3-2024

Loose ends in Singapore Equal Protection doctrine

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Singapore Journal of Legal Studies
[2024] 32–51

LOOSE ENDS IN SINGAPORE'S EQUAL PROTECTION DOCTRINE

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A trilogy of landmark Singapore Court of Appeal decisions has defined the landscape of constitutional equal protection doctrine in Singapore: *Lim Meng Suang*, *Syed Suhail* and *Tan Seng Kee*. While this trio of cases has laid the doctrinal foundation for the constitutional right to equality in Singapore, three loose ends remain for clarification. First, what is the relationship between the legal tests articulated in *Syed Suhail* and *Lim Meng Suang*? Second, what is the relationship between both steps in the *Syed Suhail* test? Third, what is the distinction between the *Syed Suhail* test and the common law judicial review ground of irrationality? This paper will seek to study how these loose ends may be best tied up through a close analysis of the decisions which the Singapore courts have handed down since the landmark trilogy was decided.

I. Introduction

The right to equality is one of the most culturally salient of our time. Few arguments strike as powerfully as an argument that the government has discriminated against a particular individual or group *vis-à-vis* another individual or group, speaking thereby to the ability of equality-based arguments to resonate with a deeply fundamental instinct – that all persons ought to be treated equally under the law.

Indeed, some of the most important constitutional law decisions in Singapore have revolved around the right to equality enshrined in Article 12(1) of the Singapore Constitution[1]. A trilogy of decisions has emerged as the landmark cases in this regard. The first in this trilogy is the Court of Appeal decision of *Lim Meng Suang v Attorney-General*.[2] In this case, the court was faced with a constitutional challenge to section 377A of the Singapore Penal Code[3] – which has since been repealed by Parliament. In addressing this challenge, the Court of Appeal took the opportunity to set out an authoritative statement of the legal test for Article 12(1)-based challenges to legislation – the "reasonable classification" test.

In 2021, the second decision of this trilogy was handed down in the Court of Appeal decision of *Syed Suhail bin Syed Zin v Attorney-General*.[4] In *Syed Suhail*

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1 Constitution of the Republic of Singapore (2020 Rev Ed) [Singapore Constitution].

2 [2015] 1 SLR 26 [*Lim Meng Suang*].

3 Penal Code 1871 (2020 Rev Ed) [Penal Code].

4 [2021] 1 SLR 809 [*Syed Suhail (CA)*].

(CA), faced with an Article 12(1) challenge to an executive decision – the scheduling of executions – the Court of Appeal articulated the authoritative test for such challenges. The applicant for judicial review would first have to prove that he had been treated differently from other "equally situated" persons.[5] Should the applicant be successful, the decision-maker in question would have to prove that this differential treatment was "reasonable in that it was based on legitimate reasons".[6]

The third and final decision of this trilogy is the 2022 Court of Appeal decision of *Tan Seng Kee v Attorney-General*.[7] Faced with another challenge to section 377A of the Penal Code, the Court of Appeal revisited the manner by which Article 12(1) would apply to this provision. In this landmark decision which played a pivotal role in the Singapore Parliament's eventual decision to repeal section 377A, the court ventured several important comments on the relationship between the *Lim Meng Suang* and *Syed Suhail (CA)* tests.

This trilogy of cases, taken together, reshaped the landscape of Article 12(1) doctrine in Singapore. Indeed, they provided a comprehensive substantiation of precisely how the constitutional right to equality in Singapore would translate into legal doctrine. Yet, three questions remained for clarification in the wake of these cases. First, what is the relationship between the *Syed Suhail (CA)* and *Lim Meng Suang* tests? Given that both tests govern the application of Article 12(1), should both tests be seen as interchangeable tests with each capable of applying to both legislation and executive action – as the Court of Appeal in *Tan Seng Kee* seemed to think – or as discrete tests with different zones of application? Second, what is the relationship between both steps in the *Syed Suhail (CA)* test? How would the courts determine whether compared persons or groups are "equally situated" for the purposes of the test, and how would this determination be distinguished from an analysis of whether the differential treatment was "reasonable"? Third, given that the *Syed Suhail (CA)* test requires an assessment of the reasonableness of differential treatment, what is the distinction between this test and the common law judicial review ground of irrationality? Indeed, the Court of Appeal in *Syed Suhail (CA)* itself noted that it was undesirable to conflate the "ordinary principles of judicial review" with the requirements of Article 12(1) since doing so risked rendering Article 12(1) "nugatory so far as it related to executive action."[8] How then can this conflation be avoided in legal doctrine?

Since these landmark equality judgments were handed down, the Singapore courts have had the opportunity to decide several more important cases revolving around Article 12(1) challenges. It is therefore an opportune time to assess the trajectory of legal development that the Singapore courts have embarked upon since this trilogy of cases was decided. This paper will begin with an overview of this trilogy to set the background. It will then discuss a series of decisions revolving around Article 12(1) that have been handed down since this trilogy of cases, with specific reference to their implications for the three issues identified in the preceding paragraph.

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5 *Ibid* at [61]–[62].
6 *Ibid* at [61]–[62].
7 [2022] 1 SLR 1347 [*Tan Seng Kee*].
8 *Syed Suhail (CA)*, *supra* note 4 at [57].

The final section will analyse the trajectory of development that the Singapore courts have carved out in relation to equal protection doctrine in Singapore.

II. Background

The constitutional right to equal protection in Singapore is enshrined in Article 12 of the Singapore Constitution. While it contains several sub-provisions, the focus of this paper will be on Article 12(1) – a provision that succinctly provides that "[a]ll persons are equal before the law and entitled to the equal protection of the law."[9] This has been described as a general equality right, which can be contrasted to a non-discrimination right providing for certain specific categories of impermissible differentiation such as religion or race.[10] Article 12(2) serves the latter function.[11]

The generality of the wording in Article 12(1) has required the courts to articulate specific legal rules to govern how this constitutional provision ought to be applied.[12] A landmark effort in this regard is the Court of Appeal decision of *Lim Meng Suang* – the first in the trilogy of cases to be described in this section. In *Lim Meng Suang*, the court was faced with several constitutional challenges to section 377A of the Penal Code, which criminalised homosexual sexual acts between men. One of these challenges was based on Article 12(1) of the Singapore Constitution. In addressing this challenge, the Court of Appeal provided an authoritative articulation of how Article 12(1) challenges to legislation ought to be analysed. Describing the relevant test as the "reasonable classification" test, the court held that there were two steps to the test. First, the statute being challenged had to contain an "intelligible differentia", in the sense that the statute must contain a clearly intelligible distinguishing mark.[13] Notably, the court added that differentia which were intelligible but so unreasonable as to be illogical or incoherent would fall foul of this step as well.[14] Second, there had to be a rational relation between the differentia and the objective sought to be achieved by the statute.[15] The court emphasised that there was no need for a perfect relationship between the differentia and the statute's objective, but that a clear disconnect between the two would cause the statute in question to fall foul of the reasonable classification test.

As the court observed, the analysis ought always to be fact and context-specific, and the outcome of this test will turn very much on how the purpose of a statute is identified.[16] Notwithstanding the centrality of purpose in applying the reasonable classification test, the Court of Appeal rejected the proposition that the court could

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9 Singapore Constitution, Art 12(1).

10 See, for example, Kenny Chng, "Constitutional equality and executive action – a comparative perspective to the comparator problem" (2023) 43(1) LS 179.

11 Singapore Constitution, Art 12(2).

12 In addition to the cases discussed here, see also *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78 (HC); *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 (CA); *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 (HC).

13 *Lim Meng Suang*, *supra* note 2 at [65].

14 *Ibid* at [67].

15 *Ibid* at [68].

16 *Ibid* at [68].

review the legitimacy of a statute's purpose in itself, holding that doing so would be to "confer on the court a licence to usurp the legislative function in the course of becoming … a 'mini-legislature'."[17] Applying this test to the constitutional challenge at hand, the court concluded that section 377A provided an intelligible differentia. Framing the relevant purpose of section 377A as directed at expressing moral disapproval of homosexual male sexual acts, the court found that there was also a "complete coincidence" in the differentia and the purpose of the statute.[18]

Lim Meng Suang proved to be a landmark decision in Singapore constitutional law. Indeed, the *Lim Meng Suang* reasonable classification test has been extensively discussed in academic literature.[19] Marcus Teo, in particular, argued that this test was structured in "a manner that favoured the Government and disadvantaged applicants", given, *inter alia*, that the test allowed for a "considerable gap" between the purpose and the differentia.[20] Regardless, this decision was not to be the last word on how Article 12(1) would apply. This brings us to the second case in Singapore's Article 12(1) trilogy of cases: *Syed Suhail (CA)*.

In *Syed Suhail (CA)*, the Court of Appeal was once more faced with a judicial review application based on Article 12(1). Unlike *Lim Meng Suang*, however, this case concerned a challenge to an executive decision. Specifically, the applicant in *Syed Suhail (CA)* argued that the scheduling of his execution violated Article 12(1), since he was scheduled to be executed earlier than other persons on death row who had been sentenced to death earlier than he had been. He claimed that the executions of the other persons on death row had been delayed because their family members residing outside of Singapore could not enter Singapore to visit and repatriate their remains, and argued that this amounted, *inter alia*, to an equal protection violation under Article 12(1). The question before the Court of Appeal was whether leave ought to be granted for the judicial review application to proceed – one of the requirements for which was that the applicant had to show a *prima facie* case of reasonable suspicion that there was a valid basis for judicial review.

Faced with this challenge, the Court of Appeal set out a legal test by which to analyse Article 12(1) challenges to executive action. Noting first of all that the then-prevailing "deliberate and arbitrary discrimination" test was problematic on the ground that it set a very high threshold for applicants to surmount and that it undesirably overlapped with the common law judicial review ground of irrationality, the court held that a new two-step approach ought to govern such challenges.[21] First, the applicant had to prove that he had been treated differently from other

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17 *Ibid* at [82].

18 *Ibid* at [153].

19 See, for example, Jaclyn Neo, "Equal Protection and the Reasonable Classification Test in Singapore: After *Lim Meng Suang v Attorney-General*" [2016] Sing JLS 95; Benjamin Joshua Ong, "New Approaches to the Constitutional Guarantee of Equality Before the Law" (2016) 28 Sing Ac LJ 320; Jack Lee, "Equality and Singapore's First Constitutional Challenges to the Criminalization of Male Homosexual Conduct" (2015) 16 Asia Pac J HR & L 150; Chang Wen-Chen, Thio Li-ann, Kevin Y L Tan and Yeh Jiunn-rong, *Constitutionalism in Asia: Cases and Materials* (Oxford: Hart Publishing, 2014) at 605–607; Yap Po Jen, "Section 377A and Equal Protection in Singapore: Back to 1938?" (2013) 25 Sing Ac LJ 630.

20 Marcus Teo, "Refining Reasonable Classification" (2023) Sing JLS 83 at 86 [Teo].

21 *Syed Suhail (CA)*, *supra* note 4 at [57].

"equally situated" persons.[22] If the applicant was successful in doing so, the second step of the test would require the government authority in question to prove that this differential treatment was "reasonable in that it was based on legitimate reasons".[23] This would involve a consideration of various factors, such as whether the differential treatment bore "a sufficient rational relation to the object for which the power was conferred", or whether the differential treatment was based on "plainly irrelevant considerations or is the result of applying inconsistent standards or policies without good reason."[24] The Court of Appeal made a further observation that this test had to be applied in a manner sensitive to the nature of the executive action in question – if a decision concerned an individual's "life and liberty to the gravest degree", the court would have to be "searching in its scrutiny."[25]

Applying this test to the facts, the Court of Appeal found that no legitimate reason had been offered for the differentiation in this case. Accordingly, the court held that there was indeed a *prima facie* case of reasonable suspicion that there was an Article 12(1) violation, granting leave for the merits of the judicial review application to be heard by the High Court – the decision of which will be discussed shortly. Focusing on *Syed Suhail (CA)* for now, as a matter of law, this case marked a significant development in Article 12(1) doctrine in Singapore on a level similar to that made by *Lim Meng Suang*. Indeed, it has also attracted academic commentary from various angles,[26] with Teo in particular noting that the *Syed Suhail (CA)* test "struck a different tone" from the *Lim Meng Suang* test, given the court's acknowledgement of the possibility of a higher standard of review where life and liberty were concerned.[27]

This brings us to the final case in this trilogy: *Tan Seng Kee*. This case's significance for present purposes is distinct from that of the preceding two cases in this trilogy – it did not involve the articulation of a new legal test, but provided an indication of how the Court of Appeal perceived the relationship between the *Lim Meng Suang* and *Syed Suhail (CA)* tests. In this case, the Court of Appeal was confronted with yet another constitutional challenge to section 377A. The court ultimately did not grant leave for the judicial review application to be heard on its merits, on the basis that the applicants were under no threat of prosecution under the law since the Attorney-General was prevented from doing so by the operation of the legitimate expectations doctrine.[28] This was sufficient to dispose of the application at hand.

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22 *Ibid* at [61]–[62].

23 *Ibid* at [61]–[62].

24 *Ibid* at [61].

25 *Ibid* at [63].

26 See, for example, Benjamin Joshua Ong, "Singapore - can delaying an execution due to COVID-19 amount to unconstitutional discrimination?" (2022) Public Law 156 [Ong, "Unconstitutional Discrimination"]; Teo, *supra* note 20; Thio Li-ann, "Of Variable Standards of Scrutiny and Legitimate Legal Expectations: Article 12(1) and the Judicial Review of Executive Action" (2022) Sing JLS 95 [Thio]; Kenny Chng, "A Reconsideration of Equal Protection And Executive Action In Singapore" (2021) 21(2) OUCLJ 295.

27 Teo, *supra* note 20 at 89.

28 For further analysis of this point, see Jaclyn L Neo, "Exceeding expectations? Substantive legitimate and constitutional rights" (2023) 139 Law Q Rev 384; Kenny Chng, "An Unexpected Development of Legitimate Expectations in Singapore" (2023) Public Law 21.

Yet, given the full arguments that had been made on the constitutional issues, the court provided detailed comments in *obiter* on these issues as well.

The Court of Appeal's comments on the Article 12(1) challenge to section 377A are of particular interest for present purposes. The court noted that two approaches to the reasonable classification test had emerged in the court's jurisprudence – the *Lim Meng Suang* and *Syed Suhail (CA)* tests. It observed that the central similarity between both approaches was that the first limb of both tests was directed at identifying a differentia that could be assessed subsequently under the second limb of the test.[29] Yet, the court thought that there were two important differences between the tests. First, the court thought that both tests differed as to whether the reasonableness of a differentia could be taken into account at the first limb of the tests. In the Court of Appeal's view, the *Lim Meng Suang* test required an assessment of reasonableness in the application of the intelligible differentia step, while the *Syed Suhail (CA)* test required only the identification of the differentia in question at the first limb of the test.[30] The court thought that under the *Syed Suhail (CA)* test, it was only at the second limb that the reasonableness of the differentia would be assessed.[31] Second, the Court of Appeal noted that the *Syed Suhail (CA)* test expressly allowed for a greater degree of scrutiny of a statutory provision depending on the context in question.[32] In contrast, the *Lim Meng Suang* test did not expressly provide for this, and indeed was conceptualised as a test that would merely serve "the minimal threshold function of requiring logic and coherence" in the legislation being challenged.[33]

Despite refraining from making a conclusive decision on the constitutional issues surrounding section 377A, the impact of *Tan Seng Kee* on Singapore constitutional law proved to be immense. In the aftermath of the Court of Appeal decision in *Tan Seng Kee*, the Singapore Parliament decided to repeal section 377A, on the basis that there was a significant risk that the court may hold section 377A to be unconstitutional in a subsequent judicial review challenge. *Tan Seng Kee* will therefore certainly go down in the record books as one of the most important constitutional law decisions in Singapore ever handed down.

III. Loose Ends

Returning to the context of equal protection doctrine, this trilogy of cases has contributed significantly to clarifying and systematising Article 12(1) doctrine in Singapore. At the same time, several remaining loose ends in equal protection doctrine can be identified.

First, what exactly is the relationship between the *Lim Meng Suang* and *Syed Suhail (CA)* tests? This is an issue that the Court of Appeal decision in *Tan Seng Kee* highlights in stark relief. It is clear from the court's analysis of both tests in

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29 *Tan Seng Kee*, *supra* note 7 at [314].
30 *Ibid* at [315]–[318].
31 *Ibid* at [318].
32 *Ibid* at [327].
33 *Lim Meng Suang, supra* note 2 at [66].

Tan Seng Kee that the court envisioned an overlap between both tests – indeed, the court's analysis was premised on the possibility of the *Syed Suhail (CA)* test applying also to legislation, since *Tan Seng Kee* involved a constitutional challenge to a statutory provision. It is on this basis that commentators such as Teo have evaluated the impact of *Tan Seng Kee* for equal protection doctrine in Singapore.[34] Yet, *Syed Suhail (CA)* did *not* involve a constitutional challenge to legislation – as described above, the Court of Appeal's focus in *Syed Suhail (CA)* was on addressing an Article 12(1) challenge to an executive decision, and the court was quite cognisant that such challenges triggered a distinct legal test as compared to that applied for challenges to legislation. In the wake of *Tan Seng Kee*, should the *Syed Suhail (CA)* test apply also to legislation, then? By the same token, should the *Lim Meng Suang* test be considered capable of applying to executive action too?

Second, what is the relationship between the two limbs of the *Syed Suhail (CA)* test? This issue was also highlighted by the Court of Appeal's decision in *Tan Seng Kee*. The court in *Tan Seng Kee* suggested that the first limb of the test – whether the relevant comparators were equally situated – did not require any assessment of reasonableness. This was supposedly one of the key distinctions between the test and the *Lim Meng Suang* test. Is it truly the case, however, that an assessment of whether comparators are equally situated will never require any assessment of reasonableness? Or might the very assessment of whether comparators are equally situated already necessarily require an assessment of whether there are *reasonable* differences between them? This is an important issue to resolve – it goes to the substance of the test and has important implications for how exactly the test should be applied.

Third, what is the relationship between the *Syed Suhail (CA)* test and the common law judicial review ground of irrationality? The Court of Appeal in *Syed Suhail (CA)* had already anticipated this issue in its recognition that it was important to distinguish the legal test for Article 12(1) challenges from the ground of irrationality at common law. Yet, the question is whether the court's articulation of the relevant test in *Syed Suhail (CA)* succeeds in being sufficiently distinct from irrationality in administrative law. Indeed, the court's usage of the terminology of "legitimate reasons" and rationality in its description of the *Syed Suhail (CA)* test evokes the ground of irrationality in administrative law. The salience of this issue has not escaped academic commentary – Thio Li-ann has picked up on the possibility of overlap between *Syed Suhail (CA)* and irrationality and has provided a set of useful proposals for how this overlap can be addressed.[35]

It is therefore clear that several loose ends in legal doctrine remain in the wake of the landmark trilogy of equal protection cases in Singapore. The remainder of this paper will be directed at exploring how these loose ends can be neatly tied up. The Singapore courts have since had several occasions to explore the implications of this trilogy, and it will be instructive to now turn to analyse these decisions with a view to observing whether further light has been shed on these loose ends.

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[34] Teo, *supra* note 20 at 89.

[35] Thio, *supra* note 26 at 126–127.

IV. The Legacy of the Trilogy

A. *Syed Suhail bin Syed Zin v Attorney-General*

We begin our discussion with the Singapore High Court decision of *Syed Suhail (HC)*.[36] This decision came after the Court of Appeal in *Syed Suhail (CA)* granted leave to the applicant for judicial review, and was a hearing of the merits of the judicial review application discussed in *Syed Suhail (CA)*. While *Syed Suhail (HC)* was not strictly decided in the wake of the entire trilogy of cases – it was handed down before *Tan Seng Kee* – this case remains important to analyse given that it was an application of the two-step *Syed Suhail (CA)* test for the first time since it had been articulated.

Applying the *Syed Suhail (CA)* test to the merits of the application, the High Court found that the applicant failed at the first step of the test. Indeed, the court held that the applicant was not equally situated with the other prisoners he sought to be compared to, since he had no realistic expectation that his case would be reviewed and potentially reopened on the merits, as compared to the other prisoners.[37] While the application could be disposed of on this ground, the High Court went on to discuss the merits of the applicant's arguments at the second step of the *Syed Suhail (CA)* test. The court noted that the nub of the applicant's argument was that COVID-19 restrictions were the rationale for the differentiation between himself and the other prisoners on death row – since it was due to the COVID-19 restrictions that the family members of the other prisoners could not enter Singapore to visit and repatriate their remains, leading to their executions being delayed. Applying the second step of the *Syed Suhail (CA)* test, the court observed that COVID-19 restrictions "may not be sufficient to amount to a legitimate reason to justify differential treatment between Singaporeans and non-Singaporeans in the scheduling of executions",[38] on the basis that this would amount to discrimination on the basis of nationality, and nationality "bore no rational relation to the scheduling of executions".[39]

In short, while the judicial review application failed at the first step of the *Syed Suhail (CA)* test, the High Court suggested that there was a possibility that the second step of the test may have been successfully made out by the applicant.[40] Benjamin Joshua Ong has argued that the High Court's reasoning could be characterised as suggesting that "nationality" was an impermissible category of discrimination under Article 12(1) of the Singapore Constitution – if so, this would be a significant development of the law, since Article 12(1) is a general equality right and does not expressly specify any category of impermissible discrimination.[41] Teo has argued against this characterisation.[42]

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[36] [2021] 5 SLR 452 [*Syed Suhail (HC)*].

[37] *Ibid* at [35], [58].

[38] *Ibid* at [62].

[39] *Ibid* at [66].

[40] See Gabriel Tan, "Singapore - a(nother) sea change for equality law on the horizon?" (2022) Public Law 347 for further academic commentary on this case.

[41] Ong, "Unconstitutional Discrimination", *supra* note 26 at 157.

[42] Teo, *supra* note 20 at 104.

Regardless what the better understanding of the High Court's decision is, the crucial point to note here is that the court's analysis of the first limb of the *Syed Suhail (CA)* test *did* require some kind of value judgment as to whether parties were equally situated. To determine whether two parties are equally situated, one needs to first identify the relevant comparator. Here, the court chose the prospect of further appeal as the comparator. But this was not the only comparator that it could have chosen. Another possible comparator could have been the fact that all the parties had been sentenced to capital punishment and had their clemency petitions rejected – the comparator that had been chosen by the Court of Appeal as it heard the application for leave for judicial review in *Syed Suhail (CA)*. If this had been chosen, the parties would indeed have been equally situated, requiring any differentiations between them to meet the requirements of the second step of the *Syed Suhail (CA)* test.

Accordingly, while the requirement to consider whether parties are "equally situated" appears *prima facie* to be a purely factual one, the court does have to make a judgment as to which is the most *relevant* comparator to select. The question then is whether a determination of whether a comparator is *relevant* might necessitate an evaluation of whether there are *reasonable* differences between the compared parties. We turn now to explore whether subsequent decisions have shed any further light on this point.

B. *Han Hui Hui and others v Attorney-General*

The next case we will analyse is another High Court decision applying the *Syed Suhail (CA)* test for an Article 12(1) challenge to executive action: *Han Hui Hui and others v Attorney-General*.[43] In this case, the applicants sought to challenge, *inter alia*, the decision of the Singapore government to commence charging unvaccinated persons medical bills for COVID-19-related expenses. A major prong of the applicants' argument in this regard was that this decision unlawfully discriminated between vaccinated and unvaccinated persons – while Article 12(1) was not specifically pleaded, the High Court noted that this was in substance an Article 12(1) argument and analysed it as such.[44]

In addressing this argument, the High Court took the opportunity to discuss the relationship between Article 12(1) and irrationality in administrative law. The court suggested that the difference between the two tests was that irrationality was directed at executive decisions which lack rationality, while Article 12(1) was directed at "executive actions which are discriminatory in nature without legitimate reasons".[45] Offering an illustration, the court thought that "a discriminatory decision which was not irrational, but reckless or negligent, could still be in breach of Article 12(1)".[46]

Moving then to consider whether there had been an Article 12(1) violation on the facts, the court applied the *Syed Suhail (CA)* test. The court held that the applicants

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[43] [2022] SGHC 141 [*Han Hui Hui*].
[44] *Ibid* at [141].
[45] *Ibid* at [38].
[46] *Ibid* at [38].

failed at the first step of the test – the applicants, who were unvaccinated, were not equally situated with fully vaccinated persons. In the High Court's view, there were "at least three material differences" between the applicants and other fully vaccinated persons: the applicants had an elevated risk of COVID-19 related illness and death, they had an increased possibility of COVID-19 infection and transmission, and they placed a greater degree of burden on the healthcare system.[47] To reach its conclusion that these were indeed material differences between the applicants and fully vaccinated persons, the court reviewed in detail clinical studies and public health data.[48] This meant therefore that the applicants were unable to surmount the first limb of the *Syed Suhail (CA)* test, and that there was no differential treatment among equally situated persons that needed justification at the second step of the test. Accordingly, the High Court denied the applicants leave to commence with their judicial review application.

This decision is particularly interesting for two main reasons. First, the High Court recognised the importance of distinguishing the law on Article 12(1) from irrationality in administrative law – one of the loose ends in Article 12(1) doctrine identified earlier. Indeed, the court appeared to have in mind two possible points of difference between both grounds. For one, based on the illustration that the High Court offered, it seemed to think that a difference between both grounds rested in an element of intent – Article 12(1) captured reckless or negligent discrimination while irrationality would capture only deliberate discrimination. If this difference is indeed what the High Court had in mind, it is, with respect, a peculiar distinction to draw. It appears to suggest that irrationality as a ground of judicial review requires an element of intent, which sits uneasily with the orthodox understanding of irrationality as directed at rendering unlawful decisions which are objectively manifestly unreasonable no matter whether the decision-maker intended to be unreasonable.

Another possible difference between both grounds that the High Court appeared to have in mind was that Article 12(1) required an element of discrimination, and was therefore more specific than irrationality which was directed generally at irrational decisions. Yet, one might wonder whether this point of difference is also problematic – indeed, what is a "discriminatory" decision? Might a value judgment be necessary to determine which differentiations are impermissibly discriminatory in nature? And might this value judgment ultimately be based on whether the differentiation is *reasonable*? If so, then the boundaries between Article 12(1) and irrationality become blurred once again.

The second reason that this decision is interesting is that the High Court's application of the *Syed Suhail (CA)* test sheds some light on the relationship between both limbs of the test – another of the loose ends identified earlier. As mentioned earlier, in applying the first step of the test to the facts, the court here paid considerable attention to whether vaccinated and unvaccinated persons were equally situated by analysing in detail the arguments canvassed by each side to determine whether there were salient differentiating factors between both groups. In doing so, the court, in its own words, was looking for "material differences" between the two groups. The question then is whether this requirement of materiality is similar

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47 *Ibid* at [149]–[150].

48 *Ibid* at [153]–[166].

in substance to an assessment of whether the alleged differentiation between the two groups is *reasonable*. Indeed, one might ask: what amounts to a "material difference" as opposed to a mere "difference"? The answer might be that a "material difference" is one that possesses at least some connection with the purpose of the decision of the executive authority in question. If so, the resemblance between the search for a "material difference" and an assessment of whether a differentiation between comparators is reasonable becomes quite clear. This would mean that the first step of the *Syed Suhail (CA)* test is not as devoid of reasonableness analysis as the Court of Appeal thought in *Tan Seng Kee*.

C. *Attorney-General v Datchinamurthy a/l Kataiah*

We next move to consider an important Court of Appeal decision – indeed, the first Court of Appeal decision since *Syed Suhail (CA)* to discuss and apply the *Syed Suhail (CA)* test. In *Attorney-General v Datchinamurthy a/l Kataiah*,[49] the applicant sought to challenge the scheduling of his execution. The nub of his argument was that he, like other prisoners, had been sentenced to death and was involved in certain pending proceedings – yet, unlike the other prisoners, he had already been scheduled for execution. This was alleged to be a violation of Article 12(1). The High Court allowed the applicant's application for leave to commence judicial review, and the Attorney-General appealed against its decision.

The Court of Appeal ultimately upheld the High Court's decision. The court commenced its analysis by holding that the proper test to apply in "assessing whether an executive action has breached Article 12(1)" was the *Syed Suhail (CA)* test.[50] Taking the opportunity to clarify the test, the Court of Appeal noted that the first step of the test is "a *factual* one of whether a prudent person would objectively think the persons concerned are roughly equivalent or similarly situated in all material respects" [emphasis added].[51] In keeping with its prior comments in *Tan Seng Kee*, the court added that it was only at the second stage of the test that the court would consider whether the differential treatment was reasonable.

Turning then to apply the test to the facts, the Court of Appeal considered that the key issue at the first step was whether the applicant was involved in "relevant pending proceedings".[52] If so, then the applicant would be equally situated with other prisoners who had similarly been denied clemency and who also were involved in relevant pending proceedings – thereby shifting the burden to the appellant to justify why the applicant had been subjected to differential treatment by being scheduled for execution while the other prisoners had not been. Given the importance of this issue, the Court of Appeal devoted significant attention to resolving it. It held that the appellant's attempts to deny the relevance of the pending proceedings amounted to an attempt to have the court try those proceedings without the benefit of a proper trial, and that it was not for the court to speculate on what evidence may be adduced

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[49] [2022] SGCA 46 [*Datchinamurthy*].
[50] *Ibid* at [29].
[51] *Ibid* at [30].
[52] *Ibid* at [31].

in respect of the pending proceedings which would possibly have an impact on the applicant's conviction and sentence of death.[53] The court also observed that the applicant's personal knowledge could indeed be relevant to the pending proceedings and that his claim in those proceedings might be hampered without his participation.[54]

Accordingly, the court found that the applicant was indeed involved in relevant pending proceedings and was equally situated with other prisoners who had not yet been scheduled for execution, shifting the burden to the appellant to provide a justification for the differential treatment. No justification had been offered, however, since the appellant had proceeded on the basis that the pending proceedings were *not* relevant – leading the Court of Appeal to conclude that "it appeared at the present stage that the respondent had been 'singled out' by the decision to schedule him for execution".[55] Since this amounted to a *prima facie* breach of Article 12(1), the Court of Appeal upheld the High Court's decision to grant the applicant leave to commence his judicial review application.

In considering the implications of this decision for the loose ends identified earlier, it is quite clear from the Court of Appeal's reasoning in this case that it understood *Syed Suhail (CA)* as the prevailing test for Article 12(1) challenges to executive action – implicit in this regard is a perception of *Syed Suhail (CA)* as a distinct test from *Lim Meng Suang* as a matter of scope of application. Further, the Court of Appeal's decision also provides food for thought for the issue of the relationship between the two limbs of the test in *Syed Suhail (CA)*. Indeed, as mentioned earlier, the court emphasised that the first step of the test was factual in nature and devoid of considerations of reasonableness – it was only at the second step that such considerations would become relevant.

Yet, one wonders whether this conception of the *Syed Suhail (CA)* test was borne out in the manner that it was applied. The Court of Appeal's focus of analysis at the first step of the test revolved around whether the applicant was involved in any *relevant* pending proceedings such that the applicant would be equally situated with the other prisoners being compared to. But in determining whether pending proceedings are "relevant", might it be necessary to ask: "relevant for what purpose?" If so, the court's analysis of whether pending proceedings were relevant might come very close in substance to an inquiry of whether there were any *reasonable* differentiations between the applicant and the other prisoners. Accordingly, the court's conception of the first step of the *Syed Suhail (CA)* test as being purely factual may not be entirely borne out in practice. To further underscore this point, it is quite telling indeed that in the same paragraph of the decision affirming the factual nature of the first step of the *Syed Suhail (CA)* test, the Court of Appeal in *Datchinamurthy* itself had to draw upon the concept of reasonableness in explaining how the first step ought to be analysed – the court described its task here as determining whether "the persons being compared are so situated that it is *reasonable* to consider that they should be similarly treated" [emphasis added].[56]

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[53] *Ibid* at [34]–[38].
[54] *Ibid* at [36].
[55] *Ibid* at [39].
[56] *Ibid* at [30].

D. *Xu Yuan Chen v Attorney-General*

The final decision which merits discussion here is another Court of Appeal decision: *Xu Yuan Chen v Attorney-General*.[57] In this case, the applicant had published on his online platform a letter written by an Australian citizen making certain comments about the Singapore judiciary. The Attorney-General's Chambers subsequently commenced an application for an order of committal for contempt of court against the applicant. In response, the applicant applied for leave to commence a judicial review application, alleging that the fact that the Attorney-General had applied for an order of committal against only him and not the original author of the letter amounted to discrimination and was unlawful under, *inter alia*, Article 12(1) of the Singapore Constitution.

The Court of Appeal noted that the crux of the applicant's argument was an equal protection challenge to executive action, and observed that the proper test accordingly was the two-step test set out in *Syed Suhail (CA)* and discussed further in *Datchinamurthy*.[58] The court further observed that the present context involved a challenge to the exercise of prosecutorial discretion, and noted that it would be quite difficult for an applicant to demonstrate that he was equally situated to another person, given the "multitude of factors" that the prosecution was entitled and obliged to take into account – factors which would easily serve to differentiate the applicant from other persons being compared to.[59]

Turning to apply the test to the facts, the Court of Appeal concluded that the applicant failed at the first step of the *Syed Suhail (CA)* test since he was not equally situated with the original author. The court noted that only one "material difference" between the applicant and the original author had to be established for the two parties to be not "equally situated".[60] In this case, the court held that two material differences were sufficiently established: the difficulty of investigation, given that the original author resided in a different jurisdiction, as well as the degree of harm caused by each party's posts – the applicant's posts attracted many more views and "likes" than the original author's, and the applicant's posts were on a well-known alternative news platform with a substantial audience, while the original author's posts were on a personal blog.[61] The Court of Appeal however found that a third differentiating factor that the Attorney-General argued for – level of culpability – was not a material difference between the two persons: while the original author indeed first penned the post and gave permission for its republication, the applicant republished the post and took the initiative to request permission to do so.[62] Nevertheless, since two material differences had been established between the compared persons, they were not equally situated and the applicant failed to meet the requirements of the first step of the *Syed Suhail (CA)* test.

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57 [2022] SGCA 59 [*Xu Yuan Chen*].
58 *Ibid* at [23]–[24].
59 *Ibid* at [26]–[27].
60 *Ibid* at [33]–[35].
61 *Ibid* at [39]–[59].
62 *Ibid* at [60]–[61].

Similar to *Datchinamurthy*, the Court of Appeal in this case also seemed to perceive *Syed Suhail (CA)* as *the* test to apply where equal protection challenges to executive action were concerned. Also, the court's reasoning here provides yet another data point in our exploration of the relationship between both limbs of the *Syed Suhail (CA)* test. As should be clear from the preceding description, the Court of Appeal devoted the bulk of its analysis at the first step of the test to considering whether there were *material* differences between the applicant and the original author, in order to determine whether they were equally situated. Again, one might wonder whether such analysis is significantly different in substance from an analysis of whether the applicant can be reasonably differentiated from the original author. In deciding whether a difference between comparators is a *material* one, it is difficult to consider the question of materiality without also considering the connection between the difference and the purpose of the differentiation made by an executive authority – indeed, the concept of materiality itself is intrinsically teleological in nature. Yet, such a mode of thinking draws very close to what the Court of Appeal thought should only occur at the second step of the *Syed Suhail (CA)* test. It is accordingly doubtful whether the distinction between the two steps of the *Syed Suhail (CA)* test is as clear as the Court of Appeal seemed to think in *Syed Suhail (CA)* itself and in *Datchinamurthy*.

V. Tying Up Loose Ends

Having surveyed a series of cases decided in the wake of the landmark trilogy of equal protection cases in Singapore, it is fitting at this juncture to turn to the question of whether these subsequent cases shed any light on the loose ends left hanging by the trilogy of cases.

We can commence with the issue of the relationship between the *Syed Suhail (CA)* and *Lim Meng Suang* tests – should the tests be viewed as distinguished by their scope of application, or are they alternative equal protection tests with the potential to overlap? As we observed earlier, the Court of Appeal in *Tan Seng Kee* analysed equal protection doctrine in Singapore on the assumption that *Syed Suhail (CA)* was possibly applicable to legislation as well. Teo evaluated *Syed Suhail (CA)* on a similar assumption as well – indeed, Teo argued that a single test applied in relation to equal protection challenges, whether the challenges were against legislative or executive acts.[63]

Yet, the cases decided since the landmark trilogy appear to have drawn a clear differentiation between both tests by their scope of application. Indeed, all the cases discussed above considered that it was the *Syed Suhail (CA)* test that would apply to the equal protection challenges at issue, since they all involved challenges to executive action. There was no discussion of any possibility of the *Lim Meng Suang* test also applying – a discussion that one might have expected if it is indeed true that both tests overlap as a matter of scope of application. The picture that emerges therefore is that the courts have consistently considered *Syed Suhail (CA)* as *the*

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[63] Teo, *supra* note 20 at 110–111.

applicable test for equal protection challenges to executive action, with the clear implication that it is the *Lim Meng Suang* test that is the governing test in relation to challenges to legislation. This picture matches also with Thio's analysis of the relevant law – indeed, her analysis was based on the idea that the *Syed Suhail (CA)* test was directed at executive action while the *Lim Meng Suang* test was directed at legislation.[64]

What then, however, of Teo's argument that there is a common test governing equal protection challenges to legislation and executive action? Teo offered a textual argument for this proposition: that "[s]ince the Constitution applies to both legislative and executive acts, the same test should apply under Article 12(1) to both kinds of acts, unless Article 12(1) itself states otherwise".[65] A short response to this argument could be that insofar as the concern is being faithful to the constitutional text, Article 12(1) does not specify the reasonable classification test either. Should one accept that the reasonable classification test can be understood as the governing test for Article 12(1) challenges, it is surely open to the courts to decide how the reasonable classification test applies in different contexts.

But Teo's argument deserves a fuller response. Building on the preceding point, it is suggested that much depends on what one means by "a common test". If one means by this term that there is a single test for equal protection challenges, but that this test can be applied differently in different contexts, Teo's argument can be readily affirmed. Indeed, one can readily affirm that a single test – the reasonable classification test – applies across legislation and executive action, but that it is expressed differently depending on the context to which it is being applied. It seems that this is what Teo means himself, as he accepts that "[t]he proposition that the same test applies to both legislative and executive acts is conceptually distinct from the proposition that the same test applies *in the same way* to both legislative and executive acts" [emphasis in original].[66]

If, however, "a common test" is taken to mean that both the *Syed Suhail (CA)* and *Lim Meng Suang* tests overlap and are effectively interchangeable, such that *Syed Suhail (CA)* would be equally applicable to legislation, it is suggested that this proposition ought not to be affirmed so readily. For one, as a matter of principle, it is desirable to recognise the distinct scope of application for each test because the reasonable classification test necessarily applies differently depending on whether the context is legislation or executive action. This is also acknowledged by Teo – he argued that courts are capable of assessing the purposes underlying executive decisions more readily as compared to legislative acts, and also that it will be naturally easier for legislative and executive rules to meet the requirements of the reasonable classification test, as compared to executive decisions.[67]

Further, as a matter of authority, the Court of Appeal in *Syed Suhail (CA)* was clear in its intent to articulate a distinct test *specifically* for equal protection challenges to executive action – indeed, it discussed the then-prevailing "deliberate and

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64 See, for instance, Thio, *supra* note 26 at 126–127.

65 Teo, *supra* note 20 at 110–111.

66 *Ibid* at 111.

67 *Ibid* at 111–112.

arbitrary discrimination" test and decided to replace it with the new two-step test.[68] If the Court of Appeal had considered that its new test would be equally applicable to the context of legislation, one might have expected that the court would have also discussed the *Lim Meng Suang* test and its connection with the new test. But the court offered no such discussion. And as described earlier, this understanding of the distinction between the two tests as a matter of scope of application was followed through by subsequent decisions.

Accordingly, on the relationship between *Lim Meng Suang* and *Syed Suhail (CA)*, it is suggested that the better view is to understand both tests as different expressions of the common reasonable classification test that is applicable for equal protection challenges. While the reasonable classification test indeed applies across both legislation and executive action, the test applies differently in each context as a matter of intensity of review and the elements that need to be satisfied.

Moving then to the issue of the relationship between both steps of the test in *Syed Suhail (CA)*, it is clear that the courts are keen to draw a distinction between both steps – this is made especially clear in both *Syed Suhail (CA)* itself and the Court of Appeal's further elaboration on the test in *Datchinamurthy*, as well as in the Court of Appeal's reflection on the test in *Tan Seng Kee*. Specifically, the courts perceive the first step of the test as a purely factual one, with any assessment of reasonableness being exclusively reserved for the second step.

The question, however, is whether this distinction between both steps indeed holds true as a matter of practice. As our study of the cases in the legacy of the trilogy revealed, the courts have consistently engaged in some form of value judgment at the first step of the test that is difficult to distinguish in substance from a "reasonableness" analysis – such as an analysis of whether pending proceedings were "relevant" in *Datchinamurthy* and whether differences between the applicant and the original author were "material" in *Xu Yuan Chen*. The proposition that the first step of the test is distinguishable from the second by being purely factual is therefore thrown into some doubt. Adding further to this doubt, it is worth noting that in all of the decisions discussed earlier, decided in the wake of the landmark trilogy, where the Article 12(1) challenge failed, the failure was always at the first step of the *Syed Suhail (CA)* test. This fact serves as a potent indication that the "equally situated" limb of the test may be doing a lot more work than is suggested by the courts' characterisation of it as a purely factual step.

What then is the implication of this finding? If the preceding analysis is correct, then this means that the two steps of the *Syed Suhail (CA)* test are not as easily distinguishable as the court might have surmised – indeed, it means that the *Syed Suhail (CA)* test might potentially boil down to an analysis of whether the executive decision causing a differentiation is a reasonable one. This in turn bears some important implications for the burden of proof – the burden of proof on the applicant may be heavier than one may have initially expected if the applicant is required not just to raise factual differentiations between factually equally situated persons to shift the burden of proof to the decision-maker, but at the first step already bears

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[68] *Syed Suhail (CA)*, *supra* note 4 at [57].

in substance the burden of proving that the differentiation made by an executive authority was not reasonable.

An additional more important implication of this finding is closely-related to the third loose end described earlier – the relationship between the *Syed Suhail (CA)* test and the administrative law ground of irrationality. Indeed, if it is correct that the *Syed Suhail (CA)* test boils down to an analysis of the reasonableness of executive differentiations, it means that the *Syed Suhail (CA)* test bears a close similarity to reasonableness review at administrative law, despite the courts' keen interest in drawing a distinction between the two grounds as expressed in *Syed Suhail (CA)* and *Han Hui Hui*. Yet, it is clear that such an overlap is not desirable as a matter of principle. As the Court of Appeal acknowledged in *Syed Suhail (CA)*, a close overlap between the requirements of Article 12(1) and irrationality in administrative law would effectively mean that the constitutional right to equality adds no further protection to the equation beyond what common law administrative law already provides.

What then is the proper way ahead in light of this overlap? There are four possible responses. The first would be to hold that Article 12(1) and irrationality in administrative law remain distinct, even if the preceding analysis is indeed correct – on the basis that Article 12(1) is focused specifically on discriminatory differentiations, while irrationality is applicable more generally to any kind of executive action. Such an argument is aligned with the High Court's suggestion in *Han Hui Hui* as to how the two grounds can be distinguished, and is also aligned with Thio's suggestion that a higher standard of rationality review can be demanded in relation to differentiations violating the principle of equal treatment.[69]

However, such a distinction between the two grounds might be more tenuous than one might have initially surmised. Might *all* executive actions be capable of being framed as drawing some kind of differentiation? After all, a decision *not* to award a licence to a person effectively differentiates the person from all those who have been awarded licences, and a decision to compulsorily acquire a person's property amounts to a decision differentiating the person from those whose property have *not* been compulsorily acquired. If it is true that all executive actions can be framed as drawing differentiations, it might be conceptually challenging to identify precisely which differentiations trigger Article 12(1) protection and which merely attract irrationality review. One might respond by saying that we are looking for *discriminatory* differentiations where Article 12(1) is concerned. But what exactly is a "discriminatory" differentiation? Going by how the courts have substantiated the test for Article 12(1), it appears that "discriminatory" is similar in substance to "unreasonable". If so, one returns full circle to the similarity between Article 12(1) and irrationality analysis.

A second possible response would be to hold that Article 12(1) and irrationality in administrative law remain distinct as a matter of legal doctrine, as with the first response, but would do so on the basis of the substance of each ground. This would require us to draw upon Teo's distinction between principled and practical reasons. In Teo's view, principled reasons are reasons which explain "how the differentiation

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[69] Thio, *supra* note 26 at 126–127.

imposed by a legislative or executive act perfectly coincides with the act's intended purpose", while practical reasons are reasons which explain why it is "unrealistic" to expect a perfect connection between the act and its purpose, generally on the ground of considerations such as resource constraints.[70] It would accordingly be arguable that a challenge based on irrationality in administrative law would not succeed as long as an executive authority is able to offer some kind of practical reason, without any need to prove it, while the executive authority would need to actually prove the practical reason to the court if faced with a challenge based on Article 12(1) in constitutional law.

This response would indeed provide for a distinction between Article 12(1) and irrationality in administrative law, if the Singapore courts were to develop the jurisprudence for each ground of review in the proposed direction. As a matter of prevailing authority, however, it is questionable whether irrationality review would indeed be unavailable as long as an executive authority is able to point to any kind of practical reason without needing to prove it to the court. The High Court decision of *Han Hui Hui* is a useful indication in this regard. In addition to the Article 12(1) challenge described earlier, the applicants also argued that the government's decision to charge unvaccinated persons medical fees for COVID-19 expenses was irrational, on the basis that it was "not true that a fully vaccinated person would have a lower probability of dying or suffering serious adverse health consequences due to COVID-19", proffering a set of statistics to buttress their argument.[71] The government offered a set of its own statistics to counter this point.

While the court indeed noted that it was not its task to "make pronouncements on the laws of nature"[72] – as this challenge effectively required it to do – it is instructive nevertheless to observe that the court entered into a detailed analysis of *both* sets of statistics in order to come to the conclusion that as a matter of statistical precision and causative value, the government's statistics were superior to those offered by the applicants.[73] It is challenging to square the High Court's close scrutiny of the statistics in *Han Hui Hui* with the proposition that the government would not have to prove its practical reasons to the court in defending its decision against a challenge based on irrationality in administrative law.

A third possible response to this overlap might be to accept the similarity between the two grounds where challenges to executive action are concerned, and to articulate the difference between both grounds as based on the fact that Article 12(1) additionally allows for challenges to legislation. Whether this is a satisfactory response is quite doubtful, however. Indeed, referencing one of Teo's arguments described earlier, since the Singapore Constitution applies equally to *both* legislation and executive action,[74] this should mean that the constitutional guarantee of equal protection should be available in relation to executive action as well and that it should at least be more meaningful than what the common law already offers.

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70 Teo, *supra* note 20 at 98.

71 *Han Hui Hui*, *supra* note 43 at [73].

72 *Ibid* at [73].

73 *Ibid* at [75]–[116].

74 Teo, *supra* note 20 at 110–111.

A fourth possible response to this overlap would build on the High Court's reasoning in *Han Hui Hui* – if Article 12(1) is indeed directed at discriminatory differentiations, then the courts could articulate expressly what kinds of differentiations will attract constitutional protection under Article 12(1). In other words, this would require the courts to articulate certain categories of impermissible differentiations which would attract constitutional protection under Article 12(1), going beyond those already provided for in Article 12(2), in a manner akin to how the US Supreme Court has formulated categories of suspect classifications in its Fourteenth Amendment jurisprudence.[75]

This response would undoubtedly require a significant shift in the landscape of equal protection doctrine in Singapore, and it would require the courts to take a more interventionist stance in relation to Article 12(1) than they have been willing to take thus far. Nevertheless, there is some support for this proposition – it is worth recalling here Ong's observation that the High Court in *Syed Suhail (HC)* appeared to suggest that "nationality" was an impermissible category of discrimination under Article 12(1) of the Singapore Constitution. Further, returning to the issue of the relationship between Article 12(1) and irrationality at common law, this response would have the advantage of drawing the sharpest distinction between the two grounds as compared to the prior responses – indeed, the value-add that constitutional protection would bring above and beyond common law protection would be clearest if this road were to be taken.

VI. Conclusion

To recapitulate the argument in this paper, it first identified three loose ends that remained unsettled in the wake of the landmark trilogy of equal protection decisions that defined the landscape of Article 12(1) doctrine in Singapore: the relationship between the *Lim Meng Suang* and *Syed Suhail (CA)* tests, the relationship between the two limbs of the *Syed Suhail (CA)* test, and the relationship between the *Syed Suhail (CA)* test and the common law judicial review ground of irrationality.

Studying the decisions handed down since this landmark trilogy yielded useful insights for how these loose ends have been perceived by the courts and how the law could develop to resolve these issues. On the relationship between the *Lim Meng Suang* and *Syed Suhail (CA)* tests, it was observed that the Singapore courts do not seem to have perceived these tests as interchangeable and overlapping tests, but rather as distinct tests distinguished by their scope of application. The paper argued that as a matter of authority and principle, the better view is to understand both tests as *different* expressions of the reasonable classification test that is applicable for equal protection challenges.

On the relationship between the two limbs of the *Syed Suhail (CA)* test, it was observed that the Singapore courts have desired to draw a distinction between both steps of the test but that as a matter of practical application, the distinction between both steps has not been as clear as one might have initially surmised – indeed, when

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[75] See, for example, *Korematsu v United States* 323 US 214 (1944) and *Nguyen v Immigration and Naturalization Service* 533 US 53 (2001).

applied, both limbs appear to boil down into a single inquiry of whether the executive decision causing a differentiation is reasonable. The paper then discussed the implications of this finding for the third loose end, and argued that this resulted in a *prima facie* normatively undesirable overlap between Article 12(1) and irrationality in administrative law. Four possible responses to this overlap were discussed. While each possible response has shortcomings of its own, it is tentatively suggested that the best way forward may be for the courts to articulate categories of impermissible differentiation under Article 12(1), beyond those already included in the text of Article 12(2).

Looking ahead, equality will certainly continue to be one of the most culturally salient constitutional rights in Singapore. Singapore law in this regard is in a somewhat unique position, possessing both a written constitutional right to equality and administrative law protections at common law. Issues of overlap between both domains of law are therefore a possibility in Singapore, which means that the courts ought to be particularly careful about which jurisdictions they draw inspiration from in developing equality jurisprudence in Singapore. Indeed, Singapore law may have to strike its own path in this regard, and it is hoped that this paper will be helpful in identifying the issues that have to be navigated by the courts as they chart a course for the future.