SUPPRESSING FAKE NEWS OR CHILLING FREE SPEECH: ARE THE REGULATORY REGIMES OF MALAYSIA AND SINGAPORE COMPATIBLE WITH INTERNATIONAL LAW?

Raphael Kok Chi Ren*

Abstract

In this modern digital era, information can go viral across all corners of the world in the blink of an eye. Since 2018, Malaysia and Singapore have taken great leaps to combat the proliferation of misinformation or disinformation – colloquially known as 'fake news'. In Malaysia, the short-lived *Anti-Fake News Act 2018* lasted barely over a year and a half between April 2018 and December 2019. Nevertheless, despite its repeal, authorities remain vigilant in cracking down fake news through existing laws, particularly the *Communications and Multimedia Act 1998*. In Singapore, the *Protection from Online Falsehoods and Manipulation Act 2019* was passed in October 2019. Since then, under this regime, regulators have swiftly issued 'take down' and 'correction' notices to authors and intermediaries (*e.g.* Facebook). This article aims to examine the compatibility of the enforcement measures taken by both neighbouring governments with international norms on human rights. Does fake news have any intrinsic value worth protecting under the umbrella of free speech? To what extent do such measures meet the international standards of legality, necessity and proportionality? Is there a risk of extraterritorial overreach? Should intermediaries assume the role as the 'arbiter of truth' and filter user content? Ultimately, the war against fake news is a delicate balancing act to protect society from dangerous lies without 'chilling' people into silence.

Keywords: Fake news, freedom of expression, proportionality, POFMA.

I INTRODUCTION

Mark Twain once said: 'A lie can run halfway around the world before the truth has got its boots on'.

Indeed, the proliferation of 'fake news' in digital communications has stirred mischief in multifarious ways – from manipulation of democratic process (*e.g.* Brexit)[1] to mass

---

* LLB (Hons) (UM), Advocate & Solicitor (High Court of Malaya) (Non-Practising), Moot Trainer, Faculty of Law, University of Malaya, Kuala Lumpur.
This article was inspired by the stellar performances of the University of Malaya teams in the Price Media Law Moot Court Competition of 2018, 2019 and 2020. The author is deeply indebted and grateful to Ms Jessie Lee Suan Cui, Ms Esther Hong Hui Jun and Ms Saradha Lakshmi for sharing their insights and research materials.

[1] Digital, Culture, Media and Sports Committee, *Disinformation and 'fake news': Final Report* (House of Commons of the United Kingdom, Eight Report, Session 2017-2019) 70 [243] ('*UK Disinformation Final Report 2019*').

panic in health emergencies (*e.g.* COVID-19)[2] and lethal mob lynching (*e.g.* unfounded rumours of child abduction in rural India).[3] People from all corners of the world are equally vulnerable to its insidious influence.

There is growing international consensus on the need to formulate new laws to combat online dissemination of fake news, even amongst liberal democracies worldwide including the United Kingdom,[4] Germany[5] and France.[6] The question is no longer whether fake news is permissible, but *how fake news ought to be regulated*.

At the outset, it must be emphasised that this article does *not* aim to interpret Malaysian and Singaporean legislation within their constitutional framework at a *horizontal level*. Instead, this article examines whether the enforcement of such laws is compatible with current international norms on human rights at a *vertical level*. To this end, the primary jurisprudence will be derived from major common law jurisdictions (*i.e.* UK, US and Canada), and international tribunals (*i.e.* the Human Rights Committee (*HRC*) and the European Court of Human Rights (*ECtHR*)).

The article is broadly divided into four parts: the socio-political backdrop and statutory framework (parts II-III); the jurisprudential theories on free speech and false speech (parts IV-V); the international standards of legality, necessity, proportionality and extra-territoriality (parts VI-VII); and the role of online intermediaries (part VIII).

II CHRONOLOGY OF EVENTS

Since 2018, the push to enact fresh legislation to combat fake news in Malaysia and Singapore escalated concurrently – almost as if both neighbours were racing to reach that distinction first. In Malaysia, legislation took form in the *Anti-Fake News Act 2018* (*AFNA*).[7] Singapore's version – more subtly and elegantly titled – was the *Protection from Online Falsehoods and Manipulation Act 2019* (*POFMA*).[8]

The key milestones from January 2018 to February 2020 are captured in the chronology below:

---

2 Rory Cellan-Jones, 'Coronavirus: 'Fake news is spreading fast', *BBC News* (online, 26 February 2020) <https://www.bbc.com/news/technology-51646309>.

3 Balla Satish, 'How WhatsApp helped turn an Indian village into a lynch mob' *BBC News* (online, 19 July 2018) <https://www.bbc.com/news/world-asia-india-44856910>.

4 Digital, Culture, Media and Sports Committee, 'Disinformation and 'fake news'' *House of Commons of the United Kingdom*, <https://www.parliament.uk/business/committees/committees-a-z/commons-select/digital-culture-media-and-sport-committee/news/fake-news-report-published-17-19/>. The House of Commons inquiry on Disinformation and 'fake news' commenced in September 2017. The Select Committee held 23 oral evidence sessions, including one in Washington, received more than 170 written submissions, and heard evidence from 73 individuals. The final report was published in 18 February 2019. No new law has been passed to date.

5 UK Disinformation Final Report 2019 (n 1) 12 [24]. In January 2018, the German government passed the Network Enforcement Act (commonly known as NetzDG) which allows the issuance of orders against Internet intermediaries to remove unlawful online content (especially hate speech) within 24 hours.

6 Ibid 13 [25]. In November 2018, the French government passed a law which allows judges to order the immediate removal of online articles deemed as disinformation during election campaigns.

7 *Anti Fake News Act 2018* (Act 803) (Malaysia) ('*AFNA*').

8 *Protection from Online Falsehoods and Manipulation Act 2019* (Singapore, No. 18 of 2019) ('*POFMA*').

Malaysia	**Date**	**Singapore**
	5 January 2018	Green Paper on '*Deliberate Online Falsehoods: Challenges and Implications*' presented by the Ministry of Communications and Information and the Ministry of Law to Parliament.[9] Select Committee appointed by Parliament to receive representations, hold public hearings and report its findings.[10]
Anti-Fake News Bill (*AFN Bill*) tabled by former ruling coalition party *Barisan Nasional* (*BN*), before the *Dewan Rakyat* (lower house of Parliament).	26 March 2018	
	14–29 March 2018	Select Committee conducts public hearings over 8 days (consisting of Ministers, academics, experts, and representatives from NGOs and Big Tech such as Facebook and Google).[11]
AFN Bill was passed by the *Dewan Rakyat* after a two day debate.[12]	2 April 2018	
AFN Bill passed by the *Dewan Negara* (upper house of Parliament).[13]	3 April 2018	
AFNA published in the *Gazette* and came into force.	11 April 2018	
First conviction under AFNA (Danish national pleaded guilty for falsely accusing the police for slow response to a distress call of a shooting via a YouTube video).[14]	28 April 2018	
Coalition party *Pakatan Harapan* (*PH*) won the general elections and entered into government.	9 May 2018	
Bill to repeal AFNA tabled by the PH government, and passed by the *Dewan Rakyat* after a three hour debate.[15]	16 August 2018	

9 Ministry of Communications and Information and the Ministry of Law, Parliament of Singapore, *Deliberate Online Falsehoods: Challenges and Implications* (Misc. 10 of 2018, 5 January 2018).

10 Select Committee on Deliberate Online Falsehoods, 'Causes, Consequences and Countermeasures' *Parliament of Singapore* <https://www.parliament.gov.sg/sconlinefalsehoods>.

11 Seow Bei Yi, '7 themes from 8 days of public hearings on deliberate online falsehoods' *The Straits T*imes (online, 29 March 2018) <https://www.straitstimes.com/politics/7-themes-from-8-days-of-public-hearings-on-deliberate-online-falsehoods>.

12 Mohd Anwar Patho Rohman, 'Anti-Fake News Bill passed in Parliament' *New Straits Times* (online, 2 April 2018) <https://www.nst.com.my/news/nation/2018/04/352180/anti-fake-news-bill-passed-parliament>.

13 Bernama, 'Dewan Negara passes Anti-Fake News Bill 2018' *Free Malaysia Today* (online, 3 April 2018) <https://www.freemalaysiatoday.com/category/nation/2018/04/03/dewan-negara-passes-anti-fake-news-bill-2018/>.

14 Reuters Kuala Lumpur, 'First person convicted under Malaysia's fake news law' *The Guardian* (online, 30 April 2018) <https://www.theguardian.com/world/2018/apr/30/first-person-convicted-under-malaysias-fake-news-law>.

15 Martin Carvalho, 'Anti-Fake News Act repealed' *The Star* (online, 17 August 2018) <https://www.thestar.com.my/news/nation/2018/08/17/antifake-news-act-repealed-we-already-have-existing-laws-to-deal-with-this-issue-says-hanipa-maidin>.

Malaysia	**Date**	**Singapore**
The *Dewan Negara* rejected the bill to repeal AFNA[16] (triggering a six month cooling period before a similar bill could be presented).	12 October 2018	
	12 September 2018	Select Committee submitted a 317-page report of 22 recommendations.[17]
	1 April 2019	First reading of the Protection from Online Falsehoods and Manipulation Bill (*POFM Bill*) in Parliament.[18]
Former Prime Minister Mahathir Mohamad (*Mahathir*) confirmed decision to repeal AFNA.[19]	9 April 2019	Prime Minister Lee Hsien Loong supported the passing of POFM Bill.[20]
	7 May 2019	Second Reading Speech on POFM Bill by Minister of Law.[21]
	1 October 2019	POFMA published in the *Gazette* and came into force.[22]
Mahathir hinted that AFNA may be amended instead of repealed.[23]	4 October 2019	
Second bill to repeal AFNA was tabled by the PH government, and passed by the *Dewan Rakyat*.[24]	10 October 2019	

---

16 Bernama, 'Dewan Negara rejects Bill to repeal Anti-Fake News Act' *The Star* (online, 12 September 2018) <https://www.thestar.com.my/news/nation/2018/09/12/dewan-negara-rejects-bill-to-repeal-anti-fake-news-act>.

17 Royston Sim, 'Select Committee releases 22 proposals to combat fake news' *The Straits Times* (online, 21 September 2018) <https://www.straitstimes.com/singapore/select-committee-releases-22-proposals-to-combat-fake-news>.

18 Protection from Online Falsehoods and Manipulation Bill (Singapore, Bill No. 10/2019, 1 April 2019) <https://www.parliament.gov.sg/docs/default-source/default-document-library/protection-from-online-falsehoods-and-manipulation-bill10-2019.pdf> .

19 Mazwin Nik Anis, 'Dr M: Malaysia stands firm over repeal of Anti-Fake News Act' *The Star* (online, 9 April 2019) <https://www.thestar.com.my/news/nation/2019/04/09/dr-m-malaysia-stands-firm-over-repeal-of-anti-fake-news-act>.

20 'Proposed anti-fake news law 'works for Singapore' despite criticism: PM Lee' *Channel News Asia* (online, 9 April 2019) <https://www.channelnewsasia.com/news/singapore/proposed-anti-fake-news-law-works-for-singapore-pm-lee-11425686>.

21 K Shanmugam, 'Second Reading Speech by Minister of Law, K Shanmugam on the Protection from Online Falsehoods and Manipulation Bill' (Speech, Parliament of Singapore, 7 May 2019) <https://www.mlaw.gov.sg/news/parliamentary-speeches/second-reading-speech-by-minister-for-law-k-shanmugam-on-the-protection-from-online-falsehoods-and-manipulation-bill> ('*Singapore Second Reading for POFMA*'); S Iswaran, Second Reading for Protection from Online Falsehoods and Manipulation Bill (Speech, Parliament of Singapore, 8 May 2019) <https://www.mci.gov.sg/pressroom/news-and-stories/pressroom/2019/5/speech-by-mr-s-iswaran-during-the-second-reading-for-pofmb-on-8-may-2019>.

22 Tham Yuen-C, 'Singapore's fake news law to come into effect Oct 2' *The Straits Times* (online, 1 October 2019) <https://www.straitstimes.com/politics/fake-news-law-to-come-into-effect-oct-2>.

23 Arjuna Chandran Shankar, 'Dr Mahathir: Malaysia's Anti-Fake News Act may be amended' *The Edge Markets* (online, 4 October 2019) <https://theedgemarkets.com/article/dr-mahathir-malaysias-antifake-news-act-may-be-amended>.

24 'Anti-Fake News Act repealed again' *The Star* (online, 10 October 2019) <https://www.thestar.com.my/news/nation/2019/10/10/anti-fake-news-act-repealed-again>.

Malaysia	**Date**	**Singapore**
Second bill to repeal AFNA passed by the *Dewan Negara.*[25]	19 December 2019	
	24 January 2020	*Lawyers for Liberty*, a Malaysian NGO, sued in the Malaysian High Court to invalidate a POFMA correction order.[26]
Four persons detained for posting false information on the COVID-19 virus on Facebook/Twitter under s 233 of the *Communications and Multimedia Act 1988.*[27]	25-27 January 2020	
	28 January 2020	*SPH Magazine* complied with POFMA correction order (post alleging a man in Singapore died from the COVID-19 virus)[28]
Journalist charged over Facebook posts concerning COVID-19 under s 505(b) of the *Penal Code*[29]	5 February 2020	First High Court decision on POFMA (*Singapore Democratic Party's* suit to set aside a correction order)[30]
	18 February 2020	Facebook blocked access to *States Times Review's* page from Singaporean users due to non-compliance of order (on COVID-19)[31]
	19 February 2020	Second High Court decision on POFMA (*The Online Citizen's* suit to set aside correction order)[32]
Ministers reiterate commitment to 'crackdown' on fake news under existing laws[33]	22 February 2020	

[25] 'Finally, Dewan Negara approves repeal of Anti-Fake News Act' *The Star* (online, 19 December 2019) <https://www.thestar.com.my/news/nation/2019/12/19/finally-dewan-negara-approves-repeal-of-anti-fake-news-act>.

[26] Nadirah H. Rodzi, 'Malaysian rights group sues Minister K Shanmugam in KL over Pofma correction order' *The Straits Times* (online, 24 January 2020) <https://www.straitstimes.com/asia/se-asia/malaysian-rights-group-sues-minister-k-shanmugam-in-kl-over-pofma-correction-order>.

[27] Malaysian Communications and Multimedia Commission, 'Four Individuals Detained For Spreading Fake News On The Novel Coronavirus (2019-nCov) Outbreak' (Press Release, 29 January 2020) <https://www.mcmc.gov.my/en/media/press-releases/press-release-four-individuals-detained-for-sprea>.

[28] 'SPH Magazine obeys Pofma correction order' *The Straits Times* (online, 28 January 2020) <https://www.straitstimes.com/singapore/sph-magazines-obeys-pofma-correction-order>.

[29] Zurairi Ar, 'Award-winning journalist charged with inciting mischief over posts on Wuhan virus' *Malay Mail* (online, 5 February 2020) <https://www.malaymail.com/news/malaysia/2020/02/05/award-winning-journalist-charged-with-public-mischief-over-posts-on-Wuhan/1834689>.

[30] Tham Yuen-C, 'First court challenge against fake news law fails; High Court dismisses SDP's appeal' *The Straits Times* (online, 5 February 2020) <https://www.straitstimes.com/singapore/first-court-challenge-against-fake-news-law-fails-high-court-dismisses-sdps-appeal>.

[31] Tham Yuen-C, 'Facebook blocks access in Singapore to States Times Review page for breaching Pofma' *The Straits Times* (online, 18 February 2020) <https://www.straitstimes.com/politics/facebook-blocks-access-to-states-times-review-page>.

[32] Tham Yuen-C, 'Judge: Onus not on Govt to prove statement is false in Pofma cases' *The Straits Times* (online, 20 February 2020) <https://www.straitstimes.com/politics/judge-onus-not-on-govt-to-prove-statement-is-false-in-pofma-cases>.

[33] Mazwin Nik Anis, 'No revival of fake news law amid crackdown' *The Star* (online, 22 February 2020) <https://www.thestar.com.my/news/nation/2020/02/22/no-revival-of-fake-news-law-amid-crackdown#cxrecs_s>.

In Malaysia, the passing of the AFNA was rushed without much scrutiny and appears to have been largely politically motivated to stifle dissent leading up to the 2018 General Elections. Whilst the PH government successfully repealed AFNA after their historic electoral victory over BN, politicians on both sides of the aisle still remain ambivalent on the need to 'crackdown' on fake news. Hence, human rights proponents should not be too quick to celebrate over the quick death of AFNA just yet.

In Singapore, the POFMA was enacted after much critical deliberation. Once enacted, the government wasted little time in enforcing POFMA against political actors, online media and NGOs. In most cases, authors have been ordered to correct their posts. More alarmingly, Internet intermediaries have also come within the government's crosshairs. Hence, human rights proponents are right to be wary of governmental overreach and abuse.

III STATUTORY FRAMEWORK

There is nothing novel in the criminalization of false statements. Traditional prohibitions include forgery,[34] perjury (lying on oath),[35] and defamation.[36] However, such prohibitions have a rather narrow application, except perhaps for defamation (whereby its criminalization remain highly contentious).[37] Indeed, the limited scope of such prohibitions is often cited as the rationale why new legislation against fake news is necessary.[38]

The term 'fake news' attained wide colloquial usage only recently in 2016.[39] The term lacks any solid legal definition, and can refer to a wide range of statements.[40] Hence, legal purists may consider the term a misnomer, and understandably, prefer the terms 'disinformation' or 'misinformation'.[41] Nevertheless, as this article aims to examine the concept of 'fake news' on the broadest possible spectrum, such term will be retained.

---

34 *Penal Code (Revised 1997)* (Act A327) (Malaysia) s 463-471 ('*PC*').

35 Ibid ss 191-193.

36 Ibid ss 499-500.

37 Human Rights Committee, *General Comment no. 34, Article 19: Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [47] (*'General Comment No. 34'*); *Kankanamge v Sri Lanka* (Human Rights Committee, Communication No. 909/2000, UN Doc CCPR/C/81/D/909/2000, 27 July 2004) [9.4].

38 Seow Bei Yi, '7 themes from 8 days of public hearings on deliberate online falsehoods' *The Straits Times* (online, 29 March 2018) <https://www.straitstimes.com/politics/7-themes-from-8-days-of-public-hearings-on-deliberate-online-falsehoods>.

39 Digital, Culture, Media and Sports Committee, *Disinformation and 'fake news': Interim Report* (House of Commons of the United Kingdom Fifth Report, Session 2017-2019) 7 [11]. <https://publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/363/363.pdf>.

40 Ibid 7 [11]. False statements include: (i) **fabricated content**: completely false content; (ii) **manipulated content**: distortion of genuine information or imagery with sensationalist headline (clickbait); (iii) **imposter content**: impersonation of genuine sources *e.g.* established news agency; (iv) **misleading content**: misleading use of information *e.g.* presenting comment as fact; (v) **false context of connection**: factually accurate content that is shared with false contextual information *e.g.* when a headline of an article does not reflect the content; (vi) **satire and parody**: presenting humorous but false stores as if they are true.

41 UK Disinformation Final Report 2019 (n 1) 10, [11]-[12].

A *Malaysia*

In Malaysia, three separate legislation merit consideration.

1. *Anti-Fake News Act 2018*

The lack of subtlety in AFNA's title foreshadows the lack of substance in its text.

The preambular purpose of the AFNA simply states: 'An Act to deal with fake news and related matters'. 'Fake news' is broadly defined as 'any news, information, data and reports, which is or are wholly or partly false, whether in the form of features, visuals or audio recordings or in any other form capable of suggesting words or ideas'.[42]

The primary offence under AFNA states:

> Any person who, by any means, maliciously creates, offers, publishes, prints, distributes, circulates or disseminates any fake news or publication containing fake news commits an offence...[43]

Secondary offences include provision of financial assistance[44] and failure to remove publication within one's possession, custody and control.[45]

Any person can apply to Court *ex parte* for an order of removal of publication containing fake news.[46] Concomitantly, the person subject to a removal order may appeal to the Court to set aside such order.[47]

In total, the AFNA contains 14 sections (plus two schedules). Its official version runs 15 pages long. Suffice to say, not many scholars would hold the short-lived AFNA in high esteem in terms of draftsmanship.

2. *Printing Presses and Publications Act 1984*

The *Printing Presses and Publications Act 1984* (*PPPA*) regulates the print media industry in Malaysia, including newspapers, books, magazines, comics and any periodic publication in the form of print or audio recording.[48]

Principally, PPPA stipulates certain regulatory-based offences, such as the printing or publication of a newspaper without permit[49] and possession, printing or publication of a prohibited publication by Ministerial order.[50]

More pertinently, s 8A(1) of PPPA states: 'Where in any publication there is maliciously published any false news, the printer, publisher, editor and the writer thereof shall be guilty of an offence...'[51]

---

[42] *AFNA* (n 7) s 2.
[43] Ibid s 4(1).
[44] Ibid s 5.
[45] Ibid s 6(1)-(2).
[46] Ibid s 7(1).
[47] Ibid s 8(1).
[48] *Printing Presses and Publications Act 1984* (Act 301) (Malaysia), Preamble and s 2 ('*PPPA*').
[49] Ibid s 5(1).
[50] Ibid ss 7(1), 8(1)-(2).
[51] Ibid s 8A(1).

This is a ‘catch-all’ provision applicable to all publications in general,[52] including pamphlets circulated at a political seminar.[53] The *mens rea* requirement is malice.[54]

3. *Communications and Multimedia Act 1998*

The *Communications and Multimedia Act 1998* (*CMA*) is a comprehensive code governing the communications and multimedia industries[55] under the aegis of the Malaysian Communications and Multimedia Commission (*MCMC*).[56]

CMA provides an array of minor ‘technical’ offences, such as operating network services without a license,[57] using equipment to hinder network operability,[58] poor dealings with consumers,[59] and fraudulent use of network facilities or services.[60] More pertinently, CMA stipulates two ‘content-based’ offences which targets ‘falsity’.

Section 211(1) of CMA states:

> No content applications service provider… shall provide content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person.

Section 233(1)(a) of CMA states:

> A person who… (i) makes, creates or solicits; and (ii) initiates the transmission of, any comment, request, suggestion or other communication which is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person… commits an offence.

Unlike the AFNA, falsity is not a requisite element. Such offences are analogous to the civil tort of intentional infliction of mental shock to another person[61] (which may, in exceptional cases, extend to truthful statements).[62]

---

52 *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566, 573 (Edgar Joseph Jr SCJ) (Supreme Court) (‘*Pung Chen Choon*’).

53 *Lim Guan Eng v Public Prosecutor* [2000] 2 MLJ 577, 594 (Zakaria Yatim FCJ) (Federal Court) (‘*Lim Guan Eng*’).

54 *PPPA* (n 48) s 8A(2): Malice is ‘presumed in default of evidence showing that, prior to publication, the accused took reasonable steps to verify the truth of the news’. In *Pung Cheng Choon* (n 52), the Supreme Court clarified that such ‘reversal of onus’ is ‘designed to assist the prosecution in establishing ‘a case to answer’ upon proving that the impugned publication is false and ‘does not relieve the court of the duty of having to be satisfied, at the close of the case for the defence, that the element of malice… has been established beyond all reasonable doubt’*:* at 577.

55 *Communications and Multimedia Act 1998* (Act 588) (Malaysia), Preamble (‘*CMA*’).

56 Ibid s 7.

57 Ibid s 126.

58 Ibid s 182.

59 Ibid s 188.

60 Ibid s 232.

61 *Wilkinson v Downton* [1897] 2 QB 57 (Wright J) (High Court).

62 *OPO (A Child) v Rhodes* [2015] UKHL 32, [107] (Lord Neuberger) (Lord Wilson agreeing) (Supreme Court). The majority opinion by Baroness Hale and Lord Toulson (Lord Clarke and Lord Wilson agreeing) did not rule on whether ‘falsity’ is a requisite element: at [77] (‘The question whether (and, if so, in what circumstances) liability under *Wilkinson v Downton* [1897] 2 QB 57 might arise from words which are not deceptive or

4. *Penal Code (Revised 1997)*

Section 505(b) of the *Penal Code (Revised 1997)* states:

> Whoever makes, publishes or circulates any statement, rumour or report… with intent to cause… fear or alarm to the public, or to any section of the public where by any person may be induced to commit an offence against the State or against the public tranquility… shall be punished with imprisonment which may extend to two years or with fine or with both.[63]

Unlike the AFNA, falsity is not a requisite element. Further, proof of intent to cause alarm and fear *to the public* is a rather high *mens rea* threshold (as opposed to ss 211(1) and 233(1) of CMA which merely require intent to harm *another person*).

This renders s 505(b) more analogous to the crime of incitement to violence[64] – the classic example being shouting 'Fire!' in a crowded theatre.[65]

B *Singapore*

POFMA is the Singaporean government's main instrument to combat fake news. In total, the POFMA contains 62 sections and a single schedule, and spans over 67 pages. It is reinforced by two other subsidiary legislation: namely, the POFMA Regulations (governing Internet intermediaries)[66] and POFMA Rules of Court (concerning judicial proceedings of appeals lodged against Ministerial orders).[67] The government even has a dedicated website with user-friendly resources, such as brochures and FAQs.[68]

In stark contrast to the minimalistic AFNA, the POFMA's preambular purpose is more verbose:

> An Act to prevent the electronic communication in Singapore of false statements of fact, to suppress support for and counteract the effects of such communication, to safeguard against the use of online accounts for such communication and for information manipulation, to enable measures to be taken to enhance transparency of online political advertisements, and for related matters.[69]

---

threatening, but are abusive, has not so far arisen and does not arise for consideration in this case.'). The Court of Appeal judgment was reversed on the separate ground of mental element: at [82]-[90].

63 PC (n 34) s 505(b) (emphasis added).

64 *Schenck v United States* 249 US 47, 52 (Holmes J) (1919) (Supreme Court) ('The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils which Congress has a right to prevent') (emphasis added)

65 *Brandenburg v Ohio* 395 US 444, 447 (1969) (Supreme Court) ('...the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to *inciting or producing imminent lawless action* and is likely to incite or produce such action.') (emphasis added).

66 *Protection From Online Falsehoods and Manipulation Regulations 2019* (Singapore, S 662 2019).

67 *Supreme Court of Judicature (Protection From Online Falsehoods and Manipulation) Rules 2019* (Singapore, S 665 2019).

68 See <https://www.pofmaoffice.gov.sg/>.

69 See also *POFMA* (n 8) s 5.

The POFMA's extensive glossary of terms itself reveals its wide ambitious scope (*e.g.* bot, inauthentic online account, Internet intermediary, public interest).[70]

Section 7(1) being the main operative provision reads:

> 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 —
> (i) be prejudicial to the security of Singapore…
> (ii) be prejudicial to public health, public safety, public tranquility or public finances;
> (iii) be prejudicial to the friendly relations of Singapore with other countries;
> (iv) influence the outcome of an election to the office of President, a general election of Members of Parliament… or a referendum;
> (v) incite feelings of enmity, hatred or ill-will between different groups of persons; or
> (vi) diminish 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....[71]

Secondary offences include making or altering bots[72] and provision of services[73] in view of communicating false statements, and non-compliance of directions.[74]

Several types of orders can be issued against an individual pursuant to Ministerial instructions:

(a) Correction Direction;[75]
(b) Stop Communication Direction;[76]
(c) Access Blocking Order (in the event of non-compliance of directions).[77]

Further, Internet intermediaries are subject to the following orders:

(a) Targeted Correction Direction;[78]
(b) Disabling Direction;[79]
(c) General Correction Direction;[80]
(d) Remedial Order (in the event of non-compliance of direction);[81]

---

70 Ibid ss 2-4.
71 The key terms 'false statement of fact' and 'communicate' are defined in ss 2(2) and 3(1) of POFMA respectively. The limbs of s (1)(b) is similar to the definition of 'public interest' in s 4 of POFMA.
72 *POFMA* (n 8) s 8.
73 Ibid s 9.
74 Ibid s 15, 27.
75 Ibid s 11.
76 Ibid s 12.
77 Ibid s 16.
78 Ibid s 21.
79 Ibid s 22.
80 Ibid s 23.
81 Ibid s 24(4).

(e) Access blocking order (in the event of non-compliance of direction or Remedial Order);[82]
(f) Account Restriction Order (in the event of coordinated inauthentic behaviour being carried out by bots or inauthentic accounts)[83]

An individual and intermediary may appeal to the High Court against such directions and orders.[84] The grounds of setting aside are three-fold:[85]
(a) the person did not communicate in Singapore the subject statement;
(b) the subject statement is not a statement of fact, or is a true statement of fact; or
(c) it is not technically possible to comply with the Direction.

Suffice to say, the POFMA is much more complex – both in form and substance – in comparison to the AFNA. To label the POFMA as an 'anti-fake news' law is to unfairly sell its draftsmanship short, as the POFMA is designed to combat all types of pernicious online threats, particularly hate speech.[86] It is hardly a spoiler to say that the POFMA invariably steals the spotlight in our analysis. After all, if AFNA is akin to a sledgehammer, POFMA would be a scalpel.

IV VALUES OF FREE SPEECH

The freedom of opinion and of expression is the foundation stone of a free and democratic society.[87] This precious freedom is well-enshrined in international human rights conventions (namely, the International Covenant on Civil and Political Rights (*ICCPR*),[88] the European Convention on Human Rights (*ECHR*),[89] the American Convention on Human Rights,[90] and the African Charter on Human and Peoples Rights),[91] as well as non-binding instruments (*i.e.* Universal Declaration of Human Rights,[92] Arab Charter on Human Rights,[93] and ASEAN Human Rights Declaration).[94]

---

82 Ibid s 28.
83 Ibid s 40(1).
84 Ibid ss 17(1), 29(1).
85 Ibid ss 17(5), 29(5).
86 See Chen Siyuan and Chen Wei, 'Singapore's Latest Efforts At Regulating Online Hate Speech: A Perspective From International Law And International Practices' (2019) Research Collection School of Law <https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=4879&context=sol_research>.
87 *General Comment No. 34* (n 37) [2].
88 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 19(1)-(2) ('*ICCPR*').
89 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950 (entered into force 3 September 1953), art 10 ('*ECHR*').
90 *American Convention on Human Rights*, opened for signature 22 November 1969 (entered into force 18 July 1978), art 11.
91 *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981 (entered into force 21 October 1986), art 9.
92 *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/RES/3/217 A (adopted 10 December 1948), art 19.
93 *Arab Charter on Human Rights*, opened for signature 15 September 1994 (entered into force 16 March 2008), art 26.
94 *ASEAN Human Rights Declaration* (adopted 18 November 2012), art 23.

Specifically, article 19(2) of the ICCPR states:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[95]

Domestically, the freedom of expression is a fundamental liberty guaranteed in constitutions worldwide, including in the US,[96] Canada,[97] Malaysia[98] and Singapore.[99]

Protection of free speech extends over all forms of expression and means of dissemination, including on the Internet.[100] Indeed, as consistently noted by the ECtHR, user-generated online content provides an unprecedented platform for the exercise of freedom of expression.[101]

There are three core rationales necessitating such protection: (1) democratic discourse, (2) truth-finding; and (3) self-fulfillment.[102] The first two rationales hold profound significance in the context of false statements.[103]

A *Democratic Discourse*

As highlighted by the Canadian Supreme Court in *Grant v Torstar*, the freedom of people to speak their minds promotes 'the proper functioning of democratic governance' and 'demands the condition of a virtually unobstructed access to and diffusion of ideas'.[104]

The role of the media as a 'public watchdog' has been affirmed by the ECtHR on numerous occasions, as affirmed by Lord Steyn in the seminal House of Lords case of *Reynolds v Times Newspaper*:

> …the pre-eminent role of the press in a state governed by the rule of law must not be forgotten. Although it must not overstep various bounds set, inter alia, for the prevention of disorder and the protection of the reputation of others, it is nevertheless incumbent on it to impart information and ideas on political questions and on other matters of public interest. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone

---

95 *ICCPR* (n 88) art 19(2).
96 *United States Constitution 1791*, amend I.
97 *Canadian Charter of Rights and Freedom 1982*, art 2(b).
98 *Federal Constitution* (Malaysia) art 10(1)(a) ('*Federal Constitution*').
99 *Constitution of the Republic of Singapore* (Singapore, 1999 reprint) art 14(1)(a) ('*Constitution of Singapore'*).
100 *General Comment No. 34* (n 37) [12].
101 *Delfi v Estonia* (European Court of Human Rights, Grand Chamber, Application no. 64569/09, 16 June 2015) [110] ('*Delfi v Estonia*'); *Ahmet Yıldırım Turkey* (European Court of Human Rights, Application no. 3111/10, 18 December 2012) [48].
102 *Grant v Torstar Corp* [2009] SCC 61, [47] (Supreme Court) ('*Grant v Torstar*').
103 Ibid [52].
104 Ibid [48], [52].

> to participate in the free political debate which is at the very core of the concept of a democratic society.[105]

Similar sentiments were shared by the Australian High Court in *Lange v Australian Broadcasting Corporation*:

> Accordingly, this court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion — the giving and receiving of information — about government and political matters.[106]

In short, freedom of expression not only safeguards the right of the speaker, but also serves the interests of the wider public in receiving information and ideas critical to keeping governmental powers in check.

B *Truth-Finding*

According to the Canadian Supreme Court in *Grant v Torstar*, the second rationale centers around the notion of 'marketplace of ideas':

> Second, the free exchange of ideas is an 'essential precondition of the search for truth'... This rationale, sometimes known as the 'marketplace of ideas', extends beyond the political domain to any area of debate where truth is sought through the exchange of information and ideas. Information is disseminated and propositions debated. In the course of debate, misconceptions and errors are exposed. What withstands testing emerges as truth.[107]

Moreover, the natural remedy to unravel falsehood is counter-speech, as aptly elucidated by Kennedy J's majority opinion of the US Supreme Court in *US v Alvarez*:

> The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth… The theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market'…. The First Amendment itself ensures the right to respond to speech we do not like, and for good reason… And suppression of speech by the government can make exposure of falsity more difficult, not less so…

---

105 [2001] 2 AC 127, 215-16 (House of Lords) ('*Reynolds v Times Newspapers*') (quoting the ECtHR in *Castells v Spain* (European Court of Human Rights, Application no. 11798, 23 April 1992) [43]).

106 (1997) 145 ALR 96, 116-17 (High Court).

107 *Grant v Torstar* (n 102) [49] (citations omitted).

> Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication...[108]

In the same case, Breyer J (Kagan J concurring) explained about the corollary notion of 'chilling effect':

> Moreover, as the Court has often said, the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart… Hence, the Court emphasizes mens rea requirements that provide 'breathing room' for more valuable speech by reducing an honest speaker's fear that he may accidentally incur liability for speaking.[109]

Further, it is unreasonable to expect individuals – or even the media – to fact-check every detail before publication, as acknowledged by the Canadian Supreme Court in *Grant v Torstar*:

> But to insist on court-established certainty in reporting on matters of public interest may have the effect of preventing communication of facts which a reasonable person would accept as reliable and which are relevant and important to public debate… Verification of the facts and reliability of the sources may lead a publisher to a reasonable certainty of their truth, but that is different from knowing that one will be able to prove their truth in a court of law, perhaps years later. This, in turn, may have a chilling effect on what is published. Information that is reliable and in the public's interest to know may never see the light of day.[110]

Simply put, strict prohibition on false statements impedes the discovery of truth in two ways. First, important truths often only emerge after being tested against falsehoods (marketplace of ideas). Second, many people may be deterred from publicly speaking out the truth on grey areas where the line between truth and falsity is blurred, especially in societies where trust in governmental authorities is low (chilling effect).

V DOES FREE SPEECH PROTECT FALSE SPEECH?

That said, we must not be blind towards the dangers posed by falsehoods, especially on social media. The very nature of the Internet – open and decentralized – allows unlawful speech to disseminate rapidly and widely, and persistently remain online.[111]

Indeed, some judges adopt the hard position that 'false speech' does not even qualify for protection. Lord Hobhouse in *Reynolds v Times Newspaper* opined:

---

108 567 US 709, 15-17 (2012) (Supreme Court) (citations omitted) (*'US v Alvarez'*)

109 Ibid 5 (Kennedy J).

110 *Grant v Torstar* (n 102) [53].

111 *Delfi v Estonia* (n 101) [110].

> The liberty to communicate (and receive) information has a similar place in a free society but it is important always to remember that it is the communication of information not misinformation which is the subject of this liberty. There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society, being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being misinformed. These are general propositions going far beyond the mere protection of reputations.[112]

On a similar note, Alito J, Scalia J and Thomas J in their joint dissenting opinions in *US v Alvarez* concluded that 'as a general matter false factual statements possess no intrinsic First Amendment value'[113] and 'merit no First Amendment protection in their own right'[114] after tracing the US Supreme Court's long chain of jurisprudence.[115]

Indeed, both Malaysian and Singaporean judges lean more heavily to this conservative school of thought. Both their apex courts in *Pung Chen Choon*[116] and *Review Publishing Co Ltd v Lee Tsien Loong*[117] have poured cold water over the notion

---

[112] *Reynolds v Times Newspaper* (n 105) 238-39.

[113] *US v Alvarez* (n 108) 8 (Alito J).

[114] Ibid 11 (Alito J).

[115] *Illinois v Telemarketing Associates*, 538 US 600, 612 (2003) ('Like other forms of public deception, fraudulent charitable solicitation is unprotected speech'); *BE&K Construction Co v NLRB*, 536 U.S 516, 531 (2002) ('[F]alse statements may be unprotected for their own sake'); *Hustler Magazine v Falwell* 485 US 46, 52 (1988) ('False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counter speech, however persuasive or effective'); *Keeton v Hustler Magazine*, 465 US 770, 776 (1984) ('There is no constitutional value in false statements of fact'); *Bill Johnson's Restaurants v NLRB*, 461 US 731, 743 (1983) ('[F]alse statements are not immunized by the First Amendment right to freedom of speech'); *Brown v Hartlage*, 456 US 45, 60 (1982) ('Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements'); *Herbert v Lando*, 441 US 153, 171 (1979) ('Spreading false information in and of itself carries no First Amendment credentials'); *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council*, 425 US 748, 771 (1976) ('Untruthful speech, commercial or otherwise, has never been protected for its own sake'); *Gertz v Robert Welch*, 418 US 323, 340 (1974) ('[T]he erroneous statement of fact is not worthy of constitutional protection'); *Time v Hill*, 385 US 374, 389 (1967) ('[T]he constitutional guarantees [of the First Amendment] can tolerate sanctions against calculated falsehood without significant impairment of their essential function'); *Garrison v Louisiana*, 379 US 64, 75 (1964) ('[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection').

[116] *Pung Chen Choon* (n 52) 572 ('Unlike the First Amendment to the Constitution of the United States of America, which makes express reference to the freedom of the press, the Constitution of Malaysia says nothing about the freedom of the press.'); at 576 ('It follows that the position of the press under our Constitution is not as free as the position of the press under the Indian Constitution and more so when compared to the position of the press in England or the United States of America.') (Edgar Joseph Jr SCJ).

[117] [2009] SGCA 46, [227] ('In contrast, we do not have a law directing the courts to have special regard, where journalistic materials are concerned, to the extent to which it is or would be in the public interest for the materials in question to be published... Furthermore, as counsel for the Respondents pointed out to us, in our political context, the notion that "[t]he press discharges vital functions as a watchdog" is not accepted. The media has no special role beyond reporting the news and giving its views on matters of public interest fairly and accurately.') (citations omitted) (Chan Sek Keong CJ) ('*Review Publishing*').

of the freedom of press. Lord Hobhouse's *dictum* has been cited with approval by the Singaporean courts on numerous occasions.[118]

In *Review Publishing,* the Singaporean Court of Appeal drew a clear line between statements of unverifiable truth (protected speech) and false statements (unprotected speech):

> It seems to us that, while the competition of ideas in the marketplace can lead to advances in science and knowledge to the benefit of mankind (which would justify allowing the fullest scope for exercising freedom of speech), this applies largely in the sphere of statements relating to ideas or beliefs which cannot or have yet to be proved with scientific certainty to be either true or false (eg, the belief that socialism is superior to capitalism as a way of organising society, or that dinosaurs became extinct as a result of a large asteroid striking the earth). Where there exist divergent ideas or beliefs whose truth or falsity cannot or has yet to be determined with scientific certainty, it is usually the case that one of these ideas or beliefs will eventually come to be accepted by society as 'true' in the sense of being the most accurate or the most rational, with the others either being discarded or falling into disfavour… From this perspective, it is possible, and indeed necessary, for 'the competition of the market' to sieve out the idea or belief which society deems to be 'true' (ie, the most accurate or the most rational), and society derives value from this process.
>
> In contrast, it is questionable whether the marketplace of ideas rationale is applicable to false statements. Such statements are (by definition) inaccurate and society does not derive any value from their publication as 'there is no interest in being misinformed'…[119]

In the context of hate speech, the ECtHR regularly declares applications that do not fall within the protective umbrella of freedom of expression as inadmissible, such as anti-Semitism (denial of Holocaust)[120] and Islamophobia (poster linking all Muslims to grave acts of terrorism).[121] Should the issue of falsity similarly be tested at the *admissibility* stage?

As a matter of principle, such approach certainly attracts some interesting jurisprudential questions. How to draw the line between 'truth' and 'lie'? What if a long article contains both true and false statements? Who bears the burden of proof? At what point of time is the veracity of a statement to be judged – when the words were

---

[118] Ibid [284] (Chan Sek Keong CJ); *Lee Tsien Loong v Roy Ngerng Yi Ling* [2015] SGHC 320, [99] (Lee Seiu Kin J); *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 13, [35] (Belinda Ang J) ('*The Online Citizen v AG*').

[119] *Review Publishing* (n 117) [282]-[283] (Chan Sek Keong CJ) (citations omitted). The case revolved around a defamation civil suit by the Singaporean Prime Minister against the publisher, editor and author of a magazine article. One of the issues on appeal was the applicability of the *Reynolds* privilege.

[120] *Garaudy v France* (European Court of Human Rights, Application no. 65831/01, 24 July 2003).

[121] *Norwood v the United Kingdom* (European Court of Human Rights, Application no. 23131/03, 16 November 2004).

uttered by the speaker, received by the audience, or reviewed by the authorized arbiter (intermediary, regulator or court)?

However, these are the very same questions often considered by courts when determining the lawfulness of an impugned expression on the *merits*.[122] As a matter of practicality, to adopt such an approach merely brings forward such questions from the substantive 'merits' stage to the preliminary 'admissibility' stage.[123]

The better position is to assume that all forms of expression are *prima facie* lawful, and that any restriction must be justified. This is consistent with the HRC's constant caution that 'the relation between right and restriction and between norm and exception must not be reversed'.[124]

VI TEST OF LEGALITY, NECESSITY AND PROPORTIONALITY

The right to freedom of opinion is absolute.[125] However, the right to freedom of expression 'carries with it special duties and responsibilities' and 'may therefore be subject to certain restrictions'.[126]

It is well-settled under international human rights law that any restriction to freedom of expression must fulfil the three-part test of legality, necessity and proportionality. Such test is widely applied by the HRC,[127] ECtHR,[128] Inter-American Court of Human Rights[129] and African Court of Human Rights.[130]

Although both Malaysia and Singapore are not signatories to the ICCPR nor parties to any regional human rights courts, such test has arguably crystallised into customary international law by fulfilling the twin elements of *settled practice* by States and *opinio juris sive necessitatis* (the belief of States that such practice is obligatory).[131]

---

[122] See Part VI of this article below.

[123] Of course, this may have some significant procedural implications, such as shifting the burden of proof to the speaker to demonstrate that the statement was a lawful exercise of freedom of expression on a *prima facie* basis.

[124] *General Comment No. 34* (n 37) [21].

[125] *ICCPR* (n 88) art 19(1); *General Comment No. 34* (n 37) [9]-[10].

[126] *ICCPR* (n 88) art 19(2)-(3); *General Comment No. 34 (*n 37) [11].

[127] *Womah Mukong* v *Cameroon* (Human Rights Committee, Communication No 458/1991, UN Doc CCPR/C/51/D/458/1991, 21 July 1994) [9.7]; *Velichkin* v *Belarus* (Human Rights Committee, Communication No. 1022/2001, UN Doc CCPR/C/85/D/1022/2001, 12 September 2011) [7.3].

[128] *Handyside* v *the United Kingdom* (European Court of Human Rights, Application no. 5493/72, December 1976) [49]; *Ceylan* v *Turkey* (European Court of Human Rights, Grand Chamber, Application no. 23556/94, 8 July 1999) [24].

[129] *Carvajal* v *Colombia (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No. 352, 13 March 2018) [176]; *Herrera-Ulloa* v *Costa Rica* (*Preliminary Objections, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 107, 2 July 2004) [120].

[130] *Lohe Issa Konate* v *Burkina Faso* (African Court of Human Rights, Application no. 004/2013, 5 December 2014) [125]; *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement* v *The Republic of Burkina Faso* (African Court of Human Rights, Application no. 013/2011, 28 March 2014).

[131] *North Sea Continental Shelf* (*Germany v Denmark*; *Germany v Netherlands*) [1969] ICJ Rep 3, [71]; *Military and Paramilitary Activities in und against Nicaragua* (*Nicaragua v United States of America*) *(Merits)* [1986] ICJ Rep 14, [207].

In *Public Prosecutor v Yuneswaran a/l Ramaraj*, the Malaysian Court of Appeal explicitly referred to the ICCPR, and even acknowledged the usefulness of the ECtHR's jurisprudence in assisting the interpretation of domestic law.[132] However, the Singaporean courts remain trenchantly against importation of principles from such jurisprudence.[133]

Regardless, as highlighted at the outset, judicial reception of foreign principles to interpret domestic law at a *horizontal level* is not our focus here. Aside from the test of legality involving a 'light touch' on statutory interpretation (*i.e.* whether a regulatory measure falls within the ambit of its empowering law), there is no need to critically decipher the statutory framework of Malaysia and Singapore (*i.e.* whether such law is constitutional). After all, our top-down *vertical* analysis is less concerned about interpreting domestic law textually in abstract, but rather reviewing the compatibility of *measures* taken under such laws with international norms.[134]

The crux of our analysis is this – *to what extent do the enforcement measures taken by Malaysian and Singaporean authorities to suppress fake news conform with international human rights law?*

A *Legality*

The principle of legality requires restrictions to freedom of expression to be provided by law.[135] 'Law' also refers to the 'quality of the law'.[136] First, the law must be made accessible to the public (transparency).[137] Second, the law must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly,[138] and consequently, reasonably foresee its consequences (foreseeability).[139] Third, the law must be compatible with the rule of law by providing sufficient safeguards against arbitrariness and abuse (due process).[140]

---

[132] [2015] 6 MLJ 47, [43] (Court of Appeal). The Court of Appeal proceeded to examine the ECtHR's case law on prior notification in relation to the right to peaceful assembly.

[133] *Review Publishing* (n 117) [260]-[262] (Chan Sek Keong CJ); *Chee Siok Chin v Minister for Home Affairs* [2005] SGHC 216, [86]-[87] (V K Rajah J) (High Court) ('*Chee Siok Chin*').

[134] *Hertzberg v Finland* (Human Rights Committee, Communication No. R.14/61/1979, UN Doc CCPR/C/15/D/61/1979, 2 April 1982) [9.2]-[9.3]; *Faurisson v France* (Human Rights Committee, Communication No. 550/1993, UN Doc CCPR/C/58/D/550/1993, 8 November 1996) [9.3].

[135] *General Comment No. 34* (n 37) [43].

[136] *Delfi v Estonia* (n 101) [120]; *Gaweda v Poland* (European Court of Human Rights, Application no 26229/95, 14 March 2012) [39]; *Maestri v Italy* (European Court of Human Rights, Grand Chamber, Application no 39748/98, 17 February 2004) [30].

[137] *General Comment No. 34* (n 37) [25]; *Muller* v *Switzerland* (European Court of Human Rights, Application no. 10737/82, 24 May 1988) [29].

[138] *Delfi v Estonia* (n 101) [121].

[139] *General Comment No. 34* (n 37) [25]; *de Groot v the Netherlands* (Human Rights Committee, Communication No. 578/1994, UN Doc CCPR/C/54/D/578/1994, 14 July 1995) [4.3]; *Chauvy* v *France* (European Court of Human Rights, Application no. 64915/01, 29 June 2004) [43].

[140] *Vukota-Bojicì v Switzerland* (European Court of Human Rights, Application no. 61838/10, 18 October 2016) [66]-[68]; *Rotaru v Romania* (European Court of Human Rights, Grand Chamber, Application no. 28341/95, 4 May 2000) [59].

Further, this principle can be traced back to the classical maxim '*nullum crimen nulla poena sine lege*'.[141] Criminal statutes must be clearly defined, construed restrictively in favour of the accused, and not extended by way of analogy.[142]

The criminalization of false statements invariably raises three core issues: [1] how much information has been furnished to the public (transparency); [2] what amounts to 'falsity' (foreseeability); and [3] who bears the burden of proving 'falsity' (due process).

1. *Transparency in Legislative Process*

In Malaysia, the AFNA was passed into law with great haste. No public consultation was held and Parliamentary debate on the Act was minimal.

In contrast, the Singaporean government's efforts during the legislative process of POFMA was much more painstaking and time-consuming. A Parliamentary Select Committee was formed and public consultation went on for eight days. Much research was undertaken, and much ink was spilt in the supporting Ministerial reports.

On this count, Singapore has outdone Malaysia.

2. *Foreseeability of Falsity*

None of the Malaysian legislation, including AFNA, provide any test to ascertain the 'falsity' of statements.

In contrast, the POFMA is more helpful in elucidating what statements would be caught under its web. The definition of 'false statement' under s 2(2) has two limbs:
(a) a statement of fact is a statement which a reasonable person seeing, hearing or otherwise perceiving it would consider to be a representation of fact; and
(b) a statement is false if it is false or misleading, whether wholly or in part, and whether on its own or in the context in which it appears.

This evokes the perennial distinction between 'fact' and 'opinion' based on the law of defamation.[143] In the 2020 High Court case of *Singapore Democratic Party v Attorney-General*, Ang Cheng Hock J construed the Singaporean Minister of Law's reference to 'existing case law' on defamation during the Parliamentary reading of POFMA as alluding to the defence of fair comment, which weighs factors such as the content and context of publication.[144]

Moreover, the common law defence of qualified privilege or responsible journalism[145] may be instructive in distinguishing 'truth' from 'fiction' for the purpose of attaching

---

141 *Kimel v Argentina (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No. 177, 2 May 2008) [63]; *Usón Ramírez* v *Venezuela (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No. 207, 20 November 2009) [55].

142 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002), art 22(1); *Kokkinakis* v *Greece* (European Court of Human Rights, Application no.14307/88, 25 May 1993) [52].

143 *Singapore Second Reading for POFMA* (n 21) [265].

144 [2020] SGHC 25, [28]-[29] (High Court) ('*Singapore Democratic Party v AG*').

145 *Seaga v Harper* [2008] UKPC 9, [8] (Lord Carswell) (Privy Council); *Jameel v Wall Street Journal* [2006] UKHL 44, [32] (Lord Bingham) (House of Lords) ('*Jameel v WSJ*'); *Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee* [2015] 8 CLJ 477, [34] (Azahar Mohamed FCJ) ('*Syarikat Bekalan Air v Tony Pua*').

liability (or at the very least, determining the proportionality of sanction).[146] One needs not look any further from Lord Nicholls' 10-point guiding principles in *Reynolds v Times Newspaper*:[147]

(1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
(2) The nature of the information, and the extent to which the subject matter is a matter of public concern.
(3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind or are being paid for their stories.
(4) The steps taken to verify the information.
(5) The status of the information. The allegation may have already been the subject of an investigation which commands respect.
(6) The urgency of the matter. News is often a perishable commodity.
(7) Whether comment was sought from the plaintiff. He may have information which others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
(8) Whether the article contained the gist of the plaintiff's side of the story.
(9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
(10) The circumstances of the publication, including the timing.

(Such test has been applied by the Malaysian Federal Court[148] and other superior courts on numerous occasions.) [149]

Further, the jurisprudence of the ECtHR may be instructive as well. The Grand Chamber in *Pedersen and Baadsgaard v Denmark* opined:

> In order to assess the justification of an impugned statement, a distinction needs to be made between statements of fact and value judgments in that, while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself... However, even where a statement

---

[146] See Part VI(C)(2) below.

[147] *Reynolds v Times Newspaper* (n 105) [205]. Lord Nicholls was quick to add: 'This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury. Over time, a valuable corpus of case law will be built up.' See also *Jameel v WSJ* (n 145) [33] (Lord Bingham), [47], [56] (Lord Hoffmann).

[148] *Syarikat Bekalan Air v Tony Pua* (n 145) [34] (Azahar Mohamed FCJ); *Datuk Harris Mohd Salleh v Datuk Yong Teck Lee* [2018] 1 CLJ 145, [33], [59] (Ahmad Maarop CJ (Malaya)).

[149] *Zaina Salleh Abdul Rahman v The New Straits Time (M'sia) Berhad* [2015] 1 LNS 834 [7] (Hamid Sultan Ahmad Backer JCA) (Court of Appeal); *Dato Annas Khatib Jaafar v Datuk Manja Ismail* [2011] 8 MLJ 747 [18] (Prasad Sandosham J) (High Court); *Sivabalan P Asapathy v The New Straits Times Press (M) Bhd* [2010] 7 CLJ 885 [46] (Mohd Zawawi Salleh J) (High Court).

> amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it will be excessive.[150]

Again, as a cautionary note, this article does *not* aim to dissect and decipher the legislative intent behind the AFNA and POFMA. Whether it is appropriate to interpret such new laws purely by drawing analogies from principles of defamation is far from settled.

The point here is simply that there is a vast body of jurisprudence that can guide the public's understanding on the rough contours of POFMA. Further, POFMA's official website is replete with a wealth of information expressed in eye-catching graphics and layman language.

On this count, Singapore has outdone Malaysia.

3. *Burden of Proof*

Burden of proof is a thorny issue where falsity is concerned. Both Malaysian and Singaporean legislation are silent on this critical matter of evidence and procedure.

On one hand, the fundamental rule of criminal law is the 'presumption of innocence' – the burden falls upon the prosecution to prove the guilt of the defendant beyond reasonable doubt.[151] The defendant only bears a legal or evidential burden to establish a defence upon the prosecution establishing a *prima facie* case[152] (such as raising the defence of alibi).[153]

On the other hand, there is a logical counterpoint to consider: *one cannot prove a negative*.[154] After all, absence of evidence is not evidence of absence. If someone accuses a married man of adultery, how does he prove the non-existence of extra-marital liaisons? Theoretically, he can furnish evidence covering every detail of his daily life (full access to his private email, social media accounts, phone; or forensic DNA testing all over his home, office and car). However, that would impose a ridiculously impractical burden upon him. To echo the immortal words of Pollock CB in *R v Curgerwen* (a case on bigamy):

> The term "burden of proof" is an inconvenient one, except when a person is called upon to prove an affirmative… We think, however, that it is contrary to the general spirit of the English law that the prisoner should be called on to prove a negative.'[155]

---

150 (European Court of Human Rights, Grand Chamber, Application no. 49017/99, 17 December 2004) [76] (citations omitted).

151 *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 1 CLJ (Rep), 315 (Mohd. Azmi SCJ) (Supreme Court).

152 *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1, 42 (Edgar Joseph Jr FCJ) (Federal Court).

153 *Public Prosecutor* v *Gan Boon Aun* [2017] 4 CLJ 41, [19] (Jeffrey Tan FCJ) (Federal Court); *PP v Azilah Hadzi* [2015] 1 CLJ 579, [37]-[39] (Suriyadi Halim Omar FCJ) (Federal Court).

154 *Rossi v Rossi* [2007] 1 FLR 790, [40] (Nicholas Mostyn QC) (High Court) (*'Rossi v Rossi*').

155 (1865) LR 1 CCR 1, 2-3; cf *Rossi v Rossi* (n 154) [40] ('It is sometimes said that 'you cannot prove a negative', but this is not true as an absolute proposition. Even the paradigm unprovable negative of Fermat's last theorem (which postulated that for the equation xn + yn = zn there is no integer solution for n greater than two) was proved by Professor Andrew Wiles in 1994. What the proposition means is that generally speaking it is very much more difficult to prove by evidence that an event did not occur than it did. This is particularly the case here. It is obviously much more difficult for W and Fabio to prove that there was no business or financial relationship between H and W after 1985 than it is for H to prove the positive proposition that there was.') (Nicholas Mostyn QC).

Interestingly, the water has been muddied by two conflicting Singapore High Court decisions on POFMA delivered in the span of two weeks. On 5 February 2020, Ang Cheng Hock J held that the burden of proof falls upon the government in *Singapore Democratic Party v AG*.[156] His primary rationale reads:

> The starting point in this regard is Art 14 of the Constitution of the Republic of Singapore… which provides that, subject to certain restrictions, 'every citizen of Singapore has the right to freedom of speech and expression'. It is thus clear from the Constitution that the members and officers of the appellant who are citizens have a right to freely express their views… The constraint on the appellant's right to free speech in the form of the CD would not exist but for the Minister's attempt to impose it, and accordingly, it is the Minister who desires this Court to give judgment that the appellant's rights should be curtailed. [157]

Later, on 20 February 2020, Belinda Ang J disagreed (albeit in *obiter*) in *The Online Citizen v Attorney-General*.[158] Mainly, her reasoning was premised upon statutory construction.[159] Further, she sided with Lord Hobhouse in *Reynolds* that free speech does not include false speech:

> Place, time and circumstance govern the Constitutional freedom of expression, and it is clear that Art 14 does not immunise every use of speech. In particular, 'a wholly unrestricted right to free speech (assuming for the moment this exists at all) does not extend to a wholly unrestricted right to deceive or to maintain a deception by not drawing attention to the falsehood' ...Put differently, the right to free speech pertains to the communication of 'information not misinformation' …It is observed that while the law must be vigilant against attempts to check the expressions of tastes and opinions contrary to our own, there is no public interest in preserving a right to disseminate falsehoods.[160]

Perhaps the solution to this thorny issue lies in context. Specific statements of facts can be disproven easily (*e.g.* 'You slept with your secretary last night'), whilst general statements are harder to debunk (*e.g.* 'You cheated on your wife of 30 years many times').

Therefore, the placement of burden of proof should largely depend on the *nature of the impugned expression*. Parties can – and *should* – resort to the general rules of

---

[156] *Singapore Democratic Party v AG* (n 144) [37]-[44].

[157] Ibid [37] (citations omitted).

[158] *The Online Citizen v AG* (n 118) [17] ('I must again point out that although both parties argued the question at length in written submissions, this question actually distracts from the material issues in OS 118 given TOC's position. To elaborate, even assuming ad arguendo that the onus lies on the respondent to prove the falsehood of a factual statement, the outcome in this decision would be the same for the simple reason that TOC has repeatedly affirmed that it takes no position regarding the truth of the Subject Statement and therefore does not argue that the Subject Statement is 'true' in the context of s 17(5)(b) of the POFMA… Nevertheless, I will address the debate on the onus of proof since parties have submitted on this matter.').

[159] Ibid [20]-[34]. As indicated, it is beyond the scope of this article to analyse the interpretation of domestic statutes.

[160] Ibid [35] (citations omitted).

evidence (*e.g.* placing the burden of proving a fact that falls within the special knowledge of a person upon such person,[161] and drawing upon presumptions on general facts).[162] Alternatively, the *nature of judicial proceedings* may be another relevant factor. Placing the burden on an author challenging the removal of content at *judicial review* does not offend notions of justice as much as defending one's innocence from conviction and imprisonment at a *criminal* trial.

Needless to say, burden of proof is a critical component to due process of law, especially in the face of criminal sanctions. Such issue remains unsettled in Singapore, and untested in Malaysia.

Hence, on this count, both Malaysia and Singapore lack the much-needed clarity.

B *Necessity*

Under international human rights law, restrictions must be necessary for a legitimate purpose.[163] Specifically, any restriction to freedom of expression must fall within two broad types of permissible grounds:[164]

(a) respect of the rights or reputation of others[165] (persons individually or as members of a community);[166]
(b) protection of national security, public order, public health or morals.[167]

Examples of valid restrictions include:

(a) *Right to privacy and reputation*:[168] Conviction of journalist for publishing a newspaper interview describing the second wife of a former Prime Minister as a marriage-wrecker and unfit mother.[169]
(b) *Right to religion*:[170] Fine of EU480 (USD$538) of public seminar speaker insinuating Prophet Muhammad as a pedophile.[171]
(c) *Public order*:[172] Imprisonment of senator publishing an article condemning the inactivity of police at the height of terrorist attacks by extremist separatists.[173]

In Malaysia, s 4(1) of AFNA did not require proof of harm nor intent to cause harm. This rendered any false statements strictly prohibited. Both ss 211(1) and 233(1)(a) of

---

161 *Evidence Act 1950* (Act 56) (Malaysia) s 106.
162 Ibid s 114.
163 *General Comment No. 34* (n 37) [33]. The principles of necessity and proportionality are overlapping, and tend to be conflated by scholars. Technicalities aside, this article will treat both principles as separate limbs of the three-part test.
164 Ibid [26].
165 *ICCPR* (n 88) art 19(3)(a).
166 *General Comment No. 34* (n 37) [28].
167 *ICCPR* (n 88) art 19(3)(b).
168 Ibid art 17(1)-(2); *ECHR* (n 89) art 8(1)-(2).
169 *Tammer v Estonia* (European Court of Human Rights, Application no. 41205/98, 6 February 2001) [64]-[71].
170 *ICCPR* (n 88) art 18(1); *ECHR* (n 89) art 9(1)-(2).
171 *E.S. v Austria* (European Court of Human Rights, Application no. 41205/98, 6 February 2001) [46], [53]-[56].
172 *ICCPR* (n 88) art 19(3)(b); *ECHR* (n 89) art 10(2).
173 *Castells v Spain* (European Court of Human Rights, Application no. 11798/85, 23 April 1992) [39], [46].

the CMA requires the *mens rea* element of 'intent to annoy, abuse, threaten or harass another person'.

In Singapore, communication of false statement of facts is only an offence under s 7(1) of the POFMA if it is likely to cause prejudice to the exhaustive enumerated items in sub-s (b).[174] Further, a pre-condition to the issuance of any POFMA direction is the Minister's 'opinion that it is in the public interest'[175] – the scope of 'public interest' is substantively identical to sub-s (b). In short, POFMA's provisions are far more descriptive and restrictive than those in the AFNA and CMA.

In any event, both their Constitutions are in *pari materia* on stipulating that Parliament may by law impose,

> such restrictions as it considers necessary or expedient in the interest of the security of [Malaysia/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.[176]

Despite the discrepancy in language, it would be splitting hairs to contend that such constitutional restrictions do *not* fall squarely within the ambit of restrictions under international human rights law. Hence, the criterion of necessity is fulfilled without much trouble.

However, as a matter of prudent formalism, Singapore has outdone Malaysia.

C *Proportionality*

Lastly, the principle of proportionality dictates that restrictions to any right must be proportionate to the pursuance of the legitimate aims[177] (*i.e.* the aforementioned grounds of necessity).

The HRC describes the principle as follows:

> Restrictive measures… must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected… The principle of proportionality has to be respected not only in the law that frames

---

[174] See Part III(B) of this article above.

[175] *POFMA* (n 8) s 10(1)(b), 20(1)(b), 40(2)(d).

[176] *Federal Constitution* (n 98) art 10(2)(a); *Constitution of Singapore* (n 99) art 14(2)(a); *Review Publishing* (n 117) [237] (Chan Sek Keong CJ). However, the Malaysian Federal Constitution contains an additional limb on restrictions in art 10(4): 'In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under paragraph (a) of Clause (2), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.'

[177] Human Rights Committee, *General Comment no. 31 [80]*, *The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.3 (26 May 2004) [6] ('*General Comment No. 31*').

> the restrictions but also by the administrative and judicial authorities in applying the law.[178]

Hence, proportionality is to be assessed from two aspects: (a) as between the legislation *itself as a whole* and the object pursued (legislative); and (b) as between the actual measure taken under such legislation and the object pursued (executive).

1. *Legislative Proportionality*

Domestic legislation providing for restrictions must not be 'overbroad'.[179]

In *Public Prosecutor v Azmi bin Sharom*, the Malaysian Federal Court upheld the constitutionality of an archaic anti-sedition law on the basis of proportionality:

> The proportionality principle/test was explained by the Court of Appeal in Dr Mohd Nasir Hashim…. In short, the learned judge said that the legislation or executive action must not only be objectively fair but must also be proportionate to the object sought to be achieved.
>
> In this regard, we agree with the learned judge in Sivarasa Rasiah, that the restriction that may be imposed by the Legislature under art 10(2) is not without limit. This means to say that the law promulgated under art 10(2) must pass the proportionality test in order to be valid… Having said that, we will now consider whether s 4(1) of the Act would pass the proportionality test. One thing is clear, this section is directed to any act, word or publication having a 'seditious tendency' as defined in s 3(1) paras (a) to (f) of the Act. This in our view is consistent with art 10 (2) (a) and art 10 (4) of the Constitution, as it cannot be said that the restrictions imposed by s 4(1) is too remote or not sufficiently connected to the subjects/objects enumerated in art 10 (2) (a).[180]

The Federal Court's constructionist approach suggests that proportionality merely requires a causal nexus between the legislation and the Constitution.[181] Further, the Federal Court rejected the applicability of the test of 'reasonableness'.[182]

The Malaysian legislations of AFNA, PPPA and CMA are not couched in the language of article10(2)(a) of the Federal Constitution. Nevertheless, any challenge on the constitutionality of such laws will unlikely succeed as the courts typically take a purposive approach in finding a causal nexus, as opposed to a formalistic and semantical exercise.

---

178 *General Comment No. 34* (n 37) [34]; Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 68th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [14]-[15]; *US v Alvarez* (n 108) 17 (Kennedy J).

179 *General Comment No. 34* (n 37) [34].

180 [2015] 6 MLJ 751, [42]-[43] (Arifin Zakaria CJ) (Federal Court) (*'Azmi bin Sharom*').

181 Some of the defined offences under the s 3(1) of the Sedition Act 1948 closely mirror the restrictions provided under article 10(2)(a) and 10(4) itself (*e.g.* 'to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State' and 'to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution or Article 152, 153 or 181 of the Federal Constitution').

182 *Azmi bin Sharom* (n 180) [35]-[40] (Arifin Zakaria CJ).

Indeed, the constitutionality of s 8A(1) of PPPA has been upheld by the Malaysian apex courts. In *Pung Chen Choon*, the Supreme Court rejected the 'reasonableness' test, and instead held that 'the scope of the court's inquiry is limited to the question of whether the impugned law… in pith and substance, is a law relating to the subjects enumerated under the permitted restrictions' under Article 10(2)(a).[183] The decision was subsequently cited with approval by the Federal Court in *Lim Guan Eng*.[184]

Prior to *Azmi bin Sharom*, there was a brief period of judicial uncertainty in light of the Federal Court's 2010 decision of *Sivarasa Rasiah v Badan Peguam Malaysia* adopting both the test of 'reasonableness' and 'proportionality'.[185] For instance, the High Court in *Nor Hisham bin Osman v Pendakwa Raya* upheld the conviction of an accused who published an online comment insulting the Sultan of Perak under s 233(1)(a) of CMA on the basis that such restriction to his freedom of expression was 'reasonable and justified' and achieved the objective of article 10(2)(a) *i.e.* security of the Federation.[186] Since *Azmi bin Sharom,* however, the proportionality test has gained more prominence. For instance, in *Syarul Ema Rena Abu Samah v PP*, the High Court rejected the accused's challenge on the constitutionality of s 233(1)(a) on the basis of being arbitrary, vague, overbroad and disproportionate.[187]

In contrast, POFMA has little difficulty in surmounting this (low) proportionality threshold. The defined aspects of 'public interest' are evidently legitimate aims worth pursuing. Indeed, during the Parliamentary reading of its bill, Minister for Law K Shanmugam tackled the common concerns arising from proportionality head-on (*e.g.* overbreadth[188] and 'chilling effect').[189] He amply demonstrated how the POFMA is narrower in scope than pre-existing legislation criminalising false statements.[190] Simply put, the POFMA is meticulously designed with *proportionality* in mind – 'to deal specifically with falsehoods that can spread online with incredible speed'.[191]

---

[183] *Pung Chen Choon* (n 52) 575 (Edgar Joseph Jr SCJ).

[184] *Lim Guan Eng* (n 53) 587 (Zakaria Yatim FCJ).

[185] [2010] 3 CLJ 507, [27], [29] (Gopal Sri Ram FCJ).

[186] [2010] 1 MLJU 1249 (Siti Khadijah Sheikh Hassan Badjenid JC).

[187] [2018] 1 LNS 1141, [9]-[13], [18]-[27] (Ab Karim Haji Ab Rahman J). The learned judge distinguished *Shreya Singhal v. Union of Indian* AIR [2015] SC 1123 (whereby the Indian Supreme Court struck down s 66A of the *Information Technology Act of 2000*) on the basis that the local circumstances in Malaysia and India are dissimilar.

[188] *Singapore Second Reading for POFMA* (n 21) [269]-[272].

[189] Ibid [266]-[268].

[190] Ibid [9]-[23]. One example is s 45 of the Telecommunications Act 1999 which states 'any person who transmits… a message which he knows to be false or fabricated shall be guilty of an offence' (repealed by Act 15 of 2019 which took effect on 1 January 2020).

[191] Ibid [38].

2. *Executive Proportionality*

Next, proportionality looks at the enforcement of domestic law.

To be clear, the test of proportionality has yet to gain a firm foothold in the constitutional framework of Singapore[192] and Malaysia.[193] The Singaporean courts have historically rejected its applicability, in the context of the liberty of a person,[194] freedom of assembly[195] and freedom of religion.[196] However, during the Parliamentary reading of the POFM Bill, the Minister of Law affirmed that 'proportionality is already incorporated into the [legal] requirements under the Bill',[197] and a judge has to examine the proportionality of POFMA directions challenged by judicial review.[198] The Malaysian Federal Court in *Azmi bin Sharom* applied proportionality narrowly in assessing the validity of the empowering legislation itself.[199]

In any event, compliance to international norms is at stake here. States cannot evade their international obligations by shielding behind their internal law (whether statutory or even constitutional).[200] Hence, any judicial rejection of proportionality would constitute a dereliction of their duty to respect freedom of expression under international law.[201]

Generally, criminal sanctions should only be applied as a measure of last resort against the most serious of cases.[202] Concomitantly, a criminal conviction resulting in imprisonment being the 'most serious form of interference with the right to freedom of expression' is an inappropriate penalty where other means of redress are available, particularly civil remedies.[203]

In Malaysia, AFNA allowed any persons to apply *ex parte* to the Court for the removal of publication containing fake news (Removal Court Order).[204] No other alternative form of non-penal remedy was provided for.

The primary remedy against fake news under Malaysian legislation is criminal conviction:

---

[192] Jack Tsen-Ta Lee, 'According to the Spirit and not the Letter: Proportionality and the Singapore Constitution' (2014) 8(3) *Vienna Journal on International Constitutional Law* 276.

[193] Simon Wood, 'Recent Cases on Fundamental Liberties in the Federal Constitution' (2016) 2 *The Law Review* 220.

[194] *Chng Suan Tze v The Minister of Home Affairs* [1989] MLJ 69, 87 (Wee Chong Jin CJ) (Court of Appeal).

[195] *Chee Siok Chin* (n 133) [86]-[87] (V K Rajah J) (High Court).

[196] *Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR 662, 689 (Yong Pung How CJ) (High Court).

[197] *Singapore Second Reading for POFMA* (n 21) [309].

[198] Ibid [253]-[254].

[199] *Azmi bin Sharom* (n 180) [42]-[43] (Arifin Zakaria CJ).

[200] *General Comment No. 31* (n 177) [4]; *Treatment of Polish Nationals, Polish Origin or Speech in the Danzig Territory (Advisory Opinion)* [1932] PCIJ (ser A/B) No 44, 24; *Greco-Bulgarian "Communities" (Advisory Opinion)* [1930] PCIJ (ser B) No 17, 32; *Free Zones of Upper Savoy and District of Gex (Second Phase)* [1930] PCIJ (ser A) No 24, 12.

[201] *General Comment No. 34* (n 37) [7]; *General Comment No. 31* (n 177) [4].

[202] *General Comment No. 34* (n 37) [47]; *Ross v Canada* (Human Rights Committee, Communication No. 736/1997, UN Doc CCPR/C/70/D/736/1997, 18 October 2000) [11.6].

[203] *Perinçek* v *Switzerland* (European Court of Human Rights, Grand Chamber, Application no 27510/08, 15 October 2015) [272]-[273].

[204] *AFNA* (n 7) s 7(1).

(i) **AFNA** (repealed)

Offence	**Subject**	**Maximum Sentence**
Creation, offering or publishing of fake news[205]	Any person	Imprisonment for six years and/or fine of RM500,000 (a further fine of RM3,000 (USD$702) for every day that the offence continues after conviction)[206] Order to make an apology to affected person (non-compliance shall be punishable by contempt of court)[207]
Provision of financial assistance or facilitation of creation, offering or publishing of fake news[208]	Any person	Imprisonment for six years and/or fine of RM500,000 (USD$117,000)[209]
Failure to remove publication containing fake news within possession, custody and control[210]	Any person	Fine of RM100,000 (USD$23,400) (a further fine of RM3,000 for every day that the offence continues after conviction)[211]
Non-compliance of Removal Court Order[212]	Any person	Fine of RM100,000[213]

(ii) CMA

Offence	**Subject**	**Maximum Sentence**
The publication of false communications through network facilities or service[214]	Any person	Imprisonment for one year and/or fine of RM50000 (USD$11,700) (a further fine of RM1,000 (USD$234) for every day that the offence continues after conviction) [215]

Prior to its repeal, one person had been convicted and imprisoned under AFNA.[216] There have been at least two unreported cases where a private person had applied – and successfully obtained – a Court order for removal.[217]

---

205 Ibid s 4(1).
206 Ibid.
207 Ibid s 4(2)-(3).
208 Ibid s 5.
209 Ibid.
210 Ibid s 6(1).
211 Ibid s 6(2).
212 Ibid s 7(1).
213 *CMA* (n 55) s 7(6).
214 Ibid s 233(1)(a).
215 Ibid s 233(3).
216 See (n 14).
217 This information was derived from the acting solicitors on a confidential basis.

The majority of convictions under s 233(1)(a) of CMA are based on offensive content, rather than false statements *per se*.[218]

In Singapore, the government has a wider array of remedies at their disposal under POFMA:

(a) ***Correction of content*** – direct a person (Correction Direction)[219] or intermediary (Targeted Correction Direction[220] or General Correction Direction)[221] to issue a Correction Notice, either by indicating that the impugned statement is false and/or a specified location where the true statement of fact can be found.

(b) ***Censorship of conten*t** – direct a person to stop communicating the impugned statement (Stop Communication Direction)[222]

(c) ***Banning of site*** – declare an online location which has communicated three or more different statements subjected to the above directions as a 'declared online location' (DOL),[223] and *may* require the owner or operator of such online location to notify such declaration to their end-users (DOL notification)[224]

(d) ***Blocking access to site or content***

 (i) direct an Internet service provider (ISP) to disable the access of end-users in Singapore to an online location in the event of non-compliance of Correction Direction,[225] Stop Communication Direction[226] or Account Restriction Direction,[227] or disable their access to a 'declared online location'[228] (Access Blocking Order)

 (ii) direct an intermediary to disable access of end-users in Singapore to an impugned content on its service (Disabling Direction),[229] or disable their access to a 'declared online location' (Access Blocking Order)[230]

(e) ***Banning of account*** – direct an intermediary to deny an inauthentic online account or bot account from communicating any statement in Singapore and/or deny any person from using such accounts to interact with any end-user in Singapore due to false statements or 'coordinated inauthentic behaviour' emanating from such accounts (Account Restriction Direction)[231]

---

[218] *Ahmad Abd Jalil v PP* [2015] 5 CLJ 480 (Facebook comment insulting Sultan of Johor); *Mohd Fahmi Reza Mohd Zarin v PP* [2019] 1 LNS 120 (Facebook photo depicting caricature of former Prime Minister Najib Razak in a clown-face); *Nik Adib Nik Mat v PP* [2017] 1 LNS 2182 (Facebook photo depicting fake nudity); *PP v Syahzan Amir Endut* [2018] 5 LNS 100 (sexually explicit MMS image); *PP v Muslim Ahmad* [2015] 5 CLJ 822 (comment on Perak government website insulting the Sultan of Perak); *Syarul Ema Rena Abu Samah v PP* [2018] 1 LNS 1141 (Facebook comment insulting and cursing former Prime Minister Najib Razak).

[219] *POFMA* (n 8) s 11(1).

[220] Ibid s 21(1). The correction notice is required to be issued to *only* end-users in Singapore.

[221] Ibid s 23(1)(a), (23)(2)(a). The correction notice is required to be issued to *all* users.

[222] Ibid s 12(1).

[223] Ibid s 33(3).

[224] Ibid s 32(3)(f).

[225] Ibid s 16(1).

[226] Ibid.

[227] Ibid s 43(2).

[228] Ibid s 32(1).

[229] Ibid s 22(1).

[230] Ibid s 34(3).

[231] Ibid s 40(1)-(2).

(f) ***Codes of practice*** – issuing codes of practice to intermediaries to enhance disclosure of sponsors and information concerning paid political advertising communicated in Singapore,[232] and directing them to remedy any non-compliance[233]

The POFMA provides for criminal conviction for two broad types of offences:

(i) **Primary offences** (commission of prohibited acts)

Offence	**Subject**	**Maximum Sentence**
Communication of false statement of facts[234]	Any person	*Individual*: Imprisonment for five years and/or fine of SG$50,000 (USD$35,662) *Others*: Fine of SG$500,000 (USD$356,638)[235]
Communication of false statement of facts *through use of inauthentic online account or bot to accelerate communication*[236]	Any person	*Individual*: Imprisonment for ten years and/or fine of SG$100,00 (USD$71,337) *Others*: Fine of SG$1,000,000 (USD$713,378)[237]
Making or altering bots for communication of false statement of facts[238]	Any person	*Individual*: Imprisonment for three years and/or fine of SG$30,000 (USD$21,404) *Others*: Fine of SG$500,000[239]
Making or altering bots for communication of false statement of facts *likely to be against public interest*[240]	Any person	*Individual*: Imprisonment for six years and/or fine of SG$60,000 (USD$42,800) *Others*: Fine of SG$1,000,000[241]
Provision of services for communication of false statement of facts in return of financial or material benefit[242]	Any person	*Individual*: Imprisonment for three years and/or fine of SG$30,000 *Others*: Fine of SG$500,000[243]
Provision of services for communication of false statement of facts in receipt of financial or material benefit *likely to be against public interest*[244]	Any person	*Individual*: Imprisonment for six years and/or fine of SG$60,000 *Others*: Fine of SG$1,000,000[245]

232 Ibid s 48(1).
233 Ibid s 50(1)-(2).
234 Ibid s 7(1).
235 Ibid s 7(2).
236 Ibid s 7(3)(a)-(b).
237 Ibid s 7(3)(c)-(d).
238 Ibid s 8(1).
239 Ibid s 8(2).
240 Ibid s 8(3)(a)-(f).
241 Ibid s 8(3)(g)-(h).
242 Ibid s 9(1).
243 Ibid s 9(2).
244 Ibid s 9(3)(a)-(f).
245 Ibid s 9(3)(g)-(h).

(ii) **Secondary offences** (non-compliance to executive directions or orders)

Offence	**Subject**	**Maximum Sentence**
Non-compliance of a Correction Direction and Stop Communication Direction[246]	Any person	*Individual*: Imprisonment for one year and/or fine of SG$20,000 (USD$14,268) *Others*: Fine of SG$500,000[247]
Non-compliance of a Targeted Correction Direction, General Correction Direction and Disabling Direction[248]	Intermediary or specified persons	*Individual*: Imprisonment for one year and/or fine of SG$20,000 *Others*: Fine of SG$500,000 (extra fine of SG$100,000 for every day the offence continues after conviction)[249]
Non-compliance of a DOL notification request[250]	Any person	*Individual*: Imprisonment for three years and/or fine of SG$40,000 (USD$28,527) *Others*: Fine of SG$500,000[251]
Failure to disable access to DOL[252]	Intermediary	Fine of SG$20,000 for every day of non-compliance up to a total of SG$500,000[253]
Operation of DOL in return of financial or material benefit[254]	Any person	*Individual*: Imprisonment for three years and/or fine of SG$40,000 *Others*: Fine of SG$500,000 (extra penalty equivalent to the value of such benefit)[255]
Failure to take reasonable steps to ensure no paid content is communicated on a DOL[256]	Any person	*Individual*: Imprisonment for one year and/or fine of SG$20,000 *Others*: Fine of SG$500,000[257]
Provision of financial support to a DOL[258]	Any person	*Individual*: Imprisonment for three years and/or fine of SG$40,000 *Others*: Fine of SG$500,000[259]

[246] Ibid s 15(1).
[247] Ibid s 15(1)(a)-(b).
[248] Ibid s 27(1).
[249] Ibid s 27(1)(a)-(b).
[250] Ibid s 32(3)(f).
[251] Ibid s 32(6)(a)-(b).
[252] Ibid s 34(3).
[253] Ibid s 34(5).
[254] Ibid s 36(1).
[255] Ibid ss 36(1)(a)-(b), 36(4).
[256] Ibid s 37(1)-(3).
[257] Ibid s 37(6).
[258] Ibid s 38(1).
[259] Ibid s 38(3).

Offence	Subject	Maximum Sentence
Failure to take reasonable steps to not facilitate communication of paid content publicising an online location that includes statements subject to directions[260]	Intermediary	*Individual*: Imprisonment for one year and/or fine of SG$20,000 *Others*: Fine of SG$500,000[261]
Non-compliance of Access Blocking Order	ISP[262] or Intermediaries[263]	Fine of SG$20,000 for each day up to a total of SG$5000,000
Non-compliance of Account Restriction Direction[264]	Intermediary	*Individual*: Imprisonment for one year and/or fine of SG$20,000 *Others*: Fine of SG$500,000 (extra fine of SG$100,000 for every day the offence continues after conviction)[265]
Non-compliance of Code of Practice[266]	Intermediary	*Individual*: Imprisonment for one year and/or fine of SG$20,000 *Others*: Fine of SG$500,000[267]

POFMA is an armoury well-stocked with a diverse array of weapons to combat 'fake news' of all shades and sizes. Correction notices are useful in curbing the spread of 'fake news' of a trivial nature on a daily basis, whilst convictions are reserved for egregious or recurring violations.

Correction notices do not impair free speech entirely and is more akin to counter speech which facilitates truth-finding. This was noted by Belinda Ang J in *The Online Citizen v AG*:

> A Part 3 CD does not inhibit free speech because it does not prevent the statement-maker from maintaining the original text of its published material… In similar vein, the statement-maker's only obligation in relation to a Part 3 CD issued under the POFMA is to insert a Correction Notice within its published material, which allows viewers to compare the competing accounts of facts and make an individual assessment based on the available evidence.
>
> In this regard, a Part 3 CD might be characterised as the Minister's response, consonant with Prof Thio Li-Ann's observation that a general 'right to reply' facilitates the search for truth…[268]

260 Ibid s 47(1).
261 Ibid s 47(4).
262 Ibid ss 16(3), 28(3), 33(4), 43(3), 54(4).
263 Ibid s 34(5).
264 Ibid s 42(1).
265 Ibid s 42(1)(a)-(b).
266 Ibid s 50(1).
267 Ibid s 50(3).
268 *The Online Citizen v AG* (n 118) [36]-[37] (citations omitted).

In practice – so far, so good. No person has been convicted yet and no punitive fine has been imposed. In most cases, the Singaporean government has issued Correction Directions. Websites have been blocked only where a user has ignored an initial Correction Direction (*States Time Review's* Facebook page).[269]

Nevertheless, the POFMA is not beyond reproach. Political and social activists decry its apparent discriminatory use against political parties (*Singapore Democratic Party*),[270] media outlets (*The Online Citizen*)[271] and independent NGOs (*Lawyers for Liberty*)[272] that are critical against the Singaporean government. The creeping extra-territorial reach of the POFMA is real.[273]

Whilst the measures employed thus far are not severe in isolation, there is genuine concern that a continual and coordinated stream of minor countermeasures will erode the resolve of the well-intentioned public to spread valuable but unverified information on matters of public interest. For instance, precious lives can be saved from urgent alerts on health emergencies (*e.g.* COVID-19) and political whistle-blowers require protection from reprisals (*e.g.* 1MDB leaks).[274]

Here and now, the AFNA is dead in the water, casting the Malaysian government back to the drawing board to decide upon the appropriate existing laws (or even new laws, if necessary) to deploy against 'fake news'. Across the Causeway, the Singaporean government appears fully committed to the course paved by POFMA.

Barely two years have elapsed in this new legal frontier. It is only natural for there to be a quantum of uncertainty surrounding fresh legislation.[275] In time, the courts will build a body of precedents that will lend more flesh to the skeletal framework of POFMA to elucidate obscure points and dispel doubts.[276] Useful interpretive aids include Ministerial explanatory notes produced during the drafting process[277] and analogous case law (such as the 10-point guiding principles of *Reynolds*).[278]

Ultimately, it is premature at this juncture to pass judgment on the proportionality of measures taken by both governments in combatting fake news from a *results* standpoint. However, as a matter of *process*, there is one clear leader. Despite taking the early lead, Malaysia has faltered in its step and is still left floundering for directions. Meantime,

---

[269] See (n 31).

[270] See (n 30).

[271] See (n 32).

[272] See (n 26).

[273] See Part VII(E) of this article. Although this issue also falls within the analysis on 'proportionality', its peculiar intricacies merit a separate topic.

[274] *Ketua Setiausaha Kementerian Dalam Negeri v The Edge Communication Sdn Bhd* [2017] 4 MLJ 200.

[275] *Savva Terentyev* v *Russia* (European Court of Human Rights, Application no. 10692/09, 28 August 2018) [58]; *Dmitriyevskiy* v *Russia* (European Court of Human Rights, Application no. 42168/06, 3 October 2017) [82].

[276] *Öztürk* v *Turkey* (European Court of Human Rights, Grand Chamber, Application no. 22479/93, 28 September 1999) [55]; *Jorgic* v *Germany* (European Court of Human Rights, Application no. 74613/01, 12 July 2007) [101].

[277] *Singapore Democratic Party v AG* (n 144) [31].

[278] See Part VI(A)(2) above. For instance, whilst the Singaporean Court of Appeal rejected the *Reynolds* privilege as a new defence under defamation in *Review Publishing* (n 117), the court opined *obiter* that such principles may be relevant to the assessment of damages (at [297]). Analogically, such principles may be relevant in testing the proportionality of regulatory measures taken under POFMA.

Singapore has raced ahead aboard its POFMA flagship with no signs of restraint (for better or for worse).

VII EXTRA-TERRITORIALITY

A *Local Developments*

By going full steam ahead in hot pursuit against falsehoods, Singapore may have perhaps made a serious misstep on one count – *extra-territoriality*. Ironically, such misstep may possibly trigger a clash between the Malaysian and Singaporean public on a matter which both their governments have been united so far.

On 16 January 2020, Lawyers for Liberty (*LFL*), a human rights NGO based in Malaysia, published a statement on the alleged unlawful methods approved by the Singaporean government on the treatment of prisoners sentenced to death by hanging (kicking the back of the neck if the rope breaks).[279] The Singapore Ministry of Home Affairs refuted the allegations, and instructed the POFMA office to issue Correction Directions against LFL and three other parties sharing its post (including *The Online Citizen* (*TOL*)).[280] Two parties issued correction notices pursuant to such direction, but LFL and TOL refused to comply. Instead, LFL filed a suit in the Malaysian High Court seeking a declaration to invalidate such direction on the basis that, amongst others, that such direction is 'an attempt by Singapore to encroach upon, or to crackdown the freedom of speech in Malaysia and impose its fake news Act on Malaysians'.[281] Subsequently, the Singapore government issued an Access Blocking Order against LFL's website.[282]

B *Statutory Framework*

POFMA provides that directions 'may be issued to a person whether the person is in or outside Singapore' and 'may require a person to whom it is issued to do an act in or outside Singapore'.[283] Further, s 60(1) under the title 'Jurisdiction of courts' states: 'Where an offence under section… is committed by a person outside Singapore, the person may be dealt with in respect of that offence as if it had been committed within Singapore'.[284]

Neither can Malaysia claim the moral high ground. Section 3(1) of AFNA – overtly entitled 'Extra-territorial application' – stated: 'If any offence under this Act is committed by any person, whatever his nationality or citizenship, in any place outside Malaysia,

[279] 'MHA refutes Malaysia NGO's claims against S'pore's execution method, issues Pofma correction orders against parties' *The Straits Times* (online, 22 January 2020) <https://www.straitstimes.com/singapore/courts-crime/mha-refutes-malaysia-ngos-allegations-against-spores-execution-method-to>.

[280] Ibid.

[281] *The Online Citizen v AG* (n 118) [54]-[61]. TOL filed a separate appeal in the Singapore High Court to revoke the directions pursuant to POFMA procedures. TOL took no position on the truth or falsity of the statements in LFL's publication, and instead relied on the defence of 'reportage'. The appeal was dismissed on 15 February 2020 by Belinda Ang J.

[282] Tee Zhuo, 'IMDA to block Malaysian NGO website after it fails to comply with Pofma correction: MCI' *The Straits Times* (online, 23 January 2020) <https://www.straitstimes.com/singapore/imda-to-block-malaysian-ngo-website-after-it-fails-to-comply-with-pofma-correction-mci>.

[283] *POFMA* (n 8) s 13(1)-(2), 25(1)-(2).

[284] Ibid s 60(1).

he may be dealt with in respect of such offence as if the offence was committed in any place within Malaysia.'[285]

Similarly, s 4(1) of CMA – overtly entitled 'Territorial and extra-territorial application' – states: 'This Act and its subsidiary legislation apply both within and outside Malaysia.'[286]

Even pre-AFNA, the Malaysian government has flexed the long arm of its enforcement jurisdiction. In January 2016, the MCMC directed Malaysian ISPs to block access of its end-users to *Medium,* a renowned US-based platform that publishes user-generated articles, for refusing to remove an article republished by *Sarawak Report* (a UK-based whistle-blower website reporting on local political affairs previously blocked by MCMC).[287] MCMC requested the article's removal 'to prevent the circulation of false, unsubstantiated and misleading content that affect Malaysia's social stability, tarnish confidence in Malaysia's economy, as well as undermine a democratically elected Prime Minister and Government', and added that such article violated s 233 of CMA.[288] This was despite CMA being wholly silent on any powers vesting MCMC to make such blocking orders without obtaining a court order.[289] The article made allegations on the involvement of former Prime Minister Najib Razak (*Najib*) in the 1MDB corruption scandal.[290] Two years later, in May 2018, *Medium* was finally unblocked by the MCMC – *right after* Najib's coalition party was defeated in the Malaysian general elections.[291] Blocking an entire platform for two years over a single article is not at all proportionate by international standards.

Indeed, history shows that both the Malaysian and Singaporean governments have little hesitation to censor foreign entities in the pursuit of combatting fake news.

C *Jurisdiction*

The critical question is this – *can domestic laws regulating online content be enforced against persons outside of its territorial jurisdiction?* Unsurprisingly, there is no clear satisfactory answer to this deeply complex and controversial issue of extra-territoriality.

The starting point is *jurisdiction*. In *Macleod v Attorney-General for New South Wales*, Lord Halsbury LC for the Privy Council opined:

---

285 *AFNA* (n 7) s 3(1).

286 *CMA* (n 55) s 4(1).

287 Lee Kah Leng, 'MCMC block Medium' *The Star* (online, 27 January 2016) <https://www.thestar.com.my/tech/tech-news/2016/01/27/mcmc-blocks-medium/>.

288 Ibid.

289 'Blocked website should sue MCMC, say lawyers' *The Edge Markets* (online, 2 March 2016) <https://www.theedgemarkets.com/article/blocked-websites-should-sue-mcmc-say-lawyers>.

290 Venxhin Pang, 'After 2 Years, Medium is Finally Unblocked in Malaysia' *Vulcan Post* (online, 17 May 2018) <https://vulcanpost.com/639918/medium-unblocked-malaysia/>.

291 Ibid.

> All crime is local. The jurisdiction over crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever.[292]
> (cited with approval by Ong J in *Lee Szu Yin v Public Prosecutor*)[293]

In modern times, however, States are increasingly extending the jurisdictional scope of criminal legislation beyond territorial borders to combat serious transboundary crimes, such as terrorism,[294] money-laundering,[295] bribery and corruption,[296] child pornography,[297] human-trafficking,[298] drug-trafficking,[299] and most pertinently, cybercrime.[300]

Broadly, there are three types of jurisdiction recognized under international law:

(a) ***Prescriptive jurisdiction*** – to make law applicable to the activities, relations, status, or interests of persons, whether by legislation, executive or administrative order, or determination by a court[301]

(b) ***Enforcement jurisdiction*** – to compel compliance or punish non-compliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other non-judicial action[302]

(c) ***Adjudicatory jurisdiction*** – to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings.[303]

Here, *prescriptive jurisdiction* refers to the Singapore Parliament's power to enact POFMA (*e.g.* extending the jurisdictional scope of its Minister and Courts extra-territorially). *Enforcement jurisdiction* refers to its Minister's power to issue directions and orders under POFMA against individuals, intermediaries and ISPs outside of Singapore (*e.g.* the Correction Direction against LFL). *Adjudicatory jurisdiction* refers to the Singaporean courts' jurisdiction to hear administrative appeals against such Ministerial directions and orders, and to conduct criminal trials commenced by the prosecution to try persons for committing POFMA offences.

---

[292] [1891] AC 455, 458.

[293] [1962] 1 MLJ 49, 50 (High Court).

[294] *Criminal Code*, RSC 1985, c C-46, s 7(3.75), 83.01(1) (Canada) ('*Canadian Criminal Code*')

[295] *Money Laundering Control Act of 1986*, 18 USC §§ 1956-57 (US).

[296] *Foreign Corrupt Practices Act of 1977*, 15 USC §§ 78dd-1 (US); *Bribery Act 2010*, s 12 (UK).

[297] *United States v Frank*, 599 F 3d 1221, 1230 (11th Cir, 2010); *United States v Harvey*, 2 F 3d 1318, 1327 (3rd Cir, 1993); cf *United States v Martinelli*, 62 MJ 52, 59-61 (CAAF, 2005).

[298] *Canadian Criminal Code* (n 294) s 7(4.11), 279.01(1).

[299] *United States v Baker* 609*,* F 2d 134, 137 (5th Cir, 1980); cf *United States v Lopez-Vanegas*, 493 F 3d 1305, 1312-13 (11th Cir, 2007).

[300] *Computer Misuse Act 1990* s 4-5 (UK) (requiring a 'significant link with domestic jurisdiction'); *Computer Fraud and Abuse Act*, 18 USC § 1030(e)(2)(b) (1986) (US) (basing jurisdiction on the use of a computer, even if located outside the US 'in a manner that affects interstate or foreign commerce or communication of the United States').

[301] American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987) § 401 cmt (a) (US).

[302] Ibid § 401 cmt (c).

[303] Ibid § 401 cmt (b).

Generally, the rules of enforcement jurisdiction are far stricter than the rules of prescriptive jurisdiction.[304] For instance, it is permissible for Parliament to enact a law to try foreign suspects of war crimes committed anywhere in the world; it is rather controversial for the police to enter a foreign territory and capture such suspects without the foreign State's consent.[305]

Of course, the issuance of directions to persons abroad to remove online content is hardly comparable to an extra-territorial abduction. What would be truly disconcerting is the hypothetical scenario where a Singaporean magistrate issues an arrest warrant against LFL's personnel.

Further, it is perhaps more appropriate to analogise fake news to cybercrime. The case against extra-territorial censorship of online content is less concerned about protecting sovereignty and comity between States, but rather protecting the *human rights* of authors or publishers.[306]

D *Protection of Human Rights*

Under international human rights law, extra-territoriality is akin to a Pandora's box that continually spawns fierce debates among judges and scholars.[307] The key contention is whether States owe an obligation to protect the human rights of foreign nationals outside their territory.

The short answer is 'yes, in exceptional circumstances'.

In the *Palestinian Wall* advisory opinion, the International Court Justice held that the ICCPR applies to 'acts done by a State in the exercise of its jurisdiction outside its own territory'.[308] In *Munaf v Romania*, the HRC opined that a State 'may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction' and that 'the risk of an extra-territorial violation must be a necessary and foreseeable consequence'.[309]

Similarly, on numerous occasions, the ECtHR has addressed this vexing issue, particularly in relation to the use of force,[310] detention,[311] deportation[312] and expropriation

---

[304] Cedric Ryngaert, 'The Concept of Jurisdiction in International Law' (2015) *Oxford University Press*, 7 ('*Ryngaert*').

[305] *Attorney General of Israel v Eichmann* (1962) 36 ILR 277, 305-07 (Supreme Court) (Israel); *US v. Alvarez-Machain*, 504 US 655, 664-70 (1992) (US).

[306] Ryngaert (n 304) 7.

[307] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford Monographs in International Law, 2011).

[308] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, [109]-[111].

[309] Human Rights Committee, Communication No. 1539/2006, 96th sess, UN Doc CCPR/C/96/D/1539/2006, (13 July 2009) [14.2].

[310] *Andreou v Turkey (Admissibility)* (European Court of Human Rights, Application no. 45653/99, 3 June 2008) [26]; *Al-Skeini v the United Kingdom* (European Court of Human Rights, Grand Chamber, Application no. 55721/07, 7 July 2011) [138]-[139].

[311] *Medvedyev v France* (European Court of Human Rights, Grand Chamber, Application no. 3394/03, 29 March 2010) [62]-[67]; *Ilaşcu v Moldova and Russia* (European Court of Human Rights, Grand Chamber, Application no. 48787/99, 8 July 2004) [314], [346]-[352] ('*Ilaşcu v Moldova*').

[312] *Hirsi Jamaa v Italy* (European Court of Human Rights, Grand Chamber, Application no. 27765/09, 23 February 2012), [114]; *Vilvarajah and Others v the United Kingdom* (European Court of Human Rights, 30 October

of property.[313] The underlying principle is that States are bound by human rights obligation in exceptional circumstances where their acts are 'performed outside their territory, or which produce effects there'.[314]

However, there is a scarcity of jurisprudence in the context of freedom of expression. The closest case is *Ben El Mahi v Denmark* where the ECtHR had to consider a complaint by Moroccan nationals against the publication of offensive caricatures of Prophet Muhammad (particularly depicting a bomb in his turban).[315] The application was declared inadmissible because 'there is no jurisdictional link' between the applicants and Denmark, nor do they 'come within the jurisdiction of Denmark on account of any extraterritorial act'.[316]

In short, enforcement jurisdiction and protection of human rights cut both ways. If Singapore expects foreign nationals outside Singapore to comply with its robust POFMA regime, Singapore must similarly be prepared to ensure that their fundamental rights are respected. Ultimately, this falls back to satisfying the three-part test of legality, necessity and proportionality.

E ***Proportionality***

On the balance of proportionality, extra-territorial enforcement jurisdiction is an exceptional measure that should only be resorted to sparingly. First, it would be unduly burdensome to expect authors and publishers to know the laws of all States in the world, and to tailor their content to the differing standards of individual States.[317] Second, it is unrealistic in this globalized era to insist upon a strict relationship of reciprocity between them and their readership, to the extent that they must weigh the peculiar political and cultural sentiments of potential readers worldwide.[318] Third, if slapped with a correction or removal order, they may encounter hardship to appear before a foreign court to challenge such order.[319]

1991), para. 103; *Saadi v Italy* (European Court of Human Rights, Grand Chamber, Application no. 37201/06, 28 February 2008) [126].

313 *Loizidou v Turkey (Merits)* (European Court of Human Rights, Grand Chamber, Application no. 15318/89, 18 December 1996), [56], [63]-[64].

314 *Ilaşcu v Moldova* (n 311) [314].

315 (European Court of Human Rights, Application No.5853/06, 11 December 2006) 7.

316 Ibid.

317 Paul S. Berman, 'A Pluralist Approach to International Law' (2007) 32 *Yale Journal of International Law*, 317.

318 *Jameel v WSJ* (n 145) [129] ('My Lords, however accurate Lord Atkinson's statement of law may be where the defamatory communication has been made to a relatively limited number of people, it does not, as it seems to me, cater for the role of the press, at the end of the 20th Century and the beginning of 21st, in reporting on matters of public importance… The publication is to the public at large. To insist on a reciprocity of duty and interest between the publisher of a newspaper and the reader of the newspaper, who may be in New York, London, Rome, or anywhere, either makes the requirement of reciprocity meaningless or deprives any defamatory statement in the paper, no matter how important as a matter of public interest the content of the statement may be, of the possibility of the protection of qualified privilege.') (Lord Scott).

319 Interestingly, LFL did *not* file an action in Singapore to invalidate the correction notice issued by the Singaporean Minister, but rather in Malaysia. The reason could be tactical, and to make a principled stance that they do not submit to the prescriptive, enforcement *and adjudicative* jurisdiction of Singapore. Nevertheless, such approach may have minimal practical effect, as the Singapore government or courts will be unlikely to recognize the validity and enforceability of such 'paper' judgment.

Indeed, the recent jurisprudence in the ECtHR and European Court of Justice (*ECJ*) hint towards a possible less intrusive measure of online censorship – *de-linking of search results* (*i.e.* the right to be forgotten). In *Fuchsmann v Germany*, the ECtHR had to balance between the competing rights to privacy and freedom of expression.[320] In finding that an online newspaper article by *The New York Times* alluding the applicant's involvement in organized crime did not violate the applicant's right to privacy, the ECtHR noted that the 'applicant provided no information in his submissions regarding any efforts made to have the link to the article removed from online search engines'.[321] A similar observation was echoed in *MW and WW v Germany*.[322]

In September 2019, the ECJ Grand Chamber in *Google LLC v CNIL* held that 'a search engine operator cannot be required to carry out a de-referencing on all the versions of its search engine'.[323] The ECJ reasoned that a 'balance between the right to privacy and the protection of personal data, on the one hand, and the freedom of information of internet users, on the other, is likely to vary significantly around the world' must be struck 'in accordance with the principle of proportionality'.[324] Hence, Google was required to remove links to web pages returned on search results appearing on the French version of its search engine, and not *all* versions globally.[325] In short, the 'right to be forgotten' under the EU General Data Protection Regulation[326] does not extend globally.

However, barely a month later in October 2018, the ECJ (Third Chamber) in *Eva Glawischnig-Piesczek v Facebook Ireland Limited* held that national courts can grant a worldwide injunction ordering intermediaries to take down user content because EU law[327] does not provide for any 'territorial limitation' and 'does not preclude those injunction measures from producing effects worldwide'.[328] Commentators have queried as to whether such ruling directly contradicts with the Grand Chamber's decision in *Google v CNIL*.[329]

---

320 (European Court of Human Rights, Application no. 71233/13, 19 January 2018) [54].

321 Ibid [53].

322 (European Court of Human Rights, Application nos. 60789/10 and 65599/10, 28 September 2018) [114].

323 (Court of Justice of the European Union, Grand Chamber, C507/17, ECLI:EU:C:2019:772, 24 September 2019) [64]-[65] (*'Google v CNIL'*). However, the court added that EU law does not require nor prohibit such practice (at [72]).

324 Ibid [60].

325 Ibid [30]-[31], [73].

326 *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46* [2016] OJ L119, art 17 (*'GDPR'*).

327 *Directive 2000/31/EC of the European Parliament and Council of 8 June 2000 on certain legal aspects of information society services in particular electronic commerce, in the Internal Market* [2000] OJ L178/1, art 18(1) ('Member States shall ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.') (*'EU E-Commerce Directive'*).

328 (Court of Justice of the European Union, C18/18, ECLI:EU:C:2019:821, 3 October 2019) [48]-[50]. The ECJ's ruling on this third issue largely turned on the interpretation of the word 'any' in article 18(1) of the EU E-Commerce Directive as had been earlier addressed in the course of its ruling on the first and second issues on the removal of 'equivalent content' (at [29]-[30]).

329 R Ingrid Silver, 'Monitoring online content: the impact of *Eva Glawischnig-Piesczek v Facebook Ireland Limited*', *ReedSmith* (online, 12 November 2019) <https://www.reedsmith.com/en/perspectives/2019/11/monitoring-online-content-the-impact-of-eva-glawischnig-piesczek-v-facebook>. However, *Google v CNIL*

Hence, it is open for LFL to argue that the Correction Direction is equivalent to an order of removal of content, and therefore disproportionate. The less intrusive remedy would be to require search engine operators, like Google and Bing, to de-link LFL's website from appearing on search results of end-users in Singapore. Alternatively, LFL should be required to issue a correction notice to *only* end-users in Singapore (Targeted Correction Direction),[330] and not to *all* users (General Correction Direction).[331]

Ultimately, the extra-territorial application of POFMA – whilst not unlawful *per se* – should be reserved for only exceptional and serious cases.

VIII ROLE OF ONLINE INTERMEDIARIES

Lastly, it is critical to consider the position and policy taken by Big Tech companies.

Traditionally, intermediaries are exempt from liability of third-party content.[332] Since they exercise no editorial control over such content, they should not be equated to authors and publishers.[333] Instead, they are deemed as mere 'conduits' which enable the access, transmission and caching of information,[334] or mere distributors 'akin to a public library or newsstand'.[335]

As such, intermediaries may be only held liable for unlawful third-party content upon possessing actual or constructive knowledge of its manifest unlawfulness, and they failed to expeditiously remove such content.[336] This is known as the 'notice-and-take-down' regime.[337]

However, such a 'hands-off' approach has come under fire of late. In the wake of the US Presidential elections, social media giants have borne the brunt of accusations of allowing fake news to run rampant on their platform and corrupt the minds of the electorate. Nevertheless, they remain defiant against taking on greater responsibility over their user content.

In November 2016, Facebook CEO Mark Zuckerberg stated:

---

may be distinguished on the basis that the case concerned the interpretation of GDPR which contains a provision limiting its territorial scope (art 3), and also that the right to be forgotten has not received recognition by third States (see *Google v CNIL* (n 323) [59]). Of course, the curious irony flowing from both decisions is that a highly restrictive measure (removal of content) could be enforced worldwide, but *not* a less-intrusive measure (removal of links from search engine results).

330 *POFMA* (n 8) s 21(1).

331 Ibid s 23(1)(a), (23)(2)(a).

332 'Manila Principles on Intermediary Liability' *A Global Society Initiative* (online, 24 March 2015), Principle I(b) < https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf >; 'Joint Declaration on Freedom of Expression and the Internet' *Organization for Security and Co-operation of Europe* (online, 1 June 2011), [2] <https://www.osce.org/fom/78309?download=true>.

333 *Delfi v Estonia* (n 101) [113].

334 EU E-Commerce Directive (n 327) art 14.

335 *Cubby Inc. v CompuServe Inc. Southern District of New York*, 776 F Supp 135 (SDNY, 1991)*; Payam Tamiz v Google Inc* [2013] EWCA Civ 68, [16] (Court of Appeal).

336 EU E-Commerce Directive (n 327) art 4; *Digital Millennium Copyright Act of 1998*, Pub L No 105-304, 112 Stat 2860 § 512(c) (US).

337 *Delfi v Estonia* (n 101) [159]; *Magyar Tartalomszolgáltatók Egyesülete v Hungary* (European Court of Human Rights, Application no 22947/13, 2 February 2016) [91].

> Identifying the 'truth' is complicated. While some hoaxes can be completely debunked, a greater amount of content, including from mainstream sources, often gets the basic idea right but some details wrong or omitted. An even greater volume of stories express an opinion that many will disagree with and flag as incorrect even when factual. I am confident we can find ways for our community to tell us what content is most meaningful, but I believe we must be extremely cautious about becoming arbiters of truth ourselves.[338]

Other Big Tech companies struck the same chord. During an August 2018 interview with *CNN*, Twitter CEO Jack Dorsey declared: 'I do think it would be dangerous for a company like ours… to be arbiters of truth'.[339]

Based on Facebook's research, there are several challenges faced by intermediaries:

(a) ***Prioritisation of harm***: Out of the many forms of unlawful online content, intermediaries are devoting their focus heavily on the more serious and harmful ones, such as terrorism, self-harm and suicide, nudity and hate speech.[340]

(b) ***Limitation of technology***: Due to the sheer volume of content generated on their platforms, even the deployment of human reviewers and cutting-edge AI programs struggle to detect such diverse range of unlawful content (at the end of 2018, Facebook could flag 99% terrorist content automatically without reporting but only 52% of hate speech).[341]

(c) ***Expertise of perpetrators***: Major floods of misinformation, including during elections, are typically coordinated campaigns launched by skilled and sophisticated operators equipped with a network of computers (originating from countries like Russia, Iran, Brazil and Myanmar).[342]

(d) ***Behaviour of users***: Unsurprisingly, 'people will engage disproportionately with more sensationalist and provocative content' – despite consistently insisting later that they dislike such content – which makes it difficult to draw the line between acceptable and prohibited content[343] (especially because the more viral a content become, the more likely it qualifies for protection of public interest).

(e) ***Effectiveness of remedies*****:** The primary vehicle of spreading misinformation is fake accounts (politically motivated), which are tackled by removal of accounts;[344] then

---

338 Mark Zuckerberg (Facebook, 13 November 2016) <https://www.facebook.com/zuck/posts/10103253901916271>.

339 Sean Burch, ''Twitter Shouldn't be 'Arbiters of Truth', says CEO Jack Dorsey' *The Wrap* (online, 20 August 2018) <https://www.thewrap.com/twitter-arbiters-truth-jack-dorsey/>.

340 Mark Zuckerberg, 'A Blueprint for Content Governance and Enforcement' (Facebook, 16 November 2018) <https://www.facebook.com/notes/mark-zuckerberg/a-blueprint-for-content-governance-and-enforcement/10156443129621634/?hc_location=ufi> (*'Zuckerberg, Blueprint for Content Governance*').

341 Ibid.

342 Mark Zuckerberg, 'Preparing for Elections' (Facebook, 13 September 2018) <https://www.facebook.com/notes/mark-zuckerberg/preparing-for-elections/10156300047606634/> (*'Zuckerberg, Preparing for Elections*').

343 Zuckerberg, Blueprint for Content Governance (n 340).

344 Facebook, *Community Standards on Fake Accounts* <https://transparency.facebook.com/community-standards-enforcement#fake-accounts>. In Q2 and Q3 of 2019, fake accounts represent approximately 5% of Facebook's worldwide monthly active users.

followed by spammers (economically motivated), which are tackled by reducing the distribution of their viral content and page respectively.[345]

In September 2019, Facebook took the surprising step in establishing an independent Oversight Board to review its user content.[346] Although the idea was first mooted by Mark Zuckerberg in November 2018,[347] the details were sketchy and reasonably perceived by some as 'hot air' to deflect growing global governmental scrutiny on Facebook's operations, particularly by the US Senate[348] and the UK Parliamentary committee.[349]

The Oversight Board is empowered to, amongst others, interpret Facebook's Community Standards, instruct Facebook to allow or remove content and instruct Facebook to uphold or reverse an enforcement decision.[350] The basis of decision-making is according to Facebook's content policies and values, prior Board decisions which have 'precedential value' and are 'highly persuasive', and 'in light human rights norms protecting free expression'.[351] The Oversight Board has yet to be constituted, but is anticipated to hear its first case by mid-2020 (in time for the US Presidential Elections in November).[352]

Why the sudden change of tune and heart? The charitable view is that intermediaries are starting to wake up to the indubitable truth that they owe the public more than just a moral obligation to regulate unlawful online content. The cynical view is the realisation that if they do not step up, governments will instead fill the gap of governance and impose stricter laws impeding their operations and revenue-generation.

The good news is that intermediaries being more active in nipping unlawful online content in the bud may stave off governmental intervention. The bad news is that they may be over-zealous in their censorship sweep,[353] and their ardent efforts may instead be perceived as a ringing endorsement for stricter governmental regulation.[354]

Hence, there must be closer coordination between governments and intermediaries in formulating their laws and policies respectively. This not only preserves legal consistency

---

345 Zuckerberg, Preparing for Elections (n 342).

346 'Establishing Structure and Governance for an Independent Oversight Board' *Facebook* (online, 17 September 2019) <https://about.fb.com/news/2019/09/oversight-board-structure/>.

347 Zuckerberg, Blueprint for Content Governance (n 340).

348 'Transcript of Mark Zuckerberg's Senate hearing' *The Washington Post* (online, 11 April 2018) <https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing/>.

349 Donie O'Sullivan, 'UK lawmaker hopes to publish secret Facebook documents within a week' *CNN Business* (online, 27 November 2018) <https://edition.cnn.com/2018/11/27/tech/facebook-hearing-damian-collins/index.html>.

350 'Oversight Board Charter' *Facebook* (online, 17 September 2019), art 1, s 4 <https://about.fb.com/wp-content/uploads/2019/09/oversight_board_charter.pdf>.

351 Ibid art 2, s 2.

352 Shirin Ghaffary, 'Here's how Facebook plans to make final decisions about controversial content it's taken down' *Vox* (online, 28 January 2020) <https://www.vox.com/2020/1/28/21112253/facebook-content-moderation-system-supreme-court-oversight-board>.

353 Heidi Tworek, 'An Analysis of Germany's NetzDG Law' *Transatlantic High Level Working Group on Content Modetation Online and Freedom of Expression* (online, 15 April 2019). <https://www.ivir.nl/publicaties/download/NetzDG_Tworek_Leerssen_April_2019.pdf>.

354 Tahira Mohamedbhai, 'Germany Cabinet approves bill for social medial platforms to report hate speech to authorities' *Jurist* (online, 21 February 2020) <https://www.jurist.org/news/2020/02/germany-cabinet-approves-bill-for-social-medial-platforms-to-report-hate-speech-to-authorities/>.

to enable the public to regulate conduct, but also serves to draw a clear line between their increasingly overlapping roles as the 'arbiters of truth'.

IX CONCLUSION

Actually, the very first line of this article is *false*. It was *not* Mark Twain – but more likely the satirist Jonathan Swift instead – who said that 'a lie can run halfway around the world before the truth has got its boots on'.[355]

Lies are not inherently evil. As aptly put by Breyer J in *US v Alvarez*:

> False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates' methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth.[356]

Some lies are harmless. Some lies are dangerous. As candidly put by Chan Sek Keong CJ in *Review Publishing*:

> It is one thing to falsely claim that an UFO has been spotted over the skies of Singapore; it is quite another to falsely assert that a person is a crook or a charlatan, especially if that person is also a holder of public office.[357]

Indeed, free speech is not an absolute virtue.[358] Whilst the truth may eventually prevail over lies, the truth alone may react too late and too slow to reverse the damage wrought by falsehoods. Some lies are alluring, stoke our inner biasness, and can persistently retain fanatical following, even in spite of clear and convincing evidence. Ironically, such lies often take the form of 'conspiracy theories' debunking well-established truths – that the Moon landing was faked,[359] or that the Holocaust and genocides never happened,[360] or that vaccination is bad for children.[361]

---

355 Niraj Chokshi, 'That Wasn't Mark Twain: How A Misquotation Was Born' *The New York Times* (online, 26 April 2017) <https://www.nytimes.com/2017/04/26/books/famous-misquotations.html>.

356 *US v Alvarez* (n 108) 4 (Breyer J).

357 *Review Publishing* (n 117) [283].

358 *Pung Chen Choon* (n 52) 576 (Edgar Joseph Jr SCJ).

359 Richard Godwin, 'One giant…lie? Why so many people still think the moon landings were faked' *The Guardian* (online, 20 July 2019) <https://www.theguardian.com/science/2019/jul/10/one-giant-lie-why-so-many-people-still-think-the-moon-landings-were-faked>.

360 *Pastörs v Germany* (European Court of Human Rights, Application no. 55225/14, 3 October 2019) [46]-[49]; *Williamson v Germany* (European Court of Human Rights, Application no. 64496/17, 8 January 2019), [26]; Anoush Baghdassaria, 'Congressional Recognition of the Armenian Genocide – 104 Years of Denial' *Harvard Human Rights Journal* (online, 27 December 2019) <https://harvardhrj.com/2019/12/congressional-recognition-of-the-armenian-genocide-104-years-of-denial/>.

361 'Hanging with the anti-vaxxers' *The Economist* (online, 28 March 2019) <https://www.economist.com/united-states/2019/03/28/hanging-with-the-anti-vaxxers>.

Moreover, sensationalist spins can destroy a person's credibility industriously cultivated over decades in the blink of an eye. Freedom of press is no *carte blanche* for character assassination. It is in the public interest that the reputation of public figures should be protected from being debased falsely.[362] Chan Sek Keong CJ is right in observing that such protection is integral to build a relationship of trust and confidence between a government and its people:

> In Singapore, there is no place in our political culture for making false defamatory statements which damage the reputation of a person (especially a holder of public office) for the purposes of scoring political points. Our political culture places a heavy emphasis on honesty and integrity in public discourse on matters of public interest, especially those matters which concern the governance of the country.[363]

Simply put, filtering noise improves the quality of sound.

Hence, governments worldwide are rightly concerned that more must be done to stop dangerous and persistent lies from spreading around the world. Since 2018, Malaysia and Singapore have taken bold steps towards stricter regulation.

Although Malaysia took the lead by enacting AFNA in April 2018, AFNA immediately fell into a limbo and disuse due to the change of government and was eventually repealed less than 2 years later in December 2019. Still, Ministers remain coy and disingenuous, continually sending mixed signals – being critical of AFNA on one hand, but calling for new laws or more use of existing laws to combat fake news on the other hand. More alarmingly, the common thread in the convictions under s 233(1)(a) of CMA is *seditious* content – this fuels suspicion that such laws are being wielded as weapons to suppress dissent against powerful public figures. Lastly, in light of the shifting winds across the Malaysian political landscape,[364] one should not be surprised if AFNA makes a comeback in a different guise.

In contrast, Singapore's approach is more measured. The POFMA was forged from methodical consultations, reports and readings involving key stakeholders over a year. The end product is an impressive tome woven with intricate details. So far, enforcement has been quick. Individuals have been slapped with correction notices, and access blocking orders were issued to intermediaries where individuals failed to comply with such notices. Attempts at extra-territorial enforcement hint towards more aggressive regulation in future.

In short, both their approaches are starkly different. Malaysia is prone to use a sledgehammer to crack a nut, whilst Singapore wields a scalpel that can silently kill free speech by a million cuts. Either way – cliché as it sounds – there is a real risk of *chilling effect*.[365] Whilst existing legislation may adhere to the principles of legality and

---

[362] *Reynolds v Times Newspaper* (n 105) [201] (Lord Nicholls); *Flood v Times Newspaper Limited* [2012] UKSC 11, [178] (Lord Mance) (Supreme Court).

[363] *Review Publishing* (n 117) [285].

[364] 'Beset at its birth: Malaysia's new government may be even more unstable than the old one' *The Economist* (online, 5 March 2020) <https://www.economist.com/asia/2020/03/05/malaysias-new-government-may-be-even-more-unstable-than-old-one>.

[365] *Singapore Second Reading for POFMA* (n 21) [266]-[267]. The Singaporean Minister of Law, K Shanmugam, rather cynically characterised 'chilling effect' as 'one of the most overused phrases' during the Parliamentary

necessity, it remains to be seen whether future regulatory measures will meet the test of proportionality, especially when applied extra-territorially. One can only hope that any heavy hand of enforcement comes with honest introspection of the effectiveness of such measures.

Ultimately, the pursuit for truth is not a sprint, but a marathon. Lies may beat the whistle and steal a march on us, but eventually, the truth will catch up and set us free.

---

reading of the POFM Bill. Nonetheless, he followed up such punchline with a dose of sensible pragmatism: 'Free speech should not be affected by this Bill. We are talking here about falsehoods, we are talking about bots, we are talking about trolls, we are talking about fake accounts and so on.'