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CONSTITUTIONAL IMPLICATIONS OF THE FIRST POFMA JUDGMENT

The Online Citizen v Attorney-General

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In *Online Citizen*, the Court of Appeal's first judgment on appeal under Section 17 of the *Protection from Online Falsehoods and Manipulation Act*, the Court addressed the constitutionality of *POFMA*'s provisions empowering the Minister to issue Correction Directions under Article 14 of the Constitution. The decision is the first application of the three-step framework set out in *Jolovan Wham* for Article 14 challenges, but the Court's reasoning therein appears to differ quite considerably from that earlier decision, both on how courts should identify restrictions on free speech under Article 14(1) and how courts should assess justifications given for those restrictions under Article 14(2). This note unpacks the Court's reasoning on the Article 14 challenge in *Online Citizen*, drawing out the implications that it may have for future challenges and constitutional adjudication more broadly.

I. Introduction

The *Protection from Online Falsehoods and Manipulation Act*[1] ("*POFMA*") is a remarkable piece of legislation. Although instruments which limit individual behaviour in the public interest have always been a mainstay of Singapore's regulatory landscape, in the past such instruments tended to be briefly-worded, conferring broad powers on the state. *POFMA*, by contrast, is meticulously drafted and precisely targeted, reflecting the Government's (in particular, the Ministry for Home Affairs') perception that modern threats are increasingly covert and difficult to distinguish from legitimate acts. It thus seemed inevitable that any judicial approach to appeals against directions issued under *POFMA* would be similarly complex and refined. The Court of Appeal's first decision on *POFMA*, *The Online Citizen v Attorney-General*,[2] delivers on that expectation. In a mammoth 246-paragraph judgment, the Court set out a five-step framework to address appeals to executive directions issued under Part 3 of *POFMA*. The framework is comprehensive and nuanced, striking a good balance between the expectations of statement-makers and the public interest in combatting misinformation on important issues like the role

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1 (No 18 of 2019, Sing).

2 [2021] SGCA 96 [*Online Citizen*].

of context in the interpretation of targeted statements and the burden of proof in appeals under *POFMA*.[3]

Online Citizen, however, is of relevance beyond *POFMA* itself, because the applicants argued that portions of Part 3 of *POFMA* contravened their right to free speech under Article 14 of the *Constitution of the Republic of Singapore*.[4] A year prior, in *Wham Kwok Han Jolovan v Public Prosecutor*,[5] the Court of Appeal had set out a seemingly-novel three-step analytical framework to address Article 14 challenges to legislation, and *Online Citizen* was the first opportunity since for the Court to test that framework. However, the manner in which the Court in *Online Citizen* applied important aspects of the framework, involving the identification of restrictions on free speech under Article 14(1) and the justification of those restrictions under Article 14(2), appears to differ considerably from what the Court did in *Jolovan Wham* itself. *Online Citizen*, then, is an important second chapter in the development of the applicable test for Article 14 challenges. This note dissects the decision and highlights the various implications it may have for future Article 14 challenges and constitutional adjudication in Singapore.[6]

II. *POFMA*, *Jolovan Wham* and *Online Citizen*

POFMA, as its name suggests, is a law meant to tackle falsehoods which spread online with deleterious consequences. Among other things, it empowers Ministers to issue executive directions against statement-makers under Part 3 of *POFMA*. Two such directions exist: Correction Directions under Section 11, which require statement-makers to append a "correction notice" identifying the subject statement as false and/or providing another statement of fact in its place;[7] and Stop Communication Directions under Section 12, which require statement-makers to remove and cease communication of identified subject statements.[8] Section 10 sets

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3 For a discussion, see Marcus Teo, "Giving Substance to Singapore's Fake News Law: *Online Citizen*", *ICONnect Blog* (4 November 2021), online: ICONnect Blog <http://www.iconnectblog.com/2021/11/giving-substance-to-singapores-fake-news-law-online-citizen/>. For an overview of the concerns that existed prior to the Court of Appeal's decision, which conflicting lower court decisions did not resolve, see Marcus Teo and Jonathan Hew, "Context and Meaning in the Interpretation of Statements Under POFMA", *Singapore Law Gazette* (June 2020), online: Singapore Law Gazette <https://lawgazette.com.sg/feature/interpretation-pofma/>; Marcus Teo and Kiu Yan Yu, "Burden of Proof and False Statements of Fact under the Protection from Online Falsehoods and Manipulation Act 2019" (2021) 33 Sing Ac LJ 760 [Teo & Kiu, "Burden of Proof"].

4 (1999 Rev Ed Sing).

5 [2021] 1 SLR 476 [*Jolovan Wham*].

6 A clarification about this note's scope should also be made: it is concerned with the implications *Online Citizen* has for the structure of Art 14 challenges (*ie,* when courts determine that the right is restricted, and how courts determine whether restrictions are justified), *not* the substantive theories of free speech which the Court of Appeal engaged with. For a discussion of how *POFMA* and *Online Citizen* are purportedly based on a "truth" theory of free speech and the conceptual difficulties that arise from this, see Marcus Teo, "Targeted Speech Directions in Singapore" (2022) *The Round Table* (forthcoming). I am grateful to the anonymous reviewer for pushing me to clarify this, which also encouraged me to touch on the latter theoretical issue in the article cited in this footnote.

7 *POFMA*, *supra* note 1, s 11(1).

8 *Ibid*, s 12(1).

out three requirements that must be met before these Directions can be issued: the subject statement must be a statement of fact; it must be a false statement; and the Minister must believe that issuing the Direction would be in the public interest.[9] An act "in the public interest" is further defined in Section 4 as an act "necessary or expedient", *inter alia*, "to prevent any influence of the outcome of [a presidential or parliamentary] election" and "to prevent a diminution of public confidence in the performance of any duty or function of, or in the exercise of any power by, the Government".[10] An individual issued a Direction under Part 3 has a right of appeal to the High Court under Section 17, but only on three grounds: that the individual did not communicate the subject statement, that the subject statement is true or not a statement of fact and that the Direction is technically impossible to comply with.[11]

POFMA was passed in 2019, amidst a global upswell in concerns about fake news and scepticism about the role of false statements in public discourse. In Parliament, Minister for Law Kasiviswanathan Shanmugam had identified as *POFMA*'s purpose the need to protect the "infrastructure of fact" upon which free speech and democratic discourse rests, citing the observations made by Professor Thio Li-ann during Select Committee hearings, that free speech should not include the right to make false statements, because "[n]o public interest is served by communicating misinformation".[12] These points echoed observations made by Sundaresh Menon CJ several years earlier in *Attorney-General v Ting Choon Meng*.[13] In a dissenting judgment, dealing with a point left unaddressed by the majority, Menon CJ reasoned that "false speech, which has been proven as a matter of fact to be false in a court of law" was "not protected under Art 14(1) of the Constitution" because it "can contribute little to the marketplace of ideas or to advances in knowledge for the benefit of society as a whole."[14] And even if false speech were protected under Article 14(1), restrictions on such speech could easily be justified under Article 14(2), because the "rapid dissemination" of false speech "could conceivably threaten public order".[15] Moreover, even though the threat to public order may not be considerable, since "the question of whether the balance between the right to free speech and the protection of public order has been struck in a necessary or expedient manner in any given case depends significantly also on the nature of the interest in that speech", the questionable public interest in false speech meant that it could justifiably be restricted to prevent even a minor threat to public order.[16]

Thus, Menon CJ's judgment in *Ting Choon Meng* doubted that false speech would be protected under Article 14, and also followed a two-step process in assessing the constitutionality of speech restrictions: first, whether the restricted

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9 *Ibid*, s 10(1).

10 *Ibid*, ss 4(d) and 4(f).

11 *Ibid*, s 17(5).

12 K Shanmugam, "Second Reading Speech on the Protection from Online Falsehoods and Manipulation Bill", *Ministry of Law* (7 May 2019), online: Ministry of Law <https://www.mlaw.gov.sg/news/parliamentary-speeches/second-reading-speech-by-minister-for-law-k-shanmugam-on-the-protection-from-online-falsehoods-and-manipulation-bill> at paras 89, 268.

13 [2017] 1 SLR 373 [*Ting Choon Meng*].

14 *Ibid* at paras 115, 117.

15 *Ibid* at paras 118-119.

16 *Ibid* at para 120.

speech was protected under Article 14(1); second, whether the restricting legislation could be justified as a legitimate "balance" between free speech and a proper purpose under Article 14(2). This two-step process would find clearer expression in *Jolovan Wham*, a Court of Appeal decision rendered after *POFMA* was enacted but before *Online Citizen* was published. In *Jolovan Wham*, an accused person was charged under s 16(1)(a) of the *Public Order Act* 2009 ("*POA*")[17] for holding a public assembly without a licence and argued that the licensing regime unjustifiably restricted free speech under Article 14. Judith Prakash JA, writing for a unanimous Court, set out "a three-step framework to assist courts in determining whether a law impermissibly derogates from Art 14 of the Constitution":[18]

> First, it must be assessed whether the legislation restricts the constitutional right in the first place …
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> Second, if the legislation is found to restrict the right guaranteed by Art 14, it must be determined … whether Parliament had considered it "necessary or expedient" to restrict the constitutional right in question, or more generally to assess the purposes for which Parliament passed the relevant legislation …
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> Third, the court must analyse whether, objectively, the derogation from or restriction of the constitutional right falls within the relevant and permitted purpose for which, under the Constitution, Parliament may derogate from that right. This must be established by showing a nexus between the purpose of the legislation in question and one of the permitted purposes identified under Art 14(2)(b) of the Constitution.
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> In the final analysis, it is imperative to appreciate that a balance must be found between the competing interests at stake … the idea of achieving a balance between a constitutional right and a constitutionally permitted derogation is not novel to our law …

In *Online Citizen*, the applicants challenged "[t]he constitutionality of Part 3 of the POFMA", arguing that "portions of Part 3 are unconstitutional to the extent that they purport to limit the right to freedom of speech on grounds other than those set out in Art 14(2) of the Constitution".[19] In particular, *POFMA* section 10(1)(b) read with sections 4(d) and 4(f) allegedly allowed Correction Directions to be issued against false statements in circumstances where those Directions would not further any purpose under Article 14(2). Menon CJ, writing for a unanimous Court, assessed the constitutionality of Part 3 of *POFMA* under *Jolovan Wham*'s three-step framework.

The Court first considered whether *POFMA* restricted free speech under Article 14(1). This question was broken down into two sub-questions: (i) "[w]hether statements that have been identified as subject statements enjoy any protection

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[17] (2020 Rev Ed Sing).

[18] *Jolovan Wham*, *supra* note 5 at para 29.

[19] *Online Citizen*, *supra* note 2 at para 42.

under Art 14(1) of the Constitution";[20] and (ii) "[w]hether the issuance of a Part 3 Direction restricts the right to freedom of speech of the communicator of a subject statement".[21] On sub-question (i), the Court held that subject statements could enjoy protection under Article 14(1). Citing Menon CJ's judgment in *Ting Choon Meng*, the Court held that "false speech, which has been proven as a matter of fact to be false in a court of law … cannot be justified as free speech which should be protected on the basis of any of the theoretical justifications underpinning the liberty of persons relating to free speech."[22] But this carve-out from Article 14(1) for "false speech" only applied to speech which had been "judicially determined" as false—and since, at the time of the appeal, a subject statement was merely a statement which the Minister, rather than the court, had identified as false, it could not be called "false speech" for the purpose of the carve-out.[23] Subject statements were therefore entitled to protection under Article 14(1).

On sub-question (ii), however, the Court held that Correction Directions did not restrict such protected speech. This was because a statement-maker against whom a Direction has been issued "is not required to modify the content of the communicated material"—it may keep the statement up in its original form, "save that it must also put up the specified correction notice in respect of that material."[24] Moreover, the obligation to append a correction notice did not amount to "compelled speech",[25] even assuming that Article 14(1) precluded compelled speech. Citing the dissenting judgments of Rehnquist and Blackmun JJ in the US Supreme Court's decision of *Wooley v Maynard*,[26] the Court differentiated an obligation to "communicat[e] a point of view" and an obligation to "assert [it] as true",[27] and reasoned that the former obligation alone did not compel speech because the speaker still "retains the freedom to qualify [the point of view] appropriately in an equally visible manner".[28] The Court then held that the obligation to post a correction notice was only an obligation to communicate a point of view, because the Direction did not "prevent the communicator of the subject statement from making clear, in a factually accurate manner, that it is challenging the Correction Direction in accordance with the relevant statutory provisions in so far as any of the grounds for setting aside the Correction Direction under s 17(5) of the POFMA might be applicable."[29]

Thus, Part 3 of *POFMA* did not restrict free speech. However, the Court of Appeal then considered *obiter* whether, were it a restriction, *POFMA* could be justified under Article 14(2). On the second step of *Jolovan Wham*'s framework, the Court found that Parliament had considered Part 3 of *POFMA* to be "necessary or expedient" in the interests of public order and national security, because Parliament had discussed "serious problems arising from falsehoods spread through news media",

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[20] *Ibid* at para 56.
[21] *Ibid* at para 61.
[22] *Ibid* at para 58.
[23] *Ibid* at para 61.
[24] *Ibid* at para 67.
[25] *Ibid* at para 68.
[26] (1977) 430 US 705 at 720-722.
[27] *Online Citizen*, *supra* note 2 at para 71.
[28] *Ibid* at para 72.
[29] *Ibid* at para 78.

such as foreign interference-related national security threats,[30] street protests and demonstrations spurred by falsehoods[31] and interferences with local elections.[32]

Finally, on the third step of *Jolovan Wham*'s framework, the Court found that there was objectively a nexus between Part 3 of *POFMA* and "public order" under Article 14(2). The Court reasoned that a "public order" threat was any act which "led to disturbance of the current life of the community", as opposed to "merely affecting an individual leaving the tranquility of society undisturbed",[33] citing here *Re Tan Boon Liat*'s[34] definition of "public order" as "the even tempo of the life of the community taking the country as a whole or even a specified locality."[35] In this regard, "the use of falsehoods and lies to undermine a democratically elected government … cannot be seen as being compatible with a state of public order" because, "[d]epending on the content of the falsehoods in question, it is entirely conceivable that their swift spread online could *threaten* the preservation of public order by undermining trust in the Government and other key public institutions".[36] Such a falsehood, especially when it affects an otherwise "free and fair electoral process", "shakes the foundations of a democratic society to its very core and carries the potential for far greater harm."[37] Thus, even if Part 3 of *POFMA* did restrict free speech, it could be justified under Article 14(2) as necessary or expedient in the interest of public order.

III. Identifying Restrictions and the Essential Premise

We consider first the Court of Appeal's reasoning on whether *POFMA* Part 3 restricted free speech under Article 14(1). As mentioned, the Court divided this into two sub-questions: (i) whether subject statements are protected under Article 14(1); and (ii) whether Correction Directions amount to restrictions on free speech. However, the Court's reasoning on both sub-questions is puzzling and, on deeper analysis, conceptually problematic.

To see why, we must first note an essential premise from which any assessment of the constitutionality of legislative provisions conferring discretionary powers on executive decision-makers must depart. The constitutionality of any law must of course turn on its effects: whether, if implemented, it would contravene constitutional provisions. But should those effects refer to what the executive *could* (factually) do, or what it *should* (legally) do, when implementing that law? The answer must be the latter: the effects and thus the constitutionality of legislative provisions conferring discretionary powers must be assessed on the premise that the executive will only act *intra vires* (*ie,* within the administrative law limits of legality, rationality and procedural propriety) thereunder. Conversely, the constitutionality of such a

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30 *Ibid* at para 89.
31 *Ibid* at para 91.
32 *Ibid* at para 92.
33 *Ibid* at para 98.
34 [1976] 2 MLJ 83.
35 *Online Citizen*, *supra* note 2 at para 98.
36 *Ibid* at para 99 [emphasis in original].
37 *Ibid* at para 100.

provision cannot be assessed on grounds that the executive may act *ultra vires*, and in doing so reach a decision that also happens to be unconstitutional: an otherwise constitutional provision does not become unconstitutional simply because the executive in acting *ultra vires* also happened to act unconstitutionally, and an otherwise unconstitutional provision does not become constitutional simply because the executive's *ultra vires* decisions thereunder are in any case also invalid for being unconstitutional. Were it otherwise, the wording of any discretion-conferring provision would *never* matter in determining its constitutionality, and so the constitutionality of any such provision would *never* be even remotely predictable: the law must be judged in accordance with what it legally enables the executive to do (which can be determined), not what the executive may as a matter of fact do (which is anyone's guess).

Thus, the constitutionality of legislative provisions conferring discretionary powers must be assessed on the premise that the executive will only act *intra vires* thereunder—we will call this the "Essential Premise". This Essential Premise in fact formed the *ratio* of the Court of Appeal's decision in *Jolovan Wham*. There, the accused had accepted[38] that the *POA* required the Commissioner of Police to grant licences save for specific reasons, and that one of those reasons—the fact that the assembly was directed toward a political end and involved the participation of foreign entities—meant that restrictions on such assemblies either did not restrict the citizen's right to freedom of assembly under Article 14(1) or were justifiable restrictions under Article 14(2). However, the accused argued that the *POA*'s licensing regime was nevertheless unconstitutional because, *were* the Commissioner to refuse a licence for reasons "ultra vires the POA", this would also render the refusal unconstitutional, and in that situation individuals would be left without a "remedy" for a breach of their Article 14(1)(b) right.[39] The Court of Appeal rejected the argument outright, reasoning that "there was no basis at all for assessing the constitutional validity of the *POA* on the premise that those entrusted with the discretion would exercise it in bad faith or for improper purposes".[40] The correct premise, instead, was that the executive would act *intra vires* under administrative law principles.

In *Online Citizen*, however, the Court of Appeal's reasoning on both sub-questions (i) and (ii) contradicts, or at least sits uneasily with, that Essential Premise. On sub-question (i), although the Court asked itself whether subject statements were protected speech, the question the Court really ended up answering was whether *Correction Directions* targeting subject statements could themselves restrict protected speech. This change in the Court's analytical focus is entirely unsurprising, given that the protection subject statements are entitled to under Article 14 is only relevant to the constitutionality of *POFMA* because the latter may through Correction Directions impinge on that protection. And so, the Court held that Correction Directions restricted protected speech: "the issuance of a [Correction Direction] … is an exercise of state power against speech that remains constitutionally protected" and so "[t]he constitutionality of a [Correction Direction] therefore

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38 Or, at least, did not seriously deny.

39 *Jolovan Wham*, *supra* note 5 at paras 10-11.

40 *Ibid* at para 56.

falls to be scrutinised under Art 14."[41] This conclusion was undoubtedly correct: whether the actual speech a Correction Direction targets is false is an open question for the court, and so Correction Directions cannot be constitutional just because the Minister believed (possibly wrongly) that they were targeted at false speech.

What is puzzling, however, is why the Court asked itself whether Correction Directions, which are *executive acts*, could restrict protected speech under Article 14(1), in the first place. Recall that the challenge the applicants brought was to the constitutionality of the empowering *legislation* (*ie,* "Part 3 of the POFMA"),[42] and *not* to the Correction Directions issued against them. Note also that the constitutionality of a discretion-conferring legislative provision is a conceptually separate enquiry from the constitutionality of an executive act issued pursuant to an exercise of that discretion.[43] If a legislative provision is unconstitutional under Article 14, any executive act taken pursuant thereto will no doubt be unconstitutional as well. But the converse is not always true: if the legislative provision is constitutional, it could still be that an executive act taken *ultra vires* under it is administratively illegal and unconstitutional. It follows that showing that an executive act could potentially be unconstitutional for a particular reason does not confirm that its parent legislation could likewise potentially be unconstitutional for that same reason.

So why did the Court of Appeal think that the question of whether Correction Directions could restrict free speech was "logically anterior" to the question of whether Part 3 of *POFMA* was constitutional under Article 14? One possibility is that the Court simply overlooked and so conflated the abovementioned difference between the constitutionality of legislation as against executive acts—but this is an uncharitable reading of *Online Citizen* which should be avoided. The other possibility is that the Court reasoned that if a Correction Direction could potentially be issued against non-false speech[44] under s 10 of *POFMA*, then Part 3 of *POFMA* would (by facilitating the same) restrict free speech even though Article 14 covered only non-false speech. In other words: if a Correction Direction *could* as a matter of fact be issued against non-false speech, it *could* be a restriction on free speech, and so Part 3 of *POFMA* which facilitates such issuance *is* a restriction on free speech.

But this reasoning is problematic because it directly contradicts the Essential Premise. A Correction Direction issued against non-false speech would, after all, clearly be *ultra vires* the Minister's powers under s 10 of *POFMA*; the falsity of the subject statement is a "precondition" for the exercise of that power.[45] The Court therefore should not have assessed whether Part 3 of *POFMA* restricted free speech, even in part, by considering whether a Correction Direction issued *ultra vires* the Minister's powers thereunder could be such a restriction. The Essential Premise is precisely that the answer to the latter question cannot shed any light on the former. Instead, the Court's conclusion on sub-question (i) should have been that Part 3 of *POFMA* cannot ever restrict protected speech because, so long as the Minister acts *intra vires*, it can only ever restrict false speech.

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41 *Online Citizen*, *supra* note 2 at para 61.

42 *Ibid* at para 42.

43 For a discussion, see Teo & Kiu, "Burden of Proof", *supra* note 3 at 762.

44 *Ie,* speech comprising non-false statements of fact or true statements of fact.

45 *Online Citizen*, *supra* note 2 at para 183.

The Court's reasoning on sub-question (ii) is similarly problematic. To recap, the Court distinguished between obligations to communicate perspectives and obligations to assert them as true, then held that only the latter compelled speech because the speaker would "not have the option of expressing its *disagreement* with [the asserted-as-true] message in the same medium".[46] The obligation imposed by a Correction Direction to append a correction notice, however, was apparently not an obligation to assert perspectives as true—so even if Article 14(1) precluded compelled speech, the obligation in question compelled no speech.

But is the obligation to post a correction notice really not an obligation to assert a perspective as true? A "correction notice", after all, is defined in s 11(1) of *POFMA* as "a statement … that the subject statement *is* false", not a statement that the *Government believes/asserts* that the subject statement is false.[47] And can a statement-maker issued with a Correction Direction really express disagreement with the content of the correction notice? The Court reasoned that the statement-maker can still communicate that the "Correction Direction [is] being challenged under s 17 of the POFMA, and that whether there [are] any grounds for setting it aside pursuant to s 17(5) remain[s] subject to judicial determination."[48] But this communicated statement—call it the "approved response-statement"—is *not* a statement that disagrees with the statement contained in the correction notice (*ie* a statement that the subject statement *is* false), because it is not a statement that the subject statement *is* not-false or true, but merely a statement that the *statement-maker believes/asserts* that its initial statement was not-false or true and that the veracity thereof will be subject to final judicial determination. Conceptually, there is no contradiction between the proposition that *p* is false and the proposition that the applicant believes that *p* is not-false or true; so why is saying the latter a "disagreement" with the former? Intuitively, too, a statement that one's subject statement *is* false but one *believes* that it is not-false or true is likely to be understood very differently from a statement that one's subject statement *is* not-false or true—only the latter is a meaningful expression of disagreement with the correction notice. But note: if a statement-maker were to unequivocally make the statement that the subject statement was not-false or true in its qualification of the correction notice, that unequivocal statement could *itself* be subject to a new Correction Direction.

Thus, on the Court of Appeal's own test for compelled speech, Part 3 of *POFMA* should be characterised as a provision which compels (non-false) speech, because it requires the statement-maker to say something it disagrees with (that the subject statement was false) without the ability to qualify it (one cannot subsequently say that the subject statement is not-false or true, only that one believes that it is not-false or true). Why, then, did the Court hold otherwise? It seems that the Court placed emphasis here on the fact that the statement-maker could still be vindicated if the subject-statement turned out to be true: "if the court finds the subject statement to be indeed a true statement of fact, the Correction Direction may be set aside

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[46] *Ibid* at para 76 [emphasis added].

[47] The required correction notices set out in the Directions issued against the applicants in *Online Citizen* bear this out; see *Online Citizen*, supra note 2 at paras 11-12, 19.

[48] *Ibid* at para 77.

pursuant to s 17(4) read with s 17(5)(b) of the POFMA."[49] The logic, then, would be that Part 3 of *POFMA* does not compel speech, because if the subject statement is ultimately true the Correction Direction will be invalid and fall away. But again, this contradicts the Essential Premise: the constitutionality of legislative provisions conferring discretionary powers like Part 3 of *POFMA* must be assessed on the basis that the executive acts *intra vires* thereunder, and an *intra vires* Correction Direction is by definition one validly issued only against false statements of fact. An otherwise unconstitutional discretion-conferring provision cannot be rendered constitutional on the premise that the executive could also act *ultra vires* under it with the consequence that its decisions would be unconstitutional.

IV. Justifying Restrictions and the Intensity of Review

In most Article 14 challenges, of course, the main issue will not be whether the legislation restricts speech under Article 14(1), but whether that restriction can be justified under Article 14(2). *Jolovan Wham*'s framework was, in that decision's wake, described as ground-breaking precisely because it appeared to herald a change from the prior applicable test for justification in *Chee Siok Chin v Minister for Home Affairs*[50] to something "more intrusive"[51]—or, to use a more oft-employed term, a more "intense" standard of review.[52] To appreciate why commentators reached this view, one must juxtapose the passage above setting out *Jolovan Wham*'s framework with this one in *Chee Siok Chin*:[53]

> "Parliament [has] an extremely wide discretionary power and remit that permits a multifarious and multifaceted approach towards achieving any of the purposes specified in Art 14(2) of the Constitution … there can be no questioning of whether the legislation is "reasonable". … The touchstone of constitutionality in Singapore in relation to the curtailment of a right stipulated by Art 14 of the Constitution is whether the impugned legislation can be fairly considered "necessary or expedient" for any of the purposes specified in Art 14(2) of the Constitution. 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 14(2) of the Constitution. In relation to any restriction impugned for unconstitutionality on this test, the Government must satisfy the court that there is a factual basis on which Parliament has considered it "necessary or expedient" to do so … Art 14 of the Constitution … allows Parliament to take a prophylactic approach in the maintenance of public order."

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49 *Ibid* at para 78.

50 [2006] 1 SLR (R) 582 [*Chee Siok Chin*].

51 Alec Stone Sweet, "Intimations of Proportionality? Rights Protection and the Singapore Constitution" [2021] Sing JLS 231 at 231, 234 [Stone Sweet, "Intimations of Proportionality?"].

52 See, *eg*, Julian Rivers, "Proportionality and Variable Intensity of Review" (2006) 65(1) Camb LJ 174; Cora Chan, "Proportionality and Invariable Baseline Intensity of Review" (2013) 33(1) LS 1.

53 *Chee Siok Chin*, *supra* note 50 at paras 49-50.

Commentators tended to identify three main differences between *Chee Siok Chin*'s test and the *Jolovan Wham* framework which apparently made the latter a more intense standard of review. The first, most obvious difference was that the latter was a framework with a clear structure: while *Chee Siok Chin* focused only on the need for a "nexus"/"factual basis" between the challenged law and proper purpose, *Jolovan Wham* set out a sequence of three distinct enquiries. Some commentators have seen the very presence of structure as capable of intensifying review: *Jolovan Wham*'s framework is seen as "far more advanced" than "bare rationality review" largely by virtue of it being a "structured test".[54]

A second difference is that *Jolovan Wham*'s framework brought "balancing" into the picture as part of the Article 14(2) enquiry, apparently as a separate test in its own right. VK Rajah J's description in *Chee Siok Chin* of Parliament's "extremely wide discretionary power" and his refusal to assess the "reasonableness" of challenged laws suggested that courts could not scrutinise the balance struck by laws between fundamental rights and public interests.[55] The only time Rajah J mentioned the word "balance" was in describing the "delicate balancing exercise"[56] between rights and public interests which "Parliament" and not the courts had the "right" to engage in.[57] In *Jolovan Wham*, however, the Court explicitly noted, immediately after laying out a three-step framework for "courts" to apply,[58] that "a balance must be found between the competing interests at stake".[59] Moreover, after applying its framework the Court held that, "in our judgment", the *POA* "achieves a careful balance between the constitutional right to peaceably assemble and the delineation of the restriction imposed on that right."[60] Commentators have thus described *Jolovan Wham* as endorsing a "balancing exercise" which exists "in addition to the [three-step] framework".[61] Some have even gone further to suggest that *Jolovan Wham*'s "balancing-friendly" framework[62] contains "intimations of proportionality", understood as a ground of review involving four "sub-tests" of "proper purposes", "suitability", "necessity" and "balancing in the strict sense".[63]

A third and final difference between *Chee Siok Chin*'s test and *Jolovan Wham*'s framework was that the latter was an "objective" test for constitutionality; although

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54 Swati Jhaveri, "The Coming of Age of Constitutional Judicial Review in Singapore: The Advent of 'Proportionality'?", *IACL-AIDC Blog* (17 December 2020), online: IACL-AIDC Blog <https://blog-iacl-aidc.org/constitutional-landmark-judgments-in-asia/2020/12/17/the-coming-of-age-of-constitutional-judicial-review-in-singapore-the-advent-of-proportionality> [Jhaveri, "The Advent of 'Proportionality'?"]. See also Azri Imran Tan, "A Watershed Judgment for Article 14 Rights in Singapore?", *Singapore Law Gazette* (December 2020), online: Singapore Law Gazette <https://lawgazette.com.sg/feature/wham-kwok-han-jolovan-v-public-prosecutor-2020-sgca-11/>, calling "the provision of a framework for assessing an Art 14 challenge" a "positive development" [Tan, "A Watershed Judgment"].

55 *Chee Siok Chin*, *supra* note 50 at para 49.

56 *Ibid* at para 52.

57 *Ibid* at para 51.

58 *Jolovan Wham*, *supra* note 5 at para 29.

59 *Ibid* at para 33.

60 *Ibid* at para 48.

61 Tan, "A Watershed Judgment", *supra* note 54.

62 Stone Sweet, "Intimations of Proportionality?", *supra* note 51 at 234.

63 *Ibid* at 238; see also Jhaveri, "The Advent of 'Proportionality'?", *supra* note 54.

under Article 14(1) Parliament has "primary decision-making power",[64] it remains "unequivocally for the judiciary to determine whether [a] derogation falls within [a] relevant purpose" under Article 14(2).[65] This description in *Jolovan Wham* of the nature of the relevant enquiry and the court's role thereunder is more muscular than Rajah J's reasoning in *Chee Siok Chin* that Parliament has an "extremely wide discretionary power" and can "take a prophylactic approach in the maintenance of public order".[66] While Rajah J did identify a judicial duty to assess whether restrictions could be "fairly considered" to fall within the ambit of "public order", this only required the court to consider whether there was a "factual basis" for such a claim;[67] moreover, in applying his test, Rajah J focused largely on Parliament's intention to protect public order.[68] By contrast, *Jolovan Wham*'s framework placed the need for an "objective" approach front-and-centre. Commentators have thus argued that *Jolovan Wham*'s framework goes further than *Chee Siok Chin*'s test because courts do not only ask whether challenged laws fell within a "range of permissible restrictions"; they ask whether Parliament could "objectively" have concluded that the law was necessary or expedient under Article 14(2).[69]

In sum, commentators believed that *Jolovan Wham*'s "structured" and "objective" framework, which considers the "balance" legislation strikes between rights and public interests, was a more intense standard of review than *Chee Siok Chin*'s test. But *Online Citizen* gives us reason to doubt that conclusion. In that case, the Court upheld *POFMA* Part 3 on the basis that, "depending on the context", it was "entirely conceivable" that fast-moving false statements could "threaten" public order.[70] Conspicuously missing from the discussion was whether *POFMA* struck a proper "balance" between Article 14(1) rights and Article 14(1)(b) public interests—the possibility alone that *intra vires* Correction Directions targeting statements with a certain content could conceivably protect public order sufficed. Nor did such Directions have to comply with a "further requirement of proportionality" to be constitutional—again, it was enough that the Correction Direction was *intra vires*.[71] If *Jolovan Wham* was a "landmark"[72] for constitutional adjudication in Singapore, *Online Citizen* is a step backward: it seems that a factual nexus between the rights-restricting legislation and an Article 14(2) purpose may once again be all that is required for laws to be constitutional.

In retrospect, though, it may have been hasty to conclude that *Jolovan Wham*'s framework would necessarily do anything more than *Chee Siok Chin*'s test would, because the three "differences" commentators identified between the former and the latter are hardly conclusive of an increase in the intensity of review. Starting from the fact that *Jolovan Wham*'s framework is an "objective" test—that a test is "objective"

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64 *Jolovan Wham*, *supra* note 5 at para 24.
65 *Ibid* at para 28.
66 *Chee Siok Chin*, *supra* note 50 at para 50.
67 *Ibid* at para 49.
68 *Ibid* at paras 55-56.
69 Jhaveri, "The Advent of 'Proportionality'?", *supra* note 54.
70 *Online Citizen*, *supra* note 2 at para 99.
71 *Ibid* at paras 111-112.
72 See Stone Sweet, "Intimations of Proportionality?", *supra* note 51 at 231; Jhaveri, "The Advent of 'Proportionality'?", *supra* note 54.

says nothing about its content, other than the quotidian fact that the purely subjective belief of the relevant executive decision-maker cannot by itself establish constitutionality. As Paul Craig notes, in judicial review proceedings courts always make the "ultimate determination in the case" regardless of the applicable ground of review:[73] even if *Wednesbury* unreasonableness[74] were (hypothetically) the only ground of constitutional review available against executive acts under Article 14, courts would still be applying an "objective" legal test—but the content of that test would simply be a (bare) prohibition against only decisions so unreasonable that no reasonable authority would make them. Calling a test "objective" says hardly anything about what its content is and how intense the applicable standard of review will be.

Similarly, the fact that *Jolovan Wham*'s framework requires "a balance … between the competing interests at stake" does not mean that the court must itself ascribe weight to and strike a balance between those interests. Again, even under *Wednesbury* courts will have regard to the weight of and balance between relevant factors—but there, courts do not ask whether they would *themselves* have weighed and balanced factors precisely as the executive did; they only ask whether the executive reached a reasonable view in doing so.[75] Saying that *a* balance must be struck thus does not "prescrib[e] what said balance should be".[76] More fundamentally, as David Tan has noted in the context of proportionality review, the notion that a balance must be struck between rights and public interests necessarily raises a preliminary question of "institutional balancing"—of whether the judiciary or the legislature is competent or better-equipped to perform the balancing exercise in the circumstances.[77] To say that a balance must be struck therefore does not say *who* should be doing the balancing. Indeed, since in *Jolovan Wham* the Court did not expressly list balancing as a *fourth* step of the framework, perhaps all the Court meant was that a balance would be struck between Article 14(1) rights and 14(1)(b) interests by, and *only* by, the preceding three stages of the framework.

We are thus left with the fact that *Jolovan Wham*'s framework is more "structured" than *Chee Siok Chin*'s test. Commentators sometimes describe a "structured" approach to judicial review as a more "searching form of review" than broad multifactorial tests,[78] because it requires courts to "look hard at the evidence, facts and arguments adduced by the parties … [and] assess the contending arguments in some depth".[79] Structured tests, it is said, will "separate out the contending arguments and address them in turn", thereby making the court's analysis more "fine-tuned" and

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73 Paul Craig, "The Nature of Reasonableness Review" (2013) 66 Curr L Prob 131 at 141 [Craig, "The Nature of Reasonableness Review"].

74 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

75 Hasan Dindjer, "What Makes an Administrative Decision Unreasonable?" (2021) 84(2) Mod L Rev 265 at 281-283.

76 Tan, "A Watershed Judgment", *supra* note 54.

77 David Tan, "Walking the Tightrope between Legality and Legitimacy: Taking Rights Balancing Seriously" (2017) 29 Sing Ac LJ 743 at 772. See also Jaclyn Neo, "Balancing Act: The Balancing Metaphor as Deference and Dialogue in Constitutional Adjudication" in Jaclyn Neo, ed, *Constitutional Interpretation in Singapore* (New York, NY: Routledge, 2017).

78 Paul Craig, "Unreasonableness and Proportionality in UK Law" in Evelyn Ellis, ed, *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999) at 102.

79 Craig, "The Nature of Reasonableness Review", *supra* note 73 at 166.

"laser-like" at each successive stage.[80] However, the effect that such structured tests have "can be greatly overstated";[81] all a structured and specific test does is that it "sets us off along certain lines" and "frames and channels the work that we do under [its] auspices"[82] compared to an unstructured and general test. And a moment's pause should reveal why a structured test, which focuses on (say) three enquiries, need not necessarily be any more intense than an unstructured test, which accommodates (say) ten different enquiries including but not limited to those three. After all, how does the proposition that an unstructured test allows courts to consider ten arguments in any order they wish, and the proposition that a structured test requires courts to consider only three of those ten arguments in a particular sequence, establish the proposition that courts will consider those three arguments in *greater detail* under the structured test? The third proposition is conceptually separate from the first two: a test's structure only determines the kinds of enquiries courts are channelled toward, not the intensity with which courts will review legislation or executive acts thereunder.[83]

Thus, although *Jolovan Wham*'s framework is "structured", "objective" and considers the "balance" between fundamental rights and public interests, none of that suggests that it is necessarily a more intense ground of review than *Chee Siok Chin*'s test. *Online Citizen*, then, serves to bring our expectations back to earth: it may still be that a factual nexus between the challenged law and a proper purpose is all that is required to justify restrictions of free speech under Article 14(2).

V. Conclusion

Online Citizen is an important judgment, bound to be remembered for its five-step framework for Correction Direction appeals, which promises clarity for the law and practice in that area. But the decision is also of considerable significance for its implications for Article 14 challenges and constitutional adjudication in Singapore. After *Online Citizen*, courts have little guidance on whether, in assessing the constitutionality of legislative provisions conferring discretionary powers, they should start from the premise that the executive will only act *intra vires* thereunder; and what precisely the applicable intensity of review should be in Article 14 and other similar constitutional challenges. *Online Citizen* is thus an ambiguous—and to some degree, unsatisfying—sequel to *Jolovan Wham*, which suggests that the law on the applicable test for constitutional rights challenges is far from settled.

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[80] Paul Craig, "Reasonableness, Proportionality and General Grounds of Judicial Review: A Response" (2021) 2 Keele LR 1 at 14-15.

[81] Jeff King, "Proportionality: A Halfway House" [2010] NZ L Rev 327 at 340.

[82] Jeremy Waldron, "Clarity, Thoughtfulness, and the Rule of Law" in Geert Keil and Ralf Poscher, eds, *Vagueness and Law: Philosophical and Legal Perspectives* (Oxford: Oxford University Press, 2016) at 321.

[83] Marcus Teo, "Proportionality as Epistemic Independence" [2022] Public Law 245 at 263.