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Reflections on thinking about the POFMA

Wei Yao, Kenny CHNG
Singapore Management University, kennychng@smu.edu.sg

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Citation
CHNG, Wei Yao, Kenny. Reflections on thinking about the POFMA. (2019).
Available at: https://ink.library.smu.edu.sg/sol_research/2986

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SINGAPORE PUBLIC LAW

Symposium on POFMA: Reflections on thinking about the POFMA by Kenny Chng

Kenny Chng is an Assistant Professor of Law at the Singapore Management University. He teaches legal theory and public law, and his research interests are in the intersection between theory and doctrine in administrative law, as well as stare decisis in constitutional law.

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The Singapore Protection From Online Falsehoods and Manipulation Act (POFMA) has generated a considerable amount of interest in the public square. Taking into account the way that public discourse has unfolded thus far, this post will offer a couple of brief reflections as to *how* one ought to think about the POFMA – indeed, borrowing a key concept from administrative law, this post is primarily concerned with the *process* of thinking about the POFMA, rather than offering a substantive position on its *merits*.

Legal and political constitutionalism

First, in thinking about POFMA, it will be useful to distinguish between the concepts of legal and political constitutionalism. A recurring theme among POFMA's sceptics is that the Act does not provide for sufficient *legal* checks against the exercise of the Minister's discretion to issue Part III and Part IV Directions under the Act. Arguments along such lines include those suggesting that it is problematic for the Minister to be responsible for making the initial determination of whether a false statement of fact has been made, that it is undesirable that appeals have to be first made to the Minister before a complainant can lodge an appeal to the High Court, and that the grounds of appeal to the High Court are unduly limited.**[1]** Such arguments weigh in favour of the *courts* playing a more robust role in the schema of the Act. In other words, such arguments suggest that legal checks administered by the courts against the exercise of the Minister's discretion are insufficient and ought to be strengthened.

It is worth noting that such arguments are premised upon a certain view of constitutionalism – that is, *legal* constitutionalism. On this view, the primary means of checking executive power rests in the law. Accordingly, such a view would accord significant emphasis to the courts, as the guardians of the law, to serve as the main bulwark against abuses of executive power. This

is arguably the predominant form of constitutionalism that the US practices. This explains why the US Supreme Court is immensely important in the American public imagination and public discourse.

But this is not the only possible view of constitutionalism. *Political* constitutionalism suggests that the primary means of checking executive power is through the political process. There are several aspects to such checks. At one level, the executive is accountable to elected members of Parliament for their actions. At a more fundamental level, members of the Executive have to periodically stand for democratic elections themselves, laying open their decisions to scrutiny and placing themselves at the mercy of the ultimate test of approval. This is traditionally the predominant form of constitutionalism practised in the UK (although recent events may have cast some doubt on this proposition).

In any case, the point being made here is that beyond the law, there *are* other methods of checking executive power. Legal and political checks are *both* plausible methods of restraining executive power. With this broader view of constitutionalism in mind, one might perhaps see that it is not entirely unjustified to take the view that the POFMA strikes a reasonable balance. It can ensure sufficient speed in addressing patent and potentially devastatingly injurious online falsehoods. At the same time, sufficient restraints on executive power are maintained through *both* legal and political means – especially since the Minister exercising power under the Act will have to "nail his or her colours to the mast" by explaining why a Direction is being issued.**[2]**

One's precise point of disagreement with the POFMA

Second, in thinking about the POFMA, one should be aware that there are at least two possible *levels* of disagreement with the POFMA. At one level, one can disagree with the theory of free speech underlying the POFMA. During the Parliamentary debates over the bill, the Minister of Law stated that the POFMA is intended to "combat the deteriorating effect falsehoods have on trust in public institutions and the democratic process in the digital age". Indeed, the Minister argued that a shared "infrastructure of fact" is necessary for free and responsible public discourse. The POFMA thus rests on a certain theory of free speech – that an entirely unregulated "marketplace of ideas" will *not* produce truth and can indeed inhibit the pursuit of the virtue of civic republicanism. On this view, the "marketplace of ideas" must be regulated to filter out patent and injurious false statements of fact to maintain a minimum threshold of quality of public discourse.

One can disagree with this underlying theory of free speech. For example, one can take the view, as Justice Kennedy in *United States v. Alvarez***[3]** did, that *even* false statements are subject to constitutional protection, because regulating false statements would cast a chill on the

freedom of speech more broadly. This suggests that the expression of even patent falsehoods has an *inherent value*. In a similar vein, Justice Breyer, concurring in the same decision, suggested that "false factual statements can serve useful human objectives", such as protecting privacy and shielding a person from prejudice. Accordingly, if one takes such a view of free speech, one would be understandably sceptical of the POFMA's underlying theory of free speech.

The key point is this: if one's disagreement with the POFMA is indeed at this level of free speech theory, one ought to bring one's own theory of free speech out in the open and defend it. One's own theory of free speech has to be justified as well. It may indeed be possible to justify the proposition that the expression of patent falsehoods has an inherent worth in itself. But such arguments have to be made clear, with due cognisance of the logical conclusions of such a proposition for the legal regulation of any speech.

There is another possible level of disagreement with the POFMA. At this other level, one *agrees* with the POFMA's underlying theory of free speech, but disagrees with the specifics of how the POFMA has effected this objective. For example, one might agree that the "marketplace of ideas" ought indeed be regulated to filter out patent and injurious falsehoods in order to facilitate reasoned public discourse, but might disagree as to *how* this regulation should be effected. Such a view would accept that there *should* be a power accorded to some institution or entity to perform such regulation, but might disagree as to *who* should exercise the power or *how* this power should be exercised.

If one observes that this is indeed the level of one's disagreement with the POFMA, then it is worth noting that the tenor of argument ought to shift accordingly. Instead of asking "should we have the POFMA?" or "is the POFMA a bad idea?", the relevant question would become "how should we *best* shape the power to deal with such patent falsehoods?" The terms of the relevant question suggest that a *positive* argument is called for. Arguments that "it accords too much power to the Minister" in themselves, without any credible alternative, run the risk of losing sight of the fact that one is indeed in agreement that there is a real problem that needs to be solved. And if one is *not* in agreement that there is a real problem to be solved, one's disagreement with the POFMA in all likelihood rests not at this level but at the level of free speech theory – and one's own theory of free speech ought then to be articulated and defended, as suggested earlier.

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[1] For example, see Cherian George, 'Online Falsehoods Bill: will words in legislation mean whatever S'pore govt chooses them to mean?' (*Mothership*, 6 April 2019) <

https://mothership.sg/2019/04/online-falsehoods-cherian-george/> accessed 29 September 2019.

[2] See *Singapore Parliamentary Debates, Official Report* (8 May 2019) vol 94 (Murali Pillai, Member of Parliament (Bukit Batok).

[3] 567 U.S. 709 (2012).