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ANALYSING THE CONSTITUTIONALITY OF EXECUTIVE ACTION UNDER ARTICLES 14 AND 15 IN SINGAPORE—THEORETICAL AND DOCTRINAL PERSPECTIVES

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Articles 14 and 15 of the *Singapore Constitution* enshrine the rights to free speech, religious freedom, and other related rights in Singapore. These provisions also set out the circumstances under which these rights may be restricted. Notably, however, these provisions are directed at legislative restrictions. The question is how they are applicable to executive action. This paper suggests that there are two possible means by which one can assess the constitutionality of executive action under Articles 14 and 15 in Singapore—the jurisdictional and substantive approaches—and demonstrates that evidence of both approaches can be found in Singapore law. Drawing upon constitutional theory, the paper argues that the theoretical foundation for legal doctrine in this regard ought to be a combination of both the jurisdictional and substantive approaches, and also discusses the doctrinal test by which challenges to executive action under Articles 14 and 15 should be assessed.

I. The Constitutionality of Executive Action In Singapore

As a jurisdiction subscribing to the doctrine of constitutional supremacy, Singapore possesses a written constitution serving as the fundamental law of the land. The fundamental liberties of freedom of speech, freedom of religion and other related rights are guaranteed under the *Constitution of the Republic of Singapore*[1] through Articles 14 and 15 respectively. Both provisions have a similar textual structure. The declared rights to "freedom of speech and expression" and to "profess and practise his religion and to propagate it" are followed by qualifications to these rights.[2] The right to free speech is qualified by Parliament's ability to impose restrictions in certain defined circumstances, while the right to freedom of religion is permissibly restricted by "any general law relating to public order, public health or morality."[3]

One might wonder, however, how rights-restrictive *executive action* fits into this legal framework. Indeed, the text of these constitutional provisions leaves some ambiguity in this regard. While Articles 14(2) and 15(4) provide that Parliament and "any general law" respectively are constitutionally able to restrict the rights

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1 *Constitution of the Republic of Singapore* (1999 Rev Ed) [*Singapore Constitution*].

2 *Ibid*, arts 14(1)(a) and 15(1).

3 *Ibid*, arts 14(2)(a) and 15(4).

contained in these provisions, the place of rights-restricting executive action is not expressly contemplated. Rights-restrictive executive action such as executive orders or policies do not issue from Parliament, and may not easily fit under "any general law".[4] Textual ambiguities of this nature which implicate the applicability of constitutional provisions to different branches of government are not unique to Singapore. Indeed, a similar issue surrounding the *First Amendment to the Constitution of the United States of America*[5] has sparked some debate—scholars in the US have suggested that since the subject of the *First Amendment*'s restrictions on government action is "Congress", the necessary textual conclusion that follows from interpreting the *First Amendment* is that it does not apply to restrict executive action.[6]

Returning to Singapore, the textual ambiguity relating to the implications of Articles 14 and 15 for executive action is an important question that needs to be addressed. Indeed, it is undeniable that constitutional liberties can be restricted not just through legislation but also through executive action. The Singapore courts have themselves recognised that executive action is capable of being rights-restrictive and therefore has to meet constitutional requirements.[7] Since it is quite clear that executive action can equally give rise to infringements upon constitutional rights, achieving a principled and clear doctrine on the constitutional requirements for executive action takes on considerable importance. The question therefore is how one ought to interpret the implications of Articles 14 and 15 for executive action.

There are several possible options. On a cursory reading of the text of these provisions, one might think that *only* Parliament can impose restrictions on the liberties protected by these provisions. On this view, any executive action seeking to restrict these fundamental liberties would automatically be rendered unconstitutional. This interpretation, however, can be disposed of summarily. It is based on a fundamental misapprehension of how a legal system works. Parliament enacts laws, and the executive applies these laws. If any executive action restricting fundamental liberties is unconstitutional, Parliament's power to enact laws restricting fundamental liberties will be rendered meaningless.

Setting this option aside, there remain other feasible options. For instance, one possible means of evaluating the constitutionality of executive action would be to determine whether the action fell within the terms of constitutionally valid legislation. Such an approach can be termed a 'jurisdictional approach'. Indeed, on this approach, as long as executive action falls within the jurisdictional limits of constitutionally valid power-conferring legislation, such action will thereby be rendered constitutional. This approach would represent a more literal reading of Articles

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4 "Law" is defined in Article 2 of the *Singapore Constitution*, *ibid*, as follows: "written law and any legislation of the United Kingdom or other enactment or instrument whatsoever which is in operation in Singapore and the common law in so far as it is in operation in Singapore and any custom or usage having the force of law in Singapore."

5 *Constitution of the United States of America*, Amendment I [*First Amendment*].

6 See *eg*, Daniel J Hemel, "Executive Action and the First Amendment's First Word" (2013) 40 Pepperdine Law Rev 601 [Hemel, "Executive Action"]; Nicholas Quinn Rosenkranz, "The Objects of the Constitution" [2011] 63 Stanford Law Rev 1005; Nicholas Quinn Rosenkranz, "The Subjects of the Constitution" [2010] 62 Stanford Law Rev 1209.

7 See also *Eng Foong Ho v Attorney-General* [2009] 2 SLR (R) 542 (CA) at para 28; *Howe Yoon Chong v Chief Assessor, Singapore* [1979–1980] SLR (R) 594 (UKPC) at para 13.

14(2) and 15(4). This approach would hold that since the permissible qualifications to the relevant rights are directed at "Parliament" and "general law" respectively, these qualifications do not apply directly to executive action, and are therefore relevant to executive action only insofar as executive action must be carried out pursuant to power-conferring legislative provisions which meet these requirements.

Another possible approach towards evaluating the constitutionality of executive action under these articles would be to assess such action directly under the permissible categories of restrictions to the relevant rights. In other words, executive action would be constitutionally permissible if it is able to demonstrate a connection with one of the enumerated categories of permissible qualifications to rights in Articles 14 and 15—for example, public order or public morality. Such an approach can be termed a substantive approach. Indeed, this approach would focus on the substance of whether the challenged executive action is actually related to public order or any other permissible restriction upon the relevant rights, *beyond* a concern with whether the challenged executive action falls within the jurisdictional limits of constitutionally valid power-conferring legislation.

This paper will aim to critically evaluate both of these possible means by which one can assess the constitutionality of executive action under Articles 14 and 15 in Singapore, and to propose a principled way forward for Singapore constitutional law. To that end, the paper will first study how the Singapore courts have thus far analysed the constitutionality of executive action by reference to Articles 14 and 15. It will highlight that evidence of both jurisdictional and substantive approaches can be found in Singapore case law, with the Singapore courts generally preferring a jurisdictional approach with respect to challenges to executive action under Article 14, while instead adopting a substantive approach with respect to challenges based on Article 15. The paper will critically evaluate each of these approaches.

Drawing from constitutional theory—in particular, Mark Elliott's modified *ultra vires* theory—the paper will then suggest that the proper theoretical foundation for an analysis of the constitutionality of executive action by reference to Articles 14 and 15 ought to be a combination of both the jurisdictional and substantive approaches. This theoretical foundation would fit with the text and context of Singapore's Constitution. With the theoretical foundation thus laid, the paper will go on to discuss the doctrinal test by which challenges to executive action under Articles 14 and 15 ought to be assessed.

As a matter of methodology, the focus of this paper will be on Articles 14 and 15 of the *Singapore Constitution*. This is primarily for the reason that the attention paid to the specific implications of these provisions for executive action has been relatively sparse. In contrast, the Singapore courts have paid significant attention to how challenges to executive action based upon Article 12—the equal protection provision of the *Singapore Constitution*—ought to be analysed, articulating distinct doctrinal frameworks for equal protection challenges to executive action and legislation respectively.[8] In addition, the primary focus of this paper will be on Singapore constitutional jurisprudence. Nevertheless, the issues treated in this paper

[8] The equal protection test for legislation is set out in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 (CA), while the equal protection test for executive action is set out in *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 (CA) [*Syed Suhail*]. See also the recent Singapore Court of Appeal

are envisioned to have salience beyond Singapore—indeed, the analysis contained herein will be useful for any jurisdiction adhering to the doctrine of constitutional supremacy.

II. The Singapore Courts On The Constitutionality Of Executive Action Under Articles 14 And 15

The Singapore courts have on various occasions been faced with challenges to executive action under Articles 14 and 15. This section will examine how the Singapore courts have approached such challenges in view of the textual ambiguity highlighted earlier in these constitutional provisions.

A. *Jurisdictional Approach*

There are several indications in Singapore constitutional jurisprudence of a jurisdictional approach to evaluating challenges to executive action. Notably, many of these indications can be found in the Singapore courts' approach to Article 14 challenges to executive action. Indeed, in assessing such challenges, the Singapore courts have often focused on reviewing the constitutionality under Article 14 of the power-granting legislation pursuant to which the relevant executive action had been performed, with their attention to the challenged action limited to a consideration of whether such action had been performed within the bounds of the power-granting legislation—if so, the challenged executive action would be considered constitutionally valid.

By way of background, the Singapore courts have developed the legal test for challenges to legislation under Article 14 over several landmark decisions such as *Jeyaretnam Joshua Benjamin v Lee Kuan Yew*,[9] *Chee Siok Chin v Minister for Home Affairs*,[10] and *Attorney-General v Ting Choon Meng*,[11] with the recent Singapore Court of Appeal decision in *Wham Kwok Han Jolovan v Public Prosecutor*[12] tying all these decisions together and setting out the authoritative approach in Singapore law. While *Jolovan Wham* was specifically concerned with the right to freedom of assembly under Article 14(1)(b), the approach articulated by the Court of Appeal in this case is equally applicable to all the other rights contained in Article 14(1).[13] Put simply, the Court of Appeal in *Jolovan Wham* set out a three-step approach to evaluating challenges to legislation under Article 14: (1) Does the legislation

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decision of *Tan Seng Kee v Attorney-General* [2022] SGCA 16, where the court briefly discussed the relationship between the two tests.

9 [1992] 1 SLR (R) 791 (CA) [*Jeyaretnam Joshua Benjamin*].

10 [2006] 1 SLR (R) 582 (CA) [*Chee Siok Chin*].

11 [2017] 1 SLR 373 (CA).

12 [2020] SGCA 111 [*Jolovan Wham*].

13 It is worth noting, however, that Article 14(2)(a) contains a category of permissible restrictions on Article 14(1)(a) rights which are not subject to the "necessary or expedient" test; see *Jeyaretnam Joshua Benjamin*, *supra* note 9. This point will be raised and discussed in more detail later.

restrict the constitutional right in the first place?[14] (2) Did Parliament consider it necessary or expedient to restrict the right?[15] (3) On an objective basis, was there a nexus between the purpose of the legislation and one of the permitted purposes for restrictions articulated in the Constitution?[16]

This approach may be described as an 'objective nexus' test. For present purposes, what is worth noting about the *Jolovan Wham* test is that it is directed specifically at legislation. *Jolovan Wham* therefore leaves open the question of how Article 14 ought to apply where executive action is concerned. Indeed, in the recent Court of Appeal decision of *The Online Citizen Pte Ltd v Attorney-General*,[17] the court applied the *Jolovan Wham* framework to evaluate the constitutionality of various aspects of the *Protection from Online Falsehoods and Manipulation Act 2019*,[18] but did not specifically address what a direct challenge under Article 14 to a *decision* made under the *POFMA*, such as a *POFMA* direction, would look like.[19]

Turning then to study how the Singapore courts have analysed challenges to *executive action* under Article 14, one observes that a jurisdictional approach appears to be the generally prevailing approach. An early indication of this trend can be found in the Court of Appeal decision of *Dow Jones Publishing v Attorney-General*.[20] In this case, a challenge was brought against the Minister for Communication and Information's decision to classify the Asian Wall Street Journal as a foreign newspaper engaging in the domestic politics of Singapore under section 16 of the *Newspaper and Printing Presses Act*,[21] thereby significantly restricting its circulation. One of the arguments made against this decision centred around Article 14. Specifically, it was argued that the Minister's decision was misdirected as a result of having failed to have proper regard for the constitutional right to freedom of speech under Article 14.[22] The Court of Appeal rejected this argument, principally on the ground that such an argument was effectively an effort to mount a constitutional argument which the appellants had no standing to make—Article 14(1) guarantees freedom of speech to Singapore citizens, but the appellants were not Singapore citizens.[23]

Interestingly, and most relevant for present purposes, the Court of Appeal took issue with this argument on another ground: that this argument would be "valid only if the court is able to declare s[ection] 16 unconstitutional", and the court could not do so here because the issue was not before the court.[24] This was a noteworthy proposition. Indeed, implicit in this reasoning is the idea that challenges to executive action under Article 14 are to be assessed by reference to whether the power-conferring

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14 *Jolovan Wham*, *supra* note 12 at para 30.
15 *Ibid* at para 31.
16 *Ibid* at para 32.
17 *The Online Citizen Pte Ltd v Attorney-General and another appeal* [2021] SGCA 96 [*The Online Citizen*].
18 (No 18 of 2019) [*POFMA*].
19 *The Online Citizen*, *supra* note 17 at paras 55-111.
20 [1989] 1 SLR (R) 637 (CA) [*Dow Jones*].
21 (Cap 206, 2002 Rev Ed Sing).
22 *Dow Jones*, *supra* note 20 at paras 50-51.
23 *Ibid* at para 53.
24 *Ibid*.

legislation pursuant to which the action was performed was constitutional, and that no independent constitutional assessment can lie against executive action directly. Such reasoning is therefore an indication of a jurisdictional approach to challenges to executive action under Article 14.

The High Court in *Jeyaretnam Joshua Benjamin v Public Prosecutor*[25] also adopted a similar line of reasoning. In the wake of the applicant's convictions under the *Public Entertainments Act*[26] for having provided public entertainment without a licence, the applicant sought to refer certain questions of law to the Court of Criminal Appeal, several of which centred around whether the decision of the Public Entertainments Licensing Officer to deny a licence to the applicant was unconstitutional as a violation of Article 14(1).

The High Court ultimately rejected the applications. But its treatment of the issues surrounding the constitutionality of the Licensing Officer's decision is particularly instructive for present purposes and is worth reproducing in full. The High Court held:

> Article 14(1) is subject to Art[icle] 14(2) and to the extent that a law is validly made under Art[icle] 14(2), the right of free speech must be to the corresponding extent diminished. In other words, by reason of the Act, no person has a right to address a gathering in a public place except in accordance with the provisions. On this basis, it must follow that the validity of any decision of the licensing officer made in the exercise of his powers in the implementation of the scheme of licensing was to be determined by well known administrative law principles of 'illegality, irrationality and procedural impropriety'.[27]

This paragraph suggests that executive action carried out under legislation which is constitutionally valid by reference to Article 14 can only be challenged under administrative law grounds. Such reasoning indicates that no direct challenge can be made to executive action under Article 14 on the basis of whether the executive action itself fell under the permissible categories of restrictions under Article 14(2). The High Court's reasoning is therefore evocative of a jurisdictional approach—as long as executive action has been performed pursuant to constitutionally valid power-conferring legislation, such action will be considered constitutional.

Finally, the High Court decision in *Chee Siok Chin v Minister for Home Affairs*,[28] a landmark case in Article 14 jurisprudence, provides yet another indication of a jurisdictional approach. In this case, the applicants were political activists who had mounted a peaceful protest outside a government agency building. They were subsequently ordered to disperse by the police. The applicant thereafter sought a declaration that the police action taken against them to disperse their protest was unlawful and unconstitutional as a violation of their Article 14(1) rights.

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[25] *Jeyaretnam Joshua Benjamin v Public Prosecutor* [1990] 1 SLR (R) 567 (HC) [*Jeyaretnam Joshua Benjamin (HC)*].

[26] (Cap 257, 2001 Rev Ed Sing).

[27] *Jeyaretnam Joshua Benjamin (HC)*, *supra* note 25 at para 11.

[28] *Chee Siok Chin*, *supra* note 10.

It is worth observing closely how the High Court dealt with this challenge. The court first addressed the question of whether the *Miscellaneous Offences (Public Order and Nuisance) Act*[29]—the legal basis of the police action—was constitutional by reference to Article 14.[30] In discussing the proper approach to evaluating the constitutionality of legislation under Article 14, the court held that "all that needs to be established is a nexus between the object of the impugned law and one of the permissible subjects stipulated in Art[icle] 14(2) of the Constitution."[31] Applying this to the *MOA*, the court found that it evidently satisfied this requirement.[32] Noting that the applicant had clarified that he intended to make a challenge to the exercise of police powers in this case and not to the *MOA* proper, the court went on to analyse this challenge under the established grounds of judicial review, eventually coming to the conclusion that the exercise of police powers was lawful.[33]

The method of the court's reasoning in this case is yet another indication of a jurisdictional approach. Indeed, it bears emphasis that the challenge in this case had been directed at the *decision* of the police to disperse the protest under Article 14. Yet, the manner in which the court engaged this challenge was to determine if the legislation pursuant to which the decision was made was itself constitutional, and when turning to assess the lawfulness of the police's *decision*, relied largely on general administrative law principles. Granted, the manner in which the court analysed the issue at hand might have been very much shaped by the way counsel pleaded their cases. Nevertheless, it is interesting to note that the prospect of evaluating the police's decision by determining whether the decision itself fell under the permissible categories of restrictions under Article 14(2) was not raised to the court or by the court. The manner in which the court resolved this case is therefore indicative of a jurisdictional approach to evaluating the constitutionality of executive action under Article 14.

B. *Substantive Approach*

While the Article 14 jurisprudence of the Singapore courts is replete with examples of a jurisdictional approach, it is interesting to observe that challenges to executive action based upon Article 15 have been instead analysed under a very different approach. Indeed, in evaluating the constitutionality of executive action under Article 15, the Singapore courts have generally considered directly whether the executive action in question falls under one of the permissible categories of restrictions under Article 15(4)—an approach that can be termed a 'substantive approach'.

It will be useful to begin this survey of Singapore's Article 15 jurisprudence with the landmark case of *Chan Hiang Leng Colin v Public Prosecutor*.[34] In this case, the appellants, who were Jehovah's Witnesses, brought challenges under Article 15 against the Minister for Culture's decision to prohibit the possession of publications

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29 (Cap 184, 1997 Rev Ed Sing) [*MOA*].

30 *Chee Siok Chin*, *supra* note 10 at para 41.

31 *Ibid* at para 49.

32 *Ibid* at paras 55-56.

33 *Ibid* at paras 93-123.

34 *Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR (R) 209 (HC) [*Colin Chan v PP*].

published by the Watch Tower Bible & Tract Society, a group affiliated with the Jehovah's Witnesses, as well as the Minister for Home Affairs' decision to deregister the Jehovah's Witnesses as a society under the *Societies Act*.[35]

Chief Justice Yong Pung How, sitting at the High Court, rejected both constitutional challenges. In relation to the challenge against deregistration, he held that religious beliefs had to be subject to the interests of public order: "[t]he sovereignty, integrity and unity of Singapore are undoubtedly the paramount mandate of the Constitution and anything, including religious beliefs and practices, which tend to run counter to these objectives must be restrained."[36] Since the Minister for Home Affairs had decided that the activities of the Jehovah's Witnesses were a threat to public order under section 24(1)(a) of the *Societies Act*, it was not the court's role to re-evaluate the decision.[37] Accordingly, the deregistration order was constitutional. As for the challenge against the ban on publications, Yong CJ held that section 3(1) of the Undesirable Publications Act[38] clearly conferred upon the Minister for Culture the power to prohibit publications contrary to the public interest. Accordingly, since the present ban on publications was indeed based on concerns of "public welfare and good order in Singapore", the Minister's decision was a lawful exercise of his statutorily-conferred discretionary power.[39]

On a cursory reading of the decision, one might have thought that its reasoning is indicative of a substantive approach, since it appears to involve an analysis of whether the challenged executive action fell within the permissible restraints on Article 15 rights specified in Article 15(4). It must be noted, however, that while Yong CJ's decision in relation to both challenges did involve a consideration of whether the Ministers' decisions were based upon the purpose of maintaining public order, his reasoning in this regard was predominantly concerned with whether the Ministers had stayed within the "statutory limitations" of their discretionary powers.[40] As such, this case is more properly characterised as indicative of a jurisdictional approach instead.

A more obvious indication of a substantive approach can be found in the subsequent High Court decision of *Chan Hiang Leng Colin v Minister for Information and the Arts*,[41] once again involving the Jehovah's Witnesses. In this case, the applicants sought leave to bring a challenge under various constitutional provisions, including Article 15, against the Minister for Information and the Arts' decision to ban materials published by the International Bible Students Association under the Undesirable Publications Act.

Holding that the main substance of the plaintiff's constitutional challenge rested on Article 15,[42] the High Court rejected the application. In an elaboration highly pertinent for present purposes, the High Court held that the proper approach to

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35 (Cap 311, 2014 Rev Ed Sing).

36 *Colin Chan v PP*, *supra* note 34 at para 64.

37 *Ibid* at para 68.

38 (Cap 338, 1998 Rev Ed Sing).

39 *Colin Chan v PP*, *supra* note 34 at para 70.

40 *Ibid*.

41 *Chan Hiang Leng Colin v Minister for Information and the Arts* [1995] 2 SLR (R) 627 (HC) [*Colin Chan v MITA*].

42 *Ibid* at para 24.

dealing with an Article 15 challenge to executive action was to consider the connection between the challenged action and one of the permissible restrictions to Article 15 specified in Article 15(4). Indeed, "a complaint about such an action could only be regarded as being of some substance if it was arguable that the restriction imposed had nothing to do with public order, public health or morality."[43] Applying this approach, the court found that the plaintiff's case did not meet the requisite threshold of an arguable case for leave to be granted for judicial review and rejected the application at hand.[44]

The reasoning in this decision is significant for present purposes. Indeed, the reasoning adopted by the High Court here is evocative of a substantive approach. Instead of addressing the question of an executive action's constitutionality by considering whether the power-conferring legislation was constitutional, and then determining whether the action fell within the scope of the legislation, the High Court here thought that the proper approach was to consider directly whether the challenged executive action itself fell within one of the permitted restrictions to Article 15 rights under Article 15(4).

On appeal, the Court of Appeal affirmed the High Court's decision to reject the application for judicial review, holding that a challenge to the Minister's decision on the basis that it was not justifiable on national security grounds was plainly not justiciable, since a scrutiny of national security concerns and the requirements of compulsory military service would be beyond the court's remit.[45] Importantly for present purposes, the Court of Appeal took no issue in principle with the High Court's approach towards analysing the constitutionality of the challenged executive action under Article 15.

More recent Singapore case law also indicates that a substantive approach is the proper approach to evaluating the constitutionality of executive action under Article 15. In *Vijaya Kumar v Attorney-General*,[46] judicial review was sought against police restrictions on the playing of music during a public Thaipusam procession, a religious event celebrated by Hindus. The applicants challenged the restrictions under Article 15, arguing that there was an insufficiently compelling nexus between the restrictions and the concern of public order under Article 15(4).[47]

The applicant's case was therefore made on the basis of a substantive approach to analysing Article 15 challenges to executive action. Indeed, the premise of the applicant's argument was that the police restrictions could be challenged directly by reference to their nexus to the permissible restrictions under Article 15(4), rather than whether they had been made pursuant to legislation constitutional under Article 15. Notably, the High Court adopted the same approach. The court framed the relevant inquiry as one going towards whether the music restrictions were related to public order.[48] The High Court then embarked on a direct assessment of whether the restrictions did indeed have a nexus with public order, holding that the "scale, duration and

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[43] *Ibid* at para 27.
[44] *Ibid* at paras 28-31.
[45] *Ibid* at paras 29-36.
[46] *Vijaya Kumar v Attorney-General* [2015] SGHC 244 [*Vijaya Kumar*].
[47] *Ibid* at para 14.
[48] *Ibid* at para 30.

the religious element of the procession" suggested that "the risk of a disruption of public order was not unreal", making the connection between the music restrictions and public order concerns "neither illogical nor unreasonable".[49] Accordingly, with its analysis structured along the lines of a substantive approach, the court held that the music restrictions were constitutional by reference to Article 15.

III. Evaluating The Singapore Courts' Approach

An interesting picture emerges from the preceding survey of the Singapore courts' approach to assessing the constitutionality of executive action under Articles 14 and 15. Indeed, instead of evincing a clear preference for a jurisdictional or substantive approach towards analysing such challenges, we observe that the Singapore courts have sent somewhat mixed signals. Evidence for both the jurisdictional and substantive approaches can be found in Singapore's constitutional jurisprudence.

Further, a noteworthy trend that can be observed from this survey of Singapore case law is that the Singapore courts have generally adopted a jurisdictional approach for challenges based on Article 14, while they have generally taken a substantive approach for challenges based on Article 15. This is quite striking. Indeed, the text of both constitutional provisions does not explain the Singapore courts' divergent approaches for each of these provisions. Both provisions expressly permit legislative restrictions to the respective rights under certain circumstances, and both provisions are equally silent as to the place of restrictions on rights stemming from executive action.

A possible reason for this divergence rests in the manner by which judicial review applications have been pleaded by litigants and lawyers. Indeed, lawyers have often framed challenges to government action under Article 14 as directed primarily at the constitutionality of power-conferring legislation, with the accompanying challenge to the executive action in question framed along the lines of the traditional administrative law grounds of review.[50] Faced with such arguments, it is unsurprising that the courts have consequently adopted a jurisdictional approach in evaluating the constitutionality of executive action under Article 14. In contrast, lawyers have framed challenges to government action under Article 15 quite differently—indeed, lawyers have sought to question the connection between the challenged executive action with the permissible categories of restrictions under Article 15(4) directly.[51] Such arguments provide the courts with fertile ground to develop a substantive approach to assessing the constitutionality of executive action under Article 15.

In any case, given that indications of both the jurisdictional and substantive approaches can be found in Singapore case law, the question which naturally arises is which approach is more justifiable as a matter of principle. One might wonder at this point, however, whether it is necessary to make a choice between both approaches. Indeed, one might argue that both approaches are not mutually exclusive and can be applied in conjunction, if one construes the jurisdictional approach

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[49] *Ibid* at para 35.

[50] The High Court decision of *Chee Siok Chin*, *supra* note 10, is a good example.

[51] See *eg*, *Colin Chan v PP*, *supra* note 34, and *Colin Chan v MITA*, *supra* note 41.

primarily as a test for *administrative legality*, with the substantive approach being a test of *constitutionality*. It is suggested, however, that while a conjunctive approach framed in such a manner would indeed not be a problem, the key issue is that the jurisdictional approach can be (and has been, as the preceding study of the case law suggests) applied as *the* test for *constitutionality*. To the extent that we are concerned with the test for constitutionality in relation to executive action, both the substantive and jurisdictional approaches are competitors on the same plane, making an evaluation of their relative merits as tests for constitutionality a relevant exercise to undertake.

Turning then to an evaluation of both approaches, we can commence with an analysis of the jurisdictional approach. The key advantage of this approach is that it would fit easily with the text of Articles 14 and 15. Indeed, as highlighted earlier, both provisions permit "Parliament" and "any general law" to provide restrictions under certain prescribed categories upon the freedom of speech and freedom of religion respectively. In the absence of wording directly applicable to rights-restrictive executive action, and in the context of the general acceptance of the *ultra vires* principle as the benchmark by which the legality of executive action ought to be analysed, a natural conclusion that one may draw from the text of both provisions would be that rights-restrictive executive action would be constitutional under Articles 14 and 15 as long as it is performed pursuant to power-conferring legislation assessed to be constitutional under these provisions.

The coherence of a jurisdictional approach with the actual text of the Constitution is a weighty and important argument in its favour. Yet, one may be concerned about the implications of such an approach upon broader constitutional principles. Singapore adheres to the doctrine of constitutional supremacy—indeed, Article 4 of the *Singapore Constitution* enshrines the Constitution as the supreme law of the land.[52] To the extent that one accepts that the Constitution is Singapore's fundamental law, and to the extent that one acknowledges that executive action is also subject to the requirements of the Constitution,[53] one might be concerned that a jurisdictional approach to analysing the constitutionality of executive action under Articles 14 and 15 might give inadequate effect to these fundamental constitutional ideas. Indeed, a jurisdictional approach would essentially entail that administrative law principles such as *ultra vires* are the only proper means of challenging executive action, and that the Constitution does not prescribe any further routes of challenge beyond what administrative law already provides. This was a consequence which the Court of Appeal in *Syed Suhail* was reluctant to accept in the context of challenges to the constitutionality of executive action under Article 12, the *Singapore Constitution's* equal protection provision.[54]

In addition, one may also be concerned that a jurisdictional approach does not adequately account for the reality that executive action is capable of infringing upon

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[52] *Singapore Constitution*, *supra* note 1, art 4: "This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

[53] It is worth noting that Article 4 suggests only that *law* inconsistent with the Constitution shall be rendered void. This point will be raised and discussed later in this paper.

[54] *Syed Suhail*, *supra* note 8 at para 57.

fundamental liberties even if the power-granting provision pursuant to which the executive action has been performed is constitutional and the executive action is *intra vires* the provision. For instance, even if the *MOA*'s provisions providing for the prevention of public nuisances are found to be constitutional with respect to Article 14 as a piece of legislation directed at pursuing the interest of public order under Article 14(2), individual exercises of police power to enforce these provisions may lack a nexus to public order and may therefore fall outside the scope of Article 14(2).

One possible response to this concern is as follows. One might say that a jurisdictional approach is capable of addressing this concern—indeed, such problematic applications of the *MOA* can be considered unlawful under the 'improper purpose' ground of review in administrative law. Accordingly, such abuses of the *MOA* would be *ultra vires* the *MOA* even on administrative law grounds, and there is no need to adopt a substantive approach in order to provide an additional constitutional safeguard in this regard.

However, it is suggested that there is an important distinction between the 'improper purpose' ground of review and the direct application of the requirements of Article 14(2) to executive action under the substantive approach. Indeed, the former is focused on determining whether the purpose of the challenged action fell under the permissible purposes allowed under the power-granting legislative provision. The latter, however, would be capable of going further to objectively evaluate the connection between means and ends—in other words, whether the challenged action itself was a rationally justifiable means to achieve one of the permissible ends under Article 14(2).

One might provide a further response to this argument by noting that if the concern is to allow the courts to perform an objective evaluation of the connection between means and ends, then this concern can be equally met by way of another administrative law ground of judicial review—the ground of irrationality. Indeed, it might be argued that the irrationality ground of review allows courts to consider whether the connection between the means adopted and the ends sought to be achieved by the decision is so tenuous as to render the decision one that no reasonable decision-maker would have made.[55] If the irrationality ground of judicial review allows for such evaluation of the connection between means and ends, then this would suggest that there is no need to adopt a substantive approach to achieve this objective.

It is suggested, however, that irrationality review would also fall short of what a substantive approach can provide. Irrationality might indeed require an analysis of the connection between means and ends. But irrationality analysis sets a very high threshold for review, in recognition of the potential of this doctrine to otherwise be overly intrusive into executive decision-making.[56] Given this high threshold of review, irrationality review would allow a decision to pass muster as long as the decision (*ie*, the means adopted) bears any kind of connection with any possible

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[55] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR (R) 525 (CA) at paras 108-115.

[56] See *eg*, *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 at 757-758, per Lord Ackner.

ends sought to be achieved.[57] A substantive approach based on the requirements of Article 14 would, in contrast, provide for a more focused and intensive inquiry: a decision must have a specific connection with one of the permissible ends spelt out in Article 14(2) for it to be constitutional. More fundamentally, the substantive approach can be applied in a manner providing for a more rigorous assessment of the means-ends connection than common law irrationality would provide.

An example is appropriate at this juncture to illustrate this point. Consider, for example, how the *MOA* confers upon the police powers to regulate public nuisances in order to further the interests of public order.[58] Suppose that the police seeks to exercise these powers to disperse and arrest a small group of homosexual persons gathering in a relatively sparsely-populated park, on the ground that public displays of a homosexual lifestyle constitute indecent behaviour under section 20 of the *MOA*. This police action is then challenged as a violation of the persons' right to freedom of assembly under Article 14(1)(b).

Should this police action be assessed under the improper purpose ground of review, the police action will likely be found lawful. Indeed, the purpose of the exercise of power here clearly falls under the statutory purpose of preventing indecent behaviour. The irrationality ground of review is unlikely to be successful as well. Without more, and bearing in mind the stringent requirements of the irrationality ground of review, it is probably not entirely unreasonable that the police officers in question would have considered that dispersing this gathering would indeed prevent riotous, disorderly, or indecent behaviour. It is not a decision so unreasonable to the extent that no reasonable police officer would have reached the same conclusion. The police power would therefore likely be considered *intra vires*.

On a jurisdictional approach, this would be the end of the inquiry—the police power was *intra vires* and exercised pursuant to a constitutionally valid statute. A substantive approach, however, would be capable of going further. If one accepts that executive action can be assessed directly against the requirements of Article 14, as a substantive approach would require, the proper inquiry here would be whether the police action was rationally connected to one of the permissible purposes set out in Article 14(2)(b). Specifically, the question would be whether the police action here is sufficiently connected to the purpose of public order. On this framing, it might be possible for one to reach the conclusion that while the statute in question is constitutionally valid, the specific *exercise* of the power conferred by this statute is insufficiently connected with public order, perhaps because the size of the group was relatively small, or because the gathering was in a relatively remote public place.

The key points to be observed are that a substantive approach permits a deeper and more intensive review of executive action, and that a jurisdictional approach might be less capable of addressing the reality of rights-restricting executive action than one might have surmised. A substantive approach to evaluating the constitutionality of executive action under Articles 14 and 15 would be able to subject executive action to a direct scrutiny of whether the challenged action reasonably furthered

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[57] The difference between irrationality review and more intensive constitutional review is illustrated by the decision in *R v Ministry of Defence, ex parte Smith* [1996] QB 517.

[58] *MOA*, *supra* note 29, s 20.

one of the ends under which restrictions are permissible under the Constitution. By doing so, this approach would better account for the reality that arbitrary rights-restrictions can still occur even if executive discretion is exercised in line with legislative authorisation.[59] Indeed, this feature of a substantive approach means that it would cohere better with fundamental constitutional principles in Singapore. As a jurisdiction adhering to the doctrine of constitutional supremacy, it stands to reason that any form of government action, whether legislation or executive action, should be directly subject to the requirements of the *Singapore Constitution*.[60]

Further, one might observe that certain troubling implications would follow from the adoption of a literal interpretation of Articles 14(2) and 15(4) to justify the proposition that these provisions have no direct implications for executive action aside from what a jurisdictional approach would specify. Indeed, the very same interpretive method, applied to Article 4 of the *Singapore Constitution*, would yield the outcome that the Constitution has no direct implications upon any executive action at all, given that Article 4 expressly renders only unconstitutional *legislation* void. Yet, such an interpretation would be at odds with the view actually adopted by the Singapore courts—the Singapore Court of Appeal has taken it for granted on several occasions that executive action can be challenged directly under the fundamental liberties protected in the Constitution.[61] Accordingly, interpreting Articles 14(2) and 15(4) in a manner that would preserve their direct application to executive action, as a substantive approach would require, would cohere best with existing constitutional precedent in Singapore.

The crucial issue with the substantive approach, however, is how such an approach can be justified on the text of the relevant constitutional provisions. Indeed, as highlighted earlier, Articles 14(2) and 15(4) make no express textual reference to executive action. This is an important concern that must be addressed, given the strong emphasis that the Singapore courts have placed upon the constitutional text in their exercises of constitutional interpretation.[62] Since the bare text of the provisions would not straightforwardly accommodate direct application to executive action, there is a need to formulate a justification for making executive action directly susceptible to these provisions beyond what a jurisdictional approach would provide for. The next section of this paper will turn to consider this challenge.

IV. The Proper Approach To The Constitutionality Of Executive Action Under Articles 14 And 15

In view of the discussion in the preceding section, the precise issue to be considered can be stated as follows: is it possible to reconcile the text of Articles 14 and 15 of

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59 Eoin Daly, "Freedom as Non-Domination in the Jurisprudence of Constitutional Rights" [2015] 28 Can JL & Jur 289 at 312.

60 See *eg*, Kenny Chng, "The Theoretical Foundations of Judicial Review in Singapore" [2019] Sing JLS 294.

61 In relation to Article 12, see *eg*, *Syed Suhail*, *supra* note 8; in relation to Article 9, see *eg*, *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 (CA).

62 See *eg*, *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 (CA) and *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 (CA).

the Singapore Constitution with a direct assessment of the constitutionality of executive action under the permitted categories of restrictions in these provisions? If we arrive at the conclusion that it is possible to do so, then a follow-on question arises: what exactly would such an approach to the review of executive action entail? This section will seek to address these questions in turn.

A. *Proposing A Combined Jurisdictional-Substantive Approach*

With the help of insights from constitutional theory, it is indeed possible to reconcile a direct assessment of the constitutionality of executive action under Articles 14 and 15 with the text of the provisions. Specifically, Mark Elliott's justificatory theory of judicial review offers an invaluable perspective that can help to resolve the conundrum at hand.

Elliott offered his highly influential theory as a contribution to the vigorous debate occurring several decades ago concerning the proper theoretical justification for judicial review of administrative action in the United Kingdom. The two main competing positions in that debate can be described as the traditional *ultra vires* theory and the common law theory. Simply put, the traditional *ultra vires* theory sought to justify judicial review of executive action by direct reference to Parliament's intent.[63] For example, Parliament intended the decision-maker in question to take into account a certain set of considerations in decision-making, thereby justifying judicial review on the basis of whether such considerations had indeed been taken into account. The common law theory, on the other hand, sought to justify judicial review of executive action by reference to fundamental principles of the rule of law residing within the common law, which the courts could legitimately draw upon in reviewing executive action.[64] For example, the *Wednesbury* unreasonableness ground of review could be justified under a rule of law norm against wholly arbitrary executive action.

Elliott's theory provided an ingenious means by which the impasse between the two main competing positions could be bridged. Termed the modified *ultra vires* theory, it sought to legitimise judicial review of administrative action by way of a more indirect connection between parliamentary intent and judicial review, as compared to the traditional *ultra vires* theory. Elliott argued that in conferring discretionary power to the executive branch, Parliament should be presumed to have generally intended that the exercise of such power be constrained by the rule of law[65]—a presumption which the courts are entirely entitled to accept, since the rule of law is a foundational constitutional principle.[66] It should thus be apparent that this theory forged a useful compromise between the traditional *ultra vires*

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63 Mark Elliott, *The Constitutional Foundations of Judicial Review* (Oxford: Hart Publishing, 2001) at 3, 23 [Elliott, *Constitutional Foundations*].

64 Mark Elliott & Robert Thomas, *Public Law*, 3d ed (Oxford; New York, NY: Oxford University Press, 2017) at 488-492.

65 Christopher Forsyth & Linda Whittle, "Judicial Creativity and Judicial Legitimacy in Administrative Law" [2002] 8 Canterbury Law Rev 453 at 461; Elliott, *Constitutional Foundations*, *supra* note 63 at 110.

66 Elliott, *Constitutional Foundations*, *ibid* at 109.

theory and the common law theory. On this view, the locus of the ultimate justification for judicial review rested in Parliament's intent, as supporters of the traditional *ultra vires* theory argued. At the same time, however, the courts could legitimately discern and draw upon principles of the rule of law in constraining executive action, as supporters of the common law theory contended.

The modified *ultra vires* theory was articulated as a justification for judicial review of executive action in administrative law, and it was formulated by reference to a jurisdiction adhering to the doctrine of parliamentary sovereignty. One might therefore wonder about the relevance of the modified *ultra vires* theory for present purposes, given that Singapore has adopted instead the doctrine of constitutional supremacy, and that the issue under discussion here relates to constitutional law. Nevertheless, the modified *ultra vires* theory provides conceptual insights that are of direct relevance in resolving the issue at hand. Indeed, the key concept behind the theory is that Parliament's grant of power to the executive is conditioned by the requirements of the rule of law. Therefore, when executive officials act contrary to the requirements of the rule of law, judges are justified in finding that these actions are *ultra vires* the parliamentary grant of power.

These central ideas are readily transplantable to Singapore's constitutional context. In Singapore, there is a much more concrete basis upon which we can anchor these limits upon Parliament's legislative power—the requirements of Singapore's written Constitution. Accordingly, just as the modified *ultra vires* theory was able to forge a compromise between the traditional *ultra vires* theory and common law theory in the English context, when transplanted to the Singapore context, the same ideas can form a theoretical foundation for a combination of the jurisdictional and substantive approaches. Indeed, Articles 14(2) and 15(4) authorise parliamentary restrictions upon the constitutional rights contained in Articles 14 and 15 respectively. Parliament is thereby constitutionally prohibited from passing rights-restrictive legislation insufficiently connected with the permissible grounds for rights-restrictions in Articles 14(2) and 15(4). Therefore, no Act of Parliament can authorise any executive action which is insufficiently connected with the permissible grounds for restrictions stated in these Articles. Such executive action would be *ultra vires* any power-granting statutory provision, even if these restrictions are not expressly stipulated in the relevant statutory provision, since Parliament *cannot* grant to the executive any power beyond what it possesses under the Constitution. What this means is that executive action conducted pursuant to any power-conferring legislation falls also to be assessed directly by the challenged action's connection with these constitutionally-stipulated categories of permissible restrictions.

It should be apparent that the solution outlined above represents a combination of both the jurisdictional and substantive approaches.[67] It is a jurisdictional approach in the sense that the constitutionality of executive action under Articles 14 and 15 depends on whether the challenged executive action is *intra vires* the power-conferring legislative provision. At the same time, it is a substantive approach in the sense that a consideration of whether the challenged executive action is *intra vires* the

[67] See Hemel, "Executive Action", *supra* note 6, for a similar argument made in the context of the *First Amendment to the Constitution of the United States of America*.

power-conferring provision depends on a direct assessment of the action against the permissible categories of restrictions in Articles 14(2) and 15(4).

This combined approach has much to recommend it. Indeed, as a combination of both the jurisdictional and substantive approaches, the proposed approach is able to remedy the issues with—and draw the key strengths from—each approach. The proposed approach squares well with the text of the relevant constitutional provisions, as the jurisdictional approach does. At the same time, the proposed approach coheres well with fundamental constitutional principle, as the substantive approach does. The approach proposed here therefore presents a neat and conceptually sound solution to the conundrum of how challenges to executive action under Articles 14 and 15 ought to be analysed.

B. *The Doctrinal Content of this Approach*

The preceding section has provided a plausible theoretical justification for the application of the Constitution's requirements directly to executive action. What then should be the proper doctrinal content of this approach?

There are various possible forms that such a direct assessment could take. One possible manner by which a direct assessment of executive action under Articles 14 and 15 can be performed would be to read Articles 14(2) and 15(4) as imposing procedural obligations on potentially rights-infringing executive action.[68] On this view, the constitutionality of executive action under these provisions would depend upon whether such action had been carried out pursuant to a decision-making process which had reasonably taken into account the concerns enumerated in Articles 14(2) and 15(4), such as public order. This approach would therefore be focused on imposing requirements on the decision-making *process* leading up to the challenged executive decision.

This approach has its merits. Indeed, by focusing on the decision-making process, one might argue that this approach would help to minimise the degree of judicial intrusion into executive action, thus better upholding the principle of separation of powers. Further, such an approach would cohere well with existing administrative law grounds of review, which would thereby preserve a certain consistency in the mode by which executive action is evaluated across both constitutional and administrative law.

On the other hand, it might be pointed out that this is precisely the issue with such an approach—it is constitutional law we are concerned with here, not administrative law. Indeed, the concern of minimising intrusiveness into executive action might be considered much less salient in a context where the provisions of the Constitution itself legitimise scrutiny of the relevant governmental action. One might also note that Articles 14(2) and 15(4), as applied to *legislation*, go beyond prescribing procedural requirements for Parliament, and do require a scrutiny of the legislative

[68] See Paul Daly, "The Constitutionalisation of English Judicial Review in Ireland" in Swati Jhaveri & Michael Ramsden, eds. *Judicial Review of Administrative Action Across the Common Law World: Origins and Adaptation* (Cambridge: Cambridge University Press, 2021) 98 at 106-107.

product. Accordingly, consistency of treatment would in fact suggest that a similar approach be adopted where executive action is concerned.

Another manner by which a direct assessment of the constitutionality of executive action under Articles 14 and 15 could be framed would be to objectively assess whether there is a connection between the challenged executive decision and one of the permitted categories of restrictions in Articles 14(2) and 15(4). This approach, in contrast to the previously-suggested approach, would extend to the substance of the challenged executive decision, rather than confining itself to a review of the decision-making process. On this approach, challenges to the constitutionality of executive action under these provisions would be assessed by reference to whether the challenged action possesses an objective nexus with one of the permissible grounds of restrictions set out in Articles 14(2) and 15(4). This would be substantially similar to the approach that the Singapore Court of Appeal in *Jolovan Wham* has adopted in relation to challenges to legislation under Article 14.

It is suggested that this should be adopted as the doctrinal approach governing assessments of the constitutionality of executive action under Articles 14 and 15 in Singapore. As a matter of principle, given the combined jurisdictional-substantive approach upon which this doctrinal test is grounded, the constitutional justification for imposing the requirements of the Constitution directly upon executive action draws upon the restrictions which the Constitution places upon legislation. It stands to reason then that the constitutional requirements as applied to both legislation and executive action should be aligned. Support for the idea that both legislation and executive action should be subject to the same doctrinal test for constitutionality can be found also in Hong Kong constitutional jurisprudence—indeed, the Hong Kong courts have not drawn a distinction between their approach to the constitutionality of legislation and their approach to the constitutionality of executive action, and have instead held that all types of governmental action infringing upon constitutional rights stand to be assessed directly against the relevant right by way of a proportionality analysis.[69] Further, to the extent that this suggested doctrinal approach would apply equally across challenges to executive action based upon both Articles 14 and 15, this approach would have the advantage of encouraging clarity and coherence of legal doctrine across both of these constitutional liberties.

The proposal here therefore is for the doctrinal content of the substantive approach to be specified via a translation of the *Jolovan Wham* approach to the context of executive action. Transposed accordingly, challenges to executive action under Articles 14 and 15 would be analysed on the following basis: (1) Did the executive action restrict the constitutional right in the first place? (2) Did the executive authority consider it necessary or expedient to restrict the right? (3) On an objective basis, was there a nexus between the purpose of the executive action and one of the permitted purposes for restrictions articulated in the Constitution?

One might note that Article 14(2)(a) contains a category of permissible restrictions on Article 14(1)(a) rights which are not subject to the "necessary or expedient" test.[70] Also, one might observe that Article 15(4) similarly does not contain

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[69] *Catholic Diocese of Hong Kong v Secretary for Justice* (2011) 14 HKCFAR 754 at para 65; *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372.

[70] *Jeyaretnam Joshua Benjamin*, *supra* note 9 at para 56.

the "necessary or expedient" qualifier in its articulation of the permitted purposes for restrictions of Article 15 rights. It might therefore be argued that the approach proposed above coheres uneasily with the text of these provisions. It is suggested, however, that this objection can be readily dealt with by removing the second step of the proposed approach where Article 15(4) or the second category of permissible restrictions in Article 14(2)(a) is concerned. This would still preserve a degree of commonality of doctrine across Article 14 and 15 challenges to executive action.

An alternative (and preferred) response would be to argue that there is adequate justification in principle for an application of the proposed three-step approach—with the inclusion of the "necessary or expedient" test—across *all* Article 14 and 15 rights. Such an approach would better ensure sufficient judicial oversight over whether a constitutional right has been infringed, would be in service of an adequate balance between constitutional rights and constitutionally permitted derogations from rights,[71] and would best further the interest of coherence of legal doctrine across challenges to legislation and executive action based upon both Articles 14 and 15. While the Court of Appeal decision of *Jeyaretnam Joshua Benjamin* does provide that the second category of permissible restrictions in Article 14(2)(a) is not susceptible to the "necessary or expedient" test,[72] it is worth noting that the wording of the recent Court of Appeal decision in *The Online Citizen*[73] suggests that the *Jolovan Wham* approach is intended for general application across all Article 14 rights, which might lend some support to the argument that the "necessary or expedient" test applies to all categories of restrictions in Article 14(1)(a).

One might also validly wonder whether the Singapore courts ought to go further in assessing the constitutionality of executive action pursuant to Articles 14 and 15. Indeed, ought the courts frame the relevant inquiry as a *rational* nexus test, or perhaps even undertake a proportionality analysis, as the Hong Kong courts have done?[74] These are pertinent questions. For present purposes, it suffices to note that an objective nexus test is the presently prevailing approach for assessing the constitutionality of legislation under Article 14,[75] and the approach that the Singapore courts have taken to analysing the constitutionality of executive action under Article 15 is also similar in substance to an 'objective nexus' test.[76] An 'objective nexus' test along the lines of the *Jolovan Wham* test and adapted accordingly to the context of executive action, as proposed earlier, therefore possesses the advantage of coherence with existing constitutional jurisprudence. Whether the Singapore courts should *develop* constitutional jurisprudence in this regard to a rational nexus or proportionality test would have implications extending beyond this paper's focus, and would require a detailed examination exceeding the confines of this paper.

In sum, this paper has sought to highlight some existing ambiguities in the law relating to the constitutionality of executive action under Articles 14 and 15 in

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71 *Jolovan Wham*, *supra* note 12 at paras 28-33.

72 *Jeyaretnam Joshua Benjamin*, *supra* note 9 at para 56.

73 *The Online Citizen*, *supra* note 17 at para 55.

74 See, for example, Marcus Teo, "A Case for Proportionality Review in Singaporean Constitutional Adjudication" [2021] Sing JLS 174.

75 See *Jolovan Wham*, *supra* note 12.

76 See, for example, *Colin Chan v* MITA, *supra* note 41, and *Vijaya Kumar*, *supra* note 46.

Singapore. It has also proposed a solution comprising both theoretical and doctrinal components—a combined jurisdictional-substantive approach to justify constitutional review of executive action under Articles 14 and 15, which then grounds a doctrinal approach based upon an 'objective nexus' test. It is hoped that the ideas offered in this paper will contribute to further clarity in this practically important area of Singapore constitutional law.