Lim Meng Suang and another *v* Attorney-General
[2013] SGHC 73

Case Number : Originating Summons No 1135 of 2012

Decision Date : 09 April 2013

Tribunal/Court : High Court

Coram : Quentin Loh J

Counsel Name(s) : Peter Cuthbert Low, Choo Zhengxi and Indulekshmi Rajeswari (Peter Low LLC) for the plaintiffs; Aedit Abdullah SC, Jeremy Yeo Shenglong and Sherlyn Neo Xiulin (Attorney-General's Chambers) for the defendant.

Parties : Lim Meng Suang and another — Attorney-General

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

Constitutional law – Constitution – Interpretation

9 April 2013 Judgment reserved.

Quentin Loh J:

Introduction

1 In this originating summons (Originating Summons No 1135 of 2012 ("OS 1135")), the Plaintiffs seek to impugn s 377A of the Penal Code (Cap 224, 2008 Rev Ed) ("the current Penal Code") on the ground that it infringes their right to equality before the law and equal protection of the law under Art 12 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution"). Section 377A 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.
>
> [emphasis added]

The facts

2 Mr Lim Meng Suang ("Mr Lim"), the first plaintiff, is 44 years old and a Buddhist who was born and raised in Singapore. He has his own graphic design company and has a Masters of Fine Arts in photography. Mr Kenneth Chee Mun-Leon ("Mr Chee"), the second plaintiff, is 37 years old and a free thinker who was also born and raised in Singapore. He is a graphic designer working in Mr Lim's company, and has a diploma in electronics engineering. Mr Lim and Mr Chee met by chance in March 1997, and have been "in a romantic and sexual relationship" with each other ever since, *ie*, for the past 16 years.

3 Mr Lim and Mr Chee do not live together. In his supporting affidavit for OS 1135, Mr Lim says

that the main reason for this is his need to stay with and look after his ageing parents who are not well. Mr Lim also says that his parents do not know that he and Mr Chee are gay. Having said that, Mr Lim describes how, over the years, his mother's attitude has changed. There was an initial confrontation over his friendship with Mr Chee, whom he had to deny was gay, and her proscription not to do "gay things". This then progressed to her trying to find him a wife, with his godmother's active participation. Finally, over the last three or so years, Mr Lim says, there has been tacit, but not open, acceptance by his mother of his relationship with Mr Chee. His mother has stopped trying to match-make him and now tells his godmother to leave him alone whenever she brings up the subject of finding him a wife. His mother has also started inviting Mr Chee over for family events and even reunion dinners. Mr Lim accepts that his mother is from a different generation and does not push the issue. However, he has told his siblings as well as his elder nephews and nieces about his sexual orientation, and they have all accepted his being gay. Mr Chee has stayed overnight with Mr Lim at times and this practice has continued for some time.

4 Mr Chee also lives with his family. In his supporting affidavit for OS 1135, he deposes that his family accepts Mr Lim as his close friend, but do not quite know the true nature of their relationship. His family, unlike Mr Lim's family, does not go out much together, and he characterises his family's policy as one of "don't ask, don't tell". Mr Chee is silent on whether Mr Lim has ever stayed overnight at his home.

5 Besides working together, Mr Lim and Mr Chee also go to the gym as well as for movies, window-shopping and overseas holidays together. Both Mr Lim and Mr Chee feel that they cannot be openly affectionate in public in Singapore. Mr Lim states that at most, he puts his arm around Mr Chee's shoulder in public. Both Mr Lim and Mr Chee grew up with the knowledge that having gay sex was illegal, but, more significantly, both of them felt the social stigma of being gay as they were growing up, and this feeling of stigmatisation continues to date.

6 Both Mr Lim and Mr Chee are also apprehensive as they have heard of male homosexuals being charged with "gross indecency" under s 377A of the current Penal Code. Mr Lim runs *TheBearProject*, an informal social group for "plus-sized" gay men who engage in activities like hiking, movies, potluck gatherings, museum-hopping and overseas trips. However, he is worried about getting into trouble with the authorities and claims that it will be difficult to register *TheBearProject* as a society as automatic approval is not granted to societies which relate to "sexual orientation".

7 Mr Lim says that he experienced discrimination in school and in the army, which discrimination continues till this day, although his mother no longer asks him not to be gay. Similarly, Mr Chee says that he has seen and also experienced discrimination against gay people in school, in the army and in society. Both Mr Lim and Mr Chee feel that s 377A of the current Penal Code reinforces this discrimination, and that the very existence of this provision, whether or not it is enforced, labels them as criminals. Whilst Mr Lim and Mr Chee do not live in fear every day of being arrested, they say that it is always at the back of their minds that if the authorities wanted to, they could arrest them and charge them with an offence under s 377A of the current Penal Code.

8 On 30 November 2012, Mr Lim and Mr Chee (collectively referred to hereafter as "the Plaintiffs") filed OS 1135 seeking, in effect, a declaration that s 377A of the current Penal Code is inconsistent with Art 12 of the Constitution, and is therefore void by virtue of Arts 4 and 162 of the Constitution. The defendant in this action, the Attorney-General ("the Defendant"), has chosen not to file any affidavits in response. I therefore take the Plaintiffs' affidavits as the factual basis on which I shall proceed to decide this case.

9 In this judgment, I shall be referring to both s 377A of the current Penal Code as well as its

predecessor provisions in earlier editions of our Penal Code. For ease of reference, I shall use the term "s 377A" to denote s 377A of the current Penal Code and, where the context requires, the applicable predecessor provision in force at the particular point in time being discussed. I shall also use the terms "s 377" and "the now-repealed s 377" interchangeably to refer to the now-repealed s 377 of the Penal Code (Cap 224, 1985 Rev Ed) ("the 1985 Penal Code"), which criminalised "carnal intercourse against the order of nature with any man, woman or animals". As for the term "the Constitution", it should be read as denoting either the Constitution as defined at [1] above or, where the context requires, the applicable predecessor version of the Constitution. References to "male homosexual conduct" in the context of this judgment refer to acts of "gross indecency" between males, and likewise, references to "female homosexual conduct" refer to acts of "gross indecency" between females.

Preliminary issues

Locus standi

10 This action is brought under O 15 r 16 and O 92 r 5 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules"). The first requirement which the Plaintiffs have to meet before they can bring this action is that they must have the requisite *locus standi*. I would have thought that this was a threshold issue to be addressed as the Plaintiffs have not been charged under s 377A; neither have they been threatened with prosecution. No State organ or officer of the law has told or warned them that they cannot have the relationship which they currently have, or that if they sleep together in Mr Lim's family home, they will be prosecuted. No one has prohibited them from cohabiting. Indeed, in their supporting affidavits for OS 1135, the Plaintiffs candidly state that the real pressure which they experience on account of their relationship seems to have been from their respective parents, their respective families and members of society, and not from any officer of the law. This could have a possible bearing on how the court exercises its discretion to determine whether the element of a real controversy in the matter (see *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112) is satisfied.

11 As to whether the Plaintiffs have a real interest in bringing this action and whether there has been a violation of their personal rights, I note that the Court of Appeal in *Tan Eng Hong v Attorney-General* [2012] 4 SLR(R) 476 ("*Tan Eng Hong*") has stated at [126] that:

> It is uncontroverted that s 377A is a law which specifically targets sexually-active male homosexuals. The plain language of s 377A excludes both male-female acts and female-female acts. Tan professes to be a member of the targeted group, and the AG has not disputed this claim. Therefore, since we have found that s 377A arguably violates the Art 12(1) rights of its target group, as a member of that group, Tan's rights have arguably been violated by the mere existence of s 377A in the statute books (see above at [94]). We also accept that there is a real and credible threat of prosecution under s 377A (see below at [175]-[183]).

12 Be that as it may, since counsel for the Defendant, Mr Aedit Abdullah SC ("Mr Abdullah SC") from the Attorney-General's Chambers, has not argued that the Plaintiffs do not have the requisite *locus standi* to bring the present proceedings, I shall proceed on the basis that the Defendant is not disputing that the Plaintiffs do have the requisite *locus standi*.

The requests made by the Plaintiffs' counsel in chambers

13 At the start of the hearing, Mr Peter Cuthbert Low ("Mr Low"), counsel for the Plaintiffs, first applied for Assistant Professor Jack Lee ("Asst Prof Lee") from the School of Law, Singapore

Management University, and Assistant Professor Lynette Chua ("Asst Prof Chua") from the Law Faculty, National University of Singapore ("NUS"), to sit in for the hearing. Mr Low said that Asst Prof Lee and Asst Prof Chua had been engaged by his firm from the start of these proceedings, had assisted in putting the written submissions together and were part of his legal team. Mr Low also said that he might need to consult Asst Prof Lee and Asst Prof Chua over any legal points that might arise in the course of the oral submissions. Mr Low confirmed that neither Asst Prof Lee nor Asst Prof Chua held practising certificates.

14 Mr Abdullah SC objected to Mr Low's application, stating that Asst Prof Lee and Asst Prof Chua were not advocates and solicitors with practising certificates but merely advisors, and their presence was not necessary. Mr Abdullah SC submitted that if Mr Low wanted to consult Asst Prof Lee and Asst Prof Chua at any point during the hearing, he could always ask the court for a short break to do so. Mr Abdullah SC also submitted that in principle, Asst Prof Lee and Asst Prof Chua did not have a sufficient "interest" in OS 1135 to have the right to sit in for this hearing, which was being held in chambers. Mr Abdullah SC conceded, however, that I had the discretion to either allow or disallow Mr Low's application.

15 I decided to allow Asst Prof Lee and Asst Prof Chua to sit in for the hearing on the basis that they were part of Mr Low's legal team and had assisted him with OS 1135 from the beginning as well as with the drafting of the written submissions. They were in a position akin to experts, who may be allowed to sit behind counsel in a hearing and whom counsel may, from time to time in the course of a hearing, turn to consult. Furthermore, as OS 1135 raised an important constitutional issue, I was particularly glad to have an assistant professor from each of our law schools present: although they had no speaking rights at the hearing, they could make very valuable contributions by their input through Mr Low. Indeed, I noticed many notes being passed to Mr Low by Asst Prof Lee and Asst Prof Chua during the course of the oral submissions. I additionally gave the parties a two-hour lunch adjournment after the morning's hearing so as to enable Asst Prof Lee and Asst Prof Chua to fully discuss the afternoon's reply submissions with Mr Low. No doubt, Mr Abdullah SC would likewise have used that long lunch adjournment to discuss his reply submissions with his colleagues.

16 Mr Low next asked permission for Mr M Ravi ("Mr Ravi"), counsel for the plaintiff in Originating Summons No 994 of 2010 ("OS 994"), to sit in for the hearing. The plaintiff in OS 994 is likewise challenging the constitutionality of s 377A and seeks reliefs similar to those sought by the Plaintiffs in this case, but based on different facts. Upon my query, Mr Low clarified that this request was not from the Plaintiffs nor from him; instead, Mr Ravi had been outside my chambers and had asked Mr Low to make the request. As Mr Ravi represented a different client in a different case and as the proceedings before me were proceedings in chambers, Mr Ravi did not have any interest in these proceedings other than as an observer. It appeared from the correspondence exchanged between Mr Ravi and Mr Low that they had discussed the developments in their respective cases with each other. I was of the view that Mr Low was free to tell Mr Ravi what happened in chambers after the hearing of OS 1135 was over. Moreover, Mr Ravi would have his chance to present his oral submissions in OS 994 before me on another day. I accordingly ruled against his presence in chambers.

Similar proceedings

17 OS 994 (as mentioned above at [16]) gave rise to the Court of Appeal's judgment in *Tan Eng Hong*. OS 994 was initially struck out by the High Court under O 18 r 19 of the Rules on the basis that it disclosed no reasonable cause of action and/or was frivolous and/or was an abuse of the process of court. The Court of Appeal allowed the plaintiff's appeal, holding that he had the necessary standing to seek the declarations which he sought, and gave him leave to argue his case before the High

Court. The Court of Appeal said (at [184] of *Tan Eng Hong*):

> Without going into the merits of the Application, we want to acknowledge that in so far as s 377A in its current form extends to private consensual sexual conduct between adult males, this provision affects the lives of a not insignificant portion of our community in a very real and intimate way. Such persons might plausibly assert that the continued existence of s 377A in our statute books causes them to be unapprehended felons in the privacy of their homes. The constitutionality or otherwise of s 377A is thus of real public interest.

18 The Court of Appeal (at [185] of *Tan Eng Hong*) framed a two-stage inquiry for the High Court to ascertain the constitutionality of s 377A under Art 12 of the Constitution as follows:

> (a) whether the classification prescribed by s 377A was founded on an intelligible differentia; and
>
> (b) whether that differentia bore a rational relation to the object sought to be achieved by s 377A.

I approach OS 1135 accordingly.

The parties' respective cases

The Plaintiffs' submissions

19 The Plaintiffs' first argument is that s 377A is contrary to Art 12 because the equal protection afforded by Art 12(1) extends to prevent discrimination on the basis of sexual orientation.

20 Second, the Plaintiffs contend that s 377A fails the test of legality under Art 12 because s 377A is so absurd, arbitrary and unreasonable that it cannot be considered good law. The reasons given for this are that: (a) s 377A criminalises sexual orientation, which is practically immutable; (b) s 377A is overly broad; (c) even the Government has acknowledged that s 377A has been arbitrarily and selectively enforced; (d) s 377A attempts to legislate morality in an arbitrary and discriminatory manner; (e) s 377A comes from tainted origins; (f) s 377A causes tangible harm to a segment of the population in that it limits the outreach of HIV/AIDS preventive measures to and inflicts psychological damage on that segment of the population; (g) s 377A makes it difficult for gay or bisexual men who have been exploited or abused by their sexual partners to approach law enforcement officers for protection, leaving them particularly vulnerable to blackmail; and (h) s 377A provides potential grounds for impugning otherwise regular commercial transactions involving homosexual men.

21 The Plaintiffs' third set of arguments addresses the two-step test set out by the Court of Appeal in *Tan Eng Hong* at [185] to determine the constitutionality or otherwise of an allegedly unconstitutional legislative provision ("the two-step *Tan Eng Hong* test") (see [18] above). Mr Low contends that s 377A fails the first step of the test as the classification which it prescribes discloses no intelligible differentia. It also fails the second step of the test as the differentia upon which that classification is based bears no rational relation to the object of s 377A.

22 The Plaintiffs' fourth group of contentions centre on international and comparative jurisprudence on a growing trend outside Singapore of guarding against discrimination based on sexual orientation.

23 Because of the Plaintiffs' emphasis in their written and oral submissions that s 377A is contrary

to Art 12(1) as it discriminates against gay or bisexual men in an arbitrary, absurd and unreasonable manner, I asked Mr Low to clarify whether this factor (*viz*, discrimination in an arbitrary, absurd and unreasonable manner) was to be considered separate from – *ie*, a third requirement in addition to – the two-step *Tan Eng Hong* test, or whether it was to be treated as a concept applicable to how that two-step test was to be applied. Mr Low clarified that this factor was an over-arching principle that sat above the two-step *Tan Eng Hong* test. Essentially, Mr Low's position is that a "law which is so absurd or arbitrary that it could not have been contemplated by our constitutional framers as 'law' when they crafted the constitutional provisions protecting fundamental liberties cannot be good law". [note: 1]

24 In relation to the Plaintiffs' submission that the classification prescribed by s 377A discloses no intelligible differentia, Mr Low makes three points. The first is that the term "gross indecency" is too vague and does not allow s 377A to be applied with certainty. The second is that the vagueness of s 377A means that the provision could conceivably be applied in a grossly over-inclusive manner. The third point is that s 377A is under-inclusive as it criminalises only male homosexual conduct and not female homosexual conduct. [note: 2] It is unclear how the second and third points made by Mr Low relate to whether the classification prescribed by s 377A is founded on an intelligible differentia (*viz*, the first step of the two-step *Tan Eng Hong* test), although they may be relevant to the inquiry into whether there is a rational relation between the differentia used in s 377A and the object of s 377A (*viz*, the second step of the two-step *Tan Eng Hong* test).

25 Mr Low submits that the "main intent and purpose of [s 377A] is clear: it is to prevent homosexual acts by criminalising them". He also posits "two other discernible objectives" of s 377A, namely, to "not cause offence and polarisation in society" and to "reflect societal conservatism and preserve family values". [note: 3]

26 Mr Low submits that the retention of s 377A has led to the polarisation of society, which is the opposite effect of what Parliament intended. With regard to the objective of reflecting societal conservatism and preserving family values, Mr Low submits that there is no evidence to suggest that criminalising homosexuality will strengthen or preserve stable family values, or that decriminalising homosexuality will have a negative impact on family values or encourage homosexuality. [note: 4] Mr Low further argues that s 377A is unnecessary for the maintenance of public decency and the protection of young persons in light of other gender-neutral criminal provisions in the current Penal Code which are targeted at these objectives. [note: 5]

The Defendant's submissions

27 Counsel for the Defendant, Mr Abdullah SC, submits, first, that the classification prescribed by s 377A is founded on an intelligible differentia and, second, that the differentia bears a rational relation to the object of s 377A in terms of public morality [note: 6] or public health. [note: 7]

28 On the "intelligible differentia" point, Mr Abdullah SC states that the differentia which underlies the classification prescribed by s 377A is based on gender. Persons within the group targeted by s 377A are men committing acts of "gross indecency" with other men. Persons left out of the group are "women committing comparable acts". [note: 8]

29 On the "rational relation" point, Mr Abdullah SC submits that there are two possible objectives of s 377A, both of which would bear a rational relation to the differentia underlying the classification prescribed by that section. The first objective of s 377A is concerned with preserving public morality

in relation to male homosexual conduct and signifying society's disapproval of such conduct. According to Mr Abdullah SC, this was the purpose of s 377A when it was first introduced into our penal legislation in 1938, and this purpose was also reflected in the Parliamentary debates in October 2007 on whether or not s 377A should be repealed ("the October 2007 Parliamentary Debates"): see *Singapore Parliamentary Debates, Official Report* (22–23 October 2007) vol 83 at cols 2175–2305 and 2354–2445. Mr Abdullah SC also submits that the October 2007 Parliamentary Debates further posit that the retention of s 377A recognises and helps to preserve the heterosexual family as the social norm in Singapore, and is the result of a political balance decided upon by our Legislature.

30 With respect to the alternative objective of safeguarding public health, Mr Abdullah SC argues that although this objective may not have been articulated at the inception of s 377A, it ought to be accepted as a justification for differentiation at the time of s 377A's enactment if it is a reasonable rationale. [note: 9] Mr Abdullah SC then refers to various medical reports which appear to suggest that there is a higher risk of certain diseases such as anal cancer, HIV/AIDS, syphilis, gonorrhoea and chlamydia for male-male sexual acts compared to male-female and female-female sexual acts. [note: 10]

31 Mr Abdullah SC also submits that the non-inclusion of female homosexual conduct in s 377A is based on a rational criterion because public morality does not target female homosexual conduct in the same way as it targets male homosexual conduct. This can be inferred from the existence of s 377A, the lack of an articulated public demand for s 377A to be repealed and the lack of governmental legislative initiatives to criminalise female homosexual acts. A possible reason for this, as submitted by Mr Abdullah SC, is that female homosexual conduct is either less prevalent or is seen as being less repugnant than male homosexual conduct. Mr Abdullah SC also submits that the non-inclusion of female homosexual conduct in s 377A shows, at most, that the classification prescribed by s 377A is under-inclusive, and under-inclusive classification cannot, without more, mean that the law has prescribed a classification which is contrary to Art 12. This is borne out of the appreciation that legislative leeway should be given to Parliament. In this regard, Mr Abdullah SC cites the Indian Supreme Court's decision in *Shri Ram Krishna Dalmia v Shri Justice SR Tendolkar* (1959) SCR 279 ("*Ram Krishna Dalmia*") at 296 that "the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest".

32 Lastly, Mr Abdullah SC submits that the court must have regard to the presumption of constitutionality, which, he says, assumes the constitutionality of the law and places the burden of proving unconstitutionality on the person alleging it. [note: 11] Thus, Mr Abdullah SC submits, the burden is on the Plaintiffs to prove that "either the enactment or operation of the statutory differentiation was *arbitrary*, or, alternatively, that it does not rest upon *any* reasonable basis" [note: 12] [emphasis in original]. The discharge of this burden usually requires proof of positive evidence of arbitrariness. This also means that the court is entitled to take the view that s 377A does not cover female homosexual conduct as Parliament has chosen not to proscribe such conduct.

My analysis

The fundamental liberties enshrined in Art 12(1)

33 The Plaintiffs rest their arguments squarely on Art 12. They contend that s 377A offends the fundamental liberties granted by Art 12(1) and should accordingly be struck down as unconstitutional. Article 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.

…

34 The oft-cited ideals enshrined in Art 12(1) are that, first, all persons are equal before the law and, second, all persons are entitled to the equal protection of the law. These twin concepts of equality before the law and equal protection of the law are well known and of considerable antiquity. Courts have traced these concepts' origins to the Magna Carta, also called the Magna Carta Liberatum (The Great Charter of the Liberties of England), signed at Runnymede in 1215, where the King of England conceded that he was not the fount of all law and justice and introduced the idea of the supremacy of the law of the land. Thereafter, the last vestiges of the feudal system with monarchical supremacy and aristocratic privileges were swept away by the French Revolution beginning in 1789 with a reputed battle cry which included the words "Equality" and "Liberty". It is not surprising, therefore, to find these two ideals – *viz*, equality before the law and equal protection of the law – enshrined in many other Constitutions. These include the Fourteenth Amendment of the US Constitution ("the US Fourteenth Amendment") and, in particular, Art 14 of the Indian Constitution, upon which our Art 12 is obviously based. Article 14 of the Indian Constitution reads:

> The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

As can be expected, the Malaysian Constitution, from which our Constitution was drawn, has an identical provision in Art 8(1).

35 The first principle in Art 12(1) – *viz*, equality before the law – comes from English common law, which prohibits special privileges in favour of any individual and mandates the equal subjection of all classes of persons to the law: see Albert Venn Dicey, *Law of the Constitution* (Macmillan, 10th Ed, 1959) at pp 202–203. A person's social standing, achievements, accolades, wealth, learning and family ties are not distinguishing factors as far as the law and its application are concerned, nor do they entitle a person to any different treatment under the law.

36 The formulation of the second principle in Art 12(1) – *viz*, that all persons are entitled to the equal protection of the law – comes from the US Fourteenth Amendment, which prescribes that "no state shall … deny to any person within its jurisdiction the *equal protection of the laws*" [emphasis added]: see Durga Das Basu, *Commentary on the Constitution of India* (S C Sarkar & Sons (P) Ltd, 6th Ed, 1975) at vol B, p 1. Some historical background to this provision would be helpful. The US Fourteenth Amendment was enacted in 1868, shortly after the end of the American Civil War, to counter legislation in the former Confederate States which restricted the rights of freed black slaves to own both personal and real property as well as to enter into certain kinds of contracts, and subjected them to harsher criminal penalties than whites. The US Fourteenth Amendment was necessary to redress this discrimination by making such legislation unconstitutional, and to guarantee the rights of and protect emancipated black slaves who were now also full citizens of the US just like their white counterparts: see Tan Yock Lin, "Equal Protection, Extra-Territorialiy and Self-Incrimination" (1998) 19 Sing LR 10 ("*Tan Yock Lin*") at p 11. Thus, in *Strauder v West Virginia* 100 US 303 (1880), a statute in West Virginia which excluded blacks from serving on juries was struck down by the US Supreme Court as unconstitutional under the US Fourteenth Amendment and the conviction of a black man by an all-white jury was set aside. The equal protection clause also ensured that other races enjoyed the same civil rights that were enjoyed by whites. In *Yick Wo v Hopkins* 118 US 356 (1886) ("*Yick Wo*"), the US Supreme Court struck down not the law, which was fair and impartial on its face, but the administrative discriminatory implementation of the law against

the Chinese, who were refused licences to operate their laundries in wooden buildings in San Francisco, whereas many non-Chinese secured licences to operate laundries in similar buildings. Stanley Matthews J, writing for the court, said (at 369):

> These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of colour, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

The court also noted that no reason was given as to why the Chinese petitioners in *Yick Wo*, along with two hundred other Chinese, were denied the right to operate their laundries in wooden buildings, whilst eighty other non-Chinese were granted licences to do so. The US Supreme Court went on to rule (at 374):

> The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it *is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution*. [emphasis added]

37 Professor Tan Yock Lin ("Prof Tan") has argued in *Tan Yock Lin* (at p 11) that initially, the principle of equal protection of the law was restricted to being a guarantee of procedural or administrative equality, but was soon expanded to include a guarantee of substantive equality as well (citing *Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 ("*Datuk Haji*")). With respect, I agree.

38 It will be seen that equality before the law and equal protection of the law are but different aspects of the same doctrine – equal justice. The first expresses the immutable principle of equal subjection of all classes of persons to the law, and the second is the positive aspect of that principle which reaches out, when invoked, to strike down unequal laws and discriminatory administrative or executive action as unconstitutional and void.

39 In *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 ("*Taw Cheng Kong (CA)*"), the Court of Appeal (at [52]–[53]) noted the origin of these twin concepts as follows:

> 52 … This concept is not new, being part of the wider doctrine of the rule of law, and its origin can perhaps be traced all the way back to the 40th article of the Magna Carta:
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> > To none will we sell, to none will we deny, to none will we delay right or justice.
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> 53 As observed by the Malaysian court in *PP v Su Liang Yu* [1976] 2 MLJ 128 at 129:
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> > The dominant idea in both expressions 'equal before the law' and 'equal protection of the law' is that of equal justice. The meaning of these two expressions have been decided in a number of decisions of the US Supreme Court and also the Indian Supreme Courts [*sic*] …

This correctly encapsulates the origins of the US Fourteenth Amendment. One of the prime movers of the US Fourteenth Amendment was Congressman John Armor Bingham of Ohio. In one of his speeches to the House of Representatives, he emphasised that "equal protection of the laws" stemmed from Art 40 of the Magna Carta: see *Cong Globe*, 42nd 1st Sess Appendix, 83 (1871).

40 It has been well said by Dr Thio Su Mien ("Dr Thio"), a former dean of the NUS Law Faculty and a prominent lawyer, in S M Huang-Thio, "Equal Protection and Rational Classification" [1963] PL 412 ("*Huang-Thio*") (at p 412) that:

> … [A] constitution … institutionalises in legal terms the highest aspirations of a people, amongst which is the establishment of an egalitarian society. Equalitarianism runs deep in man, and age cannot wither nor custom stale its infinite vitality.

41 Herein lies the paradox: it becomes evident the moment one moves from lofty ideals, which have everything to commend them, to practical implementation. As Dr Thio herself postulates, do "equal laws" connote that all laws must be equal in their application? Must all laws apply universally to all persons in all circumstances? Dr Thio's self-evident answer (at p 413) is:

> Clearly this is well-nigh impossible. Human beings are not equal by nature, attainment, circumstances and conditions. Their needs vary and their problems require separate treatment.

Legislatures around the world have to continually classify diverse groups and activities within their society for different purposes and different treatment in areas such as health care, welfare and immigration, just to name a few. This is clearly illustrated in issues like taxation, differences between corporations and individuals, protection of women, young children and the mentally infirm – the list is long. It is implicit from Art 12 itself that Art 12(1) does not prohibit classification in *toto* because it is immediately followed by two other clauses, Art 12(2) and Art 12(3), which set out, respectively, prohibited and permitted kinds of discriminatory classification:

> (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.

42 The Indian Supreme Court in *Chiranjit Lal v Union of India* (1950) SCR 869 ("*Chiranjit Lal*") acknowledged (at 932):

> It is plain that every classification is in some degree likely to produce some inequality.

Similarly, in *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128 ("*Su Liang Yu*"), which was cited by our Court of Appeal in *Taw Cheng Kong (CA)* at [53] (see [39] above), the Malaysian court said (at 129):

> Due to the demands caused by the complexity of modern government the doctrine of classification was evolved by the courts for practical purposes and read into the equality provisions. It has been accepted therefore that a legislature for the purpose of dealing with the complex problems arising out of an infinite variety of human relations cannot but proceed upon some sort of selection or classification of persons upon whom the legislation is to operate.

Prof Tan opines (see *Tan Yock Lin* at p 12):

> Another remarkable past phenomenon was the dash of apology attributing the necessity of differentiation to the complexity of modern laws, expressed by Frankfurther J in these terms: "The more complicated society becomes, the greater the diversity of problems and the more does legislation direct itself to the diversities" [citing *Morey v Daud* 354 US 457 at 472 (1957)]. Again, from our distance of time, a more enlightened and encompassing view is much to be preferred: that differentiation is the essence of law. No law is, nor can be, free from it; for the law represents the authority to divide and dispose of, and thus differentiate in, a nation's resources, its past, present and future burdens and privileges.
>
> Our anxiety to secure equal protection particularly in reformative legislation explains why we have overlooked this fact that all law, written or unwritten, differentiates.

43 In *Taw Cheng Kong (CA)*, the Court of Appeal cited (at [57]) with approval the following passage from the judgment of Salleh Abas LP (which, although a dissenting judgment, was not disputed in terms of the law applied and the approach taken) in *Malaysian Bar v Government of Malaysia* [1987] 2 MLJ 165 ("*Malaysian Bar*") at 166–167:

> The requirement for equal protection of the law does not mean that all laws passed by a legislature must apply universally to all persons and that the laws so passed cannot create differences as to the persons to whom they apply and the territorial limits within which they are in force. Individuals in any society differ in many respects such as, *inter alia*, age, ability, education, height, size, colour, wealth, occupation, race and religion. *Any law made by a legislature must of necessity involve the making of a choice and differences as regards its applications in terms of persons, time and territory. Since the legislature can create differences, the question is whether these differences are constitutional. The answer is this: if the basis of the difference has a reasonable connection with the object of the impugned legislation, the difference and therefore the law which contains such provision is constitutional and valid. If on the other hand there is no such relationship the difference is stigmatized as discriminatory and the impugned legislation is therefore unconstitutional and invalid*. This is known as the doctrine of classification which has been judicially accepted as an integral part of the equal protection clause. [emphasis in original]

44 It is therefore clear and important to note that Parliament, in dealing with the issues arising within and without the country, is entitled to pass laws that deal with, *inter alia*, the myriad of problems that arise from the inherent inequality and differences pervading society. In so dealing with specific problems and specific groups of people, it is inevitable that classification will produce inequality of varying degrees. It is now settled law that equality before the law and equal protection of the law under Art 12(1) does not mean that all persons are to be treated equally, but that all persons in like situations are to be treated alike: see, *eg*, *Taw Cheng Kong (CA)* and *Ong Ah Chuan and another v Public Prosecutor* [1979–1980] SLR(R) 710 ("*Ong Ah Chuan*").

The "reasonable classification" test

45 The test for constitutionality under Art 12(1) has been termed the "reasonable classification" test (see *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103 ("*Nguyen*") at [70] and *Yong Vui Kong v Public Prosecutor and another matter* [2010] 3 SLR 489 ("*Yong Vui Kong*") at [111]). This test is well established in the common law. The Court of Appeal in *Taw Cheng Kong (CA)* distilled the "reasonable classification" test from the Privy Council decision of *Ong Ah Chuan* at [37], the Indian Supreme Court cases of *Ram Krishna Dalmia* and *Ghulam Sarwar v Union of India* [1967] 2 SCR 271,

and the Malaysian cases of *Datuk Haji* and *Government of Malaysia v VR Menon* [1990] 1 MLJ 277. It also cited with approval two of the three judgments delivered in *Malaysian Bar*, namely, the judgment of Salleh Abas LP (see [43] above) and that of Mohamed Azmi SCJ (see *Malaysian Bar* at 170), quoting (*inter alia*) the following extract from the latter judgment (see *Taw Cheng Kong (CA)* at [58]):

> …
>
> (b) 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.

46 This test is the same as the two-step *Tan Eng Hong* test set out at [18] above, which is binding upon me. In accordance with that test, where the impugned legislation has a differentiating measure, that legislation will only be consistent with Art 12(1) if:

(a) the classification prescribed by the legislation is founded on an intelligible differentia ("the First Limb"); and

(b) the differentia bears a rational relation to the object sought to be achieved by that legislation ("the Second Limb").

The First Limb – intelligible differentia

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* at [125]–[126]. In my view, the First Limb is satisfied and few can cavil with this conclusion.

The Second Limb – rational relation to the object of the legislation

49 The Second Limb requires an ascertainment of the object or purpose of the statutory provision in question followed by a determination of whether the differentia underlying the classification prescribed by that legislation bears a rational relation to the object or purpose of the provision. Both these elements are more complex than they appear.

50 Determining the purpose or object of a piece of legislation is not always a straightforward task, for example:

(a) What if the legislation in question or the Legislature is silent on the purpose or object of the legislation? Do we frame the purpose or object generally with regard to all the provisions of the legislation, or do we only take the section or group of sections which we are concerned with?

(b) There is sometimes a general statement explaining the need for an Act when it is first introduced in Parliament, but does that general statement always apply to the many individual and varying statutory provisions within the Act, which may be quite specific in their application and effect? The current Penal Code, with over 500 sections, is a prime example.

(c) If the legislation in question was added as an amendment, and in introducing the amendment, there was no or insufficient articulation of the purpose or object of that amendment, what purpose or object is to be ascribed to it? Should it be its own purpose or object as ascertained by the court, or the original purpose or object of the statute within which it appears when that statute was first introduced in Parliament?

(d) Is the purpose or object of a piece of legislation to be framed narrowly and/or simply, or widely and therefore more vaguely? As we shall see below from the High Court's judgment in *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78 ("*Taw Cheng Kong (HC)*") and the Court of Appeal's judgment in *Taw Cheng Kong (CA)*, how the purpose of a piece of legislation is framed does make a difference when ascertaining whether there is a rational relation between the differentia underlying the classification prescribed by that legislation and the purpose of that legislation.

(e) What if, as here, the provision in question started out as a provision enacted in England in 1885, and was later introduced into Singapore in 1938? Assuming the purpose of the provision was expressed when it was enacted in England, do we take that original English purpose or the purpose for which the provision was introduced into Singapore in 1938? More generally, in determining the purpose or object of a local statutory provision, can we look at the Parliamentary records of the country or countries from which the provision originated?

(f) What if additionally, as in this case, substantial amendments to the 1985 Penal Code were tabled before Parliament in October 2007 but not on s 377A, although there were debates (*ie*, the October 2007 Parliamentary Debates (see [29] above)) on the continued retention of that section as well as a call for its repeal because of a petition submitted by a Nominated Member of Parliament ("NMP"), and no vote was ultimately taken on its possible repeal: do we ascertain or identify the object or purpose of s 377A based on the October 2007 Parliamentary Debates? What if there are differences between the purpose of s 377A as stated in 1938 when this provision was first introduced into our penal legislation and the purpose as stated during the October 2007 Parliamentary Debates: which purpose or purposes are to be adopted?

(g) What if the original purpose or object of the legislation in question is no longer valid or has ceased to exist, but there is a new and valid purpose or object which the legislation fulfils: are we permitted to substitute the new purpose or object to ascertain whether the differentia underlying the classification prescribed by that legislation bears a rational relation to this new purpose or object?

51 When we come to the "rational relation" element, we can also face some very daunting issues. For instance:

(a) If the courts are able to ascertain a more efficient or different classification which will better achieve the purpose or object of the legislation concerned, can the courts then strike down the legislation on the basis that the differentia underlying the classification prescribed therein lacks a rational relation with the purpose or object of that legislation?

(b) What if there is significant under-classification (*eg*, the object or purpose of the legislation covers five different groups in society, but the legislation only singles out and affects one of the five groups): does that point to the non-existence of a rational relation between the differentia underlying the classification prescribed by the legislation and the purpose or object of that legislation?

(c) What if there is significant over-classification (*eg*, the object or purpose of the legislation covers two groups in society, but the legislation affects not only those two groups but five other groups as well): does that likewise point to the non-existence of a rational relation between the differentia underlying the classification prescribed by the legislation and the purpose or object of that legislation?

(1) The difficulties of applying the Second Limb: *Taw Cheng Kong (HC)* and *Taw Cheng Kong (CA)*

52 Some of the complexities in applying the Second Limb can be illustrated by a comparison of the respective approaches taken *in Taw Cheng Kong (HC)* and *Taw Cheng Kong (CA)*. In the discussion which follows (at [53]–[61] below), only the relevant aspects of these two decisions in relation to Art 12 will be considered, with the other issues raised (*eg*, the *ultra vires* doctrine and the admissibility or inconsistency of evidence) being put to one side.

53 The accused in *Taw Cheng Kong (HC)*, a Singapore citizen, was a regional manager of the Government of Singapore Investment Corporation ("GIC") based in Hong Kong. He was in charge of GIC's equity portfolios in Hong Kong and the Philippines, and had the authority to decide which companies GIC would invest in, with about S$1 billion at his disposal. He was convicted by a District Court of corruption for receiving from one Kevin Lee, a Managing Director of Rockefeller's Far East operations, various sums of money each time GIC invested in a Pioneer Hong Kong Fund managed by Rockefeller and an "incentive fee" each time he caused GIC to purchase shares in certain companies. The accused's conviction was based on s 6(*a*) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) ("the PCA"), read together with s 37(1) thereof, which provides as follows:

> The provisions of this Act have effect, in relation to citizens of Singapore, outside as well as within Singapore; and where an offence under this Act is committed by a citizen of Singapore in any place outside Singapore, he may be dealt with in respect of that offence as if it had been committed within Singapore.

54 One of the grounds which the accused relied upon in his appeal to the High Court against his conviction and sentence by the District Court was that s 37(1) of the PCA discriminated against him as a Singapore citizen and violated his rights under Art 12(1). He contended that the criterion of citizenship in s 37(1) of the PCA was arbitrary and discriminatory, in that if a non-citizen or a Singapore permanent resident, together with a Singapore citizen, jointly committed an offence under the PCA abroad, only the Singapore citizen could be dealt with and charged, but not the non-citizen or the Singapore permanent resident.

55 M Karthigesu JA, sitting as a High Court judge on the accused's appeal, found that s 37(1) of the PCA was discriminatory and violated the accused's rights under Art 12(1). He therefore held s 37(1) of the PCA to be unconstitutional, allowed the accused's appeal and set aside his conviction

and sentence. In dealing with the Second Limb (*viz*, whether the differentia of citizenship adopted in s 37(1) of the PCA bore a reasonable relation or rational nexus to the object of that Act), Karthigesu JA ruled:

(a) According to the relevant Parliamentary debates, the PCA was originally enacted in 1960 (as the Prevention of Corruption Ordinance 1960 (No 39 of 1960) ("the original PCA")) to eradicate corruption from Singapore's Civil Service ("the Singapore Civil Service") and among fiduciaries in Singapore, and not corruption globally irrespective of national boundaries.

(b) Section 37(1) of the PCA was not part of the original PCA and was added by an amendment in 1966. It was incorrect, as a matter of statutory interpretation, to "rely on earlier material to interpret subsequent legislation as if the subsequent legislation was tailored from a retrospective standpoint … to fit seamlessly into the schematics of the original Act" (see *Taw Cheng Kong (HC)* at [40]), and it was important to look at the amending legislation afresh.

(c) From the Parliamentary material relating to the enactment of the original PCA in 1960 and the subsequent addition of s 37(1), it could be seen that s 37(1) was added to address acts of corruption taking place outside Singapore but affecting events within Singapore.

(d) Therefore, classification along the lines of citizenship was an unreasonable means of attaining the objective of s 37(1) of the PCA for it was both over-inclusive and under-inclusive:

(i) It was over-inclusive as it included a class of persons not originally contemplated as falling within the objective of the PCA: *eg*, a Singapore citizen who was now a permanent resident of and employed in a foreign country, and who received a bribe in a foreign currency from a foreign payor for an act to be done in that foreign country and not Singapore. Such a person would be guilty of a corruption offence because of s 37(1) of the PCA.

(ii) It was under-inclusive as it failed to include a class of persons who clearly fell within the mischief sought to be addressed by the PCA: *eg*, a Singapore permanent resident or a foreigner working in the Singapore Civil Service who took a trip outside Singapore to receive a bribe in Singapore dollars in relation to an act which he was do in Singapore. Such a person would not be caught by s 37(1) of the PCA.

(e) The Singapore permanent resident or foreigner in scenario (d)(ii) above posed a greater threat to the integrity of the Singapore Civil Service than the Singapore citizen employed abroad in scenario (d)(i) above, but only the latter, and not the former, was caught by s 37(1) of the PCA.

(f) The strength of the nexus or relation between the objective of the PCA and the differentia underlying the classification prescribed therein (*viz*, the differentia of citizenship) was insufficient to justify the derogation from the constitutional guarantee of equality in Art 12(1).

56 As pointed out by Prof Tan in *Tan Yock Lin* (at pp 15–16), Karthigesu JA's narrow framing of the object or purpose of the PCA was decisive. Karthigesu JA tied the objective of the PCA back to Singapore, *ie*, the object of the PCA was to eradicate corruption which infringed on the efficient running of the Singapore Civil Service and stem out corrupt practices amongst fiduciaries *in Singapore*. Since s 37(1) of the PCA was added to address acts of corruption taking place outside Singapore but affecting events *within Singapore*, that made the differentia employed – *viz*, that of citizenship – more vulnerable to failing to achieve the purpose.

57 Following the accused's acquittal by the High Court in *Taw Cheng Kong (HC)*, the Attorney-General brought a criminal reference on questions of law under s 60 of the Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed). One of these questions was whether s 37(1) of the PCA was discriminatory against Singapore citizens and, hence, inconsistent with Art 12(1). The Court of Appeal considered the concept of equality and the tests for determining whether a statute or an executive act violated Art 12, applied those tests to s 37(1) of the PCA and answered this question in the negative. In dealing with the issues surrounding the object of the PCA and the application of the "rational relation" requirement, the following points made by the Court of Appeal (at [60]–[88] of *Taw Cheng Kong (CA)*) are germane:

(a) Without commenting on Karthigesu JA's approach to statutory interpretation in ascertaining the purpose or object of the PCA and of the later enactment of s 37(1) of the PCA (see [55(b)]–[55(c)] above), the Court of Appeal looked at the preamble to the PCA, which reads: "[a]n Act to provide for the more effectual prevention of corruption", and framed the purpose of s 37(1) of the PCA quite differently and broadly (see *Taw Cheng Kong (CA)* at [63]):

> We thought it obvious that the 1966 introduction of the extra-territorial clause in [s 37(1)] was, *inter alia*, to widen the ambit of the Act [*ie*, the original PCA] for the more effective control and suppression of corruption.

(a) Thus formulated, s 37(1) of the PCA was capable of capturing all corrupt acts by Singapore citizens outside Singapore while still falling within the broad purpose of controlling and suppressing corruption.

(b) The removal from the objective of the PCA of any reference to acts of corruption which had a demonstrable effect in Singapore made it immediately easier to justify the constitutionality of the differentia prescribed in s 37(1) of the PCA.

(c) The Court of Appeal also dismissed the notion that the under-inclusiveness or over-inclusiveness of s 37(1) of the PCA meant that it was unconstitutional:

> (i) In the case of under-inclusiveness, Parliament had to respect international comity, which made it impractical to extend s 37(1) of the PCA to non-citizens outside of Singapore.
>
> (ii) In the case of over-inclusiveness (*viz*, a Singapore citizen who was a foreign permanent resident employed in a foreign country and who received a bribe paid in foreign currency by a foreign payor for an act to be done in that foreign country), it was irrelevant to the constitutional issue of equality because s 37(1) of the PCA applied to all Singapore citizens as a class.

(b) The Court of Appeal said (at [82] of *Taw Cheng Kong (CA)*):

> … [I]f the differentiation along the line of citizenship was justified and permissible, as we so held, over-inclusiveness was irrelevant to the constitutional issue. Section 37(1) was only over-inclusive because, as the learned judge found, it captured that segment of Singapore citizens not contemplated by the [PCA]. But, this would not offend the equality provision because the section would apply to *all* Singapore citizens as a class. It followed then that the objection to classification between citizens and non-citizens on the basis of over-inclusiveness did not arise at all. [emphasis in original]

(d) The Court of Appeal (at [81] of *Taw Cheng Kong (CA)*) accepted that even if s 37(1) of

the PCA was under-inclusive, in that it failed to capture non-citizens whose corrupt acts outside Singapore had consequences in Singapore, the overriding need to observe international comity made it impractical to extend s 37(1) of the PCA to capture non-citizens whose corrupt acts outside Singapore had consequences in Singapore. The Court of Appeal also held that it was undeniable that s 37(1) of the PCA would go some way toward capturing the corrupt acts of Singapore citizens abroad and that, itself, furthered the object of the PCA. It said (likewise at [81]):

> … [S]urely it was undeniable that s 37(1) would go some way in capturing the corrupt acts of citizens abroad, and that in itself would have furthered the object of the [PCA] – that in our view was sufficient; the under-inclusiveness of the provision was not fatal. The enactment of a provision need not be seamless and perfect to cover every contingency. Such a demand would be legislatively impractical, if not impossible.

(e) The Court of Appeal found that it was not unreasonable or irrational for s 37(1) of the PCA not to apply to the corrupt activities of Singapore permanent residents and non-citizens which took place outside Singapore.

58 Prof Tan has made a number of comments on *Taw Cheng Kong (CA)* in *Tan Yock Lin* (at pp 15–16). The first relates to the importance of the proper framing of the object or purpose of the impugned legislation. If the true purpose of s 37(1) of the PCA and the PCA itself is *not* to deter the causing of harmful effects in Singapore from corruption but to deter the participation of *Singaporeans* in corruption, then the objection of over-inclusiveness (based on the example of the Singapore citizen who lives abroad and commits a corrupt act abroad which has no effect in Singapore) disappears because it falls within the aforesaid re-framed purpose. Prof Tan has also made the following comments (see *Tan Yock Lin* at pp 18–19):

(a) The Court of Appeal was wrong in dismissing over-inclusiveness as irrelevant on the ground that s 37(1) of the PCA applied to all Singapore citizens. In other words, it was incorrect of the Court of Appeal to say that since there was equality within the class targeted by s 37(1) of the PCA, the provision was fair, and the differentiation permissible. Prof Tan comments that this amounts to a tautology and, therefore, no classification would ever be over- or under-inclusive:

> This syllogistic dismissal of the objection of overinclusiveness betrays its premises, since it amounts to an argument that class fairness is a tautology and on this account, nothing that is overinclusive or underinclusive can ever be recognised. But in the first place, the willingness to test for inclusiveness predicates the rejection of a tautologous conception of class fairness. A convincing answer must therefore be found outside the expression brandished in *Ong Ah Chuan v PP*.

(b) If the under-inclusiveness of s 37(1) of the PCA is justified purely on the basis of international comity, then whilst this might explain why the citizenship criterion is sound, there would be a glaring under-inclusion in the case of the Singapore permanent resident. In Prof Tan's view:

> The under-inclusion of the permanent resident seems, however, to have been ignored in both courts principally because the arguments focused on the supposed ideal effects criterion, contrasting the nationality criterion with it. But if considerations of international comity explain why the nationality criterion is sound, the omission of the permanent resident becomes a glaring omission. He seems to go with the citizen as wood goes with fire. Would there not be a serious under-inclusion in his omission?

59 With the greatest respect, and with due deference to the Court of Appeal in *Taw Cheng Kong (CA)*, Prof Tan does make some valid points, the most important of which, in my view, is his criticism of the use of tautological reasoning in deciding whether or not a classification is constitutionally permissible. In this same regard, Prof Tan raised the Privy Council case of *Ong Ah Chuan* as another example of tautological reasoning. The question posed to the Privy Council in that case (at [32]) was whether it was inconsistent with Art 12(1) to impose a mandatory death penalty on an offender who "gratuitously supplied an addict friend with 15g of heroin from his own private store, and to inflict a lesser punishment upon a professional dealer caught selling for distribution to many addicts a total of 14.99g". In answering this question, Lord Diplock made a number of important observations (at [33] and [35]–[37]):

> 33 Their Lordships would emphasise that in their judicial capacity they are in no way concerned with arguments for or against capital punishment or its efficacy as a deterrent to so evil and profitable a crime as trafficking in addictive drugs. *Whether there should be capital punishment in Singapore and if so, for what offences are questions for the Legislature of Singapore*. …
>
> …
>
> 35 … 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 offence that has been committed.
>
> 36 The discrimination that the appellants challenge in the instant cases is discrimination between class and class: the imposition of a capital penalty upon that class of individuals who traffic in 15g of heroin or more and the imposition of a penalty, severe though it may be, which is not capital upon that class of individuals who traffic in less than 15g of heroin. The dissimilarity in circumstances between the *two classes* of individuals lies in the quantity of the drug that was involved in the offence.
>
> 37 The questions whether this dissimilarity in circumstances justifies any differentiation in the punishments imposed upon ***individuals who fall within one class and those who fall within the other*** , and, if so, what are the appropriate punishments for each class, *are questions of social policy*. Under the Constitution, which is based on the separation of powers, these are questions which it is the function of the Legislature to decide, not that of the Judiciary. *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 in italics and bold italics]

60 Lord Diplock's judgment presents two clear strands of principles. The first strand concerns differentiation within the same class, which is always prohibited; the second concerns differentiation between two or more different classes, which is permissible if it passes the "reasonable classification" test. If we apply Prof Tan's reasoning, it will be seen that this is, in effect, a possibly illusory distinction. Although Lord Diplock appears to have distilled two categories of cases, there is in fact only one category governed by the fundamental rule that "like should be treated alike". This is because within Lord Diplock's first category of differentiation (*ie*, differentiation within one single

class), it is more often than not conceptually possible to break down the single class into smaller classes, thereby creating two or more classes. For example, returning to *Taw Cheng Kong (HC)* and *Taw Cheng Kong (CA)*, Singapore citizens, Singapore permanent residents and foreigners living in Singapore can all perform corrupt acts which adversely affect the Singapore Civil Service and/or fiduciaries in Singapore. We can create one class with all three groups within it on the basis that their corrupt acts adversely affect the Singapore Civil Service and/or fiduciaries in Singapore. In such an event, we cannot discriminate within that one big class. But, we can also create two classes out of the three groups: one class that resides here, and another class that resides outside Singapore but performs corrupt acts which affect Singapore. It would then be acceptable to discriminate against one class because such discrimination would be across classes, but we are, in effect, discriminating against some of these people but not others when they were previously grouped as one big class. The same tautology is seen if we classify these persons into three classes – *viz*, Singapore citizens, Singapore permanent residents and foreigners living in Singapore – in which case, it is again permissible to discriminate against a particular class. Similarly, we can classify these same persons into six groups: from each of the three groups (*viz*, Singapore citizens, Singapore permanent residents and foreigners living in Singapore), we can divide them further into those that do acts which affect Singapore, and those that do not. We can divide them further into twelve groups if we add in the factor of where the gratification was accepted or where the bribe was made, *ie*, whether in Singapore or overseas.

61 The way to avoid this tautology is to be less fixated with the idea of *classes*, and more focused on the fundamental rubric that "like should be treated alike". In determining whether like persons are being treated alike, the inquiry has to be informed by the purpose of the legislation in question and its connection to the differentia underlying the classification prescribed by the challenged legislation. Speaking in the abstract of permissible discrimination *between* classes and impermissible discrimination *within* a class is not helpful.

62 Bearing in mind the above, I now examine the object of s 377A and the issue of whether there is a rational relation between that object and the differentia underlying the classification prescribed by s 377A. I begin with the former.

(2) What is the object of s 377A?

(A) The Labouchere Amendment

63 The Court of Appeal in *Tan Eng Hong* has (at [23]–[33]) comprehensively set out the legislative history of s 377 and s 377A, and there is no need to repeat the same, save to refer to it where relevant. The wording of s 377A comes from the amendment commonly known in England as "the Labouchere Amendment" (see *Tan Eng Hong* at [26]), which was introduced into English criminal law via s 11 of the Criminal Law Amendment Act 1885 (c 69) (UK) ("the UK 1885 Act"). The proposer of this amendment, Mr Henry Labouchere ("Mr Labouchere"), was described as a radical Liberal Party Member of Parliament ("MP") and a banking heir who had put his money and energies into a radical, muck-raking newspaper called "Truth". He advocated, *inter alia*, the abolition of the House of Lords and an end to racism, and championed the working classes, women and the dispossessed: see Douglas E Sanders, "377 and the Unnatural Afterlife of British Colonialism in Asia" (2009) 4 Asian Journal of Comparative Law 163 at p 176. The preamble to the UK 1885 Act stated that it was an Act to make further provision for, *inter alia*, the protection of women and girls and the suppression of brothels. Section 11 of that Act specifically focused on sexual conduct, both in public and in private, between male homosexuals and was thus not quite related to the preamble. The reasons for the enactment of the Labouchere Amendment are now a little obscure. Francis Barrymore Smith ("Smith"), in his article "Labouchere's Amendment to the Criminal Law Amendment Bill" (1976) 17 Historical

Studies 165 ("*F B Smith*"), states that: "[t]he question [of why the Labouchere Amendment was enacted] can never be settled convincingly. Mr Labouchere's personal papers mostly seem to have been destroyed and the few that are known have no bearing on this episode." At paras 106–108 of the United Kingdom Report of the Departmental Committee on Homosexual Offences and Prostitution (Cmnd 247, 1957) ("the Wolfenden Report"), the additional points emerge:

(a) Buggery and attempted buggery, wherever and with whomsoever committed, have long been criminal offences in the UK. These acts are criminal offences regardless of whether they are committed in public or in private and whether they are committed between consenting parties or non-consenting parties.

(b) The Labouchere Amendment was introduced in the late stages of a Bill to make further provision for, *inter alia*, the protection of women and girls and the suppression of brothels ("the 1885 Bill"). Specifically, this amendment was introduced in the House of Commons at the report stage of the 1885 Bill (*ie*, the 1885 Bill had already been passed by the House of Lords, where it had been introduced without any reference to "gross indecency" between males). Mr Labouchere's reasons for introducing the amendment were recorded as follows (see *Daily Debates* (6 August 1885) at col 1397):

> … [A]t present any person on whom an assault of the kind here dealt with was committed must be under the age of 13, and the object with which [Mr Labouchere] had brought forward this clause was to make the law applicable to any person whether under the age of 13 or over that age …

(c) The Labouchere Amendment was passed by the House of Commons without any discussion on its substance, the only question raised being whether it was in order to move an amendment that dealt with a class of offence totally different from the offences contemplated by the 1885 Bill, which had already been read for the second time in the House of Commons.

(d) The Speaker of the House of Commons ruled that anything could be introduced by the leave of the House, and the Labouchere Amendment was adopted.

(e) The clause which became s 11 of the UK 1885 Act went much wider than Mr Labouchere's stated intention as set out at sub-para (b) above, and it seems probable that the UK Parliament let it pass without the detailed consideration which such an amendment would almost certainly receive today.

(f) Lastly, s 11 of the UK 1885 Act read as follows:

> *Any male* person who, in *public or private*, commits, or is a party to the commission of, or procures or attempts to procure the commission by *any male person* of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour. [emphasis added]

It appears that the original intent behind s 11 of the UK 1885 Act was to protect any person from an indecent assault "of the kind here dealt with", regardless of whether that person was below or above 13 years of age and whether the act in question was committed in public or in private. It was not specifically directed at criminalising male homosexual conduct. However, what was eventually passed into law was something different and more far-reaching as it made acts of "gross indecency" between males, whether in public or in private and whether or not there was consent, an offence.

64 Although the purpose of the Labouchere Amendment and the history of its passage into the statute books may remain obscure, the implementation or enforcement of the resulting legislative provision – s 11 of the UK 1885 Act – did not. Oscar Wilde was one of those prosecuted, convicted and sentenced to two years' imprisonment with hard labour under that provision in 1895. In convicting him and imposing the maximum sentence on him, the trial judge, Wills J, said that the maximum sentence allowed was "totally inadequate for a case such as this", and that the case was "the worst case I have ever tried": see *F B Smith* at p 171; see also "Sentencing Statement of Justice Wills" <http://law2.umkc.edu/faculty/projects/ftrials/wilde/sentence.html> (accessed 29 March 2013). What we do know of Victorian society at the time of Oscar Wilde's trial is that society felt it a great depravity and immorality to have men like Oscar Wilde in society seducing young boys and men into leading their way of life, and felt that this kind of conduct deserved the clearest condemnation. Smith (in *F B Smith* at p 165) writes that "within the decade there developed in the British public a *rabid detestation* of male homosexuality" [emphasis added].

65 What can be gleaned today, almost 130 years later, is that Mr Labouchere wanted to introduce legislation to protect persons above the age of 13 (as the existing law already protected those below 13) from assaults of the kind dealt with by the Labouchere Amendment, even though this proposed amendment did not quite fall within the main purposes of the 1885 Bill. Although the reason given by Mr Labouchere appeared gender-neutral, the provision that was passed clearly targeted homosexual males and applied to acts of "gross indecency" between males, whether in public or in private and whether or not there was consent. It must also be remembered in context that in the UK, it was only in 1861 (via s 61 of the Offences Against the Person Act 1861 (c 100) (UK) ("the UK 1861 Act")) that the death penalty for the offence of buggery was replaced with life imprisonment. Further, it may well be that the phrase used by Mr Labouchere – *viz*, "assault[s] of the kind dealt with" – referred to sexual acts committed by male homosexuals.

(B) The Penal Code (Amendment) Ordinance 1938 (No 12 of 1938)

66 Whilst s 11 of the UK 1885 Act was not imported into the Indian Penal Code 1860 (Act No 45 of 1860) ("the IPC"), from which our Penal Code is derived, it found its way into many of the former British colonies, including Singapore, Hong Kong, Malaysia, Gibraltar and Australia (see also the equivalent provisions in Kenya, Malawi, Zambia, Jamaica, Kiribati, Nauru and Tuvalu), where some of the corresponding provisions survive to this day. In Singapore, s 11 of the UK 1885 Act was introduced into the Penal Code (Cap 20, 1936 Rev Ed) ("the 1936 Penal Code") by the Penal Code (Amendment) Ordinance 1938 (No 12 of 1938) ("the Howell Amendment"). As set out in *Tan Eng Hong* at [27], the then Attorney-General, Mr C G Howell ("AG Howell"), made the following statements in the Legislative Council on the introduction of the Howell Amendment (see *Proceedings of the Legislative Council of the Straits Settlements* (13 June 1938) at p B49):

> With regard to clause 4 it is *unfortunately the case that acts of the nature described have been brought to notice*. As the law now stands, such acts can only be dealt with, if at all, under the Minor Offences Ordinance, and then *only if committed in public*. Punishment under the Ordinance is inadequate *and the chances of detection are small. It is desired, therefore, to strengthen the law* and to bring it into line with 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]

67 From this short address, it can be seen that the reasons given for the introduction of the Howell Amendment were as follows:

(a) it was "unfortunately the case" – *ie*, it was a regrettable state of affairs or a misfortune or

an undesirable thing or state of affairs – that males were engaged in grossly indecent acts with other males;

(b) such acts had been brought to notice;

(c) at that time, such acts could be dealt with by the law only if they were committed in public;

(d) the chances of detecting such acts were small; and

(e) it was desirable to strengthen Singapore's criminal law and bring it in line with English criminal law as well as the criminal law of other British colonies.

The purpose of s 377A's enactment was therefore clear. The act of males engaging in grossly indecent acts with other males was to be criminalised. The prevalence of such acts was a regrettable state of affairs and was not desirable. It was necessary to strengthen the criminal law and enable it to prosecute males engaging in such grossly indecent acts even if the acts were committed in private. This was because the then prevailing law made it difficult to detect and prosecute such acts.

68 In today's context, three things are notable about the Howell Amendment:

(a) The proposed new section would only apply to grossly indecent acts between males. Females were not included or targeted.

(b) At the time when the Howell Amendment was enacted by the Legislative Council in 1938, Singapore had no Constitution as such nor any provisions relating to fundamental liberties. (In 1938, the Governor of the Straits Settlements ("the Governor"), Sir Shenton Thomas, ruled the Colony of Singapore as part of the Straits Settlements under Letters Patent with the assistance of the Executive Council and the Legislative Council. The Legislative Council was, in a sense, entrusted with the law-making powers of the Straits Settlements. It was composed of members of the Executive Council, the Chief Justice and representatives appointed by the Governor, with the Governor having the power of assent and the right of veto in respect of all proposed legislation: see *Essays in Singapore Legal History* (Kevin Y L Tan gen ed) (Marshall Cavendish Academic, Singapore Academy of Law, 2005) at pp 37–40.)

(c) The proposed new section would apply even to grossly indecent acts between males done in private.

69 As I mentioned earlier, the original purpose of s 11 of the UK 1885 Act, from which our s 377A is derived, was admittedly a little hazy and appears to have changed from its original intention to become a more wide-reaching provision. However, by 1938, when s 11 of the UK 1885 Act was adopted locally as s 377A of the 1936 Penal Code, the purpose of the provision, although laconically expressed, was quite clear. Acts of "gross indecency" between males, whether in private or in public and whether or not there was consent, constituted criminal behaviour, and it was a criminal offence to indulge in such acts.

70 In my judgment, the purpose or object of s 377A is that articulated by AG Howell in 1938 when he spoke in the Legislative Council and introduced the provision which later became s 377A (see [66]–[67] above). In ascertaining the purpose or object of a statutory provision, if such purpose or object is not already clear from the provision itself (which is not the case here), then in accordance with s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) ("the Interpretation Act"), we may look to any

explanatory statement in the Bill introducing the provision or to the speech made in Parliament at the second reading of that Bill. These must be the primary guideposts. The purpose of an earlier precursor of the statutory provision, especially if that precursor is a statute or subsidiary legislation from another jurisdiction, is but a secondary guidepost at best, referable for context or for elucidation when the primary guideposts are silent or unclear. Such secondary guideposts must be used with extreme caution. For instance, the Labouchere Amendment was introduced in the UK in 1885 and more than 50 years passed before s 377A was introduced into the 1936 Penal Code in Singapore. English society and norms in 1885 must have been vastly different from those prevailing in Singapore in 1938. Furthermore, our Penal Code originates from India, and not England. In this regard, Karthigesu JA's warning in *Taw Cheng Kong (HC)* – *viz*, that statutory provisions which are inserted later in time should not necessarily be governed by or interpreted based on earlier material – is all the more apposite. Statutory provisions are sometimes adopted with modifications or undergo amendments before they are passed into law. Bills, drafts, precursors and Parliamentary speeches should not be resorted to uncritically. Looking to another jurisdiction with similar statutory provisions, which may be helpful in some cases, should also be done bearing in mind factors like possible differences in the purpose of the corresponding foreign statutory provisions, possible differences between the legislative history of that foreign jurisdiction and the legislative history of Singapore, the context of the legal system or statute within which the corresponding foreign statutory provisions are contained, as well as possible differences in that foreign jurisdiction's society and its individual or special needs. In this case, given AG Howell's articulation in 1938 of the purpose of the Howell Amendment, I do not think the ascertainment of the purpose of s 377A would be helped very much by looking at English sources; these sources can only be contextual background at best.

71 When Singapore formed part of Malaysia in 1963, the Federal Constitution of Malaysia which contained Art 8 became applicable. When Singapore became an independent and sovereign nation on 9 August 1965, it adopted the Constitution, which contained Art 12 within Part IV (headed "Fundamental Liberties"). Does the fact that Singapore did not have a Constitution in 1938 in some way affect s 377A's validity once the Constitution came into being in August 1965? The short answer is no. As noted by the Court of Appeal in *Taw Cheng Kong (CA)*, equality before the law and equal protection of the law became part of the wider doctrine of the rule of law and were already an important part of the law of England when English law was imported into Singapore by the Second Charter of Justice in 1826. Equality before the law and equal protection of the law were therefore already part of the law of our land when s 377A was introduced in 1938. That said, no challenge as to s 377A's validity has been made until these cases were brought.

(C) The October 2007 Parliamentary Debates

72 The next significant event, as far as the purpose or object of s 377A is concerned, occurred in October 2007 when Parliament considered major revisions to the 1985 Penal Code through the Penal Code (Amendment) Bill 2007 (Bill 38 of 2007) ("the 2007 Bill"). The then Senior Minister of State for Home Affairs, Assoc Prof Ho Peng Kee ("Assoc Prof Ho"), made the following introduction at the 2007 Bill's second reading (see *Singapore Parliamentary Debates*, *Official Report* (22 October 2007) vol 83 at cols 2175–2176):

> Sir, the Penal Code [*ie*, the 1985 Penal Code] is the primary criminal statute in Singapore with more than 500 provisions. It is a key part of the corpus of Singapore's laws which have served us well in keeping our law and order situation under control all these years. As a major criminal statute, its provisions reflect our society's norms and values. This review is the most comprehensive undertaken since 1984, when we amended the Penal Code [(Cap 103, 1970 Rev Ed)] to introduce mandatory minimum punishment for several serious offences. Now, we are amending the Code so that it remains effective in a dynamic and changing environment that

remains challenging.

Assoc Prof Ho told Parliament that this comprehensive review of the 1985 Penal Code was a process which had stretched over two to three years. The Government had worked closely with the Attorney-General's Chambers, the Ministry of Law and other Government agencies, and had taken into account legislative changes in other jurisdictions as well as comments made by judges in their judgments. The amendments before Parliament had also been refined through a robust process of public consultation, with input from members of the public, professional organisations, stakeholders of the criminal justice system, the Law Society of Singapore, the Subordinate Courts and the Singapore Academy of Law; there had also been multiple points of engagements with people from different walks of life.

73 Pursuant to this comprehensive review of the 1985 Penal Code, s 377 was repealed, but s 377A was retained. Both the Plaintiffs and the Defendant have relied on the various speeches made on 22 and 23 October 2007 during the October 2007 Parliamentary Debates in their respective submissions.

74 This reliance on the October 2007 Parliamentary Debates raises two questions which I put to the parties:

(a) What is the position where, after a statutory provision is enacted, there are subsequent Parliamentary debates on the same provision? Can these be looked at to re-examine the purpose of the provision, and if so, what is the effect if the re-examination reveals further or new reasons for or expands upon the original purpose of the provision?

(b) What happens if the original purpose of the statutory provision is no longer applicable or acceptable, but there is a new purpose which that statutory provision can still fulfil? Can that new purpose be substituted for the original purpose in ascertaining the constitutionality or otherwise of the statutory provision?

75 In answering the first of the two questions above, it is important to remember four facts:

(a) First, the October 2007 Parliamentary Debates were not debates on the enactment or introduction of s 377A. At the time of those Parliamentary debates, s 377A was an existing provision and no amendments thereto were being proposed.

(b) Secondly, a comprehensive review of the 1985 Penal Code had been undertaken and it had been decided, after due deliberation and consultations, to repeal s 377 but not s 377A.

(c) Thirdly, s 377A became an issue during the October 2007 Parliamentary Debates because a NMP, Mr Siew Kum Hong, submitted a petition dated 6 October 2007 signed by 2,341 citizens calling for the repeal of s 377A ("the Petition"). (It should be noted that under the Constitution, NMPs have limited voting rights in Parliament.)

(d) Fourthly, no vote was taken on the Petition or on whether to repeal s 377A, albeit it was clear that the majority of the Members of Parliament were in favour of retaining s 377A.

76 The Petition called for s 377A to be repealed along with s 377. It recited, *inter alia*, that:

(a) With the repeal of s 377, anal and oral sex between heterosexual couples would no longer be an offence. In comparison, the continued existence of s 377A would prejudice the rights and interests of homosexual and bisexual men in an unconstitutional manner.

(b) Section 377A was discriminatory because the same act of "gross indecency" between heterosexual couples was permitted, but it was criminalised if performed between homosexual and bisexual men.

(c) Such discrimination infringed Art 12(1).

(d) Even if it was accepted that Singapore was a conservative society where the majority had a negative attitude towards homosexuality, this discrimination against homosexual and bisexual men represented the tyranny of the majority, and this was exactly what Art 12(1) was intended to protect the minority against.

(e) The stated rationale of s 377A failed the "rational relation" test for determining the constitutionality of a deviation from Art 12(1).

(f) According to the public consultation paper and the proposed amendments issued by the Ministry of Home Affairs, our Penal Code (*ie*, the 1985 Penal Code, at the time of the October 2007 Parliamentary Debates) was intended to maintain a safe and secure society. The amendments were meant to bring the 1985 Penal Code up to date, and decriminalising private sexual conduct between consenting adults would not make Singapore unsafe or less secure.

(g) Furthermore, reflecting the public's conservative attitude towards sex was not one of the stated aims of our Penal Code or even the 2007 Bill. Yet, the stated objective of s 377A was to reflect public morality; s 377A was therefore not rational when assessed against the legitimate aims of our Penal Code.

(h) No harm was done to society when consenting heterosexual adults had sex in private. Why should it be any different when it came to sex between two men in private? The correct basis for determining the criminality or otherwise of sexual acts between adults should be consent.

(i) Section 377A represented an unconstitutional derogation from the guarantee of equality and equal protection encapsulated in Art 12(1).

(j) It was undisputed that society found extra-marital affairs immoral. Yet, our Penal Code did not criminalise such activities.

(k) Throughout history, public morality as a justification for discriminatory action had never stood up over time. It had been used in the past by other countries to enforce slavery, discrimination against racial and religious minorities and discrimination against women, and none of these forms of institutional discrimination remained today.

(l) Article 12(1) states the principle simply but elegantly: all persons are equal before the law and are entitled to the equal protection of the law.

The Petition ended by respectfully requesting Parliament to uphold the fundamental principle set out in Art 12(1), and extend equal protection to all Singaporeans in respect of their private consensual conduct, regardless of their sexual orientation.

77 In my judgment, if the purpose of a provision was articulated in Parliament when it was first introduced, and at some later date, a comprehensive review of the Act containing that provision was carried out and it was decided that the provision should be retained, then absent any unusual facts or circumstances, the purpose of the provision as articulated in Parliament when the provision was

first introduced will still be the purpose for which that provision was enacted.

78 Should we look at the October 2007 Parliamentary Debates to ascertain the purpose or object of s 377A? I do not think there is a need to do so, but in any event, I found that those debates did not assist the Plaintiffs at all. In this case, the purpose of s 377A was articulated, albeit within the context of a colonial government, when it was enacted by the Legislative Council in 1938. Section 377A was considered again some 69 years later, and it was decided that the provision should be retained even though s 377 was to be repealed. That was the view taken by Parliament in 2007. In effect, the purpose of s 377A, as articulated by AG Howell in 1938, was reaffirmed by Parliament in 2007. That purpose therefore still remains valid today (see [77] above).

79 Be that as it may, as the Plaintiffs have made lengthy submissions, *inter alia*, to the effect that: (a) the purpose of s 377A is no longer valid; (b) the Government has said that it is not going to pro-actively enforce s 377A; and (c) the purpose of leaving s 377A on the statute books is not to polarise society but to maintain social cohesion, I shall proceed to examine these submissions.

80 During the October 2007 Parliamentary Debates, Assoc Prof Ho told Parliament that s 377 would be repealed as it was intended to remove the use of the archaic term "carnal intercourse against the order of nature". Consequently, any sexual act, including oral and anal sex, between a consenting heterosexual couple aged 16 and above would no longer be a crime when done in private. Assoc Prof Ho said that our Penal Code reflected social norms and values, and repealing s 377 was the right thing to do as Singaporeans by and large did not find oral and anal sex in private between a consenting male adult and a consenting female adult offensive or unacceptable. This was clear from the public reaction to the decision in *Annis bin Abdullah v Public Prosecutor* [2004] 2 SLR(R) 93, which reaction was confirmed through public feedback during the review of the 1985 Penal Code and the public consultation which took place pursuant to that review.

81 Assoc Prof Ho then went on to explain that s 377A, which criminalised acts of "gross indecency" between two male adults, would be retained. He said that public feedback on s 377A was emotional, divided and strongly expressed, with the majority calling for s 377A's retention. Assoc Prof Ho also explained that Singapore was still a conservative society where the majority found homosexual behaviour offensive and unacceptable.

82 Assoc Prof Ho further said that since neither side (*ie*, respectively, those in favour of retaining s 377A and those in favour of repealing it) was going to be able to persuade or convince the other of its position, we should live and let live, and let the situation evolve in tandem with the values of our society. This approach was a pragmatic one that maintained Singapore's social cohesion. Assoc Prof Ho also said that the police had not been proactively enforcing s 377A and would continue to take this stance except where minors were exploited or abused or where male adults committed the offence in public places such as public toilets or back-lanes. Assoc Prof Ho said that whilst homosexuals had a place in society and had, in recent years, been given more social space, repealing s 377A would be very contentious and might send the wrong signal that the Government was encouraging and endorsing the homosexual lifestyle as part of our mainstream way of life.

83 Quite a number of MPs and NMPs rose to speak during the October 2007 Parliamentary Debates, at times passionately and vigorously, with well-reasoned points that focused on the many different aspects to the retention or otherwise of s 377A. The debate crossed party lines, with some members of the ruling People's Action Party advocating s 377A's repeal, but a larger number supporting its retention. The opposition MP, Mr Chiam See Tong, like some other MPs, did not touch on s 377A, while Non-Constituency MP Ms Sylvia Lim, Chairman of the Workers' Party, told Parliament quite candidly that the Workers' Party's leadership had extensively discussed the issue and, having been

unable to arrive at a consensus that s 377A should be repealed, were accordingly not calling for its abolition. There were certainly polarised views. Quite a few MPs recounted anecdotal incidents of parents' non-acceptance of homosexual behaviour by their children. These parents' reactions were not very different from the initial reaction of Mr Lim's mother set out above at [3].

84 Counsel for the Plaintiffs, Mr Low, pointed to the later portions of the speech by Prime Minister Lee Hsien Loong ("the Prime Minister") during the October 2007 Parliamentary Debates and submitted that in view of the reasons put forward for the retention of s 377A, the purpose of the provision was now this: since neither the pro-s 377A side nor the anti-s 377A side would be able to convince the other of its point of view, and since pushing the issue would polarise and divide our society, we should live and let live, and it was best that we do nothing and leave s 377A as it stood. That, Mr Low submitted, could not be a legitimate purpose for legislation. With respect, I cannot disagree more. First and foremost, the purpose submitted by Mr Low was *not*, on any reading of the official record of the October 2007 Parliamentary Debates, put forward as the *purpose* of s 377A. Instead, it was a practical reason why, amongst other more basic reasons, s 377A should be retained. Secondly, Mr Low's submission was derived by taking a small part of three or four paragraphs of the official record of the October 2007 Parliamentary Debates out of context in an attempt to frame a purpose. It is quite clear from the Prime Minister's speech, as well as from the speeches of other MPs who spoke in favour of s 377A's retention, that they viewed s 377A and its continued retention as follows:

(a) Whether s 377A should be retained or repealed was a question of morality and concerned the moral values of Singapore society. Singapore was a conservative society where the majority did not accept homosexual behaviour and wanted s 377A to be retained (as an example, the Prime Minister pointed out that as against the 2,341 signatures on the Petition, there were, at the time of his speech in Parliament, 15,560 signatures on a counter-petition to retain s 377A).

(b) The family was still the basic building block of Singapore society, and a "family" meant one man marrying one woman, having children and bringing up their children within the framework of a stable family unit. That was the policy of the Government, and the Government, after extensive feedback and long discussion, wanted to maintain that status quo.

(c) The aforesaid concept of a "family" was what was taught in schools. The vast majority of Singaporeans wanted to keep it that way, and so did the Government.

Parliament also accepted that: (a) male homosexuals had already been given more social space and were part of our society; and (b) the policy of not enforcing s 377A actively, save where minors were exploited or abused or where grossly indecent acts were committed by male adults in public, would be continued. The majority of the MPs were of the view that whilst retaining s 377A might be legally untidy, repealing it would result in the loss of a moral signpost and would not reflect the views of a vast majority of society who were not ready to accept homosexuality as part of our mainstream way of life. The majority were against putting homosexual couples on par with normal heterosexual couples who conceived children and formed the basic building blocks of families in our society.

85 It is clear from the speeches made during the October 2007 Parliamentary Debates that the *purpose* of s 377A has not changed from the purpose articulated by AG Howell in 1938. After extensive consultations at all levels, the Government decided to repeal s 377 but retain s 377A. Because of the Petition presented to Parliament, which called for the repeal of s 377A, the debate over the abolition or retention of this provision took place and in fact overshadowed the rest of the proposed amendments to the 1985 Penal Code. The reason for s 377A's retention, which affirmed the purpose of the provision as articulated by AG Howell in 1938, was that Singapore was a conservative

society where the majority did not accept homosexuality. One MP said that based on his constituents' feedback, the majority found homosexual behaviour offensive and repugnant. One of the last few MPs to speak, Dr Muhammad Faishal Ibrahim, said (see *Singapore Parliamentary Debates*, *Official Report* (22 October 2007) vol 83 at cols 2469–2472): "The message that I heard loud and clear is that the majority of Singaporeans are not ready for open homosexuality acts to be part of our way of life yet."

86 The Plaintiffs contended that as one of the purposes of s 377A was to preserve the "family" (as described at [84(b)] above) as the basic building block of our society, s 377A was discriminatory as the behaviour of lesbians and those who had extra-marital sex would also undermine this "purpose", but such groups were not targeted as criminals. In my view, this contention is incorrect. [84(b)] above does *not* set out the purpose of s 377A. Instead, it states a value shared by Singapore society, and s 377A by itself does not bring about this value or ensure its continuity. It is clear that this shared value stems not from our penal law, but from societal mores and norms which have been built up over time and which are supported by the Government's policy to promote the same.

87 The second query which I raised at [74(b)] above, arose during the course of the oral submissions before me – what if the original purpose of a statutory provision is no longer applicable or acceptable, but there is a new purpose that the provision can now fulfil? For example, if medical science can prove today that sexual orientation is entirely inborn – *ie*, determined entirely by nature – and is not influenced at all by parental/societal nurturing or lifestyle choices, then the targeting of male homosexuals by s 377A may no longer justifiable. But, if medical science today can show that indulging in male homosexual conduct is a major factor for the spread of HIV/AIDS, can the new purpose of curbing the spread of HIV/AIDS be substituted for the original purpose of s 377A? HIV/AIDS was certainly not around in 1938, and society then saw male homosexuality as a lifestyle choice or a matter of personal conduct. 75 years later, can the aforesaid new purpose of s 377A still sustain the provision if the premise of its original purpose is no longer valid? It is interesting to note that both Mr Abdullah SC and Mr Low accepted that we can substitute this new purpose as a valid purpose of s 377A. Intriguing as this issue is, it does not, however, arise on the facts of this case. I shall therefore leave it for another occasion if and when it does become an issue for decision.

(3) Does the differentia underlying the classification prescribed by s 377A bear a rational relation to the purpose of the provision?

(A) The meaning of "rational relation"

88 Having stated the purpose of s 377A (see [67] above), I now turn to the next element of the Second Limb, *viz*, whether the differentia underlying the classification prescribed by s 377A has a rational relation to the purpose of this provision (see [49] above).

89 What is meant by the term "rational"? It seems clear to me that it must mean something that is based on, endowed with or governed by reason. It must be, at the minimum, reasonable in the sense that it is capable of being supported or justified by reason and is in conformity with what is fairly to be expected or called for. That rationality is tied to reasonableness in this sense can be seen from the judgment of Mukherjea J in the Indian Supreme Court's decision in *Chiranjit Lal* at 911–912:

> … The legislature undoubtedly has a wide field of choice in determining and classifying the subject of its laws, and if the law deals alike with all of a certain class, it is normally not obnoxious to the charge of denial of equal protection; *but the classification should never be arbitrary. It must always rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made; and classification made without any substantial basis should be regarded as invalid.* … [original citation omitted; emphasis added in

italics]

90 Mukherjea J makes a number of propositions. The first is a general one that classifications prescribed by law should not be arbitrary. The second elaborates on how this is ensured. Classifications prescribed by law must be founded on a substantial or discernible basis, such that it will be known who falls within or without the ambit of the law. This is the "intelligible differentia" requirement. Mukherjea J's third proposition is that the differentia underlying a classification must bear a "reasonable and just relation" to the reason why the classification was prescribed in the first place. This is essentially an elaboration of the "rational relation" test. The final point is that where the classification prescribed by a law does not satisfy the two aforesaid requirements, it should be regarded as invalid.

91 Therefore, the meaning of "rational relation" is a relation that is also reasonable and just. Indeed, this seems to be the standard adopted by the Singapore courts in applying the "rational relation" test to legislation which is said to violate Art 12. In *Ong Ah Chuan*, the Privy Council, in deciding that the mandatory death penalty for trafficking in heroin exceeding 15g was not contrary to Art 12, found (at [38]) that:

> There is *nothing unreasonable* in the Legislature's holding the view that an illicit dealer on the wholesale scale who operates near the apex of the distributive pyramid requires a stronger deterrent to his transactions and deserves more condign punishment than do dealers on a smaller scale who operate nearer the base of the pyramid. [emphasis added]

92 This concept of reasonableness was also relied upon by the High Court in *Taw Cheng Kong (HC)*. Karthigesu JA canvassed an "ordinary and reasonable man" test, and applied the test in arriving at the following conclusion (at [70]):

> Pressed, therefore, to conclude whether or not there is a sufficiently strong nexus between the objective of s 37 [of the PCA] and the basis for classification, I think the *ordinary and reasonable man would answer the question in the negative*: the basis of classification is an inadequate means of achieving the objective. I cannot state in more certain terms that the objective of the section is noble, and I agree wholeheartedly with the Public Prosecutor's observation that without an extraterritorial dimension, the whole objective of the [PCA] is too easily defeated. However, my conclusion is that this noble objective was aspired to by unconstitutional means. [emphasis added]

93 The concept of reasonableness is, therefore, central to the inquiry into whether the "rational relation" test is satisfied in any particular case. In addition, some principles have emerged from previous case law which set out helpful pointers for the courts in deciding whether the differentia underlying the classification prescribed by a piece of legislation bears a reasonable and just relation to the purpose of that legislation. I shall elaborate on two of these principles at [94]–[99] below.

(I) The differentia underlying the prescribed classification must be broadly proportionate to the purpose of the law which prescribes that classification

94 An important part of the "rational relation" requirement is that the differentia underlying the classification prescribed by a law must be broadly proportionate to the purpose of that law. In *Yong Vui Kong*, where the constitutional challenge was to the allegedly arbitrary divide of 15g of heroin, above which an accused faced the death penalty but below which he did not, the Court of Appeal approved the passages in *Ong Ah Chuan* cited above at [59], and further added (at [112] of *Yong Vui Kong*):

> We would also add that the quantity of addictive drugs trafficked is not only *broadly proportionate* to the quantity of addictive drugs brought onto the illicit market, but also *broadly proportionate* to the scale of operations of the drug dealer and, hence, *broadly proportionate* to the harm likely to be posed to society by the offender's crime. For these reasons, we find that the 15g differentia bears a rational relation to the social object of the [Misuse of Drugs Act (Cap 185, 2001 Rev Ed)]. [emphasis added]

The Court of Appeal was effectively ensuring that the relation between the differentia based on 15g of heroin and the object of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("the MDA") (which, *inter alia*, made the death penalty mandatory for drug traffickers convicted of trafficking in more than 15g of heroin) was a reasonable and just one by testing the efficacy of that differentia in achieving the purpose of the MDA.

95 It is clear that in using the term "broadly proportionate", the Court of Appeal in *Yong Vui Kong* did not mean that the prescribed differentia had to be the most effective means of achieving the object of the MDA. The Court of Appeal was merely ensuring that the differentia underlying the classification prescribed by the MDA was not one which was so far removed from the object of the MDA that it would result in an unreasonable and unjust relation between the two. So long as the differentia underlying the classification prescribed by a piece of legislation is broadly effective to achieve the object of that legislation, it is not the court's function to displace Parliament's decision in prescribing that classification. Furthermore, what is the *most effective* differentia to use as the basis of a classification prescribed by law is something which "reasonable people may well disagree [on]", and this is a matter which "lies within the province of the Legislature, not the Judiciary" (see *Yong Vui Kong* at [113]):

> Our finding that there is a rational relation between the 15g differentia and the social object of the MDA should not, however, be taken to mean that this differentia is the best and that there is no other better differentia which would further the social object of the MDA. In this regard, we appreciate the points made in Mr Ravi's second, third and fourth arguments at [104]–[106] above, all of which suggest possible reasons for expanding the differentia to take into account something more than just the quantity of controlled drugs trafficked. *We should also point out that although a differentia which takes into account something more than merely the quantity of controlled drugs trafficked may be a better differentia than the 15g differentia, what is a better differentia is a matter on which reasonable people may well disagree. This question is, in truth, a question of social policy, and, as the Privy Council stated in* Ong Ah Chuan *at 673 (quoted at [101] above), it lies within the province of the Legislature, not the Judiciary.* Our judiciary has to respect the constitutional role of our legislature as delineated in the Singapore Constitution (under Art 38), and this is why our courts will only act to ensure that the differentia employed in the MDA for determining when the [mandatory death penalty] is to be imposed bears a rational relation to the social object of that statute. As mentioned in the preceding paragraph, we find that the 15g differentia does satisfy this test. [emphasis added]

The court's role and function is not to second-guess whether Parliament could have or ought to have devised a *more efficacious* differentia. Instead, the court can intervene only if the differentia enacted by Parliament is so clearly inefficacious that it would not even be capable of being considered *broadly proportionate* to the object of the legislation in question.

(II) Under-inclusiveness and over-inclusiveness

96 Another facet of the "rational relation" requirement is that the prescribed classification has to broadly *fit* the object of the law prescribing that classification in terms of the scope of its application.

"Fit" is another way of capturing the concepts of under- and over-inclusiveness, which were first judicially examined and recognised in Singapore in *Taw Cheng Kong (HC)* and *Taw Cheng Kong (CA)*. In *Taw Cheng Kong (HC)*, Karthigesu JA held (at [64]) that:

> ... Parliament's classification of persons on the basis of citizenship is both over-inclusive and under-inclusive, that is, *the net cast by the Legislature catches a class of persons not contemplated as falling within the objectives of the Act* [*viz*, the PCA]*, and also does not catch a class of persons who clearly do fall within the mischief sought to be addressed.* For example, a Singapore citizen now a foreign permanent resident, employed in the foreign country by the foreign government, receiving a bribe paid in the foreign country in a foreign currency by a foreign payor is guilty of an offence under the Act. At the same time, a Singapore permanent resident or a foreigner working for the Singapore government who agrees to take a short trip outside Singapore to receive a bribe in Singapore dollars in relation to an act he will then do in Singapore is not caught by the Act. This is so even though the threat posed in the latter case is so much more obvious and direct than in the former example. Lying between the two extremes are many shades of grey. What is clear is that in such cases, citizenship is not a useful criteria for determining guilt. [emphasis added]

97 Where the differentia underlying the classification prescribed by a piece of legislation results in that classification applying either too broadly or too narrowly, it should follow that the strength of the relation between the differentia and the objective of that legislation may not be sufficiently strong to justify making that classification. In other words, the "reasonableness of the classification is insufficient": see *Taw Cheng Kong (HC)* at [65].

98 That said, a complete coincidence between the classification prescribed by a piece of legislation and the class defined by the object of that legislation is not necessary in order for the relation between the differentia underlying the classification and the object of the legislation to be a reasonable one. This is eloquently elaborated upon by *Huang-Thio* at p 431:

> [I]n determining whether the inequality produced in a classification is trivial or not, the court has to embark on an investigation into the *degree of inequality* involved. Indeed, this is precisely what the courts do all the time when faced with equal protection problems. *The reason is that the doctrine of reasonable classification does not demand a perfect classification, i.e., a complete coincidence of the class defined by the law and the class defined by the purpose of the law.* Under this doctrine, the courts may sustain or reject an imperfect classification, depending on the degree of inequality involved. *The measure of reasonableness of a classification depends on the degree of its success in treating similarly those similarly placed, and the closer the correspondence between the legislative classification and that implied by the purpose of the law, the easier it is to sustain the classification as reasonable.* [emphasis added]

Prof Tan further opines in *Tan Yock Lin* (at p 17) that US case law shows that:

> … [T]ypical responses to the compositional constraint have been to support underinclusive classifications in terms of legislative leeway and overinclusive criteria in terms of urgency or emergency.

99 With regards to over-inclusiveness, there have been US and Indian cases, where the courts have held that an over-inclusive classification might nevertheless satisfy the "rational relation" test. These cases usually involve situations of emergency or relate to policies which entail positive discrimination: see *Hirabayashi v United States* 320 US 81 (1943), *Korematsu v US* 323 US 214 (1944) ("*Korematsu*"), *Ramakrishnan Singh v State of Mysore* AIR 1960 Mys 338 and *Kesava Iyegar v State*

of Mysore AIR 1956 Mys 20. In the Singapore context, the High Court in *Taw Cheng Kong (HC)*, as stated above at [55(d)], held that the classification prescribed by s 37(1) of the PCA was both under- and over-inclusive, and therefore failed the "rational relation" test. Although this conclusion was rejected by the Court of Appeal in *Taw Cheng Kong (CA)*, the principle that over-inclusiveness could possibly result in the "rational relation" test not being satisfied was not rejected. It was merely that the Court of Appeal found over-inclusiveness not to have arisen on the facts.

(B) The object of s 377A bears a rational relation to the differentia underlying the classification prescribed

100 As established above at [67], the purpose of s 377A is to criminalise male homosexual conduct because such conduct is not acceptable or desirable in Singapore society. The differentia underlying the classification prescribed by s 377A, as established at [48] above, is that of male homosexual conduct. Therefore, s 377A is a law where there is a complete coincidence between the differentia underlying the classification prescribed by the legislation and the class defined by the object of that legislation. Given that the differentia adopted in s 377A results in a classification which mirrors the purpose of s 377A, the differentia would be, at the very least, broadly proportionate to the purpose of s 377A in terms of efficacy; it also cannot be under-inclusive or over-inclusive *vis-à-vis* that purpose. In these circumstances, the relationship between the differentia underlying the classification prescribed by s 377A and the object of s 377A (or the mischief which it is designed to deter) clearly satisfies the "rational relation" test.

101 Mr Low contends that since it was said during the October 2007 Parliamentary Debates that s 377A would not be actively enforced (save in the two instances mentioned at [82] above), s 377A does not serve the function of signalling that male homosexual conduct is undesirable and should not be practised openly. In my view, this argument is without merit for two reasons. First, it is questionable whether, in order for a criminal provision to fulfil its function of signalling that certain conduct is undesirable and should not be practised openly, that criminal provision *must* be enforced. Of course, the effectiveness of a criminal provision in fulfilling such a purpose would be greater where enforcement is robust, but not all criminal provisions operate in a similar manner. In the case of s 377A, the Legislature has decided that pursuing the policy of retaining s 377A while not advocating enforcement of s 377A is adequate to fulfil the purpose of s 377A. This judgment made by Parliament should be respected. Whether it is constitutional for the Public Prosecutor to prosecute some but not others for an offence is a separate question which I shall deal with later (see [135] below). The second reason why I find Mr Low's aforesaid argument unmeritorious lies in the presumption of constitutionality, which I shall elaborate on shortly. For now, the short answer to Mr Low's argument is that the express retention of s 377A as a criminal offence is a clear indication by Parliament that acts of "gross indecency" between males is not desired in Singapore, and this indication is sufficiently put across regardless of whether or not Parliament advocates a policy of active enforcement of s 377A. If the Plaintiffs seek to show that this is not the case (*ie*, that s 377A cannot serve its function of signalling disapprobation of male homosexual conduct if it is not actively enforced), compelling or cogent material or factual evidence has to be adduced. Such evidence has not been put forward.

The presumption of constitutionality

102 I turn now to the presumption of constitutionality. I agree with Mr Abdullah SC's submission that the court must always be mindful of this presumption when applying the "reasonable classification" test.

103 The Court of Appeal in *Taw Cheng Kong (CA)* laid down the approach to be adopted in cases

where legislation is impugned as being unconstitutional. The starting point is a strong presumption of constitutional validity. The basis for the presumption of constitutionality, as stated by the US Supreme Court in *Middleton v Texas Power and Light Company* 249 US 152 (1919) at 157 and cited with approval by the Indian Supreme Court in *Chiranjit Lal* at 913, is this:

> It must be presumed that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds.

This proposition is further supported by the following passage from the judgment of Mohamed Azmi SCJ in *Malaysian Bar* at 170, which was cited with approval by the Court of Appeal in *Taw Cheng Kong (CA)* (at [58]):

> In considering Art 8 [of the Malaysian Constitution] there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy.

104 The presumption of constitutionality is given effect practically in a number of ways. The first is that the court *prima facie* leans in favour of constitutionality and supports the impugned legislation if it is reasonable to do so. The second is that it is for the party who attacks the validity of a piece of legislation to place relevant materials and evidence before the court. These principles were established as far back as 1976 in *Su Liang Yu* (at 131):

> When a law is challenged as offending the guarantee of equality and equal protection of the law, the first duty of the court which is really a rule of common sense is to examine the purpose and policy of the statute and then to see whether a classification has been made and which does not result in a real or actual discrimination. In its approach to the problem the court ought *prima facie*, to *lean in favour of constitutionality and should support the legislation if it is possible to do so on* ***any reasonable ground*** and ***it is for the party who attacks the validity of the legislation*** *to place all materials before the court to show either the enactment or the exercise of the power under it is arbitrary and unsupportable.* [emphasis added in italics and bold italics]

105 The Court of Appeal in *Taw Cheng Kong (CA)* reaffirmed (at [80]) that the burden of proof lay with the challenger and, further, elucidated another way in which the presumption of constitutionality had a bearing on a constitutional challenge to a law. The court held (likewise at [80]) that postulating examples of arbitrariness were not helpful in rebutting the presumption of constitutionality:

> … [U]nless the law is plainly arbitrary on its face, postulating examples of arbitrariness would ordinarily not be helpful in rebutting the presumption of constitutionality. This is because another court or person can well postulate an equal number if not more examples to show that the law did not operate arbitrarily. If postulating examples of arbitrariness can always by themselves be sufficient for the purposes of rebuttal, then it will hardly be giving effect to the presumption that Parliament knows best for its people, that its laws are directed at problems made manifest by experience, and hence its differentiation is based on adequate grounds.

The Court of Appeal then explained (also at [80]) how the presumption of constitutionality might be rebutted:

> … Therefore, to discharge the burden of rebutting the presumption, *it will usually be necessary for the person challenging the law to adduce some material or factual evidence to show that it*

was enacted arbitrarily or had operated arbitrarily. Otherwise, there will be no practical difference between the presumption and the ordinary burden of proof on the person asserting unconstitutionality. In the present case, no such evidence was adduced by the respondent, and the learned judge simply postulated examples of arbitrariness in a vacuum. That, in our view, could not rebut the presumption. [emphasis added]

106 I would say that *Yick Wo* is a good example of a challenger placing cogent material and factual evidence before the court to show that the impugned executive action was unjustifiably discriminatory and unconstitutional as it infringed the US Fourteenth Amendment. What level and kind of material or factual evidence is required will, of course, depend on the facts and circumstances of each case.

107 Lest I be taken to rule that the party seeking to uphold the constitutionality of an impugned legislative provision need only sit back and see what the challenger puts forward, I would point out what Wee Chong Jin CJ noted at [19] of *Lee Keng Guan and others v Public Prosecutor* [1977–1978] SLR(R) 78, citing the Indian Supreme Court decision of *Ram Krishna Dalmia* at 547–548:

> … [W]hile good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporation to hostile or discriminating legislation.

108 Finally, it may also be appropriate to borrow a theme from the doctrine of justiciability. Sundaresh Menon JC, as he then was, stated in *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [98] that a calibrated approach to judicial review should be adopted whereby the intensity of judicial review in a particular case turned on factual content and common sense "which takes into account the simple fact that there are certain questions in respect of which there can be no expectation that an unelected judiciary will play any role". Although Menon JC's remarks were made in the context of judicial review of executive action, the doctrine of justiciability rests on the doctrine of separation of powers, which in turn, has been described as a fundamental doctrine of the Constitution: see *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [134].

109 Professor Thio Li-ann, further adds that the "[c]ourts will decline review in matters where they lack expertise or special knowledge, or where their institutional capacity makes it ill-suited to address issues like allocative decisions": see Thio Li-ann, *A Treatise on Singapore Constitutional Law* (2012 Academy Publishing) at para 03.024. The Court of Appeal appears to have recognised this in *Yong Vui Kong* at 113 (see [95] above). Professor Thio Li-ann and David Chong Gek Sian SC, in "The Chan Court and Constitutional Adjudication – 'A Sea Change into Something Rich and Strange?'" in *The Law in His Hands* (Academy Publishing, 2012) (Chao Hick Tin *et al* eds) at p 103, para 28, opined that:

> Judicial review may also be constrained by the judicially-developed doctrine of non-justiciability, a constitutional concept recognising the limited "capacities of the courts", which reflects the "societal concern" that courts only undertake those functions "appropriate to their place in the constitution and the way they are structured and expected to operate". This form of judicial self-restraint implicates both a theory of judicial power and the particular conception of separation of powers a political system is modelled upon.

110 The presumption of constitutionality is intimately tied to the idea of separation of powers and, to that end, where issues of social morality are concerned, the calibrated approach mentioned at

[108] above should be tilted in favour of persons who are elected and entrusted with the task of representing the people's interests and will.

When will our courts find that a law or an application of a law contravenes Art 12?

111 Notwithstanding the foregoing, does the strong presumption of the constitutionality of laws enacted by Parliament mean that our courts will never intervene to strike down a law as unconstitutional? The answer must be a categorical and unqualified no.

112 It is both the duty and the constitutional role of our courts to ensure that Parliament does not contravene the rights enshrined in the Constitution for it is the Constitution, and not Parliament, that is supreme in our legal system. Our courts are the guardians who ensure that the rule of law and all that it entails is observed and prevails. Successive Chief Justices of our Supreme Court have emphasised this role:

(a) Wee CJ said in *Chng Suan Tze v Minister of Home Affairs* [1988] 2 SLR(R) 525 at [86]:

> All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power. If therefore the executive in exercising its discretion under an Act of Parliament has exceeded the four corners within which Parliament has decided it can exercise its discretion, such an exercise of discretion would be *ultra vires* the Act and a court of law must be able to hold it to be so.

(b) Yong Pung How CJ said in *Taw Cheng Kong (CA)* at [89]:

> Questions on the constitutionality of our laws and whether they have been enacted *ultra vires* the powers of the Legislature are matters of grave concern for our nation as a whole. The courts, in upholding the rule of law in Singapore, will no doubt readily invalidate laws that derogate from the Constitution which is the supreme law of our land.

(c) Chan Sek Keong CJ in *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 highlighted (at [79]) that beyond Art 149 of the Constitution:

> ... Parliament left untouched the full amplitude of the *Chng Suan Tze* principle, and thereby implicitly endorsed it. Thus, in *Phyllis Tan*, this court stated that the *Chng Suan Tze* principle, which was applied to a *statutory* power in *Chng Suan Tze* (*viz*, the power to make detention orders and to suspend such orders under, respectively, s 8 and s 10 of the Internal Security Act), was also applicable to a *constitutional* power. [emphasis in original]

(a) Chan CJ, writing extra-judicially in "Securing and Maintaining the Independence of the Court in Judicial Proceedings" (2010) 22 SAcLJ 229, also opined (at para 2) that:

> The rule of law has meaning only if all are subject to the law and all are equal before the law. Hence, the governors as well as the governed must respect the law and subject themselves to it. But respect for and subjection to the law can only be sustained if a *neutral institution* exists to ensure that the law is respected and enforced against all. That institution, in all democracies, is the Judiciary. It is in this sense that the Judiciary is the "lynchpin of a democratic society and the rule of law". [emphasis in original]

113 It is therefore not surprising that in many of the cases involving constitutional challenges to legislation, even though the challenges fail, the courts underline the fact that they will intervene if it

is warranted. For instance:

(a) In *Ong Ah Chuan*, the Privy Council said (at [37]) that a legislative provision which treated different classes of persons differently would not be inconsistent with Art 12 "[p]rovided 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" [emphasis added].

(b) In *Kedar Nath Bajoria Hari Ram Vaid v State of West Bengal* AIR 1953 SC 404, the Indian Supreme Court said (at 406): "the legislative classification *must not be arbitrary*" [emphasis added].

(c) In *Chiranjit Lal*, the Indian Supreme Court said (at 911–912): "the classification [prescribed] *should never be arbitrary*" [emphasis added].

(d) In *Malaysian Bar*, the Malaysian Supreme Court held (at 167 *per* Salleh Abas LP) that:

> … [I]f the basis of the difference has a reasonable connection with the object of the impugned legislation, the difference and therefore the law which contains such provision is constitutional and valid. If on the other hand there is no such relationship the difference is stigmatized as discriminatory and the impugned legislation is therefore unconstitutional and invalid.

(e) In *Yong Vui Kong*, our Court of Appeal pointed out Lord Diplock's unease in *Ong Ah Chuan* when the Prosecution sidestepped answering his question as to whether, so long as a statute was an Act of Parliament, it would constitute "law" for the purposes of Art 9(1) of the Constitution, however unfair, absurd or oppressive that statute might be. Chan CJ went on to say (at [16] of *Yong Vui Kong*):

> Perhaps, the Privy Council had in mind colourable legislation which purported to enact a "law" as generally understood (*ie*, a legislative rule of general application), but which in effect was a legislative judgment, that is to say, legislation directed at securing the conviction of particular known individuals (see *Don John Francis Douglas Liyanage v The Queen* [1967] 1 AC 259 at 291), or *legislation of so absurd or arbitrary a nature* that it could not possibly have been contemplated by our constitutional framers as being "law" when they crafted the constitutional provisions protecting fundamental liberties (*ie*, the provisions now set out in Pt IV of the Singapore Constitution). [emphasis added]

I do not advocate moving to the "strict scrutiny" test of "a more searching judicial inquiry" applied by the US courts when it comes to disadvantaged groups, suspect classification or impinging on fundamental rights (see *Korematsu* and *United States v Carolene Products Co* (1938) 304 US 144 at 152, n 4). However, I would say it is only natural for our courts to scrutinise very carefully a piece of legislation and the relation between its purpose and the differentia underlying the classification prescribed therein if the court finds not only that the differentia in question appears arbitrary, but that it also appears to be discriminatorily based on factors like race or religion and concerns the fundamental liberties set out in Part IV of the Constitution.

114 I say this because it is possible to conceive of cases where the object of the legislation is illegitimate. The fact that such cases may be very far and few between does not preclude the possibility that they can occur. The need for legitimacy of purpose is heightened because whether the differentia underlying the prescribed classification is found to be rationally related to the purpose of the legislation depends on how broadly or narrowly the purpose of the legislation is framed. If the

legislation in question is truly discriminating arbitrarily and without a legitimate purpose, the court cannot stand by the sidelines and do nothing. Parliament cannot introduce arbitrary and unjustified discrimination by simply hiding behind the curtain of words and language used in impugned legislation, or behind statements in Parliamentary debates which will yield an apparent purpose of the legislation concerned that invariably relates rationally to the differentia underlying the classification prescribed by that legislation, thereby satisfying the "reasonable classification" test. The courts can, and will, critically examine and test such legislation where necessary and appropriate.

115 Dr Thio addresses this issue by arguing that "it is conceivable that a classification may satisfy the 'reasonable relation' test and yet be invalid because the object sought to be achieved is itself inherently bad" (see *Huang-Thio* at p 422). She then illustrates this, quite aptly, by citing the case of *Takahashi v Fish and Game Commissioner* 334 US 410 (1948). In that case, the challenger, Takahashi, was an alien under US immigration laws and was ineligible for US citizenship. He was barred by Californian law from earning his living as a fisherman in the ocean waters off the coast of California since Californian law prohibited the issue of commercial fishing licences to Japanese aliens. Takahashi challenged that law on the ground of denial of equal protection. The State of California argued that the law was passed as a fish conservation measure, or alternatively, to protect Californian citizens engaged in commercial fishing from competition by Japanese aliens. The US Supreme Court held that the law violated the requirement of equality on either of these stated purposes. If fish conservation was the purpose of the law, then a classification based on ineligibility for citizenship had no rational relation to the purpose and was therefore unconstitutional. If, on the other hand, the purpose was to protect Californian citizens engaged in commercial fishing from competition from Japanese aliens, then the legislation would have passed the "rational relation" test and should have been upheld, but the fact that it was struck down on this ground as well must mean that the law, which discriminated against the targeted group based on racial grounds as an end in itself, violated the requirement of equality because the objective sought was not legitimate. In this regard, Murphy and Rutledge JJ pointed out (at 427) that the law in question was:

> … directed in spirit and in effect solely against aliens of Japanese birth. It denies them commercial fishing rights not because they threaten the success of any conservation program, not because their fishing activities constitute a clear and present danger to the welfare of California or of the nation, but only because they are of Japanese stock ...

116 I agree that this has to be the position adopted in relation to Art 12. However, the terminology of "legitimacy" has to be very carefully understood. "Legitimacy" in the context of Art 12 is undoubtedly a substantive concept, and is relevant only in scrutinising the purpose of legislation which applies to a very specific class of people in society. Where a piece of legislation does not satisfy the requirement of legitimacy of purpose, the terms "capricious", "absurd" and "*Wednesbury* unreasonableness" come to mind. Such legislation will more likely than not also infringe other parts of the Constitution as well. In directing my mind to whether the purpose of a piece of legislation is legitimate or illegitimate, I accept that it would be wrong to decide such a matter based on a blind acceptance of legislative fiat. It is the court's "duty to declare invalid any exercise of power, *legislative* and executive, which exceeds the limits of the power conferred by the Constitution, or which contravenes any prohibition which the Constitution provides" [emphasis added]: see *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294 at [50]. As the Court of Appeal observed in *Nguyen* at [73], a fundamental question in most cases is "the proper weight that ought to be ascribed to the views of Parliament as encapsulated in the impugned legislation".

The purpose of s 377A is not an illegitimate purpose

117 Is the purpose of s 377A then illegitimate? As stated above at [67], s 377A essentially

addresses a social and public morality concern which our Legislature identified in 1938 and subsequently affirmed in 2007. One possible argument that could be made against the legitimacy of the purpose of s 377A is that female homosexual conduct is not criminalised while male homosexual conduct is. This exclusion of female homosexual conduct has been pointed out by the Plaintiffs, and was also referred to in *Tan Eng Hong* at [126].

118 Bearing in mind that the Plaintiffs have not produced cogent and compelling evidence to establish that such a purpose (*ie*, criminalising only male homosexual conduct and not female homosexual conduct) is illegitimate, and also taking into consideration certain reasons which I shall elaborate upon shortly, I find that the purpose of s 377A is not illegitimate as to warrant the court's intervention notwithstanding that the two-step *Tan Eng Hong* test is satisfied. There are two reasons for arriving at this conclusion.

The weight of historical practices vis-à-vis male homosexual conduct suggests a basis for those practices

119 The first reason is grounded in the idea that the courts should not be too quick to dismiss practices which have persisted and developed within the framework of a common law legal system. It is fair to presume that if a law has withstood the test of time, it cannot be devoid of any basis. If the court is to pronounce that a law which has stood for decades or centuries is wrong and ought not to have been enacted because its bases, whatever they may be, are so flawed, a justification of proportionate magnitude is invariably required. Where such a justification is not evident or forthcoming, whether or not any changes should be made to that law should be left up to Parliament. With this in mind, I proceed to state an undeniable fact, *viz*, that the common law has for a long time only proscribed male homosexual conduct, and not female homosexual conduct.

120 English criminal law has always only targeted male homosexual conduct, and not female homosexual conduct. An attempt was made in 1921 in England to criminalise female homosexual conduct, but this attempt was not successful. The proposed clause making female homosexual conduct an offence read as follows:

> **Acts of indecency by females**
>
> Any act of gross indecency between female persons shall be a misdemeanour, and punishable in the same manner as any such act committed by male persons under section eleven of the Criminal Law Amendment Act 1885 [*ie*, the UK 1885 Act mentioned at [63] above].

The similarity between the above clause and s 11 of the UK 1885 Act is unmistakable. It appears from the speech of the Earl of Malmesbury during the House of Lords' debate on 15 August 1921 that this clause was introduced in the early hours of the morning at the end of a session by some private members of the House of Commons (see *HL Deb* (16 August 1921) vol 43 at cols 567–577, and likewise for all the subsequent quotes in this paragraph). The Earl of Malmesbury felt that "this subject did not require serious attention, and that such stories as [those members of the House of Commons] heard were exaggerated. … If, after careful inquiry, it is found desirable [to] introduce a measure to make criminal this particular offence … [he] would support it if [he] was convinced that it was needed". The Earl of Desart similarly spoke against the clause, saying that "it was a new clause, involving a serious alternation in the Criminal Law and creating a new offence – a course open to the greatest objection and of a very controversial character". The Lord Chancellor also said: "I hold the strongest view, for the reasons stated by Lord Desart, that the case has not been made out on its merits for such an alteration in the law". The House of Lords refused to sanction passage of the clause. There does not appear to have been another attempt to make female homosexual conduct an

offence in England. Even in the Wolfenden Report, there is only one reference to indecent assaults by females on females at para 103, which reads:

> **Indecent Assaults by Females on Females**
>
> 103. Since an indecent assault by one female on another could take the form of a homosexual act, we have included indecent assaults on females by females in the lists of homosexual offences in paragraph 77 above. We have, however, found no case in which a female has been convicted of an act with another female which exhibits the libidinous features that characterise sexual acts between males. We are aware that the criminal statistics occasionally show females as having been convicted of indecent assaults on females; but on enquiry we find that this is due in the main to the practice of including in the figures relating to any particular offence not only those convicted of the offence itself, but also those convicted of aiding and abetting the commission of the offence. Thus, a woman convicted of aiding and abetting a man to commit an indecent assault on a female would be shown in the statistics as having herself committed such an assault.

121 The proscription by English criminal law of only male homosexual conduct and not female homosexual conduct is, possibly, a reflection of religious or other customary beliefs which have long permeated English law and politics. One plausible basis for such beliefs is the Judeo-Christian traditions, which proscribed male homosexual practices in the clearest condemnatory terms in the Old Testament of the Bible and even prescribed the punishment of death by stoning. In comparison, there appears to be only one passing reference in the New Testament of the Bible to women who "exchanged natural relations for those that are contrary to nature" (see Romans 1:26).

122 It could be argued that notwithstanding the law against committing acts of "gross indecency", there were other laws relating to sexual offences which, on their plain wording, did not focus only on male homosexual conduct but were instead gender-neutral, *ie* in the sense that the laws could possibly relate to sexual conduct between females. This was pointed out by the Court of Appeal in *Tan Eng Hong*, which noted (at [26]) that England's buggery laws were gender-neutral whereas s 11 of the UK 1885 Act was not. The phraseology in the now-repealed s 377 was certainly, on its face, gender-neutral. But, it is with great diffidence and with great respect that I venture a query as to whether the buggery laws of old were truly gender-neutral. In my view, the basic physiological differences between men's and women's genitalia must mean that our s 377 and English sodomy laws were not gender-neutral.

123 We need to first examine the definitions of "sodomy" and "bestiality". The word "sodomy" is defined in *Jowitt's The Dictionary of English Law* (Clifford Walsh ed) (Sweet & Maxwell Limited, 1959) as unnatural sexual intercourse by a man with another man or a woman; in criminal law, such sexual intercourse is known as "buggery". The reader is then directed by the definition provided, to the term "abominable crime", which is explained as the term used in s 61 of the UK 1861 Act (see [65] above) to describe the crimes of buggery and bestiality. "Buggery" is defined as carnal intercourse by a male person with another person or an animal consisting of penetration *per anum*, while "bestiality" is defined as the crime of having carnal intercourse with beasts. There is also a reference to the term "infamous crime", which is defined in s 46 of the Larceny Act 1861 (c 96) (UK) as "the abominable crime of buggery, committed either with mankind or with beast ...". The definitions of "abominable crime", "buggery", "bestiality" and "infamous crimes" are taken from *Jowitt's Dictionary of English Law* (Daniel Greenberg gen ed) (Thomson Reuters (Legal) Limited, 3rd Ed, 2010).

124 It will be seen from a closer examination of these definitions that they clearly are not gender-neutral. If the essence of sodomy is penile penetration *per anum*, then two women cannot sodomise

one another. The definition of "buggery" above also refers to penetration *per anum*; it similarly cannot apply to "intercourse" between two women. In this regard, I do not think that the offence of buggery applies to digital penetration. The exception to this is that a woman can lie with a beast. The buggery laws of old were therefore not gender-neutral as they depended on penile penetration *per anum*. The Explanation in s 377 is similarly phrased: "Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

125 The use of the phrase "carnal intercourse against the order of nature" in the now-repealed s 377 came later in time and was construed to include oral sex. In cases like *Public Prosecutor v Tan Kuan Meng* [1996] SGHC 16 and *Public Prosecutor v Kwan Kwong Weng* [1997] 1 SLR(R) 316 ("*Kwan Kwong Weng*"), our courts, relying on some Indian cases, construed "carnal intercourse against the order of nature" in s 377 to include fellatio. It is interesting to note that the Court of Appeal in *Kwan Kwong Weng*, whilst examining the legal effect of fellatio in the context of s 377, only referred to cunnilingus once towards the end of its judgment, and even then, when it came to what amounted to "carnal intercourse against the order of nature", the court only mentioned fellatio at [31]:

> Approaching the question as we have done, consent becomes a material element for when couples engaged in consensual sexual intercourse willingly indulge in fellatio and cunnilingus as a stimulant to their respective sexual urges, neither act can be considered to be against the order of nature and punishable under s 377 of the [1985] Penal Code. ***In every other instance the act of fellatio*** between a man and a woman will be carnal intercourse against the order of nature and punishable under s 377. [emphasis added in bold italics]

The Court of Appeal seemed to have deliberately avoided saying that cunnilingus (which allows for the possibility of a woman-to-woman sexual act to be included) fell within s 377. Therefore, even where s 377 was interpreted to include oral sex, female homosexual conduct was never the issue.

126 It can, therefore, be seen that the common law tradition has never criminalised female homosexual conduct.

Specific traditions with regard to procreation and lineage

127 The second reason for my conclusion at [118] above is that some portions of Singapore society today still hold certain deep seated feelings with regard to procreation and family lineage. This has significance, because the courts should not readily dismiss the views of one portion of society in favour of those of another portion of society. This is especially so where Parliament has made clear its position on the matter.

128 During the October 2007 Parliamentary Debates, one of the MPs, Mr Baey Yam Keng, referred to a Chinese saying, "*Bu Xiao You San, Wu Hou Wei Da*", which, translated into English, means: "There are three unfilial acts, the greatest is not to have a son." He explained that the Chinese portion of Singapore society was still largely traditional, with parents looking forward to their children marrying and producing offspring in order to carry on the family name; male homosexuals, just like the Plaintiffs, are likely to appreciate that they would not be having children and are likely to, therefore, disappoint their parents. This tradition of carrying on the family name is focused on males rather than females, since the usual way to carry on the family name is through the birth of a male descendant.

129 Of course, this is not conclusive proof that Singapore society does indeed treat procreation and lineage as an important value. However, the courts should not dismiss a legislative purpose as illegitimate (under Art 12), where there are plausible justifications for this purpose within the context of Singapore's societal mores and norms.

130 Accordingly, even if the Plaintiffs had argued that the purpose of s 377A was illegitimate, for the reasons above (at [119]–[129]), I would be slow to find that there is no basis whatsoever for Parliament to have chosen to criminalise male homosexual conduct only.

The remaining arguments raised by the Plaintiffs

131 I now turn to deal with the remaining contentions raised by the Plaintiffs. In my judgment, the Plaintiffs have not offered or adduced any compelling or cogent material or factual evidence that s 377A is arbitrary or operates in an arbitrary manner.

The term "gross indecency" is vague

132 The Plaintiffs submit that the vague wording of "gross indecency" in s 377A would result either in the differentia in that provision being unintelligible or in that provision being applied arbitrarily. I find these submissions misplaced. A law cannot be struck down for being unconstitutional based merely on the contention, without further substantiation, that it is worded in an allegedly vague manner. What amounts to "gross indecency" is a matter of statutory interpretation. The fact that there is some width in the interpretation of this term and, therefore, there can be argument as to what acts amount to "gross indecency" and what acts do not does not in itself make s 377A unconstitutional. In this regard, I note that the term "indecent" is not unknown in our criminal law: *eg*, it is used in relation to criminal provisions concerning public exposure and exhibition in the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed). The word "gross" is likewise not an unknown adjective in our criminal law.

There is a world-wide movement to decriminalise homosexual activity

133 The Plaintiffs have also made numerous references to the decriminalisation of male homosexual conduct in other jurisdictions as well as to the position taken on this issue by various international and regional organisations. With respect, I find these submissions to be of no weight. First and foremost, Singapore is an independent nation with its own unique history, geography, society and economy. What is adopted in other parts of the world may not be suitable for adoption in Singapore. Secondly, postulating examples of how the world is changing without more is unhelpful as such examples can be countered by examples of areas where there are shifts in the opposite direction. Furthermore, it can be seen that a number of former British colonies, such as Botswana, Malaysia, Sri Lanka, Sudan, Tanzania, Yemen and the Solomon Islands, have criminalised *female* homosexual conduct while retaining their respective equivalents of s 377A. The death penalty for male homosexual conduct is still retained in a few countries. An apt illustration of such differences held by different societies was brought up by the Prime Minister during the October 2007 Parliamentary Debates when he highlighted the fact that even within the Anglican or Church of England community, the Asian and the African Anglican Churches had threatened to split from the American and the English Anglican Churches over the ordination of gay bishops. The short – and only relevant – answer to this point is that our Parliament has debated the removal of s 377A and has decided against it.

If no one is to be prosecuted under s 377A, then why have s 377A?

134 During the October 2007 Parliamentary Debates, Assoc Prof Ho said that the police would not actively prosecute cases under s 377A unless minors were preyed upon by homosexuals or unless acts of "gross indecency" took place in public (see [82] above). Why then, the Plaintiffs contend, is there a need to have s 377A on our statute books if there is going to be no prosecution? With respect, I disagree with this submission. In October 2007, Parliament, after two days of intensive debate, decided to retain s 377A. Valid reasons were given for its retention and the decision was supported

by a majority of the MPs. Whether s 377A can still fulfil its purpose of signalling the public's disapprobation of male homosexual conduct notwithstanding the policy of non-enforcement is a consideration for Parliament and is also supported by the presumption of constitutionality. The Plaintiffs have only provided mere postulations, but no material evidence, to show that the purpose of s 377A would not be achieved if the provision is not actively enforced.

135 Furthermore, whether or not there is prosecution of an offence is a matter of prosecutorial discretion. If there is no prosecution of s 377A offences, that is no ground to say that s 377A is unconstitutional. There is no complaint of arbitrary enforcement in this case, and postulations that there *may* be cases of arbitrary enforcement carry no weight in considering the issues that have been raised in this originating summons. Furthermore, if the issue is with regard to the arbitrary enforcement of s 377A which results in an infringement of Art 12, this has been settled by the Court of Appeal in *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49; but more importantly, it is not an issue in the present case.

The repeal of s 377 renders the retention of s 377A unjustified

136 In 2007, Parliament recognised that social norms and values in Singapore had changed, and that the majority of Singaporeans no longer saw anything morally wrong or objectionable in consenting heterosexual couples aged 16 and above engaging in oral and anal sex in private. I accept that this represented a major shift in morality and principle. The Plaintiffs submit that since the objection to oral and anal sex in private between consenting heterosexual couples aged 16 and above has been removed, there is no logic in continuing to proscribe (via s 377A) anal and oral sex between two consenting male adults.

137 The answer can perhaps be found in Antonin Scalia J's statement in his dissenting opinion in *Lawrence v Texas* 539 US 558 (2003) ("*Lawrence*") at 604:

> One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts – and may legislate accordingly.

138 Again, I repeat that during the October 2007 Parliamentary Debates, Parliament considered s 377 and s 377A carefully, and after debating the matter fully, endorsed the repeal of s 377 but chose to retain s 377A. I can see no basis in this case to interfere given my reasons set out above. It is clear that Parliament saw a reasonable differentia upon which to distinguish between two classes: anal and oral sex in private between a consenting man and a consenting woman (both aged 16 and above) was acceptable, but the same conduct was repugnant and offensive when carried out between two men even if both men were consenting parties. There is therefore no reason to strike down the basis of the classification prescribed by s 377A – *viz*, male homosexuality – as arbitrary or discriminatory, or on the ground that it does not bear any rational relation to the purpose of the provision.

Conclusion

139 We are a society in the midst of change. Some changes come fast; others evolve and take time to gain a hold and to gain currency. In the latter case, a court will be hard put, when it stands at a particular point in time between the two ends of the spectrum when the change in a particular long-held social norm has yet to gain currency, to decide whether that social norm should be retained

or discarded in the face of a constitutional challenge to that social norm. In our legal system, that decision is left to Parliament. Even when society has clearly shifted closer to one end of the spectrum, our courts can but call on Parliament to consider changing the law. That said, I also accept that there are times, albeit very rare, when a court is able to say that a certain principle of law is outmoded and should no longer be enforced. To my knowledge, this has only happened once in Singapore, and that was in relation not to a statutory provision, but to a common law cause of action. In the case of *TPY v DZI* [1997] 1 SLR(R) 843, a husband, whose wife had left him for another man, tried to sue that man for damages for loss of consortium under the tort of enticement. MPH Rubin J struck out the claim and held that the tort of enticement was founded on an archaic concept of women as chattels, which was clearly not acceptable in modern society (at [14]):

> Having regard to the perfunctory nature of the pleadings and taking the pleadings at its face value, it is my view that to give currency to a cause of action which had no known presence in Singapore and one which had been given a final farewell in its place of birth would be to lend a hand to encouraging fruitless litigation for vindictive purposes. In my opinion, though the tort of enticement might well have been received in Singapore under the Second Charter of Justice, it cannot continue to serve any useful purpose particularly when society no longer subscribes to the view that women are mere chattels and whose existence is only to be in the service of their husbands. Sections 45, 46, 48 and 49 of the Women's Charter clearly underscore the aspect that a wife is a person in her own right and not someone who is subordinate to, or a chattel of her husband.

140 In the US, it took a civil war to end slavery and an even longer time to fully emancipate blacks; indeed, it was only in 2008 that the US elected its first black President. In 1986, the US Supreme Court held that the US Constitution did not prohibit what almost all the States had done from the founding of the US until recent times, *viz*, make homosexual conduct a crime: see *Bowers v Hardwick* 478 US 186 (1986) ("*Bowers*"). Some twenty years later, in June 2006, the US Supreme Court in *Lawrence* in effect reversed *Bowers* by a majority, holding that the Texas statute making "deviate sexual intercourse" with another individual of the same sex a misdemeanour furthered no legitimate State interest which could justify the statute's intrusion into the personal and private life of an individual. That case dealt with the liberty of the individual as well as his right to privacy.

141 Very recently, on 26 March 2013, the US Supreme Court heard oral arguments in the first of two cases on same-sex marriage, *Dennis Hollingsworth et al v Kristin M Perry et al* (Case No 12-144), which was an appeal from the decision in *Perry v Hollingsworth* 671 F 3d 1052 (9th Cir, 2012). The case concerned the constitutionality of California's Proposition 8 (the result of a referendum held in November 2008), which bans same-sex marriage by defining "marriage" as a union between a man and a woman. The US Supreme Court justices' questions and observations in the course of hearing arguments obviously do not necessarily reflect how they will eventually decide the issue, but I find them telling all the same. The US Supreme Court justices were clearly concerned about the pace of change. Justice Kennedy, uncertain about the consequences for society if same-sex marriage was allowed, expressed his caution that "[w]e have five years of information to weigh against 2,000 years of history or more". Justice Alito Jr echoed, saying "[y]ou want us to step in and render a decision based on an assessment of the effects of this institution [*viz*, same sex marriage] which is newer than cellphones or the Internet?" The other US Supreme Court justices too, appeared to have reservations about having to determine the issue at this juncture. Justice Sotomayor noted that that the US Supreme Court had taken its time to decide on landmark issues before, for instance, letting "racial segregation perk for 50 years from 1898 to 1954". She was referring to the seminal decision of *Brown v Board of Education* 347 US 483 (1954), which barred racial segregation in public schools and outlawed the "separate but equal" facilities for black people that the US Supreme Court had upheld half a century earlier (see *Homer A Plessy v Ferguson* 163 US 537 (1896)).

142 To my mind, defining moral issues need time to evolve and are best left to the Legislature to resolve. Even the seminal case of *Roe v Wade* 410 US 113 (1973) has been doubted. Justice Ginsburg has often been quoted as saying that the decision was incorrect, with the most recent instance being at an event in Columbia Law School, where she said "[i]t's not that the judgment was wrong, but it moved too far, too fast". Justice Ginsburg aptly sums up her views on this matter in an article written when she was still a United States Circuit Judge (see Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*" (1985) 63 North Carolina Law Review 375 at pp 385–386):

> *Roe*, I believe, would have been more acceptable as a judicial decision if it had not gone beyond a ruling on the extreme statute before the Court. The *political process was moving in the early 1970s*, ***not swiftly enough for advocates of quick, complete change, but the majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify*** and appears to have provoked, not resolved, conflict. [emphasis added in italics and bold italics]

143 Therefore it is not that the courts do not have any role to play in defining moral issues when such issues are at stake. However, the courts' power to intervene can only be exercised within established principles. The issue in the present case no doubt is challenging and important, but it is not one which, in my view, justifies heavy-handed judicial intervention ahead of democratic change.

144 As stated above, the basis underlying s 377A's existence is, in the final analysis, an issue of morality and societal values. The views ventilated in Parliament during the October 2007 Parliamentary Debates and at the hearing of this case are without a doubt controversial and disparate among various segments of our society. What is clear, however, is that Parliament has decided that s 377A should be retained. That decision is not one which is undeniably wrong. Our courts cannot substitute their own views for that of Parliament.

145 As eloquently put by Scalia J in his dissenting opinion in *Lawrence* (at 603):

> Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining States that criminalize private, consensual homosexual acts. But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I would no more require a State to criminalize homosexual acts – or, for that matter, display *any* moral disapprobation of them – than I would *forbid* it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change. [emphasis in original]

146 In my judgment, the object of s 377A is clear. It criminalises male homosexual conduct as conduct that is not acceptable in our society. Its retention was endorsed by Parliament in 2007. Applying the "reasonable classification" test, there is complete coincidence between the differentia underlying the classification prescribed by s 377A and the object of the provision. The differentia underlying the classification prescribed by s 377A therefore bears a rational relation to the object of the provision, and therefore satisfies both limbs of the "reasonable classification" test set out at [46] above. Therefore s 377A is neither arbitrary nor discriminatory in the constitutional context. I also find that the purpose of s 377A is not a purpose which is so patently wrong as to render it an illegitimate purpose upon which to base a classification prescribed by law.

147 For the reasons set out above, I decline to make the orders (which are in truth for declarations) sought by the Plaintiffs and dismiss their claim that s 377A is unconstitutional and infringes their rights under Art 12.

148 I shall hear the parties on costs.

[note: 1] Plaintiffs' written submissions at para 47.

[note: 2] Plaintiffs' written submissions at paras 146–154.

[note: 3] Plaintiffs' written submissions at para 36.

[note: 4] Plaintiffs' written submissions at para 163.

[note: 5] Plaintiffs' written submissions at paras 167–177.

[note: 6] Defendant's written submissions at paras 26–65.

[note: 7] Defendant's written submissions at paras 66–85.

[note: 8] Defendant's written submissions at para 8.

[note: 9] Defendant's written submissions at para 65.

[note: 10] Defendant's written submissions at paras 73–80.

[note: 11] Defendant's written submissions at paras 9–14.

[note: 12] Defendant's written submissions at para 14(b).

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