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The relevance of purpose in constitutional equal protection challenges to executive action

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ABSTRACT

Written constitutions often include generalized guarantees of equal protection which imply a proscription on unconstitutional differential treatment. This paper will examine what the analytical focus ought to be when evaluating challenges to executive action based on such rights, a particularly relevant issue given recent developments in Hong Kong's and Singapore's equal protection jurisprudence. These developments suggest that there are three possible analytical focal points, each of which takes a different perspective on the relevance of the executive's purpose in utilizing differential treatment: (1) the connection between the chosen differentiation and the specific purpose of the challenged executive action; (2) the connection between the differentiation and the broad purpose for which power was conferred upon the authority to perform the challenged action; and (3) a generalized assessment of the action's rationality independent of purpose. This paper will critically evaluate each of these possibilities. It will argue that a specific purpose approach (namely (1)) is to be preferred, and that such an approach should be substantiated through a structured proportionality framework.

KEYWORDS

Equal protection; executive action; judicial review; Hong Kong; Singapore

I. Introduction

Equal protection guarantees are a staple of written constitutions around the world. They come in two main forms – a general right to equality and a prohibition against discrimination on the basis of certain specified characteristics¹ – and written constitutions can contain both types of provisions.²

The focus of this paper will be the general right to equality. Such rights raise interesting problems. A general right to equality in itself provides little guidance as to how it should be applied by judges. Indeed, while a constitutional guarantee of equal protection articulates a powerful aspirational ideal, what exactly does it mean for persons to be equal before the law? Modern states necessarily have to draw distinctions between persons

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¹Tamas Gyorfi, 'From Equal Treatment to the Prohibition of Arbitrariness – An Analysis of the General Right to Equality' (2012) 6 *Vienna Online Journal on International Constitutional Law* 65, 68.

²For example, Article 12(1) of the Constitution of the Republic of Singapore, a general right to equality, has been construed as offering separate legal test from Article 12(2), which does include prohibited grounds of discrimination – see *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [90]–[94].

in regulating the distribution of benefits and burdens.³ How can one square, as a matter of law, the imperative to secure equality before the law with the necessity of differentiation?

Such rights are often invoked to challenge allegedly discriminatory legislation. Significant attention has been devoted to analysing constitutional equality rights in this context. However, while it is commonly appreciated that constitutional rights to equality can apply also to executive action, much less attention has been devoted to studying the applicability of a general equality right specifically to executive action.

This is notwithstanding the fact that the application of general equality rights to executive action raises unique issues.⁴ Indeed, how should one analyse a differentiation's constitutionality where executive action is concerned? The answer to this question requires engagement with two issues. First, what is the proper analytical focus in evaluating the differentiation? This is not a banal question by any means. Indeed, the constitutional equal protection jurisprudence of Hong Kong and Singapore suggests that there are several possibilities in this regard, each of which takes a differing perspective on the relevance of the executive's purpose in utilizing differential treatment.

To illustrate, suppose that an immigration authority declines to grant a dependant visa to a same-sex partner. The decision is subsequently challenged on equal protection grounds. Assuming the relevant differentiation to be the sexual orientation of the applicant,⁵ and moving to evaluate whether this differentiation is lawful, there are several points upon which the analysis can be focused. For one, the focus could be on whether there was a rational connection between the identified differentiation and the *specific* purpose of the differentiation – for example, to protect the institution of marriage. Alternatively, the connection between the differentiation and the *broad* purpose of the immigration authority's power to grant dependant visas could be the focus of analysis – for example, to regulate immigration. Yet another possible approach would be to simply require a generalized analysis of the decision's rationality without express reference to purpose.

A second related issue is what the appropriate standard of review ought to be. Again, there are several possibilities. The differentiation could be assessed on the basis of irrationality or through a proportionality-type framework drawing attention to whether a proper balance had been struck between the societal benefits of the potentially rights-infringing governmental action and the degree of burden placed upon the affected individual. An additional range of possibilities linked to the proper standard of review is whether the legitimacy of the governmental purpose ought to be scrutinized.

This article will engage with both of these issues, with an emphasis on the first. Indeed, it should be readily apparent that both issues are closely intertwined. For example, one might observe that a proportionality framework incorporates a specific purpose approach, and that the generalized rationality approach is also itself suggestive of a

³Jaclyn L. Neo, 'Equal Protection and the Reasonable Classification Test in Singapore: After *Lim Meng Suang v Attorney-General*' (2016) *Singapore Journal of Legal Studies* 95, 95.

⁴Another issue is the difficulty in identifying the correct comparator to analyse in equal protection analysis. See Aileen McColgan, 'Cracking the Comparator Problem: Discrimination, "Equal" Treatment and the Role of Comparisons' (2006) 6 *European Human Rights Law Review* 650, 673, for a discussion of this issue, a criticism of a comparator-driven approach, and a suggestion that the question of likeness ought to be dealt with at the justification stage.

⁵This point may be less straightforward than it appears here. Indeed, one may frame the relevant differentiation as whether the partner is party to a marriage legally recognised by the jurisdiction. This illustrates the problems that may arise at the stage of identifying the comparator, briefly mentioned in the preceding footnote.

standard of review. Accordingly, the discussion in this paper will proceed as follows. It will first address the broader question of how a general right to equality ought to be realized in legal doctrine. Generally, there is a convergence of opinion that in deciding whether there has been an infringement of such a right, the inquiry revolves around whether the relevant differentiation was rationally justifiable. The question that arises then is the specific analytical focus of such a requirement of rational justification. Drawing from Hong Kong and Singapore constitutional jurisprudence, the paper will identify and critically evaluate three possible approaches: a generalized rationality approach, a broad purpose approach, and a specific purpose approach. The paper will argue that a specific purpose approach is to be preferred, and will suggest that a proportionality analysis is the appropriate standard of review that should be adopted. While particular attention will be paid in this paper to Hong Kong and Singapore jurisprudence, the principles to be drawn from this discussion are relevant more broadly to common law constitutional jurisdictions possessing constitutional equal protection guarantees.

II. Rational justification as a requirement for differential treatment

In thinking about how to effect a general right to equality in legal doctrine, a useful starting point would be to interpret such a guarantee as requiring institutions of government to give effect to formal justice – the Aristotelian idea that like persons or situations ought to be treated alike.⁶ But proceeding with this as the starting point, one swiftly runs into a problem: an imperative to treat like cases alike tells us nothing about how to determine what are like cases in the first place.⁷ Indeed, there is a broad scholarly consensus that such a determination inevitably requires a *moral* assessment of whether cases are alike in a morally relevant sense.⁸ In view then of the inevitable need for a moral assessment inherent in a general right of equality, the question of how such a right ought to be effected in legal doctrine acquires an additional layer of complexity. How should equal protection doctrine grapple with this necessity of moral assessment, especially when these assessments can sometimes be deeply contentious?

It is interesting to note that there has been a remarkable convergence of responses to this difficulty. Scholars and commentators from various perspectives have suggested that a general right of equality, when effected in legal doctrine, boils down to a requirement that governmental action has to be rationally justifiable.

From one perspective, equality reflects a fundamental requirement of the rule of law – specifically, the requirement that governmental action must not be unreasonable. This component of the rule of law requires that any differentiations be justified as a means of avoiding arbitrary differentiations.⁹ A well-known proponent of such a view is the constitutional scholar T.R.S. Allan. He argued that the rule of law ‘insists that all forms of discrimination between persons, at the hands of government, must be justified on grounds

⁶Gyorfi (n 1) 72.

⁷Peter Westen, ‘The Empty Idea of Equality’ (1982) 95(3) *Harvard Law Review* 537, 544–45; Ben Mitchell, ‘Process Equality, Substantive Equality and Recognising Disadvantage in Constitutional Equality Law’ (2015) 53 *Irish Jurist* 36, 38.

⁸Gyorfi (n 1) 72; Neo (n 3) 96–97, 112; Guy Lurie, ‘Proportionality and the Right to Equality’ (2020) 21 *German Law Journal* 174, 178; Michael P Foran, ‘Equality Before the Law: A Substantive Constitutional Principle’ (2020) (Apr) *Public Law* 287, 297–98.

⁹Foran (n 8) 306; Gyorfi (n 1) 73; Isaiah Berlin, ‘Equality as an Ideal’ in F A Olafson (ed), *Justice and Social Policy* (Prentice-Hall, 1961) 128, 137.

rationally related to a conception of the public good which is itself open to debate and scrutiny'.¹⁰ Others have argued, along similar lines, that rational justification is precisely what a general right of equality is about, as opposed to requiring the entrenchment of notions of fairness necessarily drawing upon substantive theories of justice.¹¹

From another perspective, effecting constitutional equal protection as imposing a requirement of rational justification on government actors is a second-best option, necessitated by the difficulties of performing the moral assessments inherent in equal protection analysis.¹² On this view, while the ideal articulation of equality in legal doctrine would involve substantive moral assessments to determine whether like cases are indeed alike in a morally relevant sense, the practical realities of judges' limitations and moral disagreement make this ideal difficult to effect. Accordingly, the next best option would be to effect the requirement of equal protection in legal doctrine by way of a requirement of rational justification. While getting less directly at what equality really requires, this second-best option would have the advantage of avoiding potentially intractable moral disputation.

From yet another perspective, one might reach the same conclusion by reflecting upon the nature of the equality right. Indeed, it has been argued that a right to equality is by nature a comparative right.¹³ A right to equality does not mandate a fixed standard of permissible treatment, but rather requires rational justification for differentiations.¹⁴ Others have made the connection between the nature of the equality right and rational justification even more directly – it has been argued that a right to equality is congruent to a right to be treated in a reasonable or proportionate manner by institutions of government.¹⁵ For example, Guy Lurie argued that the Aristotelian imperative to treat like cases alike itself incorporates a 'relational means-ends test' boiling down to a requirement of proportionality.¹⁶ In his view, analysing contraventions of the equal protection guarantee by examining first whether there was a contravention of the right to equality and then determining whether such a contravention was justifiable by reference to proportionality would therefore be repetitive.¹⁷

Accordingly, there is a variety of perspectives on how a general right to equality ought to translate into legal doctrine. While differing in their reasoning, these perspectives converge as a matter of outcome: that equal protection should be effected in legal doctrine in the form of a requirement of rational justification. Construing the equality right as congruent to a requirement of rational justification has also been considered normatively desirable – it fosters a culture of justification¹⁸ and provides a means for the judiciary to exercise supervision over the allocation of benefits in a manner befitting of the judiciary's constitutionally prescribed role.¹⁹ Indeed, there is ample practical motivation for judges to

¹⁰T R S Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115(Apr) *Law Quarterly Review* 221, 222–23.

¹¹Robert E Park, 'Thinking About Equal Protection' (1980) 57 *University of Detroit Journal of Urban Law* 961, 986–87.

¹²Gyorfi (n 1) 79.

¹³Kenneth W Simons, 'Equality as a Comparative Right' (1985) 65 *Boston University Law Review* 387, 391.

¹⁴*Ibid.*

¹⁵Charles-Maxime Panaccio, 'Apologia for a General Doctrine of Substantive Equality and Discrimination' (2020) 11(2) *Jurisprudence* 213, 217–18.

¹⁶Lurie (n 8) 179.

¹⁷*Ibid.*, 178–79.

¹⁸Panaccio (n 15) 221–22.

¹⁹*Ibid.*, 223.

view equality as a matter of rational justification: daunted by the prospect of the rigorous philosophical speculation needed to fully flesh out the deeply complex right to equality, viewing the right to equality as synonymous with a requirement of rational justification may be perceived as more conducive for efficient decisionmaking.

Further questions remain, however, about what equality effected as a requirement of rational justification would mean when applied to the context of executive action. Indeed, applying a requirement of rational justification to executive action raises two closely related issues: what is the analytical focus of such a requirement (namely, what is the executive being asked to justify), and what is the appropriate standard of review? The second issue is common across challenges to legislation and executive action and has already received a considerable amount of attention. The first issue, however, has been relatively underexplored. In the context of challenges to legislation, it is widely accepted that the relevant analytical focus is to determine whether there is a rational connection between the differentiation contained within the legislative provision and the purpose of the provision.²⁰ In contrast, in the context of executive action, the equality jurisprudence of Hong Kong and Singapore suggests that there is in fact a variety of possible analytical focal points for a requirement of rational justification. The following sections of this paper will identify and critically evaluate each of these possibilities.

III. Approach 1: general rationality

The first means by which a requirement of rational justification in equal protection doctrine can be linked to executive action is through a generalized assessment of the challenged action's rationality without express reference to purpose.

A. Singapore – the deliberate and arbitrary discrimination test

Such an approach has precedent in Singapore. By way of background, Article 12(1) of Singapore's Constitution provides a guarantee of equality before the law and equal protection of the laws – in other words, it is a general right to equality.²¹ While Article 12(2) sets out certain specific categories of prohibited discrimination – religion, race, descent, or place of birth – the Singapore courts have held that Articles 12(1) and (2) provide independent legal tests.²² This means that government action can be challenged under either one of these provisions, or under both together. Given the focus of this paper on a general right to equality, Singapore's constitutional jurisprudence relating to Article 12(1) is of greatest relevance.

The Singapore Court of Appeal, the apex court in Singapore, has recently articulated a new approach to Article 12(1) challenges to executive action in *Syed Suhail bin Syed Zin v Attorney-General*²³ ('*Syed Suhail (CA)*') – an approach which will be discussed in due

²⁰See, for example, *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [57]–[75]; *Secretary for Justice v Yau Yuk Lung* [2007] 3 HKLRD 903 at [19].

²¹Article 12(1), Constitution of the Republic of Singapore.

²²Article 12(2), Constitution of the Republic of Singapore; *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [90]–[94].

²³*Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809. The Singapore Court of Appeal in the recent case of *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [300]–[329] also briefly considered the relationship between *Lim Meng Suang v Attorney-General* and *Syed Suhail bin Syed Zin v Attorney-General* as doctrinal tests for Article 12 challenges in Singapore, but left for a future occasion a conclusive holding on the relationship between the two tests.

course. However, prior to *Syed Suhail (CA)*, the prevailing approach governing equal protection challenges to executive action in Singapore was a generalized assessment of an executive action's rationality. Indeed, the previously authoritative approach for equal protection challenges to executive action required the courts to determine whether the action in question amounted to deliberate and arbitrary discrimination.²⁴ If so, the relevant action would contravene Article 12(1) of the Singapore Constitution.

This approach was usefully illustrated in the Singapore Court of Appeal decision of *Eng Foong Ho v Attorney-General*.²⁵ The applicants in this case were members of a Buddhist temple. Their temple was gazetted for compulsory acquisition under the Singapore Land Acquisition Act. The applicants challenged this decision on the basis that it was a violation of Article 12(1), since a nearby Hindu mission and a Christian church had not been similarly gazetted.²⁶ In dealing with this challenge, the Court of Appeal first affirmed the then-authoritative test for equal protection challenges to executive action: 'an executive act may be unconstitutional if it amounts to intentional and arbitrary discrimination'.²⁷ Applying this test to the facts, the court held that the challenged compulsory acquisition decision did not amount to such discrimination, since it had been made on the basis of planning considerations. These considerations provided a reasonable means of distinguishing the Buddhist temple from the other properties being compared to.²⁸

The key point to observe about the test of deliberate and arbitrary discrimination is that it does not explicitly incorporate an assessment of purpose. The test merely requires a generalized assessment of the decision's rationality, and may therefore readily invite comparisons to the judicial review ground of irrationality. Indeed, it is interesting to note that common law administrative law does also give effect to the idea of equality by way of a generalized assessment of a decision's rationality. The Privy Council decision of *Matadeen v Pointu* acknowledged that the imperative to treat like cases alike is 'a general axiom of rational behaviour' which has been safeguarded through the judicial review ground of irrationality.²⁹ The experience of administrative law therefore lends some credence to the idea that equal protection challenges to executive action can be evaluated by way of a generalized assessment of an executive action's rationality. Indeed, if administrative law, which has as its *raison d'être* the regulation of executive action, can adopt a generalized rationality analysis to achieve the same end, one might think that this can be applied also to constitutional equal protection doctrine.

B. Evaluation

In sum, a generalized rationality analysis simply requires that any differentiations have to be justified, without any express reference to purpose. Insofar as a general right to

²⁴See *Howe Yoon Chong v Chief Assessor* [1979–1980] SLR(R) 594 at [13]; *Howe Yoon Chong v Chief Assessor* [1990] 1 SLR(R) 78 at [15]–[18].

²⁵*Eng Foong Ho and others v Attorney-General* [2009] 2 SLR(R) 542.

²⁶While the applicants also sought to rely upon Article 12(2), which specifically prohibits differentiations on the ground of religion, the Court of Appeal in *Eng Foong Ho* held that there was no differentiation on the ground of religion at all – see [31]–[38]. This suggests that how the relevant differentiation is identified is an important issue in equal protection jurisprudence applied to executive action.

²⁷*Eng Foong Ho and others v Attorney-General* [2009] 2 SLR(R) 542 at [30].

²⁸*Ibid.*, [32]–[38].

²⁹*Matadeen v Pointu* [1999] AC 98, 109. See also *Kruse v Johnson* [1898] 2 QB 91, 99; Rabinder Singh, 'Equality: The Neglected Virtue' (2004) 2 European Human Rights Law Review 141, 143.

equality is indeed about ensuring the rational justifiability of differentiations, this approach appears to have the advantage of expressing directly the nature of the right.

It is suggested, however, that there are several problems with a generalized rationality approach. First, such an approach can be criticized as overlapping significantly with the common law administrative law ground of irrationality. There might indeed be no issue in principle with constitutional law drawing upon administrative law principles to substantiate the applicability of constitutional rights to executive action. However, effecting a constitutional equality guarantee in a manner that would render it indistinguishable from irrationality at common law may not give sufficient effect to the idea that a *constitutional* right to equality is superior in the hierarchy of legal norms to the common law, and should therefore provide for a higher degree of protection – a concern raised by the Court of Appeal in *Syed Suhail* (CA).³⁰

One might argue in response that the higher order nature of constitutional rights will be preserved in any case due to the difference in burden of proof between challenges based upon administrative law as compared to challenges based upon constitutional rights. Where constitutional rights are concerned, once an applicant is able to prove a *prima facie* infringement of a constitutional right, the burden of proof shifts to the government to justify the infringement. In contrast, under administrative law, an applicant will bear the burden of proving that the government had acted irrationally. In view of this difference, one might argue that even if a generalized rationality approach is taken towards the constitutional right to equality, there still remains a meaningful distinction between the constitutional right to equality and the administrative law ground of irrationality.

It is suggested, however, that such a distinction is insufficient as a meaningful difference between constitutional equality and administrative law irrationality. First, given the discussion in Part II pointing out the close linkage between the nature of the right to equality and the requirement of rational justification, a determination of whether there has been an infringement of the right to equality may very well be tied to whether the relevant government action is rationally justifiable, thereby minimizing the practical difference in burden of proof.³¹ Second, if the standard of review is the same under both constitutional equality and administrative law irrationality, the burden of proof on the government to justify its actions remains low and is easily satisfied, raising doubts about whether the difference in burden of proof would be sufficient to give effect to constitutional equality as a higher order right.

Moving on to the second and more fundamental issue with a generalized rationality approach, one might wonder whether it is possible for the rational justifiability of executive action to be assessed without reference to any concept of purpose. Any assessment of rational justifiability might necessarily require some consideration of purpose in order to arrive at meaningful conclusions. Taking the well-known illustration of a red-haired teacher being dismissed on the mere ground of having red hair as an example of impermissible irrationality, the reason one is able to draw the conclusion that such a decision is irrational is because of an intuitive assessment that the decision has no connection with any legitimate purpose that could lie behind dismissal decisions. Absent a consideration of purpose, it becomes challenging to draw any conclusions as to the decision's

³⁰*Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [57].

³¹See in particular the argument in Lurie (n 8).

rationality. Indeed, an assessment of rationality in the context of equal protection detached from any consideration of purpose may be reduced to determining whether all red-haired teachers had been treated the same – a form of inquiry surely inadequate in getting at the true problem underlying such decisions.³²

If purpose is necessary for any assessment of rationality to be meaningful, the question remains as to *which* purpose is analytically relevant. The experience of Hong Kong and Singapore equal protection jurisprudence suggests that there are in fact two possible ways of framing the relevant purpose. Each of these possibilities will be discussed in the following sections.

IV. Approach 2: broad purpose

In the landmark equal protection decision of *Syed Suhail* (CA), the Singapore Court of Appeal rejected the deliberate and arbitrary discrimination test and instituted a new approach to analysing equal protection challenges to executive action – an approach which provides a fitting illustration of a broad purpose approach.

A. Singapore – *Syed Suhail* (CA)

In *Syed Suhail* (CA), a judicial review challenge was brought against the scheduling of a prisoner's impending execution, part of which was based upon Article 12(1) of the Singapore Constitution. The applicant argued that the scheduling of his execution ahead of other prisoners, despite having been sentenced to death later than these prisoners, amounted to an equal protection violation. This argument was based, *inter alia*, on the ground that a failure to schedule executions in the order that prisoners were sentenced to death would deprive prisoners of having a fair amount of time by which they could adduce new evidence to challenge their convictions.

In addressing the Article 12(1) argument, the Singapore Court of Appeal took the opportunity to articulate a new approach to equal protection challenges to executive action. The court held that the deliberate and arbitrary discrimination test would no longer be the governing approach for challenges to executive action under Article 12(1). It came to this conclusion for various reasons, including the previous approach's similarity to common law administrative law and its setting of an unacceptably high standard for executive action to infringe upon Article 12(1).³³ In place of the old test, the Court of Appeal introduced a new two-step approach. First, the applicant had to prove that he was treated differently from 'equally situated' persons.³⁴ Should the applicant succeed, the second step would require the decision-maker in question to prove that this differential treatment was 'based on legitimate reasons'.³⁵ Most notably for present purposes, the court held that the reasonableness of such differential treatment would be evaluated by considering whether such treatment had 'a sufficient rational relation to the object for which the power was conferred'³⁶ – in essence, a broad purpose approach.

³²Neo (n 3) 100.

³³*Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [57].

³⁴*Ibid*, [61]–[62].

³⁵*Ibid*, [61]–[62].

³⁶*Ibid*, [61].

Applying this new approach to the facts, the Court of Appeal considered that there was indeed differential treatment at the first stage. The execution of another prisoner had arisen for scheduling on the same date as the applicant, placing both prisoners in equal situations. Yet, the applicant's execution had been scheduled earlier, despite the fact that he had been sentenced to death later than the other prisoner.³⁷ Accordingly, this differentiation had to be justified. The Court of Appeal did not perform an in-depth evaluation at the second stage, given that the novelty of this new approach meant that there had been no opportunity for full argument, but granted leave for judicial review in order that the High Court could address the issue.³⁸

The High Court's decision on the merits, structured around this new Article 12(1) test, is an instructive example of what a broad purpose approach looks like in practice.³⁹ Applying the newly articulated two-stage approach, the High Court in *Syed Suhail bin Syed Zin v Attorney-General* ('*Syed Suhail* (HC)') held that the applicant failed at the first stage – the applicant was not equally situated with the other prisoners being compared to since the applicant had no realistic expectation of his case being reviewed and potentially reopened on the merits, while the other prisoners did.⁴⁰ The applicant's equal protection challenge to the scheduling of his execution therefore could be disposed of on this ground.

The High Court nevertheless went on, for completeness, to consider the second stage of the *Syed Suhail* (CA) test. By way of background, one of the applicant's arguments was that he had been discriminated against vis-à-vis non-Singaporeans whose executions had been halted because of Covid-19 restrictions in Singapore, which prevented their family members from entering Singapore and would also cause difficulties in relation to the repatriation of their remains.⁴¹ Taking the applicant's case at its highest and assuming that the Covid-19 restrictions were indeed the reason for the differential treatment, the High Court acknowledged that the *Syed Suhail* (CA) test required the court to consider whether the relevant differentiation had 'a sufficient rational relation to the object for which the power was conferred'.⁴² The court suggested that the power of the state to schedule executions was intended to 'facilitate the administration of justice and enable the law to take its course'.⁴³ In the High Court's view, while 'operational concerns' and 'administrative constraints' had to be taken into account in the scheduling of executions, Covid-19 restrictions in themselves 'may not be sufficient to amount to a legitimate reason to justify differential treatment between Singaporeans and non-Singaporeans in the scheduling of executions'.⁴⁴ This was because this would amount to discrimination on the basis of nationality, and nationality 'bore no rational relation to the scheduling of executions'.⁴⁵

³⁷Ibid, [76].

³⁸Ibid, [77].

³⁹*Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452.

⁴⁰Ibid, [35], [58]. This once again illustrates the difficulty of identifying the relevant differentiation in any equal protection challenge to discrete executive action.

⁴¹*Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452 at [24], [50].

⁴²*Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [61].

⁴³*Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452 at [62].

⁴⁴Ibid, [62].

⁴⁵Ibid, [66].

The High Court, in answering the question of whether the differentiation in question was rationally justifiable, therefore provided an illustration of how a broad purpose approach would look like in practice. The court, in line with a broad purpose approach, placed the analytical focus on whether there was a rational connection between the differentiation – in this case, characterized as nationality – and the purpose of the state’s power to schedule executions more broadly, coming to a tentative conclusion that a rational connection may not be made out in such circumstances.⁴⁶

B. Evaluation

Moving to critically evaluate this approach, the first point to be made is that it does represent an improvement over a generalized rationality approach. Indeed, a broad purpose approach would expressly incorporate an assessment of purpose, which has been argued above to be a necessary component of any assessment of the rational justifiability of executive action.

A broad purpose approach, however, raises challenges of its own. First, insofar as this approach requires judges to discern the relevant purpose for which power has been granted to the executive to perform the kind of action being challenged, such a determination might be susceptible to considerable malleability. It is instructive to have regard to the differing articulations of broad purpose in the Singapore High Court and Court of Appeal decisions of *Taw Cheng Kong v Public Prosecutor*⁴⁷ and *Public Prosecutor v Taw Cheng Kong*⁴⁸ respectively. These cases involved an equal protection challenge to section 37 of Singapore’s Prevention of Corruption Act, a provision which allowed corruption offences committed by a Singapore citizen outside Singapore to be treated as if they had been committed in Singapore. This provision was argued to be a violation of Singapore’s equal protection guarantee, on the basis that it rendered Singapore citizens but not non-citizens guilty if corrupt gratification were received outside of Singapore.

In addressing this challenge, the High Court found that the provision was indeed unconstitutional. Framing the purpose of the Prevention of Corruption Act as directed at the prevention of corruption *in Singapore*,⁴⁹ the High Court thought that the classification based on citizenship was both over-inclusive and under-inclusive; it was over-inclusive because it included Singapore citizens engaged in corrupt acts outside of Singapore with no effect in Singapore, and it was under-inclusive because it excluded corrupt acts committed by foreigners with direct effects on Singapore.⁵⁰ On appeal, however, the Court of Appeal framed the purpose of the Prevention of Corruption Act as directed at the prevention of corruption more broadly.⁵¹ This meant that the classification based on citizenship did indeed further the broad purpose of the Act by addressing corruption in a manner that preserved international comity, and the challenge to section 37 failed.⁵²

While these cases concerned equal protection challenges to legislation, they nevertheless usefully demonstrate that the kind of analytical inquiry which the broad purpose

⁴⁶*Ibid.*, [67].

⁴⁷*Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78.

⁴⁸*Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489.

⁴⁹*Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78 at [51].

⁵⁰*Ibid.*, [63]–[70].

⁵¹*Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [63].

⁵²*Ibid.*, [80]–[82].

approach calls for is susceptible to significant malleability – a malleability which renders this approach vulnerable to the criticism that it lacks principle.

Further, if the executive action being challenged is based on the prerogative power or does not have a clear statutory basis, the challenge of articulating the broad purpose becomes even more pronounced. Indeed, in the absence of a statutory provision through which one can at least attempt to discern the proper purposes of power, any determination of purpose in the broad sense may become even more vague and unhelpful in providing meaningful guidance. The High Court decision in *Syed Suhail* (HC) provides a pertinent illustration of this problem. The court suggested that the power to schedule executions was conferred to ‘facilitate the administration of justice and enable the law to take its course’⁵³ – a vague articulation of purpose which was of little aid in the court’s conclusion that there was no rational connection between this purpose and a differentiating factor based on nationality, as evinced in the fact that this conclusion, while made only in *obiter*, amounted to little more than a bare assertion.⁵⁴

V. Approach 3: specific purpose

Aside from a broad purpose approach, there is an alternative means of framing a requirement of purpose in equal protection analysis: a specific purpose approach. This would require the court to consider whether there was a rational connection between the differentiation effected by the executive action and the specific purpose of the action.

A. Hong Kong

The approach taken by the Hong Kong Court of Final Appeal – the apex court in Hong Kong – to equal protection challenges to executive action provides a useful illustration of this approach. By way of background, a general right to equality can be found in Article 25 of Hong Kong’s Basic Law as well as Article 1 of the Hong Kong Bill of Rights Ordinance, both of which are documents enjoying constitutional status in Hong Kong.⁵⁵ In applying the equal protection guarantee as a basis for challenges to government action, the Hong Kong Court of Final Appeal in *Secretary for Justice v Yau Yuk Lung* (*‘Yau Yuk Lung’*) articulated the following approach: the court would first consider whether there had been a differentiation giving rise to an equal protection concern; if so, the court would evaluate whether the differentiation in question could be justified.⁵⁶

This test of justification is in substance a proportionality analysis – it requires the court to evaluate whether the differentiation pursued a legitimate aim, whether the differentiation was rationally connected to the legitimate aim, and whether it was no more than necessary to achieve the legitimate aim.⁵⁷ This is a test applicable across all

⁵³*Syed Suhail bin Syed Zin v Attorney-General* [2021] 5 SLR 452 at [62].

⁵⁴*Ibid.*, [66].

⁵⁵Article 11 of the Hong Kong Basic Law; Article 7 of the Hong Kong Bill of Rights Ordinance; *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 at [61]; Richard Gordon QC and Johnny Mok SC, *Judicial Review in Hong Kong* (2nd edn, LexisNexis, 2014), 160, 178.

⁵⁶*Secretary for Justice v Yau Yuk Lung* [2007] 3 HKLRD 903 at [19].

⁵⁷*QT v Director of Immigration* [2018] HKEC 1792 at [81]–[87]; *Secretary for Justice v Yau Yuk Lung* [2007] 3 HKLRD 903 at [20]; Richard Gordon QC and Johnny Mok SC, *Judicial Review in Hong Kong* (2nd edn, LexisNexis, 2014) 566, Anton Cooray, *Constitutional Law in Hong Kong* (2nd edn, Walters Kluwer, 2017) 234.

constitutional challenges to government action in Hong Kong and is not limited to the context of equal protection. The Court of Final Appeal in *Hysan Development Co Ltd v Town Planning Board* ('*Hysan Development*') added a fourth step: it held that the court also ought to consider whether a reasonable balance had been struck between the benefits of the rights-infringing governmental action and the degree of the infringement upon an individual's rights, with specific attention to the question of whether the societal benefit of the action would result in an undue burden on the individual.⁵⁸

This is in essence a specific purpose approach – it requires the court to evaluate whether there was a rational connection between the differentiation in question and the specific aim of the differentiation. The landmark equal protection decision of *QT v Director of Immigration*⁵⁹ ('*QT*') provides an illustration of how this approach works. In this case, the applicant was in a same-sex civil partnership registered in England. While her partner was granted an employment visa in Hong Kong, the applicant was denied a dependant visa on the basis that she was not in a marriage recognized for the purposes of such visa grants – a monogamous marriage between a man and a woman. The applicant subsequently brought a challenge on equal protection grounds against this decision, alleging that she had been discriminated against unlawfully for her sexual orientation.

The Court of Final Appeal held that the central point of equal protection analysis was an examination of 'every alleged case of discrimination to see if the difference in treatment can be justified'.⁶⁰ Applying the test of justification described earlier, the court identified three legitimate aims underlying the Director of Immigration's decision to distinguish same-sex relationships from traditional marriage relationships for the purpose of dependant visa applications: encouraging talented persons to join the workforce, controlling the quality and quantity of immigrants entering Hong Kong, and promoting administrative convenience.⁶¹

Proceeding with the analysis on the basis of these three legitimate aims, the court held that a crucial problem with the Director's decision was that there was no rational connection between these aims and the decision. The 'talent' rationale was considered to be 'plainly not rationally connected' to a policy making distinctions on the basis of sexual orientation.⁶² The immigration control rationale was considered to be similarly unrelated to the sexual orientation of dependants – permitting only heterosexual spouses to receive dependant visas would do little to maintain the quality or quantity of immigrants entering Hong Kong.⁶³ The aim of administrative convenience was also not rationally connected to the distinction drawn by the Director: since same-sex partners could easily produce their civil partnership certificate, preventing same-sex partners from receiving dependant visas

⁵⁸*Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 at [83]; *QT v Director of Immigration* [2018] HKEC 1792 at [86]. See also the landmark case of *Kong Yunming v Director of Social Services* [2013] HKCFA 107, where the Court of Final Appeal considered that the balance between an infringement upon individual rights and the social benefit of the governmental action was not properly made, rendering a stricter government policy governing eligibility for social welfare unconstitutional by reference to the right of social welfare protected under Articles 36 and 145 of the Basic Law.

⁵⁹*QT v Director of Immigration* [2018] HKEC 1792.

⁶⁰*Ibid.*, [83].

⁶¹*Ibid.*, [88].

⁶²*Ibid.*, [90].

⁶³*Ibid.*, [91].

on the ground of administrative convenience was considered to be irrational.⁶⁴ Accordingly, the Director's decision contravened the equal protection guarantee.⁶⁵

Another landmark equal protection decision of the Hong Kong Court of Final Appeal, *Leong Chun Kwong v Secretary for Civil Service*⁶⁶ ('*Leong Chun Kwong*'), provides one more example of a specific purpose approach applied in practice. In this case, the applicant challenged two separate decisions: a decision to deny spousal benefits under civil service employment and a decision to disallow filing for a joint income tax assessment where the spouse in question was party to a same-sex marriage entered into in a foreign jurisdiction. These decisions were challenged as unlawful discrimination on the ground of sexual orientation.

In keeping with the approach taken by the Court of Final Appeal in *QT*, the court in *Leong Chun Kwong* similarly focused its equal protection analysis on the test of justification. The court first sought to identify whether there was a legitimate aim underlying the differential treatment in question. At this point, the Court of Final Appeal accepted that 'the protection of the institution of marriage in Hong Kong, being the voluntary union for life of one man and one woman to the exclusion of all others' was indeed a legitimate aim, and that 'differential treatment directed to that aim may be justified if the other elements of the justification test are satisfied'.⁶⁷

The problem, however, was that the court had difficulty finding a rational connection between this legitimate aim and the differential treatment in question. The court held that the denial of spousal benefits would do nothing to weaken the institution of marriage in Hong Kong, and the disallowance of joint tax assessments for same-sex married couples had no connection to encouraging persons to enter opposite-sex marriages in Hong Kong.⁶⁸ Since there was no rational connection between the differentiation and the identified legitimate aim, the challenged decisions contravened the equal protection guarantee in Hong Kong law.

Such reasoning is a valuable illustration of the workings of a specific purpose approach. The relevant purpose to be analysed in *Leong Chun Kwong* was not the broad purpose underlying the power to grant spousal benefits or allow joint tax assessments, but rather the purpose behind the specific decisions to disallow spousal benefit claims and the filing of joint tax assessments where same-sex married couples were concerned.

B. Evaluation

A specific purpose approach addresses the key shortcomings of the approaches previously discussed. As compared to a general rationality approach, a specific purpose approach would have the advantage of expressly incorporating an assessment of purpose. A specific purpose approach is also less susceptible to the malleability of the broad purpose approach, since the relevant purpose to be analysed can be discerned with greater specificity.

⁶⁴Ibid, [97].

⁶⁵Ibid, [109].

⁶⁶*Leong Chun Kwong v Secretary for Civil Service* [2019] HKEC 1765.

⁶⁷Ibid, [61].

⁶⁸Ibid, [67].

In addition, a specific purpose approach would be capable of giving better effect to the idea that a constitutional equal protection guarantee ought to provide more robust protection than common law administrative law. This would especially be the case if the Hong Kong Court of Final Appeal's approach towards equal protection is adopted, in view of its incorporation of a specific purpose approach by way of a structured proportionality-based inquiry.

Most fundamentally, a crucial advantage of a specific purpose approach is that it places the strongest justificatory burden upon executive authorities for any differentiations they effect, as compared to the other two approaches. The malleability of the broad purpose approach renders it a less secure safeguard of constitutional equality – it will be relatively easier for the executive to bring allegedly rights-infringing action under an articulation of purpose favourable to it. And to the extent that the generalized rationality approach is analogous to the judicial review ground of irrationality, this approach would render executive actions unconstitutional only if no other reasonable authority would have made the same decision – a very high threshold for applicants to surmount.⁶⁹ In contrast, a specific purpose approach requires a direct correlation between the specific purpose of the executive action and the differentiation adopted, placing upon executive authorities the highest justificatory burden out of all the three identified approaches, and thereby giving greatest effect to the primacy of constitutional rights in a constitutional system.

The facts of *QT* can be drawn upon to illustrate this point. It is readily apparent that the Court of Final Appeal's reasoning in *QT* paid close attention to the specific purposes of the differentiation in question. Indeed, the court carefully identified the possible purposes of the specific differentiation, assessed their legitimacy, and then evaluated whether there was a rational connection between these purposes and the differentiation under challenge. By way of contrast, an analysis based upon the broad purpose approach would have been framed rather differently. It would have centred around the broad purpose for which the Director was granted the power to grant dependant visas in the first place. This would have very much reduced the justificatory burden upon the Director. As was noted earlier, such broad purposes are very malleable and can be framed very broadly. For instance, the relevant broad purpose here could have been framed as regulating immigration into Hong Kong. Articulated as such, it would have been much easier for the Director to justify his decision to distinguish same-sex relationships from traditional marriage relationships for the purpose of dependant visa applications by reference to this purpose. While one could take issue with whether the Director's decision really served the specific purpose of safeguarding the quality and quantity of immigrants coming into Hong Kong, *inter alia* – as the Court of Final Appeal did – it would have been much more difficult to take issue with the proposition that the decision was indeed broadly directed at regulating immigration into Hong Kong. The Director's decision would have passed muster more easily on such a basis.

A generalized rationality approach would have presented even less of a justificatory burden for the Director in *QT*. The Director's decision, evaluated independent of any consideration of purpose, was unlikely to be seen as a decision that no other reasonable Director would have made in his position, as was evinced by the Director's ability to

⁶⁹The Singapore Court of Appeal in *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 expressed the same concern – see [57].

articulate a set of *prima facie* plausible reasons for the differentiation he made. What ultimately rendered the differentiation at hand unconstitutional was the insufficient rational connection between the differentiation and the specific purposes for which the differentiation had been adopted – thereby underscoring the value of a specific purpose approach in demanding greater rigour in the assessment of executive action.

It will be useful to consider at this juncture a possible counter-argument to the proposition that a specific purpose approach provides for the heaviest justificatory burden for any restrictions upon the right to equality. One might argue that the specific purpose approach may in practice allow the government to raise multiple possible purposes for the adopted differentiation, thereby allowing the government to rely on the aggregate weight of the justifications across all of the posited specific purposes combined, even if each justification would have been insufficient in itself. This might then have the effect of making it easier for the government to surmount its burden of justification.

Against this counter-argument, however, it is suggested that a specific purpose approach would not have such an effect. The key inquiry under a specific purpose approach is whether the government's specific purpose in adopting a differentiation is rationally connected with the adopted differentiation. No matter how many purposes are posited by the government, the key is that *each* specific purpose must have a rational connection with the adopted differentiation – as the discussion of *QT* above has illustrated. Indeed, it is the generalized rationality approach which would be most susceptible to such an aggregation of justifications, given that all that it requires is a generalized assessment of a differentiation's rationality.

Accordingly, it is suggested that out of the three possible approaches identified and evaluated thus far, a specific purpose approach is the best option. But this conclusion raises a further question. If a specific purpose approach is indeed the best way of evaluating executive action against an equal protection guarantee, the question remains as to what the standard of review ought to be in evaluating whether there is a rational connection between the relevant differentiation and the purpose of the differentiation. It should be noted that this question is no longer unique to executive action and is equally relevant to equal protection challenges to legislation. Indeed, the question of the proper standard of review is capable of being the subject of another paper in itself, and cannot be fully done justice here. Nevertheless, given its close connection with the argument that has been proffered thus far, some comments on the proper standard of review will be ventured.

The question of the proper standard of review raises two related issues. First, how far should courts go in determining whether there is a connection between the adopted differentiation and the purpose of the differentiation? Indeed, looking again more closely at the approach adopted by the Hong Kong Court of Final Appeal, one observes that it incorporates several steps of increasing intensity.⁷⁰ The *Yau Yuk Lung* test requires the court to first evaluate whether there is a rational connection between the differentiation and the legitimate aim. The inquiry does not stop there, however, and the court is required at the next stage to consider whether the differentiation was no more than necessary to accomplish the legitimate aim. This next stage can be described as a

⁷⁰*Secretary for Justice v Yau Yuk Lung* [2007] 3 HKLRD 903 at [19]; *QT v Director of Immigration* [2018] HKEC 1792 at [84]; *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 at [83].

minimal impairment standard.⁷¹ If this step is passed, the court moves on to the final stage: a step which has been described as ‘proportionality as such’,⁷² and which requires the court to consider whether a reasonable balance had been struck between the societal benefits of rights-infringing action and the burden that it would place upon individuals.

The second issue raised by the question of the proper standard of review is whether evaluation of the legitimacy of the governmental action’s purpose is permissible. The Hong Kong Court of Final Appeal accepted that the court had a role in reviewing whether the governmental action giving rise to a differentiation pursued a legitimate purpose.⁷³ The Singapore Court of Appeal, however, in the context of equal protection challenges to legislation, declined to take a similar step, holding that a review of the legislative purpose’s legitimacy would amount to judicial overreach.⁷⁴

With the relevant issues thus described, it is useful to bear in mind that an acceptance of a specific purpose approach does not necessarily entail accepting in entirety the manner through which the Hong Kong Court of Final Appeal has incorporated a specific purpose approach. Indeed, a specific purpose approach can be effected in a variety of other ways: for example, by leaving out an evaluation of the legitimacy of the executive action’s purpose, or by stopping short of ‘proportionality as such’ or even of the minimal impairment inquiry. A legal approach which simply requires the presence of a rational connection between the relevant differentiation and the purpose of the executive act can still be accurately characterized as a specific purpose approach.

This variety of methods by which one can frame the standard of review required under a specific purpose approach is particularly important in light of a perennial issue influential in any discussion of the proper standard of review – the concern of excessive intrusion into the merits of executive decisionmaking.⁷⁵ Indeed, this variety of methods by which a specific purpose approach can be incorporated in legal doctrine forms a solution to this concern. A specific purpose approach does not necessarily entail intrusive judicial review, and can be properly given effect as long as the relevant legal doctrine requires a rational connection to be established between the relevant differentiation and the purpose of the executive act.

One may go further to suggest, however, that *even* if one frames the proper standard of review of a specific purpose approach in a manner that incorporates a ‘proportionality as such’ inquiry and a review of the legitimacy of the executive act’s purpose, this does not give rise to separation of powers concerns in the degree to which it is commonly feared. Indeed, even a ‘proportionality as such’ inquiry, properly understood, does not require courts to substitute their judgment for that of the decision-maker – it merely requires courts to evaluate the relative weight accorded to the various interests at stake, ensuring that proper attention has been accorded to fundamental rights in the decisionmaking process.⁷⁶ In doing so, the balancing exercise entailed by a ‘proportionality as such’ inquiry is not directed at finding the best possible decision that could have been

⁷¹Vicki C Jackson, ‘Constitutional Law in an Age of Proportionality’ (2015) 124 Yale Law Journal 3094, 3114.

⁷²*Ibid.*, 3116.

⁷³*Secretary for Justice v Yau Yuk Lung* [2007] 3 HKLRD 903 at [19], *QT v Director of Immigration* [2018] HKEC 1792 at [84].

⁷⁴*Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [76]–[89].

⁷⁵The Singapore Court of Appeal decision in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 is an example of judicial concern about overreach in relation of challenges to legislation – see, for example, the decision at paras [76]–[89]. The Singapore Court of Appeal decision in *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 displays a similar concern in relation to challenges to executive action – see, for example, the decision at paras [34]–[63].

made, but rather at identifying decisions which do not satisfy the minimal conditions of rationality and coherence.⁷⁷ The same point can be made in relation to a review of the executive purpose's legitimacy – it is not directed at identifying ideal purposes, but rather at filtering out purposes which do not meet the conditions of minimal rationality. Also, a specific purpose approach incorporating a robust proportionality inquiry and a review of the government's purpose is capable of being flexible enough to calibrate the rigour of judicial supervision to the nature of the subject matter at hand.⁷⁸

This discussion of the proper standard of review has been kept relatively brief in the interest of space. Nevertheless, this discussion does permit one to offer a tentative suggestion that a specific purpose approach such as that adopted by the Hong Kong Court of Final Appeal, incorporating elements of 'proportionality as such' analysis and allowing review of the legitimacy of the specific executive purpose, ought to be the preferred mode of evaluating equal protection challenges to executive action.⁷⁹ Indeed, in view of the greater degree of rigour that such an approach would require, this approach would best address a concern that has recurred throughout this paper – how constitutional equal protection doctrine can be sufficiently distinguished from general administrative law in order to give effect to the legal importance of constitutional norms.⁸⁰ A robust constitutional right to equality substantiated in such a manner can co-exist with the administrative law ground of irrationality. While irrationality is broad enough to also capture unequal treatment in executive action, it is fitting for applicants to be able to subject such executive action to a more rigorous standard of rational justification, over and above what irrationality would require – indeed, discriminatory executive action is particularly odious to a jurisdiction governed by the rule of law.⁸¹ The role of administrative law irrationality would be to continue to provide for generalized protection against irrationality across all types of executive action, while the constitutional right to equality would confer an additional avenue of recourse where the problematic executive action is discriminatory in nature.

VI. Conclusion

This paper has sought to shed light on an issue in the application of constitutional equality to executive action that has been relatively underexplored. To recapitulate, the specific question that this paper sought to address was what the analytical focus ought to be in evaluating the constitutionality of differentiations effected by executive action. The paper first argued that a general right to equality is properly effected in legal doctrine as a requirement of rational justification. As to what the analytical focus of such a requirement of rational justification ought to be, the paper evaluated three possible approaches: a generalized rationality approach, a broad purpose approach, and a specific purpose

⁷⁶Jackson (n 71) 3100–01; Niall Buckley, 'Merging Principles of Public Law: Towards Proportionality in an Irish Context' (2004) 39 *Irish Jurist* 161, 207–08.

⁷⁷Park (n 11) 994–95.

⁷⁸Buckley (n 76) 208. See, as an example, *Fok Chun Wa v Hospital Authority* [2012] HKEC 471 at [61], [71], [90].

⁷⁹For other benefits of proportionality analysis, see Jackson (n 71).

⁸⁰This concern was expressed by the Singapore Court of Appeal in *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [57].

⁸¹See, for example, Allan's argument referenced above in Part II – T R S Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115(Apr) *Law Quarterly Review* 221.

approach. The paper has argued that a specific purpose approach is to be preferred, and has ventured a tentative view that the proper standard of review that ought to be taken is a proportionality-type analysis incorporating a ‘proportionality as such’ balancing exercise and a review of the legitimacy of the executive action’s purpose.

Other interesting issues yet remain in equal protection doctrine – for example, the identification of the relevant differentiation to be analysed yields particularly challenging issues in the context of discrete executive acts. The discussion of such issues will have to be left for another occasion, however, and it is hoped that the analysis in this paper will bring some clarity to the evaluation of equal protection challenges to executive action.

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