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EQUAL PROTECTION AND THE REASONABLE CLASSIFICATION TEST IN SINGAPORE: AFTER *LIM MENG SUANG V ATTORNEY-GENERAL*[1]

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The realisation of the almost universally accepted ideal of equality as a legal doctrine is complicated by the fact that differentiation is an inherent part of regulation in the modern state. In Singapore, the courts have regarded the *Constitution*'s injunction for the equal protection of the law to be a relative, rather than an absolute, concept. Differentiating laws therefore only has to satisfy a reasonable classification test in order to pass constitutional muster. This article argues that despite recent judgments elaborating upon the scope and meaning of the equality clause, there remains at least three areas in need of further judicial elucidation. It further argues that the reasonable classification test as it now stands is sufficiently capacious for the courts to read substantive content into the equality provision should a suitable case arise in the future.

I. INTRODUCTION

There is a particular difficulty in the endeavour to realise the almost universally accepted ideal of equality as a legal doctrine. The difficulty I have in mind arises due to a divergence between the *ideal* that all persons should be treated the same under the law and the *necessity* of making distinctions as an inherent part of regulation in the modern state. To illustrate, in regulating the distribution of benefits and burdens, the modern state inevitably has to differentiate between persons who deserve the benefits and those who do not. Concomitantly, the state has to determine who should, and how they should, bear the burdens of contributing to the income of the state (*ie* taxation).[2] More generally, the legislature must necessarily have the power to draw distinctions in order to solve specific problems or address specific situations, thus limiting the applicability of the law to those affected by those problems or situations.[3] Yet, this appears to stand in tension with equal protection under the law, which broadly embodies "the immutable principle of equal subjection of all classes

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

2 It has been observed that "differentiation is the essence of law" and that no law can be free from differentiation: Tan Yock Lin, "Equal Protection, Extra-Territoriality and Self-Incrimination" (1998) 19 Sing L Rev 10 at 12.

3 S M Huang-Thio, "Equal Protection and Rational Classification" (1963) PL 412 at 413.

of persons to the law".[4] This in turn requires that the "law shall be equal and equally administered, without privilege or special treatment by reason of factors such as race, birth, or creed."[5]

This article discusses the general tension between the need to differentiate and equal protection in the context of Singapore. Equal protection is generally guaranteed under Article 12(1) of the *Constitution of the Republic of Singapore*,[6] which states: "All persons are equal before the law and entitled to the equal protection of the law." The concept of equality is not new and has been noted in Singapore to be part of the wider doctrine of the rule of law. In particular, the Singapore Court of Appeal has noted that "its origin can perhaps be traced all the way back to the 40th article of the Magna Carta",[7] which states: "To none will we sell, to none will we deny, to none will we delay right or justice."

Nonetheless, Singapore courts have repeatedly recognised the inherent difficulty with the legal protection of equality and affirmed that differentiating among persons is a necessary aspect of government and of laws. The *locus classicus* is *Ong Ah Chuan v Public Prosecutor*,[8] which is arguably the Privy Council's most enduring jurisprudential legacy to Singapore law. There, the Privy Council held that equality under the *Constitution* does not require that all persons be treated alike but only that *all persons in like situations are to be treated alike*.[9] It explained:

> Equality before the law and equal protection of the law require that *like should be compared with like*. What Art 12(1) of the Constitution assures to the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits laws which require that some individuals within a single class should be treated by way of punishment more harshly than others; it does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed.[10]

This principle of *like be treated alike* renders equality in the *Constitution* "not an absolute feature but rather a relative one."[11] It encompasses the idea that "the reason one person should be treated in a certain way is that he is 'like' or 'equal to' or 'similar to' or 'identical to' or 'the same as' another who receives such treatment."[12] In other words, persons should be treated alike because they are *alike in a morally*

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4 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at para 38 (HC) [*Lim (HC)*]. *Lim (HC), ibid* and *Lim (CA)*, *supra* note 1, are collectively "*Lim Meng Suang*".

5 Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Singapore: Academy Publishing, 2012) at 692.

6 1999 Rev Ed Sing [*Constitution*].

7 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR (R) 489 at para 52 (CA) [*Taw (CA)*].

8 *Ong Ah Chuan v Public Prosecutor* [1979-1980] SLR (R) 710 (PC) [*Ong*].

9 See *eg*, *Taw (CA)*, *supra* note 7 at para 54; *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR (R) 78 at para 27 (HC) [*Taw (HC)*]. *Taw (CA)*, *supra* note 7, and *Taw (HC)*, *ibid*, are collectively "*Taw Cheng Kong*".

10 *Ong*, *supra* note 8 at para 35 [emphasis added].

11 *Taw (HC)*, *supra* note 9 at para 27.

12 Peter Westen, "The Empty Idea of Equality" (1982) 95(3) Harv L Rev 537 at 540. Westen points out that rights are often contrasted with equality, and are said to refer to "all claims that can justly be made by or on behalf of an individual or group of individuals to some condition or power–except claims that 'people who are alike be treated alike'." See also Westen, *ibid* at 544.

relevant way.[13] The requirement of like be treated alike however does not mean that the measure of constitutionality is limited to ensuring that persons within the same class are treated in the same way.[14] On the contrary, the Singapore courts have adopted the reasonable classification test which requires that there be some relation between the classification and the object of the law.

Lim Meng Suang v Attorney-General[15] is the latest Singapore Court of Appeal case addressing the meaning and scope of the equality guarantee under the *Constitution*. In *Lim (CA)*, the Court of Appeal affirmed the reasonable classification test as the standard to apply in measuring the constitutionality of a law. The court also, for the first time, addressed the relationship between Article 12(1) and Article 12(2). While Article 12(1) provides a general guarantee of equal protection, Article 12(2) identifies specific grounds upon which discrimination is prohibited:

> 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.[16]

This article examines the Court of Appeal's decision in *Lim (CA)* and argues that while the decision clarifies critical aspects of the reasonable classification test, there are at least three issues that require further elaboration. First, there remains some uncertainty as to the construction of the object of the law, which makes the reasonable classification test malleable. Secondly, there does not appear to be a consistent standard or 'fit' required to satisfy rational relation. Thirdly, while the Court of Appeal rejected an additional step to determine the inherent legitimacy of the purpose of the law, it appears to have incorporated some legitimacy enquiry into the reasonable classification test but through the intelligible differentia limb. Consequently, I argue that this leaves open the possibility for a future court to strike down laws that are clearly discriminatory, even if such laws would strictly speaking satisfy the reasonable classification test. This, I argue, is desirable as it recognises judicial discretion to strike down obviously discriminatory laws beyond those that fall within Article 12(2) of the *Constitution*.

Part II of this article elaborates upon the reasonable classification test and examines its use in recent challenges to section 377A of the *Penal Code*[17] on the basis of the equality clause in the *Constitution*. Part III analyses the current state of the law on equality, post the section 377A challenges, and identifies three areas for further clarification. Part IV discusses the scope for substantive equal protection within the *Constitution* while Part V concludes.

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[13] Westen considers this a tautology because categories of morally alike objects do not exist in nature. Moral alikeness is established only when people define categories. See Westen, *ibid* at 544, 545.

[14] See the discussion in Huang-Thio, *supra* note 3 at 418-420.

[15] *Lim (CA)*, *supra* note 1.

[16] *Constitution*, *supra* note 6, art 12.

[17] Cap 224, 2008 Rev Ed Sing.

II. Reasonable Classification Test

A. *Legal Test for Constitutionality of Laws*

The scope of equal protection under Article 12 was recently tested in two cases brought to challenge the constitutionality of section 377A of the *Penal Code* which criminalises "acts of gross indecency" between males. The cases addressed the constitutionality of the law. They did not specifically address any executive or administrative action that flows from the implementation of the law. Notably, the Singapore courts have developed divergent tests for testing the constitutionality of governmental acts under Article 12(1). While the reasonable classification test is broadly accepted as applicable to laws challenged under Article 12(1), executive actions appear to be subject to a different standard of "intentional and arbitrary discrimination".[18] There is insufficient jurisprudence on what this would entail, for instance when and whether evidence of disparate impact would be sufficient to prove intentional and arbitrary discrimination.[19] Furthermore, it is open to discussion whether this is the correct test to apply or whether executive action should also be subject to the same reasonable classification test based on "like be treated alike". However, this article does not address these issues concerning the legal test of constitutionality for executive action. Instead, it focuses on the reasonable classification test applied to determine the constitutionality of laws against Article 12(1) of the *Constitution*.

In *Lim (CA)*, the Court of Appeal stated that strictly speaking, the reasonable classification test comprises only two closely-related stages: (1) the classification is founded on an *intelligible differentia* which distinguishes persons that are grouped together from others left out of the group; and (2) the differentia has a *rational relation* to the object sought to be achieved by the law in question.[20] On the first limb, the Court of Appeal endorsed the High Court's elaboration of the intelligible differentia in the same case. The High Court explained:

> "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. Scientifically, one talks

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[18] *Eng Foong Ho v Attorney-General* [2009] 2 SLR (R) 542 at para 30 (CA). As the Court of Appeal rightly points out, even where a law is constitutional, its application may nevertheless be unconstitutional. The only question is what test to apply and the court opined that the "executive act may be unconstitutional if it amounts to intentional and arbitrary discrimination."

[19] It is interesting to note that the High Court in *Lim (HC)*, *supra* note 4 at para 106, cited *Yick Wo v Hopkins*, 118 US 365 (1886) [*Yick Wo*], a Supreme Court of the United States decision, as "a good example of a challenger placing cogent material and factual evidence before the court to show that the impugned executive action was unjustifiably discriminatory and unconstitutional". This was in relation to what is necessary to rebut the presumption of constitutionality and therefore *obiter*. This is noteworthy because *Yick Wo* is the source of modern jurisprudence on disparate impact, whereby discrimination is established by statistical inequality rather than through proof of intentional discrimination.

[20] This test has been repeatedly affirmed in Singapore. See *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 (CA) [*Tan Eng Hong* (CA, Striking Out)] and *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at para 109 (CA) [*Yong*]. Note that the High Court in *Taw (HC)* formulated a three-step test which is more detailed but substantively the same as the two-step test.

> of an attribute by which a species is distinguished from all other species of the same genus.[21]

The requirements of intelligible differentia appear to be easily satisfied. Indeed, the underlying rationale for requiring an intelligible differentia has been said to guard against extreme arbitrariness. After all, as Lee points out, "it is evident that if a class is so poorly defined that one cannot tell with certainty as to who belongs to that class, then it is pointless to talk about whether members of the class have been treated differently from members of comparable classes."[22] Nonetheless, all that is required appears to be a "consistent means of identifying the persons discriminated against, for example, gender, age, race, religion, seniority of professional qualification or area of residence."[23] Indeed, in an earlier seminal case addressing reasonable classification, the High Court noted that a lack of a common identifying feature would render the discrimination arbitrary.[24] This low threshold requirement was acknowledged in *Lim (CA)*, where the court noted that it would be "*very seldom*" for a statute to fail to pass legal muster under the first limb.[25] It explained:

> This is because the differentia concerned need not be perfect; it need only be "intelligible". This connotes (in turn) 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.[26]

On the second limb, the question of whether the differentia used bear a rational relation to the object sought to be achieved under the statute involves two enquiries: first, what is the object/purpose of the statute; and two, does the classification bear a rational relation to the object or purpose of the provision. This rational relation could take many forms. Nonetheless, the Court of Appeal in *Lim (CA)* again acknowledged that the requisite rational relation would "more often than not…be found."[27] Again, this is because the relation need not be perfect.[28] Rational relation does not require "complete coincidence" between the differentia in question and the purpose and object of the statute. Under the reasonable classification test, according to the Court of Appeal, "the relation need only be a rational one."[29] This, the Court of Appeal explained, was logical and commonsensical. The lack of a rational relation between the differentia and the purpose and object of the statute meant that "there is, *ex hypothesi*, no logical and/or coherent basis upon which to hold that the statute is based on reasonable classification to begin with."[30]

It is interesting here to note that although the courts have characterised the equal protection under Article 12(1) of the *Constitution* as a matter of treating like alike, the

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21 *Lim (HC)*, *supra* at note 4 at para 47.

22 Jack Tsen-Ta Lee, "Equality and Singapore's First Constitutional Challenges to the Criminalization of Male Homosexual Conduct" (2015) 16(1–2) Asia-Pacific Journal of Human Rights and the Law 150 at 156 [Lee, "Equality"].

23 *Taw (HC)*, *supra* note 9 at para 33.

24 *Ibid*.

25 *Lim (CA)*, *supra* note 1 at para 65 [emphasis added].

26 *Ibid*.

27 *Ibid* at para 68.

28 *Ibid*.

29 *Ibid*.

30 *Ibid*.

test for constitutionality, *ie* the reasonable classification test, as it is currently formulated, focuses on the relationship between the differentiation and the object/purpose. In other words, the reasonable classification test looks at whether a law that differentiates between persons in comparable situations does so in a consistent and justifiable manner. Intelligibility ensures consistency while reasonable relation provides the justification for the differentiation. In this regard, the reasonable classification test appears to address a different form of arbitrariness, one that ensures that the basis of classification itself is not arbitrary, but bears some reasonable or rational relation to the object of the executive action. It goes beyond addressing arbitrariness that arises when persons in the same class are treated differently.[31] Concomitantly, just because persons in the same class are treated in the same manner does not mean that there is no discrimination under the law. The reasonable classification test directs the courts to examine more than just equal treatment within a class.[32] This should be regarded as correct since the enquiry of whether persons in the same class are treated alike tends to be tautologous. After all, the law creates these classes when it specifies a differentiating factor as the basis for the law. Furthermore, it is usually conceptually possible to break down a single class into smaller classes, and claim that the law is constitutional as it treats persons within that smaller class equally.[33] In addition, there is a certain circularity in this enquiry since the question of who should be treated alike is determined by a prior consideration who are alike in the first place.[34]

B. *Section 377A Challenges: Two Cases*

Before analysing the test itself, some background information on the cases is apposite. The section 377A challenge, culminating in the Court of Appeal decision in *Lim (CA)*, actually comprised two separate suits that were consolidated upon appeal. The plaintiffs in both cases challenged the constitutionality of section 377A of the *Penal Code* under Article 12(1) of the *Constitution* (as well as Article 9(1) which guarantees the right to life and personal liberty). Section 377A 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,

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[31] These are two of the three types of arbitrariness that the High Court in *Taw (HC)* highlights that equal protection laws need to guard against (*supra* note 9 at para 29):

> (a) The first is defined by the guiding principle that all persons being discriminated against must share a common identifying mark which is not borne by those persons not discriminated against. In other words, there must be a discernible basis of classification. If the classification is arbitrary, the law is bad.
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> (b) The second form of arbitrariness is arbitrary treatment between persons in the same class. Having classified persons on a discernible basis, all persons falling into a particular class must be treated the same way.
>
> (c) Lastly, the basis of classification itself must not be arbitrary but must bear a reasonable relationship to the object of the executive action.

[32] Interestingly, the question of whether persons within the same class are treated equally was included by the High Court in *Taw (HC)* as one of the enquiries that the court should engage in when testing the constitutionality of a differentiating law. However, this part of the enquiry has been largely taken for granted in subsequent cases. See *Taw (HC)*, *supra* note 9 at para 33.

[33] See the discussion in *Lim (HC)*, *supra* note 4 at paras 57-60.

[34] See *eg*, Westen, *supra* note 12 at 544, 545.

> any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years.

The first constitutional challenge arose out of a criminal case. The applicant, Tan Eng Hong, had been arrested for engaging in oral sex with a male partner in the cubicle of a public toilet. He and his male partner were initially charged under section 377A of the *Penal Code*, and he filed an application to challenge the constitutionality of the law. This charge was later dropped and substituted with a different charge under section 294(a) of the *Penal Code* for the commission of an obscene act in a public place. Tan pleaded guilty to the substituted charge, and was convicted and fined $3,000. Pursuant to this, the government challenged Tan's standing to continue the constitutional challenge and applied to strike out the action. The High Court allowed the striking out but was overturned on appeal.[35]

The second constitutional challenge was brought by a same-sex couple that had been in a romantic and sexual relationship for the past 15 years. They filed an application to challenge the constitutionality of section 377A.[36] They argued *inter alia* that section 377A reinforces discrimination against them on the basis of their sexual orientation, and that the very existence of the provision, whether or not it is enforced, labels them as criminals. They further argued that while they do not live in fear every day of being arrested, it is always at the back of their minds that if the authorities wanted to, they could arrest them and charge them with an offence under section 377A of the *Penal Code*.

The constitutional challenges failed on all grounds. On the equality issue, the Court of Appeal opined that section 377A satisfied the reasonable classification test. It held that the classification prescribed by section 377A, *ie* male homosexuals or bisexual males who perform acts of 'gross indecency' on another male, satisfies the intelligible differentia requirement. There is little difficulty in determining who fell within and without the provision since the section clearly excludes male-female acts and female-female acts. As for the rational relation requirement of the reasonable classification test, the Court of Appeal held that there was complete coincidence in the relation between the differentia and the purpose and object of the statute. It opined that the object of section 377A is to strengthen the criminal law by enabling the law to prosecute male homosexual conduct. The court further rejected the argument that the provision was intended to be confined to the specific problem of male prostitution, opining that the law was meant to be of general application. Consequently, the Court of Appeal held that section 377A was not inconsistent with the equal protection clause under Article 12 of the *Constitution*.

III. Reasonable Classification Test Post-*Lim Meng Suang*: Three Areas for Further Clarification

The judgments in *Lim (HC)* and *Lim (CA)* are significant for their substantiation of the law relating to Article 12(1) of the *Constitution*. However, there remain aspects of the reasonable classification test that require further clarification. The first relates

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35 *Tan Eng Hong* (CA, Striking Out), *supra* note 20; *Tan Eng Hong v Attorney-General* [2011] 3 SLR 320 (HC).

36 *Lim (HC)*, *supra* note 4; *Lim (CA)*, *supra* note 1.

to the construction of the object. The second concerns the standard or 'fit' required under rational relation. The third addresses the issue of inherent legitimacy of the impugned law.

A. *Constructing the Object: Uncertainty and Malleability*

The rational relation limb of the reasonable classification test requires judges to determine the object of the impugned statute. However, as the High Court conceded in *Lim (HC)*, determining the purpose or object of a piece of legislation is "not always a straightforward task".[37] There are a number of issues that the court has to grapple with in determining purpose or object, some of which were extensively discussed by the High Court in this case. The High Court's ascertainment of the object of section 377A of the *Penal Code* in the *Lim Meng Suang* cases, and as affirmed by the Court of Appeal, provides some possible clarifications on how to approach the task of ascertaining the purpose or object of an impugned law.

First, the cases affirm that the object or purpose is to be discerned from *parliamentary intent*. This is significant since object or purpose is not necessarily the same as intent. One could for instance, discern the object or purpose of a law from the "natural operation and effect of the provisions", rather than from the "intended objectives".[38] Lee points out that in earlier cases, "courts sometimes declared what the statutory objects were without explicitly identifying how they had ascertained them."[39] It is possible that the courts in those instances saw statutory object as being simply a matter of interpretation derived from the law's ordinary meaning and effect. However, in *Lim (HC)*, the High Court clearly adopted parliamentary intent in determining object or purpose. This is consistent with the approach under section 9A of the *Interpretation Act*; in authorising the use of parliamentary reports and speeches in ascertaining the purpose of a law, section 9A effectively elevated parliamentary intent as the primary indicator of purpose and object of the law.[40]

Secondly, and following from the first, the courts did not hesitate from referring to *extrinsic materials* in ascertaining object or purpose of the law. As highlighted above, these extrinsic materials include parliamentary speeches by the Minister moving the bill and other relevant parliamentary materials on record, which presumably includes speeches made in support or opposition to the bill. Indeed, among the main extrinsic materials specified as permissible extrinsic materials are "any explanatory statement relating to the Bill containing the provision", "the speech made in Parliament by [the] Minister [moving the Bill at the second reading]", and "any relevant material in any official record of debates in Parliament".[41] These materials point to a particular parliamentary intent. The Court of Appeal appears to affirm the High Court's approach in this regard.

Thirdly, despite alluding to the difficulties in this regard, the High Court appeared to focus on the object or purpose of the *impugned provision specifically*, rather

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37 *Lim (HC)*, *supra* note 4 at para 50.

38 Tan, *supra* note 2 at 16. Indeed, Tan contrasts "intended objectives" from the objective that could be discerned as a matter of looking at the "natural operation and effect of the provisions".

39 Lee, "Equality", *supra* note 22 at 161.

40 *Interpretation Act* (Cap 1, 2002 Rev Ed Sing), ss 9A(2), 9A(3).

41 *Ibid*.

than simply look at the general purpose or object of the law. This approach may be particularly apposite when the statute contains many sections and provisions. One interpretive problem has been whether the purpose or object required for the reasonable classification test should be ascertained for the entire law or only the specific provision. This becomes particularly vexing when there is a single statute with many sections and provisions. The *Penal Code* is one such statute. In that regard, there could be a purpose for the statute in general, a different purpose for a particular section in the statute, and, finally, a different purpose for each particular provision within the section/statute.[42]

Thus, the *Lim Meng Suang* judgments clearly do provide further guidance as to how to ascertain the object of the statute. However, some issues of interpretation remain. First, it is not clear if the focus on the object of the specific provision rather than of the entire law applies across the board, regardless of the type of legislation involved. Is the court justified in referring to a specific object only where there is an omnibus statute like the *Penal Code*? Is it then supposed to rely on a general object where there is a more targeted statute like the *Prevention of Corruption Act*?[43] Furthermore, where there is a range of purposes, should the primary purpose count more heavily than any subsidiary purpose?[44] These are some questions that need further judicial clarification.

Secondly, some evidentiary problems remain. For instance, while the Minister moving the bill may articulate the purpose or object of the law, this may be extremely general and may not provide sufficient guidance as to the specific object of the impugned provision. This problem is exacerbated if there was no direct mention or treatment of the specific provision during the parliamentary debates. Another more fundamental problem arises when the materials (specifically the parliamentary debates) may point to a range of purposes or objects, and there is insufficient guidance as to which of these purposes would apply to the specific provision. This is particularly since section 9A does not rank the extrinsic materials by order of priority. The court may properly refer to the Minister's speech in Parliament as well as the official debates following the introduction of the bill, which may discuss different purposes underlying the law. In this regard, the court will still have to determine for itself which of the stated purposes or objects should be applied to the impugned provision.[45]

Thirdly, there is an issue as to timing: is the purpose of the statute supposed to be determined when the statute was first introduced or when an amendment was added? The situation relating to section 377A specifically highlights the difficulty with timing. It started out as a provision enacted in England in 1885, and was introduced into Singapore in 1938. The purpose or object for enactment in 1885 could conceivably differ from the purpose or object for introducing the provision in 1938. Does the 1885 enactment or does the 1938 introduction count for determining

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42 This was also raised by the High Court as one of the issues to be considered in ascertaining the object of a law. See *Lim (HC)*, *supra* note 4 at para 50.

43 Cap 241, 1993 Rev Ed Sing [*PCA*]. On the *PCA*, it appears that the Court of Appeal relied on the general object of the statute in *Taw (CA), supra* note 7. See *Taw (CA), supra* note 7 at paras 63, 64.

44 *Ibid.*

45 See further Goh Yihan, "Statutory Interpretation in Singapore: 15 Years on from Legislative Reform" (2009) 21 Sing Ac LJ 97.

the carrier of original purpose or object? This is further complicated by the fact that the provision was debated and retained in 2007.[46] The object or purpose enunciated in 2007 for the law did to some extent differ from those enunciated in both 1885 and 1938. It is then not obvious which object or purpose a court should adopt in the reasonable classification test. The High Court, voicing its awareness of this vexing issue, asked:

> What if the original purpose or object of the legislation in question is no longer valid or has ceased to exist, but there is a new and valid purpose or object which the legislation fulfils: are we permitted to substitute the new purpose or object to ascertain whether the differentia underlying the classification prescribed by that legislation bears a rational relation to this new purpose or object?[47]

Notably, the High Court in *Lim (HC)* adopted the original purpose of section 377A as that enunciated in 1938, and the Court of Appeal endorsed this construction of the object.[48] The High Court further determined that despite the varied speeches given during the 2007 parliamentary debates on whether to repeal the provision, the purpose of section 377A had not changed from the original purpose enunciated in 1938.[49] Nonetheless, certain general questions relating to how to construct the object of the impugned law were left largely unanswered in *Lim (CA)*. While extensively surveying the history of section 377A, the Court of Appeal did not lay down general principles for addressing the question of construction of the object. Yap has criticised this adoption of the original purpose in a case note critiquing the High Court judgment in *Lim (HC)*. As he puts it, the original purpose of the lawmakers is relevant but should not be determinative. He argues that the relevance of the original purpose should be calibrated according to the vintage of the legislation. If the law has been passed recently, the original purpose may be more relevant. However, where the law is older and, in fact, passed during colonial times, Yap says that "local judges may prefer to be more circumspect about relying solely on the legislative purpose articulated by colonial officials on legislation passed in pre-independence Singapore."[50]

This call for circumspection seems sensible. However, unless there is an intervening event whereby the legislature clearly articulated a different purpose, which could be said to substitute this original purpose, it is difficult to conduct, much less justify, Yap's proposed recalibration. Contrary to Yap, Lee takes the position that the courts acted correctly in looking at the original purpose and in not accepting fresh explanations of the purpose from the executive branch. As he explains, to do so would have amounted to a "novel and unorthodox avenue for the interpretation

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46 See the account of the parliamentary debates in *Lim (HC)*, *supra* note 4 at paras 72-76, 80-85.

47 *Lim (HC)*, *supra* note 4 at para 50(g).

48 *Lim (HC)*, *supra* note 4 at para 70. See also the discussion by the Court of Appeal in *Lim (CA)*, *supra* note 1 at paras 116-152. One objection to the use of the original purpose of the law has been raised by Yap. Yap argues that the High Court in *Lim (HC)* has taken an unduly restrictive approach in framing the object. He argues that it is "not self-evident why the object sought to be achieved by s 377A must be confined to the original purpose of the lawmakers back in 1938 when the legislation was first passed." See Yap Po Jen, "Section 377A and Equal Protection in Singapore: Back to 1938" (2013) 25 Sing Ac LJ 630 at para 10.

49 *Lim (HC)*, *supra* note 4 at para 85. The High Court noted that the "reason for s 377A's retention, which affirmed the purpose of the provision as articulated by AG Howell in 1938, was that Singapore was a conservative society where the majority did not accept homosexuality".

50 Yap, *supra* note 49 at para 12.

of the provision to be manipulated without the matter being debated by the legislature."[51] He further points out in relation to section 377A that while there was an extensive parliamentary debate in 2007 about retaining the provision in the statute book, there was no articulation of a new object or purpose for that retention.[52] If it had been otherwise, such as where Parliament expressly decided to retain the provision on the basis of a new objective (*eg*, to reduce the transmission of HIV/AIDS), it would have been justified for the court to adopt this new purpose/object in applying the reasonable classification test. However, no such express re-articulation of the purpose/object took place.

Now, these issues of interpretation are crucial because the framing of the object is a critical part of the reasonable classification test. The High Court directly addressed this in *Lim (HC)* when it observed that "how the purpose of a piece of legislation is framed does make a difference when ascertaining whether there is a rational relation between the differentia underlying the classification prescribed by that legislation and the purpose of that legislation."[53] More specifically, constructing the object narrowly could lead to the law failing to bear a rational nexus in the sense of not being capable of achieving or advancing the purposes.[54] On the other hand, construing the object widely may supply what would have been lacking in terms of the nexus.[55] Different formulations of the object thus could lead to divergent results as evidenced by a comparison between the High Court and the Court of Appeal decisions in *Taw Cheng Kong* addressing the constitutionality of section 37(1) of the *PCA*. This section extends the statute to "citizens of Singapore" who commit acts of corruption outside Singapore. The High Court opined that the purpose of section 37(1) of the *PCA* was to address acts of corruption taking place outside Singapore but affecting events within Singapore. On that basis, the court decided that the nexus or relation between the differentia and the object of the statute was insufficient as it was over- and under-inclusive (discussed further below).

In comparison, the Court of Appeal in *Taw (CA)* took the view that the purpose of the section is framed more broadly as "more effective control and suppression of corruption."[56] The court thus concluded that section 37(1) of the *PCA* would go some way toward capturing the corrupt acts of Singapore citizens abroad and that, itself, furthered the object of the *PCA*. The Court of Appeal conceded that this broad formulation of the object led to under-inclusiveness because cases that involve non-Singaporeans who commit acts of corruption abroad but with effects in Singapore are not covered by the *PCA*. However, the court justified this on the basis of international comity. It "unanimously concluded that it was rational to draw the line at citizenship and leave out non-citizens so as to observe international comity and the sovereignty of other nations."[57] Furthermore, as has been observed, if the purpose of section 37(1) of the *PCA* is to deter the participation of Singaporeans in corruption, then the objection of over-inclusiveness (based on the example of a Singapore citizen who

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51 Jack Tsen-Ta Lee, "The Text Through Time" (2010) 31 Stat L Rev 217 at 228; Lee, "Equality", *supra* note 22 at 169, 170.

52 Lee, "Equality", *ibid* at 170.

53 *Lim (HC)*, *supra* note 4 at para 50.

54 Tan, *supra* note 2 at 15.

55 *Ibid.*

56 *Taw (CA)*, *supra* note 7 at para 63.

57 *Ibid* at para 75.

lives abroad and commits a corrupt act abroad which has no effect in Singapore) disappears because it falls within the aforesaid re-framed purpose.[58]

Tan suggests that one way to minimise the uncertainty that arises with the framing of the object in the reasonable classification test is for Parliament to be more explicit in enunciating the purposes of the law such that it is less likely that its enactments would be subject to the "vagaries of construction and be found wanting in constitutionality."[59] While this may address some of the problems discussed above, it would not entirely obviate interpretive uncertainty, not least because Parliament could not possibly exhaustively specify the purpose of each provision in every statute. As such, the courts could definitely help to further clarify this area of the law.

B. *Rational Relation: What Standard?*

Another issue requiring further clarification has to do with the relationship between the differentia and the object of the law. In *Lim (CA)*, the Court of Appeal explicitly recognised that "the absence of such a rational relation can take many forms".[60] It was also clear that "the requisite rational relation will – more often than not – be found."[61] This was because, as the Court of Appeal affirmed the High Court's opinion on this, "perfect relation" or "complete coincidence" is not necessary.[62] The court was careful to state however that this did not mean that a rational relation would always be found to exist. It gave one example: the reasonable classification test would not 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."[63] The final outcome depends on the "specific facts as well as context before the court."[64]

However, there is conceivably a broad spectrum of possible relations between perfect coincidence and clear disconnect. What if there is incomplete coincidence but not complete disconnect? Would a law where the differentia and the object are not clearly disconnected, in the sense of having completely no relation at all, but where the connection is loose at best satisfy the rational relation limb? In other words, how much 'fit' is required or how closely related must the differentia and the object or purpose be in order for the relation between them to be rational? This issue impinges upon a crucial discussion in the High Court judgment in *Lim (HC)* about over- and under-inclusiveness. There, the High Court endorsed the views expressed by SM Huang-Thio, particularly this passage:

> [I]n determining whether the inequality produced in a classification is trivial or not, the court has to embark on an investigation into the degree of inequality involved. Indeed, this is precisely what the courts do all the time when faced with equal protection problems. The reason is that the doctrine of reasonable

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58 See *Lim (HC)*, *supra* note 4 at para 58; see also Tan, *supra* note 2.
59 Tan, *ibid* at 16.
60 *Lim (CA)*, *supra* note 1 at para 68.
61 *Ibid*.
62 *Ibid*.
63 *Ibid*.
64 *Ibid*.

> classification does not demand a perfect classification, *ie* a complete coincidence of the class defined by the law and the class defined by the purpose of the law. Under this doctrine, the courts may sustain or reject an imperfect classification, depending on the degree of inequality involved. The measure of reasonableness of a classification depends on the degree of its success in treating similarly those similarly placed, and the closer the correspondence between the legislative classification and that implied by the purpose of the law, the easier it is to sustain the classification as reasonable.[65]

The enquiry as to whether a differentia is over- or under-inclusive could provide a more stringent test than one where all that is required is some relation. If all that is required is some relation, the only situation that the rational relation would guard against is one which exhibits a complete lack of relation between the differentia and the purpose or objective. In other words, if all that is required is some relation, only a law where there is a complete disconnect between the differentia and the purpose or objective would fall foul of the reasonable classification test.

The Court of Appeal's judgment in *Lim (CA)* is not conclusive in this regard. Although the Court of Appeal opined that the rational relation requirement would more often than not be satisfied, one might suggest that the Court of Appeal implicitly accepted that there could be situations where complete disconnect is not required to fail the reasonable classification test. Similarly, in a prior case, *Yong*, the Court of Appeal appeared to accept that there could be instances where there is no rational relation even where the differentia is not completely disconnected from the purpose or object of the law. This arises from the Court of Appeal's explanation that to satisfy the second limb of the reasonable classification test, the differentia must be "broadly proportionate" to the purpose of the law.[66] The court there was, however, careful to state that this does not mean that the differentia must be the best or most effective means of achieving the object, thereby implicitly rejecting a proportionality type analysis. Nonetheless, broad proportionality suggests that a certain degree of under-inclusiveness or over-inclusiveness could render the law insufficiently proportionate. The question then is how much under-inclusiveness or over-inclusiveness would render the relation not rational?

The High Court in *Lim (HC)* discussed this broadly proportionate requirement and suggested that what that prescribes is that the differentia must be "broadly effective" to achieve the object of the legislation.[67] The High Court explained the point as such:

> 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.[68]

For the High Court in *Lim (HC)*, broadly proportionate means that "the prescribed classification has to broadly fit the object of the law prescribing that classification in

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65 *Lim (HC)*, *supra* note 4 at para 98, citing Huang-Thio, *supra* note 3 at 431.
66 *Yong*, *supra* note 20 at para 112.
67 *Lim (HC)*, *supra* note 4 at para 95.
68 *Ibid* [emphasis added].

terms of the scope of its application."[69] It further explained that 'fit' is another way of capturing the concepts of under- and over-inclusiveness.[70] Thus, the High Court stated:

> Where the differentia underlying the classification prescribed by a piece of legislation results in that classification applying either too broadly or too narrowly, it should follow that the strength of the relation between the differentia and the objective of that legislation may not be sufficiently strong to justify making that classification. In other words, the "reasonableness of the classification is *insufficient*"…[71]

As the High Court in *Lim (HC)* noted, the Court of Appeal in *Taw (CA)* did not outright reject the relevance of over-inclusiveness as a factor to measure rational relation. It highlighted that the Court of Appeal merely rejected the lower court's determination that section 37(1) of the *PCA* was both under- and over-inclusive in *Taw (HC)*.[72] This issue was not addressed at all by the Court of Appeal in *Lim (CA)*. While rejecting the argument that the classification under section 377A was under- and over-inclusive, the court's disagreement was with the object rather than the test itself. Furthermore, the Court of Appeal probably did not find it necessary to address over- and under-inclusiveness since it accepted that there was complete coincidence in the relation between the differentia and the purpose and object of the statute.[73] Taking these cases as a whole, one might surmise that over- and under-inclusiveness may still be relevant considerations in determining whether there is a rational relation between the classification and the object of the statute.

One way forward may be to reformulate this second limb of the reasonable classification test to require not just any mere relation but as requiring a reasonable relation between the differentia and the object of the law. This is entirely within the scope of the current jurisprudence. Indeed, there are cases where the term *reasonableness* is used in characterising the relation required under this limb of the test. In *Taw (HC)*, the High Court formulated this test as such: "is the basis of discrimination a *reasonable means* of achieving the object?"[74] More recently, in *Lim (HC)*, the High Court opined that "the meaning of 'rational relation' is a relation that is also *reasonable and just*."[75] For the High Court, "reasonable and just" captures the Court of Appeal's earlier pronouncements in *Yong* that the law must be broadly proportionate to the purpose of the law.[76] Reasonableness could refer to more than just a mere relation, however tenuous, but requires that the link between the differentia and the object to be more substantial. This gives greater weight to the constitutional rights involved. Reasonableness could entail closer scrutiny and broader judicial discretion. This is nonetheless unlikely to lead to judicial overreaching. Singapore courts tend to

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69 *Ibid* at para 96.

70 *Ibid*.

71 *Ibid* at para 97, affirming *Taw (HC)*, *supra* note 9 at para 65 [emphasis added].

72 *Ibid* at para 99. Notably, the Court of Appeal in *Taw (CA)* took the view that the differentia was not under-inclusive.

73 See *Lim (CA)*, *supra* note 1 at para 153.

74 *Taw (HC)*, *supra* note 9 at para 33 [emphasis added].

75 *Lim (HC)*, *supra* note 4 at para 91 [emphasis added].

76 *Ibid* at para 95.

take a deferential approach in constitutional adjudication.[77] In previous cases, the courts have applied a robust presumption of constitutionality when deciding constitutional challenges and this has tended to make it much more difficult for applicants to challenge the constitutionality of laws and even executive action.[78]

C. *Substantive Content: Prohibited Bases of Discrimination*

Despite the Court of Appeal's rejection of an additional requirement of legitimacy of the object, it is not entirely clear whether the reasonable classification test would allow judges to strike down clearly discriminatory laws even where there is an intelligible differentia with a rational relation to the object. An additional requirement was introduced by the High Court in *Lim (HC)*, which could address such a scenario. There, the court opined that "it is possible to conceive of cases where the object of the legislation is illegitimate."[79] Now, the High Court's acceptance of this additional requirement is extremely important. While conceding that "such cases may be very far and few between", the High Court nonetheless took the view that this "does not preclude the possibility that they can occur."[80] The High Court explained that it wanted to provide for this possibility because:

> If the legislation in question is truly discriminating arbitrarily and without a legitimate purpose, the court cannot stand by the sidelines and do nothing. Parliament cannot introduce arbitrary and unjustified discrimination by simply hiding behind the curtain of words and language used in impugned legislation, or behind statements in Parliamentary debates which will yield an apparent purpose of the legislation concerned that invariably relates rationally to the differentia underlying the classification prescribed by that legislation, thereby satisfying the "reasonable classification" test. The courts can, and will, critically examine and test such legislation where necessary and appropriate.[81]

For the High Court, legitimacy is "undoubtedly a substantive concept".[82] It could be used to scrutinise the purpose of a legislation where it applies to "a very specific class of people in society."[83] Such a law would not have a legitimate purpose if it is "capricious", "absurd" and "unreasonable (in the *Wednesbury* sense)".[84] The High Court also endorsed Huang-Thio's suggestion that a law could be invalid even if it satisfies the reasonable relation test because "the object sought to be achieved is itself inherently bad".[85]

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[77] See the discussion on the Singapore courts' evolution from deference as submission to deference as respect in Jaclyn L Neo, "Balancing Act: The Balancing Metaphor as Deference and Dialogue in Constitutional Adjudication" in Jaclyn L Neo, ed, *Constitutional Interpretation in Singapore: Theory and Practice* (Routledge, 2016) (forthcoming).

[78] Lee, "Equality", *supra* note 22 at 179-183. See also Jack Tsen-Ta Lee, "Rethinking the Presumption of Constitutionality" in Jaclyn L Neo, ed, *Constitutional Interpretation in Singapore: Theory and Practice* (Routledge, 2016) (forthcoming).

[79] *Lim (HC)*, *supra* note 4 at para 114.

[80] *Ibid*.

[81] *Ibid*.

[82] *Ibid* at para 116.

[83] *Ibid*.

[84] *Ibid*.

[85] *Ibid* at para 115, affirming Huang-Thio, *supra* note 3 at 422.

The Court of Appeal disagreed. It opined:

> To permit the court the power – over and above its power of scrutinising legislation pursuant to the "reasonable classification" test – to declare a statute inconsistent with Art 12(1) (and, therefore, unconstitutional under Art 4) 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."[86]

However, while the Court of Appeal rejected the legitimate purpose requirement, it appeared to read the first limb of intelligible differentia as encompassing some substantive standard, beyond merely ensuring consistency in identification. The court stated that even if a differentia is capable of being understood or apprehended by the intellect or understanding, it "may nevertheless still be unintelligible to the extent that it is *so unreasonable as to be illogical and/or incoherent*."[87] Thus, the Court of Appeal stated:

> [T]o the extent that there are serious flaws with regard to the intelligibility of the differentia embodied in a statute and/or a clear disconnect between that differentia and the purpose and object of the statute, the court will hold that the statute does not pass legal muster under Art 12(1).[88]

This is a substantiation of the intelligible differentia limb and indeed, the court conceded this. It stated that this might be viewed in substance "as introducing a limited element of illegitimacy which is embodied in the "reasonable classification" test."[89] Nonetheless, the Court of Appeal emphasised that it was "vitally important to note that this element of illegitimacy is not an additional test over and above the "reasonable classification" test".[90] Instead, it was merely an application of the test, albeit by reading substantive content into the test.[91]

To foreclose criticism that this would open doors to potential abuse, the court stated that this "illogicality and/or incoherence must be of an extreme nature."[92] This means that "[i]t must be so extreme that no reasonable person would ever contemplate the differentia concerned as being functional as intelligible differentia."[93] Thus the Court of Appeal said:

> Put simply, the illogicality and/or incoherence of the differentia concerned must be such that there can be no reasonable dispute (let alone controversy) as to that fact from a moral, political and/or ethical point of view (or, for that matter, any other point of view). Where such illogicality and/or incoherence is present, there

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86 *Lim (CA)*, *supra* note 1 at para 82.
87 *Ibid* at para 67 [emphasis added].
88 *Ibid* at para 84.
89 *Ibid*.
90 *Ibid*.
91 *Ibid*.
92 *Ibid* at para 67.
93 *Ibid*.

> is no point even beginning to talk about the concept of equality (let alone whether there has been a violation of the right to equality contrary to Art 12) because no reasonable classification even exists in the first place.[94]

Now, this is the most subtly remarkable part of the judgment because the court has now read into the first limb of requiring an intelligible differentia with substantive content. Satisfying the intelligible differentia limb appears to now require more than just a consistent distinguishing mark. The importation of illogicality and incoherence appears to bring into the test certain normative judgment as to what bases for differentiation are permissible. This is further reinforced by the court's response to the question of whether a law banning all women from driving would violate Article 12(1) of the *Constitution*:

> We would observe, parenthetically, that, in any event, such a law is an extreme provision which would probably not be enacted by a reasonable Parliament in the Singapore context. That having been said, anything is, of course, possible. Should such a law indeed be passed by the Singapore Parliament, there would, in our view, be at least an arguable case that that law would not pass legal muster under the "reasonable classification" test. The differentia embodied in that law might, arguably, be illogical and/or incoherent for the purposes of the first limb (*ie* Limb (a)) of the "reasonable classification" test. Further, as pointed out above, there is also a second limb (*ie* Limb (b)) of the "reasonable classification" test which must be satisfied, Limb (a) and Limb (b) being consecutive and *cumulative* aspects of the test. Looked at in this light, it is at least arguable that there might *not* be a rational relation between the differentia embodied in the aforementioned law on the one hand and the purpose and object of that law on the other – unless the purpose and object of that law is precisely to ban all women from driving. However, if that is indeed the case, we would come back full circle, so to speak, to the issue (just mentioned) of whether or not the differentia (as identified under the first limb of the "reasonable classification" test) is illogical and/or incoherent. *No* such circularity arises on the facts of the present appeals.[95]

It may be that it is in this narrow sense that the Court of Appeal opined that "the "reasonable classification" test is by no means a merely mechanical or purely procedural test" but "in fact, contain[s] substantive elements."[96]

This reading of *Lim (CA)* is confirmed by the Court of Appeal in the case of *Yong Vui Kong v Public Prosecutor*.[97] While affirming the earlier position that controversial issues of policy, ethics, or social values are more appropriately debated and resolved in the legislative sphere, the Court of Appeal there nonetheless admitted that the reasonable classification test "imports a limited requirement of legitimacy", and that a law which adopts a "manifestly discriminatory object would not pass muster under the first limb of the test."[98] This is because "the differentiating factor used 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

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94 *Ibid*.
95 *Ibid* at para 114 [emphasis added].
96 *Ibid* at para 71.
97 *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at para 106 (CA).
98 *Ibid.*

reasonable person would consider such a differentiating factor to be functional as an intelligible differentia."[99] In other words, some differentia may be intelligible but unintelligible.

This assessment of the first limb of the reasonable classification test undoubtedly requires a substantive evaluation that goes beyond merely intelligibility, and indeed would seem to go against the court's earlier assertion in the *Lim (CA)* judgment that the enquiry into intelligible differentia "ought to avoid any consideration of substantive moral, political and/or ethical issues because these issues are potentially (and in most instances, actually) controversial."[100] After all, the question of whether a particular classification is unreasonable or, more accurately, illegitimate requires the court to make a normative evaluation that hinges upon substantive values. In order to say, for instance, that it is unreasonable to pass laws banning women from driving such that it is illogical or incoherent, a court has to make an *a priori* determination, whether explicitly or implicitly, that as a matter of morality, ethics, or even politics, it is wrong to discriminate against women, or more specifically to discriminate against women in this way. This is particularly since the *Constitution* is silent as to gender discrimination.

IV. Substantive Bases for Discrimination: Judicial Role and Social Agreement

At the end of the day, the critical issue underlying these cases challenging the constitutionality of section 377A is really substantive rights. The challenge is about whether the government is constitutionally justified in treating homosexuals differently from heterosexuals. This goes beyond merely requiring that like be treated alike, or that the law should not be arbitrary in the sense of treating persons differently without a rational basis. The fundamental claim in these cases is that homosexuals should not be treated differently. That involves broader issues of social policy and requires a determination that goes to the substance of what are permissible and impermissible bases for differentiation. The Singapore *Constitution* explicitly prohibits certain bases for discrimination of citizens. Under Article 12(2) discrimination on the basis of race, religion, place of birth, and descent is absolutely prohibited in any law, in official appointments or employment under a public authority, as well as in the administration of law relating to property, trade, business, profession, vocation or employment. According to the Court of Appeal in *Lim (CA)*, Article 12(2) provides legal criteria that are over and above the reasonable classification test in testing the constitutionality of laws.[101] This means that a law that satisfies the reasonable classification test could still be unconstitutional and struck down if it discriminates on the basis of the differentia identified therein (religion, race, place of birth, or descent).[102] These legal criteria are specific and concrete.[103]

There is therefore no question that the Singapore *Constitution* does contain some substantive bases for the protection of equality. The question however is whether

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[99] *Ibid*.
[100] *Lim (CA)*, *supra* note 1 at para 65.
[101] *Ibid* at para 90.
[102] *Ibid* at paras 90, 102.
[103] *Ibid* at para 90.

the substantive grounds for equality are limited to what is expressly stated in Article 12(2) of the *Constitution* or whether Article 12(1) could be extended to include other impermissible bases of discrimination. It is here that the Court of Appeal in *Lim (CA)* took an extremely narrow view of the matter. It held that the specific grounds of discrimination found in Article 12(2) are "the only grounds of discrimination that are proscribed under the Singapore Constitution."[104] According to the court, the original intent of the drafters (as evidenced by the *Report of the Constitutional Commission 1966*[105]) was to prohibit discrimination on the basis of race, religion, place of birth, or descent to prevent societal division and/or friction on racial, linguistic, and/or religious lines.[106] It was clear that the issue of discrimination on the basis of sex, gender or sexual orientation was not raised at the time of drafting.[107] The court conceded that these substantive grounds could be included as constitutionally prohibited bases for discrimination to reflect the prevailing social mores but that the proper route is for Parliament to amend the *Constitution*.[108] In other words, the Court of Appeal appeared to regard Article 12(2) as providing a closed list of prohibited bases for discrimination.[109]

The justification for this highly restrictive view rests on the court's view of the judicial role and the separation of powers. There were repeated emphases that the courts should not act as "mini-legislatures".[110] By this, the court assumed that there is a clear line to be drawn between legal and extra-legal arguments. The court thus opined that it could only consider legal arguments in deciding cases. To take into account what it considers extra-legal arguments would be tantamount to the court assuming legislative functions which are beyond its remit.[111] This is an interesting exposition on the role of judges. While acknowledging that the courts do indeed develop principles of common law and equity, the Court of Appeal opined that this is "*quite different* from the process of *legislative* enactment or amendment of legislation."[112] According to the court, if it was to be "involved in expressing views on extra-legal issues", this would make it "no longer able to sit to assess the legality of statutes from an *objective* perspective."[113] This is because these "extra-legal issues" are or are at least perceived to be "*subjective* in nature."[114]

It would appear that the distinction that the Court of Appeal drew between legal and extra-legal, objective and subjective, or development of the law and legislation alludes to an underlying assumption about the distinction between law and politics. It views the judicial role as strictly legal and objective, in contrast with the arena

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104 *Ibid* at para 102.

105 Sing, Constitutional Commission, 1966, *Report of the Constitutional Commission 1966* (Singapore: Government Printer, 1966).

106 *Lim (CA)*, *supra* note 1 at para 185.

107 See the discussion at *ibid*, para 92.

108 *Ibid* at para 102.

109 *Ibid* at para 185.

110 See *ibid* at paras 77, 82, 84, 101, 173, 189.

111 *Ibid* at para 189. This approach can be criticised as it is not clear that such a clear distinction can be drawn between legal and extra-legal arguments, particularly in constitutional matters.

112 *Ibid* at paras 78, 79 [emphasis added].

113 *Ibid* at para 189 [emphasis added].

114 *Ibid* [emphasis added].

of politics which it regards as being subjective and contested.[115] The Court of Appeal's characterisation of certain arguments raised by the applicants as being extra-legal hints at a desire to insulate the law from the political, which it sees as a sphere of contestation and disagreement. The supposed "extra-legal" arguments it rejected were those concerning the need to protect minorities from the tyranny of the majority, arguments made from the harm principle, argument based on immutability and/or intractability of change, and arguments concerning the safeguarding of public health.[116] Other constitutional courts may take the view that these are arguments that are not foreign to a constitutional case, and indeed entirely legitimate for a court to consider. The Court of Appeal's attempt to differentiate legal from extra-legal arguments is thus interesting, but criticism may be made that it is simply not possible to make such a distinction in a neat and principled manner. This is especially if one takes the view that law, in particular constitutional "law", is inherently political.[117] Furthermore, it has been pointed out that judicial work is not "merely ministerial and mechanical."[118] Judges have discretion in their interpretation of the law and thus, it has been suggested that they cannot be excused from the consequences of fashioning legal rules in one way or another.[119] Consequently, while the Court of Appeal acknowledged that the proposition that judges do not make law could no longer be credibly made, its reliance on a purported distinction between legal and extra-legal suggests that it retains the view that judicial discretion is still highly limited.

At the heart of this attempt to delineate judicial role appears to be the Court of Appeal's discomfort at the prospect of having to adjudicate over what might be considered to be a highly contentious social and political issue in this matter. Reading the Court of Appeal's judgment sympathetically, one might suggest that in a different matter, where the issue is less contentious, the court remains within its powers, even after the *Lim (CA)* judgment, to intervene where there is substantive inequality beyond the stated bases under Article 12(2) of the *Constitution*. After all, in addressing the hypothetical law prohibiting women from driving, the court characterised such a law "an extreme provision".[120] To say that the law is "extreme" necessarily entails a normative judgment as to what would be normal, reasonable, or acceptable. A clue as to how such a normative judgment could be made and when it would be made can be gleaned from its discussion on determining what grounds of discrimination should be included in interpreting an open-ended provision on the

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[115] Herbert Wechsler for instance is a strong proponent of the distinction between law and politics, which appears to rest upon the presence or absence of reason. In a seminal 1959 essay, Wechsler argues that political decisions express preference and desire, whereas judicial decisions possess "legal quality" which "inheres primarily in that they are – or are obliged to be – entirely principled." Thus, a principled decision "rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." See Herbert Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73(1) Harv L Rev 1 at 19.

[116] *Lim (CA)*, *supra* note 1 at paras 157-180.

[117] See *eg*, Learned Hand, *The Bill of Rights* (Cambridge: Harvard University Press, 1958).

[118] Robert Post, "Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics" (2010) 98 Cal L Rev 1319 at 1331.

[119] *Ibid*.

[120] *Lim (CA)*, *supra* note 1 at para 114.

right to equality. There, the Court of Appeal stated:

> How, for example, is the court to decide *which particular ground* of discrimination ought to come within the ambit of that provision? There is every danger that the court could end up acting like a "mini-legislature". Indeed, it might have *no choice* but to do so, except, perhaps, *in the clearest instances* (which would, *ex hypothesi*, have the endorsement of *at least the majority of the population* in that particular jurisdiction, although there would be very real and practical difficulties in the court's ability to ascertain the existence of such endorsement in the first place).[121]

The passage suggests that there may be instances where a court would be exercising its proper judicial function in prohibiting a ground for discrimination if it could be determined that it would be endorsed by the majority of the population. Notably, this discussion was made in distinguishing the Singapore position from the American position, specifically the Fourteenth Amendment, and it hints at the overarching worry that the judiciary is not in the best position to determine a matter that remains politically contested. However, the converse would be that where the matter is not as politically contested, as in this case, perhaps the courts may legitimately intervene to strike down a law. One could imagine such a situation arising for instance where the government has become unresponsive to public opinion. Indeed, this gels with the Court of Appeal's concession that it would likely not uphold a law that blatantly discriminates against women who drive, which it apparently sees as a move that would be endorsed by at least the majority of the population. Thus, there appears to be some room for future courts in Singapore to extend substantive equality protection beyond Article 12(2) of the *Constitution*, albeit in rare instances and through the reformulated first limb of the reasonable classification test on intelligible differentia. It would be interesting to see the extent to which this residual discretion could be exercised in future cases.

V. Concluding Reflections

The reasonable classification test is undoubtedly limited. It seeks to balance the need to allow the government to make differentiating legislation with the need to guard against arbitrary discrimination. This was conceded in *Lim (CA)* where the court stated that the reasonable classification test is useful but does not really address the fundamental questions of "[h]ow. . . is the law to ensure that there is a basic level of equality, applying the principle of equality generally, and more importantly, in what situations would such a level of equality be deemed to be legally mandated?"[122] Indeed, the court noted that "the very nature of the "reasonable classification" test renders it incapable of furnishing the requisite (or complete) normative as well as analytical impetus (let alone the requisite criterion or criteria) to answer these questions."[123]

The 'thinness' of the reasonable classification test has led to suggestions that it be reformed or even jettisoned in favour of other more stringent tests. For instance, Lee

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[121] *Ibid* at para 101 [emphasis added].
[122] *Ibid* at para 61.
[123] *Ibid*.

has suggested that the courts should consider recasting the reasonable classification test into a "more rigorous proportionality analysis".[124] Proportionality is regarded as a more stringent test as it requires the court to examine not only the *suitability* of the law (there being a rational relation between the law and the differentia), but also the *legitimacy* of the object and *necessity* of the law.[125] Under a common formulation of the proportionality test, the court is required to look at the legitimacy of the statute's aim or object, as well as to ensure that differential treatment is "no more than is necessary to accomplish the legitimate aim."[126] This is in addition to ensuring that the differentia is rationally connected to the aim/object of the statute.

Besides introducing such a proportionality analysis, another approach for comparison is the American tiered scrutiny approach, whereby the standard for constitutionality is calibrated according to the type of differentia and/or rights involved. The equal protection jurisprudence (under the Fourteenth Amendment) currently sets out three tiers of scrutiny. First, where the discrimination involves fundamental rights or a suspect class, strict scrutiny is applied. This means that the statute must be narrowly tailored to serve a compelling government interest and there must be a less restrictive alternative. Secondly, intermediate scrutiny may be applied to some forms of discrimination, and this was developed specifically in relation to gender discrimination. Thirdly, and for all other laws, only a rational basis review is applied.[127] This tiered scrutiny approach goes beyond merely requiring a rational relation between the differentia and the object of the law, but calibrates the relation required according to the type of interests implicated. It essentially encompasses a proportionality type analysis because it looks at suitability and necessity.

Nonetheless, on the basis that the courts are committed to retaining the reasonable classification test, I would argue that the test is sufficiently capacious to allow for a more stringent scrutiny of the laws. While the current test relies on the first limb to import a certain measure of judicial judgment as to the substantive legitimacy of the differentiation (albeit couched in terms of intelligibility), I would argue that the second limb also has the potential to be further developed in order to institute differing standards of stringency for assessing discriminatory laws. One key factor, it seems, for taking a narrow or expansive approach to reasonable classification appears to be judicial self-reflection about the role of judges within the constitutional framework. For instance, the Court of Appeal's observations in *Lim (CA)* about the judicial role and the need to accord as much legislative leeway as possible to the legislature[128] contrasts with the High Court's reflection that "[o]ur courts are the guardians who ensure that the rule of law and all that it entails is observed and prevails."[129] While not clearly contradictory positions, the emphasis chosen by

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[124] See Lee, "Equality", *supra* note 22 at 177-179, 184.

[125] For further discussion on the proportionality analysis, see Alec Stone Sweet & Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47 Colum J Transnat'l L 72.

[126] See for instance the use of a proportionality analysis in the equivalent Hong Kong case of *Secretary for Justice v Yau Yuk Lung, Zigo* (2007) 10 HKCFAR 335.

[127] Note however that this tiered scrutiny approach has been criticised. See the discussion in James E Fleming, "'There is Only One Equal Protection Clause': An Appreciation of Justice Steven's Equal Protection Jurisprudence" (2006) 74(4) Fordham L Rev 2301.

[128] *Lim (CA)*, *supra* note 1 at para 70.

[129] *Lim (HC)*, *supra* note 4 at 112.

each court could determine how the reasonable classification test applies in each case. That said, what is important is the need for judicial vigilance in ensuring that the courts do not shy away from striking down clearly discriminatory laws. There is clearly scope, not just for further clarification, but also for recalibration of the reasonable classification test. Despite an overall cautious approach in *Lim (CA)*, the Court of Appeal have, rightly, left the door open to this possibility.