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New approaches to the constitutional guarantee of equality before the law: 'Lim Meng Suang v Attorney-General' [2015] 1 SLR 26 (CA); [2013] 3 SLR 118 (HC): 'Tan Eng Hong v Attorney-General' [2013] 4 SLR 1059 (HC); [2012] 4 SLR 476 (CA)

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Case Note

NEW APPROACHES TO THE CONSTITUTIONAL GUARANTEE OF EQUALITY BEFORE THE LAW

Lim Meng Suang v Attorney-General
[2015] 1 SLR 26 (CA); [2013] 3 SLR 118 (HC)

Tan Eng Hong v Attorney-General
[2013] 4 SLR 1059 (HC); [2012] 4 SLR 476 (CA)

In a recent series of challenges to s 377A of the Penal Code (Cap 224, 2008 Rev Ed), the courts have developed the jurisprudence on review of legislation under Art 12(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution"). Both the High Court and the Court of Appeal set a very high (but not insurmountable) threshold, but each did so in a different manner due to differing conceptions of equality. A critical examination of both approaches shows that the courts' conclusions are ultimately defensible more as a means of disposing of the instant case than as a watertight doctrinal foundation for Art 12(1) adjudication. The judgments also bring up other miscellaneous areas for further development.

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I. Introduction

1 Section 377A of the Penal Code[1] criminalises male-male acts of "gross indecency". Against the backdrop of political debate in public *fora* and in Parliament regarding whether or not s 377A should be repealed, two attempts were made to have the courts declare it unconstitutional for breach of the principle of equality before the law in Art 12 of the Constitution of the Republic of Singapore[2] ("the Constitution"). The first was by Tan Eng Hong, who was charged with an offence under s 377A (though the charge was later amended to one under s 294(*a*) of the Penal Code, which focused on the public nature of his sexual act rather than the fact that it involved two males). The second was by Lim Meng Suang and Kenneth Chee Mun-Leon, who sought to challenge s 377A

1 Cap 224, 2008 Rev Ed.
2 1985 Rev Ed, 1999 Reprint.

simply on the basis of their being homosexual men. Both applications were dismissed by Quentin Loh J sitting as the High Court;[3] these decisions were upheld upon a conjoined appeal (but on different grounds) by a unanimous Court of Appeal comprising Andrew Phang Boon Leong JA, and Belinda Ang Saw Ean and Woo Bih Li JJ.[4]

2 Political interest in the outcome of the cases aside, these cases are noteworthy for containing some of the most detailed jurisprudence on Art 12(1) in particular and the judicial review of legislation in general: they were not simply a matter of applying settled law. Both courts struggled with the problem of how to formulate a test that would reserve to the courts a real power to identify and strike down the most objectionable laws, but not others which are a legitimate exercise of legislative power. In other words, these cases demonstrate the tension between the recent judicial adoption of the "green-light" model of the State[5] and the much older statement that:[6]

> … [t]he courts, in upholding the rule of law in Singapore, will no doubt readily invalidate laws that derogate from the Constitution which is the supreme law of our land.

3 Thus, while there are interesting debates to be had on the proper roles of the processes of prosecutorial discretion and adjudication by the courts in such polarising matters,[7] as well as the broader issue of the interaction between morality and the law,[8] this note is concerned with the doctrinal implications for Singapore's equality law under Art 12(1). It seeks to add to existing work on this matter[9] by, without expressing an opinion on the outcome of the case or the merits of s 377A, highlighting elements of the procedural history of the cases as well as the differing approaches, both explicit and implicit, taken by the High Court and the Court of Appeal. The author will explore each court's approach, offering several possible doctrinal criticisms (but without commenting on whether they would necessarily have made

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3 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118; *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059.

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

5 See generally *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345, endorsing Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469. For a summary, see Benjamin Joshua Ong, "Public Law Theory and Judicial Review in Singapore" *Singapore Law Watch Commentary* (December 2013).

6 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [89].

7 Lynette J Chua, "The Power of Legal Processes and Section 377A of the Penal Code" [2012] Sing JLS 457.

8 Tham Lijing, "377A: Law and Morality" *Singapore Law Gazette* (January 2015) at p 21.

9 Yap Po Jen, "Section 377A and Equal Protection in Singapore: Back to 1938?" (2013) 25 SAcLJ 630.

a difference to the outcome of the case) and ultimately concluding that the courts' approaches are, in the light of the complexities involved, defensible mainly as a means of disposing of the instant case but not as a means of laying the foundations for future Art 12(1) issues in other cases.

4 The issues raised by the judgments have proven to be so complex that organising this note has proven to be a challenge. Nonetheless, it is hoped that the following structure will be the most useful. The author will begin by examining the nature of the applicant's claims,[10] before beginning his analysis of the nature of equality and hence the test for constitutionality under Art 12(1) by examining the High Court's approach.[11] This will prove to require a more detailed look at the concept of legislative purpose,[12] which will lay the groundwork for an examination of the Court of Appeal's approach[13] by considering but ultimately rejecting a possible solution to the issues with the High Court's approach. The judgments also raise several miscellaneous side issues, which will be examined (in no particular order)[14] before some concluding remarks are made.[15]

II. The claims made by the applicants

A. A novel type of claim

5 Although two cases were heard as conjoined appeals by the Court of Appeal, it must be borne in mind that they were fundamentally different. Lim and Chee's case was based on the effects of the very existence of s 377A: they said that it "reinforces … discrimination" and "social stigma" which, they said, made homosexuals "feel that they cannot be openly affectionate in public" and led to "discrimination in school and in the army".[16]

6 On the other hand, Tan's case was, at least at first, based not on the *existence*, but rather on the *application*, of the law. Hence, one of the Court of Appeal's *main* reasons for granting him leave to pursue the claim was the potential violation of his constitutional rights between his arrest and the amendment of the charge.[17] Even in so far as the alleged

10 See paras 5–11 below.
11 See paras 12–25 below.
12 See paras 26–38 below.
13 See paras 39–62 below.
14 See paras 63–82 below.
15 See paras 83–88 below.
16 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [5]–[7].
17 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [151], [154] and [172].

latent violation of rights caused by the very existence of s 377A was concerned, the court focused on the potential *criminal charges* faced by him in future, rather than on matters such as social stigma.[18] The closest thing that came to a recognition of social stigma as a violation of a right known to the law was the observation that s 377A "affects the lives of a not insignificant portion of our community in a very real and intimate way",[19] but even then the court immediately went on to focus on the *legal* consequences of this (*eg*, victims of male-male domestic abuse being reluctant to report it *for fear of being prosecuted*) rather than the *social* ones.

7 Seen in this light, Lim and Chee's case was truly novel, in that it was one of the first allegations that a law could be rendered unconstitutional by virtue of its extra-legal effects, or at least its tendency to produce them. One might therefore think that the traditional framework of asking whether the statute's classifying, and thus treating differently, legal subjects is (a) founded on an "intelligible differentia"; and (b) rationally linked to the purpose of classification (the "traditional test")[20] was fundamentally unsuitable to Lim and Chee's case. This is because this framework has to do with whether the effects *mandated* by the statute *qua* law are constitutional, whereas Lim and Chee's concerns were, at least in part, really about the effects *occasioned* by the statute *qua* sociological phenomenon. In other words, their claim was not about equality before the *particular law in question* (that is, equality before s 377A), but rather equality before the *legal system* (equality before *the law*, in the sense of the edifice of the legal system in totality as experienced by the legal subject).

8 This view might shed some light on why the courts characterised the differentia as they did. On its face, s 377A targets male-male *sexual activity*, not *homosexuality* itself. Thus, two heterosexual men who engage in sexual activity with one another would be caught by the law, but not two homosexual men who perform intimate, even sexual, acts not amounting to "gross indecency". Yet Loh J held (and the Court of Appeal agreed)[21] that the differentia was between "male *homosexuals* or *bisexual* males who perform acts of 'gross indecency' on another male" [emphasis added] and other persons[22] – he read into the purpose of the statute a differentiation based on sexual orientation which is not evident from the face of the statute.

18 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [173]–[183].
19 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [184].
20 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [185].
21 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [111].
22 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [48].

B. Were the claims legal or extra-legal?

9 Thus, strictly speaking, the right that Lim and Chee sought to assert in court was not quite the same as the right on the basis of which Tan, and probably, by extension, they,[23] had been granted *locus standi*. One might suspect that it is their novel contentions that prompted some apprehension by the Court of Appeal, which began its judgment with a warning that the court cannot "be sucked into and thereby descend into the *political* arena" [emphasis in original] by taking into account "extra-legal considerations" instead of only "legal arguments".[24] On this view, as far as the Court of Appeal was concerned, the only permissible reason for challenging a criminal statute was fear of prosecution under it (and not, say, social stigma which it adds to).

10 It is certainly true that, as the Court of Appeal noted, judicial fairness does not demand that the court start with a desired substantive outcome in mind and then twist the law to work towards it. The Court of Appeal's judgment does, however, raise the issue of what exactly a "legal argument" is, given that the court has the power to apply *and* to change the law: there is an element of circularity in saying that the court can only consider legal arguments, given that, by definition, "legal" matters are simply those which a court of law may consider. It might, moreover, be the case that the law demands (or is changed so as to demand) that the courts take into account what would *otherwise* be "extra-legal considerations".

11 The upshot is that one cannot escape from the fact that the court has *Kompetenz-Kompetenz*, in that it itself determines what is "legal" and what is not: the phrase "legal argument" may well be a stand-in for some unarticulated ideas of the proper relative roles of the various institutions and/or the *content* of the arguments. Therefore, Lim and Chee's claim may be seen as being not only a claim brought *to* the court, but a claim *about* the court and its role in engaging with constitutional debates. The Court of Appeal's response to this will be looked at more closely below.[25] For now, the author will begin by examining the concept of equality and its implications for Loh J's analysis.

23 The Attorney-General did not challenge Lim and Chee's having *locus standi* when they came before the High Court, and made a challenge before the Court of Appeal but then withdrew it: *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [31].

24 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [6]–[12].

25 See paras 39–43 below.

III. The High Court's approach: Legitimacy of legislative purpose

A. The history of Art 12(1)

12 Loh J, in describing the history of Art 12(1), said that it may be traced to (a) "English common law, which prohibits special privileges in favour of any individual and mandates the equal subjection of all classes of persons to the law";[26] and (b) the desire to prevent racial discrimination against black people in the US after the American Civil War.[27] Thus, Art 12(1) was described as "includ[ing] a guarantee of substantive equality";[28] and, for Loh J, the problem lay in ensuring that *formal* inequality (*eg*, taxing high-income earners more than others),[29] which is not only permissible but *necessary*, was not used as a cloak for impermissible *substantive* inequality, which is contrary to the goal of establishing an "egalitarian society".[30] (The issue of exactly what kinds of substantive inequality are impermissible will be revisited below.)[31]

13 If equality law had its roots in "classes" of persons, what did Loh J mean when he concluded that, in Singapore, equality law should be "less fixated with the idea of *classes*, and more focused on the fundamental rubric that 'like should be treated alike'" [emphasis in original]?[32] The answer lies in the nature of equality itself.

B. Equality as the rule of law

14 What follows is an attempt to make sense of the model of the concept of equality contained in Art 12 that Loh J implicitly had in mind, because, as will be seen, this is rather different from the Court of Appeal's conception of Art 12.

15 One might, based on the historical account, think that equality is best thought of as being a right personal to legal subjects: Art 12 falls under the part of the Constitution titled "Fundamental Liberties", and Loh J referred to it as a "right".[33] However, it is not, in the sense that it is not a matter purely between the individual and the State – it (to recall

26 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [35].
27 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [36].
28 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [37].
29 One might infer this example from the reference to "taxation": *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [41].
30 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [40], citing Huang-Thio Su Mien, "Equal Protection and Rational Classification" [1963] PL 412 at 412.
31 See paras 44–62 below.
32 *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [61].
33 *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [89].

Hohfeld's analysis)[34] lacks the quality of bilaterality. This is because the content of the "right" would shift depending on how others were treated: if everyone in society were (for example) tortured by the State, nobody could complain about inequality; but if only some people (say, members of a particular race) were tortured, not only those who were of that race, but even those who were *not*, could be said to be treated unequally from the rest. The "right" to equality would thus be, like the "right" of a beneficiary under a will, ambulatory and not concrete.

16 If the "right to equality" is not really a personal right, what is it? It is, on its face, an embodiment of the rule of law:[35] it simply says that laws must be justified. To say that the "right to equality" is something to be "balanced" against other concerns[36] is not simply a claim that the Art 12 "right" is limited in the same way as, say, the Art 14 right to freedom of expression is. The Art 14 analysis weighs countervailing considerations against the right to freedom of expression, which is a right exigible against the State. By contrast, the Art 12 analysis weighs countervailing considerations against not a personal right, but rather the reasons for a law to exist. This is because *all* law creates inequality in treatment (*eg*, a law penalising theft creates inequality between thieves and non-thieves); it is always possible to say that the inequality is not between, say, persons of different citizenship, but rather simply between people to whom the law applies and people to whom it does not. This is what Peter Westen termed the "empty idea of equality": "[E]quality is entirely 'circular'. It tells us to treat like people alike; but when we ask who 'like people' are, we are told they are 'people who should [according to the statute in question] be treated alike'." Thus, he says, what is commonly termed "equality analysis" in fact "logically collapses into rights analysis", *eg*, a claim against racism is a claim for a right to "racial justice" rather than a claim based on equality.[37]

C. The High Court's approach to Art 12(1) review

17 But if equality is an "empty idea", as Westen said (and the Court of Appeal seems to have agreed),[38] is it not arguable that, as the Court of Appeal itself argued in a different context (*viz* that of "proximity" in the law of negligence), "[r]ather than denouncing it as a mere 'label', the

34 See generally Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions As Applied in Judicial Reasoning" (1917) 26(8) Yale LJ 710.

35 *Attorney General of Canada v Lavell* [1974] SCR 1349 at 1365–1367.

36 *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [89].

37 Peter Westen, "The Empty Idea of Equality" (1982) 95(3) Harv L Rev 537 at 547, 560 and 565.

38 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [61], citing Peter Westen, "The Empty Idea of Equality" (1982) 95(3) Harv L Rev 537.

courts should strive to infuse some meaning into it"?[39] This is, it is submitted, what Loh J attempted to do. As has been seen, to say that equality is a "right" would lead one to begin analysis with the question of whether the "right" has been "infringed". However, because *all* law is a *prima facie* "infringement" of equality, the real focus ought to be on the concept of *justification*. This would explain why Loh J said that his response to the potential circularity in the traditional two-stage test under Art 12, which is essentially the problem that Westen identified, was to note that "it is possible to conceive of cases where the object of the legislation is illegitimate", in which case "the court cannot stand by the sidelines and do nothing".[40]

18 It is important to appreciate how large a change this was from the traditional test. It is true that Loh J cited this *older* line of case law as well, gleaning from it the proposition that:[41]

> It is now settled law that equality before the law and equal protection of the law under Art 12(1) does not mean that all persons are to be treated equally, but that all persons in like situations are to be treated alike.

But it is immediately evident how this *alone* does not live up to the spirit behind Art 12(1) itself as Loh J had found it to be. To take the American historical context Loh J noted, a law discriminating against black people would certainly fall foul of the spirit and purpose of Art 12(1), yet it would indeed pass muster under the traditional test: it would treat "persons in like situations" (*viz* all black people) alike, though badly and differently from other persons (*viz* persons of other races).

19 This uneasy result might explain why Loh J saw the need to add analysis of the legitimacy of the purpose of the legislation as a limb of the Art 12 test. As has been argued, the crux of Art 12 is the justification of law. To Loh J's mind, however, it was not enough to say that the classification was justified relative to the reason for classification, for the two might often, by definition, overlap, as they did here:[42]

> … there is a complete coincidence between *the differentia* underlying the classification prescribed by the legislation and the class defined by *the object* [in the sense of *objective* or *purpose*] of that legislation. [emphasis added]

39 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [80].

40 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [114].

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

42 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [100].

Rather, he said, the reason for classification *itself* had to be justified.[43]

20 Unlike *formal* equality, which was the concern of older cases such as *Ong Ah Chuan v Public Prosecutor*,[44] Loh J said that the question of legitimacy of purpose was "undoubtedly a substantive concept". He provided, as an example of an illegitimate purpose, the statute in *Takahashi v Fish and Game Commission*[45] ("*Takahashi*"), which prohibited "person[s] ineligible to citizenship" from receiving commercial fishing licences (and, in fact, used to prohibit "alien Japanese" in those terms from doing so).[46] However, this usefully illustrates the fact that, as Loh J recognised,[47] the new approach of assessing the legitimacy of legislative purpose is not free from problems.

D. Issues with the High Court's approach

21 First, while one would think that Lim and Chee's argument was that s 377A, like the statute in *Takahashi*, "discriminated against the targeted group … as an end in itself".[48] However, the vital difference is that, while in *Takahashi* it was the *statute itself* that *constituted* the discrimination, Lim and Chee only claimed that the discrimination was an *existing* societal phenomenon which s 377A *reinforced*.[49] Again, this brings one back to the problem of how to frame an Art 12 claim: for example, Loh J appears to have struggled with the fact that the classification performed by s 377A was essentially one along the lines of sexual orientation,[50] yet it did not do so *explicitly*.

22 Second, there are conceptual issues with the very idea of legislative purpose. For example: For the purposes of inquiring whether a law is justified because it has a "legitimate" purpose, should regard be had only to the effects specifically intended to be created by the law itself (as was Tan's claim – it was a claim in respect of the criminalising effect of s 377A, which was plain on its face), or should other effects also be considered, such as the illocutionary effect of the law and its practical consequences for homosexuals (as was Lim and Chee's claim)? These issues will be explored in more detail below.[51]

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43 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [114].
44 [1979–1980] SLR(R) 710.
45 334 US 410 (1948).
46 *Takahashi v Fish and Game Commission* 334 US 410 at 413–414 and 413, fn 3 (1948).
47 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [50]–[51].
48 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [115].
49 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [7].
50 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [48].
51 See paras 26–38 below.

23 Third, the idea that the purpose has to be legitimate leaves open the question as to the *standard* of justification. In the US, the position is that "prejudice against discrete and insular minorities … may call for a correspondingly *more searching judicial inquiry*" [emphasis added].[52] This has been interpreted to include "racial classifications" on the grounds that they are "especially suspect".[53] Later debates in American equality law have thus focused on what other grounds of differentiation are also inherently suspect,[54] though it is not always clear *why* they are and why the standards of review are what they are.

24 Given all these issues, one can understand why Loh J took the safest course of setting the threshold for legitimacy of purpose as being akin to "*Wednesbury* unreasonableness",[55] which is (or, at least at the time, was) high.[56] However, this itself contains ambiguity: Would the standard be (to adapt the words in *Associated Provincial Picture Houses v Wednesbury Corp*[57] ("*Wednesbury*") itself) that no reasonable Legislature could ever pass a statute with such a purpose,[58] or that no reasonable Legislature, *having regard to Singapore's Constitution*, could ever do so, or that no reasonable Legislature, *having regard to the views of the people of Singapore*, could ever do so? This problem is not particular to the judicial review of primary legislation; it is inherent in *Wednesbury* itself.

25 This may explain why, by way of comparison, several foreign jurisdictions have refined the test in various ways: for example, (a) the European Court of Human Rights has adopted a conception of "necessary in a democratic society" as a test for legitimacy of purpose[59]

52 *United States v Carolene Products Co* 304 US 144 at 152, fn 4 (1938).

53 *Loving v Virginia* 388 US 1 at 11 (1967).

54 Thus, for instance, *United States v Virginia* 518 US 515 at 532–533 (1996) held that there the State must show an "exceedingly persuasive" justification for gender-based classification (although, for reasons which need not detain us here, this burden on the State is not as heavy as with race-based classification).

55 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [116].

56 The traditional view is that "the standard of [*Wednesbury*] unreasonableness, is from a jurisprudential perspective, pragmatically fixed at a very high level": *Chee Siok Chin v Minister of Home Affairs* [2006] 1 SLR(R) 582 at [125]. However, the approach in the recent case of *Vijaya Kumar s/o Rajendran v Attorney-General* [2015] SGHC 244 casts doubt on this view, in that it also alluded to considerations which one would associate more with proportionality: while Tay Yong Kwang J in that case described the threshold as being "relatively high" (at [48]), he also did focus on the police's having "nuanced its approach over time" and taken a "calibrated approach": at [38].

57 [1948] 1 KB 223.

58 See generally *Associated Provincial Picture Houses v Wednesbury Corp* [1948] 1 KB 223.

59 See generally Convention for the Protection of Human Rights and Fundamental Freedoms (213 UNTS 222) (4 November 1950; entry into force 3 September 1953), *eg*, Arts 8, 9, 10 and 11.

(with its own jurisprudence on the values of a "democratic society", *eg*, "pluralism, tolerance, and broadmindedness");[60] (b) the Supreme Court of Canada considers qualities particular to grounds of discrimination expressly prohibited by the Canadian Charter of Rights and Freedoms[61] or analogous to them[62] such as immutability and lack of political power;[63] (c) the Constitutional Court of South Africa applies tests such as whether the "fundamental human dignity of persons as human beings" is potentially impaired, or "comparably serious" harm is done;[64] and (d) anti-discrimination legislation in the US has (in the employment context) focused not only on the *purpose* of measures that limit rights, but also on the *effects*.[65] Of course, each of these approaches has problems of its own: in particular, there is always the problem of the role that grounds of discrimination ought to play and whether some should be more protected than others.[66] One may therefore take issue with Loh J's analysis, but must bear in mind that the various issues he faced are by no means easy to tackle.

IV. The concept of legislative purpose

26 Before examining the Court of Appeal's judgment (though at the risk of disrupting the flow of thought), it is necessary to examine in more detail the very concept of legislative purpose for two reasons. First, it is central to Loh J's analysis. Second, it raises problems which, as will be seen, turn out to be similar to the issues raised by the Court of Appeal's approach.

60 *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 at [83] and [87].

61 Constitution Act 1982 (Canada) Pt I.

62 For completeness, it is submitted that the approach of analogising from the grounds of discrimination explicitly prohibited by Art 12(2) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) to other grounds such as gender and sexual orientation should not be adopted in Singapore; if anything prohibits discrimination on these un-enumerated grounds, it must be Art 12(1), not Art 12(2). This is because, unlike in certain foreign jurisdictions, the list of prohibited grounds of discrimination in Art 12(2) was not intended to serve as a list of examples, but rather as an exhaustive list targeted at very specific issues facing Singapore when Art 12(2) was enacted in its present form in the context of immediate post-independence Singapore: see *Report of the Constitutional Commission* (1966) ch 2 (Chairman: Wee Chong Jin).

63 *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at 152–153, *per* Wilson J, and 195, *per* La Forest J.

64 *Harksen v Lane NO* 1997 (1) SA 300 at [50(b)(i)].

65 Civil Rights Act 42 USC § 2000e-2(k) (1964) (also known as Title VII of the Civil Rights Act).

66 See generally *Egan v Canada* [1995] 2 SCR 513 at 540–572, *per* L'Heureux-Dubé J (dissenting) and Owen M Fiss, "Groups and the Equal Protection Clause" (1976) 5(2) Phil & Pub Aff 107.

A. The problem of circularity

27 Loh J recognised that "[d]etermining the purpose or object of a piece of legislation is not always a straightforward task".[67] He was not referring merely to the *evidential* difficulty of doing so; he was, rather, referring to the *conceptual* difficulties with the very idea of legislative purpose, *eg*, that of the "proper framing of the object or purpose of the impugned legislation".[68] Yet his approach shows that, with respect, these difficulties had not been fully overcome, and that, even if the Court of Appeal's decision is authoritative on the purpose of s 377A, the nature of the concept of legislative purpose remains a significant open question. This is best illustrated by following how the courts determined the purpose of s 377A.

28 Loh J began by noting that the enactment of s 377A in the Penal Code in the Straits Settlements in 1938[69] was done with reference to the introduction of a similar provision in England in 1885.[70] He characterised the purpose of s 377A as being to, based on the understanding that acts of "gross indecency" between men *whether in private or in public* was "regrettable", add to and "strengthen" the existing law in Singapore that criminalised them *in public* by also criminalising them *in private*, hence also bringing Singapore law on this point in line with the law in England and other British colonies.[71]

29 Note that this is a statement, not of the *factual problem* targeted by the law, but rather *what legal outcome (*viz *criminalisation) the law was thought to achieve*.[72] The distinction between the two is similar to that between motive and intention in criminal law:[73]

> A man who … boards a plane which he knows is bound for Manchester, clearly *intends* to travel to Manchester, even though it is the last place he wants to be and his *motive* for boarding the plane is simply to escape pursuit. [emphasis added]

It is true that the law *would* criminalise consensual "gross indecency" in private, such that such criminalisation must have been the *intention* of

67 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [50].
68 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [58], citing Tan Yock Lin, "Equal Protection, Extra-territoriality and Self-incrimination" (1998) 19 Sing L Rev 10.
69 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [66]–[71].
70 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [63]–[65].
71 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [67].
72 This is a distinction drawn by Bennion in Francis Bennion, *Bennion on Statutory Interpretation* (London: LexisNexis, 5th Ed, 2008) at pp 483–486.
73 *R v Moloney* [1985] AC 905 at 926.

the Legislature. However, the "*motive*"[74] for introducing this law – that is, the "social mischief" ("a factual situation … which Parliament desires to remedy") or "legal mischief" ("a condition which constitutes a defect in the law") which motivated the passing of the law[75] – was said in 1938 to be that under English law, *viz* that in 1885 – "to introduce legislation to protect persons above the age of 13 (as the existing law already protected those below 13) from *assaults*" [emphasis added].[76]

30 Similarly, before the Court of Appeal, counsel had contended that the purpose of s 377A was only to combat male prostitution, such that the differentia drawn by s 377A was not rationally connected to this purpose, but was instead too broad.[77] The Court of Appeal responded that the legislative purpose was not *only* to suppress male prostitution, but must *also* have been to combat what was considered to be "indecent behaviour" and "injury … to the morals of the community" in general.[78] This point was based on, *inter alia*, reports that referred to the need to supplement s 377 (which prohibited "carnal intercourse against the order of nature") rather than to supplement another statute which prohibited prostitution. The next premise seems to be that there is no evidence that society's idea of what is "indecent" or "immoral" has changed since then.

31 But this leads to the same problem of circularity which Loh J identified. The Court of Appeal began with the question "What is the purpose and object of Section 377A?"[79] It eventually answered it with:[80]

> [T]he available objective evidence demonstrates that s 377A was intended to be of *general* application, and was not intended to be merely confined only (or even mainly) to the specific problem of male prostitution. [emphasis in original]

Again, this is a statement of the *intended effect* of the legislation, not its *purpose* in the sense of the *mischief* that *motivated* the passing of the law; it addresses *what* the legislation criminalised, not *why* it did. Given this approach, the Court of Appeal was constrained to hold that there was a "complete coincidence"[81] between the differentia and the "purpose":

74 The author is using the word "motive" for the convenient analogy with the criminal law; he does not mean it to refer to Bennion's definition of motive as the "political reasons for the historical decision to legislate in [a particular] way at [a particular] time for [a particular] purpose": Francis Bennion, *Bennion on Statutory Interpretation* (London: LexisNexis, 5th Ed, 2008) at p 484.

75 *R v Moloney* [1985] AC 905 at 922–923.

76 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [65].

77 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [131]–[139].

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

79 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [116].

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

81 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [153].

the differentia was between men who commit acts of "gross indecency" between other men, and the "purpose" was to prohibit the same.

32 If "purpose" is taken to refer to the intended *legal effects* of the statute – what criminal lawyers would call "intention" – then there is great potential for a circular statement of purpose: the law criminalises X; the purpose of the law is said to be "to criminalise X". It is no wonder, then, that Loh J saw the potential circularity – "statements in Parliamentary debates which will yield an apparent purpose … that *invariably* relates rationally to the differentia" [emphasis added] – and hence saw the need to "critically examine and test such legislation" for legitimacy of purpose.[82]

33 The Court of Appeal said that the way to prevent this circularity from rendering Art 12(1) toothless is through an alternative formulation of the "intelligible differentia" test.[83] The author shall examine to what extent this avoids the problem of circularity after discussing the theoretical foundations behind the Court of Appeal's approach. First, however, it will be considered whether there can be another way out of this circularity.

B. An alternative approach, and its difficulties

34 From the above discussion, one might think that the best step for the law to take is to rethink the concept of legislative purpose, and define it tightly so as to ensure that the *purpose of the law* is framed such that it *cannot automatically* overlap with the *law itself* or with the *differentia drawn by the law*. Such a definition might be that, for the purposes of Art 12(1) analysis, "purpose" should refer to the *mischief* targeted by the legislation, not the *intended legal outcome*. This might be justified for two reasons.

35 First, the metaphor with the criminal law is imperfect in one important regard: while it might be that a criminal's intention and motive may be the same, *eg*, when a person intentionally kills not with the motive of getting money through insurance fraud, but rather intentionally kills simply with the psychopathic motive of killing, the law abhors the notion that the Legislature could ever act for a capricious purpose – or, rather, in so capricious a manner as to have no purpose.

36 Second, circularity is not only *possible*, but a *necessary result*, whenever "purpose" is defined in terms of bringing about a *legal* result rather than a *factual* one, such as to say (as did the High Court) that the

82 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [114].
83 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [114].

purpose is to criminalise X or (as did the Court of Appeal) to be of general application to situations of X. This is circular simply because legislation is *constitutive* of legal results. One can coherently say that the purpose of criminalising X is to "reduce the incidence of X", or to "discourage X", for then the courts would be able to test arguments such as that such purposes are not necessarily best achieved by criminalisation; but to say that the purpose of criminalising X is to criminalise X is to say very little at all.

37 That having been said, it must be acknowledged that this solution is far from perfect: it still leaves the problem that there are different possible levels of generality at which to frame the purpose of legislation. Bennion himself (who equates "purpose or object" with "mischief")[84] admits that "the concept of legislative purpose is not straightforward": he notes that there are various "purposes", from the purpose of law itself, to the purpose of different areas of law, to the purpose of an Act, to the purpose of a particular provision.[85] The problem is made even more difficult when (as with s 377A) the legislation in question is an addition to or modification of existing legislation.

38 An example of these difficulties is seen in *Public Prosecutor v Taw Cheng Kong*,[86] as summarised by Loh J: the Court of Appeal in that case held that the purpose of the additions to the Prevention of Corruption Act[87] was the "more effective control and suppression of corruption"[88] (that is, it focused on the purpose of the Prevention of Corruption Act), whereas the High Court's framing of the purpose specified exactly what was insufficiently "effective" about the previous legislation: the purpose was to "address acts of corruption taking place outside Singapore but affecting events within Singapore"[89] (that is, it focused on the purpose of the *new provisions* in the Act). And one can imagine a reviewing court demanding an even more specific statement of legislative purpose that, for example, proves that such acts are so significant that whether or not they are addressed makes a difference to whether the overall anti-corruption regime is "effective" or not. Unless some clearer definition of "purpose", including principles on how generally it is to be defined, can be drawn up, this problem will prove to

84 Francis Bennion, *Bennion on Statutory Interpretation* (London: LexisNexis, 5th Ed, 2008) at p 483 read with pp 916 and 922–923.
85 Francis Bennion, *Bennion on Statutory Interpretation* (London: LexisNexis, 5th Ed, 2008) at p 947.
86 [1998] 2 SLR(R) 489.
87 Cap 241, 1993 Rev Ed.
88 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [57(a)].
89 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [55(c)].

be most intractable. Therefore, with this problem in mind, the Court of Appeal's view will now be examined.

V. The Court of Appeal's analysis: An expanded notion of an "intelligible differentia"

A. The rejection of the test of legitimacy of purpose

39 For the Court of Appeal, the test of illegitimacy of legislative purpose was a non-starter because for a court to apply it would be to "usurp the legislative function" and act like a "mini-legislature".[90] With respect, however, the link between the two is not as clear as it may seem. After all, one may ask, is not *any* judicial review of legislation for constitutionality an interference with the legislative function? It may be true in *one* sense that, as the Court of Appeal recognised, the courts cannot "amend or modify a statute": this is true in so far as they cannot do so "based on [their] own personal preference or fiat" [emphasis in original omitted].[91] However, it does not follow that "*only* the Legislature has the power to review its own legislation and amend legislation accordingly" [emphasis added].[92] Not only the test under Art 12(1) endorsed by the Court of Appeal, but *any* test for compatibility with *any* of the Pt IV fundamental liberties, *will* potentially lead to "amend[ment] or modif[ication] of a statute" in the sense of rendering infringing legislation "void" "to the extent of the inconsistency"[93] – and it may be that this, even applying the Court of Appeal's test, entails striking out a statute *in toto* rather than doing anything which may be described as mere "interpret[ation]"[94] – *because Art 4 of the* Constitution *says so*; and Loh J was not claiming any power of "amend[ment] or modif[ication]" beyond this.

40 In other words, with respect, the phrase "mini-legislature" must be read with caution. If Loh J's test can be said to entail the court acting as a "mini-legislature", then so must be *any* exercise of a power of judicial review of legislation, including even the Court of Appeal's Art 12(1) test. Indeed, by this reasoning, one may as well describe a court performing the judicial review of executive action as being a "mini-executive". In truth, judicial review of executive action, even to the extent of holding that executive power is exercised for an improper purpose, is not an exercise of executive power at all, even to a limited extent; it is, rather, an exercise of the judicial power to police the

90 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [82]–[83] and [154].
91 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [81].
92 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [82].
93 Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) Art 4.
94 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [81] and [83].

boundaries of executive conduct. Similarly, the judicial review of legislation is an exercise of the judicial power to police the boundaries of legislative conduct. In both cases, it is for the courts to discover *what* these boundaries are, but the question of whether it is legitimate to police them does not turn on what they are.

41 This leads to the way to break out of what would otherwise be a question-begging problem: that it is rightly said that the courts cannot exercise legislative power or act as "mini-legislatures"; but it is not explained *why*, on the Court of Appeal's account, one technique for "scrutinising legislation"[95] is an unacceptable usurpation of legislative power while another is not. The answer is that this takes the wrong starting point. One should note that the Constitution defines the courts' role in *absolute and positive*, not *relative and negative*, terms. It does not make a statement similar to one that the courts are by definition a "counter-legislature and not a Legislature", or that "the courts cannot encroach upon the legislative power", or that "the courts' power is to do anything other than exercise legislative power". Rather, the Constitution simply says that the courts have exclusive "judicial power".[96] Defining "judicial power" is difficult, but the point is that the best approach in determining what the courts can do is not to ask what the courts are *not*, and not to ask what *legislative* power is, but rather to ask only what *judicial power* is.

42 For these reasons, it is respectfully submitted that the bare concept of the separation of powers – that "the courts are *separate and distinct from* the Legislature" [emphasis in original][97] – does not *by itself* completely justify the Court of Appeal's rejection of Loh J's test; only a *definition* of the powers, not merely a recognition of the fact that they are separated, can. This, in turn, engages the issue highlighted above[98] of identifying the difference between the legal and the extra-legal, which is, in short, that this difference is itself constructed by the law through the courts. It is, for the reasons in the paragraphs above, unclear whether, when the Court of Appeal said that "there are *no legal standards* which can guide the court in ascertaining whether the object of that statute is illegitimate" [emphasis in original],[99] it means that there *can never be* standards that are legal in nature, or that, according to the law *as it is*, there *happen to be* no legal standards (in which case the courts are free to devise some). This underscores the author's argument that the proper role of the courts is by no means self-evident.

95 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [82].
96 Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) Art 93.
97 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [77].
98 See paras 5–11 above.
99 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [85].

43 Nonetheless, all this is somewhat academic, for, as will be seen, the Court of Appeal's test may not be very different from Loh J's test in practice.

B. Equality as an aspiration

44 If the test of illegitimacy of purpose was, in Loh J's view, so necessary to the concept of equality, how could the Court of Appeal do away with it and yet not leave Art 12 totally useless? It is submitted that the answer must begin with a recognition that the Court of Appeal was dealing with equality in a completely different sense from the idea proffered above of equality as a demand for justification of laws. Like the latter, the former is also an idea of inequality as something that is inevitable. However, unlike the understanding of the High Court's reasoning presented above, the Court of Appeal saw inequality not as something *created* by the *law*, but rather something that naturally exists *in fact*. It is true that Loh J alluded to this too, speaking of the "inherent inequality and differences pervading society"; but he appears to have conflated it with, and ultimately subsumed it under, the proposition that "it is inevitable that [the *legal* act of] classification will produce inequality".[100] By contrast, the Court of Appeal's *focus* was the "(*factual*) reality that inequality (in all its various forms) is an inevitable part of daily life" [emphasis in original omitted; other emphasis added], such that it saw its task of one as creating, as far as it could, a "basic level of equality".[101]

45 Hence, for the Court of Appeal, Art 12 was not an embodiment of the rule of law; rather, it was an allusion to the desirability of "various forms" of equality. It is not clear what these "various forms" are, but the reference to "daily life" is suggestive – at the risk of speculation, one may suppose that this includes "forms" such as income equality and equality of educational opportunity. This suggests that the Court of Appeal's approach to Art 12, and, perhaps, Pt IV of the Constitution more generally, was very different from Loh J's.

46 Loh J appears to have begun with the assumption that Art 12 is purely a legal concept. Thus, he justified his formulating and applying the test of the legal legitimacy of legislative purpose on the grounds that, otherwise, the law, through "the court", would but be able to "stand by the sidelines and do nothing".[102] By contrast, the Court of Appeal spoke of asking what "*the law*" can do "to ensure that there is a *basic level of*

100 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [44].
101 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [61].
102 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [114].

equality" [emphasis in original],[103] and said that the legal test as formulated "furnish[es] the courts with particular *legal* principles that give effect (*albeit not fully*) to the concept of equality embodied in Art 12(1)" [emphasis in original; other emphasis added],[104] suggesting that there is *more* to the Art 12 conception of equality, but that this "more" is *not* the business of the courts, and is not even a limitation on the exercise of the legislative power. In other words, Art 12(1) is "declaratory and aspirational"[105] – it is submitted that this may be unpacked as meaning that the *legal* part is "declaratory" while the *non-legal* part is "aspirational". If one thinks this renders Art 12(1) weak, it must be remembered that, in so holding, the Court of Appeal, like the High Court, ultimately *did* recognise that Art 12(1) refers to *substantive* rather than *formal* equality, hence paving the way for the expansion of the test which will be explored below.[106]

47 As an aside, one may criticise the Court of Appeal's saying that part of Art 12(1) is "aspirational in nature".[107] As Tribe argues, an aspiration can be broad and open-ended but still a legal norm;[108] thus, the fact that Art 12(1) does not itself contain "specific legal criteria"[109] may just as plausibly be taken as an invitation to the courts to create some (just as, one may argue, the Privy Council did, and the Singapore courts later followed, in introducing into the jurisprudence on Art 9 the idea of "fundamental principles of natural justice", a phrase which appears nowhere in the Constitution).[110]

48 Alternatively, if by "aspirational" the court meant "non-legal", then there arises a problem which Scalia identified: How does one tell *which* parts of the *Constitution* are to be taken to create legal norms and which are not, since "[i]t would be most peculiar for aspirational provisions to be interspersed randomly among the very concrete and hence obviously nonaspirational prescriptions" in the Constitution?[111] One might as well say that, for example, Art 9(1) is "aspirational in

103 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [61].
104 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [88].
105 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [90].
106 See paras 50–62 below.
107 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [88].
108 Laurence H Tribe, "Comment" in *A Matter of Interpretation* (Antonin Scalia & Amy Gutmann eds) (Princeton: Princeton University Press, 1997) at p 88 *ff*. This position appears similar to Dworkin's account of legal principles (as opposed to legal rules) in Ronald M Dworkin, "The Model of Rules" (1972) 81(5) Yale LJ 912.
109 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [90].
110 The origin of this is *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710. See generally *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [61]–[67] for a summary of the present position.
111 Scalia in *A Matter of Interpretation* (Antonin Scalia & Amy Gutmann eds) (Princeton: Princeton University Press, 1997) at p 135.

nature" because it contains much less legal detail than Arts 9(2) to 9(4) – a position which runs contrary to long-established case law in Singapore.

49 Nonetheless, the idea of Art 12(1) being partly "aspirational" still merits consideration because, as will be seen, it changes the nature of the legal test to be applied. To recapitulate: while Loh J thought that Art 12 (and, perhaps, all of the Pt IV fundamental liberties) was *purely* legal in nature, the Court of Appeal thought that it was only *partly* legal in nature, and that the court should confine itself to the legal part lest it usurp non-legal (that is, political) bodies' role in handling the non-legal part. Of course, this does not mean that Loh J was advocating juristocracy at the expense of the Legislature's role – indeed, one dares say that, if he had been, then the plaintiffs' claims would have succeeded before him without much fanfare at all. Rather, what happened was that, because of their different conceptions of the nature of Art 12 itself, Loh J and the Court of Appeal also had different ideas of the *conceptual* nature of the limitations to a potential Art 12 legal claim.

C. The Court of Appeal's approach to Art 12(1) review and potential issues

50 Yet, like Loh J, the Court of Appeal *also* reserved the right to strike down patently unjustifiable legislation. Loh J did so by adding a test of the legitimacy of legislative purpose, on the understanding that the "intelligible differentia" and "rational relation" test were *both* limited because of how they operated *in tandem*. By contrast, the Court of Appeal did so by, while holding that the "rational relation" test was *by itself* limited because it "does *not* really address the concept of *equality* as such" [emphasis in original],[112] *expanding* the definition of "intelligible differentia" from an *understandable* distinction into a *justifiable* (that is, not "so unreasonable as to be illogical and/or incoherent" [emphasis in original omitted])[113] distinction.

51 The conceptual difference here is subtle, but crucial. Both Loh J and the Court of Appeal applied a high threshold of unreasonableness, but they applied it to different things. Loh J applied it to the *purpose* of classification, while the Court of Appeal applied it to the *very act* of classification. Thus, Loh J asked whether *criminalising homosexual intercourse to express disapproval of it* was *Wednesbury* unreasonable, while the Court of Appeal, it would appear at first glance (but see below), asked whether *singling out homosexuals (for whatever purpose)* was *Wednesbury* unreasonable.

112 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [69].
113 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [67].

52 The fact that the Court of Appeal's approach is an *expansion* of what was, before this case, the prevailing understanding of the "intelligible differentia" test, and that it is arguably, just like Loh J's test, *also* partly motivated by the novel nature of the claims (as outlined above),[114] is evident from a comparison with the "intelligible differentia" test as articulated by the High Court in *Taw Cheng Kong v Public Prosecutor*[115] (which was not overturned on appeal on this point), *viz* "a consistent means of identifying the persons discriminated against", or, to put it another way, a "common identifying feature".[116] Unlike the Court of Appeal's definition in the instant case, this older definition of "intelligible differentia" *only* asks whether it is clear which side of a line a person falls on, but does *not* ask whether the line is a good one to have.

53 What does one make of this new development? One possible view is that the Court of Appeal's analysis comes much closer to the doctrine of "suspect classifications" in the US.[117] It was previously noted that the US courts will be more willing to hold a differentia based on race, for example, as being unacceptably unreasonable, however clearly comprehensible it may be. Similarly, the Court of Appeal arguably had *some* kinds of inherently suspect differentiae in mind. Therefore, while the Court of Appeal may appear to have disapproved of Loh J's test of rationality of purpose for being too far-reaching, the Court of Appeal's test is potentially equally or even *more* far-reaching. A statute based on a *Wednesbury* unreasonable *differentia* but with a rational, even noble, *purpose* (perhaps, to modify the example in *Wednesbury* itself, firing all red-haired teachers on the grounds that, statistically speaking, the vast majority of red-haired teachers happen to be bad at teaching) would have been allowed by Loh J, but perhaps not by the Court of Appeal. On this view, the question, then, is: What are these unacceptable differentiae of which the Court of Appeal speaks?

54 An explicit answer is not given. The Court of Appeal said that what would be an unacceptable differentia in its eyes would be one that is "illogical and/or incoherent", such that "there can be no reasonable dispute (let alone controversy) as to that [illogicality and/or incoherence] from a moral, political and/or ethical point of view (or, for that matter, any other point of view".[118] This is not entirely clear, given that illogicality and incoherence are, on some definitions, the *same* as incomprehensibility (which was Loh J's test). Therefore, if the Court of Appeal had *modified* Loh J's understanding of the "intelligible

114 See paras 5–11 above.
115 [1998] 1 SLR(R) 78.
116 *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78 at [33(b)].
117 See paras 21–25 above.
118 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [67].

differentia" test (as it said it did), then it must have used "illogical and/or incoherent" to refer to *substantive* undesirability rather than merely creating a *procedure* of classification that is undesirable because it is too incomprehensible to apply in practice.

55 Yet this does not help surmount the problem of circularity identified above, which is that the *differentia* and the *purpose* of the law might be defined in exactly the same terms, such that, *by definition*, there must be a rational relation (indeed, often a perfect overlap) between the two. Loh J aimed to surmount this circularity by testing the legitimacy of the *purpose*. The Court of Appeal aimed to surmount it by testing the legitimacy of the *differentia*. As has been seen, the former is not a perfect solution. It will now be argued that the latter test is actually, in effect, similar to the former. This will be done by considering counsel's hypothetical example of a law which "bans all women from driving on the roads".

56 The court said that the differentia in this example may well be "illogical and/or incoherent"[119] (in the sense defined in the previous paragraphs).[120] But the court did not say exactly what this differentia is. It did offer something of a definition of "differentia": it suggested that the word "differentia" refers not to the purpose of the statute, for the Court of Appeal mentioned it as a *separate* stage; it refers to the classification system – a "distinguishing mark or character".[121]

57 Now, one might think that the key problem with this law is its discrimination against women. Hence, one might say that the differentia is between men and women. However, this would mean that what would be "illogical and/or incoherent" in the Court of Appeal's sense would, by the Court of Appeal's reasoning, be not the banning of women from driving (which is the law and/or the purpose of the law), but simply the application of different laws to men and women (which is the differentia itself). This would be a most striking proposition: it would mean that much of the Women's Charter,[122] to take just one example, would be unconstitutional. And because the "intelligible differentia" test is a "threshold test",[123] there would not even be a legally valid counter-argument that different treatment of men and women is sometimes justified.

58 On this view, this example shows the difficulties with not only the Court of Appeal's test. Indeed, the fact that the court remarked that

119 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [114].
120 See paras 50–52 above.
121 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [67].
122 Cap 353, 2009 Rev Ed.
123 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [61]–[62].

this would be an "*extreme* provision which would probably not be enacted by a *reasonable* Parliament in the Singapore context" [emphasis added][124] suggests that the real problem with such a law might not be with the "intelligible differentia" test, but rather simply with its content – and that such an "extreme" case would warrant a similarly striking change in the court's approach, *eg*, toward Loh J's approach of questioning the legitimacy of the purpose of the statute (which would probably save the Women's Charter from being struck down).

59 However, reading the Court of Appeal's judgment in such a manner and holding the differentia drawn by the hypothetical law to be between men and women is difficult to reconcile with the Court of Appeal's affirmation that Art 12(2), which identifies only "religion, race, descent [and] place of birth" as prohibited grounds of discrimination, exhausts the list of prohibited grounds of discrimination.[125] The Court of Appeal observed that the American courts are free to take the lead in identifying different grounds on which unequal treatment may be based and applying different tests or different presumptions to different grounds, because the corresponding provision is worded in an open-ended manner. But it then held that this does not apply to Singapore because, although Art 12(1) is worded in a similarly open-ended manner, Art 12(2) mentions *specific* grounds of discrimination, with the implication that no *others* are constitutionally protected. Indeed, the court then went on to remark that its Art 12(1) test, though attenuated compared to Loh J's test, is *strengthened* by the substantive checks in Art 12(2).[126]

60 (As an aside, perhaps one could retort that this is incorrect – that Art 12(2) does not confine Art 12(1) because they discuss two different things: Art 12(1) is about "equality" and inequality, while Art 12(2) uses the word "discrimination". On at least some accounts, there are conceptual differences between the two.[127] Nonetheless, no such arguments appear to have been considered by the Court of Appeal.)

61 Therefore, it is more likely that, in the example of the legislation banning women from driving on roads, the differentia the Court of Appeal identified (and took issue with) was not women *versus* men, but rather women who could drive *versus* men who could drive, or perhaps women who could drive *versus* all other persons. In short, therefore, the difficult problem of determining how to frame the *differentia* for the

124 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [114].
125 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [90]–[92].
126 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [113].
127 See, as just one example, Elisa Holmes, "Anti Discrimination Rights without Equality" (2005) 68(2) MLR 175.

purposes of the Court of Appeal's test is almost the same as the problem identified above of determining how to frame the *legislative purpose* for the purposes of Loh J's test. If this is correct, then the power which the Court of Appeal reserved for itself to strike down legislation must be exactly the same as that which Loh J would have reserved, just phrased in different terms.

62 The upshot is that it might well be that the Court of Appeal, though starting from different theoretical foundations compared to Loh J, ultimately ended up with a test that is, in substance, the same. And if this is so, the potential problems of circularity remain the same.

VI. Other miscellaneous issues arising from the judgments

A. How legislative purpose is formed

63 A piece of evidence of legislative purpose which Loh J (but not the Court of Appeal) examined in detail was a set of speeches made in Parliament during debates on s 377A in 2007. It is unclear what effect these speeches had on the issue of legislative purpose. Was the correct approach for the court to look at the purpose as it was *in 2007*, such that it held that Parliament had affirmed *in 2007* the purpose of s 377A as it was in 1938? Or is it that the 2007 debates were not relevant *at all*, and the court was supposed to look at the purpose as it was *in 1938*? Loh J equivocated between the two, saying that he "d[id] not think there [was] a need to" look at the 2007 debates (suggesting that they *could not even have changed* the purpose), but *also* that "the purpose of s 377A, as articulated … in 1938, was reaffirmed by Parliament in 2007" (suggesting that Parliament *could have* changed the purpose in *2007*, but had *consciously decided* not to).[128] This raises some subtle but interesting constitutional issues; there is insufficient space to do more than outline them here.

64 If Parliament could in principle have changed the purpose of existing legislation in 2007, pursuant to what power would it have done so? Article 58 of the Constitution says that "the power of the Legislature to make laws shall be exercised by Bills passed by Parliament and assented to by the President"; but, as Loh J acknowledged, no bill was introduced regarding s 377A and nothing was even voted on.[129] The bill discussed and voted on only discussed s 377 – a different statute. This raises two problems.

128 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [78].
129 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [75].

65 The first problem is about the distinction between making of legislation and formation of legislative purpose. There are three possibilities: (a) Parliament *could not* have changed or added to the purpose of s 377A in 2007, for otherwise it would have been violating Art 58; (b) it *could* have because *changing the purpose* of *existing* legislation is not an act of "mak[ing] laws" within the meaning of Art 58; or (c) it *could* have because the act of law-making that consisted of introducing legislation to repeal *s 377* could have changed or added to the purpose of *s 377A*.

66 Some light may be shed on this issue by Loh J's interesting distinction between "practical reason[s]" to retain s 377A on the one hand, and the "purpose" of s 377A on the other.[130] With respect, the *conceptual* distinction between the two is not quite clear: as Dworkin put it, "a statute owes its existence not only to the decision people made to enact it but also to the decision of other people later not to amend or repeal it".[131] Rather, the difference Loh J had in mind, it is submitted, can be distilled from the words "*put forward* as the purpose" [emphasis in original omitted; other emphasis added].[132] It was not a conceptual distinction, but rather one between legislators' *implicit* reasoning and their *stated* reasons. Loh J meant that what matters is the *stated* purpose, not what the Legislature *actually* had in mind.

67 This approach may be contrasted with that in the contemporaneous Court of Appeal case of *Vellama d/o Marie Muthu v Attorney-General*[133] ("*Vellama*"), where the court, based on analysis of what Members of Parliament "could have" said[134] and whether or not they shared a common understanding of words and phrases in the Constitution, sought to ascertain not what purpose the Legislature *stated*, but what it *actually had in mind*.[135]

68 Moreover, in *Vellama*, the court focused not on the views of the *single* legislator who had introduced the Bill, but rather on that of the Legislature *as a whole*.[136] This leads us to the second issue: How is purpose "put forward", and through what evidence may it be proven to have been "put forward"?

130 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [84].
131 Ronald Dworkin, *Law's Empire* (London: Fontana Press, 1986) at p 318.
132 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [84].
133 [2013] 4 SLR 1.
134 *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [68].
135 Benjamin Joshua Ong, "Developments in the Law on Constitutional and Statutory Interpretation" *Singapore Law Watch Commentary* (September 2013) at pp 4–5.
136 Benjamin Joshua Ong, "Developments in the Law on Constitutional and Statutory Interpretation" *Singapore Law Watch Commentary* (September 2013) at p 5.

69 All this raises the fundamental *conceptual* problem of the distinction between the purpose of law (and, for that matter, the intention of the Legislature) on one hand, and law itself on the other. Is purpose (and intention) something tied to a *single* piece of legislation, such that one cannot contemplate its *very existence* apart from the legislation to which it attaches? Or is it that purpose (and intention) is something that the Legislature has in the background, and the Legislature *can* choose to express it and give it effect (*or partly, or not at all*) by choosing to legislate (*or less far-reachingly, or not at all*)?

70 This aside, there is also an *evidential* problem. Unlike with Parliament's policy of adopting a single statement of purpose by a Minister who introduces a Bill as its *collective* will, particularly after the passing of s 9A of the Interpretation Act,[137] it is less clear that the debates on legislation in the abstract are to be held to evidence legislative intent. On the other hand, it is also arguable that *Jeyaretnam Kenneth Andrew v Attorney-General*[138] ("*Jeyaretnam*") is authority for the act of "locating legislative intent in the *ongoing* practice or attitude of the Legislature … rather than in the intention at the time when the legislation was made", the assumption being that "Parliament was seen as playing an active role in the development and operation of the law rather than just the making of the law".[139]

71 Ultimately, the approach taken by the High Court blurs the distinction between *acts* of Parliament and *acts* (in the sense of *actions*) of Parliament. It is interesting to see how this trend will play out: it is by no means constitutionally wrong, but it certainly is different from the English position. Again, this highlights the fact that, while the Constitution says that the Legislature has exclusive "legislative power",[140] the definition of "legislative power" is not set in stone, and certainly not necessarily the same as in other jurisdictions.

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137 Cap 1, 2002 Rev Ed. It is somewhat suggestive that, during debates in Parliament, the Minister introducing what became s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) said, and no Member of Parliament ("MP") objected, in response to a comment by one MP's remark about the nature of legislative intention (*Singapore Parliamentary Debates, Official Report* (26 February 1993) vol 60 at col 519):

> Where I disagree with him is when he says that the intention of the Bill [*ie*, of Bills in general] is not decided by the Ministers or Cabinet but by the officials [*ie*, civil servants and draftsmen] … I can tell him that in this Government, in this Cabinet, *the decisions and the intentions are made by Cabinet and the Ministers which compose the Cabinet*. [emphasis added]

138 [2014] 1 SLR 345.

139 Benjamin Joshua Ong, "Public Law Theory and Judicial Review in Singapore" *Singapore Law Watch Commentary* (December 2013) at p 3.

140 Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) Art 38.

B. Evidence in judicial review proceedings

72 In Tan's case, the additional argument was made that s 377A was "absurd" because homosexuality is immutable.[141] Putting aside the factual question of whether sexual orientation is really "inborn and unable to be changed" [emphasis in original omitted],[142] a few observations may be made from the fact that Loh J even allowed these arguments to be heard.

73 Loh J chose to admit – in fact, order the tendering of – scientific evidence on this issue because the matter was "grav[e]" and "contentious".[143] In other words, Loh J was prepared to perform judicial review of s 377A not only based on the considerations that had gone into its enactment (*viz* whether Parliament had considered the mutability issue), but also regarding whether those considerations had been considered *correctly* if he had found that the evidence, objectively speaking, had been clear either way. This approach would have been potentially game-changing. Would this approach also have allowed or even demanded, say, evidence of budgets to be considered in judicial review of the non-provision of a healthcare service by the State,[144] or data about school curricular and the relative performance of students of different races in judicial review of the State's education system?[145] For that matter, would s 108 of the Evidence Act[146] place the burden of production of such data on the State[147] on the ground that it would be "especially within the knowledge of" the State rather than the individual applicant? Such practices are not wrong, but are certainly not often (if at all) presently heard of in Singapore.

74 By contrast, it is less clear that the Court of Appeal would have heard such evidence. There is an element of ambiguity in its approach: the Court of Appeal said (a) there was "no definitive evidence" [emphasis in original omitted][148] one way or another; but also that (b) "[*i*]*n any event*" the court would "*not* [be] in a position to arrive at a conclusive determination" [emphasis in original][149] because the issue would be a "scientific and extra-legal argument" [emphasis in original omitted].[150]

141 *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [22(d)].
142 *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [45].
143 *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [42].
144 *Eldridge v Attorney General of British Columbia* [1997] 3 SCR 624 at [87].
145 *DH v Czech Republic* (2008) 47 EHRR 3.
146 Cap 97, 1997 Rev Ed.
147 *DH v Czech Republic* (2008) 47 EHRR 3.
148 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [176].
149 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [176].
150 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [176].

75 Assuming that the latter is what the Court of Appeal meant, the distinction is as follows: Loh J's concern was that the plaintiffs' scientific evidence was *insufficient*, whereas the Court of Appeal suggested that it was, and *must* have been, *irrelevant*. With respect, Loh J's approach should be preferred. The Evidence Act specifically allows the admission of expert evidence on scientific matters;[151] *if* such evidence is relevant to the case, why should there be a blanket ban on it in constitutional review cases? Again, this revisits the problem of distinguishing between the "legal" and the "extra-legal". It is true that science is not law, but it may well be that the law directs the courts to consider science. It might be that the Legislature, with the support of the Executive and the civil service, may *generally* be in a *very good* position to assess scientific evidence, but it does not follow that (a) it *has* done such an assessment at all; or (b) the courts *must* therefore have no role to play at all. The Court of Appeal should thus have stopped at saying that there was insufficient and insufficiently weighty evidence *before it* to prove the plaintiffs' case; it should not have ruled out all "scientific" matters *by default*.

76 These issues aside, counsel could have, by pleading the case differently, avoided the problems of scientific evidence altogether. Counsel had tendered foreign court decisions as authority for the fact that sexual orientation is immutable. Loh J rightly rejected this approach: "such opinions are not substitutes for *evidence* of a fact" [emphasis in original],[152] particularly since foreign decisions might *assume* that sexual orientation is immutable rather than *make a finding of fact* to that effect. Instead, what counsel should have done was to cite these very same cases as authority for *another* point, *viz* that, even if sexual orientation is factually changeable, people should not be expected to change it[153] because it is "changeable only at unacceptable personal costs",[154] or a fundamental part of one's very "experience of being human".[155] Given that, as has been seen, Loh J was willing to see past a criminalisation of particular *behaviour* to the underlying impact on people with a particular *identity*, it would have been better to take the opportunity to push this argument further to consider *why* the analysis ought to pay particular attention to that particular sort of identity. This line of argument may well have helped the plaintiffs overcome the Court

151 Evidence Act (Cap 97, 1997 Rev Ed) s 47.

152 *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [49].

153 See generally Sandra Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2nd Ed, 2011) at pp 131–139, especially 131–134, for this argument as well as possible variants.

154 *Egan v Canada* [1995] 2 SCR 513 at 528, cited in *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [51].

155 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (1) SA 6 at [101], cited in *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [53].

of Appeal's view that "scientific" arguments are "extra-legal" and therefore "outside the purview of the court" [emphasis in original omitted][156] by avoiding the scientific issue and focusing on a normative one instead.

C. The future of the law regarding Art 12(2)

77 Even as this note has focused on the courts' pronouncements on Art 12(1), another aspect of the instant cases must not be neglected: the Court of Appeal has strongly reaffirmed the role of Art 12(2) in prohibiting discrimination on certain grounds in certain circumstances. This is perhaps best analysed in more detail elsewhere; here, it will suffice respectfully to point out that Art 12(2) contains issues which are not as much more "concrete" and "specific"[157] than Art 12(1) than the Court of Appeal made it out to be. Examples include: Must *intent to "discriminat*[*e*]*"* be proven, or is it also "discrimination" to have *ostensibly neutral* treatment but which has a disparate *impact* on people of different groups?[158] Are private actors bound by the prohibition of discrimination in the "carrying on of any trade [*etc*]", and, if so, does that mean that *other* Pt IV fundamental liberties also have a horizontal direct effect as between private parties?[159] The words "on the ground only of" suggest a causation test; what exactly is the nature of this test? Consider the interesting example of whether a blind person who uses a seeing-eye dog who is excluded from a restaurant which disallows dogs should properly be said to have been excluded *because* he is blind or *because* he has a dog.[160] Moreover, causation is complicated by the fact that discriminators may seek to give excuses to obscure the true nature of the reason for their disparate treatment of certain groups.

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156 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [176].

157 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [89]–[91].

158 *Eg*, Civil Rights Act 42 USC § 2000e-2(k) (1964); see also *Egan v Canada* [1995] 2 SCR 513 at 553:

> If a projectile were thrown against a soft surface, then it would leave a larger scar than if it were thrown against a resilient surface. In fact, the depth of the scar inflicted will generally be a function of both the nature of the affected surface and the nature of the projectile used. In my view, assessing discriminatory impact is, in principle, no different.

159 There appears to be no authority on this point in Singapore, although the Malaysian courts have said that the Constitution of Malaysia 1957 only concerns relations between the individual and the State: see Thio Li-ann, "Soft Constitutional Law in Nonliberal Asian Constitutional Democracies" (2010) 8(4) Int'l J Con L 766 at 780, referring to *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia* [2005] 3 MLJ 681 at [13].

160 *London Borough of Lewisham v Malcolm* [2008] 1 AC 1399 at [35], *per* Lord Scott, now reversed in effect by s 15(1)(a) of the UK Equality Act 2010 (c 15).

D. The grounds for judicial review of legislation

78 Loh J's novel analysis of the issue of legitimacy of legislative purpose, and (as has been argued) the Court of Appeal's implicitly having reached a similar result which is similar in effect, raises a very interesting side issue which warrants much further consideration that is possible here; what follows is merely an outline. If, as Loh J said, a statute can be struck down in an Art 12(1) claim for having an illegitimate purpose, or the Court of Appeal's hypothetical law banning women from driving may be struck down, then why must Art 12(1) come into the picture at all, when the real claim being made is illegitimacy of purpose rather than inequality? One can imagine, for example, a statute mandating that *everyone* be tortured for a monarch's sadistic pleasure: this would not be unequal, but would still probably be an illegitimate purpose. So might be a statute banning *everyone* from driving.

79 The proposition that judicial review of legislation can be performed without reference to the grounds set out in the Constitution (such as conflict with the fundamental liberties set out in Pt IV of the Constitution, or usurpation of judicial power)[161] is unprecedented in Singapore. One might think that it is an absurd non-starter. It certainly is in the UK, by virtue of the doctrine of parliamentary sovereignty; there, the courts' powers under the Human Rights Act 1998[162] to interpret legislation in a manner compliant with the European Convention of Human Rights[163] or declare it incompatible[164] with the Convention are limited, and seen as an *exception* to parliamentary sovereignty. However, in Singapore, it is the Constitution, not Parliament, which is supreme; at most, it is said that Parliament is the supreme *legislator* while the courts are the supreme *judicial* authority – *neither* is said to be supreme or sovereign over the other.

80 One must therefore not take the Court of Appeal's statement that "Singapore has adopted the model of parliamentary sovereignty"[165] as denying this. With respect, this use of the phrase "parliamentary sovereignty" is somewhat imprecise as the court goes on to conflate it

161 Chan Sek Keong, "The Courts and the 'Rule of Law' in Singapore" [2012] Sing JLS 209 at 214, discussing Art 93 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint).

162 c 42 (UK).

163 Convention for the Protection of Human Rights and Fundamental Freedoms (213 UNTS 222) (4 November 1950; entry into force 3 September 1953); Human Rights Act 1998 (c 42) (UK) s 3. See *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 for a striking example of the extent of such "interpretation" possible.

164 Human Rights Act 1998 (c 42) (UK) s 4.

165 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [107].

with the "common law tradition of positivism". It is true that "laws declared by Parliament are valid by virtue of their enactment", as is the case in the UK – this is one part of the doctrine of parliamentary sovereignty. However, parliamentary sovereignty goes further and holds that such laws can *never* be rendered invalid by the courts; this is certainly *not* the case in Singapore.[166]

81 Seen in this light, it is at least arguable that, at common law, the courts have the power to strike down legislation for reasons other than explicitly spelt out in the Constitution. This can take place by means of expansive interpretation of the words of the Constitution (*eg*, interpreting the word "law" to mean "a system of law which incorporates … fundamental rules of natural justice").[167] Might it, however, also cover grounds not explicitly mentioned in the Constitution, such as those which currently apply to judicial review of administrative action such as irrelevant considerations, improper purposes and pure irrationality?[168] After all, it must be remembered that the Singapore courts' power of judicial review has been said to extend to "legislative and executive" acts;[169] it would logically follow that the grounds of review may well be the same for both.

82 In short, the High Court's test of legitimacy of purpose and the Court of Appeal's test of unreasonableness of differentia would both, taken to their logical conclusions, allow any statute to be struck down for having an illegitimate purpose simply by nominally invoking Art 12(1) without actually grappling with the concept of *equality* (assuming the plaintiff can meet the threshold of *Wednesbury* unreasonableness).[170] This would be an odd claim to make under a constitutional provision relating to equality, but it might be arguable that it is supportable *independently of Art 12*. If this proposition sounds striking – and it is certainly unprecedented – it may well be worth exploring in more detail elsewhere.

VII. Conclusion: The proper role of the courts

83 A number of difficult issues which have faced the courts have been looked at, many of which go beyond the issue of Art 12(1) to,

166 Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) Art 4.

167 *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710 at [26].

168 See generally *Lines International Holdings (S) Pte Ltd v Singapore Tourist Promotion Board* [1997] 1 SLR(R) 52 and *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582.

169 *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294 at [50], cited in *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [116].

170 See para 24 above.

indeed, the very roots of the Constitution; critiques have been offered suggesting that the courts' reasoning may not form a complete justification for the outcome of the case (though this is not to say that the outcome was therefore necessarily wrong). That having been said – and the Court of Appeal seems, from its focus on the relative institutional roles of the courts and the Legislature as a unifying theme, to have recognised this – it might well be that the most difficult problem is not so much *how* to translate these theoretical issues into a practical procedure, but rather *who* should take the lead.

84 On this note, notwithstanding that Loh J said that the instant case concerned "defining moral issues" which "need time to evolve and are best left to the Legislature to resolve",[171] there is a hint that he would not have completely ruled out *court-led* law reform in future. He mentioned legislative reform as having secured the abolition of the common-law tort of enticement in Singapore and civil war as having secured the end of slavery in the US, but also *judge-led* reform to the common law in barring racial segregation in US schools.[172] What, for him, would have tipped the balance and allowed the *courts* to take the lead on reforming the law on sexual orientation? Would it have been a large change in societal views, as with race relations in the US? Or would it have been a statute with a much more drastic impact on homosexuals, such as an actively enforced statute mandating segregation in schools based on sexual orientation?

85 By contrast, in declaring that the courts must not act as "mini-legislatures", the Court of Appeal drew a stronger *institutional* demarcation between the courts and the Legislature. Whereas Loh J's approach suggests that there are matters which the court *can in principle* review but in practice *will be unable to*, the Court of Appeal's approach would hold that the court *should not even try* to review such matters. Yet, as has been seen above, the Court of Appeal *also* appears willing to change its stance in "extreme" cases.

86 Therefore, in conclusion, perhaps the key question – which extends beyond the issue of Art 12(1) to judicial review more generally – is whether the response to extreme cases should be to change the legal test *as and when* those cases come up (as a *reaction*), or rather to change the test *now* (in a *pre-emptive* manner). Ultimately, this comes down to Singapore's constitutional order: Does the law lead politics, or does politics lead law? As has been mentioned, the Court of Appeal remarked

171 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [142].
172 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [139]–[141].

recently in *Jeyaretnam* that, following the "green-light" model of constitutions, the answer might be closer to the latter.[173]

87 Moreover, the Court of Appeal remarked that the question of what is the proper philosophy that should be taken to outline the proper limits of legislation is *itself* a question for the Legislature[174] – in other words, not only the courts,[175] but *also* the Legislature, have *Kompetenz-Kompetenz* of sorts: there is an implicit understanding of the proper relative role of the two, but it is amorphous and subject to change in "extreme" cases – and what is "extreme" is hardly settled. There is therefore latent tension between the two of a *complex* nature as *both* have powers to define the scope of their own powers.

88 The upshot may therefore be that, even if the courts *could* have gone further than they did in the instant cases without violating Singapore's constitutional law and overstepping their boundaries (contrary to what they, particularly the Court of Appeal, held), and even if the Legislature did not have *exclusive* jurisdiction over the issues behind s 377A, the result that the Legislature should *still* take the leading role may well be justified on the grounds that legislation is often better at upholding what Yowell calls the "virtue of clarity" as its law-making activity need not be piecemeal in nature (whereas judicial law-making involves a tension between the desirability of potentially far-reaching changes to the law and the desirability of prospectivity)[176] – provided that this leading role takes the form not only of going into detail on legislation regulating public morality, but also detail on the *limits* to such legislation (consider, for example, the leading role of some foreign legislatures and constitution-framers in developing comprehensive systems of equality and discrimination laws, in some cases thereby limiting the scope of legislative powers).[177] Either that, or much more work needs to be done on the definitions of complex but foundational concepts such as judicial power, legislative power, legislative intent and legislative purpose – and it will probably fall to the courts, as the leading interpreters of *general* constitutional law, to do it. The former may well turn out to be easier in practice as a means of resolving the *particular*

173 See n 5 above.

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

175 As has been seen at paras 5–11 above.

176 Paul Yowell, "Legislation, Common Law, and the Virtue of Clarity" in *Modern Challenges to the Rule of Law* (Richard Ekins ed) (Wellington: LexisNexis New Zealand, 2011) at pp 123–128.

177 See generally Sandra Fredman, *Comparative Study of Anti-discrimination and Equality Laws of the US, Canada, South Africa and India* (Luxembourg: Office for Official Publications of the European Communities, 2012) at pp 13–19, which outlines change led by the Legislature in the US, Canada and South Africa; and the Constitution of the Republic of South Africa 1996. See also the UK Equality Act 2010 (c 15).

dispute before the courts, but only the latter can provide a watertight foundation for the further development of the jurisprudence on Art 12(1), as well as other areas of constitutional adjudication, in the long run.
