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FICA: What checks & balances are needed against powers being used inappropriately?

Tan K. B. EUGENE
Singapore Management University, eugene@smu.edu.sg

Benjamin Joshua ONG
Singapore Management University, benjaminjong@smu.edu.sg

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Eugene K. B. Tan, Benjamin Joshua Ong

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COMMENTARY: The key question is not whether the state should have powers to take countermeasures, but rather whether there are adequate checks against the risk of those powers being inappropriately used..

The state must have sufficient powers to protect Singapore from the threat of covert foreign interference.

The threat is real. In 2018, Parliament's Select Committee on Deliberate Online Falsehoods heard well-documented evidence of foreign interference in various countries, including through the use of disinformation. At least 18 representors at the Select Committee discussed hostile information campaigns (HIC), with two being held behind closed doors because of the sensitive nature.

In 2019, Minister for Home Affairs K Shanmugam said in a security conference that the government needed the right tools to fight the HIC threats online.

Moreover, the modus operandi is constantly evolving. Using communication technologies such as social media, perpetrators are prepared to invest for the long haul by systematically degrading societal trust and confidence in public institutions or exploiting our inherent societal fault-lines and vulnerabilities.

Yet, it would be detrimental to democracy and governance in Singapore if the state were to block potentially useful information and ideas from being considered and debated merely because they have some link with a foreign source.

Hence, clarifications and even assurances enshrined in Fica will be needed to assuage Singaporeans' concerns regarding this. Over the weekend, the Ministry of Home Affairs (MHA) clarified that "the bill does not apply to Singaporeans discussing issues, or advocating any matter" nor does it "cover the vast array of collaborations between Singaporeans and foreigners, on many matters".

Besides this concern about Singaporeans sharing information or advocating for any matter that the government disagrees with, the key question is not whether the state should have powers to take countermeasures, but rather whether there are adequate checks against the risk of those powers being inappropriately used.

Centrality of judicial review

One important check on executive power is the courts' ability to perform judicial review. In our system of constitutional government, courts have the final authority to enforce the legal limits to state power. Through judicial review, if the court finds that the executive had acted unlawfully, the court may declare that the executive's action is void and of no legal effect.

A major concern over the Foreign Interference (Countermeasures) Act or Fica is the limits placed on judicial review. Clause 104 of the Bill provides that the courts may not review certain decisions by the executive except on narrow procedural grounds. This (known as an "ouster clause") is potentially concerning, given the importance of judicial review in ensuring that state authorities do not break the law.

Suppose the Minister orders that a particular person stop communicating certain material that is allegedly the product of illegitimate, disguised foreign interference. Now suppose a Minister was motivated by bias - what will be the safeguards for the Singaporean who is targeted?

Ordinarily, that person would be able to apply for judicial review. On its face, the elaborate Fica ouster clause could arguably make this impossible, as long as all procedures mandated by Fica have been followed.

One might fear that more extensive judicial review would entail the court usurping executive authorities' power. But in truth, the court's job is to enforce the law - and no more. The court has no power to strike down a lawful decision made by the Government in its discretion and within its jurisdiction and expertise.

Because judges know this, they defer to good-faith judgments made by executive authorities. They understand that the Government has access to data, expertise (in fields other than the law), and resources that the courts do not.

Moreover, the Government is accountable to the people through Parliament, whereas courts are not directly democratically accountable in the same way.

So all judicial review involves is a court asking whether certain basic legal principles have been transgressed.

For example, executive decision-makers must not act in a biased manner; must give genuine consideration to arguments from all sides; must act only for lawful purposes; and must take into account relevant matters and disregard irrelevant ones.

It is true that courts are not experts in the machinations of foreign interference nor are they well-equipped to determine what national security requires. But that does not stop them from ensuring that decisions relating to them are taken in a lawful manner.

Given the importance of judicial review and the courts' stance towards it, we suggest that the ouster clause in Fica may not be taken at face value by the courts. It is possible that the court will hold the ouster clause unconstitutional and decline to apply it.

If so, the courts may be able to perform judicial review of Fica decisions to a greater extent than the ouster clause may suggest. For example, a court may be able to review a decision on the ground of alleged bias or bad faith, even if the ouster clause, as drafted, suggests that it cannot.

In the 2019 case of Nagaenthran a/l Dharmalingam, the Court of Appeal suggested that ouster clauses are "constitutionally suspect", even if they do allow for judicial review on procedural grounds. That does not mean that the court can replace the executive's decision just because the judge personally disagrees with it. But the court can still check whether the decision was arrived at in a lawful manner.

Strengthening the Review Tribunals

A counter-argument is this: Decisions under the Bill will likely involve sensitive information, which should remain confidential in the interest of the public. Hence, any court hearing that requires the disclosure of sensitive information may go against the public interest it seeks to protect in the first place.

This was the Government's concern with decisions taken under the Internal Security Act. The solution was to heavily restrict judicial review and instead have Advisory Boards. Advisory Boards would perform a similar function to judicial review, namely, to consider allegations that the Government's decision was improper or otherwise unlawful.

Similarly, Fica provides for Reviewing Tribunals as an alternative safeguard. If one cannot apply for judicial review of the Minister's decision, one can still appeal that decision to such a tribunal. So, what is important is that Reviewing Tribunals be sufficiently competent and independent to perform the task of reviewing the executive's Fica decisions.

Reviewing Tribunals comprise a sitting Supreme Court judge as chair and two other persons independent of the Government. Tribunal members are to be appointed by the President on the advice of Cabinet for a renewable three-year term. As intelligence and national security considerations may be involved, such a tribunal will not sit publicly.

It would enhance public confidence in Fica to ensure that the tribunal is sufficiently independent of the Government. One safeguard of its independence is that tribunal members' remuneration and terms of service must not be altered to their disadvantage during their term of office – so a rogue government cannot pressure them by threatening to cut their pay. Another is that the tribunal is chaired by a Supreme Court judge, who is an expert in the law and is not part of the Executive.

We propose further safeguards to promote and protect the tribunal's independence.

The Cabinet, when deciding whom to appoint as tribunal members, should consult the Chief Justice and/or the Chairman of the Public Service Commission.

Furthermore, the law should state explicitly that a tribunal member cannot be removed from office during his term except on the ground of misbehaviour or inability to properly discharge his duties (for example, due to illness). These are the only grounds on which Supreme Court judges may be removed.

Finally, the law should spell out the qualifications required for the tribunal members. This can provide assurance that the tribunal is competent and capable of dealing with the various dimensions of foreign interference while preserving a healthy democracy.

Beyond "Politically Significant Persons"

To mitigate the risk of foreign interference, individuals and organisations directly involved in Singapore's political processes will be defined under Fica as "politically significant persons" (PSPs) and will be subject to countermeasures.

Under Fica, political parties, political office holders, members of Parliament, election candidates and their agents are PSPs by definition. In addition, others can be designated as PSPs if their activities are directed towards a political end, and the competent authority assesses that it is in the public interest that countermeasures be applied.

The law can go further. We propose that those who work to influence Singapore's public policy and laws at the behest of a foreign principal be required to disclose that fact, even if they are not themselves PSPs. This would include, for example, those who advocate certain views because a foreign principal has asked or paid them to do so.

Such a requirement will promote disclosure, transparency, and scrutiny – all watchwords against foreign interference. For example, Australia requires certain activities (such as lobbying and public communication) to be registered if done on behalf of a foreign principal.

Singapore's recently-introduced rule under the Maintenance of Religious Harmony Act (MRHA) will require a religious group to disclose sources of foreign control or power over it.

The onus would be on the relevant individuals and organisations to make the relevant disclosures, which are made available on a publicly accessible register – similar to Australia's Foreign Influence Transparency Scheme Public Register which details a person or organisation's foreign principals and activities.

This would provide clarity on the foreign affiliations and associations of prominent voices who advocate publicly views on Singapore's domestic and foreign policies. This can also deal with concerns about the negative implications that may be associated with being designated a PSP.

There would also be an important signalling effect: that in dealing with foreign interference, the government cannot do it alone. The public register will enable and facilitate more scrutiny - not just by the government but organisations and individuals as well.

It will encourage them to appraise for themselves who they are dealing with and to consider whether they are at risk of serving as unwitting vehicles for foreign subterfuge and subversion.

In addition, Fica provides that designated PSPs can challenge their designation or stepped-up countermeasures imposed on them by submitting an application for the competent authority's reconsideration or an appeal to the Minister for Home Affairs.

We propose that a final appeal can be made to the reviewing tribunal to obviate any concern that the Minister will more likely than not agree with the officials.

Checks & balances

Foreign interference cannot be wished away. A multi-pronged and multi-stakeholder approach is patently needed.

Fica will provide the state with sufficiently flexible powers to face ever-evolving forces that seek to divide and destroy our way of life through underhanded means. Other laws such as the Internal Security Act, the Protection from Online Falsehoods and Manipulation Act and the MRHA can also be used in tandem.

What is necessary is that these powers be subject to robust safeguards in each case when they are invoked. Whatever form these safeguards take, it must be clear that someone has the authority and legitimacy to ensure that powers under Fica are exercised in a fair, proportionate, and rational manner.

In order to assuage fears about overreach in the application of Fica, we suggest that the Minister for Home Affairs provide concrete examples of situations when Fica can or cannot be used.

The bottom-line is that the more power that is vested in and at the disposal of the authorities, the more they must be robustly balanced by meaningful checks and balances. The government must provide an unequivocal guarantee that these checks and balances are enshrined in the law.

About the authors: Eugene K B Tan is an Associate Professor of Law at the Singapore Management University (SMU). Benjamin Joshua Ong is an Assistant Professor of Law at SMU.