accessed 21 February 2021.

Trump's handle while Facebook and Instagram banned⁶ the President's profile for the rest of his term. Youtube also restricted accounts that posted videos containing false information about the election.⁷

Similarly, in another incident in India, allegations of ideological interference in the Farm-Laws protest gained increased currency when protestors stormed the iconic monument of Red Fort and added fuel to the speculations of the growing threat to free speech and democracy in India.⁸ The Government of India responded to the growing online movement by asking twitter to block certain handles.⁹ After unreleting for a while¹⁰ (3 take-down notices by the Government), twitter finally caved in to the pressure from the Indian Government and blocked over 500 accounts in an unprecedented move.¹¹

These two contrasting instances depict the enforcement actions adopted by the SMP in response to misinformation issues, which raise questions about their role, worldwide reach – and responsibility. In the backdrop of such increasing instances of misinformation representations, SMP will need to embrace the nature & gravity

6 Guy Rosen and Monika Bickert, 'Our Response to the Violence in Washington - About Facebook' (About Facebook, 2021) <<https://about.fb.com/news/2021/01/responding-to-the-violence-in-washington-dc/>> accessed 21 February 2021.

7 <<https://twitter.com/YouTubeInsider/status/1347231471212371970>> accessed 21 February 2021.

8 AL JAZEERA, 'Free Speech under Threat as India Clamps down on Farmer Protests' (2021) <<https://www.aljazeera.com/news/2021/2/5/free-speech-under-threat-as-india-clamps-down-on-farmer-protests.>> accessed 21 February 2021.

9 Ibid.

10 Twitter Safety, 'Updates on Our Response to Blocking Orders from the Indian Government' <https://blog.twitter.com/en_in/topics/company/2020/twitters-response-indian-government.html> accessed 21 February 2021.

11 Aashish Aryan, 'In Fresh Notice, Govt Asks Twitter To Block 1200 Accounts 'Flagged As Khalistan Sympathisers or Backed By Pakistan' *The Indian Express* (2021) <<https://indianexpress.com/article/india/twitter-accounts-block-govt-notice-khalistan-sympathiser-pakistan-7179728/>> accessed 21 February 2021.

of the proliferation of harmful information online, perpetuating through their enclosures that can lead to monumental social harms.

Through this Research Article, I will firstly draw out the concept and the epistemic features of the phenomenon of 'fake news'. Having done that, I will then discuss the different facets of social harms associated with 'fake news'; categorically laying down the reasons, which necessitate the Regulation of SMP. Taking a pro-regulatory approach as point of departure, I will then explore the avenues through which it can be achieved. This would require me to evaluate whether the organs of Indian State can derive powers from the Constitution to regulate or prohibit the proliferation of 'fake news'? After determining the requisite legislative and the judicial avenues, I then proceed to map out an overview of regulatory approaches and challenges for the regulation of social media platforms. I conclude by proposing Lessing's Decentred Dynamic Model as the model framework for the regulation of SMP that takes into account the architectural limitations of technology, and is equally responsive to change. While doing so, I also discuss its normative and functional aspects, deeming it as the most potent regulatory model that could eradicate the menace of 'fake news' right from its roots.

II. FAKE NEWS – CONCEPT & EPISTEMIC FEATURES

It is said that when we lie, we place the recipient in the lower pedestal than our own selves.¹² The term, "fake news", when spoken in its historical context, raises a certain kind of scepticism. This could be due to the political climate, vagueness and a certain inadequacy of the term.¹³ So, what constitutes 'fake news'? Are honest

12 See Christine Korsgaard, 'Two Arguments Against Lying' (1988) 2 Argumentation <<https://www.people.fas.harvard.edu/~korsgaard/CMK.Two.Args.pdf>> accessed 21 February 2021.

13 C. Wardle and H. Derakhshan, 'Information Disorder: Toward an Interdisciplinary Framework for Research and Policymaking', Council of Europe report DGI (2017) <<https://rm.coe.int/information-disorder-toward-an->

reporting errors also considered 'fake news'? Perhaps not! The most fundamental ingredient that pervades 'fake news' is intentional deception; honest reporting is not considered 'fake news'.¹⁴ When HINDU tweeted an article titled, "Coronavirus: Wuhan Institute's study on bats and bat hunters in Nagaland to be probed" which in fact referred to a study on Filo virus, this was not 'fake news'.¹⁵ More so because when independent fact-checking organisations pointed this out to the editor of Hindu, he acknowledged the mistaken headline for its web edition report and then carried out a subsequent correction with a disclaimer.¹⁶ 'Fake news' is not merely misleading; it involves deception. This deception is targeted towards an audience larger than the immediate recipient with the presumed expectation of a cumulative network effect.¹⁷ In certain instances, the creators of 'fake news' employ deception at least on marginal scales as an instrumental recourse to some other larger end.¹⁸ To take another example, a doctored video showing how China is bombing its own citizens in Wuhan was widely shared and transmitted across twitter.¹⁹ For the transmission of 'fake news', it is vital that a large number of people share the click-

interdisciplinary-framework-for research/168076277c> accessed 21 February 2021; European Association for Viewers Interests, 'Infographic: Beyond Fake News – Ten Types of Misleading News – Nine Languages' <<https://eavi.eu/beyond-fake-news-10-types-misleading-info/>> accessed 21 February 2021.

14 Regina Rini, 'Fake News And Partisan Epistemology' (2017) 27 Kennedy Institute of Ethics Journal 43-63 <<https://kiej.georgetown.edu/fake-news-partisan-epistemology/>> accessed 21 February 2021 (Hereinafter Regina Rini).

15 Archis Chowdhury, 'The Hindu Article Erroneously Links Filo virus Study to Coronavirus (Boom Live 2020)' <<https://www.boomlive.in/fake-news/the-hindu-article-erroneously-links-filovirus-study-to-coronavirus-6789>> accessed 21 February 2021.

16 Ibid.

17 Regina Rini (n 13) 44.

18 Ibid.

19 See Jignesh Patel and Mohammed Zubair, 'Chinese Police 'Shooting Down' Coronavirus Patients? Manufactured Clip Viral - Alt News' (*Alt News*, 2021) <<https://www.altnews.in/chinese-police-shooting-down-coronavirus-patients-manufactured-clip-viral/>> accessed 21 February 2021.

bait link and this can only happen if some of them believe in the truth value of the story.²⁰

This leads me to pose the vital question: Why do people believe in ‘fake news’? People believe in ‘fake news’ because on most occasions, they learn it through their networks on social media. Sharing information on social media already has the effect of reducing critical rationality²¹ and this is further amplified when the testifier belongs to their own affiliates. This is because information obtained from affiliates or networks acts as *de facto* testimony²² that has the effect of granting more credibility to the information than would otherwise be ascribed. A person is much more likely to believe the testimony from someone who is regarded as an epistemic peer.²³ A community of people who accept each other’s testimony learn more than the sceptic individual who arrives at information on his or her own volition.²⁴ SMP offer individuals (‘nodes in the information assemblage’) to accept bent form of testimonies.²⁵ The algorithms of the platform on the basis of the online behavioural pattern of its subjects also enable them to construct their ethos through reflection and reactivation of their prevailing epistemic attitudes.²⁶ People believe what they want to believe in. This goes against modernity’s de-subjectivating and objective brand of truth-seeking.²⁷ The truth doesn’t matter anymore. The platform dynamics

20 Regina Rini (n 13) 45.

21 *See generally* Herbert Marcuse, ‘Some Social Implications of Modern Technology’ (1941) 9 *Studies in Philosophy and Social Sciences* 138-162

<https://courses.cs.washington.edu/courses/cse490e/19wi/readings/marcuse_social_implications_1941.pdf> accessed 22 February 2021 (Hereinafter Marcuse).

22 Regina Rini (n 13) 1.

23 *See generally* CAJ Coady and Boyce Gibson, *Testimony: A Philosophical Study* (Clarendon Press 1992) (Hereinafter *Testimony*).

24 Regina Rini (n 13) 46.

25 *Ibid.*

26 Rickyd’Andrea Crano, ‘Neoliberal Epistemology and the Truth in Fake news (self-writing/self-enterprise/self-control)’ (2018) 11(31) *Angelaki* 24 (Hereinafter *Neoliberal Epistemology*).

27 *Ibid.*

also promote the proliferation of confirmation bias among its subjects.²⁸ This confirmation bias occurs due to the intellectual laziness and naive skepticism of its subjects.²⁹

Moreover, certain SMP promote the use of ‘false amplifiers’ which uses fake accounts to push rapid, repeated posts for ideological & financial motives.³⁰ This provides a breeding ground for the proliferation of misinformation.³¹ The promotion and push for ideologies via SMP raises the epiphany – is any information completely objective & free from the dictates of ideology? Is ‘fake news’ a source or else is it a reaction to the world’s absurdity?

Regardless of such abstract concerns, to tackle the menace of ‘fake news’, a pragmatic approach would be to regulate the SMP. In this ensuing section, I will discuss the various social harms associated with ‘fake news’ while also laying down the reasons that necessitate its regulation.

III. WHY REGULATION OF FAKE NEWS IS NECESSARY?

A. EXPLOITATION OF PSYCHOLOGICAL DRIVES

In Greek Mythology, Narcissus who was renowned for his radiance, was provoked by Nemesis to a still pool in which he saw his own reflection in the water and was

²⁸ Cass R Sunstein. *Republic.com 2.0*. (Princeton University Press, 2007) <www.jstor.org/stable/j.ctt7tbsw> accessed 21 Feb 2021.

²⁹ Penny cook, Gordon and Rand, David G., ‘Lazy, Not Biased: Susceptibility to Partisan Fake News Is Better Explained by Lack of Reasoning than by Motivated Reasoning’ (2018) 188 *Cognition* 39-50 <<https://ssrn.com/abstract=3165567>> accessed 21 Feb 2021.

³⁰ See Irini Katsirea, ‘“Fake news”: reconsidering the value of untruthful expression in the face of Regulatory Uncertainty’ (2018) 10(2) *Journal of Media Law* <[10.1080/17577632.2019.1573569](https://doi.org/10.1080/17577632.2019.1573569)> accessed 21 February 2021 (Hereinafter Irini Katsirea).

³¹ Tambuscio Marcella and others, ‘Fact-checking Effect on Viral Hoaxes: A Model of Misinformation Spread in Social Networks’ (2015) in *Proceedings of the 24th ACM International Conference on World Wide Web* <<https://doi.org/10.1145/2740908.2742572>> accessed 21 February 2021.

enchanted by it, not realising it was merely an image.³² Infatuated with the allure of his reflection, Narcissus lost his will to live.³³ Similarly, SMP possess the same alluring capacities instigating people to often dig deeper beyond their physical identities in order to make sense of themselves and the communities wherein they form their self-identities.³⁴ The Hedonistic pleasure offered by SMP cause automatic and instinctive reactions in people by further creating a habit of cyclic usage pattern that erodes self-control. The reflexivity offered by these platforms also generates feelings of anticipation and arousal by the way in which it manipulates us in responding as though what it depicts is real and about to be ours that also makes it pleasurable. For example, the desire to share what I may be eating is caused by performity and generates the affective capacity to excite us as if it were food itself.³⁵ Any manipulative action consists of targeted but careless influence on someone.³⁶ The subtle manipulative cues inherent in the architecture of these platforms enable us to extend & reproduce our familiar lived reality over time.³⁷ The manipulation is apparent because these platforms maximise consumptive behaviour while hiding the reasons for such behaviour.³⁸ The course of such an extension leads to the

32 See Timothy Gantz, *Early Greek Myth: A Guide to Literary and Artistic Sources* (The Johns Hopkins University Press 1996).

33 Ibid.

34 Laura Scaife, 'Learning from the Laws of the Sea, Foucault and Regulatory Theory: Proposing a Regulatory Harbour Model for the Regulation of Social Media that Serves Rather than Rules the Waves' [2018] 69(4) Northern Ireland Legal Quarterly 433-73 <<https://nilq.qub.ac.uk/index.php/nilq/article/view/187/143>> accessed 21 February 2021 (Hereinafter Regulatory Harbour Theory).

35 Marcus Gilroy-ware, *Filling the Void: Emotion, Capitalism and Social media* (Repeater 2017) 95 (Hereinafter Filling the void).

36 Michael Klenk, 'Digital Well-Being and Manipulation Online' in Luciano Floridi and Christopher Burr (eds.), *Ethics of Digital Well-Being* (Springer, Cham 2020) 3 (Hereinafter Digital Well-Being).

37 See Alfano, Mark, J. Adam Carter, and Marc Cheong, "Technological Seduction and Self-Radicalization." (2018) 4 (3) 298-322 *Journal of the American Philosophical Association* <<https://doi.org/10.1017/apa.2018.27>> accessed 21 February 2021.

38 Digital Well-Being (n 35).

expansion of our virtual self, while our real lived reality takes a back-seat. The glorification of the virtual avatar simultaneously leads to the dilution of our real sense of self. We direct our beliefs towards ourselves, i.e. “I as active subject”, without God and without Master”. During the course of such architectural manipulation, the objective truth becomes a scapegoat and consequently this leads to the emergence of phenomena of the proliferation of ‘fake news’.

This architectural aspect of SMP thereby raises the quintessential question: Will a regulatory approach tackle consumptive use of social media? The benefit of such an approach would ensure that the problem of ‘fake news’ is eradicated from its roots.

B. PROMOTION OF NEO-LIBERAL LOGICS OF CONTROL

Hayek posited that the function of market societies is to not to distribute goods but information - knowledge without resorting to any hierarchal source.³⁹ In his essays in the Counter-Revolution of Science set in the 1940s, he ridicules the modernization shaping the industrialisation in Europe and instead focuses on the rise of elite set of technocrats, politicians, and business magnates who ultimately dictate the social distribution of resources, bodies and information in accord with their models. Detesting the market socialist positions of his time, he takes neoliberalism outside the contours of ‘reason’ and goes on to conceptualize something called the Human Capital Theory (‘HCT’).

The core idea of his model is that in HCT, the subject is established in a complex relationship with society’s market regulators.⁴⁰ Interestingly, the Market is in

39 See FA Hayek, 'Competition as a discovery procedure' (2002) 5(3) The Quarterly Journal of Austrian Economics <<http://faculty.citadel.edu/sobel/ENTR301/5.%20Hayek%20%20Competition%20as%20a%20Discovery%20Procedure.pdf>> accessed 21 February 2021.

40 Michael Foucault, 'The Hermeneutics of the Subject' (1981-82) in Frédéric Gros. Trans. Graham Burchell. (eds.), *Lectures at the Collège de France (New York: Picador 2001)* (Hereinafter Hermeneutics of Subject).

Human Nature.⁴¹ Investment in the areas of skill, knowledge or health by virtue of exercises such as vitamin consumption or media engagement are categorized as investment in human capital. In fact, HCT integrates any decision concerning allocation of subject's leisure time into its analytical framework.⁴² Whether working, consuming, investing, spectating or surfing, the subject is actively engaged in the production of a "commodity" – health, well-being, attention: a life.⁴³

Along similar lines, Foucault's lectures, *The Hermeneutics of the Subject*,⁴⁴ provide techniques concerned with the "care of the self" in the Hellenistic paradigm i.e. Epicurean, Stoic & Cynical writings. Foucault dives into the relationship between the subject and the truth, focusing on how human Beings, as subjects, reflexively constitute their own selves, subjectivate as well as bind ourselves through their own processes of writing, listening, meditating, truth-telling, and returning to ourselves.⁴⁵

Foucault's reading of Hellenistic-Roman model of subjectivities & Hayek's HCT is relevant to the Misinformation Debate today. In the Hellenistic-Roman Model, the experience of subject takes place through a "teleological concentration".⁴⁶ Repeated inscriptions on the page, on the mind and on the body, subjectivates the truth.⁴⁷ A very crude example would be self-affirmative techniques to harness self-belief. This Hellenistic-Roman Model, where truth is not about what one knows but rather

41 See Fredric Jameson, *Postmodernism, or, the Cultural Logic of Late Capitalism*. (Durham: Duke University Press, 1991).

42 Gary S Becker, 'A Theory of the Allocation of Time' (1965) 75 (299) *The Economic Journal* <<https://doi.org/10.2307/2228949>> accessed 21 February 2021.

43 *Hermeneutics of Subject* (n 39).

44 *Ibid.*

45 *Hermeneutics of Subject* (n 39).

46 *Neoliberal Epistemology* (n 25).

47 *Hermeneutics of Subject* (n 39).

which prescribes an action or response, is renewed today where SMP like Twitter, Facebook & Instagram provide individuals for writing themselves through digital telematic self-writing: the “share” and the “retweet”. Earlier, it was done through activities like painting, reading and writing, while today it has taken the form of sharing information on SMP within their enclosures of Neo-liberal control systems enabling its subjects to invest in themselves. The subject constructs its identity as an acquisitive assemblage, which besides illustrating the consumptive habit of self-production also sustain the world’s largest and most profitable Capitalistic Corporations. Retweets or shares are less about endorsements and are more of a statement of the presence of digital self.

Moreover, SMP are premised on the neo-liberal logic, perpetuating Hayek’s HCT that if people are lonely, unhappy, horny, or whatever it could be, it is more easy to sell things, even if these “solutions” are anything but.⁴⁸

C. MITIGATION OF OBJECTIVE TRUTH

In Greek terms, Social Media subjects’ construct their ethos through reactivation of a particular attitude or a statement of revolt against modernity’s objective brand of truth-seeking.⁴⁹ Essentially, these platforms are enabling subjects to expel their version of truth, something that they or others could act upon into the fabric of Digital Reality via engagements. These platforms supplicate the Hellenistic-Roman culture of seeing the self as end in itself, as something that must be worked upon, reactivated and carried out.⁵⁰ In the final analysis, the consequence of such a telematic subjectivity is the inhibition & investment of a group-subject that serves

48 Ibid.

49 Ibid.

50 Ibid.

the proprietary algorithms of capitalist social media. The assimilations and repetitions of truth, in the event that 'fake news' is shared serve as preparation of life in the aggregate, i.e. the collective online activity of the hive-mind or the flock which does not need a forefront leader to guide the actions of each member. The algorithms ensure that the most impressive idea wins at the expense of objectivity.

As pointed out above, critical rationality is replaced by technological rationality that encourages bent testimony.⁵¹ Let's take a hypothetical example – I believe that Prime Minister Narendra Modi threatened to kick Rahul Gandhi out of the country in a campaign rally. My belief is false; Modi never said that. But I believed it because I saw the headline circulating in my twitter feed. My belief is based on the testimony; I believe it because it was painted as true by my friend who shared it on twitter. So, can I say that my friend made that assertion? Can a retweet be considered as an endorsement?

Again this would depend on something known as incentives.⁵² For instance, consider a situation: a person on the street corner is handing out printed pamphlets of a coaching centre. Should I assume that this person believes the tall factual claims of the coaching centre? It depends. If this person is taking payment, then probably not; Sales person don't necessarily believe in much of what they sell. On the other hand, if the person is not being compensated, then it is reasonable to assume that they believe the contents of what they are handing out.

51 Marcuse (n 51); *See also* Aayush, 'Techno-Philosophy | Are Human Beings Reduced to mere interfaces in the Eco-system' (Per Pro Schema, 18th March 2020) <<https://medium.com/per-pro-schema/techno-philosophy-are-human-beings-reduced-to-mere-interfaces-in-the-ecosystem-43ca13a7dfb5>> accessed 22 February 2021.

52 *See generally*, Donella Meadows, *Thinking in Systems* (Chelsea Green Publishing Co 2015) 158; *See also* Deborah Stone, *Policy Paradox – The Art of Political Decision* (2nd ed., W W Norton & Co 2001) 271 (Hereinafter Policy Paradox).

However, in the world of social media, these epistemic norms are unstable.⁵³ What usually happens is that the subjects of social media conveniently assert the contents of whatever they share if it turns out to be true or else if it gains traction; on the other hand, they claim no such responsibility when any trouble emerges.⁵⁴ Regardless of such dichotomy, we usually tolerate such instabilities. Therefore, it can be safely said that the instability of these norms encourage bent testimony. Such bent testimony has the causal effect of deadening people's normal application of consistency with the world.⁵⁵ Prior to the advent of SMP, stories circulated through word of mouth.⁵⁶ But something about SMP allowed an absurd story to build testimonial momentum till the point of its acceptance by a majority of audience.⁵⁷ This has the cumulative effect of the mitigation of objective truth.

D. COLLAPSE OF TRADITIONAL NARRATIVES, INSTITUTIONS & FALL OF DEMOCRACY

Falsehoods masquerading as truth directly reduce voter knowledge of basic facts, which is already on the decline.⁵⁸ Especially during the election times, polarisation poses significant risks to social cohesion.⁵⁹ This reduces trust in traditional media, making it difficult for true stories to have impact. Moreover, the architectural design of social media breeds divineness and erodes social solidarity that promotes political

53 Regina Rigi (n 13) 48.

54 Ibid.

55 *See generally* James Young, 'The Coherence Theory of Truth' (Stanford Encyclopaedia of Philosophy, Sep 3, 1996) <<https://plato.stanford.edu/entries/truth-coherence/>> accessed 22 February 2021.

56 Regina Rigi (n 13) 49.

57 Ibid.

58 *See* The economist & You Gov, the economist/You Gov poll: (December 17–20, 2016–1376 US adults 58 (2016) accessed 22 February 2021 >; *See generally* Press Release, Annenberg Pub. Pol'y Ctr. Americans Know Surprisingly Little about Their Government, Survey Finds (Sept. 17, 2014), <<http://www.annenbergpublicpolicycenter.org/americans-know-surprisingly-little-about-their-government-surveyfinds/>> accessed 22 February 2021.

59 Irini Katsirea (n 29).

polarization.⁶⁰ Political polarization is promoted by media bubbles, leading to environments, where individuals are not exposed to conflicting perspectives that challenge their existing notions and beliefs.⁶¹ The Marketing circle, with practices like Data Harvesting, incentivized by these platforms subsumes the political circle inside it.⁶²

As a consequence, with 'Market Mentality' at its forefront, the Role of God, Nature, tradition or moral imperative(s) take a back-seat.⁶³ As grand narratives and institutions of modernity continue to collapse, individuals increasingly direct their beliefs towards themselves.⁶⁴ The SMP turns its subject interminably after oneself by maintaining their online presence or else the algorithms will diminish one's presence in the lives of others.⁶⁵

If we understand the idea of democracy as the set of conditions that enable the possibility of truth, then the phenomena of 'fake news' also poses a threat to democracy.⁶⁶ This is because 'fake news' lead to the proliferation of false narratives,

60 See Alexandra Andorfer, Spreading Like Wildfire: Solutions for Abating the Fake News Problem on Social Media via Technology Controls and Government Regulation, 69 Hastings L.J. 1409 (2018). <https://repository.uchastings.edu/hastings_law_journal/vol69/iss5/5>. accessed at 22 February 2021.

61 Terry Lee, 'The Global Rise of "Fake News" and the threat to democratic elections in the USA' (2019) 22(1) Public Administration and Policy: An Asia-Pacific Journal <10.1108/PAP-04-2019-0008> accessed 21 February 2021; EVGENY Morozov, 'Think Again: The Internet' (Think Again, 26 April 2010) <<https://foreignpolicy.com/2010/04/26/think-again-the-internet/>> accessed 22 February 2021; Kalliopi Kyriakopoulou, 'Authoritarian states and internet social media: Instruments of democratization or instruments of control?' (2011) 18(26) Human Affairs <<https://link.springer.com/article/10.2478%2Fs13374-011-0003-y>> accessed 21 February 2021.

62 Luciano Floridi, 'Marketing as Control of Human Interfaces and Its Political Exploitation' (2019) 32(3) Philosophy & Technology 379-388 <<https://doi.org/10.1007/s13347-019-00374-7>> accessed 21 February 2021.

63 Hermeneutics of Subject (n 29) at 25.

64 Ibid.

65 Ibid; See also Jannick Schou and Johan Farkas, 'Algorithms, Interfaces, and the Circulation of Information: Interrogating the Epistemological Challenges of Facebook' [2016] 4(1) Kome: An International Journal of Pure Communication Inquiry <<http://dx.doi.org/10.17646/KOME.2016.13>> accessed 21 February 2021.

66 Johan Farkas, *Post-Truth, Fake News and Democracy: Mapping the Politics of Falsehood* (Routledge Studies in Global Information, Politics and Society 2019) 5.

which ultimately comes to shape voter choices and therefore gives rise to situations wherein the voter is not able to exercise informed choice in the selection of election candidates. This weakens the foundational prong of Democracy.⁶⁷

IV. LEGAL REMEDIES: REGULATION OF FAKE NEWS

A. POWER TO REGULATE OR PROHIBIT FAKE NEWS

The First question – whether State has the power to legislate in areas concerning cyber-space, information & SMP – is something that needs to be addressed in limine. Moreover, we need to look at the existing legal avenues through which Regulation of Fake News can be carried out.

i. PROHIBITING ‘FAKE NEWS’ – 69A OF THE IT ACT

SMP are presently defined as ‘Intermediaries’ as per section 2(w) of the Information Technology Act 2008⁶⁸ (‘IT Act’). In India, they are exempted from liability of any third-party content that is shared on their platform by virtue of safe-harbour clause, i.e. Section 79 (2) of the IT Act.⁶⁹ However, the Draft Information Technology⁷⁰ (‘Intermediary Guidelines’ Amendment Rules’) was formulated in 2018 to amend laws to make social media and Internet Platforms accountable by introducing requirements like tracing out of originator of information for assistance to law enforcement, deployment of tools for filtering of unlawful content, takedown of illegal content within 24-hours. Additionally, section 69A of the IT Act is also employed by the State for blocking access to any information to the public as per the

⁶⁷ See for e.g. James Hollyer and others, ‘Fake news is Bad news for Democracy’ (The Washington Post April 2019) <<https://www.washingtonpost.com/politics/2019/04/05/fake-news-is-bad-news-democracy/>> accessed 22 February 2021.

⁶⁸ See Information Technology Act, 2000 s 2(w).

⁶⁹ *ibid* s 79(2).

⁷⁰ See <<http://pib.nic.in/newsite/PrintRelease.aspx?relid=186770>> accessed 21 February 2021.

grounds laid down therein.⁷¹ Recently, in the wake of farmer protests, Twitter withheld several accounts for allegedly making “false, provocative and intimidating tweets” as per the Government Order under section 69A of the IT Act itself.⁷² Therefore, section 69A of IT Act is one avenue that could be deployment by the State to prohibit the proliferation of ‘fake news’ on a case-to-case basis.

ii. CONCEPTION OF INTERNET – CHANNEL OF ‘INTERSTATE COMMERCE’

Another mechanism would be to compartmentalize Internet as a channel of interstate Commerce⁷³ (legal fiction) and then arguably define SMP as ‘Internet-based companies’ that engage in Interstate Commerce.⁷⁴ Because the Internet is a channel, the Centre would be well within its powers⁷⁵ to legislate on areas where online communications occur between individuals across different states via any medium.⁷⁶ Furthermore, the apex Court in the Internet Shutdown case⁷⁷, extensively discussed freedom of trade over the medium of Internet. Acknowledging and affirming the proliferation of neo-liberal capitalistic capillaries, the Court stressed upon the the role of Internet as a tool for trade and commerce pointing out that certain trade are completely dependant upon the Internet⁷⁸ and held that that the Freedom of trade and commerce through the medium of Internet is protected under

⁷¹ Information Technology Act, 2000 s 69(a).

⁷² Revathi Krishnan, 'Accounts of Prasar Bharati CEO, Caravan, actor Sushant Singh among those 'withheld' by Twitter' (The Print, 1 February 2021) <<https://theprint.in/india/accounts-of-prasar-bharati-ceo-caravan-actor-sushant-singh-among-those-withheld-by-twitter/596638/>> accessed 22 February 2021.

⁷³ See *United States v. Konn*, [2015] 634 Fed. Appx. 818, 821 (2d Cir.); *United States v. Tello* [2016] 600 F.3d 1161, 1165 (9th Cir.); *Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, [2008] 527 F.3d 1045, 1054 (10th Cir.) (citing *United States v. Shafer*, [2007] 501 F.3d 1197, 1201 n.8 (10th Cir.)); *United States v. MacEwan*, [2006] 445 F.3d 237, 245 (3d Cir.); *United States v. Homaday*, [2004] 392 F.3d 1306, 1311; *SEC v. Straub*, [2016] U.S. Dist. LEXIS 136841 *1, *35(S.D.N.Y. Sept. 30, 2016).

⁷⁴ *United States v. Darby* [1941] 312 U.S. 100.

⁷⁵ INDIA CONST art 246 (1) read with Entry 42 of List I.

⁷⁶ *Anuradha Bhasin and Ors. v. Union of India (UOI) and Ors* (2020) 3 SCC 637 (Hereinafter Anuradha Basin).

⁷⁷ Ibid.

⁷⁸ Ibid.

Article 19 (1) (g). Once trade over Internet is afforded constitutional protection under Article 19(1) (g), then that freedom can be subjected to reasonable restrictions.⁷⁹ Based on the aforementioned categorization of SMP as ‘Internet-based companies’ that engage in Inter-state Commerce, they could be subjected to constitutionally permissible restrictions or prohibitions.⁸⁰ In that case, proliferation of ‘fake news’ on SMP could then be considered as an instance of unfair and deceptive trade practice⁸¹ subject to the prescribed sanctions under the Consumer Protection Act, 2019.⁸²

B. DEVELOPMENT OF JUDICIAL DOCTRINE - RESTRICTIONS ON COMMERCIAL SPEECH

By taking cues from the Central Hudson test from United States, ‘fake news’ can be likened to commercial speech for the Courts in India to develop a restrictive judicial doctrine.⁸³ The Central Hudson test was a four-part test employed in the United States (‘U.S’) to determine whether any regulation on commercial speech violates the First Amendment. It involves the determination of four-prongs whether (1) speech is lawful and misleading; (2) whether the asserted governmental interest in regulating the speech is substantial (3) whether the regulation directly advances the projected government interest; and (4) whether the government is no more extensive than necessary to achieve that interest.⁸⁴ Hypothetically, if a judicial

⁷⁹ See INDIA CONST art 302.

⁸⁰ Ibid.

⁸¹ See Consumer Protection Act 2019 s 2(47).

⁸² Ahran Park Kyu ho youm and Ahran Park & Kyu Ho Youm, 'Fake news from a Legal perspective: the United States and South Korea compared' [2019] 25 South-western Journal of International Law <https://heinonline.org/HOL/LandingPage?handle=hein_journals/sjlta_25&div=8&id=&page=.> accessed 21 February 2021 (Hereinafter Fake News from a Legal Perspective).

⁸³ See generally *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.* [1980], 447 U.S. 557.

⁸⁴ Ibid.

doctrine is developed on lines of the Central Hudson test, any regulation that prohibits 'fake news' from being shared on social media would thereby pass the scrutiny of first prong of the test, although the satisfaction of other prongs would prove to be difficult.⁸⁵

C. JUDICIAL SCRUTINY - REASONABLE RESTRICTION TO FREE SPEECH AND EXPRESSION UNDER ARTICLE 19

A plausible approach would be to subject 'fake news' to the scrutiny of the test of reasonable restriction under Article 19 that would require a claim other than defamation or incitement of offence.⁸⁶ To punish 'fake news', a link of causality would need to be established between speech in question and the harm that resulted.⁸⁷ This would require empirical factual evidence that 'fake news' resulting in actual harm.⁸⁸ Moreover the jurisprudence of Courts pertaining to the doctrine of reasonable restriction under Article 19 establish three requirements.⁸⁹

First, restriction on free speech and expression may include cases of prohibition.⁹⁰ Second, there should not be excessive burden on free speech even if a complete prohibition is imposed, and the government has to justify imposition of such

⁸⁵ See Alexandra Andorfer, 'Spreading like Wildfire: Solutions for Abating the Fake News Problem on Social Media via Technology Controls and Government Regulation (2018) 69(5) Hastings Law Journal 1409-1431 <https://repository.uchastings.edu/hastings_law_journal/vol69/iss5/5/> accessed 21 February 2021 (Hereinafter Spreading like Wildfire).

⁸⁶ See INDIA CONST art. 302; See also Anuradha Bhasin (n 70).

⁸⁷ See *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011).

⁸⁸ See Clay Calvert, 'Fake News Free Speech, & the Third-Person Effect: I'm No Fool, but Others Are' (2017) 7(12) Wake Forest Law Review <<http://wakeforestlawreview.com/2017/O2/fake-news-free-speech-the-third-person-effect-im-nofool-but-others-are/>> accessed 21 February 2021.

⁸⁹ See *Indian Express v. Union of India* (1985) 1 SCC 641; *Odyssey Communications Pvt. Ltd. v. Lokvidayan Sanghatana* (1988) 3 SCC 410; *Madhya Bharat Cotton Association Ltd. v. Union of India* (1954) SC 634; *Narendra Kumar v. Union of India* (1960) 2 SCR 375; *Sushila Saw Mill v. State of Orissa*, (1995) 5 SCC 615; *Pratap Pharma (Pvt.) Ltd. v. Union of India*, (1997) 5 SCC 87; *Dharam Dutt v. Union of India*, (2004) 1 SCC 712.

⁹⁰ See Anuradha Bhasin (n 70).

prohibition and explain as to why lesser alternatives would be inadequate.⁹¹ Thirdly, whether a restriction amounts to a complete prohibition is a question of fact, which is required to be determined by the Court with regard to the facts and circumstances of each case.⁹²

However, setting a precedent of Information Regulation by State could lead to the possibility of populist majoritarian governments taking control of thought and media when other viable approaches of regulating the information sphere is available.⁹³ This approach seems paternalistic and borders on unconstitutional and undemocratic self-governance.⁹⁴ A prescriptive legal approach would do more harm more than good when it comes to the regulation of 'fake news'.

V. REGULATORY APPROACHES AND CHALLENGES - OVERVIEW

Any attempt to curb fake news necessarily implies the regulation of SMP and therefore presents a host of challenges. On an abstract level, firstly it requires us to ponder over the concern whether is it possible for any piece of information to be completely objective? Is anything and everything not tainted with some prongs of ideology?

Second, regulators have to overcome the barrier of the identification of 'fake news'. Which entity should be responsible for this and whether a full proof technical solution is available or not? For the ascertainment of such concerns, we have to look

91 Ibid.

92 Ibid.

93 Spreading like Wildfire, (n 84) 1429.

94 Ibid.

at the traditional regulatory approaches operating in the Cyber-Space. Traditional Regulatory approaches concerning cyber-space consist of :-⁹⁵

- Self-Regulation – SMP framing and enforcing their own voluntary content regulation policies or deploying techniques such as AI fact checking, engaging in reporting or flagging process.⁹⁶ The absence of the involvement of the Government in the initiation or operation of the regulation is seen as the central tenet to the definition of self-regulation.⁹⁷ Critics of this approach point out that since the ‘fake news’ phenomena is central to the business model of SMP, it would not be the interests of SMP to address it meaningfully. ⁹⁸
- Quasi-Regulation – Non-legal rules having an element of governmental imprints, that include government endorsed tech-industry codes of practice, agency guidance notes, industry custom agreements and accreditation schemes.⁹⁹
- Co-Regulation – It refers to a form of legislative delegation of power to enforce and regulate rules and codes, requiring the tech-industry to have a code and have powers to mandatorily or voluntarily prescribe one.¹⁰⁰ However, this could have

95 Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in 'Post Regulatory 'World ' [2001] 54(1) 121 Current Legal Problems <<https://doi.org/10.1093/clp/54.1.103>> accessed 21 February 2021 (Julia Black).

96 Ibid 114.

97 Ibid 116.

98 See Paul Bernal, 'Fakebook: Why Facebook Makes the Fake News problem inevitable' (2018) 69 (4) Northern Ireland Legal Quarterly <<https://nilq.qub.ac.uk/index.php/nilq/article/view/189/145>> accessed 21 February 2021.

99 Productivity Commission, Regulation and Its Review 1997-1998 (Canberra, 1998).

100 See e.g. Joanna R Shelton, 'OECD REPORT ON REGULATORY REFORM: SYNTHESIS' (1997) <<https://www.oecd.org/gov/regulatory-policy/2391768.pdf>> accessed 22 February 2021.

the potential of having a “chilling effect” on anti-’fake news’ law on the freedom of online speech.¹⁰¹

The Regulation of Social media poses considerable challenges for legislators and policymakers alike. Intrinsic to the growth of Internet has been the principle that it has always traditionally been open and accordingly the main concern with any interventionist approach vis-a-viz online communication is that such an approach is likely to be construed as a wedge; once regulators get their foot in the room, they will be pushing in with more and more rules.¹⁰² Any attempted ‘suppression’ of ‘fake news’ could have ancillary consequences of its restriction for protected truthful expression.¹⁰³ The State should avoid a “first move” approach in order to prevent the inevitable “push”.¹⁰⁴ The consequence of such an approach invariably could lead to Teubner’s Regulatory trilemma; the indifference of the ‘target’ system (i.e. cyberspace) to the intervention, the destruction of the ‘target’ system itself, or the destruction of the intervening system.¹⁰⁵ This trilemma is based on the premise that unilateral intervention by any one single actor (for instance, the legislators) would impede the Regulatory objectives itself because across the cyberspace, the associated actors are restricted by the autonomy of others as well as the limitations of their own knowledge.¹⁰⁶

101 David O Klein & Joshua R Wueller, ‘Fake News: A Legal Perspective’ (2017) 20 (10) <http://governance40.com/wp-content/uploads/2018/12/Fake-News-A-Legal-Perspective.pdf> accessed on 21st February 2021.

102 Policy Paradox (n 51) 173.

103 Iri Katsirea (n 29) 188.

104 Policy Paradox (n 51) 174.

105 See Anthony Beck “Is Law an Auto-poietic System?” (1994) *Oxford Journal of Legal Studies*, 14 (3), 401–418. <<https://www.jstor.org/stable/764738>>. accessed 23 Feb. 2021.

106 See Julia Black (n 94).

The root of the problem can be traced to the fact that technology is normally global whereas law is essentially tied to a geographical location. Moreover, the various actors in the cyber-space can also be viewed as nodes varying in their size, scalability and influence. Recently, a tweet from Elon Musk — an influential node asking users to switch to Signal considerably boosted the sales of the messaging app.¹⁰⁷ This shows that different nodes in the cyber-space have significant & variable impact over different stakeholders. Does that imply that we should have different prescriptive norms for different nodes or is it even possible to regulate each and every node?¹⁰⁸ Prescribing any regulatory norms for cyber space could also potentially lead to the relegation of these norms into the back-seat, particularly in light of their architectural technical codes that govern their realization.¹⁰⁹ Moreover, the regulation of information over social media is also challenging due to the dynamic pace of changes in technology.¹¹⁰

VI. PROPOSED REGULATORY FRAMEWORK – LESSIG’S ‘DECENTRED’

APPROACH TO REGULATION

Due to the dynamic pace of changes in the cyber-sphere, the open, unguarded, virtual cyberspace requires a ‘Decentred’ Regulatory Design that takes us away from the traditional understanding where the State retains its monopoly on regulation, and instead places the locus of the activity of ‘regulation’ from State to other,

107 See E-Tech, 'Another Signal gains after Elon Musk's tweet' (The Economic Times, 12 Jan) <<https://economictimes.indiatimes.com/tech/tech-bytes/another-signal-gains-after-elon-musks-tweet/articleshow/80234425.cms?from=mdr>> accessed 22 February 2021.

108 See generally Edwin Tucker, 'The Morality of Law' (1965) 40(2) *Indiana Law Journal* 5.

109 Andrew Feenberg, 'Democratizing Technology: Interests, Codes, and Rights.' (2001) *The Journal of Ethics*, 5(2) 2001 177–195. JSTOR, <www.jstor.org/stable/25115688> accessed 29 Jan. 2021. (Hereinafter Feenberg).

110 John Perry Barlow 'The Economy of selling ideas': Selling wine without bottles on a global net' (2019) 18 *Duke Law & Technology Review* 8-31 (2019) available at <<http://www.eff.org/EconomyOfIdeas.html>> accessed 29 Jan. 2021.

multiple locations, actors and across a range of instruments¹¹¹. This is because the Cyber space consists of technical arrangements that constitute a world within themselves, generating their own norms, practices and perceptions.¹¹²

A. REGULATORY DESIGN & NORMATIVE APPROACH

Any Regulatory Design has to be firstly responsive to the normative goals¹¹³ ; secondly decentred¹¹⁴ to the context in which the Internet operates and thirdly sensitive to the web of interactions and interdependencies operating between the social actors, and between the government and the social actors. The normative goals for the regulation of Internet should ensure that the regulatory approach takes into account the conditions for responsiveness, prevents entropy while stimulating system integration.¹¹⁵ For the determination of context around the regulation of Internet, there needs to be clarity in ascertainment whether SMP are neutral or deterministic or instrumentalistic or whether they are be construed as a value-laden sphere (means form a way of life that includes ends), or along the contours of substantivism (means and ends linked in systems) or else within the lens of critical theory (choice of alternative means-ends systems).¹¹⁶ Once a conception of SMP has been effectively agreed, the next step involves the assignment of the roles of the different Intervening Agents.

111 Julia Black (n 94) 10.

112 Feenberg (n 108) 187.

113 Ian Ayres, Responsive Regulation: Transcending the Deregulation Debate in Lodge and others Martin Lodge and others (eds), *The Oxford Handbook of Classics in Public Policy and Administration* (Oxford 2015).

114 See Feenberg (n 108).

115 Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law & Soc. Rev.* 239; See also Gunther Teubner, *Juridification of Concepts, Aspects, Limits, Solutions.* in Gunther Teubner (ed.), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labour, Corporate, Antitrust and Social Welfare Law* (De Gruyter 1987).

116 Andrew Feenberg, What Is Philosophy of Technology? in Dakers Jr (ed.), *Defining Technological Literacy* (Palgrave Macmillan 2006) 5.

B. ROLES OF INTERVENING AGENTS

SMP involve the interplay of law, norms, market and architecture, and therefore require clear prescriptive demarcation with respect to the roles played by each of these elements. Lessig's delineation of these roles, in his seminal Code of Law¹¹⁷, is especially relevant when we want to delve into the Regulatory approaches and challenges dealing with the regulation of information.-

Law – A positivist role of law, i.e. respond to clear and imminent threats. For instance, a legislation could prevent the different forms of surveillance. The objective of law could be to enhance the power of individuals to control the usage of data about them, or to disable such subversive use of power.¹¹⁸

Norms – Norms could be deployed to enable trusts around certain practices.¹¹⁹ For example, the six data protection principles — purpose limitation¹²⁰, access limitation, data minimisation¹²¹, storage limitation, fairness and transparency, integrity and confidentiality exhibit the same.

Markets – Markets could be used to protect the privacy of individuals.

Architecture/Code – Architecture of technologies could be deployed to protect privacy.¹²² There are technologies designed to ensure the user gets more control over the data associated with him or her.¹²³

117 See generally Lawrence Lessig, *Code and other Laws of Cyberspace* (Basic Books 1999) 223 [Code and Laws].

118 Ibid.

119 Ibid.

120 "Bibliography." Maximilian von Grafenstein, *The Principle of purpose limitation in Data protection laws the risk-based approach, principles, and private standards as elements for Regulating innovation* (2018) Baden-Baden Nomos 2018) 655-676 <www.jstor.org/stable/j.ctv941v5w.8> accessed 30 Jan. 2021.

121 See Asia J Biega, Peter Potash, Hal Daume, Fernando Diaz, Michele Finck, 'Operationalizing the Legal Principle of Data Minimization for Personalization, (2020) at 2.

122 Code (n 116) 223.

123 Ibid.

C. DYNAMIC WORKING OF FRAMEWORK: LESSING'S REGULATORY HARBOUR MODEL

Lessig employed Regulatory theory as a backdrop in the contextual setting of SMP by formulating a 'responsive regulatory' which is based on a software development model.¹²⁴ This Framework is congruent with the dynamic technological environment of the Internet, the differential nature of logics, and the institutional practices of regulator and regulated in India. It serves as a viable model that is both flexible and robust alike and thus is the most appropriate for the Indian Regulatory Regime for Information Regulation.¹²⁵

i. THEORETICAL BASIS OF MODEL - FOUCAULT'S CIRCLE OF DESKS

The Regulatory Harbour model is based on Foucault's Circle(s) of Desks.¹²⁶ This hypothetical is essentially an enclosed arrangement of students that creates closed circular spaces.¹²⁷ By altering the accepted arrangement of students, seated in rows and columns into a series of small groups, we decrease the student's power and enhance teacher's domination over them by partitioning them and pinning them down in smaller units. This arrangement of students in smaller circles, and by the act of walking up and down, the teacher gets greater visibility and scrutiny of students. Moreover, the circle of desks also allows the teacher to deploy the students as supplementary and reinforcing gazes to their own. This arrangement forces the student to lock themselves each other into a grid of increased visibility ensuring intersecting observations. The students cannot possibly hide if they are unprepared, or doing other work, or bored because they are observing each other aside from

124 See Regulatory Harbour Theory (n 33).

125 Ibid 435.

126 See Paul Heilker, "Discipline and Punish" and Process and Paradigms (or Foucault, Visibility, (Dis) Empowerment, and the Construction of Composition Studies)." (1994) *Composition Studies* 22 (1) (1994): 4-13 accessed February 23, 2021. <http://www.jstor.org/stable/43501276>.

127 Ibid.

being observed by the teacher. This arrangement has the intended effect of altering the existing power distribution cycle.

Along similar lines, the Regulatory framework concerning social media should model Foucault's circle of desks with the obvious exception of the presence of school teacher. In crude terms, the framework should ensure that the associated actors, i.e. (organs, of state, policy-makers, technology developers as well as SMP) are arranged in a grid of reinforced gazes. Each actor keeps a check on each other and this ensures that the power structure remains decentralized.

ii. AN ITERATIVE AND DYNAMIC MODEL

Normatively, this diagrammatic or conceptual arrangement when applied to the representation of technological regulatory architecture would highlight the 'arrangement of individuals' in relation to one another, of hierarchal organisation, of orientation of centres and outlets of power. What is imperative is that such a framework would ensure that SMP move away from the traditional outcome-based focus of social media panopticon towards the integration of the limitations of technological architecture.¹²⁸ The Regulatory framework should also employ a holistic and iterative approach to the design of the regulatory architecture.¹²⁹ The Road-map for the framework should prioritise technological architectural requirements, which should take precedence over iterations of prescriptive solutions used to achieve the applicable legal principles.¹³⁰ The objective should be iterative evolution and not prescriptive revolutions that takes into account the

128 See Regulatory Harbour Theory (n 122).

129 See also John Braithwaite, and Peter, Drahos, 'Global Business Regulation in *Cambridge Books* (Cambridge University Press 2000) <<https://EconPapers.repec.org/RePEc:cup:cbooks:9780521784993>.

130 See Regulatory Harbour Theory (n 122).

institutional environments in which the regulators act.¹³¹ The framework should incorporate the following features:-

Firstly, core principles (freedom of expression, privacy concerns) must be designed and/or drafted into the vision of regulation.¹³² Broad wording of regulations that is backed by teeth through enforceable sanctions will ensure that the scope of these principle is respected.¹³³

Secondly, the technology developer community must be considered on how to deliver the outcome balancing the competing interests between achieving business objectives and meeting regulatory requirements.¹³⁴

Thirdly, a 'consultation panel' should be established comprising of SMP providers and policy-makers (well-versed with the functioning of social-media platforms) to develop a common language about risk and to facilitate learning.¹³⁵

The proposed solutions should then be modulated to balance government's priorities and human rights obligations taking into account the industrial risks such as cost, complexity, delivery.

iii. FUNCTIONING OF THE ITERATIVE REGULATORY MODEL

Any foundational principle (e.g. principle of proportionality) has to be read in consideration of different legal issues (e.g. criminal liability, privacy infringement, defamation, trolling, sedition) implying that there will an intermingling of various

131 Ibid.

132 Ibid.

133 Ibid.

134 J Black and R Baldwin, 'When risk based regulation aims low: approaches and challenges' (2012) 6(1) Regulation and Governance 2 22 (Hereinafter Black).

135 See J Black and R Baldwin, 'Really Responsive Regulation', (2008) The Modern Law Review 71 (1) 59-94. (Hereinafter Responsive Regulation).

rules and principles.¹³⁶ However, Lessig proposes that across the different sub-legal terrains, they should become less prescriptive.¹³⁷ During each iteration, the role of regulator is not to come up with more prescriptions but to clarify those prescriptions.¹³⁸ Once the different stakeholders have built consensus, then the policy/prescription can be released, in a way that has allowed the platform providers to consider architecture issues prior to implementation to the regulation.¹³⁹ As and when the draft legislation is prepared, information campaigns, guidance notes, stakeholder consultation should be undertaken to improve the design and implementation of principles. Such iterative model ensures considerable flexibility and, if there is hurdle at any stage of the process, there is an inlet that can be fallen back on.¹⁴⁰ Unlike the traditional drafting model, wherein an intolerable strain would be placed on the legislation (for instance, Draft Data Protection Bill) seeking to contain the dynamic technological environment, there is always a pressure-release system that can accommodate dynamisms of the environment.¹⁴¹

Lessig's Regulatory Harbour Model is the applicable Regulatory solution that can respond to attitudinal setting, institutionalisation and private sector's interests, creating flexible models responsive to change.¹⁴² Such a model has the potential of curbing dynamic and ever-evolving issues associated with the cyber-space, especially for tackling the dissemination and proliferation of 'fake news'.

VII. CONCLUSION

136 See Uta Kohl, 'The rise and rise of online intermediaries in the governance of the Internet and beyond: connectivity intermediaries' (2012) 26(2) *International Review of Law, Computers and Technology* 185-210.

137 Black (n 133).

138 Regulatory Harbour Theory (n 122) at 470.

139 Ibid.

140 See S Barrett and C Fudge, *Policy and Action: Essays on the Implementation of Public policy* (Methuen 1981).

141 Regulatory Harbour Theory (n 122).

142 See Responsive Regulation (n 134).

SMP have led to the emergence to an ethos that have led to the emergence and proliferation of 'fake news'. This has undermined the foundational imprints of the Rule of Law and eclipsed Democracy across the globe. Exploitation of psychological drives, promotion of neo-liberal logics of control, mitigation of objective truth and collapse of traditional narratives and institutions are the key reasons that make regulation of SMP imperative. What is at stake is the Factual Reality itself! As indicted in my analysis, the power to regulate social media can be sufficiently derived from the Constitution of India. However, the dynamic pace of changes in the cyber-sphere would make any static prescriptive-principled based approach to the regulation of SMP obsolete. Therefore, any Regulatory prescription that hopes to counter the proliferation of 'fake news' has to employ a Decentred approach to Regulation. This make Lessig's Regulatory Harbour Model as the preferred Regulatory framework, which bears the potential to curb dynamic and ever-evolving issues associated with the cyber-space. Moreover any Regulatory framework with the objective of countering 'fake news' has to combat two over-arching & elusive issues — its definition leading to its identification. Till date, it has not been easy to lay down a definition of 'fake news'. At the moment, there is no clear and shared definition of 'fake news'.¹⁴³ Moreover, there is also absence of a fool-proof technological solution for the precise identification of Fake News.

Therefore, let us be hopeful that any Regulatory approach towards SMP represents a deep need for freedom, openness and restoration in the ideal of the Rule of Law because the coming future with potential for information-acceleration and transfiguration, remains highly uncertain, as it always has.

143 Fake News from a Legal Perspective (n 76) 119.