Lim Meng Suang and another *v* Attorney-General and another appeal and another matter [2014] SGCA 53

Case Number	: Civil Appeals Nos 54 and 125 of 2013 and Summons No 3664 of 2013
Decision Date	: 28 October 2014
Tribunal/Court	: Court of Appeal
Coram	: Andrew Phang Boon Leong JA; Belinda Ang Saw Ean J; Woo Bih Li J
Counsel Name(s)	: Deborah Barker SC, Ushan Premaratne and Ng Junyi (KhattarWong LLP) for the appellants in Civil Appeal No 54 of 2013; M Ravi (L F Violet Netto) for the appellant in Civil Appeal No 125 of 2013; Aedit Abdullah SC, Seow Zhixiang, Neo Xiulin Sherlyn, Teo Siqi and Jurena Chan Pei Shan (Attorney-General's Chambers) for the respondent in Civil Appeals Nos 54 and 125 of 2013.
Parties	: Lim Meng Suang and another — Attorney-General

Constitutional Law – Equal protection of the law – Equality before the law

Constitutional Law – Fundamental liberties – Right to life and personal liberty

Constitutional Law – Constitution – Interpretation

28 October 2014 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

Overview

1 There are very few legal provisions in the Singapore legal landscape which, although simply stated (and intuitively attractive), are very difficult to apply in practice. Article 12 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Singapore Constitution") is one of these rare exceptions. In particular, Article 12(1) of the Singapore Constitution ("Art 12(1)"), which is one of the provisions in issue in the present appeals (*viz*, Civil Appeal No 54 of 2013 ("CA 54/2013") and Civil Appeal No 125 of 2013 ("CA 125/2013")), is deceptively simple in its economy of language:

> **Equal protection**
>
> **12.**—(1) All persons are equal before the law and entitled to the equal protection of the law.
>
> …

2 The issue before this court in the present appeals can be stated very simply: is s 377A of the Penal Code (Cap 224, 2008 Rev Ed) ("the current Penal Code") inconsistent with Art 9 and/or Art 12 of the Singapore Constitution (referred to hereafter as "Art 9" and "Art 12", respectively), and hence, unconstitutional to the extent of such inconsistency? In this regard, Art 9(1) of the Singapore Constitution ("Art 9(1)"), which is the specific provision in Art 9 that the appellants in CA 54/2013 and the appellant in CA 125/2013 (collectively, "the Appellants") are relying on, provides as follows:

Liberty of the person

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

…

Art 4 of the Singapore Constitution ("Art 4"), which is set out below, should also be noted:

Supremacy of Constitution

4. This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

3 Section 377A of the current Penal Code, the provision which is the subject of the Appellants' constitutional challenge, reads as follows:

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.

In this judgment, we shall be referring to s 377A of not only the current Penal Code, but also earlier editions of that statute. As there are no substantial differences between the various versions of s 377A, we shall use the generic term "s 377A" to denote the version of s 377A in force at the particular point in time being discussed.

4 We also note that there is a presumption of constitutionality inasmuch as a court will not lightly find a statute or any provision(s) thereof (referred to hereafter as a "statute" for short) unconstitutional (see, for example, the decision of this court in *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 ("*Taw Cheng Kong (CA)*") at [60]). This is only logical as well as commonsensical as our legislature is presumed not to enact legislation which is inconsistent with the Singapore Constitution. However, an issue arises in these appeals as to whether or not this presumption applies to *colonial* legislation as well, given that s 377A was first introduced into our Penal Code in 1938, when Singapore was still a British colony.

5 Whilst the central issue in the present appeals (as set out above at [2]) can be stated simply, it is intensely controversial, and has elicited diametrically opposed (as well as, on occasion at least, intense and even emotional) responses in the extra-legal sphere, especially where Art 12 is concerned. A great many arguments have been mounted by proponents on each side of the divide. It is no exaggeration to say that this court found itself in the midst of a cacophony of voices. Be that as it may, only one voice – and one voice alone – is relevant in so far as the present appeals are concerned: it is the voice of the law, which represents the voice of objectivity. All other voices are irrelevant; indeed, they generate unnecessary heat (and distraction) rather than needful (and illuminating) light.

Important general points

Only legal arguments are relevant

6 Before we set out the background facts and procedural history of the present appeals, it is necessary for us to first highlight a few important general points. The first is that many of the difficulties encountered in the context of Art 9 and Art 12 relate to the fact that the court is often involved in a delicate balancing process. More importantly, it often faces a paradox which it must nevertheless negotiate. On the one hand, it must disregard extra-legal considerations that are uniquely within the purview of the legislature (here, the Singapore Parliament). This was in fact a central motif in the justly famous theory of adjudication proffered by the late Prof Ronald Dworkin (in an entire series of works, commencing with his seminal book, *Taking Rights Seriously* (Harvard University Press, 1978) (especially at ch 4)). Yet, where the constitutionality of a statute is challenged under Art 9 and/or Art 12, the court must have regard to extra-legal considerations *in so far as they impact the application of* Art 9 and Art 12 themselves. The vexing difficulty – particularly in the context of the present appeals – is to discern where the line is to be drawn, bearing in mind that where the court does indeed have regard to extra-legal considerations, this must (in the nature of things) be by way of *a very limited brief premised only on* what is *absolutely necessary* to enable the court to *apply* the relevant *legal* principles *relating to Art 9 and Art 12*.

7 Drawing such *a line in the legal sand* is imperative. If this is not done, the court will necessarily be sucked into and thereby descend into the *political* arena, which would in turn undermine (or even destroy) the very role which constitutes the *raison d'être* for the court's existence in the first place – namely, to furnish an *independent, neutral and objective* forum for deciding, on the basis of objective legal rules and principles, (*inter alia*) what rights parties have in a given situation. That the court's role as a neutral arbiter is utterly vital is underscored in a situation where (as is the case here) the arguments on either side of what is in substance a *legislative* divide are intensely controversial and the relevant empirical evidence is ambiguous at best. All that the court can – and must – be concerned with in these circumstances is whether any *fundamental rights* under *the Singapore Constitution* (such as those pursuant to Art 9 and Art 12) have indeed been violated.

8 In determining the constitutionality of a statute which is alleged to be inconsistent with Art 12 (or, for that matter, any other Article of the Singapore Constitution), the court's main concern is to be careful not to trespass into extra-legal territory which legitimately belongs only to the legislature. Looked at in this light, the many extra-legal arguments on the constitutionality of s 377A are *irrelevant* to the court's application of Art 12. We hasten to add that this does *not* mean that these arguments are *wholly* irrelevant in *all* contexts. They are appropriate to a *legislative* debate, but that is wholly beyond the remit of the court. The proponents of these arguments fail to see this because they overlook the vital distinction referred to above (at [6]) between legal principles and extra-legal considerations. Hence, they proffer various extra-legal arguments as though those arguments are central to the court's task, when they serve only to muddy an already difficult legal path which the court is attempting its level best to negotiate. This is unfortunate, to say the least. Indeed, the difficulties are exacerbated by the fact that some of the extra-legal arguments might also have an overlay of emotional and/or other overtones, and, on this ground alone, are more suited (if at all) to a *legislative* (or even *philosophical*) – but *not* a *legal* – debate.

What is legally relevant (and irrelevant) in the context of the present appeals

9 It follows, *a fortiori*, from the observations in the preceding paragraph that in deciding the present appeals, this court cannot – and must not – be drawn into the sphere of even broader (and, arguably, even more speculative) debate, in particular, on the possible legal as well as extra-legal *consequences* flowing from its decision on the constitutionality of s 377A. Indeed, counsel for the appellants in CA 54/2013, Ms Deborah Barker SC ("Ms Barker"), was at pains to point out right at the outset of her clients' written case (as well as in her oral submissions before this court) that her clients' appeal is *not* about *other legal* rights (such as the right to same-sex marriage). There is, in

fact, *no necessary connection* between any court decision on the constitutionality of s 377A and any *positive* rights, the grant (or otherwise) of which is clearly a matter for *the legislature – and the legislature alone*. The line referred to above between what is legitimately within the purview of the court and what is legitimately within the purview of the legislature applies, as noted at the outset of the present paragraph, in an *a fortiori* manner in the present appeals.

10 It follows that in the present appeals, this court will take into account *only* those arguments which are *legally* relevant to the application of Art 9 and Art 12. All other arguments – interesting though they might be – ought to be canvassed in the *appropriate* fora (whether of a legislative, academic or some other public (but non-judicial) nature).

11 It is also important to emphasise that it follows that nothing in this judgment impacts the freedom of a person or group of persons to *freely* espouse as well as practise his/its values *within the boundaries of the law* (such as, in the religious context, within the boundaries laid down by Art 15 of the Singapore Constitution and the Maintenance of Religious Harmony Act (Cap 167A, 2001 Rev Ed)). This is consistent with the multi-racial, multi-cultural, multi-lingual as well as multi-religious nature of Singapore society. This is not mere political rhetoric, but a real and practical framework that furnishes real and practical freedom for each group and each individual to practise its/his values – *provided (it is important to reiterate) this is done within the parameters and boundaries laid down by the existing law of the land.* This freedom *cannot*, however, extend to an insistence by a particular group or individual that its/his values be *imposed* on *other* groups or other individuals.

12 Given our approach of focusing only on the relevant *legal* arguments in the present appeals, might it be argued that this court is conducting itself like an ostrich whose head is buried in the sand inasmuch as it might be ignoring the need to achieve a *substantively fair* result in the two cases at hand? This is, at first blush, a rather powerful argument. However, there seems to us no reason why a *substantively fair* result cannot be arrived at by focusing only on the relevant *legal* arguments. Indeed (and on the *contrary*), *were* this court to *also* consider *extra*-legal arguments that are *within the purview of the Singapore Parliament*, would *that* not be *contrary* to *fairness* in both a procedural *as well as* a substantive sense? It should also be noted that *if it is thought that a substantively fair result can only be achieved by a consideration of extra-legal arguments as well, then the Singapore Parliament can always remedy the situation in the appropriate fashion. However, it would then be doing so in a legitimate manner. It bears repeating that this court cannot seek to achieve the same result as it does not have the legitimate jurisdiction to do so – the legitimate jurisdiction lies, instead, with the Singapore Parliament.*

Background facts and procedural history

13 As we have already mentioned, the present appeals pertain to the constitutionality of s 377A. The Appellants are essentially arguing that s 377A violates Art 9 and/or Art 12.

14 The appellant in CA 125/2013, Tan Eng Hong ("Tan"), was arrested on 9 March 2010 for engaging in oral sex with a male partner in the cubicle of a public toilet. Tan and the male partner were charged under s 377A on 2 September 2010 and 1 September 2010 respectively. Tan filed an application (by way of an originating summons ("OS")) to challenge the constitutionality of s 377A on 24 September 2010. On 15 October 2010, the Prosecution substituted the s 377A charges against Tan and his partner with charges under s 294(*a*) of the current Penal Code for the commission of an obscene act in a public place. Tan and the Attorney-General, the respondent in the present appeals ("the Respondent"), proceeded to litigate over the issue of whether Tan had the requisite *locus standi* to challenge the constitutionality of s 377A. That culminated in the decision of this court in *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 ("*Tan Eng Hong (standing)*"), delivered on

21 August 2012, where it was held that Tan did have the requisite *locus standi*.

15 The appellants in CA 54/2013, Lim Meng Suang ("Lim") and Kenneth Chee Mun-Leon ("Chee"), have been in a romantic and sexual relationship for the past 15 years. Together, they run "TheBearProject", an informal social group for plus-sized gay men. Both men aver that they have been sexually attracted to men since young, and have experienced various forms of social discrimination against homosexual men. On 30 November 2012, slightly over three months after the judgment in *Tan Eng Hong (standing)* was delivered, Lim and Chee filed an OS to challenge the constitutionality of s 377A.

16 Tan's substantive application was first heard by a High Court judge on 18 January 2013. Lim and Chee's substantive application was first heard by the same High Court judge ("the Judge") on 7 February 2013. Judgments for these two substantive applications were released on, respectively, 2 October 2013 (reported as *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 ("*Tan Eng Hong (substantive)*")) and 9 April 2013 (reported as *Lim Meng Suang and another v Attorney-General* [2013] 3 SLR 118 ("*Lim Meng Suang*")). In both judgments, the Judge held that s 377A did not violate the Singapore Constitution.

17 Lim and Chee filed their notice of appeal on 30 April 2013. On 15 July 2013, Lim and Chee sought, *inter alia*, leave to amend their OS to include new arguments centring on how s 377A violated Art 9. Their application was dismissed by a High Court judge sitting as a single judge of the Court of Appeal. Lim and Chee then filed Summons No 3664 of 2013 ("SUM 3664/2013") on 17 July 2013, requesting a three-judge Court of Appeal to review that judge's dismissal of their application. SUM 3664/2013 was heard on 2 August 2013, whereupon it was adjourned to be heard together with Lim and Chee's substantive appeal (*ie*, CA 54/2013). CA 54/2013 was set down to be heard on 14 October 2013.

18 In the meantime, Tan filed an application on 14 August 2013 for leave to intervene in CA 54/2013. This application for leave to intervene was subsequently withdrawn when it was heard on 5 September 2013. As mentioned above at [16], the judgment for Tan's substantive application was released on 2 October 2013. A notice of appeal (assigned the number "CA 125/2013") was quickly filed on 8 October 2013, along with an application for, *inter alia*, CA 125/2013 to be expedited and heard together with CA 54/2013 on 14 October 2013. That application was heard on 10 October 2013, wherein this court ordered CA 54/2013 and CA 125/2013 to be heard together because they raised essentially the same issues of law. The hearing for CA 54/2013, originally scheduled for 14 October 2013, was vacated to allow counsel for Tan, Mr M Ravi ("Mr Ravi"), to file submissions.

Summary of the arguments in the court below

19 Ms Barker's arguments in the court below centred on how s 377A violated Art 12. Firstly, it was submitted that equal protection under Art 12 extended to protection from discrimination on the basis of sexual orientation. Secondly, it was said that s 377A was so absurd, arbitrary and unreasonable that it could not be good law. Thirdly, it was argued that s 377A failed the two-step test for determining the constitutionality of a statute under Art 12 ("the 'reasonable classification' test") because it disclosed no intelligible differentia and the differentia applied bore no rational relation to the object of s 377A. (Under the "reasonable classification" test, which was enunciated in, *inter alia*, *Taw Cheng Kong (CA)*, *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103 ("*Nguyen Tuong Van*") and *Yong Vui Kong v Public Prosecutor and another matter* [2010] 3 SLR 489 ("*Yong Vui Kong*"), a statute that prescribes a differentiating measure will nonetheless be consistent with Art 12 if it is based on "reasonable classification"; *ie*, if: (a) the classification prescribed by the statute is founded on an intelligible differentia which distinguishes persons within the defined group from persons

outside the group; and (b) that differentia has a rational relation to the object sought to be achieved by the statute.) Lastly, Ms Barker submitted that s 377A did not conform to trends in international jurisprudence, which militated against discrimination on the basis of sexual orientation. She therefore prayed for s 377A to be struck down in *toto* (*cf* the prayers sought by Lim and Chee on appeal at para 347 *et seq* of their Appellants' Case, in which it is argued, as an alternative, that s 377A should be read down by striking out the words "or private" therein).

20 Mr Ravi's arguments in the court below centred on how s 377A was inconsistent with both Art 9 and Art 12. He argued that s 377A was contrary to the fundamental rules of natural justice and was therefore not "law" for the purposes of Art 9(1). In relation to Art 12, he contended that s 377A was absurd, arbitrary and unreasonable, and that the differentia of males bore no rational relation to the object of the provision.

21 The Respondent essentially argued that s 377A passed the "reasonable classification" test. The objectives of s 377A, it submitted, comprised the preservation of public morality and the safeguarding of public health (it should be noted that this last-mentioned point was not pursued before this court). The non-inclusion of female homosexual conduct did not render s 377A under-inclusive because such conduct was either less prevalent or perceived to be less repugnant than male homosexual conduct. Even if s 377A were under-inclusive, the Respondent contended, legislative leeway ought to be given to our Parliament. Most importantly, it was submitted, there should be a strong presumption of constitutionality for laws passed by the legislature.

The decisions below

The decision in Lim Meng Suang

22 The Judge commenced his decision in *Lim Meng Suang* by undertaking a historical inquiry into Art 12. Article 12 was found to be consanguine with equivalent provisions in the US Constitution, the Constitution of India and the Federal Constitution of Malaysia. Equal protection, the Judge held, was a guarantee of not merely procedural or administrative equality, but also substantive equality. Nevertheless, legislatures around the world had had to continually classify diverse groups and activities for different purposes; a legislature was entitled to pass laws that dealt with the problems stemming from the inherent inequality and differences pervasive in society.

23 The Judge proceeded to apply the "reasonable classification" test to s 377A. It was clear, he held, that the classification prescribed by s 377A was based on an intelligible differentia: there was little difficulty in determining who fell within and without the provision. The second-stage inquiry into whether the differentia was rationally related to the object of s 377A was, however, fraught with difficulty. Determining the purpose of legislation was not straightforward, and there were also problems with the extent of over- or under-classification required before the court could find that a rational relation was absent. In addition, there was a danger of engaging in tautological reasoning.

24 The Judge was of the view that the purpose of s 377A was to be determined at the time it was first introduced into Singapore's Penal Code in 1938. That purpose, he found, had remained unchanged to the present day: "[t]he act of males engaging in grossly indecent acts with other males was to be criminalised" (see *Lim Meng Suang* at [67]). There was thus a "complete coincidence" (see *Lim Meng Suang* at [100]) between the differentia in relation to the classification prescribed by s 377A and the object of that provision; the "reasonable classification" test was clearly satisfied. Turning to the issue of legitimacy of purpose, the Judge held that the purpose of s 377A was legitimate because of the weight of historical practice and "deep seated feelings" pertaining to procreation and family lineage (see *Lim Meng Suang* at [127]).

The decision in Tan Eng Hong (substantive)

25 The Judge commenced his judgment in *Tan Eng Hong (substantive)* with an examination of Art 9(1), and held that the reference to "law" therein had to include a reference to the fundamental rules of natural justice. He observed that there was a dearth of jurisprudence on the concept and scope of those rules. Nevertheless, he noted two possible types of legislation that would not qualify as "law" for the purposes of Art 9(1), namely: (a) legislation aimed at securing the conviction of particular individuals; and (b) legislation that was absurd or arbitrary.

26 After considering statements from pro- as well as anti-homosexual groups, medical and scientific bodies and court decisions, the Judge declined to find that homosexuality was a natural and immutable attribute. This rendered moot the argument that s 377A was an absurd law which was contrary to the fundamental rules of natural justice because it targeted a natural and immutable attribute of a person. The Judge was also not persuaded that s 377A was unconstitutional because it was too vague and uncertain.

27 In so far as the constitutional challenge under Art 12 was concerned, the Judge held that the "reasonable classification" test applied to all constitutional challenges based on this Article. He did not adopt the approach taken in the foreign authorities cited to him because those authorities factored in legal and extra-legal social, economic, cultural and political considerations which were unique to their respective jurisdictions. The Judge also observed that s 377A could not be said to have an unsound purpose merely because that purpose was to advance a certain allegedly controversial morality. Finally, the Judge ruled that there was a complete coincidence between the differentia embodied in s 377A (*viz*, male homosexuals or bisexual males who engage in acts of gross indecency with another male within the meaning of the provision) and the purpose and object of the provision (*viz*, making male homosexual conduct an offence because such conduct was not desirable).

The parties' respective cases on appeal

CA 54/2013

28 Before this court, Ms Barker submitted (in relation to CA 54/2013) that Lim and Chee possessed the requisite *locus standi* to challenge the constitutionality of s 377A for the following reasons:

> (a) *Tan Eng Hong (standing)* made it clear that where a person who was a member of the group defined by a purportedly unconstitutional statute (referred to hereafter as an "impugned statute" where appropriate to the context) faced a real and credible threat of prosecution under that statute, this was sufficient to give him *locus standi* to challenge the constitutionality of that statute under Art 12. Lim and Chee were both sexually active male homosexuals falling within the group defined by s 377A. They thus had the *locus standi* to challenge s 377A as being violative of Art 12.
>
> (b) With regard to Art 9, given Lim and Chee's averment that their personal rights under that Article had been violated and that there was a real controversy between the parties, this sufficed to establish their *locus standi* to challenge the constitutionality of s 377A under that Article.

29 In terms of the substantive merits of CA 54/2013, Ms Barker argued that s 377A violated Art 12(1). Section 377A was said to be arbitrary on its face as: (a) it ran foul of the concept of constitutional supremacy wherein a State could not deprive minorities of their fundamental liberties simply because of popular moral sentiment; and (b) it criminalised acts that were legal for non-male

homosexuals. Section 377A, it was contended, also failed the "reasonable classification" test as the classification prescribed by that provision was not based on an intelligible differentia; and even if the classification could be said to be based on an intelligible differentia, that differentia bore no rational relation to the object of s 377A. Section 377A, it was further submitted, also violated Art 12(2) of the Singapore Constitution ("Art 12(2)") because sexual orientation was a practically immutable aspect of a person's identity.

30 In relation to Art 9, Ms Barker argued that s 377A violated Art 9(1). The right to life and personal liberty set out in Art 9(1), she submitted, should be given a purposive interpretation to include a limited right of privacy. Life and personal liberty must, at their core, include a right of personal autonomy allowing a person to enjoy and express affection and love towards another human being.

31 The Respondent, on its part, originally submitted that Lim and Chee lacked the requisite *locus standi* to challenge the constitutionality of s 377A. In particular, it argued that a real controversy was required to establish standing and jurisdiction, and that such a controversy would only arise when the State took action pursuant to the impugned statute in question. However, in a subsequent letter to Ms Barker dated 1 July 2014, the Respondent stated that it would not be pursuing its case on this particular point as it had not been raised before the Judge in the proceedings below.

32 In so far as the substantive issues in CA 54/2013 were concerned, the Respondent argued that s 377A did not violate Art 12(2). Article 12(2), the Respondent submitted, was exhaustive in terms of the prohibited grounds of discrimination set out therein, and was distinguishable from constitutional provisions in other jurisdictions which explicitly enumerated sex or sexual orientation as one of the prohibited grounds of discrimination. It was further argued that:

(a) Section 377A did not violate Art 12(1). A single standard of review should be applied to determine the constitutionality of an impugned statute under Art 12(1), namely, the "reasonable classification" test. Applying that test, the classification prescribed by s 377A was founded on an intelligible differentia which bore a rational relation to the legislative purpose of the provision. The "reasonable classification" test did not, and ought not to, require substantive judicial review of the legislative purpose of s 377A. In any case, the purpose of s 377A was constitutionally permissible.

(b) Section 377A also did not violate Art 9(1). In this regard, comparative jurisprudence was inapplicable. Reading Art 9(1) to entail a right to privacy was contrary to the weight of authority, as well as the history, text and structure of Art 9. In any case, s 377A was "law" for the purposes of Art 9(1).

CA 125/2013

33 In CA 125/2013, Mr Ravi made four arguments in relation to Art 12. First, he submitted that the applicable test for determining the constitutionality of an impugned statute under Art 12 was not confined to the "reasonable classification" test. Secondly, he contended that the classification prescribed by s 377A was not based on an intelligible differentia because s 377A was vague and "[did] not apply differentia based on either gender, sexual orientation or [the] nature of [the] sexual act". Thirdly, the object of s 377A was, according to Mr Ravi, an expression of animus by the majority against a minority, and was therefore incompatible with the constitutional guarantee of individual fundamental freedoms against majoritarian oppression. Fourthly, it was argued that there was no rational relation between the purpose of s 377A and the differentia embodied in that section.

34 In relation to Art 9, Mr Ravi argued that s 377A was inconsistent with that Article for three reasons. First, s 377A was impermissibly vague in the scope of the activity which it purported to prohibit, thereby creating not only doubt as to its effect, but also a substantial risk of perversity or arbitrariness in its application. Secondly, s 377A was arbitrary inasmuch as the criminal penalty which it imposed served no rational purpose in theory or in practice. Thirdly, s 377A was absurd in that it criminalised, without any logically defensible reason, a minority of citizens on the grounds of a core aspect of their identity which was either unchangeable or suppressible only at a great personal cost.

35 In response to Mr Ravi's submissions, the Respondent made the following arguments with regard to Art 12. First, the established test for determining the constitutionality of an impugned statute under Art 12(1) only required the classification prescribed by the impugned statute to be founded on an intelligible differentia which bore a rational relation to the purpose and object of the statute. Secondly, the relevant classification in relation to s 377A was based on an intelligible differentia (*viz*, male homosexuals or bisexual males who engage in acts of gross indecency with another male within the meaning of the provision), and that differentia was rationally related to the purpose and object of the provision (*viz*, making male homosexual conduct an offence because such conduct was not desirable). Thirdly, Art 12(1) did not contemplate judicial scrutiny of the legislative purpose of an impugned statute. Fourthly, Art 12(1) "[did] not impose any blanket prohibition on classifications based on sex or sexual orientation or 'immutable' characteristics, or on classifications that [were] 'unreasonable' or 'impermissible'" [emphasis in original omitted].

36 The Respondent's submissions in relation to Art 9 were as follows. First, Art 9(1) referred to "the deprivation of life in the sense of the death penalty, and personal liberty in the sense of the liberty of the person … and the freedom from unlawful incarceration or detention". Secondly, s 377A was "law" for the purposes of Art 9(1) because it had a clear core of meaning and was not unconstitutionally vague. Thirdly, Art 9(1) did not protect a person's sexual identity or orientation, regardless of whether or not that was an immutable aspect of a person's identity.

The issues before this court

The preliminary issues

37 From the procedural history set out above, it can be seen that the following two preliminary issues were *originally* raised in CA 54/2013:

(a) Do Lim and Chee have the requisite *locus standi* to challenge the constitutionality of s 377A?

(b) Should Lim and Chee be allowed to amend their OS to include new arguments centring on how s 377A violates Art 9?

As noted above (at [31]), the Respondent indicated in its letter to Ms Barker dated 1 July 2014 that it was no longer pursuing the first of the aforesaid preliminary issues – in particular, because the *locus standi* point had not been raised before the Judge in the proceedings below. By that same letter, the Respondent stated that it was also not objecting to Lim and Chee's application for leave to amend their OS to include new arguments centring on how s 377A violated Art 9. Both of the above preliminary issues are therefore no longer live issues before this court.

38 We would add that, in any event, had it been necessary for us to decide SUM 3664/2013, we would have allowed the application. In their supporting affidavit for SUM 3664/2013, Lim and Chee averred that the constitutionality of s 377A was a matter of public interest, and that the proposed

amendment to their OS would allow this court to consider the merits of all the arguments relating to whether or not s 377A was unconstitutional and determine once and for all whether s 377A violated Art 12 and/or Art 9. Lim and Chee further contended that there would be no prejudice to the Respondent if the proposed amendment to their OS were allowed.

39 The court has a wide discretion to allow an amendment of an OS at any stage of the proceedings on such terms as to costs or otherwise as may be just (see O 20 r 5(1) read with O 20 r 7 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed)). In a similar vein (although not applicable in the present appeals), a party may introduce on appeal a new point not taken in the court below, but it must state this clearly in its case (see O 57 r 9A(4)(*b*)).

40 We are of the view that Lim and Chee's proposed amendment to their OS would not cause the Respondent any prejudice which cannot be compensated in costs (see the decision of this court in *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 ("*Review Publishing Co*") at [113]). The proposed amendment would give symmetry to the present appeals and allow a broader spectrum of arguments to be aired on an important constitutional point in the Singapore context.

The substantive issues

41 The present appeals raise several overlapping arguments about the constitutionality of s 377A. These boil down to whether s 377A violates the following provisions of the Singapore Constitution:

(a) Art 9(1);

(b) Art 12(1); and

(c) Art 12(2).

We shall discuss each of these substantive issues in turn, beginning with the issue of whether s 377A violates Art 9(1).

Whether s 377A violates Art 9(1)

42 Article 9, part of which was set out above at [2], provides as follows:

> **Liberty of the person**
>
> **9.**—(1) No person shall be deprived of his life or personal liberty save in accordance with law.
>
> (2) Where a complaint is made to the High Court or any Judge thereof that a person is being unlawfully detained, the Court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the Court and release him.
>
> (3) Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.
>
> (4) Where a person is arrested and not released, he shall, without unreasonable delay, and in any case within 48 hours (excluding the time of any necessary journey), be produced before a Magistrate, in person or by way of video-conferencing link (or other similar technology) in accordance with law, and shall not be further detained in custody without the Magistrate's authority.

(5) Clauses (3) and (4) shall not apply to an enemy alien or to any person arrested for contempt of Parliament pursuant to a warrant issued under the hand of the Speaker.

(6) Nothing in this Article shall invalidate any law —

(*a*) in force before the commencement of this Constitution which authorises the arrest and detention of any person in the interests of public safety, peace and good order; or

(*b*) relating to the misuse of drugs or intoxicating substances which authorises the arrest and detention of any person for the purpose of treatment and rehabilitation,

by reason of such law being inconsistent with clauses (3) and (4), and, in particular, nothing in this Article shall affect the validity or operation of any such law before 10th March 1978.

43 The arguments raised by Mr Ravi and by Ms Barker on Art 9 in the present appeals are different. Ms Barker argues that the right to life and personal liberty under Art 9(1) should include a limited right to privacy and personal autonomy allowing a person to enjoy and express affection and love towards another human being. Mr Ravi, on the other hand, contends that s 377A is vague, arbitrary and absurd.

44 In so far as Ms Barker's arguments are concerned, our view is that the right to privacy and personal autonomy which she canvassed should not be read into the phrase "life or personal liberty" in Art 9(1) for three reasons.

4 5 *First*, such an interpretation of Art 9(1) would be contrary to established Singapore jurisprudence. The phrase "personal liberty" in Art 9(1) refers only to the personal liberty of a person from unlawful incarceration or detention (see *Tan Eng Hong (standing)* at [120], affirming *Lo Pui Sang and others v Mamata Kapilev Dave and others (Horizon Partners Pte Ltd, intervener) and other appeals* [2008] 4 SLR(R) 754). Although the phrase "life" has not been authoritatively interpreted by the Singapore courts, it should be interpreted narrowly in accordance with the jurisprudence on "personal liberty" and Art 9's context and structure, which brings us to our next point.

46 Our *second* reason for rejecting Ms Barker's arguments on Art 9 is that the narrow interpretation of Art 9(1) which we have just mentioned above at [45] is (as the Respondent has correctly argued) supported by the context and structure of Art 9 itself. Articles 9(2) to 9(4) provide various procedural safeguards in relation to the arrest and detention of a person. Article 9(2) gives expression to the common law prerogative writ of *habeas corpus*; Art 9(3) provides for an arrested person's right to counsel and the right to be informed of the grounds for his arrest; and Art 9(4) relates to the production of an arrested person before a magistrate within 48 hours. Articles 9(5) and 9(6) contain exceptions to the rights guaranteed to an arrested person. Read in this context, it is clear that the phrase "life or personal liberty" in Art 9(1) refers only to a person's freedom from an unlawful deprivation of life and unlawful detention or incarceration.

4 7 *Thirdly*, protection against unlawful detention is the particular focus of Art 21 of the Indian Constitution, from which our Art 9 is derived. India's Art 21 states that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law". As the Respondent has argued (again, correctly, in our view), the framers of India's Art 21 consciously rejected the wider US formulation "without due process of law" in the Fifth and Fourteenth Amendments to the US Constitution, and enacted additional provisions similar to Singapore's Art 9(3) and Art 9(4) to protect India's citizenry against unlawful detention. There is no indication that they intended to impute an

expansive meaning into the phrase "life or personal liberty". India's Art 21 was the basis for the "liberty of the person" provision in Art 5(1) of the Malaysian Constitution, which was later adopted in Singapore as Art 9(1).

48 In a related vein, foreign cases that have conferred an expansive constitutional right to life and liberty should be approached with circumspection because they were decided in the context of their unique social, political and legal circumstances. For example, the Supreme Court of India has taken an expansive view of the right to life to include an individual's right to health and medical care. This approach must be understood in the context of India's social and economic conditions (see *Yong Vui Kong* at [83]–[84]). A similarly broad approach has been adopted in the US because of the due process clauses in the Fifth and Fourteenth Amendments to the US Constitution, which are materially different from our Art 9(1).

49 Indeed, it is significant that Ms Barker herself conceded that the *private* law relating to privacy was a *developing* one. It is clear that Lim and Chee (and likewise, Tan in CA 125/2013) cannot obtain by the (constitutional) backdoor what they cannot obtain by the (private law) front door. Indeed, that would be a wholly inappropriate utilisation of the existing body of *constitutional* law (which serves *a quite different* function). More importantly, as we have already noted above (at [30]), Lim and Chee base their Art 9(1) rights on a narrow conception of the right to privacy, *viz*, that the right to life and personal liberty under Art 9(1) should include a limited right to privacy and personal autonomy allowing a person to enjoy and express affection and love towards another human being. Once again, such a right ought, in our view, to be developed by way of the *private* law on privacy instead. Indeed, we also observe that the right claimed by Lim and Chee, although of an apparently limited nature, is, in point of fact, not only vague and general, but also contains within itself (contradictorily) the seeds of an *unlimited* right. Put simply, such a right could be interpreted to encompass as well as legalise all manner of subjective expressions of love and affection, which could (in turn) embody content that may be wholly unacceptable from the perspective of broader societal policy. At this juncture, we are, of course, back to "square one", so to speak, for this brings us back (in substance at least) to the issue of whether or not s 377A ought to enforce broader societal morality.

50 We turn now to Mr Ravi's arguments on the alleged unconstitutionality of s 377A under Art 9.

51 First, we do not think the phrase "act of gross indecency with another male person" in s 377A is of such vagueness that would cause the provision to fall outside the classification of "law" for the purposes of Art 9(1). The concept of indecency is not alien to Singapore legislation (see, for example, s 145(1) of the Women's Charter (Cap 353, 2009 Rev Ed) and s 7 of the Children and Young Persons Act (Cap 38, 2001 Rev Ed)), and we do not think there is any objectionable degree of vagueness inherent within s 377A itself. We would venture to suggest that s 377A prohibits, at its core, sexual acts between males. The Judge's views on the operation of s 377A (in *Tan Eng Hong (substantive)* at [76], [82] and [83]) were tentative in nature *not* because the provision was vague, *but* because the matter before him did not involve a criminal charge under s 377A.

52 Secondly, s 377A is not arbitrary. Mr Ravi's submissions on this point are not easily comprehensible, but they appear to suggest that there is no rational purpose for s 377A. Mr Ravi asserted, without any legal substantiation whatsoever, that the purpose of s 377A in signalling societal disapproval of grossly indecent acts between males was arbitrary.

53 Thirdly, s 377A is not absurd. Mr Ravi argued that s 377A was absurd because it criminalised a minority of citizens based on a core aspect of their identity which was either unchangeable or suppressible only at a great personal cost. As noted by the Respondent, Mr Ravi's argument here

closely resembles Ms Barker's argument that "personal liberty" in Art 9(1) should be interpreted to include a limited right to privacy and personal autonomy. For the reasons given above, Mr Ravi's argument in this particular guise must likewise be rejected. 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 (see above at [6]).

54 Let us turn now to the issue of whether s 377A violates Art 12(1).

Whether s 377A violates Art 12(1)

The relevant legal provisions

55 To begin our analysis of the constitutionality of s 377A under Art 12(1), it would be appropriate to not only set out Art 12(1) again, but also reproduce the *rest* of Art 12 as well, as the *context* of Art 12 (in particular, Art 12(2)) is, as we shall see, very significant. Article 12 reads as follows:

> **Equal protection**
>
> ***12. — (1)*** All persons are ***equal before the law and entitled to the equal protection of the law*** .
>
> (2) *Except as expressly authorised by this Constitution*, there ***shall*** *be* ***no discrimination*** *against* ***citizens of Singapore*** *on the ground* ***only*** of ***religion*** , ***race*** , ***descent*** *or* ***place of birth in any law*** *or* in ***the appointment to any office or employment under a public authority*** *or* in ***the administration of any law relating to the acquisition, holding or disposition of property*** *or* ***the establishing or carrying on of any trade, business, profession, vocation or employment*** .
>
> (3) This Article does not invalidate or prohibit —
>
> (*a*) any provision regulating personal law; or
>
> (*b*) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion.
>
> [emphasis added in italics, underlined italics, bold italics and underlined bold italics]

56 As the constitutionality of s 377A is the central issue in these appeals, we also set out this provision again, even though we have already done so at the outset of this judgment (see above at [3]):

> **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.

The applicable test for constitutionality: the "reasonable classification" test

The test articulated

57 The established test in Singapore for determining the constitutionality of a statute under Art 12 is the *"reasonable classification"* test. This is clear from the relevant case law (see, for example, *Ong Ah Chuan and another v Public Prosecutor* [1979–1980] SLR(R) 710 ("*Ong Ah Chuan*") at [37]; *Taw Cheng Kong (CA)* at [58]; *Nguyen Tuong Van* at [70]; *Yong Vui Kong* at [109]; and *Tan Eng Hong (standing)* at [124]). It should, however, be noted that the "reasonable classification" test is not even engaged if the impugned statute is not discriminatory in the first place. In the words of Mohamed Azmi SCJ in the Malaysian Supreme Court decision of *Malaysian Bar v Government of Malaysia* [1987] 2 MLJ 165 ("*Malaysian Bar*") at 170 (referred to in *Taw Cheng Kong (CA)* at [58]):

> … The first question to be asked is, is the law discriminatory, and that the answer should then be – if the law is not discriminatory, it is good law …

Indeed, the question set out in the above quotation has been referred to as the first stage of "a three-stage inquiry" (see, for example, the Singapore High Court decision of *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78 at [32]; that decision was reversed by this court in *Taw Cheng Kong (CA)*, but without any apparent comment on this particular point). Strictly speaking, however, the "reasonable classification" test, in our view, comprises only two closely-related stages.

58 The "reasonable classification" test was articulated by, *inter alia*, this court in *Taw Cheng Kong (CA)*, which, after referring to the above passage from *Malaysian Bar*, went on to cite (at [58]) Azmi SCJ's observations in that same case (*viz*, *Malaysian Bar*) as follows (at 170):

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

59 *Taw Cheng Kong (CA)* also cited (at [54]) the following comments by Lord Diplock in the Privy Council decision of *Ong Ah Chuan* (at [35] and [37]) with approval:

> 35 All criminal law involves the classification of individuals for the purposes of punishment, since it affects those individuals only in relation to whom there exists a defined set of circumstances – the conduct and, where relevant, the state of mind that constitute the ingredients of an offence. *Equality before the law and equal protection of the law require that like should be compared with like. What Art 12(1) of the Constitution assures to the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits laws which require that some individuals within a single class should be treated by way of punishment more harshly than others*; it does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offences that has been committed.
>
> …

> 37 … Provided that the factor which the Legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law, there is no inconsistency with Art 12(1) of the Constitution.
>
> [emphasis added; emphasis in original omitted]

60 Under the "reasonable classification" test, therefore, a statute which prescribes a differentiating measure will be consistent with Art 12(1) only if: (a) the classification prescribed by the statute is founded on an intelligible differentia; *and* (b) that differentia bears a rational relation to the object sought to be achieved by the statute (see also *Tan Eng Hong (standing)* at [124]).

The difficulties with the "reasonable classification" test

(1) The true nature and function of the test

61 The "reasonable classification" test is not without its difficulties. This has been articulated in the legal literature (see, for example, Joseph Tussman & Jacobus tenBroek, "The Equal Protection of the Laws" (1949) 37 Cal L Rev 341). Perhaps because of the perceived lack of viable alternative tests and the very thorny nature of the concept of equality itself (especially when it is to be applied in a *practical* context), the cases (at least in the Singapore context) continue to endorse (only) the "reasonable classification" test as the test for determining the constitutionality of a statute under Art 12. The concept of equality is thorny, not least because whilst it is eminently desirable (in theory) to achieve equality, this (*normative*) *ideal* faces the (*factual*) *reality* that *inequality* (in all its various forms) is *an inevitable part of daily life*. How, then, is *the law* to ensure that there is a *basic level of equality*, applying the principle of equality *generally*, and more importantly, in *what situations* would such a level of equality be deemed to be *legally mandated*? As we shall see in a moment, the "reasonable classification" test, whilst useful, *does not really address the fundamental questions just posed* (see also Peter Westen, "The Empty Idea of Equality" (1982) 95 Harv L Rev 537). This is not surprising because (as we shall also see) the *very nature* of the "reasonable classification" test renders it *incapable* of furnishing the requisite (or complete) normative as well as analytical impetus (let alone the requisite criterion or criteria) to answer these questions.

62 However, it is also of the first importance to note, at this juncture, that this does *not* mean that the "reasonable classification" test ought to be *rejected* out of hand. That would be to throw the baby out together with the bathwater. As we shall elaborate upon below, the "reasonable classification" test is *an important threshold test*, without which any attempt to determine whether or not Art 12 has been contravened by an impugned statute cannot even take off the ground in the first place. We shall also see that if a particular statute fails to pass legal muster under this test, it would mean that that statute *is so legally illogical and/or incoherent that it would,* ipso facto*, be repugnant to any idea of legal equality to begin with*. The reader would be forgiven for thinking that all this is rather general and abstract. Indeed, it is. However, it sets the stage for the more detailed analysis that follows. It would, in fact, be appropriate at this juncture to turn to an explanation of why the "reasonable classification" test functions only as a *threshold* legal test.

63 It will be recalled (see above at, *inter alia*, [60]) that the "reasonable classification" test states that a statute which prescribes a differentiating measure will be consistent with Art 12(1) only if: (a) *the classification* prescribed by the statute is founded on an *intelligible differentia* (referred to hereafter as either "the first limb" or "Limb (a)" of the "reasonable classification" test); *and* (b) *that differentia* bears *a rational relation* to *the purpose and object* sought to be achieved by the statute (referred to hereafter as either "the second limb" or "Limb (b)" of the "reasonable classification" test). It is our view that the *underlying rationale* of both the aforementioned limbs of the "reasonable

classification" test is not only logical, but also commonsensical as well as self-evident. Let us elaborate.

64 In our view, whilst it is clear that *both* Limb (a) and Limb (b) must be satisfied in order for the "reasonable classification" test as a whole to be satisfied, Limb (a) operates *prior to* Limb (b) inasmuch as if the classification concerned is *not* based on an *intelligible differentia* to *begin with*, then it is pointless for the court to ascertain whether Limb (b) has been satisfied (*ie*, whether *the differentia* bears *a rational relation* to *the purpose and object* sought to be achieved by the statute in question). This is only logical and commonsensical: if there is *no* intelligible differentia to *begin with*, *then* there is *no* set of *intelligible* differentia *in existence* that can be *compared with* the purpose and object of the statute (which is the pith and marrow of Limb (b)).

65 When, however, would a statute *fail* to pass legal muster under the *threshold* legal criterion embodied within Limb *(a)*? The answer is that it would, in the nature of things, *very seldom* be the case. This is because the differentia concerned need not be perfect; it need only be "*intelligible*". This connotes (in turn) a *relatively low threshold that ought to avoid any consideration of substantive moral, political and/or ethical issues because these issues are potentially (and in most instances, actually) controversial*. We should note, parenthetically, that when we refer to "controversy" with respect to moral, political and/or ethical issues, we are not necessarily referring to anything sinister, malevolent or even insidious in nature because *reasonable persons can reasonably disagree on a myriad of issues which arise in moral, political and/or ethical contexts*. *More importantly, it is no business of the courts or the law generally to engage in the resolution of such issues – except to the extent necessary to resolve any* ***legal*** *issue(s) at hand*. It is not surprising, therefore, that the (legal) criterion centring on the need for an *intelligible* differentia under Limb *(a)* is (as already mentioned) *a relatively low threshold* that only requires the differentia concerned to be based on *intelligibility*. In this regard, the Judge observed thus in *Lim Meng Suang* (at [47]):

> The First Limb [*ie*, Limb (a)] requires that the classification prescribed by the impugned legislation must be based on an intelligible differentia. "Intelligible" means something that may be understood or is capable of being apprehended by the intellect or understanding, as opposed to by the senses. "Differentia" is used in the sense of a distinguishing mark or character, some attribute or feature by which one is distinguished from all others. Scientifically, one talks of an attribute by which a species is distinguished from all other species of the same genus.

66 We agree with the Judge's observations. They may appear value-neutral, but that is precisely what, in our view, was intended by the criterion of intelligible differentia to begin with. Value-neutrality is not the same as redundancy or an absence of functionality. As alluded to earlier, the "reasonable classification" test in general and its component limbs in particular are only intended to (and, in the nature of things, can only) serve a minimal *threshold* function of requiring logic and coherence in the statute concerned, without which the court cannot meaningfully proceed in any event to determine whether that statute violates Art 12.

67 In the context of Limb *(a)*, what this means is that the differentia embodied in the impugned statute must not only identify a clear distinguishing mark or character, but must *also* be *intelligible* (as opposed to illogical and/or incoherent). In this regard, we would go a little further than the Judge, although we think that our view is at least implicit within his observations in any event. In particular, we are of the view that a differentia which is capable of being understood or which "is capable of being apprehended by the intellect or understanding" (see *Lim Meng Suang* at [47]) may *nevertheless* still be *un*intelligible to the extent that it is *so unreasonable as to be illogical and/or incoherent*. We recognise that this last-mentioned proposition may open the doors to potential abuse, so we include the caveat that the illogicality and/or incoherence must be of *an extreme nature*. It must be so

extreme that *no reasonable person* would ever contemplate the differentia concerned as being functional as *intelligible* differentia. Put simply, 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). Where such illogicality and/or incoherence is present, there is no point even beginning to talk about the concept of equality (let alone whether there has been a violation of the right to equality contrary to Art 12) because *no reasonable classification even exists in the first place*. In such circumstances, Limb *(b)* is *not engaged at all*. More generally, there would be no way in which the statute concerned can possibly pass legal muster in so far as the concept of equality embodied within Art 12 is concerned.

68 Assuming, however, that there is an intelligible differentia in place such that Limb (a) of the "reasonable classification" test is in fact satisfied, it must *further* be demonstrated that Limb (b) has been satisfied *as well* in order for the "reasonable classification" test as a whole to be satisfied. To recapitulate, where Limb (b) is concerned, it must be demonstrated that *the differentia* identified pursuant to Limb (a) bears *a rational relation* to *the purpose and object* sought to be achieved by the statute in question. It is clear that a prerequisite for the satisfaction of Limb (b) is that the *purpose and object* of the statute in question *must first be determined or ascertained*. Once that purpose and object has been determined or ascertained, *a rational relation* between the differentia identified pursuant to Limb (a) *and* that purpose and object must then be demonstrated in order for Limb (b) to be satisfied. Again, this is both logical as well as commonsensical: if there is no rational relation between the differentia identified pursuant to Limb (a) and the purpose and object of the statute concerned, there is, *ex hypothesi*, no logical and/or coherent basis upon which to hold that the statute is based on *reasonable* classification to begin with. Although the absence of such a rational relation can take many forms, it seems to us that the requisite rational relation will – more often than not – be found. This is because (as the Judge held in *Lim Meng Suang* at [98]) there is *no* need for *a perfect* relation or "*complete* coincidence" [emphasis added] between the differentia in question and the purpose and object of the statute concerned. As the "reasonable classification" test itself prescribes, the relation need only be a *rational* one. That having been said, this does *not necessarily* mean that a rational relation will *always* be found to exist by the courts. For example, if there is *a clear disconnect* between the purpose and object of the impugned statute on the one hand and the relevant differentia on the other, the "reasonable classification" test will be held *not* to have been satisfied. But, all this is easily stated in the abstract. What will determine the final outcome in any given case will be *the specific facts as well as context* before the court. We should add, at this juncture, that ascertaining the purpose and object of a statute will not always be easy. Indeed, as we shall see later in this judgment (below at [116]–[152]), ascertaining the purpose and object of s 377A is both an extremely complex as well as extremely difficult exercise.

69 As is the position with regard to Limb (a), the key inquiry under Limb (b) does *not* really address the concept of *equality* as such. Its focus, as explained above, is primarily logical as well as commonsensical. Put simply, if there is no rational relation between the relevant differentia on the one hand and the purpose and object of the statute concerned on the other, there is (again) no point even beginning to talk about the concept of equality (let alone whether there has been a violation of the right to equality contrary to Art 12) because *no* reasonable classification even exists *in the first place*. Furthermore, if Limb (b) is not satisfied, it would also follow that the statute in question *cannot possibly* satisfy the concept of equality embodied within Art 12 *in any event* – a result that will likewise obtain if Limb (a) is not satisfied (as noted above at [64] and [67]).

70 It should be noted that the threshold nature of the "reasonable classification" test helps to *balance* the need to accord as much legislative leeway as possible to the legislature against the need to ensure that laws which are patently illogical and/or incoherent do not pass legal muster. In a

related vein, this test simultaneously prevents the courts from becoming "mini-legislatures" (a point which is dealt with in more detail below, especially at [77]).

71 As mentioned above at [61]–[62], the fact that the "reasonable classification" test is a threshold test which does not in itself furnish the requisite criteria for determining whether the right to equality under Art 12 has been violated does *not* mean that this test ought therefore to be dispensed with. Indeed, it is quite *the opposite*. As we pointed out earlier (at [62] above), the "reasonable classification" test serves a minimal – *but vital* – threshold function of requiring logic and coherence in the statute concerned, without which the court cannot meaningfully proceed to determine whether that statute contravenes Art 12. Put simply, there is no point analysing the statute concerned from the perspective of the concept of equality if the "reasonable classification" test is not even satisfied in the first place. *Looked at in this light, the "reasonable classification" test is by no means a merely mechanical or purely procedural test. It does, in fact, contain substantive elements.* That having been said, it is important to reiterate at the same time that the "reasonable classification" test *in itself* does not really aid the court in ascertaining whether or not the concept of equality under Art 12*(1)* has been violated. Let us elaborate.

(2) The "reasonable classification" test in relation to the concept of equality in Art 12(1)

72 It will be recalled that Art 12(1) reads as follows:

> **Equal protection**
>
> **12.**—(1) All persons are ***equal before the law and entitled to the equal protection of the law*** .
>
> …
>
> [emphasis added in bold italics and underlined bold italics]

73 It will be seen that Art 12(1) comprises two main limbs. The *first* states that "[a]ll persons are *equal before the law*" [emphasis added]. No reasonable person would seriously attempt to controvert this particular statement as it is just and fair from both a logical as well as an intuitive point of view. However, what precisely does it mean when we state that "[a]ll persons are equal before the law"? In the first place, what does the phrase "the law" in this particular limb of Art 12(1) mean? Does it refer to *the law in general*? If so, then this particular limb is no more than a *declaratory* statement that is, as just alluded to, self-evident. Alternatively, does the phrase "the law" refer specifically to the statute that is sought to be impugned as being inconsistent with Art 12(1) and, hence, unconstitutional pursuant to Art 4? In the context of the present appeals, "the law" would then refer to s 377A. But, even if that be the case, this limb of Art 12(1) does not really assist us in so far as the concept of equality is concerned – on *what legal basis and on what legal criterion (or criteria)* can the court find that a particular person or group of persons has not been accorded equality of treatment in relation to s 377A? Presumably, all those who fall within the scope of s 377A would be considered to be "equal" before that particular provision, but that would hardly be an argument which the Appellants would want to rely upon. If the Appellants seek to argue that they are not being accorded equal treatment because s 377A applies only to them (*ie*, Lim, Chee and Tan) and no other male homosexuals, that would be an entirely separate and distinct argument which would require a separate criterion (or set of criteria) for determining whether the Appellants' Art 12(1) rights have indeed been violated.

74 What, then, about the second limb of Art 12(1), which states that "[a]ll persons are … *entitled*

to the equal protection of the law" [emphasis added]? As in the case of the first limb, what does "the law" in this second limb refer to? If it refers to *the law in general*, then, likewise as in the case of the first limb, the second limb would be no more than a *declaratory* statement which is, by its very nature, self-evident. Alternatively, if the phrase "the law" in the second limb of Art 12(1) refers to the impugned statute (in the present appeals, s 377A), this would be of no assistance to the Appellants since they are *not* seeking equal *protection under* s 377A. Indeed, what they desire is *quite different*, in that what they are seeking is *protection from* ***prosecution under*** s 377A.

75 It should be noted that Ms Barker, in her oral submissions before this court, was of the view that the two aforementioned limbs of Art 12(1) ought to be read as an integrated whole. We agree with this to the extent that the second limb follows from the first. However, this does not preclude (for the purposes of analytical clarity) the approach to the two limbs which has just been set out.

Is there an additional test of illegitimacy?

76 We pause at this juncture to deal with the Judge's observation in *Lim Meng Suang* that a statute can still be rendered unconstitutional *even if* it satisfies the "reasonable classification" test, *provided* it can be demonstrated that the *object* of that statute is *illegitimate* (at [114]–[116]). Not surprisingly, the Appellants have endorsed this particular proposition. We also note that counsel for the Respondent, Mr Aedit Abdullah SC ("Mr Abdullah"), whilst not purporting to endorse this proposition *in toto*, indicated that he was willing (but only by way of a fallback argument) to admit to a test of *unreasonableness* along the lines embodied in this court's decision in *Yong Vui Kong* (at [111]–[119]) and the seminal English Court of Appeal decision of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 ("*Wednesbury*") (*cfLim Meng Suang* at [116]). We note, parenthetically, that there was no real elaboration by Mr Abdullah with regard to the Respondent's reliance on *Yong Vui Kong* in this connection. In so far as the test of unreasonableness in *Wednesbury* is concerned, Lord Greene MR (with whom Somervell LJ and Singleton J agreed) described the requisite level of unreasonableness as involving (in the context of administrative law) a decision or conclusion that was "so unreasonable that no reasonable [public] authority could ever have come to it" (see *Wednesbury* at 230 and 234). We would, with respect, *differ* from *all* these aforementioned views. Let us elaborate.

77 It is important to commence our analysis in this regard by referring to a fundamental proposition that constitutes part of the wider concept of the separation of powers. Put simply, the courts are *separate and distinct from* the legislature. More specifically, whilst the courts do "make" law, this is only permissible in the context of the interpretation of statutes and the development of the principles of common law and equity. It is *im*permissible for *the courts* to arrogate to themselves *legislative powers* – to become, in other words, "*mini-legislatures*". This must necessarily be the case because the courts have no mandate whatsoever to create or amend laws in a manner which permits recourse to *extra-legal policy factors as well as considerations*. The jurisdiction as well as the power to do so lie exclusively within the sphere of *the legislature*. Indeed, the power of the legislature to enact and amend laws is governed by quite a different procedure. Hence, the duty of a court is to *interpret* statutes enacted by the legislature; it *cannot amend or modify statutes* based on its own personal preference or fiat as that would be an obvious (and unacceptable) usurpation of the *legislative* function.

78 The legislative powers which we have just discussed are different from the court's role in developing the law – a task which it frequently undertakes. As already alluded to above, the courts do indeed develop the principles of common law and equity. Indeed, as Lord Reid famously observed in an extra-judicial lecture (see "The Judge As Law Maker" (1972–1973) 12 JSPTL (NS) 22 ("*The Judge As Law Maker*") at p 22):

> There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the pass word and the wrong door opens. But we do not believe in fairy tales any more.

79 The process of such development is, however, *quite different* from the process of *legislative* enactment or amendment of legislation, and is effected through *development of case law*. In this regard, it should be noted that *the legislature* can *reject* existing principles of common law and equity. Put simply, the legislature can enact a statute *overruling* an existing principle of common law or equity if the legislature thinks it fit to do so. However, absent such a situation, the courts can – and do – develop the principles of common law and equity.

80 A paradigm example of this may be seen in the law of negligence, commencing with the seminal House of Lords decision of *M'Alister (or Donoghue) (Pauper) v Stevenson* [1932] AC 562 (more commonly cited as "*Donoghue v Stevenson*" and referred to hereafter as "*Donoghue*"). This decision effected a sea change in this foundational area of the law of tort (see generally the valuable background prior to this decision furnished in Edward H Levi, *An Introduction to Legal Reasoning* (University of Chicago Press, 1949), as well as equally valuable background pertaining to the decision itself in Geoffrey Lewis, *Lord Atkin* (Butterworths, 1983; reprinted, Hart Publishing, 1999) at pp 51–67; see also Matthew Chapman, *The Snail and the Ginger Beer: The Singular Case of Donoghue v Stevenson* (Wildy, Simmonds & Hill Publishing, 2009) and *The Juridical Review – Donoghue v Stevenson: The Paisley Papers* (*Special Edition*) (2013)). Indeed, the law of negligence has developed even further since *Donoghue*. For example, the House of Lords extended the law of negligence to cover liability for negligent misstatements in its path-breaking decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 ("*Hedley Byrne*"). In this regard, and several years prior to the decision of the House in *Hedley Byrne*, Denning LJ (as he then was) adopted precisely the legal position which was ultimately endorsed in *Hedley Byrne* itself, but found himself in a *minority* in the English Court of Appeal decision of *Candler v Crane, Christmas & Co* [1951] 2 KB 164 ("*Candler v Crane*"). Indeed, Denning LJ significantly referred in an extra-legal context to his powerful dissenting judgment in *Candler v Crane* as his "most important judgment" (see Lord Denning's "Foreword" to the inaugural volume of the *Denning Law Journal* ([1986] Denning LJ 1 at p 1)). In the course of delivering his judgment in that case, Denning LJ drew a distinction (at 178) between "timorous souls who were fearful of allowing a new cause of action" and "bold spirits who were ready to allow it [*viz*, a new cause of action] if justice so required". Indeed, the ultimate vindication by the House of Lords in *Hedley Byrne* of Denning LJ's views in *Candler v Crane* bears ample testimony to the virtues of the courts being "bold spirits". And something of that spirit can be seen in the course of the development of the law of negligence in countries where English law has been transplanted – as witnessed, for example, in the decision of this court in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 (see also generally the valuable survey as well as analysis in David Tan & Goh Yihan, "The Promise of Universality – The *Spandeck* Formulation Half a Decade on" (2013) 25 SAcLJ 510).

81 The briefest of summaries of the development of the law of negligence set out in the preceding paragraph is but one illustration not only of the nature of the courts' development of the principles of common law and equity, but also (and more importantly in the context of the present appeals) of the fact that the courts will not hesitate to develop the law *in appropriate circumstances*, taking on the nature of "bold spirits" in those circumstances (indeed, Ms Barker herself *supported* this particular point by citing decisions of this court on the development of *the common law* in her further written reply submissions in an attempt to persuade this court to adopt a more activist approach towards the

interpretation of Art 12(1); the decisions which she cited in this regard were *Lau Siew Kim v Yeo Guan Chye Terence and another* [2008] 2 SLR(R) 108 and *Chandran a/l Subbiah v Dockers Marine Pte Ltd (Owners of the Ship or Vessel "Tasman Mariner", third party)* [2009] 3 SLR(R) 995). *However*, in *other* situations, the courts will necessarily be more circumspect. This is especially the case with respect to matters which are uniquely within the sphere of *the legislature*. Whilst, for example, a court will not hesitate to *interpret* a statute, it will *not – indeed, cannot – amend or modify a statute* based on its own personal preference or fiat (or even *its* view of what *it thinks* the relevant *extra-legal considerations should be*) because (as already noted above at [77]) that would be an obvious and unacceptable usurpation of the *legislative* function.

82 Here, we come to the crux of the issue at hand. To permit the court the power – *over and above* its power of scrutinising legislation pursuant to *the "reasonable classification" test* – to declare a statute inconsistent with Art 12(1) (and, therefore, unconstitutional under Art 4) because the ***object*** of that statute is *illegitimate would precisely be to confer on the court a licence to usurp the legislative function in the course of becoming (or at least acting like) a "mini-legislature"*. Put another way, *only the legislature has the power to review its own legislation and amend legislation accordingly if it is of the view that this is necessary*. The *courts*, in contrast, have *no* such power – *nor ought they to have such power.*

83 Indeed, to argue, as the Appellants seemed to do, that the court has the duty to declare a statute unconstitutional if its object is "illegitimate" *does not explain the legal basis upon which the court can find the object to be illegitimate in the first place*. If the argument is that the object of the statute is illegitimate because that object is unconstitutional, this would lead to a circularity which, *ex hypothesi*, lacks the requisite explanatory as well as normative power. The courts are called upon – and ought – to be "bold spirits", *but **only** on **appropriate** occasions.* Put simply, they *cannot* claim to act as "bold spirits" *when they are in fact acting outside their proper sphere of jurisdiction.* This point will become particularly important in the analysis below – especially in the face of the Appellants' calls to this court to update the law on s 377A based purely on *extra-legal arguments* which are *appropriate only* in the *legislative* sphere. *Put simply but clearly, to permit the court to effectively amend (as opposed to interpret) the law in this area would not only entail the court acting beyond its jurisdiction, but also permit the Appellants to obtain by the (judicial) backdoor what they ought to have sought to obtain by the (legislative) front door.*

84 That having been said, *an important qualification* is in order at this juncture. The important qualification is this: to the extent that there are *serious flaws* with regard to the *intelligibility* of the differentia embodied in a statute and/or a *clear disconnect* between that differentia and the purpose and object of the statute, the court will hold that the statute does not pass legal muster under Art 12(1). *This may be viewed, in substance at least, as introducing a limited element of illegitimacy which is embodied in the "reasonable classification" test. However, it is vitally important to note that this element of illegitimacy is **not** an additional test over and above the "reasonable classification" test; it is,instead, no more than an application of the "reasonable classification" test.* The only *legal* test for the purposes of Art 12(1) is the "reasonable classification" test, and it is important to note that in applying this test, the court would be applying a ***legal** test that is not based on extra-legal considerations,but rather, one that is clearly within its remit as a court of law (as opposed to acting as if it were a "mini-legislature")*.

85 Put simply, in determining the constitutionality of an impugned statute under Art 12(1), there are *no legal standards* which can guide the court in ascertaining whether the object of that statute is illegitimate. In the nature of things, any purported standards would be *extra-legal* in nature. This brings us back to the point just made – that *the legislature* is the appropriate forum to canvass the issue of whether or not the object of a particular statute is illegitimate because the extra-legal

standards pertinent to such an issue would be quintessentially within the sphere of legislative review.

86 At this juncture, we note (as mentioned above at [76]) that Mr Abdullah was prepared (albeit only by way of a fallback position) to endorse the test in *Wednesbury*. This particular test is premised on the concept of *unreasonableness*. Whilst it does constitute a legal standard, it is not, in our view, an appropriate legal standard in the context of a challenge to the *constitutionality* of a statute. More importantly, *even if* the concept of unreasonableness laid down in *Wednesbury* were applicable, it would not aid this court inasmuch as the present constitutional challenge to s 377A is premised on *extra-legal* arguments which, as we have already noted, are quintessentially within the purview of *the legislature*. It also bears reiterating what has just been alluded to above at [84] – *viz*, that in situations of *extreme illogicality and/or incoherence*, the statute concerned would probably *not* be able to pass legal muster under one *or* both limbs of *the "reasonable classification" test* in any event. Indeed, in such situations, the statute might possibly infringe *other* Articles of the Singapore Constitution as well (*cf* also *Lim Meng Suang* at [116]).

87 We note that Ms Barker cited *Report of the Constitutional Commission 1966* (27 August 1966) ("the 1966 Report"), the report of the constitutional commission chaired by the then Chief Justice Wee Chong Jin, to buttress her argument that Art 12*(1)* ought to be invoked by this court (via a declaration of s 377A's unconstitutionality) in order to ensure that the Appellants were accorded equality before the law. In particular, Ms Barker referred to para 32 of the 1966 Report, which dealt with Art 8 of the then Constitution of Malaysia (the equivalent of Singapore's present Art 12) and which stated as follows:

> We deal now with Article 8 of the present Constitution of Malaysia. Having regard to our Terms of Reference, our recommendations on the form and substance that this Article should take and contain will constitute the very core of our views on the whole problem of minority rights in Singapore. *In the first place we deem it essential that the principle of equality before the law and equal protection of the law for all persons should be clearly and categorically laid down.* ***Secondly, it should be no less clearly and categorically laid down that there shall be no discrimination in any law or in the effect of any law, except as expressly authorised by the Constitution, against any citizen on the ground only of race, religion, place of birth or descent . Lastly, it should also be clearly and categorically laid down that there shall be no discrimination in the administration of any law, except as expressly authorised by the Constitution, against any person on the ground only of race, religion, place of birth or descent*** . [emphasis added in italics, bold italics and underlined bold italics]

88 Ms Barker relied on all the italicised words set out in the above quotation to support the argument mentioned in the preceding paragraph. In our view, the sentence "In the first place we deem it essential that the principle of equality before the law and equal protection of the law for all persons should be clearly and categorically laid down" is but *a paraphrase of* the language of Art 12(1) itself, and to that extent, is clearly declaratory and aspirational in nature (see also below at [90]). For the reasons explained above (at [73]–[74]), this particular sentence (like the words in Art 12(1)) does not really set out any concrete *legal* principles which can guide the courts, such as the "reasonable classification" test. Indeed, the "reasonable classification" test itself was formulated by the courts, and it does (as we have explained above) furnish the courts with particular *legal* principles that give effect (albeit not fully) to the concept of equality embodied in Art 12(1). Significantly, the last two sentences of para 32 of the 1966 Report, which correspond to Art 12*(2)*, refer *specifically* to the concept of "*discrimination*" [emphasis added], albeit in the context of the proscription of discrimination *on specific grounds* (as opposed to a general proscription of discrimination as such). Indeed, that the *specific and applicable principles relating to the right to equality under the Singapore Constitution are located in Art 12(2) – rather than Art 12(1) – is*

*confirmed by the following extract from the very next paragraph of the 1966 Report (*viz*, para 33)*:

> We consider, having regard to *the multi-racial, multi-cultural, multi-lingual and multi-religious composition of the population of Singapore and of its citizens*, that ***the recommendations we have outlined in the preceding paragraph*** will not only *form an impregnable shield against racial communalism and religious bigotry as well as an effective weapon to wipe away any fears the minorities may harbour concerning discriminatory treatment but will also lay a firm and lasting foundation on which to build a democratic, equal and just multi-racial society in Singapore*. … [emphasis added in italics and bold italics]

Read in its proper context, the reference to "recommendations" in the extract just quoted is clearly a reference to the principles embodied in Art 12*(2)*, and *not* Art 12*(1)*.

89 This would be an appropriate point to turn to a consideration of the legal relationship between Art 12(1) and Art 12(2).

The legal relationship between Art 12(1) and Art 12(2)

Art 12(1) and Art 12(2) read inter se

90 To recapitulate, the analysis proffered above at [73]–[74] is that Art 12*(1)* appears to be more of a *declaratory (as well as aspirational) statement of principles*, as opposed to a set of specific legal criteria as such. This is, perhaps, not surprising as Art 12(1) is framed at *a very general level*. Indeed, as alluded to in the analysis proffered above, the two limbs of Art 12(1) are both logically and intuitively attractive, and their content would not be something that a reasonable and fair-minded person would seriously controvert. However, it is perhaps precisely because Art 12(1) is framed at such a general level that it does not furnish the *specific* legal criteria which can guide the courts in determining, in specific fact situations, whether a particular statute violates Art 12. That having been said, it bears reiterating that any statute *must* nevertheless pass (threshold) muster under the *"reasonable classification" test* before it can be found to be consistent with Art 12. More importantly, we emphasise that what we have just said (about the lack of specific legal criteria in Art 12(1)) does *not* mean that there are no specific legal criteria which can guide the court in specific fact situations. On the contrary, *in addition* to the *"reasonable classification" test*, Art 12*(2)* furnishes specific as well as concrete legal criteria which ensure that any statute which is *discriminatory within the scope and meaning of Art 12(2)* (and, hence, contravenes the concept of equality embodied in Art 12) will, pursuant to Art 4, be void to the extent of such contravention and inconsistency. On a practical level, parties are free to challenge the constitutionality of a statute under Art 12(1) or Art 12(2) or, indeed, under both provisions (as was the case here). The court's decision on the constitutionality (or otherwise) of the impugned statute would ultimately depend on the particular facts and circumstances of the case.

91 Article 12(2) (also set out earlier at [55] above) reads as follows:

> (2) *Except as expressly authorised by this Constitution*, there ***shall*** *be* ***no discrimination*** *against* ***citizens of Singapore*** *on the ground* ***only*** of ***religion*** , ***race*** , ***descent*** *or* ***place of birth in any law*** *or* in ***the appointment to any office or employment under a public authority*** *or* in ***the administration of any law relating to the acquisition, holding or disposition of property*** *or* ***the establishing or carrying on of any trade, business, profession, vocation or employment*** . [emphasis added in italics, underlined italics, bold italics and underlined bold italics]

92 It can immediately be seen that Art 12(2) furnishes *specific legal criteria as to what constitutes discrimination and is therefore prohibited from a constitutional perspective*. In many ways, the approach adopted in Art 12(2) is more structured and principled compared to the approach under open-ended constitutional provisions in some other jurisdictions that place the courts in the unenviable position of being (in effect) "mini-legislatures" of sorts. It is also noteworthy (indeed, crucial, in so far as the present appeals are concerned) that within the prohibited grounds of discrimination delineated in Art 12(2), there is *no reference to "sex", "sexual orientation" or "gender"*. This is not surprising. Not all Constitutions will be exactly the same. Each Constitution is supposed to reflect the social mores of the society which it emanates from. It is true that such social mores can – and often will – change over time. However, there is nothing precluding a legislature from *amending* the Constitution accordingly. In the Singapore context, the provision governing amendment of the Singapore Constitution is Art 5(2), which states:

> A Bill seeking to amend any provision in this Constitution shall not be passed by Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of the elected Members of Parliament.

An amendment of the Singapore Constitution is obviously *beyond* the remit of our courts. It is nevertheless important to emphasise that the possibility of constitutional amendment just referred to furnishes our Parliament with *the necessary flexibility to ensure that the Singapore Constitution reflects the* ***prevailing*** *social mores as well as aspirations of Singapore society.*

93 Before proceeding to consider some other constitutional provisions in a comparative context, we ought to briefly address a further argument by Ms Barker based on the fact that Art 12(2) applies *only* to *citizens of Singapore*. She argued that in contrast, Art 12(1) was framed more broadly to apply to "*[a]ll* persons" [emphasis added], and hence (citing the paragraph of the 1966 Report quoted above at [87]), Art 12(1) ought to be given an *expansive* interpretation that goes *beyond* the "reasonable classification" test so as to accord equal protection to all persons. *However*, that brings us back full circle to the difficulties outlined above (especially at [77]) to the effect that the courts would then become "mini-legislatures". Indeed, the argument proffered by Ms Barker is a double-edged legal sword inasmuch as if Art 12(1) could be construed and applied in the broad manner which she suggested, why, then, was it necessary to promulgate Art 12*(2)*? After all, taking the broad approach canvassed by Ms Barker, every prohibited ground of discrimination referred to in Art 12(2) would *necessarily* be *subsumed* under Art 12(1) and Art 12(2) would then be rendered redundant. *In any event, nothing in this particular argument by Ms Barker impacts the respective cases of not only her clients but also Mr Ravi's client inasmuch as all the Appellants are citizens of Singapore*. Be that as it may, it also bears emphasising that even though we do not accept Ms Barker's argument that an expansive interpretation should be given to Art 12(1), this does *not* mean that *non*-citizens are *without any rights*. They have rights under Art 12(1), in that they can avail themselves of *the "reasonable classification" test*. Indeed, it can be said that *this is the general legal position in any event*. It should also be borne in mind that non-citizens are also entitled to other specific fundamental rights under the Singapore Constitution, some of which are set out in the next paragraph.

94 It is also not – in principle – unfair that *citizens of Singapore* are given *further (and entrenched) rights under Art 12(2)*. Indeed, there are other fundamental rights in Pt IV of the Singapore Constitution which *only citizens of Singapore* can avail themselves of (see, for example, Art 13 in relation to the prohibition of banishment and the right to freedom of movement; Art 14 in relation to the right of freedom of speech, assembly and association (see also the decision of this court in *Review Publishing Co* at [254] and [257]); and Art 16(1) in relation to rights in respect of education). However, there are also many other Articles in Pt IV of the Singapore Constitution which (probably because they impact *any* person in *the most fundamental* manner) apply to *all* persons

(see, for example, Arts 9(1)–9(4) in relation to liberty of the person; Art 10(1) in relation to the prohibition of slavery and forced labour; Art 11 in relation to protection against retrospective criminal laws and repeated trials; and Art 15 in relation to freedom of religion). In any event, the question of whether or not *non*-citizens should be given similar rights as citizens of Singapore in the present context, whether with respect to some or all of the prohibited grounds of discrimination set out in Art 12(2) (or, albeit less probably, outside Art 12(2)) is obviously something beyond the remit of the courts, and, as already mentioned, is in any event irrelevant on the facts of the present appeals.

Comparative constitutional provisions

(1) Constitutional provisions which make express reference to "sex", "sexual orientation" and/or "gender"

95 It is instructive, in our view, that in *contrast to Art 12(2)*, there are constitutional provisions from other jurisdictions which *expressly prohibit discrimination on the grounds of "sex", "sexual orientation" or "gender" (or a combination thereof)*.

96 One example is Art 8(2) of the Malaysian Constitution. The material part of Malaysia's Art 8 reads as follows:

> **Equality**
>
> **8.** (1) All persons are equal before the law and entitled to the equal protection of the law.
>
> (2) Except as expressly authorized by this Constitution, there shall be no discrimination against *citizens* on the ground only of religion, race, descent, place of birth or ***gender*** in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.
>
> …
>
> [emphasis added in italics and bold italics]

97 Turning to the Indian Constitution, which prohibits discrimination on the grounds of (*inter alia*) sex, the relevant Articles on the right to equality read as follows:

> ***Right to equality***
>
> **14. Equality before law.**—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
>
> **15. Prohibition of discrimination on grounds of religion, race, caste**, ***sex*** **or place of birth.**—(1) The State shall not discriminate against *any citizen* on grounds only of religion, race, caste, ***sex*** , place of birth or any of them.
>
> (2) No citizen shall, on grounds only of religion, race, caste, ***sex*** , place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—
>
> (*a*) access to shops, public restaurants, hotels and places of public entertainment; or
>
> (*b*) the use of wells, tanks, bathing ghats, roads and places of public resort maintained

wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

16. Equality of opportunity in matters of public employment.—(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) *No citizen* shall, on grounds only of religion, race, caste, ***sex*** , descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

…

[emphasis added in italics, bold italics and underlined bold italics]

98 Section 15 of the Canadian Charter of Rights and Freedoms likewise contains an express prohibition of discrimination on the grounds of (*inter alia*) "sex", as follows:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, ***sex*** , age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the

amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, ***sex*** , age or mental or physical disability.

[emphasis added in bold italics]

99 Finally, to take just one more (and even clearer) illustration, s 9 of ch 2 of the Constitution of South Africa, which prohibits discrimination on the grounds of (*inter alia*) gender, sex *and* sexual orientation, reads as follows:

9. Equality.—(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, ***gender*** , ***sex*** , pregnancy, marital status, ethnic or social origin, colour, ***sexual orientation*** , age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

[emphasis added in bold italics]

(2) Open-ended constitutional provisions

100 As mentioned above at [92], there are, in contrast, *other* jurisdictions where the corresponding constitutional provision on the right to equality is *open-ended*. The paradigm example is the US Constitution – in particular, the Fourteenth Amendment, which reads as follows:

AMENDMENT XIV

SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

…

101 It can be seen that the provision just quoted in the preceding paragraph is open-ended inasmuch as *it does not contain any equivalent of Art 12(2)*. Not surprisingly, therefore, the US courts (in particular, the US Supreme Court) have taken the view that different grounds of discrimination will

attract different levels of scrutiny, with the legal principles applicable to the different grounds to be enunciated and developed through *case law*. Had, in fact, the Fourteenth Amendment to the US Constitution contained a provision which was *equivalent to our Art 12(2)*, the position might have been quite different. We pause to observe, parenthetically, that an open-ended provision on the right to equality in a Constitution brings problems and difficulties of its own. How, for example, is the court to decide *which particular ground* of discrimination ought to come within the ambit of that provision? There is every danger that the court could end up acting like a "mini-legislature". Indeed, it might have *no choice* but to do so, except, perhaps, in the clearest instances (which would, *ex hypothesi*, have the endorsement of at least the majority of the population in that particular jurisdiction, although there would be very real and practical difficulties in the *court's* ability to ascertain the existence of such endorsement in the first place).

A brief summary of our analysis thus far

102 A brief summary at this juncture is apposite, but it should be read and understood in conjunction with the detailed analysis proffered above:

(a) The "reasonable classification" test is the applicable test in Singapore for determining the constitutionality of a statute under Art 12(1). It is a *threshold* test inasmuch as a failure to satisfy it (by satisfying both Limb (a) *and* Limb (b) of the test) will result in the statute concerned being rendered void *without* the court even having to *directly* engage the concept of equality as such. This is because the statute concerned would be so illogical and/or incoherent that, *ex hypothesi*, it cannot possibly even begin to satisfy the concept of equality embodied in Art 12(1). To that extent, the "reasonable classification" test contains substantive elements which impact the concept of equality itself.

(b) Article 12*(1)* is more declaratory and aspirational in nature. However, as stated at sub-para (a) above, any statute which does not satisfy the "reasonable classification" test will necessarily be in contravention of Art 12(1).

(c) To the extent that both limbs of the "reasonable classification" test embody the requirements of logic and/or coherence, it can be said that a statute is *illegitimate* if and to the extent that either or both of these requirements is *not* satisfied because the statute fails to pass muster under one or both of the limbs of the "reasonable classification" test. For the avoidance of doubt, it should be emphasised that there is *no further* test of *illegitimacy* (*vis-à-vis* the object of the impugned statute) for the detailed reasons set out in this judgment.

(d) Article 12*(2)* prohibits *specific* grounds of discrimination, which are the *only* grounds of discrimination that are proscribed under the Singapore Constitution. Any discrimination (albeit only) on any of the grounds stated in Art 12(2) will render the statute concerned void pursuant to Art 4 to the extent of the inconsistency with Art 12(2). Article 12(2) sets out a structured and principled approach to the right to equality, as compared to constitutional provisions in other jurisdictions which are more open-ended and which might therefore vest too much "legislative" power in the courts. Although only specific grounds of discrimination are prohibited under Art 12(2), the necessary flexibility to include additional prohibited grounds of discrimination exists inasmuch as Art 12(2) can be amended by the Singapore Parliament (pursuant to Art 5 of the Singapore Constitution) in order to reflect the prevailing social mores as well as aspirations of Singapore society at any given point in time. Whilst Art 12(2) applies only to citizens of Singapore, non-citizens are nevertheless still accorded protection under Art 12(1) pursuant to the "reasonable classification" test.

103 Let us now turn to *apply* the principles set out above to the facts of the present appeals.

Our decision on whether s 377A violates Art 12(1)

Our approach

104 As already mentioned earlier, the "reasonable classification" test must necessarily be the first legal port of call. This court must also consider whether or not the facts of the present appeals fall (more specifically) within Art *12(2). However*, before proceeding to examine these two issues, there is a significant preliminary issue that needs to be considered: is there (as the Respondent argues and, not surprisingly, the Appellants refute) a *presumption of constitutionality* where s 377A is concerned, given the fact that it was promulgated during *colonial* times when, *ex hypothesi*, there was (at least literally speaking) no Constitution in existence in Singapore?

Is there a presumption of constitutionality?

105 As alluded to above, the Appellants argue that the Respondent cannot rely on a presumption of constitutionality in so far as the legal status of s 377A is concerned. In particular, they point to the fact that s 377A was enacted at a point in time when there was *no Constitution in existence* in Singapore. In doing so, they draw a distinction between laws enacted before Singapore became an independent sovereign State on 9 August 1965 ("pre-Independence laws") and laws enacted thereafter ("post-Independence laws").

106 The difficulty with the aforesaid distinction is that whilst there was (literally speaking) no Constitution in existence in Singapore at the time pre-Independence laws were promulgated, these laws nevertheless constitute part of the corpus of Singapore law. In this regard, Art 162 of the Singapore Constitution ("Art 162"), which provides for the continuation of existing laws, might be usefully noted:

> **Existing laws**
>
> **162**. Subject to this Article, all existing laws shall continue in force on and after the commencement of this Constitution and all laws which have not been brought into force by the date of the commencement of this Constitution may, subject as aforesaid, be brought into force on or after its commencement, but all such laws shall, subject to this Article, be construed as from the commencement of this Constitution with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution.

Looked at in this light, it is difficult to regard pre-Independence laws as being somehow "inferior" to post-Independence laws inasmuch as the former were promulgated during colonial times. Whilst there was some discussion as to whether or not Art 162 had a substantive (as opposed to a merely technical (including linguistic)) effect in so far as the words "modifications, adaptations, qualifications and exceptions" were concerned, this does not detract from the fact that pre-Independence laws do in fact constitute part of the corpus of Singapore law. If any of these laws is alleged to be unconstitutional, that will have to be determined (as in the present appeals) by the courts in accordance with the relevant constitutional rules and principles.

107 Mr Abdullah accepted (correctly, in our view) that whilst the presumption of constitutionality ought to still operate even in relation to pre-Independence laws, the presumption might not, in the nature of things, operate as strongly as it would compared to post-Independence laws (which would necessarily have been promulgated in the context of, *inter alia*, an elected legislature which, it can be

assumed, would have fully considered all views before enacting the (post-Independence) laws concerned). As mentioned in the preceding paragraph, it would, in our view, be too artificial and too extreme to discard the presumption of constitutionality altogether in so far as pre-Independence laws are concerned. The approach advocated by Mr Abdullah represents a viable middle-ground which avoids throwing out the baby together with the bathwater. Indeed, when viewed from a practical perspective, the court, in applying the presumption of constitutionality, will always have regard to all the circumstances of the case (including both the relevant text *as well as* the context of the statute concerned).

108 To summarise, whilst the presumption of constitutionality applies in the context of the present appeals, this is subject to the precise facts and circumstances which we shall be considering in due course. Let us now turn to the application of the "reasonable classification" test to s 377A.

Application of the "reasonable classification" test to s 377A

109 As mentioned earlier at (*inter alia*) [60] above, the "reasonable classification" test comprises two limbs, both of which must be satisfied before the test is satisfied. To recapitulate (albeit in the briefest of terms), Limb (a) requires the classification prescribed by the statute concerned to be founded on an intelligible differentia, while Limb (b) requires a rational relation between that differentia and the object sought to be achieved by the statute.

(1) Is the classification prescribed by s 377A based on an intelligible differentia?

110 As already noted above (at [23]), the Judge held in *Lim Meng Suang* that it was clear that the classification prescribed by s 377A was based on an intelligible differentia inasmuch as there was little difficulty in determining who fell within and without the provision. In his view (see *Lim Meng Suang* at [47]–[48]):

> 47 The First Limb requires that the classification prescribed by the impugned legislation must be based on an intelligible differentia. "Intelligible" means something that may be understood or is capable of being apprehended by the intellect or understanding, as opposed to by the senses. "Differentia" is used in the sense of a distinguishing mark or character, some attribute or feature by which one is distinguished from all others. Scientifically, one talks of an attribute by which a species is distinguished from all other species of the same genus.
>
> 48 Applying this to the present case, it is quite clear that the classification prescribed by s 377A – *viz*, male homosexuals or bisexual males who perform acts of "gross indecency" on another male – is based on an intelligible differentia. It is also clear from the differentia in s 377A that the section excludes male-female acts and female-female acts. There is little difficulty identifying who falls within this classification and who does not. The Court of Appeal seemed to say as much in *Tan Eng Hong [(standing)]* at [125]–[126]. In my view, the First Limb is satisfied and few can cavil with this conclusion.

111 We agree with the Judge and his reasoning as set out in the preceding paragraph. Indeed, the intense controversy surrounding the debate on s 377A in the extra-legal sphere in general and during the parliamentary debates in October 2007 on proposed changes to the revised edition of the Penal Code then in force (*ie*, the Penal Code (Cap 224, 1985 Rev Ed) ("the 1985 Penal Code")) in particular demonstrate that the differentia embodied in s 377A, whilst *controversial*, is *not unintelligible*. Put simply, if the very elements of s 377A were *illogical and/or incoherent to begin with, there would have been no basis upon which the parties on each side of this cavernous divide could have joined issue in the first place.* Indeed, the controversy relates more to *extra-legal* arguments that are

relevant to the debate as well as the decision in the *legislative* sphere (on whether s 377A should be retained in our statute books or repealed).

112 Mr Ravi argued that the differentia embodied in s 377A was *not* intelligible because it was discriminatory inasmuch as it discriminated between male homosexuals on the one hand and female homosexuals on the other. He also utilised (as did Ms Barker), in oral arguments, the analogy of a law banning all women from driving on the roads.

113 With respect, Mr Ravi has *conflated* the "reasonable classification" test (in particular, the first limb thereof, which is the focus of the present analysis) on the one hand and the issue of whether or not there has been discrimination on the other. Put simply, the latter issue (*viz*, whether or not there has been discrimination) has been merged with the first limb of the "reasonable classification" test. It will be recalled that the "reasonable classification" test is only a *threshold* test (see above at, *inter alia*, [61]–[62]). As we have already explained, this does not mean that the test is merely technical or mechanistic; instead, it does, to some extent, impact the concept of equality in Art 12 itself (see above at [62] and [71]). Indeed, the "reasonable classification" test, in embodying the requirements of logic and/or coherence, also introduces (to *that* extent) a limited element of *legitimacy*, although it has been emphasised above (at [84]–[85]) that there is *no further* test of *illegitimacy* (*vis-à-vis* the object of the impugned statute) as such. Looked at in this light, the differentia embodied in s 377A is both logical and coherent. Mr Ravi obviously begs to differ. However, this difference in view is premised on *substantive criteria that lie outside the scope of the "reasonable classification" test altogether.* In the *Singapore* context, these substantive criteria lie, instead, within the purview of Art 12*(2)* (see above at [92]). Put simply, contrary to what Mr Ravi appeared to suggest, the "reasonable classification test" is *not* the only (and definitive) test for determining whether the right to equality under Art 12 as a whole has been violated. This is because even if an impugned statute passes legal muster under the "reasonable classification" test for the purposes of Art 12(1), it will *also* have to pass legal muster under Art 12(2). As we shall show below (at [181]–[182]), s 377A not only passes legal muster under the "reasonable classification" test, but *also* does *not* run foul of Art 12(2) for the simple reason that Art 12(2) does *not* address or encompass the subject matter of s 377A.

114 Similar reasoning to that set out in the preceding paragraph would apply to Mr Ravi's and Ms Barker's arguments (by analogy) with respect to a law which bans all women from driving on the roads. We would observe, parenthetically, that, in any event, such a law is an extreme provision which would probably not be enacted by a reasonable Parliament in the Singapore context. That having been said, anything is, of course, possible. Should such a law indeed be passed by the Singapore Parliament, there would, in our view, be at least an arguable case that that law would not pass legal muster under the "reasonable classification" test. The differentia embodied in that law might, arguably, be illogical and/or incoherent for the purposes of the first limb (*ie*, Limb (a)) of the "reasonable classification" test. Further, as pointed out above, there is also a second limb (*ie*, Limb (b)) of the "reasonable classification" test which must be satisfied, Limb (a) and Limb (b) being consecutive and *cumulative* aspects of the test. Looked at in this light, it is at least arguable that there might *not* be a rational relation between the differentia embodied in the aforementioned law on the one hand and the purpose and object of that law on the other – unless the purpose and object of that law is precisely to ban all women from driving. However, if that is indeed the case, we would come back full circle, so to speak, to the issue (just mentioned) of whether or not the differentia (as identified under the first limb of the "reasonable classification" test) is illogical and/or incoherent. *No* such circularity arises on the facts of the present appeals.

115 We turn now to the next (and closely-related) issue of whether or not the second limb of the "reasonable classification" test has been satisfied on the facts of the present appeals, *viz*, is there a rational relation between the differentia embodied in s 377A and the purpose and object of that

provision?

(2) Is there a rational relation between the differentia embodied in s 377A and the purpose and object of the provision?

(A) What is the purpose and object of s 377A?

116 Although this particular question of the purpose and object of s 377A did not appear to pose a problem in the court below and, indeed, before this court (at least for the initial part of the parties' oral submissions), it does not – for the reasons set out below – admit of that clear an answer.

(I) The English origins of s 377A

117 Section 377A is based on s 11 of the Criminal Law Amendment Act 1885 (c 69) (UK) ("the 1885 UK Act"), which is more commonly known as "the Labouchere Amendment" (as it was introduced by Mr Henry Labouchere). This court has, in *Tan Eng Hong (standing)*, dealt with the historical backdrop to both the UK and the local positions in some detail. Suffice it to state that the precise origins of s 11 of the 1885 UK Act ("the UK s 11") are none too clear – a point also acknowledged by the Judge in the court below (see *Lim Meng Suang* at [64]). Put briefly, the UK s 11 was introduced at, literally, the eleventh hour, and had nothing to do with the main thrust of the 1885 UK Act itself. It is therefore not surprising that there was no debate in the UK Parliament on this particular provision before enacting it. This merely adds to the mystery surrounding its origins and, more importantly, its purpose and object.

(II) The introduction of s 377A into the Straits Settlements in 1938

118 What, then, of s 377A? Although it was (as already mentioned) based on the UK s 11, it was introduced into our Penal Code only in 1938 – some *53 years after the inception of its original counterpart in the UK.* The UK s 11 was introduced into the Straits Settlements in the form of s 377A of the Penal Code (Cap 20, 1936 Rev Ed) ("the 1936 Penal Code") via s 3 of the Penal Code (Amendment) Ordinance 1938 (No 12 of 1938) ("the 1938 Penal Code Amendment Ordinance"). Whilst an immediate response might, notwithstanding the substantial lapse of time just referred to, be to assume that the purpose and object of s 377A was the same as that of the UK s 11, an equally immediate problem is that the purpose and object of the latter provision was *unclear to begin with*. In this last-mentioned regard, it appears that it has merely been *assumed* that the purpose and object of the UK s 11 was *coterminous with the general language contained therein*. This is not the most enlightened of approaches in so far as ascertaining the purpose and object of a statutory provision is concerned, but it might, in the circumstances, have been the only viable way forward. That having been said, it *does not logically follow that the purpose and object of s 377A would necessarily be the same as that of the UK s 11 – especially when we take into account the fact (already mentioned) that s 377A was enacted some 53 years after the latter provision.* Unfortunately, what *objective* evidence we have on the purpose and object of s 377A is *itself unclear*. Let us elaborate.

(III) The Attorney-General's speech before the Straits Settlements Legislative Council

119 The starting point is the following brief paragraph by the then Attorney-General, Mr C G Howell ("Mr Howell"), in his speech when introducing the Penal Code (Amendment) Bill 1938 ("the 1938 Penal Code Amendment Bill") in the Straits Settlements Legislative Council (that Bill was later enacted as the 1938 Penal Code Amendment Ordinance). Mr Howell stated as follows (see *Proceedings of the Legislative Council of the Straits Settlements* ("*Proceedings*") (13 June 1938) at p B49):

> With regard to clause 4 [later enacted as s 3 of the 1938 Penal Code Amendment Ordinance, which introduced s 377A into our Penal Code] 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 the 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 Gibraltar where conditions are somewhat similar to our own*** . [emphasis added in italics, bold italics and underlined bold italics]

120 Whilst Mr Howell's statement (as quoted in the preceding paragraph) is brief, it is (as we shall see) extremely cryptic. It is, in fact, pregnant with meaning, and (as we shall elaborate upon below) the difficulty lies in ascertaining the precise meaning which Mr Howell intended. Before proceeding to do so, it is appropriate to set out other historical documentation which might be of relevance to the present inquiry into the purpose and object of s 377A.

(IV) The Objects and Reasons accompanying the 1938 Penal Code Amendment Bill

121 We turn, first, to the "Objects and Reasons" which accompanied the 1938 Penal Code Amendment Bill ("the *Objects and Reasons*"). The material part of the *Objects and Reasons* reads as follows (see *Proceedings* (25 April 1938) at p C81):

> 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 [1936 Penal] Code*** . [emphasis added in italics, bold italics and underlined bold italics]

(V) Important questions raised

122 At this particular juncture, *an extremely important point should be noted: whilst Mr Howell referred to the need to supplement the Minor Offences Ordinance 1906 (No 13 of 1906)* ("the 1906 Minor Offences Ordinance") *in his speech to the Straits Settlements Legislative Council* (see above at [119]), *the* Objects and Reasons *referred, instead, to the need to supplement s 377 of the 1936 Penal Code.* (For ease of discussion, we shall hereafter use the term "s 377" to denote not only s 377 of the 1936 Penal Code, but also, where appropriate to the context, its successor provisions up to the time s 377 of the 1985 Penal Code was repealed by the Singapore Parliament via the Penal Code (Amendment) Act 2007 (Act 51 of 2007) ("the 2007 Penal Code Amendment Act").) Why are there references to *different* statutes? More importantly, is there an *inconsistency*, *or* is the inconsistency more *apparent* than real? On a related note, *both* Mr Howell's speech to the Straits Settlements Legislative Council (referred to hereafter as "Mr Howell's Legislative Council speech" where appropriate to the context) *as well as* the *Objects and Reasons* referred to the fact that s 377A was based on *English law* (*ie*, *the UK s 11*). What is the significance, if any, of this last-mentioned reference to English law? Before attempting to answer these questions, we shall continue to set out the rest of the historical documentation that might be relevant to the present inquiry.

(VI) Other relevant historical documentation

(A) COLONIAL OFFICE CORRESPONDENCE

123 There is Colonial Office correspondence relating to the 1938 Penal Code Amendment Ordinance,

which was sent *after* the enactment of that Ordinance (the Ordinance was assented to by the Governor and Commander-in-Chief on 2 July 1938 and came into effect on 8 July 1938). The first piece of correspondence (from the UK Public Record Office, Colonial Office Series 273) is a cover letter dated 13 July 1938 from the Deputy of the Governor of the Straits Settlements, the material part of which reads as follows:

> Sir,
>
> I have the honour to forward herewith Ordinance No.12 of 1938, entitled "An Ordinance to amend the Penal Code (Chapter 20 of the Revised Edition)", together with the Attorney-General's certificate *and* ***report*** *on the Ordinance*.
>
> …
>
> [emphasis added in italics and bold italics]

124 What is interesting in the aforesaid cover letter is the reference to the enclosed "*report*" [emphasis added], which was entitled "Report on an Ordinance to amend the Penal Code (Chapter 20 of the Revised Edition). (No. 12 of 1938)" and dated 21 June 1938 ("the June 1938 Report"). The relevant part of that report (relating to the introduction of s 377A) reads as follows:

> Section 3 [of the 1938 Penal Code Amendment Ordinance] 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 [1936 Penal] Code*** . [emphasis added in italics, bold italics and underlined bold italics]

It will be noticed that the extract just quoted is *virtually identical* to the relevant part of the *Objects and Reasons* set out above (at [121]), and is, correspondingly, *different from* Mr Howell's Legislative Council speech (which refers, instead, to the need to supplement *the 1906 Minor Offences Ordinance*).

(B) ANNUAL REPORTS ON THE ORGANISATION AND ADMINISTRATION OF THE STRAITS SETTLEMENTS POLICE AND ON THE STATE OF CRIME

125 Of possible relevance, too, are some extracts from the *Annual Report on the Organisation and Administration of the Straits Settlements Police and on the State of Crime* ("the *Annual Report*") for the years 1936 to 1938. In particular, reference may be made to the *Annual Report* for the year 1936 at para 40, where it is stated as follows:

> Prostitutes are no longer to be found soliciting in numbers on street parades; they find it more profitable to go to amusement parks, cafes, dancing places and, generally speaking, no exception can be taken to their behaviour. *Singapore, a port and a town combined, is not free from the very low type of prostitute*. The lewd activities of these have been sternly suppressed. ***Male prostitution*** was ***also*** *kept in check*, ***as and when encountered*** . [emphasis added in italics and bold italics]

126 Reference may also be made to the *Annual Report* for the year 1937 at para 36 as well as paras 38–39, where it is stated thus:

> ***Public Morals***

36. The Police took action to suppress the old type of brothel (a keeper and several women) and have prevented as far as it has been possible the establishment of the new type–two or more women living on or available at premises rented for the purpose of prostitution.

Soliciting in public was kept in check, a difficult and unpleasant type of work and one requiring ceaseless supervision. …

…

38. The fact that the Police are not the deciding authorities in matters of ***public morals*** is often overlooked. The duty of the Police is to suppress offences. *Offences* ***against public decency*** are defined in the laws of the land. The presence of ***prostitutes*** on the streets is no offence. *An offence is committed only if* ***a woman persistently solicits to the annoyance of a member of the public . The public have not yet come forward to give evidence that she does so.*** It would seem that in Singapore the concourse of East and West is alone responsible for such publicity as has been given to a state of affairs similar to that in Europe, where it passes almost unnoticed.

39. ***Widespread existence*** of ***male prostitution was discovered and reported to the Government whose orders have been carried out*** .

A certain amount of criticism based probably upon too little knowledge of the actual facts, has been expressed against a policy the object of which is to stamp out this evil. ***Sodomy is a penal offence; its danger to adolescents is obvious; obvious too, is the danger of blackmail , the demoralising effect on disciplined forces and on a mixed community which looks to the Government for wholesome governing .***

[emphasis added in italics, bold italics and underlined bold italics]

127 Finally, reference may be made to the *Annual Report* for the year 1938 at paras 45–48, which read as follows:

Public Morals

45. The duty of the Police in *safeguarding public morals* is limited to enforcing the law. The slightest deviation from such a policy, in this matter more than in any other, would lead to the risk of very serious persecution or connivance. The law of the Colony is based on the law of the United Kingdom, and that human nature is not subject to climatic variations is well proved by a visit to, for instance, Jermyn Street, the dock area of Southampton, or street corners at Woolwich or Sandhurst at the recognised hours. The only difference is to be found in the text of the law in *the words* ***"persistently" solicits*** . The courts have to be satisfied on this point by evidence independent of the Police. This evidence has not been forthcoming in the city of Singapore.

46. *Action against the* ***local brothels*** – ***2 women*** living together–was continued, but rapid changes of addresses and fines of $1 make matters difficult.

47. Action was taken against pimps and traffickers whenever evidence was forthcoming.

48. ***Male prostitution*** *and* ***other forms of beastliness*** *were stamped out as and when opportunity occurred.*

[emphasis added in italics and bold italics]

(VII) Analysis of and decision on the purpose and object of s 377A

128 Let us now return to the important questions posed above (at [122]) as they impact directly and significantly on the crucial inquiry at hand, *viz*, the purpose and object of s 377A. This relates to the application of Limb (b) of the "reasonable classification" test.

129 It will be recalled that one key difficulty lies in the fact that Mr Howell referred to *the need to supplement the 1906 Minor Offences Ordinance* in his speech to the Straits Settlements Legislative Council (see above at [119]), whereas both the *Objects and Reasons as well as* the *June 1938 Report* referred to *the need to supplement s 377* (see above at [121] and [124], respectively).

130 In so far as *the 1906 Minor Offences Ordinance* was concerned, the relevant provision was *s 23* thereof ("s 23"), which read as follows:

> Any person who is found drunk and incapable of taking care of himself, ***or*** is guilty of any riotous, disorderly ***or indecent behaviour*** , ***or*** of ***persistently soliciting or importuning for immoral purposes*** in any ***public*** road or in any ***public*** place or place of ***public*** amusement or resort, or in the immediate vicinity of any Court or of any public office or police station or place of worship, *shall be liable to* a fine not exceeding twenty dollars, or to imprisonment for a term which may extend to fourteen days, and on a second or subsequent conviction to a fine not exceeding fifty dollars or to imprisonment for a term which may extend to three months. [emphasis added in italics, bold italics and underlined bold italics]

131 Counsel for all the Appellants relied heavily on the fact that Mr Howell referred to the 1906 Minor Offences Ordinance to argue that s 377A was enacted in order to combat the problem of *male prostitution*. On their argument, applying s 377A to categories *outside* the narrow category just mentioned (*viz*, male prostitution) would be *over-inclusive and, hence, unconstitutional*. In particular, Ms Barker pointed to the words "persistently soliciting or importuning for immoral purposes" in s 23 as evincing an intention on the part of the Straits Settlements Legislative Council that s 377A (dealing as it did with male-to-male conduct) should cover the social as well as public ill of *male prostitution*. Whilst we see some force in this particular argument, there are at least two difficulties with it. Let us elaborate.

132 The *first* difficulty relates to the fact that s 23 contains not only the phrase "persistently soliciting or importuning for immoral purposes", *but also* the (*more general*) phrase "guilty of any … *indecent behaviour*" [emphasis added]. That these two phrases set out *two separate and distinct limbs* of the offence under s 23 is clear, and is confirmed by the fact that these two limbs presently exist as *two separate and distinct sections* (*viz*, s 19 and s 20, respectively) of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed), the current equivalent of the 1906 Minor Offences Ordinance. This first difficulty in fact leads us to the second difficulty, to which it is (as we shall see in a moment) closely related. This second difficulty lies in the fact that *both* the *Objects and Reasons as well as* the *June 1938 Report* did *not* refer to the need to supplement the 1906 Minor Offences Ordinance at all, but referred *instead* to *the need to supplement s 377.* Section 377 as it stood in 1938 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.

133 This (*apparently*) *alternative* purpose and object of s 377A (*ie*, to *supplement s 377*) is significant *because it is consistent with the other (and more general) limb of s 23 (which, it will be recalled, relates to the proscription of,* inter alia*, "indecent behaviour")*. Indeed, *this* particular limb of s 23 was broader than s 377 inasmuch as it covered "indecent behaviour" that included but was not confined to anal and/or oral sex (hereafter referred to as "penetrative sex"); however, it was confined to *public* conduct. 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.* However, we would expect that prior to our Parliament's repeal of s 377 via the 2007 Penal Code Amendment Act, where acts of penetrative sex were involved, the accused would probably have been charged under s 377 as that section imposed a heavier penalty (compared to s 377A), although the Prosecution would also have had the option of charging the accused under s 377A instead. This is not surprising because, as we have just observed, acts of penetrative sex are *the most serious* instances of the possible acts of "gross indecency". Now that s 377 has been repealed, there is no reason in principle why a charge under s 377A cannot be brought in a situation involving acts of *penetrative* sex between two males (which, as we have already noted, would, *ex hypothesi*, fall within the definition of "any act of gross indecency" within the meaning of s 377A). We note, however, that the current policy (as declared during the October 2007 parliamentary debates mentioned at [111] above) is for the Prosecution to generally *not* charge accused persons under s 377A, so the point just referred to is – in the practical context at least – merely academic. It is, nevertheless, an important point to make in the context of *the present appeals*, particularly in the light of the further written submissions which Ms Barker tendered on behalf of her clients (and which are dealt with below at [144]).

135 Returning to the comparison between s 377A and s 23, s 377A was, as we mentioned above at [133], *broader in scope than s 23* inasmuch as s 377A covered "grossly indecent" acts between males in *private as well*. Such an analysis would explain why Mr Howell referred to the need to supplement *the 1906 Minor Offences Ordinance* in his speech to the Straits Settlements Legislative Council (see above at [119]), and is in fact supported by the reference by Mr Howell himself (*in the same speech*) to the need to capture acts which were committed in *private* as well (which acts, he pointed out, were not captured by the 1906 Minor Offences Ordinance as s 23 *only covered* acts committed in *public*). It would *also* explain why Mr Howell further referred (as, indeed, did the *Objects and Reasons* as well as the June 1938 Report) to the fact that s 377A was based on *English law – specifically, on the UK s 11*, which (despite the lack of clarity as to its precise origins) has always been perceived as a provision having *general* application.

136 We think that the analysis just set out is the most persuasive because it resolves what appears to be an inconsistency (or even a contradiction) between Mr Howell's Legislative Council

speech (see above at [119]) on the one hand and the *Objects and Reasons* as well as the June 1938 Report (see above at [121] and [124], respectively) on the other. But, if that be the case (*ie*, if s 377A was indeed meant to *supplement s 377*), it would then follow that s 377A itself ought to be given *the same general application* as s 377, and – *contrary* to the Appellants' argument – *should not* be confined only to male prostitution.

137 That *s 377* was intended to be of *general* application is clear from the language as well as the historical context of that provision. The language itself is self-explanatory. In so far as the historical context of *s 377* is concerned, it consisted (originally) of two provisions which were worded quite differently. They were clauses 361 and 362 of the original draft Indian Penal Code submitted by the then Indian Law Commission (headed by Lord Macaulay) to the then Governor-General of India in Council, Lord Auckland, in 1837. These clauses read as follows:

> *OF UNNATURAL OFFENCES*
>
> 361. Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine.
>
> 362. Whoever, intending to gratify unnatural lust, touches for that purpose any person without that person's free and intelligent consent, shall be punished with imprisonment of either description for a term which may extend to life and must not be less than seven years, and shall also be liable to fine.

138 That the clauses just quoted in the preceding paragraph (as well as the "successor" provision embodied in s 377) were intended not only to be of *general* application, but *also (and more importantly) to enforce societal morality is clearly evidenced in no uncertain terms by the following observations of the then Indian Law Commission* (see *A Penal Code prepared by the Indian Law Commissioners, and published by command of the Governor General of India in Council* (Pelham Richardson, 1838; reprinted from the Calcutta Edition and reprinted (in turn) by The Lawbook Exchange, Ltd, 2002) at p 117 (also reprinted as *Introductory Report upon the Indian Penal Code* in *The Works of Lord Macaulay: Speeches – Poems & Miscellaneous* vol XI, pp 3–198 at p 144)):

> Clauses 361 and 362 relate to ***an odious class of' offences*** *respecting which it is desirable that as little as possible should be said*. We leave, without comment, to the judgment of his Lordship in Council the two clauses which we have provided for these offences. We are unwilling to insert, either in the text or in the notes, any thing which could give rise to public discussion on ***this revolting subject*** ; *as we are 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*. [emphasis added in italics, bold italics and underlined bold italics]

139 In *contrast*, if the Appellants' analysis of the purpose and object of s 377A (*ie*, that the provision was *only* intended to deal with *male prostitution*) were adopted, there would necessarily be an inconsistency (or even a contradiction) between the purpose and object alleged by the Appellants and the purpose (mentioned in the preceding paragraph) of guarding against "injury … to the morals of the community".

140 Indeed, after s 377A was introduced into the Straits Settlements via s 3 of the 1938 Penal Code Amendment Ordinance, *both* s 377 *and* s 377A were listed under *the broad and general heading*

"Unnatural Offences" (see also, to this effect, the relevant heading and provisions in the Penal Code (Cap 119, 1955 Rev Ed)). This clearly militates *against* the *very specific* purpose and object canvassed by the Appellants *vis-à-vis* s 377A.

141 It should also be noted that the relevant historical documents (see above at [121] and [124]) refer to "*acts* of *gross indecency* between *male* persons" [emphasis added] in a *general* sense, which again militates against the narrow approach advocated by the Appellants.

142 What, then, about the references to *male prostitution* in the various volumes of the *Annual Report* cited above (at [125]–[127])? If one looks at the plain language of s 377A (reproduced above at [3] and [56]), it is clear that the provision would not only capture "grossly indecent" acts between males in a *general* sense, but would *also necessarily capture* (in an *a fortiori* manner) the (relatively) more *specific* acts relating to male prostitution, including procurement as well as abetment by third-party pimps. It should also be noted that both the *Annual Report* for the year 1937 and the *Annual Report* for the year 1938 (at paras 38 and 45, respectively) referred to the problem of "persistently soliciting or importuning for immoral purposes" in the context of *female* – as opposed to male – prostitution. More importantly, perhaps, the *Annual Report* for the year 1937 and the *Annual Report* for the year 1938 both referred (at paras 38 and 45, respectively) to the need for the Police to safeguard "*public morals*" [emphasis added] in a *general* sense (as opposed to in the context of male prostitution specifically). Indeed, the phrase "public morals" constitutes the *heading* of the relevant part of the respective *Annual Reports* mentioned above. This is, of course, wholly consistent with the Respondent's arguments on the purpose and object of s 377A in the present appeals.

143 For the reasons set out above, we 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).

144 As mentioned above at [134], Ms Barker (with the leave of this court) tendered further written submissions on behalf of her clients after the oral hearing before us had concluded. In essence, she argued, first, that the phrase "gross indecency" in s 377A did *not* cover *penetrative* sex and conduct which amounted to an "unnatural offence" under s 377. She argued that s 377A was intended, instead, to cover *other* acts of "gross indecency" *apart from* acts of *penetrative* sex, and that this was the meaning to be attributed to Mr Howell's Legislative Council speech (reproduced above at [119]) with regard to the ambit of s 377A. Ms Barker then proceeded to argue, secondly, that the original purpose of s 377A was to *suppress male prostitution.* To support this particular argument, she cited not only the historical materials already referred to earlier in this judgment, but also further materials relating to the suppression of prostitution and brothels in the Straits Settlements. In addition, she referred to materials demonstrating that in the *English* context, the prosecution of the famous author, Oscar Wilde, under the UK s 11 had been pursuant to his sexual activity with persons who were, in effect at least, male prostitutes. In this connection, we note that Mr Ravi similarly tendered further written submissions which adopted Ms Barker's arguments as stated above. Mr Ravi also advanced arguments based on executive estoppel and doubtful penalisation which were largely premised on Ms Barker's arguments.

145 With respect, we are unable to accept either Ms Barker's or Mr Ravi's arguments. Let us elaborate.

146 In so far as Ms Barker's first argument is concerned, we have already explained above (at [133]) why the phrase "gross indecency" in s 377A must necessarily cover penetrative sex as well. Indeed, it must surely be the case that *male prostitution* might – and, in most cases, probably would

– involve *penetrative* sex (although, conceivably, *other* acts of "gross indecency" could also be involved). On this logical and commonsensical ground alone, the first argument by Ms Barker at [144] above does not, with respect, ring true.

147 In so far as Ms Barker's second argument at [144] above is concerned, the additional historical materials proffered to this court (which included the observations by Ms Nicoll-Jones in "Report on the Investigation of the Problem of Prostitution in Singapore" covering the period from May 1940 to May 1941) are, at best, neutral. They referred to the suppression of prostitution and brothels *generally*. Moreover, their focus (as also alluded to above at [142]) was on *female* (as opposed to male) prostitution. We further note the Respondent's argument in its supplemental written case that, in any event, the references to Ms Nicoll-Jones' observations are irrelevant in so far as those observations were made *after* the enactment of s 377A.

148 In so far as Ms Barker's reference to the trial of Oscar Wilde is concerned, the argument is, again, neutral, at best. As the Respondent pointed out in its supplemental written case, Wilde was also charged under the UK s 11 for engaging in sexual activity with men who were *not* male prostitutes, and he was acquitted in those instances *not* because the men concerned were not male prostitutes, but rather, because the Prosecution did not succeed in proving the ingredients of the offence. In any event, it *does not necessarily follow* from the fact that Wilde might have been convicted under the UK s 11 for sexual activity with persons who were, in effect at least, male prostitutes that this particular provision was *not* intended to cover *more general situations as well*. Indeed, the position is precisely the converse: put simply, if the UK s 11 covered *all* situations relating to "acts of gross indecency" between males, *it would follow that similar situations involving male prostitutes would also be covered on an* a fortiori *basis*. In this regard, there is nothing in the legislative background surrounding the UK s 11 which suggests otherwise. Further (and more importantly), the legislative background surrounding s 377A, which has already been set out in detail above, militates against the interpretation proffered by Ms Barker on behalf of her clients. For the same reasons, Mr Ravi's arguments fall away as they were premised on the very same arguments that Ms Barker advanced.

149 We also note that if the purpose and object of s 377A had been so specific as to only or mainly target the problem of male prostitution, it would have been open to Mr Howell to have been much clearer (and, more importantly, more specific). He spoke, instead, in far more *general* terms in his speech to the Straits Settlements Legislative Council (see above at [119]). We also note that given the *specificity* of the purpose and object argued for by the Appellants, it might have been more direct and more relevant for the Straits Settlements Legislative Council to have simply amended the 1906 Minor Offences Ordinance instead (which, of course, was not the measure taken by the Straits Settlements Legislative Council in 1938).

(VIII) A comparative perspective?

150 In his speech to the Straits Settlements Legislative Council, Mr Howell referred, *inter alia*, to the respective situations in Gibraltar and Hong Kong. Unfortunately, what evidence was available before this court as to the situation in those two jurisdictions at that point in time was not particularly helpful. Indeed, there appears to be no real historical evidence with regard to the situation in Gibraltar at the material time (although we note that Gibraltar's equivalent of s 377A was abolished *legislatively* in 1993).

151 In so far as the situation in Hong Kong was concerned, Hong Kong's equivalent of s 377A was enacted as s 2 of the Hong Kong Criminal Law Amendment Ordinance 1901 (No 3 of 1901). That was done some 37 years prior to the introduction of s 377A into the Straits Settlements. In the "*Objects*

and Reasons" accompanying the Criminal Law Amendment Bill 1901 (HK), the then Attorney-General, Mr W Meigh Goodman, stated as follows (see the *Hongkong Government Gazette* (1 February 1901) at p 170):

> Section 2 of this Ordinance extends to this Colony the provisions of section eleven of the English Criminal Law Amendment Act, 1885. When the various sections of Part I of that Act which is headed "Protection of Women and Girls" were considered with a view to their being embodied in our local legislation relating to that subject, section eleven which is out of place in Part I of the English Act was omitted.

152 Unfortunately, the statement quoted in the preceding paragraph does not aid us in ascertaining what precisely was the purpose and object of Hong Kong's equivalent of s 377A. Indeed, the above statement is somewhat ambiguous and (at best) merely repeats what the (literal) situation in Hong Kong was at the time the 1885 UK Act was promulgated. We should also observe that Hong Kong (like Gibraltar) abolished its equivalent of s 377A *legislatively* in 1991.

(B) Is the "rational relation" requirement satisfied?

153 For the purposes of the second limb (*ie*, Limb (b)) of the "reasonable classification" test, we agree with the Judge that there is a rational relation between the differentia embodied in s 377A and the purpose and object of the provision as set out above. Indeed, given our findings with respect to the two limbs of the "reasonable classification" test, we hold (as did the Judge) that there is, in fact, *a complete coincidence* in the relation between that differentia and that purpose and object.

The issue of illegitimacy

154 As already stated earlier in this judgment, there is *no separate or independent test of illegitimacy* (*vis-à-vis* the object of the impugned statute) for the purposes of ascertaining the constitutionality of that statute under Art 12. There is therefore no need for us to consider the issue of illegitimacy in relation to the facts and circumstances of the present appeals, given our finding (applying the "reasonable classification" test to s 377A) that there is no illogicality or incoherence in the differentia embodied in that provision. It is important to reiterate that the courts cannot become "mini-legislatures". That would be an illegitimate use of their powers. Indeed, the present appeals illustrate precisely the dangers of adopting such an approach. To elaborate, we have already referred above (at [111]) to the intense controversy surrounding the debate on s 377A in the extra-legal sphere in general and during the October 2007 parliamentary debates mentioned in that same paragraph in particular. This controversy has been marked on both sides of a very stark (and often emotional) divide by a great number of *extra-legal* arguments which are clearly and wholly outside the remit of the courts, and which fall instead within the purview of the legislature.

The status and role of extra-legal arguments

155 We turn now to consider the status and role of the aforementioned *extra-legal* arguments, a number of which were made by the parties in both their written as well as their oral submissions before this court. In our view, these arguments are (as already mentioned) clearly *neither* relevant *nor* material in so far as the application of the "reasonable classification" test is concerned. Neither are they relevant in so far as the application of Art 12*(2)* is concerned. What, then, *would* be the relevance (if any) of these arguments? In order to answer this more general question, it would be useful, in our view, to consider the specific extra-legal arguments which were made in the context of the present appeals. We should, however, emphasise that in doing so, we are *not* in any way taking these extra-legal arguments into account for the purposes of our decision on the legal issues set out

above at [41] *vis-à-vis* the constitutionality of s 377A.

156 In our view, whilst many of the Appellants' extra-legal arguments are valid (or, at least, plausible) ones, they are not arguments that may be appropriately considered by the court and are thus *legally irrelevant*. Put simply, the court is *not the appropriate forum* in which to canvass such arguments; the appropriate forum in this regard is, instead, *the legislature*. We shall demonstrate this with reference to each of the extra-legal arguments proffered to this court.

(1) The "tyranny of the majority"

157 One of the extra-legal arguments canvassed by the Appellants was that s 377A represented the "tyranny of the *majority*" *vis-à-vis* persons who were in the Appellants' shoes (and who were in the *minority*). The right to equality under Art 12(1) constituted, so the argument went, the Appellants' legal bulwark against the aforementioned "tyranny of the majority".

158 In our view, this particular argument, whilst attractive at first blush, consists more of rhetoric than of substance. Let us elaborate.

159 First, the argument raises a centuries-old philosophical conundrum to which, to the best of our knowledge, there has (despite the vast amounts of ink that have been spilt on this particular subject) hitherto been no satisfactory solution. Put simply, ought majoritarian rights always to trump minority rights? If not, when should the latter trump the former? In our view, invoking the phrase "tyranny of the majority", *without more*, does not address these questions in a practical (nor, for that matter, in a theoretical) manner. Indeed, the majority could turn the argument just mentioned on its head and contend that likewise, they ought not to be subject to the "tyranny of the *minority*".

160 Secondly, and turning to a more practical point, what the minority (in this case, the Appellants) have to demonstrate to make out their argument is that there is *a legal basis* for claiming that their rights should trump those of the majority. *However, this brings us back full circle to the interpretation as well as the application of Art 12(1) and Art 12(2) which we have already undertaken above*. Any other (and broader) argument would not be one that the court can legitimately address. If at all, such other arguments should be addressed by *the legislature* instead.

161 We should, however, observe, in fairness to the Appellants, that perhaps, their reliance on the argument that there should be no "tyranny of the majority" could *also* be grounded in the (related) argument that it would be wrong for *the majority* to enforce (through s 377A) *societal morality* to the detriment of the *individual rights* of *the minority*. This last-mentioned argument will be dealt with below at [162]–[174] in the course of considering the Appellants' argument based on the absence of harm, to which we now turn our attention.

(2) The argument based on the absence of harm (and societal morality revisited)

162 The Appellants' argument based on the absence of harm was that their sexual conduct caused no harm to others. This particular argument was, of course, part of the broader jurisprudential debate on the enforcement of morals between Lord Devlin on the one hand (see generally Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1963) ("*The Enforcement of Morals*")) and Prof H L A Hart on the other (see H L A Hart, *Law, Liberty and Morality* (Oxford University Press, 1963) as well as, by the same author, *The Morality of the Criminal Law: Two Lectures* (Magnes Press, Hebrew University, 1964) (the two lectures mentioned in the title of this particular work were the Harry Camp Lectures delivered at Stanford University and the Lionel Cohen Lectures delivered at the Hebrew University of Jerusalem, respectively)).

163 The aforesaid debate stemmed from Lord Devlin's famous Maccabaean Lecture in Jurisprudence entitled "The Enforcement of Morals" (1959) 45 Proceedings of the British Academy 129, which was delivered on 18 March 1959 at the British Academy and which was reprinted in the book with the same title (mentioned above) (the lecture constituted the first chapter of that work, albeit with the new title "Morals and the Criminal Law"). What is interesting in the context of the present appeals is that this particular lecture by Lord Devlin was prompted by the views expressed in the *Report of the Departmental Committee on Homosexual Offences and Prostitution* (HMSO, Cmnd 247, 1957), more popularly known as "The Wolfenden Report" (after the chairman of that committee, Sir John Wolfenden) and hereafter referred to as "*The Wolfenden Report*". Paragraph 61 of *The Wolfenden Report* states as follows:

> … We have outlined the arguments against a change in the law, and we recognise their weight. We believe, however, that they have been met by the counter-arguments we have already advanced. There remains one additional counter-argument which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. *Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.* To say this is not to condone or encourage private immorality. On the contrary, to emphasise the personal and private nature of moral or immoral conduct is to emphasise the personal and private responsibility of the individual for his own actions, and that is a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law. [emphasis added]

164 Briefly stated, Lord Devlin was of the view – contrary to that expressed in *The Wolfenden Report* – that *the law could* regulate as well as sanction *private* acts in order to preserve the moral fabric of society. In setting out his views, Lord Devlin proceeded, *inter alia*, on the premise that *there was a societal morality that could constitute the basis upon which private conduct could be regulated and sanctioned by means of the law. This is, in fact, akin to the approach adopted by the Respondent in the present appeals.*

165 Prof Hart, on the other hand, disagreed with this view. Indeed, although Prof Hart's best known works are those cited above (at [162]), he in fact pointed to an earlier article (*viz*, H L A Hart, "Immorality and Treason" *The Listener* (30 July 1959) at pp 162–163) as being not only "one of [his] better [articles]", but also the piece that catalysed the entire debate; in Prof Hart's own words, the article "attacked Devlin. He was horrified. [So] he [published] a whole book [*viz*, *The Enforcement of Morals*] in reply to it" (see "Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman" (2005) 32 Journal of Law and Society 267 at p 284). Put simply, Prof Hart agreed with the views expressed in *The Wolfenden Report*. In doing so, he was, *in contrast to Lord Devlin*, proceeding, *inter alia*, on the premise that *the individual liberty of each person was inviolate, such that societal morality could not be utilised as a justification for regulating and sanctioning private conduct – except to the (limited) extent (as we shall elaborate upon briefly below) that harm would otherwise result to others. This is, in fact, akin to the approach adopted by the Appellants in the present appeals.*

166 Ideas and arguments do not exist in an intellectual vacuum. Not surprisingly, therefore, both Lord Devlin and Prof Hart relied upon works of prior authors in support of their respective views. Lord Devlin's views are consistent with those of the famous Victorian jurist and judge, James Fitzjames Stephen (see James Fitzjames Stephen QC, *Liberty, Equality, Fraternity* (Smith Elder, & Co, 2nd Ed, 1874; reprinted, The University of Chicago Press, 1991) ("*Stephen*"); see also the preface to *The Enforcement of Morals* at p vii), whilst Prof Hart's views are consistent with those of the famous

British philosopher, civil servant and Member of Parliament, John Stuart Mill (see J S Mill, *On Liberty* (John W Parker and Son, 1859; reprinted with Editing as well as an Introduction by Gertrude Himmelfarb in Pelican Books, 1974) ("*Mill*")), whose views were (not surprisingly) the subject of vigorous challenge in *Stephen*. So the debate between Lord Devlin and Prof Hart was an important debate with weighty protagonists on both sides (including their predecessors).

167 As already alluded to above (at [164]), a close analysis of the approach adopted by *the Respondent* in the present appeals will demonstrate that it is essentially relying upon the approach adopted by *Lord Devlin*. In particular, Mr Abdullah focused not a few times upon the argument that s 377A gave effect to public morality. Further, Mr Abdullah submitted that that public morality was one which was determined by *the legislature* to exist, and such determination was uniquely within the purview of that institution. Any *change* (including, presumably, the repeal of s 377A) *therefore lay within the province of the legislature – and the legislature alone*. We pause to observe, parenthetically, that the use of the phrase "*public* morality" ought to be contrasted with the use of the phrase "*popular* morality" as the latter might engender *unnecessarily negative* psychological (as well as other) perceptions. To avoid any possible misunderstanding whatsoever, we shall henceforth utilise (and, in fact, have already utilised) the phrase "societal morality" instead.

168 The Appellants, in contrast, are obviously relying on the views of both Prof Hart as well as J S Mill. In particular, Mill enunciated the famous "harm principle" as follows (see *Mill* at pp 68–69):

> The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties or the moral coercion of public opinion. That principle is that *the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.* His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign. [emphasis added]

169 Turning, first, to the general debate between Lord Devlin and Prof Hart, the arguments on each side of the philosophical divide are, as mentioned above at [166], weighty ones. What is more important is that given those circumstances and given the nature of the arguments themselves, there are no clear answers – not even at a theoretical level and, *a fortiori*, not at a practical one. This is not surprising. Interesting as these issues are as a matter of jurisprudence and legal philosophy, they are issues that lie quintessentially within the sphere of *the legislature*. The balancing of rights on a broad philosophical basis is not a task that the court can – or ought to – undertake. In particular, the Appellants' reliance in these proceedings on the "harm principle" enunciated by Mill raises the very pertinent issue of what constitutes "harm" in the first place. It is not – as appears to be the implicit assumption of the Appellants – necessarily confined only to *physical* harm. But, if not, how far should the ambit of "harm" extend? A moment's reflection will reveal that the answers to this as well as other related questions lie quintessentially within the sphere of *the legislature.* This point – already made several times in the course of this judgment – cannot be emphasised too much. Hence, the

Appellants' argument based on the absence of harm, when examined more closely, reveals itself to be, in substance if not in form, one which ought (if at all) to be considered by *the legislature*.

170 *As, if not more, importantly, a fundamental difference between the approach adopted by the Respondent on the one hand and that adopted by the Appellants on the other lies (as explained above) in the fact that whilst the Respondent is of the view that it is (*pace *Lord Devlin) appropriate (and, indeed, legitimate) for the legislature to enforce societal morality through s 377A, the Appellants are of the (diametrically opposed) view that it is (*pace *Prof Hart) inappropriate for the legislature to do so, except to the extent that harm has resulted (or might result) to others.* To recapitulate, it will be recalled (see above at [167]) that one of the premises underlying *the Respondent's* approach is that it is appropriate and legitimate for *the legislature* to ascertain *what the prevailing societal morality is, and to decide whether or not (in the context of these proceedings) s 377A ought to be repealed or retained in view of that societal morality*. As already noted above (at [29]–[30] and [33]–[34]), *the Appellants* are of the view that such an approach *simply discriminates against* them *and deprives them of their fundamental rights*, and as a result, s 377A is unconstitutional.

171 In our view, there is much force in the Respondent's argument as just set out in the preceding paragraph. The legislature is an elected body and thus has the mandate from the electorate to promulgate laws which reflect as well as preserve societal morality. Whilst it might (as is the situation in the present proceedings) be difficult to ascertain what the prevailing societal morality on a particular issue is at any given point in time, it is still *the legislature's task* to make this determination.

172 As we understand the Appellants' arguments, even if the prevailing societal morality can be ascertained, giving effect to it through the law (in this case, s 377A) would be a violation of *the minority's constitutional rights* as it would constitute the "tyranny of the *majority*". *However*, as we have already noted above (at [159]), this argument is *a double-edged one*, for it can *equally* be argued by the majority that there should be no "tyranny of the *minority*". We hasten to add that this is *not* to endorse the approach that *the majority must always prevail.* Rather, this brings us back to the protections embodied in the Articles on fundamental rights in the Singapore Constitution – of which Art 9 and Art 12 are the focus of the present appeals. *The Appellants must therefore seek to bring their respective cases within the ambit of these two Articles.*

173 Put simply, Art 9 and Art 12 would constitute a *legal* basis on which the Appellants can seek to vindicate their rights. The Appellants *cannot* ask the court to vindicate their rights based simply – and *without more* – on the argument that *they feel that the prevailing societal morality is wrong as it deprives them of their freedom*. This is *not* to state that such an argument cannot be made. But, a moment's reflection will reveal that in order to succeed in this argument, the Appellants will necessarily need to bring to bear a great number of *extra-legal arguments*, which, as we have already emphasised, are *uniquely* within the purview of *the legislature*. These extra-legal arguments include *empirical data in the form of,* inter alia*, surveys* (some of which were referred to by both the Appellants and the Respondent in the course of the present appeals) *which this court is not equipped to assess*. At this particular juncture, the vitally important distinction between the judicial function on the one hand and the legislative function on the other must be emphasised yet again. Put simply, the court *cannot and must not attempt to (still less actually) operate as a "mini-legislature"* – lest the vital role of the court as an independent and neutral institution deciding objectively, on the basis of objective legal rules and principles, the rights which parties have in a particular situation (among other issues) be reduced to naught.

174 Indeed (and consistent with the observations just made), it is also highly significant, in our view, to note that *The Wolfenden Report*, which (as we mentioned above at [163]) was the effective

catalyst of the jurisprudential debate between Lord Devlin and Prof Hart, ultimately led (albeit only a decade later) to *legislative* action on the part of *the UK Parliament* (in the form of the Sexual Offences Act 1967 (c 60) (UK), which, *inter alia*, abolished the UK equivalent of s 377A).

175 Let us now turn to yet another *extra-legal* argument which the Appellants proffered to this court, *viz*, the argument based on immutability and/or the intractable difficulty of change on the part of male homosexuals.

(3) The argument based on immutability and/or the intractable difficulty of change

176 Put simply, the Appellants' argument based on immutability and/or the intractable difficulty of change on the part of male homosexuals was this: if the Appellants' sexual orientation was biologically determined, they ought not to be discriminated against via s 377A. In particular, Mr Ravi submitted that there was overwhelming evidence supporting the proposition that a person's sexual orientation was biologically determined. This is primarily a *scientific and extra-legal* argument which, again, is *outside* the purview of the court. We agree with the Judge (see *Tan Eng Hong (substantive)* at [63]) that the scientific evidence on this particular issue is – contrary to what Mr Ravi submitted – unclear inasmuch as there is *no definitive evidence* pointing clearly to one side of the divide or the other. *In any event*, as just mentioned, the court is *not* in a position to arrive at a conclusive determination on this issue. Again, this argument should – if at all – be addressed by *the legislature* instead.

(4) The safeguarding of public health

177 It should be noted that the Respondent, in its case before this court (*cf* its case in the court below (see above at [21])), did *not* rely upon the safeguarding of public health. This was, in our view, the correct approach simply because, once again, the court is *not* in a position to arrive at a conclusive determination in this particular regard. That having been said, we hasten to add that this is by no means an inappropriate argument, but it should – if at all – be addressed by *the legislature* instead as it raises what are clearly *extra-legal (in this instance, medical as well as scientific)* issues.

(5) Summary of our discussion of the Appellants' extra-legal arguments

178 The underlying thread of our discussion at [157]–[177] above is clear and may be stated simply: all the arguments referred to in those paragraphs are extra-legal arguments that, whilst not necessarily unpersuasive, ought nevertheless to be raised in the appropriate forum, which is the legislature. Correlatively, the court is not the appropriate forum to consider such arguments. As emphasised right at the outset of this judgment, *only relevant legal* arguments can (and should) be considered by the court. It is also important to emphasise that the Appellants are *not* thereby deprived of the opportunity to proffer the *extra-legal* arguments they have raised, but they have to do so at a *different* forum, *viz*, before *the legislature*. At this juncture, it is appropriate to note the following perceptive observations by Lord Reid in the extra-judicial lecture referred to above at [78] (see *The Judge As Law Maker* at p 23):

> Now let me come to the real difficulty about judges making law. *Everyone agrees that* ***impartiality is the first essential in any judge*** *. And that means not only that he must not appear to favour either party.* ***It also means that he must not take sides on political issues*** ***. When public opinion is sharply divided on any question – whether or not the division is on party lines – no judge ought in my view to lean to one side or the other if that can possibly be avoided.*** *But sometimes we get a case where that is very difficult to avoid. Then I think we must play safe.* ***We must decide the case on the preponderance of existing authority. Parliament is the right place to settle issues which the ordinary man regards as***

controversial. On many questions he will say: "That is the lawyers' job, let them get on with it." But on others he will say: "I ought to have my say in this. I am not going to accept dictation from the lawyers." … [emphasis added in italics, bold italics and underlined bold italics]

179 On a related note, Lord Bingham of Cornhill, quoting from Lord Reid's aforesaid lecture, classified the situation where "public opinion is sharply divided on [a] question" as a situation "[w]here the question involves an issue of current social policy on which there is no consensus within the community" (see Tom Bingham, "The Judge as Lawmaker: An English Perspective" in *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, 2000) ch 2 at p 31), and stated that judges should, consequently, refrain from making new law in such a situation. Lord Bingham also referred (at p 32 of the same work) to another situation where, in his view, judges ought to refrain from making new law, namely:

> [W]here the issue arises in a field far removed from ordinary judicial experience. This is really another way of saying that *whereas the Judges may properly mould what is sometimes called lawyers' law*, ***they should be very slow to lay down far-reaching rules in fields outside their experience. They should be alert to recognize their own limitations.*** [emphasis added in italics and bold italics]

180 Indeed, our legislature can, apart from actually abolishing s 377A, also effect solutions which are clearly beyond the powers of the court. For example, Ms Barker strongly urged this court (as a possible alternative) to at least delete the words "or private" in s 377A, hence "reading down" s 377A to that extent (see the paragraphs of Lim and Chee's Appellants' Case which we referred to above at [19]). However, consistent with the analysis set out above, this proposed solution is clearly outside the powers of this court, although it is an approach which can be taken by our Parliament (if it is so persuaded).

Our ruling on the constitutionality of s 377A under Art 12(1)

181 For the reasons set out above, we are of the view that s 377A satisfies both limbs of the "reasonable classification" test. It therefore passes legal muster pursuant to Art 12*(1)*. However, that is not the end of the matter. Consistent with the applicable principles set out earlier in this judgment, and given that a challenge was also mounted to the constitutionality of s 377A under Art 12*(2)*, it is now necessary for us to proceed to consider a further – and more specific – issue: although s 377A does not violate Art 12(1), does it nevertheless fall within the scope of Art 12*(2)*, and if so, does it violate that provision?

Whether s 377A falls within the scope of Art 12(2), and if so, whether it violates that provision

182 It is clear, in our view, that s 377A does *not* violate Art 12(2) for the simple reason that it does *not* even fall within the scope of Art 12(2) to begin with. As we have already noted (see above at [92]), the words "gender", "sex" and "sexual orientation" are noticeably absent from Art 12(2). When viewed from a historical context, this is not surprising. In particular, para 33 of the 1966 Report furnishes us with more than a hint as to why Art 12*(2)* was drafted the way it was.

183 Paragraph 33 of the 1966 Report reads as follows:

> We consider, having regard to *the* ***multi-racial*** , ***multi-cultural*** , ***multi-lingual*** *and* ***multi-religious*** *composition of the population of Singapore and of its citizens*, that ***the recommendations we have outlined in the preceding paragraph*** will *not only form* ***an impregnable shield against racial communalism and religious bigotry as well as an***

effective weapon to wipe away any fears the minorities may harbour concerning discriminatory treatment *but will* ***also lay a firm and lasting foundation on which to build a democratic, equal and just multi-racial society in Singapore*** . We accordingly recommend that the present Article 8 [the then Malaysian equivalent of our Art 12] should be deleted and in its place we recommend the following two Articles: —

8a. All persons are equal before the law and entitled to the equal protection of the law.

8b. (1) Except as expressly authorised by this Constitution and subject to the provisions of this Article —

(*a*) no law shall make any provision that is discriminatory either of itself or in its effect; and

(*b*) no persons shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(2) In this Article, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, colour or creed whereby persons of one such description are subject to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not afforded to persons of another such description.

(3) Paragraph (1)(a) of this Article shall not apply to any law so far as that law makes provision —

(*a*) for the appropriation of the general revenues of Singapore;

(*b*) with respect to persons who are not citizens of Singapore;

(*c*) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.

(4) Nothing contained in any law shall be held to be inconsistent with or in contravention of paragraph (1)(*a*) of this Article to the extent that it makes provision with respect to standards or qualifications (not being standards or qualifications specifically relating to race, place of origin, colour or creed) to be required of any person who is appointed to any office in the public service, any office in a disciplined force, or any office in the service of a body corporate established by any law for public purposes.

(5) Paragraph (1)(*b*) of this Article shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in either of the two preceding paragraphs.

(6) For the purposes of paragraph (1)(*b*) of this Article, the certificate of the Attorney-General that the exercise of any discretion relating to the institution, conduct or discontinuance of criminal proceedings in any court that is vested in him or in any other person by or under this Constitution or any other law has not been discriminatory shall be conclusive and shall not be called in question in any court.

[emphasis added in italics, bold italics and underlined bold italics]

184 The last sentence of para 32 of the 1966 Report (reproduced in full above at [87]) is also relevant and is, in fact, referred to in para 33 of the same report (see the text in underlined bold italics in the quotation in the preceding paragraph). The last sentence of para 32 of the 1966 Report reads as follows:

> … Lastly, it should also be clearly and categorically laid down that *there shall be* ***no discrimination*** *in the administration of any law, except as expressly authorised by the Constitution, against any person on the ground* ***only*** *of* ***race, religion, place of birth or descent*** . [emphasis added in italics, bold italics and underlined bold italics]

185 It can be seen that the 1966 Report was concerned, in the main, with the entrenching of fundamental rights relating to *race, language as well as religion* in a constitutional context. As pointed out in the 1966 Report itself (at para 33), given Singapore's status as a newly-independent sovereign State at that time, "an impregnable shield against *racial* communalism and *religious* bigotry" [emphasis added] had to be put in place; otherwise, societal division and/or friction on racial, linguistic and/or religious lines could have resulted in an acutely painful (or even fatal) rending or tearing apart of Singapore's social fabric. That Singapore was (and continues to be) a multi-racial, multi-religious, multi-cultural as well as multi-lingual society meant that it was (and remains) particularly susceptible to such a tragic fate if minority rights in relation to race, language and religion are not protected constitutionally. More importantly for the purposes of the present appeals, there was no focus whatsoever on the issue of discrimination based on gender, sex and/or sexual orientation in the 1966 Report, and hence, *no inclusion* of these factors as prohibited grounds of discrimination under what is now Art 12*(2)*. It might well be the case that the time is now appropriate for the inclusion of these factors as prohibited grounds of discrimination within our constitutional framework. However, that is a matter which is entirely outside the remit of the court, and must (if at all) be effected (as already explained above at [92]) by our legislature via *a constitutional amendment instead.* Returning to the present appeals, it is clear, in our view, that given the linguistic as well as historical contexts set out above, s 377A (which relates to matters of gender, sex and/or sexual orientation) does *not* fall within the scope of Art 12(2). For that reason, it cannot possibly be inconsistent with Art 12(2).

186 Ms Barker argued in her written submissions that domestic law, including the Singapore Constitution, should as far as possible be interpreted consistently with Singapore's international obligations (see *Yong Vui Kong* at [59]). She further argued that one of those obligations was to eliminate discrimination on the basis of sexual orientation, and pointed out that our Government had stated that the Singapore Constitution contained protection from discrimination on this particular basis. In support of this contention, Ms Barker cited Singapore's "Responses to the list of issues and questions with regard to the consideration of the fourth periodic report" dated 12 May 2011 to the United Nations' Committee on the Elimination of Discrimination against Women ("Singapore's 12 May 2011 Response"). Paragraphs 31 and 31.1 of Singapore's 12 May 2011 Response state as follows:

> **31. Please comment on reports with regard to prevalent and systematic discrimination against women based on sexual orientation and gender identity in the social, cultural, political and economic spheres in the State party. What measures are being undertaken to address these problems, especially with a view to destigmatizing and promoting tolerance to that end.**
>
> 31.1 The principle of equality of all persons before the law is enshrined in the Constitution of the Republic of Singapore, regardless of gender, sexual orientation and gender identity. All persons in Singapore are entitled to the equal protection of the law, and have equal access to basic

> resources such as education, housing and healthcare. Like heterosexuals, homosexuals are free to lead their lives and pursue their social activities. Gay groups have held public discussions and published websites, and there are films and plays on gay themes and gay bars and clubs in Singapore.
>
> …

187 With respect, we do not think there is any merit in this argument by Ms Barker. First, the above extract from para 31.1 of Singapore's 12 May 2011 Response does not in any way suggest that Art 12(2) should be expanded to include protection from discrimination based on "gender, sexual orientation and gender identity" since it makes no reference to either Art 12(2) or its prohibited grounds of discrimination (*viz*, race, religion, place of birth and descent). The phrase "equality of all persons before the law" in the above extract is, in our view, a reference to Art 12(1), under which the "reasonable classification" test would indeed apply to all persons regardless of "gender, sexual orientation and gender identity" (see above at [93]).

188 Secondly, and more fundamentally, international law and domestic law are regarded in Singapore as *separate* systems of law, and the former does not form part of the latter "until and unless it has been applied as or definitely declared to be part of domestic law by a domestic court" (see, in the context of customary international law, *Yong Vui Kong* at [91] as well as the decision of this court in *Nguyen Tuong Van* at [94]). Therefore, for the purposes of the present appeals, Singapore's treaty obligations under international treaties such as the Convention on the Elimination of All Forms of Discrimination against Women would not automatically have the effect of amending the Singapore Constitution to include new prohibited grounds of discrimination under Art 12(2).

Conclusion

189 The present appeals were argued by both Ms Barker as well as Mr Ravi with great passion on behalf of their respective clients. This is not surprising, especially when one takes into account the intensely controversial (and even emotional) nature of the arguments surrounding the nature and function of s 377A which have been canvassed by proponents on either side of the extra-legal divide. Indeed, many of the arguments tendered to this court, whilst valid (or, at least, plausible) in their own right, involved *extra-legal considerations and matters of social policy which were outside the remit of the court, and should, instead, have been canvassed in the legislative sphere.* It is entirely appropriate, at this juncture, to reiterate a point we have already made several times in the course of this judgment, not least because it is an extremely important and fundamental one: the court can only consider *legal* (as opposed to *extra-legal*) arguments. This ensures that it will not become a "mini-legislature". The court *cannot – and must not –* assume *legislative* functions which are necessarily beyond its remit. To do so would be to efface the very separation of powers which confers upon the court its *legitimacy* in the first place. If the court were to assume legislative functions, it would no longer be able to sit to assess the legality of statutes from an *objective* perspective. Worse still, it would necessarily be involved in expressing views on extra-legal issues which would – in the nature of things – be (or at least be perceived to be) *subjective* in nature. This would further erode the *legitimacy* of the court, which ought only to sit to administer the law in an *objective* manner.

190 We have carefully considered all the legal arguments tendered to this court in all their various forms (including the relevant historical materials). For the reasons set out above, we dismiss both the present appeals. Given the unusual nature of these proceedings (not least because the decision of this court has implications for male homosexuals or bisexual males who might fall within the ambit of s 377A generally), we make no order as to costs both here and below. The usual consequential orders

will apply. Whilst we understand the deeply-held personal feelings of the Appellants, there is nothing that this court can do to assist them. Their remedy lies, if at all, in the legislative sphere.

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