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Symposium on POFMA: Parliamentary debates about POFMA – Hansard beyond statutory interpretation?

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The issue of a legislative response to falsehoods first drew public attention when the **Select Committee on Deliberate Online Falsehoods** held its public hearings. This public attention was renewed when the **Protection from Online Falsehoods and Manipulation Act ("POFMA")**, in Bill form, was unveiled. Questions arose among both the public and MPs about whether POFMA would grant the Government power to stifle **academic research**, **journalism**, or the **expression of opinion**, as well as whether it would be **difficult** for an individual to seek recourse against an allegedly wrongly made Direction.

This post focuses not with the substance of these issues (important as they are) but rather with the *manner* in which the Government responded to them. The Government's response took the form of statements made by Ministers and other MPs. This raises the question of how the courts ought to respond to, and make use of, such statements, given that they are not law. That, in turn, raises difficult questions relating to the separation of powers, the role of the Legislature, and the nature of law-making itself. This post does not purport to answer these questions, but aims merely to highlight ways in which the Parliamentary debates on POFMA provide food for thought in addressing them.

Various MPs from the ruling party, including in particular the Minister for Law, Mr K Shanmugam, acknowledged various concerns about the Bill, but refused to amend the Bill to address them explicitly. Their reasoning was generally that the Bill, properly interpreted, would not have the effects that one might fear it would. For example, a group of three Nominated MPs**[1]** **proposed** that the Bill be amended to state explicitly that it did not cover "opinions, comments, critiques, satire, parody, generalisations or statements of experiences". The **response** by the Minister for Law, Mr K Shanmugam, was that it was *already* clear that the Bill, as drafted, would not cover these types of expression: "By definition, once it talks about fact,

then it excludes satire and comedy"; "The Bill does not cover academic opinion". In fact, Mr Shanmugam had expressed similar views not only in Parliament, but also **through the media**.

What is the status of the Minister's statements that the Bill does not cover satire, comedy, academic opinion, etc.? After all, these statements are not part of the legislative text and therefore do not have the force of law. Rather, they purport to be views as to how POFMA is to be interpreted. However, one would think that the courts, not ministers, are the final arbiters of the correct interpretation of legislation. Seen in this light, the NMPs were entirely justified in their view that the Bill ought to be amended to reflect Mr Shanmugam's statements.

But this view must be moderated, because ministerial statements, though not law, are not devoid of legal effect. They are important in the interpretation of statutes in Singapore because of **section 9A of the Interpretation Act**. Section 9A provides that "[i]n the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law" is to be preferred to one that does not. In going about interpretation, the courts may consider "any material not forming part of the written law" in order to "ascertain the meaning of the provision" if the provision is "ambiguous or obscure". In such cases, the courts may consider statements by Ministers, particularly those made in Parliament, in interpreting legislation.

It is at this point that a tension arises. On the one hand, despite the importance of ministerial statements in statutory interpretation, section 9A does not give ministerial statements the force of law. In a line of cases culminating in *Tan Cheng Bock v Attorney-General*,**[2]**the Court of Appeal has recently attempted to restrict the use of such statements (and other extraneous material) in interpreting statutory provisions. According to *Tan Cheng Bock*,extraneous materials are not to be referred to as a matter of course. Instead, if statutory language has an identifiable "ordinary meaning", then the court may not "use… extraneous material as a basis for departing from the ordinary meaning";**[3]** recourse to extraneous material is *only* of use in "ascertain[ing]" the meaning of the text" when the text of the statute is "ambiguous or obscure".**[4]**

On the other hand, the debates on POFMA reveal instances when the Minister for Law urged the courts to refer to *Hansard*, apparently without considering whether the *Tan Cheng Bock* approach would lead to the conclusion that such reference is warranted. Take, for example, the issue of what counts as a "statement of fact", as opposed to a statement of opinion. At one point, Mr Shanmugam stated that this is already sufficiently addressed by the "body of case law on what is 'fact' and what is not fact". This suggests that the phrase "statement of fact" is already well-defined, and not ambiguous. According to *Tan Cheng Bock*, in the absence of ambiguity, reference to *Hansard* for the purposes of interpretation is not allowed. Yet, the

Minister saw fit not only to provide a few hypothetical examples illustrating the fact-opinion distinction, but to stress that these examples would form "part of the record". By this latter remark, it would appear that Mr Shanmugam intended to invite the courts to consider these examples in interpreting and applying POFMA. So, too, did another Minister: when asked in Parliament about whether a given hypothetical situation would be caught by the Act, Mr Ong Ye Kung responded in detail and **added**: "I am prepared to explain this and have it recorded in the Hansard".

Another example of a Minister urging the courts to refer to *Hansard* is as follows. The three NMPs argued that various principles ought to be explicitly set out in POFMA. But Mr Shanmugam **considered** that this was not necessary, because the "robust debate" about these principles and "expla[nation] [of] what the Bill is all about" was already "a matter of record in the Hansard and that is used by the Courts as a matter of interpretation… the Nominated Members' concern about enshrining principles… is best served by the debate and by the Courts… interpreting the provisions in future."

Mr Shanmugam's and Mr Ong's remarks raise the interesting question: Can Parliament (through a Minister or otherwise) express an intention that *Hansard* be given greater weight in statutory interpretation than the weight that the courts would otherwise accord it? Perhaps the courts will need to consider a departure from the strictures of the *Tan Cheng Bock* approach in such situations, and, further, reconsider the weight to be given to *Hansard* as an interpretive aid.

One can go further and ask whether the POFMA debates assume that *Hansard* may be used for purposes that go beyond interpretation. It appears that interpretation, according to *Tan Cheng Bock*, is a matter of determining the meaning of a particular word or phrase**[5]** that is found in legislation (such as "person"**[6]** or "office of President"**[7]**). By contrast, the debates purport not only to shed light on the interpretation of words in POFMA, but also to create *new* concepts and expressions which are *not* found in POFMA. Take, for example, the statement in Parliament that POFMA does not cover "satire and parody".**[8]** Suppose the recipient of a direction under POFMA, claiming to be a satirist, seeks judicial review of that direction on the ground that it is *ultra vires* the Minister's power. How are the courts to respond? According to the orthodox approach, the only question for the court is whether the statement is a "statement of fact", for the words "statement of fact" are the words that appear in POFMA. But will *Hansard* prompt the courts to direct their minds toward a *different* question, namely, whether the statement is "satire" or "parody"? In other words, can *Hansard* be used not only as a tool of interpretation, but also as a way of shaping the analytical frameworks which the courts use in applying legislation?

These issues become all the more important when statements in Parliament take the form of promises as to the Executive's future conduct. Mr Shanmugam promised that the Government "intend[ed] to set [various matters] out in subsidiary legislation". Does this mean that subsidiary legislation passed in breach of the Government's promises[9] would be unlawful? According to Mr Murali Pillai, **the answer may well be yes**: such promises "g[o] into the corpus of the Hansard… and that creates a legitimate expectation… the Court… can strike down the power which is used outside the legitimate expectations it has been created." This is striking: if Mr Pillai is correct, the breach of a promise found not in law, but instead in a minister's speech in Parliament, can render subsidiary legislation void. This proposition would hold Ministers to their promises far more stringently than does the existing law of legitimate expectations.[10]

One could go yet further, and ask whether remarks in *Hansard* can shape the courts' views on the separation of powers as embodied in the law of judicial review. As Marcus Teo's post on this blog has **pointed out** , Mr Shanmugam stated in Parliament that one may seek judicial review of a direction on the ground that it is disproportionate.[11] Will this direction by Parliamentto the courts to consider proportionality suffice to overcome the courts' fears that proportionality review may involve "wrongful usurpation of [executive] power" by the courts? [12]

This post has highlighted several instances in the POFMA debates where Parliament has shown an intention that, in the interpretation and application of legislation, *Hansard* is to play a far more significant role than it currently does. One eagerly awaits not only the courts' views on POFMA and its application, but also an indication of whether the POFMA debates herald a new pattern of legislative behaviour and a new mode of lawmaking, and, if so, how the courts will respond.

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[1] The NMPs were Anthea Ong, Irene Quay, and Walter Theseira.

[2] [2017] 2 SLR 850 (CA).

[3] *Tan Cheng Bock v AG* [2017] 2 SLR 850 (CA) [48].

[4] *Tan Cheng Bock v AG* [2017] 2 SLR 850 (CA) [47(b)].

[5] Cf. the law on contractual interpretation, in which the Court of Appeal has explicitly stated that "interpretation" refers to the "process of ascertaining the meaning *of expressions*"

(emphasis added), as opposed to "the contract *as a whole*" (emphasis in original): *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 (CA) [27], [31].

[6] *AG v Ting Choon Meng* [2017] 1 SLR 373 (CA).

[7] *Tan Cheng Bock v AG* [2017] 2 SLR 850 (CA) [58(a)].

[8] I am grateful to Jaclyn Neo for raising this point.

[9] The Government has proven to have kept its promises as regards the content of the subsidiary legislation: see the **Protection from Online Falsehoods and Manipulation Regulations 2019** and the **Supreme Court of Judicature (Protection from Online Falsehoods and Manipulation) Rules 2019**.

[10] Under the existing law on legitimate expectations, a person who seeks to rely on the Executive's promise must show that it was "reasonable" for him to rely on the promise and that he suffered detriment as a result of its breach; and the Executive may renege on his promise on the grounds of an "overriding national or public interest": *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 (HC) [119(d)], [119(f)(iii)]. By contrast, Mr Pillai suggested that Mr Shanmugam's promises are not so readily defeasible: "the Executive's case would be crystallised at the outset".

[11] This runs contrary to the approach, seen in the case law, in which the words "necessary or expedient" (words found in POFMA) are taken to *exclude* a doctrine of proportionality: *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 (HC).

[12] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 (UKHL) 762, cited in *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294 (CA) [41].