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Deliberate Online Falsehoods – Causes, Consequences and Countermeasures

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I. INTRODUCTION

We acknowledge the validity of the concerns about spreading deliberate online falsehoods which may stir up discord and undermine racial and religious harmony to the detriment of the multi-religious and multi-racial society of Singapore. While it is central to our democratic society that freedom of debate and discourse remain open, we appreciate that this could harm other fundamental liberties and public goods, such as freedom of religion and freedom of speech, both of which are enshrined in our Constitution. Hence, the proposed deliberate online falsehoods law should strike an appropriate balance between these two constitutional rights and legitimate public order concerns. This is because Article 4 of the Constitution entrenches the supremacy of the Constitution and provides that any legislation which is inconsistent with it shall be void. In this regard, we have two main points. First, we are concerned that the proposed deliberate online falsehood law may limit the right to free speech guaranteed by the Constitution. Hence, we propose some principles to delineate the scope of "deliberate online falsehoods" and also a multi-factorial sanctions regime. Second, we are concerned that the right to religious freedom and the principle of secularism would be undermined should "false religious beliefs" fall within the ambit of "deliberate online falsehoods".

II. FREE SPEECH ISSUES

Article 14(1) protects the Singapore citizen's freedom of speech and expression, but expressly subjects this fundamental liberty to"eight exhaustive restrictions listed in Article 14(2)(a). Parliament may pass laws restricting the right to free speech "as it considers necessary and expedient" only provided that such laws are "in the interests of":

1) The security of Singapore;
2) Friendly relations with other countries;
3) Public order;
4) Public morality;
5) Parliamentary privileges;
6) Contempt of court;
7) Defamation; and
8) Incitement to any offence.

As a preliminary point, the free speech issues discussed in this part concern only *Singapore citizens* . They have no relevance to non-citizens "because the makers of our Constitution did not think it proper or wise to confer constitutional free speech on non-citizens, who have no stake in our country."[1] Instead, non-citizens enjoy "common law free speech in Singapore, and they are entitled to express themselves freely subject only to the ordinary laws of the land, including the law of defamation."[2]

A. The "balancing" approach, as a constitutional framework, should be adopted to set the appropriate statutory limits to free speech.

As Sundaresh Menon CJ sets out in his dissenting judgment in *Attorney-General v Ting Choon Meng*[3], "[it] is clear that there is no absolute right to free speech." The excerpt of his judgment merits reproduction, as follows[4]:

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[1] *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 0052 at [268] [*Review Publishing*]
[2] *Ibid.*
[3] *Attorney-General v Ting Choon Meng and another appeal* [2017] SGCA 6 at [114] - [115] [*Ting Choon Meng*]
[4] *Supra* note 3, at [109].

> Turning to the substantive question on the constitutionality of the remedy contained in s. 15 [of the Protection from Harassment Act], in my judgment, s. 15 as I have interpreted it would not impermissibly inhibit the right to free speech. **It is clear that there is no absolute right to free speech.** The right conferred under Art 14(1)(a) of the Constitution can be restricted in the wider interests of, among others, broader societal concerns such as public peace and order so that the exercise of that right does not impinge on or affect the rights of others. **Whether speech may be limited entails a *delicate balancing exercise* between the nature of the individual's right to speak and the competing interest in limiting that right** … **and whether in the circumstances, it is "necessary or expedient" to do so** (under Art 14(2)(a) of the Constitution). (emphasis added)

In other words, the constitutionality of legislative restrictions on fundamental liberties is determined using a "balancing" approach. The term "balancing" connotes "a form of constitutional reasoning to address conflicting values and interests."[5] The starting point for the "balancing" exercise is laid down by Karthigesu JA in *Taw Cheng Kong v Public Prosecutor*, as follows[6]:

> I think two questions must be answered when a court is asked to give effect to an article in Part IV [of the Constitution, which sets out fundamental liberties]. **Firstly**, the court must ask itself what is the **underlying rationale** of the article: what are the reasons for the existence of such a right and for placing it on a constitutional pedestal? It is only by recognising the **purpose** and importance of a right that it may be given proper effect. **Secondly**, the court must determine the **scope** of the right: **how extensive is the protection intended to be given by the constitution**? The second question bears a direct relationship to the validity of an impugned statute as a statute is only valid insofar as it does not intrude on the scope of the protection contemplated. (emphasis added)

A "categorical" approach should be eschewed insofar as constitutional rights are automatically trumped by public order concerns threatening the "sovereignty, integrity and unity of Singapore."[7]

B. Proportionality review should be incorporated in a balancing exercise.

Since the right to freedom of speech is a right based on a constitutional or higher legal order foundation[8], the Select Committee should further consider whether any intended restriction on free speech (for example, the imposition of onerous fines) is reasonable or proportionate[9].

Proportionality review gives more protection to Singapore citizens whose rights are subject to state restrictions, "by requiring the government authority not only to show that **[a]** the restrictive measure was based on a permissive ground, but also **[b]** 'allows a court to examine whether legislative interference with individual rights corresponds with a pressing social need; **[c]** whether it is proportionate to its legitimate aim and **[d]** whether the reasons to justify the statutory interference are relevant and sufficient.'"[10]

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[5] Thio Li-ann, *A Treatise on Singapore Constitutional* Law (Singapore: Academy Publishing, 2012) at 11.091 [*Treatise on Singapore Constitutional Law*]

[6] *Supra* note 5, at 11.101. Part E of Chapter 12 provides a very useful explanation on how to conduct the "balancing" exercise.

[7] *Supra,* note 5, from 11.147 to 11.148; citing *Chan Hiang Leng Colin and others v Public Prosecutor* [1994] SGHC 207 at [64].

[8] *Supra,* note 1, at [261], [263] and [264].

[9] *Supra*, note 5 from 11.147 to 11.148.

[10] *Supra,* note 5 at 11.149, citing *Chee Siok Chin v Minister for Home Affairs* [2005] SGHC 216 at [87].

A similar approach applied in continental European jurisprudence asks what the least restrictive measures, which are "necessary within a democratic society", might be, and therefore "subject[s] government measures to a standard of democracy developed by the [European Court of Human Rights]."[11] The "necessary within a democratic society" standard has also been applied by the English courts, thanks to the Human Rights Act[12].

Even though (i) the High Court in *Chee Siok Chin v Minister for Home Affairs* has rejected proportionality review, and (ii) Parliament may enact laws limiting free speech if it thinks this "necessary and expedient", it is hoped that the Select Committee would apply the principle of proportionality (or a more freedom-friendly concept of "necessity"[13] in Article 14(2)(a) that mirrors the "necessary within a democratic society" standard), given that this principle has been applied in substance (though not expressly stated) in a recent 2015 court decision reviewing the constitutionality of a police ban on musical instruments during a Thaipusam procession against Article 15.[14] This would help strike a sweeter balance between freedom of speech and public order concerns. More exacting standards should be employed, as the high deterrent effect of state sanctions against deliberate online falsehoods risks unduly chill speech in a "vertical" sense[15].

C. Applying the balancing framework to deliberate online falsehood regulation

There are two conflicting items to balance: first, the value of deliberate online falsehoods as free speech; and second, countervailing "public order" concerns. It is envisaged that the balance would tilt in favour of the latter ("public order" being a constitutional ground to limit free speech), as there is no interest in protecting false statements of fact that are designed to mislead. It is hoped that the Select Committee would then further consider whether the proposed mechanisms to quell these public order concerns are proportionate.

This sub-section sets out four issues:

a. the definition of "public order";
b. the theoretical arguments against protecting deliberate online falsehoods as free speech;
c. the difficulty in defining what "deliberate online falsehoods" means; and
d. the benefits of a multi-factorial approach towards the imposition of liability.

a. Meaning of "Public Order" within Article 14(2)(a)

It is important to understand the scope of "public order" as a countervailing constitutional interest in Article 14 that permits statutory limitations on free speech. As no written law defines "public order", the Malaysian decision of *Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia*[16] is instructive.[17]

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[11] *Supra*, note 5 at 11.149.
[12] *Ibid.*
[13] *Supra*, note 5 at 11.156.
[14] *Vijaya Kumar s/o Rajendran and others v Attorney-General* [2015] SGHC 244 at [33] to [38].
[15] *Supra*, note 5 from 14.028 to 14.030.
[16] *Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1976] 2 MLJ 83 [*Tan Boon Liat*].
[17] *Supra,* note 5 at 11.135. The 2015 High Court decision in *Vijaya Kumar* (*supra*, note 14) appeared to endorse the definition of "public order" in *Tan Boon Liat*: at [31].

In that case, Abdoolcader SCJ concluded that:

> The expression 'public order' is not defined anywhere but danger to human life and ***the disturbance of public tranquillity*** must necessarily fall within the purview of the expression… The test to be adopted in determining whether an act affects [a] law and order or [b] public order is this: **Does it lead to disturbance of the current life of the community so as to amount to disturbance of the public order or does it merely affect an individual leaving the tranquillity of the society undisturbed?** (emphasis added)

Abdoolcader SCJ distinguishes between the wider concept of "***law and order***" and the narrower one of "***public order***". He describes the latter as a "less decentralised and narrower conception than the ordinary maintenance of law and order."

Hence, an act affecting "public order" and an act affecting "law and order" are not equivalent. These two acts are different in nature. More importantly, they differ in terms of their "**impact or effect on the community at large**; the practical implication [being] that executive action taken to prevent the subversion of the public order might not be permitted if the goal was just the 'maintenance of law and order under ordinary circumstances."[18]

The point is succinctly summarised in Professor Thio Li-ann's *A Treatise on Singapore Constitutional Law*[19]:

> Every breach of the law "always affects order", but before it can be said to affect ***public*** order, "it must affect the community or the public at large". As such, "a line of demarcation must be drawn between serious and aggravated forms of disorder which directly affects the community or injure the public interest and the relatively minor breaches of peace of a purely local significance which primarily injures specific individuals, and only in a secondary sense public interest."
>
> Although the distinction is a question of degree, the relevant factors identified are **[a] the gravity of the action**, **[b] its impact on the community** and **[c] the connection between the act and the threat it posed to public order**. As far as evaluating the nature of the threat to "public order" is concerned, the Indian Federal Court in *Rex v Basudeva* stated that this connection had to be "real and proximate, not farfetched or problematical; the American test is that of "clear and present danger." [emphasis added]

However, it should be noted that VK Rajah J (as he then was) in *Chee Siok Chin v Minister for Home Affairs* adopts a far broader view of public order as he held that "**disseminating false or inaccurate information or claims can harm and threaten public order**."

It is proposed that the Select Committee make further distinctions within this capacious statement in *Chee Siok Chin, viz.* that the dissemination of false information in general can harm and threaten public order, by applying the principles canvassed from *Tan Boon Liat.* Online misinformation occurs in a myriad of circumstances. Hence, the gravity of harm caused by the dissemination of deliberate online falsehoods lie on a spectrum. In this regard, we can distinguish between (i) deliberate online falsehoods that clearly upset "public order", *viz.* disruptions to the community's tranquillity and security, and (ii) inconsequential disseminations of online falsehoods.

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[18] *Tan Boon Liat* at [22], as cited in *Treatise on Singapore Constitutional Law* at 11.136.
[19] *Supra,* note 5 from 11.138 to 11.139.

b. Deliberate online falsehoods are not constitutionally protected speech

The right to free speech in Article 14 does not protect the right to make deliberate online falsehoods of *fact*[20]. Such statements constitute non-valuable speech, which are not justified by two prominent free speech rationales: (i) the argument from truth; and (ii) the argument from democracy[21].

The Court of Appeal in *Review Publishing Co Ltd v Lee Hsien Loong* ("*Review Publishing*") opined, in the context of the tort of defamation, that "defamatory statements which, *because they are false*, have no political, social or cultural value."[22] Such statements are thus not constitutionally protected speech based on the arguments from both truth and democracy.

(i) Argument from truth

There are two versions of the argument from truth: (i) the classic version, as espoused by John Milton and John Stuart Mill; and (ii) the alternative version, or the "competition of the market" rationale, which conceptualises the same argument from the perspective of the free market[23].

The High Court in *Lee Hsien Loong v Roy Ngerng Yi Ling* ("*Roy Ngerng*") succinctly explains the difference between these two versions[24]:

> The classic exposition of the argument from truth … says that opinions, both true and false, should be protected so as not to deprive society of 'the opportunity of exchanging error for truth' and a 'clearer perception and livelier impression of truth'… This is premised on the assumption that the ***absolute truth*** will eventually emerge. In more recent times, the argument from truth has been conceptualised in an alternative manner, which considers truth to be ***relative***. What is "true" is simply what emerges from open discussion and argument to be accurate and/or rational: see [*Treatise on Singapore Constitutional Law*] at para 14.011. This is expressed in Holmes J's powerful and widely-cited dissent in *Abams v United States*… in which he states:
>
> > [W]hen men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – **that the very best test of truth is the only power of the thought to get itself accepted in the competition of the market**, and that truth is the only ground upon which their wishes can safely be carried out. (emphasis in bold and underline added)

The classic version of the argument from truth does not justify protecting deliberate online statements of *fact* from governmental regulation. The intentional/deliberate fabrication of content, by virtue of its clear falsity, makes no contribution to society's search for the *absolute truth*.

Similarly, the "competition of the market" rationale is inapplicable to false statements of fact *per se*, much less false statements of fact made with *the intention to mislead*. The Court of Appeal in *Review*

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[20] *Lee Hsien Loong v Roy Ngerng Yi Ling* [2015] SGHC 320 at [99]; *Review Publishing* at [279] – [285].
[21] *Lee Hsien Loong v Roy Ngerng Yi Ling* at [97], citing *Treatise on Singapore Constitutional Law* from 14.006 to 14.020.
[22] *Supra,* note 1 at [279].
[23] *Lee Hsien Loong v Roy Ngerng Yi Ling* [2015] SGHC 320 at [98] [*Roy Ngerng*].
[24] *Ibid.*

Publishing questions "whether the marketplace of ides rationale is applicable to false statements, [as] [s]uch statements are (by definition) inaccurate and do not derive any value from their publication as '***there is no interest in being misinformed***' (*per* Lord Hobhouse of Woodborough in [the seminal House of Lords decision of *Reynolds v Times Newspapers Ltd*] at 238)."[25]

However, *Review Publishing* states that the "competition of the market" rationale should accord "the fullest scope for exercising freedom of speech [to] the sphere of statements relating to *ideas or beliefs which cannot or have yet to be proven 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 "the competition for ideas in the marketplace can lead to advances in science and knowledge to the benefit of mankind."[26]

Society benefits from protecting the free expression of such competing ideas or beliefs "**whose truth or falsity cannot or has yet to be determined with scientific certainty**."[27] "Truth" becomes *relative*, insofar as 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."[28] The "competition of the market" is thus necessary as it allows alternative views to challenge the incumbent view. Consequently, "truth" emerges from this jostling of diverse views for favour among, in this case, netizens who would rationally assess these competing views.

In this regard, the "competition of the market" argument for free speech does ***not*** justify the protection of deliberate online falsehoods, precisely because false statements of fact cause the ideal free market mechanism to fail in the following four respects:

(i) the deliberate fabrication of information ***misleads***, rather than facilitates, the public's ability to rationally decide which view to prefer;
(ii) it undermines the presumption that the public has "***perfect information***", *viz.* that netizens are well-equipped to distinguish between accurate and inaccurate information;
(iii) it undermines the presumption that the ***public would always act rationally***, and thus would initiate fact-checking exercises whenever in doubt and listen to alternative viewpoints; and
(iv) deliberate online falsehoods compete with accurate statements in an "***unequal playing field***"[29] insofar as the various viewpoints are unable to compete fairly for the public's attention. Automated bots can create the fiction that certain websites are highly popular, and there is a real risk that the public is unable to discern between truth and falsehood.

(ii) Argument from democracy

Deliberate online falsehoods should not be protected speech, as these statements hinder democracy in two ways. First, they undermine representative government as voters are unable to make informed choices between competing candidates and policies.[30] This situation is increasingly common as most of the Green Paper's examples of deliberately fabricated reports (*i.e.* "fake news") and rumours were published and circulated during national elections and referendums. Second, during the period in between elections, such false statements undermine "democracy as *process*"[31]. Deliberative open

[25] *Supra,* note 1 at [283].
[26] *Supra,* note 1 at [282].
[27] *Ibid.*
[28] *Ibid.*
[29] *Supra,* note 5 at 14.012.
[30] Peter Singer, "*Free Speech and Fake News*", 19 Jan 2017, *The Daily Star (Lebanon).*
[31] *Supra,* note 5 at at 03.114 to 03.115: "[d]emocracy as *process* focuses on the importance of developing a culture of reasons for the exercise of government power beyond bare majoritarianism ***through a deliberative process***

political debate is undermined by intentionally fabricated information, which consequently destroys the feedback loop between the government and the governed.

At this juncture, Lord Hobhouse's observation in the seminal House of Lords' decision of *Reynolds v Times Newspapers Ltd*, which was affirmed by *Review Publishing*[32], is pertinent.

> It is always important 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 and not misinformed. Misleading people and … 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***. (emphasis added)

c. Definitional issues

At this point in our write-up, the concern about the precise scope of "deliberate online falsehoods" is apposite. We suggest that "deliberate online falsehoods" be restricted to false statements of *fact*. This is because the courts' various arguments against the constitutional protection of false speech was premised on the courts being able to confidently conclude that the speech in question "*has been proven as a matter of fact to be false in a court of law*"[33] ("the key premise").

The Select Committee may consider using the key premise to restrict the scope of "deliberate online falsehoods" (for the purposes of legal regulation) to online statements of *fact* (leaving aside, for this moment, the further criterion of *mens rea*, *i.e.* the intention that accompanies the making and/or circulation of such statements).

In the event where a quasi-judicial body is created to adjudicate whether online statements constitute "deliberate online falsehoods", the key premise also raises two relevant principles. First, the quasi-judicial body should be ***independent***. Second, the adjudicatory process should be conducted according to ***proper procedures***.

The rationale for these two principles is based on the two common law procedural rules of natural justice, *viz.* (i) the ***rule against bias*** (*nemo iudex in re sua*) and (ii) the ***fair hearing rule*** (*audi alteram partem*). These two rules reflect a universal, inherent desire for fair play, objectivity and impartiality. These rules are "not some arcane doctrine of law. They represent what the ordinary man expects and accepts as fair procedure for the resolution of conflicts and disputes by a decision making body that affects his interest."[34]

Parliament may choose to enact statutory requirements of fair procedure. However, the court may imply in procedural fairness requirements ***over and above*** those provided by statute, as "the justice of the

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which protects viewpoint diversity and enables 'all or almost all citizens' to appreciate these reasons as 'public-regarding', that is, serving the common good." (emphasis added).

[32] *Supra,* note 1 at [284].

[33] *Supra,* note 3 at [115].

[34] *Stansfield Business International Pte Ltd v Minister for Manpower* [1999] SGHC 183 at [26].

common law supplies the omission of the legislature."[35] Generally, the courts are less willing to exercise their discretion the more comprehensive the statutory procedural safeguards[36].

(i) Rule against bias

The rule against bias prevents anyone from being a judge in his own cause[37]. This results in a perversion of justice, because justice could not be done and would not be *seen* to be done when those having personal or pecuniary interests in the dispute sit on the adjudicatory panel[38].

Should the creation of an adjudicatory body be in the offing, the Select Committee should ensure that the composition of the panel does not fall foul of the rule against bias. Perhaps such bodies could compose of a council of peers, instead of personnel from the Government or social media/tech companies.

(ii) Fair hearing rule

The bundle of procedural rights required by the fair hearing rule is not fixed but dependent on the nature of the interest involved and the nature of the decision-making body[39].

However, the core set of principles has been enunciated by Lord Hodson in *Ridge v Baldwin*[40]:

1. the right to have notice of the adverse charge;
2. the right to be heard in answer to the charge and
3. to contradict the charge before an unbiased tribunal.

Similarly, the Court of Appeal in *Per Ah Seng Robin v Housing and Development Board* affirmed that:

> "If the right to be heard is to be a real right worth anything, it must carry with it a right in the accused man to **[a]** know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then **[b]** he must be given a fair opportunity to **[c]** contradict or correct them."[41]

The Select Committee can design its regulatory framework bearing these three core elements of the fair-hearing rule in mind.

d. Constructing a multi-factorial sanctions regime

The fact that the making and/or circulation of "deliberate online falsehoods" can arise in a myriad of circumstances should be reflected in a sanctions regime that imposes the appropriate degree of liability in light of the unique factual matrix at hand.

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[35] *Cooper v Wandsworth Board of Works* [1863] CNBS 180, cited in *Law Society of Singapore v Chan Chow Wang* [1975] 1 MLJ 59.
[36] *Furnell v Whangerei High School* [1973] 1 All ER 400, cited in *Law Society of Singapore v Chan Chow Wang*.
[37] *Chiam See Tong v Singapore Democratic Party*, affirmed by *Sim Yong Teng v Singapore Swimming Club* [2016] SGCA 10 at [79].
[38] *Khong Kin Hoong Lawrence v Singapore Polo Club* [2014] SGHC 82.
[39] *McInnes v Onslow-Fane* [1978] 1 W.L.R. 1520.
[40] *Ridge v Baldwin* [1964] AC 40, cited in *Law Society of Singapore v Chan Chow Wang*.
[41] *Per Ah Seng Robin v Housing and Development Board* [2015] SGCA 62 at [89], affirming Lord Denning in *B Surinder Singh Kanda v Government of the Federation of Malaya* [1962] AC 322.

As a preliminary matter, the Select Committee should clarify whether the new regulations would be based on ***strict liability*** (*i.e.* where a person is liable for committing an action, regardless of what his intention was when committing the action[42]). It may be safe to assume that the proposed legislation considers ***intention*** as a relevant factor in determining whether liability attaches, since this logically flows from the Select Committee's mandate to study ***deliberate*** online falsehoods.

We propose a non-exhaustive list of six possible factors (to be applied holistically) that may guide the courts in assessing the appropriate liability for those falling foul of the new regulations. Several of these factors are not new; the courts currently use them to make an assessment for general damages in defamation suits[43]. We also offer some points for consideration in our elaboration for some of these factors.

(i) The level of intention or knowledge necessary to attract liability.

Publishing false statements of fact online *recklessly* should suffice to attract liability. The case of *Goh Chok Tong v Jeyaretnam Joshua Benjamin* held that the maker of a false statement made "recklessly, without considering or caring whether it be true or false" is "treated as if he knew it to be false" and had acted in malice[44]. There is also a further question as to whether gross negligence would suffice to attract liability.

(ii) The role of the person involved.

This factor differentiates the severity of responsibility imposed on someone who *authored* a false statement and another who *circulates* it. The level of *mens rea* (factor (i)) is also relevant here; a careless forwarder of online falsehood is much less culpable than one who authors false statements of fact with the intention to mislead.

(iii) The factor of malice.

In the context of defamation, the term "malice" has not been restricted to its ordinary meaning of spite or ill-will but has also been taken to include "some wrong or improper motives"[45]. This meaning of "malice" could similarly apply in deliberate online falsehood regulation.

(iv) The nature and magnitude of harm caused by deliberate online falsehoods.

A key question is whether the magnitude of harm sufficiently affects the public interest. However, it is worth bearing in mind that "what engages the ***interest of the public*** may not be material which engages the ***public interest***."[46] As Baroness Hale puts it, "the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public, but no one [can] claim any real public interest in … being told all about it."[47] The Court of Appeal in *Review Publishing* also notes that, "it is one thing to falsely claim that an UFO has been spotted over the skies of Singapore; it is quite

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[42] Strict Liability, Wex Legal Dictionary/Encyclopedia, Cornell Law School, online: https://www.law.cornell.edu/wex/strict_liability

[43] *Supra,* note 23 at [21] for the comprehensive list of these factors.

[44] *Goh Chok Tong v Jeyaretnam Joshua Benjamin* [1998] 2 SLR(R) 971 at [53], cited in *Roy Ngerng* at [68].

[45] *Lee Kuan Yew v Davies Derek Gwyn* [1989] 2 SLR(R) 544 at [112], cited in *Roy Ngerng* at [68].

[46] *Supra*, note 1 at [207(b)], citing Lord Bingham in *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2007] 1 AC 359.

[47] *Ibid.*

another to falsely assert that a person is a crook or a charlatan, especially if that person is also a holder of public office."[48]

Applying this factor to, say, the infamous deliberately fabricated rumour circulating during the 2016 US presidential elections that Hillary Clinton was running a paedophilia ring, the gravity of the false allegation and the "opportune" time at which it was circulated deeply engages the public interest, insofar as the protection of reputation is not simply a matter of importance to the affected individual and his family. More importantly, the "protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely."[49] This observation has even more force when false allegations against public figures circulate during national elections.

(v) The identity of the purveyor of falsehood and the degree of care that he was supposed to take in fact-checking.

As the High Court in *Roy Ngerng* put it, "[the] words of a dishevelled tramp in a street corner would be far less capable of causing damage than that of the CEO of a multi-national company."[50] The High Court then went on to consider two factors, *viz.* (a) the reach of the defamatory publication; and (b) whether the defendant had "represented himself to be a person who promised to speak the truth and to present accurate information on issues concerning Singaporeans."

The High Court, in *obiter dicta*, suggested that it was possible to award a larger quantum of damages for defamation, if:

- In relation to (a), that "the ***popularity of the Blog*** … and the manner in which [the defendant's] views were presented were ***sufficient to elevate his credibility*** to that of a leading opposition, or to imbue his words with the gravitas they would have had had they been in a publication with an international circulation."
- In relation to (b), that there was ***sufficient evidence*** to show that the defendant "had in fact enjoyed such standing [for] there [was] no evidence of his perceived credibility or the influence he actually wielded."

The proposed deliberate online falsehood legislation could adopt a similar framework by imposing stricter penalties on individuals like the editors of the now-defunct socio-political website, *The Real Singapore* ("*TRS*"), who, despite being cognisant of *TRS's* relative popularity as a news website that Singaporeans visit, deliberately published false new stories that threatened the multi-racial and multi-religious social fabric for monetary gain.

(vi) Whether the person was a first-time or a repeat offender.

III. RELIGIOUS FREEDOM ISSUES

The primary thesis for this part is that "false representations" of a religion should not be treated as "deliberate online falsehoods" because this undermines the Singapore model of secularism and, consequently, religious freedom guaranteed under Article 15 of the Constitution. Hence, the Select Committee should distinguish between (i) false facts that are designed to mislead and (ii) questionable visions of religious truth. The scope of deliberate online falsehood should be confined to the former; it

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[48] *Supra,* note 1 at [284].
[49] *Supra,* note 1 at [279], citing Lord Nicholls in the House of Lords decision in *Reynolds v Times Newspaper Ltd* (at 201).
[50] *Supra,* note 23 at [39] to [43].

should not be extended to include "false religious beliefs" – a proposition that has been raised by a forum contributor[51].

Article 15(1) guarantees the right to profess and practise one's religion and to propagate it. Article 15(4) authorises restrictions on this right on the ground of "public order, public health or morality." As for the principle of secularism, although it is not expressly stated in the Constitution, it has nevertheless been "clearly understood"[52] since Singapore's independence that "the legitimacy to govern derives from democratic elections as 'ultimate political authority' rather than 'any divine or ecclesiastical sanction'."[53]

Secularism is a "protean term" and its meaning "depends on the socio-historical context in which it is used and who uses it". As far the Singapore model of secularism is concerned, it is "anti-theocratic, not anti-religious" insofar as the Government is ***neutral*** in neither preferring nor disadvantaging theistic or anti-theistic views (which are, in fact, anti-religion *religions*).

An important corollary of ***state neutrality*** is "a state agnosticism towards religious truth." The secular Singapore state is not a defender of religious orthodoxy. Therefore, the Government has no political authority to get entangled with the question of "true" or "false" versions of religious doctrine, because secularism prevents the conflation of Church and State. The Singapore Government, which derives its legitimacy to rule from democratically-held elections, rather than the "mandate of heaven" bestowed upon it by religious authorities, should never be perceived by Singaporeans to have a political interest in defining religious truth.

The public order concerns flowing from certain statements of religious belief, *viz.* the message spread by terrorist groups like ISIS that members of the Islamic faith "achieve paradise through suicide bombings"[54], are, in fact, ***separate*** from the veracity of such beliefs (which is something that cannot be determined by fiat or mere numbers). These public order concerns are already addressed by existing legislation, like sections 8 and 9 of the Maintenance of Religious Harmony Act, which empowers the Minister to issue restraining orders against persons in positions of religious authority or lay members, if he is satisfied, *inter alia,* that such persons are "causing feelings of enmity, hatred, ill-will or hostility between different religious groups."

IV. CONCLUDING THOUGHTS

The law is not the only way to regulate deliberate online falsehoods. Ultimately, self-regulation and greater media literacy are indispensable to mitigate against the spread of deliberate online falsehoods and their attendant effects. In this regard, the Select Committee may consider setting up independent central fact-checking websites and/or organisations. It may further consider working with the relevant

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[51] In his forum contribution to *The Straits Times* on 8 Jan 2018 titled "***The Select Committee studying fake news should look into false beliefs***", Mr Nordin Amat wrote: "I strongly suggest that the war against falsehoods perpetuated online be extended to include ***false* religious beliefs** and practises which could incite social unrest and turmoil... In line with the Green Paper's vision of preventing the dissemination of deliberate falsehoods which attack the very heart of democracy, the public needs to be warned that **sharing or supporting any *false* belief, such as achieving paradise through suicide bombing,** will be construed as inciting such heinous acts." Online: http://www.straitstimes.com/forum/letters-in-print/select-committee-studying-fake-news-should-also-look-into-false-beliefs [*Nordin Amat's article*]

[52] *Supra,* note 5 at 03.122.

[53] *Supra,* note 5 at 03.130.

[54] *Supra*, note 51.

ministries to draft a "Code of Online Ethics" that would systematically guide netizens in assuring the factual accuracy of any content they publish and/or read.

Thank you very much for considering our concerns, which we hope you will address.

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(willing to appear before the Committee to give evidence, if required)