

## **Written Representation 55**

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### **Parliament of Singapore Select Committee on Deliberate Online Falsehoods - Causes, Consequences and Countermeasures**

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## I. INTRODUCTION: HARMFUL SPEECH AND THE CONSTITUTIONAL FRAMEWORK

1. Parliament has identified a problem of global dimensions: the need to regulate deliberate online falsehoods, whether perpetuated by local or foreign actors, which have a negative public impact of a non-trivial nature. The harms identified by the Green Paper on Deliberate Online Falsehoods: Challenges and Implications (“Green Paper”) are ***national*** in scale, where the aim of such speech is “to sow discord amongst racial and religious communities, exploit fault lines, undermine public institutions, interfere in elections as well as other democratic processes”, which can weaken countries.
2. This submission seeks primarily to address the issues raised in Paragraph 84(c) and (d) of the Government Green Paper, which implicate the theory, rationale and scope of free speech in general, and within our constitutional framework. The hope is to contribute towards identifying the principles that should guide Singapore’s response.

c) The consequences that the spread of online falsehoods can have on Singapore society, including to our institutions and democratic processes; and

(d) How Singapore can prevent and combat online falsehoods, including:  
(i) the principles that should guide Singapore’s response; and  
(ii) Any specific measures, including legislation, that should be taken.

- 2.1. Essentially, the Select Committee is engaged upon the task of differentiating between speech which is valuable and worthy of constitutional protection, and speech whose content is not valuable, unworthy of constitutional protection because of the harm or threat it poses to other values of co-equal or greater importance. In other words, while the freedom of speech is a constitutionally recognised fundamental liberty for citizens (it is a common law right for non-citizens which connotes a lesser degree of protection),<sup>1</sup> free speech is not an absolute right and not necessarily a primary right,<sup>2</sup> given that it has to be balanced against competing rights, duties and public goods.
- 2.2. However, Parliament does not enjoy an absolute discretion to limit free speech and render it illusory, but may only regulate a fundamental right in a manner consonant with the Constitution, which is the supreme law of the land. Our free speech clause, article 14(1), is framed in the form of a constitutional

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<sup>1</sup> *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52, [266]-[267]. The Court of Appeal noted that “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.” [68].

<sup>2</sup> Sydney Kentridge, 'Freedom of Speech: Is it the Primary Right' (1996) 45(2) ICLQ 253-270

bargain, reflecting a trade-off between free speech and eight exhaustive competing interests stipulated in article 14(2). The relevant provisions are reproduced below:

**Freedom of speech, assembly and association**

**14.—(1)** Subject to clauses (2) and (3) —

(a) every citizen of Singapore has the right to freedom of speech and expression;

(2) Parliament may by law impose —

(a) on the rights conferred by clause (1)(a), such restrictions as it considers necessary or expedient in the interest of the security of 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;

2.3. Any enactment of laws regulating speech, including the spreading of deliberate online falsehood must fall within one of the eight grounds listed in article 14(2)(a).

2.4. **Ground of Derogation:** The two obvious candidates are concerns relating to “the security of Singapore” or “public order” concerns. Provisionally, it would appear apt to park any law regulating deliberate online falsehood under the umbrella of “public order”. This is because the Constitution has reserved “national security” level considerations for the most egregious or serious threats to the body politic or matters which impact state survivability, most notably through article 149 which confers special powers authorising anti-subversion or Emergency legislation.

2.5. Public order is a “less decentralised” idea than a ‘law and order’ issue. It is usually defined as relating to a disturbance to communal tranquility under which every person feels safe under the protection of the law, where danger to human life and safety falls within its purview and can involve matters relating to public health or drug trafficking which has obvious deleterious social impact. ‘Public order’ is not engaged merely because a law is broken, which always affects order; to affect ‘public order’ the act in question

must affect the community or the public at large, and that in this connection a line of demarcation must be drawn between serious and aggravated forms of disorder which directly affect the community or injure the public interest and the relatively minor breaches of peace of a purely local significance

which primarily injure specific individuals, and only in a secondary sense public interest.<sup>3</sup>

Public order thus entails a disruption of the “even tempo of the life of the community taking the country as a whole.”<sup>4</sup>

- 2.6. I suggest that a law regulating deliberate online falsehood may be justified under the ground of ‘public order’ under article 14(2) as the courts appear oriented towards an expansive or capacious understanding of ‘public order’ that transcends the threat of physical violence. As Judicial Commissioner VK Rajah (as he was then) noted in *Chee Siok Chin v MHA* [2005] SGHC 216 at [135]

While it is axiomatic that in every democratic society those who hold office must remain open to criticism, such criticism must be founded on some factual or other legitimate basis. The object of contesting and changing government policy has to be effected by lawful and not unlawful means. Wild and scurrilous allegations should be neither permitted nor tolerated under the pretext and in the guise of freedom of speech. ***Disseminating false or inaccurate information or claims can harm and threaten public order. (italics and emphasis, mine)***

- 2.7. ‘Public order’ thus appears able to accommodate not only physical threats, but threats to fundamental values and processes, such as the harm deliberate online falsehoods poses to democratic institutions and processes (elaborated upon, below). Such falsehoods may be found within a single publication or cumulatively in a series of publications, causing harm by a single death blow or causing death by a thousand cuts. Anticipatory preventive action may be required, though care must be taken to ensure that there is a non-trivial basis for such action.
- 2.8. That said, others might take the view that deliberate online falsehoods which attempt to undermine democratic elections rise to the level of a national security threat, akin to attempts to subvert an elected government. Perhaps it is a hybrid between a threat to public order and national security. The internet in particular provides the speaker/publisher with a platform to an audience of thousands if not hundreds of thousands, as opposed to a speaker addressing a local crowd or handing out tracts to dozens of people in a localised setting. The exponential spread of online information in terms of speed and reach has yielded characterisations of deliberate online falsehoods as a mode of ‘weaponising’ public narratives with the intent to deceive, to effect

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<sup>3</sup> *Re Tan Boon Liat* [1976] 2 MLJ 68.

<sup>4</sup> *Ibid.*

misrepresentation, in order to get a certain result. This could be for personal pecuniary benefit which is simply anti-social and irresponsible, or to manipulate political processes by spreading duplicitous narratives, which implicates the common weal.

- 2.9. Thus, free speech is not really 'free' in the sense of being offered "just for the sake of expression." As Professor Stanley Fish, who wrote "There's no such thing as free speech: and it's a Good Thing too" (Oxford University Press, 1994), noted, it is often assumed in discussing free speech that the typical situation is one where a person speaks and "delivers an opinion in a seminar-like atmosphere"<sup>5</sup> with no thought of eliciting action in response to what is said. It follows from this assumption that any limit on free speech is a deviation from this typical situation. Fish argues that this assumption is false, that it occurs only among a small group of people within an essentially academic setting; in the main, free speech is offered either to drive an agenda, or to shut down an agenda. It is not weightless and in this sense, is a means to an end, and not the end itself.
- 2.10. With respect to the right to speak, certain ends are legitimate and others are not. If one speaks with the goal to defame another's reputation, to denigrate a judge in a contemptuous fashion, to incite violence against an ethnic or religious group or to abusively harass someone who expresses a view in the public square which the abuser dislikes and wishes to silence through intimidation and threats, the law steps in and sanctions rather than protects such speech. Such speech is adjudged unworthy of protection, as it violates the rights of others or undermines a social interest, or both.
- 2.11. Not all forms of speech are equally worthy of protection; the law makes distinctions here, either to elevate or degrade the weight of a free speech interest in the balancing process. A society is entitled to prohibit or severely restrict forms of speech to vindicate social values, such as banning or severely restricting pornography, in the interests of public morality or feminist concerns about gender stereotyping and the degradation or commodification of women. Even if regulation is not entirely effectively, the prohibition has a signaling function, indicating to the citizen the boundaries of what is and is not socially desirable or approved. This discharges the educative function of law.
- 2.12. Bright lines are drawn in Singapore where fundamental values like racial and religious harmony are at stake, such as the government position that the burning of sacred texts such as the Bible and Koran (the act of burning is itself a form of speech), would not be allowed. These represent substantive limits

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<sup>5</sup> See Interview with Stanley Fish, Australian Humanities Review at <http://www.australianhumanitiesreview.org/archive/Issue-February-1998/fish.html>

on free expression, which are justified on grounds of other overriding considerations which go to the heart of community identity and moral solidarity. Societies of course differ as to where to draw these lines; where free speech is valorised and elevated, it is harder to justify speech restriction; a “clear and present danger” might be required, as in the case of the United States. This is an idiosyncratic test which our Court of Appeal in *AG v Shadrake* (a case concerning contempt of court) characterized as the “argument from paramountcy.” This is distinct from the general Commonwealth position which takes a more holistic balancing approach rather than attributing determinative weight to one side of the balance:

41 The “clear and present danger” test applies, in the main, in the United States’ (“US”) context...where the concept of freedom of speech is inextricably linked to the *unique* culture as well as constitutional position (*ie*, the First Amendment) in the US ...With the exception of a seemingly solitary and divided Canadian decision...the “clear and present danger” test appears to apply in no other Commonwealth jurisdiction. To return to this particular test *as set in its US context*, it should, first, be noted that in the US *there does not even appear to be a concept of scandalising contempt to begin with* (see *Bridges*) – the US Supreme Court in *Bridges* considered criticism of the courts, no matter how unrestrained, made after a decision has been rendered, to be an exercise of the right of free discussion and free speech. As alluded to above, the concept of freedom of speech has – owing to the unique cultural as well as constitutional heritage of the US – been accorded a paramountcy in a manner *quite different* from other Commonwealth jurisdictions. This is not surprising when we consider the language of the First Amendment itself...

The US First Amendment is clearly quite different from the corresponding articles in the respective constitutions of Commonwealth jurisdictions (of which Art 14 of the Singapore Constitution is a representative illustration). This is not to state that freedom of speech is absent – or even lacking, for that matter – in Commonwealth countries. There is, instead, far more attention accorded to the issue of *balance* between the right to freedom of speech on the one hand and its abuse on the other (*inter alia*, by conduct amounting to contempt of court). One might add that the paramountcy accorded to the right to freedom of speech in the US is *not*, with respect, *necessarily* an approach that *ought* to be emulated as it could actually result in possible *abuse* and *consequent negation* of the right itself. This is no mere parochial rhetoric but is, rather, premised on logic and commonsense. Hence, it is no surprise, therefore, that jurisdictions across the Commonwealth (which are numerous as they are diverse and which, of course, include Singapore) adopt, instead, the approach from *balance* ...

2.13. The idea of permitting substantive limits of rights would be anathema to those who subscribe to a brand of radical liberalism or libertarianism, which would not permit the state to make distinctions on the worthiness of speech. This stems from the liberal dogma that the state should remain ‘neutral’<sup>6</sup> when it comes to visions of what the ‘good life’ is, and leave this to the individual to decide. Those of this persuasion are prone to “free speech rightism” in their valorisation or elevation of free speech to the character of a “trump” or determinative factor - that is, to assume that free speech is an absolute value such that speaking should not be subject to legal regulation, at least not on the Web. Free speech rightists may be criticised for not taking a more holistic view of the other side of the equation in balancing rights. If article 14 is framed as a bargain, that involves balancing (itself a difficult task), which precludes the categorical invocation of a ‘trump’, which would displace the balancing process.

2.14. Again, Rajah JC’s observations in *Chee Siok Chin* are instructive:

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136 The applicants appear to suggest that as long as there is no actual or threatened breach of peace, they are perfectly at liberty to say or do anything they see fit, wherever and whenever they choose to; they are misguided. They cannot but observe and abide by the civil and criminal laws of defamation, sedition, public nuisance and public order. Freedom of action invariably ends where conflicting rights and/or interests collide. Contempt for the rights of others constitutes the foundation for public nuisance. All persons have a general right to be protected from insults, abuse or harassment. Those who improperly infringe or intrude upon such a right to draw publicity to their cause, regardless of the extent and sincerity of their beliefs, must be held accountable for their conduct. ***The right of freedom of expression should never be exercised on the basis that opinions are expressed in hermetically sealed vacuums where only the rights of those who ardently advocate their views matter. That is entirely inappropriate.*** Freedom of expression when left unchecked may reach a point where protest, criticism and expression culminate in nuisance or something even more serious. The law inevitably has to intervene then. (italics and emphasis, mine)

## II. SINGAPORE POSITION ON FREE SPEECH - ACTUAL AND VIRTUAL

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<sup>6</sup> One may ask whether neutrality is a myth and indeed, question whether neutrality is a virtue. One should not, for example, be neutral towards rape or genocide. As the very act of legislation requires a value-judgement, assertions of neutrality often embody a form of subterfuge or a power-grab, a strategy to oppose a position or stance which makes an overt value-judgement (“we should legislate X rather than Y”), through advancing a position or agenda which claims ‘neutrality’ (let the people decide whether to do X and Y) but which is not neutral but biased in making a covert value-judgement (X should not be enacted).

3. The Singapore position on free speech, with specific reference to internet or online speech may be briefly stated.
- a. Singapore has rejected the “no regulation” approach which free speech rightism may propound. It has also (until now) not enacted a special regime for online speech, although general legislation such as the Penal Code or the Prevention from Harassment Act do address online speech which harasses or invokes ill-will between racial and religious groups, for example.
  - b. In effect, the same legal regime applies to virtual or online speech, as it does to actual speech. For example, the Sedition Act has been applied to online speech: *Public Prosecutor v Benjamin Koh Song Huat* [2005] SGDC 272; *Public Prosecutor v Yang Kaiheng* (District Court - MAC 903116-2015)...Section 298 of the Penal Code (deliberate intent to wound religious feelings of any person) has also been applied to online speech: *Public Prosecutor v Amos Yee Pang Sang* [2015] SGDC 215. Online defamation also attracts liability: *Lee Hsien Loong v Roy Ngerng* [2015] SGHC 320.
  - c. Political speech in the form of criticism against government officials or public institutions is permissible, provided there is a “factual or other legitimate basis to do so.”<sup>7</sup> In relation to fair criticism as an element of contemptuous speech against the court, speech which is fair, temperate, “supported by argument and evidence” and reasoned argument or expostulation is not contemptuous. Abusive language gives rise to an inference of an intention to vilify the court while “temperate, balanced criticism allows for rational debate about the issues raised and thus may even contribute to the improvement and strengthening of the administration of justice. Scurrilous and preposterous attacks, on the other hand, are likely to have the opposite effect.”<sup>8</sup>
  - d. In 2004, then Deputy Prime Minister Lee Hsien Loong delivered a speech at the Harvard Club entitled ‘Building a Civic Society’ where the focus again was on open, rational, elevated debate rather than bare or emotional assertions:

People should debate issues with reason, passion and conviction, and not be passive bystanders in their own fate. Disagreement does not necessarily imply rebellion, and nor should unity of purpose and vision mean sameness in views and ideas...

...The second way to promote civic participation is to debate policies and national issues rigorously and robustly. Some people are afraid to speak up for fear of saying the wrong thing, or being taken to task. But for debate to

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<sup>7</sup> *Chee Siok Chin v MHA* at [134]

<sup>8</sup> *AG v Tan Liang Joo John* [2009] SGHC 41 at [18]-[19]

be fruitful, it has to be rigorous and not held back out of concern for egos or sensitivities. It has to be issue-focussed, based on facts and logic, and not just on assertions and emotions. The overriding objective is to reach correct conclusions on the best way forward for the country.

- e. The attitude towards free speech in relation to political matters is best summed up below, where the ideas of responsibility, civility, accuracy and decency are underscored:

117. While we welcome more open and informed discourse, we remain cognisant of the importance of exercising the freedom of speech in a responsible manner which respects and is sensitive to broader societal interests, especially in cyberspace where information moves much faster, and has greater potential to cause irrevocable deep offence or misunderstanding. We have seen how the pursuit of absolute freedom of expression in other countries can give rise to polarising extremism, racism and xenophobia, which have in turn led not only to acrimony between different groups but tragic bloodshed at times. We want to avoid such incidents in Singapore. Our citizens also demand a high level of civility in our public discourse, especially on such sensitive matters. This is because respect, tolerance and courtesy among different races and religions remain fundamental values for Singaporeans. Similarly, when falsehoods calculated to mislead the public or damage a person's reputation are wilfully made, individuals must have the right to reply or to seek legal recourse.

118. Our approach towards the role of the media is also the same - to encourage responsible free speech and expression. We also believe that the same standards of responsibility, accuracy and decency should be applied across all media.<sup>9</sup>

### III. THE LIGHT AND DARK SIDE OF ONLINE SPEECH

4. There are three primary rationales for the right to free speech which has been succinctly discussed by Judge Lee Seiu Kin in *Lee Hsien Loong v Roy Ngerng Yi Ling* [2015] SGHC 320

97 There are different philosophical justifications for the right to free speech. Three primary arguments can be identified: the argument from truth, the argument from democracy, and the argument from human dignity (see, eg, Dario Milo, *Defamation and Freedom of Speech* (Oxford University Press,

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<sup>9</sup> National Report: Singapore, Working Group on the Universal Periodic Review, A/HRC/WG.6/24/SGP/1 (28 Oct 2015).

2008) (“*Freedom of Speech*”) at pp 55–79; Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) (“*Singapore Constitutional Law*”) at paras 14.006–14.020). No one theory prevails over the others. Nevertheless, it has been observed that “aspects of defamation law predominantly reflect the first two theories, and defamation law betrays a bias for the argument from democracy”: see *Freedom of Speech* at p 55.

98 The classic exposition of the argument from truth, as encapsulated in the works of the theorists John Milton and John Stuart Mill, 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”: see John Stuart Mill, “Of the Liberty of Thought and Discussion” in *On Liberty* (1869) ch 2 <<http://www.bartleby.com/130/2.html>> (accessed 8 October 2015)). This is premised on an 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 *Singapore Constitutional Law* at para 14.011. This is expressed in Holmes J’s powerful and widely cited dissent in *Abrams v United States* 250 US 616 (1919) at 630, in which he states:

[W]hen men have realized 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 best test of truth is the 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 safely can be carried out. ...

99 The merits of the “competition of the market” rationale was discussed by the Court of Appeal in *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 (“*Review Publishing*”) at [279]–[285], which questioned its applicability to false statements of *fact* (as opposed to opinions) – the core of the tort of defamation. Putting aside the observations of the Court of Appeal at [285] that “[o]ur 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” (which I have addressed above in relation to the gravity of the defamation), there is force in the criticism that there is simply “no interest in being misinformed”: see *Reynolds v Times Newspapers Ltd and others* [2001] 2 AC 127 (“*Reynolds (HL)*”) at 238. Essentially, the point that is made is that there is no benefit to a system in which false statements of fact are freely disseminated, relying only on the “competition of the market” to expose them. This perhaps lays bare the disjoint between theory and

practice; as *Freedom of Speech* states at p 57, “history has taught us that falsehood frequently prevails over truth with deleterious societal consequences”. Through the competition of ideas, the best ones surface. But there is no benefit in permitting the free dissemination of false assertions of fact that destroy a person’s reputation.

4.1. The **Argument from Truth** and the **Argument from Democracy** are probably the two most important theories that warrant consideration in relation to the regulation of online deliberate falsehoods.

4.2. There is an important and well-articulated argument that the justification for the safeguarding of free speech is to protect its key role in democratic society, at whose core is free and open political debate, which includes the right to dissent from and contest government policy. Citizens have an interest in receiving information pertinent to the actions of politicians and public affairs, to be able to understand public affairs and to enable them to make an informed choice in electing representatives; for elected representatives, information is important to effective public debate and informed policy-making.<sup>10</sup> The relationship between free speech, the role of the media and democracy is evident here. Indeed, the Court of Appeal at [267] of *Review Publishing v Lee Hsien Loong* [2009] SGCA 46 noted that free speech as a constitutional guarantee enabled citizens “to express their views on matters of public interest.” Thus:

The theory of the value of speech in a democracy focuses on the interests of the recipients of communications. It stands on a commitment to democratic procedures and open political discussions and is predicated on the idea that in the process of deliberation which requires informational flows, citizens gain an understanding of public issues and are better equipped to participate in the workings of a democratic society. For this process to work best, citizens must be exposed to a plurality of views, rather than a selected few.<sup>11</sup>

5. **Internet as Mixed Blessing to Democracy:** The Internet has been a mixed blessing to democracy; it is important to appreciate both its positive and negative aspects. As a vehicle for human communication, the manner of communication will be shaped by human nature, which is capable of both wickedness and altruism, such that both benefit and harm may be generated depending on the proclivities of its user.

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<sup>10</sup> Lord Nicholls, *Reynolds v Times Newspaper* [2001] 2 Act 127 at 200.

<sup>11</sup> Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012), para 14.017, referenced by Lee J in *Lee Hsien Loong v Roy Ngerng* [2015] SGHC 320 at [102].

5.1. **The ‘Light’ Side of Online Free Speech:** Democracy is served by the freedom to disseminate and receive information on political matters, insofar as this promotes reflective public debate and helps citizens make informed choices. This is rooted in an idea of democratic self-government and political sovereignty.<sup>12</sup>

5.2. The internet has promoted and expanded informational flows and given everyone who has access to the internet a platform to express views and attempt to influence policy, politics and politicians. It empowers like-minded people to connect and mobilise in aid of a cause.

6. **The ‘Dark’ Side of Online Free Speech:** However, if this is the light side of the moon, we cannot ignore the dark side. The increase in information flows is accompanied by an increase in misinformation flows which undermines the democratic process.

6.1. **No Human Right to Misinformation:** The Singapore Court of Appeal in *Lee Hsien Loong v Review Publishing* [2009] SGCA 46 at [284] cited approvingly the astute observation of Lord Hobhouse in *Reynolds v Times Newspaper* at 238

[I]t 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 ... 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]

6.2. The Singapore Court of Appeal in *Lee Hsien Loong v Review Publishing* at [285] affirmed that this observation bore “resonance” in Singapore where the political culture “places a heavy emphasis on honesty and integrity in public discourse on matters of public interest, especially those matters which concern the

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<sup>12</sup> I draw here from a previously published article: Thio Li-ann, ‘The Virtual and the Real: Article 14, Article 14, Political Speech and the Calibrated Management of Deliberative Democracy in Singapore’ [2008] Singapore Journal of Legal Studies 25-57.

governance of the country.” Of course, there is a difference between things which may be of interest to the public and things which are of genuine public interest.<sup>13</sup>

- 6.3. Thus, we see that freedom of expression can be a double-edged sword: free speech promotes and indeed is the lifeblood of democratic society; however, the abuse of free speech through the propagation of deliberate falsehoods can undermine deliberative democracy and have other deleterious effect. The impact of the Internet on assumptions underlying free speech rationales is explored further below.
  
7. Questions of regulating fundamental liberties involve the balancing of liberties against competing interests. As a metaphor, ‘balancing’ entails a process which includes the need to (a) identify the relevant factors which are placed on the balancing scale; (b) assign a weight to these factors. The process is completed when both sides of the scales are measured against each other; judicially, the goal is to ensure that neither interest is rendered “otiose” in other words, to try to give optimal effect to both sides of the equation.<sup>14</sup> Courts give effect to the presumption that “Parliament knows best for its people, that its laws are directed at problems made manifested by experience...”.<sup>15</sup>
  - 7.1. It would false to characterize the balancing process as always involving an individual’s right to free speech against a state-defined and defended public interest. The process can be far more complex; the exercise of a right in a certain manner can erode its rationale.
    - a. **Liberty vs Public Good:** The popular view of a free speech issue often pits the right of an individual versus the interest of the state in regulation.
    - b. **Right vs Right:** However, a free speech issue could involve a clash between two co-equal rights e.g. the right to free speech and the right to reputation as a facet of privacy rights.
    - c. **Negative Liberty vs Positive Liberty:** Free speech is characterized as a ‘negative liberty’, which requires the state to refrain from interfering with expression as a liberty right. Sometimes, however, free speech as a negative liberty may be in conflict not with a state defined good but with a positive liberty. A positive liberty “is the power to control or participate in public decisions”, serving an idealized vision of democracy where the people govern themselves. An example of this might be pornography as

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<sup>13</sup> To this point, Baronness Hale stated in *Reynolds* at [147] “...the most vapid tittle-tattle about the activities of footballers’ wives and girlfriends interests large sections of the public but no-one could claim any real public interest in our being told all about it.”

<sup>14</sup> Quentin Loh J, *AG v Shadrake* [2011] 2 SLR 445 at [57]

<sup>15</sup> *Public Prosecutor v Tan Cheng Kong* [1998] SGCA 37 at [80].

an exercise of free speech (negative liberty) which in constructing women in sexually subordinate and inferior positions perpetuates a male domination/female subordination culture; this has been criticized as violating the 'positive liberty' of women insofar as pornography creates an environment where women cannot have political power because pornography creates degrading stereotypes of women, projecting them as commodities or somehow unfit for public office. Feminists have long argued that the negative liberty or pornographers conflicts with positive liberty insofar as it leads to women's political subordination by perpetuating an inauthentic view of women; pornography "denies the positive liberty of women; it denies them the right to be their own masters by recreating them, for politics and society, in the shapes of male fantasy."<sup>16</sup>

d. **Negative Liberty vs Negative Liberty (or Free Speech can kill Free Speech).** The exercise of a negative liberty like free speech can actually erode someone else's right to free speech. Harvard Law Professor Frank Michelman has argued that certain speech (like pornography) can have a "silencing" effect so as to prevent other people from exercising their negative freedom to speak. If I speak and you engage in simultaneous and/or abusive speech, you may intimidate me into silence or otherwise prevent me from effectively communicating my views (which is the point of free speech).

7.2. This discussion serves to underscore the point that the exercise of a negative liberty such as free speech (a means to the end of serving the democratic processes), may actually undermine the democratic process, where free speech is abused. If you misinform me about a certain electoral candidate and I choose to vote for her opponent, you thwart my positive liberty to effectively participate in the political process in an informed manner because of the deliberate confusion your falsehoods caused. If I should repeat what you said or forwarded your propagated false views to someone, you have poisoned my exercise of the negative liberty of free speech to transmit accurate information.

7.3. Certain exercises of the right of free speech (communicating truthful or accurate information) serve the democratic processes; other exercises of free speech, such as deliberate online falsehoods, mar the democratic processes. One warrants protection, the other, regulation in the interests of safeguarding democracy.

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<sup>16</sup> Ronald Dworkin, 'Liberty and Pornography' *The New York Review of Books*, Aug 15 1991.

- 7.4. It is thus illusory to approach the regulation of fake news or deliberate online falsehood simply as a limitation on free speech as this issue is far more complex and needs more nuanced analysis. As discussed, free speech as a negative liberty can conflict with itself; certain kinds of speech can 'kill' other kinds of speech; free speech can damage democratic values. Where free speech does not serve the justifications for free speech, by harming the earnest search for truth or by preventing citizens from becoming informed on issues through deliberate lying which causes confusion, those exercises of speech do not warrant protection - in the same way that crying fire in a theatre is not protected as valuable speech, for the harm it causes and the good it does not serve.
- 7.5. To identify the best principles for regulating deliberate online falsehood, we must probe a little deeper into the assumptions underlying free speech rationales, to see whether they still hold water or whether some adjustments are warranted. To pose the question bluntly, do rationales for free speech developed in the early 20<sup>th</sup> century remain appropriate and compelling in the 21<sup>st</sup> century, particularly with respect to online speech?

#### IV. FREE SPEECH RATIONALES - ARE EARLY 20<sup>TH</sup> CENTURY ASSUMPTIONS APPROPRIATE IN THE 21<sup>ST</sup> CENTURY?

8. Free speech is important as embodying the principle of dissent from orthodoxy or government policy; it is important within a democratic polity as a way to keep governors accountable, by scrutiny and criticism of their conduct and policies. However, the abuse of free speech to spread misinformation poisons the well and negatively impacts public debate. The law makes value judgements in determining the value of speech, such as when it ascertains what an 'undesirable' publication is, under the Undesirable Publications Act.
9. **Free Speech Absolutism: Bad speech? More speech.** Some argue that the antidote to bad speech (false speech) is 'more speech'; apparently, 'sunshine is the best disinfectant' and bad speech should be censured by public opinion, not censored, lest it go underground and fester. This view holds that while speech may harm, and that it may be morally wrong to harm others, the harms caused by speech can be addressed through more speech. Implicit in this stance is a faith that the better argument and best ideas will prevail. This may not be the case all the time.
- 9.1. This faith in speech flows into the marketplace of ideas rationale for free speech famously articulated by Justice Oliver Wendell Holmes in the early twentieth century decision of *Abrams v United States* 250 U.S. 616 (1919):

But when men have realized 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...The best test of truth is the 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 safely can be carried out

- 9.2. This theory, which has its roots in Milton's *Areopagitica* ('let truth and falsehood collide - who ever knew truth to be put to the worst in a free and open encounter?') and John Stuart Mill's writings, holds that where ideas are freely disseminated, this creates a social process where truth triumphs over falsehood. Judge Learned Hand declared in *United States v Associated Press*, 326 U.S. 1 (1945) that: "The First Amendment ... presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and will always be, folly; but we have staked upon it our all."
- 9.3. JS Mill in *On Liberty* (Ch II) identified the evil of silencing an opinion in these terms: "If the opinion is right, [those who dissent from the opinion]...are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error." The marketplace would only be shut down where one attained 'truth', which remains a dangerous proposition from the standpoint of a constitution that protects pluralism and viewpoint diversity. Only one who assumed his own infallibility would have no qualms silencing the opinions of others. This would transform a view into dogma, diminishing intellectual vitality and pluralism.
- 9.4. So too, Justice Brandeis in the case of *Whitney v California* 247 U.S. 357 at 376-377 (1927) described free speech as "functions essential to effective democracy". Limits on speech would to his mind only be justified where there was a 'clear and present danger' of a harm so imminent that the opportunity to fully discuss what had been said was precluded. He stated:

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech, there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one...even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of

incitement and there is nothing to indicate that the advocacy would be immediately acted on.

...Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

- 9.5. This brand of free speech absolutism is reflected in a high tolerance for falsehoods as something which is inevitable in the course of free debate. This is reflected in US First Amendment jurisprudence where it is accepted that:

[E]rroneous statement is inevitable in free debate, and... must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive...' <sup>17</sup>

American jurisprudence therefore protects dissenters and trouble-makers and the falsehoods they might speak, in order to secure the broader goal of the search and struggle for truth, where, with the free flow of ideas, falsehood could be exchanged for truth.

- 9.6. In general, there is great merit in the idea of free competition in the marketplace of ideas to get to the 'truth' of things, as opposed to a 'protectionist' approach towards speech where the government or some private power serves as censor or 'truth czar'. However, two lines of interrogation are here raised, to test the desirability of the marketplace ideal

- 9.6.1. First, there is a need to question the assumptions underlying the marketplace rationale, concerning how we speak and receive information. If these are problematical, we may need to adjust our free speech theory, which is relevant to how we weigh free speech against competing interests when enacting regulatory legislation or in judicial review.

- 9.6.2. Second, the marketplace rationale may only be compelling with respect to certain types of topics.

## 10. **Questioning the assumptions underlying the Free Marketplace of Ideas Rationale:**

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<sup>17</sup> *New York Times v Sullivan* 376 US 254 (1964) (US Supreme Court)

10.1. The marketplace of ideas rationale operates on various assumptions including:

- a. **The conviction that man is rational, and in search of the truth or best way forward in relation to issues of governance and the common good.** To this end, Rational Man engages a wide array of views, assesses them and formulates an informed conclusion. This necessitates an understanding that free speech is about communicating ideas (not hindering the expression of ideas) and evaluating ideas in the public square, which requires a commitment to treat other speakers with civility. This reflects to some degree a predilection towards the European Enlightenment and its view of the Rational Man, the man of intellect and self-restraint who can tolerate distasteful or offensive speech in service of the broader and higher goal of maximizing free speech for all.
- b. That the Rational Man has free and equal access to the marketplace of ideas
- c. That a broad range of views are available in the marketplace, which the Rational Man can and will diligently evaluate, sifting cogent from dubious arguments.
- d. So equipped, all citizens may equally participate in the democratic process in search of the best approaches towards social problems.

10.2. This view of the Rational Man and the Marketplace seems somewhat naïve in the age of the Internet and the focus on “fake news” today, where misinformation is presented and packaged as though it came from a serious or reputable news sites, in a calculated move to mislead recipients. Where this relates to political matters, such deliberate falsehoods, perpetrated swiftly and extensively through the Internet, poses a threat to democratic institutions and election processes.<sup>18</sup> It undermines the basic precept that in democratic elections, the voter is equipped to make an informed choice between various candidates for public office. ‘Fake news’ which can be from a domestic or external source, can sour international relations, making for a more destabilized world.

10.3. In place of the Rational Man who is discerning and committed to wading through and interrogating a variety of perspectives on an issue, we might have instead

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<sup>18</sup> In the US, referring to accusations that a presidential candidate was personally guilty of murdering children as part of a fake news campaign, some have suggested a return to criminal libel: Peter Singer, “Free Speech and Fake News’ Project Syndicate, 6 Jan 2017.

- a. **The Impetuous/Undiscerning** - someone who receives information without any critical filters, who is prone to the seduction of quick soundbites rather than sustained argument. Such a disposition may generate a shallow understanding of an issue, which does little to facilitate public discourse. This is reminiscent of the view that the 'coloured populations' in British colonies were somewhat gullible and hence, the need for contempt of court laws there, where such laws were effectively abolished in Great Britain: *Macleod v St Aubyn* (Privy Council, 1899).<sup>19</sup> The ease of access and availability of numerous views expressed online may promote laziness, a mentality that lacks judgement or discernment, where the reader merely parrots views he has read, rather than thinking through the issue himself. He is an echo and not a voice, contributing nothing new to a discussion. Thus, a citizen has to do some heavy lifting in terms of independent thinking to make full use of his right of equal participation in the political process.
- b. **The Ideologue** - someone who is not interested in public debate and the use of free speech to engage in ideas and good faith discussion with fellow citizens; rather the ideologue is close minded and rigid in belief; often, many personal emotions are at play. The ideologue aggressively pushes his own ideological agenda as an advocate rather than interlocutor. This does not encourage robust debate or rational thinking. Indeed, the ideologue may, in the vein of cultural Marxism, seek to silence his opponent through abusive invective, harassment, intimidation and *ad hominem* arguments ('argument' by name-calling), which is a form of uncivil speech lacking rational basis. This not only lowers the standard of debate, but also may shut down the speech of others. Cyber-bullying tactics can close down a virtual market stall and limit the range of views that would otherwise be on offer. Private actors exercising their free speech rights can do so in a manner which violates the free speech rights of other private actors, a form of censorship by 'horizontal' chilling.

Further, it is quite easy for a third party conflict entrepreneur to cause widespread social unrest by spreading online outrageous lies about religious group A to other religious groups / citizens in general, to raise opprobrium towards A in aid of an anti-social agenda or other forms of mischief.

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<sup>19</sup> "Committals for contempt of Court by scandalizing the Court itself have become obsolete in this Country (meaning England). Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalising to them. But it must be considered that in small colonies, consisting principally of coloured populations, the enforcement in proper case of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court." (Per Lord Morris in *McLeod v St. Aubyn*, 1899 AC 549.)

- c. **The Iago Factor (deliberate misleading):** Iago is a fictional character and chief antagonist in Shakespeare's *Othello*, whose brand of wickedness relates to spreading fake news and manipulating narratives to destructive effect. Modern day Iagos may do so for pecuniary benefits or political purposes.
- d. **Irrational/Impassioned Man:** The Emotional Man who is easily offended and calls for limits on speech he finds offensive. If he is religiously committed, he may demand laws which punish views contrary to his religious beliefs (a form of blasphemy?) which he describes as 'fake religious views' or falsehoods. That we have laws which cater to the "feelings" of people, demonstrates that the vision of the citizen in Singapore is not exclusively of someone who is coldly logical and dispassionate; in certain cases, emotions, passions, illogic, feelings, are taken into account insofar as stirring these feelings to promote ill-will or hostility between racial and religious groups or classes constitutes an offence: Sedition Act, s298 Penal Code.

10.4. **Unpacking Assumptions - Townhall and Marketplace:** The idea of a marketplace of ideas, particularly in relation to free speech and the argument from democracy, is based on a 'townhall' conception of popular decision-making where politicians meet their constituents to hear their views or to discuss upcoming laws. This is based on all town members assembling in a common space to take decisions together, within the context of face to face discussions in an authentic, human sized community where people knew one another. This would entail the discipline of listening with civility to views opposite from one's own and to engage with these opposing views. This does not exist where modern government or indeed internet speech is concerned, particularly where anonymity facilitates the very worst in human nature. This changes the very nature of human relating, which is discussed below.

10.5. The mass media and Internet era has altered how information is generated, disseminated and consumed. Several factors ought to be borne in mind, which may demonstrate that **the assumptions underlying the marketplace of ideas may be inaccurate, inapplicable or require revision/modification.**

- a. **Equal Access to the Marketplace?** First, not everyone has equal access to the marketplace. Although everyone with internet access can easily have a blog to air his views, what counts is the degree of influence that blog has *i.e.* readership traffic. If no one reads a blog, it will have little impact. In this respect, the courts have opined that an institutional blog like that belonging to a news outlet or a traditional newspaper will be more

credible than a run of a mill blog.<sup>20</sup> The key point is that there is no equality of influence in cyberspace as there is an amplification of certain voices, whether through wealth or the clout of successful 'social influencers' who command an extensive audience.

- b. **Biased News, Selective Reporting and Limiting the Range of Views in the Marketplace:** Most citizens get their news from mainstream media or online sources, rather than source for it themselves. Obviously news companies or foreign governments with sizeable resources will have more influence in purveying and promoting a view in the marketplace. Indeed, given the fact that certain very influential news companies (on all side of the political spectrum, whether CNN or Fox News for instance) now conflate news with views and becoming crusading journalists or political actors with an agenda to advance; their reporting is politically biased. Politics has become so polarized in certain countries that a news network which does not represent your views is automatically condemned as a guilty source of fake news. This will degrade democracy which requires fair and objective reporting (insofar as possible) streams, rather than uninhibited political advocacy by news media. Not to mention, social trust in the press which plays a public role.
- c. Seeing that most of us get our news from the mainstream media (and internet sources), newspaper publishers can easily restrict the range of views published such that citizens cannot effectively see points and counterpoints to an issue, but only the proffered preferred point. Some American newspapers for example infamously reported on election day that Hillary Clinton was going to win the US presidential election contrary to the truth of the eventual outcome - they let their readers down by reporting their desired hope as fact, in attempting to transform what was desired into reality. This has undermined the credibility of the US mainstream media in the eyes of many. Political actors will always spout political propaganda rather than accurate reports, where it suits their preferences. This state of unhappy affairs recalls a quote by Mr Mark Twain to the effect that "If you don't read the newspaper you're uninformed. If you read the newspaper, you are mis-informed."

10.6. The Internet has opened new informational horizons to us all, to enable us to be well-informed citizens equipped to engage in public debate both as hearers and speakers.

#### 10.6.1. **Speakers and Responsibility**

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<sup>20</sup> *Lee Hsien Loong v Roy Ngerng* [2015] SGHC 320 at [55]

- a. Anyone can be a citizen-journalist if he has access to the internet. This is a boon to democracy insofar as this breaks the monopoly mainstream media or the government has over information and the creation of narratives through which facts are interpreted and apprehended. However, the speaker in this case who publishes online material is not subject to the rigors of checking mechanisms and editorial oversight in ensuring the veracity of information. Recklessness or negligence may be the order of the day, particularly where material is anonymously published or under a *nom de guerre*. Not responsible and accountable journalism.
- b. Secondly, someone who receives this (mis)information can with the click of a button forward it to large number of recipients - technology has facilitated access to a broad audience whether in relation to the original publisher or republisher(s), allowing news containing misinformation to go viral and to exacerbate the harm caused.
- c. There are few ethical guidelines or constraints on those who play informational roles via social media, in contrast to the ethos of professional journalists. As information is a source of power, this points to the problem of potential abuse and need for regulation (though this should not be heavy handed as liberty issues are concerned and there will always be a perennial fear that any form of regulation may itself be abused and used to curtail legitimate dissent and views which serve the purposes of democracy).

10.6.2. **Too Much Information! Hearers and Discerning the Wheat from the Tares:** With the internet, the problem is no longer informational deficits but a surfeit of information, which gives rise to the need for the hearer to be able to discern good from bad arguments, truths from falsehood. The process is complicated where there is deliberate sowing of misinformation. The surfeit of information can overload the brain and hamper clear thinking; this is worsened where falsehoods are mixed in with the truth. With multiple accounts of an event, it may be more difficult if not impossible to discern what is true. People may just give up being an engaged participant in civic life, as fake information may crowd out reliable news, rendering it near impossible to judge the veracity of content, to tell truth from falsehood, wheat from tares. In the absence of reliable informational sources, the wearied person may retreat to the less taxing world of entertainment and the vapid titter-tattle of gossip; if this takes place on a large scale, it would be a loss for the democratic process and culture. This concern and desire to correct this is reflected in programmes which ask participants whether they can discern fake from true news, to alert them to this danger.

10.6.3. **Balkanisation, Bell Jars and the End of the Shared Public Space**

- a. **A sense of solidarity and common identity and the sharing of a range of common experiences by citizens is necessary for the long-term health of a society.** To identify with each other as fellow citizens, it is necessary for people to have a common framework for social experience and a sense of a shared common good. Otherwise, society may devolve into ‘tribes’ championing single-issue agendas, without the ability to compromise and arrive at reasonable accommodations, or to uphold fundamental values crucial to the survivability of society, particularly societies which are plural in terms of ethnicity, faith, philosophies and worldviews.
  
- b. **It is necessary for a citizen to engage with a range of representative views of issues of common concern,** both for understanding accurately where another citizen is coming from and what they are thinking and for facilitating compromise and overlapping consensus where possible. In a free society, it is important for citizens to encounter people, topics and ideas which have not been pre-selected in advance, so as to have a wide range of experiences necessary for understanding and working with each other in pacific co-existence, and to cultivate a commitment to pluralism as key to a harmonious relationally healthy society. One’s views may be modified, and indeed, improved and strengthened, by considering counter-perspectives, aided where one has access to a broader pool of arguments. An experience of society’s diversity thus is part of living in a system committed to plural democracy.
  
- c. **Media as Public Forum:** People who rely on intermediaries like print media preserve the opportunity to have ‘chance’ encounters with views or issues “involving shared experience with diverse others and exposure to material that they did not specifically choose...In that sense, mainstream media operate as a public forum of a kind, exposing people to a wide range of speakers, unanticipated topics and viewpoint, and exposing viewpoints to a diverse public. A system in which you lack control over the particular content that you see has a great deal in common with a public street, where you might encounter not only friends, but a heterogeneous variety of people engaged in a wide array of activities (including, perhaps, political protests and begging).”<sup>21</sup>
  
- d. **Maintaining a Public Square or Common Domain for Citizen Interaction:** If all citizens are exposed to a wide range of views and news, this will provide a common framework for engagement and common

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<sup>21</sup> Cass Sunstein, ‘The Daily We: Is the Internet really a blessing for democracy?’ Boston Review, 1 June 2001.

experiences, a shared space where plural viewpoints are exchanged, interrogated, debated, with all sides better understanding the complexities of a public issue and the range of positions taken on such questions.

- e. This shared framework or public square would not be possible if one could cut off news and views one does not like, which can moderate the views we hold. The internet provides the facility for so doing. Such individuated control reduces the importance and efficacy of common spaces for social bonding. While the internet is a vehicle to expand our horizons, which can conduce to effective public debate, some have used it to produce narrowness rather than breadth.
- f. **Individuating News and Bell Jars: Creating a Fragmented Communications Universe:** In an age where the consumer is sovereign, the internet comes with the technology which allows us to filter or select the kind of news we want to hear, and to block out views we consider 'undesirable.' By customizing the news we receive, we block out materials not chosen in advance. This is harmful to a well-functioning democracy insofar as it is important (even if irritating) to be exposed to and engage with points of views and topics which we might come across through unanticipated encounters we cannot control e.g. the reader cannot control the type of articles a paper publishes.
- g. **Balkanisation:** It has been commonly observed that people who choose only to speak to the like-minded or to read views from sources who share their ideological biases will come away with a more extreme version of their original view and initial tendencies, since they refuse to look beyond the filter bubbles of their own making in their closed communications universe. Extreme views are reinforced. These self-selected filtering preferences are inimical to pluralism, a core democratic value. Furthermore, constant exposure to one set of views is likely to lead to errors or confused thinking / unthinking conformity.
- d. **Group Polarisation, Alienation and Social Disharmony:** Although the internet has the potential to be the virtual extension of the public square and although online speech may connect groups of like-minded people who then build online 'communities', online speech can also undermine the public square and cause alienation and social tensions between groups owing to group polarization. As communication is not face to face, there are not the filters to curb impulses or to moderate reactions to another speaker. This may hinder rather than promote conversation and deliberation. Indeed, the anonymity the internet offers may divest the speaker of the inhibitions and basic civilities we afford to people we speak

with. This can degenerate into vulgar and vicious attacks which operates as conversation stoppers rather than conversation starters. This is another instance where free speech can chill free speech. Furthermore, the internet can be a ground for breeding extremism as people with extreme views can connect online and discuss matters with like-minded compatriots without encountering opposing views

‘Online’ groups of like-minded individuals may also undertake campaigns to harass individuals through hateful speech or to undermine societies by inventing false crises to induce public panic e.g. an invented SARS crisis, or as conflict entrepreneurs, to foment distrust between different social groups. Furthermore, “online echo chambers or silos divide people into separate camps, at times even inciting them to express anger and hatred at a volume not seen in previous communications forms.”<sup>22</sup>

- e. This sorry state of affairs is not conducive to democratic debate which is robust but civil, which nurtures its sustainability. The argument from democracy as a rationale for free speech must be re-evaluated, particularly where free speech can be deployed to destroy its’ *raison d’etre*, that is, deliberative and participatory democracy with involved and informed citizens. Speech exercised to undermine deliberative and participatory democracy causes a social harm that does not warrant protection - this will shape the contours of the scope of free speech.

## 11. In relation to which topics might the marketplace rationale be ill-suited?

11.1. The marketplace of ideas rationale underlying free speech, which can support its use as a ‘trump’ to the detriment of all competing interests, may not be applicable to certain types of speech, and more suited to others. This is an argument for restrictive measures on the former.

11.2. The Court of Appeal in *Review Publishing Co Ltd v Lee Hsien Loong* [2009] SGCA 46 was correct in observing at [282] that the idea of competition of ideas in the marketplace was not equally applicable across the board. It was most cogent in relation to 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). Here, the free marketplace idea could promote beneficial advances in knowledge, justifying “the fullest scope for exercising freedom of speech.” It stated:

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<sup>22</sup> Pew Research Centre, ‘The Future of Truth and Misinformation Online’ 19 Oct 2017 at <http://www.pewinternet.org/2017/10/19/the-future-of-truth-and-misinformation-online/>

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. Taking one of the examples which we have just mentioned, it is possible, by comparing the economic growth of capitalist countries and that of socialist countries over time, to ascertain whether capitalism or socialism is the better way of organising society. From this perspective, it is possible, and indeed necessary, for “the competition of the market” (*per* Holmes J in *Abrams v United States* 250 US 616 (1919) at 630) 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.

11.3. In contrast, where false statements were concerned, the Court of Appeal was of the opinion that the marketplace of ideas rationale was not applicable, as such statements were inaccurate and of no social value. In the context of the issue of political defamation and how to value speech which is potentially libelous, the Court at [283] noted that asserting a UFO had been spotted over Singapore skies was distinct from asserting a politician was a crook. The latter statement if false should not be protected as “there is no interest in being misinformed.” They approvingly quoted Lord Hobhouse in *Reynolds v Times Newspaper* who astutely noted that there is no human right to disseminate falsehood, which serves no public interest and is destructive of the democratic society, of which it should form no part. He said there was no interest in being misinformed, as a general proposition.

#### V. SOME CONCERNS - (HATE SPEECH AND REGULATING FALSE RELIGION)

12. In the context of this inquiry into the problems of deliberate online falsehood and how to deter/prevent /regulate this, I would like to raise two incidental points.

##### 12.1. **The State Should Not Regulate “Fake Religious Beliefs” or include it within the ambit of “deliberate online falsehood”**

a. This was not directly raised in the Green Paper, but rather in a letter addressed to the *Straits Times*, dated 15 December 2017 by one Nordin

Amat titled "Select Committee studying fake news should also look into false beliefs".<sup>23</sup>

- b. Here, a suggestion was made to the effect that the 'deliberate online falsehood should encompass 'false religious beliefs and practices which could incite social unrest and turmoil.' He gives as an example the need to warn the public that sharing false information that paradise could be reached via suicide bombing, a false belief, would be construed as 'inciting such heinous acts.'
- c. As the constitution is secular, which entails the freedom of religion from government control and the non-interference of government in matters of religious truth or orthodoxy, the state should not be involved in the task of determining religious truth. The principle of secularity operates as a principle of restraint and limited government, delineating a sphere of government incompetence, even if a government is entitled to regulate external expressions of religious practices like religious processions. Indeed, this is a principled stance which the government has consistently taken. A recent re-iteration of this stance is reflected in the Law Minister's statement that: "The Government will not interfere in doctrinal matters within each religion. But it has to step in to protect our racial, religious harmony."<sup>24</sup>

12.2. **Regulating Hate Speech? First, define it!** The concern with deliberate online falsehoods is distinct from concerns associated with the relatively vague term of 'hate speech'. Should Parliament decide to have 'hate speech' laws (too often used in a casual, vague fashion), this would need to be thoroughly examined and debated on a separate occasion, given its complexity and impact on free speech.

12.3. Laws regulating both would share in common the fact they constitute content-based restrictions on speech, although the motive or rationale for both are distinct. Hate speech laws are typically directed towards protecting ethnic and religious groups or other vulnerable groups from racist or disparaging speech, to protect them from negative stereotyping and vilification which, in inflicting psychological harm, might cause members to withdraw from society and not participate as equal citizens in democratic processes. It is a very fine line between critical speech (e.g. feminist perspectives against religiously permitted polygamy) and 'hate speech',

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<sup>23</sup> <http://www.straitstimes.com/forum/letters-in-print/select-committee-studying-fake-news-should-also-look-into-false-beliefs>

<sup>24</sup> 'Singapore must do more to safeguard racial, religious harmony: Shanmugam,' Channel Newsasia, 19 Jan 2016.

which usually has an element of inciting violence against a group, which warrants protection because society deems that group to be of intrinsic value.

12.3.1. 'Hate speech' legislation represent a serious curtailment of free speech which is considered 'wicked' - this of course begs the question of what criteria is being used to decide which group warrants protection, and who decides? 'Hate speech' is a subjective and malleable concept and prone to abuse,<sup>25</sup> as it allows a power elite to determine what lesser mortals may think or discuss, such that one person's hate speech is another person's political opinion. Attempts to invoke 'hate speech' laws may be attempts to insulate certain practices or lifestyles from critical scrutiny, rather than to protect a group from physical or actual harm, by characterizing critical speech as 'hatred' or a form of 'violence' towards a group. There is a difference between protecting one from a reasonable fear of violence which is justifiable, and laws to prohibit the offending of sensibilities, which may be illiberal and an attempt by an ideological elite to put something which should be the subject of fair debate, beyond the sphere of public debate e.g. transgenderism, multi-sex toilets and female safety.

12.4. Where deliberate online falsehoods are calculated to stir hatred or hostility towards a racial or religious minority/group or other vulnerable groups like migrant workers, this warrants some regulation as it may engender social disharmony, a public order concern.

a. International human rights law as embodied in article 20(2) of the International Covenant on Civil and Political Rights states that "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

b. The only group the Constitution addresses are "racial and religious minorities" in Singapore, to whom the government owes a duty to care for them, and the "special position of Malays" as indigenous peoples, under article 152. The principle of maintaining racial and religious harmony, as part of the public order, is a fundamental tenet, if not an implied constitutional norm. To that end it would be appropriate to legislatively recognize the harm caused against these stipulated groups by online deliberate falsehood which targets them and incites violence against them. This is consistent with Penal Code religious offences which criminalise for example, the deliberate wounding of racial and religious feelings of any person or criminalises speech which promotes

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<sup>25</sup> Jeremy Waldron, *The Harm in Hate Speech*, Harvard University Press 2014

“on grounds of religion or race, disharmony of feelings of enmity, hatred or ill-will between different religious or racial groups.” (Section 298, 298A).

- c. Speech inciting violence against racial and religious groups, whether false or otherwise ‘true’, may be limited in the interests of social harmony. If Parliament decides at a later stage to extend ‘hate speech’ laws to other sectors of society, this should be thoroughly examined and debated; the terms and intent of such a law needs to be clarified, to ensure hate speech laws are not used or abused by a political elite to decide what arguments are acceptable in the public domain, or, to impose an ideologically charged absolutist code of political correctness. This would be inimical to a free and democratic society.

## VI. TOWARDS SUSTAINABLE DEMOCRACY

13. It is clear that many countries have adopted or are considering enacting laws against deliberate online falsehoods to address the many national problems such false speech pose. Such problems should be national in scale and not trivial e.g. gossip about who prominent government officials may be fraternizing with etc...
14. The question of whether freedom of expression protects the deliberate dissemination of disinformation is one that implicates the duties of various stakeholders, including the government (as Educator? Regulator? Censor?), mainstream and social media, civil society and individuals.
15. Concerns about fake news basically have at its heart a distrust in the public’s power of judgement or fears it will be duped or gullible. However, considering the consequences that deliberate online falsehoods could have on the conduct of national elections or the economy etc...and how the internet has altered our communications universe, there is a legitimate need to regulate this to mitigate the effects of such false speech. Ideas have consequences and misleading narratives fueled by digital news bear the potential of grave anti-social consequences. Liars, opportunists, conflict entrepreneurs and attention-seekers we shall always have with us. The falsehoods they spin should be challenged, the question of course, is how. What criteria will be deployed to ascertain truth from falsehood, and who will administer it? A government agency or some kind of public-private committee to alleviate concerns that another law entails another layer of regulatory control over the lives of citizens, with the persistent, popular fear that legitimate criticism, particularly in relation to political matters, may be imperiled or chilled. Legitimate news sources and critical voices must be protected, as these uphold democracy.

16. This submission has not addressed the “how” of regulation or prevention; its concern has been with how the “how” may impact free speech, as a constitutional guarantee, and underlying rationales for protecting free speech, to inform the debate generally. Nonetheless some factors that might be worth considering include:
  - a. If an offence against deliberate online falsehood is created, will this be a strict liability offence or will liability turn on degrees of reckless intent, negligence etc...? If sometime forwards rather than authors the false speech, will a ‘discount’ in terms of sentencing be given for taking (or not taking) responsible steps to verify the accuracy of the speech? Does it matter whether it was done for financial gain or political purposes?
  - b. Who will be involved in deciding whether online speech is deliberate and false, what criteria will be used?
  - c. Could legislation be passed to require online platforms to allow its users to register a challenge or concern over a potentially false statement or to report it the platform operation who would be obliged to investigate after a certain number of reports are made, or ‘take it down’?
  - d. Is there a way to allow the internet community to warn fellow users about online falsehoods i.e. red flagging potentially false statements?
  - e. Is it possible or desirable to make public the identity of those who indulge in deliberate online falsehood?
17. Rather than, or in tandem with legislation, it may be worth exploring a Netizen Code of Conduct (involving all stakeholders) to promote a culture of honesty and integrity, online and offline, to encourage users to take steps to judge the veracity of statements, with the goal of raising the tone and quality of public discourse. Self-regulation has its limits, but should still be encouraged as a facet of active citizenship. Students could be taught the importance of discernment, of ascertaining truth from falsehood or at least being apprised of the problem. Forewarned is forearmed.
18. A smart nation (in the technological sense) must also have a smart people, citizens who are committed to upholding democratic processes and common values, who are discerning. For all its virtues and boon to democracy, the internet has a destructive and corrosive power upon civil civilized society in the

absence of a trusted, reliable method or separating what is true from falsehood. This harms democracy.

19. Any attempt to regulate free speech must take into account the purpose of free speech and its value in a democratic society. However, this issue should not be simplistically characterized as a “State vs Individual” stand-off. The matter is more complex. If free speech is primarily a means to an end and not an end in itself, then free speech which does not serve that end (democracy, finding truth or accuracy) is an illegitimate exercise which may be restricted by countervailing considerations, such as the preservation of the democratic process. Free speech, ostensibly to promote democracy, can if misused, undermine democracy. The Green Paper recognised this:

81. It is important that such discourse and debate be open, and not be based on deliberate falsehoods. We should guard against developments that can undermine, discredit, or debase such debate and discourse. The dissemination of deliberate falsehoods, particularly if this is done covertly, attacks the very heart of democracy. It seeks to mislead, to crowd out truth, and prevent constructive debate and discourse. If this is allowed unchecked, people’s faith in the country, democracy, and its institutions will be undermined.

A negative liberty (deliberate falsehoods) can contravene another liberty (the right to speak to contribute to democratic deliberation). The exercise of a right can contravene another person’s right, as well as public goods.

20. We live in a ‘post truth’ era.<sup>26</sup> This term was celebrated by the online Oxford English Dictionary as the 2016 word of the year. This relates to circumstances “in which objective facts are less influential in shaping public opinion than appeals to emotions and personal belief.” Rather than the Rational Man engaged in democratic processes in a Townhall setting, which underlines free speech theories of the early 20<sup>th</sup> century, we may instead find an Emotional or Irrational Man or an Ideological Man who seeks comfort in echo chambers rather than open debate, or who seeks to advance an agenda by advancing deliberate falsehoods. While we may aspire towards rational issue-focused democratic debate which demands maximal free speech protection, we cannot ignore the reality that there are liars among us, who peddle their wares online for profit or for politics; we should also be aware that our own political preferences and predilection to ‘choose the news’ through customisation may blunt our ability to discern truth and falsehood, to our collective detriment.

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<sup>26</sup> <https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016>