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RIGHTISM, REASONABLENESS AND REVIEW: SECTION 377A OF THE PENAL CODE AND THE QUESTION OF EQUALITY – PART ONE

This article examines Art 12 equality jurisprudence with specific reference to the case law and legal discourse over the constitutionality of s 377A of the Penal Code (Cap 224, 2008 Rev Ed), which is paradigmatic, in terms of attracting legal and political controversy. How the multi-vocal concept of equality is interpreted, implicates interpretive method, rights adjudication and the appropriateness of a "moral questions" doctrine in advocating modest, calibrated judicial review in addressing morally controversial questions. In Singapore, the prevailing "reasonable classification" test and the accompanying presumption of constitutionality of legislation has attracted two primary criticisms. First, that it has been misapplied; second, that the test itself is too deferential in according primary weight to the "reasonableness" of Parliament and should be replaced by a more robust test of judicial scrutiny. The article contests the argument that s 377A fails to satisfy the reasonable classification test, particularly because it serves no purpose or an inadequate purpose given its original rationale. It argues that calls to revise the reasonable classification test in favour of a preferred vision of substantive equality constitute an unwelcome invitation to "rightism" and an outcome-oriented "living tree" approach to judicial review, which trades in value arguments based on an egalitarian liberal theory of the good. The extensive coverage of the above discussion necessitates publication of the content over two discrete yet connected articles. The first of which is this article which unpacks the orientation and method of "rightism" in relation to general approaches towards construing Pt IV liberties and sets forth the extant reasonable classification test, which disfavours a rights-driven path of judicial activism, in distinguishing between arguments for constitutional interpretation and for constitutional change.[1]

1 The second article of the same title will be published on e-First <https://journalsonline.academypublishing.org.sg/e-First/Singapore-Academy-of-Law-Journal>.

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I. Introduction

1 Judicial philosophy informs interpretive method: in reading broadly framed rights to "personal liberty" or "equality", divergent paths avail.

2 Courts may tread an "activist" path and treat these terms as empty containers, into which the preferred ideology *du jour* is poured into and from which an array of rights as entitlement claims are expansively pronounced into existence. Such courts are heroes or villains, depending on one's ideological orientation.

3 Alternatively, courts may demur from this path and adopt more modest forms of review that seek to refrain from legislating new constitutional rights in the guise of interpreting existing provisions. Where "political questions" or morally controversial issues are concerned, such as the fractious divide over what vision of public sexual morality should be normative, courts in refusing to descend into the political thicket evade criticism of illegitimate judicial law-making. Singapore courts have thus far manifested this latter predilection.

4 While all except the most ardent formalists accept that judicial interpretation is a creative exercise, the more pressing issue is the degree to which this is acceptable and legitimate. Where a court situates itself on this spectrum is itself a reflection of the relationship between legislators and judges in a constitutional democracy, how the rule of law and separation of powers is apprehended, and which rights theory is ascendant.

5 In Singapore, s 377A of the Penal Code[2] ("s 377A") is paradigmatic of the sort of issue that is contested both before courts of law and the court of public opinion. This provides:

> 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,

2 Cap 224, 2008 Rev Ed. References to s 377A in this article refer to both the Penal Code and its precursors, as "there are no substantial differences between the various versions of s 377A": *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [3].

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

6 In the political realm, the "intensely controversial"[3] debate over whether to retain or repeal s 377A has attracted "diametrically opposed" views before and beyond Parliament. The Prime Minister ("PM") has described retaining s 377A, coupled with a policy not to proactively enforce it,[4] as an "uneasy compromise".[5] Some political parties have refused to take clear positions towards this "symbolic"[6] lightning rod for social conservatives and liberals.[7]

7 Both sides "have mobilised to campaign for their causes":[8] one side argues for "LGBTQI rights", the other opposes the threat the homosexualism agenda[9] poses to public morality and fundamental liberties like expressive and religious freedoms[10] and parental rights

3 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [5]; Wong Siew Ying, "Singapore Not Ready for Same-Sex Marriage as Society is Still Conservative: PM Lee" *The Straits Times* (5 June 2015).

4 PM Lee Hsien Loong noted "we are not enforcing it proactively", but if s 377A was abolished, "we may be sending the wrong signal that our stance has changed, and the rules have shifted": Singapore Parl Debates; Vol 83; Col 2402; [23 October 2007]. This is distinct from past proactive undercover police enforcement operations seeking to flush out homosexual activity in public places: see *Tan Boon Hock v Public Prosecutor* [1994] 2 SLR(R) 32; *Lim Meng Suang v Attorney-General* [2013] SGHC 73 at [84] and "12 Men Nabbed in Anti-gay Operation in Tanjong Rhu" *The Straits Times* (23 November 1993) at p 19.

5 Charissa Yong, "PM Lee on BBC's Hardtalk: Most Would Back Retaining Section 377A if a Referendum was Held" *The Straits Times* (1 March 2017).

6 Singapore Parl Debates; Vol 83; Cols 2402–2403; [23 October 2007].

7 Martino Tan, "Pritam Singh on 377A: Workers' Party Would Not Be Calling for Its Repeal" *mothership.sg* (5 April 2019) <https://mothership.sg/2019/04/workers-party-pritam-singh-377a-repeal-lgbt/> (accessed 15 August 2021).

8 Singapore Parl Debates; Vol 83; Col 2402; [23 October 2007].

9 Justice Antonin Scalia, dissenting, in *Lawrence v Texas* 539 US 558 at 602 (2003), described the "homosexual agenda" as "the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium … traditionally attached to homosexual conduct". See Kees Waaldijk, "Standard Sequences in the Legal Recognition of Homosexuality – Europe's Past, Present and Future" (1994) 4 *Australasian Gay and Lesbian Law Journal* 50. This sequence includes (a) decriminalisation of homosexual acts between adults; (b) equal age limits for homosexual and heterosexual sex; (c) legislative recognition of same-sex cohabitation; (d) legislation prohibiting sexual orientation discrimination in matters like employment; (e) anti-discrimination legislation and providing goods or services; (f) introduction of registered partnership; (g) allowing joint and/or second parent adoption by same-sex partner(s); and (h) same sex marriage: Kees Waaldijk, "Eight Major Steps in the Legal Recognition of Homosexual Orientation" *Choices* (11 November 2007) and Kees Waaldijk, "Letter to Editor" *Choices* (11 November 2007).

10 Articles 14 and 15 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) respectively. While no Singapore case has yet dealt with competing

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over their children's education.[11] Judges have received death threats for deciding s 377A is constitutional;[12] academic articles[13] and op-eds authored by legal luminaries have urged both retention and repeal.[14]

8 The second decade of the 21st century has seen a steady stream of cases which have unsuccessfully challenged the constitutionality of s 377A. In 2013, the Court of Appeal in *Lim Meng Suang v Attorney-General*[15] ("*LMSCA*") affirmed the High Court decisions of *Tan Eng Hong v Attorney-General*[16] and *Lim Meng Suang v Attorney-General* ("*LMSHC*") that s 377A satisfied the reasonable classification test and passed constitutional muster. On the basis of new arguments, "including points premised on new historical evidence and case law", subsequent to *LMSCA*, another failed challenge was brought in *Ong Ming Johnson v Attorney-General*[17] ("*Johnson*"), which has been appealed. That challenge raised arguments based on Art 9 (life and personal liberty), Art 14 (freedom of speech) and Art 12 (equality) of the Constitution of the

co-equal rights, "equality" has elsewhere been used as "trump" to truncate other constitutional liberties. See, *eg*, Augusto Zimmerman, "Same-Sex Marriage, Freedom of Speech and Religious Liberty in Australia – A Critical Appraisal" (2017) 7(1) *Solidarity: The Journal of Catholic Social Thought and Secular Ethics* article 4; Hans C Clausen, "The 'Privilege of Speech' in a 'Pleasantly Authoritarian Country': How Canada's Judiciary Allowed Laws Proscribing Discourse Critical of Homosexuality to Trump Free Speech and Religious Liberty" (2005) 38 Vanderbilt J of Transnat'l Law 443 and M H Ogilvie, "After the Charter: Religious Free Expression and Other Legal Fictions in Canada" (2002) 2 *Oxford University Commonwealth Law Journal* 219.

11 Universal Declaration of Human Rights (A/RES/217A (III), adopted at the United Nations General Assembly (10 December 1984)) Art 26(3). See Charles J Russo, "Same-Sex Marriage and Public School Curricula: Preserving Parental Rights to Direct the Education of Their Children" (2007) *Educational Leadership Faculty Publications* 152 <https://ecommons.udayton.edu./eda_fac_pub/152> (accessed 15 August 2021) and Lauren Vanga, "Ending Bullying at a Price? Why Social Conservatives Fear Legislatively Mandated LGBT Indoctrination in Schools" (2014) 17(2) *Chapman Law Review* 659.

12 Louisa Tang, "Man Charged with Threatening Judge on Instagram Stories over Dismissal of Section 377A Challenges" *Today* (14 August 2020) ("[h]omophobic judges need to be put down immediately").

13 *Eg*, Yvonne Lee, "'Don't Ever Take a Fence Down until You Know the Reason it Was Put Up' – Singapore Communitarianism and the Case for Conserving 377A" [2008] Sing JLS 347 and Lynette Chua, "Saying No: Sections 377 and 377A of the Penal Code" [2003] Sing JLS 209.

14 Tommy Koh, "Section 377A: Science, Religion and the Law" *The Straits Times* (25 September 2018); V K Rajah, "Section 377A: An Impotent Anachronism" *The Straits Times* (30 September 2018); Thio Li-ann, "377A – A Contemporary, Important Law" *The Straits Times* (7 October 2018).

15 [2015] 1 SLR 26.

16 [2013] 4 SLR 1059.

17 [2020] SGHC 63.

Republic of Singapore[18] ("Constitution"), liberally borrowing from a lengthy article authored by the learned former Chief Justice Chan Sek Keong.[19]

9 Many of these challenges are rooted in liberal ideology, which valorises individual autonomy and the "neutral" state that purports not to espouse a conception of human good, leaving this to individual self-determination. They are advanced by a "living tree" interpretive methodology which directly draws on value-based arguments; this brand of judicial activism sustains a conception of erotic liberty and equality of lifestyle that opposes "heteronormativity" and controversially asserts the moral equivalence of heterosexuality and homosexuality.

10 In other jurisdictions, this has produced "rightism": a rights-oriented, court-centric model of constitutionalism where rights may operate as trumps. This manifests, *in extremis*, as a "cult of egalitarian liberalism",[20] a substantive ideology associated with ideological "progressive" liberalism, distinct from classic liberalism.[21] This sits at odds with the approach adopted in Singapore, with its mix of political and legal constitutionalism, manifesting communitarian, statist and liberal values. The courts have viewed juristocracy as subverting constitutional principles of the separation of powers, rule of law and democracy.[22]

11 This article focuses on Art 12-related challenges to the constitutionality of s 377A and how the model of equality so championed is significantly driven by liberal ideology and its "hidden" values assumptions, which manifests "rightism".

12 The prevailing test of "reasonable classification" and the accompanying presumption of constitutionality has attracted two primary criticisms. First, for being misapplied; second, for being too deferential in according primary weight to the "reasonableness" of Parliament. Critics advocate for more intensive review or appeal to equality as a categorical trump.

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18 1985 Rev Ed, 1999 Reprint.

19 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773.

20 *Navtej Singh Johar v Union of India, THR Secretary and Ministry of Law and Justice* AIR 2018 SC 4321; Writ Petition (Criminal) No 76 of 2016 at [86]–[87].

21 Broadly speaking, the classic liberal political project is about freedom from government restrictions and from our own ungovernable human desires, as part of self-governance. Ideological liberalism seeks to enlist state power in defining oppressors and ending oppression, in a postmodern setting. See Patrick J Deneen, *Why Liberalism Failed* (Yale University Press, 2019) and Paul W Kahn, *Putting Liberalism in its Place* (Princeton University Press, 2004).

22 *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [75].

13 The article argues that scoping equality through the reasonable classification test remains appropriate within a communitarian polity, given the constitutional roles of the courts and Parliament, constitutional amendability, the broad reach of equality which applies to any differentiating law, and what might be described as a "moral questions" doctrine, informing a brand of calibrated judicial review. This bears analogical similarity to the political questions doctrine which recommends judicial deference in the face of polycentric, policy-laden and politicised issues. "Heavy-handed judicial intervention" would prematurely short-circuit democratic processes and does not resolve moral conflicts,[23] as evident in the enduring abortion and same-sex marriage disputes in liberal jurisdictions like the US.[24]

14 The retention or repeal of laws like s 377A has wide-ranging legal and social consequences,[25] which may be obscured within the parameters of judicial proceedings, where courts "decide cases on the basis of the facts and the arguments put to them",[26] often narrowly framed. Therefore, a judicial test like "reasonable classification" that recognises the primary role of elected representatives in managing polarising topics, is a reasonable choice, reflecting the role of courts within a system where political constitutionalism is accented.

15 This article is divided into two parts. Part One focuses on general interpretive approaches to fundamental liberties and the nature of the reasonable classification test, as applied to Art 12 cases. Part Two will take a deep dive into the specificities of the challenges against s 377A, in furtherance of the core argument in defence of the reasonableness of the reasonable classification test, and the normative desirability of resisting and rejecting the juristocratic path of rightism. It will examine alleged misapplications of the reasonable classification as well as arguments that this test be replaced by more aggressive judicial scrutiny.

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23 The late Justice Ruth Bader Ginsburg thought the *Roe v Wade* 410 US 113 (1973) decision incorrect for moving "too far, too fast": "Some Thoughts on Autonomy and Equality in Relation to *Roe v Wade*" (1985) 63 *North Carolina Law Review* 375 at 385–386, quoted by Quentin Loh J in *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [142].

24 Former President Barack Obama observed that more Hispanic voters supported the Republicans because they rejected Democratic positions "on same sex marriage or abortion". "Obama's Take on Evangelical Hispanics Could Reinforce Democrats' Challenge" *The Washington Post* (26 November 2020).

25 This is evident from a cursory survey of foreign jurisdictions which repealed sodomy laws, ushering in an expansion of LGBT related rights including unisex marriage, precipitating clashes with existing rights: see Chris Geidner, "The Court Cases that Changed LGBTQ Rights" *The New York Times* (19 June 2019).

26 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at para 3.

16 Part II of this article discusses what "rightism", fueled by liberal ideology, entails and what a "rightism" based challenge to s 377A might look like in terms of values-driven "living tree" interpretive approaches. This represents an anti-model to the contemporary judicial approach towards reading Pt IV of the Constitution ("Pt IV"), which does not conflate and confuse interpretation with amendment.[27] It considers how "rightism" may impact administrative governance, in relation to expectations that s 377A not be pro-actively enforced. Part III of this article examines the "threshold" Art 12 reasonable classification test, what it does and does not do, and the extent to which it incorporates substantive elements beyond formal equality requirements. It considers the concept of equality in general and extant in Art 12(1) and how it interrelates with Art 12(2). It concludes with observations on how the reasonable classification test, in strictly cabining how considerations of legitimacy apply, is resistant towards "rightism" oriented interpretive approaches.

II. Framing constitutional challenges to section 377A: Rightism as anti-model?

17 According insufficient weight to fundamental rights is always a constitutionalist's concern. So too is undue emphasis on rights, the main pathway "judicial activism" travels upon, where juristocracy displaces democracy or tempers it "by aristocracy".[28] Strategically framing controversial political claims as legal rights insulates such claims from political contention, servicing a "politically correct"[29] anti-constitutionalist totalising ideology.

18 "Rightism" is a shorthand reference to an ethos or patterns of rights-based argument valorising individual autonomy. "Rightism" may neglect that "individual rights do not exist in a vacuum", but co-exist with competing rights, duties and public goods; to solely focus on "unfettered individual rights" may usher in "a society premised on individualism and self-interest".[30] Such hyper-individualism may breed a "worship of 'rights'

27 *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at [122].

28 James Grant, "The Rise of Juristocracy" (2010) 34(2) *Wilson Quarterly* 16 at 17.

29 Critics argue that political correctness attacks the foundations of a free society: see Janet Albrechsten *et al*, "You Can't Say That: Freedom of Speech and the Invisible Muzzle" *Centre for Independent Studies* (The Centre for Independent Studies Limited, 2012) <https://www.cis.org.au/app/uploads/2015/07/op124.pdf?> (accessed 15 August 2021).

30 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR (R) 582 at [52].

and 'choice'",[31] inflating the self, weakening the collective.[32] A relentless individualism and rightist liberalism which sponsors extravagant rights formulations with peremptory weight fuels the "absoluteness" of "rights talk" and generates social conflict. By promoting "mere assertion over reason-giving", it degrades public debate by squelching "common sense or moral intuitions," impeding "rational political discourse." [33]

19 "Rightism" manifests in two main ways. First, it facilitates rights proliferation by identifying unenumerated rights or through reading existing rights expansively. Second, it seeks a brand of review where rights are accorded heavy or determinative weight.

20 This is fueled by a "living tree" interpretative method[34] which considers judicial engagement in moral reasoning legitimate, enabling judges to connect the law with their perception of evolving social values. This non-textual approach discounts the importance of constitutional

31 John Leo, "When Stability was All the Rage" *US and World Report* (30 October 1995) at p 27.

32 See David Brooks, "The Relationalist Manifesto" in *The Second Mountain: The Quest for a Moral Life* (Random House, 2019) at pp 296–312.

33 Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press, 1991) at pp 14–15.

34 The more modest original "living tree" approach espousing a generous, not technical, reading of constitutions, has given way to a "progressive" evolving interpretation which, in jurisdictions like Canada, has produced radically non-originalist and non-doctrinal decisions in rights cases, based on subjective judicial ideologies: Bradley W Miller, "Origin Myth: The Person's Case, the Living Tree, and the New Originalism" in *The Challenge of Originalism: Theories of Constitutional Interpretation* (Grant Huscroft & Bradley W Miller eds) (Cambridge University Press, 2011) at pp 120–146. This disdains parodied versions of originalism as the ancestral worship of "frozen rights": Grant Huscroft, "The Trouble with Living Tree Interpretation" (2006) 25(1) *University of Queensland Law Journal* 3 at 5 and *Minister of Home Affairs v Fourie* [2006] (1) SA 524 (CC) at [102], *per* Sachs J.

text, history, precedent,[35] or theory,[36] in favour of direct appeals "to moral, political or social values or policies".[37]

21 What might a rightism-based approach to challenging the constitutionality of s 377A look like, and is this consonant with the current judicial approach?

A. Judicial declaration of unwritten norms and rights

22 It could assume the form of declaring an unwritten privacy right, specifically, a right to consensual homosexual sodomy. This could stem from declaring a general right to autonomy or privacy, based on some sort of natural law or 'higher law' theory. Alternatively, one could discern a right to make choices "central to personal dignity and autonomy"[38] from "penumbras" emanating from the "spirit" of enumerated rights,[39] drinking from the well of liberal ideology.

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35 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [143]. The court affirmed that vertical *stare decisis* ought to be preserved, rejecting the invented Canadian approach justifying a lower court's departure from a higher court's binding decision: *Canada (Attorney-General) v Bedford* [2013] 3 SCR 1101 at [42] and *Carter v Canada (Attorney-General)* [2015] 1 SCR 331 at [44]. In politicised settings, *stare decisis* can be manipulated: see Justice Scalia, *Lawrence v Texas* 539 US 558 (2003) at 587 on the Supreme Court's inconsistent treatment of *Roe v Wade* 410 US 113 (1973) as discussed in *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833 at 866–867 (1992) and *Bowers v Hardwick* 478 US 186 (1986) as precedents: widespread criticism of *Roe v Wade* and *Bowers v Hardwick* was strong reason to reaffirm the former and overrule the latter.

36 For example, the courts have considered novel points from "first principles" (*eg*, *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [55]) and have interpreted constitutional provisions in light of values associated with Westminster parliamentarianism, *eg*, *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [79].

37 Value arguments "assert claims about what is good or bad, desirable or undesirable, as measured against some standard that is independent of what the constitutional text requires": Richard H Fallon Jr, "A Constructivist Coherence Theory of Constitutional Interpretation" (1987) 100 Harv L Rev 1189 at 1204–1205.

38 In an ode to metaphysics and subjectivism, Justice Kennedy declared the "heart of liberty" resided in "the right to define one's own concept of existence, of meaning, of the universe and of the mystery of human life", to service an open-ended unenumerated right to make personal choices, such as terminating life *in utero*: *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833 at 851 (1992). Justice Scalia in *Lawrence v Texas* 539 US 558 at 588 (2003) described this as "the passage that ate the rule of law".

39 The US Supreme Court found such "penumbras" from various guarantees in *Griswold v Connecticut* 381 US 479 (1965) which included a right to marital privacy that invalidated state laws restricting contraception. Appealing to sweeping rhetoric, the Indian Supreme Court invented the supermajoritarian concept of "constitutional morality", composed of vague ideals like a "pluralistic and inclusive society", without unpacking what manner of diversity was being anointed with constitutional status.

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23 Treating "natural law" as a self-evident norm is over-simplistic and was disavowed in *Yong Vui Kong v Public Prosecutor*:[40] the Court of Appeal refused to create unenumerated rights "out of whole cloth simply because they consider it to be desirable".[41]

24 The courts have recognised implied constitutional rights which facilitate the functioning of the inherited Westminster system, such as the right to vote in *Daniel De Costa Augustin v Attorney-General*.[42] However, this is not to be apprehended as a free-standing, unenumerated right, but as a right "found in the Constitution" construed in its entirety or by "necessary implication" in light of constitutional references to elections in Arts 66 and 39(1).[43]

B. Expansive judicial construction of existing rights

25 One could attempt to find a right to homosexual sodomy by expansively construing existing open-textured rights, such as the Art 9 guarantee of "life or personal liberty". Terms like "personal liberty" would provide an empty container to be filled with rhetorical invocations of "human dignity"[44] or other subjective preferences. This is reflected in the autonomy-invoking arguments raised in *LMSCA*, euphemistically phrased in terms of "a right of personal autonomy allowing a person

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This concept does not aid interpretation but operates as an all-purpose weapon to invalidate "a majoritarian view or popular perception": *Navtej Singh Johar v Union of India, THR Secretary and Ministry of Law and Justice* AIR 2018 SC 4321; Writ Petition (Criminal) No 76 of 2016 at [119] and [124]. Delving into metaphysical abstraction, the Indian constitution was anthropomorphised as a "living integrated organism" with its own soul, spinal cord and limbs. Apparently, only judges can access this "soul" to divine the ideals driving a brand of "transformative constitutionalism", to meet the "changing needs of the time": at [82] and [97].

40 [2015] 2 SLR 1129 at [73]–[75]. Natural law theory has a complex history and varied strands: as an objective higher law discerned by practical reasoning or a a synonym for political preferences associated with humanistic "enlightenment jurisprudence". See Stephen Hall, "The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism" (2011) 12(2) EJIL 269.

41 *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [73]. To do so would entail judges "enacting their personal views of what is just and desirable into law", like a "super-legislature", which subverts the rule of law: at [75].

42 [2020] 2 SLR 621 at [7].

43 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [9]. The Court of Appeal in considering the text, theory and history did not find an implied prohibition against inhumane treatment in *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at [72].

44 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [9]; *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [120]. "Human dignity" is not a self-evident term and while it affirms individual worth, its contours are shaped by a prior philosophy. See generally *Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Marcus Duwell *et al* eds) (Cambridge University Press, 2014).

to enjoy and express affection and love towards another human being". Within this apparently limited formulation resided "the seeds of an unlimited right", able to encompass and legalise "all manner of subjective expressions of love and affection", which could fall afoul of "broader societal policy".[45] It fell within the Legislature's quintessential province[46] whether to recognise such liberties; otherwise, courts may be suspected of applying a "make-it-up-as-you-go-along" approach to construing "personal liberty".[47]

26 Singapore courts have avoided the "values-oriented" activist bent reflected in American substantive due process doctrine, and in the Indian Supreme Court's invention of new rights through expansive construction. The Constitution of India's Art 21 guarantee of life and personal liberty, with its ever-expanding horizons, has been transformed to include rights to livelihood and a healthy environment, with personal liberty encompassing economic and erotic liberties,[48] linking the right to health with the free exercise of "choice in their sexual lives".[49] Individual autonomy, as the apparent über-norm from whence rights are judicially deduced, perhaps with some reference to directive principles, becomes a sort of philosopher's stone empowering judges to create new rights they feel the legal system should have. Singapore courts have stated the need to treat Indian cases circumspectly, as where their courts read into Art 21 a right to health, which is shaped by India's socio-economic conditions;[50] foreign developments should not be blindly imported as they may ill-suit independent Singapore's autochthonous legal system.[51]

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45 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [30] and [49].

46 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [49].

47 The scope of Art 9(1) was determined by examining its historical precursors, dating back to cl 39 of the Magna Carta: *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [16]–[18].

48 Singapore courts have rejected reading personal liberty as including a liberty to contract or a right to "sexual autonomy": *Lo Pui Sang v Mamata Kapildev Dav* [2008] 4 SLR(R) 753; *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [49] and *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [120]. See V K Rajah, "Interpreting the Constitution" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at pp 23–31, especially at p 28.

49 *Navtej Singh Johar v Union of India, THR Secretary and Ministry of Law and Justice* AIR 2018 SC 4321; Writ Petition (Criminal) No 76 of 2016 at [149], *per* Chandrachud J. The Supreme Court at [229]–[230] declared "sexual autonomy" as a privacy right under Art 21 of the Constitution of India, without indicating its limit. It stated at [67] that individuals have the "freedom to enter into relationships untrammelled by binary of sex and gender" and to receive the "requisite institutional recognition to perfect their relationships". This is a positive demand, rather than a negative liberal "right to be left alone".

50 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [49].

51 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [133] (noting that examples about decriminalisation of male homosexual conduct in some jurisdictions "can be

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27 Laws criminalising homosexual sodomy could be challenged as violating a constitutionally prohibited ground of discrimination, where sexual orientation is an enumerated ground,[52] through creatively interpreting an express prohibition against "sex" (a biological term) discrimination to extend to "sexual orientation"[53] (an indeterminate construct),[54] or by declaring sexual orientation to be an analogous ground of forbidden discrimination.[55]

28 Singapore courts have found the four prohibited grounds of discrimination in Art 12(2) to be exhaustive; any additional ground would require a constitutional amendment.[56] This rejection of non-textual

countered by examples of areas where there are shifts in the opposite direction"; at least seven former British colonies have retained their equivalent of s 377A while also criminalising female homosexual conduct).

52 *Eg*, s 9 of the South Africa Constitution, as noted by the Court of Appeal in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [99].

53 *Bostock v Clayton County* 140 S Ct 1731 (2020) in relation to the sex discrimination prohibition in Title VII of the Civil Rights Act (1964) which the six–three majority held included sexual orientation and gender identity, which Justice Alito, dissenting, criticised as pure "legislation". See Richard A Epstein, "The Gorsuch Legal Alchemy" *Defining Ideas* (22 June 2020) <http://www.hoover.org/research/gorsuch-legal-alchemy> (accessed 15 August 2021). See *Navtej Singh Johar v Union of India, THR Secretary and Ministry of Law and Justice* AIR 2018 SC 4321; Writ Petition (Criminal) No 76 of 2016 at [36] and the Canadian Supreme Court reading of the reference to "sex" in s 15, Canadian Charter of Rights and Freedoms as encompassing sexual orientation based on the "intersectional nature of sex discrimination": *Vriend v Alberta* [1998] 1 SCR 493 at [90].

54 *Eg*, David L Mundy, "Hitting Below the Belt: Sex-Ploitive Ideology & The Disaggregation of Sex and Gender" [2001–2002] 14 *Regent University Law Review* 215 (arguing that treating sex as a social construct is contrary to biological and anthropological evidence).

55 Courts may be invited to do so by "open-ended constitutional provisions" such as s 15(1) of the Canadian Charter of Rights and Freedoms, which is an exercise inviting ideological choices to feed the substantive structuring of the equality principle in relation to "personal characteristics" based discrimination. This places such courts in the "unenviable position" of being "mini-legislatures": *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [92].

56 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [182]–[185]. As Singapore is a dualist system, international treaties do not automatically amend the Constitution: at [188]. The courts have not found persuasive appeals to non-binding "soft" international law instruments like the Yogyakarta Principles on Sexual Orientation and Gender Identity, adopted by self-selecting, self-referential private "experts": *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [260]. The Principles have been critiqued as not accurately reflecting international law and undermining other human rights: see Pierro A Tozzi, "Six Problems with the Yogyakarta Principles" *International Organizations Research Group Briefing Paper No 1* (2 April 2007) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id-1551652> (accessed 15 August 2021) and *OIC-IPHRC Study on Sexual Orientation and Gender Identity in the Light of Islamic Interpretations and International Human Rights Framework* (Independent Permanent Human Rights Commission, May 2017) at paras 1–3

(cont'd on the next page)

interpretive approaches reflects a co-equal[57] vision of the separation of powers, where courts do not have "an exalted or superior position" over other government branches.[58]

C. Rightism, heightened judicial scrutiny and protecting expectations

29 Liberal or communitarian theories[59] shape interpretive methodology and the appropriate level of judicial scrutiny in adjudicating rights. The former, based on the meta-liberal value of normative individualism, may view rights as "trumps", oppositionally situated against public goods, while the latter is receptive to a "structured conception" of rights as judicial techniques to police which purposes may permissibly justify state action.[60] A communitarian polity would be more supportive than a liberal one of a strong vision of public morality as a social good, given the latency of the liberal theory of the good.[61] Moved by a "liberalism of fear",[62] advocates of rights-oriented judicial review seek greater rights protection through more intensive forms of review.

<https://www.oic-iphrc.org/en/data/docs/studies/46303.pdf> (accessed 15 August 2021). Singapore courts take the text seriously; for example, Art 12(2) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) only applies to citizens such that "place of birth" as a listed ground could not be interpreted to mean "nationality": *Syed Suhail bin Syed Zin v Attorney-General* [2021] SGHC 31 at [70].

57 Courts which accept the view that gender identity is fluid and sexual orientation, whether chosen or inborn, is a matter of sexual self-determination, lend support to a controversial political project which, in opposing patriarchal or "heteronormative" oppression, seeks to subvert the binary understanding of humanity as male and female.

58 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [90].

59 Singapore courts have characterised public law as expressive of "communitarian values", including "the preservation of morality": *Public Prosecutor v Kwong Kok Hing* [2008] 2 SLR(R) 684 at [17]. This is reflected in the White Paper on shared values (Cmd 1 of 1991) at para 30, and has been elaborated upon as including "dialogue, tolerance, compromise and placing the community above self": Sundaresh Menon, "The Rule of Law: The Path to Exceptionalism" (2016) 28 SAcLJ 413 at [24].

60 Richard H Pildes, "Why Rights are Not Trumps: Social Meanings, Expressive Harms and Constitutionalism" (1998) 27 *Journal of Legal Studies* 725 at 734.

61 The liberal theory of the good, valorises desire and consent: James Kalb, "Tyranny of Liberalism" (2000) *Modern Age* 241 at 247. Liberal states are concerned with choice, not whether choices are desirable. Autonomy itself is a "slippery concept" and may relate to an atomistic or relational person: *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918 at [116]–[118]. See Stephen Macedo, *Liberal Virtues: Citizenship, Virtue and Community in Liberal Constitutionalism* (Clarendon Press, 1990).

62 Judith Shklar, *Political Thought and Political Thinkers* (Stanley Hoffman ed) (University of Chicago Press, 1998) at p 3.

30 While not endorsing proportionality review,[63] Singapore courts have intimated that careful scrutiny would be applied to questions of discrimination where "factors like race or religion" concerning Pt IV liberties are involved,[64] or "searching scrutiny", where Art 9 rights of life and liberty are affected.[65] This enhanced review reflects the greater importance accorded to constitutional rights as part of the supreme law, compared to non-constitutional interests.[66]

31 As important public law interests, rights have implications for administrative law governance, particularly where courts have to balance fairness to individuals and administrative autonomy, in cases involving "substantive legitimate expectations" ("SLE");[67] these arise where a public authority unequivocally promises to apply a certain policy to a small group of people, which is reasonably and detrimentally relied upon. Where a policy is departed from, bearing in mind that discretion must not be unduly fettered, the question of whether frustrating private expectations constitutes an abuse of power arises. While an overriding public interest can justify departure from what was promised, the involvement of a fundamental right lends weight to the "fairness" side of the equation. [68]

63 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [87]. More recently, the courts appear to be applying a "reasonableness" test in rights adjudication: *Vijaya Kumar s/o Rajendran v Attorney-General* [2015] SGHC 244, which is a shift away from applying statist trumps: *Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR(R) 209 at [64]. They have demonstrated concern that constitutional rights not be eviscerated by literal, subjective approaches where the court simply accepts Parliament's view that legislative restrictions are necessary: *Wham Kwok Han Jolovan v Public Prosecutor* [2021] 1 SLR 476 at [22]. Here, a structured "three-step" approach was devised to assess whether a law impermissibly derogated from a constitutional right: at [29]–[33]

64 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [113].

65 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [63]; *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 at [50].

66 A parallel common law development is evident in the flexible approach where greater judicial scrutiny applies to fundamental rights cases: *Kennedy v Charity Commission* [2014] 2 WLR 808 at [51]–[55].

67 Tay Yong Kwang J in *Chiu Teng @Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [119] considered that the doctrine should be recognised as a stand-alone ground of judicial review. The Court of Appeal made *obiter* observations in *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 at [59]–[63] that if Singapore law adopted substantive legitimate expectations, a revised understanding of the judicial role in public law would be required.

68 In *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213, the promise to a severely disabled person and seven other patients was that if she moved to Mardon House, an NHS facility for the long-term disabled, she would have a "home for life". The decision to shut down Mardon House not only constituted unfairness amounting to abuse of power, but would violate Art 8(1) of the European Convention on Human Rights.

32 Would the Government's statement that s 377A would not be proactively enforced,[69] such as through enforcement raids, give rise to a SLE? This is unlikely, as cases of an enforceable expectation of a substantive benefit mostly apply in quasi-contractual settings, involving one person or a few people,[70] as distinct from an innominate class.[71] In so far as enforcement relates to how the police investigate potential offences, it is difficult to see how a potential offender may have a substantive benefit in not having a potential crime actively investigated. Neither can the Government "bind" the Public Prosecutor from exercising prosecutorial discretion in a "non-proactive way", whatever that means, as this would fetter the independent discretion vested in the Attorney-General under Art 35(8).[72] There is no right or public law interest in not being prosecuted for committing a crime, unless the courts tread the rightism route of declaring an unenumerated privacy right, to add heft to private expectations, balanced against the public interest; this would attract criticism of being a value judgment too far.

33 Certainly, considerations of trust and good governance rest on public bodies keeping promises they make. However, this can be given due weight not just by ordering that an applicant enjoy the substantive benefit itself, but by requiring the public body to provide reasons for policy shifts or departures, and to treat the importance of keeping promises as a mandatory relevant consideration.[73] This appreciates the continuing need to alter policy to adapt to change, while not allowing the

69 Singapore Parl Debates; Vol 83; Col 2354 *ff*; [23 October 2007]. Statements from Cabinet ministers are authoritative sources of public policy: *UKM v Attorney-General* [2019] 3 SLR 874 at [138].

70 *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at 242G–H.

71 Section 377A of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) is unrelated to sexual orientation as it deals with conduct, not identity.

72 Lucien Wong, Attorney General, "Government Has Not Removed or Restricted Prosecutorial Discretion for Section 377A, Public Prosecutor Retains Full Prosecutorial Discretion", Attorney-General's Chambers media release (2 October 2018) <https://www.agc.gov.sg/docs/default-source/newsroom-doucments/media-releases/2018/agc-media-release---public-prosecutor-retains-prosecutorial-discretion-for-section-377a_final.pdf> (accessed 15 August 2021). While it is not the policy under the law that all offenders must be prosecuted, or that all offences are provable in a court of law, the Attorney-General cannot make this decision in a whimsical manner but must do so based on the public interest, without bias and without considering any irrelevant consideration. In so doing, the Attorney-General may consider a "myriad of factors" in deciding whether to charge an offender, and for which offence: *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR at [51]–[53].

73 *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 at [63].

policy-maker to be judge in his own cause, as policy choices from that perspective will "almost always be rational".[74]

34 If the SLE is argued to arise not out of a promise or representation to a small number of specific persons, but from a general policy of broad application relating to non-proactive enforcement of s 377A, would departing from this policy or changing the policy amount to an instance of unfairness constituting an abuse of power? Such policy-based expectations affect both the applicant and the general public.

35 Clayton argues that rather than treating such cases as SLE, it would be better to approach this as implicating a principle of consistency, seen as a dimension of the *Wednesbury* unreasonableness test.[75] This would restrain judges from becoming primary policymakers in being drawn beyond reviewing the decision-making process, into adjudicating case merits. The principle would operate on the presumption that an administrative body will follow its own policy, to ensure real weight is accorded to it, while acknowledging its power to alter policy, subject to considerations of irrationality.[76]

36 Would statements about the non-proactive enforcement of s 377A give rise to a "legitimate legal expectation", a concept distinct from SLE, arising from Art 12(1)?[77] This was raised by the Court of Appeal in *Syed Suhail bin Syed Zin v Attorney-General*,[78] to ensure sufficient protection was accorded the interests protected by a constitutional liberty, in the judicial review of executive discretion.

37 The case concerned the order in which death row prisoners were scheduled for execution. Executions had been halted pending the determination of a case relating to unlawful execution methods. Subject to certain considerations, the general policy is that executions are scheduled following the order prisoners were sentenced to death.

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74 *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at 245A.

75 Lord Hoffmann in *Matadeen v Pointu* [1999] 1 AC 98 at 109 noted that equality before the law "requires that people should be uniformly treated, unless there is some valid reason to treat them differently". Treating like cases alike was described as a "general axiom of rational behaviour", which relates back to the *Wednesbury* test.

76 Richard Clayton, "Legitimate Expectations, Policy and the Principle of Consistency" (2003) 62(1) CLJ 93.

77 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [51].

78 [2021] 1 SLR 809. See Thio Li-ann, "Of Variable Standards of Scrutiny and Legitimate Legal Expectations: Article 12(1) and the Judicial Review of Executive Action" Sing JLS (forthcoming, March 2022).

38 The Court of Appeal posed the question whether a prisoner awaiting capital punishment had a "legitimate legal expectation" that the date on which his sentence was to be executed would not result in his being treated differently, compared to other similarly situated prisoners.[79] This does not challenge a law, but the powers exercised under it.

39 Death row prisoners are entitled to equal protection of the law under Art 12(1). Even if a person lacks any "free-standing legal right" to certain treatment, differential treatment by a public authority "is presumptively subject to scrutiny under Art 12(1)".[80]

40 The "legitimate legal expectation"[81] arose from Art 12(1) itself, to underscore that prisoners had a "legally significant interest"[82] thereunder. The court clearly had in mind the importance of giving appropriate weight to constitutional rights, clarifying that variable levels of scrutiny applied, depending on the subject matter and nature of interest. It considered the "intentional and arbitrary discrimination"[83] test, which had applied to economic issues, inappropriate as it provided too low a level of protection for Art 12(1) cases where life and liberty were at stake, being tantamount to the administrative law principle of rationality. Irrational action is distinct from "impermissibly discriminatory" acts which are impacted by the Art 12(1) prohibition against "impermissible differential treatment".[84]

41 To apply an administrative law review principle to constitutional review of Art 12(1) would be to discount its higher law constitutional status and to "render Art 12(1) nugatory so far as it related to executive action".[85] Further, more robust review was warranted in instances involving individualised justice, rather than broadly applicable general policy.[86]

42 Instead, a two-limb test would apply in rights cases. The first limb ascertains whether *A* and *B* were similarly situated, while the second limb

79 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [14].
80 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [49].
81 The idea of expectations was discussed in conjunction with the *nullum* principle entrenched under Art 11(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1992 Reprint) in *Abdul Nasir bin Amer Hamsah v Public Prosecutor* [1997] 2 SLR(R) 842 at [51]–[56].
82 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [50].
83 *Howe Yoon Chong v Chief Assessor of Singapore* [1979–1980] SLR(R) 594 at [13]; *Howe Yoon Chong v Chief Assessor* [1990] 1 SLR(R) 78 at [29].
84 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [49].
85 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [57].
86 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [58].

asks whether there are legitimate reasons for differentiated treatment.[87] The reasonableness of differential treatment could be assessed by standards such as plain irrelevant considerations, inconsistency in applying policies without good reason, and whether the rationale was rationally related to the object for which the power was conferred.[88]

43 A right to fair treatment under Art 12(1) was recognised in relation to scheduling executions, deriving from the applicant's concrete interest in not having his death sentence implemented on a date "decided without due regard to his constitutional rights"; that is, to ensure the same scheduling policy applied to all prisoners similarly situated to the applicant,[89] and that any departure be justified.

44 Such an approach gives greater weight to, without valorising, equal protection rights. Differential treatment is not categorically prohibited, as some flexibility in discharging this executive function is desirable, provided it is "exercised lawfully".[90] A rightist trump is not applied, in seeking a balance between administrative autonomy and accountability.

D. Implications of a "rightism" approach

45 A "rightism approach" may entail a relational change, where "activist" courts intervene in the collective decision-making process of the political branches. This entails a more immodest approach to judicial review which intrudes on merits and grapples with balancing incommensurable values "inside a black box".[91] By determining social policy, the courts become "a player" in the culture wars that "assail society".[92]

87 The need for "legitimate reasons" to justify charging two persons involved in the same crime with different offences was applied in *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [37] and [70]–[71]. Challenging the exercise of statutory powers to ensure consistency in application is distinct from challenging the legitimacy of legislation.

88 The applicant in discharging his evidentiary burden need not directly impugn the process but can highlight circumstances giving rise to a *prima facie* case that the public authority acted arbitrarily, such as inconsistently treating two similarly situated persons: *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 at [52].

89 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [68].

90 *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [72].

91 T Alexander Aleinikoff, "Constitutional Law in the Age of Balancing" (1987) 96(5) *Yale Law Journal* 943 at 976.

92 *UKM v Attorney-General* [2019] 3 SLR 874 at [1]. Here, the court took sides in the culture war, in assuming rather than interrogating what was in the child's best interests: see Tan Seow Hon, "Surrogacy, Child's Welfare and Public Policy in Adoption Applications" [2019] 19 Sing JLS 263.

46 If what a constitutional provision means turns on a judge's policy preferences, this indeterminate outcome-oriented jurisprudence empowers judges to adopt a counter-majoritarian posture in remaking the constitution in their preferred image. The legitimacy of courts as impartial tribunals guided by law may be compromised where courts continue politics by bestowing a "constitutional benediction"[93] on rights deemed worthy. Rule by judges bears negative implications for the rule of law and democracy,[94] where whether a judgment is praised or condemned turns on ideological biases. If representative democracy manifests a misplaced faith in majoritarian government to resolve social disagreements, reposing faith in judges to do so merely replaces one governing elite, with another.

47 A "rightism" based approach to constitutional interpretation is at odds with the current communitarian approach to judicial review;[95] this is not formalistic as judges recognise that a "degree of judicial lawmaking" takes place in "the interstices of written law"[96] in interpreting statutes and developing common law principles,[97] subject to legislative overriding.[98] The real issue pertains to ensuring "visible adherence to the law and legal method"[99] in delineating the proper judicial function such that courts

93 Abella J, of the right to strike in *Saskatchewan Federation of Labour v Saskatchewan* [2015] 1 SCR 245 at [3].

94 Disparate views on this exist: see, *eg*, Alon Harel, "Rights-based Judicial Review: A Democratic Justification" (July 2003) 22(3) *Law and Philosophy* 247 and Jeremy Waldron, "The Core of the Case against Judicial Review" (2006) 115(6) *Yale Law Journal* 1346.

95 Thio Li-ann, "Principled Pragmatism and the 'Third Wave' of Communitarian Judicial Review in Singapore" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at pp 75–116.

96 V K Rajah, "Interpreting the Constitution" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at pp 23–31, especially at p 25. Vinodh Coomaraswamy J in *Republic of India v Vedanta Resources plc* [2020] SGHC 208 discussed how common law judges make law through judicial reasoning, building up the *corpus* of common law precedents.

97 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [77]. The court in doing justice lacks law-making power in relation to statutes, and may not add or take away from statutory language: *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [1]. Singapore courts have expressly rejected the declaratory theory whereby judges "discover" the law as a fiction: *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [241] and *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [78], citing Lord Reid, "The Judge as Law Maker" (1972–1973) 12 JSPTL (NS) 22.

98 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [79]. For example, the Administration of Justice (Protection) Act (Act 19 of 2016) replaced the common law developed test of "real risk" in relation to the contempt of court offence, with that of "risk".

99 V K Rajah, "Interpreting the Constitution" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at pp 23–31, especially at p 26.

do not operate as an "engine for law reform,"[100] displacing Parliament's primary law-making role.

48 In articulating unwritten constitutional principles, such as "fundamental rules of natural justice",[101] courts have refused to unleash the "metaphorical unruly horse"[102] and instead populated the concept by disciplined recourse to history, precedent and precepts associated with Westminster constitutionalism.[103]

49 The rationale underlying the "living tree" approach was the need to develop a constitution to meet unanticipated realities, where the constitution was hard to amend. This lacks resonance where the Singapore Government's commanding parliamentary majority gives it the "necessary flexibility" to amend the Constitution to reflect the "prevailing social mores as well as aspirations of Singapore society".[104] This undergirds the prevailing judicial understanding of its role in a constitutional democracy.

III. The reasonable classification test and equality: Universal ideal, no univocal conception

A. Observations on equality and the cult of egalitarian liberalism

50 When construing constitutional liberties, courts have to grapple with threshold definitional or conceptual questions (what is religion?)[105] and the underlying theory determining whether something attracts constitutional protection (is false speech valuable?).[106] If something does not qualify as a religion, Art 15 is not engaged. The right of "all adult

100 *Regina (Elgizouli) v Secretary of State for the Home Department* [2020] 2 WLR 857 at [170], *per* Lord Reed. The ethos of judicial review in Singapore reflects a focus "on vindicating personal rights and interests through adjudication, rather than determining public policy through exposition": *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [34].

101 This was clarified to refer only to procedural fair trial rights, rather than substantive legal rights in *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [64].

102 *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [31].

103 *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [68]–[72].

104 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [92].

105 Article 15 (religious freedom) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) was not engaged as *Falungong* practitioners in *Ng Chye Huay v Public Prosecutor* [2006] 1 SLR(R) 157 at [34] declared they were "not a religion".

106 False speech was considered not to serve any of the theoretical bases which underpinned free speech and thus had "little, if any" value: Sundaresh Menon CJ (dissenting), *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [117].

Singaporeans to engage in private consensual acts of sexual intimacy with whomsoever they desire" was not found to fall within the Art 14 protection of verbal communication. [107]

51 Article 12, however, has the sweeping potential of applying to any law; further, what equality requires is not self-evident. Formal equality requires accurate, consistent application of the law, that like be treated alike. Equal pay for equal work done by men and women, would be an example, although formal equality itself provides no criteria for, *eg*, quantifying minimum wage.

52 Article 12(1) is not absolute, but must be read in context, with Arts 12(2) and 12(3) setting out the "prohibited and permitted kinds of discriminatory classification".[108] Article 12(2) provides substantive criteria[109] for proscribing discrimination while Art 12(3) creates a limited religious exception to equality. The Art 12(1) concept of equality is given effect by the specific principles in Art 12(2) and the judicial test of reasonable classification; Art 12(1), which is generally framed, is considered to be "more of a declaratory … statement of principles".[110]

53 "Equality" is a universal ideal, without a univocal conception. It may demand uniform or disparate treatment. What "substantive" equality[111] requires is parasitic on a governing ideology, such as conceptualising equality in terms of "fairness" or redistributive justice, realised through special measures. No substantive notion of equality is uncontroversial, given its "relatively unclear meaning and potentially explosive force".[112]

54 Value judgements are necessary in determining what "fairness" requires, or which groups deserve preferential treatment; these are made in legislative classifications. Political philosophy determines the contours of justice and public morality, informing the model of equality adopted.

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107 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [240]. If sexual expression was protected by Art 14, this would protect sexual offences such as incest, paedophilia, necrophilia or bestiality, by characterising such acts as "mere expressions of sexual preference according to the idiosyncrasies of the individual": *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [263].

108 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [41].

109 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [113].

110 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [88] and [90].

111 Susanne Baer, "Equality" in *Oxford Handbook of Comparative Constitutional Law* (Michel Rosenfeld & András Sajó eds) (Oxford University Press, 2012) at pp 983–1001.

112 Manfred Nowak, "Article 26" in *UN Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel, 1993) at pp 458–479, especially at p 461.

55 Many of the challenges to the constitutionality of s 377A are rooted in a liberal prioritisation of individual autonomy[113] in the vein of sexual expression, compounded with the assertion of equality of lifestyle, that heterosexual and homosexual forms of sexual expression are morally equivalent. The object is to invalidate s 377A, or to have it read down to omit the term "in private",[114] putting on par heterosexual or homosexual sexual conduct and what it represents.

56 In this respect, a distinction must be drawn between "classic" liberalism and a new ideological liberalism which strenuously champions the equality of lifestyle as an absolute value.

57 The classic liberal commitment to universalist principles of freedom and equality of all, where like is treated alike within a "neutral" state, views its addressees in a reductionist manner, "not in all their particularity, but as identical abstract beings".[115] This has been criticised by feminists, critical race scholars and communitarians for its anti-particular, homogenising conception of the atomistic self as an organising ideal. Further, state neutrality would require governments not to act "on the claim that certain forms of life are inherently more [or less] valuable than others".[116]

58 However, the liberal tenet that obligations arise from choice and consent is not a neutral stance; in fact, appeals to such neutrality conceal

113 The Court of Appeal in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [164]–[166] noted that those challenging the constitutionality of s 377A sided with Hart, rather than Devlin, in relation to whether law can regulate private acts to preserve society's moral fabric, a view traceable to John Stuart Mill's libertarian views. This is reflected in the call of a petition presented before Parliament in 2007 to repeal s 377A and extend "equal protection" to all with respect to their "private consensual conduct, regardless of their sexual orientation": *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [76]. See further, Seow Hon Tan, "Pragmatism, Morals Legislation and the Criminalization of Homosexual Acts in Singapore" (2009) 3(2) *Journal of Comparative Law* 285.

114 Reading down s 377A would preserve only acts of gross indecency committed in public as an offence: *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [19]; *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [15]. The liberal approach was applied by the European Court of Human Rights in *Dudgeon v UK* (1982) 4 EHRR 149 where laws penalising homosexual acts between consenting adults were found to violate the right to respect for privacy and family life under Art 8 of the European Convention on Human Rights.

115 William Lucy, "Equality Under and Before the Law" (2011) 61(3) *University of Toronto Law Journal* 411 at 413. This thinness of anthropological, moral and metaphysical assumptions is considered the safest way to organise a free, peaceful human society: Ryszard Legutko, "What's Wrong with Liberalism?' (Winter 2008) *Modern Age* 7 at 8.

116 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) at p 274.

hidden normative assumptions. The liberal state is not merely concerned with protecting citizens, but in fostering "an autonomist, experimental, choice-oriented disposition in citizens",[117] as well as a brand of (in) tolerance that "insists we have no right to evaluate the moral choices of others".[118]

59 Further, there is a covert, substantive liberal theory of the "good".[119] The view that choice is ultimate sustains arguments barring the state from the private acts of consenting adults. This is predicated on associating the good with the equal satisfaction of desire, which is essentially hedonism.[120] Worldviews based on what is chosen, rather than the facility of choice, would be ranked inferior. Nonetheless, within classic liberalism, personal autonomy and choice are not exalted as an ultimate imperative, such that the commitment to individual freedoms can tolerably co-exist with public morality.

60 However, new ideological or "progressive" liberalism in exalting personal autonomy to imperative status places the "right" before the "good" and is hostile towards public morality, which regards certain choices as normatively undesirable. Ideological liberalism, joined with egalitarianism, would assert the equal status of lifestyle choices as a fundamental, natural right.[121] This conflates the basic respect owed to all human beings who are of intrinsic worth, with the more dubious demand that any chosen lifestyle deserves equal respect.[122] If so, it follows that lifestyle libertarianism and a drug culture based on "present-oriented hedonism and self-expression" would be regarded as having the same value as "an ethic of self-control and civility".[123] Such a "neutral" posture may breed a tyrannical state-sanctioned amoralism for those rejecting this relativist credo.[124] Ideological, egalitarian liberalism becomes illiberal.

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117 Li-ann Thio, "Constitutionalism in Illiberal Polities" in *Oxford Handbook of Comparative Constitutional Law* (Michel Rosenfeld & András Sajó eds) (Oxford University Press, 2012) pp 133–152, especially at p 135.

118 There is evidence that liberalism in America manifests an illiberal intolerance: Kim R Holmes, *The Closing of the Liberal Mind: How Groupthink and Intolerance Define the Left* (Encounter Books, 2016).

119 In so far as liberalism asserts that it is neutral and only concerned about preserving choice, it is able by stealth to keep "the substantive moral values it enforces invisible": James Kalb, "Tyranny of Liberalism" (2000) *Modern Age* 241 at 242.

120 James Kalb, "Tyranny of Liberalism" (2000) *Modern Age* 241 at 247.

121 Harry M Clor, "The Death of Public Morality" (2000) 45 Am J Juris 33 at 41.

122 One could attribute more dignity to marriage than prostitution, without going so far as to treat prostitutes as devoid of any human dignity: Harry M Clor, "The Death of Public Morality" (2000) 45 Am J Juris 33 at 47.

123 Harry M Clor, "The Death of Public Morality" (2000) 45 Am J Juris 33 at 46.

124 For example, the argument that marriage law leads to unequal outcomes for homosexual couples depends on the "hidden assumption" that homosexual partnerships enjoy moral equivalence with "traditional" marriage between one

(cont'd on the next page)

61 "Equal rights" within egalitarian liberal ideology may possess quasi-trump-like status, where conceptions of the good life are relativised as mere opinions or preferences. Ideological liberals, as "moral busybodies",[125] want a remoralised state to rank competing values, to stipulate what opinion or behaviour "is morally correct or incorrect",[126] advancing a "superior" ethic.[127] In ranking conceptions of the good, ideological liberals are more egalitarian than libertarian in selecting "some fashionable minority" and making the acceptance of their demands "the criterion of 'openness' to plurality".[128]

62 For example, to assert the moral equivalence of heterosexual and homosexual conduct, or to equate traditional marriage with same-sex "marriage" serves an agenda of moral reconstruction. Although there may be some residual claim to neutrality and value agnosticism, liberalism in general is clearly a "comprehensive governing philosophy that determines the whole of public morality", with "pervasive implications for the whole of life".[129] Framing a political agenda in categorical terms as an "equality right" in order to "trump" competing moral perspectives and rights is an attempt to evade moral debate.[130] No viewpoint should get a free pass in a democratic society.

63 For those who do not hold that all ethical creeds are equal, "a supreme authority will have to impose the rule of equality on all

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man and one woman who are not already married, not related by blood and of marriageable age – sexual orientation is in fact irrelevant to the content of marriage law. Claims by unisex couples of being denied access to marriage actually constitute a challenge to the very concept of marriage as a "distinctive vision of the good of sexual relationships": Julian Rivers, "The Abuse of Equality" (Summer 2006) 11(1) *Ethics in Brief* 1 at 3.

125 Ryszard Legutko, "What's Wrong with Liberalism?' (Winter 2008) *Modern Age* 7 at 12.

126 John Mearsheimer, "Political Liberalism" in *Great Delusion: Liberal Dreams and International Realities* (Yale University Press, 2018) at pp 45–81, especially at p 50.

127 John Mearsheimer, "Political Liberalism" in *Great Delusion: Liberal Dreams and International Realities* (Yale University Press, 2018) at pp 45–81, especially at p 67. Where liberal dogma is seen as a universal salvation creed, it operates as a substitute for tradition, wisdom, empiricism and competing reasoning: Yoram Hazony, "Conservative Democracy: Liberal Principles Have Brought Us to a Dead End" *First Things* (January 2019).

128 Ryszard Legutko, "What's Wrong with Liberalism?' (Winter 2008) *Modern Age* 7 at 13.

129 James Kalb, "Tyranny of Liberalism" (2000) *Modern Age* 241 at 242–243.

130 Merely invoking "equality" does not settle the question of whether *X* should be treated the same as *Y*: see Peter Westen, "The Empty Idea of Equality" (1982) 95 Harv L Rev 537 at 596, cited in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [61].

groups".[131] This reflects an illiberal intolerance, oppressive to the free speech and conscience rights of dissenters from ideological conformity, who are denounced as oppressors. The claims of egalitarian liberalism are neither procedural nor modest.

B. Judicial posture and the reasonable classification doctrine

64 The "broad nature" of Art 12(1), providing that all persons are equal before the law and entitled to the equal protection of the law, "has lent itself to much litigation".[132] While intuitively attractive, the provision is "very difficult to apply in practice".[133] How judges view their role informs their vision of equality and how they shape doctrine.

65 "Equality"-based claims have been invoked to spearhead far-reaching social change, such as asserting, as a matter of "sexual sovereignty", the moral equivalence of traditional heterosexuality and pansexualism, including homosexuality. This involves judges making what they consider "progressive" value judgments, clothed in "highfalutin" rhetoric often with conclusory references to constitutional ideals. For example, the Indian Supreme Court, posturing as a "voice of reason", declared its mission to transform "constitutional idealism into reality" through "abandoning … some unacceptable social notions built on medieval egos" in order to serve their project of "establishing the cult of egalitarian liberalism".[134] Through implementing this cultic project, judges assume the role of oracles of decency and morality.

66 The courts in Singapore reject this judicial posture. This is unsurprising, given the antipathy for judicial overreaching; a holistic[135] approach to balancing is adopted. In the Art 12 context, the long-established reasonable classification test[136] is the prevailing single

131 Ryszard Legutko, "What's Wrong with Liberalism?' (Winter 2008) *Modern Age* 7 at 13.

132 V K Rajah, "Interpreting the Constitution" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at pp 23–31, especially at p 26.

133 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [1].

134 *Navtej Singh Johar v Union of India, THR Secretary and Ministry of Law and Justice* AIR 2018 SC 4321; Writ Petition (Criminal) No 76 of 2016 at [86]–[87].

135 Judith Prakash J advocated a "holistic approach" to determine the "meaning and effect" of Art 15 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1992 Reprint), which had to be "read as a whole" rather than "focus on one sub-paragraph and contend that that contains the essence of the article and that the other sub-paragraphs are in some way subordinate to it": *Chan Hiang Leng Colin v Minister for Information and the Arts* [1995] 2 SLR(R) 627 at [25].

136 S M Huang-Thio, "Equal Protection and Rational Classification" [1963] PL 412.

standard of review.[137] This has been affirmed, despite calls for aggressive scrutiny aligned with the ambitions of egalitarian liberalism.[138]

67 The modest "reasonable classification" test adopts a means–ends methodology in which judges ask whether a legislative classification is sufficiently related to the goals it is pursuing. This involves a two-stage test with "consecutive and cumulative" limbs:[139] first, the classification prescribed by the statute must be based on an intelligible differentia, and second, that differentia must bear a rational relation to the object the statute seeks to achieve.[140] This is accompanied by a "strong"[141] presumption of constitutionality, which critics argue is inappropriate.[142]

68 Reasonable classification as a threshold test minimally engages value judgments, preventing the court from becoming a "mini-legislature".[143] The first limb, which requires an "intelligible differentia", posits a "relatively low threshold" in requiring a distinguishing trait to be something that can be intellectually apprehended or understood, as distinct from the senses. The differentia must be objective, clear and understandable; it need not be perfect and hence, only "very seldom" would a statute not pass legal muster.[144] The criterion is value-neutral, pitched at a level that "ought to avoid any consideration of substantive moral, political and/or ethical issues"[145] which are controversial in nature. It goes beyond judicial purview to engage in resolving issues where "reasonable persons can reasonably disagree".[146]

69 Even if the differentia is clear, it can still be unintelligible if it is "so unreasonable as to be illogical and/or incoherent",[147] as it would "be

137 *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [90]–[92] ("there is no suggestion … that there could be another stricter test for other special circumstances" such as a "broader and more zealous test" entailing "a higher standard of scrutiny" where immutable traits are concerned).

138 For example, calls for a proportionality test in *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [195] and for a more expansive interpretation that goes beyond "reasonable classification" in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [33] and [93].

139 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [114].

140 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [70].

141 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [82].

142 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [155]–[163]; Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 109.

143 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [70].

144 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [65].

145 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [65].

146 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [65].

147 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [67].

repugnant to any idea of legal equality to begin with"[148] such that "no reasonable classification even exists in the first place".[149] This illogicality or incoherence must be of an "extreme nature" where "no reasonable person" could consider the differentia "as being functional as intelligible differentia".[150] There could be "no reasonable dispute" on this score, from a moral or political point of view.[151]

70 The second limb relates to the "rational nexus" criterion which will "more often than not be found", unless "a clear disconnect" exists between the legislative object and relevant differentia. This turns on the "specific facts as well as context".[152]

71 As such, the reasonable classification test does not deeply engage with the content of equality in Art 12, as it focuses on ensuring a statute is logical, coherent and common-sensical; without these traits, no reasonable classification could be found, nor could the Art 12 concept of equality be satisfied.[153]

72 The reasonable classification test thus represents a "balance" between regulating law-making and ensuring legislative leeway.

73 There is no "separate or independent" test[154] which evaluates the legitimacy of legislative purpose, as courts "should not be adjudicating on controversial issues of policy, ethics or social values".[155] In political philosophy, tests of legitimacy abound. However, a "limited element of illegitimacy"[156] is incorporated within the reasonable classification test itself, importing a minimalist substantive element into a test which is not "purely procedural".[157] This is cabined to extreme illogicality or incoherence.

74 A wide legislative berth should be accorded to Parliament in formulating classifications, given the presumption of constitutionality which places the burden on the one challenging the constitutionality of legislation to show a clear transgression of constitutional principles,

148 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [62].
149 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [67].
150 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [67].
151 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [67].
152 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [68]. The Court of Appeal noted that ascertaining the purpose and object of a statute was often an extremely complex and difficult exercise.
153 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [69] and [71].
154 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [154].
155 *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [106].
156 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [84].
157 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [71].

not simply by postulating examples of arbitrariness.[158] This flows from the presumption that "Parliament knows best for its people", that it directs its laws at "problems made manifest by experience" and hence its differentiation "is based on adequate grounds".[159] As such, the Legislature is "free to recognize degrees of harms" and "may confine its restrictions to those cases where the need is deemed to be the clearest".[160] The Legislature must have the autonomy to approach a perceived problem "incrementally", even if this approach is "significantly over-inclusive or under-inclusive".[161] In deciding whether the presumption may be sustained, the court may consider matters of common knowledge and report, "the history of the time" and "may assume every state of facts which can be conceived existing at the time of legislation".[162]

75 Nonetheless, the Government cannot just sit back and see what the challenger puts forth; if nothing is brought to the court's notice in support of the reasonableness of a classification, the presumption of constitutionality cannot "be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporation to hostile or discriminating legislation".[163] As noted in *Saravanan Chandaram v Public Prosecutor*,[164] the presumption of constitutionality in ascertaining legislative validity is "no more than a starting point that legislation will not presumptively be treated as suspect or unconstitutional".[165] Otherwise, it runs the risk of "presuming the very issue which is being challenged". The court must apply "applicable principles", not personal preferences, to determine whether a challenged law is constitutional.[166]

158 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [80].
159 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [80].
160 *Shri Ram Krishna Dalmia v Shri Justice S R Tendolkar* AIR 1958 SC 538; [1959] SCR 279 at 297, para (d), *per* Sudhi Ranjan Das CJ; referenced in *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [56].
161 *Haves v City of Miami* 52 F 3d 918 at 923 (11th Cir, 1995). The US Supreme Court in *FCC v Beach Communications Inc* 508 US 307 at 314 (1993) held that a statute would survive rational basis scrutiny so long as "there is any reasonably conceivable state of facts that could provide a rational basis for the statute".
162 *Shri Ram Krishna Dalmia v Shri Justice S R Tendolkar* AIR 1958 SC 538 at 547–548, cited in *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 513 at [79].
163 Wee Chong Jin CJ in *Lee Keng Guan v Public Prosecutor* [1977–1978] SLR(R) 78 at [19], citing *Shri Ram Krishna Dalmia v Shri Justice S R Tendolkar* AIR 1958 SC 538 at 547–548.
164 [2020] 2 SLR 95.
165 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [154]. This understanding also applies to the acts of those holding high public office: *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [63].
166 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [154].

76 Clearly the reasonable classification test does not robustly engage with value judgments,[167] though it does to a limited extent impact the Art 12(1) concept of equality.[168] The test cannot provide the "normative as well as analytical impetus" to answer fundamental questions, such as identifying situations where "a basic level of equality"[169] would be legally mandated. Unlike the European proportionality test, it does not require that the least restrictive measure be applied where rights are restricted, only that the means or end fit be broadly proportionate.

77 Nonetheless, the test is not "merely technical or mechanistic";[170] there is room for variability in its application, though not after the American tiered scrutiny approach, where various factors attract pre-ordained levels of judicial scrutiny. The reasonable classification test operates in the context of considering all relevant circumstances, with careful scrutiny applied where discrimination implicates factors like race, religion or Pt IV fundamental liberties.[171] This might translate into calibrating the strength of the presumption of constitutionality or if a decision-maker is shown to have ignored the presence of these factors, this may speak to the unreasonableness of the classification.

C. The reasonableness of the reasonable classification test and the rejection of rightism

78 The reasonable classification test is a common-sense test grounded in an imperfect pragmatism. "Legislatively impractical, if not impossible",[172] perfect classifications are not required. Under-inclusive or over-inclusive classifications are not in themselves fatal.[173] In assessing the permissibility of classifications, the court should not be fanatical,

167 This is distinct from the Indian judicial approach, *eg*, in *Navtej Singh Johar v Union of India, THR Secretary and Ministry of Law and Justice* AIR 2018 SC 4321; Writ Petition (Criminal) No 76 of 2016, as noted in *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [222]–[223].

168 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [113]. The notion of equality embodied in the reasonable classification test has been described as "thin" and "formal": see Jaclyn L Neo, "Equal Protection and the Reasonable Classification Test in Singapore: After *Lim Meng Suang v Attorney-General*" [2016] Sing JLS 95 at 115 and Benjamin Joshua Ong, "New Approaches to the Constitutional Guarantee of Equality Before the Law" (2016) 28 SAcLJ 320 at paras 20 and 46.

169 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [61].

170 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [113].

171 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [113].

172 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [81].

173 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [81]–[82]. See *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [116] on the exemption of men over 50 from caning as a non-fatal over-inclusive classification.

finical or dogmatic,[174] as classifications "produce inequality of varying degrees".[175]

79 The idea of "reasonableness" is variously applied in relation to the reasonable classification test. Conceptually, "reasonableness" does not import the idea of "one right answer" but a permissible range of "rational" legislative solutions. As such, two reasonable persons can in good faith "arrive at quite different decisions based on the same facts", pointing to "an inherent measure of latitude" in assessing reasonableness.[176] If two reasonable persons disagree over whether an intelligible differentia is so illogical and incoherent as not to be able to function as a differentia, the differentia will pass muster.[177]

80 Translated to the plane of inter-institutional relationships, the reasonable classification test imports a high degree of public trust in the political process and sweet reasonableness of Parliament;[178] this views parliamentarians as responsible law-makers who represent their constituents' views, such that Parliament can operate to secure liberty and the common good. Where there are competing views on a controversial non-legal point, the "only reasonable conclusion" for a court not seeking to act as a legislative chamber is to register the "considerable uncertainty," rather than pick a side.[179]

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174 *Datuk Haji bin Harun Idris v Public Prosecutor* [1977] 2 MLJ 155, *per* Lord Suffian, referenced in *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [56].

175 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [44].

176 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [95]. The High Court in *Vijaya Kumar s/o Rajendran v Attorney-General* [2015] SGHC 244 at [41] held that the music restrictions on a religious procession bore a reasonable nexus to the regulatory objective, to maintain public order, such that it was "not illogical or unreasonable" even if others may have decided "to take more risks by giving greater latitude". Notably, the Court of Appeal in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [86] did not consider *Wednesbury* unreasonableness an appropriate test where the constitutionality of legislation is challenged.

177 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [67]. The Court of Appeal in *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [111] expressed this in terms of something very rare which may be "so manifestly discriminatory that no reasonable person would consider the differentia adopted by the law to be a valid means of differentiation". M Karthigesu JA in *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78 at [67] stated that a reasonable classification was one which "an ordinary and reasonable citizen" appreciated was necessary and not unjust.

178 Although Parliament had the power to decide "all blue-eyed babies should be murdered", there were restraints on Parliament as "legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it": A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan and Co, 1889) at p 77.

179 For example, in relation to whether sexual orientation is immutable: *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [278].

81 The reasonable classification test seeks to balance protecting equality with safeguarding the "political autonomy" Parliament has to legislate within constitutional parameters.[180] Something "reasonable" is "capable of being supported or justified by reason".[181] This will be shaped by context, as in *Public Prosecutor v Taw Cheng Kong*:[182] Here, the under-inclusiveness of anti-corruption legislation which did not apply to non-citizens, was not fatal. Instead, it was commended as a piece of "highly responsible legislation",[183] which was not "arbitrary or unreasonable"[184] in seeking to preserve international comity.

82 If the nexus between object and legislative classification is "sufficiently strong",[185] enjoying some degree of effectiveness, it would pass legal muster. The differentia had to be "broadly proportionate"[186] to the legislative purpose, not "the best", as "reasonable people may well disagree" on what a better differentia is, which is a social policy question[187] for the Legislature.[188] Judicial intervention was only warranted if the differentia was "clearly inefficacious".[189] The court should remember that Parliament faced "other practical constraints or considerations" and bore the main responsibility in legislating "practicable" laws to meet social needs.[190]

83 What may fail the reasonable classification test is a law banning women from driving on the roads.[191] Under the first limb, the differentia might be illogical or incoherent, the only substantive criteria within the

180 *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [89].
181 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [89].
182 [1998] 2 SLR(R) 489.
183 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [83].
184 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [83].
185 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [97]. The closer the correspondence between the classification and the legal purpose, the easier it is to argue it is reasonable. This is a question of degree which imports in some uncertainty, as seen in the different observations of the High Court and Court of Appeal that the means or end fit only went "a little way" (*Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR (R) 78 at [65]), as opposed to going "some way" and having a sufficiently strong nexus: *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [81].
186 The quantity of addictive drugs trafficked was "broadly proportionate" to the amount brought into the illegal market, the scale of a drug-dealer operations and the social harm posed by drug trafficking crimes: *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489. See also *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [100].
187 *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at [113], citing *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 at 673.
188 *Public Prosecutor v Taw Cheng Kong* [2010] 3 SLR 489 at [113].
189 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [95].
190 *Taw Cheng Kong v Public Prosecutor* [1998] 2 SLR(R) 489 at [88].
191 This hypothetical was raised and discussed in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [114].

scope of the test. Under the second limb, there may not be a rational relation between the differentia and the legislative object, unless the latter was precisely to ban all women from driving; this would bring it "full circle" to the question of whether the law in treating men and women differently violated Art 12(1) such that the differentia was indeed illogical or incoherent.[192] While the first limb deals in a limited sense with the substantive quality of the law, the second limb deals with its efficacy.

84 Most importantly, a faith in political constitutionalism is evident in the judicial observation that such a law would be an "extreme position" which a "reasonable Parliament in the Singapore context"[193] would probably never enact. It would explode a shared political rationality and social consensus, not gel with the sensibilities of most Singaporeans and extract a devastating political cost. It would violate erode the presumption that Singapore acts consistently with its international commitments, including those under the Convention for the Elimination of All Forms of Discrimination against Women.

85 Where public opinion is sharply divided over a "culture war" issue, judges must "not take sides on political issues", allowing Parliament to "settle issues which the ordinary man regards as controversial".[194] Even where public opinion has "shifted closer to one end of the spectrum", the courts should as interlocutor "call on Parliament to consider changing the law",[195] where "moral questions" are concerned.

86 The judicial deference to Parliament's legislative role which the reasonable classification test engenders reflects the conviction that unelected judges should not take away political power from elected politicians. The limited role accorded to legitimacy within the threshold test of requiring a rational relation between the means–end fit sets its face against rightism, both in the sense of declaring new rights and according these categorical status, accompanied by predetermined levels of review, or in adopting intrusive standards of review, truncating parliamentary autonomy by requiring that the means adopted be one which minimally impairs the right. The reasonable classification test involves contextual

192 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [205].

193 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [114].

194 Lord Reid, "The Judge as Law Maker" (1972–1973) 12 JSPTL (NS) 22 at 23, quoted in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [178].

195 See, *eg*, *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [88] and *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 at [94]. Only exceptionally, where there is objective evidence that law and society has rejected it, would a court refuse to enforce an outmoded legal principle, such as treating women as chattels in the common law tort of enticement: *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [139].

balancing, where rational review may be beefed up by careful scrutiny where constitutional rights are at stake, but one which appreciates that moral deliberation in relation to social problems belongs to the realm of politics, where mechanism of political accountability apply, and within which competing rights and interests may be negotiated and compromises struck. Rights in this conception, are not products of a post political society where the mere invocation of rights rhetoric may prematurely terminate the processes of deliberative democracy.