

Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, pursuant to Human Rights Council resolution 34/18.

In this connection, I would like to offer the following comments on the Protection from Online Falsehoods and Manipulation Bill, which raises serious concerns regarding freedom of expression.

I welcome the opportunity to submit these comments in light of international human rights standards on the right to freedom of opinion and expression, and I stand ready to engage further with your Excellency's Government on this matter.

According to the information received:

On April 1 2019, the Parliament of Singapore tabled the Protection from Online Falsehoods and Manipulation Bill ("the Bill") for first reading.

Criminal prohibition of the communication of "false statements of fact"

Section 7 of the Bill makes it an offense to "communicate in Singapore a statement knowing or having reason to believe that ... it is a false statement of fact," and if such communication is likely to be, *inter alia*, prejudicial to "the security of Singapore ... public health, public safety, public tranquility or public finances," "influence the outcome of ... a general election of Members of Parliament," "incite feelings of enmity, hatred or ill-will between different groups of persons," or "diminish public confidence in the performance of any duty or function of ... the Government."

Offenses under Section 7 are punishable with a fine of up till \$50,000 SGD (i.e. about USD 37,000), imprisonment of up till 5 years or both.

Minister's authority to require correction or stop communication of "false statement of fact"

Under Section 10(1), the Bill authorizes any Minister to instruct the relevant government authority to issue a "Correction Direction" or a "Stop Communication Direction" if: (1) "a false statement of fact has been or is being

communicated in Singapore;” and (2) “the Minister is of the opinion that it is in the public interest to issue the Direction.”

The Bill further states that “it is in the public interest to do anything if the doing of that thing is necessary or expedient in the interest of the security of Singapore ... to protect public health or public finances ... secure public safety or public tranquility ... prevent any influence of the outcome of an election ... prevent incitement of feelings of enmity, hatred or ill-will among different groups of persons ... or to prevent a diminution of public confidence in the performance of any duty or function of ... the Government.”

Under Section 11, a Correction Direction requires the publication of a notice which states that “the subject statement is false.” The notice may also be required to include “a specified statement of fact” (presumably, for example, a statement that the Minister deems to be accurate). This correction notice must be placed in a “specified online location” and/or a specified newspaper or printed publication.

Under Section 12, a Stop Communication Direction requires a person to “stop communicating the subject statement by the specified time,” and may include a requirement not to share any “substantially similar” statement.

Non-compliance with these Directions is punishable with a fine up to \$20,000 SGD (i.e. about USD 15,000), imprisonment of a term up till 12 months, or both.

Both Directions may be issued to persons who communicate a “false statement of fact” even if they do not know or have no reason to believe that the statement is false.

Minister’s authority to impose obligations on intermediaries

Under Section 20, a Minister may instruct the relevant government authority to issue a Targeted Correction Direction, a Disabling Direction or a General Correction Direction to an internet intermediary if material containing a “false statement of fact” is being communicated in Singapore, and if the Minister determines that it is in the “public interest” to issue the Direction.

Under Section 21, a Targeted Correction Direction requires intermediaries to communicate a notice stating that the subject material contains a “false statement of fact.” The notice may also be required to include or reference a “specified statement of fact.” The notice must be communicated to all end-users in Singapore who accessed the “false statement of fact.”

Under Section 22, a Disabling Direction requires intermediaries to “disable access by end-users in Singapore” to material containing a “false statement of fact.” The Direction may also require disabling access to “identical copies” of such material, and the communication of a relevant correction notice.

Under Section 23, General Correction Direction requires intermediaries to communicate a correction notice on their services to all end-users who use those services.

Under Section 27, intermediaries that do not comply with these Directions may incur fines of up till \$1 million SGD (i.e. about USD 750,000). A further fine of up till \$100,000 SGD (i.e. about USD 75,000) will be imposed for “every day or part of day during which the offence continues after conviction.”

Access blocking orders

Under Sections 16 and 28, a Minister may direct the relevant authorities to issue access blocking orders when a person or an intermediary has not complied with a Direction. Under these circumstances, internet access service providers may be ordered to “take reasonable steps to disable access” to the “online location” that engages in the communication of material containing “false statement[s] of fact.”

Under Section 33, internet access service providers may be ordered to “take reasonable steps to disable access” to a “declared online location.” Under Section 32, a Minister may declare a website to be a “declared online location” if it is engaged in the communication of at least three different “false statement[s] of fact” within six months of the date of the Declaration.

Appeals of the Minister’s decisions

Under Sections 17 and 29, any appeal to vary or cancel a Direction must first be brought before the Minister who directed its issuance.

The appeal can only be brought before the High Court if the Minister has refused the appeal in whole or in part.

The High Court may only consider the appeal on limited grounds. For Correction Directions and Stop Communication Directions, for example, the Court may only set aside the Direction if: (a) “the person did not communicate in Singapore the subject statement;” (b) “the subject statement is not a statement of fact, or is a true statement of fact;” or (c) “it is not technically possible to comply with the Direction.”

The relevant Direction generally “remains in effect” despite the appeal. The Direction is only stayed in exceptional circumstances, such as when the “appellant establishes a prima facie case that it is technically impossible to comply” with a Direction.

Before addressing my specific concerns with the aforementioned legislation, I wish to outline the internationally recognized standards protecting the right to freedom of

opinion and expression. Under Article 2(2)(i) of the ASEAN Charter, your Excellency's Government has affirmed that it "shall act" with "respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice." Under Article 23 of the ASEAN Human Rights Declaration, your Excellency's Government has affirmed that "[e]very person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person's choice."

While Singapore is not a party to the International Covenant on Civil and Political Rights, the language of the right to freedom of expression established under the Declaration – and the Universal Declaration of Human Rights, which provides global standards in human rights for all States – is materially similar to Article 19 of the Covenant. Article 19(1) of the Covenant states that "[e]veryone shall have the right to hold opinions without interference." Article 19(2) establishes State Parties' obligations to respect and ensure "the right to freedom of expression," which includes the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." Accordingly, the jurisprudence of Article 19 (and particularly its criteria for valid limitations on freedom of expression) provides persuasive guidance on the scope of Singapore's obligations to respect and ensure the right to freedom of opinion and expression.

Article 19(3) of the Covenant provides that restrictions on the right to freedom of expression must be "provided by law", and necessary "for respect of the rights or reputations of others" or "for the protection of national security or of public order (ordre public), or of public health and morals." The General Assembly and the Human Rights Council have affirmed that permissible restrictions online are the same as those offline. (A/HRC/17/27)

Article 19(3) establishes a three-part test for permissible restrictions on freedom of expression:

- a) *Restrictions must be provided by law.* Any restriction "must be made accessible to the public" and "formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly." (CCPR/C/GC/34) Moreover, it "must not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution." *Id.*
- b) *Restrictions must protect legitimate aims*, which are limited to those specified under article 19(3). The term "rights...of other under article 19(3)(a) includes "human rights as recognized in the Covenant and more generally in international human rights law." *Id.*
- c) *Restrictions must be necessary to protect legitimate aims.* The requirement of necessity implies an assessment of the proportionality of restrictions, with the

aim of ensuring that restrictions “target a specific objective and do not unduly intrude upon the rights of targeted persons.” *Id.* The ensuing interference with third parties’ rights must also be limited and justified in the interest supported by the intrusion. Finally, the restriction must be “the least intrusive instrument among those which might achieve the desired result.” *Id.*

The Human Rights Committee, the body charged with interpreting and monitoring implementation of the Covenant, has found that these criteria “may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights.” *Id.* Furthermore, the Covenant places “particularly high” value on protecting expression in “circumstances of public debate in a democratic society concerning figures in the public and political domain.” *Id.* Laws that penalize “the expression of opinions about historical facts,” or generally prohibit “expressions of an erroneous opinion or an incorrect interpretation of past events,” are also incompatible with the limitations criteria under Article 19(3). *Id.*

In the context of online expression, I have explained that “States should only seek to restrict content pursuant to an order by an independent and impartial judicial authority, and in accordance with due process and standards of legality, necessity and legitimacy.” States should also “refrain from imposing disproportionate sanctions, whether heavy fines or imprisonment, on Internet intermediaries, given their significant chilling effect on freedom of expression.” (A/HRC/38/35) I have also urged States to refrain from adopting models of regulation “where government agencies, rather than judicial authorities, become the arbiters of lawful expression.” *Id.*

State regulation of online misinformation should also comply with all applicable international human rights standards. In the 2017 Joint Declaration on freedom of expression and “fake news”, disinformation and propaganda, I joined a group of inter-governmental experts on freedom of expression to urge governments to refrain from “[g]eneral prohibitions on the dissemination of information based on vague and ambiguous ideas, including ‘false news’ or ‘non-objective information’”, which “are incompatible with international standards for restrictions on freedom of expression.” The Joint Declaration also concluded that internet intermediaries “should never be liable for any third party content relating to those services unless they specifically intervene in that content or refuse to obey an order adopted in accordance with due process guarantees by an independent, impartial, authoritative oversight body (such as a court) to remove it and they have the technical capacity to do that.”

In light of the above-mentioned standards, I am concerned that the Bill, if adopted, would be incompatible with international human rights law. While I understand Your Excellency’s Government’s interest in regulating online misinformation, I am concerned that the Bill confers on select executive officials excessive authority to restrict, censor and punish online expression it designates as “false,” with limited opportunity for appeal.

I am concerned that the Bill gives Ministers virtually unfettered discretion to label and restrict expression they disagree with as “false statements of fact.” Under Section 2(1), a statement may be found to be false “if it is false or misleading, whether wholly or in part, and whether on its own or in the context in which it appears.” This definition raises concern that a Minister can take a portion of a statement out of its context and direct its correction or removal on that basis. Taken to its logical conclusion, a statement that is factually accurate as a whole may nevertheless be restricted on the basis that a portion of it has been taken out of context and labeled “false.” I am concerned that this overbroad definition of falsehood will lead to the criminalization and suppression of a wide range of expressive conduct, including criticism of the government, and the expression of unpopular, controversial or minority opinions.

Directions may also be issued on vague and unspecified assessments of the “public interest,” without the opportunity to appeal such assessments before a court or an independent body. While State objectives such as national security, public order and public safety are legitimate grounds for the restriction of freedom of expression, the Bill does not provide any guidance on how a Minister should assess whether a subject statement adversely affects these objectives, or the circumstances under which a Direction would be a necessary and proportionate means of protecting these objectives. I am concerned that this lack of guidance does not meet the level of clarity and predictability required by international human rights law. The lack of independent review of the Minister’s assessments of the “public interest” also enhances the potential for abuse, since it confers on each Minister sweeping authority to adjudicate the criminality of statements addressed at them, their functions or their activities.

The criminal penalties that may be imposed for the communication of a “false statement of fact” or the failure to comply with a Direction also heighten the risk of censorship and government overreach. The broad discretion afforded to select executive officials to police “false statement[s] of fact,” coupled with the threat of heavy fines and custodial sentences, is likely to create a significant chilling effect on freedom of expression. I am particularly concerned that these penalties will be disproportionately imposed on or threatened against journalists, civil society activists, government critics and the political opposition. The threat of severe financial penalties and “access blocking orders” also places significant pressure on intermediaries to err on the side of caution and broadly interpret their obligations to restrict content under a Direction, even if this would unduly restrict expression that is legitimate or lawful. I am also concerned that “access blocking orders” will be used to shut down entire websites or platforms that are essential to public discourse in Singapore.

Finally, the appeals process raises concern that it is designed to deter meaningful forms of recourse for Directions that may unduly restrict freedom of expression. Since judicial review is established as an option of last resort rather than a requirement prior to the issuance of a Direction, the burden is on individuals and intermediaries to challenge executive determinations of “false statement[s] of fact.” Given that such statements are criminalized, this practice effectively reverses the traditional presumption that an accused is innocent until proven guilty of criminal conduct. Furthermore, the grounds for judicial

appeal also omit executive assessments of the “public interest” from review, even though such assessments are a critical aspect of the decision to issue a Direction that may lead to criminal penalties in the event of non-compliance. Given that there are no time limits on the resolution of an appeal, individuals and intermediaries subject to a Direction will be forced to issue a correction notice or restrict access to online content even if it is ultimately determined that the content at issue does not contain a “false statement of fact.” Even if they are ultimately rescinded, such corrections or takedowns could potentially skew public discourse during critical and time sensitive processes, such as elections or legislative debates. The high financial and administrative costs and lengthy timelines potentially associated with the appeals process, which requires an appeal to the Minister before an appeal to the High Court, may also deter individuals and intermediaries from seeking judicial review.

In light of the above, I am concerned that the Bill would not only serve as a basis to deter fully legitimate speech, especially public debate, criticism of government policy, and political dissent; I am also concerned that the Bill could serve as a model for far-reaching restrictions on vague and discretionary grounds of falsity. In my experience as Special Rapporteur, I have seen laws against “false information” be used to target journalists, activists, and others, and the proliferation of such laws are cause for grave concern.

In this light, I urge your Excellency’s Government to withdraw the Bill and to provide additional time for legislative and public consideration to evaluate the Bill to ensure it aligns with international human rights standards.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency’s Government will be made public via the communications reporting [website](#) within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression