IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 63

Originating Summons No 1114 of 2018

Between

Ong Ming Johnson

… *Plaintiff*

And

Attorney-General

… *Defendant*

Originating Summons No 1436 of 2018

Between

Choong Chee Hong

… *Plaintiff*

And

Attorney-General

… *Defendant*

Version No 1: 27 Oct 2020 (22:41 hrs)

Originating Summons No 1176 of 2019

Between

Tan Seng Kee

… *Plaintiff*

And

Attorney-General

… *Defendant*

JUDGMENT

[Constitutional Law] — [Equal protection of the law] — [Equality before the law]
[Constitutional Law] — [Fundamental liberties] — [Right to life and personal liberty]
[Constitutional Law] — [Fundamental liberties] — [Freedom of expression]
[Constitutional Law] — [Constitution] — [Interpretation]
[Statutory Interpretation] — [Construction of statute] — [Ejusdem generis]
[Statutory Interpretation] — [Construction of statute] — [Extrinsic aids]

Version No 1: 27 Oct 2020 (22:41 hrs)

TABLE OF CONTENTS

INTRODUCTION **1**

OUTLINE OF THE THREE APPLICATIONS **3**

OS 1114/2018 3

OS 1436/2018 5

OS 1176/2019 6

ISSUES TO BE DETERMINED **6**

INTERPRETATION: ASCERTAINING THE PURPOSE OR OBJECT OF S 377A **8**

PLAINTIFFS' ARGUMENTS 8

DEFENDANT'S ARGUMENTS 10

THE LAW ON STATUTORY INTERPRETATION 11

LEGISLATIVE MATERIAL 12

AG Howell's Speech *13*

Objects and Reasons *15*

ADDITIONAL MATERIAL 16

Crime Reports for 1934 and 1935 ..... *18*

Accounts of the "Malayan Male Prostitute Sex Scandal" by Hyam and Purcell *21*

The Malayan Prosecutions Memo *22*

The Moses Report *26*

The McKnight Letter *28*

The ECM Minutes *29*

MY DECISION ON THE ISSUE OF INTERPRETATION OF S 377A 30

Version No 1: 27 Oct 2020 (22:41 hrs)

The text and context of s 377A *31*

Legislative purpose or object of s 377A (I) – the "male prostitution" argument *34*

Legislative purpose or object of s 377A (II) – the "no overlap" argument *39*

Section 377A deals with offences against public morality *46*

Concluding observations *48*

PRESUMPTION OF CONSTITUTIONALITY 50

OPERATION OF THE PRESUMPTION IN RELATION TO S 377A 51

POTENTIAL ISSUES WITH THE PRESUMPTION OF CONSTITUTIONALITY 52

ARTICLE 12 AND EQUALITY BEFORE THE LAW 55

WHETHER THERE WAS NO INTELLIGIBLE DIFFERENTIA 56

WHETHER THERE WAS A RATIONAL RELATION BETWEEN THE INTELLIGIBLE DIFFERENTIA AND THE OBJECT SOUGHT TO BE ACHIEVED 60

Whether the differentia in s 377A is under-inclusive *61*

Whether the differentia in s 377A is over-inclusive *65*

Whether a test of proportionality should be adopted *65*

(1) The nature of Art 12(1) 66

(A) Article 12(1) - a declaratory and aspirational statement *66*

(B) The executive and legislature's comments *67*

(C) Preventing majority oppression *69*

(2) Potential limitations of the reasonable classification test 69

(A) Malaysia *70*

(B) India *72*

(C) United States *74*

(D) Hong Kong *75*

ARTICLE 14 AND FREEDOM OF EXPRESSION 78

Version No 1: 27 Oct 2020 (22:41 hrs)

TEXT AND CONTEXT OF ART 14(1)(A) 80

LEGISLATIVE PURPOSE OR OBJECT OF ART 14(1)(A) 85

ADDITIONAL MATERIAL ON THE MEANING OF "FREEDOM OF EXPRESSION" 86

ARTICLE 9(1) AND SCIENTIFIC EVIDENCE ON CAUSE(S) OF MALE HOMOSEXUALITY 88

ARTICLE 9(1) AND RIGHT TO LIFE AND PERSONAL LIBERTY 93

WHETHER S 377A CRIMINALISES PERSONS FOR THEIR IDENTITY 93

NON-ENFORCEMENT OF S 377A 94

THE POTENTIAL REDUNDANCY OF S 377A 96

STARE DECISIS – ADDITIONAL OBSERVATIONS 99

WHETHER THE COURT OF APPEAL'S FINDINGS AS TO THE SCOPE OF S 377A WERE OBITER DICTA 99

VERTICAL STARE DECISIS 101

CONCLUSION 103

ANNEX A 105

COMPARATIVE TABLE: SCOPE OF RELEVANT OFFENCES 105

RELEVANT WORDING 105

Version No 1: 27 Oct 2020 (22:41 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Ong Ming Johnson
v
Attorney-General and other matters

[2020] SGHC 63

High Court — Originating Summons Nos 1114 of 2018; 1436 of 2018 and 1176 of 2019
See Kee Oon J
13, 15, 18, 20 November 2019

30 March 2020 Judgment reserved.

See Kee Oon J:

Introduction

1 Section 377A of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") became part of Singapore law in 1938 while Singapore was under British colonial administration. The present three Originating Summons ("OS") applications concern the constitutionality of s 377A. The parties consented for all three matters to be heard together before me.

2 Section 377A, which criminalises acts of gross indecency between male persons, reads:

> **Outrages on decency**
>
> 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.

3 In their respective written and oral submissions, the plaintiffs focused on specific issues but otherwise aligned themselves with each other's submissions. Notwithstanding that the prayers they sought were not entirely identical, this posed no difficulty as they hoped to achieve a common outcome, namely, to have s 377A declared unconstitutional on the basis that it violates Arts 9, 12 and/or 14 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("Constitution").

4 I highlight at the outset that a prior challenge against s 377A was dismissed by the High Court and subsequently affirmed by the Court of Appeal in *Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2015] 1 SLR 26 ("*Lim Meng Suang CA*"). The plaintiffs submitted that their applications involved new arguments on issues not previously canvassed before the court, including points premised on new historical evidence and case law subsequent to *Lim Meng Suang CA*. As such, not only was I not bound by the decision of the Court of Appeal, I would in any event have to consider fresh submissions. Among these were submissions as to:

(a) the true purpose or object of s 377A in the light of additional contextual material;

(b) expert medical evidence as to the cause(s) of male homosexuality and its relevance to s 377A; and

(c) whether Art 14 of the Constitution encompasses the freedom to express one's sexual orientation or sexual preference.

5 A preliminary application was made on behalf of Dr Tan Seng Kee ("Dr

Version No 1: 27 Oct 2020 (22:41 hrs)

Tan"), the plaintiff in OS 1176/2019, for the matters to be heard in open court. I declined to direct that the matters be so heard as there was no exceptional reason to depart from the general position of having OS proceedings heard in chambers. In any event, I made it clear that I would furnish a written judgment setting out my reasons after the hearing.

6 Having heard the parties' submissions, I reserved judgment. I proceed to set out the reasons for my decision in full.

Outline of the three applications

OS 1114/2018

7 Mr Ong Ming Johnson ("Mr Ong"), the plaintiff in OS 1114/2018, sought a declaration that s 377A is inconsistent with Arts 9(1) and/or 12(1) of the Constitution. Mr Ong is an international disc jockey. He is a homosexual man who has been attracted to males from a young age, and has been in a long-term relationship with a man since 2017.[1]

8 Mr Ong argued that s 377A is inconsistent with Art 9(1) as it is absurd and arbitrary in criminalising persons for their identity. He further argued that it violates Art 12(1) of the Constitution in not having intelligible differentia and in failing to bear any rational relation to its legislative object. Further, it violates Art 14(1)(*a*) of the Constitution as the criminalisation of sex between men limited the ability of homosexual men to freely express their sexual orientation and exchange ideas pertaining to sexuality and sexual orientation.

---

[1] Ong Ming Johnson's 1st Affidavit dated 10 September 2018 ("OMJ's 1st Affidavit) at paras 14 and 15

Version No 1: 27 Oct 2020 (22:41 hrs)

9 Apart from his contentions concerning Arts 12(1) and 14(1)(*a*) of the Constitution, Mr Ong also submitted that *Lim Meng Suang CA* ought to be reconsidered. He offered four reasons for doing so: (1) that the parties in *Lim Meng Suang CA* did not put forward arguments on the bedrock concept of human dignity, which would affect the constitutionality of s 377A; (2) that after the decision in *Lim Meng Suang CA*, there has been comprehensive consensus that sexual orientation is unchangeable; (3) that the personal liberty of homosexual men continues to be potentially affected by s 377A; and (4) that international judicial developments suggest that *Lim Meng Suang CA* should be departed from.

10 In connection with the last point, it may be noted that OS 1114/2018 was filed not long after the decision of the Supreme Court of India in *Navtej Singh Johar v Union of India, THR. Secretary and Ministry of Law and Justice* AIR 2018 SC 4321 ("*Navtej*"). In *Navtej*, the Supreme Court of India declared s 377 of the Indian Penal Code (Act No. 45 of 1860) (India) to be unconstitutional. That provision deals with carnal intercourse against the order of nature and is *in pari materia* to s 377 of Singapore's Penal Code (Cap 20, 1936 Rev Ed) ("the 1936 Penal Code") which remained operative until s 377 was repealed in 2007.

11 In support of his point on the immutability of sexual orientation, Mr Ong adduced a total of six affidavits from three expert witnesses. The affidavits focus on the status of scientific consensus on the nature of sexual orientation, the efficacy of attempts to modify sexual orientation, and the effects of criminalisation of same-sex sexual conduct and societal disapproval on a homosexual individual's mental health.

Version No 1: 27 Oct 2020 (22:41 hrs)

OS 1436/2018

12 Mr Choong Chee Hong ("Mr Choong"), the plaintiff in OS 1436/2018, was an Executive Director of Oogachaga Counselling and Support. He is a homosexual man who is currently single and sexually active.[2]

13 Mr Choong contended that properly construed, s 377A criminalises only commercial (male) homosexual activity and not private, consensual acts of a non-commercial nature. In addition, s 377A does not extend to penetrative sexual activity, which was already covered by s 377 at the time when s 377A was enacted.

14 By an amendment to OS 1436/2018 dated 20 October 2019, Mr Choong sought a declaration that in light of the proper construction of s 377A, the provision is inconsistent with Arts 12 and/or 14 of the Constitution. He argued that s 377A violates Art 12 as there is no rational nexus between the intelligible differentia and the legislative purpose or object of s 377A.

15 In the alternative, he sought a declaration that s 377A is inconsistent with Art 14 of the Constitution as it impermissibly restricts the freedom of a class of Singapore citizens to express consensual acts of sexual intimacy by criminalising such acts. To the extent that it is void on account of such inconsistency, he argued that s 377A ought to be modified pursuant to the Court's power under Art 4 and/or Art 162 of the Constitution by omitting the words "in private".

---

2 Choong Chee Hong's 1st Affidavit dated 22 November 2018 ("CCH's 1st Affidavit") at paras 5 and 12

Version No 1: 27 Oct 2020 (22:41 hrs)

16 Mr Choong also raised concerns regarding the correctness of *Lim Meng Suang CA*, the significance of foreign jurisprudence on matters concerning male homosexuality, and how homosexual men continue to be negatively affected by s 377A through the violation of the right to intimacy and privacy and the constant threat of potential criminal investigations. These arguments bear similarities to those raised by Mr Ong, and will thus be addressed together.

OS 1176/2019

17 Dr Tan, the plaintiff in OS 1176/2019, is a medical doctor and a homosexual man. He is active in the LGBT (Lesbian, Gay, Bisexual, Transgender) activist scene.[3] His case was filed only in 2019, after the first two OS matters were already proceeding towards a hearing. Thereafter, all three matters were consolidated at the pre-hearing stage so that directions could be made for a joint hearing with the consent of all the parties.

18 Dr Tan sought to challenge s 377A on the grounds that it violates Arts 9(1), 12(1) and 14 of the Constitution. His arguments are broadly consistent with those mounted on behalf of the other plaintiffs. In his oral submissions, counsel for Dr Tan focused on the absurdity and arbitrariness of permitting s 377A to remain on our statute books given that the official Government policy position is non-enforcement in respect of consensual homosexual acts in private between males.

Issues to be determined

19 The following issues arise for my consideration and determination:

---

[3] Tan Seng Kee's 1st Affidavit dated 20 September 2019 ("TSK's 1st Affidavit") at paras 5, 6 and 14

Version No 1: 27 Oct 2020 (22:41 hrs)

(a) whether, applying principles of statutory interpretation to s 377A to ascertain its purpose or object, s 377A only covers the narrow scope of non-penetrative male homosexual activity and is targeted only at commercial male homosexual activity (*ie* male prostitution);

(b) whether the presumption of constitutionality applies to s 377A;

(c) whether, for the purposes of Art 12 of the Constitution, the reasonable classification test is met and intelligible differentia exists in s 377A;

(d) whether there is a non-derogable right to freedom of expression under Art 14 of the Constitution which encompasses sexual orientation and sexual preference;

(e) whether there is sufficient evidence that male homosexuality is caused purely by biological factors, as a result of which sexual orientation is immutable and if so whether this renders s 377A unconstitutional for being in violation of Art 9(1) of the Constitution;

(f) whether continued criminalisation of male homosexual activity through the retention of s 377A is absurd or arbitrary and thus inconsistent with Art 9(1) of the Constitution; and

(g) whether *stare decisis* applies and whether *Lim Meng Suang CA* ought to be departed from.

Version No 1: 27 Oct 2020 (22:41 hrs)

Interpretation: ascertaining the purpose or object of s 377A

Plaintiffs' arguments

20 Counsel for Mr Choong led the submissions for the plaintiffs and described the question of interpretation of the purpose or object of s 377A as the central or "lynchpin" issue.[4] The other plaintiffs expressly aligned themselves with Mr Choong's submissions on this point.

21 In putting forth his submissions on this issue, Mr Choong relied on ostensible "new historical evidence" which was previously unavailable and had either only come to light after the decision in *Lim Meng Suang CA*, or which was not placed before the court then. It was strenuously argued that this "significant new evidence" would support Mr Choong's contention that s 377A has a limited scope and does not extend to private, consensual, non-commercial male homosexual activity.[5]

22 The plaintiffs acknowledged that in *Lim Meng Suang CA*, the Court of Appeal had set out its reasoning and observations pursuant to submissions which were made on the purpose or object of s 377A. Nevertheless, it was suggested that those observations were made *obiter* and hence were not binding.

23 It was further submitted that *Lim Meng Suang CA* would not be binding on me in any event given that new legal issues had been surfaced for my consideration. Mr Choong did not contend that the Court of Appeal had erred in concluding, on the basis of submissions and material that were then before the court, that s 377A was intended for wider general application covering

---

4 Transcripts, 13 November 2019 at p 12 line 23

5 Transcripts, 13 November 2019 at p 5 line 3

Version No 1: 27 Oct 2020 (22:41 hrs)

consensual non-commercial homosexual conduct. Rather, he emphasised that the Court of Appeal came to its conclusion without the benefit of "fresh contemporaneous colonial-era material" which was not available at the time the decision was made.[6]

24 As s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) ("IA") mandates a purposive approach towards statutory interpretation, Mr Choong contended that the court should find that the legislative purpose of the colonial legislature in enacting s 377A in 1938 was to target the mischief of "rampant male prostitution" and that s 377A does not criminalise penetrative sex.[7]

25 Mr Choong also contended that there should be no overlap between s 377A and s 377 as it would serve no purpose for s 377A to cover penetrative sexual acts when such conduct already fell within the scope of s 377, and lighter sentences would result in prosecution of offences involving penetrative sexual acts under s 377A (the "no overlap" argument).

26 Finally, Mr Choong contended that should s 377A be construed to cover penetrative sexual acts, this would lead to "reverse discrimination" in that heterosexual men (and women generally) would be punished with heavier sentences of up to 10 years' imprisonment and a fine under s 377, as contrasted with gay and bisexual men who would be punished only with up to two years' imprisonment under s 377A for the same sexual acts (the "reverse discrimination" argument).

---

6 CCH's Written Submissions at para 23

7 CCH's Written Submissions at para 3

Version No 1: 27 Oct 2020 (22:41 hrs)

Defendant's arguments

27 According to the defendant, as the ordinary meaning of "gross indecency" covers both penetrative and non-penetrative sex acts and is not limited to commercial sex, extraneous material can only be used to confirm this meaning and not alter it. Further, reference to the extraneous materials adduced by the plaintiffs is impermissible as they are neither clear nor unequivocal, and are not directed to the very point in question. In any case, the new extraneous materials do not contradict the ordinary meaning of s 377A, as they do not show that the sole purpose of s 377A is to combat male prostitution.

28 In relation to the "no overlap" argument, the defendant submitted that there is nothing anomalous in having two offence provisions, one "wider" and one "narrower", proscribing similar types of conduct across a spectrum of culpability. As recognised in *Tan Liang Joo v Attorney-General* [2019] SGHC 263 ("*Tan Liang Joo*") at [35], penal laws do commonly overlap. The "wider" offence invariably carries the lower punishment and the converse is true: the "narrower" offence generally carries higher punishment than the "wider" one.

29 In relation to the "reverse discrimination" argument, the defendant submitted that this was absurd and untenable since nothing in s 377 prevented penetrative sexual activity between two men from being the subject of prosecution under s 377.

30 I will deal with the various legislative materials and extraneous materials first, before returning to address the "no overlap" argument and "reverse discrimination" argument further below.

Version No 1: 27 Oct 2020 (22:41 hrs)

The law on statutory interpretation

31 Section 9A(1) of the IA provides:

> In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.

32 The Court of Appeal judgment in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*"), which was handed down after the decision in *Lim Meng Suang CA*, articulated a three-step framework towards statutory interpretation ("the *Tan Cheng Bock* framework") as follows (at [37]):

> (a) First, ascertain the possible interpretations of the provision, having regard not just to the text of the provision but also to the context of that provision within the written law as a whole;
>
> (b) Second, ascertain the legislative purpose or object of the statute;
>
> (c) Third, compare the possible interpretations of the text against the purposes or objects of the statute.

33 The parties agreed that the *Tan Cheng Bock* framework would provide guidance in the present case but they differed on how the framework ought to be applied.

34 Mr Choong's arguments focused on the words "any act of gross indecency" which are contained in s 377A. He submitted that these words are vague and undefined, and the provision is on its face ambiguous and obscure. As such, numerous possible interpretations of the scope of s 377A can be

Version No 1: 27 Oct 2020 (22:41 hrs)

contemplated. Section 9A(2)(*b*)(*i*) of the IA is engaged, and the court can therefore consider extraneous material to ascertain the meaning of s 377A.

35 The defendant countered Mr Choong's arguments by pointing out that applying the *Tan Cheng Bock* framework would instead amply demonstrate that the Court of Appeal's reasoning and conclusions in *Lim Meng Suang CA* on the purpose or object of s 377A were unassailable.

36 I turn to address the substantive arguments made by the parties on the extraneous material.

Legislative material

37 It is not disputed that there is limited contemporaneous legislative material in relation to the introduction of s 377A in 1938. These essentially comprise:

(a) Attorney-General Howell's Legislative Council speech on 13 June 1938 ("AG Howell's Speech") in moving the 1938 Penal Code (Amendment) Bill ("1938 Bill") to its Third Reading[8]; and

(b) The Explanatory Note to the 1938 Penal Code (Amendment) Bill ("Objects and Reasons")[9].

38 In *Lim Meng Suang CA*, the Court of Appeal noted the paucity of legislative material and fully considered the above references in arriving at its conclusions on the purpose or object of s 377A (at [119] – [121]).

---

8 CCH's Bundle of Authorities ("BOA") Vol 4 at Tab 52, p 514

9 CCH's BOA Vol 4 at Tab 55, p 734

Version No 1: 27 Oct 2020 (22:41 hrs)

AG Howell's Speech

39 The modern-day equivalent of AG Howell's Speech is the Minister's Second Reading of a Bill in Parliament. The relevant portions of AG Howell's Speech are as follows:

> With regard to clause 4 it is unfortunately the case that acts of the nature described have been brought to notice. As the law now stands, *such acts can only be dealt with, if at all, under the Minor Offences Ordinance, and then only if committed in public.* Punishment under the Ordinance is inadequate and the chances of detection are small. It is desired, therefore, *to strengthen the law and to bring it into line with English Criminal Law, from which this clause is taken*, and the law of various other parts of the Colonial Empire of which it is only necessary to mention Hong Kong and Gibralter [*sic*] where conditions are somewhat similar to our own.
>
> [emphasis added]

40 Clause 4, as referred to in the above extract from AG Howell's Speech, dealt with the addition of s 377A to the 1936 Penal Code.

41 In *Lim Meng Suang CA*, the Court of Appeal labelled this speech "extremely cryptic" and "pregnant with meaning" (at [120]). In this connection, the Court of Appeal had thoroughly considered (at [131] – [143]) the argument that Mr Choong has canvassed, namely, that s 377A was aimed narrowly at combating the problem of male prostitution. The Court of Appeal eventually rejected this narrow interpretation, preferring instead the broader interpretation that s 377A was (a) of general application, and (b) intended to safeguard public morals and enforce a stricter standard of societal morality (at [138] – [143]).

42 I concur with *Lim Meng Suang CA* that AG Howell's Speech could certainly have been less obscure – for instance, he avoided explaining exactly what were the "acts of the nature described" (*ie* the "grossly indecent" acts between males as stipulated in clause 4) that needed to be dealt with through the

Version No 1: 27 Oct 2020 (22:41 hrs)

introduction of clause 4, for which more severe punishment was felt to be needed. He also stated that clause 4 was taken from the "English Criminal Law" without explicitly stating which provision it was taken from (although, as will be seen below, this was made clear in the Objects and Reasons). It would seem that such reticence was not uncommon at the time when dealing with culturally-sensitive or taboo topics which might offend prevailing moral sensibilities.

43 It is nonetheless still possible to discern the Legislative Council's intent through AG Howell's statement that these "acts", if committed in public, could have been dealt with under the Minor Offences Ordinance. This was a reference to s 23 of the Minor Offences Ordinance 1906 (No 13 of 1906) ("MOO") which was then in force, which criminalised "indecent behaviour" and "persistently soliciting … for immoral purposes" in public.

44 Moreover, while noting the inadequacy of available punishments for such "acts of the nature described", AG Howell also expressly stated that the intent was to "strengthen the law and bring it into line with English Criminal Law, from which this clause is taken". The relevant "English Criminal Law" from which clause 4 was taken was s 11 of the Criminal Law Amendment Act 1885 (c 69) (UK) ("the 1885 UK Act") or the "Labouchere Amendment" (after Mr Henry Labouchere, the Parliamentarian who pushed through this late addition to the UK Bill) which criminalises gross indecency between males. In my view, these statements taken together do provide reasonably clear indicators of the legislative purpose of introducing s 377A as well as its scope. I shall return to address them further below.

Version No 1: 27 Oct 2020 (22:41 hrs)

Objects and Reasons

45 The Objects and Reasons contained in the 1938 Bill states the following by way of explanation:

> Clause 4 introduces a new section based on section 11 of the Criminal Law Amendment Act 1885 (48 and 49 Vict c 69). The section makes punishable acts of gross indecency between male persons which do not amount to an unnatural offence within the meaning of section 377 of the Code.

46 The reference to "section 377 of the Code" relates to s 377 of the 1936 Penal Code ("s 377"), which read as follows:

> **Unnatural offences**
>
> 377. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with penal servitude for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine or to whipping.
>
> Explanation. – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

47 Mr Choong argued that "unnatural offences" under s 377 (*ie* penetrative sexual acts) were expressly intended to be excluded from the scope of s 377A, since the Objects and Reasons stated that clause 4 was to cater for acts of gross indecency between male persons "which do not amount to an unnatural offence within the meaning of section 377".

48 This submission however glosses over the first sentence in the Objects and Reasons. It was expressly mentioned that clause 4 was "based on section 11 of the Criminal Law Amendment Act 1885" (*ie* criminalising "gross indecency" between male persons). This should be read together with AG Howell's Speech, which specifically also mentioned the desire to "bring [the law] into line with English Criminal Law, from which this clause is taken".

Version No 1: 27 Oct 2020 (22:41 hrs)

49 Leaving aside for the moment the plain words of s 377A, both sources of legislative material would indicate cogently and unambiguously that the legislative intent was to import the existing English criminal law. This refers to s 11 of the 1885 UK Act. I shall return to this after I have touched on the additional material placed before me.

Additional material

50 Mr Choong also sought to rely on the following additional material:

(a) *Annual Report on the Organisation and Administration of the Straits Settlements Police and on the State of Crime* ("Crime Reports") for 1934 to 1935;[10]

(b) Crime Reports for 1936 to 1938 which were expressly considered in *Lim Meng Suang CA* (at [125]);

(c) an account by Ronald Hyam in his book, *Empire and Sexuality: The British Experience* (Manchester University Press, 1990) (at p 109), of the "Malayan Male Prostitute Sex Scandal" that "rocked colonial Malaya" in the decade that s 377A was introduced;[11]

(d) an allusion to the "Malayan Male Prostitute Sex Scandal" in Victor Purcell's book, *The Memoirs of a Malayan Official* (Cassell, London, 1965) (at p 199 and pp 240 – 241). Victor Purcell was a colonial

10 CCH's BOA Vol 5 at Tabs 70 and 71

11 CCH's BOA Vol 5 at Tab 67; CCH's Written Submissions at para 37

Version No 1: 27 Oct 2020 (22:41 hrs)

official who spent 25 years in the Malayan Civil Service from 1921 to 1946;[12]

(e) the Addendum to a 1940 Report from the local authorities to Sir G Gater (Permanent Under-Secretary of State for the Colonies), titled "Prosecutions, The Malayan 'Sexual Perversion' cases" ("the Malayan Prosecutions Memo");[13]

(f) a report concerning the resignation of Mr H. Moses ("the Moses Report") dated 24 March 1938 from the Governor and High Commissioner of the Straits Settlements (Sir Shenton Thomas) to the Secretary of State for the Colonies;[14]

(g) a letter titled "Prostitutes in Local Cafes – A Singapore Problem" dated 5 June 1938 to the editor of The Singapore Free Press and Mercantile Advertiser from one Mr Herbert A McKnight ("the McKnight Letter");[15] and

(h) minutes of the Executive Council Meeting of 18 May 1938 ("the ECM Minutes").[16]

---

12 CCH's BOA Vol 5 at Tab 68

13 CCH's BOA Vol 5 at Tab 76, *Discipline Under Colonial Regulations*, CO850/170/1, declassified in 2016

14 CCH's BOA Vol 5 at Tab 77, *Discipline Under Colonial Regulations*, H. Moses Malaya, declassified in 2014

15 CCHs BOA Vol 5 at Tab 66, Published in the 6 June 1938 edition of The Singapore Free Press and Mercantile Advertiser

16 CCH's BOA Vol 5 at Tab 75, *Minutes of Executive Council Meeting*, 18 May 1938, CO 275/134

Version No 1: 27 Oct 2020 (22:41 hrs)

51 Mr Choong submitted that the "full body of evidence" which includes fresh documents not previously before the courts demonstrates "beyond peradventure" that the legislative purpose of s 377A in 1938 was to address the problem of "rampant male prostitution".[17]

52 I preface my discussion below by stating that I agree with the defendant's submission that these additional materials should strictly not be considered as relevant extraneous material under the *Tan Cheng Bock* statutory interpretation framework. These materials are not legislative materials. They fail to meet the standard of relevancy and reliability to permit reference to be made to them as aids to interpretation. Nevertheless, to err on the side of caution and completeness, I shall take the Plaintiffs' case at its highest and proceed to examine each of these materials on the assumption that they can all be taken into account.

53 In the ensuing discussion, I shall proceed to summarise the substance of the documents referred to in the course of the proceedings and consider the weight if any to be attached to each of them.

Crime Reports for 1934 and 1935

54 Mr Choong sought to contrast the pre-1936 Crime Reports with those referred to by the Court of Appeal in *Lim Meng Suang CA*, to demonstrate that serious concerns about male prostitution in the Straits Settlements only began to emerge after 1936. It was pointed out that the Crime Reports for 1934 and 1935 made no mention of male prostitution. As for the 1936 Crime Report, male prostitution was mentioned in passing, in a single sentence indicating that it was

---

17 CCH's Written Submissions at para 56

Version No 1: 27 Oct 2020 (22:41 hrs)

"also kept in check, as and when encountered". All these are valid observations based on objective records and I take no issue with them.

55 As noted above, in *Lim Meng Suang CA*, the Court of Appeal referred to the Crime Reports from 1936 to 1938 (at [125] – [127]). The Crime Reports provide contemporaneous vignettes of the relevant social context. They support the argument that "rampant male prostitution" may have escalated to a point where it caused sufficient alarm within the colonial Government to prompt a response, and may have resulted in the introduction of s 377A in 1938.

56 For example, the Court of Appeal noted (at [126]) that it was reported at para 39 of the 1937 Crime Report that "[w]idespread existence of male prostitution was discovered and reported to the Government whose orders have been carried out." The Court of Appeal further noted (at [127]) that para 48 of the 1938 Crime Report recorded that *"[m]ale prostitution and other forms of beastliness* were stamped out as and when opportunity occurred" (emphasis added).

57 In this connection, it is pertinent to note that in earlier twentieth century usage, the word "beastliness" could refer to (male) masturbation and/or homosexual activity.[18] It would be reasonable to read para 48 of the 1938 Crime

---

[18] See *eg* John Ayto, *The Bloomsbury Dictionary of Euphemisms* (Bloomsbury, Rev Ed, 1993) at p 74 where it is suggested that the word "beastliness" "seems to have been applied to *any sort of sexual activity of which the speaker disapproves*, from masturbation to copulation" (emphasis added). There is also a reference to "beastliness" by Lord Robert Baden-Powell (founder of the scouting movement) at p 196 of *Scouting for Boys – A Handbook for Instruction in Good Citizenship* (C Arthur Pearson Ltd, London, 7th 1915); last accessed on 29 March 2020 on archive.org at http://bit.ly/2zA3ELh). In the context that Baden-Powell wrote of, this was a reference to masturbation. Separately, Rudyard Kipling wrote to his son John in 1912 cautioning him to "keep clear of any chap who is even suspected of beastliness", which referred to homosexuality – secondary source: Ronald Hyam, *Empire and Sexuality: The*

Version No 1: 27 Oct 2020 (22:41 hrs)

Report to mean that "*other forms* of beastliness" contemplated a far more extensive range of other intolerably "beastly" male homosexual activities, over and above "male prostitution" alone. Otherwise, those additional words in para 48 would be wholly otiose.

58 It may also be relevant to note that the Crime Reports for 1934 to 1936 dealt with the issue of prostitution (both male and female) generally under the broad heading of "Social Services". No submissions were made before me as to this chosen characterisation, which may have been deliberately innocuous and euphemistic. For the 1937 to 1938 Crime Reports, the issue of prostitution was reported under a rather different new heading of "Public Morals". In addition, the reference to "beastliness" emerged in the 1938 Crime Reports. This suggests, albeit inferentially only, that concerns over matters affecting societal morality may have begun to come under sharper focus from 1937.

59 The Crime Reports, without more, do not point conclusively to male prostitution being the *sole* mischief which the introduction of s 377A was meant to address. I make this common observation in the course of examining various other additional materials and I shall return to touch on this point at subsequent junctures in this judgment.

British Experience (Manchester University Press, 1990) at p 67 citing at footnote 48 to Chapter 3 E.L. Gilbert (ed) '*O Beloved Kids': Rudyard Kipling's Letters to his Children* (London, 1983) p 127.

Version No 1: 27 Oct 2020 (22:41 hrs)

Accounts of the "Malayan Male Prostitute Sex Scandal" by Hyam and Purcell

60 Mr Choong relied on the books written by Hyam and Purcell as "historical sources" indicating that the only purpose of s 377A was to deal with male prostitution.[19] He pointed to the following extract from Hyam's book:[20]

> There was a major scandal in the 1930s when the diary of a professional 'Chinese catamite' fell into the hands of the police, resulting in an official inquiry and the disgrace of 'several prominent persons'. The press was forbidden to report the case. There were some speedy deportations, and the two men left behind both committed suicide. *Purcell heard about this*; he also knew of a civil servant who lived incestuously with his sister on a remote station, of a baronet who ditched his family in order to elope to Siam with a Chinese girl, and of certain Johore planters who indulged in wife swapping. He himself had a temporary mistress in Canton in the 1920s.
>
> [emphasis added]

61 As can be seen from the above extract, Hyam drew from Purcell's book as his primary source. At footnote 71 to Chapter 4 of Hyam's book, he expressly cites Purcell's memoirs. Purcell's memoirs are a selection of musings recounting his time spent in various postings in colonial Malaya. He wrote of the "social upheaval of the 'thirties when the diary of a professional Chinese catamite fell into the hands of the police, resulting in an official inquiry, the disgrace of several prominent persons, and the suicide of two of those who were implicated in the matter".[21]

62 It is evident that Hyam's account was largely a paraphrased version of Purcell's narrative, echoing what Purcell had "heard about" and written of in

---

19 CCH's Written Submissions at para 37

20 CCH's BOA Vol 5 at Tab 67 p 133

21 CCH's BOA Vol 5 at Tab 68 p 146

Version No 1: 27 Oct 2020 (22:41 hrs)

his memoirs. However, Purcell provides no more than an anecdotal account which itself appears to have been based on hearsay.

63 I find that both Hyam and Purcell's writings are of limited value as legitimate sources of historical information. Neither author provides any further details or other sources for their accounts. I accept that their narratives may help shed some light on the relevant social conditions in colonial Singapore or the Straits Settlements in the 1930s. However, they do not go so far as to provide support for the argument that combating "rampant male prostitution" was the *sole* purpose or object of introducing s 377A.

The Malayan Prosecutions Memo

64 Mr Choong argued that the Malayan Prosecutions Memo, which was declassified by the Government of the United Kingdom in 2016, is of "critical importance" in demonstrating that s 377A was introduced to address the rampant problem of male prostitution.[22] The primary reference is to an Addendum ("the Addendum") to the Malayan Prosecutions Memo. It is not clear who authored the Addendum.

65 Two specific cases of colonial officials who had "associated" with catamites (originally described vaguely as "bad characters" in the typed draft) are mentioned in the Addendum. The first named member was one Mr Reeves from the Malayan Civil Service, and the second was a Mr Rivaz, an officer in the Malayan Customs Service. The thrust of the Addendum was to set out the unsatisfactory state of affairs in relation to prosecution and/or dismissal or removal from the Service in disciplinary cases involving civil servants. Apart

---

22 CCH's Written Submissions at para 40

Version No 1: 27 Oct 2020 (22:41 hrs)

from the above two cases, another case involving one Mr Nisbet, an executive engineer in the Public Works Department, was also noted.

66 At the commencement of the Addendum, it was noted that at the beginning of 1938, reports were received from Malaya of "a number of cases of this nature" having come to light. A police report furnished by Sir Shenton Thomas (then Governor of the Straits Settlements) was said to show the "extent of the outbreak".[23]

67 Both Mr Reeves and Mr Rivaz faced charges under Colonial Regulation 68. They were brought separately before the Committee of the Executive Council ("the Committee") for disciplinary action. The Committee found that the charges against Mr Reeves were not proved even though they had a "strong suspicion" that he had been "associating" with catamites. Mr Rivaz was however dismissed from his post after the Committee found "a number of charges proved". The Addendum did not specify any details of what those charges related to.

68 Mr Rivaz's lawyers had made representations challenging his dismissal as being "contrary to all justice to brand a man as criminal by a secret tribunal". It was observed in the Addendum that "[t]here is some justification for this statement as the charges against Mr Rivaz have recently, by an amendment of the law, been made offences under the Penal Code." Mr Choong submitted that this observation in the Addendum would make it "crystal clear" that s 377A was

---

[23] CCH's BOA Vol 5 at Tab 77 p 392

Version No 1: 27 Oct 2020 (22:41 hrs)

introduced in 1938 "to address the "outbreak" of male prostitution and the problem of civil servants patronising catamites".[24]

69 Mr Choong went on to state that the Addendum "establishes that, like Mr Reeves, Mr Rivaz was brought before a disciplinary tribunal for the same conduct of patronising male prostitutes".[25] I shall assume for the moment that this statement is correct even though the Addendum made no specific mention that Mr Reeves and Mr Rivaz faced similar charges involving similar conduct, and did not elaborate on what exactly "associations" with catamites meant.

70 On this assumption, I agree that the "recent" amendment of the law mentioned in the Addendum which made the charges against Mr Rivaz offences under the Penal Code would logically be a reference to the introduction of s 377A. Section 377A would facilitate prosecution of grossly indecent conduct falling short of a s 377 offence, and address male homosexual activity in private without requiring proof of penetrative sex having taken place. I accept Mr Choong's submission that, taken together with AG Howell's explanation for the introduction of s 377A, the new provision would "enable easier detection and prosecution of "acts of the nature described".[26] It would suggest that s 377A was intended to help address the "outbreak" of male homosexual activity which had come to light at the beginning of 1938. Nevertheless, as I have observed above, this does not ineluctably mean that male prostitution was the *sole* mischief that s 377A was intended to address, or that the scope of s 377A was limited to commercial non-penetrative male homosexual activity.

---

24 CCH's Written Submissions at para 43

25 CCH's Written Submissions at para 46

26 CCH's Written Submissions at para 47

Version No 1: 27 Oct 2020 (22:41 hrs)

71 I should also point out that the Addendum makes further references to certain "principles" promulgated in 1938 to deal with "cases of this nature", and specifically outlines them for both "Officials" and "Unofficials". In the latter category, there were apparently cases involving two missionaries where Sir Shenton Thomas felt that prosecution may be undesirable and not in the public interest, as well as a case involving the son of a bishop where the Governor "would not like to subject this man's family to the publicity of criminal proceedings".[27] It was clear that the colonial Government was concerned not only with colonial officials' homosexual activities, but also with alarming revelations of a spike (or "outbreak") in male homosexual activity *generally*. Moreover there were no references whatsoever in the Addendum to the "commercial" nature of the "associations" with the "catamites". The "associations" might very well even have been non-commercial in nature, and it remains unclear whether all the "cases of this nature" that contributed to the "outbreak" involved male prostitutes.

72 Mr Choong has assumed that a "catamite" is synonymous with a male prostitute.[28] I find this to be without basis. The word "catamite" has its origins in ancient Greece. At least in the first half of the twentieth century, it was generally still in use and understood to refer to a pubescent or young boy who is kept or groomed for "unnatural" (homosexual) purposes.[29]

---

27 CCH's BOA Vol 5 at Tab 77 p 394

28 See *eg* CCH's Written Submissions at paras 42, 43 and 45, where the words "male prostitutes" are added to explain "catamites". See also Transcripts, 13 November 2019, at p 27 lines 15 – 16

29 "Catamite" was defined in the early twentieth century as "a boy kept for unnatural purposes" – Thomas Davidson (ed), *Chambers's English Dictionary* (London, W&R Chambers Ltd, 1901). A similar dictionary definition remained from the 1930s through to the 1960s: see *eg* William Little and John V Dodge, *The Shorter Oxford English Dictionary on Historical Principles* (London, 1st Ed, 1933); *The Shorter Oxford*

Version No 1: 27 Oct 2020 (22:41 hrs)

73 In contrast, a male prostitute may not necessarily be a young or pubescent boy. It may perhaps be surmised that most "catamites" in the 1930s were also male prostitutes. However, there is no evidence of this before me. It is not necessarily clear from the Addendum that a "catamite" *must* refer only to a male prostitute. There is no evidence before me that both descriptions were widely and incontrovertibly accepted to be synonymous in the 1930s. I would therefore not wish to speculate.

74 Further, if Mr Choong's argument at [68] above is fully pursued to its logical end, it can be argued that s 377A is primarily intended to address the embarrassing immediate problem of male colonial civil servants' "associations" with catamites (and/or male prostitutes).[30] If this was the intent of the legislature, a much more targeted approach ought to have been adopted to deal with "Officials" or civil servants only. There was no need to resort to introducing the equivalent of s 11 of the 1885 UK Act which was of wider general application. The fact that the legislature chose to introduce such a general provision goes against Mr Choong's arguments. I shall deal with this point more fully below.

The Moses Report

75 According to Mr Choong, the Moses Report was declassified by the Government of the United Kingdom in 2014. This is a report dated 24 March 1938 from the Governor and High Commissioner of the Straits Settlements (Sir Shenton Thomas) to the Secretary of State for the Colonies, documenting the

---

English Dictionary on Historical Principles Combined with Britannica World Language Dictionary (Encyclopaedia Britannica Ltd, London, 6th Ed, 1963)

30 CCH's Written Submissions at paras 47 and 49

Version No 1: 27 Oct 2020 (22:41 hrs)

circumstances under which one Mr H. Moses, "European Warder, Grade III, Straits Settlements Prisons" had resigned from the service.

76 The Moses Report records that Moses was arrested just after 4.40 am on 23 January 1938, before the enactment of s 377A on 8 July 1938. He was found in bed in a "Japanese hotel in Prinsep St" with two "known catamites", who were described as "boys" in the accompanying Statement ("Statement") of one Mr D.W. MacIntosh, Assistant Superintendent of Police ("ASP MacIntosh"), one of two arresting officers. According to ASP MacIntosh, Moses admitted that though the offence of sodomy had not happened, it would have happened but for the intervention of the police.

77 Moses was later charged with attempted sodomy under s 377 read with s 511 of the 1936 Penal Code. In lieu of standing trial, he was permitted to resign and be "given a passage" (*ie* allowed to leave Singapore, in this case, for Brisbane) at his request.

78 I agree broadly though not entirely with Mr Choong's submissions. Essentially, the Moses Report reflected the recognised problem of colonial civil servants engaging in homosexual activities with boys. An offence under s 377 in this case would not have been provable since the Statement of ASP MacIntosh suggested that penetrative sexual activity had not yet taken place. Specifically, even though all three male persons were found naked in bed, it was observed that Moses' penis was not erect.

79 Much of the same observations I have made above at [70] – [74] relating to the Malayan Prosecutions Memo would also apply generally here. First, notwithstanding that s 377A might have been meant to address the recognised problem of civil servants "associating" with catamites (and/or male prostitutes),

Version No 1: 27 Oct 2020 (22:41 hrs)

this did not necessarily limit its scope so precisely to only commercial and non-penetrative male homosexual activity. Second, even though Moses was caught *in flagrante delicto* in the course of a homosexual liaison with two boys who were described as "known catamites", the assumption Mr Choong has again made is that these "catamites" *were in fact* male prostitutes.[31] But the Statement of ASP MacIntosh provides no clarity as to whether these terms were indeed synonymous or interchangeable. Once again, there is no evidence before me that they *must* be read that way in the climate of the 1930s.

The McKnight Letter

80 Next, Mr Choong relied on the McKnight Letter dated 5 June 1938 to the editor of The Singapore Free Press and Mercantile Advertiser. McKnight had observed that "[r]ecently it has been found necessary to introduce legislation on the subject of male prostitution". He went on to label this an "absolute disgrace", noting that "[t]his disgusting crime always follows unrestricted prostitution" and is "never caused by a lack of female prostitutes".

81 Mr Choong argued that the McKnight Letter showed that members of the public understood s 377A to have been enacted for the purpose of dealing with male prostitution. In response, the defendant argued that no weight should be accorded to the McKnight Letter.

82 I note that the McKnight Letter did not state that legislation was introduced *solely* to deal with the "subject of male prostitution". It is apparent from a reading of the McKnight Letter in its entirety that the writer was lamenting the perceived problem of *both male and female prostitution* in

---

[31] CCH's Written Submissions at paras 51 and 52(a) and (b)

Version No 1: 27 Oct 2020 (22:41 hrs)

Singapore. He urged the authorities to introduce greater oversight over prostitution in general, and not solely over *male* prostitution. He was particularly concerned that the authorities seemed content to allow "prostitutes (both sorts) … to visit some cafes". He had earlier in his letter referred to the last (presumably 1937) Crime Report which suggested that the police did not take exception to prostitutes being found in "amusement parks, cafés and dancing places", as long as they were not found "in numbers, parading the streets".

83 Interesting as McKnight's wryly-crafted account may be, I am unable to see why any weight should be given to his letter for the purpose of this present endeavour to ascertain legislative intent. The McKnight letter reflects the subjective views of *one* writer of a letter to a local newspaper. I do not accept that it constitutes an accurate and reliable matter of historical record. It would be quite a stretch at any rate to contend that his view alone would reflect public opinion.[32]

The ECM Minutes

84 Mr Choong also referred to the ECM Minutes dated 18 May 1938 to support the argument that s 377A was intended to deal only with non-penetrative sexual activity (in private) as this had not been criminalised prior to 1938. The relevant extracts of the ECM Minutes are as follows:

> Council further agrees that in moving the second reading [of the Bill to amend the Penal Code] the Attorney-General should explain that the clause relating to such offences is designed to make penal certain practices which are already punishable in other countries (which he will name) but have not hitherto been made punishable in this country.

---

32 CCH's Written Submissions at para 54

Version No 1: 27 Oct 2020 (22:41 hrs)

> It is pointed out by the Attorney-General that the act of sodomy is already an offence under the Penal Code whereas the practices against which the new law is aimed are not, at present, offences against the law; and therefore that no person can be prosecuted for such practices until the amending Bill is passed unless, of course, the act constitutes an offence against public decency in which case prosecution can take place under the Minor Offences Ordinance.

85 As noted above, AG Howell subsequently delivered his speech on 13 June 1938 in the Legislative Council, in moving the 1938 Bill to its Third Reading. Mr Choong contended that the ECM Minutes fortified his argument that there should be "no overlap" between s 377A and s 377.

86 Mr Choong further submitted that, read together with the ECM Minutes, AG Howell's Speech should be construed to mean that the mischief which s 377A was intended to address was not penetrative sex between men *simpliciter*. Such conduct was already covered by s 377 and a much higher punishment was already prescribed for such an offence.

87 I find that the ECM Minutes are of no assistance in determining legislative intent as they add little to what was stated in AG Howell's Speech and the Objects and Reasons. I agree with the defendant's submissions on the various facets of the "no overlap" argument. I set out my analysis and reasons below at [119] – [135], as part of a holistic consideration of all the key arguments raised.

My decision on the issue of interpretation of s 377A

88 In attempting to glean a more accurate understanding of what the Legislative Council had in mind when introducing s 377A, a major challenge posed was to attempt to reconstruct the socio-political context of colonial Singapore more than 80 years after 1938. This is not a straightforward exercise.

Version No 1: 27 Oct 2020 (22:41 hrs)

There is a dearth of legislative material and reliable contemporaneous historical records. Our perception and understanding may well be coloured by contemporary lenses. Correspondingly, there is a danger of resorting too readily to inference to impute legislative intent.

89 In addition, I am somewhat chary of strict application of present-day principles of statutory construction to examine the intent of legislators in an era governed by very different social and political mores. There were comparatively far fewer reliable sources of extraneous material back in 1938. The fact that the subject-matter was considered taboo exacerbates the difficulties. In a present-day exercise where statutes are construed purposively, we have the benefit of Bills which are more fully explained and more extensive Parliamentary debates on matters pertaining to legislative object and purpose. A broader contextual appreciation can also be much more easily attained.

90 The exercise of statutory interpretation is not an exercise in intuition or impression. More importantly, it should not allow for a subjective and visceral interpretation which may be configured by one's personal views, beliefs and preconceptions. The purpose of laying down a framework in *Tan Cheng Bock* was to help ensure that judicial interpretation of statute law is an objective and disciplined exercise, to give proper effect to the purposive approach.

91 The parties were *ad idem* in the present case that the *Tan Cheng Bock* framework for statutory interpretation provides a helpful starting point.

The text and context of s 377A

92 The text of s 377A merely replicates the text of s 11 of the 1885 UK Act. Section 377A does not define "gross indecency" between males. It offers no illustrations of such conduct.

Version No 1: 27 Oct 2020 (22:41 hrs)

93 Turning to the first step of the *Tan Cheng Bock* framework, this requires that we ascertain the possible interpretations of s 377A, having regard not just to the text of the provision but also to the context of that provision within the written law as a whole. This would involve consideration of the context of s 377A within the Penal Code at the time of its enactment in 1938. I make no reference to extraneous material at this stage.

94 The ordinary meaning of "gross indecency with another male person" is expansive but not so vague or ambiguous that on any reasonable reading, it must give rise to various differing interpretations of the scope of s 377A. On its face, it is wide enough to cover both penetrative and non-penetrative sexual activity between male persons. The words do not connote any limitation to activities involving male prostitution or to non-penetrative sexual activity only.

95 Section 377A is located in the Penal Code Chapter on "Sexual Offences" which deals with a wide range of sexual offences. These include outrages on decency involving male persons and outrages of modesty involving females. A further point that merits consideration is that s 377A was paired with s 377, with both offences grouped under the descriptive heading of "Unnatural Offences". Section 377 imposes no requirement that the "unnatural offence" involving penetrative sexual activity between male persons must be limited to commercial male homosexual activity. In the application of s 377, as well as s 23 MOO, there has been no such known restriction. There is no reason why a special limitation should be introduced to s 377A.

96 The text and context of s 377A within the Penal Code then in force would indicate that it was intended to be of general application. It was aimed at male homosexual practices generally, to enforce a stricter standard of societal morality in 1938.

Version No 1: 27 Oct 2020 (22:41 hrs)

97 As noted earlier, s 377A is based on s 11 of the 1885 UK Act. However, there was no debate in the UK Parliament on s 11 before it was enacted, and thus the origins of s 11, as well as its purpose or object, remain fairly obscure and uncertain. As such, it would not be helpful to immediately assume that the purpose or object of s 377A was the same as that of the UK s 11 (see *Lim Meng Suang CA* at [118]). I should add however that we should not immediately reach the opposite conclusion, *ie* that the purpose or object of s 377A was not the same as that of the UK s 11.

98 In ascertaining the purpose or object of s 377A, the Court of Appeal in *Lim Meng Suang CA* undertook a comprehensive review and analysis of the background and historical developments leading to its enactment in 1938 (at [116] – [149]). The Court of Appeal ultimately held (at [133] – [134]):

> 133 Hence, s 377A, which would *also* cover "grossly indecent" acts between males in *private*, would apply to situations which were *outside the purview of s 23*. It is also important to note that s 377A would *simultaneously supplement s 377 inasmuch as s 377A would (like s 23) cover even "grossly indecent" acts which fell short of penetrative sex*. It should be pointed out, at this juncture, that it follows that s 377A would *necessarily cover acts of penetrative sex as well*. Any other interpretation would be illogical since it cannot be denied that acts of penetrative sex constitute *the most serious* instances of the possible acts of *"gross indecency"*.
>
> 134 As just mentioned, s 377A *broadened the scope* hitherto covered by s 377 to cover not only penetrative sex but also *other (less serious)* acts of "*gross indecency*" committed between *males.*
>
> [emphasis in original]

99 The Court of Appeal went on to conclude (at [143]):

> … [W]e are of the view that the available objective evidence demonstrates that s 377A was intended to be of *general* application, and was not intended to be merely confined only (or even mainly) to the specific problem of male prostitution (notwithstanding the fact that this would be covered as well).

Version No 1: 27 Oct 2020 (22:41 hrs)

100 To the extent that additional new material was surfaced and/or additional legal submissions were made before me (as compared to in *Lim Meng Suang CA*), it is necessary for me to address two main planks in the plaintiffs' arguments more fully, namely, the "male prostitution" argument and the "no overlap" argument.

Legislative purpose or object of s 377A (I) – the "male prostitution" argument

101 At the second and third steps of the *Tan Cheng Bock* framework, we must attempt to ascertain the legislative purpose or object of the statute; and compare the possible interpretations of the text against the purposes or objects of the statute. With respect to these possible interpretations, the Court of Appeal considered the text and context of s 377A, while making further reference at the same time to extraneous material to ascertain the purpose or object of s 377A. It did not approach that task in the structured manner laid down in *Tan Cheng Bock* (which was decided after the decision in *Lim Meng Suang CA*), but as the defendant noted, that may have accounted at least partly for why its task was made more challenging.

102 I begin by addressing why I do not accept the "male prostitution" argument. This refers to the submission that s 377A was intended to address the precise mischief of "rampant male prostitution" and would cover only grossly indecent activities involving male prostitutes. This is not a novel submission; the Court of Appeal had been addressed on the "male prostitution" argument in *Lim Meng Suang CA* and had rejected it (at [147] – [149]). The plaintiffs (in particular Mr Choong) nevertheless sought to persuade me that there was additional new material which would fundamentally change the parameters of the discussion.

Version No 1: 27 Oct 2020 (22:41 hrs)

103 It is common ground between the parties that s 377 covered offences involving penetrative sexual activity between males (*ie* both oral sex (fellatio) and anal sex (sodomy or buggery), whether committed in public or in private, or consensual or non-consensual. As for s 23 MOO, this covered indecent behaviour or persistent solicitation for immoral purposes, provided these took place in public. The "indecent behaviour" limb of s 23 MOO would effectively be the wider offence encompassing any act of "gross indecency", as long as it took place in public.

104 It is also not in dispute that s 377A was introduced due to the difficulty in detecting and proving offences of gross indecency between male persons and the perceived inadequacy of punishment under s 23 MOO. This can be seen from AG Howell's Speech, as stated earlier. In addition, the stated object of s 377A, as spelt out in the Objects and Reasons, was to deal with acts "not amounting to an unnatural offence within the meaning of 377".

105 Hence, with the introduction of s 377A, it would not be necessary to prove that sexual penetration had taken place in the course of "unnatural" grossly indecent acts involving male persons. This helped to address the main impediments for a successful s 377 prosecution involving acts in private – the difficulty of proving such acts on account of lack of witnesses who would offer direct evidence, or lack of cooperation and confessions to make out an offence.

106 Section 377A could also aid detection and investigation and enable stronger enforcement and prosecution since it would foreseeably make it easier to secure confessions for a s 377A offence, which involves a far lower punishment than that under s 377. A higher likelihood of cooperation with investigations might then result.

Version No 1: 27 Oct 2020 (22:41 hrs)

107 Looking at the relevant existing legislation prior to the introduction of s 377A, s 23 MOO, being of a wider ambit, already covered all forms of indecent behaviour, including penetrative sex and non-penetrative sex, involving male persons provided only that the acts must be done in public but not in private. Section 377 already covered all penetrative sexual activity involving male persons whether in public or in private but excluded non-penetrative sexual activity. Consent was irrelevant to both these offences, as was whether the offences took place in a commercial or non-commercial setting.

108 Hence the gap in the existing criminal legislation in 1938 was that some unnatural offences fell outside the scope of both s 23 MOO and s 377. This necessitated the introduction of s 377A to cover non-penetrative sexual activity in private involving male persons. Consent was again irrelevant. But this does not inexorably lead to the conclusion that s 377A was intended *only* to deal with the mischief of male prostitution, or that s 377A was intended to cover only non-penetrative sexual activity.

109 From my review of all the legislative materials, the evident intent of s 377A was to criminalise acts of gross indecency between males *beyond* what was already covered by both s 377 *and* s 23 MOO. As such, s 377A would minimally have to extend to *all forms of non-penetrative sexual activity regardless of whether they involve male prostitutes or whether the acts were done in public or in private*. This is consistent with the ordinary meaning of gross indecency in s 377A which I have outlined above (at [94] – [96]).

110 Importantly, in both the Objects and Reasons as well as AG Howell's Speech, nothing was said about any specific exclusionary intent, or about targeting male prostitution as the sole mischief. Nothing was said either about any intent to ensure that there was no overlap with s 377 or s 23 MOO. This

Version No 1: 27 Oct 2020 (22:41 hrs)

buttresses the ordinary meaning of the provision. *Prima facie*, there is no reason why a strained interpretation to narrow the scope of s 377A should be adopted. In this regard, I agree with Belinda Ang J's concerns, as expressed in *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [43], in relation to "the propriety of reconstructing legislative intent on the basis of a concern … that Parliament did not articulate".

111 As noted earlier, even assuming that the scourge of "rampant male prostitution" was a prime reason for the introduction of s 377A in 1938, it cannot be definitively said that this was the *only* mischief or the *sole* reason why it was felt necessary to "strengthen the law and bring it into line with English Criminal Law". It would be contradictory and confounding that in seeking to "strengthen the law", the colonial Government was not prepared to apply it in the same way that the English had done over the past 53 years in using s 11 of the 1885 UK Act.

112 I have no doubt that the problem of male prostitution was the cause of much consternation among the British colonial administration. Yet there is absolutely no mention of male prostitution in the text of the provision, or the legislative material comprising AG Howell's Speech and the Objects and Reasons. I find it untenable that s 377A was enacted simply as a knee-jerk response, when it would not conceivably have required much effort to craft a more precise legislative solution to tackle what the plaintiffs contend was a singularly precise problem *ie* male prostitution.

113 I have set out my analysis above of the additional materials which were tendered by the plaintiffs. These materials do not speak with one voice or point unequivocally in one singular direction. Pertinently, the Crime Reports of 1938 in fact expressly record that there were "other forms of beastliness" (*ie* male

Version No 1: 27 Oct 2020 (22:41 hrs)

homosexual activity) which were "stamped out" resolutely, *together with* male prostitution. There were known problems of civil servants associating with catamites, *and* also problems with male prostitution. All these strongly indicate that the purpose or object of s 377A was *not* targeted solely at the mischief of male prostitution.

114 Moreover, the Malayan Prosecutions Memo is titled "Sexual Perversion Cases". This is a far more general description than "male prostitution". The title could have categorically stated that these were "Male Prostitution Cases" if this was precisely all there was to it. After all, the editors of the Crime Reports of 1937 were evidently not squeamish about making explicit reference to the "widespread existence" of male prostitution.

115 Further, and as explained above, the Malayan Prosecutions Memo does not detail specific activities of civil servants patronising male prostitutes. It speaks more generally of civil servants and their undesirably licentious and sexually perverse "associations" with "catamites", before discussing the distinct approaches in dealing with cases that involved either "Officials" or "Unofficials", including specific mention of missionaries and the son of a bishop. The overall substance of the Malayan Prosecutions Memo would in fact suggest that there were far wider concerns over the degenerating state of public morality, given the "outbreak" of "sexual perversions" (or homosexual activity) noted in the Addendum. The concerns were not confined narrowly to male prostitution alone.

116 Similar observations can be made in relation to the Moses Report. The two boys Moses was caught in bed with were purportedly "known catamites". As stated earlier, I am unable to assume in the absence of clear evidence that *all* "catamites" must invariably also have been male prostitutes.

Version No 1: 27 Oct 2020 (22:41 hrs)

117 Finally, I reiterate that the accounts of the "Malayan Male Prostitute Sex Scandal" by Purcell and Hyam are of scant assistance. These accounts make for amusing reading, but cannot serve as legitimate reference material for the court. They are anecdotes based on nothing more than hearsay, with no known or verifiable sources. As for the McKnight Letter, it merely reflects the writer's subjective and possibly idiosyncratic views on the problem of prostitution generally and his perceptions of inadequate enforcement action on the part of the authorities. I do not accept it to be an accurate and reliable matter of historical record.

118 In any case, in *Lim Meng Suang CA*, the Court of Appeal addressed the "male prostitution" argument squarely. It will serve no purpose for me to revisit each and every facet of the reasoning and determination of the Court of Appeal; I find that the Court of Appeal's conclusions on this argument are binding on me and I would respectfully adopt them in totality. In any case, as I have explained above, the additional new material before me does not displace or undermine the Court of Appeal's conclusions. The new material is neutral or indeterminate at best. The Malayan Prosecutions Memo may even be seen to provide further support for the Court of Appeal's conclusions.

Legislative purpose or object of s 377A (II) – the "no overlap" argument

119 The second key plank of the plaintiffs' submissions was the "no overlap" argument. Again, this argument is not novel. The Court of Appeal dealt with this in *Lim Meng Suang CA*. I shall explain my analysis of the argument below and why I conclude that I am not persuaded by the plaintiffs' contentions.

120 In this connection, there is a possible fallacy in Mr Choong's arguments on this point. He had assumed that s 11 of the 1885 UK Act was "used [only] to

Version No 1: 27 Oct 2020 (22:41 hrs)

prosecute male homosexual conduct short of sodomy".[33] It is a vital cornerstone of Mr Choong's submission that s 377A was not intended to extend beyond commercial non-penetrative sexual activity, since sodomy was already punishable under s 61 of the UK Offences Against the Person Act 1861 (c 100) ("OAPA 1861"), which is the equivalent of s 377. However, with respect, this premise is incorrect.

121 It cannot be gainsaid that there was an articulated legislative intent in AG Howell's Speech to "strengthen the law and bring it into line with English Criminal Law". Thus, the interpretation of s 377A must embrace both the spirit and the letter of the law, and it should not be conveniently detached from its practical application in England since 1885. The plain intent must have been that all acts of gross indecency that were covered by s 11 of the 1885 UK Act should be included, so that a consistent and harmonious set of laws would govern all such conduct in the UK and in Singapore.

122 In the *Wolfenden Report*, the Committee on Homosexual Offences and Prostitution had observed in 1957 that while "gross indecency" is not statutorily defined, it appears "to cover *any act involving sexual indecency between two male persons*".[34] Hyam similarly notes that s 11 of the 1885 UK Act "made illegal *all types of sexual activity between males* (not just sodomy, as hitherto), and irrespective of either age or consent" (emphasis added).[35]

---

33 CCH's Written Submissions at para 64(d)iv.

34 *The Wolfenden Report – Report of the Committee on Homosexual Offenses and Prostitution* (Stein and Day, New York, 1963) at p 67.

35 Ronald Hyam, *Empire and Sexuality: The British Experience* (Manchester University Press, 1990) at p 65. The same observation is made by Michael S Foldy, *The Trials of Oscar Wilde – Deviance, Morality and Late-Victorian Society* (Yale University Press,

Version No 1: 27 Oct 2020 (22:41 hrs)

123 The broad scope of s 11 of the 1885 UK Act is borne out by actual examples of the use of the provision to prosecute offences where sodomy was involved. Its use was not confined to cases involving non-penetrative sexual activity, or to commercial sexual activity involving male prostitutes.

124 One such case was *The King v Barron* [1914] 2 KB 570, which was cited by the defendant. The appellant had been indicted on a charge of gross indecency. He pleaded *autrefois acquit* on the basis that he had been previously indicted on the same facts on a charge of sodomy with the same boy. He was initially convicted on the sodomy charge, but that conviction was quashed on appeal as evidence had been wrongly admitted. He eventually pleaded guilty to the charge of gross indecency but repeated the plea of *autrefois acquit* on appeal.

125 In rejecting his plea, the Court of Criminal Appeal held that the question was "whether the acquittal on the charge of sodomy involves, according to the principles that we have stated, an acquittal on the charge of gross indecency" (see p 574). It stated at p 576:

> *The graver charge of sodomy involves gross indecency and something else*, and, as was decided in Reg. v. De Salvi (1), *an acquittal of the whole of an offence does not involve an acquittal of every part of it.* There has, therefore, been no verdict that the appellant was not guilty of gross indecency, and the appellant has never been in peril before of being convicted of gross indecency …
>
> *In this case penetration was an essential element of the charge of sodomy…neither the act of penetration nor the intention to penetrate is an essential element of the offence of "gross indecency"*, so that the offence to which the appellant eventually pleaded guilty at the second trial is not the same or substantially the same as that charged against him at the first trial.

1997) at p 31. Foldy describes s 11 of the 1885 UK Act as encompassing "all forms of sexual intimacy between men".

Version No 1: 27 Oct 2020 (22:41 hrs)

[emphasis added]

126 Section 11 of the 1885 UK Act was used to prosecute Oscar Wilde for 25 offences involving gross indecencies and conspiracy to commit gross indecencies, which included alleged acts of sodomy. Mr Choong conceded that Oscar Wilde's gross indecency charges did involve penetrative sex.[36]

127 There is mention of the charges Oscar Wilde was tried on at footnote 34 of a recently-published article by former Chief Justice Chan Sek Keong, "*Equal Justice Under the Constitution and Section 377A of the Penal Code – The Roads Not Taken*" (2019) 31 SAcLJ 773 (the "*Equal Justice*" article). In his article, Mr Chan appears to have adopted the premise that s 11 of the 1885 UK Act was used only to prosecute acts of gross indecency which did *not* involve sodomy. With respect, this premise is incorrect. My perusal of the available transcripts and other reference material relating to the Oscar Wilde trial confirms that s 11 of the 1885 UK Act was used for all the 25 counts in question.[37] The transcripts

---

[36] Transcripts, 20 November 2019, p 10 lines 31 – 32

[37] See footnote 34 of his article, where Mr Chan Sek Keong states that Oscar Wilde was *initially charged for sodomy and acts of gross indecency and was acquitted on the sodomy charge, but convicted under s 11 of the 1885 UK Act (c 69)*. This suggests that he understood Wilde to have actually faced *separate* charges for sodomy (*ie* s 61 OAPA 1861) and gross indecency (*ie* s 11 1885 UK Act). With respect, this understanding was erroneous. Oscar Wilde underwent two criminal trials. The indictment in the first trial involved 25 counts, *all* of which were for gross indecency under s 11 of the 1885 UK Act. It led to a hung jury and a retrial was ordered. In the retrial *ie* the second trial, the prosecution elected not to proceed with the evidence of certain witnesses. Oscar Wilde was ultimately convicted of seven charges under s 11 of the 1885 UK Act.

Mr Chan appears to have relied largely if not wholly on a secondary source, solely citing Marcus Field, "*Is Oscar Wilde's Reputation Due for Another Reassessment?*" (Independent (5 October 2014)), also accessible online at https://www.independent.co.uk/arts-entertainment/theatre-dance/features/is-oscar-wilde-facing-a-retrial-9773718.html# . However, that source itself indicates that Oscar Wilde faced two trials and *all* the charges in question involved gross indecency under s 11 of the 1885 UK Act, notwithstanding that there was evidence for the prosecution

Version No 1: 27 Oct 2020 (22:41 hrs)

show that although Oscar Wilde was not charged with the offence of sodomy, evidence was adduced of him having committed sodomy in relation to some counts of gross indecency.[38]

128 Additionally, Oscar Wilde was purportedly known to have groomed young men for sexual activities, and the transcript of his trial clearly shows that not all of the males who engaged in sexual activities with him could be properly characterised as male prostitutes.[39] As the Oscar Wilde case illustrates, prosecutions under s 11 of the 1885 UK Act did involve penetrative sexual acts and did not invariably involve male prostitutes.

129 In addition, I note that there are a number of local case precedents which show that s 377A had formerly, at least prior to 2007, been used to prosecute acts of fellatio.[40] This was done even though fellatio is a form of penetrative

---

showing that Oscar Wilde had committed sodomy in some instances. Marcus Field's article in The *Independent* was published in the wake of a 2014 production of a play (*The Trials of Oscar Wilde*) produced by Oscar Wilde's grandson (Merlin Holland) in collaboration in John O'Connor. The 2014 play was based on original transcripts of Oscar Wilde's initial (failed) libel lawsuit against Lord Douglas, the Marquess of Queensberry and also transcripts from the subsequent criminal trials resulting in Oscar Wilde's eventual conviction.

38 H. Montgomery Hyde (ed), *Famous Trials 7 – Oscar Wilde* (Penguin, 1962) at pp 12, 19, 171, 172 and 175; Tim Coates, *The Trials of Oscar Wilde 1895* (The Stationery Office, 2001) at pp 117, 120, 121 and 127 where the prosecution witness Charles Parker testified that Oscar Wilde "committed the act of sodomy" upon him on various occasions; see also Merlin Holland & John O'Connor, *The Trials of Oscar Wilde* (Samuel French, 2014) at p 53, which contains the script for the 2014 play mentioned above at footnote [37].

39 This point was also made in the Marcus Field article from The *Independent* mentioned at footnote [37] above. The Court of Appeal recognised this distinction at [148] of *Lim Meng Suang CA*.

40 *Practitioners' Library - Sentencing Practice in the Subordinate Courts, Vol 1* (Lexis Nexis, 3rd Ed, 2013) lists five such cases, comprising four appeals to the High Court and one case which originated in the High Court (at pp 600 – 602). These cases date from 1993 to 2003. There would in all likelihood have been more similar unreported

Version No 1: 27 Oct 2020 (22:41 hrs)

sexual activity within s 377, as recognised in *Public Prosecutor v Kwan Kwong Weng* [1997] 1 SLR(R) 316, following Indian authorities beginning with *Khanu v Emperor* AIR 1925 Sind 286.

130 Furthermore, the "no overlap" argument is hardly compelling when it is clear that throughout our penal legislation, and specifically the Penal Code itself, there are numerous examples of overlapping offences (*eg* ss 323 and 325; ss 354 and 354A; ss 379 and 379A: ss 406 and 408 of the Penal Code). This has not hitherto been found to be objectionable, and I see no reason why it should now be so for s 377 and s 377A specifically. Indeed, in the recent High Court decision of *Tan Liang Joo*, the court noted that it was common for offences to overlap and this drew no criticism from the court. It is also evident that all "wider" offences within the Penal Code carry lesser punishment than the "narrower" ones which target specific aggravated forms of the "wider" offence.

131 It was strenuously argued that s 377A was only intended for "unnatural" conduct not covered within s 377; *ie* acts which "do not amount to an unnatural offence within the meaning of s 377", drawing from a portion of the Objects and Reasons. I accept that a reading to the effect that s 377A should exclude penetrative sex can arguably be supported by reference to that portion of the Objects and Reasons, but that would only be so if we read that portion wholly in isolation, without taking into account other contemporaneous material. It is not the only reasonable understanding of the relevant phrase in the Objects and Reasons.

---

cases where the offenders did not file an appeal and no reasoned judgments were issued.

Version No 1: 27 Oct 2020 (22:41 hrs)

132 As noted by the Court of Appeal in *Lim Meng Suang CA* at [122], there were apparent differences in the references made to existing legislation at the time s 377A was being considered – AG Howell referred to the need to supplement s 23 MOO, but the Objects and Reasons mentioned instead the need to supplement s 377 of the Penal Code. It was emphasised by the Court of Appeal (at [123] – [127]) that it would also be necessary to consider the Colonial Office correspondence relating to the 1938 Penal Code Amendment Ordinance and the Crime Reports.

133 The Court of Appeal went on to examine the apparently discrepant references to a need to supplement s 23 MOO on one hand and s 377 on the other (at [129] – [136]). It eventually arrived at the conclusion (at [134]) that s 377A "broadened the scope hitherto covered by s 377 to cover not only penetrative sex but also other (less serious) acts of "gross indecency" committed between males". Section 377A would necessarily cover or overlap with penetrative sexual activity, since acts of penetrative sex must represent the "most serious instances of the possible acts of gross indecency" (at [133]). Section 377A was also "broader in scope than s 23 inasmuch as s 377A covered "grossly indecent" acts between males in private as well" (at [135]).

134 I am unable to see any basis to disagree with the Court of Appeal's analysis and conclusions which are in any case binding on me. I would only venture to add that the law as it stood in 1938 would be strengthened by the enactment of s 377A because it would facilitate more successful prosecution. Not only would proof of penetrative sexual activity be unnecessary, chances of cooperation and guilty pleas might conceivably be boosted by the prospect of a charge being preferred involving a "lesser" offence with a far lower maximum punishment than what s 377 provided for. This would also effectively bring the law "into line with English Criminal Law".

Version No 1: 27 Oct 2020 (22:41 hrs)

135 For completeness, I shall deal only very briefly with Mr Choong's "reverse discrimination" argument. I adopt the defendant's submission on this point. There is nothing in s 377A that prevents penetrative sexual activity between two men from being the subject of prosecution under s 377. Hence no issue of "reverse discrimination" arises.

Section 377A deals with offences against public morality

136 In the light of the foregoing analysis, s 377A should be seen as a general provision criminalising homosexual acts of gross indecency as offences against public morality, instead of a specific provision targeting commercial male prostitution when it was enacted in 1938.

137 If the Legislative Council had intended s 377A to specifically deal only with commercial homosexual activity between males and non-penetrative sex, it could have expressly provided for this in the statute itself or made this clear in the legislative material, but this was not done. *Lim Meng Suang CA* noted the same, observing that AG Howell's Speech did not elucidate any specific intent, but described the purpose of s 377A in "far more *general* terms" [emphasis in original] (at [149]).[41] There was really nothing to prevent the Legislative Council from tailoring bespoke legislation to target a much narrower mischief,

---

41 An alternative socio-political theory as to what led to the introduction of s 377A was advanced in a May 2018 article by J Y Chua, *The Strange Career of Gross Indecency: Race, Sex and Law in Colonial Singapore* (Law and History Review 2019) accessible at https://www.cambridge.org. The author suggests that the enactment of s 377A defies monocausal explanations. He posits three causes: the increasing visibility of male prostitution alongside intensified policing of female prostitution by the early 1930s, the emergence of homosexuality as a distinct conceptual category, and scandals about sexual liaisons between male European officials and Asian men which threatened British legitimacy. He argues that s 377A went further than legislating sexual morality; it protected the image, standing and authority of Singapore's colonial rulers.

Version No 1: 27 Oct 2020 (22:41 hrs)

if that had indeed been the precise intent. The fact that it did not do so is highly significant; this cannot be simply glossed over.

138 Even if the Legislative Council had intended to address male prostitution, it could have used other means instead of choosing to do so by adopting s 11 of the 1885 UK Act. This may have been intended to expediently deal with male prostitution, while at the same time facilitating prosecution of all acts of gross indecency, commercial or otherwise and in private or in public.

139 This general purpose of s 377A also coincided with the societal needs at that time. Victorian-era sensibilities remained and "unnatural" acts of "beastliness" were frowned upon. However, these were not always openly and directly discussed. For instance, in Lord Macaulay's *Introductory Report upon the Indian Penal Code* in *The Works of Lord Macaulay: Speeches – Poems & Miscellaneous* vol XI, pp 3–198 at p 144, reference was made to the relevant "unnatural offences" (covered by what would eventually be s 377 of the Indian Penal Code) as an "odious class of offences respecting which it is desirable that as little as possible should be said" (*Lim Meng Suang CA* at [138]). The Law Commissioners attempted to avoid generating further public discussion on "this revolting subject", being "decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision" (*Lim Meng Suang CA* at [138]).

140 The above remarks of Lord Macaulay, though made in 1838, reflect both the continuing concerns with societal morality as well as the reluctance to generate public discourse on these "odious" offences that remained extant in post-Victorian 1938 in colonial Singapore. The Crime Reports for 1937 and 1938 also referred to the need for the police to safeguard public morals in a

Version No 1: 27 Oct 2020 (22:41 hrs)

general sense, as opposed to only male prostitution specifically (*Lim Meng Suang CA* at [142]).

Concluding observations

141 On a plain reading of s 377A, I am of the view that it is not limited to commercial sex between males. It is unequivocally wide enough to cover all forms of male homosexual activity including penetrative and non-penetrative sex, whether in public or in private and with or without consent. Understood in the context of societal mores of the late 1930s, all these were among the varied forms of "sexual perversion" between males which were deemed grossly indecent by the British colonial administration. They encompassed male prostitution and the entire gamut of "other forms of beastliness", all of which were criminalised in the UK under s 11 of the 1885 UK Act.

142 Section 377A, a direct copy of s 11 of the 1885 UK Act, was thus enacted in Singapore to "strengthen the law and bring it into line with English Criminal Law". Even if the original purpose or object of s 11 may have been mysterious and arcane at the time of its enactment in 1885, the relevant authorities in the UK understood it as being meant for broad and general application. The Court of Appeal recognised this as well at [135] in *Lim Meng Suang CA*. It was used to supplement s 61 OAPA 1861 where appropriate, in the name of enforcing public morality. Those values and mores, shaped in Victorian times during the late nineteenth century, had not fundamentally shifted even after the effluxion of more than 50 years. This is the discernible common thread from all the extraneous material put forward.

143 I conclude that I remain bound by the Court of Appeal's holding in *Lim Meng Suang CA* in respect of the purpose or object of s 377A. Specific rulings

Version No 1: 27 Oct 2020 (22:41 hrs)

were made in respect of both key planks of the plaintiffs' present arguments viz. the "male prostitution" and "no overlap" arguments. I do not accept that I should depart from established principles of vertical *stare decisis*, and thus I am bound by those rulings (see [118] and [134] above).

144 Even if I am not so bound as a matter of *stare decisis*, I find no reason to differ from the Court of Appeal's reasoning and conclusions. This remains so even after I have taken into account the additional material canvassed by the plaintiffs (principally by Mr Choong). For the reasons I have alluded to above at various junctures, I do not agree that the new evidence significantly changes the parameters of the discussion or provides grounds to warrant a reinterpretation of the purpose or object of s 377A.

145 The additional material cannot be used to advance an interpretation not supported by the text of the provision: see *Tan Cheng Bock* at [50]. In the present case, the additional material does not contradict the plain meaning of s 377A, but may well serve to confirm it. With the benefit of having perused all the additional material and considered the arguments before me, I conclude that there is every justification to accept the Court of Appeal's determination in *Lim Meng Suang CA* on the issue of the purpose or object of s 377A.

146 I summarise my main conclusions relating to the proper interpretation of s 377A as follows:

(a) Section 377A is not limited to commercial sex between males. It is framed widely enough to cover all forms of male homosexual activity including penetrative and non-penetrative sex, whether in public or in private and with or without consent.

Version No 1: 27 Oct 2020 (22:41 hrs)

(b) Nothing is said in any official legislative or other additional background material about male prostitution being the sole mischief necessitating the introduction of s 377A, having regard to the contextual societal concerns in 1938.

(c) The scope of s 377A overlaps with both s 23 MOO and s 377. There was no exclusionary intent to avoid overlap with s 377 which is confined to penetrative sexual activity between male persons, whether in public or in private and with or without consent.

(d) The purpose or object of s 377A was to safeguard public morals generally, through enabling enforcement and prosecution of all forms of gross indecency between males, covering penetrative and non-penetrative homosexual activity whether in public or in private and with or without consent. It was not limited to commercial male homosexual activity or to non-penetrative sexual activity between males when it was enacted in 1938 (see Annex A which contains a comparative table setting out the relevant scope for the respective offence provisions examined).

147 I shall deal with the various constitutional challenges next. Once again, many of the submissions pertain to areas already examined and dealt with by the Court of Appeal in *Lim Meng Suang CA*.

Presumption of constitutionality

148 It is settled law that a presumption of constitutional validity generally applies in cases where legislation is being impugned as being unconstitutional (see *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 ("*Taw Cheng Kong CA*") at [39]). Mr Choong submitted that the presumption of

Version No 1: 27 Oct 2020 (22:41 hrs)

constitutionality would not apply to s 377A, given that it is colonial-era legislation "passed long before the promulgation of the Constitution".[42]

Operation of the presumption in relation to s 377A

149 This question was addressed by the Court of Appeal in *Lim Meng Suang CA*. The Court of Appeal stated that it was "difficult to regard pre-Independence laws as being somehow "inferior" to post-Independence laws inasmuch as the former were promulgated during colonial times" (at [106]). Specifically, Art 162 of the Constitution provided for the continuation of existing laws with "such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity" with the Constitution.

150 The Court of Appeal went on to opine, however, that the presumption of constitutionality for pre-Independence laws might not "operate as strongly as it would compared to post-Independence laws", as the latter would have been promulgated in the context of an elected legislature which would have fully considered all views before enacting the laws concerned (at [107]).

151 This serves as a useful starting point to evaluate how the presumption of constitutionality may operate in relation to s 377A which had already been in existence since 1938. Unfortunately, the Court of Appeal did not have the opportunity to elaborate on this particular issue.

152 I am of the view that the presumption of constitutionality applies with equal (if not greater) force to s 377A as it does to post-Independence laws. As noted by Quentin Loh J in the High Court decision in *Lim Meng Suang and*

---

42 CCH's 1st Affidavit at para 56(a)

Version No 1: 27 Oct 2020 (22:41 hrs)

another v Attorney-General [2013] 3 SLR 118 ("*Lim Meng Suang HC*") (at [74] – [85]), s 377A was extensively debated in Parliament in 2007 (see *Singapore Parliamentary Debates, Official Report* (22–23 October 2007) vol 83 ("*s 377A Hansard*")). For present purposes, it is not necessary to recite the detailed background and substance of the debates.

153 Section 377A is unlike many other pre-Constitution provisions that simply remained on the statute books without subsequent consideration and debate in Parliament. Views on s 377A were expressed by over a dozen Members of Parliament ("MPs"), with the Prime Minister stating that "the continued retention of section 377A would not be a contravention of the Constitution" (*s 377A Hansard* at col 2397). The vast majority of MPs supported the retention of s 377A. Mr Siew Kum Hong, a Nominated Member of Parliament ("NMP"), was the only member who wished for his dissent to be recorded in the Votes and Proceedings and the Official Report (*s 377A Hansard* at col 2444).

154 Although s 377A was considered as a part of a petition rather than a bill, it was extensively debated and comprehensively considered by Parliament. Parliament's decision was to retain it. Hence the presumption of constitutionality should operate and be given full weight.

Potential issues with the presumption of constitutionality

155 In the "*Equal Justice*" article, Mr Chan takes issue with the presumption of constitutionality more generally. He argues that "the presumption of constitutionality has no role in constitutional adjudication", and that laws which

Version No 1: 27 Oct 2020 (22:41 hrs)

are impugned for violation of Art 12(1) should not be presumed to be constitutional.[43]

156 Mr Chan points out that the question whether a written law or provision violates the Constitution "is within the exclusive purview of the courts to decide under the separation of powers".[44] If the presumption of constitutionality is treated as a substantive doctrine, it violates a fundamental rule of natural justice that requires an impartial tribunal to adjudicate any dispute before it. Under the presumption of constitutionality, the court is to presume the very outcome which is its duty to determine.

157 Although none of the plaintiffs expressly relied on this point, the defendant did address it in their submissions.[45]

158 With respect, the purpose of the presumption of constitutionality is to operate as a starting point for the court to consider a piece of legislation, and is intimately tied to the doctrine of separation of powers. As noted in *Lim Meng Suang HC*, where issues of social morality are concerned, the court will adopt a calibrated approach to judicial review in favour of persons who are elected and entrusted with the task of representing the people's interests and will (at [110]).

159 Thus, while the question of whether the Constitution is violated can no doubt be said to be "within the exclusive purview of the courts", it is not untoward for the court to recognise, as an underlying premise, that the Legislature is best placed to understand and represent the interests of Singapore

---

43 "*Equal Justice*" at para 109

44 "*Equal Justice*" at para 124

45 Defendant's Submissions at para 50

Version No 1: 27 Oct 2020 (22:41 hrs)

citizens. This presumption may be rebutted where the person challenging the law adduces "some material or factual evidence to show that it was enacted arbitrarily or had operated arbitrarily" (see *Taw Cheng Kong CA* at [80]).

160 Further, the presumption of constitutionality is not a uniquely Singapore creation. The Indian Supreme Court in *Nand Kishore v State of Punjab* (1995) 6 SCC 614 had stated, in no uncertain terms:

> Raising the constitutionality of a provision of law, as it appears to us, stands on a different footing than raising a matter on a bare question of law, or mixed question of law and fact, or on fact. *There is a presumption always in favour of constitutionality of the law …*
>
> [emphasis added]

161 The presumption of constitutionality was also affirmed by the Privy Council in *Arorangi Ltd and others v Minister of the Cook Islands National Superannuation Fund* [2017] 1 WLR 99 at [31]:

> The Board would accept that, save perhaps in extreme circumstances, *a statute should be presumed to be constitutional until it is shown to be otherwise*, that (in so far as it is helpful to speak of a burden in such circumstances) the burden is on the party alleging that a statute is unconstitutional, and that any court should be circumspect before deciding that a statute is unconstitutional.
>
> [emphasis added]

162 In the "*Equal Justice*" article, Mr Chan further suggests, with reference to *Ong Ah Chuan and another v Public Prosecutor* [1979–1980] SLR(R) 710 ("*Ong Ah Chuan*"), that the presumption of constitutionality conflicts with fundamental rules of natural justice (and hence is also in conflict with the presumption of innocence). Insofar as these presumptions appear to engage similar concepts, I agree with the defendant that these presumptions operate on different planes, at one level relating to the validity of a law, and the other

Version No 1: 27 Oct 2020 (22:41 hrs)

relating to proof of guilt. The conflict is more apparent than real. Moreover, as the defendant has rightly pointed out, the Privy Council in *Ong Ah Chuan* in fact upheld the validity of the provision in question, namely the presumption of possession for the purpose of trafficking found in the Misuse of Drugs Act 1973 (Act 5 of 1973). This presumption goes towards proof of the ingredients of the offence, and therefore lies on the same plane as the presumption of innocence. It would follow from the Privy Council's ruling that these two presumptions are not inconsistent or in conflict with one another.

163 I am therefore of the view that the presumption of constitutionality remains valid, and should continue to apply in constitutional adjudication.

Article 12 and equality before the law

164 The plaintiffs argued that s 377A was contrary to Art 12(1) of the Constitution. I note that the Court of Appeal had considered and rejected arguments arising from a similar challenge in *Lim Meng Suang CA*. I am bound by the Court of Appeal's ruling but I shall address the parties' submissions in any event.

165 For reference, Art 12(1) states:

> 12.–(1) All persons are equal before the law and entitled to the equal protection of the law.

166 The parties are in agreement that the reasonable classification test operates as a threshold test in determining whether a piece of legislation is consistent with Art 12(1). As noted in *Taw Cheng Kong CA* and affirmed in *Lim Meng Suang CA* at [58], this test consists of two parts:

> … Discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification, provided that

Version No 1: 27 Oct 2020 (22:41 hrs)

> (i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and
>
> (ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question."

167 The reasonable classification test therefore contemplates examining whether: (1) there is an intelligible differentia; and (2) the intelligible differentia has a rational relation to the object sought to be achieved by the legislation. The plaintiffs raised a number of arguments against both parts of the reasonable classification test to support their contention that s 377A violates Art 12(1). I shall address them in turn.

Whether there was no intelligible differentia

168 Mr Ong argued that "there is no intelligible differentia as the manifest purpose of Section 377A is to discriminate".[46] Mr Choong mounted a similar argument, relying on the case of *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 ("*Yong Vui Kong (caning)*") for the proposition that "a law which adopts a manifestly discriminatory object would not pass muster under the first limb of the test".[47]

169 The plaintiffs' argument essentially appears to be as follows:

---

46 OMJ's Written Submissions at para 109

47 CCH's Written Submissions at p 49

Version No 1: 27 Oct 2020 (22:41 hrs)

(a) The object of s 377A discriminates against men as it only criminalises male-male sexual conduct as opposed to male-female sexual conduct or female-female sexual conduct.

(b) Section 377A is thus manifestly discriminatory.

(c) As a result, the reasonable classification test is not satisfied.

170 The argument appears to engage both limbs of the reasonable classification test as the plaintiffs would need to show that the differentia is not intelligible and that the object of s 377A is improper. With respect to the first limb, the legal criterion centering on the need for an intelligible differentia involves a relatively low threshold. It only requires the differentia concerned to be intelligible (*ie* capable of being apprehended by the intellect or understanding); it need not be perfect (see *Lim Meng Suang CA* at [65] and [67]). The plaintiffs must show that the differentia is so unreasonable as to be illogical and/or incoherent. As the Court of Appeal put it, "the illogicality and/or incoherence of the differentia concerned must be such that there can be no reasonable dispute (let alone controversy) as to that fact from a moral, political and/or ethical point of view (or, for that matter, any other point of view)" (*Lim Meng Suang CA* at [67]).

171 Section 377A undoubtedly provides a clear differentia: it is targeted at homosexual acts between males, as opposed to sexual acts between females or between males and females. The key question is thus whether targeting of male-male sexual conduct as opposed to male-female sexual conduct or female-female sexual conduct is so unreasonable as to be illogical and/or incoherent. Put another way, the inquiry looks at whether there is no reasonable dispute as

Version No 1: 27 Oct 2020 (22:41 hrs)

to the unreasonableness of the differentia concerned from a moral, political and/or ethical point of view.

172 I find that the differentia is not so patently unreasonable. There are certain areas within Singapore law where distinctions are drawn between men and women. For example, women are excluded from caning under s 325(1)(*a*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"). This was challenged in *Yong Vui Kong (caning)*, where the Appellant argued that the punishment of caning violated Art 12(1) of the Constitution, and that there was no valid justification for the differential treatment of males and females with respect to caning. The Court of Appeal disagreed with his contention, stating that there were "obvious physiological differences between males and females which we think Parliament was legitimately entitled to have taken into account" (at [110]). The Court proceeded to elaborate upon its reasoning at [111]:

> And in so far as the exclusion of women was due to the moral sense that it is barbaric to inflict violence upon women or that their decency would be violated, we do not think that it is appropriate for us to pass judgment on the soundness or rationality of such gendered social attitudes … We further note that *s 325(1)(a) was re-enacted when the CPC was amended in 2010* (*vide* Act 15 of 2010), which suggests that our attitudes towards the relative acceptability of inflicting corporal punishment on men *vis-à-vis* women have yet to change. *It thus cannot be said that the exemption of women from caning is a colonial relic that no longer represents prevailing opinion.*
>
> [emphasis added]

173 Another example of gender-based differential treatment may be found in s 69 of the Women's Charter (Cap 353, 2009 Rev Ed) which deals with spousal maintenance. A court may, on the application of a wife, and on due proof that her husband has neglected or refused to provide reasonable maintenance for her, order the husband to pay a monthly allowance or a lump

Version No 1: 27 Oct 2020 (22:41 hrs)

sum for the maintenance of that wife. In contrast, an application for maintenance may only be made by an incapacitated husband under s 69(1A).

174 Given the above, s 377A, seen in the broader context of Singapore law, cannot be said to be an outlier in the way in which distinctions are drawn based on gender. Moreover, the issue of the intelligibility of the differentia in s 377A was specifically decided in *Lim Meng Suang CA* (at [110] – [111]), and the differentia was found to be sufficiently intelligible.

175 Additionally, as stated above at [154], the question whether s 377A should be repealed had been put to Parliament and extensively debated in 2007. Similar to how s 325(1)(*a*) of the CPC was re-enacted, Parliament had made a conscious decision to retain s 377A. This was the case even when two MPs, Mr Hri Kumar Nair and Mr Charles Chong had raised concerns over the exclusion of female homosexual conduct from s 377A (*s 377A Hansard*). Mr Hri Kumar Nair stated:

> In addition, the question arises also why section 377A does not deal with lesbianism. Over and above the legal basis for discriminating between men and women, where is the consistency?

176 Similarly, Mr Charles Chong raised his concerns:

> The section criminalises act [*sic*] of gross indecency in public and in private only if it is engaged between men. Surely, the Minister must acknowledge that women are as capable as men of committing such acts.

177 From Parliament's decision to retain s 377A in its present form, it would be fair to conclude that there was no significant change in the degree of societal disapproval towards male homosexual conduct, as opposed to female homosexual conduct, as well as the impact the former was understood to have on public morality.

Version No 1: 27 Oct 2020 (22:41 hrs)

178 I am thus of the view that the differentia in s 377A was not so unintelligible to the extent that there is no reasonable dispute as to its unreasonableness *ie* its illogicality and/or incoherence based on moral, political or ethical grounds. As the Court of Appeal found in *Lim Meng Suang CA*, the differentia in s 377A was logical and coherent. It therefore cannot be said that there was no intelligible differentia in s 377A.

Whether there was a rational relation between the intelligible differentia and the object sought to be achieved

179 The plaintiffs relied on several arguments, some of which were framed as alternatives:

(a) First, if the purpose of s 377A is to criminalise commercial sex between men, there would be no rational nexus between the legislative object (criminalising male prostitution) and the intelligible differentia (male-male sexual acts) due to s 377A's over-inclusiveness.

(b) Second, if the purpose of s 377A is found to be uncertain or obscure, there would not be a rational nexus between the legislative object and the intelligible differentia.

(c) Third, even if the purpose of s 377A was to reflect "societal abhorrence at homosexuality", it would be absurd and arbitrary to criminalise non-penetrative sexual acts under s 377A when penetrative homosexual acts under s 377 have since been decriminalised.

(d) Fourth, the differentia in s 377A is over-inclusive because it targets conduct in private which does not harm public morals, and/or under-inclusive because it excludes females who engage in same-sex sexual conduct.

Version No 1: 27 Oct 2020 (22:41 hrs)

(e) Fifth, a broader test based on proportionality ought to be adopted to review s 377A.

180 The first and third arguments above are non-starters given my finding that the legislative object of s 377A was not limited to the criminalisation of male prostitution or to non-penetrative sexual activity between male persons.

181 In relation to the second argument, although the text of s 377A is capable of an expansive reading, I am of the opinion that it is not ambiguous or obscure on its face. Upon considering the text and context of s 377A, as well as the relevant extraneous materials, I have found that the purpose of s 377A is to safeguard public morals generally (see above at [146(d)146(d)]). I thus dismiss the plaintiffs' second argument as well.

182 This leaves me to examine the fourth and fifth arguments enumerated above at [179].

Whether the differentia in s 377A is under-inclusive

183 The plaintiffs argued that s 377A is both under- and over- inclusive. First, s 377A is under-inclusive as it excludes female homosexual conduct and other conduct which harms public morals equally, such as adultery. Secondly, s 377A is over-inclusive as it targets conduct in private which does not harm public morals.

184 The question of inclusiveness often arises in the course of considering whether there was a rational relation between the object of the legislation and its differentia. This concept was explained by Loh J in *Lim Meng Suang HC* at [96]–[97]:

Version No 1: 27 Oct 2020 (22:41 hrs)

> 96 Another facet of the "rational relation" requirement is that the prescribed classification has to broadly *fit* the object of the law prescribing that classification in terms of the scope of its application. "Fit" is another way of capturing the concepts of under- and over-inclusiveness …
>
> 97 Where the differentia underlying the classification prescribed by a piece of legislation results in that ***classification applying either too broadly or too narrowly***, it should follow that the ***strength of the relation between the differentia and the objective of that legislation may not be sufficiently strong*** to justify making that classification. In other words, the "reasonableness of the classification is insufficient": see *Taw Cheng Kong (HC)* at [65].
>
> [emphasis in italics in original; emphasis added in bold]

185 It bears reiterating however that there is no need for a perfect coincidence between the differentia used and the object sought to be achieved (see *Yong Vui Kong (caning)* at [116]). It would be legislatively impractical to require the enactment of a provision to be seamless and perfect to cover every contingency (*Taw Cheng Kong CA* at [81]).

186 In deciding whether a statute is under- or over-inclusive, it is important to avoid tautological reasoning (see *Lim Meng Suang HC*, citing Professor Tan Yock Lin's article, "*Equal Protection, Extra-Territoriality and Self-Incrimination*" (1998) 19 Sing LR 10) In *Lim Meng Suang HC*, Loh J presented the following illustration at [60]:

> … Singapore citizens, Singapore permanent residents and foreigners living in Singapore can all perform corrupt acts which adversely affect the Singapore Civil Service and/or fiduciaries in Singapore. We can create one class with all three groups within it on the basis that their corrupt acts adversely affect the Singapore Civil Service and/or fiduciaries in Singapore. In such an event, we cannot discriminate within that one big class. But, we can also create two classes out of the three groups: one class that resides here, and another class that resides outside Singapore but performs corrupt acts which affect Singapore. *It would then be acceptable to discriminate against one class because such discrimination would be across classes, but we are, in effect, discriminating against some of*

Version No 1: 27 Oct 2020 (22:41 hrs)

> *these people but not others when they were previously grouped as one big class …*
>
> [emphasis added]

187 Loh J concluded that the courts should be less fixated with the idea of classes, and more focused on the fundamental rubric that "like should be treated alike" (at [61]). The key inquiry should relate to the purpose of the legislation in question and its connection to the differentia underlying the classification prescribed by the challenged legislation, rather than an exercise of demarcating various categories and classes.

188 The plaintiffs' argument on s 377A being under-inclusive is premised on the notion that s 377A concerns only male homosexual conduct while other purportedly immoral conduct such as female homosexual conduct or adultery is not criminalised. In this regard, the fundamental rubric of "like should be treated alike", which concerns how individuals in similar circumstances should be treated alike, would purportedly be breached due to the differing treatment of persons who engage in different types of immoral conduct.

189 However, as I have found above, the very purpose of s 377A is the criminalisation of male homosexual conduct to safeguard public morals generally and reflect societal morality. The differentia in s 377A serves to criminalise only acts of gross indecency between male persons. This was the same conclusion reached by the Court of Appeal in *Lim Meng Suang CA*. There would, as a result, be a complete coincidence in the differentia and object of the legislation.

190 Mr Choong further sought to rely on a point made by Mr Chan in the "*Equal Justice*" article. He argued that framing the purpose of s 377A as the criminalisation of male homosexual conduct renders the reasonable

Version No 1: 27 Oct 2020 (22:41 hrs)

classification test redundant. Mr Chan argued the following, at paragraph 76 of his article:

> If the purpose of the law is to create the differentia, then they will always coincide, and the reasonable classification test can never be unsatisfied. This argument may be illustrated by the following hypotheticals. Suppose the word "male" in section 377A is replaced with the word "female". The differentia and the purpose will coincide, but female homosexuals would be discriminated against. Similarly, suppose that the words "whoever", "a person" or "any person" in any of the offence-creating provisions of the Penal Code were replaced with the word "female". Coincidence will occur in every case, the reasonable classification test would also be satisfied, but half the population of Singapore would be discriminated against. Art 12(1) would not be violated because all persons in like situations, that is, within the classification, are treated alike. This formulation of the purpose of a discriminatory law will result in legal formalism trumping constitutional rights and protections.

191 While I acknowledge the force of Mr Chan's argument, it is inapplicable to s 377A. This is because the purpose of s 377A is not to discriminate against male homosexual conduct. Rather, it is for the safeguarding of public morals through the criminalising of such conduct. In any case, even in a situation where the purpose and object of a piece of legislation is exactly the same as the differentia, the court would "come back full circle", so to speak, to the first limb of the reasonable classification test and ascertain whether the differentia is illogical and/or incoherent (see *Lim Meng Suang CA* at [114]); it is not the case that the reasonable classification test would automatically be fulfilled.

192 The courts should not bear ultimate responsibility for – and indeed, the courts should guard against – the determination of public morality. Implicit in the plaintiffs' argument is the idea that conduct such as adultery or female homosexual activity should be subject to the same degree of societal disapproval, just as male homosexual conduct has been disapproved of.

Version No 1: 27 Oct 2020 (22:41 hrs)

However much intuitive appeal one might be prepared to find in such an argument, it is for Parliament, not the courts, to make such a determination.

Whether the differentia in s 377A is over-inclusive

193 The plaintiffs also argued that s 377A is over-inclusive as it targets conduct in private which does not harm public morals. This argument presupposes that conduct in private can be divorced from precepts of public morality. This cannot be so. As the defendant rightly argued, there are various instances under Singapore law where private acts are criminalised due to concerns over the degeneration of public morality. The act of incest, for instance, is criminalised under s 376G of the Penal Code, making it an offence for any man or woman above 16 years' old to have sexual relations with a relative, regardless of whether it was committed in private with consent. Similarly, the act of sexually penetrating an animal is also criminalised under s 377B of the Penal Code, regardless of whether the act takes place in public or private.

194 Seen in this light, it cannot be maintained that s 377A is over-inclusive. As s 377A cannot be said to be under- or over-inclusive, I find that there is indeed a rational relation between its object and its differentia.

Whether a test of proportionality should be adopted

195 The plaintiffs took the position that a broader test of proportionality between the legislative object of the statute and the effect of the statute should be adopted, as: (1) Art 12(1) is not merely declaratory or aspirational, and its substantive protection is not limited by the scope of Art 12(2); (2) the reasonable classification test is flawed; and (3) reference ought to be made to foreign jurisdictions which have adopted a broader test. It was contended that s 377A

Version No 1: 27 Oct 2020 (22:41 hrs)

would not pass such a test of proportionality. I will address the points in turn but given the overlap between the second and third points, I will address them together.

(1) The nature of Art 12(1)

196 In *Lim Meng Suang CA*, the Court of Appeal pointed out that Art 12(1) "appears to be more of a declaratory (as well as aspirational) statement of principles" (at [90]). In doing so, the court remarked that Art 12(1) was framed "at a very general level".

197 The plaintiffs argued that the Court of Appeal in *Lim Meng Suang CA* adopted an overly restrictive approach in relation to Art 12(1). Specifically, it was incorrect for the court to rely only on Art 12(2) to provide substantive protection against discrimination.

(A) ARTICLE 12(1) - A DECLARATORY AND ASPIRATIONAL STATEMENT

198 First, the plaintiffs argued that a generous interpretation ought to be given to the constitutional rights of individuals in order to avoid the austerity of tabulated legalism (*Ong Ah Chuan* at [23]).

199 I have little doubt that the broad guidance provided by the Privy Council in *Ong Ah Chuan* remains relevant today, as it has been continually cited and endorsed. However, any argument as to the extent of fundamental liberties that ought to be allowed has to be grounded in the context of Singapore law specifically. In order to address the plaintiffs' concerns, it is crucial to understand the Court of Appeal's statements in *Lim Meng Suang CA* in their proper context.

Version No 1: 27 Oct 2020 (22:41 hrs)

200 The Court of Appeal's comments on the nature of Art 12(1) as a declaratory and aspirational statement of principles stemmed from its analysis of the reasonable classification test in relation to the concept of equality in Art 12(1). Article 12(1) provides that all persons are "equal before the law". The wording of "the law" could not possibly refer to the impugned statute in question (s 377A in that case), as s 377A would apply equally to those who fall within its scope, and that argument would not have assisted the appellants in that case. Further, the appellants were not seeking equal protection under s 377A but rather, protection from prosecution under s 377A.

201 The reference to "the law" must thus be seen as a reference to the law in general. It was in this context that the Court of Appeal noted that Art 12(1) was declaratory and aspirational. This did not mean that Art 12(1) is a toothless provision. Rather, the court simply meant to affirm that the wording of Art 12(1) did not provide any specific legal criteria to assist the court in ascertaining whether a particular statute was in violation of Art 12(2) itself. Hence, the reasonable classification test would operate to address any contentions that a statute purportedly violated Art 12(1).

(B) THE EXECUTIVE AND LEGISLATURE'S COMMENTS

202 Second, the plaintiffs argued that Art 12(1) must protect gender equality, even though Art 12(2) does not expressly prevent discrimination based on gender or sex. The plaintiffs submitted that the Executive and Legislature have acknowledged that Art 12(1) is not merely aspirational or declaratory. They referred to instances where the Government and Parliament had affirmed that concepts such as gender equality and cultural rights were enshrined in the Singapore Constitution. Specifically, the plaintiffs cited a publication by the Ministry of Community Development, Youth and Sports, Republic of

Version No 1: 27 Oct 2020 (22:41 hrs)

Singapore, *Singapore's Fourth Periodic Report to the UN Committee for the Convention on the Elimination of all forms of Discrimination Against Women*, UN Committee on the Elimination of Discrimination against Women, UN Doc CEDAW/C/SGP/4 (2009). The report stated, at paragraph 2.4, that:

> Although there is no specific gender equality and anti-gender discrimination legislation in Singapore, the principle of equality of all persons before the law is enshrined in the Singapore Constitution. This provision encompasses the non-discrimination of women.

203 The plaintiffs also cited the views of then Prime Minister Lee Kuan Yew on the importance of creating a situation where "the minority either in ethnic linguistic or religious terms" would share "equal rights with the dominant ethnic groups who accept its equality as a matter of fact" (see *Singapore Parliamentary Debates*, *Official Report* (15 March 1967) vol 25, col 1284).

204 I accept the plaintiff's arguments that gender equality and the protection of linguistic minorities must stem from Art 12(1) rather than Art 12(2). This is because Art 12(2) provides for an enumerated list of grounds (religion, race, descent or place of birth, etc) that does not encompass gender equality or linguistic minorities.

205 However, Art 12(1) does not preclude all differentiation based on gender, but only prohibits differentiation which fails the reasonable classification test. It does not accord free-standing substantive rights. For example, the illustration adopted in *Lim Meng Suang CA* of a law banning all women from driving on the roads would clearly violate the values of gender equality under Art 12(1). Such a law would contravene the first limb of the reasonable classification test, on the basis that the purported differentia (gender) is illogical and/or coherent.

Version No 1: 27 Oct 2020 (22:41 hrs)

(C) PREVENTING MAJORITY OPPRESSION

206 Third, the Plaintiffs argued that substantive protection ought to be offered by Art 12(1) given the importance of preventing majority oppression.

207 While the protection of the minority from the potential oppression of the majority is undoubtedly important, the clear wording of constitutional provisions cannot be disregarded. The wording of Art 12(1) does not lend itself to the creation of categories for substantive protection independent of Art 12(2). Indeed, it would not be open to the court to devise such categories, without taking upon itself the risk of becoming a "mini-legislature".

208 It should also be emphasised that Art 12(1) should be interpreted in a manner that would ensure that Art 12(2) is not rendered otiose. An overly expansive reading of Art 12(1) to provide for additional categories deserving of substantive protection would detract from the significance of Art 12(2)'s focus on the specific enumerated categories of religion, race, descent or place of birth.

(2) Potential limitations of the reasonable classification test

209 I turn to address the plaintiffs' criticisms of the reasonable classification test, and their reliance on foreign case law to aid in interpretation of the Singapore Constitution. While the plaintiffs acknowledged that the Singapore Constitution is primarily to be interpreted within its own four walls (see *Chan Hiang Leng Colin and others v Public Prosecutor* [1994] 3 SLR(R) 209 at [51]), they argued that these foreign decisions can be instructive as they emanate from jurisdictions with similar societies, histories, or legal systems and heritage to Singapore.

210 There are undoubtedly limitations to the reasonable classification test

Version No 1: 27 Oct 2020 (22:41 hrs)

insofar as it operates solely as a threshold inquiry. As the Court of Appeal in *Lim Meng Suang CA* noted, it "does not really aid the court in ascertaining whether or not the concept of equality under Art 12(1) has been violated" (at [71]).

211 However, these limitations do not necessarily justify the addition of a proportionality limb to the reasonable classification test. As much reliance was placed by the plaintiffs on decisions from Malaysia, India, the US and Hong Kong, I will examine each jurisdiction in turn.

(A) MALAYSIA

212 Article 8(1) of the Malaysian Federal Constitution (2010 Reprint) provides that "[A]ll persons are equal before the law and entitled to the equal protection of the law".

213 The plaintiffs argued that the Malaysian Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 ("*Sivarasa*") accepted that Art 8(1) of the Malaysian Federal Constitution incorporates the doctrine of proportionality. The Court in *Sivarasa* stated (at [30] – [31]):

> [30] It will be seen from a reading of the speech of Lord Steyn in *Daly* that the threefold test is applicable not only to test the validity of legislation but also executive and administrative acts of the state. In other words, all forms of state action … that infringe a fundamental right must (a) have an objective that is sufficiently important to justify limiting the right in question; (b) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and (c) *the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve.*
>
> [31] It is clear from the foregoing discussion that *the equal protection clause houses within it the doctrine of proportionality* …

Version No 1: 27 Oct 2020 (22:41 hrs)

[emphasis added]

214 *Sivarasa* relied on the case of *Regina (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 ("*Daly*"), which concerned the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950), ETS No 5 ("the ECHR"). To be more specific, *Daly* was setting out the applicable test to determine whether a limitation was "arbitrary or excessive" under the approach of proportionality (see *Daly* at [27]). The words "arbitrary or excessive" are absent from Art 12(1).

215 In addition, in *Daly*, Lord Steyn had acknowledged the "material difference" between the traditional grounds of judicial review, and the approach of proportionality applicable in respect of review where rights under the ECHR were at stake. Lord Steyn listed three non-exhaustive differences (at [27]):

> (a) First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions.
>
> (b) Second, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.
>
> (c) Third, even the heightened scrutiny test developed in *Regina v Ministry of Defence, Ex parte Smith* [1996] QB 517 is not necessarily appropriate to the protection of human rights.

216 This, in my view, suggests that a proportionality approach ought not to be taken in relation to equal protection clauses as it would necessarily involve a review of the legitimacy of the object of a statute. Doing so would again entail the risk of the courts usurping the legislative function in the course of becoming

Version No 1: 27 Oct 2020 (22:41 hrs)

or acting like a "mini-legislature", which the Court of Appeal cautioned against in *Lim Meng Suang CA* (at [82]).

217 This appears to be a sentiment shared by the Malaysian courts. In *Public Prosecutor v Yuneswaran a/l Ramaraj* [2015] 6 MLJ 47 at [63], the Malaysian Court of Appeal considered and affirmed the proposition that "the courts in this country do not comment on the quality of a law, that is to say, the courts do not consider it any part of its judicial function to paint any law as 'reasonable' or 'unreasonable' or 'harsh' or 'unjust'". The Malaysian Court of Appeal also noted the earlier decision of the Federal Court in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 at p 188E, where the Federal Court affirmed the following observations of Lord Macnaghten in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107, at 118:

> Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.

(B) INDIA

218 Article 14(1) of the Constitution of India (1950) ("Indian Constitution") provides that "[T]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". Article 12 of the Singapore Constitution was "obviously based" on Art 14 of the Indian Constitution (see *Lim Meng Suang HC* at [34]).

219 The plaintiffs relied on *Om Kumar v Union of India* AIR 2000 SC 3689

Version No 1: 27 Oct 2020 (22:41 hrs)

("*Om Kumar*"), where the Indian Supreme Court held that the reasonable classification test encompasses the doctrine of proportionality (at [32]):

> So far as Article 14 is concerned, the courts in India examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. Obviously, when the court considered the question whether the classification was based on intelligible differentia, the courts were examining the validity of the differences and the adequacy of the differences. *This is again nothing but the principle of proportionality.*
>
> [emphasis added]

220 The doctrine of proportionality contemplated in *Om Kumar*, however, is the same one used by the European Court of Justice and the European Court of Human Rights. As the Indian Supreme Court observed at [27]–[28]:

> 27. The principle originated in Prussia in the nineteenth century and has since been adopted in Germany, France and other European countries. The European Court of Justice at Luxembourg and the European Court of Human Rights at Strasbourg have applied the principle while judging the validity of administrative action. But even long before that, the Indian Supreme Court has applied the principle of 'proportionality' to legislative action since 1950, as stated in detail below.
>
> 28. By 'proportionality', we mean *the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature* or the administrator *so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be.* Under the principle, *the Court will see that the legislature and the administrative authority 'maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve' …*
>
> [emphasis added]

221 As I have suggested earlier, this conception of proportionality should be viewed as distinct from traditional principles of judicial review. While the Indian courts may have adopted such an approach, the Singapore courts have

Version No 1: 27 Oct 2020 (22:41 hrs)

made clear that we continue to subscribe to the traditional principles of judicial review.

222 The willingness of the Indian judiciary to readily intervene in reviewing the object of any given legislation may be seen in *Anuj Garg and others v Hotel Association of India and others* (2008) 3 SCC 1, where the court opined at [46] that "[l]egislation should not be only assessed on its proposed aims but rather on the implications and the effects". This decision was noted and affirmed in the subsequent Indian Supreme Court decision of *Navtej*.

223 This approach is however at odds with the Court of Appeal's guidance in *Lim Meng Suang CA*, articulating in no uncertain terms that the Singapore courts ought not take into consideration extra-legal arguments, regardless of how valid or plausible they may seem to be (see *Lim Meng Suang CA* at [156]).

(C) UNITED STATES

224 The Fourteenth Amendment of the United States Constitution provides that:

> … No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

225 The plaintiffs sought to liken the reasonable classification test to the rational basis standard of review in the US. This standard of review was explained by the US Supreme Court in *Romer v Evans*, 517 U.S. 620 (1996) ("*Romer*") at 631:

> The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one

Version No 1: 27 Oct 2020 (22:41 hrs)

> purpose or another, with resulting disadvantage to various groups or persons … We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, *we will uphold the legislative classification so long as it bears a rational relation to some legitimate end* …
>
> [emphasis added]

226 At first glance, this does appear to comport with the reasonable classification test as adopted in Singapore. However, the US courts directly engage in the determination of whether there are "legitimate state interests" (*Romer* at 632). Thus, in *Romer*, the US Supreme Court rejected a proposed amendment by the State of Colorado that would preclude all Legislative, Executive or Judicial action at any level of state or local government designed to protect persons based on their homosexual, lesbian or bisexual orientation. The US Supreme Court found that the amendment bore no rational relation to any proper legislative end, and stated at 635 that:

> We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate estate interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.

227 The US Supreme Court proceeded to note also that class legislation was "obnoxious" to the prohibitions of the Fourteenth Amendment (at 635).

228 The willingness of the US courts to review the legitimacy of a statute, as well as its implications, would again be at odds with the reluctance of the Singapore judiciary to address extra-legal arguments.

(D) HONG KONG

229 Article 25 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (1990) states that "All Hong Kong

Version No 1: 27 Oct 2020 (22:41 hrs)

residents shall be equal before the law". Similarly, Art 22 of the Hong Kong Bill of Rights Ordinance (Cap 383, Rev Ed 2017) ("HK Bill of Rights") provides that "All persons are equal before the law and are entitled without any distinction to the equal protection of the law".

230 The plaintiffs relied on the Hong Kong Court of Final Appeal's decision in *Secretary for Justice v Yau Yuk Lung Zigo* (2007) 10 HKCFAR 335 ("*Yau Yuk Lung*") to argue that a proportionality-based approach ought to be developed. The Hong Kong Court of Final Appeal noted at [20] that in order for differential treatment to be justified, the state had to show that: (1) the difference in treatment must pursue a legitimate aim. For any aim to be legitimate, a genuine need for such difference must be established; (2) the difference in treatment must be rationally connected to the legitimate aim; and (3) the difference in treatment must be no more than is necessary to accomplish the legitimate aim.

231 This test, dubbed the "justification test" by the Hong Kong Court of Final Appeal in *Yau Yuk Lung* (at [20]), is essentially the same as the "threefold test" of proportionality as adopted in *Sivarasa*. Given that the HK Bill of Rights implements the provisions of the International Covenant on Civil and Political Rights (19 December 1966), 999 UNTS 171 ("ICCPR") as applied to Hong Kong (see *Yau Yuk Lung* at [10]), the application of the "justification test" is not unexpected.

232 The principle of proportionality is applicable to the ICCPR, and an example of this can be seen in how Art 19(3) of the ICCPR permits restrictions on the right to freedom of expression only where "provided by law and are necessary", to ensure legitimate public purposes. The concept of proportionality that applies to the ICCPR is similar to that of the ECHR (Yutaka Arai-

Version No 1: 27 Oct 2020 (22:41 hrs)

Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002) at p 186). This is perhaps unsurprising given that all parties to the ECHR are also parties to the ICCPR (see *Moohan and another v Lord Advocate (Advocate General for Scotland intervening)* [2014] UKSC 67 at [78]).

233 Singapore, however, has not adopted the ICCPR. As such, the decision in *Yau Yuk Lung* is less relevant to our context. The plaintiffs argued that Hong Kong decisions remain relevant notwithstanding this difference. They pointed out that the Singapore Court of Appeal in *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 ("*Tan Eng Hong CA*") had chosen to follow the Hong Kong case of *Leung T C William Roy v Secretary for Justice* [2006] 4 HKLRD 211 ("*Leung*"), reversing the High Court's decision in *Tan Eng Hong v Attorney-General* [2011] 3 SLR 320 ("*Tan Eng Hong 2011*").

234 I am not persuaded by this contention. In *Tan Eng Hong 2011*, Lai Siu Chiu J declined to follow the decision in *Leung* for a number of reasons, including the fact that *Leung* was based on the ICCPR, which has no force of law in Singapore (at [26]). While the Court of Appeal in *Tan Eng Hong CA* did follow *Leung*, it held at [137] that the absence of a real controversy does not invariably deprive the court of its jurisdiction, and the court may exercise its discretion to hear hypothetical issues in appropriate cases, but made no reference to the fact that *Leung* was based on the ICCPR.

235 In contrast, the proportionality-based approach propounded in *Yau Yuk Lung* appears to be heavily influenced by the ICCPR, as well as the approach in the ECHR. It would be inappropriate to import such a test into Singapore law.

236 I note also that V K Rajah J (as he then was) in *Chee Siok Chin and*

Version No 1: 27 Oct 2020 (22:41 hrs)

others v Minister for Home Affairs and another [2006] 1 SLR(R) 582 ("*Chee Siok Chin*") had, in the context of administrative law, rejected the doctrine of proportionality, observing that (at [87]):

> … the notion of proportionality has never been part of the common law in relation to the judicial review of the exercise of a legislative and/or an administrative power or discretion. Nor has it ever been part of Singapore law.

237 I therefore find that the foreign jurisprudence adduced is of limited assistance in establishing the applicability of a proportionality-based approach in Singapore law. Accordingly, I decline to endorse such an approach.

Article 14 and freedom of expression

238 Article 14 of the Singapore Constitution provides for a number of enumerated rights, including the right to freedom of speech and expression. It states:

> 14.–(1) Subject to clauses (2) and (3) –
>
> (*a*) every citizen of Singapore has the right to freedom of speech and expression;
>
> (*b*) all citizens of Singapore have the right to assemble peaceably and without arms; and
>
> (*c*) all citizens of Singapore have the right to form associations.
>
> (2) Parliament may by law impose –
>
> (*a*) on the rights conferred by clause (1)(*a*), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence;
>
> (*b*) on the right conferred by clause (1)(*b*), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof or public order; and

Version No 1: 27 Oct 2020 (22:41 hrs)

> (*c*) on the right conferred by clause (1)(*c*), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, public order or morality …

239 It is common ground between the parties that the Court of Appeal's observations in *Tan Eng Hong CA* as to whether s 377A breaches Art 14 are merely *obiter*. The defendant submitted that nonetheless these views ought to be given considerable weight. It is clear from the text of Art 14 that the rights enumerated, including the right to freedom of speech and expression, are not unqualified but may be subject to restrictions that are lawfully imposed by Parliament.

240 The plaintiffs argued that the right to expression under Art 14(1)(*a*) encompasses and guarantees, *inter alia*, the right of all adult Singaporeans to engage in private, consensual acts of sexual intimacy with whomsoever they desire. As a result, s 377A is incompatible with Art 14. Section 377A also cannot be considered to be a restriction validly imposed by Parliament under Art 14(2).

241 In assessing the validity of this claim, the meaning and scope of the term "freedom of expression" would be of primary importance. To this end, the *Tan Cheng Bock* framework would again be applicable even in situations concerning constitutional interpretation (see *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223). In applying this framework, the court will seek to interpret the provision in a way that gives effect to the intent and will of Parliament (see *Tan Cheng Bock* at [54]). I have set out the three-step framework at [32] above and I do not propose to repeat it here.

Version No 1: 27 Oct 2020 (22:41 hrs)

Text and context of Art 14(1)(a)

242 In determining the possible interpretations of "freedom of expression", I begin by ascertaining the plain and ordinary meaning of the term "expression", which may provide an indication of the object and purpose of Art 14(1)(*a*).

243 The plaintiffs relied on the *Oxford English Dictionary* Vol V ("OED") for their preferred definition of the word "expression" as "[t]he action or process of manifesting (qualities or feelings) by action, appearance or other evidences or tokens".[48] The defendant however pointed out that this is merely one among various definitions of the word "expression" proffered by the OED, which can include:

(a) "The action of expressing or representing (a meaning, thought, state of things) in words or symbols; the utterance (of feelings, intentions, etc.)";

(b) "An utterance, declaration, representation";

(c) "Manner or means of representation in language; wording, diction, phraseology";

(d) "A word, phrase or form of speech".

244 The various definitions of "expression" enumerated above are not (and indeed should not be) identical as they depend on the intended usage of the word

---

48 CCH's Written Submissions at p 38, referring to J.A. Simpson and E.S.C. Weiner, *The Oxford English Dictionary* Vol V (Clarendon Press, Oxford, 2nd Ed, 1989): CCH's BOA Vol 5 Tab 79 at p 480

Version No 1: 27 Oct 2020 (22:41 hrs)

and its context.[49] At a broad level, one common meaning that may be discerned is that "expression" involves a form of communication that may or may not involve language. In that sense, the plain and ordinary meaning of the term itself does not rule out the possibility of sexual intercourse being a form of expression.

245 The court, however, should also have regard to the context of a term when interpreting it. This includes consideration of the marginal notes in a statutory provision. It is well-established that marginal notes can be used as an aid to statutory interpretation (*Tee Soon Kay v Attorney-General* [2007] 3 SLR(R) 133 ("*Tee Soon Kay*") at [41]). The court nevertheless should exercise caution in its use of marginal notes. Primacy ought to be given to the actual statutory language used and its context. As the Court of Appeal explained in *Tee Soon Kay* at [41]:

> While we note that it is now well established that marginal notes can be used as an aid to statutory interpretation, ultimately, the meaning to be given to any statutory provision must be gleaned from *the actual statutory language as well as the context*. For example, if despite the marginal note of s 8 itself which reads, "Pensions, etc., not of right", s 8(1) had gone on to state the direct opposite, for example, that an officer has a right to a pension, the courts would derive little or no help from the marginal note which states the direct opposite of what was said within the provision itself.
>
> [emphasis in original]

246 With this in mind, I turn to the marginal note to Art 14. The marginal note states "Freedom of speech, assembly and association", with no mention

---

[49] These definitions are consistent with earlier dictionary definitions – see *eg* William Little and John V Dodge, *The Shorter Oxford English Dictionary on Historical Principles* (London, 1st Ed, 1933); *The Shorter Oxford English Dictionary on Historical Principles Combined with Britannica World Language Dictionary* (Encyclopaedia Britannica Ltd, London, 6th Ed, 1963) which incorporates an updated version of the 3rd Edition of the *Shorter Oxford English Dictionary* published in 1944.

Version No 1: 27 Oct 2020 (22:41 hrs)

made of freedom of expression as a free-standing right. From the marginal note, at least, it appears that the right to freedom of expression was contemplated as something relating to or falling within the right to freedom of speech *ie* the verbal communication of an idea, opinion or belief.

247 *Ejusdem generis*, a canon of statutory interpretation, may also be applied to assist in interpreting Art 14(1)(*a*). As explained by the Court of Appeal in *Public Prosecutor v Lam Leng Hung and others* [2018] 1 SLR 659 ("*Lam Leng Hung*"), the principle of *ejusdem generis* is "a principle of statutory construction with distant and venerable origins" that may be used to resolve ambiguity or uncertainty (at [106]). In order to apply the principle, the court must identify the "genus" or the common thread that runs through all the items in the list that includes the disputed term. Other parts of the statutory context may assist in identifying the genus (see *Lam Leng Hung* at [114]–[116]).

248 Admittedly, Art 14(1)(*a*) is not an ideal provision to which the *ejusdem generis* principle may be applied since it lists only the right to freedom of speech and freedom of expression. However, it is not necessary for the provision in question to have a particular form or structure (*Lam Leng Hung* at [119]). The Court of Appeal had previously affirmed that the principle may apply to permit the inferred meaning of a disputed term even where the generic string consists only of a single other word or term (see *Lam Leng Hung* at [117] and [120]).

249 In line with what I have set out above, the ordinary meaning of the term "expression", when read together with the term "speech", must necessarily point towards some form of verbal communication. This interpretation of Art 14(1)(*a*) is fortified by its surrounding provisions. The right to assemble without arms, contained under Art 14(1)(*b*), is similarly not mentioned in the marginal note which only lists the right to freedom of assembly. It is unlikely that the right to

Version No 1: 27 Oct 2020 (22:41 hrs)

assemble without arms can be seen to be a right distinct from that of the right to assemble peaceably. Similarly, I do not think that the right to freedom of expression can be divorced from the right to freedom of speech.

250 I do not think that such a reading offends the caution sounded by the Court of Appeal in *Tee Soon Kay*, namely, that the marginal note ought not to be prioritised over the actual text of the provision. The marginal note to Art 14 does not contradict what is contained within Art 14(1)(*a*) but it merely provides guidance as to the scope of the right to freedom of expression.

251 The plaintiffs, however, contended that such a reading would render the term "expression" otiose, as it would mean the same thing as "speech". Emphasis was placed on the rule that Parliament shuns tautology and does not legislate in vain; the court should therefore endeavour to give significance to every word in an enactment (see *Tan Cheng Bock* at [38]).

252 I recognise the need to give due regard to the wording chosen by Parliament, but rules of interpretation cannot be blindly applied. They must be applied having due regard to the precise text that the court is faced with. In the case of constitutional interpretation, for instance, the court is often tasked with interpreting legislation that was put in place many years before. Diggory Bailey and Luke Norbury, *Bennion on Statutory Interpretation* (LexisNexis, 7th Ed, 2017) ("*Bennion*") explain thus at section 21.2:

> Sometimes, particularly where the wording of a provision derives from earlier legislation, redundant words may have been included …
>
> Sometimes terms of virtually identical meaning are used together, as in the Children Act 1989, s 22(3)(a). This imposes a duty to 'safeguard and protect' the welfare of a child. It is surplusage, since either term would have sufficed on its own.

Version No 1: 27 Oct 2020 (22:41 hrs)

253 *Bennion* also makes reference to the decision in *The Friends of Finsbury Park, R (on the application of) v Haringey London Borough Council & Ors* [2017] EWCA Civ 1831, where Hickinbottom LJ observed [at 43]:

> [Counsel] submitted that the tenet of construction that Parliament does not use otiose words – i.e. that Parliament intends that every word used in legislation has some purpose and meaning – is weak in circumstances where, as here, there is a long history and borrowed phraseology. That submission has considerable power.

254 As noted in *Chee Siok Chin* at [51], the genealogy of Art 14 can be traced back to G A Smith, *Report of the Federation of Malaya Constitutional Commission 1957* (1957) (at paragraph 162) where it was recommended "that freedom of speech and expression should be guaranteed to all citizens subject to restrictions in the interests of security, public order or morality or in relation to incitement, defamation or contempt of court". Subsequently, freedom of speech and expression became constitutional rights in Singapore on 16 September 1963 when Art 10(1)(*a*) of the Constitution of the Federation of Malaya (1962 Reprint) ("1963 Federal Constitution") was enacted into the Constitution of the State of Singapore (1963) as Art 14(1). As the Court of Appeal noted in *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 at [237], the two constitutional provisions are worded in substantially the same way. For reference, Art 10(1)(*a*) of the 1963 Federal Constitution states that "every citizen has the right to freedom of speech and expression".

255 Article 14(1)(*a*) would thus, at least when considered against the backdrop of the relatively short history of post-independence Singapore, be considered as having a fairly "long history and borrowed phraseology". Some allowance for surplusage or redundant words should hence be given. From the text and context of Art 14(1)(*a*) alone, the term "expression" must be understood

Version No 1: 27 Oct 2020 (22:41 hrs)

in its ordinary meaning to relate to freedom of speech encompassing matters of verbal communication of an idea, opinion or belief, and "expression" in the form of male homosexual acts would not qualify for protection under Art 14(1)(*a*).

Legislative purpose or object of Art 14(1)(a)

256 I shall next turn to consider the legislative purpose or object of Art 14(1)(*a*), but this is only for completeness, since the text and context are the first port of call in statutory interpretation. As I have explained above, the fundamental emphasis of Art 14(1)(*a*) is on the right to freedom of speech, rather than expression. This may be seen from the marginal note to Art 14 as well as the structure of Art 14(1)(*a*) and (*b*).

257 Where the ordinary meaning of the provision is clear, extraneous material can only be used to confirm the ordinary meaning but not to alter it. In determining the weight that ought to be placed on the extraneous material, the court must have regard to whether the material is clear and unequivocal, whether it discloses the mischief aimed at or the legislative intention underlying the statutory provision, and whether it is directed to the very point of statutory interpretation in dispute (see *Tan Cheng Bock* at [47] and [54]).

258 In the *Report of the Constitutional Commission 1966* (27 August 1966), the Constitutional Commission, which was headed by then Chief Justice Wee Chong Jin, stated at paragraph 37:

> We recommend the retention of Article 10 of the Constitution of Malaysia and that it should be written into the Constitution of Singapore. This Article gives every citizen the right to freedom of speech, assembly and association.

259 No mention was made of any independent free-standing right to freedom

Version No 1: 27 Oct 2020 (22:41 hrs)

of expression. This confirms the ordinary meaning of Art 14(1)(*a*) that I have set out at [255] above. The enactment of Art 14(1)(*a*) was aimed at the purpose of giving effect to the right to freedom of speech and expression as forms of verbal communication; and the right to freedom of expression is encompassed within the right to freedom of speech.

Additional material on the meaning of "freedom of expression"

260 The plaintiffs also referred to additional authorities in the form of foreign case law and the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity ("Yogyakarta Principles") to support their proposition that freedom of expression includes sexual expression. Particular reliance was placed by the plaintiffs on the decision of *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 S.C.R. 927 ("*Irwin*"). In *Irwin*, the Supreme Court of Canada made the following observations at [41]–[42]:

> 41 "Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content …
>
> We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. *Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee.* Of course, *while most human activity combines expressive and physical elements, some human activity is purely physical and does not convey or attempt to convey meaning.* It might be difficult to characterize certain day-to-day tasks, like parking a car, a having expressive content. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning. For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource. If that person could demonstrate that his activity did in fact have expressive content, he would,

Version No 1: 27 Oct 2020 (22:41 hrs)

> at this stage, be within the protected sphere and the s 2(*b*) challenge would proceed.
>
> 42 The content of expression can be conveyed through an *infinite variety of forms of expression: for example, the written or spoken word, the arts, and even physical gestures or acts*.
>
> [emphasis added]

261 I accept that acts of physical intimacy may, in certain circumstances, serve as means through which meaning is conveyed. However, I emphasise that the right to freedom of expression under Art 14(1) has to be understood in its proper context, as being encompassed within the right to freedom of speech. This does not appear to have been the situation before the Supreme Court of Canada in *Irwin*. I note also that none of the parties took the position that it was.

262 A similar point may be made in addressing *Navtej*, where the Supreme Court of India ruled that the criminalisation of male homosexual conduct violates, among other rights, the right to freedom of expression. I am unable to agree with the reasoning of the Indian Supreme Court given that the court appeared to have accepted a wider meaning of what constitutes "expression", extending beyond verbal communication of ideas, opinions or beliefs.

263 I should add that the other cases cited by the plaintiffs in support of their argument for an expansive reading of the right to freedom of expression appeared to consider the right to freedom of expression *simpliciter*, with no reference to freedom of speech. An expansive interpretation can potentially lead to absurd outcomes. As the defendant rightly noted, if such an interpretation is adopted, it would mean that virtually any act could be protected under Art 14(1)(*a*) and this could not have been intended by the constitutional draftsmen. More specifically, sexual offences such as incest, paedophilia, necrophilia, or bestiality can arguably be covered by the Art 14(1)(*a*) umbrella as protected forms of "sexual expression", on the premise that these acts can be characterised

Version No 1: 27 Oct 2020 (22:41 hrs)

as mere expressions of sexual preference according to the idiosyncrasies of the individual. This surely cannot be correct, at least not in the Singapore context where these acts remain criminalised.

264 Reference was also made by Dr Tan to the Yogyakarta Principles in arguing that the right to freedom of expression extends to one's expression of sexual identity. The Yogyakarta Principles are, however, of limited assistance or relevance in the present case. With only 29 signatories to date, less than one-sixth of the 193 current member states of the United Nations have subscribed to them. Singapore is not one of the 29 signatories. Insofar as the plaintiffs are attempting to establish a rule of customary international law that the right to freedom of expression necessarily encompasses one's expression of sexual identity, the requirement of widespread state practice is plainly not met. Such a rule must first be clearly and firmly established before its adoption by the courts (see *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103; *Yong Vui Kong (caning)* at [29]).

265 In view of my conclusion that Art 14(1) does not afford a constitutional right to engage in male homosexual acts as a form of "expression", it is unnecessary for me to further consider whether Art 14(2) expressly permits derogation.

Article 9(1) and scientific evidence on cause(s) of male homosexuality

266 A key plank of the plaintiffs' case (as argued by Mr Ong in particular) was the argument that there is now comprehensive scientific consensus that a person's sexual orientation is immutable as it is biologically determined. Mr Ong argued that although *Lim Meng Suang CA* as well *as Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 ("*Tan Eng Hong 2013*") had rejected this

Version No 1: 27 Oct 2020 (22:41 hrs)

argument, the respective courts did not have the benefit of expert evidence in reaching their decision.

267 Given the ostensible scientific consensus, Mr Ong argued that it was thus open to me to find that the restrictions and prohibitions resulting from s 377A are absurd and arbitrary and therefore in violation of Art 9(1) of the Constitution, which reads:

> 9.–(1) No person shall be deprived of his life or personal liberty save in accordance with law …

268 Mr Ong adduced a number of affidavits from his expert witnesses, focusing on current scientific opinion on the nature of sexual orientation, the efficacy of attempts to modify sexual orientation, and the effects of criminalisation of same-sex sexual conduct and societal disapproval on a homosexual's mental health.

269 In response, the defendant adduced several affidavits from their expert witnesses to show that the scientific evidence for how sexual orientation is attained and whether sexual orientation is immutable remains inconclusive.

270 Mr Ong relied mainly on the evidence of the following experts:

(a) Dr Jacob Rajesh ("Dr Rajesh"), a senior consultant psychiatrist and a Fellow of the Academy of Medical Sciences of Singapore.

(b) Professor Dinesh Bhugra, Professor Emeritus of Mental Health and Cultural Diversity at the Institute of Psychiatry, Psychology and Neurosciences, King's College London. He is also a Fellow at various colleges in the UK.

Version No 1: 27 Oct 2020 (22:41 hrs)

(c) Dr Cai Yiming ("Dr Cai"), an Emeritus Consultant in the Department of Developmental Psychiatry at the Institute of Mental Health.

(d) Dr Tay Sin Hock John, a retired geneticist and practising doctor.

271 Although no expert evidence was adduced in *Lim Meng Suang CA*, the Court of Appeal made clear that arguments based on scientific opinions on sexual orientation fall to be considered as extra-legal arguments that are not within the remit of the court (at [53]):

> … In so far as the supposed immutability of a person's sexual orientation is concerned, the conflicting scientific views on this issue suggest that there is, at present, no definitive conclusion, and it may therefore be premature to express any conclusive views on it. Indeed, this is precisely one of the *extra-legal* arguments that is *not* within the remit of this court …
>
> [emphasis in original in italics, emphasis added in underline]

272 This point was repeated at [176]: "the proposition that a person's sexual orientation was biologically determined … is primarily a *scientific and extra-legal argument*" that falls outside the purview of the court (emphasis in original). I respectfully adopt this view.

273 In any case, I find that the evidence adduced does not demonstrate any definitive conclusion on the immutability of one's sexual orientation. There has not been any groundbreaking new scientific discovery let alone any newly-forged medical consensus on this matter. I find myself in agreement with Loh J's statement in *Tan Eng Hong 2013*, that there is "an abundance of scientific literature both for and against the theory of homosexuality being immutable" (at [59]). This continues to hold true. The experts in the present case also appear to agree that it is possible for sexual orientation to change over time. For example,

Version No 1: 27 Oct 2020 (22:41 hrs)

Dr Rajesh (the plaintiffs' witness) clearly agrees with Dr Cai (the defendant's witness) that it is not that we will never see natural change, at least in some persons, over time.

274 Each expert relied on numerous scientific studies to further their position. Taking Mr Ong's case at its highest, the scientific studies only go so far as to establish that non-social causes of sexual orientation *may* play a larger role than social causes. For instance, Dr Rajesh relied on an article by J Michael Bailey *et al* titled "*Sexual Orientation, Controversy and Science*", published in *Psychological Science in the Public Interest* vol 17(2) (Association for Psychological Science, 2016) at pp 45 – 101 for the proposition that:

> … sexual behaviour and identity may be voluntarily constrained by an individual, so as to conceal homosexual attraction due to fear of condemnation from family, friends or society at large. However, while individuals may have a significant degree of control over their actions, they cannot choose their (involuntary) feelings and reactions.

275 I note however that the same article concludes (at p 46):

> *No causal theory of sexual orientation has yet gained widespread support.* The most scientifically plausible causal hypotheses are difficult to test. However, there is considerably more evidence supporting non-social causes of sexual orientation than social causes …
>
> [emphasis added]

276 This echoes the sentiments of the American Psychiatric Association ("APA") in its Position Statement on Issues Related to Homosexuality (2013). The APA explicitly acknowledged that "the causes of sexual orientation (whether homosexual or heterosexual) are not known at this time and likely are multifactorial including biological and behavioural roots which may vary between different individuals and may even vary over time". Similar observations have been made in the scientific articles cited by the experts for

Version No 1: 27 Oct 2020 (22:41 hrs)

both the plaintiffs and defendant.

277 What is indisputably clear from the expert evidence adduced is that the expert witnesses generally do agree that there is no single dominant factor or root cause of homosexuality. In addition, there is scientific consensus for the proposition that a person's sexual orientation is determined by *both* genetic and environmental factors. There remains much debate and contention over the degree of significance of genetics or non-social environmental factors (such as the concentration of sex hormones like testosterone in the intrauterine environment) in determining homosexuality.[50]

278 Mr Ong's expert witness, Dr Rajesh, acknowledged that there was "no singular theory of what causes certain men to be attracted to other men". He agreed with the defendant's expert witnesses that the causes of homosexuality are highly complex and multifactorial.[51] From this, the only reasonable conclusion is that there remains considerable uncertainty to this day as to whether a person's sexual orientation can be said to be immutable.

279 In the present case, it is evident that there is no definitive conclusion or consensus among the expert witnesses. I agree entirely with the defendant's argument that the court is not the appropriate forum to seek a resolution of a scientific issue that remains controversial. Any controversy is best addressed by the relevant scientific community itself. Ultimately the issue is an extra-legal one that does not come under the proper purview of the courts.

---

50 Dr Cai Yiming's 1st Affidavit dated 30 April 2019 at para 38; Dr Jacob Rajesh's 2nd Affidavit dated 2 August 2019 at para 6

51 Dr Jacob Rajesh's 2nd Affidavit dated 2 August 2019 at para 8

Version No 1: 27 Oct 2020 (22:41 hrs)

Article 9(1) and right to life and personal liberty

280 Mr Ong and Dr Tan further argued that s 377A violates Art 9(1) of the Constitution as it seeks to attach criminal liability to male homosexuals on account of their ingrained identity or sexual orientation. This flowed from the plaintiffs' arguments on the immutability of sexual orientation.

Whether s 377A criminalises persons for their identity

281 I have addressed the point that there is no conclusive scientific evidence at present to show that homosexuality is immutable and/or solely caused by biological factors. I note that s 377A is not predicated on a person's identity or status.

282 I accept the defendant's submission that s 377A does not make a male homosexual a potential offender purely on account of his homosexual orientation. His identity or status is not an element of the offence and does not trigger the *actus reus* of the offence. The *actus reus* consists of the performance of any homosexual act with another man. Hence sexual orientation *per se*, or whether the male person in question identifies himself as bisexual, heterosexual or homosexual, is completely irrelevant. It is not a defence to a s 377A prosecution to prove that one is not homosexual (even if that may possibly give rise to doubt on other grounds). A heterosexual male can equally be prosecuted under s 377A if he commits such an offence.

283 As the defendant rightly noted, Mr Ong was in effect asking the court to confer constitutional protection to homosexuals on the basis of their homosexual identity, and asking for an unqualified constitutional right to "personal liberty". I do not accept this as it is clear that many rights enshrined

Version No 1: 27 Oct 2020 (22:41 hrs)

in the Constitution are qualified and not absolute, and unenumerated rights are not capable of specific protection.

Non-enforcement of s 377A

284 Dr Tan argued that s 377A would not constitute "law" within the meaning of Art 9(1) as it was absurd and/or arbitrary. This absurdity and/or arbitrariness ostensibly arose due to s 377A being enforced in an arbitrary manner.

285 This argument takes reference from a press release by the Attorney-General, Mr Lucien Wong (Attorney-General's Chambers, "Government has not removed or restricted prosecutorial discretion for section 377. Public Prosecutor retains full prosecutorial discretion" (2 October 2018) ("2018 AGC Press Release"). The Attorney-General clarified that "where the conduct in question was between two consenting adults in a private place … absent other factors … prosecution would not be in the public interest". The 2018 AGC Press Release is consistent with the Singapore Government's espoused approach, namely that the police will not proactively conduct patrols or enforcement raids for offences under s 377A (see *s 377A Hansard* at col 2401).

286 According to Dr Tan, this stance towards enforcement would result in a number of problems. First, the circumstances in which sexual conduct between consenting men in private will be investigated and/or prosecuted are vague and unpredictable. Secondly, the stance of non-enforcement taken towards s 377A is incongruous with s 424 of the CPC.

287 As a starting point, it must be emphasised that Dr Tan was taking issue with the *enforcement* of s 377A, as opposed to the constitutionality of s 377A itself. These issues are separate and distinct. The manner in which a provision

Version No 1: 27 Oct 2020 (22:41 hrs)

is enforced, even if arbitrary, cannot, without more, result in the provision itself being rendered unconstitutional. The appropriate recourse in such a situation would be to seek administrative review, not constitutional review.

288 In any case, I note that the 2018 AGC Press Release had highlighted that the police would not conduct enforcement raids to enforce s 377A but would take steps to conduct investigations where there are reports lodged of minors being exploited and abused. While this is far from an exhaustive list of circumstances, it provides a degree of guidance and shows that investigations would likely be commenced if there was a concern involving instances of illegality in appropriate cases.

289 I turn to Dr Tan's second contention. Section 424 of the CPC places a duty on persons to give information relating to the commission or potential commission of arrestable offences. Section 424 reads:

> **424.** Every person aware of the commission of or the intention of any other person to commit any arrestable offence punishable under [s 377A] of the Penal Code … shall, in the absence of reasonable excuse, the burden of proving which shall lie upon the person so aware, immediately give information to the officer in charge of the nearest police station or to a police officer of the commission or the intention.

290 Dr Tan argued that s 424 imposes an obligation upon gay and bisexual men to report their intention to engage in homosexual activities to the police. It also imposes an obligation on their friends, relatives and neighbours to report the couple's intention to engage in homosexual activities. It was also suggested that the police are statutorily obliged to investigate all complaints received, having regard to ss 14 and 17 of the CPC which specify the duties of police officers upon receiving information about offences. Dr Tan argued that this is incongruous with the stance of non-proactive enforcement of s 377A, and such

Version No 1: 27 Oct 2020 (22:41 hrs)

a stance must be considered absurd, arbitrary, and a breach of Art 9(1) of the Constitution.

291 This argument is, again, premised on the policy of enforcement adopted in relation to s 424 of the CPC and s 377A of the Penal Code. This is a matter that ought not to be considered in an application for constitutional review. In any case, I accept the defendant's contention that, following the Attorney-General's position on s 377A, it would "naturally follow" that any prosecution under other provisions which would contradict the non-prosecution position for consenting male homosexual adults for their sexual acts in private would likewise not be in the public interest. Correspondingly, it would follow that there is no real risk of a person being prosecuted under s 424 for failing to report any actual or intended male homosexual activity in private between consenting adults.

292 As for the plaintiffs' arguments relating to the duty of a police officer to investigate offences as required by s 17(1) of the CPC, I accept the defendant's explanation that one cannot take s 17(1) to be absolute. Police enforcement policies can allow for the exercise of discretion, and s 17(2) would in any event afford the police the operational discretion not to investigate or to prosecute any particular case.

The potential redundancy of s 377A

293 The plaintiffs also pointed out s 377A has been rendered redundant given the Singapore Government's stance of non-enforcement in respect of consensual male homosexual activity in private. This was also a position taken by Mr Chan in the "*Equal Justice*" article at paragraph 50(*e*):

> Finally, it is arguable that the Government decision not to enforce s 377A with respect to consensual male penetrative sex

Version No 1: 27 Oct 2020 (22:41 hrs)

> in private is effectively a repudiation of the legitimacy of the same purpose attributed to s 377A in 1938, and implies that the Government recognises that no legitimate state interest would be served or advanced by criminalising or, alternatively, prosecuting such conduct. The 1938 purpose became invalid in the eyes of the Government in 2007.

294 Mr Chan's stated premise was that the purpose of s 377A was "to eliminate the mischief caused by male prostitution and its associated activities to law and order, public morality and wholesome government". I have explained why I did not accept this and how I have instead concluded, as the Court of Appeal did in *Lim Meng Suang CA*, that the purpose of s 377A was to safeguard public morality generally. Bearing this purpose in mind, the question to be addressed is whether non-enforcement results in the redundancy of s 377A.

295 I do not think that s 377A has been rendered irrelevant or redundant. I reiterate that the issue of the constitutionality of s 377A is separate and distinct from how it is enforced. At any rate, it is certainly not the case that s 377A has absolutely no practical utility or has fallen completely into disuse, given the Attorney-General's clarification in the 2018 AGC Press Release as noted at [285] above. As an example, instances of exploitation or abuse of minors could still be investigated and potentially result in prosecution under s 377A.

296 Singapore has long recognised the importance of statutory provisions in reflecting public sentiment and beliefs. In *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2010] 1 SLR 1129, the Court of Appeal relied on the fact that there was an "elaborate legal framework" provided under the Casino Control Act (Cap 33A, 2007 Rev Ed) to control and regulate casino gambling to ultimately find that gambling continued to be contrary to Singapore's public policy..

297 I note also that the Court of Appeal in its recent decision of *UKM v*

Version No 1: 27 Oct 2020 (22:41 hrs)

Attorney-General [2019] 3 SLR 874 has acknowledged the importance of legislative provisions in signalling public sentiment. The Court stated at [206]:

> … Although s 377A is not enforced, it has not been repealed. For the avoidance of doubt, we note that one or more fresh challenges against its constitutionality is or are pending before the courts and nothing which we say here bears on that. As things stand, the presence of s 377A on our statute books and the evident unwillingness of the Government to repeal it continues to signal public sentiment against sexual conduct between males, even in private. Section 12(1) of the Women's Charter also communicates that society does not accept same-sex family units. It follows *a fortiori* from the existence of such disapproval that the Government does observe a public policy against the formation of same-sex family units …

298 Hence, even assuming s 377A had fallen into disuse and notwithstanding non-enforcement of s 377A for consenting homosexual acts between male adults in private, the provision continues to serve its purpose of safeguarding public morality by showing societal moral disapproval of male homosexual acts. I am fortified in this conclusion by the views expressed by MPs in the s 377A Hansard. Mr Christopher De Souza, for instance, stated:

> The lack of enforcement is another argument put forward by those advocating a repeal. Whether section 377A is enforced or not is the decision of the Executive. In fact, the Ministry has just confirmed in the Second Reading of the Bill that it has been enforced in certain circumstances. By retaining section 377A, the consequences listed above can be prevented. In any event, enforcement cannot be construed as the sole litmus test for an effective law. The effectiveness of section 377A is seen in what it prevents beyond the act criminalised. For example, to attempt suicide is an offence in Singapore. Yet, how many are prosecuted for it? I dare say a negligible percentage of those who do attempt to commit suicide. Yet, the offence remains on the books even after this amendment because it conveys the message that we do not want people taking their own lives. Will that message become weaker if the offence is taken off the books? Of course, it will. That is why we cannot only be fixated with enforcement.

Version No 1: 27 Oct 2020 (22:41 hrs)

Stare decisis – additional observations

299 In dealing with the parties' submissions, I have stated my view that a considerable number of points had been addressed previously in *Lim Meng Suang CA*, and I am bound by the Court of Appeal's decisions insofar as those points are concerned. To the extent that new arguments have been put forth, I do not find them persuasive.

300 I shall deal finally with a few other specific considerations pertaining to *stare decisis* which arose from the parties' submissions. The parties disagreed, for instance, as to whether the statements in *Lim Meng Suang CA* as to the scope of s 377A were *ratio* or *dicta* and whether the Canadian Supreme Court's approach as to vertical *stare decisis* should be followed.

Whether the Court of Appeal's findings as to the scope of s 377A were obiter dicta

301 As stated above at [143143], I accept that I am bound by the Court of Appeal's decision as to the purpose or object of s 377A. However, the plaintiffs contended that the Court of Appeal's decision in *Lim Meng Suang CA* as to the purpose of s 377A (which constituted the *ratio decidendi*) has to be distinguished from its views on the scope of s 377A (which was *obiter dicta*). In contrast, the defendant submitted that the decision in *Lim Meng Suang CA* on the scope of s 377A was part of the *ratio decidendi* and therefore binding on me.

302 The Court of Appeal's main focus in *Lim Meng Suang CA* was on determining the object and purpose of s 377A. The central question that arises for present purposes is whether the Court of Appeal's finding on the scope of s 377A was necessary in order to make out its finding as to the purpose of s 377A.

Version No 1: 27 Oct 2020 (22:41 hrs)

303 I differ from the plaintiffs' view that the Court of Appeal's findings on the scope of s 377A were *obiter*, as I take the view that these findings were necessary in the light of the issues and submissions before the court. Further written submissions had been tendered on behalf of the appellants to the Court of Appeal by Ms Deborah Barker SC, with the leave of the court (see *Lim Meng Suang CA* at [144]). This was done after the oral hearing had concluded. These submissions addressed the scope of s 377A, namely whether it covered penetrative sex. Mr M Ravi had also tendered further submissions on his client's behalf, adopting Ms Barker's arguments.

304 The Court of Appeal hence had the benefit of receiving arguments in full and found that the purpose of s 377A was to supplement s 377 inasmuch as s 377A would cover a wider range of "grossly indecent" acts which fell short of penetrative sex. The court proceeded to state (at [133]):

> It should be pointed out, at this juncture, that it follows that s 377A would *necessarily cover acts of penetrative sex as well*. Any other interpretation would be illogical since it cannot be denied that acts of penetrative sex constitute *the most serious* instances of the possible acts of "*gross indecency*".
>
> [emphasis in original]

305 The Court of Appeal had to determine whether s 377A extended to penetrative sex given that it was considering arguments relating to whether s 377A targeted male prostitution and the purpose of s 377A in relation to s 23 MOO and s 377. The Court of Appeal's finding as to the scope of s 377A was tied to its finding as to the purpose of s 377A, and both findings were necessary to dispose of the case. The object and purpose of s 377A may have taken centre stage, but the findings as to its scope were necessarily intertwined.

306 Even assuming that a valid distinction may be made between the Court of Appeal's decision as to the purpose or object of s 377A and its scope, I would

Version No 1: 27 Oct 2020 (22:41 hrs)

have had to give due consideration to the Court of Appeal's *dicta*. As I have explained above (at [144]), even if I am not bound as a matter of *stare decisis*, I would have reached the same conclusions that the Court of Appeal arrived at, notwithstanding having taken into account the additional material put forth by the plaintiffs.

Vertical Stare Decisis

307 The applicability of vertical *stare decisis* is well-established under Singapore law. There is however a relative paucity of cases and material touching on the nuances of the doctrine in Singapore law. Concerns were raised by the plaintiffs as to how strictly it ought to apply, especially in the context of Art 12. I pause to add that the discussion in this section is *obiter*, given my conclusion that I would in any event have reached the same findings as the Court of Appeal in relation to the purpose or object of s 377A.

308 The defendant argued that there were no exceptions to the application of vertical *stare decisis*. This was the case even if a ruling was given *per incuriam* (see *Attorney-General v Au Wai Pang* [2015] 2 SLR 352 ("*Au Wai Pang*") at [18]). The defendant also relied on an article by former Attorney-General, Mr Walter Woon (see Walter Woon, *Precedents that bind – A Gordian Knot: Stare decisis in the Federal Court of Malaysia and the Court of Appeal, Singapore* (1982) 24 Mal.L.R. 1 at p 2).

309 In response, the plaintiffs referred me to the Supreme Court of Canada's decisions in *Canada (Attorney General) v Bedford* [2013] 3 S.C.R. 1101 ("*Bedford*") and *Carter v Canada (Attorney General)* [2015] 1 S.C.R. 331 ("*Carter*") to justify a lower court's departure from the binding decision of a higher court. According to the plaintiffs, the facts of these decisions are not

Version No 1: 27 Oct 2020 (22:41 hrs)

important but the guidance offered by the Canadian Supreme Court's approach is.

310 The Canadian Supreme Court in *Bedford* found that the common law principle of *stare decisis* is "subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional" (see *Bedford* at [43]). Where a "new legal issue is raised, or if there is a significant change in the circumstances or evidence", a lower court may be entitled to ignore binding precedent and revisit a matter that was already decided by a higher court. Examples of such situations include where a lower court is faced with fresh arguments that were not raised before the higher court, and significant developments in the law (see *Bedford* at [42]). The Canadian Supreme Court endorsed a similar approach in *Carter* (see *Carter* at [44]).

311 In *Bedford*, the Canadian Supreme Court called for the subordination of common law *stare decisis* principles to the Constitution but cited no authority for its approach. Perhaps it did not believe that it was constrained to have to cite authority. But the defendant justifiably reiterated the need for caution in adopting what it termed the Canadian Supreme Court's "invention", as it would have the potential to severely erode certainty in the law. It would not be possible to confine *Bedford*, once endorsed in principle, to only constitutional law and exclude its application to other areas *eg* commercial law. Moreover, it would also be capable of being extended to any decision made by any court or tribunal of first instance, to justify departure from any decision of a higher court where it forms the view that the circumstances warrant it.

312 The potential ramifications of adopting the approach in *Bedford* are wide-ranging and significant. This is all the more evident in the present case where the plaintiffs are at least tacitly advocating a clear endorsement of

Version No 1: 27 Oct 2020 (22:41 hrs)

activism and a readiness to depart from binding pronouncements of the Court of Appeal on issues pertaining to constitutional interpretation.

313 I would respectfully decline to take this step. Constitutional rights are of fundamental importance, and adoption of the approach in *Bedford* promotes uncertainty in relation to their scope. This would be eminently undesirable. The ordinary citizen will face difficulty arranging his or her affairs in both the private and public sphere, and it would engender even more uncertainty in the provision of legal advice.

314 I am unable to agree that there are cogent reasons for a Singapore court to be able to depart from binding decisions of the highest court in the land. The integrity of vertical *stare decisis* therefore ought to be preserved and maintained.

Conclusion

315 I conclude by conveying my thanks to counsel for their considerable assistance in putting forward thought-provoking and forceful submissions on a wide range of points. Having considered the various arguments by the parties, I am not persuaded that there is merit in the applications. Hence I dismiss all three applications. I shall hear the parties on their submissions (if any) as to costs.

See Kee Oon
Judge

Version No 1: 27 Oct 2020 (22:41 hrs)

Eugene Thuraisingam, Johannes Hadi and Suang Wijaya (Eugene Thuraisingam LLP) for the plaintiff in OS 1114/2018;
Harpreet Singh Nehal SC (Audent Chambers LLC), Jordan Tan (Cavenagh Law LLP) (instructed) with Choo Zheng Xi, Priscilla Chia Wen Qi and Wong Thai Yong (Peter Low & Choo LLC) for the plaintiff in OS 1436/2018;
Ravi s/o Madasamy (Carson Law Chambers) for the plaintiff in OS 1176/2019;
Hui Choon Kuen, Denise Wong, Jeremy Yeo and Jamie Pang (Attorney-General's Chambers) for the defendant.

Version No 1: 27 Oct 2020 (22:41 hrs)

ANNEX A

Comparative table: scope of relevant offences

	S 61 UK Offences Against the Person Act (1861)	**S 11 UK Criminal Law Amendment Act (1885)**	**S 23 Minor Offences Ordinance (1906)**	**S 377 Penal Code (1936)**	**S 377A Penal Code (1938)**
Relevant wording	Buggery	Any act of gross indecency	a. Indecent behaviour b. Persistently soliciting … for immoral purposes	Carnal intercourse against the order of nature	Any act of gross indecency
Public conduct	Yes	Yes	Yes	Yes	Yes
Private conduct	Yes	Yes	No	Yes	Yes
Anal sex	Yes	Yes	Yes	Yes	Yes
Oral sex	No	Yes	Yes	Yes	Yes
Non-penetrative sex acts	No	Yes	Yes	No	Yes
Limited to sex acts with prostitutes	No	No	No	No	No

Version No 1: 27 Oct 2020 (22:41 hrs)