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BETWEEN JUDICIAL OLIGARCHY AND PARLIAMENTARY SUPREMACY: UNDERSTANDING THE COURT'S DILEMMA IN CONSTITUTIONAL JUDICIAL REVIEW

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This article considers the dilemma that constitutional judicial review presents to the most well-meaning of judges—that of navigating the narrow and difficult road between parliamentary supremacy and judicial oligarchy. It examines the Singapore Court of Appeal's delineation of legal and extra-legal considerations in view of Ronald Dworkin's theory of adjudication in determining the constitutionality of s 377A of the *Penal Code* in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 (CA). It proposes an alternative natural law approach to constitutional judicial review based on Radbruch's formula, which helps courts to avoid the pitfalls of judicial idiosyncrasies and usurpation of legislative mandate while staying true to constitutionalism.

I. THE SPECIAL DILEMMA OF THE COURTS IN CONSTITUTIONAL JUDICIAL REVIEW

In the constitutional jurisprudence of the United States, *Roe v Wade*[1] is regarded as a classic example of judicial activism. The United States Supreme Court ("US SC") ruled that the Fourteenth Amendment[2] of the *Constitution of the United States*[3] guaranteed the right to privacy under the idea of "liberty", and this right included a woman's right to terminate her pregnancy.[4] Restrictive abortion laws passed by a state or the federal government were unconstitutional. Even some supporters of permissive abortion laws were of the view that such laws should have been legislatively enacted:[5] *Roe v Wade* was seen as an encroachment by the judiciary, through the creative reading of a constitutional provision, on legislative mandate.[6]

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1 410 US 113 (1973).

2 Section 1 of the Fourteenth Amendment of the US Constitution provides that a state shall not "deprive any person of... liberty... without due process of law...": US Const amend XIV.

3 US Const [*US Constitution*].

4 *Roe v Wade*, *supra* note 1 at 152-154.

5 See *eg,* John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v Wade*" (1973) 82 Yale LJ 920.

6 See *eg,* Justice Rehnquist's comment in his dissenting judgment on the court's judicial legislation in *Roe v Wade, supra* note 1 at 172-177. See, also, the discussion by Justice Scalia in *Lawrence v Texas*, 539 US 558 at 587-592 (2003) [*Lawrence*].

Judges involved in constitutional interpretation, while not being "timorous souls"[7] and while rightfully ensuring that constitutionally-protected rights are given effect to, would do well to discern the actual scope of fundamental liberties. The adoption of a written constitution calls for a more rigorous check, than in the case of parliamentary supremacy, on the laws that Parliament passes. But the judicial function in checking legislation is to enforce the constitution: a government based on constitutional supremacy should not turn into a judicial oligarchy or a juristocracy[8]—a rule by judges as they creatively rewrite the constitution or substantially arrogate law-making powers to themselves under the guise of enforcing the constitution. Constitutional judicial review presents a special dilemma, to the most well-meaning of judges, of navigating the narrow and difficult road between parliamentary supremacy and juristocracy. Judges acting in bad faith would not be confronted with such a dilemma, as they would either engage in judicial legislation, or rubber-stamp whatever law Parliament passes.

The Singapore Court of Appeal ("CA") confronted this dilemma in *Lim Meng Suang v Attorney-General*.[9] *LMS/TEH* was the culmination of appeals from the High Court ("HC") decisions of *Lim Meng Suang v Attorney-General*[10] and *Tan Eng Hong v Attorney-General*.[11] As both cases concerned challenges to the constitutionality of s 377A of the *Penal Code*[12] in view of arts 9 and/or 12 of the *Constitution of the Republic of Singapore*,[13] they were heard together. This article will use the CA's calibration of constitutional judicial review as a launch-pad for the discussion of the dilemma facing courts in constitutional judicial review. The HC's judgments will be examined insofar as they offer a different calibration. As pertinent comments were subsequently made by the CA in *Yong Vui Kong v Public Prosecutor*,[14] I shall examine whether those comments qualify or advance the CA's approach in *LMS/TEH*.

In Part II, I shall provide a brief background relating to s 377A, beginning with the controversial legislative review and subsequent retention of s 377A in Singapore's Parliament in 2007, and culminating in the legal challenges made in *LMS/TEH*. In Part III, I shall examine the CA's judgment in light of the dilemma mentioned. In this regard, three aspects are of especial interest: the interpretation of art 9; the protection of equality and the reasonable classification test; and the classification of legal and extra-legal considerations. In Part IV, I shall propose an approach to constitutional judicial review, based on what has been termed "Radbruch's formula",[15] which helps the courts to properly navigate between parliamentary supremacy and juristocracy. I conclude in Part V with a brief survey of challenges of the times we live in.

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7 I borrow Lord Denning's term in *Candler v Crane, Christmas & Co* [1951] 2 KB 164 at 178 (CA) (Denning LJ's dissent).

8 Henceforth, I shall use the term "juristocracy" to refer to a judicial oligarchy. The term has been used, for example, by Hirschl in Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2007).

9 [2015] 1 SLR 26 (CA) [*LMS/TEH*].

10 [2013] 3 SLR 118 (HC) [*LMS* (HC)].

11 [2013] 4 SLR 1059 (HC) [*TEH* (HC)].

12 Cap 224, 2008 Rev Ed Sing.

13 1999 Rev Ed [*Singapore Constitution*].

14 [2015] 2 SLR 1129 (CA) [*Yong Vui Kong* (2015)].

15 See *eg,* Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (Oxford: Oxford University Press, 2009) at 40.

II. The Criminal Law Review of 2007 and the Constitutional Challenge

Given the highly polarised debate in and outside of Parliament, in 2007 and before, concerning the legal regulation of homosexual acts,[16] the constitutional challenges in *LMS/TEH* were unsurprising.

According to s 377A:

> 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.[17]

Section 377A was extensively debated in Parliament in 2007 when its repeal was not tabled in the *Penal Code (Amendment) Bill*,[18] which had "77 provisions expanded, updated or clarified, four provisions repealed, and 21 new offices enacted to address identified gaps in the law, strengthen enforcement capability and accord better protection to vulnerable persons."[19] Relatedly, the then-s 377, which prohibited "carnal intercourse against the order of nature with any man, woman or animals",[20] was repealed, with bestial acts covered under the new s 377B. The retention of s 377A, the repeal of the then-s 377, and the enactment of the new s 377B meant that bestial acts and homosexual acts between male persons remain criminalised, while heterosexual acts "against the order of nature" and homosexual acts between female persons were not criminalised. The government sought feedback from the public; intense debate in the public square preceded the second reading of the *Bill* with emails and letters being sent to government leaders;[21] two opposing internet campaigns were mounted to garner support for online letters to the Prime Minister. A petition was presented by Nominated Member of Parliament Siew Kum Hong in Parliament on behalf of those hoping for repeal, on the ground that the provision was an "unconstitutional derogation from the constitutional guarantee of equality and equal protection of the law as set out in Article 12(1) of the Constitution."[22] The government decided to retain s 377A, but the Prime Minister said it would not be pro-actively enforced.[23]

In light of the allegation that the provision was unconstitutional, the worldwide movement in relation to homosexual rights, and increased visibility of homosexuals

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16 In 2003, the then-Prime Minister Goh Chok Tong had acknowledged that homosexuals were hired in sensitive government positions. From about that time, there was also increased visibility of what was to some groups in society an alternative lifestyle. This was discussed in Tan Seow Hon, "Pragmatism, Morals Legislation and the Criminalization of Homosexual Acts in Singapore" (2008) 3 Journal of Comparative Law 285 at 292.

17 *Penal Code*, *supra* note 12, s 377A.

18 No 38 of 2007, Sing [*Bill*].

19 *Parliamentary Debates Singapore: Official Report*, vol 83 at col 2175 (22 October 2007) (Senior Minister of State for Law, Associate Professor Ho Peng Kee).

20 *Penal Code* (Cap 224, 1985 Rev Ed Sing), s 377.

21 *Parliamentary Debates Singapore: Official Report*, vol 83 at col 2397 (23 October 2007) (Prime Minister Lee Hsien Loong) [*Parliamentary Debates* (23 October 2007)].

22 *Parliamentary Debates Singapore: Official Report*, vol 83 at col 2121 (22 October 2007) (Mr Siew Kum Hong).

23 *Parliamentary Debates* (23 October 2007), *supra* note 21 at col 2401.

in Singapore,[24] the constitutional challenge in *LMS/TEH* was unsurprising. The two contexts in which the homosexual acts occurred were, however, worlds apart.

Tan Eng Hong had been arrested for engaging in oral sex in a cubicle in a public toilet of a shopping complex and was initially charged under s 377A—a charge later substituted with another charge under s 294(a) of the *Penal Code*, concerning the commission of an obscene act in a public place. Prior to the substitution, Tan Eng Hong had brought an application to challenge s 377A for violating arts 9, 12, and 14 of the *Singapore Constitution*. When the charge was substituted, the Attorney-General applied to strike out Tan Eng Hong's application for disclosing no reasonable cause of action, being frivolous or vexatious, and/or being an abuse of court process. The CA found that Tan Eng Hong had the *locus standi* to make the application as he had initially been arrested, investigated, detained and charged exclusively under s 377A.[25] The issue arose as to whether these acts were "in accordance with law" within the meaning of art 9(1), given that s 377A was arguably inconsistent with art 12 of the *Singapore Constitution*. Moreover, there remained a real and credible threat of prosecution under s 377A. Tan Eng Hong was allowed to vindicate his rights through a constitutional challenge.

Lim Meng Suang ("Lim") and his partner, Kenneth Chee Mun-Leon ("Chee"), challenged s 377A for infringing art 12 of the *Singapore Constitution*. They had been "in a romantic and sexual relationship" with each other since 1997.[26] Both said they had experienced discrimination and that s 377A had reinforced the discrimination, as "the very existence of this provision, whether or not it is enforced, [labelled] them as criminals."[27]

While Tan Eng Hong's case concerned a sexual act in a public toilet, Lim's case concerned sexual acts within a long-term homosexual relationship. On the one hand, the nature of the relationship of the parties engaging in the acts proscribed by s 377A should not affect the outcome of their respective constitutional challenges. On the other, given that emotive appeals were made during the 2007 criminal law review in Parliament about how homosexuals were like the rest of citizens, the general public might have been more sympathetic to Lim's case for a right to sexual intimacy in the context of a long and stable relationship.[28]

Lim and Chee challenged s 377A as it was "always at the back of their minds that if the authorities wanted to, they could arrest them and charge them"[29] under s 377A. Ironically, despite losing their case after the disclosure about their sexual relationship, they were not arrested. While there is no assurance that they would never be prosecuted, inasmuch as they were permitted to continue to go on with their lives, the omission is consistent with the government's stance during the parliamentary debates that it would not pro-actively enforce s 377A.

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[24] See *eg,* the activism of Pink Dot SG, a non-profit movement, online: Pink Dot SG <http://pinkdot.sg/about-pink-dot/>.

[25] *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at para 186 (CA) [*TEH* (CA)].

[26] *LMS* (HC), *supra* note 10 at para 2.

[27] *Ibid* at para 7.

[28] The parties appealed to the public to raise funds for their litigation costs, online: YouTube <https://www.youtube.com/watch?v=qOyWOz1LyUY>.

[29] *LMS* (HC), *supra* note 10 at para 7.

III. Legal and Extra-Legal Arguments in Constitutional Judicial Review

I shall consider the CA's interpretation of arts 9 and 12 of the *Singapore Constitution* and its delineation of legal and extra-legal considerations, examining the HC's reasoning insofar as it offers an alternative perspective of constitutional judicial review.

A. *Liberty and the Right to Privacy: Article 9*

According to art 9(1), no person shall be "deprived of life or personal liberty save in accordance with law."[30] The CA held that this guaranteed freedom from unlawful deprivation of life and unlawful detention or incarceration.[31] Two points are worth noting. First, the definitive statement of the CA that there was no general constitutional right to privacy or personal autonomy in art 9(1)[32] settled Singapore's position on a constitutional provision that was as close as any could get to the substantive due process clause of the *US Constitution*: the substantive due process jurisprudence was rejected. Any right to privacy should be developed by way of private law on privacy. Moreover, the CA noted that the limited right being asserted was potentially unlimited, as it might "legalise all manner of subjective expressions of love and affection, which could (in turn) embody content that may be wholly unacceptable from the perspective of broader societal policy", though the CA acknowledged that this raised the question of whether broader societal morality ought to have been enforced by s 377A.[33] The second point concerns the interpretation of the phrase, "in accordance with law". Tan Eng Hong's counsel had argued that the "law" should not be "arbitrary" or "absurd".[34] The CA's dismissal of the argument is, strictly, not a rejection of the requirements of "law", but involved a narrower finding that absurdity had not been established when conflicting evidence was relied upon: the acts proscribed were clear;[35] there was no legal substantiation as to why "signalling societal disapproval of grossly indecent acts between males was arbitrary";[36] the argument for absurdity—that a minority was criminalised "based on a core aspect of their identity which was either unchangeable or suppressible only at a great personal cost"[37]—hinged on conflicting scientific views about immutability that the CA thought were beyond its remit.[38]

I have elsewhere argued that a jurisprudential debate between legal positivists and natural law theorists is implicated in the interpretation of the word "law" in art 9(1).[39] The meaning of "law" cannot be settled as a matter of definitions found in the

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30 *Singapore Constitution*, *supra* note 13, art 9.
31 *LMS/TEH*, *supra* note 9 at para 46.
32 *Ibid* at para 44.
33 *Ibid* at para 49.
34 *Ibid* at paras 51, 52.
35 *Ibid* at para 51.
36 *Ibid* at para 52.
37 *Ibid* at para 53.
38 *Ibid*.
39 Tan Seow Hon, "Constitutional Jurisprudence: Beyond Supreme Law: A Law Higher Still?" in Thio Li-ann & Kevin Y L Tan, eds, *Evolution of a Revolution: 40 Years of the Singapore Constitution* (London: Routledge-Cavendish, 2009) at 79-113 [Tan, "Constitutional Jurisprudence"].

interpretive provisions of written law. While "law" is defined in art 2, the definition is non-exhaustive as law is said to include "written law and any. . . other enactment or instrument. . . in operation in Singapore". In turn, s 2 of the *Interpretation Act*[40] suggests that "written law" means "the Constitution. . . and enactments by whatever name called. . . for the time being in force in Singapore". Therefore, "law" in art 9(1) *includes* what is validly passed by Parliament which is "in operation". But *what else* is included in the reference to "law" in art 9(1)? This is important because whatever violates art 9(1) would not be in operation.[41] In other words, whether a statute that deprives one of life or personal liberty that Parliament attempts to pass would be "in operation" hinges on whether it is passed in accordance with "law", and this hinges on the interpretation of "law". Jurisprudential debates as to what counts as "law" are implicated in the interpretation of art 9(1), which was what the Privy Council in *Ong Ah Chuan* thought when it referred to the rules of natural justice as having been incorporated.[42] Or, "law", according to a wider interpretation, such as a natural law interpretation, incorporates Radbruch's formula according to which manifestly unjust laws are not laws.[43] I shall argue in Part IV that preferring the natural law understanding, over a positivistic one that refers to law as a social fact, for example, to be determined by the sovereign[44] or what people recognise to be law,[45] does not lend itself to the sort of subjectivity the CA is concerned with. Crucially, this is different from the approach regarding the substantive due process clause in the United States. The CA's rejection of the argument of Tan Eng Hong that s 377A is absurd in view of immutability is a rejection of the finding of absurdity in the context of this case, not a rejection of the court's intervention in a case when evidence is not conflicting and a law is on its face truly irrational. Instances of absurdity, however, usually implicate art 12,[46] to which we now turn.

B. *Equality and the Reasonable Classification Test: Article 12*

According to art 12(1), "[a]ll persons are equal before the law and entitled to the equal protection of the law."[47] Article 12(2) specifies that, "[e]xcept as expressly

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40 Cap 1, 1997 Rev Ed Sing.

41 This was also noted by the Privy Council in *Ong Ah Chuan v Public Prosecutor* [1979-1980] SLR (R) 710 at para 25 (PC) [*Ong Ah Chuan*].

42 *Ibid* at para 26.

43 See Part IV of this article below.

44 See Austin's theory of law as sovereign commands: John Austin, *The Province of Jurisprudence Determined* (Indianapolis/Cambridge: Hackett Publishing Company, Inc, 1998).

45 According to Hart, law is a system of rules, which are determined to be valid by a rule of recognition of the legal system. In England, for example, the rule of recognition suggests that whatever the Queen in Parliament enacts is the law. Legal validity is found as a matter of social practice, by determining what the rule of recognition is. The content of the rule of recognition is "shown in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers": H L A Hart, *The Concept of Law*, 2d ed (Oxford: Clarendon Press, 1997) at 101. Such persons manifest the internal point of view—an acceptance of the rules in question as standards, displayed by: criticism of those who deviate or threaten to deviate from them; demands for conformity; an acknowledgment that the line of conduct and the criticisms and demands in question are proper and justified; and the use of normative vocabulary of "ought", "must", "should", "right" and "wrong": Hart, *ibid* at 82-91, 102, 103.

46 This is not always the case. For example, proving irrationality under art 9 may be simpler in that it does not require the identification of discriminatory treatment *vis-à-vis* another class.

47 *Singapore Constitution*, *supra* note 13, art 12(1).

authorised by [the] 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 relation to various other matters.[48] The appellants in *LMS/TEH* argued that they should be protected from discrimination on the basis of sexual orientation; that s 377A was so absurd, arbitrary and unreasonable that it could not be good law; and that it failed the reasonable classification test.

According to the Privy Council in *Ong Ah Chuan*, art 12(1) "assures to the individual... the right to equal treatment with other individuals in similar circumstances."[49] The court noted that whether the dissimilarity in circumstances justified differentiation in the punishment, and if so, what the appropriate punishments were, were "questions of social policy" for the legislature rather than the judiciary to decide: if the factor constituting the dissimilarity in circumstances that the Legislature adopted was not "purely arbitrary" but "[bore] a reasonable relation to the social object of the law", there was no violation of art 12(1).[50] In *Ong Ah Chuan*, the most dangerously addictive drugs had been singled out to stamp out the illicit drug trade, and the social evil caused by trafficking could be seen as broadly proportional to the quantity of drugs trafficked. There was nothing unreasonable in the legislature's decision that a dealer nearer "the apex of the distributive pyramid [required] a stronger deterrent" and deserved a "more condign punishment".[51] Where the quantitative barrier lay was for the legislature to decide in light of information available to it, and no plausible reason had been advanced for suggesting that the line drawn by the statute was so low as to be purely arbitrary.[52]

The deference to legislative judgment is facilitated by the presumption of constitutionality in the application of the reasonable classification test. According to the CA in *Public Prosecutor v Taw Cheng Kong,*[53] the elected legislature is taken to better appreciate the needs of a society and has the mandate to decide questions of social policy. The court should generally uphold legislation if it is possible to do so on any reasonable ground. The party attacking the legislation must place all the material or factual evidence before the court to show either the enactment or the exercise of power under it is arbitrary and that the classification does not rest on a reasonable basis. Postulating examples of arbitrariness is insufficient to rebut the presumption of constitutionality if the legislation is not arbitrary on its face. In *Taw Cheng Kong*, the object of the *Prevention of Corruption Act*[54] was to more effectively control and prevent corruption: the provision in question captured corrupt acts of Singapore citizens, in or outside of Singapore. The breadth of the provision was in line with the object and rightly excluded non-citizens out of international comity.[55] While some might think that it should have captured, instead, acts of citizens and non-citizens which had consequences in Singapore, the under-inclusiveness in relation to

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48 *Ibid*, art 12(2).
49 *Ong Ah Chuan, supra* note 41 at para 35.
50 *Ibid* at para 37.
51 *Ibid* at para 38.
52 *Ibid.*
53 [1998] 2 SLR (R) 489 at paras 78-80 (CA) [*Taw Cheng Kong*]. The CA adopted the principles in *Lee Keng Guan v Public Prosecutor* [1975-1977] SLR 231 (CA).
54 Cap 241, 1993 Rev Ed Sing [*PCA*].
55 *Taw Cheng Kong*, *supra* note 53 at paras 64-75.

non-citizens was necessary in view of the need for comity, while the differentiation along the line of citizenship was justifiably related to the objective.[56]

The HC in *LMS* (HC) reiterated that the presumption was "intimately tied to the idea of separation of powers".[57] In the context of issues of social morality, there should be due deference to the elected legislature which had been "entrusted with the task of representing the people's interests and will".[58] If there was a difference of opinion between the legislature and the judiciary as to the appropriate differentia or the objective of the law, the judiciary could not strike down the law for that reason alone as long as the differentia bore a rational relation to the objective, even if there existed more effective differentia[59] or more salutary objectives. Though the CA more tersely noted that the presumption is "logical as well as commonsensical as our legislature is presumed not to enact legislation which is inconsistent with the Singapore Constitution",[60] its statement should be taken as reflecting the same understanding of the separation of powers, given its emphases on the court not being a mini-legislature.[61]

Before delving into *LMS/TEH*, it should be noted that a distinction must be maintained between the classification and the objective of the law: the objective identified by the courts should never be expressed in similar terms to the classification. For example, the classification in s 304A of the *Penal Code* is of persons who cause death by rash or negligent acts, with the former being punishable with a lengthier term than the latter and with both being punishable less severely than in the case of culpable homicide (s 304 of the *Penal Code*) and murder (s 302 of the *Penal Code*). The differentiation in punishment is ostensibly related to the varying moral culpability of the acts, whether requiring greater retribution or greater deterrence. The differentiae in ss 302, 304, and 304A—*mens rea*—bear a rational relation to the objective of the laws, which punish according to moral culpability. The objective of s 304A should not be expressed as that of punishing those who have caused death

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56 As noted in *LMS* (HC), *supra* note 10 at paras 58, 59, Tan Yock Lin had commented that less comprehensible is the CA's point that even if a segment of Singapore citizens not contemplated by the Act was captured, it did not offend the equality provision insofar as it captured all of them as a class (*Taw Cheng Kong, supra* note 53 at para 82), though the finding of a rational relation between the objective and the class is understandable: see Tan Yock Lin, "Equal Protection, Extra-Territoriality and Self-Incrimination (1998) 19 Sing L Rev 10. The HC had concluded from the parliamentary debates that the objective of s 37 of the *PCA*, the provision in question, was to address acts of corruption taking place outside Singapore but with consequences in Singapore. As such, the classification on the basis of citizenship was over-inclusive for catching a class of persons not contemplated as falling within the objective of the *PCA* (for example, a Singapore citizen employed by a foreign government within a foreign country whose act of corruption had no consequences in Singapore) and under-inclusive for failing to catch a class of persons whose acts clearly fall within the mischief sought to be addressed (for example, a foreigner working for the Singapore government who took a short trip to receive a bribe in relation to an act which would be done in Singapore). There was thus a failure of the requisite nexus between the classification on the basis of citizenship and the objective of the *PCA*: *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR (R) 78 at paras 64, 65 (HC). Since the CA perceived the objective differently, as being that of widening the scope of the Act to more effectively control and suppress corruption, all Singaporeans could be targeted for this purpose, even those whose acts did not have consequences in Singapore.

57 *LMS* (HC), *supra* note 10 at para 110.

58 *Ibid*.

59 *Ibid* at para 95.

60 *LMS/TEH*, *supra* note 9 at para 4.

61 *Ibid* at paras 70, 77, 82, 84, 92, 93, 101, 154, 173, 189.

by rash or negligent acts, as such expression of the objective merely repeats the classification chosen by the legislature, which renders the reasonable classification test meaningless as all classification would be rationally related to objectives stated in the terms of the differentiae. For example, in *Taw Cheng Kong,* the objective was to more effectively control and prevent corruption and the width of the differentia was understandable in view of this. The classification in s 377A is of acts of gross indecency between males; the objective should not be expressed as that of punishing males who commit acts of gross indecency.

The HC in *LMS* (HC) found the task of deciding legislative objective complicated, as s 377A was based upon an English provision enacted in 1885, was introduced in 1938 and survived the contentious criminal law review of 2007. It decided that the purpose in 1938 was reaffirmed by Parliament in 2007: the purpose was to criminalise behaviour that was undesirable or unacceptable given the majority's moral values, according to which homosexual behaviour was not accepted, the family was regarded as the basic building block of society, and a family meant the bringing up of children within a one-man-one-woman marital context.[62] Although the objective was that of criminalising male homosexual behaviour because it was not acceptable or desirable,[63] such phrasing is not problematic for equating the classification with the objective because it stipulates a reason for criminalisation, just as punishing according to moral culpability in the case of s 304A does.

There are concerns with such an objective, though. Is it under-inclusive because other similar unacceptable or undesirable behaviours have not been criminalised? If one compares it with the analysis of s 304A, the enunciation is as general as the suggestion that s 304A exists to punish morally culpable acts. Just as one does not think of all other similarly morally culpable acts that are not criminalised and fault the legislature for the under-inclusiveness of s 304A, s 377A is not under-inclusive in failing to criminalise all other unacceptable or undesirable acts. However, no such general charge is made; one is usually thinking of a narrow range of similar behaviours, particularly non-coital sexual acts in view of the repeal of the old s 377. Thus, the real question is: was s 377A under-inclusive for failing to criminalise gross indecency between females or other "unnatural" sexual acts? Following *Taw Cheng Kong*, the presumption of constitutionality applies for s 377A to be upheld even if a more effective classification could be found, as long as the chosen classification is not irrational, for example, because such acts between males are thought of as particularly unacceptable because of distinct physiological possibilities.

This leads to the question whether the majority's moral values finding such behaviour especially unacceptable or undesirable may be a proper basis for legislation. This inquiry concerns the legitimacy of the law's objective. It has been argued by Thio Su Mien based on *Takahashi v Fish and Game Commissioner*,[64] and accepted in *LMS* (HC), that a classification may satisfy the reasonable relation

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62 *LMS* (HC), *supra* note 10 at paras 84, 85, 146. It noted that s 377A was not enacted to preserve the family as the basic building block of society; rather, the fact that the family was the basic building block was simply a shared value (at para 86).

63 *Ibid* at para 100.

64 334 US 410 (1948).

test and yet be invalid as the object is "inherently bad".[65] The court may look into the legitimacy of purpose in limited circumstances when the purpose is "capricious", "absurd", or amounts to "*Wednesbury* unreasonableness".[66] It is submitted that disallowing inherently bad objectives honours the principle behind the equality provision and the reasonable classification test. If objectives of legislation could be inherently bad, the test would be merely formalistic. For example, a racial genocide law singling out a particular race for the death penalty might have as its object the wiping out of persons of Race X. The classification easily bears a rational relation to the law's objective, and if the court could not distinguish between inherently bad and permissible objectives, the law would pass muster under art 12(1) if art 12(2) was amended to remove the racial ground of protection.[67] Suppose, to avoid an inherently bad objective, the law was tweaked by a disingenuous legislature which said its purpose was to eliminate all traitors in a wartime emergency. Two objections would arise: first, the objective might not be legitimate as it would amount to punishment without trial; second, the classification by race would not be rationally related to such an objective as not all persons of Race X were traitors. Thus, barring inherently bad objectives makes it harder for manifestly unjust laws to be passed. How does such an analysis apply in the case of s 377A?

The HC in *LMS* (HC) viewed s 377A as addressing a "social and public morality concern".[68] The purpose was not illegitimate in view of the weight of historical practices *vis-à-vis* male homosexual conduct that suggested a basis for those practices within a framework of the common law regime.[69] The HC noted that if a court were to pronounce that a law that had stood for decades or centuries was wrong and ought not to have been enacted because its bases were flawed, "a justification of proportionate magnitude [was] invariably required", and if this was not "evident or forthcoming", the matter was for Parliament to decide.[70] Moreover, in the context of Singapore's societal mores and norms, males were traditionally involved in "carrying" the family name, thus explaining the singling out of male homosexual acts. The HC in *TEH* (HC) similarly disagreed with the argument that advancement of morality was not a sound object, noting that Parliament may amend legislation to reflect societal norms and values.[71] This suggested the court did not distinguish between an objective morality and societal morality and also did not question whether societal morality was sound or motivated by animus.

While the *LMS* (HC) did not explicitly analyse whether the norm of societal morality stemmed from bias or animus, the reference to a law that has stood for decades or centuries in various jurisdictions indicates a broad historical consensus as to a moral norm undergirding the law and would be in line with the natural law

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65 *LMS* (HC), *supra* note 10 at paras 115, 116.

66 *Ibid* at para 116.

67 Whether such an amendment could be made depends on whether there are implied substantive limitations on the power of amendment, for example, in the form of the basic features doctrine. Whether the basic features doctrine enunciated in *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461 is part of Singapore law was left open in *Yong Vui Kong* (2015), *supra* note 14 at para 72.

68 *LMS* (HC), *supra* note 10 at para 117.

69 *Ibid* at paras 119-121.

70 *Ibid* at para 119.

71 *TEH* (HC), *supra* note 11 at para 94.

interpretation of art 12 that I am propounding in this article.[72] At the very least, such reference indicates that there exists no broad historical consensus as to the injustice of such laws, which is what is required by the approach I am proposing. Did the HC, however, reject a natural law approach? The HC observed that in spite of the statement regarding the word "law" in *Ong Ah Chuan*, for the purpose of art 12 the only relevant test for violation or compliance was the reasonable classification test, and art 12 did not further import the requirements of natural justice.[73] While that may be so, I would note that this does not imply natural law is irrelevant in the interpretation of art 12: the reasonable classification test is a manifestation of the workings of natural law, which is all the more evident if one accepts the holding in *LMS* (HC) that the purpose must not be inherently bad. In Part IV, I shall explicate my proposed approach according to which the judiciary may not strike down a law on the ground that the purpose is inherently bad unless there exists a broad historical consensus that the norm on which the law is based is morally egregious. Otherwise, it would be substituting its judgment about a contentious moral norm for the legislature's.

The CA regarded the reasonable classification test as a "threshold test"[74] which did not answer the fundamental questions pertaining to what equality required, noting that Peter Westen had considered the difficulties related to the idea of equality.[75] Rarely would a statute not pass muster under it, given that differentia must only be "intelligible", not perfect,[76] and the relation to the objective need only be "rational" and not "perfect".[77] The requirement of intelligibility should "*avoid any consideration of substantive moral, political and/or ethical issues*" and it was "*no business of the courts or the law generally to engage in the resolution of such issues—except to the extent necessary to resolve any* ***legal*** *issue(s) at hand*."[78] While the CA adopted *LMS* (HC)'s notion of intelligible differentia as value-neutral,[79] it qualified that something would be unintelligible if it was "*so unreasonable as to be illogical and/or incoherent*", so "extreme" that "no reasonable person" would regard it

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[72] See Part IV of this article. Note that in the case when the legislature enacts a law, it does not have to base it on a moral norm in relation to which there is a broad historical consensus. The approach I propose permits the court to overturn a law only when there is a broad historical consensus as to its injustice. If, however, the HC is of the view that laws across many jurisdictions are based on such moral views, no broad historical consensus to the contrary exists, and the court cannot act. That would be so even though Yap Po Jen has pointed out that some of these jurisdictions have repealed their laws (see Yap Po Jen, "Section 377A and Equal Protection in Singapore: Back to 1938?" (2013) 25 Sing Ac LJ 630 at 638) as the fact of repeal *per se* is inconclusive: the consensus must not only be across many jurisdictions, it must have persisted for a long time and the consensus must also pertain to the reason for the repeal.

[73] *TEH* (HC), *supra* note 11 at para 28.

[74] *LMS/TEH*, *supra* note 9 at para 62.

[75] *Ibid* at para 61. See Peter Westen, "The Empty Idea of Equality" (1982) 95 Harv L Rev 537; compare with Erwin Chemerinksy, "In Defense of Equality: A Reply to Professor Westen" (1983) 81 Mich L Rev 575. The conclusions of the CA in view of the observation that equality was an empty idea was surprising in view of Westen's views, but more will be said later: see the text accompanying note 140 below in this article.

[76] *LMS/TEH*, *supra* note 9 at para 65.

[77] *Ibid* at para 68.

[78] *Ibid* at para 65 [emphases in original].

[79] *Ibid* at para 66.

as intelligible.[80] The test had substantive elements,[81] but because courts were not "mini-legislatures",[82] they could not declare a statute unconstitutional because of illegitimacy of its object,[83] as there were no legal standards, only extra-legal ones, by which courts could judge legitimacy.[84] But a "*limited element of illegitimacy*"[85] was embodied in the reasonable classification test: in the case of "*extreme illogicality and/or incoherence*", the statute would fail the reasonable classification test in one or both limbs.[86] Notably, the CA rejected the concept of *Wednesbury* unreasonableness in the context of a constitutional challenge and said that even if it were applicable, it would not help in the present context where the arguments were extra-legal.[87] As for s 377A, it sought to enforce societal morality and was not confined to addressing the problem of male prostitution. Thus, it did not fail the reasonable classification test.[88] Instead of pleading illegitimacy of objective, one had to mount a challenge under art 12(2), which furnished legal criteria for alleging discrimination. Sexual orientation was not included, but it could be amended by the legislature in view of changing social mores.[89]

To what extent may legitimacy be considered under the idea of illogicality or incoherence rendering differentia unintelligible? On whether a law that banned women from driving was constitutional, the CA observed that such an "extreme provision. . . would probably not be enacted by a reasonable Parliament in the Singapore context".[90] I would suggest that the CA was probably stating its prediction of Singapore politics rather than a reason for rejecting the illegitimacy consideration, given that constitutionalism exists to protect citizens from unreasonable legislatures, not reasonable ones in relation to which a system of parliamentary supremacy would work equally well. Thus, the CA could not have intended its statement as a reason for rejecting the illegitimacy consideration. The CA noted, however, that the provision might fail the second limb of the reasonable classification test unless its purpose was to ban all women from driving, in which case the question would also arise as to whether the differentia was illogical and/or incoherent.[91] While the CA left a limited challenge of illegitimacy under the idea of intelligible differentia open, it regarded art 12(1) as aspirational and rejected the concept of *Wednesbury* unreasonableness and the determination of legitimacy of objectives. Whether these moves are problematic is examined in the next section.

C. *Legal and Extra-Legal Considerations*

While the delineation of legal and extra-legal considerations was considered primarily in relation to the reasonable classification test, the discussion merits separate

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80 *Ibid* at para 67 [emphasis in original].
81 *Ibid* at para 71.
82 *Ibid* at para 77.
83 *Ibid* at paras 82, 83, 154.
84 *Ibid* at para 85.
85 *Ibid* at para 84 [emphasis in original].
86 *Ibid* at para 86 [emphasis in original].
87 *Ibid*.
88 *Ibid* at paras 138, 143, 153.
89 *Ibid* at paras 90-92.
90 *Ibid* at para 114.
91 *Ibid*.

examination in view of the CA's opening words on its role in regarding only legal arguments. This section will introduce the jurisprudential theories considered and examine their import for constitutional judicial review.

LMS/TEH stands out for its consideration of legal philosophy, beginning with what it called "a central motif in the justly famous theory of adjudication proffered by the late Prof Ronald Dworkin" that the court "must disregard extra-legal considerations that are uniquely within the purview of the Legislature" and yet "have regard to extra-legal considerations *in so far as they impact the application of* Art 9 and Art 12 themselves"[92] and when "*absolutely necessary* to enable the court to *apply* the relevant *legal* principles *relating to Art 9 and Art 12*".[93] The court should not be:

> sucked into and thereby descend into the *political* arena, which would in turn undermine (or even destroy) the very role which constitutes the *raison d'être* for the court's existence in the first place—namely, to furnish an *independent, neutral and objective* forum for deciding on the basis of objective legal rules and principles, (*inter alia*) what rights parties [had] in a given situation.[94]

This was imperative when arguments were "intensely controversial" and empirical evidence was ambiguous.[95]

Dworkin's theory of adjudication[96] suggests that judges interpreting the law should be cognisant of settled "rules" in cases, which apply in an all-or-nothing fashion and set out the legal consequences when certain conditions are met, and "principles" underlying the legal rules, which are requirements of justice, fairness or some other dimension of morality. Where no settled legal rule dictates a decision either way, judges are to exercise discretion and decide such "hard cases" by weighing principles which provide arguments for particular decisions, and making decisions that they can justify by an interpretation of the law in the particular area which can also justify other decisions they propose to make. This can be achieved if the judge finds an interpretation of law that best fits and justifies all the precedents, which applies to the hard case at hand and which they are prepared to employ in future cases.[97] Thus, like cases would be treated alike, having been decided by legal rules or underlying principles. Judges should not apply "policies", which set out goals to be reached and generally concern improvements in some economic, political or social features of the community and are not part of the law unless the legislature decides to enact a statute to advance such goals (which then have limited effect in the terms

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92 *Ibid* at para 6 [emphasis in original].

93 *Ibid* [emphasis in original].

94 *Ibid* at para 7 [emphasis in original].

95 *Ibid.*

96 This is set out in several books, including Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) and Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1986).

97 Dworkin, *Taking Rights Seriously*, *ibid* at ch 4. Some cases must be dismissed as "mistakes" in order to arrive at an interpretation of law that best fits and justifies precedents, as it may not be possible to find an interpretation that fits all precedents, or even if one does so, an interpretation that fits fewer of the precedents may better justify the law. That said, the number and character of events that may be disposed of as mistakes are limited, as one must be honouring the institutional history and materials. The task is of interpreting and not creating afresh a perspective of law. See Dworkin, *Taking Rights Seriously*, *ibid* at 120-123.

of the statute).[98] Adjudicating in this manner, unelected judges would not violate the ideals of democracy because principles are part of the law, underlying specific rules, and provide arguments for concrete pre-existing rights, while policies do not and any policy advanced in a statute would already be honoured by the enforcement of the statutory rule.[99] Judges remain faithful to their judicial function of applying the law, rather than making new law. While the CA did not refer directly to Dworkin's terminology of rules, principles and policies, but only to the exclusion of extra-legal considerations except insofar as they impact the application of arts 9 and 12, it may be surmised that the CA would, in a Dworkinian manner, countenance moral values underlying constitutional provisions, which would be part of the legal institutional morality that Dworkin suggests judges should apply in the exercise of their discretion. It is therefore imperative to examine what "extra-legal considerations" or legal institutional morality underlies the constitutional provisions.

The CA discussed four "*extra-legal* arguments which are clearly and wholly outside the remit of the courts, and which fall instead within the purview of the Legislature", in dismissing their relevance for the reasonable classification test.[100] They are: the tyranny of the majority; the argument based on the absence of harm and societal morality not being a legitimate ground for legislation; the argument based on immutability or intractable difficulty of change; and the safeguarding of public health.[101] The four arguments are inter-linked and revolve around the idea of whether John Stuart Mill's harm principle, formulated to support his idea of liberty, is correct. I shall explain how these arguments revolve around liberty and also assess which arguments are outside the court's remit, given that the CA adopted Dworkin's theory.

1. *Tyranny of the Majority, Absence of Harm, and the Enforcement of Societal Morality*

The CA recognised that the argument about the tyranny of the majority might be grounded in the argument about the absence of harm. Relatedly, the CA noted that the argument about the tyranny of the majority might be based on rights which trump, a point dependent on the interpretation of art 12. The arguments raised similar issues as the Hart-Devlin debate over the "Wolfenden Report"[102].[103]

Hart adopted with qualification the view of Mill, in his work *On Liberty*, according to which the only ground on which society may interfere with the liberty of another was for self-protection.[104] Only the prevention of harm to others may be a ground for the coercive force of the law to be used against an individual, while his own good, whether physical or moral, may not. An individual should not be compelled to do or refrain from doing something because it would be better for him, he would be

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98 Dworkin, *Taking Rights Seriously*, *ibid* at 82.

99 *Ibid* at 81-86.

100 *LMS/TEH*, *supra* note 9 at paras 154, 155 [emphasis in original].

101 *Ibid* at paras 157-177.

102 UK, "The Report of the Departmental Committee on Homosexual Offences and Prostitution", Cmnd 247 in *Sessional Papers* (1957-58) ["Wolfenden Report"].

103 *LMS/TEH*, *supra* note 9 at para 162.

104 John Gray, ed, *John Stuart Mill: On Liberty and Other Essays* (Oxford: Oxford University Press, 1998) [*On Liberty*].

happier, or because the majority thought it wise and right.[105] The first two extra-legal arguments are inter-linked: if the law may only step in to prevent harm to others apart from the actor, societal morality is not a legitimate ground for legislation; the majority is tyrannical if it restricts what the individual might have done if the law had not been in place, or if it imposes sanctions for a violation.[106]

While the Attorney-General relied on Lord Devlin's approach, according to which public (as opposed to popular) morality could be enforced through law, the appellants relied on the view of Hart/Mill.[107] The CA said that these issues were "a matter of jurisprudence and legal philosophy. . . [and lay] quintessentially within the sphere of *the Legislature*".[108] The court could not and ought not to undertake the "balancing of rights on a broad philosophical basis".[109] For example, the definition of "harm" in Mill's harm principle was contentious and to be determined by the legislature.[110] The legislature as an elected body had the mandate to promulgate laws to reflect and preserve social morality.[111] Apart from pursuing their rights through arts 9 and 12, the appellants could not vindicate their rights by the argument *simpliciter* that "*they feel that the prevailing societal morality is wrong as it deprives them of their freedom*".[112] While the argument could be made, the appellants would "necessarily need to bring to bear a great number of *extra-legal arguments*", such as empirical data, that were uniquely within the legislature's purview.[113]

The CA's reference to inconclusive jurisprudential debates should not be taken as a stamp of approval that a legislature may select any philosophical principle on which to found laws: the selected principle must be allowed by the *Singapore Constitution*. If fundamental rights are at stake, the majority's morality—for example a racially discriminatory or Nazi morality—which derogates from such rights may not be enforced. Where no constitutional rights were infringed, it was futile to assert a general freedom.[114]

Logically, finding a constitutional right should precede the determination that societal morality may not be enforced. The US SC, when finding a similar law unconstitutional, said it violated the Due Process Clause of the Fourteenth Amendment of the *US Constitution*. Thus, it refused to enforce a Texas statute criminalising

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105 *Ibid* at 14.

106 H L A Hart, *Law, Liberty and Morality* (Stanford: Stanford University Press, 1963) at 1-22.

107 *LMS/TEH*, *supra* note 9 at paras 167, 168.

108 *Ibid* at para 169 [emphasis in original]. See also Chief Justice Roberts's comment in *Obergefell v Hodges*, 135 S Ct 2584 (2015) [*Obergefell*] that "a Justice's commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of 'due process'" (at 2622).

109 *LMS/TEH*, *supra* note 9 at para 169.

110 *Ibid*.

111 *Ibid* at para 171.

112 *Ibid* at para 173 [emphasis in original].

113 *Ibid* [emphasis in original]. This may be correlated with the CA's point regarding the difficulty of resolving jurisprudential debates (see the text accompanying note 108 above). What the CA must have meant when it said the argument *could* be made was that it was a viable argument on a theoretical level, but the proper place to make such an argument was in the legislature.

114 *Ibid* at para 161. This was suggested by the CA's note that the appellants might have been arguing that societal morality should not be enforced to the detriment of individual rights, presumably under the Constitution, since a contrast was drawn with the general arguments (at para 160) that might have been made apart from the constitutional provisions (reiterated at para 172).

homosexual acts. A digression to *Lawrence*,[115] which overruled *Bowers v Hardwick*,[116] shows what the CA might have been seeking to avoid: the US SC might have been swayed by their perception of majority opinion (referring to an "emerging awareness") in finding that a contentious right existed. Rejecting the analysis in *Bowers* that there was no fundamental right for homosexuals to engage in sodomy, the US SC suggested that anti-sodomy laws had more far-reaching consequences even as they prohibited only particular sexual acts, as they touched upon the most private human conduct in the most private places and sought to control the right of homosexuals to enter into personal relationships which were within the liberty of persons to choose. Intimate conduct as an overt expression of sexuality was but one element in a personal bond that was more enduring, which homosexuals had a right to choose under the *US Constitution*.[117] Justice Scalia, dissenting, criticised this, noting that there was "no right to 'liberty' under the Due Process Clause, though [the majority] repeatedly [made] that claim."[118] While the doctrine of substantive due process had been applied in the interpretation of the Fourteenth Amendment, it prohibited states from infringing fundamental liberty interests, which were rights "deeply rooted in [the] Nation's history and tradition", unless the infringement was narrowly tailored to serve a compelling state interest.[119] Where liberty interests unsupported by history and tradition were circumscribed by state laws, state laws only had to be rationally related to legitimate state interests.[120] Justice Scalia criticised the majority's view that there was "*an emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex*", noting on the contrary that states prosecuted many sex-related crimes.[121] Justice Scalia further objected to the majority's finding that there was no legitimate state interest served by the Texas statute, when it sought to further the belief of citizens that certain sexual behaviour were immoral and unacceptable—the "same [state] interest furthered by laws against fornication, bigamy, adultery, adult incest, bestiality and obscenity".[122]

How did the judges in the majority determine that such a right to choose the most intimate bonds existed? And how did they determine that societal morality could not constitute a legitimate state interest? It might have been a result of their view as to the importance of sexual liberty.[123] The importance of sexual liberty has been advocated by philosophers such as Hart. Jeffrie Murphy notes that Hart might have wanted to protect the freedom of homosexual relations between consenting adults when he emphasised the difficulty of suppression of sexual impulses and thus the importance

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115 *Lawrence, supra* note 6.

116 478 US 186 (1986) [*Bowers*].

117 *Lawrence, supra* note 6 at 567.

118 *Ibid* at 592.

119 *Ibid* at 593.

120 *Ibid*.

121 *Ibid* at 572, 597, 598 [emphasis in original].

122 *Ibid* at 599.

123 Rather than defend sexual freedom on the grounds of privacy or equality, Bamforth and Richards have relied on the idea of a moral right to autonomy, relying on Duff's idea that "respect for a person as an autonomous subject requires respect for their integrity as a sexual agent": Nicholas C Bamforth & David A J Richards, *Patriarchal Religion, Sexuality, and Gender: A Critique of Natural Law* (USA: Cambridge University Press, 2008) at 212, 213. According to such a view, the lack of consent of the other party might be the only ground for restricting the agent's sexual freedom.

of sexual liberty in the claim of protection from the state's coercive interference.[124] If this general idea is what the majority in *Lawrence* relied upon, it preferred its own, over the Legislature's, resolution of a contentious philosophical debate; it is debatable whether it truly found any right within the *US Constitution*. Murphy notes it is unlikely that Hart would have offered the same protection to those with a taste for necrophilia.[125] Murphy opines, drawing upon Justice Kennedy's judgment in *Lawrence*,[126] that homosexual sex is protected as it is part of forming an intimate personal bond with another adult human being—an element absent in sex with a "corpse or animal or child".[127] But Murphy's defence of homosexual liberty on this distinction is problematic.

First, Murphy offers no reason why an intimate personal bond is intrinsically worthy. If it is based on majority opinion, majority opinion becomes the basis of fundamental rights—a conclusion Hart and advocates of fundamental rights for homosexual intimacy cannot consistently accept, as they deny that majority opinion is sufficient for circumscribing rights. Where a majority fails to recognise a right, it follows liberty might be constrained. The absence of majority opinion as to the worthiness of postmortem bonds, especially (*arguendo*) that which someone in their lifetime consented to and requested believing this would continue a precious personal bond—*even at death, they do not part!*—can be used to justify the criminal prohibition of necrophilia.[128] Murphy claims that:

> If the liberty to do something is not very important (as the liberty to have sex with human bodies clearly is not) then arguably reasonable beliefs about the sacredness or dignity of the human body could justify curtailment of this liberty without showing disrespect to those who would like to exercise such a liberty. However, if the liberty is of considerable importance (as Justice Kennedy has argued is the case with sexual relations between homosexuals), then arguments that such relations disrespect the sacredness or dignity of the human body—even if arguably reasonable and not merely expressions of thoughtless disgust—would not be sufficient to justify criminalization.[129]

Murphy fails to explain how one may determine that "the liberty to have sex with human bodies clearly is not" very important, while homosexual relations are.

The second question Murphy must answer is the basis on which necrophilia, but not homosexuality, is regarded as "psychopathology".[130] The classification shows what is at stake in the Hart-Devlin debate: as laws should not criminalise what is intrinsically good, what acts are intrinsically good?[131] Fundamental rights exist to

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[124] Jeffrie G Murphy, "A Failed Refutation and an Insufficiently Developed Insight in Hart's Law, Liberty, and Morality" (2013) 7 Crim Law and Philos 419 at 424.

[125] *Ibid* at 425, 426.

[126] *Lawrence, supra* note 6 at 567.

[127] Murphy, *supra* note 124 at 429.

[128] Though Murphy is not necessarily in favour of such legislation, he considers it for the sake of argument as to what might count as good reasons: *ibid* at 430.

[129] *Ibid* at 432.

[130] *Ibid* at 430.

[131] See *eg,* Richard J Arneson, "The Enforcement of Morals Revisited" (2013) 7 Crim Law and Philos 435 at 445.

protect intrinsic goods. Some Rawlsian liberals who argue for the priority of the right over the good claim they do not settle the question of what is good, and may decide on rights, using John Rawls's public reason. Murphy, for example, attempts to show he does not rely on brute majority opinion (or animus), but on "democratic politics" and a qualified Rawlsian public reason test,[132] according to which majority opinion may have effect if it has given weight to all reasonable arguments, pro and con.[133] If majority opinion relies on "conceptions of sin that rest solely on matters of religious sectorial dogma", they fail to respect the reasonable views of all citizens.[134] Rawls endeavours to order a pluralistic society by a political conception of justice, which is worked out for a limited object of having a basic structure of government, rather than any citizen's comprehensive doctrine which addresses what is of value in human life.[135] As the analysis of homosexuality and necrophilia shows, however, a fundamental right to engage in one but not the other is hard to explain without resolving the question of the intrinsic goodness (or lack thereof) of either act.[136] If majority opinion is based on the unworthiness of acts of necrophilia, it is based on a particular conception of the good, which is prohibited by Rawlsian public reason.

The upshot is that the US SC read into the *US Constitution* a right to enter into personal relationships, which included the right to homosexual practices. Societal morality could not be enforced in violation of such a right, unless there was a legitimate state interest. In its view, none existed. In contrast, the CA did not think there was a similar right, and given that no rights were violated, it was not its place to take one side in the Hart-Devlin debate when the legislature had taken the opposite side: the considerations of the Hart-Devlin debate were "extra-legal" because they did not feature in the delineation of the constitutional right in question.

Consider, however, a hypothetical case: a legislature removes the art 12(2) ground of race[137] and decides to enforce Nazi (societal) morality by exterminating Jews. The court should only say that the legislature has the mandate to choose one side in the Hart-Devlin debate and enforce societal morality if no constitutional right was at stake. Are arts 9(1) or 12(1) violated? For art 9(1), it would depend on whether "law" is given a natural law reading. As noted,[138] one hopes that the CA did not generally reject the requirement that the law not be absurd or arbitrary, but only found that absurdity and arbitrariness had not been made out in *LMS/TEH*. A natural law interpretation requires that absurdity and arbitrariness be determined by an objective morality, and I propose in Part IV that the judiciary may only find a law unconstitutional according to Radbruch's formula. For art 12(1), it would depend on whether, in view of the rejection of the consideration of legitimacy of objectives, illogicality or incoherence is established such that the first limb of the reasonable classification test is not satisfied. The criterion of *Wednesbury* unreasonableness has also been rejected, at least in *LMS/TEH* where all the arguments made under

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[132] Murphy's qualifications are not relevant for our purposes: see Murphy, *supra* note 124 at 431.

[133] *Ibid*.

[134] *Ibid.*

[135] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 140, 175, 176.

[136] See *eg,* Robert P George, *In Defense of Natural Law* (New York: Oxford University Press, 1999) at 217, 218, where George explains the "deeper moral and metaphysical questions" that are implicated, albeit in a different context of marriage.

[137] But see note 67 above.

[138] See the text accompanying note 34 above.

it were thought of as extra-legal, and the CA required that challenges be made on the grounds in art 12(2). However, its brief consideration of the female driving ban hypothetical example leaves open the possibility of a challenge outside of art 12(2). The approach I propose in Part IV circumscribes more restrictively than the concept of *Wednesbury* reasonableness the principles on which the court may find unconstitutionality, and goes some way to addressing the CA's likely concern with potentially boundless judicial activism if the court is permitted, without more, to determine whether objectives are legitimate or unreasonable. When the CA referred to Westen's view that equality was an empty idea, it unfortunately went on to conclude that art 12(1) was merely aspirational and the reasonable classification test was readily satisfied. It is problematic if moral considerations are not relevant to the consideration of the first limb of the reasonable classification test and the legitimacy of the objective may not be considered. Moral considerations are "extra-legal" (within the CA's typology) but should not be dismissed because they are necessarily implicated in the consideration of equality under art 12(1). Equality is empty of content without a higher moral law, as the true question is what similarity or difference between persons is "morally significant",[139] and what the appropriate treatment is for a class singled out by the law. Referring to natural law in interpreting the reasonable classification test is in fact unavoidable for the test to be meaningful: one must understand what rights are fundamental and what treatment is just if equality is derivative of, or logically posterior to, rights.[140] If, for example, the argument against s 377A is that an individual has a right to make decisions affecting his own destiny and choose sexual intimacy as he pleases, metaphysical questions about human nature are implicated as to whether there exists a fundamental human right to sexual intimacy or whether, on the contrary, a higher moral law determines that certain sexual acts are egregious. If there exists no broad historical consensus for such fundamental rights, the law stands to give effect to legislative mandate. If, on the other hand, there exists such consensus in relation to racial discrimination, a manifestly unjust law ordering racial genocide falls because societal morality may not be enforced in violation of fundamental rights.

2. *Is Sexual Orientation Biologically Determined?*

The third argument considered by the CA was that if sexual orientation was biologically determined, homosexuals ought not to be discriminated against. The CA suggested this was "primarily a *scientific and extra-legal* argument" outside the CA's purview:[141] there was no definitive evidence on whether sexual orientation was biologically determined. One should note that this argument, while based on an assertion of scientific fact, is a philosophical or moral argument.[142] It builds upon the first two

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139 Peter Westen, "The Empty Idea of Equality", *supra* note 75 at 573.

140 *Ibid* at 548-556.

141 *LMS/TEH*, *supra* note 9 at para 176 [emphasis in original].

142 The identification of the nature of the argument is not trivial as a number of other arguments in the context of law are of this nature. For example, the argument that the unborn has personhood and abortion should be prohibited is a philosophical argument that is based upon scientific fact. Science informs us about the processes of foetal development and the unique genetic composition of the foetus. But it is philosophy that develops the argument about the rights that the unborn ought to have, based upon similarities with the newborn and the rights the newborn is taken to have.

by bolstering the suggestion that, if immutability or difficulty of change is a scientific fact, s 377A is oppressive.[143] The third argument, strictly, is not dependent on Mill's principle for legislation. Even if the prevention of harm is not the only ground for restrictive legislation and even if the enforcement of morality is permissible, the third argument suggests that there are no good reasons for such legislation. It is not morally relativistic. While the first two arguments, if they are based on morality, might be based on the idea that the autonomy of the individual on moral matters is supreme, which might suggest that there is no moral law over individuals,[144] the third involves a positive moral assertion that it is morally abhorrent to criminalise homosexual acts, given that homosexuals are not desirous of engaging in them, over heterosexual acts, by choice.

Understanding the nature of the third argument helps us to make sense of the CA's decision. The CA was content to say that the scientific fact asserted is not proven and the argument should be addressed by the legislature. What, exactly, should be addressed by the legislature? There are two possibilities. First, it was for the legislature to decide whether sexual orientation was biologically determined. This is unlikely, as what was in issue was a biological question. Second, in the absence of conclusive evidence, the legislature could decide whether it would act on the basis that homosexuality was or was not biologically determined. This is more likely.

The difficult issue, however, is whether the courts would be allowed to determine that a legislature has decided unreasonably, in the case of other factual questions for which uncontroverted conclusions are available to the contrary. The CA's approach does not preclude that: arguably, "*scientific and extra-legal*" arguments were outside its purview in the particular context of arguments for which there was no definitive evidence either way. *TEH* (HC) is clearer on this: it had similarly concluded that medical and scientific evidence was divided and inconclusive, but instead of saying that scientific arguments were outside its purview, said that Tan Eng Hong had not established his factual assertion that homosexuality was a natural and immutable trait. By *TEH* (HC)'s approach, a law is open to challenge if its discriminatory treatment is based upon an assertion of scientific fact which prevailing thought suggests is untrue.

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[143] Some take the view that even if sexual orientation is innate and immutable, and even if someone is not morally culpable for having a particular lifestyle or orientation, laws and public decision may still work to discourage the acts in question. For example, Wolfe has made the argument by analogy with alcoholism: see Christopher Wolfe, "Homosexuality in American Public Life" in Christopher Wolfe, ed, *Same Sex Matters: The Challenge of Homosexuality* (Dallas: Spence Publishing Company, 2000) at 5.

[144] This is a highly tenuous position. First, if there is no moral law over individuals, all individuals are worthless because any individual may do anything to someone else. If, however, individuals may exercise their autonomy insofar as they do not harm others, there is a moral law over all individuals, which stipulates, for example, that another has physical integrity. Someone who asserts the primacy of autonomy must accept qualifications to that primacy in the form of a moral law and give up their non-cognitivism. But once this is conceded, what are the origins and content of such moral law, and on what basis does one claim that the moral law stops at norms such as the prohibition of physical harm to others? These are questions to be answered but will have to be left to another article. Second, an argument that is ultimately based on the violation of the principle of equality is a moral argument: see *eg,* Robert R Reilly, *Making Gay Okay: How Rationalizing Homosexual Behavior is Changing Everything* (San Francisco: Ignatius Press, 2014) at 104.

3. *The Safeguarding of Public Health*

The fourth argument seeks to demolish the case that s 377A is necessary for the safeguarding of public health: if the case is made out, there would exist a public policy reason, apart from the enforcement of morality, for s 377A; the first two arguments would not avail the appellants if s 377A is not, in the first place, for the purpose of enforcing morality.

The CA noted that the Attorney-General did not rely on this argument in the appeal. The CA said it was "not in a position to arrive at a conclusive determination in this particular regard" given that the argument raised extra-legal (medical and scientific) issues and should be addressed by the legislature.[145] One might again restrict the CA's refusal to consider extra-legal issues to the context when it was controversial whether the section aided or hindered the objective, as legislative decision could reasonably go either way in such an instance.

IV. Calibrating Judicial Review

I suggested in Part III that constitutional judicial review should be conducted in line with natural law theory. Does this open the doors for an activist judiciary to disregard, and encroach upon, the legislature's mandate to make laws?

The higher law in the natural law tradition is a moral law. While natural law theory suggests that law and morality are necessarily connected, not all morals must be legislated. Still, the enforcement of morals through law would be acceptable to a natural law theorist.[146] A reference to a higher law is not to be conflated with the US SC's reference to what liberty entails in substantive due process,[147] which can in fact be the antithesis of natural law theory. The US SC in *Lawrence* did not cite natural law theory, but instead reiterated that the enforcement of morals was not a legitimate state interest. The majority opinion emphasised that liberty protected persons from "unwarranted governmental intrusions into a dwelling or other private places" and presumed "an autonomy of self that [included] freedom of thought, belief, expression, and certain intimate conduct."[148] The Court rejected legislation against private consensual conduct on the ground of morals, reiterating the statement in *Planned Parenthood v Casey*[149] that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life".[150] It dismissed what it called "sweeping references" by Chief Justice Burger in *Bowers* "to the history of Western civilization and to Judeo-Christian

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145 *LMS/TEH*, *supra* note 9 at para 177 [emphasis omitted].

146 While legal moralism is famously associated with Devlin's thesis in the Hart-Devlin debate (Hart, *Law, Liberty and Morality*, *supra* note 106 and Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965)), there are other arguments for the enforcement of morals apart from Devlin's. George, for example, offers other perspectives on why a society may legitimately enforce morals. See Robert P George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford: Clarendon Press, 1995). In particular, Devlin is not a natural law theorist as he ostensibly subscribes to non-cognitivism and moral relativism.

147 Murphy refers to this as the "process of adding new liberties": Murphy, *supra* note 124 at 427.

148 *Lawrence, supra* note 6 at 562.

149 505 US 833 (1992).

150 *Lawrence*, *supra* note 6 at 574.

moral and ethical standards".[151] The majority opinion may be contrasted with Justice Scalia's opinion in *Lawrence* which suggests that offences based on morals would no longer be sustainable in light of the overruling of *Bowers*.[152] Instead of referring to objective moral norms, substantive due process emphasises the primacy of autonomy of the individual.

Reading "natural law" into arts 9 and 12, contrary to the concern expressed in *Yong Vui Kong* (2015),[153] does not lend to the ideological preferences of the US SC. In *Yong Vui Kong* (2015), the appellant had argued that a prohibition against torture and inhuman punishment (including caning) should be read into the *Singapore Constitution* because such practices violated the "first principles of natural law".[154] The CA held:

> [W]here a right cannot be found in the Constitution (whether expressly or by necessary implication), *the courts do not have the power to create such a right out of whole cloth simply because they consider it to be desirable* or perhaps to put in terms that might *appear* more principled, to be part of natural law. We note that even among natural law theorists, there is no consensus on what natural law requires of judges. Some have contended that natural law in fact requires judges to respect the boundaries of authority conferred upon them by the Constitution.[155]

The CA quoted Robert George's view that a natural law theorist such as himself can reject "what Black denounced as 'the natural law due process philosophy' of judging".[156] Problematically, Black used the phrase "natural law" in referring to the substantive due process philosophy of the US SC. That philosophy is in fact contrary to the natural law tradition affirmed by philosophers such as John Finnis and George.[157] As George himself wrote at the start of the quoted article (in a sentence not cited by the CA): "the 'natural law due process philosophy' that Black rejects has no necessary connection to the 'natural law' I affirm".[158] Indeed, George goes on to explain that Black would not deny the natural law principles incorporated into the *US*

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151 *Ibid* at 572.

152 *Ibid* at 590.

153 *Yong Vui Kong* (2015), *supra* note 14.

154 *Ibid* at para 68.

155 *Ibid* at para 73 [emphasis in original].

156 *Ibid.*

157 Bamforth and Richards have criticised the new natural law theorists for their conclusion as to the moral prohibition of homosexual acts based ostensibly on self-evident basic human goods and human fulfilment. They have argued that new natural law is not really secular: see Bamforth & Richards, *supra* note 123 at ch 4. Their arguments are not explored in this article. In view of the challenge against new natural law, the point ought to be made that the approach to constitutional judicial review based on Radbruch's formula proposed in this article relies more generally on law's necessary connection with morality, however, and seeks to distinguish the occasions when judges may find that laws are unconstitutional from those when they may not. This relies particularly on a distinction between a natural law view relying on objective moral norms (albeit imperfectly discerned through a broad historical consensus) and the general idea of liberty relying on the primacy of autonomy. The method of challenging the tenability of the latter, in comparison with the former, is purely dialectical: it probes, for example, the source of the moral norm of autonomy and the argument for its primacy.

158 Robert P George, "The Natural Law Due Process Philosophy" (2001) 69 Fordham L Rev 2301 at 2301, 2302.

Constitution by the framers.[159] Further, George points out in the passage cited[160] by the CA that natural law requires of judges in "*a basically just regime*" to respect the limits of authority settled by the constitution.[161] One senses the apprehension of the CA towards (what has been wrongly called) natural law theory when it said—one senses, with approval—that there is nonetheless a remnant of good sense: "[s]ome [natural law theorists] have contended" that judges should respect the boundaries of authority in a by and large just constitutional supremacy.[162] I should add that one can expect *all* natural law theorists who are also moral realists, who believe in the existence of an objective moral law, to reject the substantive due process jurisprudence of the US SC, which is the antithesis of natural law theory. While more than one system of government might be chosen consistently with natural law theory, it is reasonable that where constitutionalism, with its separation of powers, has been adopted, representative legislative mandate should generally prevail over judicial opinion on contentious moral norms. When objective morality is not clear on a matter, a deliberative representative democracy can take a stand through its legislature.

A question remains, however, as to the precise scope of constitutional judicial review if such higher law is invoked. I suggest in the first section that Radbruch's formula provides a check against the rise of a juristocracy, whilst allowing a natural law approach to constitutional interpretation. Where a higher law incorporated by arts 9 and 12 and upon which they are based is thought to have been violated, the presumption of constitutionality should operate in favour of upholding legislation unless the threshold of injustice in Radbruch's formula is met. In the second section, I explain why the adoption of Radbruch's formula is not illegitimate in the face of a written constitution that has not explicitly adopted it and is in fact consistent with constitutionalism.

A. *Application of Radbruch's Formula in Constitutional Judicial Review*

According to Radbruch's formula, advocated after Radbruch's experience of Nazi atrocities, positive law takes precedence even when its content is unjust, unless the conflict between the statute and justice reaches an intolerable degree. In the case of manifestly unjust laws, the demands of legal certainty (assured through the upholding of laws) must yield to the needs of justice. Alexy's consideration of Radbruch's formula is particularly helpful. He argues that there are good reasons for a judge to regard an extremely unjust norm as having no legal character and reject the positivistic view that legal validity is not necessarily dependent on justice.[163] Alexy acknowledges that a basic non-relativistic ethics is presupposed by the formula, but is of the view that the work of centuries demonstrates such broad consensus in the declaration of human and civil rights that only with much scepticism can one harbour doubts about the existence of basic moral norms. Conceptually, Alexy concedes that historical experience and the existence of broad consensus do not

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159 *Ibid* at 2302.

160 This is a passage I also cite in Tan, "Constitutional Jurisprudence", *supra* note 39 at 95.

161 *Yong Vui Kong* (2015), *supra* note 14 at para 73 [emphasis in original].

162 *Ibid*.

163 Alexy, *supra* note 15 at 40-62.

refute relativism. Nevertheless, the consensus about what amounts to injustice to an intolerable degree ensures that a judge applying Radbruch's formula in good faith and having to find broad historical consensus would generally not be able to use it to strike down just statutes for their failure to comply with perverse local moralities such as Nazi morality.[164] Judges have to demonstrate the content of the higher law by reference to broad historical consensus. For example, in the event that racial discrimination is not specifically proscribed by the constitution and the equality of persons of all races is not constitutionally protected, should the legislature enact a statute that puts persons to death on the ground of race alone, Radbruch's formula can be invoked to strike down the law because of the broad historical consensus against racial genocide. Another clear instance in which it can be invoked is when a statute authorises slavery. These examples may coincide with what is proscribed by the peremptory norms of international law because, arguably, a necessary though not sufficient condition for the emergence of peremptory norms would be the existence of broad historical consensus.

The reference to peremptory norms of international law is undertaken to discern the broad historical consensus about morality—in particular, manifest injustice. When Radbruch's formula is invoked in constitutional judicial review, peremptory norms are not being directly incorporated by Radbruch's formula into domestic law. Thus, even if Singapore adopts dualism over monism[165] in relation to the interaction between domestic law and international law and even if it does so with respect to peremptory norms, this does not bar the reference to broad historical consensus. It might be argued that this would be to allow by the backdoor, via Radbruch's formula, what the CA refused to countenance in *Yong Vui Kong* (2015). It is submitted, however, that as norms of manifest injustice under Radbruch's formula and peremptory norms are not congruent sets, in principle the objection should not apply. They are not congruent sets for two reasons. First, peremptory norms could concern something outside domestic law and pertain to inter-state relations. More crucially, broad historical consensus could exist in relation to moral norms that have not quite acquired peremptory status in international law. Where the incorporation of peremptory norms are concerned, there may be good reasons why domestic laws should take precedence,[166] or that international law and domestic law should be regarded as separate legal systems. These positions and the view that broad historical consensus as to manifest injustice should not be deviated from domestically are not mutually exclusive. While peremptory norms within a dualistic framework may be rooted in the conscience of mankind but regarded as essential to the life of the international, rather than the local, community,[167] the idea that (domestic) laws may not be manifestly unjust is rooted in the definition (that is, the concept or theory) of law.

In contrast to the situation involving a law that is manifestly unjust according to broad historical consensus, judges in *Roe v Wade* should not have struck down restrictive abortion laws by invoking Radbruch's formula on the ground that they were manifestly unjust, even if judges thought that it was not unreasonable for a

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164 *Ibid* at 53-55.

165 *Public Prosecutor v Tan Cheng Yew* [2013] 1 SLR 1095 (HC), followed in *Yong Vui Kong* (2015), *supra* note 14 at para 29.

166 This question is not considered in this article.

167 *Yong Vui Kong* (2015), *supra* note 14 at para 36.

woman to insist she had a right to control her own body or that restrictive abortion laws were unreasonable. To strike down laws using Radbruch's formula, they would have had to find broad historical consensus in 1973 that suggested that it was manifestly unjust for a woman to be restricted from undergoing abortion. To allow judges to strike down laws on a lesser threshold than Radbruch's formula involves letting them substitute their judgment for the elected legislature's in a manner that amounts to usurpation of legislative authority. This view does not prevent the elected legislature from repealing such laws.

Likewise, judges cannot at this present time invoke Radbruch's formula to strike down, for example, s 12 of the *Women's Charter*[168] for regarding a marriage solemnised between persons of the same gender as void. While more and more jurisdictions have approved of same sex marriage or civil partnerships, there is no broad historical consensus that to deny same sex couples such benefits is manifestly unjust.[169] The limit of Radbruch's formula means that the court should not do as the Massachusetts Supreme Judicial Court did in *Goodridge v Department of Public Health*[170] or as the US SC did in *United States v Windsor*[171] or *Obergefell*.[172] In *Obergefell,* there was, in favour of the advocates for same sex marriage, "'extensive litigation,' 'many thoughtful District Court decisions,' 'countless studies, papers, books, and other popular and scholarly writings,' and 'more than 100' *amicus* briefs in these cases alone".[173] These would still not be sufficient to constitute the broad historical consensus as the opinions in favour of same sex marriage are located within a short span of time. The requirement of broad historical consensus makes perfect sense because if the evidence constituting an argument for striking down a law is indeed so overwhelming but localised and current, the argument should be made through the legislative process in a representative democracy, otherwise the decision would be essentially made by a bare majority of an "unaccountable and unelected"[174] court. Radbruch's formula facilitates meaningful constitutional judicial review with inbuilt restraints on judicial power. But what if the trend of accepting same sex marriages and civil partnerships persists in more and more jurisdictions? Could Radbruch's formula be invoked decades on? This is the catch to natural law theorists who subscribe to Radbruch's formula while opposing same sex marriage. While some new natural law theorists do not accept Radbruch's formula but treat the maxim *lex injusta non est lex* as a subordinate theorem of natural law,[175] the possibility of Radbruch's formula being invoked in a scenario like that in *Goodridge* or *Obergefell* would be

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168 Cap 353, 2009 Rev Ed Sing.

169 This may be inferred from the fact that until recent decades, laws criminalising homosexual acts existed in various jurisdictions. For the evolution of the same sex marriage debate in various jurisdictions, see *eg*, William N Eskridge, Jr & Darren R Spedale, *Gay Marriage: For Better or For Worse?* (Oxford: Oxford University Press, 2006).

170 798 NE (2d) 941 (Mass 2003) [*Goodridge*].

171 133 S Ct 2675 (2013) [*Windsor*]. No broad historical consensus existed that same sex marriage must be recognised. Indeed, as Justice Scalia noted, the view that marriage excluded same sex couples "had been unquestioned in virtually all societies for virtually all of human history" (at 2709).

172 *Obergefell*, *supra* note 108. Chief Justice Roberts referred to marriage as "an unvarying social institution enduring over all of recorded history" (see his dissent in *Obergefell*, *supra* note 108 at 2622).

173 *Ibid* at 2624 (Chief Justice Roberts's dissent).

174 *Ibid*. See also Justice Scalia's dissent, noting that the people have been robbed of "the most important liberty. . . the freedom to govern themselves" (*ibid* at 2627).

175 John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1992) at 351-368.

of especial concern to a natural law theorist who accepts Radbruch's formula but opposes same sex marriage. Practically, it might mean that jurisdictions in which legislatures have chosen against same sex marriage might not be able to resist a worldwide trend many decades on if judges applied Radbruch's formula.

While Radbruch's formula enables resistance of Nazi-type laws by a judiciary, it also possibly facilitates the overturning of legislatively enacted laws predicated on objective moral norms contrary to norms in relation to which broad historical consensus exists. Exceptionally, the latter norms may be challenged if they are found, for example by a process of logical reasoning, to be the antithesis of objective moral norms, such as when they are in fact based on moral scepticism. Radbruch's formula is conceptually not predicated on agnosticism as to the soundness of moral norms, but is justifiable if there exists, not just a non-relativistic morality but, an objective morality as endorsed by moral realists. Moral realists are of the view that moral facts and properties exist and that a statement about the rightness or wrongness of an act is neither a mere opinion nor a statement about one's sentiments.[176] If Radbruch's formula is to be applied in constitutional judicial review by an unelected judiciary, however, prudentially, to guard against judges instituting their possibly idiosyncratic personal ideologies by striking down laws based on moral norms they do not agree with, requiring reference to broad historical consensus generally provides a good check on judges. Conceptually, broad historical consensus may not accurately reflect objective morals: certainly, it is not conflated with objective morals. Deciphering the content of objective morality by reference to broad historical consensus is imperfectly based on an egalitarian assumption that, if objective morals exist, grassroots morality within deliberative democracies can approximate it and over time, broad historical consensus would converge on the content of such morals.

The reference does not present us with problems in all situations in which consensus on what is manifestly unjust is flawed. For example, it may be that international consensus has been "wrong" on moral norms—at least from the point of view of later communities. The longstanding historical approval of slavery is contrary to the current view of slavery. During the time when slavery was acceptable, Radbruch's formula was *ineffective* rather than *problematic* in redressing wrongs, as there was no broad historical consensus against slavery that a judge might have relied on. But this means that the overturning of local laws where there is a lack of broad historical consensus on manifest injustice should be legislatively achieved. If broad historical consensus fails us, we do no better by counting on a juristocracy to protect us. Moral realists would be most concerned with cases where broad historical consensus has in their view gone dreadfully wrong but the legislature purports to do right locally. Radbruch's formula lends to a situation in which all have to live with the views of the times in a world gone dreadfully wrong, allowing no local deviation from historically and broadly prevailing wrong views, unless those views also happen to be demonstrably based on the antithesis of objective morals. This is a true instance when Radbruch's formula is *problematic* and not merely *ineffective.*

The upside of Radbruch's formula in a constitutional supremacy is that it provides a better counter-majoritarian check given that wrongs that are done *through the law* are often done by an elected representative government against some of its own

[176] Robert Audi, ed, *The Cambridge Dictionary of Philosophy*, 2d ed (Cambridge: Cambridge University Press, 1999) at 588, 589.

citizens: Radbruch's formula allows such wrongs to be righted by the judiciary. The downside is that a nation which wishes to resist an unjust worldwide and historical trend, if indeed the world comes to such a stage, through laws enacted by its elected representative government will find it hard to do so.

There is a further complication in the development of the broad historical consensus that is linked precisely to the existence of judicial oligarchies. If legislatively enacted laws are constantly overridden by judicial oligarchies, in view of how laws shape societal morality,[177] judges are becoming more instrumental than elected representatives in shaping collective worldwide societal consensus.[178] Over time, the broad historical consensus that develops in a world full of judicial oligarchies might reflect the views of select groups of judges. In such a scenario, Radbruch's formula sadly cannot be constrained by a proper broad historical consensus that is truly representative of grassroots morality.

Should Radbruch's formula be accepted if there is a potential downside? To answer this question, one has to examine the alternatives. An alternative to allowing laws to be struck down if they are manifestly unjust is to allow them to be struck down as long as they are unjust, even if not manifestly so. This lends to temerity on the part of unelected judges who do not have the people's mandate. A second alternative is to adopt legal positivism and let an autocrat (in a totalitarian state), a few oligarchs (in an oligarchy), or the majority (in a representative democracy) have their say through the legislature without a judicial check. How would an autocrat, a few oligarchs, or even a brute majority better secure justice than judges acting on their views as to what broad historical consensus on what is manifestly unjust suggests? In the real world, we are left to choose between, on the one hand, the problems of uncertainty associated with the determination of what is manifestly unjust and of judges acting in bad faith despite the limits of Radbruch's formula; and on the other hand, the problems associated with the view that laws have no necessary connection with morality.

B. *Legitimacy of Radbruch's Formula in the Context of Constitutionalism*

What is the justification for Radbruch's formula in the context of constitutionalism? In the event that a constitution outrightly contradicts Radbruch's formula, for example, by singling out persons of a particular race as not human and therefore rightfully enslaved or subject to racial genocide, can Radbruch's formula override such a provision; and if so, would this not straightforwardly suggest its illegitimacy when compared with a constitution which has been accepted by a nation?

Constitutional supremacy is most soundly predicated on the principle of equal moral worth—a principle central to natural law theory.[179] In turn, Radbruch's formula is a specific tenet of natural law theory which is applied by judges in constitutional review. Constitutional provisions such as arts 9 and 12 may legitimately import

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[177] See *eg,* Leslie Green, "Should Law Improve Morality?" (2013) 7 Crim Law and Philos 473 at 479-486.

[178] For example, when the US SC decided *Obergefell*, *supra* note 108, only the voters and legislators in 11 States and the District of Columbia had changed the definition of marriage to include same sex couples (see Chief Justice Roberts's dissent at 2615).

[179] See *eg,* Christopher Wolfe, *Natural Law Liberalism* (Cambridge: Cambridge University Press, 2006) at 185-187, 192, 193.

a higher law (including Radbruch's formula). But even when they are amended to preclude protection of a particular race so that racial genocide may be ordered by legislation, such legislation as well as the constitutional amendments would constitute manifestly unjust laws that should be struck down by Radbruch's formula because they violate the principle of equal moral worth on which constitutionalism is most soundly premised.

In what sense is constitutionalism most soundly premised on equal moral worth of all? The very idea that a constitution has the legitimacy that Radbruch's formula lacks, if not incorporated in it, tends to be based on the acceptance of the constitution by all, whether by ratification (in the early days of a constitutional supremacy, through a referendum, for example) or acquiescence.[180] Basing legitimacy of a constitution on acceptance by the people, however, is based on a belief as to the equal dignity[181] of all persons, which is precisely what Radbruch's formula secures. Radbruch's formula also better secures the protection of the equal dignity of all persons than a constitution which has been amended to approve of racial discrimination by a majority. Even though a special majority vote in a national referendum may be recognised as a mode for constitutional amendment, it should be observed that a majority vote, as opposed to unanimous assent, is on principle chosen as sufficient for legitimacy often only as a second best option as unanimity is unlikely to be achieved. Basing decisions on majority vote, instead of unanimous assent, does not *ipso facto* on principle detract from the equal moral worth of the minority. But if the view that all persons have equal moral worth is the basis for giving any significance to majority vote, then majority vote must not sanction a constitutional norm that violates the equal moral worth of all. Radbruch's formula ensures precisely this.

V. Conclusion

The CA tried its best to negotiate its way in extremely difficult terrain in *LMS/TEH*, avoiding being a "mini-legislature" whilst taking seriously its role in constitutional judicial review. Its attitude is commendable, perhaps especially so in what some might perceive to be a time of judicial excesses in other jurisdictions. By its approach, it clearly avoids an "exalted conception"[182] of itself and instituting a juristocracy. Unfortunately, it also takes an overly sanguine attitude towards future legislatures doing what is right or acting in good faith, a point that is borne out in its own words that "an extreme provision... would probably not be enacted by a reasonable Parliament in the Singapore context."[183] While that may turn out to be actually true, the adoption of constitutionalism arguably serves precisely to protect subjects of the

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[180] Those arguing for the legitimacy of the constitution have not suggested that a constitution is legitimate as long as it is approved by a majority race, for example, because the minority race is really sub-human. But if such an argument is raised, then the burden is on those who raise it to explain how there are rationally and morally significant differences between persons of the majority race and those of the minority race that one should be counted as human while the other would not.

[181] Some are of the view that "dignity" can appear to be an empty concept that adds nothing to other concepts needed to flesh it out, such as autonomy. See *eg,* Michael Rosen, *Dignity: Its History and Meaning* (Cambridge: Harvard University Press, 2012).

[182] This was the critique of the US SC by Justice Scalia in *Windsor*, *supra* note 171 at 2698.

[183] *LMS/TEH*, *supra* note 9 at para 114.

law in the scenario when there is no reasonable Parliament. If it could be guaranteed that Parliament would be reasonable, there is no real need for constitutional supremacy—parliamentary supremacy would offer adequate protection for subjects within a framework of a representative government.

The thesis in this article is that the CA's categorisation of "extra-legal arguments" should not be taken as a dismissal of all considerations that are not explicitly written into the law. Indeed, the CA did not intend to dismiss all such considerations, which could still form part and parcel of interpretation of the law. This is evident in the opening reference to the views of Ronald Dworkin who thinks that principles—requirements of justice, fairness, or some other dimension of morality—are part of the law which may be applied by judges. Further, while the CA rejected the consideration of the legitimacy of the objective of the law, the consideration of such objectives is arguably retained within the idea of intelligibility of the differentia chosen by the legislature.

Finally, in the event that an elected legislature fails to act in good faith, a refinement of the CA's approach through the incorporation of Radbruch's formula, which makes pertinent the limited consideration of a higher law, allows a restrained judicial check on majoritarian power. Such a natural law approach to constitutionalism—the antithesis of the substantive due process jurisprudence of the US SC because of the central place it gives to an objective moral law to which the exercise of autonomy is subject, rather than individual liberty and autonomy—stays true to the premises of constitutionalism while avoiding the excesses of hypothetical unreasonable legislatures and judiciaries. If objective morality exists and broad historical consensus can only approximate it, however, the soundness of the approach proposed in this article hinges on that consensus not going dreadfully wrong. If it does, the approach might hinder a local legislature desirous of doing right and leave the decision in the hands of the judiciary.