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ONLINE FALSEHOODS, CONSTITUTIONAL FREE SPEECH AND ITS LIMITS

The Online Citizen v Attorney-General

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The Singapore Court of Appeal has for the first time in *The Online Citizen v The Attorney-General* (8 October 2021) adjudicated on the constitutionality of correction directions issued by Ministers against allegedly false statements of fact under the *Protection from Online Falsehoods and Manipulation Act 2019*. An overarching framework was utilised to assess whether the Ministerial directions restrict free speech under Article 14(1)(a) of the *Constitution*; if so, whether the restrictions are justifiable under the *Constitution* and whether there is a rational nexus between the statutory aims and enumerated exceptions. This case comment also examines the constitutional stance towards subject statements, the doctrine of compelled speech as applied in the US and UK, stop communication directions, the contexts in which statements are interpreted and their potential harms as well as the proportionality analysis for assessing the constitutionality of legislation.

I. Introduction

Concerns over fake news globally have continued unabated in recent years. Conscious of the proliferation of online falsehoods, the Singapore Government issued a Green Paper[1] in January 2018 highlighting the risks and challenges, and recommended the setting up of a Select Committee by Parliament to examine the issues. After receiving numerous written representations and hearing oral evidence from the public including tech and media experts, law academics, civil society activists and community groups, the Select Committee presented its report[2] to Parliament in September 2018. This led to a Bill being drafted, debated and passed in Parliament, culminating in the enactment of the *Protection from Online Falsehoods and Manipulation Act 2019* ("*POFMA*").[3] Amongst other measures, the Minister is empowered to instruct the *POFMA* Office to issue a Correction Direction ("CD") and/or Stop Communication Direction ("SCD") (Part 3 Directions) in respect of

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1 Parliament of Singapore, Ministry of Law, *Deliberate Online Falsehoods: Challenges and Implications* in *Miscellaneous Papers*, Misc 10 of 2018.

2 Parliament of Singapore, Select Committee, *Report of the Select Committee on Deliberate Online Falsehoods—Causes, Consequences and Countermeasures*, Parl 15 of 2018 (19 September 2018) [Select Committee Report].

3 (No 18 of 2019). The statute took effect from 2 October 2019.

the communication in Singapore of a false statement of fact if the Minister is of the opinion that it is in the "public interest" to issue the direction.[4]

The present case—*The Online Citizen v The Attorney-General*[5]—marked the first constitutional challenge to the statute before the highest court of the land. The five-member Singapore Court of Appeal, in a lengthy judgment delivered by Sundaresh Menon CJ, upheld the constitutionality of the provisions under Part 3 of the *POFMA* utilising an overarching judicial framework. Given the perceptions that this statute would confer additional powers on the government to curb speech, it was crucial that the scope of constitutional free speech under Article 14 of the Singapore Constitution,[6] the statutory objectives and the permitted restrictions upon free speech be subject to thorough judicial scrutiny.

A. *Factual Background*

The Minister for Manpower issued three CDs to the Singapore Democratic Party ("SDP"), an opposition political party, arising from an online article and two Facebook postings. Two subject statements relating to local retrenchment and the employment situation were identified by the Minister to be false. The SDP complied by adding correction notices but subsequently applied to the Minister to vary or cancel the CDs under *POFMA*.[7] When the Minister rejected the application, the SDP applied to the High Court to set aside the CDs.[8] In the other appeal, The Online Citizen ("TOC"), an Internet content provider,[9] had reported in an article that Lawyers for Liberty ("LFL"), a Malaysian NGO, issued a press statement about the inhumane treatment of prisoners in Singapore. The Minister for Home Affairs issued a CD against TOC, identifying the subject statement containing LFL's claims about the methods used in the prison, which prompted TOC to apply to set aside the CD.

Both the applications by SDP[10] and TOC[11] were dismissed by the High Court, and their respective appeals against the High Court decisions were heard together. One CD was set aside whilst the others remained intact. The constitutional issue before the Court of Appeal, which will be the focus of this case comment, was whether the Part 3 Directions issued by the Ministers under *POFMA* contravened Article 14.[12]

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4 *POFMA*, s 10.

5 [2021] SGCA 96 [*TOC v AG*].

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

7 *POFMA*, s 19.

8 *POFMA*, s 17.

9 TOC's licence has since been cancelled by the authorities for failing to declare all its funding sources: "No intention of submitting further information to IMDA: The Online Citizen" *Channel News Asia* (28 Sep 2021), online: Channel News Asia <https://www.channelnewsasia.com/singapore/online-citizen-website-licence-no-intention-submit-further-information-imda-2206446>.

10 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25.

11 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36.

12 The other two issues on appeal related to the proper approach to deal with applications to set aside Part 3 Directions and the associated burden and standard of proof.

B. *The Court of Appeal Decision*

Central to the issue of constitutional protection of free speech was whether the relevant provisions of the statute and its objectives could withstand constitutional scrutiny under Article 14:

> 14.—(1) Subject to clauses (2) and (3) —
>
> (a) every citizen of Singapore has the right to freedom of speech and expression; …
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> (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; …[13]

In 2020, the Singapore Court of Appeal in *Wham Kwok Han Jolovan v Public Prosecutor*[14] enunciated a three-step approach to determining the constitutionality of legislation under Article 14. Transposed to our present context, the *Jolovan Wham* approach would enquire:

(a) whether the issuance of a Part 3 Direction restricts the right to freedom of speech of the communicator of a subject statement;
(b) whether Part 3 of the *POFMA* is justifiable under Article 14(2)(a) of the *Constitution*; and
(c) whether there is a nexus between the purpose of the *POFMA* and the exceptions to free speech under Article 14(2)(a) of the *Constitution*.

On the first enquiry, the Court of Appeal in *The Online Citizen* opined that the issuance of a CD by the Minister did not restrict the right of a statement-maker to continue publishing an alleged falsehood. The statement-maker only has to put up the correction notice as required under the *POFMA* but is not required to "modify the content of the communicated material; nor is [he or she] prevented from modifying, if [he or she] so wishes, the content of that material".[15]

With respect to the second enquiry, section 4 of the *POFMA* provides that "it is in the public interest to do anything if the doing of that thing is necessary or expedient" in the interests of the security of Singapore, friendly relations of Singapore with other countries or to achieve other specified objectives. The SDP argued that the scope of "public interest" in section 4 of the *POFMA* is broader than the permitted ground of "public order" in Article 14(2)(a) of the *Constitution* for restricting free speech.

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[13] *Constitution*, *supra* note 6, art 14.
[14] [2021] 1 SLR 476 (CA) [*Jolovan Wham*].
[15] *TOC v AG*, *supra* note 5 at para 67.

Upon reviewing the parliamentary debates on the Bill, the Court of Appeal concluded that the Singapore Parliament regarded the *POFMA* as "necessary or expedient" in the interests of national security and public order.[16] During the debates,[17] references were made by the Minister for Law and Members of Parliament to the statutory objectives to "support the infrastructure of fact and promote honest speech in public discourse", the threats posed by "information operations" to the "national sovereignty and security" of states including Singapore, the "serious loss of trust in governments, in institutions" and the impact on "public perception in elections around the world".

Turning to the third enquiry, there was also a rational nexus between the purpose of the *POFMA* and the exceptions to free speech under Article 14(2)(a) of the *Constitution*.[18] The court adopted an expansive definition of the phrase "in the interest of public order" in Article 14(2)(a) to include "laws that are not purely designed or crafted for the immediate or direct maintenance of public order".[19] In their view, the extensive and rapid spread of online falsehoods could certainly pose risks to the preservation of public order by undermining trust in the Government and other key public institutions[20] and by influencing the outcome of elections.[21]

II. Discussion

We will critique the court's approach to the constitutionality of the *POFMA* provisions covering issues pertaining to the constitutional status of subject statements, compelled speech in the United States ("US") and United Kingdom ("UK") with reference to the *European Convention on Human Rights*,[22] stop communication directions, the contexts in which subject statements are interpreted and their potential harms, and the proportionality analysis to assess the constitutionality of legislation.

A. *Constitutional Free Speech for Subject Statements*

Before applying the *Jolovan Wham* framework, the court considered whether subject statements identified by the Minister to be false enjoy any constitutional freedom of speech. Based on judicial precedents on the tort of defamation[23] and the

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16 *Ibid* at para 89.

17 *Parliamentary Debates Singapore: Official Report*, vol 94 (7 May 2019) [*Singapore Parliamentary Debates*].

18 *TOC v AG*, *supra* note 5 at para 101.

19 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR (R) 582 (HC) [*Chee Siok Chin*]. The narrower definition in *Public Prosecutor v Phua Keng Tong* [1985–1986] SLR (R) 545 (HC) being "synonymous with 'public safety and tranquillity'" was rejected.

20 *TOC v AG*, *supra* note 5 at para 99.

21 *Ibid* at para 100.

22 *European Convention for the Protection of Human Rights and Fundamental Freedoms,* 4 November 1950, ETS No 005 [*ECHR*].

23 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at para 283 (CA) [*Review Publishing*].

Protection from Harassment Act[24] respectively, it was clear that speech that has been proven to be false should not be protected under the *Constitution*. The court stated in no uncertain terms that there was no room for false speech under the "free marketplace of ideas"[25] rationale. Insofar as subject statements that were merely identified by the Minister to be false, however, the Court of Appeal held that such statements should continue to enjoy constitutional protection at least until they are judicially determined to be false, for "[t]ruth and falsehood are ultimately matters to be determined by a court based on the evidence".[26]

Hence, how subject statements are to be determined by the court to be false under *POFMA* would be crucial for delineating the scope of free speech in Singapore. The High Court judge in *Singapore Democratic Party v Attorney-General*[27] had stated, based on the existence of constitutional free speech for citizens in Article 14(1) as a "starting point", that the Minister, if he so wishes to restrict speech via a CD, should have the onus to prove that the subject statement was false. Though the High Court's "starting point" on constitutional free speech for citizens appeared similar to that adopted by the Court of Appeal, the latter court took a different course on burden of proof, ruling that the statement-maker, in an application to set aside Part 3 Directions, has the burden to provide *prima facie* evidence of reasonable suspicion, for example, that the statement was not a statement of fact, or was true.

This conclusion was based on an analysis of the statutory framework under *POFMA* that, according to the court, treated the application for setting aside a CD as an avenue for the aggrieved statement-maker to challenge the executive decision.[28] Instead of relying on *prima facie* constitutional free speech, the Court of Appeal reiterated the existing principle of the presumption of legality of executive action to support its conclusion on burden of proof.[29]

How do we draw the connection to the court's ruling that subject statements enjoy constitutional free speech until they are judicially determined to be false? Presumably, if the statement-maker cannot discharge his burden of proof, the subject statement would be regarded as false by the court and it would therefore lose constitutional free speech protection under Article 14. However, there is a conceptual problem. The failure of the statement-maker to discharge the burden of proving the truth of the statement does not necessarily mean the statement is false; strictly speaking, we can only conclude that it is not proved to be true.

For the avoidance of doubt, the falsity of the statement should be distinguished from the legality of the CD as the latter may be set aside for reasons that have nothing to do with whether the subject statement was false—for example, if the subject statement was shown not to have been communicated in Singapore or that it was not technically possible to comply with the CD.[30]

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[24] (Cap 256A, 2015 Rev Ed Sing), s 15; and the minority judgment in *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at paras 115–117 (CA).

[25] *Abrams v United States* 250 US 616 (1919) at 630 *per* Oliver W Holmes Jr ("the best test of truth is the power of the thought to get itself accepted in the competition of the market").

[26] *TOC v AG*, *supra* note 5 at para 60.

[27] [2020] SGHC 25.

[28] *TOC v AG*, *supra* note 5 at para 176.

[29] *Ibid* at para 180, citing *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 (CA).

[30] *POFMA*, s 17(5).

B. *The Doctrine of Compelled Speech*

TOC argued that the CD mechanism, in requiring the putting up of a correction notice, compels the statement-maker to admit that it has made a false statement of fact.[31] In response, the Singapore Court of Appeal stated that the statement-maker who is subject to a CD is entitled to make clear "in a factually accurate manner that it is challenging the CD" in line with the grounds for setting aside a CD, for example, by arguing that the subject statement constituted a true statement of fact.[32] Yet, it is not inconceivable that a statement-maker, who honestly believed that his statement was entirely true, might in fact feel compelled to qualify or disagree with the subject statement identified by the Minister to be false.

In advocating a doctrine of compelled speech, TOC relied on the US Supreme Court majority decision in *Wooley v Maynard*[33] for the principle that one should not only have the "the right to speak freely" but also "the right to refrain from speaking at all". Maynard, a Jehovah Witness, had challenged the New Hampshire law that criminalised his act of obscuring the State motto "Live Free or Die" on his automobile licence plate as the motto was morally objectionable to him. The majority judges in *Wooley* held in 1977 that the state law was contrary to the First Amendment and therefore unconstitutional. The doctrine of compelled speech in the US not only encompasses the interference of the speaker's autonomy not to engage in speech—for example, in having to accept the state motto in *Wooley*,[34] but also cases where the compulsion to make certain speech meant the speaker was restricted in what he would have desired to say.[35] The doctrine continues to hold sway in recent US decisions.[36] Another case that accepted the doctrine of compelled speech was *Lee v Ashers Baking Co Ltd and others*.[37] The Ashers Bakery refused to add decorations on the cake with the words "support gay marriage" as requested by the customer, a homosexual man. The bakery subsequently refunded the payments because the owners, the McArthurs, believed that the notion of same-sex marriage was contrary to their Christian faith. The UK Supreme Court held that though there was no direct discrimination on the ground of sexual orientation or political opinion since a heterosexual customer would have received a similar response from the McArthurs,[38] the owners were being compelled to "express a message with

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31 *TOC v AG*, *supra* note 5 at para 68.

32 *Ibid* at para 78.

33 430 US 705 at 714 (1977) [*Wooley*].

34 See also *West Virginia State Board of Education v Barnette*, 319 US 624 (1943) (compelling students' flag salute and pledge as a form of utterance was held unconstitutional).

35 See *eg*, *Miami Herald Pub Co v Tornilla* 418 US 241 (1974) (compelling newspapers to publish replies to criticisms of candidates for political office); and *Riley v National Federation of the Blind of North Carolina, Inc* 487 US 781 at 797 (1988) (requiring professional fundraisers to disclose percentage of gross receipts turned over to charity). See generally, Spencer Livingstone, "Two Models of the Right Not to Speak" (2020) 133:7 Harv L Rev 2359.

36 *National Institute of Family & Life Advocates v Becerra* (2018) 138 S Ct 2361 (US) at 2379; *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission* (2018) 201 L Ed 2d 35 (US) at 65.

37 [2018] 3 WLR 1294 (UKSC) [*Lee*].

38 The claims were brought under *The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006* (NI) No 439; and *The Fair Employment and Treatment (Northern Ireland) Order 1998* (NI) No 3162(NI 21).

which they deeply disagreed".[39] The latter, according to the court, contravened the freedom of thought, conscience and religion (Article 9) and the right to freedom of expression (Article 10) under the *ECHR*.

The Singapore court noted that Article 10 of the *ECHR* on freedom of expression, unlike the Singapore counterpart, includes the "freedom to hold opinions". In this regard, the UK Supreme Court stated that Article 10 incorporates the freedom not to hold and not to have to express opinions.[40] It thus concluded that a doctrine similar to the US doctrine of compelled speech in *Wooley* applied to the *ECHR* context.[41]

The Singapore Court of Appeal observed that the majority judges in *Wooley* and the UK court in *Lee* respectively were directing their minds to freedom of thought or belief[42] rather than speech. *Wooley* had indeed focused on freedom of thought or mind under the First Amendment.[43] As for *Lee*, though reference was made to Article 9 *ECHR* on freedom of thought and conscience, the UK court also considered that free speech under Article 10 of *ECHR per se* was wide enough to accommodate the freedom *not* to express an opinion.[44] The phrase "freedom of speech and expression" in Article 14(1)(a) of the *Constitution* should impliedly include the freedom to hold opinions even if the words are not explicitly stated. In the defamation case of *Review Publishing*,[45] the Court of Appeal stated that the fundamental right to free speech enables citizens "to express their views on matters of public interest", and the expression of opinions is clearly a basic premise underlying the defence of fair comment to a claim in civil defamation.

Furthermore, the cases were distinguishable on the facts. Instead of the majority's interpretation, the Singapore court preferred the minority view in *Wooley*[46] that Maynard was not compelled to speak but was free to express disagreement with the motto by adding qualifications to the licence plate in an "equally visible manner"[47] similar to the appellants in the present appeal. In contrast, the McArthurs in *Lee* were not entitled to change or qualify the words on the cake notwithstanding their disagreement with them.

Based on the interpretations of *Wooley* and *Lee*, TOC's arguments were therefore rejected by the Court of Appeal without the necessity to rule on whether the doctrine of compelled speech ought to be applicable to Singapore.[48] It remains open for the court to articulate in a future case whether Article 14 should incorporate the (negative) freedom *not* to speak or express an opinion. On this issue, the factual matrix in *Lee* suggests that there are or will be circumstances in the future in which a statement-maker may not have the freedom to qualify his or her original

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[39] *Lee*, *supra* note 37 at para 54. See also Christopher McCrudden, "The Gay Cake Case: What the Supreme Court Did, and Didn't, Decide in Ashers" (2020) 9 Oxford J L Relig 238 at 251–256.

[40] It cited *RT (Zimbabwe) v Secretary of State for the Home Department* [2013] 1 AC 152 (UKSC) at paras 36, 42 *per* Lord Dyson JSC.

[41] *Lee*, *supra* note 37 at paras 52, 53.

[42] *TOC v AG*, *supra* note 5, at paras 70 (on *Wooley*), 76 (on *Lee*).

[43] *Wooley*, *supra* note 33.

[44] *Lee*, *supra* note 37 at para 52.

[45] *Review Publishing, supra* note 23 at para 267.

[46] *Per* Justices Rehnquist and Blackmun.

[47] *TOC v AG*, *supra* note 5 at para 72.

[48] *Ibid* at para 79.

statements. Hypothetically speaking, if the CD mechanism were tweaked such that the statement-maker would be prevented from adding any qualifications to the correction notice, this would arguably amount to compelled speech. If we were to adopt a strict interpretation of free speech in Article 14 that excludes the right not to speak, speech in the above instances would not be protected under the *Constitution*.

Any doctrine of compelled speech applicable to Singapore would have to be accommodated within Article 14—with respect to which the core premise should be the right not to speak or express an opinion as part of democratic discourse as opposed to purely freedom of conscience based on dignitarian interests.[49] To that end, the judiciary might delineate the scope of compelled speech to be protected or not (*eg*, note that the US jurisprudence does not generally protect compelled disclosures of factual statements *per se*).[50] Furthermore, the particular form of compelled speech, even if accepted as part of the citizen's freedom of speech and expression protected under Article 14(1), would have to satisfy the requirements of justifiability of restrictions and rational nexus set out in Article 14(2).

C. *The Constitutionality of SCDs*

Thus far, the discussion has centred on the constitutionality of CDs. Even if the court did refer to Part 3 Directions generally, it had not applied its mind specifically to SCDs which require the statement-maker to stop communicating in Singapore the subject statement by a specified time,[51] or any statement that is substantially similar[52] to the subject statement. In effect, when a SCD is issued, the statement-maker may either be restricted from repeating the original statement or restricted from making statements substantially similar to the original statement.

SCDs would arguably result in a greater restriction of free speech when compared to CDs, which do not impact the original statement made by the statement-maker and, as indicated by the court, allow the statement-maker some freedom to qualify the correction notice. The statement-maker subject to a CD can continue to reiterate the original statement or make a declaration as to its truth. Nevertheless, even if the effect of SCDs is to restrict constitutional free speech, such directions issued by the Minister would be held to be constitutional ultimately if the second and third steps of the *Jolovan Wham* approach are satisfied. Hence, though the analysis of the first step would differ for SCDs, the ultimate outcome as to its constitutionality may well be the same as for CDs.

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[49] See the critiques of US jurisprudence: Ashutosh Bhagwat, "The Conscience of the Baker: Religion and Compelled Speech" (2019) 28:2 Wm & Mary Bill Rts J 287; and Vikram David Amar & Alan Brownstein, "Toward a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine" [2020] 2020:1 U Ill L Rev 1.

[50] *Beeman v Anthem Prescription Mgmt, LLC*, 315 P 3d 71 at 86 (Cal 2013). See Eugene Volokh, "The Law of Compelled Speech" (2018) 97:2 Tex L Rev 355 at 379–382.

[51] *POFMA*, s 12(1).

[52] *POFMA*, s 12(2).

D. *The Meaning of 'False' Statements: Contexts and Harms*

An issue was raised as to whether the broad definition of "false" in section 2(2)(b) of the *POFMA* was constitutional. TOC contended that the provision should be amended (with the strike-through) as follows: "a statement is false if it is false or misleading, whether wholly or in part, and whether on its own or in the context in which it appears". As mentioned above, the TOC article that was subject to the CD issued by the Minister had reported on the LFL article concerning inhumane treatment in the Singapore prison. The thrust of TOC's argument appeared to be that a false statement of fact in the form of a neutral reportage should not be regulated under the *POFMA*.

In response, the Court of Appeal took the position that false statements, even if they were to be read out of context, might nevertheless give rise to harms which the *POFMA* was meant to address.[53] Hence, the focus should be the actual and potential harms targeted by the *POFMA* rather than the contexts in which the false statements were interpreted. As the assessment of "public interest" under section 4 is within the Minister's "discretion",[54] it is likely that the determination of whether the associated harms would arise from the allegedly false statements would be made by the Minister.

The court's stance does not imply that the online materials communicated in Singapore would be susceptible to a no-holds-barred interpretation under the *POFMA* without any recourse to context. In fact, an objective test based on the perspective of the ordinary reasonable reader would be applied to interpret the allegedly false materials and ascertain whether they contained the subject statements identified by the Minister.[55] That is, the reasonable reader's perspective would determine the interpretive context(s). However, one should note that the reasonable reader may from time to time read the materials out of context depending on how the materials are presented. Further, eschewing the "single meaning" rule in defamation law, the court has accepted that there may be multiple reasonable interpretations of the subject statement and materials.[56]

E. *Proportionality Analysis under the POFMA?*

TOC argued that the Minister, when assessing whether it was "in the public interest" to issue a Part 3 Direction, has to consider proportionality analysis, namely "the least restrictive means" available to him of taking action against a statement that he or she considered to be a false statement of fact. Though the Minister for Law had during the second reading of the *POFMA* bill[57] in 2019 alluded to the proportionality approach, he had assumed that the approach was "already incorporated into the requirements under the Bill" without any specific mention of "the least restrictive

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53 *TOC v AG*, *supra* note 5 at para 108.

54 *Ibid* at para 130.

55 *Ibid* at para 109.

56 *Ibid* at paras 133, 137, 152.

57 *Singapore Parliamentary Debates*, *supra* note 17.

means". Hence, the court concluded that there was to be no additional requirement of proportionality[58] other than what was already stated in the statute namely the existing requirement of whether it is "necessary or expedient in the public interest" in section 4.[59]

Based on the judicial interpretation, the current approach in Singapore for the Minister's assessment of "public interest" for the issuance of Part 3 Directions should be based on whether he considers it "necessary and expedient" to do so and not the test of "the least restrictive means". Indeed, the *Jolovan Wham* framework, which was pronounced in 2020 subsequent to the Minister's speech in Parliament, did not refer to such a test. Nonetheless, Singapore already embraces a form of proportionality analysis within Article 14 through the application of the three-step framework that requires the court to balance free speech against legislative restrictions based on the justifiability of restrictions and the rational nexus test.

The apparent confusion may be due to the different meanings attributed to the term "proportionality" in constitutional parlance. The term can be used generically to refer to the court's assessment of fundamental rights and the permitted restrictions, and in that regard, may encompass one or more of the approaches based on the rational nexus between the statutory aims and restrictions, the minimal restriction of rights and/or the cost-benefit analysis.[60] When used in tandem with the phrase "the least restrictive means", it may represent a distinctive method used in the balancing exercise premised on necessity. In the absence of the phrase in court judgements, however, differing opinions can arise as to the precise proportionality analysis used by the court.[61]

Consideration must also be given to the interpretation of the constitutional text. Article 14 of the *Constitution* allows the Parliament to impose restrictions not merely where it is "necessary" but also if it is "expedient" to do so. The legislative remit in Article 14 is quite wide, possibly extending beyond the confines of "the least restrictive means" test.[62] References may also be made to local precedents which noted that the proportionality analysis was of European origin and not part of common law of Singapore law;[63] and distinguished Singapore law from Article 14 of the *Canadian Charter of Rights and Freedoms*,[64] which required restrictions to no more than minimally impair rights and freedoms.[65]

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58 *TOC v AG*, *supra* note 5 at para 111.

59 *Ibid* at para 112.

60 Jack T-T Lee, "According to the Spirit and Not to the Letter: Proportionality and the Singapore Constitution" (2014) 8:3 Vienna J Intl Const L 276 at 278.

61 See Alec S Sweet, "Intimations of Proportionality? Rights Protection and the Singapore Constitution — *Wham Kwok Han Jolovan v Public Prosecutor*" [2021] 1 Sing JLS 231 (the *Jolovan Wham* framework approximates to a proportionality analysis including the least restrictive means test); and Li-Ann Thio, "Constitutional and Administrative Law", SAL Annual Review of Singapore Cases (2020) 21 SAL Ann Rev 1 at para 1.159 (no application of "least restrictive means" test in *Jolovan Wham*).

62 See David Tan and Jessica SJ Teng, "Fake News, Free Speech and Finding Constitutional Congruence" (2020) 32 Sing Acad LJ 207 at para 23.

63 *Chee Siok Chin*, *supra* note 19 at para 87. There was no mention of the "least restrictive means" or similar test.

64 Part I of the *Constitution Act 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

65 *Chee Soon Juan v Public Prosecutor* [2011] 2 SLR 940 (HC). The Canadian case was *Vancouver (City) v Zhang* [2010] BCCA 450 at paras 67, 69 (city bylaw that had the effect of restricting political

Arguably, Article 14 as it stands does not specifically mandate the application of "the least restrictive means test". That said, the test offers the prospect for a more nuanced analysis when we consider whether and how its application may affect the constitutionality of CDs and SCDs. If we accept the court's assessment that CDs do not require any modification to the speech content of statement-maker to begin with, the CD mechanism would appear to be consistent with the "least restrictive means" test. There may, however, be a different slant to its application to SCDs. Arguably, the use of SCDs by the Minister to stop the communication of speech may not pass muster unless there is evidence that it was not feasible in the circumstances to employ CDs or other less restrictive means to counter the alleged falsehoods. This would also be in line with the "calibrated manner" in which legislative measures should be deployed as highlighted by the Select Committee.[66]

III. Conclusion

The Singapore Court of Appeal has in this landmark judgment made several salient points concerning the constitutionality of Part 3 Directions under the *POFMA*:

(i) subject statements identified by the Minister are constitutionally protected until they are judicially determined to be false;
(ii) CDs do not in themselves restrict constitutional free speech due to the freedom of the statement-maker to qualify the subject statements, and, in any event, such purported restrictions would be justifiable under Article 14;
(iii) the *POFMA* (correctly) envisages that false subject statements can give rise to actual or potential harms even if they are read out of context; and
(iv) the proportionality analysis insofar as it is based on the requirement of "the least restrictive means" is at present not applicable in Singapore.

Though the Singapore court has ruled that Part 3 Directions are constitutional under the *Jolovan Wham* framework, there remain lingering questions regarding the effects on constitutional free speech arising from the issuance of SCDs and the potential application of the doctrine of compelled speech in Singapore.

expression was held unconstitutional as it did not meet the minimal impairment requirement); and *R v Oakes* [1986] 1 SCR 103 (SCC) (on the minimal impairment requirement).

66 Select Committee Report, *supra* note 2 at 134.