October, 2015

Equality and Singapore's First Constitutional Challenges to the Criminalization of Male Homosexual Conduct

Jack Tsen-Ta Lee

School of Law
Singapore Management University
60 Stamford Road, #04-11, Singapore 178900
jacklee@smu.edu.sg • *http://www.law.smu.edu.sg*

1 June 2015 (published October 2015)

Equality and Singapore's First Constitutional Challenges to the Criminalization of Male Homosexual Conduct

Lim Meng Suang and another v Attorney-General [2015] 1 SLR 26

Jack Tsen-Ta *Lee**

* LLB (Hons) (Nat'l University of Singapore), LLM (UCL, Lond); PhD (B'ham); Advocate & Solicitor (Singapore), Solicitor (England & Wales); Assistant Professor of Law, School of Law, Singapore Management University.

Equality and Singapore's First Constitutional Challenges to the Criminalization of Male Homosexual Conduct

Lim Meng Suang and another v Attorney-General [2015] 1 SLR 26

Jack Tsen-Ta *Lee*[*]

In 2013, in *Lim Meng Suang and Kenneth Chee Mun-Leon v Attorney-General*[1] and *Tan Eng Hong v Attorney-General*[2] the High Court of Singapore delivered the first judgments in the jurisdiction considering the constitutionality of section 377A of the Penal Code, which criminalizes acts of "gross indecency" between two men, whether they occur in public or private. The Court ruled that the provision was not inconsistent with the guarantees of equality before the law and equal protection of the law stated in Article 12(1) of the Constitution of the Republic of Singapore. The result was upheld in 2014 by the Court of Appeal in *Lim Meng Suang and another v Attorney-General*[3] with slight differences in the reasoning. This article examines the courts' analysis of equality law, and submits in particular that the courts ought to re-evaluate whether they should apply a presumption of constitutionality, refuse to assess the legitimacy of the object of the impugned provision, and rely on a standard of mere reasonableness or lack of arbitrariness when determining if a rational relation exists between the provision's object and the differentia underlying a classification used in the provision.

IN 2013 THE SINGAPORE HIGH COURT (HC), delivering the first judgments in the jurisdiction stemming from a constitutional challenge to a statutory provision criminalizing male gay sex, ruled that the provision does not violate Article 12(1) of

---

[*] LLB (Hons) (Nat'l University of Singapore), LLM (UCL, Lond), PhD (B'ham); Advocate & Solicitor (Singapore), Solicitor (England & Wales); Assistant Professor of Law, School of Law, Singapore Management University. While I was consulted on a *pro bono* basis by the plaintiffs' counsels in the High Court cases under review, the views expressed herein are my own. I would like to thank Vicki C Jackson and Eva Brems for having reviewed an earlier version of this article for the IX World Congress of Constitutional Law in Oslo, Norway, 16–20 June 2014.

1 *Lim Meng Suang v Kenneth Chee Mun-Leon v Attorney-General* [2013] 3 SLR 118 (HC) (*Lim Meng Suang* (HC)).

2 *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 (HC) (*Tan Eng Hong* (merits)).

3 *Lim Meng Suang and another v Attorney-General* [2015] 1 SLR 26 (CA) (*Lim Meng Suang* (CA)).

the Constitution of the Republic of Singapore (the Constitution),[4] which guarantees that '[a]ll persons are equal before the law and entitled to the equal protection of the law'.

The first judgment to be handed down, *Lim Meng Suang and Kenneth Chee Mun-Leon v Attorney-General*,[5] was not the first challenge to the provision in question, section 377A of the Penal Code[6] which states:

> Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years.

In September 2010, a man named Tan Eng Hong who had been charged with a section 377A offence for engaging in oral sex with another man in a public toilet cubicle in a shopping centre applied to the HC to impugn the constitutionality of the provision. Although the HC found[7] that he lacked standing to bring the case because the original charge had been withdrawn and substituted with a charge under section 294(a) for committing an obscene act in a public place, which he had pleaded guilty to, this decision was reversed by the Court of Appeal (CA), Singapore's final appellate court.[8]

In the meantime, Lim Meng Suang and Kenneth Chee Mun-Leon, who were described as being 'in a romantic and sexual relationship',[9] filed their own application contending that section 377A infringes the Constitution. Lim and Chee's application was heard by Justice Quentin Loh in mid-February 2013, and shortly thereafter, at the beginning of March, his Honour also heard Tan's substantive application, *Tan Eng Hong v Attorney-General*.[10] The judgments in *Lim Meng Suang* and *Tan Eng Hong* were respectively issued on 9 April and 2 October 2013. The cases were then heard on appeal together in July and August 2014, and on 28 October 2014 in *Lim Meng Suang and another v Attorney-General*[11] the Court of Appeal upheld the results of the cases below with some differences in the reasoning. This article focuses on the analysis of the constitutional guarantee of equal protection in *Lim Meng Suang* at the HC and CA levels, since in the HC judgment of *Tan Eng Hong* the judge largely followed his own reasoning in the earlier *Lim Meng Suang* decision, though he did deal with additional points raised by the plaintiff's counsel. Save as they have a bearing upon equal protection, I will not be examining arguments raised in *Tan Eng Hong* and in *Lim Meng Suang* at the CA level on the alleged breach of Article 9(1) of the Constitution which protects the rights to life and personal liberty.[12]

In reaching its decisions in the two cases, the HC was bound to follow earlier pronouncements by the CA on how Article 12(1) should be interpreted, notably in the 1998 case of *Public Prosecutor v Taw Cheng Kong*.[13] While the section 377A cases shed new light on Article 12(1), the HC felt constrained by *Taw Cheng Kong* to apply

---

4 Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Rep) (The Constitution).
5 *Lim Meng Suang* (HC) (n 1).
6 Penal Code, Cap 224, 2008 Rev Ed.
7 *Tan Eng Hong v Attorney-General* [2011] 3 SLR 320 (HC).
8 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 (CA) (*Tan Eng Hong* (standing)).
9 *Lim Meng Suang* (HC) (n 1), 122, [2].
10 *Tan Eng Hong* (merits) (n 2).
11 *Lim Meng Suang* (CA) (n 3).
12 See generally, ibid 42–45, [42]–[53]; and *Tan Eng Hong* (merits) (n 2), 1068–1090, [22]–[84].
13 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 (CA) (*Taw Cheng Kong* (CA)).

a standard of mere reasonableness or lack of arbitrariness in various contexts, such as when applying a presumption of constitutionality, assessing the legitimacy of the object of the impugned provision, and determining if a rational relation exists between the provision's object and the differentia underlying a classification used in the provision. The CA largely affirmed this reasoning, and I submit that the outcome of the cases was primarily due to the adoption of this strict standard. However, the CA went further than the HC did, stating the law in a way that severely restricts its own discretion and forecloses the striking down of all but the most extreme cases of discrimination.

I. Introduction to The Reasonable Classification Test, and Differentiating Effect

A good starting point for an analysis of Article 12(1) of the Constitution is the CA's judgment in *Taw Cheng Kong*, which set out the applicable test in the following terms:[14]

> (a) The first question to be asked is, is the law discriminatory, and that the answer should then be – if the law is not discriminatory, it is good law, but if it is discriminatory, then because the prohibition of unequal protection is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation, we have to ask the further question, is it allowed? If it is, the law is good, and if it is not the law is void.
>
> (b) Discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification, provided that
>
> > (i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and
> >
> > (ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.
>
> (c) In considering Art 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy.

While the Court of Appeal approved this test, it preferred to reserve the adjective 'discriminatory' for laws and executive acts that contravene Article 12, and directed that those which do not should simply be referred to as having a 'differentiating' effect.[15]

The passage above was a quotation from *Malaysian Bar v Government of Malaysia*,[16] a decision of the Supreme Court of Malaysia based on Article 8(1) of the Malaysian Constitution which is identical to Article 12(1) of the Singapore

---

14 ibid 508, [58].
15 ibid 508, [59].
16 *Malaysian Bar v Government of Malaysia* [1987] 2 MLJ 165 (Sup Ct, Malaysia) 170.

Constitution.[17] The Malaysian courts had themselves adopted the test applied by the Supreme Court of India to Article 14 of the Indian Constitution,[18] which had ultimately applied the judgment of the Supreme Court of the United States (US) in *Southern Railway Co v Greene*[19] regarding the Fourteenth Amendment to the US Constitution.[20] Notably, the US case had been decided in 1910. This was before the 1938 appearance of Justice Harlan Stone's Footnote Four in *United States v Carolene Products Co*[21] which suggested the application of a stricter standard of scrutiny where the government has classified persons in a way that offends fundamental rights in the Constitution (such as those set out in the first ten Amendments) or where such a classification results from 'prejudice against discrete and insular minorities',[22] as well as the Supreme Court's adoption of the standard in subsequent cases. In *Greene* itself, the Court held that an Alabama law violated the Equal Protection Clause because it required only out-of-state corporations to pay an annual franchise tax to the state. The case involved neither discrete or insular minorities, nor a breach of other fundamental constitutional rights.

When determining if Tan Eng Hong possessed standing, the Singapore CA applied a simpler restatement of the test:[23]

> [A] differentiating measure prescribed by legislation would be consistent with Art 12(1) only if:
>
> (a) the classification was founded on an intelligible differentia; and
>
> (b) the differentia bore a rational relation to the object sought to be achieved by the law in question.

The CA applied this version of the test in *Lim Meng Suang*.[24] It abridges paragraph (a) of the passage from *Taw Cheng Kong* to a mere mention that the legislatively prescribed measure must be 'differentiating', but this is nonetheless a reminder that no claim pursuant to Article 12(1) can succeed unless the claimant can show *prima*

---

17 Singapore was a state of Malaysia between 1963 and 1965. Upon achieving full independence, it adopted various provisions of the Malaysian Constitution, including Art 8(1), into its own Constitution by way of the Republic of Singapore Independence Act 1965, No 9 of 1965, 1985 Rev Ed, s 6(1).

18 *Malaysian Bar* (n 16) 170, citing *Datuk Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 FC (Malaysia) 165–166, which cited *Shri Ram Krishna Dalmia v Shri Justice S R Tendolkar* AIR 1958 SC 538, [1959] SCR 279 (SC, India) 296–297. Art 14 of the Indian Constitution reads: 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'

19 *Southern Railway Co v Greene* 216 US 400 (1910) (SC).

20 *Shri Ram Krishna Dalmia* (n 18), [1959] SCR at 296–297, citing *Budhan Choudhry v State of Bihar* AIR 1955 SC 191, [1955] 1 SCR 1045 (SC, India) 1048–1049, which cited (among others) *Chiranjit Lal v Union of India* AIR 1951 SC 41, [1950] SCR 869 (SC, India) 932, which in turn cited *Greene*: 'While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed, and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification.' See ibid 417.

21 *United States v Carolene Products Co* 304 US 144 (1938) (SC) 152, n 4.

22 ibid.

23 *Tan Eng Hong* (standing) (n 8), 525, [124], citing *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 (CA) (*Yong Vui Kong* (2010)) 536, [109].

24 *Lim Meng Suang* (CA) (n 3), 48, [60]. It was also applied by the HC: *Lim Meng Suang* (HC) (n 1), 126, [18].

facie that the measure treats him or her differently from people in comparable classes.[25] By this token, it is logically wrong to conclude that if the measure treats the claimant the same as other members of the class to which he or she belongs, Article 12(1) is not infringed.[26] In *Kok Hoong Tan Dennis v Public Prosecutor*,[27] the HC appeared to have committed this error. The Ministry of Home Affairs had deregistered the Singapore Congregation of Jehovah's Witnesses in 1972 pursuant to the Societies Act[28] on the ground that it was being used for purposes 'prejudicial to public peace, welfare or good order in Singapore'.[29] Subsequently, in the mid-1990s, the appellants were convicted under the Act by a District Court for having attended a meeting of an unlawful society or for knowingly allowing their premises to be used for the meeting of an unlawful society. Responding to the appellants' contention that their prosecutions had breached their right to equality, the HC held that 'all Jehovah's Witnesses who fell foul of the same law were equally treated and there could be no complaint that some were treated more favourably than others'.[30]

Similarly, in *Taw Cheng Kong*, the CA held that the legislative measure in question 'would not offend the equality provision because the section would apply to *all* Singapore citizens as a class'.[31] The judge in *Lim Meng Suang* accepted that this reasoning was tautologous,[32] and emphasized the need to focus on the 'fundamental rubric' that 'like should be treated alike'.[33] I submit that this is in line with the need to show that members of the class of persons to which the claimant belongs have been treated differently from members of one or more comparable classes.[34]

One last point – it would arguably make more sense to consider if a legislative measure has a differentiating effect *after* determining if the classification is based on an intelligible differentia. I will examine the intelligible differentia stage of the

---

25 The CA noted that 'the "reasonable classification" test is not even engaged if the impugned statute is not discriminatory in the first place': *Lim Meng Suang* (CA) (n 3), 47, [57].

26 See Joseph Tussman & Jacobus tenBroek, 'The Equal Protection of the Laws' (1949) 37 Cal L Rev 341, 345; S[u] M[ien] Huang-Thio, 'Equal Protection and Rational Classification' [1963] Pub L 412, 418–422.

27 *Kok Hoong Tan Dennis v Public Prosecutor* [1996] 3 SLR(R) 570 (HC).

28 Societies Act, Cap 311, 1985 Rev Ed; now 2014 Rev Ed.

29 ibid, s 24(1)(a).

30 *Kok Hoong Tan Dennis* (n 27), 578, [33]; see also 580, [40]: '[T]here was no discrimination within the class, *ie* all members of the SCJW who had been found to have violated the Societies Act or Order 179 were treated similarly'.

31 *Taw Cheng Kong* (CA) (n 13), 514, [82] (original emphasis). The impugned measure was s 37(1) of the Prevention of Corruption Act, Cap 241, 1993 Rev Ed (PCA), which stated: 'The provisions of this Act have effect, in relation to citizens of Singapore, outside as well as within Singapore; and where an offence under this Act is committed by a citizen of Singapore in any place outside Singapore, he may be dealt with in respect of that offence as if it had been committed in Singapore.'

32 *Lim Meng Suang* (HC) (n 1), 140–144, [57]–[60], relying on Tan Yock Lin, 'Equal Protection, Extra-Territoriality and Self-Incrimination' (1998) 19 Sing L Rev 10, 18–19.

33 ibid 144, [61]. The idea that 'like should be treated alike' has been traced to Aristotle. See, for example, *Nicomachean Ethics*, Bk V, Ch III, Bekker number 1131a23–24: '[I]f the persons are not equal, they will not have equal shares; it is when equals possess or are allotted unequal shares, or persons not equal equal shares, that quarrels and complaints arise.' (Aristotle; H Rackham (transl), *The Nicomachean Ethics* (Cambridge, Mass: Harvard University Press; London: William Heinemann, 1934), Vol 19.)

34 See *Ng Chye Huay v Public Prosecutor* [2006] 1 SLR(R) 157 (HC) 169–170, [37]–[38], for an example of a case in which paragraph (a) of the *Taw Cheng Kong* passage was not satisfied. The appellants, who were Falungong practitioners, failed to prove that subsidiary legislation requiring a permit to be obtained from the police to hold a public assembly discriminated against them by treating them differently from other people. The HC found that the legislation applied equally to all persons seeking to hold public assemblies.

reasonable classification test later.[35] Nonetheless, it is evident that if a class is so poorly defined that one cannot tell with certainty as to who belongs to the class, then it is pointless to talk about whether members of the class have been treated differently from members of comparable classes.

II. DEFINITION OF THE CLASSIFICATION

The next step of the reasonable classification test – limb (a) of the test in *Lim Meng Suang*, which was also mentioned in paragraph (b)(i) of the *Taw Cheng Kong* passage – is the need to see if the classification employed by the government is based on an 'intelligible differentia'. This is lawyerese for requiring the classification to be defined by clearly understandable characteristics. As the HC in *Lim Meng Suang* put it: '"Intelligible" means something that may be understood or is capable of being apprehended by the intellect or understanding, as opposed to by the senses. "Differentia" is used in the sense of a distinguishing mark or character, some attribute or feature by which one is distinguished from all others.'[36] This step was well explained by Judge of Appeal M Karthigesu when he sat as a High Court judge in the case of *Taw Cheng Kong v Public Prosecutor*:[37]

> [T]here must be a consistent means of identifying the persons discriminated against, for example, gender, age, race, religion, seniority of professional qualification or area of residence. If there is no common identifying feature, then the discrimination violates... arbitrariness and the statute is invalid. If there is an intelligible differentia, then the discrimination is not arbitrary in this sense and it is necessary to proceed to the [next] stage.

This limb of the test does not usually appear to pose much difficulty for executive or legislative classifications. Indeed, in *Lim Meng Suang* the CA said it would be 'very seldom' that a classification would fail limb (a) as it 'connotes... a relatively low threshold that ought to avoid any consideration of substantive moral, political and/or ethical issues because these issues are potentially (and in most instances, actually) controversial'.[38] It explained the intelligible differentia requirement in the following terms:[39]

> [T]he differentia embodied in the impugned statute must not only identify a clear distinguishing mark or character, but must *also* be *intelligible* (as opposed to illogical and/or incoherent). ... [W]e are of the view that a differentia which is capable of being understood... may *nevertheless* still be unintelligible to the extent that it is *so unreasonable as to be illogical and/or incoherent*. We recognise that this last-mentioned proposition may open the doors to potential abuse, so we include the caveat that the illogicality and/or incoherence must be of *an extreme nature*. It must be so extreme that *no reasonable person* would ever contemplate the differentia concerned as being functional as *intelligible* differentia.

---

35 See the next part of the article, 'Definition of the Classification' (Pt II), below.

36 *Lim Meng Suang* (HC) (n 1), 135–136, [47], cited in *Lim Meng Suang* (CA) (n 3), 50, [65].

37 *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78 (HC) (*Taw Cheng Kong* (HC)) 94, [33]. This decision was overruled by the CA, but the CA did not disapprove of the passage cited: *Taw Cheng Kong* (CA) (n 13).

38 *Lim Meng Suang* (CA) (n 3), 49–50, [65] (emphasis omitted).

39 ibid 50, [67] (original emphasis).

This passage is significant as it indicates that limb (a) incorporates a 'limited requirement of legitimacy'.[40] The Court explained in the subsequent case of *Yong Vui Kong v Public Prosecutor* (2015) that 'a law which adopts a manifestly discriminatory object would not pass muster under the first limb of the test. The differentiating factor used in such a law might be intelligible in the sense that it clearly distinguishes those covered by the law from those not covered by the law; but it would be "unintelligible" in the sense that no reasonable person would consider such a differentiating factor to be functional as an intelligible differentia.'[41] This explains why the Court claimed that the differentia embodied in a law banning all women from driving might arguably be illogical and/or incoherent under limb (a)[42] – while it is obvious which class of persons would be affected by the law (women who wish to drive), the differentia used may be unintelligible because it arguably makes no sense to ban women from driving.

The Court defined the intelligible differentia requirement in a manner highly deferential to the Government. This reflected the Court's concern that it should not become a 'mini-legislature',[43] a point it repeated many times in its judgment. Since it is not really in doubt who section 377A affects, it is hardly surprising that the CA agreed with the HC judge's view that:[44]

> [I]t is quite clear that the classification prescribed by s 377A – *viz*, male homosexuals or bisexual males who perform acts of 'gross indecency' on another male – is based on an intelligible differentia. It is also clear from the differentia in s 377A that the section excludes male-female and female-female acts. There is little difficulty identifying who falls within this classification and who does not.

The plaintiffs had submitted that the vagueness of the term *gross indecency* meant either that the classification used in section 377A was not based on an intelligible differentia, or that the provision might be applied arbitrarily. This point was tersely dealt with by the HC, which held that the contention was 'without... substantiation', and that simply because 'there is some width in the interpretation of this term... does not in itself make s 377A unconstitutional' – the terms *gross* and *indecent* are 'not unknown in our criminal law'.[45]

When arguing that section 377A violates fundamental rules of natural justice and the rule of law, the plaintiff in *Tan Eng Hong* also suggested that the breadth of the term *gross indecency* violated the intelligible differentia requirement of the reasonable classification test.[46] He submitted it was uncertain whether acts of 'kissing, holding of hands, or even merely hugging' constituted offences. The HC remained unpersuaded, taking the view that just because a statutory provision is seldom invoked does not necessarily render it vague and uncertain, because its meaning may be developed through case law.[47] Moreover, looking at the

---

40 ibid 57, [84] (emphasis omitted), cited in *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 (CA) (*Yong Vui Kong* (2015)) 1173, [106].
41 *Yong Vui Kong* (2015), ibid 1173, [106].
42 *Lim Meng Suang* (CA) (n 3), 70, [114].
43 ibid 52, [70], and 54, [77].
44 *Lim Meng Suang* (HC) (n 1), 136, [48], approved in *Lim Meng Suang* (CA) (n 3), 68–69, [110]–[111].
45 *Lim Meng Suang* (HC), ibid 173–174, [132].
46 *Tan Eng Hong* (merits) (n 2), 1089, [80].
47 ibid 1089, [82].

considerations which existed at the time section 377A was introduced in 1938 (a point that will be dealt with later),

> there is at least an arguable case that the conduct in the hypothetical example... would *not* constitute an offence under s 377A. In fact, it is quite telling that none of the more than a hundred case authorities cited... was of a decision by the Singapore court convicting two males for kissing, holding hands or hugging.[48]

I suggest that for the differentia of a classification to be unintelligible for failing to unmistakably identify who belongs to the class, it would have to lack a clear judicial definition at the time of assessment. Furthermore, as the judge alluded to in *Tan Eng Hong*, the differentia would have to be so subjective and inherently vague as to be incapable of clear definition in the future. It is quite hard to think of a truly unintelligible differentia, but perhaps physical attractiveness might be an example.[49]

On balance, it is submitted that the HC correctly concluded that the term *gross indecency* was not so vague as to cause section 377A to be based upon an unintelligible differentia in this sense. In *Ng Huat v Public Prosecutor*[50] the Court had laid down the standard for determining what amounts to a grossly indecent act, explaining that it

> must depend on whether in the circumstances, and the customs or morals of our times, it would be considered grossly indecent by any right-thinking member of the public... . The court does not sit to impose its own moral standards or precepts, but to enforce the morals of the general public.[51]

Guidance may also be sought from judgments in successful prosecutions brought under section 377A (all of which so far have involved non-consensual acts);[52] and from cases involving the equivalent provisions in the United Kingdom (UK) – section 11 of the Criminal Law Amendment Act 1885[53] and, later, section 13 of the Sexual Offences Act 1956[54] – and in other Commonwealth jurisdictions.

---

48 ibid 1089–1090, [83].

49 It may be recalled that in 1995 Andrea Guglieri, the mayor of the town of Diano Marina on the Italian Riviera, sparked off what Italian newspapers called the 'Bikini Wars' by discouraging 'ugly women' from wearing bikinis in public: see, for example, 'The Odd, Strange & Curious: Bikini War on Riviera', *Daily News* (Kingsport, Tennessee, 16 August 1995), vol 24, no 119, at 11 <*https://news.google.com/newspapers?nid=1241&dat=19950816&id=Z31TAAAAIBAJ&sjid=IIYDAAAAIBAJ&pg=6529,5554315&hl=en*> (accessed 17 May 2015).

50 *Ng Huat v Public Prosecutor* [1995] 2 SLR(R) 66 (HC).

51 ibid 76, [27], citing *R v K & H* (1957) 21 WWR 86 (SC, Alberta, Canada).

52 *Public Prosecutor v Chan Mun Chiong* [2008] SGDC 189 (DC) (fellatio); *Ng Huat* (n 50), *Public Prosecutor v N* [2004] SGDC 52 (DC); *Public Prosecutor v Rahim bin Basron* [2010] 3 SLR 278 (HC) (the last three cases involved touching the penis). Anal intercourse, which was an offence under the former s 377 of the Penal Code (voluntary carnal intercourse against the order of nature with any man, woman or animals: see, for example, *Kanagasuntharam v Public Prosecutor* [1991] 2 SLR(R) 874 (Ct of Crim Appeal); and *Lim Hock Hin Kelvin v Public Prosecutor* [1998] 1 SLR(R) 37 (CA)) until it was repealed with effect from 1 February 2008, would presumably also amount to gross indecency.

53 UK Criminal Amendment Act 1885, 48 & 49 Vict, c 69.

54 UK Sexual Offences Act 1956, c 59 (amended by the Sexual Offences Act 1967, c 60, s 1, to decriminalize homosexual acts in private). Some cases include *R v Hunt* [1950] 2 All ER 291, 301 (two men in a shed both 'making filthy exhibitions the one to the other' without physical contact) and *R v Preece* [1977] QB 370 (CA) (two men watching each other masturbating through a hole in a partition between lavatory cubicles). The Wolfenden Report stated: 'From the reports we have seen and the other evidence we have received it appears that the offence usually takes one of three

What is less clear is whether the CA went on to consider if the classification in section 377A is intelligible in the logical sense. It concluded that section 377A is neither illogical nor incoherent, because if it was 'there would have been no basis upon which the parties on each side of this cavernous divide could have joined issue in the first place'.[55] However, there did not appear to be any real assessment of whether the object of the section is manifestly discriminatory. Indeed, rather puzzlingly, the Court said it would not be appropriate for it to do so, a point examined below.[56]

III. Rational Relation between Differentia of Classification and Statutory Object

As mentioned above, the main issue in most Article 12(1) cases mostly concerns limb (b) of the test in *Lim Meng Suang*, which appeared in paragraph (b)(ii) of the *Taw Cheng Kong* passage. This requires the court to ascertain the statutory object, and the standard of review it will apply when determining the rationality of the relation between the differentia of the classification employed in the impugned provision and the statutory object.

A. Ascertaining the Statutory Object – Reliance on Extrinsic Materials

Prior to *Taw Cheng Kong* and *Lim Meng Suang*, courts sometimes declared what the statutory objects were without explicitly identifying how they had ascertained them. Most likely the object of an Act or a specific provision thereof was simply determined by considering the effect of the provisions in the Act.[57] For example, in *Ong Ah Chuan v Public Prosecutor*,[58] provisions of the Misuse of Drugs Act 1973[59] imposed the mandatory death sentence on people convicted of trafficking in 15 or more grams of heroin. The appellants, who had been duly convicted and sentenced to death, submitted that the provisions offended Article 12(1) 'since it compels the court to condemn to the highest penalty of death an addict who has gratuitously supplied an addict friend with 15g of heroin from his own private store, and to inflict a lesser punishment upon a professional dealer caught selling for distribution to many addicts a total of 14.99g'.[60] The Privy Council, then Singapore's final appellate court, held that the 'social object' of the Act 'is to prevent the growth of drug addiction in Singapore by stamping out the illicit drug trade and, in particular, the trade in those most dangerously addictive drugs, heroin and morphine'. It was for Parliament to determine, based on available information about the structure of the illicit drug trade,

---

forms; either there is mutual masturbation; or there is some form of intercrural contact; or oral-genital contact (with or without emission) takes place. Occasionally the offence may take a more recondite form; techniques in heterosexual relations vary considerably, and the same is true of homosexual relations.' See Home Office & Scottish Home Department, *Report of the Committee on Homosexual Offences and Prostitution* (Chairman: Sir John Wolfenden; Cmnd 247) (London: HMSO, 1957) (Wolfenden Report) 38, [104].

55 *Lim Meng Suang* (CA) (n 3), 69, [111] (emphasis omitted).

56 See the part of this article entitled 'Legitimacy of the statutory object' (Pt III.B.2), below.

57 Compare Goh Yihan, 'Statutory Interpretation in Singapore: 15 Years on from Legislative Reform' (2009) 21 Sing Acad LJ 97, 121, [24].

58 *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710 (PC on appeal from Singapore).

59 Misuse of Drugs Act 1973, No 5 of 1973 (now Cap 185, 2008 Rev Ed).

60 *Ong Ah Chuan* (n 58) 724, [32].

where to establish the 'appropriate quantitative boundary' between 'a dealer on the wholesale scale who operates near the apex of the distributive pyramid' who deserved heavier punishment and 'dealers on a smaller scale who operate nearer the base of the pyramid'.[61] In the final analysis, Parliament had not acted arbitrarily in differentiating in the Act between those who trafficked in less than 15 grams of heroin and those who had trafficked in 15 grams or more, and this differentia bore 'a reasonable relation to the social object of the law'.[62] Their Lordships' characterization of the object of the Act was subsequently adopted in other cases.[63]

In 1993, soon after the House of Lords (HL) decided *Pepper (Inspector of Taxes) v Hart*,[64] the Parliament introduced section 9A into the Interpretation Act,[65] subsection (1) of which states:

> In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.

Although the provision is aimed at the ascertainment of the meaning of a written law rather than the object of a written law for the purpose of the reasonable classification test, in *Taw Cheng Kong*[66] the HC proceeded to adopt the purposive approach for the latter purpose. This is arguably not a misuse of section 9A since the purposive approach towards statutory interpretation in fact requires the court to ascertain 'the purpose or object underlying the written law'.[67] The Court sounded a note of caution, saying that when a new provision has been introduced into an Act, it is not right to blindly assume that the object of the original Act also applies to the new provision:[68]

> [I]t is not a rule that Parliament must legislate consistently with past legislation. On the contrary, subsequent legislation must, where inconsistent with past legislation, prevail over it. The objective of the court is not to construe all legislation as if Parliament was in some way bound by its intentions when it first passed the Act. It is to construe why Parliament has seen fit to amend that Act in the light of the inadequacies that the passage of time has revealed or new needs carried by the tide of progress.[69]

Section 9A(2) of the Interpretation Act goes on to explain that a court may consider extrinsic materials, that is, 'any material not forming part of the written law... capable of assisting in the ascertainment of the meaning' of a provision of a written law, either 'to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law' or

---

61 ibid 725–726, [38].
62 ibid 725, [37].
63 See, for example, *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103 (CA) 122–123, [69]; *Johari bin Kanadi v Public Prosecutor* [2008] 3 SLR(R) 422 (HC) 432, [14].
64 *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 (HL).
65 Interpretation Act, Cap 1, 1985 Rev Ed (now 2002 Rev Ed). Section 9A was introduced by the Interpretation (Amendment) Act 1993, No 11 of 1993. For a general discussion about the effect of the provision in Singapore, see Goh (n 57).
66 *Taw Cheng Kong* (HC) (n 37).
67 Interpretation Act, Cap 1, 2002 Rev Ed (IA), s 9A(1).
68 *Taw Cheng Kong* (HC) (n 37), 97, [40].
69 ibid 97, [42].

> to ascertain the meaning of the provision when — (i) the provision is ambiguous or obscure; or (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law leads to a result that is manifestly absurd or unreasonable.

Among the extrinsic materials that may be consulted are 'any explanatory statement relating to the Bill containing the provision', 'the speech made in Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in Parliament', and 'any relevant material in any official record of debates in Parliament'.[70]

Section 9A(1) which decrees the use of a purposive approach to statutory interpretation, and section 9A(2) which deals with the use of extrinsic materials by the courts, are distinct from each other – nothing in section 9A(1) mandates resorting to extrinsic materials to determine the object of a written law.[71] However, the CA has held: 'A purposive approach to statutory interpretation would invariably involve reference to extrinsic materials that may assist in the interpretation of the statutory provision.'[72] This may justify the courts consulting extrinsic materials when determining the statutory object in the context of the reasonable classification test, even though section 9A(2) only refers to the use of such materials to ascertain or confirm the meaning of a provision.

In *Taw Cheng Kong*, the Court had to establish the object of section 37(1) of Prevention of Corruption Act (PCA),[73] which had been introduced in 1966 into the original Prevention of Corruption Ordinance 1960,[74] to determine if the use of Singapore citizenship as a differentia in the section infringed Article 12(1). Section 37(1) is an extraterritoriality clause that extends the effect of the Act to Singapore citizens who commit corrupt acts outside Singapore. The Court began by looking at the explanatory statement in the 1966 bill and the parliamentary debates that had taken place at that time. However, finding them unhelpful, it concluded that Parliament had intended the 1966 amendments to further the objectives of the original statute. Accordingly, it turned to the explanatory statement in the bill that had subsequently been enacted as the 1960 Ordinance, and the speech of the Minister for Home Affairs during the Second Reading of the bill. Noting that the Minister had emphasized the Government's determination to stamp out bribery and corruption in Singapore, the Court concluded that the object of the PCA is to root out corruption affecting the Singapore Civil Service or corrupt practices among fiduciaries in Singapore. Thus, the object of section 37(1) was to address corrupt acts taking place outside Singapore which affected events within the country.[75]

This led the Court to conclude that there was an insufficient nexus between the object and the differentia of citizenship.[76] The classification was over-inclusive as it subjected to criminal liability citizens whose corrupt acts had no effect on Singapore – for example, 'a Singapore citizen now a foreign permanent resident, employed in the foreign country by the foreign government, receiving a bribe paid in

---

70 IA, s 9A(3)(b)–(d).
71 Goh (n 57) 110, [12].
72 *The "Seaway"* [2005] 1 SLR(R) 435 (CA) 445, [25].
73 PCA (n 31).
74 Prevention of Corruption Ordinance 1960, No 39 of 1960. Section 37(1) was introduced into the 1960 Ordinance as s 31A by the Prevention of Corruption (Amendment) Act 1966, No 10 of 1966.
75 *Taw Cheng Kong* (HC) (n 37), 99–101, [46]–[51].
76 ibid 104, [65].

the foreign country in a foreign currency by a foreign payor'. Simultaneously, it was under-inclusive because permanent residents and foreigners whose corrupt acts committed abroad did in fact have an impact on Singapore were excluded – for example, 'a Singapore permanent resident or a foreigner working for the Singapore government who agrees to take a short trip outside Singapore to receive a bribe in Singapore dollars in relation to an act he will then do in Singapore'.[77]

When the matter came before the CA by way of a criminal reference,[78] it took a much less comprehensive approach and reached a different result. First, it examined the long title of the 1960 Ordinance, noted it merely stated 'An Act to provide for the more effectual prevention of corruption', and commented that it was obvious the extraterritoriality clause was introduced 'to widen the ambit of the Act for the more effective control and suppression of corruption'.[79] Next, it examined section 37(1) itself, and concluded that the wide language used meant that the provision 'is capable of capturing all corrupt acts by Singapore citizens outside Singapore, irrespective of whether such corrupt acts have consequences within the borders of Singapore or not'.[80] In other words, the Court did not see why the object of the provision should be limited to corrupt acts occurring outside Singapore which have an effect in the country. The Court found it could ascertain the object of the provision from an examination of the PCA alone, without having to resort to extrinsic materials. Eventually it held that, given the potential breadth of section 37(1), it was rational for Parliament to have drafted it 'to draw the line at citizenship and leave out non-citizens so as to observe international comity and the sovereignty of other nations'.[81] In addition, the CA found the HC had been wrong to postulate that the provision was arbitrary because it was under- and over-inclusive. This was because the respondent, Taw, had not adduced sufficient 'material or factual evidence to show that it was enacted arbitrarily or had operated arbitrarily', and thus the presumption of constitutionality had not been displaced.[82]

Tan Yock Lin prefers the CA's view, being of the opinion that the HC's conclusion that section 37(1) was aimed at ensuring corrupt acts committed abroad which have an effect in Singapore was 'presupposed rather than proved'.[83] He also wonders why the HC gave effect to the effects notion of extraterritoriality rather than other possible forms.[84] I am not sure I agree with him, because the HC based its conclusion on a parliamentary speech and did not merely pluck it out of the air. The answer may lie in a careful reading of Hansard to determine what exactly was the Parliament's intent when enacting the PCA.

---

77 ibid 104, [64].

78 The defendant, Taw Cheng Kong, had been found guilty of corruption by a District Court, but the conviction was overturned on appeal to the HC *inter alia* on the ground that s 37(1) of the PCA violated Art 12(1) of the Constitution. As the HC is the final appellate court for criminal matters originating from the District Court, to obtain a ruling on the constitutionality of s 37(1), the Public Prosecutor brought the matter before the CA by way of a criminal reference. The CA's judgment was purely on points of law and had no effect on the defendant's acquittal: 'Two Key Issues Referred to Court of Appeal', *The Straits Times* (Singapore, 27 May 1998) 41.

79 *Taw Cheng Kong* (CA) (n 13), 509, [63].

80 ibid 509–510, [64].

81 ibid 512, [75].

82 ibid 512, [77], and 514, [80].

83 Tan (n 32) 16.

84 ibid; other notions of extraterritorial crimes include the result notion (the crime is committed wherever its result or any part of its result occurs), the continuing notion (the crime is committed wherever a part of the continuation of the crime occurs), and even the notion that a crime may be punished within a jurisdiction when a significant portion of the crime is committed there, though Tan notes there are 'obvious disadvantages' to the latter notion: ibid 29–30.

Turning now to the HC decision in *Lim Meng Suang*, it is evident that the Court adopted the approach taken by the HC in *Taw Cheng Kong*, though the judge rightly did not rule out the possibility of the object being inferable from the provision itself. He said:

> In ascertaining the purpose or object of a statutory provision, if such purpose or object is not already clear from the provision itself..., then in accordance with s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed)..., we may look to any explanatory statement in the Bill introducing the provision or to the speech made in Parliament at the second reading of that Bill. These must be the primary guideposts. The purpose of an earlier precursor of the statutory provision, especially if that precursor is a statute or subsidiary legislation from another jurisdiction, is but a secondary guidepost at best, referable for context or for elucidation when the primary guideposts are silent or unclear. Such secondary guideposts must be used with extreme caution.[85]

Accordingly, he preferred the reasons given by the Attorney-General during a debate of the Straits Settlements Legislative Council on 13 June 1938 for the introduction of section 377A over the reasons for the introduction of the provision's British precursor, section 11 of the Criminal Law Amendment Act 1885.[86] The Attorney-General had stated:

> With regard to clause 4 it is unfortunately the case that acts of the nature described have been brought to notice. As the law now stands, such acts can only be dealt with, if at all, under the Minor Offences Ordinance, and then only if committed in public. Punishment under the Ordinance is inadequate and the chances of detection are small. It is desired, therefore, to strengthen the law and to bring it into line with the English Criminal Law, from which this clause is taken, and the law of various other parts of the Colonial Empire of which it is only necessary to mention Hong Kong and Gibraltar where conditions are somewhat similar to our own.[87]

The CA followed suit, noting it could not be assumed that the object of section 377A was the same as the object of section 11 of the UK Act introduced more than half a century earlier.[88] I submit this was correct as ultimately the relevant opinions are those of the local legislature, not those of any foreign legislative body.

Furthermore, the CA also followed the approach of the HC in *Taw Cheng Kong*, embarking on a detailed examination of extrinsic materials to ascertain the object of section 377A. In addition to the Attorney-General's speech, these included the objects and reasons accompanying the Penal Code (Amendment) Bill 1938, prior legislation such as section 23 of the Minor Offences Ordinance 1906[89] and section 377 of the Penal Code[90] which were both referred to in the foregoing materials, Colonial Office correspondence on the enactment of section 377A, and annual reports on the organization and administration of the Straits Settlements Police and the state

---

85 *Lim Meng Suang* (HC) (n 1), 149, [70].

86 UK Criminal Amendment Act 1885 (n 53).

87 C G Howell (Attorney-General), speech during the Second Reading of the Penal Code (Amendment) Bill, *Proceedings of the Legislative Council of the Straits Settlements* (13 June 1938), B49, cited in *Lim Meng Suang* (n 1) 148, [66]. The bill was enacted as the Penal Code (Amendment) Ordinance 1938, No 12 of 1938, on the same day.

88 *Lim Meng Suang* (CA) (n 3), 71, [118].

89 Minor Offences Ordinance 1906, No 13 of 1906 (Straits Settlements).

90 Penal Code, Cap 20, 1936 Rev Ed (Straits Settlements).

of crime in the Settlements.[91] These materials shed light on the mischief that section 377A was enacted to address. They led the Court to conclude that the provision was intended to have general application and to enforce societal views about the morality of sexual acts between men. It rejected the appellants' assertion that the section was only intended to combat male prostitution, which implied that use of the provision to target consensual behaviour was over-inclusive and unconstitutional.[92]

When ascertaining the object of section 377A, the CA made no mention of the parliamentary debate about the provision that look place on 22 October 2007 when the Penal Code (Amendment) Bill 2007,[93] which sought to comprehensively revise the Penal Code, was given its Second Reading. Prior to this, news that the Government had decided not to repeal section 377A as part of its review of the Code had engendered heated debate in the media, and led to a petition signed by 2,341 citizens calling for section 377A to be repealed being presented to Parliament for its consideration.[94] The petition was debated during the Second Reading of the amendment bill. We may surmise that the CA agreed with the HC that the debates were irrelevant. The judge had stated:

> ... if the purpose of a provision was articulated in Parliament when it was first introduced, and at some later date, a comprehensive review of the Act containing that provision was carried out and it was decided that the provision should be retained, then absent any unusual facts or circumstances, the purpose of the provision as articulated in Parliament when the provision was first introduced will still be the purpose for which that provision was enacted.[95]

In his view, no 'unusual facts or circumstances' had been demonstrated, so the purpose of section 377A remained that articulated by the Attorney-General of the Straits Settlements in 1938, as the speeches made by Members of Parliament supporting the retention of the provision had essentially affirmed 'that Singapore was a conservative society where the majority did not accept homosexuality'.[96]

Po Jen Yap has commented that the HC took an unduly restrictive approach by inquiring into the original purpose of section 377A when it was introduced in 1938, instead of considering fresh purposes supporting the section which were put forward by the state during the hearing.[97] Indeed, the Attorney-General and the plaintiffs' counsel agreed that if the original purpose of section 377A is no longer applicable or acceptable today,[98] but there exists a new purpose which the section might serve such as preventing the spread of HIV/AIDS, this new purpose could be substituted for the old one. The HC felt the issue was 'intriguing' but did not arise on the facts of the case and so made no decision on it.[99] The CA said it was 'by no means an

---

91 *Lim Meng Suang* (CA) (n 3), 71–75, [119]–[127].
92 ibid 75–81, [128]–[149].
93 Penal Code (Amendment) Bill 2007, Bill No 38 of 2007.
94 The petition is summarized in *Lim Meng Suang* (HC) (n 1) 152–153, [76].
95 ibid 153, [77].
96 ibid 156, [85].
97 *Yap* Po Jen, Case Comment, 'Section 377A and Equal Protection in Singapore: Back to 1938?' (2013) 25 Sing Acad LJ 630, 632–636, [6]–[20].
98 For example, if there exists scientific evidence that sexual orientation is determined entirely by genetic factors and not by parental or societal nurturing or lifestyle choices, and is immutable: *Lim Meng Suang* (HC) (n 1), 156–157, [87]. In *Tan Eng Hong* (merits) (n 2), 1081–1083, [57]–[64], the Court said that since medical and scientific evidence on the issue is inconclusive, on a balance of probabilities it could not hold that homosexuality is a natural and immutable attribute.
99 *Lim Meng Suang* (HC) (n 1) 156–157, [87].

inappropriate argument', but that it raised 'extra-legal' issues which should be addressed by the legislature rather than the court.[100]

With respect, it is submitted that the courts acted correctly in looking primarily to the object of section 377A articulated in 1938. In *R v Big M Drug Mart Ltd*,[101] Chief Justice Brian Dickson, writing for a majority of the Supreme Court of Canada, held that legislative purpose 'is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable'.[102] Hence, the Court took the view that it was the purpose of the Lord's Day Act,[103] which made it an offence to sell goods on a Sunday, when it was adopted in 1906 which had to be judged. It was clear that the Act had been enacted to enforce observance of the Christian Sabbath, and since it was impermissible to attribute to the Act the fresh secular purpose of providing workers with a day of rest, the Act infringed the fundamental freedom of conscience and religion guaranteed by section 2(a) of the Canadian Charter of Rights and Freedoms, and was not a reasonable limit on the freedom demonstrably justifiable in a free and democratic society.

Moreover, as I have written elsewhere:

> If the court were to accept fresh explanations of a provision's purposes from the executive branch, this would provide a novel and unorthodox avenue for the interpretation of the provision to be manipulated without the matter being debated by the legislature. It is contended that the latter is the appropriate method for the legislature to imbue an existing provision with a new purpose. If Parliament has had occasion to reconsider a provision and there is cogent evidence that it has decided to retain it unchanged for fresh purposes, this ought to be taken into account by the court. However, absent such a scenario, ... [there] is no warrant for a court to ignore the original legislative purpose and construct a largely fictitious one.[104]

Thus, if in 2007 the Singapore Parliament had expressly decided to retain section 377A in the statute book for a new objective, such as to reduce the transmission of HIV/AIDS, this would have to be taken into account when applying the reasonable classification test. According to the HC in *Lim Meng Suang*, though, there was no evidence of this.

The judgments discussed above highlight the following. First, a court may ascertain the object of a provision by examining its wording and its context (such as other provisions of the Act in which it is found, and the long title of the Act), as well as extrinsic materials such as the explanatory statement in the bill which preceded the Act, and parliamentary speeches that were made during the enactment of the bill. As regards the latter, the court must necessarily be wary about relying on statements taken out of context. Secondly, and perhaps more crucially, different results will be reached depending on how narrowly or widely the object is expressed.[105] The point will become evident when we examine the rational relation requirement of limb (b) in the next section of this article. At the moment, we have little guidance from the courts on how the task of properly characterizing a statutory object should be fulfilled. The CA's judgment in *Lim Meng Suang* suggests the court must strive to be objective and avoid imputing intentions to the legislature that cannot fairly be

---

100 *Lim Meng Suang* (CA) (n 3), 89, [177] (emphasis omitted).
101 *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 (SC, Canada).
102 ibid 335, [91].
103 Lord's Day Act, RSC 1970, c L–13 (Canada).
104 Jack Tsen-Ta Lee, 'The Text through Time' (2010) 31(3) Stat L Rev 217, 228.
105 Tan (n 32) 15.

discerned from the statutory text and relevant extrinsic materials. Nonetheless, it appears the courts wield much discretion in this respect.

B. WHETHER A RATIONAL RELATION EXISTS

1. *Standard of Review*

This brings us to our next issue – whether there can be said to be a rational nexus or relation between the differentia underlying the classification and the object of the impugned provision. In *Lim Meng Suang* the HC defined something that is rational as being 'based on, endowed with or governed by reason. It must be, at the minimum, reasonable in the sense that it is capable of being supported or justified by reason and is in conformity with what is fairly to be expected or called for.'[106] This is uncontroversial, but then the Court cited the following passage from the Indian case *Chiranjit Lal v Union of India*:

> ... The legislature undoubtedly has a wide field of choice in determining and classifying the subject of its laws, and if the law deals alike with all of a certain class, it is normally not obnoxious to the charge of denial of equal protection; *but the classification should never be arbitrary. It must always rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made; and classification made without any substantial basis should be regarded as invalid.*[107] [Emphasis added by the HC.]

The reference to arbitrariness echoes *Eng Foong Ho v Attorney-General*,[108] an earlier CA decision involving the allegedly discriminatory application of a statute neutral on its face, rather than a statute containing a discriminatory classification. In view of this difference, the Court recast the reasonable classification test by stating that '[t]he question is whether there is a reasonable nexus between the state action and the objective to be achieved by the law'.[109] Arguably, the Court need not have done so, as it could have considered whether the state action had discriminated against one class of persons as compared to one or more similarly situated classes, and then carried out the familiar process of assessing if the differentia underlying the impugned classification bore a rational relation to the object of the state action.[110] In any case, the Court said: 'An executive act may be unconstitutional if it amounts to intentional and *arbitrary* discrimination',[111] and noted that '[a]rbitrariness implies the *lack of any rationality*'.[112] The existence of inequalities due to 'inadvertence or

---

106 *Lim Meng Suang* (HC) (n 1), 157, [89].

107 *Charanjit* (n 20), [1950] SCR at 911–912 (citation omitted).

108 *Eng Foong Ho v Attorney-General* [2009] 2 SLR(R) 542 (CA).

109 ibid 550, [25].

110 For example, in *Mohamed Emran bin Mohamed Ali v Public Prosecutor* [2008] 4 SLR(R) 411, 420–424, [22]–[33], the HC held that it was not discriminatory for the Public Prosecutor to have prosecuted the appellant for drug trafficking but to have taken no action against the state *agent provocateur* responsible for entrapping the appellant into selling drugs to him, because there was 'a perfectly rational nexus between entrapment operations and the socially desirable and laudable objective of containing the drug trade': 422, [30].

111 *Eng Foong Ho* (n 108) 553, [30] (emphasis added), citing *Public Prosecutor v Ang Soon Huat* [1990] 2 SLR(R) 246 (HC) 258, [23], which in turn cited *Howe Yoon Chong v Chief Assessor* [1990] 1 SLR(R) 78 (PC on appeal from Singapore) 84, [17].

112 *Eng Foong Ho*, ibid (emphasis added), citing *Ang Soon Huat*, ibid.

inefficiency' might also infringe Article 12(1), but not unless they are 'on a very substantial scale'.[113]

This standard of review is highly deferential to the political branches of the government, because it is easily achieved – the state need only show that the relationship between the classification and the object is neither arbitrary nor irrational. The standard is particularly significant because in *Lim Meng Suang* the HC applied it to different facets of the reasonable classification test – not only when determining if a rational relation existed between the classification and the statutory object, but also when ascertaining the legitimacy of the object and applying a presumption of constitutionality, which will be examined below.

The rationality of the relationship is a function of the 'fit' between the classification and the object. The HC held that what Article 12(1) requires is a 'broad fit'[114] or, in the words of the CA's judgment in *Yong Vui Kong v Public Prosecutor* (2010),[115] the differentia underlying the classification must be 'broadly proportionate' to the purpose of the law.[116] The test does not require a complete coincidence between the classification and the object[117] or, to put it another way, it is unnecessary for the classification to be the most efficient means of achieving the statutory objective. Indeed,

> what is the *most effective* differentia to use as the basis of a classification prescribed by law... is a matter which "lies within the province of the Legislature, not the Judiciary"...[118] The court's role and function is not to second-guess whether Parliament could have or ought to have devised a *more efficacious* differentia. Instead, the court can intervene only if the differentia enacted by Parliament is so clearly inefficacious that it would not even be capable of being considered *broadly proportionate* to the object of the legislation in question.[119]

As a result, the current reasonable classification test tolerates a fair degree of under- and over-inclusiveness, a point illustrated by the CA's decision in *Taw Cheng Kong*.[120] The CA found that the under-inclusiveness of section 37(1) of the PCA was not fatal. It was enough that the classification furthered the object of the Act, and it did not have to be 'seamless and perfect to cover every contingency. Such a demand would be legislatively impractical, if not impossible.'[121] As regards over-inclusiveness, the HC in *Lim Meng Suang* noted there were cases from India and the US which had upheld such classifications in emergency situations or to give effect to an affirmative action policy.[122]

Ultimately, though, the HC held that the differentia underlying the classification in section 377A was neither under- nor over-inclusive. Rather, in this case there was a 'complete coincidence' between the classification and the statutory

---

113 *Eng Foong Ho*, ibid 551, [28], citing *Howe Yoon Chong v Chief Assessor* [1979–1980] SLR(R) 594 (PC on appeal from Singapore) 600, [13].
114 *Lim Meng Suang* (HC) (n 1), 160, [96].
115 *Yong Vui Kong* (2010) (n 23) 537, [112].
116 *Lim Meng Suang* (HC) (n 1), 158–159, [94].
117 ibid 160–161, [98], citing Huang-Thio (n 26) 431.
118 *Yong Vui Kong* (2010) (n 23) 538, [113].
119 ibid 159–160, [95] (original emphasis).
120 *Taw Cheng Kong* (CA) (n 13). See the text accompanying nn 73–82 above.
121 *Taw Cheng Kong* (CA) (n 13), 514, [81].
122 *Lim Meng Suang* (HC) (n 1), 161, [99].

object.[123] The CA did not discuss the rational relation requirement in much detail, but agreed with the HC that a perfect relation need not be present, and stated that the requirement would only fail to be satisfied if there is '*a clear disconnect* between the purpose and object of the impugned statute on the one hand and the relevant differentia on the other'.[124] It accepted the HC's view that a complete coincidence existed between the differentia and the object of section 377A. This conclusion was not surprising, given the CA's fairly narrow characterization of section 377A's object based on its reading of the 1938 Legislative Council debates.

2. *Legitimacy of the Statutory Object*

In *Lim Meng Suang* the CA admitted that '[a]lthough the absence of… a rational relation can take many forms, … the requisite rational relation will – more often than not – be found'.[125] This is particularly so if the court defines the object of the impugned statutory provision narrowly. For example, let us say that the government has developed an animus towards red-haired people, and therefore enacts a statute expelling people with hair of that colour from the country. The differentia underlying the classification (people with red hair) clearly bears a rational relation to a closely drawn object (the expulsion of red-haired people). The statute is arguably problematic because its object is irrational and unjust, and thus illegitimate. Yet it is entirely conceivable for an illegitimate object to satisfy the rational relation component of the reasonable classification test.[126]

If the legislature's object for enacting section 377A in 1938 was 'to respond to a prevalence of grossly indecent acts between males – whether in public or in private – which the Legislature deemed a regrettable state of affairs that was not desirable',[127] can the court declare that this object is illegitimate? Earlier cases on Article 12(1) of the Constitution were silent on the issue, but the HC in *Lim Meng Suang* said it was necessary for the court to assess whether the object of the impugned provision is legitimate, or whether it is itself discriminatory.[128] However, the CA disagreed, holding:

> To permit the court the power… to declare a statute inconsistent with Art 12(1)… because the ***object*** of that statute is *illegitimate would precisely be to confer on the court a licence to usurp the legislative function in the course of becoming (or at least acting like) a "mini-legislature"*. Put another way, *only the legislature has the power to review its own legislation and amend legislation accordingly if it is of the view that this is necessary*. The *courts*, in contrast, have *no* such power – *nor ought they to have such power*.[129]

Moreover, according to the CA, Article 12(1) provides no legal standards that assist the courts to determine if a statutory object is illegitimate. Any such standards would be 'extra-legal'.[130] The Court identified some of these standards as the 'tyranny of the

---

123 ibid 161–162, [100].
124 *Lim Meng Suang* (CA) (n 3), 51, [68] (original emphasis).
125 ibid.
126 The point has been made by various scholars: see, for example, Tussman & tenBroek (n 26) 356–361; and Huang-Thio (n 26) 422–429.
127 *Tan Eng Hong* (merits) (n 2), 1090, [86(b)].
128 *Lim Meng Suang* (HC) (n 1), 167–168, [114].
129 *Lim Meng Suang* (CA) (n 3), 56, [82] (original emphasis).
130 ibid 57, [85].

majority', the absence of harm, the immutability and/or intractable difficulty of changing one's sexual orientation, and the safeguarding of public health; it concluded that these were relevant for Parliament to take into account if amending the law, but irrelevant to the courts' task of applying Article 12(1).[131] In the Court's view, the only legal standards it could consider were set out in Article 12(2) of the Constitution:

> Except as expressly authorised by this Constitution, there shall be no discrimination against citizens of Singapore *on the ground only of religion, race, descent or place of birth* in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment. [Emphasis added.]

Since this provision did not prohibit discrimination on the ground of sex, sexual orientation or gender, it did not invalidate section 377A.[132]

It is respectfully submitted that the CA's pronouncements set out above appear inconsistent with the role of the courts delineated by Articles 4 and 162 of the Constitution. Article 162 states:

> Subject to this Article, all existing laws shall continue in force on and after the commencement of this Constitution and all laws which have not been brought into force by the date of the commencement of this Constitution may, subject as aforesaid, be brought into force on or after its commencement, but *all such laws shall, subject to this Article, be construed as from the commencement of this Constitution with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution.* [Emphasis added.]

The provision explicitly envisages that pre-independence laws must be made to conform with the Constitution through 'modifications, adaptations, qualifications and exceptions', and when considering if the plaintiff Tan Eng Hong had standing to challenge the constitutionality of section 377A, the CA asserted that this power is exercised by the courts.[133] In *Ghaidan v Godin-Mendoza*,[134] the HL went so far as to regard clauses along the lines of Article 162 in the constitutions of former colonial territories as giving the court:

> ... a quasi-legislative power, not a purely interpretative one; for the court is not constrained by the language of the statute in question, which it may modify (ie amend) in order to bring it into conformity with the constitution. ... Such a power is appropriate where the constitution (particularly one based on the separation of powers) is the supreme law, and where statutes inconsistent with the constitution are to the extent of the inconsistency automatically rendered void by the constitution. A finding of inconsistency may leave a lacuna in the statute book which in many cases must be filled without delay if chaos is to be avoided and which can be filled only by the exercise of a legislative power.[135]

---

131 ibid 83–90, [155]–[178].
132 ibid 59–62, [90]–[94], and 91–93, [182]–[185].
133 *Tan Eng Hong* (standing) (n 8), 506, [57]–[58].
134 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 (HL).
135 ibid 585, [64].

Article 4 states that the Constitution 'is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void'. In *Tan Eng Hong*, the CA held that despite the express wording of Article 4, on a purposive reading of this provision with Article 162 the courts possess power under Article 4 to invalidate legislation pre-dating the Constitution which is inconsistent with it.[136] These constitutional provisions and the CA's own interpretation of them are hard to square with the Court's averment in *Lim Meng Suang* that 'the duty of a court is to *interpret* statutes enacted by the legislature', and that 'it *cannot amend or modify statutes* based on its own personal preference or fiat as that would be an obvious (and unacceptable) usurpation of the *legislative* function'.[137]

In fact, in *Yong Vui Kong* (2010) the Court had made the *obiter* suggestion that 'legislation of so absurd or arbitrary a nature that it could not possibly have been contemplated by our constitutional framers as being "law" when they crafted the constitutional provisions protecting fundamental liberties' would not qualify as a 'law' justifying the deprivation of life or personal liberty under Article 9(1) of the Constitution.[138] In *Lim Meng Suang* it was argued that section 377A was both absurd and arbitrary,[139] and while the CA rejected these submissions it cast no doubt on the *Yong Vui Kong* principle.[140] If a court can find that legislation is inconsistent with Article 9(1) because it is absurd or arbitrary, it should also be able to hold that legislation is inconsistent with Article 12(1) because its object is illegitimate. The two tasks are essentially the same.

The necessity for the court to assess the legitimacy of statutory objectives is illustrated by the example of a hypothetical law banning women from driving raised by the appellants and commented on by the CA. The Court said it was at least arguable that the law would fail the reasonable classification test. There might not be a rational relation between the differentia used in the law and the object of the law under limb (b). This might be so if the object was, say, to improve road safety standards. However, the Court acknowledged that the rational relation requirement would be satisfied if 'the purpose and object of that law is precisely to ban all women from driving'. It then argued that the differentia used in the law might be illogical and/or incoherent under limb (a).[141] As was noted earlier,[142] ascertaining whether an applicant fell within the class of persons burdened by the law would fairly straightforward, so the differentia can only unintelligible because it is manifestly discriminatory. If a court has a duty under limb (a) to determine if the differentia in a law is logically intelligible, it is hard to see why it is wrong for it to consider the legitimacy of the statutory object. The task need only be carried out once, so whether it is done under limb (a) or (b) is immaterial, though it may be clearer to confine limb (a) to an assessment of whether who comes within the class defined by the law is unequivocally ascertainable. The point is that an attempt by Parliament to expressly discriminate against a class of persons can only be opposed by the court if it accepts it has a responsibility to examine the legitimacy of the statutory object.

---

136 *Tan Eng Hong* (standing) (n 8), 506–508, [59]–[61].
137 *Lim Meng Suang* (CA) (n 3), 54, [77] (original emphasis).
138 *Yong Vui Kong* (2010) (n 23), 500, [16]. Art 9(1) of the Constitution states: 'No person shall be deprived of his life or personal liberty save in accordance with law.'
139 *Lim Meng Suang* (CA) (n 3), 40, [34].
140 ibid 45, [52]–[53].
141 ibid 70, [114].
142 See nn 37–39 and the accompanying text.

3. *Proportionality*

Assuming the court does recognize this responsibility, it will have to set out a test for determining when a statutory objective should be regarded as illegitimate. In this respect, the HC in *Lim Meng Suang* set the standard of review very high by requiring the legislative objective to discriminate 'arbitrarily'.[143] It commented that '[w]here a piece of legislation does not satisfy the requirement of legitimacy of purpose, the terms "capricious", "absurd" and "*Wednesbury* unreasonableness" come to mind', and that 'a fundamental question in most cases is "the proper weight that ought to be ascribed to the views of Parliament as encapsulated in the impugned legislation"'.[144] However, the CA itself recognized that the *Wednesbury* standard 'is not... an appropriate legal standard in the context of a challenge to the *constitutionality* of a statute'.[145]

It is submitted that in place of limb (b) of the current reasonable classification test the court should move towards adopting a proportionality analysis, which has been applied in Hong Kong (HL). *Secretary for Justice v Yau Yuk Lung*[146] provides a good illustration of this approach. Although homosexual acts in the form of buggery occurring in private had been decriminalized in HK in 1991, it remained a crime under section 118 F(1) of the Crimes Ordinance[147] for a man to commit buggery with another man otherwise than in private. The respondents had been charged with the offence for engaging in homosexual buggery in a car parked at the side of a public road. They argued, among other things, that because no comparable offence was committed by a man and a woman who engaged in vaginal intercourse or buggery otherwise than in private, this provision violated their right to equality guaranteed by Article 25 of the Basic Law of the HK Special Administrative Region of the People's Republic of China and Article 22 of the Hong Kong Bill of Rights Ordinance.[148] The former provision states that '[a]ll Hong Kong residents shall be equal before the law', while the latter reads:

> All persons are equal before the law and are entitled without any distinction to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 25 of the Basic Law and the first sentence of Article 22 of the Bill of Rights Ordinance are *in pari materia* with Article 12(1) of the Singapore Constitution. The second sentence of Article 22 provides an open-ended list of grounds on which discrimination is prohibited and thus merely illuminates the first sentence. I submit the fact that it has no equivalent in the Singapore Constitution does not rule out the application of a proportionality analysis to the latter.

In *Yau Yuk Lung* the Court of Final Appeal (CFA) set out its mode of analysis, which it termed the 'justification test' as follows:[149]

---

143 *Lim Meng Suang* (HC) (n 1), 168, [114].
144 ibid 168–169, [116]. The latter quotation is from *Nguyen Tuong Van* (n 63), 124, [73].
145 *Lim Meng Suang* (CA) (n 3), 57, [86] (original emphasis).
146 *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335 (CFA, HK).
147 Crimes Ordinance, Cap 200 (HK).
148 Hong Kong Bill of Rights Ordinance, Cap 383 (HK).
149 *Yau Yuk Lung* (n 146), 349, [20].

In order for differential treatment to be justified, it must be shown that:

> (1) The difference in treatment must pursue a legitimate aim. For any aim to be legitimate, a genuine need for such difference must be established.
>
> (2) The difference in treatment must be rationally connected to the legitimate aim.
>
> (3) The difference in treatment must be no more than is necessary to accomplish the legitimate aim.

The HK Government argued that by enacting section 118 F(1), the legislature must be regarded as having felt a genuine need for such an offence as part of its reform of the law relating to homosexual conduct. The Court held that it could not be assumed from the mere fact of the provision's enactment that there was a genuine need for the differential treatment. Since the Government had not otherwise demonstrated such a genuine need, step 1 of the justification test had not been satisfied.[150] Thus, the section was unconstitutional and the charges against the respondents should be dismissed.

Stage 2 of the test is broadly similar to the reasonable classification test applicable in Singapore, but the latter lacks stages 1 and 3. Stage 1 requires an assessment of the legitimacy of the statutory object, and by adopting it the court would avoid the curious result that the Parliament can enact a blatantly discriminatory law that nonetheless satisfies the reasonable classification test. Stage 3 establishes a rigorous standard that laws and executive actions must achieve, which emphasizes the importance of the fundamental right of equality and ensures that Article 12(1) is not mere rhetoric. Regrettably, the HC has, in the past, declined to apply a proportionality analysis to the rights to freedom of speech and assembly guaranteed by Article 14 of the Constitution;[151] the point is certainly ripe for reassessment.[152]

IV. THE ROLE OF THE PRESUMPTION OF CONSTITUTIONALITY

In *Lim Meng Suang*, the CA reaffirmed that in constitutional claims 'there is a presumption of constitutionality inasmuch as a court will not lightly find a statute or any provision(s) thereof... unconstitutional... . This is logical as well as commonsensical as our legislature is presumed not to enact legislation which is inconsistent with the Singapore Constitution.'[153] The Court cited its own prior decision, *Taw Cheng Kong*, where it had said that a 'strong presumption of constitutional validity' applies when the constitutionality of a statutory provision is challenged under Article 12(1).[154]

---

150 *Yau Yuk Lung* (n 146), 350, [26]–[27].

151 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 (HC) 616, [87] (the point was *obiter*); *Chee Soon Juan v Public Prosecutor* [2011] 2 SLR 940 (HC) 946–947, [7]–[9].

152 See, generally, Jack Tsen-Ta Lee, 'According to the Spirit and not to the Letter: Proportionality and the Singapore Constitution' (2014) 8(3) Vienna J Int'l Const L 276.

153 *Lim Meng Suang* (CA) (n 3), 31, [4].

154 *Taw Cheng Kong* (CA) (n 13), 509, [60], also cited in *Lim Meng Suang* (HC) (n 1), 162, [103].

This principle has been applied in other constitutional cases,[155] though it was not explained in them how a 'strong' presumption is different from an ordinary one, or why a strong instead of an ordinary presumption applies. While the Court did not expressly mention the adjective *strong* when speaking of the presumption in *Lim Meng Suang*, it did posit that the presumption does not operate as strongly to pre-independence laws (that is, laws enacted before 9 August 1965) as it does to post-independence laws.[156] This is because pre-independence laws were enacted in the absence of any constitution,[157] whereas post-independence laws 'would necessarily have been promulgated in the context of, *inter alia*, an elected legislature which, it can be assumed, would have fully considered all views' before enacting the laws. In any case, when applying the presumption the court would 'always have regard to all the circumstances of the case (including both the relevant text *as well as* the context of the statute concerned)'. [158] This reasoning would justify referring to the presumption applying to post-independence laws as 'strong'.

Oddly, the Court did not clearly indicate how the presumption of constitutionality applied to the facts of the case. One would imagine that it is an overarching principle that applies to both stages of the reasonable classification test. However, in practice it has only been invoked during the rational relation stage. At the HC level in *Lim Meng Suang*, in an attempt to demonstrate there was no rational relation between the classification employed in section 377A and the provision's object, the plaintiffs argued that the existence of the provision did not indicate that male homosexual behaviour is undesirable since the Government had announced a policy of not proactively enforcing the provision when private consensual conduct was involved. This policy was reiterated in the 2007 parliamentary debates. The HC found the submission unmeritorious because of the presumption of constitutionality – because the plaintiffs had not adduced 'compelling or cogent material or factual evidence' that section 377A could signal disapprobation of male homosexual conduct merely by remaining on the statute book, the presumption had not been displaced and the Court had to assume that the provision was constitutional.[159]

The reference to 'material or factual evidence' was from *Taw Cheng Kong*, in which the CA explained the workings of the presumption in these terms:

> [U]nless the law is *plainly arbitrary* on its face, postulating examples of arbitrariness would ordinarily not be helpful in rebutting the presumption of constitutionality. This is because another court or person can well postulate

---

155 See, for example, *Lee Keng Guan v Public Prosecutor* [1977–1978] SLR(R) 78 (CA) 86, [19]; *Chee Siok Chin* (n 151) 603, [49]; *Johari bin Kanadi* (n 63) 430, [10]; *Ramalingam Ravinthran v Public Prosecutor* [2012] 2 SLR 49 (CA) 70, [43]–[44]; and *Chan Kin Foo v City Developments Ltd* [2013] 2 SLR 895 (HC) 901, [23]; and compare *Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR(R) 209 (HC) 232, [56]; *Kok Hoong Tan Dennis* (n 27) 579, [34]; *Ng Chye Huay* (n 34) 170, [37]; *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 (CA) 1255, [139]; and *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 (CA) 891, [28].

156 In fact, rather than use Singapore's independence as the relevant date, it would have been more accurate for the CA to have referred to pre- and post-merger laws. This is because a legally enforceable bill of rights in the form of Pt II of the Federal Constitution of Malaysia first applied to Singapore when it merged with the Federation of Malaya, North Borneo (Sabah) and Sarawak on 16 September 1963 and became a state of Malaysia.

157 *Lim Meng Suang* (CA) (n 3), 66–67, [105].

158 ibid 67–68, [107] (original emphasis).

159 *Lim Meng Suang* (HC) (n 1), 162, [101]; see also ibid 163, [104], citing *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128 (HC, Malaysia) 131 which was also cited in *Taw Cheng Kong* (CA) (n 13), 509, [60]: 'it is for the party who attacks the validity of a piece of legislation to place relevant materials and evidence before the court'; and also see 173–175, [131] and [134]–[135].

> an equal number if not more examples to show that the law did not operate arbitrarily. If postulating examples of arbitrariness can always by themselves be sufficient for purposes of rebuttal, then it will hardly be giving effect to the presumption that Parliament knows best for its people, that its laws are directed at problems made manifest by experience, and hence its differentiation is based on adequate grounds. Therefore, *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.* Otherwise, there will be no practical difference between the presumption and the ordinary burden of proof on the person asserting unconstitutionality.[160] [Emphasis added.]

However, 'if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation'.[161]

Once again, the standard of review applied to the presumption of constitutionality was arbitrariness, casting a heavy onus on the applicant. When determining if a law is inconsistent with Article 12(1), and 'if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed' by the court.[162] Yet, the Government is not called on to discharge its evidential burden of proving the constitutionality of law unless the applicant is able to adduce compelling or cogent material or factual evidence demonstrating that the law was enacted arbitrarily or operated arbitrarily.[163] Clearly, such evidence is difficult to procure. One can practically rule out obtaining any direct evidence of arbitrary enactment since it is unlikely legislators will openly admit that they intend to enact a discriminatory law. As for arbitrary operation of a law, will the court accept anything less than a statistically significant survey which will be costly to arrange? Moreover, it is unclear what is needed to overcome the presumption if an applicant claims that the classification used in a law is intrinsically discriminatory. For example, assuming for the sake of argument that the legislative object of section 377A is to preserve the traditional heterosexual family, it is not easy to see what sort of evidence an applicant should compile to show that the classification employed in the section lacks a rational relation to this object.

In view of how deferential to the Government the reasonable classification test already is, it seems quite unnecessary for the courts to erect the presumption of constitutionality as yet another stumbling block in an applicant's way. Indeed, if there is to be a presumption at all, one might argue it has already been given effect through how the reasonable classification test is structured, and there is no need to require an applicant to produce compelling or cogent material or factual evidence on top of that.

---

160 *Taw Cheng Kong* (CA) (n 13), 514, [80], cited in *Lim Meng Suang* (HC) (n 1) 163–164, [105].

161 *Shri Ram Krishna Dalmia* (n 18), [1959] SCR at 297–298, cited in *Lee Keng Guan* (n 155) 85–86, [19], and in *Lim Meng Suang* (HC) (n 1), 164, [107].

162 *Lindsley v Natural Carbonic Gas Co* 220 US 61 (1911) (SC) 78, cited in *Malaysian Bar* (n 16) 166–167, and in *Taw Cheng Kong* (CA) (n 13), 507, [57].

163 *Lim Meng Suang* (HC) (n 1), 162–164, [101] and [105].

However, given how the presumption imposes an uncertain and unfair burden on applicants in constitutional cases, I would argue that it should be abandoned as part of the adoption of a proportionality analysis in constitutional adjudication, which was discussed above. In *Yau Yuk Lung* the CFA held:

> The *burden is on the Government* to satisfy the court that the justification test is satisfied. Where one is concerned with differential treatment based on grounds such as race, sex or sexual orientation, the court will *scrutinize with intensity* whether the difference in treatment is justified.[164] [Emphasis added.]

It was on this ground that the HKCA had, in an earlier case, rejected the argument that the courts should apply a concept akin to the presumption of constitutionality – the margin of appreciation – in favour of the legislature whenever the constitutionality of legislation was challenged.[165]

It seems evident that the difference in the outcomes of the *Yau Yuk Lung* and *Lim Meng Suang* cases is due largely to the application of a presumption of constitutionality in the Singapore judgment. Whereas in *Yau Yuk Lung* section 118 F(1) was found to violate the respondents' rights to equality because the HK Government failed to discharge its burden of proving that there had been a genuine need for the section to treat homosexual men differently from heterosexual persons, in *Lim Meng Suang* the appellants failed to establish that section 377A was unconstitutional because the burden lay on them to do so.

If the Singapore courts cannot be convinced to do away with the presumption of constitutionality, it is submitted that the presumption should at most be regarded as a restatement of the general evidential rule that it is for the applicant to raise a *prima facie* case of unconstitutionality, whereupon the Government must discharge its own evidential burden of showing that the law in question is constitutional.[166]

V. CONCLUSION

The *Lim Meng Suang* and *Tan Eng Hong* judgments are significant simply for being the first constitutional challenges against section 377A of the Penal Code, but they also provided an opportunity for the courts to explain how they will determine if executive action or legislation infringes the rights to equality before the law and equal protection of the law guaranteed by Article 12(1) of the Constitution. The courts revealed their great reluctance to involve themselves in what they saw as a morally controversial issue. Thus, the CA affirmed the application of the reasonable classification test, and characterized it as merely an 'important threshold test'[167] that balances 'the need to accord as much legislative leeway as possible to the legislature against the need to ensure that laws which are patently illogical and/or incoherent do not pass legal muster'.[168] The Court adopted this highly deferential stance towards

---

164 *Yau Yuk Lung* (n 146), 349, [21], citing *Ghaidan* (n 134) 568.

165 *Leung v Secretary of Justice* [2006] 4 HKLRD 211 (HKCA) 239–240, [52]–[53].

166 Compare *Manitoba (AG) v Metropolitan Stores Ltd* [1987] 1 SCR 110 (SC, Canada) 124–125; Clive Lewis, *Judicial Remedies in Public Law* (4th ed) (London: Sweet & Maxwell, 2009), 394, [9-115]: 'The burden is on the claimant to establish that a ground for review exists [*R v Reigate Justices, ex parte Curl* [1991] COD 66 (Div Ct, England & Wales)]. ... [O]nce the claimant has established a ground for review, the burden is on the defendant to show some adequate reason why the court should exercise its discretion and refuse a remedy.'

167 *Lim Meng Suang* (CA) (n 3), 49, [62] (emphasis omitted).

168 ibid 52, [70].

the Government to '[prevent] the courts from becoming "mini-legislatures"',[169] seeing Article 12(1) as 'more of a *declaratory (as well as aspirational) statement of principles*, as opposed to a set of specific legal criteria as such'.[170]

One wonders whether it was necessary for the courts to take such an approach that will henceforth severely limit their ability to enforce Article 12(1). They have applied a presumption of constitutionality, and generally adopted an arbitrariness standard of review when assessing whether a rational relation exists between the differentia underlying the classification used in the impugned provision and the object of the provision. Despite accepting that a classification's differentia would be unintelligible if manifestly discriminatory, the Court of Appeal claimed it should not assess the legitimacy of the statutory object. These features have stacked the deck against applicants, making it very hard to see when equality challenges will succeed.

The Court was keen to try and draw a line between legal issues which it felt capable of dealing with, and 'political' ones which should be left to Parliament. Perhaps the time has come to recognize that since rights adjudication is inherently political in that it inevitably impinges on policy matters, bright lines do not exist. Moreover, there is no warrant for holding that important legal changes can only be effected through legislation rather than court judgments. We need only consider landmark cases like *Brown v Board of Education*[171] which overturned the 'separate but equal' doctrine, and *Loving v Virginia*[172] which held laws banning interracial marriage to be discriminatory and unconstitutional.

It is therefore submitted that, when the opportunity arises, the CA should consider recasting the reasonable classification test. The requirement in limb (a) of the test for a legislative classification to be defined by an intelligible differentia should be limited to an examination of whether it is possible to unambiguously ascertain who the class encompasses. Also at this stage, applicants must be able to raise a *prima facie* case that the law treats the class to which they belong less favourably than one or more comparable classes. As for limb (b), the present rational relation requirement should be replaced by a more rigorous proportionality analysis, which would require the court to consider if the difference in treatment established by the law has a legitimate object, if there is a rational connection between the differential treatment and the object, and if the law infringes equality no more than is necessary to achieve the object. This would strike a more equitable balance between the protection of individual rights and other societal interests.

Under such a modified test, a court would have to take into account some of those matters which the CA in *Lim Meng Suang* regarded as 'extra-legal' and thus irrelevant to its decision. In *Tan Eng Hong*, the plaintiff argued that 'because homosexuality was not an incontrovertible immorality and did not harm public order, the advancement of morality as the underlying justification for s 377A was not a sound social object'.[173] The HC judge countered this by opining the plaintiff's argument was 'ultimately premised on the notion that Parliament is not allowed to legislate on an issue where the morality of that issue is controversial', and said 'that... cannot be right'.[174] However, I believe the plaintiff's argument was more subtle. His point was that Parliament should only be permitted to legislate on the basis of

169 ibid.
170 ibid 59, [90].
171 *Brown v Board of Education* 347 US 483 (1954) (SC).
172 *Loving v Virginia* 388 US 1 (1967) (SC).
173 *Tan Eng Hong* (merits) (n 2), 1093, [93].
174 ibid 1093, [94].

contested morality *if some additional element, such as harm to public order*, is likely to eventuate.

In my view, this is the nub of the challenges to the constitutionality of section 377A: under Article 12(1) of the Constitution, is mere moral disapproval without more a legitimate object of a statute creating criminal liability? An examination of this issue is beyond the scope of this article,[175] but it may be pointed out that a positive answer to the question would mean that the Parliament is entitled to criminalize conduct ranging from using contraception to wearing revealing clothes simply on the ground that such conduct is perceived to be immoral. Whether the Parliament should have such broad power is clearly a fraught issue, but one that I would submit the CA must confront when fulfilling its duty to judicially review the actions of the political branches of government.

---

[175] For some discussions of the issue, see Peter M Cicchino, 'Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?' (1998) 87 Geo LJ 139; Suzanne B Goldberg, 'Morals-based Justifications for Lawmaking: Before and After *Lawrence v Texas*' (2004) 88 Minn L Rev 1233; and Yvonne C L Lee, '"Don't Ever Take a Fence Down until You Know the Reason It was Put Up" – Singapore Communitarianism and the Case for Conserving 377A' [2008] Sing J Legal Studies 347.