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# Cancel Culture and Freedom of Speech: Definitions, Effects, and the Way Forward

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Published by:

Centre for Applied Research

Singapore University of Social Sciences, Singapore

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ISBN: 978-981-18-9898-3

This paper was commissioned by the Ministry of Law, and presented at the Ministry of Law Online Harms Symposium 2023.

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## 1. Executive Summary

Cancel Culture is a new phenomenon involving the use of peer pressure to “Cancel”, that is unilaterally censor, a target individual or organisation. The phenomenon is still evolving and definitions are in flux. This paper deals with the question of how lawyers should start to think about responding to the issues raised by Cancel Culture.

First, the paper begins with a survey of what Cancel Culture is. This is an empirical question, best left to social scientists. The argument here is that, for lawyers, it is not necessary to define the term “Cancel Culture” – the real issue is to identify behaviours associated with Cancel Culture that are in need of regulation.

In this vein, the paper examines activities that fall into four broad categories, differentiated by the motivation of the perpetrator:

Category 1: Actions taken to raise awareness and seek accountability for perceived wrongs.

Category 2: Actions taken to seek justice for perceived wrongs.

Category 3: Actions taken to censor others due to perceived wrongs.

Category 4: Actions taken to inflict intentional harm on others due to perceived wrongs.

These categories are derived from existing social science research into how the phenomenon is understood. They are positive descriptors, not normative. They exist as heuristic tools to identify the various behaviours that may be associated with Cancel Culture, which can manifest in many different ways.

Second, the thesis of this paper is that while Cancel Culture is a new phenomenon, the legal debate over what we should do about it is not – it is really an extension of the debate surrounding the right to Freedom of Speech. This is because, fundamentally, when a person attempts to “Cancel” another person, what is happening is that one individual is exercising his Freedom of Speech to do something that infringes upon the target’s right to Freedom of Speech. When the State should get involved is really therefore a question of what the applicable limits of the right to Freedom of Speech are.

The paper therefore proceeds through a brief overview of the concept of Freedom of Speech, first as a matter of political philosophy, and then as a matter of law. It argues that Freedom of Speech as a legal right is instrumentalist in nature: States are justified in curtailing Freedom of Speech where, on balance, the curtailment of such right is more beneficial to society than to allow such speech to be unfettered.

Third, the principles governing the limits of Freedom of Speech must be understood in relation to the values chosen by a particular society. Different societies value Freedom of Speech to different extents. In discussing what Singapore's approach to Cancel Culture should be, we must necessarily begin by understanding Singapore's approach to Freedom of Speech. The paper therefore quickly reviews Singapore's legal landscape relating to Freedom of Speech, in order to distil the key principles governing what constitutes an abuse of the right to Freedom of Speech in Singapore:

Principle 1: Promulgation of falsehoods.

Principle 2: Causation of physical or mental harm.

Principle 3: Incitement to any offence.

Principle 4: Disturbance of public harmony, especially regarding race and religion.

Principle 5: Offense to Public Morality.

The paper proceeds on the basis that these five principles are broadly representative of the "Out of Bounds Markers" in Singapore's approach to Freedom of Speech.

Fourth, it follows that whether Cancel Culture activities should be circumscribed depends on whether such activities fall afoul of any of the five Principles governing Freedom of Speech. Cross referencing the four Categories of Cancel Culture activities with the five Principles of Freedom of Speech, the paper suggests that Categories 1 and 2 are likely to be considered a *constructive* use of the right to Freedom of Speech and therefore are permissible, whereas Categories 3 and 4 are likely to be considered a *destructive* abuse of the right to Freedom of Speech and should therefore be regulated.

Fifth, the paper concludes by suggesting a framework within which to consider how to address Cancel Culture issues in a methodical, step-by-step manner. The central concern is to first define and delineate the categories of unacceptable Cancel Culture activities, followed by the creation of a legal mechanism to decide, on a case-by-case basis, which category a particular activity falls within. The framework suggests that this should be a multi-step process, in which the legislature sets broad guidelines, and then subsequently creates an enforcement mechanism in the form of a legal remedy adjudicated by a court or other public authority.

This paper is intended to be a starting point for further discourse on the topic of legal regulation of Cancel Culture. It is, by necessity, a broad overview of the issues involved, and calls for further detailed study of many of the areas touched on.

## 2. Introduction

Freedom of speech is one of the fundamental liberties guaranteed by Singapore’s Constitution.<sup>1</sup> Indeed, Freedom of Speech is a fundamental right guaranteed by many democratic societies.<sup>2</sup> Voltaire is famously said to have put it thus, “I disagree with what you say, but I will defend to the death your right to say it!”

Historically, since the days of Socrates in ancient Athens,<sup>3</sup> the main tension with the right of Freedom of Speech exists between the speaker, a private individual, and the government. The age-old issue is what the limits of such freedom are, and therefore, when a government may intervene to stop someone from saying something. Although some extreme positions may hold that Freedom of Speech is unlimited, the reality is that no functioning society has taken this position.<sup>4</sup> This fundamental tension occurs because, simply, the government was historically the only entity with the ability to stop an individual from expressing his views – usually by some legal mechanism.<sup>5</sup>

This is no longer the case. The advent of the internet, in particular Web 2.0,<sup>6</sup> has created a paradigm in which peer pressure is capable of imposing severe negative penalties on targets. This phenomenon is known as, “Cancel Culture”. Never before in history has a private individual had the ability to mobilise support so easily and widely. The fear is that such movements could create chilling effects on Freedom of Speech, that is, they could illegitimately stop people from expressing themselves when they have a legal, moral, and civic right to do so.<sup>7</sup>

As Singapore contemplates regulatory action to deal with the issue of “Cancel Culture”,<sup>8</sup> it is timely to go back to basics and think about why we have a right of Freedom of Speech, what the limits of that right are, and how this relates to Cancel Culture. The right of Freedom of Speech is enshrined in the Constitution and the government has a legal and moral duty to ensure that its citizens are able to substantively exercise that right, free from undue influence. On the other hand, by intervening, the government risks contravening the same right to Freedom of Speech, since stopping someone from “cancelling” another might likewise be seen as undue interference with Freedom of Speech. Given that Singapore views Freedom of Speech from an instrumentalist perspective, any intervention to curb Cancel Culture must, on balance, advance the substantive enjoyment of the right to Freedom of Speech more than it curtails it.

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1 Art 14(1)(a) of the Constitution of the Republic of Singapore.

2 See Section 4(a) below.

3 See Section 4 below.

4 See Section 4(a) below.

5 See, for example, Section 5 below for an overview of relevant legal mechanisms in Singapore.

6 Web 2.0. is the informal classification of the current state of the internet, which is characterised by usability and an abundance of user-created content. There is no official or authoritative body that pronounces on the state of the internet, rather, it is a loose conception adopted by internet users. For example, see Will Kenton, *What is Web 2.0? Definition, Impact, and Examples* (Investopedia, 2023): <https://www.investopedia.com/terms/w/web-20.asp#:~:text=Key%20Takeaways-,Web%202.0%20describes%20the%20current%20state%20of%20the%20internet%2C%20which,how%20the%20Internet%20is%20used.> [Accessed 18 Aug 2023]

7 See the remarks of Minister for Home Affairs and Minister for Law, K Shanmugam, in Tham Yuen-C, *Section 377A: Ministries looking at ways to deal with cancel culture, work pressure, says Shanmugam* (The Straits Times, 2022): <https://www.straitstimes.com/singapore/politics/section-377a-ministries-looking-at-ways-to-deal-with-cancel-culture-work-pressure-says-shanmugam> [Accessed 18 Aug 2023]

8 *Ibid.*

This paper will briefly review the concepts of Cancel Culture and Freedom of Speech. We then turn to examining the legal limits of Freedom of Speech in Singapore. The aim of the paper is to suggest a principled framework on which further regulatory measures can be grounded.

### 3. Cancel Culture – An Overview

The first thing to do is define “Cancel Culture”. To start, there is no legal definition of the term.

Even the ordinary language meaning of Cancel Culture is not settled. The term is a relatively new one, said to have originated from the slang term, “cancel”, which refers to breaking up with a romantic partner. This colloquial usage is alleged to have come from a song in the 1980s, and then developed through popular culture in the 2010s.<sup>9</sup>

The Cambridge English Dictionary defines it as follows:

*[A] way of behaving in a society or group, especially on social media, in which it is common to completely reject and stop supporting someone because they have said or done something that offends you*<sup>10</sup>

The Pew Research Center conducted a survey of Americans in 2020 which found essentially that there is no uniform definition of Cancel Culture: what Cancel Culture was varied, sometimes widely, across demographic groups. In particular, Republicans were more likely to view Cancel Culture negatively, as a form of censorship, while Democrats were more likely to view it positively, as a method of holding people accountable.<sup>11</sup>

In Singapore terms, a study conducted by researchers at Nanyang Technological University found that there were many different aspects of Cancel Culture, but broadly the term could be understood as follows:

*Our analysis found that cancel culture is defined as involving the public shaming of a target on social media, carried out or supported by a group of people, which aims to hold the target accountable for socially incorrect or unacceptable behavior.*<sup>12</sup>

None of these definitions are sufficiently firm ground on which to found legal principles. Laws must be clear and precise, and in any case, legal definitions function very differently from common language definitions. A legal definition need not conform to a common language definition: for example, the term “consideration” means very different things to a lawyer than it does to a layperson.<sup>13</sup>

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9 Emily A. Vogels, Monica Anderson, Margaret Porteus, Chris Baronavski, Sara Atske, Colleen McClain, Brooke Auxier, Andrew Perrin and Meera Ramshankar, *Americans and ‘Cancel Culture’: Where Some See Calls for Accountability, Others See Censorship, Punishment* (Pew Research Center, 2021): <https://www.pewresearch.org/internet/2021/05/19/americans-and-cancel-culture-where-some-see-calls-for-accountability-others-see-censorship-punishment/> [Accessed 18 Aug 2023].

10 *Cancel Culture* (Cambridge Dictionary): <https://dictionary.cambridge.org/dictionary/english/cancel-culture><https://dictionary.cambridge.org/dictionary/english/cancel-culture> [Accessed 18 Aug 2023]

11 Pew Research Study, *supra* note 9.

12 Edson C. Tandoc, Jr, Beverly Tan Hui Ru, Gabrielle Lee Huei, Ng Min Qi Charlyn, Rachel Angeline Chua and Zhang Hao Goh, *#CancelCulture: Examining definitions and motivations* (New Media and Society, 2022): #CancelCulture: Examining definitions and motivations - Edson C Tandoc, Beverly Tan Hui Ru, Gabrielle Lee Huei, Ng Min Qi Charlyn, Rachel Angeline Chua, Zhang Hao Goh, 2022 (sagepub.com) [Accessed 18 Aug 2023]

13 In contract law, “consideration” refers to something valuable that parties offer in exchange for a promise to be enforced. See, for example, *Gay Choon Ing v Loh Sze Ti Terene Peter and Another Appeal* [2009] SGCA 3 at [66] – [69].



The way to out of this Gordian Knot is simply to cut it: we do not need to define Cancel Culture, but rather identify key behaviours associated with the phenomenon and then decide how to regulate them.

This strategy has been used before, for example, in relation to hate speech. In Singapore, there is no general offence of hate speech. Rather, specific acts of hate speech may be captured by specific offences: hate speech involving race might be punishable under the Penal Code 1871,<sup>14</sup> hate speech not involving race but involving harassment might be dealt with under the Protection from Harassment Act 2014,<sup>15</sup> and hate speech that involves the concoction of malicious falsehoods might instead be prosecuted under the Protection from Online Falsehoods and Manipulation Act 2019.<sup>16</sup>

The top three descriptions of Cancel Culture in the Pew survey were:<sup>17</sup>

1. Actions taken to hold others accountable;
2. Censorship of speech or history; and
3. Mean-spirited actions taken to cause harm to others.

The main motivations for Cancel Culture, as derived from the NTU survey were:<sup>18</sup>

1. Seeking accountability;
2. Seeking justice; and
3. Raising awareness and educating others.

Synthesizing these insights, the following types of behaviours are, for the purposes of this paper, associated with Cancel Culture:

1. Actions taken to raise awareness and hold others accountable for perceived wrongs;
2. Actions taken to seek justice for perceived wrongs;
3. Actions taken to censor others due to perceived wrongs; and
4. Actions taken to inflict intentional harm on others due to perceived wrongs.

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<sup>14</sup> Chapter 15 of the Penal Code 1871.

<sup>15</sup> Sections 3, 4 and 5 of the Protection from Harassment Act 2014.

<sup>16</sup> For potential criminal offences, see sections 7 and 8 of the Protection from Online Falsehoods and Manipulation Act 2019. Alternatively, regulatory action may be taken in the form of Directions issued under Parts 3 and 4 of the same Act.

<sup>17</sup> Pew Research Study, *supra* note 9.

<sup>18</sup> NTU Study, *supra* note 12 at pp 8 – 9.

At this stage, it is important to focus on motivations for conceptual clarity. The key question is whether the person carrying out the activity is attempting to contribute *constructively* to public dialogue, which is the very purpose of the right to Freedom of Speech, or *destructively*, which is an abuse of the right of Freedom of Speech and leaves society overall worse off.

The motivation behind a particular activity must necessarily be a *subjective* inquiry, since it is a matter of the mental state(s) of the person(s) carrying out that activity.

However, I propose that whether that motivation is considered *constructive* or *destructive* should be an *objective* test – it is a matter of legal policy for society to decide what behaviour contributes to the public discourse and what does not.

It should not be left to a subjective test, as many people who participate in Cancel Culture activities would, subjectively, believe they are doing good even when their activities are manifestly and objectively disproportionate and harmful to society.

For example, English author JK Rowling was subjected to accusations that her views on gender were, “*literally killing trans people with [her] hate*” and to threats of violence and verbal abuse.<sup>19</sup> It is not physically possible that Rowling’s views alone are *literally* killing anyone. It is difficult to see how such activities, notwithstanding that the activists in question may genuinely believe that Rowling’s views are harmful and that their actions are justified for the greater good, can be characterised as *constructive* and healthy for public discourse.

A brief survey of the kinds of actions that fall into each category now follows.<sup>20</sup> The issue of which categories are *constructive* and therefore permitted, and *destructive* and therefore should not be permitted, will be reserved for Section 6 below – the evaluation of these activities requires a prior understanding of the philosophical and legal foundations of the right of Freedom of Expression. Of course, the categories are not air-tight and some behaviour will most likely cross categories or defy easy classification. The categories are nonetheless useful heuristics and form a starting point for further analysis.

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19 J.K. Rowling, J.K. *Rowling Writes about Her Reasons for Speaking out on Sex and Gender Issues* (jkrowling.com, 2020): <https://www.jkrowling.com/opinions/j-k-rowling-writes-about-her-reasons-for-speaking-out-on-sex-and-gender-issues/> [Accessed 18 Aug 2023].

20 This survey is intended to illustrate use cases of legal concern. It is a normative survey, not a positive one. The intention is to arrive at useful legal principles, not to derive a socio-linguistic definition based on prevailing usage of the term, “Cancel Culture.” There is, of course, much more need for study by sociologists into the phenomenon, but that is beyond the scope of this paper.

### (a) Category 1: Actions taken to raise awareness and hold others accountable for perceived wrongs

The most common definition of Cancel Culture found in the Pew survey was “actions taken to hold others accountable.”<sup>21</sup> Similarly, the NTU also found that one of the most common motivations for engaging in “Cancellation” was to seek accountability. Although the NTU survey also found that a separate motivation was to raise awareness and educate others,<sup>22</sup> from a regulatory perspective, this is functionally equivalent to seeking accountability as the ultimate end of the awareness campaign is to hold the target accountable.

It is not entirely clear what “accountable” means in this instance. It is clear that the objective is not legal accountability, since the targets of Cancel Campaigns cannot be subject to legal liability *via* the campaign alone. It appears that “accountability” in this sense means more that the target should publicly acknowledge their wrongdoing and express remorse for it.

For analytical purposes, this category of behaviour should be understood as exclusively calling for admission of wrongdoing or an apology and not advocating any particular action beyond that.

One prominent example would be the various campaign conducted against British author J.K. Rowling. Rowling has been repeatedly accused of transphobic views for her stance on gender issues.<sup>23</sup> The controversy over Rowling runs the entire gamut of behaviours associated with Cancel Culture: from various commentators calling her out as speaking from a position of privilege, to people on Twitter hurling abuse at her, to having her books burned, and being subjected to a boycott of her intellectual property.<sup>24</sup>

Those who merely sought to draw attention to the issue and rebut Rowling’s position would, for the purposes of this paper, constitute Category 1 cases.

In Singapore, an example of Category 1 behaviour would be the outcry over the fashion influencer Priscilla Shunmugam. Shunmugam, the founder of fashion brand, Ong Shunmugam, had said in a virtual lecture hosted by the Asian Civilizations Museum that she believed that Chinese women have “*progressed significantly faster and further as compared to their Malay and Indian counterparts.*” This response was part of her answer to a question about why the cheongsam, a traditional Chinese form of dress, is a recurring motif in her work.<sup>25</sup>

A video clip of her answer went viral on social media, prompting some users to accuse Shunmugam of racism. Shunmugam later acknowledged that her remarks had been, “*clumsy, hurtful and insensitive*” and that she was “*rightly being held accountable.*”<sup>26</sup>

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21 Pew Research Study, *supra* note 9.

22 NTU Study, *supra* note 12 at pp 8 – 9.

23 J.K. Rowling, *supra* note 19.

24 *Ibid.*

25 Low Youjin, *Founder of fashion brand Ong Shunmugam apologises for race-related remarks at ACM event* (TODAY Online, 2022): <https://www.todayonline.com/singapore/founder-fashion-brand-ong-shunmugam-apologises-race-related-remarks-acm-event-1855321> [Accessed 18 Aug 2023]

26 *Ibid.*

More recently, Malaysian Prime Minister Anwar Ibrahim has been accused of sexism as he had joked with a female student that, had he been younger, he would have asked for her phone number. This has prompted some commentators, including one of his political opponents, to call for an apology.<sup>27</sup>

The crux of Category 1 is that the activity goes no further than seeking accountability, usually by demanding that the target acknowledge the perceived wrongdoing and issue an apology.

## (b) Category 2: Actions taken to seek justice for perceived wrongs

The NTU study found that seeking justice was another distinct motivation of those involved in Cancel Campaigns. This may be thought of as a distinct category from seeking accountability: while those seeking accountability do not necessarily have recourse to the authorities, seeking justice implies some relationship with the authorities. This is usually a response to the aggrieved parties feeling that the authorities have somehow failed them.<sup>28</sup>

A good local example of this kind of conduct is the case of Monica Baey. Baey was a student with the National University of Singapore ("NUS"). She was the victim of voyeurism by another NUS student. The Attorney-General's Chambers declined to prosecute the offender, giving him a 12-month conditional warning. NUS merely suspended the offender for a semester, assigning him to mandatory counselling, and forced him to write an apology to Baey.<sup>29</sup>

Baey was dissatisfied with these outcomes and decided to take her grievances to social media, where she rapidly went viral. Her objective was to get NUS to relook its disciplinary policies and possibly re-open her case.<sup>30</sup> To her great credit, she discouraged online commentators from conducting personal attacks on the offender.<sup>31</sup>

Happily for Baey, her social media campaign succeeded in its objectives. NUS admitted that it had failed her and committed to reviewing its policies.<sup>32</sup> Even the Education Minister, Mr Ong Ye Kung, weighed in on the issue, saying that NUS's response had been "manifestly inadequate".<sup>33</sup>

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27 The Star/Asia News Network, *Apologise for joke that objectified female student, Malaysia's PM Anwar told* (The Straits Times, 2023): <https://www.straitstimes.com/asia/se-asia/apologise-for-joke-that-objectified-female-student-anwar-told> [Accessed 18 Aug 2023]

28 NTU Study, *supra* note 12 at p 8

29 Amelia Teng, *NUS Peeping Tom given conditional warning due to high likelihood of rehabilitation: Police* (The Straits Times, 2019): <https://www.straitstimes.com/singapore/courts-crime/student-in-nus-sexual-misconduct-case-given-conditional-warning-due-to-high> [Accessed 18 Aug 2023]

30 Sherlyn Seah, *NUS student Monica Baey hopes for case to be re-opened, glad for support received* (TODAY Online, 2019): <https://www.todayonline.com/singapore/nus-student-monica-baey-hopes-case-be-re-opened-gratified-support-received> [Accessed 18 Aug 2023]

31 Ng Huiwen, *NUS Peeping Tom case: Monica Baey urges online bullying against Nicholas Lim to stop* (Asiaone, 2019): <https://www.asiaone.com/singapore/nus-peeping-tom-case-monica-baey-urges-online-bullying-against-nicholas-lim-stop> [Accessed 18 Aug 2023]

32 Amelia Teng, *NUS admits it failed Monica Baey; will set up victim support unit and improve campus security* (The Straits Times, 2019): <https://www.straitstimes.com/singapore/education/nus-admits-it-failed-monica-baey-will-set-up-victim-support-unit-and-improve> [Accessed 18 Aug 2023]

33 Today, *Peeping tom case: Penalties by NUS 'manifestly inadequate', Ong Ye Kung says* (TODAY Online, 2019): <https://www.todayonline.com/singapore/peeping-tom-case-penalties-nus-manifestly-inadequate-ong-ye-kung-says> [Accessed 18 Aug 2023]

The important thing about Category 2 activities is that they ultimately have recourse to proper authorities to mete out punishment and do not seek to impose it unilaterally. This may be contrasted with Category 4 activities, in which the Cancel Campaign seeks to impose penalties on the alleged wrongdoer without recourse to public authorities.

### (c) Category 3: Actions taken to censor others due to perceived wrongs

Where Category 1 concerns actions taken merely to call for accountability, Category 3 is concerned with actions that go beyond that and attempt to restrain the target from further expressing their views. This is sometimes called “deplatforming”.<sup>34</sup>

One prominent international example of such activity is the Cancel Campaign directed at Canadian academic Jordan Peterson. Peterson is vilified in certain circles for his stance against “Political Correctness”.<sup>35</sup> The controversy over Peterson’s political views led to Cambridge University rescinding an invitation of a Visiting Fellowship. The University said that it was, “*an inclusive environment and we expect all our staff and visitors to uphold our principles. There is no place here for anyone who cannot.*” This view was apparently also echoed by the Cambridge University students’ union.<sup>36</sup>

Another example of deplatforming, albeit on a smaller scale, occurred in 2017 when Balliol College of Oxford University banned the Oxford Christian Union from attending its freshers’ fair. The freshers’ fair is an annual event in which the various societies and interest groups engage new students at the start of the academic year. Although it is not clear whether this was a result of a Cancel Campaign as such, the concept is related, as the Christian Union was deplatformed due to fears that it could cause “harm” to certain students who might be made to feel unwelcome, as “*Christianity’s influence on many marginalised communities has been damaging in its methods of conversion and rules of practice, and is still used in many places as an excuse for homophobia and certain forms of neo-colonialism.*”<sup>37</sup>

These are example of deplatforming. They go beyond merely disagreeing with a viewpoint and extend into *unilateral* attempts to censor the freedom of speech of another. This is what makes Category 3 activities fundamentally *destructive* to public discourse.

Another aspect of Category 3 activities, one which differentiates them from Category 2, is the failure to have recourse to public authorities or to provide targets with any attempt at a fair hearing.

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<sup>34</sup> *Deplatform* (Cambridge Dictionary): <https://dictionary.cambridge.org/dictionary/english/deplatform> [Accessed 18 Aug 2023]

<sup>35</sup> For an example of how controversial he is, see Dorian Lynskey, *How dangerous is Jordan B Peterson, the rightwing professor who ‘hit a hornets’ nest’?* (The Guardian, 2018): <https://www.theguardian.com/science/2018/feb/07/how-dangerous-is-jordan-b-peterson-the-rightwing-professor-who-hit-a-hornets-nest> [Accessed 18 Aug 2023]

<sup>36</sup> Sarah Marsh, *Cambridge University rescinds Jordan Peterson invitation* (The Guardian, 2019): <https://www.theguardian.com/education/2019/mar/20/cambridge-university-rescinds-jordan-peterson-invitation> [Accessed 18 Aug 2023]

<sup>37</sup> Caroline Davies, *Anger as Oxford college bans Christian group from freshers’ fair* (The Guardian, 2017): <https://www.theguardian.com/education/2017/oct/09/anger-as-oxford-college-bans-christian-group-from-freshers-fair#:~:text=A%20University%20of%20Oxford%20college,potential%20for%20harm%20to%20freshers%E2%80%9D>. [Accessed 18 Aug 2023]

In Singapore, a prominent example of this was the #PunishXiaxue campaign. Xiaxue is the pseudonym of local influencer Wendy Cheng. Cheng is known for her pointed online commentary. Things came to a head in 2020, when someone dug up some of Xiaxue's old tweets that allegedly accused Indian migrant workers of molesting women and leering at girls. A Police Report was made against her.<sup>38</sup> Subsequently, a petition called, "Punish Xiaxue for seditious content" was put up, which garnered over 27,000 signatories.<sup>39</sup>

The backlash against Xiaxue started only in 2020 because it was not really about those particular tweets but rather a response to her perceived attacks on opposition politician Raeesah Khan, who was then under investigation by the Police for allegedly making racist remarks.<sup>40</sup>

It is not entirely clear what the perpetrators of #PunishXiaxue wanted, but some online commentators called on various brands that sponsored Xiaxue to discontinue their deals with her. At least one brand, Fresh, did so. The intention seems to have been to deplatform Xiaxue by starving her of sources of funding. The attempt, however, apparently failed.<sup>41</sup>

The key difference between #PunishXiaxue and Monica Baey's case was that the perpetrators of the #PunishXiaxue movement were not content to let the authorities deal with Xiaxue. This is what makes it an example of a Category 3 activity, as there was no recourse to public authorities and no attempt at due process.

#### (d) Category 4: Actions taken to inflict intentional harm on others due to perceived wrongs

Category 4 encompasses actions taken that are deliberately destructive to the target. This is what might be called "cyber-vigilantism".

Category 4 conduct may be further subdivided into harm that is merely abusive to the target and harm that causes more serious, material effects.

JK Rowling again provides a good example of the first sub-species of Category 4 harm. Rowling was subject to a barrage of abuse for her views on gender on Twitter, with people calling her, "cunt" and "bitch", and having her books burned.<sup>42</sup>

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38 Syahindah Ishak, *Police report lodged against Xiaxue over alleged racist tweet from 2010* (Mothership, 2020): <https://mothership.sg/2020/07/xiaxue-police-report/> [Accessed 18 Aug 2023]

39 *Punish Xiaxue for seditious content* (Change.org, 2020): [https://www.change.org/p/singapore-punish-xiaxue-for-seditious-content?recruiter=934601310&utm\\_source=share\\_petition&utm\\_medium=twitter&utm\\_campaign=psf\\_combo\\_share\\_initial&utm\\_term=psf\\_combo\\_share\\_abi&recruited\\_by\\_id=f74dde50-29d1-11e9-9adb-7dbd39e14343](https://www.change.org/p/singapore-punish-xiaxue-for-seditious-content?recruiter=934601310&utm_source=share_petition&utm_medium=twitter&utm_campaign=psf_combo_share_initial&utm_term=psf_combo_share_abi&recruited_by_id=f74dde50-29d1-11e9-9adb-7dbd39e14343) [Accessed 18 Aug 2023]

40 Mothership, *supra* note 38.

41 Joshua Lee, Fasiha Nazren, *Xiaxue hits back at 'woke mob' who use cancel culture to 'blackmail' brands to get her dropped* (Mothership, 2020): <https://mothership.sg/2020/07/xiaxue-cancel-culture-blackmail/#:~:text=She%20also%20went%20on%20to,equate%20endorsing%20them%2C%20said%20Cheng.> [Accessed 18 Aug 2023]

42 J.K. Rowling, *supra* note 19.

JK Rowling also provides a good example of the more serious sub-species of Category 4 harm: threats of violence were made against her. Rowling says that “*hundreds of trans activists have threatened to beat, rape, assassinate and bomb me.*”<sup>43</sup>

In Singapore, an example of Category 4 conduct is the case of Mark Lin Youcheng. Lin was a volunteer with a dog shelter who witnessed a hit and run incident with one of the shelter’s dogs. Angered that the driver had not taken responsibility for the incident, Lin took a picture of the car’s licence plate and posted it online, seeking the identity of the driver. The car was identified as belonging to Soon Kim Choo. Lin then posted Soon’s contact details online, leading to her being harassed by calls and messages. He also posted on Facebook, imploring readers to “*give her hell*” and also on the Facebook page of Soon’s employer, “*Please manage your atrocious and cruel employee or the public will.*”<sup>44</sup> In fact, Soon had not been driving the car that day, having lent it to someone else.<sup>45</sup>

Lin was subsequently convicted of an offence under the Protection from Harassment Act 2014.<sup>46</sup>

Category 4 conduct differs from Category 3 in that the objective of the Cancel Campaign is explicitly to cause harm to the target, not merely to deplatform them. Of course, there may be some overlap, especially in cases where the mechanism for deplatforming is to cause some kind of harm to the target’s interest, thus pressuring them into compliance – as in #PunishXiuxue, where the objectives of the campaign were to attack her financial interests and thereby deprive her of her platform.

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<sup>43</sup> *Ibid.*

<sup>44</sup> Low Youjin, *Animal shelter volunteer fined for harassing wrong driver after dog was run over* (TODAY Online, 2020): <https://www.todayonline.com/singapore/animal-shelter-volunteer-fined-harassing-wrong-driver-after-dog-was-run-over> [Accessed 18 Aug 2023]

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

## 4. Classical Freedom of Speech

Having briefly reviewed the four categories of behaviour associated with Cancel Campaigns, a picture should be emerging as to where the line for acceptable conduct might reasonably be drawn. However, in order to conduct this analysis rigorously, some understanding of the principles behind the concept of Freedom of Speech is necessary.

The first issue is *why* one should have a right to Freedom of Speech. There are two possible philosophical bases for the legal right: either it has *intrinsic* value or it has *instrumental* value. That is, either it is a moral end in itself, or it is a means towards some greater moral end.<sup>47</sup>

If Freedom of Speech has intrinsic value, that means that it is worth protecting for its own sake: It is a fundamental and irreducible moral right. This position is an ancient one, made famous by the Athenian philosopher Plato.

Plato recounts how his teacher, the Athenian philosopher Socrates, was put to death by the Athenians for, essentially, talking too much. Socrates was famous for questioning everything, from whence the modern term, “Socratic Method”, is derived. This infuriated his political opponents, who had him put on trial, convicted, and sentenced to death by hemlock. In his defence at trial, Socrates explained thus the importance of Freedom of Speech:

*Some one will say: Yes, Socrates, but cannot you hold your tongue, and then you may go into a foreign city, and no one will interfere with you? Now I have great difficulty in making you understand my answer to this. For if I tell you that this would be a disobedience to a divine command, and therefore that I cannot hold my tongue, you will not believe that I am serious; and if I say again that the greatest good of man is daily to converse about virtue, and all that concerning which you hear me examining myself and others, and that the life which is unexamined is not worth living – that you are still less likely to believe. And yet what I say is true, although a thing of which it is hard for me to persuade you.<sup>48</sup>*

A more modern interpretation of Freedom of Speech is that it has instrumental value, in that it promotes the well-being of a democratic society. This position was made famous by the English philosopher John Stuart Mill. It is famously called Mill’s “Marketplace of Ideas” theory – the concept being that rigorous discussion helps to sieve out untruths and strengthen good ideas.

In fact, Mill had several distinct reasons for believing strongly in the right to Freedom of Speech:

*First [sic], if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility.*

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<sup>47</sup> For an explanation of the concepts of intrinsic and instrumental value, see Michael J. Zimmerman and Ben Bradley, *Intrinsic vs Extrinsic Value* (The Stanford Encyclopedia of Philosophy, 2019): <https://plato.stanford.edu/entries/value-intrinsic-extrinsic/#WhaExtVal> [Accessed 18 Aug 2023]

<sup>48</sup> Plato, *Apology of Socrates*, edited by J. Robertson (Monee, Illinois, 2023) at p 51.



*Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only be the collision of adverse opinions that the remainder of the truth has any chance of being supplied.*

*Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds.*

*And not only this, but fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction from reason or personal experience.<sup>49</sup>*

The conceptual basis of the right to Freedom of Speech, intrinsic or instrumental, matters because the right is not absolute: there are limits to Freedom of Speech. The issue is where those limits should lie.

If the right to Freedom of Speech is an intrinsic good, then it is obviously much harder to justify its circumscription. On the other hand, if Freedom of Speech is merely an instrumental good, then its curtailment can be justified where, on balance, the restriction produces a greater good (however defined) than otherwise.

#### (a) Freedom of Speech internationally

Most legal authorities do not adopt the pure Socratic ideal, that Freedom of Speech is a divine command or the greatest good. It is largely accepted that, whatever its moral underpinnings, the right to Freedom of Speech may be curtailed.

For example, the Declaration of the Rights of Man, passed by the National Assembly of France in 1789, states:

*11. The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.<sup>50</sup>*

Article 11 is qualified by Article 5:

*Law can only prohibit such actions as are hurtful to society. Nothing may be prevented which is not forbidden by law, and no one may be forced to do anything not provided for by law.<sup>51</sup>*

In contrast, the United States Bill of Rights, ratified in 1791, appears to take a more unqualified stance towards Freedom of Speech. The First Amendment provides:

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49 John Stuart Mill, *On Liberty, Utilitarianism and Other Essays* (Oxford University Press, 2015) at p 52.

50 The Avalon Project, *Declaration of the Rights of Man – 1789* (Yale Law School, 2008): [https://avalon.law.yale.edu/18th\\_century/rightsof.asp](https://avalon.law.yale.edu/18th_century/rightsof.asp) [Accessed 18 Aug 2023]

51 *Ibid.*

### *Amendment I*

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*<sup>52</sup>

However, subsequent jurisprudence has shown that the First Amendment is not, indeed, unqualified and there has been substantial legal debate about its limits.<sup>53</sup>

The debate over the limits of Freedom of Speech has largely been dominated, in modern times, by Mill. Mill's view was that:

*...the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.*

This is now known as the "Harm Principle". However, while the Harm Principle is widely recognised, it is not clear what the definition of "harm" encompasses.<sup>54</sup>

The post-World War 2 period saw the growth of Human Rights law. The 1948 Universal Declaration of Human Rights states:

### *Article 19*

*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*<sup>55</sup>

The 1953 European Convention on Human Rights has a more detailed, qualified version of the right, which reads:

### *ARTICLE 10 Freedom of expression*

*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

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<sup>52</sup> Legal Information Institute, *First Amendment* (Cornell Law School): [https://www.law.cornell.edu/constitution/first\\_amendment](https://www.law.cornell.edu/constitution/first_amendment) [Accessed 18 Aug 2023]

<sup>53</sup> There is extensive literature on this. For a quick overview, see Eric Barendt, *Freedom of Speech 2nd Edition* (Oxford University Press, 2009) at pp 48 – 55.

<sup>54</sup> David van Mill, *Freedom of Speech* (The Stanford Encyclopedia of Philosophy, 2021): <https://plato.stanford.edu/entries/freedom-speech/#-JohStuMilHarPri> [Accessed 18 Aug 2023]

<sup>55</sup> United Nations Department of Public Information, *Universal Declaration of Human Rights – English* (United Nations): <https://www.ohchr.org/en/human-rights/universal-declaration/translations/english> [Accessed 18 Aug 2023]

2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*<sup>56</sup>

The 1966 International Covenant on Civil and Political Rights ("ICCPR") contains a similarly, though more broadly, qualified version of the right:

*Article 19*

1. *Everyone shall have the right to hold opinions without interference.*

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

3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

*(a) For respect of the rights or reputations of others;*

*(b) For the protection of national security or of public order (ordre public), or of public health or morals.*<sup>57</sup>

This is very likely to be a much broader interpretation of "harm" than what Mill had intended.

The ICCPR has 167 state parties.<sup>58</sup> Unlike the UDHR, it is a multilateral treaty that has binding force on its Contracting Parties, and it is also arguable that at least some of its provisions constitute binding customary international law.

In Southeast Asia, the 2012 ASEAN Declaration of Human Rights also recognises a right to Freedom of Speech:

23. *Every 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.*<sup>59</sup>

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<sup>56</sup> *European Convention on Human Rights*, available at: [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf) [Accessed 18 Aug 2023]

<sup>57</sup> United Nations Office of the High Commissioner for Human Rights, *International Covenant on Civil and Political Rights* (United Nations): <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> [Accessed 18 Aug 2023]

<sup>58</sup> Ratification status is available on the website of the United Nations Office of the High Commissioner for Human Rights: [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en) [Accessed 18 Aug 2023]

<sup>59</sup> *ASEAN Human Rights Declaration*, available at: <https://asean.org/asean-human-rights-declaration/> [Accessed 18 Aug 2023]

Though this appears, at first glance, to be an unqualified right, it must be read in conjunction with Articles 7 and 8 of the same Declaration, which state:

*7. All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.*

*8. The human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society.<sup>60</sup>*

It is therefore clear that the right to Freedom of Speech in ASEAN is, as in most of the world, subject to limitations in the public interest.

Indeed, the point is that although the Socratic ideal of Freedom of Speech as a pure, unrestrained right exists in philosophy, in reality, no functioning society subscribes entirely to that ideal. It would simply not be workable. All societies circumscribe Freedom of Speech, the question is only to what extent and on what basis they do so.<sup>61</sup>

## (b) Freedom of Speech as a legal right

A further issue with Freedom of Speech is how the right should be enforced, and by whom?

To adopt American jurist WN Hohfeld's terminology, the right to freedom of speech is a Liberty – I am at liberty to say what I please. Therefore, the necessary implication is that others have no valid claim against me to stop me from saying what I please.<sup>62</sup>

Indeed, in Mill's conception of Freedom of Speech, the necessity to protect individuals holding unpopular opinions is a cornerstone of Freedom of Speech:

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<sup>60</sup> *Ibid.*

<sup>61</sup> Van Mill, *supra* note 54: <https://plato.stanford.edu/entries/freedom-speech/> [Accessed 18 Aug 2023]

<sup>62</sup> Barendt, *supra* note 53, at p 101; For an explanation of Hohfeld's rights analysis, see Leif Wenar, *Rights* (The Stanford Encyclopedia of Philosophy, 2023): <https://plato.stanford.edu/entries/rights/> [Accessed 18 Aug 2023]

*The worst offence of this kind which can be committed by a polemic, is to stigmatize those who hold the contrary opinion as bad and immoral men. To calumny of this sort, those who hold any unpopular opinion are peculiarly exposed, because they are in general few and uninfluential, and nobody but themselves feels much interested in seeing justice done to them; but this weapon is, from the nature of the case, denied to those who attack a prevailing opinion...in general, opinions contrary to those commonly received can only obtain a hearing by studied moderation of language, and the most cautious avoidance of unnecessary offence, from which they hardly ever deviate even in the slight degree without losing ground: unmeasured vituperation employed on the side of the prevailing opinion, really does deter people from professing contrary opinions, and from listening to those who profess them. For the interest, therefore, of truth and justice, it is far more important to restrain this employment of vituperative language than the other...<sup>63</sup>*

However, Mill did not think that it was the function of the law to provide this protection but rather public opinion:

*It is, however, obvious that law and authority have no business with restraining either, while opinion ought, in every instance, to determine its verdict by the circumstances of the individual case...<sup>64</sup>*

Mill was not a lawyer. From a legal perspective, three observations may be made.

First, since the right to Freedom of Speech is, in most cases, created by treaty or legislation, it is a legal right. The difference between a legal and a moral right is that a legal right is guaranteed by a sovereign.<sup>65</sup> This implies that it is the obligation of the sovereign power that created it to enforce it. Indeed, if the sovereign power of the state is derived from individuals who willingly cede it this power in exchange for certain services and protections, one might argue that the sovereign has a moral responsibility, in addition to a legal one, to guarantee the legal rights of its citizens.<sup>66</sup>

Second, if the nature of the legal right to Freedom of Speech is a Liberty, it follows that no other person may deprive the right-holder of said Liberty. It may be said that the point of a legal right is to create for the individual a sphere of “freedom as independence”, that is, an area within which the right-holder’s actions are free from interference by all others.<sup>67</sup> If one must depend solely on public opinion for protection, then there is no guarantee that one may, in practice, benefit from it. The right would be merely theoretical and not practically effective.

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63 Mill, *supra* note 49, at p 53.

64 *Ibid.*

65 This is a proposition from jurisprudence, and is sometimes hotly debated. I adopt a positivist view of law for the purposes of this paper. For further reading on legal positivism, see HLA Hart, *The Concept of Law 3rd Edition* (Oxford University Press, 2012)

66 John Locke, *Of Civil Government: The Second Treatise* (Wildside Press) at p 51.

67 This is again an idea from jurisprudence and one that could be contested. I adopt this position for the purposes of this paper. For further reading, see Nigel Simmonds, *Law as a Moral Idea* (Oxford University Press, 2008).

Third, a related, practical issue is who can enforce the right to Freedom of Speech? This may be answered at two levels: Pragmatically, it is not always possible for the general public to enforce the right to Freedom of Speech. Public opinion is not always well-informed. And even if it were, public opinion is not always rational, unbiased, or productive. Legally, members of the public do not have the necessary powers to enforce the right. All they can do is apply moral pressure to those attempting to contravene it. Unlike the state, the public has no legal ability to conduct investigations, take evidence, make binding decisions, or impose punishments.

Indeed, saying that the responsibility for enforcing the right to freedom of speech lies upon the general public may inadvertently be taken to encourage vigilantism which, in the case of Cancel Culture, is precisely the problem that needs to be addressed.

To sum up, the main issues with the right to Freedom of Speech are what the limits on such rights are, and who should enforce the right. In relation to Cancel Culture, these philosophical issues are important, because the answer to these age-old questions provides the basis upon which one may determine which kinds of activities associated with Cancel Culture should be permissible and which should not. The question is whether such activity contravenes the limits of the right to Freedom of Speech, and whether it may therefore be curtailed by state intervention. The next section deals with how Singapore has responded to these classic philosophical problems.

## 5. Freedom of Speech in Singapore

The starting point for Freedom of Speech in Singapore is the Constitution.<sup>68</sup>

### 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;

Singapore conforms to the typical model of affirming a general right to Freedom of Speech, subject to exceptions. It is, however, the way that Singapore approaches the exceptions that has sometimes attracted controversy.

A recent, high-profile example of Singapore's approach to these issues comes from the passage of the Protection from Online Falsehoods and Manipulation Act 2019 ("POFMA"). This statute proved to be controversial, eliciting both domestic and international commentary that claimed it infringed the right to Freedom of Speech.<sup>69</sup>

POFMA creates two distinct regimes to address abuses of Freedom of Speech in relation to the promulgation of falsehoods: criminal and regulatory. The criminal remedies created by POFMA include, for example, the creation of offences for communication of false statements of fact or the making of bots for the purposes of communicating false statements of fact.<sup>70</sup> The regulatory remedies are more commonly used, and include the power for cabinet ministers to issue directions to individuals and internet intermediaries to correct, stop publication, or block access to specified statements.<sup>71</sup> The main gateways to the exercise of these powers are that a false statement of fact is being or has been communicated in Singapore and the Minister is of the opinion that it would be in the public interest to issue the Direction.<sup>72</sup>

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68 Constitution of the Republic of Singapore, available at: <https://sso.agc.gov.sg/Act/CONS1963> [Accessed 21 Aug 2023]

69 *Academics against disinformation* (Academia.sg,2019): <https://www.academia.sg/pofma/> [Accessed 21 Aug 2023]

70 Part 2 of the Protection from Online Falsehoods and Manipulation Act 2019.

71 Parts 3 and 4 of the Protection from Online Falsehoods and Manipulation Act 2019.

72 Sections 10 and 20 of the Protection from Online Falsehoods and Manipulation Act 2019.

Detailed discussion of POFMA is beyond the scope of this paper. However, the Parliamentary debates surrounding the passage of the legislation provide some insights into the government's views on Freedom of Speech in general. Minister for Law, K Shanmugam, said:

*Ideally, public discourse will help citizens understand complex policy issues. It will guide policy-makers to make optimal decisions. It will shape differing viewpoints and expand common ground.*

*But public discourse can only take place when there is free and responsible speech.*

*The pre-requisites for national conversations are a common vocabulary, an underpinning of facts and that provides a platform for accommodation and compromise amongst diverse voices in society.<sup>73</sup>*

This is an instrumentalist view of the right to Freedom of Speech. The same instrumentalist approach can also be seen in the jurisprudence of the Singapore courts.

In *Review Publishing Co Ltd and Another v Lee Hsien Loong and Another Appeal* [2009] SGCA 46, a defamation case involving Singapore's Prime Minister, the Court of Appeal said at [282] - [283]:

*282 It seems to us that, while the competition of ideas in the marketplace can lead to advances in science and knowledge to the benefit of mankind (which would justify allowing the fullest scope for exercising freedom of speech), this applies largely in the sphere of statements relating to ideas or beliefs which cannot or have yet to be proved with scientific certainty to be either true or false (eg, the belief that socialism is superior to capitalism as a way of organising society, or that dinosaurs became extinct as a result of a large asteroid striking the earth). Where there exist divergent ideas or beliefs whose truth or falsity cannot or has yet to be determined with scientific certainty, it is usually the case that one of these ideas or beliefs will eventually come to be accepted by society as "true" in the sense of being the most accurate or the most rational, with the others either being discarded or falling into disfavour. 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.*

*283 In contrast, it is questionable whether the marketplace of ideas rationale is applicable to false statements. Such statements are (by definition) inaccurate and society does not derive any value from their publication as "there is no interest in being misinformed" (per Lord Hobhouse of Woodborough in *Reynolds (HL)* at 238; see also [284] below). This is a fortiori the case where the false statement in question is also one which is defamatory because (id at 201 per Lord Nicholls):*

*Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being ...*

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<sup>73</sup> K Shanmugam, *Protection from Online Falsehoods and Manipulation Bill 2<sup>nd</sup> Reading* (Singapore Parliamentary Reports, 2019): <https://sprs.parl.gov.sg/search/#/sprs3topic?reportid=bill-364> [Accessed 21 Aug 2023]



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

Similar views were expressed by the minority judgment in *Attorney-General v Ting Choon Meng and Another Appeal* [2017] SGCA 6, in which Chief Justice Menon said:

*116 The value of free speech depends ultimately on its nature, how it is used, where it occurs and whether it contains an assertion of fact that has been proven to be a falsehood.*

Both *Review Publishing* and the comments of the minority in *Ting Choon Meng* were approved by the Court of Appeal in the leading judgment on POFMA, *The Online Citizen Pte Ltd v Attorney-General and another appeal and other matters* [2021] SGCA 96 at [58].

It is therefore reasonably clear that Singapore adopts an instrumentalist approach to Freedom of Speech. The issue is always whether the speech in question contributes more value to society than the harm it causes.

The next issue is how Singapore defines “harm”. Although there is no overarching legal definition, some idea of the contours of the concept may be inferred from a survey of the relevant legal instruments.

#### (a) Principle 1: Promulgation of falsehoods

Defamation has already been mentioned. This is a common law, civil cause of action that allows an affected person to sue someone who has falsely damaged his reputation.<sup>74</sup> There is also a criminal offence of defamation under the Penal Code, although it is more rarely invoked.<sup>75</sup>

However, if the allegations can be proved to be true, then it is not defamation.<sup>76</sup>

Thus, it can be inferred that false harm to reputation is one line that should not be crossed in Singapore.

The promulgation of false information has also already been mentioned. It is an offence to deliberately spread false statements of fact under POFMA.<sup>77</sup> Free speech may also be curtailed by a Stop Communication or Access Blocking Direction under POFMA, if the statement made is false and it is, in the Minister’s opinion, in the public interest to do so.

It is also an offence under the Penal Code to give false evidence, especially to law enforcement authorities or a court.<sup>78</sup>

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<sup>74</sup> Defamation Act 1957.

<sup>75</sup> Section 499 of the Penal Code 1871.

<sup>76</sup> Section 8 of the Defamation Act 1957. See also the First Exception to s 499 of the Penal Code 1871.

<sup>77</sup> Section 7 of the Protection from Online Falsehoods and Manipulation Act 2019.

<sup>78</sup> Chapter 11 of the Penal Code 1871.

There are also private remedies available to individuals to deal with falsehoods under the Protection from Harassment Act.<sup>79</sup>

Thus, as a general principle, it may be inferred that the deliberate promulgation of false information is an abuse of the right of Freedom of Speech. Menon CJ said, in *Ting Choon Meng*:

*115 Put simply, false speech, which has been proven as a matter of fact to be false in a court of law, can contribute little to the marketplace of ideas or to advances in knowledge for the benefit of society as a whole. This is wholly different and removed from the propagation of ideas or beliefs, which may not immediately be able to be objectively discerned to be true or false, and which through an open dialogue, can then be determined by society as a whole to be 'true'.*

## (b) Principle 2: Causation of physical or mental harm

A second, reasonably clear principle is that Freedom of Speech does not extend to the causing of physical or mental harm to a person.

For example, under the Penal Code, it is an offence to voluntarily cause hurt.<sup>80</sup> The concept of voluntarily causing hurt extends to mental hurt caused by non-physical means. In the Indian case of *Jashanmal Jhamatmal v Brahmanand Sarupanand* AIR 1944 Sind 19, cited by the Singapore Court of Appeal in *Kwong Kok Hing PP v Kwong Kok Hing* [2008] SGCA 10 at [26], the court convicted the accused of voluntarily causing hurt by jumping out at the victim, shouting at her, and pointing a pistol at her, in consequence of which she suffered a nervous shock.

It is also an offence under the Penal Code to commit criminal intimidation<sup>81</sup> or assault.<sup>82</sup> The existence of both these offences show that Freedom of Speech does not extend to the making of threats.

Further, under the Penal Code, it is also an offence to cheat,<sup>83</sup> commit forgery,<sup>84</sup> or to fraudulently or dishonestly dispose of property.<sup>85</sup> These offences have some conceptual overlap with the first limit to Freedom of Speech, falsehood, but they also illustrate how Freedom of Speech does not extend to the causing of harm to property.

In fact, the harm principle in Singapore's criminal law is very broad. Under the Protection from Harassment Act, it is an offence to intentionally cause harassment, alarm or distress to another person.<sup>86</sup>

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<sup>79</sup> Part 3 of the Protection from Harassment Act 2014.

<sup>80</sup> Section 323 of the Penal Code 1871.

<sup>81</sup> Section 503 of the Penal Code 1871.

<sup>82</sup> Section 352 of the Penal Code 1871.

<sup>83</sup> Sections 415 – 420A of the Penal Code 1871.

<sup>84</sup> Sections 463 – 477A of the Penal Code 1871.

<sup>85</sup> Sections 421 – 424B of the Penal Code 1871.

<sup>86</sup> Section 3 of the Protection from Harassment Act 2014.

### (c) Principle 3: Incitement to any offence

Third, it is also reasonably clear that any incitement to causing harm is also an abuse of Freedom of Speech.

Under the Penal Code, there is a general secondary liability provision of abetment, one species of which is abetment by incitement.<sup>87</sup> Thus, any incitement to commit any offence, would itself be an offence and therefore an abuse of the right of Freedom of Speech.

There are also specific offences targeted at speech which is calculated to incite harm or violence. For example, intentionally giving provocation with intent to cause a riot,<sup>88</sup> or intentional insult with intent to provoke a breach of the peace.<sup>89</sup>

### (d) Principle 4: Disturbance of public harmony, especially regarding race and religion

Fourth, something that is controversial internationally but clear in Singapore is that any disturbance to public harmony and safety, especially regarding race or religion, is beyond the pale.

Under the Penal Code, for example, it is an offence to utter words with deliberate intent to wound the racial feelings of any person.<sup>90</sup> It is also an offence to promote enmity between different groups on the grounds of race.<sup>91</sup> It is also a major aggravating factor for any offence under the Penal Code to be committed for racial or religious reasons, resulting in liability to enhanced punishment.<sup>92</sup>

The Maintenance of Religious Harmony Act gives the Minister civil powers to issue restraining orders against officials or members of religious groups or institutions.<sup>93</sup> It also creates criminal offences, notably, urging violence on religious grounds or against religious groups,<sup>94</sup> and inciting hatred or ill-will against religious groups.<sup>95</sup>

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87 Section 107(1)(a) of the Penal Code 1871.

88 Section 153 of the Penal Code 1871.

89 Section 504 of the Penal Code 1871.

90 Section 298 of the Penal Code 1871.

91 Section 298A of the Penal Code 1871.

92 Section 74 of the Penal Code 1871.

93 Part 3 of the Maintenance of Religious Harmony Act 1990.

94 Section 17E of the Maintenance of Religious Harmony Act 1990.

95 Section 17F of the Maintenance of Religious Harmony Act 1990.

The Sedition Act also formerly made it an offence to do any act with a seditious tendency. Seditious tendency was explicitly defined as including the promotion of feelings of ill-will and hostility between different races or classes of the population. Though the Sedition Act has now been repealed, it was previously interpreted broadly, such as in the prosecution of the operators of the website, The Real Singapore (“TRS”). TRS had profited from a business model in which it had published articles with false information, designed to stir up anti-foreigner sentiment among Singaporeans. The two operators of the website were subsequently successfully prosecuted for sedition.<sup>96</sup>

The general principle expressed by the Singapore courts is that the act in question need not actually cause a breakdown in public order. It is sufficient that the act constitutes a threat to public order. In *The Online Citizen Pte Ltd v AG and another appeal and other matters* [2021] SGCA 96, the Court of Appeal said at [99]:

*Undoubtedly, unlawful assembly, rioting and inciting intra-community enmity are clear examples of a disturbance to public order. But they are not exhaustive of the proper ambit of the public order exception to free speech under Art 14(2)(a). Indeed, even though the Indian jurisprudence cited in Phua Keng Tong and Chee Siok Chin appears to have been concerned with laws that seek to restrict free speech so as to prevent or contain physical disturbances in a public space, the approach even in Indian case law is not so limited. In Shreya Singhal v Union of India (2015) 3 MLJ 162 at [35], the Supreme Court of India considered the line of cases addressing the ambit of the public order exception to free speech, and stated that the overarching test for whether this exception could properly be invoked was whether a particular act “[led] to disturbance of the current life of the community”, as opposed to “merely [affecting] an individual leaving the tranquility of society undisturbed”. This test was recognised in Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 2 MLJ 83 (“Re Tan Boon Liat”), which surveyed the case law emanating from the Supreme Court of India. The types of acts that may affect public order are therefore not closed, and whether or not a particular act poses a threat to public order depends in each case on the degree of disturbance that may be caused to the life of the community ...*

#### (e) Principle 5: Offense to public morality

Fifth, there is a residual category of legal remedies against speech that might be somehow harmful to the moral values of society.

For example, it is an offence under the Penal Code to perform “obscene acts” in a public place,<sup>97</sup> or to sell or distribute “obscene” material.<sup>98</sup>

Incest<sup>99</sup> and sexual penetration with animals<sup>100</sup> are also offences under the Penal Code.

<sup>96</sup> The case was not reported in the Law Reports. However, the outcome can be found in contemporaneous newspaper reports. See Rachel Au-Yong, *TRS trial: Yang Kaiheng admits he lied about meeting Ai Takagi during GE2011* (The Straits Times, 2016): <https://www.straitstimes.com/singapore/courts-crime/trs-trial-yang-kaiheng-says-he-referred-to-website-as-his-because-he-took> [Accessed 21 Aug 2023]; Elena Chong, *Former TRS editor Ai Takagi, who is 8 weeks pregnant, jailed for 10 months for sedition* (The Straits Times, 2016): <https://www.straitstimes.com/singapore/courts-crime/former-trs-editor-ai-takagi-who-is-8-weeks-pregnant-jailed-10-months-for> [Accessed 21 Aug 2023]

<sup>97</sup> Section 294 of the Penal Code 1871.

<sup>98</sup> Section 292 of the Penal Code 1871.

<sup>99</sup> Section 376G of the Penal Code 1871.

<sup>100</sup> Section 377B of the Penal Code 1871.

It is also an offence to make a word or gesture intended to insult the modesty of any person.<sup>101</sup> Although this arguably does constitute mental harm to the victim, there is also a moral element to the offence.

On the civil side, there are also powers of regulation available to various agencies for the purposes of content control. For example, the Infocomm Media Development Authority has powers under the Films Act 1981 to censor films. Although it has now moved towards classification rather than outright censorship, Singapore has a long history of controversial media regulation.

Similarly, through the Broadcasting (Class Licence) Notification, the IMDA regulates internet service providers and internet content providers.<sup>102</sup> Occasionally, internet websites are banned. It is well-known that Singapore tries to block pornography websites. Another prominent example of regulation on the basis of morality was the banning of Ashley Madison, a dating website specialising in enabling extramarital affairs.<sup>103</sup>

It is not entirely clear that this group of powers is consistent with Mill's harm principle. It is debatable whether moral harm is harm at all, or whether it is merely offensive. Therefore, this group of legal powers might better be described as based on an "offense principle", as advocated by American academic, Joel Feinberg.<sup>104</sup> This still leaves a considerable degree of ambiguity about the limits of this grouping, as it is not clear what constitutes "offense".

#### (f) Summary of Freedom of Speech in Singapore

To sum up, Singapore's approach to the limits of Freedom of Speech can be inferred from the existence of several "out of bounds" markers, arranged here in descending order of clarity and certainty:

1. Promulgation of intentional falsehoods;
2. Causation of physical or mental harm;
3. Incitement to any offence;
4. Disturbance of public harmony, especially regarding race or religion; and
5. Offense to public morality.

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<sup>101</sup> Section 377BA of the Penal Code 1871.

<sup>102</sup> For further details of internet content regulation in Singapore, see Warren B. Chik and Saw Cheng Lim, *Information and Communications Technology Law in Singapore* (Academy Publishing, 2020), Chapter 2.

<sup>103</sup> Media Statement, *Ashley Madison website not allowed to operate in Singapore* (MDA, 2013): <https://www.imda.gov.sg/resources/press-releases-factsheets-and-speeches/archived/mda/press-releases/2013/ashley-madison-website-not-allowed-to-operate-in-singapore> [Accessed 21 Aug 2023]

<sup>104</sup> Joel Feinberg, *Offence to Others: The Moral Limits of the Criminal Law* (Oxford University Press, 1985).

This is, of course, not an exhaustive survey of Singapore law. There are hundreds of statutes and thousands of cases that could conceivably have some bearing on the issue of Freedom of Speech. However, this brief overview captures the most prominent and frequently invoked laws relating to Freedom of Speech and should be sufficient to give a pragmatic, working understanding of Singapore's approach in principle.

These principles are not universally recognised. However, Singapore's government has always emphatically justified its policies by reference to its own set of values.

This debate is also called the "Asian Values" debate, a notable proponent of which was Singapore's founding Prime Minister, Lee Kuan Yew. Lee's thesis was that Asian societies have a distinct set of values, rooted in collectivism, distinct from "Western" liberal values.<sup>105</sup> Analysis of this debate is beyond the scope of this paper – it is a matter for political philosophers.

The implication for lawyers, especially Singapore lawyers, is that any legal tools developed to address Cancel Culture must necessarily be rooted in Singapore's own values, and the principles expressed in the wider body of Singapore law. Proposals based on philosophical positions that are inconsistent with Singapore law and policy are not likely to be effective.

It should be highlighted that Singapore's principles for regulation of freedom of speech are not the most intrusive or far-reaching. For example, the French courts have developed a substantive doctrine of constitutional pluralism that justifies the legislature interfering with private rights of Freedom of Speech. In particular, the power to regulate broadcasters, newspapers, and other private media organisations to ensure pluralism in the mainstream media.<sup>106</sup> This is similar to Italy, where the courts have likewise upheld a Constitutional right to pluralism trumps private media interests.<sup>107</sup> Arguably, if it is unjustified for media companies to exercise unilateral powers of censorship, on the basis of a substantive value of pluralism, it would likewise be unjustified for private individuals or groups of individuals to *de facto* exercise similar powers of censorship over others. However, a substantive right to pluralism as a societal value has yet to be recognised in Singapore.

We therefore proceed on the basis of the five principles enumerated above, as roughly representative of Singapore's instrumentalist, collectivist approach to Freedom of Speech.

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105 For an overview of the debate, see Susan J. Henders, *Asian values* (Britannica, 2017): <https://www.britannica.com/topic/Asian-values> [Accessed 21 Aug 2023]

106 Barendt, *supra* note 53, at p 69.

107 Barendt, *supra* note 53, at p 71.

## 6. Cancel Culture as an Abuse of Freedom of Speech

We are now in a position to assess the merits and demerits of the various types of activities associated with Cancel Culture.

Singapore takes an instrumentalist view of the Right to Freedom of speech. Therefore, any restriction on a particular person's Freedom of Speech must be justified by reference to the prevention of harm or the advancement of another kind of social good. On balance, the restriction must produce greater benefits than detriments, however quantified. This is not a clear, objective analysis. It requires some assessment of moral values and comparison of, to some extent, incommensurables. The practical issue is therefore *who gets to decide?*

Legally, the answer is straightforward: it is a matter for Parliament. In a Westminster system, Parliament has the primary function of making laws and setting societal values. This is derived from its democratic mandate, as elected representatives of the people.

The following assessment should therefore be taken as a principled guide for Parliamentarians to consider, and not necessarily as a statement of law.

This brings us back to the issue of whether any given activity is a *constructive* or *destructive* use of the right to Freedom of Speech. We now have a more rigorous way of deciding whether a particular activity should, objectively, be considered *constructive* or *destructive*. The rule of thumb is simple: if the activity in question contravenes any of the Principles governing Freedom of Speech set out above, then it should be considered *destructive*.

The analysis of Cancel Culture activities can be cross-referenced with the Principles that govern Freedom of Speech to produce a matrix that provides an indicative starting point for the permissibility of each Category of Cancel Culture activities. If the Cancel Culture activity in question contravenes one or more Principles, then it should be considered *destructive* and there may be justification for restricting it by exercise of legal power.

		Principles limiting Freedom of Speech				
		Principle 1: Promulgation of intentional falsehoods	Principle 2: Causation of physical or mental harm	Principle 3: Incitement to any offence	Principle 4: Disturbance of public harmony, especially regarding race or religion	Principle 5: Offense to public morality
Cancel Culture Activities	Category 1:  Actions taken to raise awareness and hold others accountable	×	×	×	×	×
	Category 2:  Actions taken to seek justice	×	×	×	×	×
	Category 3:  Actions taken to censor others	×	?	?	?	×
	Category 4:  Actions taken to inflict intentional harm on others	?	√	?	?	×



The foregoing summary table shows the thrust of the argument. It seems as if Category 1 and 2 activities would not ordinarily contravene any of the five Principles. They should therefore, in principle, be considered legitimate exercise of the right of Freedom of Speech – they are constructive activities that add to the rigour of public discourse and are consistent with the rationale for creating a legal right to Freedom of Speech. Categories 3 and 4 however are more problematic – they may be destructive activities that are antithetical to public order and the functioning of a democratic society, thus contravening the very rationale for Freedom of Speech in the first place.

### (a) Detailed Analysis of Category 1

Actions taken to raise awareness and hold others accountable would not, ordinarily, contravene any of the Principles limiting Freedom of Speech. Category 1 activities are usually things like calling someone out for being culturally insensitive and demanding an apology.<sup>108</sup>

Category 1 activities would not contravene Principle 1, as long as the allegations are based on truth. This is, of course, a major conditional. If the allegations are false, then such activity might contravene Principle 1.

Category 1 activities would not ordinarily cause harm of any sort. By definition, activities causing harm are more likely to fall within Category 4. Therefore, Category 1 activities are not likely to contravene Principle 2. A likely problem with this neat analysis is that some degree of harm, perhaps mental, may be caused to the target of the activities. This harm may even be deserved. In such situations, it will be a question of fact as to whether the societal interest in whistleblowing and public accountability outweighs the harm caused to the target.

Category 1 activities would not ordinarily contravene Principle 3. If there was any incitement to the commission of an offence, the activity would likely fall under Category 4 instead.

Category 1 activities would not ordinarily contravene Principles 4 and 5. Indeed, in many cases, Category 1 activities may be intended to promote the same objectives of public harmony or public morality as Principles 4 and 5. For example, in the case of Priscilla Shunmugam, the intention of the Cancel Campaign was to raise awareness of perceived racism.<sup>109</sup> The difficulty occurs where public morality is extremely divided, as in the Culture Wars in the United States of America.<sup>110</sup> In such a situation, an attempt to hold someone accountable according to one set of values may in fact contribute to further divisions to society. It is not possible, in the abstract, to say how such a situation should be resolved, beyond the general utilitarian proposition that a course of action that minimises social harm should be adopted.

<sup>108</sup> See Section 3(a) above.

<sup>109</sup> See Section 3(a) above.

<sup>110</sup> For an overview of the phenomenon of “Culture War”, see Boddy Duffy and Gideon Skinner, *Culture wars around the world: how countries perceive divisions* (Ipsos/The Policy Institute, King’s College London, 2021): [https://www.ipsos.com/sites/default/files/ct/news/documents/2021-06/Culture%20wars%20around%20the%20world%20\\_0.pdf](https://www.ipsos.com/sites/default/files/ct/news/documents/2021-06/Culture%20wars%20around%20the%20world%20_0.pdf) [Accessed 21 Aug 2023]

## (b) Detailed Analysis of Category 2

Category 2 activities would not ordinarily violate any of the principles limiting Freedom of Speech. Indeed, there is an argument that Category 2 activities should be encouraged as they are entirely consistent with the rationale for Freedom of Speech – that private citizens will contribute somehow to the public good.

The only area in which Category 2 activities might be problematic is where the appeal to authorities is used maliciously to inflict wrongful harm to another. For example, in the case of #PunishXiuxue, a Police Report was made against Xiuxue not out of civic duty but as a means of applying pressure to her for her political views.<sup>111</sup>

The implications of this are actually quite important: the remedy to Cancel Campaigns should not itself be capable of being easily weaponised by Cancel Campaigns. Thus, any legal tools designed to combat Cancel Campaigns must have a sufficiently high legal threshold to ensure that they cannot be wielded easily and frivolously, and mechanisms to deter abuse.

The intention behind the reporting is therefore important – reports made in good faith, even if mistaken, are still valuable. They do not cause unjustified harm because ultimately enforcement action is left to the proper authorities.

However, appeal to an authority, if made maliciously, is harmful, and should be thought of not as a genuine Category 2 activity but rather Category 4.

## (c) Detailed Analysis of Category 3

Category 3 is the most problematic of the Categories. Actions taken specifically to deplatform an individual, without recourse to public authorities or due process, would often violate Principle 2, in that it would be deliberately designed to cause reputational or economic harm to the target.

If the allegations against the target are false, then such activity would also violate Principle 1, which is that deliberate falsehoods are an abuse of Freedom of Speech.

In situations where deplatforming is based on certain political views and designed to deny the opposite side from legitimately expressing their own views, this could also offend against Principle 4, which states that damage to societal harmony is an abuse of Freedom of Speech. This could especially occur where race or religion are concerned, such as in the Oxford University case where the Christian Union was banned from participating in the Balliol College Freshers' Fair.<sup>112</sup>

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<sup>111</sup> See Section 3(c) above.

<sup>112</sup> See Section 3(c) above.

A major issue with Category 3 activity is going to involve the classification of Cancel Campaigns that advocate deplatforming through negative, rather than positive action. Rather than doing anything to the target, the Cancel Campaign may simply advocate withdrawing support from the target by unsubscribing or boycotting their goods and services. An example of this would be the attempted boycott of the Hogwarts Legacy video game, in which people were encouraged not to buy the game, due to JK Rowling's alleged anti-trans political views.<sup>113</sup>

This is difficult. As an individual, one is not obliged to subscribe to any particular influencer or to purchase any particular goods or services. Thus, if one decides that a particular author's works are not to one's tastes (for whatever reason), there is no legal, moral or political reason why one should be forced to purchase them. Advocating a withdrawal of support is therefore, *prima facie*, not an abuse of the right of Freedom of Speech.

However, where the objective of the campaign is specifically to cause economic damage and thereby force the deplatforming of the target, this could be construed as an abuse of Freedom of Speech, since it violates Principle 2. This kind of activity, as in #PunishXiaxue where advertisers were pressured to break their deals with Xiaxue in order to punish her,<sup>114</sup> could also arguably be classified under Category 4, since the intention is not merely to deplatform but to cause harm.

#### (d) Detailed Analysis of Category 4

Category 4 contains a wide variety of conduct but is legally straightforward. If the objective of the Cancel Campaign is to cause harm to the target, then it is an abuse of the right of Freedom of Speech as it explicitly and incontrovertibly contravenes Principle 2. Category 4 amounts to, essentially, vigilantism and mob justice, which cannot be tolerated.

The problem is that Cancel Campaigns may not, in practice, be monolithic. Some elements of the Cancel Campaign may stick to legitimate, Category 1 or 2 activities. Other elements may take things too far and shade into Category 3 or even Category 4. The case of Monica Baey is a good example of this – although Baey herself stuck to Category 2, in that she merely attempted to get redress from public authorities against her voyeur, outraged members of the public apparently began to harass him online. Baey had to urge her supporters not to do so.<sup>115</sup>

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113 Helen Lewis, *The Hogwarts Legacy Boycott That Wasn't* (The Atlantic, 2023): <https://www.theatlantic.com/ideas/archive/2023/04/hogwarts-legacy-game-jk-rowling-transphobia-accusation/673583/> [Accessed 21 Aug 2023]

114 See Section 3(c) above.

115 See Section 3(b) above.

## 7. Determining which Category Cancel Culture activities fall within

We have dealt with, in principle, which Categories are *constructive* and consistent with the rationale for Freedom of Speech, and which are *destructive* and counter to the rationale for Freedom of Speech. The practical question is how to decide which Category any given activity falls within.

This is really a matter of *evidence*. Conceptually, an activity's Category will depend on the motivations of the perpetrators. However, it is not possible to determine motivations directly, since they are internal to the mind of a perpetrator. Motivations may only be inferred from observable facts – that is, evidence.

It may very well be that a perpetrator claims that his actions are designed only to hold the target to account, thus falling within Category 1. However, the nature of his actions might be clearly harmful, such as in the case of Mark Lin Yucheng, who incited people to “give [the target] hell”.<sup>116</sup> As such, on the available evidence, we ought to interpret his actions as falling within Category 4, since the observable facts lead to the inference that he really intended harm to the target.

Feinberg proposes a six-point framework for legislative and judicial deliberations in relation to his “offense principle”. The idea is to weigh the various factors to decide, on balance, whether the conduct in question should be allowed or whether it constitutes a contravention of the “offense principle” and ought to be regulated. The six points are:<sup>117</sup>

1. **Personal importance.** *The more important the offending conduct is to the actor, as measured by his own preferences and the vitality of the those of the actor's own interests it is meant to advance, the more reasonable that conduct is.*
2. **Social value.** *The greater the social utility of the kind of conduct of which the actor's is an instance, the more reasonable is the actor's conduct.*
3. **Free expression.** *(A corollary of 1 and 2.) Expressions of opinion, especially about matters of public policy, but also about matters of empirical fact, and about historical, scientific, theological, philosophical, political, and moral questions, must be presumed to have the highest social importance in virtue of the great social utility of free expression and discussion generally, as well as the vital personal interest most people have in being able to speak their minds fearlessly. No degree of offensiveness in the expressed opinion itself is sufficient to override the case for free expression, although the offensiveness of the manner of expression, as opposed to its substance, may have sufficient weight in some contexts.*
4. **Alternative opportunities.** *The greater the availability of the alternative times or places that would be equally satisfactory to the actor and his patterner (if any) but inoffensive to others, the less reasonable is conduct done in circumstances that render it offensive to others.*

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<sup>116</sup> Low, *supra* note 44.

<sup>117</sup> Feinberg, *supra* note 104, at p 44.

5. **Malice and spite.** *Offensive conduct is unreasonable to the extent that its impelling motive is spiteful or malicious. Wholly spiteful conduct, done with the intention of offending and for no other reason, is wholly unreasonable. Especial care is required in the application of this standard, for spiteful motives are easily confused with conscientious ones.*
6. **Nature of the locality.** *(A corollary of 4.) Offensive conduct performed in neighbourhoods where it is common, and widely known to be common, is less unreasonable than it would be in neighbourhoods where it is rare and unexpected.*

Feinberg's principles are still fairly high-level. They provide general indicators of how to balance an activity in relation to Freedom of Speech.

In relation to Cancel Culture, Jonathan Rauch has proposed a more specific list of indicators as to when something may be considered "Cancelling", which is illegitimate, as opposed to mere "Criticism", which is legitimate. Rauch contrasts the "Constitution of Knowledge", his shorthand term for the way in which a liberal democratic society uses public discourse to discern truth, with Cancel Culture, which he thinks is equivalent to "despotism of the few". These factors are what he calls "diagnostic indicators", which are non-exhaustive but useful rules of thumb.<sup>118</sup>

- **Punitiveness:** *Does what is being said to or about you have the goal or foreseeable effect of jeopardizing your livelihood or isolating you socially? Are people denouncing you to your employer, your professional groups, your social connections? Are you being blacklisted from jobs and social opportunities? The Constitution of Knowledge punishes the idea, not the person; cancel culture punishes the person, not the idea.*
- **Deplatforming:** *Are campaigners attempting to prevent you from publishing your work, giving speeches, attending meetings? Are they claiming that allowing you to be heard is violence or makes them unsafe? The Constitution of Knowledge relies on diversity of expression; cancel culture prevents it.*
- **Grandstanding:** *Is the tone of the discourse ad hominem, ritualistic, posturing, accusatory, outraged? Are people flattening distinctions, demonizing you, slinging inflammatory labels, and engaging in moral one-upsmanship? Are people ignoring what you actually said and talking about you but not to you? The Constitution of Knowledge rewards careful, rational argumentation; cancel culture rewards demagoguery.*
- **Reductionism:** *Are you being condemned on the basis of one or two things you may have said or done, taken in isolation and shorn of context? Are people collapsing the totality of your character and career down to a single mistake or offense, without regard for your other contributions and accomplishments? The Constitution of Knowledge builds reputational credibility over decades; cancel culture demolishes it overnight.*
- **Orchestration:** *Does criticism appear to be organized and targeted? Are the organizers recruiting others to pile on? Are you being swarmed and brigaded? Are people hunting through your work and scouring social media to find ammunition to use against you? The Constitution of Knowledge relies on independent observers; cancel culture relies on mob action.*

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<sup>118</sup> Jonathan Rauch, *The Constitution of Knowledge* (Brookings Institution Press, 2021) at p 219.

- **Secondary boycotts:** *Is there an explicit or implicit threat that anyone who supports you will get the same treatment that you are receiving? Are people putting pressure on employers and professional colleagues to fire you or stop associating with you? Do people who defend you, or criticize the campaign against you, have to fear adverse consequences? The Constitution of Knowledge relies on independent judgment; cancel culture relies on bullying.*
- **Inaccuracy:** *Are the things being said about you incorrect? Do the people saying them seem not even to care about veracity? Do they feel at liberty to distort your words, ignore corrections, and make false accusations? The Constitution of Knowledge puts accuracy ahead of politics; cancel culture puts politics ahead of accuracy.*

Neither Feinberg or Rauch provide authoritative criteria, they are cited merely as examples of criteria that could be used. The point is that a society is free to decide and weigh the balance on its own. The exact criteria that we use to decide when a particular act is a legitimate or illegitimate use of the right to Freedom of Speech will necessarily depend on the specific legal remedy being pursued.

For example, in the tort of defamation, the courts have considered the following factors as relevant to the extent of damages awarded:<sup>119</sup>

- Nature and gravity of the defamation;
- The parties' standing and damage to reputation;
- Mode and extent of publication;
- Malice;
- Failure to apologise; and
- Subsequent conduct after publication.

Assuming that a similar legal remedy for victims of Cancel Campaigns were to be created, a customised list of factors could be created for a court to take into account, either to determine liability or extent of damages.

The broader point is that whatever specific list of indicators is chosen must point back towards the deeper, principled inquiry, which is whether the conduct in question is fundamentally *constructive* or *destructive*. Given the level of granularity at which this analysis must be performed, and the necessity for the production of evidence, it is probably not feasible for all relevant factors to be legislated. Since the analysis must be performed on a case-by-case basis, the mechanism for deciding would more likely be some kind of court, tribunal or other public authority.<sup>120</sup>

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<sup>119</sup> See, for example, *Lee Hsien Loong v Xu Yuan Chen and anor* [2021] SGHC 206 at [66] – [117].

<sup>120</sup> For example, Australia has an eSafety Commissioner's office that deals with online harms: <https://www.esafety.gov.au/> [Accessed 21 Aug 2023].

A final, important point to reiterate is that whatever legal remedies are created must be sufficiently rigorous and have mechanisms for addressing abuse. As argued above, it is sometimes the case the Cancel Campaigns utilise legal remedies as a means of applying illegitimate pressure on their targets.<sup>121</sup> This should, as far as possible, be avoided – the cure must not become part of the disease.

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<sup>121</sup> See Section 6(b) above.

## 8. A Framework for Addressing Abuses of Freedom of Speech

In summary, the question of how to address Cancel Culture is a multi-step process, as follows:

First, it is not necessary to define “Cancel Culture” in the abstract. We should focus on specific activities associated with Cancel Culture and ask whether such activities should or should not be allowed.

Second, whether an activity should or should not be allowed depends on whether that activity is a legitimate use of the Constitutional right of Freedom of Speech.

Third, whether something is a legitimate use of Freedom of Speech is a question of whether that activity is consistent with the rationale for providing said right in the first place.

Fourth, the rationale for the right to Freedom of Speech, at least in Singapore, is instrumentalism – the idea that giving people a right to free speech helps to uphold truth and strengthen the democratic process.

Fifth, any activity that is consistent with this rationale is *constructive* and therefore legitimate. Any activity that is contrary to this rationale is *destructive* and therefore an abuse of the right to Freedom of Speech.

Sixth, Parliament should therefore look to the existing body of laws and determine what kinds of Cancel Culture activities are *constructive* and what kinds are *destructive*. *Destructive* activities that are not already captured by existing regulation ought, *prima facie*, to be regulated.

Seventh, in general, activities associated with Cancel Culture may be thought of broadly as falling within four Categories: calling for accountability (Category 1), seeking justice (Category 2), unilateral censorship (Category 3), and vigilantism (Category 4). Categories 1 and 2 would ordinarily be considered *constructive* activities, whereas Categories 3 and 4 would be considered *destructive*.

Eighth, whether a particular act of Cancel Campaign falls within a given Category is a matter of characterisation based on available evidence. Parliament can set the broad guidelines by creating legal remedies to address Category 3 and 4 activities, but whether a given act falls within the ambit of those legal remedies must necessarily be considered on a case-by-case basis. The exact list of indicators that the decision-making body should consider or balance may be determined by Parliament when creating the legal remedy in question.

This is a high-level strategic approach to solving the problem. It is easy to say, but not so easy to implement. Each stage of the process could be the subject of detailed debate and discussion on its own. The fourth and fifth steps are fertile ground for political philosophers and jurists, the sixth step a matter for legislators and legal academics, the seventh step could benefit from the work of social scientists, and the eighth is probably the hardest of all, for policymakers to undertake.



This paper is, by necessity, but a brief overview of the issues involved and an attempt to take a step back and understand the work that needs to be done. It does not purport to be anything like the last word on the issue, on the contrary, it is merely the first. The hope is that this broad view of the legal issues relating to Cancel Culture will help to set direction for future discussion and policymaking, so that it can be done in a rigorous, principled manner.