Limits on the Constitutional Right to Freedom of Assembly:
***Wham Kwok Han Jolovan v Public Prosecutor* [2020] SGCA 111**

I. Executive Summary

Is section 16(1)(*a*) of the Public Order Act (Cap 257A, 2010 Rev Ed) ("**the POA**"), which restricts the constitutional right of peaceable assembly, a valid derogation from Article 14 of the Constitution of the Republic of Singapore (Cap 1, 1985 Rev Ed) ("**the Constitution**")? This question was considered by a five-judge coram of the Court of Appeal ("**the CA**") in *Wham Kwok Han Jolovan v Public Prosecutor* [2020] SGCA 111.

In this case, the Applicant, Wham, was convicted by the District Court under section 16(1)(*a*) of the POA for organising and holding a public assembly without a permit. At trial and on appeal to the High Court ("**the HC**"), Wham's contention that section 16(1)(*a*) of the POA was unconstitutional was rejected. Wham was subsequently granted leave to refer section 16(1)(*a*)'s constitutionality to the CA as a criminal reference on a question of law.[1]

In its grounds of decision, the CA affirmed that the assembly held by Wham attracted the licensing regime under the POA. Since Wham had failed to apply for the requisite permit in the first place, he could only argue that the POA was constitutionally invalid to resist conviction.

However, the CA held that section 16(1)(*a*) of the POA was constitutional and accordingly dismissed Wham's application. In doing so, it reiterated an objective test of constitutionality and found that the restriction on the right to peaceable assembly under section 16(1)(*a*) of the POA was constitutional as it was objectively "necessary or expedient" in the interests of public order. Significantly, the CA expressly rejected the notion that Acts of Parliament carried a presumption of constitutionality.

II. Material Facts

Wham had organised an event called "Civil Disobedience and Social Movements" ("**the Event**") at a public venue on 26 November 2016. According to Wham, the purpose of the Event was to discuss "the role of civil disobedience and democracy" in effecting social change. Joshua Wong ("**Wong**"), a Hong Kong activist, was invited by Wham to deliver a speech from Hong Kong *via* video link.

Three days before the Event, Wham was advised by the Police to apply for the relevant permit under the POA in order to carry on with the Event. A permit was deemed necessary since Wong was not a Singapore citizen.

However, on 26 November 2016, Wham proceeded with the Event (including Wong's speech) without having applied for the requisite permit. Accordingly, Wham was charged for organising a public assembly without a permit under section 16(1)(*a*) of the POA.

At trial, Wham contended that section 16(1)(*a*) was unconstitutional, but this was rejected by the District Judge, who convicted Wham on the charge. On appeal to the HC, Wham again raised the submission that the permit requirement under the POA was unconstitutional. However, Wham's appeal was rejected in its entirety.

Wham then applied for leave to refer section 16(1)(*a*)'s constitutionality to the CA as a question of law. Leave was granted, partly on the basis that the CA had never previously ruled on the constitutionality

[1] This is a process whereby parties may refer any question of law of public interest to the CA for guidance.

of a permit imposed by section 16(1)(*a*) of the POA and had yet to consider the scope of Articles 14(1)(*b*) and 14(2)(*b*) of the Constitution, which provide as follows (in relevant part):

> **Freedom of speech, assembly and association**
>
> **14.—(**1) Subject to clauses (2) and (3) —
>
> …
>
> (*b*) all citizens of Singapore have the right to assemble peaceably and without arms; and
>
> …
>
> (2) Parliament may by law impose —
>
> …
>
> (*b*) on the right conferred by clause (1)(*b*), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof or public order; and
>
> …

III. Issues

The CA addressed the question of whether section 16(1)(*a*) of the POA was a constitutionally valid derogation from Article 14(1) of the Constitution. First, the CA considered whether a permit was required for the Event. Second, it laid out an approach to determine whether a restriction of the right to peaceable assembly under Article 14 is permissible. Third, the CA applied such approach to determine the constitutionality of section 16(1)(*a*) of the POA. The CA then addressed some further considerations with regard to Wham's case.

A. Legislative regime of the POA

The CA first considered the legislative regime of the POA and found that under the act, a permit was required for the Event.

Section 16 of the POA makes it an offence to organise a public assembly without a permit. As a default rule, permits are required for public assemblies unless the assembly is exempted under the Public Order (Exempt Assemblies and Processions) Order 2009 (S 489/2009) ("**the Order**"). One condition for an exemption under paragraph 4(1) of the Order is that every speaker must be a Singapore citizen.

However, on the facts, the CA found that the Event did not qualify to be exempted from the licensing regime because Wong, a non-Singaporean activist from Hong Kong, was invited to speak, and did speak at the Event. Accordingly, the Event fell beyond the scope of the exemption under the Order and a permit under the POA was thus necessary.

B. Approach by the court to determine whether a restriction is permissible

At the outset, the CA observed that the right to freedom of assembly under Art 14 is not unlimited. Yet, the CA rejected a wholly subjective approach in determining whether a restriction is permissible. This is because such a subjective approach would render the constitutional right of freedom of assembly nugatory, as there would be nothing to constrain Parliament's ability to pass laws abrogating or restricting that conferred right. Thus, an objective approach must be adopted.

However, the CA also held that in applying the objective approach, the court must bear in mind that the Constitution confers on Parliament the primary decision-making power as to whether a derogation from a constitutional right is necessary or expedient. Accordingly, under the objective approach, the court will decide whether the restriction under the POA is, objectively, necessary or expedient in the interests of public order and whether Parliament could have objectively arrived at this conclusion.

Notably, the CA expressly rejected the observation that there is a presumption of legislative constitutionality which would not be lightly displaced in the court's assessment of whether an Act of Parliament is unconstitutional. This is because such an approach would entail presuming the very issue which is being challenged. Moreover, such a presumption of constitutionality stands contrary to the principle of separation of powers.

Lastly, the CA held that it is unequivocally for the judiciary (i.e. the courts) to determine whether a derogation from the constitutional right to peaceable assembly is valid under Article 14(2)(*b*). Accordingly, the CA set out a three-step framework to determine whether a law impermissibly derogates from Article 14 of the Constitution:

(a) First, the legislation must be assessed to restrict the constitutional right in the first place. If the legislation does not even restrict the constitutional right, the second and third steps of the analysis will not be triggered.

(b) Second, if the legislation is found to restrict the right guaranteed by Art 14, it must be determined whether the restriction is "necessary or expedient" in the interests of one of the enumerated purposes under Art 14(2)(*b*) of the Constitution. To do so, the court will assess the purposes for which Parliament passed the relevant legislation. However, a failure by Parliament to have expressly referred to the restriction of the constitutional right does not *ipso facto* render the legislation constitutionally suspect.

(c) Third, the court must objectively determine whether the derogation from or restriction of the constitutional right falls within the relevant and permitted purpose under the Constitution. Specifically, in this case, a nexus between the purpose of the legislation in question and one of the permitted purposes identified under Article 14(2)(*b*) of the Constitution must be shown.

Finally, the CA stressed the importance of the need to balance the competing interests at stake, *viz*. the balance between the constitutional right to peaceably assemble and the interest of public order.

C. Application to section 16(1)(a) of the POA

In applying the approach to determine the constitutionality of section 16(1)(*a*) of the POA, the CA first considered whether section 16(1)(*a*) restricted the right to peaceable assembly. Second, it determined if Parliament had considered the restriction to be necessary or expedient in the interests of public order. Finally, the CA considered the nexus between Art 14(2)(*b*) and the POA.

(1) Does section 16(1)(a) of the POA restrict the right to peaceable assembly?

First, the CA held that it is self-evident that section 16(1)(a) of the POA restricted a person's constitutional right to peaceable assembly, as it subjects the exercise of this right to criminal prosecution where no permit under the POA is obtained.

However, the CA rejected Wham's contention that the POA went beyond a mere "restriction" permitted under Article 14(2)(*b*) of the Constitution, by making the constitutional right exercisable only by permission. This was because, ultimately, the POA did not prohibit the right to peaceably assemble, but simply made it exercisable with the permission of the Commissioner. Further, certain types of public assemblies were totally exempted from the permit regime. Moreover, the Commissioner's discretion was subject to legal limits.

(2) Did Parliament objectively consider the restriction necessary or expedient?

Second, the CA found that Parliament had objectively considered the restriction imposed by section

16(1)(*a*) to be "necessary or expedient" in the interests of public order. The CA noted that it was apparent from the name and long title of the POA that its purpose was to preserve public order. This was consistent with the then Second Minister for Home Affairs' speech in Parliament that the main principle underpinning the Public Order Bill[2] was to give adequate space for an individual's rights of political expression without compromising social order and stability. Thus, the CA concluded that the purpose of the POA is the maintenance of public order and therefore it is compatible with Article 14(2)(*b*).

(3) What is the nexus between Article 14(2)(b) and the POA?

The CA first considered the relevant statutory provisions. As a default rule, as provided under Section 5(1)(*a*) of the POA, a public assembly shall not take place unless the Commissioner of Police ("**Commissioner**") is notified of the intention to hold the public assembly and grants a permit. However, an exemption may be granted by the Minister under section 46. Upon receiving an application, the Commissioner must exercise his discretion to grant or refuse to grant a permit, taking into account the relevant circumstances set out by section 7(2) of the POA.

In its judgement, the CA found that section 7(2) of the POA achieves a careful balance between the constitutional right to peaceable assembly and the restriction imposed on that right. First, all of the circumstances listed under section 7(2) are situations in which public order could reasonably be threatened. Even if the Commissioner reasonably apprehends that one of the listed circumstances may occur, he may still grant a permit if, on balance, he considers that public order will not be compromised.

Second, the right to freedom of assembly under Article 14 applies only to Singaporeans, not foreigners. Accordingly, a more generous standard of review by the court would be applied to derogations which are directed at the participation of foreigners.

Third, the CA thought it wholly reasonable for Parliament to set up a permit regime as whether an event could cause disorder is highly fact-specific, and Parliament cannot be expected to anticipate all the circumstances that may arise. Moreover, such a regime would ensure the best prospects of preventing disorder as opposed to restoring order after disorder had taken place.

Given the above, the CA held that section 16(1)(*a*) of the POA passes constitutional muster and is therefore valid.

D. Other considerations

Lastly, the CA also observed that there was a considerable difficulty in Wham's constitutional challenge as he did not even apply for the requisite permit in the first place. This meant that Wham's only route to resist conviction was to argue that the POA was constitutionally invalid.

For the same reason, Wham was wrong to suggest that he had no real or effective remedy against any decision which had been made by the Commissioner in bad faith or otherwise to deny him the necessary permit to carry out the public assembly. The CA explained that had Wham applied for and been refused a permit, he could have appealed to the Minister. Moreover, if both the Commissioner and the Minister had acted in bad faith, Wham could have applied for a quashing order by way of judicial review. However, such an argument was not open to Wham as he had not even applied for the relevant permit.

IV. Lessons Learnt

[2] The Public Order Bill (8/2009) was passed in Parliament on 13 April 2009 to amend the POA.

First, this case serves as a reminder to individuals who might wish to organise a non-exempted event to comply with the requirements of the law by applying for the requisite permit and exhausting all available remedies provided by law, such as filing an appeal to the Minister, even if they personally consider the underlying legislation to be unconstitutional. Doing so *before* filing an action would possibly allow the applicant to also seek judicial review in administrative law, thereby increasing the number of legal arguments and potential remedies available to him or her.

More significantly, this case is clear authority for the rejection of the presumption of constitutionality which had hitherto been part of Singapore's constitutional jurisprudence for the past few decades. This is a desirable development. Moreover, as former Chief Justice Chan Sek Keong ("**CJ Chan**") noted in *Equal Justice*, there is "no difference between the presumption and the ordinary burden of proof on the person asserting unconstitutionality".[3] This suggests that the presumption is unnecessary.

To explain CJ Chan's point, sections 103 and 104 of the Evidence Act (Cap 97, 1997 Rev Ed) are of guidance. Section 103(1) provides that "[w]hoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist." Section 104 states that "[t]he burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side." Clearly, the burden of proof falls upon the person alleging unconstitutionality and it is thus difficult to see why a presumption of constitutionality would be necessary.

However, the rejection of the presumption of constitutionality may in fact be of theoretical significance only, as it is unlikely that a different result would be reached in all the previous cases which applied the presumption.

Using *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 as an example, it is submitted that the same result, *viz*. that section 37(1) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) was not unconstitutional, would be reached without the invocation of the presumption of constitutionality. There, Yong Pung How CJ held that "to discharge the burden of rebutting the presumption, it will usually be necessary for the person challenging the law to adduce some material or factual evidence to show that it was enacted arbitrarily or had operated arbitrarily."

This is precisely the ordinary burden of proof which an applicant in any judicial review case bears. This burden of proof exists without the presumption of constitutionality. Accordingly, it seems that the presumption of constitutionality is indeed dispensable in constitutional adjudication, as argued by CJ Chan. In sum, it is argued that the holding here, that there is no presumption of constitutionality, is a good and principled development in Singapore's constitutional law.

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[3] Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code" (2019) 31 SAcLJ 773 ("***Equal Justice***") at para 111.