5-2019

Looking beyond the vague terms in Singapore's fake news laws

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Published in Today, 2019 May 14

https://www.todayonline.com/commentary/looking-beyond-vague-terms-fake-news-laws

Pofma covers statements that are "false or misleading", but does not define "misleading". But case law gives us a clearer understanding of what "misleading" means, says the author.

In recent debates about the Protection from Online Falsehoods and Manipulation Act (Pofma), some criticised it for being too vague. Yes, at first glance, Pofma contains words and phrases whose meaning is not explicitly clear.

But such criticisms only consider Pofma on the surface in isolation from its legal context. Much of the Act makes sense when one understands how it will operate in the light of other relevant legal principles.

First, Acts passed by Parliament (such as Pofma) are not the only source of law in Singapore. Another important source of law is case law. This is the law developed and nuanced by the courts over time.

Many areas of our law, such as the laws of contracts, defamation, and negligence, consist mainly of rules from case law. These rules are the product of decades or centuries of development, first by the English courts, and now by independent Singapore's courts.

In developing case law, the courts apply established legal principles, the wisdom of experience, and a good dose of legal common sense. The courts also give due weight to fundamental liberties (such as the freedom of expression).

What is the relevance of all this to Pofma?

Under our Constitution, the courts have the ultimate authority to pronounce on how Acts are to be interpreted. In doing so, the courts take into account not only the Act itself, but also relevant case law.

Hence, it is not possible to understand an Act of Parliament without also understanding the relevant case law. Often, an Act that is at first glance vague, overly broad, or open to abuse by the Government, turns out not to be when read against the backdrop of the case law.

MISLEADING OR NOT?

Take, for example, the word "misleading". Pofma covers statements that are "false or misleading", but does not define "misleading".

This has raised concerns that the Government has free rein to pronounce any statement to be "misleading", and bring Pofma down to bear on it.

But case law gives us a clearer understanding of what "misleading" means.

It refers to statements that tell half-truths, by omitting important details and failing to paint a full picture of the facts. Consider the following example.

In a 2016 case, AXA Life Insurance had written a reference for Ramesh Krishnan, leader of a team of financial advisers, after he resigned. Mr Ramesh sued AXA, claiming that he lost an opportunity to get a new job because AXA's reference was (among other things) "misleading".

For example, the reference stated that Mr Ramesh had been "investigated" for "compliance issues" after a complaint was made against him. It also stated that some of the advisers under his supervision had faced police investigations.

The Court of Appeal said that this was technically true, but "misleading" because it did not tell the full story: namely, that the investigation had concluded that there was no evidence to substantiate the complaints against Mr Ramesh, and that the police declined to take action against the advisers.

As a result, the reference gave the misleading impression that Mr Ramesh had been "involved in some serious misconduct".

Seen in this light, the word "misleading" in Pofma is necessary to prevent the law being evaded through selective statements of facts that are individually true but collectively paint a false picture.

That is what the word "misleading" means. It is clearly not a licence for the Government to prevent any statement which it does not like.

"REASON TO BELIEVE"

Another contentious phrase is "reason to believe". Pofma makes it a criminal offence to communicate something which one knows or has "reason to believe" is a false statement of fact likely to result in certain consequences (such as a threat to public health or an influence on the outcome of elections).

On its face, this is scary, because it suggests that one may be fined or jailed for speaking on certain topics if one is not absolutely sure of what one is saying.

But, in case law from 1993, the High Court has explained that "[m]ere suspicion or pure speculation" is not "reason to believe".

Hence, a person cannot be convicted under Pofma merely for making a statement when he is genuinely unsure whether the statement is true or false.

“OF THE OPINION”

Pofma gives any minister the power to order a falsehood to be taken down as long as the minister if “of the opinion” that making such an order would be in the “public interest” (for example, in the interests of public health or racial harmony).

To laymen, this appears to mean that any minister can get away with making any order he likes according to his whims and fancies, as long as he claims to be of the “opinion” that it is necessary.

But case law clarifies that this is not true. There are always minimum standards which government decision-makers must adhere to, even when an Act says that they may act based on their “opinion”.

In a 1991 case, the Registrar of Businesses ordered one Jessie Tan to change the name of her business (which was similar to the name of another business). The Registrar claimed that the name of her business had been “calculated to mislead” customers.

But the High Court overruled this order, because there was no evidence to support the Registrar's contention. It was not enough for the Registrar to say that she was of the “opinion” that the name was misleading.

Similarly, Pofma does not entitle a minister to make orders without having some supporting evidence, or without taking into consideration the views of the person targeted by the order. The minister is also forbidden from acting for unlawful purposes, such as bad faith or malice.

If a Minister contravenes these rules, the person affected by the minister's order may apply for judicial review. This is a process in which he may ask the court to pronounce that the order is unlawful and hence void.

It is good that people are taking Pofma and other proposed laws seriously, and subjecting the precise wording of these laws to intense scrutiny.

But words and phrases in Acts always have to be interpreted, and our courts are accustomed to interpreting them in a manner that upholds the purpose of the Act while maintaining fairness to those affected by it and preventing the threat of abuse of Government power.

In order to engage in an informed analysis or critique of Pofma — or, indeed, of any Act — one must look beyond the words of the Act, to the constellation of principles and definitions laid down by the courts in the case law.

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