

FAKE NEWS, FREE SPEECH AND FINDING CONSTITUTIONAL CONGRUENCE

In September 2018, the Select Committee on Deliberate Online Falsehoods issued a report that recommended new legislation to address the harms of online falsehood or “fake news”. After much vigorous debate in Parliament, the Protection from Online Falsehoods and Manipulation Act (Act 18 of 2019) (“POFMA”) was passed on 8 May 2019 and came into effect on 2 October 2019. As expected, POFMA, like any legislation which attempts to curtail the spread of fake news, has attracted much criticism. As the business models of social media platforms such as Facebook and Twitter thrive on community engagement and user-generated content, such technology companies lack the incentive to curb the virality of fake news under a voluntary self-regulation regime. At the same time, fake news laws can overreach and significantly restrict the constitutional right to freedom of speech. This article surveys the efficacy of the legislative landscape pre-POFMA in combating fake news and suggests that an umbrella legislation like POFMA is necessary. This article concludes that POFMA, even if perceived to be draconian, is congruent with Art 14 of the Singapore Constitution (1999 Reprint). Nevertheless, such plenary powers are subject to potentially powerful political limits in the electoral process. The final test for the legitimacy of POFMA really lies in how the Government enforces this new law.

David **TAN**

*PhD, LLB, BCom (Melbourne), LLM (Harvard);
Professor and Vice Dean (Academic Affairs), Faculty of Law,
National University of Singapore.*

Jessica **TENG** Sijie

*LLB (Hons) (National University of Singapore),
BA (Hons) (Yale-National University of Singapore).*

I. Introduction

1 In September 2018, the Select Committee on Deliberate Online Falsehoods in Singapore (“Select Committee”) denounced online falsehoods as a threat to the “cornerstones of a well-functioning and

democratic society”¹; a sentiment that has been expressed by government figures in the UK, France, Germany, the Philippines, Malaysia, and elsewhere.² Stressing that there is “no one silver bullet”, the Select Committee recommended new legislation as part of a multi-pronged approach to counter online falsehoods.³

2 The Select Committee justified the need for legal intervention on two grounds. First, indirect measures such as raising media literacy, promoting quality journalism and implementing fact-checking initiatives cannot overcome the “cognitive biases” of human psychology that make individuals susceptible to fake news.⁴ Second, technology companies are not incentivised to take active steps against the promulgation of online falsehoods under a voluntary self-regulation regime.⁵ For example, Facebook requires a post to meet a high threshold of imminent harm; mere falsity is insufficient grounds for removal.⁶

3 Subsequently the Protection from Online Falsehoods and Manipulation Bill⁷ was passed in Parliament on 8 May 2019 with a majority of 72 to nine (all opposition Members of Parliament (“MPs”) voted against), with three Nominated Members of Parliament abstaining. The bill was accompanied by the Protection from Harassment (Amendment) Bill,⁸ which extended the s 15 remedy to private entities and provided the courts with expanded powers to order the falsehood’s removal.⁹ Taken together, the two bills implement measures that address the harms posed by all categories of falsehoods discussed in this article. Significantly, the Minister for Law has clarified that the correction mechanism under the Protection from Online Falsehoods and Manipulation Bill is intended to be the “primary tool” to address the harms of online falsehoods; criminal

1 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 26.

2 “Fake News a Democratic Crisis, MPs Warn”, *BBC News* (28 July 2018); Angelique Chrisafis, “Emmanuel Macron Promises Ban on Fake News during Elections” *The Guardian* (3 January 2018); Paterno Esmaque II, “Australian Envoy to PH: Fake News ‘a Threat to Democracy’” *Rappler* (25 January 2017); “Fake News Pose Greater Threat to Malaysia: DPM Zahid” *Channel NewsAsia* (18 April 2018).

3 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 66.

4 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at pp 98–99.

5 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 125.

6 Adrian Lim, “Parliament: Facebook Allows Itself to Spread Lies by Not Removing States Times Review Post, Says Edwin Tong” *The Straits Times* (20 November 2018).

7 Bill 10 of 2019.

8 Bill 11 of 2019.

9 Lianne Chia, “‘Doxxing’ to Be Criminalised under Amendments to Protection from Harassment Act” *Channel NewsAsia* (1 April 2019).

sanctions and takedown mechanisms are reserved for situations where the falsehood poses an elevated harm to public interest.¹⁰

4 Thus the Protection from Online Falsehoods and Manipulation Act¹¹ (“POFMA”) was enacted and it came into force on 2 October 2019. Unsurprisingly, POFMA was the target of significant criticism, with the chief concern that it was a serious threat to civil liberties.¹² At the time of writing, there have been eight Correction Directions issued under POFMA: against opposition politician Brad Bowyer of Progress Singapore Party (25 November 2019),¹³ Alex Tan Zhi Xiang at *States Times Review* (29 November 2019),¹⁴ the Singapore Democratic Party (14 December 2019),¹⁵ opposition politician Lim Tean (16 December 2019),¹⁶ Malaysia-based non-governmental organisation Lawyers for Liberty (22 January 2020)¹⁷ and, in the wake of the Wuhan coronavirus outbreak, against Hardwarezone.com (27 January 2020),¹⁸ AB-TC City News website and Alex Tan Zhi Xiang at *States Times Review* (31 January 2020).¹⁹ It is expected that some of the Correction Directions will be

10 Tham Yuen-C, “Parliament: Law against Online Falsehoods Will Not Stifle Free Speech: Shanmugam” *The Straits Times* (2 April 2019).

11 Act 18 of 2019.

12 For example, “RSF Explains Why Singapore’s Anti-fake News Bill Is Terrible” *Reporters Without Borders* (8 April 2019); Yojana Sharma, “Sweeping ‘Fake News’ Bill a Risk for Academic Freedom” *University World News* (15 April 2019); and Tessa Wong, “Singapore Fake News Law Polices Chats and Online Platforms” *BBC News* (9 May 2019).

13 Tham Yuen-C, “PSP Member Asked to Correct Post in 1st Use of Fake News Law” *The Straits Times* (26 November 2019) at p A4.

14 Tan Tam Mei, “Facebook Complies with Order to Publish Correction Notice” *The Sunday Times* (1 December 2019) at p A2.

15 Tham Yuen-C, “SDP Asked to Correct Claims of Fewer Local PMETs in Jobs” *The Sunday Times* (15 December 2019) at p A3; Goh Yan Han, “SDP Complies with Pofma Orders but Will Seek to Cancel Notices” *The Straits Times* (17 December 2019) at p A4; Rei Kurohi, “SDP Defends Posts, Plans to Apply to Cancel Pofma Notices” *The Straits Times* (3 January 2020) at p B6; Nicole Chang, “SDP Correction Directions: Party Says It Will Pursue Matter in Court” *Channel NewsAsia* (7 January 2020).

16 Clement Yong, “Opposition Politician Told to Put up Correction Notices for Online Posts” *The Straits Times* (17 December 2019) at p A5.

17 “MHA Refutes Malaysian NGO’s Allegations on S’pore Executions: Correction Orders under Fake News Law Issued against 4 Parties” *The Straits Times* (23 January 2020) at p B4. Three other parties who have shared the allegations – activist Kirsten Han, The Online Citizen website and Yahoo Singapore – were also ordered to correct the false statements.

18 “SPH Magazines Obeys Pofma Correction Order” *The Straits Times* (28 January 2020) at p A4.

19 Clara Chong & Linette Lai, “Pofma Invoked against Two Fake Posts on Masks, S’porean Cases” *The Straits Times* (1 February 2020) at p A6.

challenged in court.²⁰ In light of the recent invocation of orders under POFMA, government officials and some commentators have defended its quintessential role in stopping the ill effects of the virulent spread of misinformation.²¹ Despite assurances by the Law Minister K Shanmugam that “free speech should not be affected by this bill”, and that the law is aimed at tackling “falsehoods, bots, trolls, and fake accounts”, there is still much scepticism whether the “clear oversight mechanism” in place in POFMA to prevent possible abuse of power by the Singapore government was a sufficient safeguard in practice.²² There is also some measured optimism that the Singapore government will be able to strike an appropriate balance:²³

If it is to be successful, ethical safeguards need to be ensured. Any [law] that gives the government sweeping power must be carefully monitored, but if there’s a country that could pull this rigid law off it’s certainly Singapore. The only thing that can be done now is wait; time will tell whether this law is a step in the right direction or a step towards a true authoritarian dictatorship.

5 Singapore’s move towards legislation is consistent with the approach taken in an increasing number of countries, such as Germany and Malaysia, which have implemented legislation to combat fake news. Although the Select Committee proposed comprehensive measures that run the gamut from the regulation of funding for online political campaign advertisements to demonetisation regimes that prevent purveyors of online falsehoods from reaping digital advertising revenue,²⁴ a close scrutiny of these measures and their implementation in POFMA is outside the scope of this article. This article will instead focus on key provisions of POFMA that (a) impose criminal sanctions on purveyors of online falsehoods; and (b) provide mechanisms for the removal of online falsehoods.

-
- 20 Yuen Sin, “SDP Files Court Appeal against MOM’s Correction Notices” *The Straits Times* (8 January 2020) at p B5; Rei Kurohi, “Fake News Law Does Cover Matters of Interpretation: AGC” *The Straits Times* (18 January 2020) at p B4.
- 21 Royston Sim, “Officials Rebut Bloomberg, SCMP Reports on Pofma” *The Straits Times* (1 January 2020) at p B2; Tan Ooi Boon, “Dribs and Drabs of Fake News Can Turn Entire Society against Authority” *The Straits Times* (4 January 2020) at p A28; Ashton Ng, “Pofma, Free Speech and the Collapse of Truth in Anglo-American Politics” *The Straits Times* (4 January 2020) p A28.
- 22 Jaime Ho & Kevin Kwang, “Proposed Law on Falsehoods Has ‘Clear Oversight Mechanism’ to Prevent Abuse by Government, Says Shanmugam” *Channel NewsAsia* (13 April 2019).
- 23 The Editorial Board, “Singapore’s Fake News Law Has Free Speech Activists Worried, but Only Time Will Tell if Their Concern is Warranted” *The Highlander* (22 October 2019).
- 24 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 135.

6 The rationale for focusing on these two areas is that criminal sanctions and takedown laws strike at the heart of the right to freedom of speech under Art 14(1) of the Singapore Constitution.²⁵ Although it has been convincingly argued that falsehoods are not worthy of protection,²⁶ the question of how legislators can draft laws that address the harms of falsehoods without creating a “chilling effect” on other types of “worthy” speech remains to be answered – a concern the Select Committee was cognisant of when it called for a “calibrated approach.”²⁷

7 The circumstances surrounding Malaysia’s Anti-Fake News Act²⁸ present a cautionary tale for Singapore. The law, which came into effect a month before the 14th General Election,²⁹ has been overshadowed by mistrust and is widely perceived to be motivated by then Prime Minister Najib’s desire to silence corruption allegations.³⁰ The politicised nature of the law can be seen from the efforts by the Mahathir-led government to repeal the law, which were countered by the opposition-led Senate’s attempts to block the repeal. It has since been repealed on 9 October 2019.³¹ In Singapore, where one party enjoys an overwhelming majority in Parliament, there is a heightened risk that POFMA will be perceived as a backdoor to suppressing political criticism. Thus, the credibility and legitimacy of POFMA rests on how one strikes an appropriate balance between the competing interests of freedom of speech and the harms of falsehoods.

8 The importance of a well-drafted fake news law is even more pressing in light of Singapore’s judicial climate of a perceived deference to Parliament when public order issues are involved. David Tan observes that courts have generally exhibited strong deference to the Legislature in relation to the interpretation of Art 14 compared to other constitutional rights.³² He posits that this is primarily due to the wording of Art 14(2), which unambiguously confers on Parliament the role of balancing

25 1999 Reprint.

26 Thio Li-ann, “Written Representation 55” in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B282.

27 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 170.

28 No 803 of 2018.

29 Reena Raj & Boo Su-Lyn, “With Historic Rejection of Anti-fake News Act Repeal, Senator Wants Law Improved” *Malay Mail* (12 September 2018).

30 Adi Robertson, “Malaysian Government Threatens 10-Year Prison Sentences for Pushing Fake News” *The Verge* (26 March 2018).

31 Rozanna Latiff, “Malaysia Government Scraps Law Penalizing Fake News” *Reuters* (9 October 2019).

32 David Tan, “Walking the Tightrope between Legality and Legitimacy” (2017) 29 SAclJ 743 at 752.

constitutional free speech with other competing rights and interests.³³ In a consistent line of cases since the 1990s, the Singapore Court of Appeal has interpreted Art 14 with deference to the “government’s assessment of the needs of public order without requiring that the restrictions be informed by substantive standards of reasonableness, proportionality, or necessity within a democratic society”.³⁴ Hence, the balancing exercise in relation to the regulation of online falsehoods must happen at the legislative stage.

9 The rest of this article is divided into four parts. Part II provides a brief overview of the substantive provisions of POFMA.³⁵ Part III presents some of the legal justifications for regulating online falsehoods and demonstrates the extensive nature of Parliament’s powers to restrict speech in Singapore.³⁶ Part IV surveys Singapore’s legal landscape and addresses the claims that our current framework is sufficient to contain the harms of fake news.³⁷ It illustrates the limitations of existing laws and makes a case for why these gaps can only be overcome by enacting new laws such as POFMA that are specifically directed at online falsehoods. Part V concludes with a summary of key findings and a note on what lies ahead for the regulation of fake news in Singapore.³⁸

II. Overview of the Protection from Online Falsehoods and Manipulation Act

10 As POFMA was only passed on 8 May 2019 and came into force on 2 October 2019, there has been no substantive academic commentary published on it. However, there is extensive media coverage and Internet postings on its passage and subsequent issue of correction orders, which the authors will not revisit here, suffice to say that the main objections were a perceived overreach by the Government to restrict the freedom of speech and stifle criticisms about public institutions and governmental officials. This article is also not intended to be a comprehensive guide to navigating POFMA and will only focus on provisions of constitutional salience.

33 David Tan, “Walking the Tightrope between Legality and Legitimacy” (2017) 29 SAclJ 743 at 764 and 771; *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [270].

34 Thio Li-ann, “Singapore: Regulating Political Speech and the Commitment ‘to Build a Democratic Society’” (2003) 1 *International Journal of Constitutional Law* 516 at 516.

35 See paras 10–14 below.

36 See paras 15–24 below.

37 See paras 25–58 below.

38 See paras 59–65 below.

11 Section 5 of POFMA states a multitude of purposes, that is:

- (a) to prevent the communication of false statements of fact in Singapore and to enable measures to be taken to counteract the effects of such communication;
- (b) to suppress the financing, promotion and other support of online locations that repeatedly communicate false statements of fact in Singapore;
- (c) to enable measures to be taken to detect, control and safeguard against coordinated inauthentic behaviour and other misuses of online accounts and bots; and
- (d) to enable measures to be taken to enhance disclosure of information concerning paid content directed towards a political end.

These articulated purposes appear to be legitimate ends and one is unlikely to argue that, on its face, these purposes are controversial.

12 The purported constitutional congruence with Art 14 of the Singapore Constitution is articulated in s 4, which states:

For the purposes of this Act and without limiting the generality of the expression, it is in the public interest to do anything if the doing of that thing is necessary or expedient —

- (a) in the interest of the security of Singapore or any part of Singapore;
- (b) to protect public health or public finances, or to secure public safety or public tranquillity;
- (c) in the interest of friendly relations of Singapore with other countries;
- (d) to prevent any influence of the outcome of an election to the office of President, a general election of Members of Parliament, a by-election of a Member of Parliament, or a referendum;
- (e) to prevent incitement of feelings of enmity, hatred or ill-will between different groups of persons; or
- (f) to prevent a diminution of public confidence in the performance of any duty or function of, or in the exercise of any power by, the Government, an Organ of State, a statutory board, or a part of the Government, an Organ of State or a statutory board.

The constitutional guarantee of freedom of speech is found in Art 14 of the Singapore Constitution, and it applies only to the *citizens* of Singapore. The article states, *inter alia*, that:

14 (1) Subject to clauses (2) and (3) —

- (a) every citizen of Singapore has the right to freedom of speech and expression;

...

(2) Parliament may by law impose —

(a) on the rights conferred by clause (1)(a), such restrictions as it considers *necessary or expedient* in the interest of the security of Singapore or any part thereof, friendly relations with other countries, *public order* or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence;

...

[emphasis added]

The eight grounds upon which freedom of speech may be restricted have been “construed expansively, both in ministerial pronouncements and judicial interpretation”.³⁹ It is interesting to note that s 4 of POFMA employs the constitutional language of “necessary or expedient” in Art 14, but uses the broader phrase “public interest” to cover different categories of conduct and does not refer to the constitutional category of “public order” even when proscribing conduct on the grounds of protecting “public health or public finances, or to secure public safety or public tranquillity”.⁴⁰ However, s 4 does attempt to map the language employed in it with some of the words in the Art 14(2) grounds such as “security of Singapore” and “friendly relations with other countries”. Nonetheless, it is not clear at this point that all six categories in POFMA fall neatly within the Art 14 grounds, as the all-encompassing “public interest” phrase does not appear in Art 14.

13 POFMA implemented many of the Select Committee’s recommendations. Its substantive provisions in Part 2 regulate communication of false statements of fact in Singapore,⁴¹ making or altering bots for communication of false statements of fact in Singapore,⁴² and providing services for communication of false statements of fact in Singapore. Under s 7, it is an offence requiring *mens rea*: a person must not do any act in or outside Singapore in order to communicate in Singapore a statement *knowing or having reason to believe* that (a) it is a false statement of fact; and (b) the communication of the statement in Singapore is likely to cause some harm in one of the six categories

39 Thio Li-ann, “Singapore: Regulating Political Speech and the Commitment ‘to Build a Democratic Society’” (2003) 1 *International Journal of Constitutional Law* 516 at 516.

40 Protection from Online Falsehoods and Manipulation Act (Act 18 of 2019) ss 4(b), 7(b)(ii), 8(3)(b) and 9(3)(b).

41 Protection from Online Falsehoods and Manipulation Act (Act 18 of 2019) s 7.

42 Protection from Online Falsehoods and Manipulation Act (Act 18 of 2019) s 8.

referred to in s 4.⁴³ Criminal sanctions vary depending on whether it is an individual or a company who was convicted, and whether a bot was used to communicate fake news. For a person who is convicted under s 7, an individual is liable on conviction to a fine not exceeding \$50,000 or to imprisonment for a term not exceeding five years or to both, but a company is liable to a fine not exceeding \$500,000. The penalties are higher where an inauthentic online account or a bot is used: an individual is liable on conviction to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding ten years or to both; while a company may be fined an amount not exceeding \$1m. Sections 8 and 9⁴⁴ largely follow the criminal sanctions of s 7,⁴⁵ but liability is found for making or altering bots for communication, or for providing services for communication of false statement of fact in Singapore, with the penalty enhanced if the communication of the statement in Singapore is likely to cause some harm in one of the six categories.⁴⁶

14 Part 3 of POFMA sets out the various directions that any Minister may instruct a competent authority to issue in relation to communication in Singapore of false statements of fact, and such directions include a Correction Direction (s 11), a Stop Communication Direction (s 12), an Access Blocking Order should a person fail to comply with a Part 3 direction (s 16). Appeals to the High Court against such directions are permitted on certain narrow grounds clearly set out in the Act (s 17). Part 4 of POFMA concerns directions to Internet intermediaries and providers of mass media services, and they include a Targeted Correction

43 The language used clearly indicates a likelihood of harm, eg, “prejudicial to”, “influence the outcome of an election”, “incite feelings of enmity” and “diminish public confidence in”: Protection from Online Falsehoods and Manipulation Act (Act 18 of 2019) s 7(1)(b).

44 Section 8(1) of the Protection from Online Falsehoods and Manipulation Act (Act 18 of 2019) states:

A person must not, whether in or outside Singapore, make or alter a bot with the intention of –

(a) communicating, by means of the bot, a false statement of fact in Singapore; or

(b) enabling any other person to communicate, by means of the bot, a false statement of fact in Singapore.

Section 9(1) states:

A person who, whether in or outside Singapore, solicits, receives or agrees to receive any financial or other material benefit as an inducement or reward for providing any service, knowing that the service is or will be used in the communication of one or more false statements of fact in Singapore, shall be guilty of an offence if the service is in fact used in such communication.

45 Protection from Online Falsehoods and Manipulation Act (Act 18 of 2019) ss 8(2) and 9(2).

46 Protection from Online Falsehoods and Manipulation Act (Act 18 of 2019) ss 8(3) and 9(3).

Direction (s 21), a Disabling Direction (s 22), a General Correction Direction (s 23) and an Access Blocking Order should a person fail to comply with a Part 4 direction (s 28). Similarly, appeals to the High Court are provided for (s 29). Part 5 enables a Minister to declare an online location as a “declared online location” if certain conditions are satisfied,⁴⁷ and to order Internet intermediaries to disable access to such a location. Furthermore, a person who, whether in or outside Singapore, solicits, receives or agrees to receive any financial or other material benefit as an inducement or reward for operating a declared online location shall be guilty of an offence (s 36), and one who expends or applies any property knowing or having reason to believe that the expenditure or application supports, helps or promotes the communication of false statements of fact in Singapore on a declared online location is also guilty of an offence (s 38). Part 6 empowers the Minister to issue directions to counteract inauthentic online accounts and co-ordinated inauthentic behaviour, such as an Account Restriction Direction (s 40) and an Access Blocking Order (s 43). Finally, during an election period, an alternate authority will be appointed by the respective Minister (s 52).

III. Justifications for the regulation of online falsehoods

A. *Theoretical underpinnings for freedom of speech*

15 In *Lee Hsien Loong v Roy Ngerng Yi Ling*⁴⁸ (“*Roy Ngerng*”), Lee Seiu Kin J identified three arguments put forward by scholars as rationales for free speech: the argument from truth (“marketplace of ideas theory”), the argument from human dignity, and the argument from democracy.⁴⁹

16 Under the marketplace theory, free competition of ideas allows truth to emerge, which enlarges the pool of knowledge available.⁵⁰ The marketplace theory is perhaps “the most famous and rhetorically resonant of all free speech theories,”⁵¹ but it also exhibits a strong

47 The conditions are:

(a) 3 or more different statements that are the subject of one or more active Part 3 Directions or Part 4 Directions, or both, have been or are being communicated in Singapore on the online location; [and]

(b) at least 3 of those statements had first been communicated in Singapore on the online location within 6 months before the date the Declaration is made.

See s 32(1) of the Protection from Online Falsehoods and Manipulation Act (Act 18 of 2019).

48 [2016] 1 SLR 1321.

49 *Lee Hsien Loong v Ngerng Yi Ling Roy* [2016] 1 SLR 1321 at [97].

50 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [282].

51 Rodney A Smolla & Melville B Nimmer, *Smolla and Nimmer on Freedom of Speech: A Treatise on the First Amendment* (Clark Boardman Callaghan, 3rd Ed, 2008) § 2:4.

underlying democratic theory, evident in the oft-quoted phrase that there is a “profound national commitment” to the principle that “debate on public issues should be uninhibited, robust, and wide-open”.⁵² While this theory is the most prominent, it has been widely discredited due to its “various imperfections, inefficiencies, and internal contradictions” and is now “rarely embraced in doctrinal formulations” outside of the US.⁵³ The concept of a free marketplace is underpinned by flawed assumptions of man’s rationality, diligence, and ability to access a diverse set of views equally.⁵⁴ In the context of online discussions, social media sites usually lack the diversity of views that is found in a veritable marketplace; algorithms and search engines often “create ‘echo chambers’ and ‘filter bubbles’ that entrench people in ideological silos”.⁵⁵ In any event, the marketplace theory has been resoundingly rejected in Singapore: “false speech, *which has been proven as a matter of fact to be false in a court of law*, can contribute little to the marketplace of *ideas* or to advances in knowledge for the benefit of society as a whole” [emphasis in original].⁵⁶

17 The argument from human dignity focuses on the “self-development or autonomy function”, where the right to free expression forms an intrinsic part of the “human spirit”.⁵⁷ However, this theory holds little weight internationally. No decision from the courts in England, Australia or Singapore has identified this theory as an important rationale for freedom of speech.⁵⁸ Moreover, it is significant that the High Court

52 *New York Times Co v Sullivan* 376 US 254 at 270 (1964) as quoted in *NAACP v Claiborne Hardware Co* 458 US 886 at 913 (1982); *Boos v Barry* 485 US 312 at 318 (1988). The democratic variant of the marketplace of ideas theory was first discussed in *Thornhill v Alabama* 310 US 88 at 96 and 101–102 (1940).

53 David Tan, “Whither the Autochthonous Narrative of Freedom of Speech? A Guide to Defaming Politicians and Scandalising Judges in Singapore” in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at p 212.

54 Thio Li-ann, “Written Representation 55” in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at B298–B300; *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 122.

55 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 122.

56 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [115].

57 David Tan, “Whither the Autochthonous Narrative of Freedom of Speech? A Guide to Defaming Politicians and Scandalising Judges in Singapore” in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at p 213.

58 David Tan, “Whither the Autochthonous Narrative of Freedom of Speech? A Guide to Defaming Politicians and Scandalising Judges in Singapore” in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at p 213.

in *Roy Ngerng* went no further than to identify this theory by name, choosing instead to examine the other two theories more closely.

18 In common law jurisdictions, the argument from democracy “commands greater acceptance” than other theories.⁵⁹ The argument is that citizens are “better equipped to participate in the workings of a democratic society” when they are exposed to a diversity of views on public issues.⁶⁰ Civic participation in the public discourse, as well as the receptiveness of the Government to public opinion, is a “necessary condition for democratic legitimacy”.⁶¹ In the UK and Australia, the theory has been used in the context of defamation law to justify the expansive boundaries given to freedom of speech through the defence of qualified privilege.⁶² The Court of Appeal in *Review Publishing* had affirmed that Art 14(1) enables citizens to “express their views on matters of public interest”.⁶³ In *Vellama d/o Marie Muthu v Attorney-General*,⁶⁴ it was also recognised that the Singapore Constitution establishes the Westminster system, where MPs act as the “voice of the people”, which has legal implications on the way constitutional rights are interpreted.⁶⁵ Tan

-
- 59 David Tan, “Whither the Autochthonous Narrative of Freedom of Speech? A Guide to Defaming Politicians and Scandalising Judges in Singapore” in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at p 213.
- 60 Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) at para 14.017.
- 61 Robert C Post, “Understanding the First Amendment” (2012) 87 Wash L Rev 549 at 553; David Tan, “Whither the Autochthonous Narrative of Freedom of Speech? A Guide to Defaming Politicians and Scandalising Judges in Singapore” in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at p 213.
- 62 *Lee Hsien Loong v Ngerng Yi Ling Roy* [2016] 1 SLR 1321 at [103]–[105]. See *Lange v Australian Broadcasting Corp* (1997) 145 ALR 96 at [115]–[116], where the High Court of Australia held that the free communication of political issues flows from the system of representative government provided under the Constitution of the Commonwealth of Australia. See also *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at [200], where the House of Lords declared that “the freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy”. For a more comprehensive examination, see David Tan, “The *Reynolds* Privilege in a Neo-Confucianist Communitarian Democracy: Reinvigorating Freedom of Political Communication in Singapore” [2011] Sing JLS 456.
- 63 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 (“*Review Publishing*”) at [267]. See also *Lee Hsien Loong v Ngerng Yi Ling Roy* [2016] 1 SLR 1321 at [105] where the court interpreted *Review Publishing* as an implicit acknowledgment that the freedom of expression in Singapore is underpinned by the argument from democracy.
- 64 [2013] 4 SLR 1.
- 65 *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [79]; David Tan, “Walking the Tightrope between Legality and Legitimacy” (2017) 29 SAclJ 743 at 761.

observes that as a corollary, Singapore citizens must enjoy, at minimum, the freedom to engage in “public discussion of how [MPs] discharge their official functions”⁶⁶ and that is:⁶⁷

... reinforced in part by a commitment to build a democratic society [as enshrined in the National Pledge], and in part by notions of Confucian communitarian ideology [which] necessitates *minimally* a recognition and protection of the freedom of speech that relates to communications pertaining to the conduct of the elected *junzi* and *gongyi*. [emphasis in original]

B. *Justifications for the regulation of online falsehoods and constitutional congruence*

19 The arguments for free speech do not extend to the protection of online falsehoods. The courts in Singapore have repeatedly questioned the applicability of the marketplace theory to statements that are verifiably false, as such statements do not advance the pool of knowledge for society’s benefit.⁶⁸ In fact, the argument from democracy presents a compelling case for the regulation of online falsehoods as the proper functioning of a democratic society is contingent on society being well informed, or more narrowly, enabling voters to exercise an informed choice at elections (which is the basis of the Australian implied constitutional freedom of political communication),⁶⁹ but misinformation or falsehood is “destructive of the democratic society”.⁷⁰ In *Review Publishing*, the Court of Appeal emphatically stated that the communication of false statements does not serve a public interest.⁷¹ Falsehoods “erode people’s trust” in information sources and “discourage people from engaging in civic life”.⁷² Falsehoods can influence voting behaviour and undermine confidence in the electoral process.⁷³ As the argument from democracy

66 David Tan, “Walking the Tightrope between Legality and Legitimacy” (2017) 29 SAclJ 743 at 761.

67 David Tan, “The *Reynolds* Privilege in a Neo-Confucianist Communitarian Democracy: Reinvigorating Freedom of Political Communication in Singapore” [2011] Sing JLS 456 at 472.

68 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [282]; *Lee Hsien Loong v Ngerng Yi Ling Roy* [2016] 1 SLR 1321 at [99]; *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [115].

69 David Tan, “The *Reynolds* Privilege in a Neo-Confucianist Communitarian Democracy: Reinvigorating Freedom of Political Communication in Singapore” [2011] Sing JLS 456 at 462–464 and 468–471.

70 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [284]; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at [238].

71 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [284].

72 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 160.

73 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 161.

does not serve as a theoretical justification for protecting false statements as free speech, it is doubtful that online falsehoods would be considered constitutionally protected speech.⁷⁴

20 Even if, for the sake of argument, online falsehoods are constitutionally protected speech, Art 14(2)(a) of the Singapore Constitution qualifies the right to freedom of speech by stipulating eight grounds of derogation. The broad ground of “public order” can validly serve as a constitutional basis for legislation that restricts the communication of online falsehoods.⁷⁵ In *Chee Siok Chin v Minister of Home Affairs*⁷⁶ (“*Chee Siok Chin*”), then V K Rajah J affirmed that public order can be harmed by the dissemination of false information.⁷⁷ More recently in *Attorney-General v Ting Choon Meng*⁷⁸ (“*Ting Choon Meng*”), Sundaresh Menon CJ remarked in *obiter* that:⁷⁹

The expression ‘public order’ usually connotes the protection of a public physical space from disorder. But ... the Internet ‘is dramatically shortening the globe’s communicative synapses’, expanding “the potential reach and impact of any individual idea or expression” and though empowering, ‘also portends abuse’. Given the modern context in which digital speech is exercised, especially where falsehoods can be rapidly disseminated in an unregulated Internet sphere and could conceivably threaten public order, there is no reason why false statements should not be justifiably restricted on the basis of the preservation of public order.

These decisions show that the courts have adopted a “capacious understanding” of “public order” that goes beyond threats of physical violence to encompass attacks on the nation’s fundamental values and processes.⁸⁰ The “public order” ground can therefore be used to justify the restriction of online falsehoods that seek to undermine trust in democratic institutions (organs of state) and processes.⁸¹

74 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [117].

75 Thio Li-ann, “Written Representation 55” in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B283.

76 [2006] 1 SLR(R) 582.

77 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [135].

78 [2017] 1 SLR 373.

79 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [119] (citing *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [1]).

80 Thio Li-ann, “Written Representation 55” in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B284.

81 Thio Li-ann, “Written Representation 55” in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B284.

21 The generous judicial interpretation of the “public order” ground under Art 14(2)(a) presents to Parliament an extremely wide discretion to pass laws that curtail the freedom of speech. In *Chee Siok Chin*, V K Rajah J observed that the wording “in the interest of ... public order” should not be confined to “the maintenance of public order” in the narrow sense, thus affording Parliament a “much wider legislative remit”.⁸² Parliament’s power to regulate speech is not limited to enacting laws for the “immediate or direct maintenance of public order”; it extends to laws that strike pre-emptively.⁸³ This has significant implications for the constitutionally permissible scope of laws promulgated against online falsehoods and for POFMA.

22 A preventive approach necessarily casts a wider net over the types of falsehoods caught under the law. A falsehood that poses a risk of eroding trust in democratic institutions, albeit a slight one, would justifiably be subject to a takedown law because the harm caused by a single publication, while impotent on its own, could amount to a sizable cumulative impact over time. This has been termed the “slow burn” effect,⁸⁴ where falsehoods “gradually inflame tensions and hollow out the political centre”.⁸⁵ By consistently “[promoting] or [attacking] a particular point of view over time”, falsehoods can change the nation’s socio-political climate.⁸⁶ To use an analogy, the impact of falsehoods can be delivered “by a single death blow” or “death by a thousand cuts”.⁸⁷ However, if Parliament’s power were confined to imposing laws for the *maintenance* of public order, the Singapore Constitution would only permit the curtailment of free speech if the threat posed by the falsehood reaches a degree of immediacy and potency, that is, “a single death blow”.

23 Parliament’s wide discretion to regulate speech is reinforced by the general wording of Art 14(2)(a), which permits Parliament to enact laws as it deems “necessary and expedient”. Unlike Art 19(3) of the Indian Constitution, which requires laws imposed in the interest of public order

82 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [50].

83 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582.

84 Eugene Tan, “Written Representation 150” in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B1314; *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at pp 218–220.

85 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 22.

86 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 22.

87 Thio Li-ann, “Written Representation 55” in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B284.

to be “reasonable restrictions”, the text of Art 14(2)(a) does not appear to operate as “substantive constraints” on Parliament.⁸⁸ In *Chee Siok Chin*, the differences in wording led the court to conclude that Art 14(2)(a) leaves no doubt that the Judiciary was excluded from any inquiry into the law’s reasonableness.⁸⁹ In addition, the phrase “necessary and expedient” was emphasised by the courts to confer on Parliament “an extremely wide discretionary power and remit that permits a multifarious and multifaceted approach towards achieving any of the purposes specified in Art 14(2) of the Constitution” and “all that needs to be established is a nexus between the object of the impugned law and one of the permissible subjects stipulated in Art 14(2) of the Constitution”.⁹⁰ In *Chee Siok Chin*, it seems that the notion of “public interest”, which was adopted in POFMA, was implicitly introduced in this passage:⁹¹

The right of assembly can never be absolute and may be *subordinated to public convenience and good order for the protection of the general welfare* whenever it is “necessary or expedient”. From time to time, for the *common welfare and good*, individual interests have to be subordinated to the *wider community’s interests*. [emphasis added]

Furthermore, the courts have categorically rejected the proportionality principle – which allows courts to engage in a form of balancing exercise – as a European jurisprudential concept that is foreign to Singapore law.⁹² The infamous “four walls” approach to constitutional interpretation in Singapore has also led to a more speech-restrictive legal culture, and it was succinctly stated by former Chief Justice Yong Pung How who unequivocally expressed his preference for interpreting the Singapore Constitution “within its four walls and not in the light of analogies drawn from other countries, such as Great Britain, the United States of

88 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [45]; David Tan, “Walking the Tightrope between Legality and Legitimacy” (2017) 29 SAclJ 743 at 764; Jack Tsen-Ta Lee, “According to the Spirit and Not to the Letter: Proportionality and the Singapore Constitution” (2014) 8 *Vienna Journal on International Constitutional Law* 276 at 284.

89 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [45].

90 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [49].

91 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [53].

92 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [87]. See generally David Tan, “Walking the Tightrope between Legality and Legitimacy” (2017) 29 SAclJ 743 at 748, where he provides a concise summary of the three criteria that form the proportionality principle: (a) there must be a “rational connection” between the means chosen and a legitimate governmental objective; (b) the limitation of a right must be “necessary” to achieve the objective; and (c) the harm (cost, burden and/or sacrifice) caused by the limitation must be “proportional in a strict sense” to the benefit (gains or good) it contributes to produce.

America or Australia.”⁹³ Indeed the “four walls” doctrine as a theory of constitutional interpretation does not demand an exclusive reliance on domestic legal sources, but it does severely restrict the engagement with foreign and international sources of law that may inform or influence local constitutional interpretation. This eschewing of proportionality review in favour of light-touch supervision has been characterised by commentators as a display of strong deference to Parliament,⁹⁴ where the Judiciary more readily accepts the balance struck by Parliament in weighing state or public goals against the right to freedom of speech. Indeed, the Court of Appeal acknowledged that the subordinate role of the courts in respect of Art 14 is dictated by the wording of the constitutional provision, which explicitly provides that Parliament has the “final say” in the balancing exercise.⁹⁵ It has been argued that the Singapore courts have unnecessarily bound themselves to the perceived strictures of Art 14(2)(a). The Malaysian Court of Appeal purposively construed an identical provision in the Federal Constitution by reading in the requirement of reasonableness.⁹⁶ However, the Malaysian decision examined the issue in a cursory and superficial manner and constitutes weak authority. As Tan notes, where the language unambiguously confers the role of balancing on the Legislature, “the Judiciary must do more to explain why it is claiming the constitutional authority to wrest this power away”.⁹⁷

93 *Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR(R) 209 at [51]. See also David Tan, “Whither the Autochthonous Narrative of Freedom of Speech in Singapore? A Guide to Defaming Politicians and Scandalising Judges in Singapore” in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at p 210.

94 For example, David Tan, “Walking the Tightrope between Legality and Legitimacy” (2017) 29 SAclJ 743 and Jack Tsen-Ta Lee, “According to the Spirit and Not to the Letter: Proportionality and the Singapore Constitution” (2014) 8 *Vienna Journal on International Constitutional Law* 276.

95 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [270].

96 See *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213 at [8], where the court held that the principle of “substantive proportionality” is imported by the “all-pervading” Art 8(1) of the Federal Constitution of Malaysia (2010 Reprint) [Art 12(1) of the Constitution of the Republic of Singapore (1999 Reprint)], thus requiring legislative action to be proportionate to the object sought. This approach was later approved by Malaysia’s apex court in *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333 at [5]. Jack Lee also posits that the Malaysian decisions can be justified on the grounds that it is “inherent in rights interpretation that the judiciary must assess the reasonableness of such limitations”, which would explain the omission of the word “reasonable” by the authors of the Federal Constitution: Jack Tsen-Ta Lee, “According to the Spirit and Not to the Letter: Proportionality and the Singapore Constitution” (2014) 8 *Vienna Journal on International Constitutional Law* 276 at 294.

97 David Tan, “Walking the Tightrope between Legality and Legitimacy” (2017) 29 SAclJ 743 at 766. Tan also notes that there are inherent difficulties with stretching Art 14(2)(a) of the Constitution of the Republic of Singapore (1999 Reprint) to
(cont'd on the next page)

24 The Art 14 jurisprudence is clearly taken into account in the drafting of POFMA. The diminutive role of the Judiciary as a fetter on Parliament's power in restricting the freedom of speech, coupled with the strong presumption of legislative constitutionality,⁹⁸ means that laws against online falsehoods, even if perceived to be draconian, will be constitutionally permissible in Singapore as long as a rational nexus between the derogation grounds and the object of the law can be made out. POFMA is such a law. Nevertheless, Parliament remains subject to potentially powerful political limits in the form of the electoral process. Arbitrary laws will simply lend credence to the claims that fake news laws are weapons used by authoritarian governments to silence political dissent.⁹⁹ Indeed, the Select Committee has acknowledged the need for a "calibrated approach".¹⁰⁰ The graduated approach in POFMA – for instance, the wide range of directions and orders depending on the degree of harm in Parts 3 to 6 – requires the Minister to conduct some form of balancing taking into account the public interest.¹⁰¹

IV. Existing legislation and their limitations

25 Having established the extensive powers of Parliament to restrict speech under Art 14(2)(a) of the Singapore Constitution, this chapter considers whether the exercise of these powers to enact new laws, and in particular POFMA, is necessary to address the harms of online falsehoods.

accommodate some form of proportionality review. While the courts can "easily employ proportionality-based balancing" under Art 10(2) of the European Convention of Human Rights (Eur TS No 5, 213 UNTS 221, 1953 UKTS No 71) (4 November 1950; entry into force 3 September 1953) as the necessity test refers to that which is "necessary in a democratic society", this qualification is conspicuously absent in Art 14(2)(a): at 764.

98 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [49].

99 Ruth Michaelson, "Fake News Becomes Tool of Repression after Egypt Passes New Law" *The Guardian* (27 July 2018); Samy Magdy, "Egypt Says It Fights Fake News, Critics See New Crackdown" *AP News* (17 September 2018); Manuel Mogato, "Spread of Fake News Aims to Silence Dissent, Says Chief of Embattled Philippine Site" *Reuters* (30 January 2018); "Is Cracking Down on 'Fake News' Merely an Excuse To Stifle Dissent?" *South China Morning Post* (20 April 2018).

100 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 134.

101 This balancing was alluded to by Minister for Communications and Information S Iswaran when responding to questions in Parliament on the use of Protection from Online Falsehoods and Manipulation Act (Act 18 of 2019): "So if you look at it in its totality, I think there is proportionality, it is fit for purpose and we have taken actions according to the situation as warranted." Matthew Mohan, "POFMA: Government Not 'Training Our Sights on Certain Types of People or Organisations', Says Iswaran" *Channel NewsAsia* (6 January 2020).

**Free Speech, Fake News,
Finding Constitutional Congruence**

26 The Select Committee’s report provides a comprehensive overview of the harms caused by online falsehoods.¹⁰² For the purposes of this article, the following categorisation of falsehoods is instructive:

Table 1: Categories of falsehoods

Category of falsehood	POFMA	Examples/comments
False statements that could rise to be a threat to <i>national security</i>	ss 7(b)(i), 8(3)(a), 9(3)(a)	The various representors appear to be the most supportive of curbing falsehoods that could rise to be a national security threat such as (a) undermining social cohesion or a sense of solidarity and common identity by sowing doubt and tension amongst a target population or engaging in hate propaganda; (b) inciting public unrest and violence; and (c) threatening territorial sovereignty. This category can overlap with inflaming tensions between racial or religious groups. ¹⁰³
False statements that inflame tensions between <i>racial or religious groups</i>	ss 7(b)(v), 8(3)(e), 9(3)(e)	<i>The Real Singapore</i> falsely claimed that a Filipino family lodged a police complaint over the noise caused by a Thaipusam procession, spawning comments that denigrated the Filipino community. ¹⁰⁴ The falsehoods were observed to have “shaped the opinions of some Singaporeans towards immigrants, Hindus, and an important event in the country’s calendar of religious festivals.” ¹⁰⁵
False statements that undermine confidence in <i>public bodies</i>	ss 7(b)(iii), 8(3)(f), 9(3)(f)	The <i>States Times Review</i> falsely asserted that Malaysia had “signed several unfair agreements with Singapore in exchange for Singapore banks’ assistance in laundering 1MDB funds” and that Prime Minister Lee Hsien Loong was “1MDB’s key investigation target.” ¹⁰⁶ The Monetary Authority of Singapore (“MAS”) condemned the article as the statements “impugned its integrity as a financial regulator” and “undermined confidence in the Government’s integrity.” ¹⁰⁷

102 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at pp 22–35.

103 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at pp 220–226.

104 Rachel Au-Yong, “TRS Case: Nurse Says Her Account of Thaipusam Case Altered” *The Straits Times* (1 April 2016).

105 Lianne Chia & Jalelah Abu Baker, “Threat to Singapore’s Social Harmony from Online Falsehoods Raised at Select Committee Hearing” *Channel NewsAsia* (22 March 2018).

106 Royston Sim, “Govt Agencies Initiate Action over Article Linking PM Lee to 1MDB” *The Straits Times* (10 November 2018).

107 Royston Sim, “Govt Agencies Initiate Action over Article Linking PM Lee to 1MDB” *The Straits Times* (10 November 2018).

False statements that erode trust in <i>democratic institutions (organs of state) and processes</i>	ss 7(b)(iv), 8(3)(d), 9(3)(d)	False statements that the outcome of Scotland's 2014 independence referendum was manipulated sparked a petition for a second referendum that gathered 100,000 signatures, undermining the credibility of the democratic process. ¹⁰⁸
		In the 2016 US Presidential Elections, false statements about the presidential candidates were widely disseminated, including statements that Hillary Clinton led a paedophilia ring in a pizzeria ("Pizzagate") ¹⁰⁹ and received donations from Saudi Arabian royalty, ¹¹⁰ and that Donald Trump had been officially endorsed by the Pope. ¹¹¹ Studies have suggested that such false statements may have influenced election outcomes in swing states. ¹¹²
		In the 2017 French Presidential Elections, Marine Le Pen falsely insinuated that her rival Emmanuel Macron possessed offshore accounts, with the intention of influencing voters. ¹¹³
False statements that affect <i>public health, safety, stability, and the financial markets</i>	ss 7(b)(ii), 8(3)(b), 9(3)(b)	In the aftermath of the Sulawesi earthquake, false reports stated that a dam was on the verge of collapse, inciting mass panic. There were also claims that the mayor had died and that free flights were available as a form of disaster relief. ¹¹⁴
		False statements that the defunct Indonesian communist party had been revived instigated a riot in Jakarta, culminating in the injuries of five police officers. ¹¹⁵
		In India, the circulation of false statements that vaccines were harmful to children was detrimental to public health as parents of 240,000 children in Kannur rejected vaccines for their children, delaying a scheduled immunisation drive by two months. ¹¹⁶

-
- 108 Esther Adley, "Scottish Referendum Vote-rigging Claims Spark Calls for Recount" *The Guardian* (22 September 2014).
- 109 Lydia Lam, "Government to Review Laws to Tackle Fake News: Some Instances of Fake News" *The Straits Times* (3 April 2017).
- 110 Kris Seavers & Nahila Bonfiglio, "Hackers Publish Fake News Story about Saudi Arabian Prince Funding Hillary Clinton" *The Daily Dot* (14 June 2016).
- 111 Lydia Lam, "Government to Review Laws to Tackle Fake News: Some Instances of Fake News" *The Straits Times* (3 April 2017).
- 112 Jane Mayer, "How Russia Helped Swing the Election for Trump" *The New Yorker* (1 October 2018).
- 113 "France's Emmanuel Macron Files Complaint after Marine Le Pen's 'Offshore Account' Claim" *The Straits Times* (4 May 2017).
- 114 Kate Lyons & Kate Lamb, "Sulawesi Tsunami: Indonesia Battles Fake News As Hoaxers Spread Panic" *The Guardian* (4 October 2018).
- 115 Jewel Topsfield, "Fake News about Communism in Indonesia Blamed for Triggering Riot in Jakarta" *The Sydney Morning Herald* (18 September 2017).
- 116 Soutik Biswas, "Fighting India's WhatsApp Fake News War" *BBC News* (20 August 2018).

**Free Speech, Fake News,
Finding Constitutional Congruence**

		A social media post that then US President Barack Obama suffered injuries from an “explosion” “wiped out” “\$130 billion in stock value” in “a matter of minutes”. Financial markets are increasingly vulnerable to manipulation due to “high-frequency trading algorithms that rely on text to make investment calls”. ¹¹⁷
False statements that cause distress, reputational or financial loss to <i>individuals</i>	Not covered	Individuals have been falsely misidentified as criminals, exposing them to mob lynching and violence. Five men were brutally assaulted in a village in India after false rumours that children were being kidnapped were circulated. ¹¹⁸ More recently, there has been a spate of fake online celebrity endorsement ads circulating on the Internet, resulting in celebrities such as Sandra Bullock and Ellen DeGeneres taking legal action. ¹¹⁹
False statements that cause financial or reputational loss to <i>organisations</i>	Not covered	Supermarket chains have been a frequent target of online falsehoods, with false claims of inaccurate <i>halal</i> certification on food products ¹²⁰ and food safety concerns over “plastic” rice ¹²¹ resulting in the “straining of ties with customers”. ¹²² A social media post falsely accused a childcare centre of mistreating the children under its care by feeding them rotten fruits. ¹²³

27 These categories are not mutually exclusive and falsehoods may fall into more than one category, as illustrated by Pizzagate. Apart from its potential impact on the electoral process, the falsehood there resulted in reputational loss to Hillary Clinton as a private individual, and reputational and financial losses to the Comet Ping Pong pizzeria as a business.¹²⁴ The falsehood also affected public safety as it prompted a gunman to “self-investigate” by threatening employees and firing his weapon in the restaurant.¹²⁵

117 Kenneth Rapoza “Can ‘Fake News’ Impact the Stock Market?” *Forbes* (26 February 2017).

118 Soutik Biswas, “Fighting India’s WhatsApp Fake News War” *BBC News* (20 August 2018).

119 Brooks Barnes & Tiffany Hsu, “Sandra Bullock and Ellen DeGeneres Sue Pop-up Websites over Misleading Ads” *The New York Times* (6 November 2019).

120 Grace Chua, “‘Halal’ Pork Label an Insensitive Hoax: FairPrice” *The Straits Times* (27 January 2014).

121 Melissa Lin, “FairPrice Files Police Report over Fake Rice Rumour” *The Straits Times* (2 February 2017).

122 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 35.

123 Toh Wen Li, “No Signs of Abuse at Pre-School Centre” *The Straits Times* (23 February 2017).

124 Lydia Lam, “Government to Review Laws to Tackle Fake News: Some Instances of Fake News” *The Straits Times* (3 April 2017).

125 “Gunman in US Charged after Threatening Restaurant Hit by Fake News on Child Abuse Ring” *The Straits Times* (6 December 2016).

A. Overview of the effectiveness of existing legislation in combating online falsehoods

28 This section provides an overview of existing laws, with reference to the categories of falsehoods they seek to combat. As “national security” is potentially the least controversial area – at least appearing to garner significant support from the representors in the Select Committee’s report – it would not be discussed here. The merits of existing legislation pre-POFMA will also be discussed based on the following factors:

- (a) Whether legislation is broad enough to cover the various categories of falsehoods;
- (b) Whether legislation is able to break virality within hours;¹²⁶ and
- (c) Whether legislation establishes a calibrated approach.¹²⁷

Table 2: Summary of existing legislation pre-POFMA

Legislation	Category of falsehood	Requirement	Mechanism for removing falsehood	Penalty/liability
Penal Code, ¹²⁸ s 298	Racial and/or religious	Deliberate wounding of feelings	No	Fine and/or imprisonment not exceeding three years
Penal Code, s 298A	Racial and/or religious	Knowingly promoting enmity, ill-will <i>etc</i>	No No	Fine and/or imprisonment not exceeding three years
Maintenance of Religious Harmony Act ¹²⁹ (“MRHA”), ss 8 and 9	Religious	Causing feelings of enmity, hatred, ill-will or hostility between different religious groups		Fine not exceeding \$10,000 and/or imprisonment not exceeding two years if contravene restraining order

126 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 134.

127 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 134.

128 Cap 224, 2008 Rev Ed.

129 Cap 167A, 2001 Rev Ed.

**Free Speech, Fake News,
Finding Constitutional Congruence**

Legislation	Category of falsehood	Requirement	Mechanism for removing falsehood	Penalty/liability
Sedition Act, ¹³⁰ s 4	Racial and/or religious	The act has seditious tendency (promotes ill-will and hostility), regardless of intention Limited defence of lack of knowledge available (s 6(2))	Yes, s 10(1) allows the Public Prosecutor to apply for an order prohibiting circulation	Fine not exceeding \$5,000 and/or imprisonment not exceeding three years
	About public bodies	The act has seditious tendency (brings into hatred, contempt or excite disaffection against the government), regardless of intention Limited defence of lack of knowledge available (s 6(2))		
Telecommunications Act, ¹³¹ s 45(b)	All	Knows message is false	No	Fine not exceeding \$10,000 and/or imprisonment not exceeding three years
Telecommunications Act, s 45(a)	Public safety or stability	Knows message is false and the message concerns explosive matter/bombs	No	Fine not exceeding \$50,000 and/or imprisonment not exceeding seven years
Penal Code, s 499	About public bodies	Intent to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person	No	Fine and/or imprisonment not exceeding two years
	About private individuals			
	About organisations			

130 Cap 290, 2013 Rev Ed.

131 Cap 323, 2000 Rev Ed.

Legislation	Category of falsehood	Requirement	Mechanism for removing falsehood	Penalty/liability
Protection from Harassment Act ¹³² (“POHA”), s 15	Public bodies – where statement targets a natural person ¹³³	False statement of fact that targets a natural person	No, but the court may grant an order requiring a notification to the publication that informs readers of the falsehood ¹³⁴	
	About private individuals			
Administration of Justice (Protection) Act ¹³⁵ (“POHA”), s 3(1)(a)	Democratic institutions (organs of state) and processes – where statement scandalises the Judiciary	Intentional publication of material that impugns the integrity of the court or poses a risk that public confidence in the administration of justice will be undermined	Yes, the court may grant an injunction restraining a contempt of court (s 13)	Depending on which court exercises its power to punish for contempt, a fine not exceeding \$12,000 or \$1000,000 and/or imprisonment not exceeding 12 months or three years
Internal Security Act ¹³⁶ (“ISA”), s 26	Public safety or stability	Likely to cause public alarm	No	Fine not exceeding \$1,000 and/or imprisonment not exceeding one year

132 Cap 256A, 2015 Rev Ed.

133 The Singapore Court of Appeal ruled 2:1 (with Sundaresh Menon CJ dissenting) that “persons” referred to in Protection from Harassment Act (Cap 256A, 2015 Rev Ed) applies only to human beings: *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373.

134 The Protection from Harassment Act (Cap 256A, 2015 Rev Ed) was amended in 2019 to provide for additional remedies against falsehoods (although the amendments have yet to come into force). See Protection from Harassment (Amendment) Bill 2019 (Bill 11 of 2019).

135 Act 19 of 2016.

136 Cap 143, 1985 Rev Ed.

**Free Speech, Fake News,
Finding Constitutional Congruence**

Legislation	Category of falsehood	Requirement	Mechanism for removing falsehood	Penalty/liability
Broadcasting (Class Licence) Notification ¹³⁷ (“Notification”) Schedule, Condition 16	Racial and/or religious	Against public interest, public order, public security, national harmony etc	Yes, the Infocomm and Media Development Authority (“IMDA”) may order content to be removed or access to the falsehood to be blocked	
	Public bodies			
	Public health, safety, stability, and the financial markets			
	Democratic institutions (organs of state) and processes			

Common law	Category of falsehood	Requirement	Mechanism for removing falsehood	Penalty/liability
Tort of defamation	About private individuals	Defamatory	Yes, the court may grant an injunction prohibiting circulation	Common law damages

(1) *False statements regarding racial or religious groups*

29 Under s 298 of the Penal Code, it is an offence to deliberately wound the racial or religious feelings of any person through any representation that is seen or heard by that person.¹³⁸ Section 298A provides a more specific offence that covers representations that knowingly promote enmity, hatred or ill-will between racial or religious groups, or acts that are prejudicial to the maintenance of harmony and likely to disturb the public tranquillity. False statements that contain inflammatory racial or religious content and are accompanied by the *mens rea* of deliberate intention to wound or knowledge can fall under these provisions.¹³⁹ The

137 Cap 28, N 1, 2004 Rev Ed.

138 See *Public Prosecutor v Amos Yee Pang Sang* [2015] SGDC 215, where statements that denigrated Christians as manipulative, power hungry and malicious were successfully prosecuted under s 298.

139 The provisions may not capture false statements by an individual who is merely negligent or impulsive. See *Public Prosecutor v Amos Yee Pang Sang* [2015] SGDC 215 at [42], where the District Court distinguished between a premeditated intention to wound and statements made in the “spur of the moment”.

present restraining orders capable of being issued under ss 8 and 9 of the MRHA are limited in scope, but the proposed amendments,¹⁴⁰ which include expanding the restraining order regime to include requiring the person who publishes inflammatory online content to take down the post and to consolidate Penal Code offences that relate to religion under the MRHA, will complement and potentially overlap with POFMA: fake news that is inflammatory may be covered by both MRHA and POFMA, while inflammatory opinions (*not* fake news) will fall under the ambit of MRHA.

30 Section 4 of the Sedition Act prohibits a person from committing any act with a seditious tendency, utter seditious words, or publish/distribute/import seditious publications. “Seditious tendency” is defined to include the tendency to promote ill-will and hostility between races and classes.¹⁴¹ Section 4 has a wide application as the seditious tendency does not have to be directed against the Government or intended to endanger the maintenance of Government.¹⁴² As a strict liability offence,¹⁴³ it can catch the vast majority of falsehoods concerning racial or religious groups. The Sedition Act has been used against such falsehoods. In 2016, the editors of *The Real Singapore* website were successfully prosecuted and sentenced to jail for their false claims that a Filipino family complained about a Thaipusam procession, which promoted ill-will and hostility between the Indian community and Filipinos in Singapore, as well as between Singaporeans in general and the Philippine nationals in Singapore.¹⁴⁴

31 Apart from criminal sanctions, s 10(1) of the Sedition Act provides a removal mechanism for seditious publications.¹⁴⁵ The Public Prosecutor can apply for a court order prohibiting the circulation of the publication.

140 Grace Ho, “Key Amendments to Maintenance of Religious Harmony Act” *The Straits Times* (8 October 2019).

141 Sedition Act (Cap 290, 2013 Rev Ed) s 3(1)(e).

142 *Public Prosecutor v Ong Kian Cheong and Another* [2009] SGDC 163 at [47].

143 *Public Prosecutor v Ong Kian Cheong and Another* [2009] SGDC 163 at [47]; *Public Prosecutor v Yue Mun Yew Gary* [2013] 1 SLR 39 at [19]–[21]. The courts have given effect to the plain and literal meaning of s 3(3) of the Sedition Act (Cap 290, 1985 Rev Ed), which expressly provides that the intention of the person charged is deemed to be irrelevant if he had in fact committed an act with a seditious tendency.

144 Elena Chong, “Former TRS Editor Ai Takagi, Who Is 8 Weeks Pregnant, Jailed 10 Months for Sedition” *The Straits Times* (23 March 2016); Pearl Lee, “TRS Co-founder Yang Kaiheng Jailed 8 Months for Sedition” *The Straits Times* (28 June 2016).

145 Sedition Act (Cap 290, 2013 Rev Ed) s 10.

32 Condition 16 of the Schedule to the Notification, read together with s 6 of the Broadcasting Act,¹⁴⁶ provides for executive action to be taken against the falsehood. IMDA can order websites to remove falsehoods or block access to such websites on the grounds of public interest, public order, public security or national harmony.

(2) *False statements regarding public bodies*

33 Section 4 of the Sedition Act could potentially apply as “seditious tendency” includes a tendency to “bring into hatred or contempt or to excite disaffection against the Government”.¹⁴⁷ However, most false statements are excluded as an extremely high threshold is required. The false statement must create “hatred” or “contempt” for the Government. For a statement to “excite disaffection”, there must be an incitement of violence or public disorder against the Government, as opposed to mere “strong criticism[s]” that lawfully pressure the Government to meet demands.¹⁴⁸

34 Under s 45(b) of the Telecommunications Act, it is an offence to transmit a message a person knows is false. As “message” is defined broadly to include “information of any nature transmitted by telecommunications”,¹⁴⁹ and there is no particularisation of the false subject matter in the wording of s 45(b), falsehoods pertaining to any subject matter, including false statements about public bodies, could theoretically fall within this section. However, it is unlikely that the provision is intended to be of broad application. The reference to “any other case [of false messages]” in s 45(b) must be construed in light of s 45(a), which specifically refers to false messages about bomb locations. Notably, all past prosecutions under s 45(b) have been concerned with the narrow factual matrix of an individual who furnishes false information to the police via a phone call.¹⁵⁰ This suggests that s 45, as a whole, is intended to penalise falsehoods that are made to *first responders*, which results in a waste of public resources, as opposed to falsehoods that are targeted at the public at large.

35 Section 499 of the Penal Code criminalises defamatory false statements and provides a takedown mechanism; the court can halt the publishing of future statements or cause the maker of the statement to retract them. A statement is defamatory if it lowers the person in the

146 Cap 28, 2012 Rev Ed.

147 Sedition Act (Cap 290, 2013 Rev Ed) s 3(1)(a).

148 *Kedar Nath Singh v State of Bihar* [1962] AIR 955.

149 Telecommunications Act (Cap 323, 2000 Rev Ed) s 2.

150 See *Public Prosecutor v Boon Yu Kai John* [2004] 3 SLR(R) 226 and *Public Prosecutor v Naganantini d/o Sommosundram Kannan* [2011] SGM C 4.

estimation of right-thinking members of society.¹⁵¹ However, the law of defamation provides no recourse for statements that are merely false,¹⁵² such as statements relating to the policies of a public body that misinform the public without negatively affecting their perception of the institution. One such example would be a false report that the MAS has proposed changes to electronic payment systems.

36 Furthermore, a civil action under the tort of defamation and the Defamation Act¹⁵³ is unlikely to be available to public bodies. In *Derbyshire County Council v Times Newspapers Ltd*¹⁵⁴ (“*Derbyshire*”), the House of Lords held that public bodies do not enjoy *locus standi* because it is in the public interest that such bodies are open to “uninhibited public criticism”.¹⁵⁵ Interestingly, the Federal Court of Malaysia departed from the common law position in 2018.¹⁵⁶ The issue was whether s 3 of the Government Proceedings Act,¹⁵⁷ which provides a statutory right for the Government to make a claim in civil proceedings, displaced common law principles such as the *Derbyshire* principle.¹⁵⁸

37 Although s 3 of Singapore’s Government Proceedings Act¹⁵⁹ is *in pari materia* with Malaysia’s s 3, it is unlikely that Singapore will follow in Malaysia’s footsteps. While no Court of Appeal decision has explicitly rejected or affirmed *Derbyshire*, judges have clarified the *scope* of the principle.¹⁶⁰ Furthermore, the Court of Appeal in *Ting Choon*

151 Penal Code (Cap 224, 2008 Rev Ed) s 499, Explanation 4. See *Jeyasegaram David v Ban Song Long David* [2005] 2 SLR(R) 712 at [28] for the meaning of “defamatory” for the common law tort of defamation.

152 *Workers’ Party v Tay Boon Too; Workers’ Party v Attorney-General of Singapore* [1975] 1 MLJ 47.

153 Cap 75, 2014 Rev Ed.

154 [1993] AC 534.

155 *Goh Chok Tong v Jeyaretnam Joshua Benjamin* [1997] 3 SLR(R) 46 at [26].

156 “Federal Court Rules that Federal and State Governments Can Sue for Defamation” *New Straits Times* (26 September 2018). The decision dispelled the confusion that arose from two conflicting Court of Appeal decisions: *Government of the State of Sarawak v Chong Chieng Jen* [2016] 3 MLJ 41 and *Utusan Melayu (M) Bhd v Dato’ Sri DiRaja Hj Adnan bin Hj Yaakob* [2016] 5 MLJ 56. This outcome has been heavily criticised and several Malaysian ministers have suggested amending the Malaysian Government Proceedings Act 1956 (No 58 of 1956) to reflect a differentiation between defamation and other lawsuits. See Zurairi AR, “Bar: Ruling Allowing Govt to Sue for Defamation Enables Repression” *Malay Mail* (2 October 2018); V Anbalagan, “Ex-Judge Questions Ruling That Government Can Sue Individuals” *FMT News* (26 September 2018).

157 No 58 of 1956 (M’sia).

158 “Federal Court Rules that Federal and State Governments Can Sue for Defamation” *New Straits Times* (26 September 2018).

159 Cap 121, 1985 Rev Ed.

160 See *Tang Liang Hong v Lee Kuan Yew* [1997] 3 SLR(R) 576 at [113]–[119], where the Court of Appeal observed that the *Derbyshire* principle only curtails the right of
(cont’d on the next page)

Meng adopted a different interpretation of s 3, stating that the provision is merely “a general piece of legislation to cloth [*sic*] the government the legal status to sue”.¹⁶¹ Whether the right of the Government to sue exists in the first place is an “anterior question” that must be answered in the context of the law in question.¹⁶² Although this was decided in the context of the POHA, the reasoning applies equally to the law of defamation. Until a future Court of Appeal decision considers whether public bodies have an antecedent common law right to sue for defamation, it is likely that Singapore’s position is aligned with the majority of common law jurisdictions.¹⁶³ Consequently, falsehoods that defame a public body as a whole, without defaming specific public officials, must be dealt with under s 499 of the Penal Code.

38 Section 15 of POHA, which allows a person who is the subject of a false statement of fact to apply to the District Court for an order,¹⁶⁴ has a wider scope as it encompasses both defamatory statements and statements that are *merely* false. Where it is just and equitable to do so, the District Court can order that the statement shall not be published unless a notification bringing attention to the falsehood is published.¹⁶⁵ This remedy requires readers to be informed of the falsity of the statement but does not provide for the removal of the statement itself. However, s 15 cannot be invoked by the Government as the reference to “any person” refers to natural persons.¹⁶⁶ Otherwise, s 15 would “sit incongruously”

public bodies to sue; individual public officers may bring an action in their personal capacity. See also *Ting Choon Meng v Attorney-General* [2016] 1 SLR 1248 at [28], where the High Court left open the question of whether the *Derbyshire* principle was “good law” in Singapore. In the Court of Appeal decision of *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [110], Sundaresh Menon CJ noted in his dissenting remarks that *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 should be confined to civil defamation and is irrelevant to the Protection from Harassment Act (Cap 256A, 2015 Rev Ed) but did not question the logic of the principle itself.

161 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [12]; *Government of the State of Sarawak v Chong Chieng Jen* [2016] 3 MLJ 41 at [109] (Wong JCA’s dissenting judgment).

162 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [14].

163 For the reasons to maintain the *Derbyshire* principle, see *Government of the State of Sarawak v Chong Chieng Jen* [2016] 3 MLJ 41 at [121]. Wong JCA was of the view that the *Derbyshire* principle ought to apply because it is consistent with Art 10 of the Federal Constitution (Art 14 of the Constitution of the Republic of Singapore (1999 Reprint)) and “to all the hallmarks of a modern democracy which, among others, related to the need for accountability, transparency, freedom of expression”. Furthermore, where clear public interests are at stake, the Government could rely on criminal defamation.

164 Protection from Harassment Act (Cap 256A, 2015 Rev Ed) s 15.

165 Protection from Harassment Act (Cap 256A, 2015 Rev Ed) s 15(2).

166 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [36].

with POHA's "scheme and structure".¹⁶⁷ Thus, false statements about public organisations cannot be covered by this remedy.

39 Falsehoods in this category can, and have been, dealt with by executive action under the Broadcasting Act. The website of the *States Times Review*, which published falsehoods about the MAS, was promptly blocked by Internet Service Providers ("ISPs").¹⁶⁸

(3) *False statements regarding democratic institutions (organs of state) and processes*¹⁶⁹

40 Where the statements target a private individual (as in Pizzagate), s 15 of the POHA could apply.¹⁷⁰ However, false statements about democratic institutions and processes in general (such as the Parliament or the Judiciary) would fall outside its ambit.

41 Section 3(1)(a) of the AJPA makes it an offence to intentionally publish or do any act that impugns the integrity of the court or poses a risk that public confidence in the administration of justice will be undermined.¹⁷¹ However, this provision only covers false statements about the Judiciary.

(4) *False statements regarding public health, safety, stability, and the financial markets*¹⁷²

42 Section 26 of the ISA makes it an offence to disseminate false statements that are likely to cause public alarm. While there is no reported decision of a prosecution under s 26, a plain reading of the provision

167 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [36].

168 "States Times Review Founder Says Will 'Shut Down' Website" *Channel NewsAsia* (9 November 2018).

169 It is unlikely that s 45(b) of the Telecommunications Act (Cap 323, 2000 Rev Ed) or s 4 of the Sedition Act (Cap 290, 2013 Rev Ed) can apply to this category of falsehoods. As discussed above, it is unlikely that s 45(b) is intended to be of broad application to falsehoods in general, while s 4 of the Sedition Act, which requires the falsehood to arouse hatred or contempt or excite disaffection against the Government, sets a high threshold that is unlikely to be satisfied by statements in this category. However, access to these falsehoods can be restricted under Condition 16 of the Broadcasting (Class Licence) Notification (Cap 28, N 1, 2004 Rev Ed) on the grounds that they undermine the public interest.

170 Protection from Harassment Act (Cap 256A, 2015 Rev Ed) s 15.

171 Administration of Justice (Protection) Act (Act 19 of 2016) s 3(1)(a).

172 Section 45(a) of the Telecommunications Act (Cap 323, 2000 Rev Ed) can cover false statements that affect public safety if they refer specifically to explosive matter such as bombs. Section 45(b) is theoretically broad enough to cover all false statements in this category, but to date, has only been invoked in cases of false statements to the police. Additionally, access to these falsehoods can be restricted under Condition 16
(cont'd on the next page)

gives rise to two interpretations: “public alarm” can be interpreted more narrowly to mean an “anxious awareness of danger”, or more generally to mean “disquiet” or “anxiety”. The latter would enlarge the scope of the provision beyond false statements that instil in the public a sense of physical danger, which is a high threshold, thus allowing statements with public health effects and impacts on financial markets to fall within its ambit. However, it is unlikely that s 26 will be expansively interpreted, given that the ISA is an act for matters relating to the “internal security of Singapore, preventive detention, the prevention of subversion, [and] the suppression of organised violence”.¹⁷³

(5) *False statements regarding an individual or organisation*

43 Section 15 of the POHA was legislated with the express intention of providing individuals with a “lower tier” remedy against false statements, in cases where they “just want the truth to be out and they do not want to escalate the matter further” by pursuing a civil claim for damages.¹⁷⁴ While s 15 can only be invoked by human persons, employees of a corporate body may seek redress where these statements, “ostensibly aimed at a corporate body”, are “in substance, an allegation against human beings who manage that corporate body”.¹⁷⁵ Where false statements are defamatory, individuals and organisations can bring an action in the tort of defamation or lodge a police report against the perpetrator for criminal defamation.

B. *Limitations of existing legislation*

(1) *Scope of criminal sanctions*

44 Critics of a new umbrella fake news law that imposes criminal sanctions point to the myriad laws already in place.¹⁷⁶ While these laws were not enacted with falsehoods in mind, they are broad enough to cover online falsehoods and can have a deterrent effect. Several representors to the Select Committee cited the successful prosecution of the editors

of the Broadcasting (Class Licence) Notification (Cap 28, N 1, 2004 Rev Ed) on the grounds that they undermine the public interest.

173 Internal Security Act (Cap 143, 1985 Rev Ed) s 26.

174 *Singapore Parliamentary Debates, Official Report* (13 March 2004) vol 91 at 2.18pm (K Shanmugam, Minister for Law).

175 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [36].

176 For example, s 4 of the Sedition Act (Cap 290, 2013 Rev Ed) and ss 298, 298A and 499 of the Penal Code (Cap 224, 2008 Rev Ed).

of *The Real Singapore* website under the Sedition Act as evidence that existing laws are adequate.¹⁷⁷

45 However, the standard of deterrence provided by the different laws varies significantly across categories of falsehoods. As there is an arsenal of laws for statements concerning racial or religious groups,¹⁷⁸ falsehoods with inflammatory racial or religious content are met with the highest level of deterrence. In contrast, limited deterrence is provided for other categories:

(a) **Public bodies.** Section 4 of the Sedition Act is of limited use as a high threshold is required while s 499 of the Penal Code only applies to defamatory falsehoods. However, statements that are merely false can still harm the public interest and the law ought to deter individuals from disseminating such falsehoods. For example, false reports of changes to the Central Provident Fund policy¹⁷⁹ can create anxiety among the public and strain relationships between the public and public bodies.

(b) **Individuals and organisations.** Victims of defamatory falsehoods can seek redress under s 499 of the Penal Code or the tort of defamation. There is currently no deterrence for statements that are merely false, such as false information regarding the promotions, products and business practices of organisations, which can nevertheless cause financial loss and damage to customer goodwill.

(c) **Democratic institutions (organs of state) and processes.** Section 3(1)(a) of the AJPA is of limited use as it is directed at falsehoods about the Judiciary. There are no other criminal sanctions available for falsehoods in this category when false statements are made regarding the legislative or executive arms of Government.

(d) **Public health, safety, stability, and the financial markets.** Section 26 of the ISA is of limited use as it only targets falsehoods that cause the public to fear for their physical safety.

177 MARUAH (Working Group for an ASEAN Human Rights Mechanism, Singapore), “Written Representation 112” in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B1045; Community Action Network, “Written Representation 72” in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B422.

178 Sedition Act (Cap 290, 2013 Rev Ed) s 4; Penal Code (Cap 224, 2008 Rev Ed) ss 298 and 298A.

179 “Govt Website Debunks CPF Savings Rumour” *The Straits Times* (18 June 2017).

**Free Speech, Fake News,
Finding Constitutional Congruence**

There are no other criminal sanctions available for falsehoods in this category.

46 Although some representors before the Select Committee have noted that s 45(b) of the Telecommunications Act can potentially serve as deterrence to all categories of falsehoods,¹⁸⁰ the structure of s 45(b) and the historically narrow factual matrix in which it has been invoked suggest that it is not intended to be of general application. As it stands, existing legislation provides insufficient deterrence for falsehoods about public bodies, individuals and organisations, and sorely deficient deterrence for falsehoods that concern organs of state, and public health, safety, stability and the financial markets. The deficiency for the latter is of particular concern as such falsehoods affect society at large and have the potential to cause serious damage. There is therefore a compelling public interest in deterring such falsehoods. Hence, a new umbrella legislation that specifically targets online falsehoods is needed to ensure that the law poses sufficient deterrence for all falsehood categories.

(2) *Removal mechanism that breaks virality*

Table 3: Limitations of existing removal mechanisms

Legislation/common law	Mechanism for removing falsehood	Limitations of removal mechanism
Penal Code, s 298	No	
Penal Code, s 298A	No	
MRHA, ss 8 and 9	No	
Telecommunications Act, s 45(a)	No	
Telecommunications Act, s 45(b)	No	
ISA, s 26	No	
POHA, s 15	No, but the court may grant an order requiring a notification to the publication that informs readers of the falsehood	

180 Simran Kaur Sandhu *et al*, “Written Representation 101” in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B977; Anonymous, *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B1040; Community Action Network, “Written Representation 72” in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B423; Calvin Cheng, “Written Representation 52A” in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B245.

Legislation/common law	Mechanism for removing falsehood	Limitations of removal mechanism
Sedition Act, s 4	Yes, s 10(1) allows the Public Prosecutor to apply for an order prohibiting circulation	<ul style="list-style-type: none"> • Not practical to obtain an injunction against hundreds or thousands of individuals in a case of viral republishing • Length of time needed to obtain an injunction is an obstacle to breaking virality
Penal Code, s 499	Yes, the court may grant an injunction prohibiting circulation	
AJPA, s 3(1)(a)	Yes, court may grant an injunction restraining a contempt of court	
Common law tort of defamation	Yes, the court may grant an injunction prohibiting circulation	
Broadcasting (Class Licence) Notification, Schedule, Condition 16	Yes, IMDA may request falsehood to be removed or access to falsehood to be blocked	<ul style="list-style-type: none"> • Only regulated Internet content providers (“ICPs”) can be ordered to remove falsehoods • Blocking access is a blunt tool as entire websites have to be blocked

47 One problem with the legal framework is that it “largely target[s] the individual, rather than the falsehood itself”.¹⁸¹ While there is an extensive list of laws that seek to deter individuals from disseminating falsehoods, only a third¹⁸² establish a removal mechanism that deals with the aftermath of the falsehood. The majority of existing laws are “perpetrator-centric” laws that focus on *preventing* falsehoods but cannot be relied on to contain virality in the event that people *do* spread online falsehoods. As Goh Yihan notes, “criminal prosecutions do not ensure that online falsehoods are removed, or that people are given access to the facts”.¹⁸³ If an individual is successfully prosecuted, “the falsehoods she

181 Goh Yihan, “Written Representation 129” in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B1123.

182 See s 4 of the Sedition Act (Cap 290, 2013 Rev Ed); s 499 of the Penal Code (Cap 224, 2008 Rev Ed); and s 3(1)(a) of the Administration of Justice (Protection) Act (Act 19 of 2016), where the court may grant an injunction to prohibit the publication of the falsehood or cause the falsehood to be retracted. See also Condition of the Broadcasting (Class Licence) Notification (Cap 28, N 1, 2004 Rev Ed).

183 Goh Yihan, “Written Representation 129” in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B1123.

propagated will [still] remain in cyberspace, with no means of ensuring that readers of the falsehoods are made aware of the true facts”¹⁸⁴

48 Even for the minority of laws that establish a removal mechanism, there are significant obstacles to accomplishing the Select Committee’s objective of breaking virality in a matter of hours.

(a) Injunctions

49 Although an injunction that limits the circulation of the falsehood may be granted under the tort of defamation and criminal offences,¹⁸⁵ this is a time-consuming and resource-intensive process. In criminal prosecutions, where the perpetrator hides under the cloak of anonymity, law enforcers must first launch an investigation to determine his identity; where the perpetrator is technologically sophisticated, more time is necessary. Once the perpetrator’s identity has been determined, extra time is required to prosecute.¹⁸⁶ Similarly, an aggrieved party bringing a civil action needs time to ascertain the person’s identity and prepare materials for the suit. Due to the nature of the court process, the time needed to obtain an injunction can vary from weeks to months.¹⁸⁷ The delay is substantial in today’s era of social media, where “two hours is an eternity [on the Internet] and things go viral in a matter of minutes or hours”¹⁸⁸

50 A more fundamental problem arises when the true identity of the perpetrator cannot be established or where the falsehoods are disseminated by social media bots rather than natural persons.¹⁸⁹ In such cases, the remedy of an injunction is not possible, and the falsehood could remain on the Internet indefinitely.

184 Goh Yihan, “Written Representation 129” in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B1123.

185 See s 4 of the Seditious Act (Cap 290, 2013 Rev Ed); s 499 of the Penal Code (Cap 224, 2008 Rev Ed); and s 3(1)(a) of the Administration of Justice (Protection) Act (Act 19 of 2016).

186 Goh Yihan, “Written Representation 129” in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B1123.

187 See *Chin Bay Ching v Merchant Ventures Pte Ltd* [2005] 3 SLR(R) 142 (where the plaintiff took two months to obtain a prohibitory and interlocutory injunction in a civil defamation suit).

188 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 40.

189 Goh Yihan, “Written Representation 129” in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B1123.

51 Furthermore, injunctions are limited in their ability to stop falsehoods from gaining traction. While an injunction that prohibits the future publication of the falsehood or mandates the retraction of the falsehood removes the falsehood from circulation, this is only effective in situations where the falsehood is published in isolation or by a small number of individuals.¹⁹⁰ Where the falsehood gains virality and is shared by hundreds or thousands of individuals within a short span of time, it is neither realistic to expect criminal prosecutions or civil actions to be initiated against all such individuals for the purpose of obtaining an injunction nor an efficient use of public resources. The potential scale of virality should not be underestimated. A false photograph depicting the use of force against demonstrators during the 2017 Catalan independence referendum was retweeted over 12,600 times,¹⁹¹ while a highly sensational falsehood like Pizzagate was shared a staggering 1.4 million times.¹⁹² Even in Singapore, which has a comparatively small digital population, falsehoods can go viral extremely quickly. An *All Singapore Stuff* online article that falsely identified an individual as a disgruntled new citizen was shared over 44,000 times, subjecting the victim to a barrage of xenophobic comments.¹⁹³

(b) Executive action under the Broadcasting Act and Broadcasting (Class Licence) Notification

52 The IMDA can remove falsehoods by: (a) ordering ICPs to remove offending content; and (b) ordering ISPs to restrict access to the offending website.¹⁹⁴ Generally, the IMDA will first order an ICP (for example, editors of *Singapore Herald*) to remove the specific article containing the falsehood; ordering the ISPs to block access to the entire

190 Note that laws are generally worded broadly enough that a criminal or civil action can be brought (and therefore remedy of injunction granted) against those who *republish* falsehoods. Under the law of defamation, each republication is considered fresh libel. See *Halsbury's Laws of Singapore: Criminal Law* vol 8 (Butterworths Asia, 2008) at para 90.507 and *Halsbury's Laws of Singapore: Tort* vol 18 (Butterworths Asia, 2017) at para 240.109. Similarly, s 4 of the Seditious Act (Cap 290, 2013 Rev Ed) is wide enough to cover those who republish the statement.

191 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 40.

192 Amanda Robb, “Pizzagate: Anatomy of a Fake News Scandal” *Rollingstone* (16 November 2017).

193 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 34; Seow Bei Yi, “Singaporean Bore the Brunt of Xenophobic Comments When His Photo Was Misused Online” *The Straits Times* (28 March 2018).

194 Broadcasting (Class Licence) Notification (Cap 28, N 1, 2004 Rev Ed); Internet Code of Practice (No 2400) (15 July 1996); Broadcasting Act (Cap 28, 2012 Rev Ed) s 6.

website is a last resort where the ICP fails to comply.¹⁹⁵ Such executive action is more effective at breaking virality as the IMDA can secure the compliance of ICPs and ISPs within a day or two.¹⁹⁶

53 However, the effectiveness of this removal mechanism remains limited due to the definition of “ICPs” under the Notification. ICPs are defined as individuals in Singapore who provide programs on the Internet for *business, political or religious purposes*, a corporation/group of individuals who provides any program on the Internet (“class licensees”) or alternatively, providers of content that are accessed from 50,000 different IP addresses in Singapore and contain at least one Singapore news program per week (“individual licensees”).¹⁹⁷ Thus, personal blogs that are not run for business, political or religious purposes, and social media platforms such as Facebook and Twitter which are considered non-content generators, are not subject to IMDA takedown orders.¹⁹⁸

54 The exclusion of social media platforms from the regulatory regime presents a particularly acute problem. If ICPs such as the *Singapore Herald* refuse to comply with the IMDA’s takedown order, the IMDA is nevertheless able to secure the desired outcome by ordering the ISPs to restrict access to its site; compliance by the ISPs is almost guaranteed and there is no record of non-compliance by ISPs. However, where falsehoods are disseminated through Facebook, the IMDA is effectively powerless as Facebook is not bound by the existing regime to remove the posts. While the IMDA *does* have the power to order ISPs to restrict Singaporeans’ access to Facebook, thereby removing access to the falsehoods, this is extremely disproportionate and politically unpalatable. Unlike an isolated website such as the *Singapore Herald*, the social media platform is the fourth most viewed website in Singapore and has 4.8 million Facebook users in Singapore.¹⁹⁹

55 The impotence of the pre-POFMA regime to effectively regulate online falsehoods is illustrated in the example of the falsehood that the MAS and Prime Minister Lee Hsien Loong are embroiled in the 1MDB

195 “IMDA Blocks Singapore Herald Website for Not Removing Articles on Singapore-Malaysia Maritime Dispute” *Channel NewsAsia* (16 December 2018).

196 In the case of the *Singapore Herald* online article, the Infocomm Media Development Authority issued a request for offending articles to be removed within two days. See “IMDA Blocks Singapore Herald Website for Not Removing Articles on Singapore-Malaysia Maritime Dispute” *Channel NewsAsia* (16 December 2018).

197 Broadcasting (Class Licence) Notification (Cap 28, N 1, 2004 Rev Ed) paras 2 and 3A.

198 Goh Yihan, “Written Representation 129” in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at pp B1121 and B1124.

199 Terrence Ngu, “Social Media Landscape in Singapore” *Hashmeta* (8 August 2018).

scandal. While the *States Times Review* website has been blocked, the accompanying Facebook post that replicates the falsehoods *in full* remains accessible.²⁰⁰ There is clearly a pressing need to bring social media platforms under the ambit of the regulatory regime. Until then, actions taken by the authorities to break virality will be of limited effectiveness.

(3) *Calibrated approach*

56 The removal mechanisms provided by the Broadcasting Act and Notification are not aligned with the spirit of the Select Committee's report, which called for a "calibrated approach" to tackle online falsehoods.²⁰¹ Where an article on a personal blog falsely claims that an election has been rigged, the blogger is not subject to the IMDA's takedown order for the *specific* article. Due to technical and operational challenges, ISPs are not able to block access to individual posts or conduct site-blocking of subdomain levels.²⁰² The only solution is for ISPs to restrict access to the *entire* blog, which may contain hundreds of non-offending posts and which may also constitute constitutionally protected speech. Hence, site-blocking is a "blunt instrument"²⁰³ that can exert disproportionate state censorship relative to the harm produced by the falsehood. As a result of its inflexible and draconian nature, site-blocking is deployed only in rare situations where the falsehoods are clearly detrimental to the public interest. In recent examples, sites were blocked because they "undermined public confidence in the integrity of the Singapore Government" or "stoke[d] feelings of ill will" in bilateral relations.²⁰⁴

57 Some representors have construed this removal mechanism as the closest thing Singapore has to an umbrella takedown law that can simply be reinforced or strengthened to tackle online falsehoods.²⁰⁵

200 *States Times Review* (6 November 2018) <<https://m.facebook.com/STReviewUncensored/>> (accessed 9 November 2019).

201 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 134.

202 Starhub Ltd, "Written Representation 126" in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B1107; Aqil Haziq Mahmud, "No Need for New Laws for Telcos, Internet Service Providers to Tackle Fake News: Singtel, Starhub" *Channel NewsAsia* (22 March 2018).

203 Starhub Ltd, "Written Representation 126" in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B1107.

204 Belmont Lay, "Another Website, Singapore Herald, Blocked by IMDA after Refusing to Take Down 8 Articles" *Mothership* (15 December 2018); Sulaiman Daud, "IMDA Issues Notice to States Times Review to Take Down False 1MDB Article, or Else, ISP Can Block Site" *Mothership* (9 November 2018).

205 Carol Soon & Shawn Goh, "Written Representation 62" in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (cont'd on the next page)

They argue that new fake news laws are unnecessary as the existing regulatory regime provides broad grounds for content to be removed (“public interest, public order, public security or national harmony”). For example, a public interest argument can be made for falsehoods against individuals who are public figures and private organisations that offer services to the public.

58 However, it is the authors’ view that this blunt measure should only be reserved for falsehoods that trigger the highest levels of public interest, such as falsehoods that cause election interference or attack the integrity of public institutions.²⁰⁶ Falsehoods of this nature pose elevated levels of harm to the public and can be distinguished from non-defamatory falsehoods about the policies of a public body (for example, information about Central Provident Fund withdrawal amounts), even if misinforming the public is against the public interest. If Singapore were to rely on executive action under the Broadcasting Act as the dominant takedown mechanism for online falsehoods, there is a serious risk that other speech that is in the public interest will be curtailed. A calibrated approach to tackling falsehoods requires new laws such as POFMA.

V. Conclusions

59 In summary, a number of key lessons emerge.

60 *First, not all categories of falsehoods are equal.* Representors before the Select Committee have argued that new laws are unnecessary because provisions in other legislation such as the Sedition Act, Penal Code and Broadcasting Act have been successfully used to deter or remove falsehoods. However, from an analysis of an amorphous concept of fake news in distinct but non-mutually exclusive categories, it becomes clear that existing laws do not treat all categories of falsehoods equally. Before the passage of POFMA, racial or religious falsehoods are overrepresented in Singapore’s deterrence measures, while falsehoods concerning democratic processes and institutions are severely underrepresented.

Countermeasures (Parl 15 of 2018, 19 September 2018) at p B380; Lim Sheng Kang Shaun, “Written Representation 133” in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B1180; Singapore Press Club and Singapore Corporate Counsel Association, “Written Representation 155” in *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B1373.

206 *Report of the Select Committee on the Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 135.

Additionally, different categories of falsehoods pose different levels of harm, which POFMA sensitively addresses in its calibrated approach with a kaleidoscope of different orders, penalties and sanctions.

61 *Second, legal and political arguments should be distinguished for conceptual clarity.* The Singapore courts have faithfully adhered to a literal interpretation of Art 14(2) of the Singapore Constitution, which gives Parliament the prerogative to restrict speech so long as it is “necessary and expedient” in the interest of “national security”, “public order” and other clearly articulated grounds.²⁰⁷ Due to the extensive powers bestowed on Parliament under the Singapore Constitution, any opposition to broad and sweeping fake news laws should carefully distinguish between political arguments and constitutional/legal arguments rather than obfuscate the two.

62 Additionally, the Singapore courts have given an expansive meaning to the “public order” ground in Art 14(2). In *Chee Siok Chin*, the court clarified that public order may be undermined even if “there is no actual or threatened breach of peace”.²⁰⁸ Menon CJ also observed that the “public order” ground can apply to online falsehoods.²⁰⁹ Given that this statement was made in the context of s 15 of POHA, which includes *merely false* statements of fact, it is possible that the “public order” ground can be extended to information that is *merely false*, even in the absence of harm. As Menon CJ stated, what is considered “necessary or expedient” in a specific case “depends significantly also on the nature of the interest in that speech”.²¹⁰ In his view, false speech is of such “limited value” that when balanced with other competing interests, the balance is likely to tilt *against* it.²¹¹ Presumably the phrase “public interest” that appears in s 4 of POFMA will be accorded overwhelming weight when balanced against online falsehoods.

63 Hence, Singapore’s laws do not strictly need to stipulate demonstrable harm in the definition of actionable fake news in order to be constitutionally justifiable. However, Parliament appears to have engaged in some form of proportionality balancing when designing POFMA: liability for communicating false statement of facts *must* be accompanied by some risk of harm to the public interest,²¹² but strict liability is imposed for making or altering bots for communication of

207 David Tan, “Walking the Tightrope between Legality and Legitimacy” (2017) 29 SAclJ 743 at 764.

208 *Chee Siok Chin v Minister of Home Affairs* [2006] 1 SLR(R) 582 at [136].

209 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [119].

210 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [120].

211 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [120].

212 Protection from Online Falsehoods and Manipulation Act (Act 18 of 2019) s 7(1).

false statements of fact with enhanced penalties if there was a likelihood of harm to the public interest.²¹³

64 *Third, enforcement of POFMA should be a bona fide attempt to tackle the harms of fake news.* As mentioned above, it is easy for laws curtailing free speech to be legally justifiable under the Singapore Constitution. The challenge lies in ensuring that these laws are justifiable in the eyes of the body politic. For instance, Malaysia’s Anti-Fake News Act, which has been repealed, was an unsatisfactory piece of legislation because of its extremely broad definition of “fake news”, an over-emphasis on defamatory false statements, and its inauspicious timing (gazetted a month before the 14th General Election) which fuelled speculation that the law was enacted to suppress political criticism. Clear guidelines that limit the law’s application are necessary such as unambiguous statements of policy that parodies and satires fall outside the reach of POFMA.²¹⁴ When carefully drafted, fake news laws can be politically neutral – for example, a German opposition politician who had strongly criticised Germany’s Network Enforcement Act²¹⁵ later successfully used the law to remove offending content about her.²¹⁶

65 However, the POFMA contains several features that arguably detract from the calibrated approach it had set out to achieve. A comprehensive discussion is not possible due to length constraints,²¹⁷ but one key deficiency stands out: weak safeguards. At first glance, POFMA appears to provide adequate safeguards against the wrongful issuance of directions. It provides a two-layered appeals process where individuals and/or intermediaries may first appeal to the Minister and subsequently to the High Court.²¹⁸ The Minister for Law has stressed that the laws “will not affect the right to free speech” as “courts are the

213 Protection from Online Falsehoods and Manipulation Act (Act 18 of 2019) ss 8(1)–8(3).

214 Cindy Co, “‘Erroneous’ to Suggest that POFMA Covers Satire: Shanmugam on Media Literacy Council’s Post” *Channel NewsAsia* (13 September 2019).

215 Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken v 01.09.2017 BGBl I S 3352 (Germany).

216 See generally LG Hamburg (324 O 51/18); Mark Hallman, “Germany’s Populist AfD Seeks to Turn Online ‘Censorship’ to Its Advantage” *DW* (2 January 2018).

217 For criticisms of the Protection from Online Falsehoods and Manipulation Bill (Bill 10 of 2019), see generally Cherian George, “Judges should have more say” *Cherian George* (5 April 2019) and “Disinformation crisis is mostly about trust” *Cherian George* (8 April 2019); Kirsten Han, “Singapore’s Anti-fake News Bill: A Primer” *We, the Citizens* (2 April 2019).

218 The High Court can set aside the direction on three grounds: (a) where the person did not communicate the statement; (b) where the statement is an opinion or is a true statement of fact; and (c) where it is not technically possible to comply with the directions. See ss 17, 29, 35 and 44 of the Protection from Online Falsehoods and Manipulation Act (Act 18 of 2019).

final arbiter of truth”²¹⁹ This is accurate as POFMA provides for the High Court to set aside a direction on the grounds that the statement is true. However, it is significant that the High Court can *only* review the Minister’s decision on the grounds of falsity – it is precluded from exercising judicial review over whether the falsehood undermines the “public interest”, which is the second element that makes a falsehood actionable under s 7 of POFMA. The effect of excluding judicial review over this aspect is that Ministers can potentially act against falsehoods even where the fake news does not undermine the “public interest”. This has raised fears that political office-holders will use POFMA to suppress political dissent. As discussed in this article, Art 14(2) of the Singapore Constitution does not strictly require restrictions on speech to be tied to some form of harm, but a clear connection to harm is essential for the new law to be politically justifiable. According judicial oversight over whether there are *bona fide* public interest grounds that warrant action against the falsehood can better secure political legitimacy. The authors hope that this article will form the springboard for further research on the effectiveness of POFMA and a more in-depth comparison with the fake news regulatory regimes in other jurisdictions.²²⁰

219 Tham Yuen-C, “Government Makes Initial Decision on Falsehood but Courts Are Final Arbiter of Truth: Shanmugam” *The Straits Times* (2 April 2019).

220 For an overview of what other countries have done, see generally National Technological University, S Rajaratnam School of International Studies, *Policy Report: Countering Fake News – A Survey of Recent Global Initiatives* (by Gulizar Hacıyakupoglu *et al*) (March 2018).