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REFINING REASONABLE CLASSIFICATION

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While it remains controversial whether Article 12(1) of Singapore's Constitution should involve a test of formal or substantive equality, the precise content of the test of formal equality itself – the "reasonable classification test" – remains unclear. This article seeks to construct a meaningful account of the reasonable classification test, that reconciles the case-law with canonical understandings of the court's constitutional role. Three arguments are made. First, courts must identify legislative purposes only from extrinsic materials when applying the test, to avoid circularity in its application. Second, when assessing the relation between differentiation and purpose, courts must require proof of the existence, and sometimes the sufficiency, of practical reasons that excuse imperfect differentiation. Third, applicants should only bear the burden of showing that laws or decisions imperfectly differentiate, before the burden shifts to the Government to justify them. The article concludes by explaining how the reasonable classification test so understood can apply to both legislative and executive acts, even if its application may differ in certain circumstances.

I. Introduction

Article 12(1) of Singapore's Constitution, which states that "[a]ll persons are equal before the law and entitled to the equal protection of the law", invokes lofty ideals of egalitarian justice, and conversely, non-discrimination.[1] However, constitutional guarantees of equality like Article 12(1) present courts with an awkward dilemma: since the idea of "equality" does not itself posit substantive grounds of non-discrimination,[2] a court which operationalises Article 12(1) as a doctrine of non-discrimination risks being accused of judicial activism. The court's only other option, then, is to stick to a test of "formal" equality, which is a mere requirement of "consistency of treatment".[3] Thus, courts in Singapore have operationalised Article 12(1) in the form of a "reasonable classification test", which only assesses the relation between a challenged law or decision and its underlying purpose; absent a sufficient relation, the law or decision is not consistently applicable to all individuals it was meant to apply to. Yet, one cannot seem to shake the feeling that, while the modest reasonable classification test is less controversial, it is also something of a

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1 See Constitution of the Republic of Singapore (1999 Reprint) Art 12(1).

2 See Peter Westen, "The Empty Idea of Equality" (1982) 95 Harv L Rev 537.

3 See *R (Gallaher Group Ltd) v Competition and Markets Authority* [2019] AC 96 at [50] (SC, Eng) [*Gallaher*].

let-down, falling short of the grand ideal of equality. Thus, the debate on whether and to what extent Article 12(1)'s guarantee of equality should go beyond the formal reasonable classification test, to include a test of substantive equality and non-discrimination, continues to rage on in the courts[4] and in the academic commentary[5] in Singapore.

The formal-versus-substantive-equality debate is an important and challenging one, but it is not my intent here to wade into those waters. Instead, I focus here on an important preliminary question: the content of the test of formal equality itself – the "reasonable classification test". While courts and commentators often talk about that test as if it were clear and well-established, in reality it is anything but. In broad terms, the reasonable classification test exists to ensure that the form of a challenged law or decision matches its function. This involves two steps: the court must identify the challenged law or decision's purpose (the "Purpose Identification Stage"), then compare that purpose to the differentiation effected by that law or decision, namely the category of individuals to which it applies to, and evaluate the relation between them (the "Relation Evaluation Stage"). But three ambiguities remain about the test's content. *First*, how should courts identify the purposes of challenged laws or decisions? *Second*, how close must the relation between purpose and differentiation be for the challenged law or decision to pass muster? *Third*, to the extent that the application of the test raises factual questions, where does the burden of proof lie? These questions may seem technical and pedantic, but in practice they can (and often do) make or break constitutional challenges. They also have serious implications for the wider formal-versus-substantive-equality debate – after all, unless we can say what the reasonable classification test *is*, how can we have a meaningful discussion on whether and to what extent it *should* be considered a sufficient test of constitutional equality?

This article thus attempts to refine our understanding of the reasonable classification test, by constructing detailed accounts of the content of the test on all three issues highlighted above from the case-law and principles extant in Singapore's constitutional jurisprudence. After tracing the evolution of the test in Singapore through recent cases and highlighting the three ambiguities mentioned above (Part II), I then attempt to resolve them by constructing the best understanding of the test available on the case-law. First, courts must identify the object of challenged laws or decisions only from extrinsic materials relevant to the interpretation of the rule-creating

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[4] See *Lim Meng Suang v AG* [2013] 3 SLR 118 at [114]–[116] (HC); *Lim Meng Suang v AG* [2015] 1 SLR 26 at [82]–[86] (CA) [*Lim Meng Suang*]; *Tan Seng Kee v AG* [2022] 1 SLR 1347 at [315]–[318] (CA) [*Tan Seng Kee*]; *Syed Suhail bin Syed Zin v AG* [2021] SGHC 274 at [61]–[62] [*Syed Suhail*].

[5] See Yap Po Jen, "Section 377A and Equal Protection in Singapore: Back to 1938?" (2013) 25 Sing Ac LJ 630 at 637–638; Jack Lee, "Equality and Singapore's First Constitutional Challenges to the Criminalization of Male Homosexual Conduct" (2015) 16 Asia Pac J HR & L 150 at 173–177; Benjamin Joshua Ong, "New Approaches to the Constitutional Guarantee of Equality Before the Law" (2016) 28 Sing Ac LJ 320 at 339–343; Jaclyn Neo, "Equal Protection and the Reasonable Classification Test in Singapore: After *Lim Meng Suang v Attorney-General*" [2016] Sing JLS 95 at 109–115. One may also see the recent debate between Chan Sek Keong and Thio Li-ann on whether equality before the law should be understood as a "first-order right" as a manifestation of the debate on substantive equality: see Chan Sek Keong, "Equal Justice Under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 Sing Ac LJ 773 at 826–830; Thio Li-ann, "Rightism, Reasonableness and Review: Section 377A of the Penal Code and the Question of Equality – Part Two" (2022) 34 Sing Ac LJ 529 at 600–605.

or discretion-conferring provision (Part III). Second, courts should countenance an imperfect coincidence between differentiation and purpose only when practical reasons exist to excuse imperfection, and exceptionally should also assess whether those reasons sufficiently justify imperfection differentiation (Part IV). Third, the burden of proof in Article 12(1) challenges should be split between parties: the applicant must prove that the challenged law or decision's differentiation is imperfect, while the Government must prove the existence and sufficiency of practical reasons excusing the imperfect differentiation (Part V). I conclude with thoughts about how the reasonable classification test may apply differently to legislative and executive acts (Part VI).

Before we begin, two clarifications about the scope and import of the arguments made here are apposite. First, the aim of this article is interpretive rather than justificatory.[6] I will not argue for a particular test of constitutional equality which I believe is justified all-things-considered, and will therefore take no stance on whether Article 12(1) should contain a test of substantive non-discrimination as well, on top of the reasonable classification test. Instead, my modest goal here is only to describe the reasonable classification test in a way that resolves the three ambiguities above, and in a manner that reconciles the case-law with an uncontroversial understanding of the judiciary's constitutional role. Second, while this article's focus is Singapore law, the arguments developed herein may be of broader comparative constitutional import. For example, they may be of relevance to other common law jurisdictions with written constitutions like Malaysia, where courts have sometimes operationalised constitutional equality as a test similar to the reasonable classification test.[7] Moreover, the arguments below, which essentially concern the content of a legal right to equality, also provide a useful contrast to the common law equality jurisprudence of English courts. So long as English law maintains that there is "no general constitutional right to equal treatment by the law or by the executive"[8] and considers (in)equality and (in)consistency mere examples of *Wednesbury* unreasonableness,[9] the common law[10] doctrine of formal equality that English courts may develop should, in principle, always be weaker than the reasonable classification test.[11]

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6 See Farrah Ahmed, "The Delegation Theory of Judicial Review" (2021) 84(4) Mod L Rev 772 at 774–777.

7 See *eg*, *Chan Kok Poh v Public Prosecutor* [2022] 9 MLJ 755 at [133]–[138]. However, Malaysian courts have occasionally described their test's Relation Evaluation Stage in stronger terms than Singapore's (see *eg*, *Alma Nudo Atenza v Public Prosecutor* [2019] 4 MLJ 1 at [117]–[127], operationalizing equality as a "doctrine of proportionality" when fundamental rights are infringed) – which may be compared with the "searching scrutiny" approach to the reasonable classification test set out in *Syed Suhail bin Syed Zin v AG* [2021] 1 SLR 809 (CA) [*Syed Suhail* (Leave)] (see text accompanying *infra* notes 35–43 and 141–159).

8 *Webster v AG of Trinidad and Tobago* [2015] UKPC 10 at [14]. See also *Matadeen v Pointu* [1999] 1 AC 98 (PC, Mauritius) at 109 (denying that equality is "a justiciable principle").

9 *Gallaher*, *supra* note 3 at [50]; *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA, Eng) [*Wednesbury*].

10 None of this casts doubt on the legitimacy of the jurisprudence of English courts developed under the UK's Equality Act 2010 and art 14 of the European Convention of Human Rights, both of which contain justiciable legal rights against non-discrimination.

11 *Cf* Jeffrey Jowell, "Is Equality a Constitutional Principle?" (1994) 47 Current Leg Probs 1; Colm O'Cinneide, "Equality: A Core Common Law Principle, or 'Mere' Rationality?" in Mark Elliott and Kirsty Hughes, eds. *Common Law Constitutional Rights* (Oxford: Hart Publishing, 2020) at 167.

II. The Reasonable Classification Test: Three Ambiguities

The reasonable classification test is the courts' chosen method of operationalising Article 12(1) in a manner that does not involve the enforcement of substantive grounds of non-discrimination. However, courts have taken two approaches to the reasonable classification test: one reflected in the Court of Appeal's decisions in *Public Prosecutor v Taw Cheng Kong*[12] and *Lim Meng Suang v Attorney-General*,[13] the other reflected in the Court's decisions in *Syed Suhail bin Syed Zin v Attorney-General*[14] and *Tan Seng Kee v Attorney-General*.[15] These two approaches differ on three issues: (i) how purposes should be identified at the Purpose Identification Stage; (ii) how the relationship between purpose and differentiation should be assessed at the Relation Evaluation Stage; and (iii) where the burden of proof should lie.

The former approach to the reasonable classification test – which I will call the "*Taw Cheng Kong*/*Lim Meng Suang* approach" – resolved all three issues in a manner that favoured the Government and disadvantaged applicants. First, courts framed the purposes of challenged laws as precisely as possible at the Purpose Identification Stage, subject to a limited test of illegitimacy for manifestly unreasonable purposes. In *Lim Meng Suang*,[16] applicants challenged the constitutionality of then-Section 377A of the Penal Code 1871,[17] which criminalised "act[s] of gross indecency" (penetrative sexual acts) between males, even when performed consensually between adults in private. Andrew Phang JA, for the unanimous Court of Appeal, affirmed Section 377A's constitutionality under Article 12(1) on grounds that Section 377A's purpose was precisely to criminalise acts of gross indecency between men, including but not limited to acts of male prostitution.[18] To Phang JA, the Purpose Identification Stage was largely forensic rather than evaluative: courts were only to identify the challenged law's purpose in as much detail as possible, not question its "legitimacy".[19] Nevertheless, certain illegitimate legislative purposes could indirectly render laws unconstitutional if manifested through differentia which were "so unreasonable as to be illogical and/or incoherent".[20] Yet, while "a law which bans all women from driving" was manifestly unreasonable in this sense, Section 377A, which banned all men from homosexual penetrative sexual acts, was not.[21]

Second, courts required only a loose connection between the challenged law or decision's differentiation and its purpose at the Relation Evaluation Stage, and this requirement was met so long as there was some overlap between purpose and differentiation. In *Taw Cheng Kong*, the Court of Appeal upheld the constitutionality

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12 [1998] 2 SLR(R) 489 (CA) [*Taw Cheng Kong*].
13 *Lim Meng Suang*, *supra* note 4.
14 *Syed Suhail* (Leave), *supra* note 7.
15 *Tan Seng Kee*, *supra* note 4.
16 *Lim Meng Suang*, *supra* note 4.
17 See Penal Code (Cap 224, 2008 Rev Ed), s 377A [*PC*].
18 *Lim Meng Suang*, *supra* note 4 at [143].
19 *Ibid* at [84].
20 *Ibid* at [67].
21 *Ibid* at [113]–[114].

of Section 37(1) of the *Prevention of Corruption Act 1960*,[22] which criminalised corrupt acts performed by Singapore citizens overseas. The applicant had argued that Section 37(1) was unconstitutional under Article 12(1) because, if its purpose was to secure "more effective control and suppression of corruption",[23] it was under-inclusive for excluding non-citizens whose corrupt acts performed outside Singapore had affected Singapore.[24] Yong Pung How CJ, writing for the unanimous court, reasoned that it was with "comity in view that non-citizens were left out of s 37(1)";[25] since the Section's purpose was to suppression corruption while maintaining comity, the exclusion of non-citizens was perfectly in line with its purpose. However, in *obiter*, Yong CJ reasoned that, even if Section 37(1) was "under-inclusive" for excluding non-citizens, that "was not fatal" to the Section's constitutionality because it would still "go some way in capturing the corrupt acts of citizens abroad".[26] At the Relation Evaluation Stage, then, a "seamless and perfect" relationship between purpose and differentiation was not needed, because it "would be legislatively impractical, if not impossible."[27] In *Lim Meng Suang*, Phang JA likewise reasoned in *obiter* that the Relation Evaluation Stage did not demand a "complete coincidence" between differentiation and purpose;[28] only a "rational relation" was needed, and this would not exist if, for instance, there was a "clear disconnect" between purpose and differentia.[29]

Third, courts maintained that there was a "presumption of constitutionality" under which "a court will not lightly find a statute or any provision(s) thereof unconstitutional" under Article 12(1).[30] In *Taw Cheng Kong*, Yong CJ affirmed that legislation challenged under Article 12(1) benefitted from a "strong presumption of constitutionality",[31] which could only be rebutted by "the person challenging the law" if she could "adduce some material or factual evidence to show that it was enacted arbitrarily or had operated arbitrarily."[32] This was the presumption's content, because "[o]therwise, there will be no practical difference between the presumption and the ordinary burden of proof on the person asserting unconstitutionality."[33] This presumption was qualified but re-affirmed in *Lim Meng Suang*, where Phang JA noted that the presumption "might not" apply as strongly to "pre-Independence laws" like Section 377A, but ultimately concluded that "it would … be too artificial and too extreme to discard [it] altogether" even in those situations.[34] The presumption of constitutionality thus placed the burden of proof in Article 12(1) challenges on the applicant, and *also* held the applicant's case to a higher legal

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22 See Prevention of Corruption Act (Cap 241, 1993 Rev Ed), s 37(1) [*PCA*].
23 *Taw Cheng Kong*, *supra* note 12 at [63].
24 As the High Court concluded: see *Taw Cheng Kong v PP* [1998] 1 SLR(R) 78 at [64] (HC).
25 *Taw Cheng Kong*, *supra* note 12 at [63], [70].
26 *Ibid* at [81].
27 *Ibid*.
28 *Lim Meng Suang*, *supra* note 4 at [68].
29 *Ibid*.
30 *Ibid* at [4].
31 *Taw Cheng Kong*, *supra* note 12 at [60].
32 *Ibid* at [80].
33 *Ibid*.
34 *Lim Meng Suang*, *supra* note 4 at [107].

standard (a higher standard of proof, or a stricter legal test) than that applicable in ordinary civil litigation.

In sum, under the *Taw Cheng Kong*/*Lim Meng Suang* approach to the reasonable classification test, (i) courts had to frame legislative purposes precisely at the Purpose Identification Stage, unless the purpose was manifestly unreasonable; (ii) a considerable gap between purpose and differentia falling short of a clear disconnect was acceptable at the Relation Evaluation Stage; and (iii) a presumption of constitutionality held the applicant's case to a high legal standard.

Syed Suhail,[35] however, heralded a departure from the *Taw Cheng Kong*/*Lim Meng Suang* approach. A prisoner sentenced to death sought leave to bring an Article 12(1) challenge against the President's decision, made on the advice of the Minister for Home Affairs, to schedule his execution before that of another prisoner who had been sentenced to death before the applicant. Sundaresh Menon CJ, writing for a unanimous coram which included Andrew Phang JCA, laid out a two-stage test for Article 12(1) challenges to executive decisions. First, the court would assess whether differently treated individuals were "equally situated such that any differential treatment required justification".[36] At this stage, the applicant bore the "evidential burden" of proving equal situation and differential treatment.[37] Second, the court would consider whether the differential treatment was "reasonable in that it was based on legitimate reasons", like whether it had "a sufficient rational relation to the object for which the power was conferred" and was not based on "irrelevant considerations".[38] At this stage, the "evidential burden" shifted to the Government to justify the differential treatment.[39] In addition, Menon CJ noted that the strictness with which the court would scrutinise the challenged decision would differ depending on the "context"[40] and its "nature";[41] when the applicant's "life and liberty" were at stake, "the court had to be searching in its scrutiny."[42] Moreover, although "a presumption of constitutionality" applied, this was "no more than a starting point that the acts in question will not presumptively be treated as suspect".[43]

Applying the test, the applicant was granted leave to apply for judicial review under Article 12(1). At the first stage, the applicant and the other prisoner were "equally situated" (both were sentenced to death, and both were denied clemency on the same day) but had been treated differently (the applicant's execution had been scheduled while the other prisoner's had not).[44] Moreover, in the circumstances, none of the factors that the Attorney-General himself had argued were relevant to the scheduling decision suggested that the applicant's execution should have been scheduled after the other prisoner's.[45] The applicant had thus established a *prima*

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35 *Syed Suhail* (Leave), *supra* note 7.
36 *Ibid* at [61].
37 *Ibid*.
38 *Ibid* at [62].
39 *Ibid* at [61].
40 *Ibid* at [57].
41 *Ibid* at [63].
42 *Ibid*.
43 *Ibid*.
44 *Ibid* at [64], [75]–[76].
45 *Ibid* at [76].

facie case that the decision to schedule his execution treated equally situated persons differently, so the evidential burden shifted to the Government to justify the decision at trial.

Because *Syed Suhail* involved an Article 12(1) challenge to executive rather than legislative acts, and because Menon CJ did not utter the phrase "reasonable classification", it was not clear what effect, if any, the decision had on the reasonable classification test as laid out in *Taw Cheng Kong* and *Lim Meng Suang*.[46] Nevertheless, *Syed Suhail* evidently struck a different tone from the latter approach on the second and third issues highlighted at the start of this Part. For one, something more than a "rational connection" which was not a "clear disconnect" between purpose and differentiation was required;[47] the relation between the two had to be "sufficient",[48] and the court might even have to be "searching in its scrutiny" if the context called for it.[49] Moreover, the "presumption of constitutionality" was watered down considerably: it no longer imposed a high legal standard on the applicant, but merely placed the burden of proof on her.

The full impact of *Syed Suhail* only became apparent in *Tan Seng Kee*, where the Court of Appeal affirmed that there was indeed a "*Syed Suhail* approach to the reasonable classification test"[50] and that it could apply to "legislation".[51] *Tan Seng Kee* involved another challenge to the constitutionality of Section 377A of the PC under Article 12(1). Menon CJ, again writing for a unanimous coram that included Phang JCA, dismissed the challenge on grounds that the applicants had no standing to bring it: since any prosecution under Section 377A would be void for breaching a substantive legitimate expectation that gay men in Singapore had against prosecution, there was no real and credible threat that the applicants could be prosecuted under Section 377A.[52] In *obiter*, however, Menon CJ discussed "the *Lim Meng Suang* and the *Syed Suhail* approaches" to "the application of the reasonable classification test",[53] and found several important differences between them.

First, under the *Syed Suhail* approach, restrictions existed on the "generality" with which courts could frame legislative purposes at the Purposes Identification Stage. While the *Taw Cheng Kong*/*Lim Meng Suang* approach contained a limited test of illegitimacy for manifestly unreasonable purposes, *Syed Suhail*'s approach imposed no such limit.[54] However, "extremely unreasonable" laws,[55] like a law banning women from driving, would still fail *Syed Suhail*'s approach for another reason: the differentia (gender) would bear "no rational relation to any conceivable

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46 *Cf* Kenny Chng, "A Reconsideration of Equal Protection and Executive Action in Singapore" (2021) 21(2) OUCLJ 295 at 300 [Chng, "Reconsideration of Equal Protection"], noting that *Syed Suhail* "brought about a closer alignment between the requirements of Article 12 in the contexts of both legislation and executive action, insofar as the rational nexus test [scrutinizing the link between purposes and differentiation] now forms a common denominator of analysis in both contexts."

47 *Lim Meng Suang*, *supra* note 4 at [68].

48 *Syed Suhail* (Leave), *supra* note 7 at [61].

49 *Ibid* at [63].

50 *Tan Seng Kee, supra* note 4 at [329].

51 *Ibid* at [314], [315], [318]–[321], [325]–[328].

52 *Ibid* at [153], [330].

53 *Ibid* at [313].

54 *Ibid* at [315], [318].

55 *Ibid* at [318].

object of that law" (which was concerned with driving).[56] Under *Syed Suhail*'s Purpose Identification Stage, the object of the law banning women from driving could not be framed so "precisely" as to "introduce the differentia that it embodies", for example by "framing a ban on all women from driving as the very object of a law".[57] This may be contrasted with the *Taw Cheng Kong*/*Lim Meng Suang* approach's Purpose Identification Stage, which does not limit the precision with which legislative objects can be framed.

Second, the *Syed Suhail* approach "contemplates a higher level of scrutiny" at the Relation Evaluation Stage.[58] Under the *Taw Cheng Kong*/*Lim Meng Suang* approach, significant gaps between differentiation and purpose were tolerable so long as there was no "clear disconnect" between them.[59] By contrast, under the *Syed Suhail* approach, "while that relationship need not be perfect, it also must not be so tenuous as to be incapable of withstanding scrutiny."[60] For instance, if Section 377A's purpose was to "disapprov[e] of homosexual conduct in general", it could "fall[] afoul of the reasonable classification test" for being "under-inclusive"; and if the Section was "targeted specifically at male prostitution only", it might be "over-inclusive and, hence, unconstitutional under Art 12."[61] Moreover, when the challenged law or decision's differentiation "affected the appellant's life and liberty", the *Syed Suhail* approach would require the court to be "searching in its scrutiny" of the relationship between purpose and differentiation.

Third, under *Syed Suhail*'s approach, "there is no presumption that every differentiating measure [Parliament] enacts bears a rational relation to the object sought to be achieved"[62] because "[t]he rights enshrined in Art 12(1) are so fundamental and basic … the court should eschew any approach that renders Art 12(1) toothless".[63] That was an effect that the presumption of constitutionality recognised in *Lim Meng Suang* and *Taw Cheng Kong* could achieve: its effect was that "differentiations may be taken to be based on adequate grounds", and so "relying on [it] to meet an objection of unconstitutionality would entail presuming the very issue which is being challenged".[64] Instead, the presumption should only be understood as "a starting point that legislation will not presumptively be treated as suspect or unconstitutional"[65] – in other words, a rule placing the burden of proof in Article 12(1) challenges on the applicant.

This latter approach to the reasonable classification test – which I will call the "*Syed Suhail*/*Tan Seng Kee* approach" – thus differs from the *Taw Cheng Kong*/*Lim Meng Suang* approach on the three issues highlighted at the start of this Part: (i) at the Purpose Identification Stage, courts cannot frame a challenged law's purpose

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56 *Ibid* at [319].
57 *Ibid* at [320].
58 *Ibid* at [328].
59 *Lim Meng Suang*, *supra* note 4 at [68].
60 *Tan Seng Kee, supra* note 4 at [325].
61 *Ibid* at [324].
62 *Ibid* at [303].
63 *Ibid* at [303].
64 *Saravanan Chandaram v PP* [2020] 2 SLR 95 at [154] (CA) [*Saravanan*], cited in *Tan Seng Kee, supra* note 4 at [303].
65 *Tan Seng Kee, supra* note 4 at [303].

"precisely" to reach a "circular" conclusion that a complete coincidence exists between purpose and differentia; (ii) at the Relation Evaluation Stage, the connection between differentia and purpose "must not be so tenuous as to be incapable of withstanding scrutiny",[66] and courts will engage in "searching scrutiny" when life and liberty is at stake; and (iii) the presumption of constitutionality only places the legal burden of proof on the applicant. Though *Tan Seng Kee* did not expressly endorse the *Syed Suhail* test,[67] Menon CJ did express a very strong preference for it – it is hard to conclude otherwise when he described it as being more consistent with "the nature of the rights at stake" and "the constitutional role of the court".[68]

But though the *Syed Suhail/Tan Seng Kee* approach represents a more robust vision of the reasonable classification test, it created problematic ambiguities on the approach that courts should take on the three issues. This is because Menon CJ phrased the *Syed Suhail/Tan Seng Kee* approach to the test only in *negative* terms: (i) courts *cannot* frame purposes in a manner that engenders "circular" reasoning; (ii) the relation between purpose and differentia *cannot* be "incapable of withstanding scrutiny"; and (iii) courts *cannot* presume that every differentia or differential treatment meets the reasonable classification test. What is now lacking, then, is a *positive* account of what the court's approach on all three issues should be.

Below, I attempt to develop such an account, which reconciles the case-law on Article 12(1) in the manner most consistent with a canonical understanding of the judiciary's constitutional role. That role, at least in relation to the interpretation and enforcement of Article 12(1), can be reduced to two simple principles. On one hand, courts must interpret and enforce the constitutional guarantee of equality in a manner that renders it meaningful *(ie*, not otiose or impossible to succeed on in practice). Yet, on the other, courts cannot make policy, and so cannot create substantive grounds of non-discrimination. The latter principle – that courts cannot make policy – is well-reflected in the judiciary's general hesitance to develop tests of substantive equality or non-discrimination. However, the former principle – that constitutional equality must be meaningful in practice – was largely neglected in *Taw Cheng Kong* and *Lim Meng Suang*, and only received attention in *Syed Suhail*[69] and *Tan Seng Kee*;[70] it is thus the main driver behind the latter cases' stronger approach to the reasonable classification test. The account of the reasonable classification test developed below will thus take seriously the idea that the test must be meaningful in practice, without evolving into a test of substantive equality or non-discrimination.

III. The Purpose Identification Stage: Clarity and Political Accountability

The Purpose Identification Stage is important because the court's identification of a challenged law or decision's purpose marks the target which the differentiation

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66 *Ibid* at [325].
67 *Ibid* at [329].
68 *Ibid* at [325].
69 See *eg*, Syed *Suhail* (Leave), *supra* note 7 at [57].
70 See *eg, Tan Seng Kee, supra* note 4 at [303], [326].

must hit to pass the Relation Evaluation Stage. Under the *Syed Suhail/Tan Seng Kee* approach, purpose identification is a purely forensic exercise, because it is "never" open to a court to assess the legitimacy of a challenged law or decision's underlying purpose.[71] Menon CJ's disapproval of the limited test of legitimacy under the *Taw Cheng Kong/Lim Meng Suang* approach is welcome, because, even pitched at that extreme standard (*ie* "manifestly unreasonable"), that latter test threatened to turn the reasonable classification test into a (limited) test of substantive non-discrimination. The standard of manifest unreasonableness that Phang JA had in mind was a legislative object which no one in Singapore would support as a sociological fact, and which came to pass as legislation only because Parliament had "become unresponsive to public opinion."[72] Thus, to Phang JA, that Section 377A of the PC was not manifestly unreasonable was "demonstrated" by the sociological fact that there was an ongoing political dispute about the legitimacy of its purpose in Singapore,[73] suggesting that only complete societal disdain for a law's purpose will render it manifestly unreasonable.[74] But such a test of sociological legitimacy for legislative purposes runs afoul of the understanding of the judiciary's constitutional role that Phang JA himself espoused in *Lim Meng Suang*, that courts should not make law or policy by reference to extra-legal values (including sociological facts) not expressed in the Constitution's text.[75]

However, the *Syed Suhail/Tan Seng Kee* approach comes with its own difficulties. Menon CJ reasoned that to avoid "formalism" and "circular reasoning" in Article 12(1) challenges – in other words, to keep the reasonable classification test meaningful in practice – courts applying the *Syed Suhail/Tan Seng Kee* approach would have to "frame" the challenged law or decision's object at "the appropriate level of generality".[76] The purpose of a law banning women from driving, then, could not be framed "precisely to ban all women from driving", because this would have the "circular" effect of "necessarily [producing] a perfect relation between the differentia and the object of that law."[77]

The difficulty is this: what did Menon CJ mean by these comments? There are three possible readings of Menon CJ's reasoning here, and only the third keeps faith with the court's constitutional role.

The first – plain, and perhaps superficial – reading of Menon CJ's reasoning here suggests that courts can *never* frame the purpose of challenged laws or decisions with such "specificity" that there is a "complete coincidence" between purpose and differentia, *even* if Parliament intended that very specific purpose. But this cannot be right. After all, surely it is a *good* thing for Parliament to be specific about the purposes that laws and decisions are supposed to serve, because such specificity gives courts clear indication of the target that the differentiation must hit.[78]

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71 *Ibid* at [318].

72 Neo, *supra* note 5 at 115.

73 *Lim Meng Suang*, *supra* note 4 at [111].

74 *Ibid* at [67].

75 *Ibid* at [81]–[85].

76 *Tan Seng Kee, supra* note 4 at [320].

77 *Ibid*.

78 Tan Yock Lin, "Equal Protection, Extra-Territoriality and Self-Incrimination" (1998) 19 Sing L Rev 10 at 16; *cf* Neo, *supra* note 5 at 106.

Thus, as the Court of Appeal made clear in *Tan Cheng Bock v Attorney-General*, when courts are discerning Parliament's intent, they must prefer "the specific intention of Parliament" when "clear", even "if it appears to contradict, undermine, or go against the grain of the more general purpose."[79] It is the court's constitutional duty to interpret and apply laws and policies as Parliament intended, and the specific purpose Parliament intended a challenged law or decision to serve will necessarily be the clearest manifestation of that intent.[80]

A second reading of Menon CJ's reasoning might be that he was not suggesting that courts should disregard all specific purposes, only those which are specific *in a certain way* that renders them illegitimate. Perhaps a purpose like banning women from driving may be said to be too specific to pass muster because it is *too targeted* at a certain class of people. The objection then is not against specificity *per se*, but targeted specificity which is "manifestly discriminatory"[81] or "*ad hominem*".[82] This might be so when the specific purpose is "double-barrelled*", ie*, a combination of two or more apparently unrelated purposes, which implies that the real (covert) purpose of the law is simply to discriminate. For example, a law banning women from driving appears blatantly discriminatory because, absent evidence that female drivers harm society more than male drivers (which seems implausible), the two factors are unrelated. Phang JA's judgment in *Lim Meng Suang* cannot be read as authority that legislative objects cannot be phrased in double-barrelled terms because Section 377A of the PC had precisely such a double-barrelled object: it banned male homosexual sex, and absent evidence that male homosexual sex harms society more than female homosexual sex (a point which Phang JA did not consider), the two factors are unrelated. But Menon CJ's comments in *Tan Seng Kee* can be so read, because he did not expressly affirm Section 377A's constitutionality, and indeed appeared to doubt it.[83]

This second reading of Menon CJ's reasoning comes closer to the mark. Unfortunately, however, a rule that disregards double-barrelled purposes still runs into constitutional difficulties, because *many* statutory provisions have double-barrelled purposes, and so any rule disregarding them all will unduly restrict Parliament's legislative competence. In *Taw Cheng Kong*, for example, Yong CJ reasoned that Section 37(1) of the PCA was not under-inclusive in relation to its purpose, because although it was intended to secure "more effective control and suppression of corruption",[84] it was also with "comity in view that non-citizens were left out of s 37(1)".[85] Thus, the *ratio* of *Taw Cheng Kong* was that Section 37(1) was not under-inclusive because it had a double-barrelled purpose: to suppress corruption as "balanced against" observing comity.[86] No one suggests that Parliament cannot pass laws with such double-barrelled purposes, and for good reason. Legislation

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79 [2017] 2 SLR 850 at [41] (CA) [*Tan Cheng Bock*].

80 Marcus Teo, "Interpreting Frequently Amended Constitutions: Singapore's Dual Approach" (2022) 42(3) Stat L Rev 364 at 374.

81 *Yong Vui Kong v PP* [2015] 2 SLR 1129 at [106] (CA) [*Yong Vui Kong*].

82 *Liyanage v The Queen* [1966] 2 WLR 682 at 695 (PC, Ceylon).

83 *Tan Seng Kee, supra* note 4 at [329].

84 *Taw Cheng Kong*, *supra* note 12 at [63].

85 *Ibid* at [70].

86 *Ibid*, emphasis added.

is meant to regulate social phenomena, which rarely, if ever, implicate isolated normative concerns. Instead, legislation must often balance multiple concerns – and so have double-barrelled purposes – because it is precisely Parliament's job to strike "political compromise[s]" between "divergent interests".[87]

A related difficulty is that double-barrelled legislative objects are also omnipresent in (and in fact, are the defining trait of) provisions creating executive discretions. This means that any rule which disapproves of double-barrelled legislative objects will have the absurd effect of outlawing executive discretion entirely. Note that the purpose of a discretion-conferring provision can be framed at two levels of generality:[88] in general terms, this "purpose" is that underlying the relevant power-conferring provision; but in more specific terms, this "purpose" encompasses a *Wednesbury*-reasonable balance[89] of the relevant factors which the executive decision-maker must consider under the provision. Courts identify both these "purposes" in administrative law proceedings by interpreting the relevant discretion-conferring provision: they identify the general purpose when reviewing decisions for improper purposes, and the specific purpose when reviewing decisions for irrelevant factors.[90] But where courts must choose only one account of what such a provision's "purpose" is (as they must in Article 12(1) challenges), they must adopt the specific formulation, *per Tan Cheng Bock*,[91] which means that the "purpose" of a discretion-conferring provision is to require the executive to balance multiple conflicting relevant factors.[92]

Thus, in Article 12(1) challenges to executive decisions, courts identify as the "purpose" of challenged decisions a *Wednesbury*-reasonable balance of the relevant factors under the discretion-conferring provision, before comparing it with the differential treatment the actual decision achieves at the Relation Evaluation Stage. For example, in *Ramalingam Ravinthran v Attorney-General*, Chan Sek Keong CJ reasoned that Article 12(1) required prosecutorial discretion to be exercised by considering and balancing multiple relevant factors, like legal guilt, moral blameworthiness, the gravity of the harm caused, the extent of the offender's cooperation with law enforcement, and the need to show compassion.[93] He then upheld the challenged

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87 *Tan Seng Kee, supra* note 4 at [9].

88 *Syed Suhail* (Leave), *supra* note 7 at [61].

89 In other words, a balance between relevant factors that is not "so unreasonable that no reasonable authority could ever have come to it": *Wednesbury*, *supra* note 9. *Wednesbury* review is in fact concerned primarily with the reasonableness of how the executive weighed and balanced relevant factors; see Paul Craig, "The Nature of Reasonableness Review" (2013) 66 Current Leg Prob 131 at 135–138; Hasan Dindjer, "What Makes an Administrative Decision Unreasonable?" (2021) 84(2) Mod L Rev 265 at 281–286.

90 See Craig, *ibid* at 135–136.

91 *Tan Cheng Bock*, *supra* note 79; see text accompanying *supra* notes 78–80.

92 This specific account of a discretion-conferring provision's purpose also reflects the reason why Parliament grants discretion to the executive in practice. As noted in HLA Hart, "Discretion" (2013) 127(2) Harv L Rev 652, Parliament confers discretion when it suffers from "relative indeterminacy of aim" (at 661). Parliament may have a vague general aim in mind, but cannot foresee how the balance of relevant factors will fall in specific cases, and so it gives the executive a discretion for the *purpose* of allowing the latter to "weigh and choose between or make some compromise between competing interests and thus render more determinate [Parliament's] initial aim" (at 662–663).

93 [2012] 2 SLR 49 at [63] (CA) [*Ramalingam*].

decision on the basis that the applicant could not show that the Public Prosecutor had considered "irrelevant considerations" in making it;[94] in other words, there was a perfect coincidence between a *Wednesbury*-reasonable balance of the relevant factors and the factors the Public Prosecutor actually considered. Likewise, in *Syed Suhail*, Menon CJ acknowledged that, in scheduling executions, the Minister had to consider the date the offender was sentenced to death, the existence of ongoing proceedings involving the offender, the desirability of sentencing co-accused persons together, whether the execution had been delayed before, and the availability of judges to hear any further applications by the offender.[95] He then granted leave because the applicant established a *prima facie* case that the scheduling decision contradicted the Attorney-General's own account of the correct balance of factors;[96] in other words, there was a gap between a *Wednesbury*-reasonable balance of the relevant factors and the factors the Minister actually considered.

Thus, the two readings of Menon CJ's comments in *Tan Seng Kee* above are unjustifiable, at least on a canonical understanding of the court's constitutional role. By preventing Parliament from enacting laws for specific and/or double-barrelled purposes, courts would effectively be *limiting* the kinds of purposes Parliament can intend statutory provisions to serve. In doing so, the court would be imposing substantive limits on Parliament's legislative power which are not expressed in the text of Article 12 itself – the court would, in other words, be making policy.

Fortunately, a better third reading of Menon CJ's comments in *Tan Seng Kee* is available. Perhaps what he meant to emphasise was not a limit on the kinds of purposes Parliament can intend legislative and executive acts to serve, but on the *methods* which the *court* can use to identify those purposes. Note that Menon CJ was not talking about Parliament's task, but rather the court's task, of "framing the object of a law" for Article 12(1) challenges.[97] Thus, when he disparaged "framing a ban on all women from driving as the very object of a law",[98] Menon CJ was not saying that *Parliament* could not frame legislative purposes with such specificity, only that *courts* should not do so themselves.

But how can courts refuse to frame legislative objects in specific double-barrelled terms without denying Parliament's competence to enact legislation with such objects? Note that there are, broadly speaking, two sources from which courts may derive the purpose which Parliament intended a statutory provision to serve: the text of the provision, including its context within the parent Act;[99] and extrinsic materials, including parliamentary debates and explanatory statements. In a situation where no one source has priority over the other, courts can affirm Parliament's competence to enact statutory provisions for specific and/or double-barrelled purposes, while restricting themselves to only *one* of the two sources which they can refer to when ascertaining that purpose. This does not prevent Parliament from enacting

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94 *Ibid* at [70]–[73].

95 *Syed Suhail* (Leave), *supra* note 7 at [18], [70].

96 *Ibid* at [76].

97 *Tan Seng Kee, supra* note 4 at [320].

98 *Ibid*.

99 This "context" includes the relevant Act's long title and preamble, and/or illustrations contained in the legislative text, where present – the common element of these sources all being that they are found (only) in the text of the statute itself.

laws for any purpose, but only requires Parliament to communicate that purpose to the court in a particular manner.

Of course, if, in determining Parliament's intent, one source of such intent should have priority over the other, courts must look to it first. But whether one source of Parliament's intent should have priority over the other cannot be answered in the abstract: everything depends on the reason for which courts are seeking to discern Parliament's intent in the first place. When courts identify purposes in statutory interpretation *(ie.* when they are trying to discern Parliament's intention as expressed in the relevant statutory provision), they must prioritise the provision's text, because interpretation cannot be performed by ignoring the text to be interpreted.[100] However, when courts are identifying purpose for the sake of applying the reasonable classification test, they are *not* trying to discern Parliament's intention *as expressed* in the challenged statutory provision, but trying to see if the purpose Parliament intended the statute to serve *actually matches* the text of that provision. And for this latter task, courts cannot prioritise the text of the provision itself – for if they did, they will never identify a legislative purpose that does not match the challenged provision's text, which means that there will always "necessarily be a perfect relation between the differentia and the object of that law".[101] The reasonable classification test would then *always* be satisfied. Instead, when courts are discerning the purpose Parliament intended a challenged statute to serve, to assess whether the statute's text matches that purpose *(ie,* to apply the reasonable classification test), they must logically prioritise extrinsic materials[102] – otherwise, the reasonable classification test would be rendered *meaningless* in practice.

This, it is submitted, is the correct reading of Menon CJ's reasoning in *Tan Seng Kee*, that the reasonable classification test should not be "circular":[103] not that Parliament cannot intend laws to serve specific and/or double-barrelled purposes, only that courts should not conclude that Parliament had that intention unless it is clear from *extrinsic materials*. So understood, Menon CJ was not saying in *Tan Seng Kee* that Parliament cannot enact a law banning all women from driving for that specific purpose. Instead, he was saying that Parliament can only be taken to have enacted that law for that purpose if the Government openly and shamelessly takes the position in parliamentary debates or explanatory statements that "women should not be allowed to drive". A case in which such an approach would have had bite is *Taw Cheng Kong*. While Parliament could of course have intended Section 37(1) of the PCA to serve the double-barrelled purpose of suppressing corruption while maintaining comity, Yong CJ's reasoning on why Parliament in fact intended the Section to serve that purpose is wanting, because he referred to no extrinsic materials whatsoever to support his conclusion. Instead, Yong CJ concluded that comity formed part of Section 37(1)'s purpose only on the basis of the Section's

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[100] See Johan Steyn, "*Pepper v Hart*; A Re-examination" (2001) 21(1) Oxford J Leg Stud 59 at 60.

[101] *Tan Seng Kee, supra* note 4 at [320].

[102] One might argue that the materials listed in *supr*a note 99 should also be relevant in constructing a statutory provision's purpose under the reasonable classification test. However, since these materials will *always* be referred to in constructing the scope of the provision's differentia, using these materials to construct the provision's purpose as well will also give rise to the problem of circularity.

[103] *Tan Seng Kee, supra* note 4 at [322].

wording itself,[104] thereby engaging in precisely the kind of circular reasoning criticised in *Tan Seng Kee*.

The humble merits of Menon CJ's reasoning under the *Syed Suhail/Tan Seng Kee* approach, so understood, are easy to appreciate. On this account, what the Purpose Identification Stage does is institute not a test of legitimacy or (non)specificity but *clarity* for legislative purposes. Parliament is fully entitled to enact any law for any purpose, but must make that purpose clear in parliamentary debates or explanatory statements, and not expect the court to divine it from the provision's text. In doing this, the court is not placing a legal limit on Parliament's legislative power, but a *political* one. Parliament can legislate manifestly discriminatory laws for manifestly discriminatory purposes but cannot do so *sub silento*. Instead, Parliament must clearly acknowledge and admit that it is passing a law for a discriminatory purpose, and then face the political consequences of doing so. Menon CJ's approach so understood effectively achieves what *Lim Meng Suang*'s "manifestly unreasonable" purposes test sought to achieve: that laws bereft of sociological legitimacy should not be tolerated. But the crucial difference is that, under the *Syed Suhail/Tan Seng Kee* approach, the court does not purport to speak on society's behalf. Instead, the court only creates the conditions for society to speak for itself, by holding its elected representatives politically accountable for any discriminatory policies purportedly made in their name.

IV. The Relation Evaluation Stage: Scrutinising Practical Reasons

If the Purpose Identification Stage marks the target which the differentiation must hit, the Relation Evaluation Stage stipulates just how close the differentiation must come to that target for it to count as having hit it. The *Taw Cheng Kong/Lim Meng Suang* approach was not helpful in defining this Stage, because "there is conceivably a broad spectrum of possible relations between perfect coincidence and clear disconnect."[105] And while the *Syed Suhail/Tan Seng Kee* approach aimed to clear this up by noting that the purpose-differentiation relation could "not be so tenuous as to be incapable of withstanding scrutiny",[106] this self-referential standard provides no positive account of what a sufficient relation might be. Perhaps the most that can be said is that, as Lord Diplock put it in *Ong Ah Chuan v Public Prosecutor,* the purpose-differentiation relation must be "reasonable",[107] but that still leaves unclear what "reasonableness" requires in this context.

To understand what the Relation Evaluation Stage requires, we should start by asking what it is said to scrutinise. According to Menon CJ in *Syed Suhail*, this is the "justification" given for "differential treatment", namely the "*reasons*" on which

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[104] And in light of a rule of statutory interpretation that statutes are presumed to operate within territorial limits and against nationals only, which Yong CJ only noted was a matter that Parliament could "rationally" have considered, not one which Parliament in fact did consider; see *Taw Cheng Kong*, *supra* note 12 at [65]–[75].

[105] Neo, *supra* note 5 at 106.

[106] *Tan Seng Kee, supra* note 4 at [325].

[107] *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710 at [37] (PC) [*Ong Ah Chuan*]; see also Neo, *supra* note 5 at 108.

the differentia is "based".[108] Two kinds of reasons which support differentiation can be distilled from the Article 12(1) case-law, which I will call "principled reasons" and "practical reasons".

A *principled reason* explains how the differentiation imposed by a legislative or executive act *perfectly coincides* with the act's intended purpose. For legislation, principled reasons are reasons based on the interpretation of the challenged differentia *(eg,* "there is a perfect coincidence between this law's differentia and its purpose, because this is the correct interpretation of the differentia"). Thus, in *Ong Ming Johnson v Attorney-General – Tan Seng Kee*'s first-instance decision – See Kee Oon J held that the text and context of Section 377A of the PC suggested that it covered both penetrative and non-penetrative sex between males, and thus rejected an argument that Section 377A was "ambiguous or obscure on its face" and thus lacked "a rational nexus between the legislative object and the intelligible differentia."[109]

For executive decisions, principled reasons are reasons based on the factors the executive actually considered when making its decision *(eg,* "there is a perfect coincidence between the differential treatment and its purpose, because the executive did in fact base its decision on a *Wednesbury*-reasonable balance of only relevant factors when making the challenged decision"). In *Ramalingam*, the reason why Chan CJ rejected the challenge to the exercise of prosecutorial discretion was that the Public Prosecutor had not been shown to have considered irrelevant factors.[110] In other words, the applicant could not establish a lack of a perfect coincidence between a *Wednesbury*-reasonable balance of the relevant factors the Public Prosecutor had to consider, and the balance of the factors which the decision to prosecute was actually based on.

By contrast, a *practical reason* explains why, despite the fact that the differentiation it introduces does *not* perfectly coincide with its purpose, the challenged law or decision should *nevertheless be tolerated*. The practical reason is thus an "excuse" for imperfect differentiation, based on an explanation of why it is unrealistic to expect perfection in the circumstances. Such practical reasons generally relate to the need to ensure that laws and executive decisions can be made or enforced in a practical manner, and include reasons like manpower constraints, time constraints, limited resources, limited capabilities, imperfect information, and the like.

For Article 12(1) challenges involving legislation, practical reasons were decisive in *Ong Ah Chuan*, where the Privy Council upheld provisions of the *Misuse of Drugs Act 1973*[111] imposing the mandatory death penalty on offenders who trafficked large quantities of controlled drugs. Lord Diplock reasoned that the harshness of the sentence was "broadly proportionate"[112] to the "moral blameworthiness"[113] of offenders who trafficked large quantities of drugs, because the possibility that such traffickers had "motive[s]" other than "cold calculated greed"

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[108] *Syed Suhail* (Leave), *supra* note 7 at [61], emphasis added.
[109] [2020] SGHC 63 at [179(b)], [181].
[110] *Ramalingam*, *supra* note 93; see also text accompanying *supra* notes 93–94.
[111] See Misuse of Drugs Act (Act 5 of 1973) [*MDA*].
[112] *Ong Ah Chuan*, *supra* note 107 at [38].
[113] *Ibid* at [39].

was "more theoretical than real".[114] Practical reasons were also important in *Yong Vui Kong v Public Prosecutor*,[115] where the Court of Appeal dismissed a challenge to Section 325(1)(a) of the *Criminal Procedure Code 2010*, which bans caning as a sentence for women. Menon CJ rejected an argument that the law was unconstitutional because it was "inaccurate to generalise and say that females are more fragile than males",[116] reasoning that there are "obvious physiological differences" between the genders even if they "might not always obtain in individual cases".[117] In both cases, Lord Diplock and Menon CJ acknowledged that, while it was possible that someone could fall within the law's scope without triggering the concerns said to justify it, that was practically unlikely to happen, and so the challenged differentia while imperfect were sufficient.

For Article 12(1) challenges involving executive decisions, practical reasons featured heavily in the Privy Council's reasoning in *Howe Yoon Chong v Chief Assessor*.[118] The applicant had been levied tax on his property at a fifteen-fold increase from the previous year, accurately reflecting the increase in its value since the rate was last revised. He then challenged the tax policy adopted by the Chief Assessor of Property Tax, arguing that the tax rates for his neighbours' properties had not been similarly updated, creating an arbitrary distinction contrary to Article 12(1).[119] Lord Fraser accepted that the tax policy was "a patchwork of annual values fixed at different dates and over a period of many years"[120] and thus contained "more defects than might have been expected",[121] "owing to shortage of manpower" in the Chief Assessor's office.[122] However, "a breach of [Article 12(1)] could not be established by proving the existence of inequalities due to inadvertence or inefficiency unless they were on a very substantial scale",[123] which was not the case there.[124] Lord Fraser's reason for upholding the tax policy was obviously not a relevant factor under the provision empowering the Chief Assessor to value properties.[125] Instead, it was a practical reason (manpower shortages) explaining why the policy's failure to coincide perfectly with its purpose should nevertheless be excused.

This distinction between principled and practical reasons helps us flesh out the Relation Evaluation Stage. We can now see that there are two alternative ways a

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[114] *Ibid*. I should point out that I am not agreeing with Lord Diplock's evaluation that the death sentence will always be "broadly proportionate" a punishment for drug trafficking – a proposition which in any case is at odds with MDA s 33B, introduced in 2012, which allows courts to sentence traffickers to life imprisonment instead of death if they are mere couriers which either assist drug enforcement operations or suffer from material abnormalities of mind. I only argue that the product of Lord Diplock's evaluation was a practical reason (manifest convenience) which he used to justify the constitutionality of the MDA's death penalty provisions.

[115] *Yong Vui Kong*, *supra* note 81.

[116] *Ibid* at [109].

[117] *Ibid* at [110].

[118] [1979–1980] SLR(R) 594 (PC) [*Howe Yoon Choong*].

[119] *Ibid* at [8], [12].

[120] *Ibid* at [9].

[121] *Ibid* at [11].

[122] *Ibid*.

[123] *Ibid* at [13].

[124] *Ibid* at [11].

[125] Rather, s 18(6)(*a*) of the Property Tax Act at the time required the Chief Assessor to re-value properties so as to "correctly represent the annual value" (*ibid* at [4]).

challenged law or decision can pass muster: if principled reasons exist showing that the differentiation perfectly coincides with its purpose, *or* if practical reasons exist that can explain why the imperfect differentiation should be excused. In other words, as a legal test,[126] the Relation Evaluation Stage consists of *two* elements: a challenged law or decision will only fail it if there are (i) no principled reasons that show that there is a perfect coincidence between the differentiation and its underlying purpose, *and* (ii) no practical reasons that show why the imperfect differentiation should be excused.

In turn, establishing that the second element of the Relation Evaluation Stage scrutinises the existence of practical reasons to support imperfect differentiation also has three important implications. All three help make the reasonable classification test a more meaningful test of formal equality or consistency.

First, it highlights that the existence of practical reasons is a *fact-in-issue* under the Relation Evaluation Stage. This is important because facts-in-issue, if contested, must be established on the basis of *evidence*,[127] adduced by the party bearing the relevant burden of proof.[128] Moreover, courts must determine the question of whether a fact-in-issue exists *on the merits*, against the relevant standard of proof;[129] the court's job is to determine for itself whether the fact actually existed, not merely to assess whether Parliament or the executive was reasonable to think that the fact existed. These propositions seem trite, but together they establish that – at the very least – courts cannot uphold the constitutionality of imperfect differentiation simply on the basis of abstract motherhood statements about (im)practicality with no bearing on the actual facts of the case. Courts, for example, cannot uphold the constitutionality of an over- and/or under-inclusive differentia simply by citing *Taw Cheng Kong*'s *dictum* that requiring perfect differentia "would be legislatively impractical, if not impossible" – instead, the court must consider whether, on the facts, there was a reason that actually explains why perfection was impractical or impossible in the circumstances. For example, a law which is meant to prevent (any) homosexual sex or (all) dangerous driving cannot be limited to male homosexuals or female drivers respectively, because their differentia would obviously be imperfect (gender has nothing to do with one's propensity to have homosexual sex or to drive dangerously) and no practical reason exists to explain the imperfection (it would be no harder to enforce laws outlawing homosexual sex or dangerous driving on one gender compared to the other).

One might argue that conceptualising the existence of practical reasons as a fact-in-issue under the Relation Evaluation Stage would require the court to make policy, because a court which holds that practical reasons do not exist would be invalidating the challenged law or decision on grounds that it was not the best way among other reasonable alternatives of furthering the underlying policy. But this criticism is

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[126] Note that, under the *Syed Suhail/Tan Seng Kee* approach, the Relation Evaluation Stage is the only real "evaluative" stage of the reasonable classification test.

[127] Unless some irrebuttable presumption of fact or doctrine of judicial notice operates. For a discussion of how this is precisely what the "presumption of constitutionality" does not do, see the text accompanying *supra* notes 62–65 and *infra* note 160.

[128] For a discussion of the applicable burden of proof, see Part V.

[129] For a discussion of the applicable standard of proof, see Part V.

avoided if one notes the limited scope of my argument here: that, in general,[130] only the *factual existence* of practical reasons, and not the *normative sufficiency* thereof, is a fact-in-issue under the Relation Evaluation Stage. The two are conceptually separate: the former is a an empirical question of fact while the latter a normative question of distributive justice. Thus, the question whether an executive institution faces resource shortages that limit the rules it can enforce or decisions it can make is largely factual, but the question whether Parliament or Cabinet should allocate more resources to it to expand its law-enforcing or decision-making capacity is a normative question of distributive justice. Importantly, if the Relation Evaluation Stage is generally concerned only with the former factual question, the court is not required to make law or policy – it is only asking whether the Government's position, that there *are* practical reasons why the challenged law or decision cannot be operationalised through perfect differentiation, can be proven on the facts. And if no such practical reasons exist, the court would be holding the challenged law or decision unconstitutional not because it disagrees that the differentiation is the best way to further that policy among several reasonable alternatives, but because it is a self-evidently bad way of doing so.

Second, conceptualising the existence of practical reasons as a fact-in-issue under the Relation Evaluation Stage also helps make the reasonable classification test more meaningful in challenges involving executive decisions specifically. This is because it makes the test "distinct" from "ordinary principles of [administrative law] judicial review for irrationality, or for taking into account irrelevant considerations",[131] contrary to criticisms some commentators have levied against it.[132]

For example, review for considering irrelevant factors in administrative law renders decisions based on irrelevant factors invalid only if those factors were "material" to the decision.[133] Thus, a decision based partially on a practical reason – which will be an irrelevant factor, since it does not derive from the discretion-conferring provision's underlying purpose[134] – will be valid so long as the practical reason was not a "substantial" basis for the decision.[135] By contrast, the reasonable classification test (as conceptualised here) asks the prior question of whether any

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[130] But there are exceptional situations where courts should consider the sufficiency of practical reasons – see text accompanying *infra* notes 141–159.

[131] *Syed Suhail* (Leave), *supra* note 7 at [57].

[132] See *eg*, Chng, "Reconsideration of Equal Protection", *supra* note 46 at 303.

[133] Paul Daly, *Understanding Administrative Law in the Common Law World* (Oxford: Oxford University Press, 2021) at 142.

[134] One might argue that the court can simply interpret any discretion-conferring provision as implicitly representing Parliament's intent that practical reasons be considered. Such an argument, however, would be highly "artificial" (because it is extremely implausible that Parliament actually considered how practical reasons would factor into the executive's decision-making process) and would also require accepting that Parliament's intent is an "empty" justification for judicial review (because it would be capable of legitimating any form judicial intervention); Mark Elliott, *The Constitutional Foundations of Judicial Review* (Oxford: Hart Publishing, 2001) at 28–30, 34, 35.

[135] *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board* [1997] 1 SLR(R) 52 at [89] (HC); *R v Rochdale Metropolitan Borough Council, ex parte Cromer Ring Mill* [1982] 3 All ER 761 at 770 (QB, Eng). By contrast, administrative law review does not assess the factual basis of decisions (and thus the existence of facts pertaining to the reasons the decision was based on), except at the low standard of "manifestly insufficient evidence"; see *Axis Law Corp v Intellectual Property Office of Singapore* [2016] 4 SLR 554 at [64] (HC).

practical reason said to excuse imperfect differentiation *exists*. Thus, under the reasonable classification test, a decision based partially on a non-existent but insubstantial practical reason will still be invalid, because absent practical reasons only perfect differentiation is constitutional.

Likewise, under *Wednesbury* review, an erroneous decision will nevertheless not be invalid unless it was "so unreasonable that no reasonable authority could ever have come to it".[136] Thus, if the executive mistakenly concluded that a practical reason explaining imperfect differentiation existed – which is an error of fact,[137] because the question of the existence of a practical reason is not an evaluative question[138] – that will not render its decision invalid, so long as the mistake was not one which "no reasonable person could arrive at".[139] By contrast, under the reasonable classification test (as conceptualised here), courts will review the executive's error of fact on the *merits*, *ie*, at a "correctness" standard. Thus, under the reasonable classification test, a mistaken but not unreasonable belief that a practical reason exists will still invalidate the decision.

The upshot is that the reasonable classification test adds a meaningful layer of scrutiny for executive decisions, on top of the traditional administrative law grounds of review. This is because a decision supported in part by a practical reason will only be valid if the practical reason is an insubstantial reason (review for irrelevant factors) and could reasonably be said to exist on the evidence (*Wednesbury* review) – *and* the court concludes, on the merits, that the reason actually exists on the evidence (under the reasonable classification test).[140]

Third, conceptualising the Relation Evaluation Stage as scrutinising the existence of practical reasons excusing imperfect differentiation can also establish why, in *exceptional* circumstances, courts should assess the *sufficiency* and not just the existence of practical reasons. In most cases, we can accept that the Government should be able to rely on a practical reason to excuse its failure to perfectly protect quotidian private interests, since the imperfect differentiation necessarily fails to protect the interests of some individuals it was meant to protect and/or curtails interests it was not meant to curtail. Collaterally affecting private interests in this manner is excusable because practical reasons can be as important as (or even more

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[136] *Wednesbury*, *supra* note 9 at 230.

[137] See text accompanying *supra* note 130.

[138] Or "a question of a matter of degree … on which reasonable persons may arrive at different conclusions on the evidence before them"; Harry Woolf *et al*, *De Smith's Principles of Judicial Review* 2d ed (London: Sweet & Maxwell, 2020) at [11-040].

[139] See *Edwards v Bairstow* [1956] 1 AC 14 at 35 (HL, Eng); *Ching Boon Huat v Comptroller of Income Tax* [1983-1984] SLR(R) 571 at [3] (PC).

[140] Instead, the administrative law ground of review that comes closest to the cumulative effect of traditional administrative law grounds of review and the reasonable classification test is that applied in *E v Secretary of State for the Home Department* [2004] QB 1044 at [63] (CA, Eng) (invaliding decisions taken on the basis of uncontentious and material mistakes of fact). But *E* has not been confirmed by the UK Supreme Court, and is considered constitutionally controversial precisely because it departs from "traditional" administrative law principles and thus morphs "review" into "appeal" (see *Shaheen v Secretary of State for the Home Department* [2005] All ER (D) 31 at [26]–[29] (CA, Eng); Harry Woolf *et al*, *supra* note 138 at [11-052]). However, understanding the reasonable classification test as such a ground of review poses no constitutional problems, because art 12(1) is a justiciable constitutional right, and courts must adjudicate questions of facts put in issue under its element on the merits.

important than) private interests. In this situation, then, it may suffice for courts only to scrutinise the existence, rather than the sufficiency, of the practical reasons relied on.

However, we also instinctively understand that practical reasons have limited importance: practical efficacy and effectiveness are weighty but never paramount concerns, and "[t]here comes a point when convenience and economy must give way to the demands of justice".[141] Thus, we can instinctively say that the Government should not generally be able to rely on practical reasons to excuse its failure to perfectly protect and/or avoid inadvertently curtailing rights like life and liberty. This is because practical reasons must be less important than such rights, which are "fundamental" to Singapore's legal system, in the sense that they are fundamental in the common law constitutional tradition.[142] Consider, for example, how the court's reasoning in *Howe Yoon Chong* would have come across if applied to the facts of *Syed Suhail*, where what was at stake was not the applicant's tax dollar but his life and liberty. Could the constitutionality of a policy that scheduled executions in a "patchwork" manner *(ie,* by lottery) be justified on grounds of a "shortage of manpower"[143] in the Singapore Prisons Service? If the answer is "no" – as it must be – the implicit proposition that we must accept is this: practical reasons should *not be as capable of* justifying imperfect differentiation which collaterally affects fundamental rights, as compared to differentiation which collaterally affects only private interests.

The notion that practical reasons cannot easily justify imperfect differentiation collaterally affecting fundamental rights reflects Menon CJ's statement in *Syed Suhail* that when challenged laws or decisions affect "life and liberty" a court has to be "searching in its scrutiny".[144] Menon CJ did not apply this "searching scrutiny" standard in *Syed Suhail* itself, because he did not need to proceed to the Relation Evaluation Stage to grant leave.[145] However, it was applied subsequently by the High Court when it heard the application on the merits, albeit in *obiter*. At that stage, the applicant argued that equally-situated Singaporean and non-Singaporean death row

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[141] *Kok Seng Chong v Bukit Turf Club* [1992] 3 SLR(R) 772 at [52] (HC).

[142] See, for example, *R v Secretary of State, ex parte Bugdaycay* [1987] 2 WLR 606 at 619 (HL, Eng), per Lord Bridge ("the most fundamental of all human rights is the individual's right to life"). One might argue that "fundamental rights" are implicated in any case where the reasonable classification test applies, because art 12(1) which contains the reasonable classification test is itself a "fundamental liberty" enshrined in Part IV of the Constitution. However, the "fundamental rights" which triggers *Syed Suhail*'s searching scrutiny standard do not correspond directly with those contained in Part IV of the Constitution. For example, the "fundamental right" to "life and liberty" which triggered searching scrutiny in *Syed Suhail* (Leave) (*supra* note 7 at [63]) is different from the right enshrined in art 9(1) – the latter is a right to "life [and] liberty save in accordance with law", and the Court of Appeal confirmed in *Jabar bin Kadermastan v PP* [1995] 1 SLR(R) 326 at [52]–[53] (CA) that the latter right does not apply to executive decisions taken against accused persons after they are convicted and their appeals dismissed, which was precisely the kind of decision at issue in *Syed Suhail* (Leave). A better understanding of the "fundamental rights" that triggers the searching scrutiny standard is those rights which are fundamental to the common law constitutional tradition, in the sense that they constitute common law constitutional rights – and, as mentioned, at common law "there [is] no general constitutional right to equal treatment by the law or by the executive" (see text accompanying *supra* note 8 above).

[143] *Howe Yoon Chong*, *supra* note 118 at [9], [11].

[144] *Syed Suhail* (Leave), *supra* note 7 at [63]; *Tan Seng Kee, supra* note 4 at [327].

[145] See text accompanying *supra* notes 95, 96.

prisoners were treated differently in an "exercise of expediency": non-Singaporeans were not being scheduled for execution because the COVID-19 travel restrictions then in place created difficulties relating to their "access to their family members" before execution and the "repatriation of their mortal remains" after execution, but Singaporeans were still being scheduled for execution because no equivalent difficulties existed.[146] See Kee Oon J reasoned that, had there actually been non-Singaporean prisoners who were not being scheduled for execution for that reason,[147] the "COVID-19 restrictions" would not have been "a legitimate reason to justify differential treatment".[148] This was because its effect would be that "the executions of Singaporeans would more likely be expedited", and "[n]ationality, in turn, would bear no rational relation to the scheduling of executions."[149] While See J's reasoning here has been read as suggesting that discrimination of grounds of nationality is unjustifiable,[150] this reading should be avoided, because See J himself recognised that the applicant had not argued that "nationality" had influenced the scheduling decision, only that COVID-19-related "reasons of expediency" had.[151] Instead, a better reading of See J's reasoning is that differential treatment cannot be based on "reasons of expediency" – *ie*, *practical reasons* – when it collaterally affects fundamental interests like life and liberty.

However, even the *Syed Suhail* "searching scrutiny" standard cannot always demand perfect differentiation when life and liberty is at stake. Imperfect differentiation may nevertheless pass muster if (and only if) the practical reasons given can show that achieving perfect differentiation was not just practically difficult but *practically impossible*, in that perfection was precluded by conditions outside the control of Parliament or the executive. This "impossibility exception" is needed if courts are to avoid making policy when applying the "searching scrutiny" standard. When it would be difficult but possible to further a given policy through perfect differentiation, a court which demands perfection is not saying that Parliament cannot further any particular purpose, only that Parliament should go the extra mile to avoid collaterally affecting the applicant's life or liberty. But when it would be impossible to further a given policy through perfect differentiation, the court which still insists on perfection, and so invalidates the imperfectly differentiating law or decision, will be unconditionally precluding Parliament from furthering that particular purpose, and so placing an absolute limit on Parliament's authority to make policy.

Saravanan Chandaram v Public Prosecutor[152] can be read as authority for the "impossibility exception" to *Syed Suhail*'s "searching scrutiny" standard. The applicant was charged with trafficking in "cannabis mixture", defined as cannabis

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146 *Syed Suhail bin Syed Zin v AG* [2021] 5 SLR 452 at [24] (HC) [*Syed Suhail* (Merits)].

147 On the facts, the applicant could not identify any such non-Singaporean prisoners (for the reasons discussed in the text accompanying *infra* note 171), and so there was no differential treatment in need of justification (*ibid* at [58]).

148 *Syed Suhail* (Merits), *supra* note 146 at [62].

149 *Ibid* at [66].

150 And criticised on that ground; see Benjamin Joshua Ong, "Singapore – can delaying an execution due to COVID-19 amount to unconstitutional discrimination?" [2022] Public L 156 at 157.

151 *Syed Suhail* (Merits), *supra* note 146 at [49], [50].

152 *Saravanan, supra* note 64.

plant matter inseparably commingled with other non-cannabis vegetable matter.[153] The MDA classified cannabis mixture as a "controlled drug",[154] and its sentencing framework for trafficking in controlled drugs pegged sentence severity to the weight of the "controlled drug" trafficked. For "cannabis mixture", this referred to the weight of the mixture trafficked, rather than the quantity of cannabinol and tetrahydrocannabinol (the psychoactive compounds in cannabis) actually contained in the mixture trafficked.[155] The applicant challenged the MDA's sentencing framework for trafficking cannabis mixture under Article 12(1), arguing that sentence severity should be pegged to the trafficked drug's "pharmacological qualities and not its legal traits", since the sentence imposed for a crime must relate to the harm it causes.[156] Menon CJ dismissed the applicant's challenge, on grounds, *inter alia*,[157] that forensic experts testified that no reliable method of accurately determining the quantity of cannabinol and tetrahydrocannabinol in any given unit of cannabis mixture currently exists.[158] Thus, while there was an imperfect coincidence between the differentia contained in the MDA sentencing framework for cannabis mixture (weight) and the purpose for those frameworks (to commensurate punishment with harm), this was constitutional because it was "*practically impossible*" to accurately separate cannabinol and tetrahydrocannabinol from other non-cannabis vegetable matter and thus to perfectly commensurate punishment for harm caused by trafficking in cannabis mixture.[159]

V. Dividing the Burden of Proof

Any constitutional test, regardless of its theoretical potency, will be meaningless in practice if the applicable evidential rules make it impossible for applicants to succeed. Both *Syed Suhail* and *Tan Seng Kee* sought to rescue the reasonable classification test from this fate by establishing that the "presumption of constitutionality" that applies in relation to the reasonable classification test is "no more than a starting point that [the challenged law or decision] will not presumptively be treated as suspect or unconstitutional".[160] In other words, since the court must give effect to the constitutional guarantee of equality in a meaningful way, challenges must stand or fall based on their merits under the reasonable classification test alone, rather than being effectively undercut by evidential rules that unduly prejudice the applicant.

Under the *Syed Suhail*/*Tan Seng Kee* approach, then, the "presumption of constitutionality" is now only an evidential rule which places the burden of proof on the applicant – it no longer says anything about the standard of proof which the

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[153] *Ibid* at [119].
[154] *Ibid* at [138], [139].
[155] *Ibid* at [141]–[143], [150], [151].
[156] *Ibid* at [160].
[157] His other reason was that Singapore's illicit drug market priced cannabis mixture by weight and not the proportion of cannabis it contained; *ibid* at [165].
[158] *Ibid* at [164], [167]–[170].
[159] *Ibid* at [169], emphasis added.
[160] *Syed Suhail* (Leave), *supra* note 7 at [63], *Tan Seng Kee, supra* note 4 at [303].

applicant's case must meet. Instead, today it seems that the applicant need only prove that a challenged law or decision fails the reasonable classification test to the standard of a *prima facie* case of reasonable suspicion, before the evidential burden shifts to the Government.[161] This latter position was established in *Ramalingam*, where Chan CJ held that the applicant must show that "there is a *prima facie* breach of a fundamental liberty", specifically "that the [challenged law or decision] was in breach of Art 12",[162] after which the Government must "justify" the challenged law or decision.[163] The reason why the applicant is held only to the standard of a *prima facie* case is, again, to ensure that the applicable evidential rules in Article 12(1) challenges do not render the reasonable classification test meaningless by unduly prejudicing applicants. While the applicant must bear the legal burden of proof to deter frivolous applications meant to extract information from the Government, genuine applicants may face difficulties establishing a case on a balance of probabilities by themselves, because there will often be an information asymmetry between them and the Government favouring the latter. Holding applicants to the lower standard of a *prima facie* case of reasonable suspicion thus helps (re)balance the odds in a fairer way.[164]

However, even if Article 12(1) applicants are required only to establish a *prima facie* case to shift the evidential burden to the Government, this may not always – or even often – give genuine applicants a meaningful shot at succeeding. Much depends on what the applicant must establish a *prima facie* case *of*. Read literally, Chan CJ's comments in *Ramalingam* suggest that the applicant must establish a *prima facie* case that *Article 12(1)* is breached, *ie*. that the challenged law or decision fails *the (entire) reasonable classification test*. But recall that a successful challenge under the reasonable classification test's Relation Evaluation Stage requires the applicant to establish two facts-in-issue: the lack of principled reasons showing why the challenged law or decision's differentia is perfect, *and* the lack of practical reasons showing why the challenged law or decision's imperfect differentia should be excused.[165] Logically, then, if the applicant must establish a *prima facie* case that the (entire) reasonable classification test is not met, she must establish *prima facie* that there are no principled reasons *and* no practical reasons which can justify the challenged differentia.

But this cannot be correct, because it requires the applicant to do something which will be extremely difficult (if not impossible) in practice. There is an important difference between requiring an applicant to prove, even at the standard of a *prima facie*

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[161] Technically, the position should be that the applicant has the legal burden of proving unconstitutionality on a balance of probabilities, but once she establishes a *prima facie* case, the evidential burden will shift to the Government if (and only if) the Government is practically in a good position to rebut the *prima facie* case in the circumstances; see *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [59], [60] (CA). In an art 12(1) challenge, though, it is hard to imagine the Government not being in a good position to rebut such a *prima facie* case.

[162] *Ramalingam*, *supra* note 93 at [50].

[163] *Ibid* at [28].

[164] See *eg*, *The Online Citizen Pte Ltd v AG* [2021] 2 SLR 1358 (CA) at [180], [184], where the Court of Appeal cited these reasons to justify placing identical burdens and standards of proof, drawn directly from art 12(1) case-law, on individuals challenging executive directions issued under the *Protection from Online Falsehoods and Manipulation Act 2019*.

[165] See text accompanying *supra* note 126 above.

case, the non-existence of principled reasons as compared to the non-existence of practical reasons. It is reasonable to expect an applicant to prove that no *principled reasons* exist that show that the challenged differentiation is perfect. This is because the existence of principled reasons is a question of law – for legislation, whether the proper interpretation of the differentia coheres with the legislative object, and for executive decisions, whether the reasons the executive considered were relevant factors. And questions of law are questions which applicants (or their lawyers) can know the answer to. By contrast, it will often be unreasonable to expect an applicant to show that no *practical reasons* exist to excuse the imperfect differentiation. This is because the practical reasons that Parliament or the relevant executive institution considered when enacting laws or making decisions will often be *indiscernible to outsiders*. Absent insider knowledge on the Government's inner workings of the kind no applicant should be expected to have, or a general duty to give reasons of the kind that the common law continues to reject,[166] *no one outside the relevant institution* will know what practical constraints existed that supported the imperfect differentiation in question. So how can any applicant be expected to establish even a *prima facie* case that a challenged law or decision was necessitated *neither* by (for example) a shortage of manpower, resources, information, capabilities *nor* time?

Since applicants cannot reasonably be expected to establish even a *prima facie* case that no practical reasons capable of excusing the imperfect differentiation existed at all, requiring them to do so would render the reasonable classification test meaningless in practice. The burden of proof in Article 12(1) challenges must therefore be qualified. It is submitted that applicants should only be required to establish a *prima facie* case that there are *no principled reasons* justifying the challenged law or decision's differentiation – *ie*, that it *differentiates imperfectly* – after which the evidential burden should then shift to the Government to justify the law or decision.

This qualified understanding of the burden of proof in Article 12(1) challenges is supported by Menon CJ's description in *Syed Suhail* of the applicable evidential rules in Article 12(1) challenges: that applicants need only show that they are treated differently compared to others "equally situated" with them, after which the evidential burden shifts to the Government "to provide justification".[167] On the facts, Menon CJ held that prisoners sentenced to death are "equally situated" for the purposes of the scheduling their executions "once they have been denied clemency",[168] because usually "there is no further pending recourse or other relevant pending proceedings in which the prisoner's involvement is required."[169] Importantly, an exercise of the power to schedule a prisoner's execution before she exhausts all avenues of recourse and before all relevant proceedings have terminated would be a decision that fails to consider obviously relevant factors. Thus, Menon CJ's application of the "equally situated" enquiry only assessed whether the applicant established a *prima facie* case that the challenged differential treatment was not

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[166] See Joanna Bell, "Reason-Giving in Administrative Law: Where are We and Why have the Courts not Embraced the 'General Common Law Duty to Give Reasons'?" (2019) 82(6) Mod L Rev 983.

[167] *Syed Suhail* (Leave), *supra* note 7 at [61].

[168] *Ibid* at [64].

[169] *Ibid* at [67].

based on a *Wednesbury*-reasonable balance of relevant factors[170] – in other words, that the decision differentiated *imperfectly* – before the evidential burden shifted to the Government to justify the decision.

This qualified understanding of the burden of proof in Article 12(1) challenges also helps highlight what exactly the Government must do to rebut the applicant's *prima facie* case. If the applicant only needs to establish a *prima facie* case that the challenged law or decision differentiates imperfectly, there are logically two ways in which the Government can respond.

First, the Government may prove that there was, contrary to first impressions, a *perfect coincidence* between differentiation and purpose. For Article 12(1) challenges to legislation, this may be seen in Yong CJ's decision in *Taw Cheng Kong*, where the applicant's argument that Section 37(1) of the PCA was under-inclusive for not criminalising the corrupt acts of non-Singaporeans which affect Singapore was met by the response that comity justified re-scoping the law's purpose more narrowly. For challenges to executive decisions, an example is See J's decision in *Syed Suhail* on the merits. See J accepted the Attorney-General's arguments that the applicant and the other prisoner sentenced to death were not "equally situated" because, unlike the applicant, the other prisoner's conviction rested on an understanding of the doctrine of willful blindness under the MDA which had recently been overturned by the Court of Appeal, prompting a review of all convictions which were inconsistent with the new position.[171] Thus, though the other prisoner was sentenced to death before the applicant, there were pending proceedings which might have overturned the former's conviction but not the latter's, which explained why the latter's execution had been scheduled but the former's had not.

Second, the Government may accept that the relationship between purpose and differentia is imperfect, but then argue that *practical reasons* exist which can excuse such imperfection. For Article 12(1) challenges to legislation, this can be seen in *Saravanan*. There, it was the evidence of the Public Prosecutor's forensic expert witness, that it would be physically impossible to determine the amount of cannabinol and tetrahydrocannabinol in any given unit of cannabis mixture, that showed the existence of practical reasons rendering perfect differentiation in sentencing pegged to the harm caused by the trafficking of cannabis mixture practically impossible.[172]

For challenges to executive decisions, *Muhammad Ridzuan bin Mohd Ali v Attorney-General*[173] provides an example of how the Government may defend imperfect differentiation by proving practical reasons, albeit in *obiter*. At issue was the Public Prosecutor's decision not to certify that the information a prisoner sentenced to death for drug trafficking had "substantively assisted the Central Narcotics Bureau ("CNB") in disrupting drug trafficking activities" under Section 33B(2)(b) of the MDA, which would have given the court discretion to sentence

[170] Or as the Court of Appeal recently put it, whether the applicant can establish that she and another person are treated differently even though they "are roughly equivalent or similarly situated in all material respects": *AG v Datchinamurthy a/l Kataiah* [2022] SGCA 46 at [30].

[171] *Syed Suhail* (Merits), *supra* note 146 at [34]–[44].

[172] See text accompanying *supra* notes 158, 159.

[173] [2015] 5 SLR 1222 (CA) [*Ridzuan*].

him to life imprisonment instead of death.[174] Menon CJ, writing for a unanimous Court, reasoned that an applicant challenging the Public Prosecutor's decision not to issue a certificate had to show only two things: "first, that [the] knowledge he acquired of the drug syndicate he was dealing with was practically identical to a co-offender's … and second, and more importantly, that he and his co-offender had provided practically the same information to CNB".[175] After this, the burden would shift to the Public Prosecutor "to justify his decision".[176] Importantly, however, the Public Prosecutor could justify his decision "*even where* … co-offenders had given practically identical information",[177] "for example" if the Public Prosecutor could show that one offender testified earlier "leading to tangible and effective outcomes" while the other testified later and so "render[ed] the information of no operational use."[178] Thus, even where two offenders were similarly situated, the Government could justify differential treatment if it proved that "operational" considerations[179] – *ie*, *practical reasons* considered in the "Public Prosecutor's decision-making process" which "the applicant would not be privy to"[180] – existed that could excuse the difference.

VI. Conclusion: Variation in the Reasonable Classification Test

The formal-versus-substantive-equality debate – on whether the reasonable classification should exhaust the definition of constitutional equality – is unlikely to cease in Singapore anytime soon. However, little progress can be made without a clear understanding of the content of the reasonable classification test itself. This article has sought to refine and clarify our understanding of that test, in a manner that reconciles the Article 12(1) case-law with a canonical understanding of the judiciary's constitutional role. It has thus made three arguments:

(1) First, the test's Purpose Identification Stage is purely forensic, but should require courts to identify the purpose of challenged laws or decisions only from extrinsic materials evincing Parliament's intent.
(2) Second, the test's Relation Evaluation Stage should require courts to scrutinise, on the merits and on the basis of evidence, the factual existence of practical reasons supporting an imperfect differentiation, and exceptionally also the normative sufficiency of those reasons when the imperfect differentiation collaterally affects fundamental liberties.
(3) Third, applicants should only bear the burden of proving a *prima facie* case that the challenged law or decision's differentiation is imperfect, which the Government must then rebut by proving either that the differentiation

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174 See MDA, s 33B(1)(*a*).
175 *Ridzuan, supra* note 173 at [51].
176 *Ibid* at [52].
177 *Ibid*.
178 *Ibid*.
179 *Ibid*.
180 *Ibid* at [40].

> was actually perfect, or that practical reasons exist that can excuse the imperfection.

In closing, something should be said about how the test for Article 12(1) challenges may vary depending on whether it is a legislative or executive act that is being challenged. In *Tan Seng Kee*, Menon CJ affirmed that the applicable test – whether applied to a legislative or executive act – is the "reasonable classification" test; this is implicit in the multiple references he makes to the notion of applying the "*Syed Suhail* approach to the reasonable classification test",[181] developed in a case involving an executive decision, to "legislation".[182] Moreover, in *Syed Suhail* itself Menon CJ noted that the Article 12(1) test for executive decisions also involved an assessment of whether the challenged decision "bears a sufficient rational relation to the object for which the power was conferred";[183] this creates an "alignment" between it and the test for legislation in that "the rational nexus test now forms a common denominator of analysis in both contexts."[184] Together, *Syed Suhail* and *Tan Seng Kee* suggest that a single test – the "reasonable classification test" – applies to both legislative and executive acts. This must be correct. Since the Constitution applies to both legislative and executive acts, the same test should apply under Article 12(1) to both kinds of acts,[185] unless Article 12(1) itself states otherwise – and it does not.

Thus, there is only one Article 12(1) test – the "reasonable classification test" – which applies to both legislative and executive acts. Against this, however, one might highlight that, in both *Syed Suhail* and *Tan Seng Kee*, Menon CJ seemed to suggest that the reasonable classification test will apply differently in different situations. For example, in *Syed Suhail*:

> When applying [the reasonable classification] test, the court would have due regard to the *nature* of the executive action in question. Since the present case was concerned with *a decision which was necessarily taken on an individual rather than a broad-brush basis*, and one which affected the appellant's life and liberty to the gravest degree, the court had to be searching in its scrutiny[186] [emphasis *italicised*].

Similarly, in *Tan Seng Kee*:

> [T]he *Syed Suhail* approach does not afford the court an open-ended mandate to evaluate legislation on the basis of its policy preferences, for that would be outside its constitutional role … correlatively, *there might even be a difference*

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[181] *Tan Seng Kee, supra* note 4 at [329].

[182] See *ibid* at [314]–[315], [318]–[321], [325]–[328].

[183] *Syed Suhail* (Leave), *supra* note 7 at [61].

[184] Chng, "Reconsideration of Equal Protection", *supra* note 46 at 300.

[185] For this argument made in relation to Arts 14 and 15, See Kenny Chng, "Analysing the Constitutionality of Executive Action under Articles 14 and 15 in Singapore – Theoretical and Doctrinal Perspectives" [2022] Sing JLS 26 at 35–39.

[186] *Syed Suhail* (Leave), *supra* note 7 at [63].

> *when considering statutory provisions as compared to executive action for compatibility with* Art 12[187] [emphasis *italicised*].

How can we reconcile these seemingly contradictory propositions? The key is to recognise that no contradiction actually exists. The 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, and the former does not necessarily imply the latter.[188] For example, it is one thing to say that the standard of care under the law of negligence, the "reasonable person" standard, may be more difficult to breach in certain cases *(eg*, involving medical professionals); but quite another to say that in those identified cases a different standard of care applies *(eg*, a standard of "gross negligence" rather than ordinary negligence, or a standard of *Wednesbury* unreasonableness rather than ordinary unreasonableness). Moreover, the conceptual distinction between the two propositions is not merely semantic but substantive. If two different tests with different elements apply, then no explanation will be needed when the stricter test proves harder to satisfy than the easier test.[189] But if the same test applies, courts must explain why that same test with the same elements will necessarily be easier or harder to satisfy depending on the situation it is applied to.

My position, then, is that the reasonable classification test (as described in this article) applies to both legislative and executive acts, *but* that when applied to executive acts it will *necessarily* be "stricter" or more difficult to satisfy than when applied to legislative acts. This is so for two reasons.

First, consider Menon CJ's comments in *Tan Seng Kee* above, which seem to imply that, while courts cannot assess the legitimacy of purposes underlying legislation, they might be able to for the purposes underlying executive decisions. The account developed in this article of how the Purpose Identification Stage operates in challenges to executive decisions supports this: the "purpose" underlying an executive decision refers not just to the abstract purpose underlying the relevant discretion-conferring provision, but to a *Wednesbury*-reasonable balance of the relevant factors underlying the decision. And importantly, *Wednesbury* unreasonableness is a limited review of the substance and merits of executive decisions: courts consider whether, despite having considered only relevant factors and not considered any irrelevant factors, the executive weighed those factors in a manner that no reasonable authority would have.[190] Thus, while courts cannot assess the legitimacy of the balance of factors that constitutes the purpose underlying legislative acts, it is trite that they can to a limited extent for executive acts. This necessarily comports a limited test of legitimacy of purposes for (only) executive decisions subject to the reasonable classification test.

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[187] *Tan Seng Kee*, *supra* note 4 at [328].

[188] See Marcus Teo, "Proportionality as Epistemic Independence" [2022] Public L 245 at 248, 249.

[189] Instead, the court will need to explain why there are two different tests for different situations in the first place.

[190] See *supra* note 89. To similar effect are judicial statements that decisions can be "so disproportionate" as to be "irrational"; see *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [121].

Second, consider Menon CJ's comments in *Syed Suhail*, which appears to suggest that decisions taken on an "individual" basis will more likely fail the reasonable classification test than decisions taken on a "broad-brush" basis. Note, also, that the distinction he drew here is not exactly between legislative and executive acts, but between decisions on the one hand, and rules and policies on the other. The account developed in this article of how the Relation Evaluation Stage operates suggests why decisions will be easier to successfully challenge than rules or policies. The Relation Evaluation Stage scrutinises whether practical reasons exist which can excuse imperfect differentiation, and the Government bears the burden of proving that such reasons exist. But the practical reasons that can logically excuse imperfectly differentiating rules and policies differ from the kinds of reasons that can logically excuse imperfectly differentiating decisions. Broad rules or policies are frameworks setting out how future decisions, which may be taken on various different fact-patterns, should be made, and so the practical reasons that shape them are necessarily general predictions about the kinds of practical obstacles the executive will face. Thus, practical reasons which can excuse imperfectly differentiating rules or policies will often be no more than *abstract reasons* why decisions which perfectly coincide with their purposes will likely be impractical or impossible. By contrast, decisions are implementations of particular rules or policies, which means that the only practical reasons that can excuse an imperfectly differentiating decision are reasons that apply to the particular fact-pattern the decision was made on. The Government therefore can only defend imperfectly differentiating decisions using *concrete reasons* explaining why perfection was not actually practical or possible in this situation. Needless to say, it will generally be easier for the Government to provide a credible abstract practical reason justifying imperfect differentiation, than a credible concrete practical reason. Thus, while the reasonable classification test demands that all legislative and executive acts which differentiate imperfectly be justified by practical reasons, the kinds of practical reasons that can excuse imperfectly differentiating rules and policies will generally be easier to prove than those that can excuse imperfectly differentiating decisions.