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Ong Ming Johnson: A Calibrated Approach to (Un)transformative Constitutionalism by the Singapore High Court

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I. Introduction

In recent times, there has been increased questioning of anti-homosexuality provisions present in statute books of former British colonies, including in Singapore. This has led to a series of challenges in Singapore with respect to constitutionality of Section 377A of of the Singapore Penal Code 1871 including in the case of Ong Ming Johnson v Attorney General.[1] The High Court of the Republic of Singapore ("Singapore High Court") (the lower division of the Supreme Court of Singapore) in the case of Ong Ming Johnson rejected the constitutional challenge to Section 377A, which criminalizes 'gross indecency' between men. The decision is the second in recent times where the judiciary in Singapore has refused to strike down Section 377A, a colonial era law, amongst others as being violative of right to equality and right to freedom of expression.[2] The objective of this article is to

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1 *Ong Ming Johnson v Attorney General* [2020] SGHC 63.

2 The Court of Appeal, the highest court in Singapore had in *Lim Meng Suang v Kenneth Che Mun-Leon* [2014] SCGA 53 previously considered a challenge to the vires of Section 377A of the Singapore Penal Code and turned it down.

bring forth the fallacies present in the judgment on constitutionality of Section 377A, which prima facie seems discriminatory.

We seek to analyze the issues in the parochial approach applied by the Singapore High Court in cases concerning fundamental right of speech and expression as well as right to equality. The Judiciary by refusing to adopt tests such as the proportionality test to examine the constitutional validity of a provision refuses to fully accept its duty under the Constitution of Singapore which is to act as the guardian of the Constitution and act against the exercise of unbridled power by the legislature.

We have divided this article into four parts. After this introductory portion in Part I, in Part II we set the context by discussing the background of Section 377A and the powers of judicial review that are vested with the Judiciary as per the Constitution. Post this, in Part III, we critique the judgement in Ong Ming Johnson on five broad grounds viz.: (a) narrow interpretation of the right to freedom of speech and expression, (b) use of public morality as a shield and ignoring constitutional morality; (c) non-engagement with arguments on disparate impact of Section 377A; (d) extending the presumption of constitutionality to a pre-constitutional provision affecting fundamental rights, and (e) applying traditional classification test to examine the vires of the provision with respect to the right to equality which has several limitations. In Part IV of the article, we provide the concluding remarks emerging out of the analysis made in the other parts of the article.

II. Section 377A of the Singapore Penal Code: Origins And Concerns

A. The imposition of victorian morality: a historical backdrop of section 377A in Singapore

In order to understand the origin of Section 377A, it is important to trace the origins of anti-homosexuality laws in Britain, which exported the same to the Straits Settlements.[3] In 1885, a member of the British Parliament, Henry Labouchere, introduced the Criminal Law Amendment Act, 1885 in the Parliament (commonly known as the Labouchere Amendment). This act outlawed any act of gross indecency, including any sexual act, between men, whether in

[3] Human Rights Watch, "This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism" in Corinne Lennox and Matthew Waites (eds), *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth* (University of London Press 2013); The Straits Settlement was a former administrative unit of the British Crown comprising of Singapore, Penang, Malacca and Dinding.

public or private.[4] The provision also provided punishment for an attempt to commit such gross indecency.[5] However, despite imposing a stringent punishment for the offence, the provision did not contain any definition for the term 'gross indecency'. Thus, there was uncertainty as to its application and scope.[6] The Labouchere Amendment provided the basis for introduction of similar provisions in British colonies, including Section 377A to the Penal Code in the then British colony of Singapore.[7]

Section 377A which was introduced in 1938 by the Legislative Council of the Straits Settlements, reads as follows:

"377A. Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years."[8]

The objective of introducing Section 377A seems to have stemmed from the need to outlaw all acts of gross indecency between male persons, as this was not explicitly covered by the already existing Section 377 of the Singapore Penal Code which only criminalised 'carnal intercourse against the order of nature' between individuals.[9] These two provisions had the combined effect of imposing the British Parliament's moral judgement of 'correct' sexual conduct on the subjects of the

4 Criminal Law Amendment Act 1885, s 11.

5 Section 11 of the Criminal Law Amendment Act provided that: "Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour."

6 Chan Sek Keong, "Equal Justice Under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773, 781.

7 Human Rights Watch (n 3).

8 Section 377A was introduced in the Singapore Penal Code vide Section 7 of Penal Code (Amendment) Ordinance 1938.

9 The Objects and Reasons of the 1938 Bill stated that the provision "*makes punishable acts of gross decency between male persons which do not amount to an unnatural offence within the meaning of section 377 of the Code*". The essence of Section 377 of the Singapore Penal Code was that whoever, whether male or female, engages in sexual acts which did not lead towards procreation, including anal sex, bestiality etc. were punishable under the Section 377. Section 377 of the Singapore Penal Code was repealed vide Penal Code (Amendment) Act 2007, s 70. Section 377A of the Singapore Penal Code as opposed to erstwhile Section 377 penalized acts of "gross indecency" between male persons only. This in essence criminalized all acts, including non-penetrative sexual acts between male persons. Whereas Section 377 was gender neutral, Section 377A specifically targets males.

Straight Settlements, without taking into account the factor of consent as a suitable defence to the persons engaging in sexual practices of the supposed 'wrong kind'.

B. Judicial review in Singapore

Article 93 of the Constitution of the Republic of Singapore, 1965 ("the Constitution") provides that judicial power in Singapore shall be vested in the Supreme Court and courts subordinate to the Supreme Court.[10] The Constitution also provides that the Supreme Court shall consist of the Court of Appeal and the High Court.[11] Therefore, the Court of Appeal of Singapore is the country's highest appellate court and is vested with the power to conclusively determine disputes relating to the interpretation of the Constitution. Article 4 of the Constitution provides that any law enacted by the Legislature which is inconsistent with the Constitution shall be void.[12]

Accordingly, the Supreme Court of Singapore has ruled that the legal model of the State is based on the supremacy of the Constitution and that the courts in Singapore have the power to declare a legislative action to be null and void if it transgresses the text of the Constitution.[13] However, in practical terms, successful challenges to legislative provisions remain few and far between due to the heavy onus of proof that the petitioners have faced while challenging a provision for being unconstitutional before the Supreme Court.[14] The Judiciary has been reticent in its approach while expanding the scope of the traditional classification test to test the legitimacy of actions undertaken by the Legislature.[15]

The Supreme Court has been overly cautious in determining constitutional issues concerning social morality.[16] In the previous challenge to Section 377A before the Court of Appeal, the Court did not shy away from stating the same in

[10] Article 93 of the Constitution of Republic of Singapore states: "**93.** The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force."

[11] Constitution of Republic of Singapore, A 94.

[12] Article 4 of the Constitution of Republic of Singapore provides for the Supremacy of the Constitution and states the following: "This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

[13] *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] SGHC 163.

[14] Jack Tsen-Ta Lee, "According to the Spirit and not to the Letter: Proportionality and the Singapore Constitution" (2014) 8(3) Vienna Journal on International Constitutional Law 276, 279.

[15] ibid 301.

[16] The High Court of Singapore even in the previous challenge to Section 377A of the Penal Code in *Lim Meng Suang v Attorney General* [2015] 1 SLR 26 refrained from testing the constitutional validity of the provision stating that it was "an issue of morality and societal values" and that in such cases the Parliament is the best judge of such controversial issues.

as many words. The Court of Appeal in Lim Meng Suang held that where issues of social morality are concerned, the court would adopt a calibrated approach to judicial review in favour of elected persons who represent the interest and will of the people.[17]

While it is important for the Judiciary to refrain from usurping the power of the Legislative wing of the State and imposing its own wisdom over legislative wisdom, heed must be simultaneously given to the fact that the Judiciary is the guardian of the Constitution, with the ultimate responsibility of interpreting the same. Accordingly, it cannot shirk away from its duty to test the social morals of the society against the ethos envisaged by and in the Constitution.[18] Taking a limited approach while testing the provisions enacted by the Legislature against the Constitution can affect the rights of persons (and in some cases only citizens) in an extremely detrimental and damaging manner. Such an approach will effectively result in the non-fulfilment of the aspirations and goals envisaged under the Constitution such as that of equality in all facets of life, resulting in the same remaining a distant dream.

III. Ong Ming Johnson: A Parochial and Formulaic Approach towards Fundamental Rights

A. Problems with using public morality as a shield in fundamental rights cases

It was argued on behalf of the State in Ong Ming Johnson v. Attorney General that Section 377A safeguards and reflects social morality when it prosecutes acts of gross indecency between males.[19] It was further argued that it is not for the courts to determine public morality, which is the domain of the legislature, comprised of elected representatives.[20] The High Court agreed with the aforesaid arguments and held that Section 377A serves the purpose of showing moral disapproval of society towards male homosexual acts.[21] The court used public morality as a shield and stated that the legislature being comprised of

[17] *Lim Meng Suang v Attorney General* [2015] 1 SLR 26. See Jack Tsen-Ta Lee, 'The limits of liberty: The crime of male same-sex conduct and the rights to life and personal liberty in Singapore: Lim Meng Suang v Attorney-General' [2015] 1 SLR 26 (2016) Hong Kong Law Journal 46(1), 49, 59.

[18] Jaclyn L Neo and Yvonne C L Lee, "Constitutional supremacy: Still a little dicey" in Li-ann Thio and Kevin YL Tan (eds), *Evolution of a Revolution: Forty years of the Singapore Constitution* (Routledge Cavendish 2009) 177.

[19] *Ong Ming Johnson* (n 1) [158].

[20] ibid.

[21] ibid.

elected representatives is the best judge of public morality. Accordingly, the courts refused to strike down Section 377A.[22]

There is no gainsaying that courts cannot estop the legislature from giving effect to what its understanding of morality is, through law.[23] In fact, legal systems especially criminal ones are based partially on the State's conception of public morality.[24] Therefore, public morality can be a legitimate purpose under Article 12 of the Singapore Constitution. However, it is pertinent to note that for public morality to be a legitimate purpose, it must not be in violation of constitutional morality.[25] Constitutional morality means that while framing laws, the governments must ensure that fundamental values on which constitutional guarantees are based are not violated.[26] This is in contrast with public morality which is the morality of the majority of the population, and is not only subjective but also constantly shifting.[27] Therefore, it can be stated that while morality of the majority population can be basis of a law, however, the same will have to give way to the fundamental values of the constitution.[28] This position is followed in jurisdictions respecting constitutional supremacy,[29] and thus Singapore being one such jurisdiction has no reason to differ and it must also test its laws on the touchstone of constitutional morality instead of merely using public morality as a shield.

Accordingly, in the instant case the Singapore High Court was required to not defer to public morality but to test the law based on public morality against constitutional morality. This is where we believe the Singapore High Court judgement falls short. The approach of the Singapore High Court bears resemblance with the approach of the Indian Supreme Court in Koushal v. Naz Foundation, wherein it had a similar issue before it and used public morality as shield to justify continuance of Section 377 of the Indian Penal Code.[30] However, the judgement in Koushal was set aside subsequently in the case of Navtej Johar.[31] A perusal at the Indian Supreme Court's approach in Navtej Johar dealing with a

[22] *Ong Ming Johnson* (n 1).

[23] Gautam Bhatia, *The Transformative Constitution* (Harper Collins 2019) 116.

[24] Gautam Bhatia, 'India's attorney general is wrong. Constitutional morality is not a 'dangerous weapon', (*Scroll*, 21 December 2018) <https://scroll.in/article/905858/indias-attorney-general-is-wrong-constitutional-morality-is-not-a-dangerous-weapon> accessed on June 26, 2020.

[25] Constitution of Republic of Singapore (n 11); *Manoj Narula v Union of India*, (2014) 9 SCC 1; *Naz Foundation v. Government of NCT of Delh*i, 2009 (111) DRJ 1.

[26] Bhatia (n 24); *R v CM*, 1995 CanLII 8924 (Can. O.N. C.A.).

[27] Bhatia (n 24).

[28] Bhatia (n 23), 116.

[29] *R v CM* (n 26); Bhatia (n 24); *Manoj Narula* (n 25); *Naz Foundation v Government of NCT of Delhi*, 2009 (111) DRJ 1.

[30] *Suresh Kumar Koushal v Naz Foundation*, (2014) 1 SCC 1.

[31] *Navtej Singh Johar v Union of India*, (2018) 10 SCC 1.

similar matter will highlight the shortfall in the approach followed in Koushal and Ong Ming. In Navtej Johar, the Indian Supreme Court when deciding a challenge against a similar provision criminalizing homosexuality, after testing the law on the touchstone of constitutional morality partially struck it down.[32] The court noted that a law in contravention with constitutional morality cannot be valid. It stated that the law was perpetuating inequality against a class of its population (homosexuals) on the basis of their intrinsic characteristics (sexual identity/orientation) which related to their personal autonomy.[33] Further, the court stated that the very purpose of such law was against constitutional morality's requirement of inclusivity.[34] It derived this requirement of inclusivity from various provisions under the Indian Constitution such as freedom of speech, assembly and association, and freedom of religion.[35] We believe that in the context of Singapore, if the High Court had tested the law on the basis of constitutional morality's requirement of inclusivity/diversity, their conclusion would have been similar to the Indian Supreme Court in Navtej. This is because similar provisions whose foundational principles are inclusivity/diversity are part of the Singapore Constitution as well, such as freedom of speech, assembly and association, and freedom of religion.[36]

B. Freedom of speech and expression in Singapore: a parochial view

The High Court in Ong Ming Johnson has narrowly interpreted Article 14(1)(a) of the Constitution to state that freedom of expression under the Constitution only means freedom to express verbally.[37] Even from a prima facie

[32] ibid [645].

[33] We are assuming homosexuality to be an intrinsic characteristic which the Singapore High Court has said is not established beyond reasonable doubt based on perfunctory look at the evidence. The standard used by Singapore Hight Court seems to be beyond reasonable doubt as it states that till homosexuality is not proven to be intrinsic through cogent scientific evidence, it is not an intrinsic feature. However, we believe that since personal freedom of various individuals is dependent on such a test, more importance needed to be given to scientific evidence and/or expert evidence. Further, the burden on the claimant should have been lower and the standard of review of the claims made by the State must have been higher. Reference for this should have been made to *Navtej Johar.*

[34] *Navtej* (n 31) [640.3.7]–[640.3.8].

[35] ibid [640].

[36] Constitution of Republic of Singapore, A 9, 12 and 15.

[37] The Singapore High Court while using marginal note to Article 14 as a tool of interpretation, has in a convoluted manner stated there is no mention made of freedom of expression as a freedom of expression as a free standing right. Therefore, it interpreted it to mean that freedom of expression would relate to or fall within the right to freedom of speech i.e. verbal communication of an idea, opinion or belief. The High Court also used *ejusdem generis* as a canon of statutory interpretation to rule that the ordinary meaning of the term "expression" when read together with the term "speech" would mean some form of verbal communication.

reading of Article 14, it will be clear to any reader that the same could not have been envisaged by the drafters of the Constitution.

In order to better understand the approach used by the Singapore High Court, it is important to appreciate the dynamics of a nation like Singapore. It is a closely knit political society which regards the interests of the community above those of an individual. This has enabled the flourishment of the current-day scenario where the right to freedom of speech and expression is limited.[38] The idea disseminated through the government machinery has always been that granting unbridled political rights is antithetical to stable and orderly growth of the country.[39] This view is aided by the availability of various grounds in Article 14(2)(a) of the Constitution through which Legislature may restrict the fundamental right of speech and expression.[40] The Judiciary in Singapore, on a prima facie reading of the provision, is not expected to look into the reasonableness of the restriction. In fact, the actions of the Legislature are supreme, even when enacting laws restricting the core fundamental rights under Article 14. Be that as it may, we opine that the problem of restricted fundamental freedoms does not arise not from the Legislature's wide power of placing restrictions, but rather, it arises from the approach taken by the Judiciary. The Judiciary, by keeping in line with the views of the Executive, has exacerbated the effects of the limitations placed on the right to freedom of speech and expression.

The fundamental right to freedom of speech and expression in Singapore is similar to the right envisaged in the Constitutions of India and Malaysia.[41]

[38] Li-ann Thio, "Singapore: Regulating political speech and the commitment "to build a democratic society", 1(3) International Journal of Constitutional Law 516.

[39] Li-ann Thio, "The virtual and the real: Article 14, Political Speech and the calibrated management of deliberative democracy in Singapore" Singapore Journal of Legal Studies 25, 26.

[40] Article 14(1)(a) of the Constitution of Republic of Singapore provides to every citizen the right to freedom of speech and expression. However, under Article 14(2)(a) of the Constitution, the Parliament has been given the power to impose restrictions on right to freedom of speech of expression where it is considered necessary or expedient in the interest of the (i) security of Singapore, (ii) friendly relations with other countries, (iii) public order, (iv) morality, (v) privileges of Parliament and to provide against (vi) contempt of court (vii) defamation and (viii) incitement to any offence.; The use of the term 'restriction' in Article 14(2) instead of 'reasonable restriction' as seen in Article 19 of the Constitution of India makes clear the desire of the drafters to limit the judicial review into the exercise of power by the Legislature.

[41] The right to freedom of speech and expression under the Indian Constitution is similar to the right to freedom of speech and expression provided for under the Constitutions of Republic of Singapore and Malaysia. However, under Article 19(2) of the Indian Constitution, only reasonable restrictions can be imposed by the Legislature on the enjoyment of the right whereas under the Constitutions of both Singapore and Malaysia, the requirement of reasonableness is not explicitly provided.

Therefore, the interpretation of this right in the two countries could help further understand the shortcomings of the interpretation given by the Courts in Singapore.

Article 19(1)(a) of the Constitution of India, much similar to Article 14 of the Singapore Constitution guarantees to each citizen the right to freedom of speech and expression.[42] The Judiciary in India as compared to Judiciary in Singapore has given an expansive meaning to the right to freedom of speech and expression under Article 19(1)(a) by stating that it does not only include the rights explicitly mentioned in the provision but also other rights which might be implied from the provision.[43] Unlike the Singapore Judiciary, which has stated that expression is a subset of speech, the Supreme Court of India has construed it broadly to further the constitutional goal of providing certain basic rights to every citizen which help develop his complete personality.[44] In People's Union for Civil Liberties,[45] the Supreme Court of India held that:

> "Freedom of expression, as contemplated by Article 19(1)(a) which in many respects overlaps and coincides with freedom of speech, has manifold meanings. It need not and ought not to be confined to expressing something in words orally or in writing.
>
> …..
>
> Even a manifestation of an emotion, feeling etc. without words would amount to expression.
>
> ……
>
> Communication of emotion and display of talent through music, painting etc. is also a sort of expression."

The interpretation of the Supreme Court of India is in complete contrast with the myopic interpretation given by the High Court of Singapore, which has the potential of stifling the rights of its citizens. Even with respect to the judicial review of legislations imposing restrictions on the right to freedom of speech and

[42] Article 19(1)(a) of the Constitution of India states that: "19. (1) All citizens shall have the right to (a) freedom of speech and expression."

[43] *IR Coelho v State of Tamil Nadu*, AIR 2007 SC 861. The Supreme Court of India has ruled that freedom of press, even though not provided for separately and specifically under the Constitution of India is covered under freedom of speech and expression.

[44] Durga Das Basu, *Commentary on the Constitution of India*, vol 3 (Lexis Nexis 2014).

[45] *People's Union for Civil Liberties and another v Union of India and another*, (2009) 4 SCC 399.

expression under Article 19(2) of the Indian Constitution, the Supreme Courts of the two countries have taken similar approaches but have reached different ends.

In India, much like Singapore, a legislation restricting a right under Article 19 of Constitution of India is presumed to be constitutional. However, once a person alleging a violation of their right to freedom of speech and expression is able to prove that there has been a prima facie violation of their right by enactment of such legislation, then the onus shifts and the burden lies on the State to conclusively prove that the legislation is within the mandated constitutional scheme.[46] This is different from the position of law in Singapore where the Judiciary seems to put a great degree of burden on the Petitioner to prove the unconstitutionality of a provision. The approach of the Supreme Court of India as opposed to the approach adopted by the High Court of Singapore ensures that a delicate and nuanced balance between the right to freedom of speech and expression of a citizen and the right of the state to inter alia to ensure public order, decency and morality is achieved and maintained.

In similar vein, we explore Article 10 of the Federal Constitution of Malaysia, 1957 on which Article 14 of the Constitution of Singapore is based,[47] provides that every citizen has the right to freedom of speech and expression.[48] The right to freedom of speech and expression under Article 10 has been construed in Malaysia in Ooi Kee Saik[49] wherein it has been held that:

"the right of freedom of speech is simply the right which everyone has to say, write or publish what he pleases so long as he does not commit a breach of the law."

Even in Malaysia, freedom of speech and expression is construed wider than the meaning adopted by the High Court of Singapore.

In this light of this and at the very minimum, any meaningful interpretation of the freedom of speech and expression must include both verbal and non-verbal activity. Both India and Malaysia, have given a wider interpretation to the right in order to enable the citizens to meaningfully develop their social consciousness. Accordingly, the interpretation given by the Singapore Judiciary to the right to freedom of speech and expression leaves much to be desired. It also leaves a number of questions in the minds of its citizens as according to the interpretation given in Ong Ming Johnson any non-verbal expression including right to express inter alia through photographs, facial expressions etc. is not protected under Article 14 of

[46] Basu (n 44).

[47] Report of the Constitutional Commission, Republic of Singapore (1966) [37].

[48] Article 10(1)(a) of the Federal Constitution of Malaysia provides that: "10. (1) Subject to Clauses (2), (3) and (4) - (a) every citizen has the right to freedom of speech and expression".

[49] *Public Prosecutor v Ooi Kee Saik & Ors* [1971] 2 MLJ 108.

the Constitution. In our opinion, it is a decision that has tilted the balance in the favour of the Legislature. The effect of the judgement in Ong Ming Johnson is such that for violation of a non-verbal right a citizen can no more approach the Constitutional Courts in Singapore.

C. Ignoring indirect discrimination as "extra-legal": lack of judicial engagement

The Singapore High Court noted that anti-discrimination/ equality provision viz. Article 12 of the Singapore Constitution is based on Article 14 of the Indian Constitution.[50] The court also noted that in the Indian context, while dealing with a case under Articles 14 and 15 of the Constitution, the Supreme Court in *Anuj Garg v Hotel Association of India & Ors*[51] observed that legislation must not only be scrutinised for its aims or objectives (direct discrimination) but also for the impact or the effect it has (indirect discrimination).[52] This decision was quoted and affirmed by the Indian Supreme Court in the case of Navtej Johar. Similar is the position in other countries such as United States and United Kingdom where courts or legislature view both direct as well as indirect discrimination as antithetical to equality.[53] In United States, disparate impact was discussed in the case of *Griggs v Duke Power Co* wherein it was stated that not only overt/direct discrimination but also discrimination in operation or effect is proscribed.[54] In United Kingdom, indirect discrimination has been defined separately in the Equality Act of 2010.[55]

In this context, when arguments were made by the petitioners in the instant case that even though Section 377A may not discriminate directly against male homosexuals, it affects them disproportionately and indirectly as it criminalises something that is integral to their identity (sexual orientation).[56] The Singapore High Court instead of assessing this argument on the basis of the Indian as well as United States decisions cited, relied on the decision in Lim Meng Suang CA.[57] Citing this earlier decision, it held that Singapore courts ought not take into account

[50] *Ong Ming Johnson* (n 1) [218].

[51] (2008) 3 SCC 1.

[52] *Ong Ming Johnson* (n 1) [18].

[53] Dhruva Gandhi, 'Rethinking "Manifest Arbitrariness" in Article 14: Part II – Disparate Impact and Indirect Discrimination' (*The Indian Constitutional Law And Philosophy Blog*, 21 May 2020) <https://indconlawphil.wordpress.com/2020/05/21/guest-post-rethinking-manifest-arbitrariness-in-article-14-part-ii-disparate-impact-and-indirect-discrimination/> accessed on 21 June 2020.

[54] *Griggs v Duke Power Co*, 401 US 424.

[55] *See* Equality Act 2010; Gandhi (n 53).

[56] *Ong Ming Johnson* (n 1) [219].

[57] *Ong Ming Johnson* (n 1) [221]–[223].

"extra legal arguments" regardless of how valid they may seem.[58] It is peritnent to note that neither the earlier decision in Lim Meng Suang CA nor this decision highlights how arguing that a facially neutral provision in effect disproprionately affects a particular class is extra legal or why arguments which have a bearing on how law operates ought not be considered. The court also failed in engaging with Navtej Johar wherein disparate impact of a similar provision was considered and the impugned provision was partially struck down. If not the other cases, the court had an obligation to at least consider, distinguish or highlight why it begs to differ with Navtej Johar. This is because Article 14 of the Indian Constitution is very similar to Article 12 of the Singapore Constitution and the petitioners specifically relied on the Navtej Johar case. By failing to do so and by ignoring disparate impact of the provision we believe the Singapore High Court failed in its constitutional duty to act as a protector of fundamental rights of its citizens.[59]

D. Presumption of constitutionality: does it extend to pre-constitutional provisions?

The Singapore High Court in Ong Ming Johnson v. Attorney General observed that presumption of constitutionality operates as much for pre-constitutional laws as it does for the post constitutional ones.[60] It also noted that Section 377A was extensively debated in the Singapore Parliament and the Parliament chose not to repeal it.[61] The High Court also observed that the presumption of constitutionality is not unique to Singapore and cited the case of Nand Kishore v. State of Punjab where the Indian Supreme Court had observed that "there is always a presumption of constitutionality in favour of the law…"[62] However, the High Court conveniently ignored the observations of the Indian Supreme Court in *Navtej Johar*.

In Navtej Johar, Justice Nariman observed that pre-constitutional provisions are not worthy of presumption of constitutionality.[63] The basis for the observation was that presumption of constitutionality of a provision is based on the fact that Parliament not only understands the needs of its people (is representative)

[58] *Ong Ming Johnson* (n 1) [223].
[59] This is also linked to deferring to Parliament and following a liberal judicial review standard which are discussed in Part I of this paper.
[60] *Ong Ming Johnson* (n 1) [152].
[61] *Ong Ming Johnson* (n 1) [152].
[62] (1995) 6 SCC 614.
[63] *Navtej Singh Johar* (n 31) [360].

but also understands the constitutional limitations for framing of laws.[64] In this regard, it must be noted that with regards laws such as Section 377A which affect fundamental rights of citizens, presumption of constitutionality is particularly problematic.[65] This is because first, those whose fundamental rights are affected had no say in drafting of those laws and now that those laws are in place, they have the burden of mobilising resources to ensure that the Parliament repeals those laws.[66] This "double-burden" is unacceptable and cannot be validated by way of a generic constitutional provision which is only a barrier to treating such laws as void and not for removal of presumption of constitutionality.[67]

As shown in Part II of this paper, Section 377A is a colonial era provision imposing Victorian morality. Despite this being the case, the High Court applies "presumption of constitutionality". We believe that this approach of the court is incorrect as Section 377A affects fundamental rights of male homosexuals and being pre-constitutional provision cannot be granted presumption of constitutionality on account of unacceptable "double-burden" highlighted above. However, the High Court without any engagement with this question, presumes it to be constitutional which is problematic as it reduces the threshold for scrutiny and puts an unreal excessive burden on the petitioners challenging the law. Therefore, we believe that presumption must have no role in cases of discriminatory or differential treatment on the basis of race, sex or sexual orientation and it must give way to proportionality analysis. This position has also found favour with courts in several commonwealth nations[68] and it is time for Singapore courts to follow and truly act as the protector of fundamental rights.[69] Further, even if the Singapore courts do not do away with the presumption completely, it should ask the applicant to prima facie make out

[64] *Navtej Singh Johar* (n 31) 361; See Tarunabh Khaitan, 'On the presumption of constitutionality for pre-constitutional laws' (*The Indian Constitutional Law And Philosophy Blog*, 11 July 2018) <https://indconlawphil.wordpress.com/2018/07/11/guest-post-on-the-presumption-of-constitutionality-for-pre-constitutional-laws/> accessed on 21 June 2020.

[65] Gautam Bhatia, '*Is there an Interpretive Methodology for Construing Colonial-era Statutes?*' (*The Indian Constitutional Law And Philosophy Blog*, October 10 2013) < https://indconlawphil.wordpress.com/2013/10/10/is-there-an-interpretive-methodology-for-construing-colonial-era-statutes/> accessed on 21 June 2020. Bhatia notes that this blanket observation by Justice Nariman may be problematic and only the pre-constitutional laws which affect fundamental rights are not worthy of presumption of constitutionality. He notes that those laws which do not affect any particular group or has no bearing on fundamental rights may be treated differently and may be granted protection by virtue of constitutional provision mandating continuance of pre-constitutional laws.

[66] ibid.

[67] Bhatia (n 65).

[68] *Navtej* (n 31) [360]; Bhatia (n 65).

[69] Constitution of Republic of Singapore, A 4 and 162.

the grounds for review and then should ask the government to independently prove constitutionality of the impugned provision.

E. Need to adopt the proportionality standard and replace traditional classification test

The High Court held that in respect of Article 12 of the Constitution, law must have some intelligible differentia and that differentia must have rational nexus with the object sought to be achieved by the law.[70] With regards differentia, the court noted that Section 377A has a clear differentia as it is only aimed at homosexual acts between men as against homosexual acts between females or heterosexual acts.[71] In this regard the court noted that the Singaporean law in certain respect treated men and women differently[72] and there was no change in societal disapproval towards male homosexual acts as opposed female homosexual acts, therefore Section 377A was justified.[73] Accordingly, the court concluded that the differentia which Section 377A seeks to create is not unreasonable. The court with regards the rational nexus, stated that the object of Section 377A was to preserve public morality and the differentia seeks to achieve that by criminalizing homosexual conduct between males.[74] Further, the court stated that as this provision has been validly enacted and the Parliament has not deemed fit to repeal the same, it must be presumed to be constitutional unless proved otherwise.[75] Accordingly, the court stated that it is not for the court to test the legitimacy of the object as by doing that it would be acting as a mini-legislature.[76]

While the court concluded as above, it acknowledged that the reasonable classification test has its limitations and operates only as a threshold level of inquiry.[77] However, apart from this acknowledgment, the court made no effort to evolve either a new standard of inquiry or to follow another standard evolved in jurisdictions with similar equality provisions. The court did not even appropriately

[70] *Ong Ming Johnson* (n 1) [170].

[71] *Ong Ming Johnson* (n 1) [171].

[72] The court failed to observe that gender-based differentiation to provide favorable treatment to women is justified on account of historical oppression and it does not in any way imply that all differentiations based on gender will be justified as per the equality provisions of the Singapore Constitution.

[73] *Ong Ming Johnson* (n 1) [172].

[74] ibid [189].

[75] Discussed in the earlier part of the paper.

[76] *Ong Ming Johnson* (n 1) [207].

[77] ibid [210]–[211]. Bhatia (n 23) 104; Joseph Tussman and Jacobus tenBroek, '*The Equal Protection of Laws*' (1949) 37(3) The California Law Review 341. Asia-Pacific Journal on Human Rights and The Law.

analyse whether the flaws in this test makes it inappropriate for cases involving fundamental rights and more specifically equality and personal autonomy. It is pertinent to note that courts in several jurisdictions including India[78] and Hong Kong[79] when faced with similar issues, where a law targeted vulnerable section of its population, have moved from the traditional classification test to deeper scrutiny review involving the proportionality test.[80] For instance, the Delhi High Court in the Naz Foundation (similar approach is followed by the Indian Supreme Court in Navtej Johar) observed that the restrictions imposed by the state's (impugned) measure must not only be legitimate and relevant but must also be proportionate to the state interest.[81] The reason for such change in approach was that such laws affect personal autonomy of individuals, which is extremely important as it forms the basis of the anti-discrimination and equality provisions of the Constitution.[82] Therefore, traditional review which is extremely deferential towards the State, has a low threshold for inquiry. It does not account for the fact that equality by its nature excludes certain legislative classifications (colour, birth, creed, etc) and legislative purposes (hostile, discriminatory) cannot appropriately help courts in protecting fundamental rights and/or in assessing violation of fundamental rights.[83]

Despite this evolution in several jurisdictions, the Singapore court ignored the doctrine of proportionality and observed that "these limitations do not necessarily justify addition of a proportionality limb to the reasonable classification test".[84]

[78] Bhatia (n 22) 105; *Navtej* (n 31); Jack Tsen-Ta Lee, 'Equality and Singapore's First Constitutional Challenges to the Criminalization of Male Homosexual Conduct' (2015) Asia-Pacific Journal on Human Rights and The Law 16(1-2), 150–185.

[79] *Hysan Development Co Ltd and Others v Town Planning Board* (FACV 21/2015).

[80] See Jack Tsen-Ta Lee (n 78); In *Navtej*, the Indian Supreme Court was extremely critical of the traditional classification test and observed that it "elevates form over substance". The observation of J. Chandrachud in this regard is as follows: "*Equating the content of equality with the reasonableness of a classification on which* a law is based advances the cause of legal formalism. *The problem with the classification test is that what constitutes a reasonable classification is reduced to a mere formula: the quest for an intelligible differentia and the rational nexus to the object sought to be achieved. In doing so,* the test of classification risks elevating form over substance. *The danger inherent in legal formalism lies in its inability to lay threadbare the values which guide the process of judging constitutional rights.*" Further, Justice Chandrachud notes that Article 14 of the Indian has an edifice over which the same is built. He observes that the quest of the provision is equal and fair treatment of individuals in all spheres and facets.

[81] *Navtej Singh Johar* (n 31).

[82] Tarunabh Khaitan, 'Beyond Reasonableness - A Rigorous Standard of Review for Article 15 Infringement' Journal of The Indian Law Institute 50(2) 177–208; While sexual orientation may not be one of the listed grounds in the provision prohibiting discrimination, the courts have justified using this scriter standard in such cases, as "sexual oritentation" is analogous to grounds on which the Constitution specifically prohibits differential treatment (Constitution of Republic of Singapore, A 12(2)).

[83] Bhatia (n 23) 105.

[84] *Ong Ming Johnson* (n 1) [211].

Further, it observed that proportionality ought not to be taken as an approach in equal protection clause cases as that would lead to reviewing the legitimacy of aims and objectives of the statues.[85] We believe that the court abdicated its constitutional responsibility of judicial review by stating that it is not for courts to review legitimacy of statutory objects, without mentioning any reason for the same. This is especially the case when Article 162 of the Singapore Constitution envisages bringing pre-constitutional laws in conformity with the Constitution by suitable exceptions, modifications, etc.[86] Thus by sticking to a formula based approach to equality, the Singapore High Court failed to act as the guardian of the Constitution.

IV. Conclusion

In this paper we have argued that the Singapore High Court has failed in its duty to act as a guardian of the constitutional provisions by upholding Section 377A in Ong Ming Johnson. The judgement echoed the view of the public, as recognized by the legislature, which still wishes to view homosexuality as a criminal offence, much similar to the Victorian times in which the provision was enacted. We highlighted that the approach of the Singapore High Court in Ong Ming Johnson strikes at the very ethos on which the Constitution of Singapore is based. The Singapore High Court followed traditional standard of review which is extremely deferential towards the State, has a low threshold for inquiry, does not account that equality its nature excludes certain legislative classifications (colour, birth, creed, etc) and legislative purposes (hostile, discriminatory), cannot appropriately help courts in assessing violation of fundamental rights. Thus, we have argued that the judiciary in Singapore needs to move away from the highly deferential standard and adopt tests that safeguard the fundamental rights of the people of Singapore in an expansive manner. We believe that Singapore High Court can draw inspiration from the Indian Supreme Court, which while considering a similar constitutional provision criminalizing homosexuality provided a more 'living' interpretation to the fundamental rights. Thus, we have proposed that the Singapore High Court should adopt the test utilized by the Indian Supreme Court viz. deeper scrutiny test involving proportionality analysis to review the legitimacy of statutory provisions.

[85] Refer to Part II (B) of this paper which deals with Judicial Review in Singapore.

[86] Constitution of Republic of Singapore, A 162.