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# Of facts and falsehoods

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Examining the proposed online falsehoods law. **By Eugene K B Tan**

VERY few, if any, Singapore laws attract global attention. One exception is the Protection from Online Falsehoods and Manipulation Bill (POFMB), which has been severely criticised locally and abroad. Parliament will debate POFMB next week.

In the face of the virality and virility of harmful falsehoods, POFMB represents a determined and robust response to combating them and their deleterious effects on society.

Critics, however, argue that the proposed law will have a chilling effect on public discourse, suppress academic freedom, curtail legitimate journalism and commentary, and curb dissent. These concerns are legitimate but much of the criticism, however, is misplaced and perhaps exaggerated.

The issue is not whether to regulate harmful online speech and expression. It would be irresponsible of governments not to do anything or to respond inadequately to the collective challenge. Instead, it is how to regulate such speech and expression to ensure that a proper balance is struck between freedom of speech and keeping society safe from harmful speech.

There is nothing worthy or virtuous in deliberate falsehoods designed to undermine society. Such irresponsible speech subverts the fundamental purpose of free speech. On the other hand, responsible speech enriches free speech.

Therefore, there is no basis, in principle or in law, to justify equal protection for both types of speech. In my view, POFMB strikes an even-handed approach towards protecting responsible speech and coming down in a no-nonsense way on false speech that is against the public interest.

At its core, POFMB's premise is that free and responsible speech is a vital prerequisite and necessary for a well-functioning democracy and to combat falsehoods. It recognises that no law can legislate for people to believe one narrative over another. It is an exercise in futility for any government to attempt to compel people to believe one way or the other.

### POFMB's unique features

In this regard, POFMB has the following distinctive features that critics have not given adequate consideration to.

First, the law targets falsehoods, not opinion, parody, satire and criticism. Additionally, the law is engaged only when the conjunctive requirements of (1) a false statement of fact has been made and (2) that it is in the public interest to take action have been met. The law specifies clearly what public interest covers.

Second, POFMB provides a wider range of counter-measures to deal with harmful falsehoods. The POFMB is not designed to be censorious except in egregious cases where a take-down order is issued to deal with a clear and present danger to life and property.

Corrections will be the dominant regulatory response wherein the authorities direct that a statement of facts be placed alongside the alleged falsehood and they "travel together". Online platforms can be required to ensure that those who previously saw a falsehood also see the correction.

Reasons for the corrections will have to be provided upfront by the Minister. Further, by not removing the alleged false statement, the reader retains full autonomy to decide for herself how to treat the contested statement of facts.

Third, the bulk of the directions under POFMB are not criminal sanctions. The criminal process kicks in only when there is non-compliance with a direction issued by the authorities or when a person deliberately spreads falsehoods with a malicious intent.

Fourth, the authorities' discretionary powers under POFMB are not unfettered. Judicial oversight is provided in the law. An aggrieved party can challenge the executive's decision by way of an appeal or judicial review. The courts are the ultimate arbiter and can override the executive's decision.

A government's decision can be challenged on its merits or the manner in which the decision was made. In the former, an appellant is arguing that the government got it wrong that a statement is false. In judicial review, the court scrutinises how the impugned ministerial decision was made, such as whether the Minister took into account irrelevant considerations, made the decision in bad faith or in furtherance of an improper purpose.

The government has also given its commitment to an expedited and affordable process for legal challenges to the government's use of discretionary power.

Fifth, the law mandates the development of binding Codes of Practice to manage inauthentic online accounts and bots, promote digital advertising transparency, and de-prioritise falsehoods. Having the industry and the government work together to develop acceptable standards and practices emphasises the centrality of a multi-stakeholder approach in effectively combating deliberate online falsehoods.

To be sure, POFMB is not perfect. Definitions of what is a falsehood and what sort of misleading statements fall within the law's purview need to be clarified during the parliamentary debate. Judges can also be afforded more discretion in granting the appropriate remedies where a legal challenge is successful.

**POFMB must be applied sensitively so that it does not undermine but instead enhances Singaporeans' resilience, bottom-up energy and drive required to fight deliberate harmful falsehoods.**

There is also concern that the POFMB's definition of public interest is unduly broad, extending to undermining public trust and confidence in the government. (However, when considered against the nefarious objectives of a deliberate disinformation campaign, public interest must certainly extend to protecting the public good.)

As I see it, the ministerial discretionary power is subject to three different checks. First, individual Ministers are accountable to Parliament for orders made. Secondly, a Minister will have to ensure his decision passes legal muster in an appeal or judicial review. Thirdly, how the government applies the law will also be subjected to the court of public opinion. A price will be paid by the government of the day if the law is misused, for instance, to clamp down on dissent.

### POFMB as pathfinder

What has perhaps been downplayed is that POFMB makes the novel and bold step of treating tech companies not as intermediaries but in a position akin to publishers. They will be accountable for harmful falsehoods on their platforms. This can facilitate the improvement of quality of information and compel tech companies to be more vigilant in monitoring harmful content on their platforms.

POFMB addresses how these platforms can operate without undermining societies. It is precisely because of the popularity and the ability of social media platforms to connect at a scale never previously possible that we should also be alive to the harms they enable.

Globally, countries are struggling to regulate harmful falsehoods as recent incidents in Sri Lanka and Myanmar demonstrate. In the United Kingdom, the just-published "Online Harms" White Paper recommends heavy sanctions for serious harms, or for repeat offenders, including individual executives of tech companies being held criminally liable.

The evolving regulatory trend is that social media companies should have a legal responsibility to take decisive and swift action against harmful content hosted on their platforms. If more countries adopt such a stance, this harmonisation, if not convergence, of laws and practice discomforts the social media platforms most.

Ultimately, POFMB is a necessary but insufficient tool against the scourge of "fake news". The effort to safeguard society must not result in a citizenry that is unable to decide and discern for itself. POFMB must be applied sensitively so that it does not undermine but instead enhances Singaporeans' resilience, bottom-up energy and drive required to fight deliberate harmful falsehoods.

After all, governments do not defeat harmful falsehoods and manipulation; it is people who do and must form the vanguard.

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