1. ADMINISTRATIVE AND CONSTITUTIONAL LAW

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Introduction

1.1 There were major developments in both the fields of constitutional and administrative law in 2013. In relation to constitutional law, the Court of Appeal held that the Prime Minister did not have an unfettered discretion to call by-elections but had to call one within a "reasonable time", in a decision which apparently discounted the intent of the constitutional framers in favour of the principle that all legal power had legal limits. The High Court affirmed the constitutionality of the law criminalising sodomy under s 377A of the Penal Code (Cap 224, 2008 Rev Ed) and confirmed that one singular test applied to the reading of the Art 12 equality clause (Art 12 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("Constitution")), that of reasonable classification. In other words, there is no test based on a standard of heightened scrutiny. It was clear that in the mode of constitutional interpretation, the separation of powers principles operated to prevent the courts from intervening in a way which would entail their imposing a substantive ideology in place of what Parliament had decided and embodied in legislation.

1.2 The law on *locus standi* and judicial review was elaborated upon and clarified and in the field of administrative law, the doctrine of substantive legitimate expectations was endorsed in principle.

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Scope of judicial review

1.3 What was at issue in *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 2 SLR 844 was whether the power of the Chief Justice under s 90(1) of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("LPA") to appoint a disciplinary tribunal ("DT") to investigate complaints against lawyers was subject to judicial review. The appellants had objected to the appointment by the Chief Justice of Selvam to be the President of the DT, which centred on claims of bias. The appellants filed for leave to apply for a quashing order of the Chief Justice's decision to appoint Selvam, with the High Court judge in *Manjit Singh*

s/o Kirpal Singh v Attorney-General [2013] 2 SLR 1108 holding that the Chief Justice's decision was not amenable to judicial review.

1.4 The Court of Appeal found that even if the Chief Justice's power under s 90(1) of the LPA was "ministerial" (any duty not requiring independent judgment or discretion in its discharge), it did not follow that it would not be subject to judicial review: at [45]. To argue that "ministerial" powers were beyond judicial review would be anachronistic: at [35]. They disagreed with the trial judge that the Chief Justice's power under s 90(1) was not amenable to judicial review because it was conferred on the Chief Justice in his judicial capacity: at [62]. The Chief Justice "wears many hats" and sometimes acts in a non-judicial capacity, as under s 90(1): at [64]. Whether the Chief Justice is acting in his judicial capacity depends on the "nature of the function in respect of which the power is conferred upon the CJ": at [65]. The s 90 power was "clearly administrative": at [65].

1.5 Harry Woolf, Jeffrey Jowell & Andrew Le Sueur, *De Smith's Judicial Review* (Sweet & Maxwell, 6th Ed, 2007) at para B-008 stated that prerogative writs today may extend to functions previously considered "administrative" or "legislative". In fact, the Federal Court sitting in Singapore in *Chief Building Surveyor v Makhanlall & Co Ltd* [1968–1970] SLR(R) 460 had held that *certiorari* was available against a purely administrative decision: at [40]. Thus, there was no reason in principle why the exercise of a statutory power to appoint tribunal members should be beyond judicial review. The rule of law demands that courts be able to examine the exercise of discretionary power: *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86] (referred to at [52]).

1.6 Further, the fact that a power has a statutory source does not mean it is subject to judicial review, although statutory powers would ordinarily be amenable to judicial review in the absence of compelling reasons to the contrary: at [28]. Thus, reviewing certain English academic texts, the Court of Appeal agreed that bodies like commercial companies and trustees may possess statutory powers and duties, but without any public element, such that they would be beyond the purview of judicial review: at [30]–[31].

1.7 In general, judicial review is based not on the actual decision but the reasoning process (at [53]), and thus did not depend on whether the applicant had suffered harm because of an alleged administrative illegality. The Court of Appeal rejected the argument that the Chief Justice's power under s 90(1) of the LPA should not be amenable to judicial review even if the power was illegal, as "it may not necessarily lead to actual prejudice" suffered by the appellants during the DT proceedings: at [53]. Judicial review avails where a decision-maker

exceeds the legal limits of his power, and proof of actual harm to the applicant as a result of a impugned decision was not an essential prerequisite to judicial review: at [53].

1.8 The nature of the Chief Justice's role was to appoint members to the DT: the Chief Justice was not involved in the disciplinary proceedings themselves, and this was a relevant factor to consider: at [55] and [60]. The nature of the power conferred upon the Chief Justice under s 90(1) of the LPA was not judicial but administrative in nature: at [65]. Unless bad faith is shown, the appointment under s 90(1) is proper so long as the DT president falls within the list of persons set out in s 90(1). While an application for judicial review of the Chief Justice's exercise of powers under s 90(1) might delay disciplinary proceedings, this itself was not a sufficient basis to hold these powers were not susceptible to judicial review. Section 91A of the LPA which delayed judicial review until after the decision of the DT was delivered did not apply to s 90(1) powers; the Court of Appeal differed from the trial judge who considered that s 91A was evidence Parliament did not intend to subject the Chief Justice's s 90(1) powers to judicial review: at [62].

1.9 The threshold of a *prima facie* case of reasonable suspicion, in an application for leave, was a low one but a bare assertion without credible basis would not pass muster: at [72]. The appellants had noted that the names of Rajah & Tann LLP, Mrs V K Rajah and K M Pillai, a lawyer from Rajah & Tann LLP, featured in their submissions and that V K Rajah JA was close friends with Selvam but provided no documents to show how these people were involved in the DT proceedings and how apparent bias might arise. As such, a reasonable and fair-minded person in possession of the facts placed before the court would not have a reasonable suspicion that the appellants could not have a fair trial: at [77].

1.10 In *Selvi d/o Narayanasamy v Attorney-General* [2014] 1 SLR 458 at [20], the High Court held that an immediate family member may apply for judicial review with respect to the findings of a Coroner. The case concerned a death which took place in official custody; under s 25 of the Coroners Act (Cap 63A, 2012 Rev Ed), an inquiry is mandatory.

1.11 The High Court in *Marplan Pte Ltd v Attorney-General* [2013] 3 SLR 201 affirmed that judicial review did not lie over a High Court judge as this would mean that Singapore's superior court might exercise supervisory jurisdiction over itself, which would make a nonsense of the word "supervisory": at [25]. This would constitute a relitigation of the issues, with the potential result that two courts of co-ordinate jurisdiction might reach conflicting decisions on the same issue. Ang J noted that the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)

("SCJA") did not distinguish between the High Court and Court of Appeal in so far as both are considered superior courts. The High Court and the Court of Appeal are treated as a unitary Supreme (and superior) court where judges of the High Court may sit as a judge of the Court of Appeal under s 29(3) of the SCJA, and Judges of Appeal may sit in the High Court under s 10(3) of the SCJA: at [24].

1.12 Thus, the High Court is part of the Supreme Court under s 3 of the SCJA and, as a superior court, its decisions are not susceptible to judicial review (at [22]): *Abdul Wahab bin Sulaiman v Commandant, Tanglin Detention Barracks* [1985–1986] SLR(R) 7.

Alternative remedies

1.13 In general, a person must exhaust all alternative remedies before seeking judicial review of the decision of a public body. The High Court in *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 ("*Chiu Teng*"), which involved a challenge to quash the Singapore Land Authority's assessment of the differential payment ("DP") payable for lifting title restrictions on two plots of land, affirmed that there is no need to use an appeals process which is inapplicable to the matter at hand. The prescribed appeals process assumes that a developer is unsatisfied with a DP payable based on the Development Charge Table of Rates ("DC Table"). In the instant case, the DP payable was not based on the DC Table and the appeals process would require a "spot valuation" which was "precisely the outcome that the applicant seeks to impugn as the applicant argues that the DC Table should apply": at [40].

1.14 Thus, there was no need to exhaust alternative remedies where "the applicant can distinguish his case from the type of case for which the appeal procedure is provided" (*R v Secretary of State for the Home Department, ex parte Swati* [1986] 1 WLR 477 at 485, *per* Sir John Donaldson MR): at [40]. There was effectively no alternative remedy to seek on the facts of the case.

Natural justice

1.15 The Court of Appeal noted in *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 2 SLR 844 at [88] that an "essential feature" of natural justice was fairness, including the right to be heard, and what fairness demanded "will depend on the subject matter and the context" as well as "the object of the process at the stage in question", following *Subbiah Pillai v Wong Meng Meng* [2001] 2 SLR(R) 556. In the instant case, a written hearing sufficed.

1.16 The Court of Appeal in *Manjit Singh s/o Kirpal Singh v Attorney-General* held there was no general duty to give reasons at common law for administrative decisions: *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531. In *Doody*, Lord Clyde had observed that exceptions could be made where the decision appeared "aberrant" or involved special importance, such as personal liberty, which were factors not present on the facts: at [85]. In the instant case, the Court of Appeal thought that any re-examination of the rule in Singapore would not assist the appellant, given the Chief Justice's limited role under s 90(1) of the LPA in appointing DT members, as opposed to deliberating upon the disciplinary charges: at [84]–[85].

Substantive review: Substantive legitimate expectations and irrationality

1.17 In *Chiu Teng* (above, para 1.13), the applicant, a property developer, sought judicial review to challenge the Singapore Land Authority's ("SLA") assessment of a differential premium ("DP") related to lifting title restriction for two particular land plots. This was allegedly done without reference to the Development Charge Table of Rates ("DC Table") the Urban Redevelopment Authority published, on the basis of a "spot valuation" at 100% of the land enhancement value. The method of assessment was spelt out in the SLA circulars and the SLA website which informed the public how the payable DP was computed: at [6]–[8]. The SLA Circulars and SLA website "are exhaustive" and only identified two exceptions to the specified method for assessing DP which did not apply in the instant case: at [58].

1.18 The applicant sought an order to quash the assessed DP and a mandatory order to direct the SLA to assess the DP in accordance with the DC Table. The SLA policy of applying the "spot valuation" approach was challenged as being irrational, as well as contrary to substantive legitimate expectations, a doctrine which had not yet been accepted in the Singapore context.

1.19 The applicant challenged the SLA's assessment as a decision which had deprived the applicant of its legitimate expectation of being assessed in accordance with the DC Table: at [47]. The applicant applied the test of *Wednesbury* unreasonableness in relation to a claimed legitimate expectation, in arguing that the SLR had acted unreasonably in the *Wednesbury* sense because a legitimate expectation arose that the "SLA will behave as it says it will": at [59]. That is, that it was unreasonable for the SLA to depart from rather than to adhere to its "public promulgations" such that its policy was applied irrationally, which encompassed "neglecting unreasonably to take into account the applicant's substantive legitimate expectation": at [72].

1.20 The Attorney-General, who was not a party to the case, made submissions to the effect that it would constitute "merits review" if the policy of assessing the DP by spot valuation was impugned in court (at [49]), as this policy was a "polycentric" matter, as reflected in s 6(2) of the Singapore Land Authority Act (Cap 301, 2002 Rev Ed) which requires the SLA to "have regard to efficiency and economy and to the social, industrial, commercial and economic needs of Singapore" in discharging its functions: at [63]. Thus, the polycentric nature of "spot valuation" was "inextricably intertwined with the State's macro-policy considerations of what is in Singapore's economic, commercial, industrial and social interests": at [66]. In addition, courts would be slow to review polycentric matters: *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [96] and [98]. The court stated that to meet the "high threshold of *Wednesbury* unreasonableness", the applicant had to show either that the SLA had taken into account extraneous considerations or not considered relevant considerations in formulating the policy, or that the SLA's decision was "so outrageous in its defiance of logic that no sensible person who had applied his mind could have arrived at the same decision", as formulated by Lord Diplock in *Council of Civil Service Unions v Minister of the Civil Service* [1985] AC 374 at 410 ("*GCHQ*"): *Chiu Teng* at [53].

1.21 The court found that the policy was not irrational, noting that the SLA policy to apply spot valuation was not what aggrieved the applicant; rather the complaint was because this policy was not publicised. The court noted there is no legal duty at common law that the government publicises the policies it seeks to implement and no general rule that reasons be given for administrative decisions: *Marta Stefan v General Medical Council* [1999] 1 WLR 1293 at 1300G–1300H, cited in *Chiu Teng* at [71]. It was thus not contrary to *Wednesbury* unreasonableness for the SLA not to publicise its "spot valuation" policy, as the applicant contended it was "led to believe" that the policy would apply to the DC Table.

1.22 Furthermore, it was argued that the doctrine of substantive legitimate expectation "should not be adopted in Singapore" and would not, in any event, arise on the facts. Further, any legitimate expectation as to procedure had already been given effect to: *Chiu Teng* at [49].

1.23 Tay J noted that where no existing legal right was allegedly infringed, there were at least three doctrines at play with respect to the granting of substantive relief: legitimate expectation, estoppel and abuse of power: *Chiu Teng* at [77].

1.24 Though there are analogies between the doctrine and estoppel, Lord Hoffmann in *R v East Sussex Country Council* [2003] 1 WLR 348 cautioned against introducing private law concepts of estoppel into

planning law and that public law had absorbed "whatever is useful from the moral values which underlie the private law concept of estoppel" and "the time has come for it to stand upon its own two feet": cited in *Chiu Teng* at [79]. Tay J considered that the doctrine of estoppel had apparently "been subsumed" under the doctrine of legitimate expectation: *Chiu Teng* at [83].

1.25 Tay J traced the history of legitimate expectations in England, noting that Lord Denning first used the term in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149. In *GCHQ* (above, para 1.20), the House of Lords held that the applicants had a legitimate expectation to be consulted before the Government took away their rights to unionise, although the duty to consult was overridden by national security considerations in that case.

1.26 Lord Fraser in *GCHQ* (at 401A–401B) noted that legitimate expectations could arise in two ways: "either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue": cited in *Chiu Teng* at [74]. This may encompass both procedural and substantive relief. In *Re Preston* [1985] AC 835 at 864G and 866H–867B, *per* Lord Templeman, the House of Lords held that substantive relief could be awarded where there is "unfairness" amounting to "abuse of power where the conduct complained about is equivalent to a breach of contract or a breach of representation". Law LJ in *The Queen on the application of Bhatt Murphy v The Independent Assessor* [2008] EWCA Civ 755 at [28] said of the legitimate expectation doctrine that the doctrine "will apply in circumstances where the change or proposed change of policy or practice is held to be unfair or an abuse of power".

1.27 In *R v Secretary of State for the Home Department; ex parte Ruddock* [1987] 1 WLR 1482, the court stated that the doctrine of legitimate expectations was not confined to cases involving the right to be heard, *ie*, procedural fairness: *Chiu Teng* at [78]. The doctrine of substantive legitimate expectation is clearly "part of English law": *Chiu Teng* at [82]. The latest pronouncement on the English test is found in *R (Patel) v General Medical Council* [2013] 1 WLR 2801 ("*Patel v GMC*") where the Court of Appeal granted a medical doctor's substantive legitimate expectation. This doctor was told through various e-mail assurances that he would be provisionally registered as a doctor with GMC after completing a distance learning pre-clinical course from a particular university. He was later denied this provisional registration, on the basis that his primary medical qualification was not accepted. Tay J noted the framework utilised by the Court of Appeal (*Chiu Teng* at [82]): essentially, this required (a) a clear statement which was relied on; (b) the party relying on the said statement must have "placed all his cards on the table"; (c) detrimental reliance on the statement was an

influential consideration though not a condition precedent in ascribing weight to the legitimate expectation; (d) the statement had to be pressing and focused, and the broader the class claiming the benefit of the expectation, the more likely a supervening public interest will be held to justify a change in position; (e) the applicant bore the burden of proving the legitimacy of his expectation; when done, the burden shifts to the respondent to justify the frustration of the legitimate expectation; and (f) the court must weigh the competing interests and decide whether there is a sufficient overriding interest to justify the departure from what had been previously promised.

1.28 Tay J made comparative references to other common law jurisdictions like Australia, Canada and Hong Kong. He examined various Australian cases which cast doubt on the legitimacy and utility of the doctrine of legitimate expectation, given the differences between the federal Australian constitutional order based on the separation of powers, and the English system. McHugh and Gummow JJ in *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* (2003) 72 ALD 613 ("*Ex parte Lam*") considered the English "abuse of power" approach as being:

> … concerned with the judicial supervision of administrative decision-making by the application of certain minimum standards and that it represented an attempted assimilation of doctrines derived from European civil systems (at [73]) into the English common law.

There was a close connection between administrative and judicial functions in civil systems, whereas:

> Australia has a written federal constitution with separation of power and judicial power does not extend to the executive function of administration (at [76]).

In the Australian context, the doctrine should be "synonymous with natural justice"; otherwise, the doctrine would "become a stalking horse for excesses of judicial power (at [82])": *Chiu Teng* at [87]. It should be limited to procedural rights only.

1.29 In the Canadian context, the courts have distinguished between procedural fairness and "legitimate expectations": *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 at [28], discussed in *Chiu Teng* at [90]. The Canadian approach was to apply their more stringent doctrine of estoppel before granting substantive relief, which requires personal knowledge by the applicant of the conduct of the public authority. Circumstances creating an estoppel may be subsumed by an overriding public interest expressed in the legislative text. The Supreme Court of Canada recently affirmed that the doctrine of substantive expectations cannot give rise to substantive

rights in *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)* (2013) CarswellNat 1983.

1.30 The Hong Kong courts have recognised the doctrine of substantive legitimate expectations, where, in the absence of overriding reason of law or policy, persons may have a legitimate expectation of a substantive outcome or benefit; if this was not given, this could lead to "such unfairness to individuals as to amount to an abuse of power" justifying judicial intervention: *Ng Siu Tung v Director of Immigration* [2002] 1 HKLRD 56: *Chiu Teng* at [95].

1.31 Tay J in deciding the applicability of substantive legitimate expectations in Singapore said the matter had to be decided from "first principles" (*Chiu Teng* at [111]), rejecting the arguments of the SLA and the Attorney-General in so far as they relied on *Ex parte Lam* for the proposition that European law had influenced the English approach, and that England, unlike Australia (and Singapore) did not have a written constitution based on the separation of powers: *Chiu Teng* at [109]. Tay J did not consider a written constitution a prerequisite for the separation of powers. It had been argued that written constitutions in Australia and Singapore explicitly demarcate the powers of government branches and it would be "tantamount to judicial overreach" for the Judiciary to enforce substantive legitimate expectations: *Chiu Teng* at [109]. The UK had its own version of the separation of powers: *Chiu Teng* at [109].

1.32 Tay J considered that if private individuals are expected to fulfil their promises (such as through the enforcement of contracts or the equitable doctrine of estoppel (*Chiu Teng* at [112])), in principle, there was no reason why the reliance of individuals or corporations on existing publicised representations by a public authority should not be protected. Thus, the "upholding of legitimate expectations" is "eminently within the powers of the judiciary": *Chiu Teng* at [113]. The difference in public law was that it involved something beyond private expectations; where a public interest "overrides" the expectation, it will not be given effect to: *Chiu Teng* at [113].

1.33 In principle, Tay J found there should be no difference between procedural and substantive expectations; indeed, he recognised the difficulty in distinguishing between the procedure and substance: *Chiu Teng* at [113]. He considered that the doctrine of legitimate expectations "should be recognised in our law as a stand-alone head of judicial review and substantive relief should be granted under the doctrine subject to certain safeguards": *Chiu Teng* at [119]. He laid down some guidelines for its application in a manner which would, he considered, not involve the court in "overstepping its judicial role". These are:

(a) The applicant must prove that the statement or representation made by the public authority was unequivocal and unqualified:

(i) if the statement or representation is open to more than one natural interpretation, the interpretation applied by the public authority will be adopted; and

(ii) the presence of a disclaimer or non-reliance clause would cause the statement or representation to be qualified.

(b) The applicant must prove the statement or representation was made by someone with actual or ostensible authority to do so on behalf of the public authority.

(c) The applicant must prove that the statement or representation was made to him or to a class of persons to which he clearly belongs.

(d) The applicant must prove that it was reasonable for him to rely on the statement or representation in the circumstances of his case:

(i) if the applicant knew that the statement or representation was made in error and chose to capitalise on the error, he will not be entitled to any relief;

(ii) similarly, if he suspected that the statement or representation was made in error and chose not to seek clarification when he could have done so, he will not be entitled to any relief; and

(iii) if there is reason and opportunity to make enquiries and the applicant did not, he will not be entitled to any relief.

(e) The applicant must prove that he did rely on the statement or representation and that he suffered a detriment as a result.

(f) Even if all the above requirements are met, the court should nevertheless not grant relief if:

(i) giving effect to the statement or representation will result in a breach of the law or the State's international obligations;

(ii) giving effect to the statement or representation will infringe the accrued rights of some member of the public; and

(iii) the public authority can show an overriding national or public interest which justifies the frustration of the applicant's expectation.

1.34 Applied to the facts, the court held that no substantive relief could be sought based on the representations on the SLA website, which is governed by its Terms of Use: *Chiu Teng* at [120]. This stated that the SLA did not make any representations or warranties about the SLA

website contents. Facing this disclaimer it was incumbent upon the applicant to write to the SLA to confirm its understanding of the policy and its application in this particular transaction.

1.35 The SLA Circulars were circulated to the public at large but realistically, only property developers or their advisors would have read or be expected to read them: *Chiu Teng* at [121]. As a property developer, the applicant would be within the class of persons the SLA Circulars targeted: *Chiu Teng* at [121]. Both relevant circulars did make unequivocal representations to the effect the DP would be determined by the DC Table, and did not state that other unpublished policies or exceptions might apply: *Chiu Teng* at [122].

1.36 The applicant averred that reliance was placed on the SLA's publication and that it had suffered a "detriment" in so far as a much higher DP had to be paid, as had been represented: *Chiu Teng* at [124]. On the evidence before the court (*Chiu Teng* at [125]–[127]), the learned judge said that the "irresistible inference" was that the applicant ought to have known the DP would not be assessed according to the DC Table and that the applicant should have written to the SLA to ask if DC Table rates would be applied to state leases which contained a Land Return Clause. This was especially since the media had widely reported that Capitaland had to pay a DP equivalent to 100% of the enhancement in land value to develop the Market Street Car Park: *Chiu Teng* at [127]. As the applicant was an experienced property developer entering a multi-million dollar transaction, it was "not reasonable for the applicant to have relied solely on the SLA's publications in the circumstances of this case": *Chiu Teng* at [129]. It could, for example, have easily checked with SLA on what the DP would be if it decided to buy and redevelop the land. The SLA in correspondence with the applicant had made it clear that the DP was assessed without reference to the DC Table. Further, SLA was under a statutory duty to optimise land resources including getting the best returns for the State in dealings with state land, which would benefit the public. Thus, the overriding public interest must prevail over the financial interests of the applicant, a commercial enterprise: *Chiu Teng* at [128]. As such, the applicant failed to show the SLA acted irrationally and did not establish a legitimate expectation on the facts: *Chiu Teng* at [131].

Remedies under O 53

1.37 The Court of Appeal in *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 ("*Vellama*") made *obiter* observations on the question of whether under O 53 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) (amended in 2011), declaratory relief may not be granted except as an addition to a prerogative order: at [47]. It disagreed with

the High Court judge's reading of O 53 and stressed that its purpose as a "facilitative provision" was to enable a court hearing an O 53 application to grant further relief to the applicant which the applicant would be entitled to obtain if a separate action had been commenced, *eg*, a declaration under O 15 r 16. The process was designed to make the court process "friendlier to litigants" so that an applicant who successfully obtains a prerogative order or declaration "need not have to institute further proceedings in order to obtain the further relief which he is entitled to": at [52].

1.38 Properly construed what O 53 provided for was that an applicant wishing to obtain a prerogative order and declaration under O 53 has to obtain leave to make an application for a prerogative order first under O 53 r 1(1)(*b*). In this same application, he can apply for declaratory relief as well. Once leave is granted and after the court hears the substantive merits of the case, the court could grant both the prerogative order and declaration, only the prerogative order or only the declaration: at [53]. The 2011 amendments were designed to allow the courts to also grant declaratory relief where an application is made for a prerogative order.

Standing: When does standing crystallise?

1.39 The issue of whether an appellant's standing crystallises at the point when proceedings are initiated or whether it remains subject to review at any stage of a hearing prior to final determination was settled by the Court of Appeal in *Vellama* in favour of the latter proposition. There had been a change in circumstances (a by-election had been called, bearing in mind that a declaration was sought to the effect that the Prime Minister had to call a by-election within a certain time) which rendered the matter factually moot.

1.40 This decision was reached after a review of English authorities (at [13]–[14]), including the case of *Inland Revenue Commissioners v National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617 where the House of Lords held that the Decisional Court's decision on standing was open to review on appeal, as the court at the leave stage may not have the full facts before it to enable it to make a conclusive determination on the question of an applicant's standing: at [13].

Standing: Public and private rights

1.41 The Court of Appeal in *Vellama* noted that the appropriate test for determining standing depended on whether public or private rights were at stake: at [29].

1.42 The difference between public and private rights was clarified in the Malaysian Supreme Court decision of *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 at 27, which was referenced by the Court of Appeal in *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [69] ("*Tan Eng Hong (CA)*"). While public rights were held and vindicated by public authorities, private rights, including constitutional rights, were held and vindicated by private individuals. Public rights are "shared in common" as they arise from public duties "owed to the general class of affected persons as a whole": *Vellama* at [33].

1.43 The Court of Appeal in *Vellama* noted (at [16]) that the Court of Appeal in *Tan Eng Hong (CA)* had affirmed the requirements of standing for declaratory relief in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112. These involved three basic propositions to the effect that there had to be a "real interest", a "real controversy" and a right personal to the application and enforceable against the adverse party to the litigation.

1.44 It noted that the English approach towards judicial review was more expansive in so far as the English courts in applying the "sufficient interest" standing test had greater leeway to grant leave in matters of public interest, even though the applicant is not personally affected: *Vellama* at [17]. With this caveat in mind, English cases were considered "as a starting point for determining our own approach on the matter": *Vellama* at [18]. Relevant considerations included whether the issue was purely academic or whether the remedy sought would have practical significance in cases where substantial legal issues were involved.

1.45 The Court of Appeal in *Vellama* also noted that in *Tan Eng Hong (CA)* (at [145]), the Court of Appeal had accepted that declaratory relief could be granted even if the facts on which the action is based were theoretical: *Vellama* at [25]. In *Tan Eng Hong (CA)*, the question on the constitutionality of s 377A of the Penal Code had become theoretical as an original decision to charge Tan under that section, which criminalises sodomy, was amended and replaced with a s 294(*a*) charge instead.

1.46 Nonetheless, the Court of Appeal considered that given Tan's sexual orientation, there was still "a real interest" in the question as to Tan and the question had a "great practical significance" as a future act might attract a s 377A prosecution: *Vellama* at [26]. Thus, in *Tan Eng Hong (CA)* (at [143]), standing for declaratory relief was granted despite there being no violation of a personal right, provided there is "a real legal interest and a real controversy". A "legal" interest was contrasted with a "mere socio-political interest" and arises "where there is a novel question of law for determination", as in the present case: *Tan Eng Hong (CA)* at [143]. The court noted it was "well-placed to determine legal

questions but not socio-political questions" and that its function as guardian of the Singapore Constitution was to ensure the Constitution was upheld inviolate. In proper cases, the court would exercise its discretion to hear a case, even where there was no *lis* between the parties.

Standing: Public rights and "special damage"

1.47 The Court of Appeal in *Vellama* expressed doubt at [37] as to whether the appellant's personal rights were violated, as the Prime Minister had expressed an intention to call a by-election considering all the circumstances. This is distinct from the situation where the Prime Minister issues a categorical statement that no by-election would be called.

1.48 In *Vellama*, prior to the calling of a by-election, the appellant as a resident of Hougang could assert a private right, arguably, to vote in a Member of Parliament ("MP") to represent her and other Hougang residents: at [27]. Thus, after the Hougang by-election was held in May 2012, the appellant could only assert a public right under Art 49, rendering her no different from any citizen interested in its proper construction. Her interest could not be framed as a private right but "the public at large undoubtedly have an interest in the issue raised as casual vacancies can arise from time to time whereupon the issue will become real": at [27]. In suing for her right as a member of the public, Vellama would have to join the Attorney-General in a relator action unless she could show she had suffered "special damage": at [29] and [38].

1.49 Where declaratory relief is sought for the alleged violation of a public right, the Court of Appeal (at [30]) noted that the applicable principle was set out in *Gouriet v Union of Post Office Workers* [1978] AC 435, which accepted the approach in *Boyce v Paddington Borough Council* [1901] 1 Ch 109 ("*Boyce*"). The applicant had to show the violation of the public right caused him "special damage". The special damage rule, which would distinguish an applicant's claim from other potential litigants in the same class, would filter out frivolous actions "raised by mere busybodies and social gadflies, to the detriment of good public administration": *Vellama* at [33]. This requirement also "safeguards against essentially political issues" which are "camouflaged as legal questions" and which are "more appropriately ventilated elsewhere": *Vellama* at [33]. The applicant does not have to undertake the "impossible task" of showing *only* he has suffered damage, as this would not be a fairly calibrated balance between accountability and good public administration unimpeded by busybodies: *Vellama* at [33]. The Court of Appeal demonstrated a concern not to descend into the political thicket in observing thus (*Vellama* at [34]):

> Taken collectively, these rules on standing espouse an ethos of judicial review focused on vindicating personal rights and interests through adjudication rather than determining public policy through exposition. Matters of public policy are the proper remit of the Executive, and decoupling judicial review from the fundamental precepts of adversarial litigation would leave the courts vulnerable to being misused as a platform for political point-scoring.

1.50 After examining academic opinion, the Court of Appeal noted there was no "categorical answer" to what special damage constituted, which could be quantitatively or qualitatively greater than the damage suffered by other members of the public: *Vellama* at [40].

1.51 It noted that the test had been adapted and formulated in terms of a "special interest" in Australia: *Vellama* at [41]. Gibbs J in *Australia Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 stated (at 530–531) that a special interest did not mean "a mere intellectual or emotional concern". "Interest" relates to a person gaining an advantage or suffering some disadvantage if the action succeeds or fails, as opposed to the satisfaction of "righting a wrong, upholding a principle or winning a contest": *Vellama* at [42]. The Court of Appeal in *Vellama* apparently considered Gibbs J's clarification useful.

1.52 On the facts of *Vellama*, the appellant failed to show any special damage or special interest, other than "a general desire to have Art 49 interpreted by the court": *Vellama* at [43]. The court noted that this was a "fact-sensitive" matter: *Vellama* at [43]. Thus, the appellant lacked standing, in not showing that her personal interests in asserting a public right was "directly and practically over and above the general class of persons who hold that right": *Vellama* at [43].

1.53 The Court of Appeal in *Vellama* also noted that standing principles arose out of cases which were "principally related to the adjudication of private rights and interests": *Vellama* at [36]. It declined to comment on cases involving breach of public duties which do not generate correlative public or private rights, which the Court of Appeal did address in *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 ("*Jeyaretnam*").

1.54 In *Jeyaretnam*, the issue of standing also arose in the context of a challenge to the alleged unlawful exercise of presidential powers under Art 144 of the Constitution. The appellant, the Secretary-General of a political party, challenged a High Court decision where he had impugned the constitutionality of a government decision, effected through the Monetary Authority of Singapore ("MAS"), to grant a contingent US$4bn bilateral loan to the International Monetary Fund ("IMF"). MAS announced that this loan would be made in April 2012, to help the IMF to address the ongoing Eurozone financial crisis and to

promote global economic and financial stability. It was in nature a contingent loan to the IMF and "the sum would remain as part of Singapore's Official Foreign Reserves ('OFR')": *Jeyaretnam* at [3].

1.55 The appellant challenged the constitutionality of the loan commitment, arguing that it violated Art 144 of the Constitution which requires the approval of the President and Parliament, which the Government had not obtained prior to agreeing to grant the loan. He sought leave for a prohibiting order to prevent the Government or MAS from making the loan unless the requisite approval was first obtained under Art 144. He also sought a quashing order in relation to the decision to grant the loan contrary to Art 144. In addition, he sought leave for a declaration that a loan and/or guarantee may not be raised or given by the Government/MAS save in accordance with Art 144; and for a declaration that a loan commitment and/or guarantee may not be given by the Government/MAS save in accordance with Art 144.

1.56 The High Court in *Jeyaretnam Kenneth Andrew v Attorney-General* [2013] 1 SLR 619 while finding that the subject matter was susceptible to judicial review, nonetheless did not find that the material disclosed an arguable case or a *prima facie* case of reasonable suspicion in favour of granting the remedies sought; neither did the applicant have sufficient interest in the matter. Thus, he lacked standing as he was seeking to enforce a public right and had not shown he had suffered a special damage.

1.57 The Court of Appeal in *Jeyaretnam* observed (at [29]) that the law on standing was an "'open point" with respect to cases involving public rights, rather than private rights. The comments made on this point were strictly *obiter*, but the court, as has become fairly common practice, took the opportunity to make observations on the matter, considering the extensive submissions made by both parties on the point, and the "sheer importance of the issue itself": *Jeyaretnam* at [30].

1.58 It noted that the law on standing was a "judge-made doctrine based on the common law" which had seen "enormous changes" over the centuries in many common law jurisdictions, including Singapore. It noted that past decisions were not "wholly consistent": *Jeyaretnam* at [33]. Standing relates to the right of an applicant to apply for a remedy and standing rules operate as a "procedural barrier" before the court examines the merits of a public law claim.

1.59 In contrast, where private law claims are concerned, "the right to apply for a remedy and the very entitlement to a remedy are tied up in the same inquiry": *Jeyaretnam* at [34]. The court noted that even though judicial review related to public law claims, this was not like the

actio popularis in Roman law where "every member of the public" would have the right to bring judicial review proceedings for a public wrong.

1.60 The Court of Appeal traced the history and rationale for judicial review, back to the understanding of the Government as being the guardian of public interests, such that "the overall basis for judicial review is very much tied up with democratic theory": *Jeyaretnam* at [35]. In 19th century England, the Attorney-General acting as *parens patrie* would restrain the misuse of charitable funds by injunction either in his own right (*ex officio*) or at the relation of another (*ex relatione*), *ie*, a relator action. In relator proceedings, the relator as a member of the public did not have to show he had a personal interest in the dispute, only that he was a member of the public. The role of the Attorney-General later expanded to encompass the protection of the public interest generally, beyond charitable trusts, whenever a public authority acted in a manner exceeding its statutory powers and which tended to interfere with public rights, thereby injuring the public. The Attorney-General was the proper plaintiff and thus the individual could not enforce a public trust by private suit alone.

1.61 There were two exceptions to the rule where a plaintiff could, without the intervention of the Attorney-General, sue for declaratory or injunction relief. This was set out by Buckley J in *Boyce* (above, para 1.49). Essentially, the applicant had to show that his private right was implicated, or where no private right was involved, that the plaintiff "in respect of his public right, suffers special damage peculiar to himself from the interference with the public right". This test, in a private law context, was later adopted in Singapore in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112.

1.62 The Court of Appeal in *Jeyaretnam* noted that Singapore had inherited the body of pre-1977 English law on standing, which was one of the most confusing areas of law from which a few general propositions could be found, bearing in mind conflicting lines of authorities.

1.63 In general, standing was stricter for private law developed remedies (declaration, injunction) than for prerogative remedies (*certiorari*, prohibition, *mandamus*). By the 16th century, the courts had developed liberal rules of standing whereby apart from the Crown, "strangers" could apply for prerogative writs like prohibition; any member of the public could have standing to apply for *certiorari* and prohibition, which was a matter of right for those whose interests were particularly affected: *Jeyaretnam* at [42].

1.64 The court in *Eng Foong Ho v Attorney-General* [2009] 2 SLR(R) 542 had favoured a uniform approach to standing rules across

the different remedies sought, despite their historical roots: *Jeyaretnam* at [43]. The intent was to "unify the threshold of *locus standi* for cases brought under O 15 r 16 and … O 53 r 1": *Jeyaretnam* at [46]. Where constitutional rights were challenged, the substantive element of standing could not change whether an application was made under O 15 r 16 (declaration) or under O 53 r 1 (prerogative writs). The court rejected the submission that a stricter standing requirement applied to declarations under O 15 r 16. Owing to changes to the Rules of Court effective 1 May 2011, declarations may now be sought as additional relief under an O 53 application: *Jeyaretnam* at [43]–[44].

1.65 The court in *Jeyaretnam* noted that the test of "sufficient interest" in the UK has since 1977 "developed liberally with more resemblance towards the earlier flexible standards of prerogative writs rather than the private law remedies. In contrast, Singapore has taken the opposite approach of endorsing the standard applied in the context of the latter instead": *Jeyaretnam* at [45]. That is, Singapore has endorsed the *Boyce* test, which was recently applied in *Tan Eng Hong (CA)* (above, para 1.42) and *Vellama* (above, para 1.37). It noted (*Jeyaretnam* at [45]):

> Since the pronouncement in *Eng Foong Ho* that the standard of *locus standi* is the same throughout for all the different remedies, it is clear from these two cases (*Tan Eng Hong* and *Vellama*) that the standard has been pitched at what used to be the requirements for the reliefs of declaration or injunction under the old English law of judicial review.

"Sufficient interest"

1.66 In reviewing standing rules in Singapore, the applicable law was that of pre-1977 English law, before statutory changes there took effect, which have no equivalent in Singapore. The English O 53 referred to a singular test of "sufficient interest" for all claims, as noted by Judith Prakash J in *Chan Hiang Leng Colin v Minister for Information and the Arts* [1995] 2 SLR(R) 627. The Court of Appeal in *Jeyaretnam* noted that the phrase "sufficient interest" was used in Singapore courts, as the standard applicants had to meet, "albeit not in the same liberal sense" it was used in the UK: *Jeyaretnam* at [40]. This was evident from the use of the phrase by the Court of Appeal in *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294 ("*Colin Chan (CA)*") at [14]:

> There is thus no need for the appellants to show that they are office holders in IBSA or members thereof. Their right to challenge Order 405/1994 arises not from membership of any society. Their right arises from every citizen's right to profess, practise and propagate his religious beliefs. If there was a breach of Art 15, such a breach would affect the citizen *qua* citizen. *If a citizen does not have* ***sufficient***

> ***interest*** *to see that his constitutional rights are not violated, then it is hard to see who has.* [emphasis added by Court of Appeal in *Jeyaretnam*]

1.67 The Court of Appeal in *Jeyaretnam* noted (at [41]) that in *Colin Chan (CA)*, *locus standi* was based on the alleged violation of the rights of the appellants, who were Jehovah's Witnesses, as citizens in relation to their Art 15 religious freedom rights. It linked the approach towards "special damage" discussed in the Court of Appeal in *Vellama* at [33]–[34] with a view of the role of judicial review in Singapore made extra-judicially by former Chief Justice Chan Sek Keong: Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469.

1.68 He had espoused a "green-light" approach towards administrative law, which was oriented principally towards encouraging good administrative practices, rather than stopping bad ones: *Jeyaretnam* at [48]. This may be contrasted with the "red-light" approach which envisages courts as the central control mechanism in relation to government action. Chan CJ "noted that the difference in both approaches has manifested in the different doctrines of *locus standi* developed in each jurisdiction": *Jeyaretnam* at [49]. While the English courts had applied the "sufficient interest" test liberally, Chan CJ opined that Singapore courts did not apply the test with the same rigour as the UK courts. Chan CJ advocated applying "a more discriminating test of *locus standi*", one which balances individual rights and the "rights of the state in the implementation of sound policies in a lawful manner": *Jeyaretnam* at [49].

1.69 Emphasising the importance of context in shaping the contours of judicial review of administrative action, the Court of Appeal considered that the "red/green light theory of administrative law" provided a "useful classification of administrative law" and also "highlights the integral role that the political and economic context of a jurisdiction play in determining which approach would be more suitable for a given jurisdiction": *Jeyaretnam* at [50].

Public duties without correlative public rights and *locus standi*

1.70 The case of *Jeyaretnam* was distinguishable from *Tan Eng Hong (CA)* (above, para 1.42) (where private constitutional rights, Arts 9, 12 and 14, were implicated) and *Vellama* (above, para 1.37) (involving a public right as a voter of a constituency which had no MP, seeking a declaration on the proper construction of Art 49): *Jeyaretnam* at [51].

1.71 The issue here was an alleged wrongdoing on the part of the Government in so far as the Government or MAS had "somehow breached their public duties by acting in contravention of Art 144":

Jeyaretnam at [51]. The appellant had none, and so could not assert any private or public right which had been violated. In involving the breach of public duties which did not generate correlative public or private rights, *Jeyaretnam* fell without the *Boyce* exceptions.

1.72 While in private law, the fact *X* owes a duty to *Y* would normally mean *Y* has a right to sue *X* for breach of duty, this does not "translate to the same effect" in public law. In public law, there is a breakdown in this "Hohfeldian duty-rights correlation" such that a public authority may be subject to the duty of following the law, but not all official action is subject to judicial review, which is a discretionary remedy: *Jeyaretnam* at [53]. There has been a tension between viewing public law as a method of protecting individual rights as opposed to preventing wrongs in the form of curbing misuses of public power: *Jeyaretnam* at [54].

1.73 The Court of Appeal in *Jeyaretnam* advised caution in approaching the "red-light" view of public law, and indeed underscored the importance of political philosophy in determining the role of citizens in a polity. It stated (at [55]):

> The recognition that members of the public do not have the right *per se* to call upon the courts to review every decision made by public bodies is not only undergirded by the obvious pragmatism of minimising disruptiveness caused by vexatious claims to the functioning of those bodies, but also exists as a reflection of the very ethos of our adversarial system. This leads us to note the principal distinction between the classical Diceyan constitution (which accords more with Austinian jurisprudence) where decisions are made by a responsible government subject to parliamentary scrutiny, and a more communitarian, civic republican tradition where citizens achieve self-fulfilment through participation in politics and decision making, much like the *actio popularis* … which essentially abolishes standing rules as we understand them to be. In the former, judicial review would be available to individuals for the purpose of protecting their own interests in dealings with the state, whereas the latter would necessarily have relaxed rules of standing in order to allow citizens to act in the public interest to contain perceived acts of governmental abuse.

1.74 The Court of Appeal stated that it saw "much value in maintaining the Dworkinian policy/principle" divide whereby the court confined itself to concerns regarding the individual's right and interests, while recognising that public policy "rightfully remains in the remit of proper political process". Judicial review was a means of challenging the legality rather than merits of a policy decision; other state organs could better perform regulatory functions and ensure good governance, compared with "extensive judicial intervention": *Jeyaretnam* at [56].

1.75 The Court of Appeal was of the view that the court should not engage in questions regarding the exercise of management powers by public bodies, such as the MAS, noting that the appellant's case "fails for a sheer lack of merit". It noted that the appellant's case basically rested on the merits of whether it was wise of the MAS to grant a loan to the IMF, as this was "not only risk, but also of dubious utility to Singapore": *Jeyaretnam* at [59].

1.76 While taking note of the concern that denying applicants standing to pursue public law claims would create a grave *lacuna* in the system and harm the rule of law, the Court of Appeal noted that this argument could not "extend to all forms of unlawful conduct without discrimination", as it cannot be the case "that a citizen is always entitled to come to court to ask for intervention by the court whenever it is alleged that a public body had acted beyond the powers conferred on it": *Jeyaretnam* at [61]. Relevant factors as to whether standing would be granted included the gravity of the breach and "the statutory scheme of things" in relation to which the alleged breach occurred: *Jeyaretnam* at [61].

1.77 In this instant case, assuming that granting a loan fell within the scope of Art 144, there were alternative political checks, including the President, to whom the appellant "had in fact brought his concern" (*Jeyaretnam* at [61]), and Parliament. The Court of Appeal noted that "neither Parliament nor the President had thought fit to question the propriety of the loan" (*Jeyaretnam* at [61]), even though the President would have the power to "veto" the commitment to grant a loan or to refer the issue under Art 100 for an advisory opinion from the constitutional tribunal. The issue was thus "entirely political" and "should be resolved as such", bearing in mind the Government within a parliamentary system would have "commanded the majority vote of the House": *Jeyaretnam* at [61].

1.78 The Court of Appeal also noted exceptionally that "special damage" might encompass situations "where a public body has breached its public duties in such an egregious manner that the courts are satisfied that it would be in the public interest to hear it": *Jeyaretnam* at [62]. In other words, where a non-correlative right generating a public duty is breached, where this breach is of sufficient gravity and implicates public interest, "an applicant *sans* rights may be accorded *locus standi* … at the discretion of the courts": *Jeyaretnam* at [64].

1.79 The Court of Appeal took pains to "pre-emptively clarify" that none of its comments should be taken as "a spurring move" towards the "surge of public interest litigation" in other jurisdictions where "taxpayers' actions questioning all nature of administrative acts" are commonplace. It was chary of the very notion of "public interest" which

bears the risk of "running amok", depending on the "whims and fancies" of any Singapore citizen: *Jeyaretnam* at [62]. In Singapore, the predominant test for most cases would remain based on the view that "individuals must have sufficient stakes in order to have standing". On the facts of the case, the appellant had not demonstrated that a public or private right had been violated, had not been able to establish standing, and had failed to show that the Government had breached its duties under Art 144, that is, no public duty had been infringed.

CONSTITUTIONAL LAW

Constitutional role of the Attorney-General in relation to private actions for criminal contempt

1.80 The constitutional role of the Attorney-General as Public Prosecutor (see s 11(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC")) was clarified by the Court of Appeal in *Aurol Anthony Sabastian v Sembcorp Marine Ltd* [2013] 2 SLR 246 ("*Aurol Anthony Sabastian*") in relation to actions for criminal contempt.

1.81 Unlike civil contempt, criminal contempt extends beyond parties bound by an order of court. The Attorney-General has the control and direction of criminal prosecutions. Article 35(8) of the Constitution enshrines the role of the Attorney-General in relation to all criminal proceedings, whether initiated under statute or common law.

1.82 Article 35(8) relates to the power to institute, conduct or discontinue any criminal proceedings, which is a matter for the Attorney-General only to decide, short of unconstitutionality. Clearly, the Attorney-General has power to institute and conduct criminal contempt proceedings (*Aurol Anthony Sabastian* at [34]) though Art 35(8) does not bar other persons from commencing private prosecutions in permitted circumstances: *Aurol Anthony Sabastian* at [34].

1.83 It is uncontroversial that the Attorney-General does not possess the sole discretion to institute or conduct criminal proceedings: *Public Prosecutor v Norzian bin Bintat* [1995] 3 SLR(R) 105 at [19]. Where an aggrieved person may commence a private prosecution without the need for the Attorney-General's consent, s 13 of the CPC allows the Attorney-General to intervene and decide whether to continue or discontinue the prosecution: *Aurol Anthony Sabastian* at [37]. The rationale is to ensure that a private prosecution does not "defeat the interests of state and society", with the Public Prosecutor determining what these interests are: *Cheng William v Loo Ngee Long Edmund* [2001] 2 SLR(R) 626 at [16].

1.84 Section 10 of the CPC identifies certain offences requiring the prior consent of the Public Prosecutor. The court noted that initiating a private prosecution for criminal contempt in the High Court without the Public Prosecutor's involvement would seem "out of step with the statutory framework", perhaps flowing from the unique nature of the offence rooted in the common law: *Aurol Anthony Sabastian* at [39].

1.85 The court reviewed the position in England, taking note of the differences wrought by the Contempt of Court Act 1981 (c 49) (UK). It also considered US Supreme Court cases: *Aurol Anthony Sabastian* at [48]. In Singapore, there is no statutory law confining the power to initiate certain types of contempt proceedings to the Attorney-General: *Aurol Anthony Sabastian* at [53]. The court concluded that given the *sui generis* nature of criminal contempt, there was a "compelling interest" that the Attorney-General, as disinterested prosecutor, be consulted before a private party commenced proceedings: *Aurol Anthony Sabastian* at [51]. Unlike other criminal private prosecutions where the accused enjoyed trial safeguards attending ordinary criminal offences, proceedings for criminal contempt are summary, based on affidavit evidence.

1.86 Bearing in mind the Attorney-General's unique and integral role as guardian of the public interest under Art 35(8) of the Constitution in relation to instituting and conducting all criminal proceedings, including criminal contempt, the court held that a private individual instituting criminal contempt proceedings "is obliged, at least in the absence of any particular concerns of urgency" to "first consult the AG" as the "disinterested prosecutor and guardian" of the public interest before commencing the suit: *Aurol Anthony Sabastian* at [53]. This struck an "appropriate balance" between allowing private individuals to initiate proceedings for criminal contempt while "ensuring … adequate oversight" by the Attorney-General in his constitutional role: *Aurol Anthony Sabastian* at [55]. This was important given the danger that a prosecutor of a contempt action representing a private beneficiary of the court order allegedly violated "does not provide a meaningful or sufficient assurance of an impartial prosecution": *Aurol Anthony Sabastian* at [55].

Constitutional interpretation

Article 144

1.87 The Court of Appeal in *Jeyaretnam* (above, para 1.52), agreed with the High Court's interpretation of Art 144, to the effect that Parliament clearly intended that the Article apply "only to the giving of guarantees and raising of loans, and not the giving of loans": at [11]. They rejected the argument that while it was common to speak of giving

a guarantee, it was not common to speak in terms of "raising" a guarantee: at [12]. They affirmed that the legislative intent behind Art 144 was to safeguard Singapore's past reserves from the irresponsible spending of the Government: at [27].

1.88 The appellant argued that a purposive construction of Art 144 would yield the reading that there should be a tighter form of financial control in so far as a decision of the Government to draw on past reserves for spending must be subject to parliamentary and executive oversight: at [15]. This was based on a reading of s 38 of the Monetary Authority of Singapore Act (Cap 186, 1999 Rev Ed) ("MAS Act") to the effect that the Government had given an implied guarantee to the MAS should the IMF eventually draw on a loan which it might be unable to repay, with the MAS being the principal debtor and the Government, the surety. Section 38(1) provides: "The Government shall be responsible for the payment of all moneys due by the Authority." The Court of Appeal found this reading flawed as the s 38(1) guarantee related to the payment of moneys due from the MAS to others, and not of moneys due to the MAS from others. Article 144(2) "merely sets out a list of statutes under some of which the Government could give a guarantee": at [16]. As such, an "implied guarantee" was a "legal impossibility": at [16]. It also rejected the appellant's contention that the MAS was a separate body distinct from the Government, as it was a statutory corporation listed in the Constitution's Fifth Sched and the Government owned all its shares. This flew against the plain terms of s 3(1) of the MAS Act which established the MAS as a "body corporate" which could "sue and be sued in its own name".

1.89 The Court of Appeal concluded that the appellant did not raise a *prima facie* question of reasonable suspicion, given that his proffered construction of Art 144 "is inconsistent with the literal sense of the provision and also flies in the face of what was the clear intention of the Legislature in enacting that Article, as evinced by the 1988 White Paper and the 1990 White Paper": at [28].

1.90 The High Court judge held that Art 144 did not apply to the instant facts as it only applied when the Government raised a loan, not when the Government gives out a loan, which remains an asset. This reading of Art 144 was based, *inter alia*, on the explanatory statement behind Art 144 when it was introduced by a 1990 constitutional amendment, its drafting history, the views of then Attorney-General Chan to this effect, which Parliament endorsed, and the maxim *reddendo singular singulis*: at [7].

Article 49 – By-elections

1.91 The Court of Appeal in *Vellama* (above, para 1.37) departed from the High Court decision which held that the Prime Minister had the full discretion to determine whether he wanted to call a by-election to fill a vacancy in a single-member constituency ("SMC"), which included determining when such a by-election should be held.

1.92 The case arose out of the expulsion of the incumbent Member of Parliament for Hougang SMC from the Worker's Party and involved the construction of Art 49 of the Constitution.

1.93 The High Court judge, Philip Pillai J, dismissed the application for a declaration that the Prime Minister must, within three months of a vacancy, or such other reasonable period, advise the President to issue the writ of election. This was predicated on a reading of Art 49, based on textual, contextual and historical analysis, that the words "shall be filled by election" referred to a process (method) and not an event: *Vellama* at [54].

1.94 Unlike Art 66 which called for "a general election" after Parliament is dissolved, Pillai J found the absence of the word "an" before "election" in Art 49 significant: at [55]. The Court of Appeal did not see how the presence or absence of the word "an" helped to resolve the question which it fully framed thus (*Vellama* at [74]):

> … whether the Prime Minister is accorded a full and unfettered discretion whether or not to advise the President to issue a writ of election to fill a casual vacancy of an elected Member and whether he could delay the tendering of such advice to the President indefinitely or declare that he is not going to fill the vacancy although Parliament is not being dissolved in the near future

1.95 This "discretionary question" remained, regardless of whether "election" was construed as a process or event: *Vellama* at [75]. Article 49 was capable of being read in a "double-barrelled sense" and the Court of Appeal considered that the High Court judge gave undue emphasis to the word "an" by his comparison of Arts 49 and 66, and opined that the key to interpreting Art 49 resided in the word "shall" in the phrase "shall be filled by election". The ambiguity was whether "the mandating effect of the word 'shall' also affects the filling of the vacancy": *Vellama* at [76]. The High Court judge effectively read Art 49 as meaning "the vacancy *may* be filled and if so *shall* be by election" [emphasis in original]; the Court of Appeal considered this directory rather than mandatory reading of "shall" unwarranted, and that this textual emphasis "substantially modified" the meaning of Art 49: *Vellama* at [77].

1.96 The interpretation that Art 49 provided the method for filling a seat was buttressed by Pillai J's interpretation of context, whereby Art 49 was located in Pt VI which deals with the various processes for filling in the seat of the three different types of parliamentarians.

1.97 The Court of Appeal closely scrutinised the historical materials referenced by the High Court in examining the historical development of Art 49. Its precursor, Art 33 of the Agreement Relating to Malaysia (1963) specifically articulated a three-month time limit for holding elections to fill vacancies. No such time limit was present in the 1955 Order: *Vellama* at [58]. A special request made in 1963 by the Singapore legislative assembly to remove the three-month time limit clause was declined and remained in the Singapore State Constitution, when Singapore became part of the Federation of Malaysia in September 1963: *Vellama* at [59]. This clause was deleted after Singapore seceded from Malaysia in 1965 by constitutional amendment (Act 8 of 1965): *Vellama* at [60].

1.98 The Court of Appeal read the 1963 parliamentary debates over the Sembawang vacancy and found that legislative interventions in 1963, 1965 and 1983 provided no consensus as to what the phrase "shall be filled by election" meant: *Vellama* at [72]. The removal of the three-month time limit clause rendered the issue of when a by-election should be called to fill a vacancy more political, but "the legal question still remains": *Vellama* at [72].

1.99 The debates did yield one common thread: that the existing law, as pointed out by opposition members, "attributed too much discretion to the Prime Minister" who they feared could "unreasonably delay the calling of a by-election": *Vellama* at [66]. No member of the ruling party had denied there was a constitutional duty to call a by-election to fulfil a casual vacancy, although the Singapore Constitution Order in Council did not prescribe a specific period within which the vacancy had to be filled: *Vellama* at [67]. The focal point of the debates was on the timing of by-elections and the Court of Appeal opined that it would "seem odd" that if Prime Minister Lee considered he had no constitutional duty to call by-elections, he could have simply said he had discretion whether to call one, which he did not: *Vellama* at [67]. He in fact said as much in 1983 in relation to the vacating of the Havelock constituency, that there was "never a requirement to hold a by-election": *Vellama* at [68]. The Court of Appeal cautioned itself to remember that Prime Minister Lee's "extemporaneous statements during a spirited Parliamentary debate" should not be treated as a definitive pronouncement: *Vellama* at [69].

1.100 The Court of Appeal found that the Sembawang vacancy could not serve as a "historical precedent" to support the proposition that

casual vacancies need not be filled at all, given the absence of contemporaneous express statements to this effect, and explanations that the delay in holding a by-election stemmed from the need to update the voter registry: *Vellama* at [71]. At its highest, the Sembawang vacancy "was an instance where the executive had tested the limits of its discretion as to *when* it had to call a by-election" [emphasis in original]: *Vellama* at [71]. It was just an example of the Prime Minister's discretion whether to call for by-elections or a general election, considering all relevant circumstances as vacancies "can be cured prescriptively by election or ontologically by the dissolution of Parliament": *Vellama* at [71].

Deletion of time clause does not mean unfettered discretion but application of statutory construction principles to resolve issues of timing

1.101 It concluded that the historical development of Art 49 while "interesting" did not shed light on its construction. The removal of the time limit did not mean the Prime Minister had unfettered discretion in calling by-elections but only that Art 49 did not provide a time frame for holding such elections: *Vellama* at [78]. The Court of Appeal noted the specification of how or when to fill a casual vacancy "cannot answer the question as to the imperative to fill the vacancy itself": *Vellama* at [78]. The absence of a specific time frame only meant that the issue of timing was to be resolved by applying the general law relating to statutory construction: *Vellama* at [78].

1.102 Harkening to democratic theory, the Court of Appeal underscored the entitlement of voters within a parliamentary system to have a Member "representing and speaking for them in Parliament", given that "the authority of the government emanates from the people": *Vellama* at [79]. It noted the modifications to the Singapore variant of the Westminster model, particularly the constitutional emphasis on the political party rather than individual parliamentarians, evidenced by the anti-hopping laws in Art 46(2)(*b*): *Vellama* at [80]. New developments relating to the Group Representation Constituency scheme ("GRC") and non-elective MPs did not alter "the basic character of an elected MP who represents the citizens who voted him into Parliament, particularly in the case of a SMC": *Vellama* at [80].

1.103 When Prime Minister Lee proposed the removal of the time limit clause in 1965 saying the three-month time limit clause was not appropriate for Singapore in the light of experience, he did not say that removing the time limit clause would confer unlimited discretion on the Prime Minister to postpone indefinitely the holding of by-elections to fill casual vacancies: *Vellama* at [82]. The Court of Appeal stated: "What he sought was not to be bound by the three-month time limit."

1.104 The Court of Appeal concluded that except where the Prime Minister intends to dissolve Parliament in the near future, Art 49 placed a constitutional duty on the Prime Minister to call a by-election to fill casual vacancies of elected MPs, at least in single member constituencies: *Vellama* at [82]. This does not apply to GRCs as s 24(2A) of the Parliamentary Elections Act (Cap 218, 2011 Rev Ed) provides that no writ of election shall be issued to fill the vacancy unless all the Members for that constituency have vacated their seats. If this is the case, it raises the question whether the statutory provision of a regime regulating by-elections in the Parliamentary Elections Act for multi-member constituencies supersedes the constitutional duty to call by-elections, read against s 52 of the Interpretation Act (Cap 1, 2002 Rev Ed). This provides:

> Where no time is prescribed or allowed within which anything shall be done that thing shall be done with all convenient speed and as often as the prescribed occasion arises.

1.105 The Court of Appeal considered that the statutory test of "all convenient speed" under s 52 of the Interpretation Act enshrined "the common law concept of a reasonable time" which contemplated all relevant circumstances: *Vellama* at [84]. This contextualises what a "reasonable" time would constitute, depending on particular case facts.

1.106 The Court of Appeal noted that the decision of whether to hold a by-election was a "polycentric matter" involving matters beyond "mere practicality" within the context of a "dynamic situation": *Vellama* at [85]. The Prime Minister in exercising his discretion could consider policy matters "including the physical well-being of the country" (*Vellama* at [85]); matters like the return of SARS or haze might be public health concerns the Prime Minister could take into account: *Vellama* at [84]. It was not desirable to elaborate on "specific considerations or factors": *Vellama* at [85].

1.107 The court sought to "balance" the rights of voters and the Prime Minister's discretion in deciding when to call for by-elections. The Prime Minister should be accorded "a measure of latitude" in this decision but it was not unfettered, such that he could not decide to indefinitely defer calling elections or declare he would call elections. This is because vacancies unfilled for "unnecessarily prolonged" periods would "raise a serious risk of disenfranchising the residents of that constituency": *Vellama* at [85]. As an aspect of the rule of law, that all discretionary power is subject to legal limits, referencing *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86], judicial review extended to the exercise of the Prime Minister's discretion in relation to calling by-elections to ensure his public duty to call one with "all convenient speed" or "within a reasonable time", was observed.

1.108 However, owing to the "fact-sensitive discretion" involved, judicial intervention was only exceptionally warranted. In other words, while the courts can review this executive power under Art 49, it will in practice afford the Prime Minister a wide berth and only intervene exceptionally. This denotes a restraint towards reviewing this brand of executive powers. Extrapolating from the reasoning in the House of Lords decision in *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513, the Court of Appeal considered that this duty imposed by Art 49 also encompassed the duty, where the Prime Minister decides not to call a by-election, to "review the circumstances from time to time" and to call a by-election where the circumstances have changed: *Vellama* at [87]. The Prime Ministerial duty to bear in mind "the interests of the people of the constituency in respect of which a vacancy has arisen" is a continuing one, oriented to ensuring that the people have representation in Parliament: *Vellama* at [87].

Article 12 and right to property

1.109 In *Chan Kin Foo v City Developments Ltd* [2013] 2 SLR 895 ("*Chan Kin Foo*"), the relevant property, Lock Cho Apartments, were sold *en bloc* on 14 August 2006. The appellant, an owner of a unit in the property, was part of the minority who opposed the collective sale. He sued the respondent, City Developments Ltd ("CDL"), who purchased the property, on the basis that CDL's purchase was contrary to the Art 12 constitutional guarantee of equality and Arts 1, 7 and 17 of the Universal Declaration of Human Rights ("UDHR") as it discriminated against the right of the minority to own property. CDL argued there was no legal basis for the claim that Art 12 was violated as the sale of the property to CDL was valid and binding. The assistant registrar struck out parts of the appellant's claims for disclosing no reasonable cause of action.

1.110 The appellant was essentially arguing that all collective sales under ss 84A–84G of the Land Titles (Strata) Act (Cap 158, 2009 Rev Ed) would violate Art 12 since such sales always involve dissentient minorities whose "rights" may be affected.

1.111 Andrew Ang J noted that the approach adopted by Choo Han Teck J in *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR(R) 754 at [7] with respect to collective sales was uncontroversial. Choo J had noted, on the question of whether collective sales violated Art 12, that "the right to equal protection under Art 12(1) must be determined from the outset", that is, it must apply to everyone equally. The law itself does not define who the minority will be, because there is no majority or minority until there is a prospective sale of a condominium. Thus, the

opportunity of selling a condominium *en bloc* "is an equal opportunity to all subsidiary proprietors".

1.112 Ang J noted that Art 12 was not intended to be an absolute right (*Chan Kin Foo* at [24]) and, following the Court of Appeal in *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 ("*Taw Cheng Kong*") at [54], "the majority and minority at the point at which a collective sale is proposed are in a like situation, and an equal opportunity to sell is presented to both": *Chan Kin Foo* at [24]. Relevant amendments introduced in 2007 to amend the Land Titles (Strata) Act were designed to secure the interests of all subsidiary proprietors without discrimination, to ensure that the interests of all owners were considered more adequately by the Sales Committee: *Chan Kin Foo* at [25]. Ang J noted that it was impossible at the outset to tell who would fall into the category of a majority or minority, as this would be determined by "the exercise of a choice": *Chan Kin Foo* at [26]. As there was no class to discriminate against at the time the Act was promulgated, it was "impossible for the legislator to be adopting a discriminatory policy" at that time: *Chan Kin Foo* at [26]. The appellant's argument was "plainly absurd", in so far as it asserted that a person could unilaterally make a law unconstitutional by making a choice which differentiates him or her from others in his or her class: *Chan Kin Foo* at [26]. Article 12(2) also references bases of discrimination like religion, race, descent or place of birth which were "characteristics inseparable from the individual's identity": *Chan Kin Foo* at [27]. A "minority" defined by its different vote from the majority vote does not relate to a trait which constitutes "an essential part of their identity": *Chan Kin Foo* at [27]. Ang J stated (*Chan Kin Foo* at [27]):

> I found that Art 12 was clearly not intended to cover a situation where a minority class is created by vote, let alone in the collective sale context where there is due compensation and clear procedure to prevent fraud and ensure that the views of the minority are heard.

1.113 Ang J also rejected an argument based on various provisions of the UDHR, most relevantly, Art 17 which deals with the right to property. The Constitution itself does not contain such a right, which was deliberately omitted from the Independence Constitution, owing to land scarcity: *Chan Kin Foo* at [29]. The appellant merely asserted that Art 17 of the UDHR formed part of the local law. For such an argument to succeed, Art 17 of the UDHR must be shown to be a binding international legal obligation which when received into the Singapore domestic legal system, was able to form the basis for a constitutional right. Ang J pointed out that no evidence was raised to show that Art 17 was a binding customary international law norm, noting "there is no state practice or *opinio juris* which supports a right to property": *Chan Kin Foo* at [31]. In fact, the "widespread state practice" allowing for collective sales by majority vote in countries like Canada, Hong Kong

and the US (Hawaii), and the existence of compulsory land acquisition legislation in Malaysia, India, South Australia and Pakistan, made "wholly untenable" the assertion that Art 17 of the UDHR was customary international law: *Chan Kin Foo* at [31]. Furthermore, assuming otherwise, Ang J noted that a customary international law norm was "not self-executing" and had first to be incorporated into Singapore law: *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 ("*Yong Vui Kong v PP*") at [89]. No such right had been legislatively incorporated and indeed the right to property was "wholly inconsistent" with the Land Titles (Strata) Act.

Article 12 – Challenges to s 377A of the Penal Code

1.114 Unsuccessful challenges were mounted against the constitutionality of s 377A of the Penal Code in the cases of *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 ("*Lim Meng Suang*") and *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 ("*Tan Eng Hong (HC)*").

1.115 In *Lim Meng Suang*, the arguments centred around the alleged violation of Art 12(1) of the Constitution which reads: "All persons are equal before the law and entitled to the equal protection of the law." Section 377A provides:

> **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]

1.116 The plaintiffs, Lim Meng Suang and Kenneth Chee, are male homosexuals who have had a 16-year sexual relationship: *Lim Meng Suang* at [2]. They had not been charged with an offence under s 377A but felt that this provision reinforces "discrimination" against homosexual people and it was "always at the back of their minds" that they could be charged with gross indecency under this provision: *Lim Meng Suang* at [7]. Lim also claimed it would be difficult to register *TheBearProject*, an informal social group he ran for "plus-sized" gay men as automatic approval is not granted to societies which relate to sexual orientation: *Lim Meng Suang* at [6]. They admitted that the "real pressure" arising from their homosexual relationship stems from their families and members of society, rather than any officer of the law": *Lim Meng Suang* at [10].

1.117 The plaintiffs thus sought a declaration that s 377A of the Penal Code was inconsistent with Art 12 of the Constitution and void by

virtue of Arts 4 and 162 of the Constitution: *Lim Meng Suang* at [8]. The action was brought under O 15 r 16 and O 92 r 5 of the Rules of Court.

1.118 The Attorney-General's Chambers did not argue that the plaintiffs lacked *locus standi* to bring the present proceedings and Quentin Loh J proceeded "on the basis that the Defendant is not disputing that the Plaintiffs do have the requisite *locus standi*": *Lim Meng Suang* at [12]. Loh J took note that the Court of Appeal in *Tan Eng Hong (CA)* (above, para 1.42) at [126] had found that Tan fell within the category of "sexually-active male homosexuals" which s 377A specifically targeted, as it did not target male-female acts or female-female acts: *Lim Meng Suang* at [11].

1.119 One may note that it may be more accurate to characterise this in terms of homosexual conduct, as opposed to a class of persons (male homosexuals), as heterosexual men can perform homosexual acts. The Court of Appeal found it was "arguable" that Art 12(1) was violated such that Tan's personal rights may be affected by "the mere existence of s 377A in the statute books", accompanied by a "real and credible threat of prosecution". This is to construe standing broadly, as one can conceive of an Act prohibiting pornography, which a budding pornographer who had not been charged under the Act may feel violates his rights to free speech. Certainly such an act would target or "discriminate" against pornographers, but the real issue would not be that of "discrimination" but whether the law should prohibit pornography on its merits. Presumably such a liberal reading of standing will be confined to cases of "real public interest": *Lim Meng Suang* at [17], quoting *Tan Eng Hong (CA)* at [184].

1.120 Quentin Loh J approached the issue following the two-stage inquiry the Court of Appeal framed for the High Court in the separate but related case of *Tan Eng Hong (CA)* at [185] in ascertaining the constitutionality of s 377A (*Lim Meng Suang* at [18]):

> (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.

1.121 Loh J noted the English and US influence over the formulation of Art 12, which was based on Art 14 of the Indian Constitution ("[t]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India"): *Lim Meng Suang* at [34]. The phrase "equality before the law" derives from the English common law while "equal protection of the law' derives from the US Fourteenth Amendment (at [35]–[36]) and was originally designed to guard against racial discrimination, specifically, the rights of

emancipated black slaves. The roots of the equal protection clause, as noted by the Court of Appeal in *Public Prosecutor v Taw Cheng Kong* (above, para 1.111) at [52]–[53] are located in the Magna Carta. Judicial authorities from India and Malaysia were cited which showed an understanding that the Legislature must make choices and classifications pursuant to these choices, which would likely produce some degree of inequality. It was established by precedent that Art 12(1) did not mean "that all persons are to be treated equally, but that all persons in like situations are to be treated alike" (*Lim Meng Suang* at [44]), as was evident in *Taw Cheng Kong* and *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710. This is essentially a formal test of equality.

1.122 In examining the structure of Art 12, Loh J noted that legislative classification is not prohibited *in toto* by Art 12(1), as Arts 12(2) and 12(3) set out grounds of discrimination both prohibited (religion, race, descent, place of birth) and permitted (on grounds of religion).

Reasonable classification test

1.123 Following judicial precedent, the two-step "reasonable classification" test was applied, with Loh J noting this was "binding upon me": *Lim Meng Suang* at [45] and [46]. It was applied with an additional gloss or third step.

1.124 Loh J rejected the plaintiff's argument that s 377A fails the test of "intelligible differentia" as it was clear that the classification prescribed related to "male homosexuals or bisexual males who perform acts of 'gross indecency' on another male". This excluded male-female and female-female acts: *Lim Meng Suang* at [48]. The first limb was easily satisfied and "few can cavil with this conclusion": *Lim Meng Suang* at [48].

1.125 The second limb involved two parts: first, ascertaining the legislative purpose, and second, ascertaining whether the purpose differentia underlying the classification bore a reasonable relation to the legislative purpose. Both these elements were "more complex than they appear": *Lim Meng Suang* at [49].

Determining the legislative purpose

1.126 The learned judge identified the range of problems implicated in discovering the legislative purpose of s 377A, pondering the situation where this was vague or where Parliament was specific or non-specific; in addition, whether the legislative purpose should be discerned from the English statute on which it was based, the reasons for its

introduction in 1938 or the reasons for its continued retention aired in Parliament in 2007: *Lim Meng Suang* at [50].

1.127 In illustrating the difficulties in construing legislative purpose, Loh J examined the narrow and broader framing of the legislative purpose in *Taw Cheng Kong* (above, para 1.111) with respect to s 37 of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) ("PCA") to show that the framing of the purpose can be "decisive": *Lim Meng Suang* at [56]. The High Court framed the purpose as being to capture corrupt acts affecting events within Singapore while the Court of Appeal framed it more broadly as seeking the more effective control and suppression of corruption: *Lim Meng Suang* at [56]–[57]. In the former formulation, the distinction drawn between citizens and non-citizens was a differentia made "more vulnerable to failing to achieve the purpose": *Lim Meng Suang* at [56].

1.128 The Court of Appeal in *Taw Cheng Kong* found that under-inclusiveness *per se* was "not fatal" or determinative of an unreasonable classification: *Taw Cheng Kong* at [81]. It accepts the "overriding need" to respect international comity and thus, the provision was confined in its operation to citizens and not non-citizens whose corrupt acts committed outside Singapore, affected Singapore: *Lim Meng Suang* at [57]. Section 37 of the PCA was constitutional as it would "go some way" towards capturing the corrupt acts of Singapore citizens abroad, and so further the legislative purpose of restraining corruption. Loh J noted that the Court of Appeal stated that a demand that a classification be "perfect to cover every contingency" would be "legislatively impractical, if not impossible" (*Taw Cheng Kong* at [81]): *Lim Meng Suang* at [57].

1.129 Applying the insights of Tan Yock Lin in his article "Equal Protection, Extra-Territoriality and Self-Incrimination" (1998) 19 Sing LR 10 which cautioned against tautological reasoning (*Lim Meng Suang* at [58]–[61]), Loh J considered that the way to avoid tautology was to focus on the fundamental rubric that "like should be treated alike" *Lim Meng Suang* at [61]. In other words, to eschew the distinction of permissible discrimination between classes and impermissible discrimination within a class, as applied by the Privy Council in *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710.

Determining rational relation

1.130 In determining what a rational relation was, Loh J considered whether significant over and under-classification might render a classification non-rational, or whether the availability of a "more efficient

or different classification" might render the existing classification not rationally related to the purpose: *Lim Meng Suang* at [51].

1.131 In applying the reasonable classification test to s 377A, Loh J first ascertained its object. Historically, s 377A originated from the Labouchere Amendment to the Criminal Law Amendment Act 1885 (c 69) (UK). The eventual s 11 of the 1885 UK Act was more far-reaching than the original intent behind s 11, which was to protect any person from male-male indecent assault, whether the person was under or over 13 years of age and whether the act was done in public or private. The final version made male-male acts of gross indecency, committed in public or private, whether with or without consent, an offence. It was "not specifically directed at criminalising male homosexual conduct": *Lim Meng Suang* at [63]. This was imported into Singapore by means of the Penal Code (Amendment) Ordinance 1938 (No 12 of 1938) whose purpose was to criminalise gross indecent acts between males, whether committed in public or private and to strengthen the criminal law, as it was then difficult to detect and prosecute such acts: *Lim Meng Suang* at [66]–[67]. This did not target females and was introduced into Singapore when it was a colony without a constitution or bill of rights: *Lim Meng Suang* at [68].

1.132 In terms of constitutional interpretation, Loh J noted that recourse may be had to the explanatory statement in a Bill introducing a legal provision or to a parliamentary speech made at the second reading. In this case, the object was clear from the provision itself: *Lim Meng Suang* at [70]. Thus, the "primary guidepost" should be the speech made in Parliament in introducing the Bill rather than speeches made in introducing the precursor of the statutory provision, particularly where made in another jurisdiction, which was at best a "secondary guidepost" which should be used "with extreme caution": *Lim Meng Suang* at [70]. For example, "English society and norms in 1885 must have been vastly different from those prevailing in Singapore in 1938": *Lim Meng Suang* at [70]. Thus, the primary reference point would be the reasons given by Attorney-General Howell in 1938 when introducing the Bill, which noted that indecent male-male acts were "a regrettable state of affairs and was not desirable": *Lim Meng Suang* at [67].

1.133 Loh J noted that a statutory provision adopted from another jurisdiction may be adopted with modifications or be amended before enactment; therefore, looking to jurisdictions with similar statutory provisions should be done considering factors such as (*Lim Meng Suang* at [70]):

> … 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 other words, English sources would at best be "contextual background": *Lim Meng Suang* at [70].

1.134 Loh J considered irrelevant the fact that Singapore did not have a constitution in 1938 in so far as this might impugn the validity of s 377A. Even before Art 12 was adopted, equality before the law and equal protection of the law were part of the wider doctrine of the rule of law; as part of English law, this was imported into Singapore by the 1826 Second Charter of Justice, and was part of Singapore law in 1938 when s 377A was introduced: *Lim Meng Suang* at [71].

1.135 Loh J considered the weight and relevance of the 2007 parliamentary debate over a comprehensive review of the 1985 Penal Code, which as the primary criminal statute "reflect[s] our society's norms and values" (Senior Minister of State for Home Affairs, Assoc Prof Ho Peng Kee (see *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at cols 2175–2176): *Lim Meng Suang* at [72]. Extensive public consultations had taken place and there had been "multiple points of engagement with people from different walks of life": *Lim Meng Suang* at [72]. Section 377A was an existing provision in 2007 though a parliamentary petition called for its repeal: *Lim Meng Suang* at [75]–[76].

1.136 Loh J considered that "absent any unusual facts or circumstances", where the original purpose for introducing a provision was articulated in Parliament, and where a decision was taken during a subsequent comprehensive review to retain that provision, that the first or original purpose "will still be the purpose for which that provision was enacted": *Lim Meng Suang* at [78]. He did not consider it necessary to consider the 2007 debates nor would they help the plaintiffs seeking to impugn s 377A. While the original purpose was articulated when Singapore was a colony, an independent Parliament ratified this purpose in 2007, some 69 years later, when it decided to maintain the section criminalising male-male gross indecency, even while modifying it to exclude heterosexual acts: *Lim Meng Suang* at [78]. The 2007 Parliament reaffirmed the purpose articulated in 1938.

1.137 Nonetheless, Loh J considered the plaintiff's lengthy submissions which argued that the purpose underlying s 377A of the Penal Code was no longer valid.

1.138 First, he rejected the argument of the plaintiff's counsel to the effect that s 377A was retained because it had polarised views within and

without Parliament (with the majority favouring retention): *Lim Meng Suang* at [81]. Counsel had characterised the issue of the Government deciding to do nothing and to leave s 377A as to "live and let live" since "pushing the issue would polarise and divide society": *Lim Meng Suang* at [84]. On this point, the learned judge stated: "I cannot disagree more", as this was not a purpose of s 377A as counsel had falsely submitted, but "a practical reason" why "among other more basic reasons" s 377A was retained: *Lim Meng Suang* at [84]. Counsel had derived his argument "by taking a small part of three or four paragraphs" of the official parliamentary record of the October 2007 debates "out of context in an attempt to frame a purpose". The learned judge pointed out that it was clear that the Prime Minister and other MPs supporting the retention of s 377A did so as they considered it a question of morality, a question of the family being "one man marrying one woman, having children and bringing up their children within the framework of a stable family unit" and the desire to have this vision of the family taught in schools, as the vast majority of Singaporeans desired: *Lim Meng Suang* at [84]. Most MPs noted that while retaining s 377A might be "legally untidy", to repeal it would entail "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": *Lim Meng Suang* at [84]. It is clear from the 2007 parliamentary speeches that the purpose of s 377A had not altered since its introduction in 1938, and that Singapore was "a conservative society where the majority did not accept homosexuality": *Lim Meng Suang* at [85].

1.139 Second, he rejected counsel's argument that as one of the purposes of s 377A was to preserve the traditional concept of marriage as between one man and one woman, s 377A was discriminatory as it did not extend to lesbian behaviour and those having extra-marital sex, such that the latter groups were "not targeted as criminals". It is worth noting that counsel again conflated an actor (one professing homosexuality) with a criminal act or conduct (homosexual acts) which is emotive rather than accurate. Loh J stated that the commitment to family was a shared Singapore value derived from social mores not the Penal Code, such that s 377A "by itself does not bring about this value or ensure its continuity": *Lim Meng Suang* at [86].

1.140 During oral submissions, the issue arose about a situation where the "original purpose" of a statutory provision was considered invalid but the provision could fulfil a "new" purpose. For example, if medical science could show that homosexuality was "entirely inborn", then targeting male homosexuals under s 377A may no longer be justifiable. Or if medical science could show homosexual activity was a

major factor in spreading AIDS/HIV, then a "new purpose" of s 377A could be that of curbing HIV/AIDS, which was not around in 1938. Both parties agreed that a new purpose can be a valid purpose of s 377A but Loh J did not rule on it, as this hypothetical did not arise on the immediate facts: *Lim Meng Suang* at [87]. He did note in (above, para 1.113) at [97] that HIV prevention and mitigation was not a purpose and object of s 377A when it was first introduced in 1938, and it would be a "stretch" to read it as a purpose for retaining the section, from an examination of the 2007 parliamentary debates: *Tan Eng Hong (HC)* at [97].

Meaning of "rational relation"

1.141 Loh J observed that the term "rational" meant "capable of being supported or justified by reason" and "in conformity with what is fairly to be expected or called for", that is, "reasonable and just": *Lim Meng Suang* at [89] and [91]. Loh J also identified two principles from case law which assisted the courts in applying the test of reasonableness under Art 12.

1.142 First, the differentia underlying the classification prescribed by a law must be "broadly proportionate" to the purpose of that law: *Lim Meng Suang* at [94]. This test was applied by the Court of Appeal in *Yong Vui Kong v PP* (above, para 1.112) at [112] in finding that the quantity of trafficked drugs was "broadly proportionate" to such factors as the drug dealer's scale of operations and the harm posed to society by the offender's crime. The Court of Appeal was testing the reasonableness of the 15g of heroin differentia by considering "the efficacy of that differentia" in achieving the legislative purpose of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed). The term "broadly proportionate" does not require that the differentia utilised had to be "the most effective means" of achieving the legislative objective, provided it was "not one so far removed" from the object of the Misuse of Drugs Act "that it would result in an unreasonable and unjust relation between the two". Provided the differentia was "broadly effective" to achieve the legislative objective, "it is not the court's function to displace Parliament's decision in prescribing that classification": *Lim Meng Suang* at [95]. As reasonable people may disagree upon the most effective differentia to secure a legislative object, this matter lay within the legislative and not judicial province, being a matter of social policy: *Lim Meng Suang* at [95]. As the Court of Appeal stated in *Yong Vui Kong v PP* at [113], the courts "ha[ve] to respect the constitutional role of our legislature" under Art 38 of the Constitution.

1.143 Thus, the judicial role is not to second-guess whether Parliament "could or ought to have devised a more efficacious

differentia"; judicial intervention should only be on the basis that the differentia adopted was "so clearly inefficacious" it could not be capable of being considered "broadly proportionate to the object of the legislation in question": *Lim Meng Suang* at [95].

1.144 Secondly, the prescribed classification has to "broadly fit" the legislative object in terms of the scope of its application. The idea of "fit" relates to imperfect classifications which may be under or over-inclusive. While a "complete coincidence" between the legislative classification and the class defined by the legislative object is not required for there to be a rational relation in terms of the means/end fit, the strength of this relation has to be "sufficiently strong" to justify the classification: *Lim Meng Suang* at [97]–[98]. Loh J noted that this involves a judicial investigation into the "degree of inequality" involved, quoting an academic article by Huang-Thio Su Mien, "Equal Protection and Rational Classification" [1963] *Public Law* 412 at 431.

1.145 Loh J noted in terms of over-inclusiveness, US and Indian case law had found that such classifications could nonetheless satisfy the "rational relation" test, with cases typically dealing with emergency situations of affirmative action: *Lim Meng Suang* at [99]. The Court of Appeal in *Taw Cheng Kong* (above, para 1.111) did not reject the principle "that over-inclusiveness could possibly result in the 'rational relation' test not being satisfied": *Lim Meng Suang* at [99].

1.146 Applying the "rational relation" test to the facts, Loh J found a "complete coincidence" between the legislatively prescribed differentia (male homosexual conduct) and the purpose of s 377A that male homosexual conduct is criminalised because it is not acceptable or desirable in Singapore society: *Lim Meng Suang* at [100]. As the differentia mirrors the legislative purpose, minimally, the differentia would be broadly proportionate to the purposes of s 377A in terms of efficacy and thus clearly satisfied the "rational relation" test. It did not merely "just go 'some distance'", as counsel had argued in *Tan Eng Hong (HC)* at [100]. Loh J dismissed the policy statement in 2007 that the provision "would not be actively enforced" (*Lim Meng Suang* at [101]) as indicating, as the plaintiff's counsel argued, that this would render s 377A unable to "serve the function of signalling" the undesirability of male homosexual conduct. Loh J noted that while the robust enforcement of a criminal provision would better effectuate its purpose, it was "questionable" that a criminal provision had to be enforced in order to have a "signalling" function: *Lim Meng Suang* at [101]. This recognises the educative function of law. He noted that "not all criminal provisions operate in a similar manner" and Parliament's judgment that the policy of retaining s 377A while not advocating enforcement of it was still adequate to fulfil its purpose "should be respected": *Lim Meng Suang* at [101]. The plaintiff would have to show "compelling or cogent

material or factual evidence" to show that s 377A could not serve its functioning of signalling disapprobation of male homosexual conduct if it is not actively enforced; bare assertion would not suffice: *Lim Meng Suang* at [101].

Presumption of constitutionality

1.147 The reasonable classification test was to be applied with a "strong presumption of constitutionality", as stated by the Court of Appeal in *Taw Cheng Kong*: *Lim Meng Suang* at [103]. Citing cases from the US, India and Malaysia, Loh J located the rationale for this behind the presumption that the Legislature best understands the needs of its own people. In operational terms, this means that the court "*prima facie* leans in favour of constitutionality and supports the impugned legislation if it is reasonable to do so". Furthermore, the onus is on the party impugning the legislation "to place relevant materials and evidence before the court": *Lim Meng Suang* at [104]. This principle dates back to *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128 at [131]: *Lim Meng Suang* at [104]. The Court of Appeal in *Taw Cheng Kong* also noted that it was not helpful to postulate examples of arbitrariness to rebut this presumption. Nonetheless, this presumption could not always "be carried to the extent of always holding that there must be some undisclosed and unknown reason" for the legislation (citing the Indian Supreme Court's decision of *Ram Krishna Dalmia v Justice Tendolkar* AIR 1958 SC 538 at 547–548), if there is "nothing on the face of the law or the surrounding circumstances" brought to judicial notice on which the classification may reasonably be regarded as based upon: *Lim Meng Suang* at [107].

1.148 Drawing an analogy with the doctrine of non-justiciability and the separation of powers, a fundamental constitutional principle, on which it is based, the learned judge noted that the presumption of constitutionality was "intimately tied" to the separation of powers idea. He affirmed a "calibrated approach" to judicial review whereby the intensity of 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" (citing Sundaresh Menon JC (as he then was) in *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [98]): *Lim Meng Suang* at [108]. Thus, the calibrated review approach commended itself to cases "where issues of social morality are concerned", with the presumption of constitutionality "titled in favour of persons who are elected and entrusted with the task of representing the people's interests and will": *Lim Meng Suang* at [110].

1.149 The presumption of constitutionality would not mean that a court would never intervene to strike down a law as being unconstitutional, as the judicial role was to ensure constitutional supremacy and the rule of law, as affirmed in past cases: *Chng Suan Tze v Minister of Home Affairs* [1988] 2 SLR(R) 525 at [86]; *Taw Cheng Kong* at [89]; *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 ("*Yong Vui Kong v AG*") highlighted at [79] (*Lim Meng Suang* at [111]–[112]).

1.150 While not advocating the move to a more intense model of review such as the US strict scrutiny test, Loh J noted it was "only natural" for the courts to review legislation and the relation between its purpose and differentia underlying its classification (*Lim Meng Suang* at [113]):

> … 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 Pt IV of the Constitution.

1.151 Loh J acknowledged that it was "possible to conceive" of a case where the legislative object is illegitimate even if "very far and few between": *Lim Meng Suang* at [114]. The court would intervene if the legislation in question "is truly discriminating arbitrarily and without a legitimate purpose": *Lim Meng Suang* at [114]. Drawing from Huang-Thio Su Mien's article "Equal Protection and Rational Classification" [1963] *Public Law* 412 at 422, Loh J noted the example of an invalid legislative object in *Takahashi v Fish and Game Commissioner* 334 US 410 (1948): *Lim Meng Suang* at [115]. There, a Californian law barring the issuing of commercial fishing licences to Japanese aliens like Takahashi was found to violate the requirement of equality. If the purpose was fish conservation, a classification based on ineligibility for citizenship bore no rational relation to this purpose; if the purpose was to protect Californian citizens from Japanese aliens, the legislation would have passed the "rational relation" test. The fact it was struck down meant that the legislative objective based on racial discrimination was an illegitimate object. Loh J found this to be the position adopted in relation to Art 12.

1.152 The courts can therefore examine whether a legislative object is legitimate, but Loh J underscored carefully that "legitimacy" had to be "carefully understood" within the context of Art 12. It was a "substantive concept" and is relevant in scrutinising the purpose of legislation "which applies to a very specific class of people in society": *Lim Meng Suang* at [116]. An illegitimate purpose would be "capricious" and "absurd", and in ascertaining legitimacy, it would be wrong "to decide such a matter based on a blind acceptance of legislative fiat": *Lim Meng Suang* at [116]. The issue was then how to accord "proper weight" to the views

of Parliament as embodied in impugned legislation, as noted in *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103 at [73].

1.153 In examining the legitimacy of s 377A, Loh J noted that it addressed "a social and public morality concern which our Legislature identified in 1938 and subsequently affirmed in 2007": *Lim Meng Suang* at [117]. He noted the "possible argument" that s 377A was not legitimate because it only criminalised male and not female homosexual conduct: *Lim Meng Suang* at [117].

1.154 Loh J noted that s 377A was constitutional as the two-step test in *Tan Eng Hong (CA)* (above, para 1.42) was satisfied; in addition, the purpose of s 377A was not illegitimate for two main reasons he identified, noting that the plaintiffs had not produced cogent and compelling evidence to establish that such a purpose was illegitimate (criminalising only male and not female homosexual conduct).

1.155 The first reason is the idea that courts should not be "too quick to dismiss practices which have persisted and developed within the framework of a common law legal system". If a law had withstood the test of time, it was "fair to presume" it "cannot be devoid of any basis": *Lim Meng Suang* at [119]. Were a court to pronounce a law which has "stood for decades or centuries" as wrong, this would require "a justification of proportionate magnitude": *Lim Meng Suang* at [119]. In the absence of such justification, it should be left to Parliament whether to change the law. Undeniably, "the common law has for a long time only proscribed male homosexual conduct, and not female homosexual conduct": *Lim Meng Suang* at [119]. Loh J noted that English criminal law has only targeted male and not female homosexual conduct and that an attempt to criminalise female homosexual conduct in 1921 had failed: *Lim Meng Suang* at [120]. The UK Report of the Departmental Committee on Homosexual Offences and prostitution (Cmnd 247, 1957) itself only made a single reference at para 103 to indecent assaults by females on females which were rare and often involved cases where a female aided and abetted a man to commit an indecent assault on a female: *Lim Meng Suang* at [120].

1.156 Loh J noted that the Court of Appeal in *Tan Eng Hong (CA)* at [26] had said that English buggery laws were gender-neutral while s 11 of the UK Criminal Law Amendment Act 1885 was not. However, Loh J queried whether the buggery laws of old were truly gender neutral, as 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": *Lim Meng Suang* at [122]. Drawing from *Jowitt's Dictionary of English Law* (2010), he noted that "buggery" was defined as carnal intercourse by a male person with another person or animal: *Lim Meng Suang* at [123]. On closer examination, the learned judge pointed

out that the definitions were "clearly … not gender neutral". Thus, if "the essence of sodomy is penile penetration *per anum*, then two women cannot sodomise one another". The same applied to the term "buggery" which also could not apply to "'intercourse' between two women". In this respect, Loh J did not think that the offence of buggery applied to digital penetration and the only exception would be where a woman had sex with a beast, *ie*, bestiality. Therefore, buggery laws of old were not gender-neutral as they "depended on penile penetration *per anum*". Indeed, the explanation to s 377 was similarly phrased in that "penetration" sufficed to constitute the offence of carnal intercourse as described by that section: *Lim Meng Suang* at [124]. Loh J noted that where s 377 was interpreted to include oral sex, female homosexual conduct was never the issue as the Court of Appeal seemed to have deliberately avoided saying that cunnilingus (which allows for the possibility of a woman-to-woman sex act to be included), as opposed to fellatio, fell within s 377. Thus, "the common law tradition has never criminalised female homosexual conduct": *Lim Meng Suang* at [126].

1.157 The second reason related to deep-seated traditions in relation to procreation and family lineage, which is focused on males rather than females. Loh J noted that particularly where Parliament has adopted a clear position, the courts "should not readily dismiss the views of one portion of society in favour of those of another portion of society": *Lim Meng Suang* at [127]. Loh J referred to one parliamentary speech in 2007 highlighting a Chinese saying in relation to the importance of having a son. While this was not conclusive that Singaporeans treated procreation and lineage as important values, the court should not dismiss a legislative purpose as illegitimate "where there are plausible justifications for this purpose within the context of Singapore's societal mores and norms". The emphasis for the Singapore approach to reading Art 12 is rooted in context and based on the test of plausibility, which is relatively lax, compared to tests which require "compelling" justifications, as for the US strict scrutiny test. Had the plaintiffs argued that the purpose of s 377A was illegitimate for the reasons stated, Loh J would have been "slow to find" there was "no basis whatsoever" for Parliament to choose to only criminalise male homosexual conduct.

1.158 Considering the remaining arguments of the plaintiffs, Loh J found that the plaintiffs had not offered or adduced any compelling or cogent material or factual evidence that s 377A is arbitrary or operates in an arbitrary manner: *Lim Meng Suang* at [131]. First, Loh J rejected the bare assertion that "gross indecency" in s 377A was vague leading to unintelligible differentia or arbitrary application; this was a matter of statutory interpretation and both terms were not unknown within Singapore criminal law. Second, the argument that other jurisdictions had decriminalised homosexual male conduct was of "no weight" for two main reasons: what was adopted in other parts of the world may

not be suitable for adoption in Singapore, *ie*, may be anti-models, bearing in mind Singapore is "an independent nation with its own unique history, geography, society and economy". Also, to merely assert that "the world is changing" was unhelpful as this could be countered by examples of areas where there are "shifts in the opposite direction". Indeed, 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" [emphasis in original]: *Lim Meng Suang* at [133]. This appreciates the selectivity of arguments claiming to invoke comparative or foreign constitutional law or the stances of various international and regional organisations (which are not binding as a matter of international law). Societies and communities differ on the issue and the short "and only relevant" answer was that the Singapore parliament "has debated the removal of s 377A and has decided against it": *Lim Meng Suang* at [133]. Third, the plaintiffs had provided "mere postulations" that s 377A could not fulfil its purpose of signalling public disapprobation of male homosexual conduct given the Government's policy of non-active enforcement save for cases where minors were preyed upon or where gross indecency took place in public. Parliament had decided to retain s 377A after two days of "intensive debates" where "valid reasons" were given for its retention and the majority of MPs supported this. The efficacy of s 377A and the policy of enforcement adopted was a matter for Parliament to consider, and was also "supported by the presumption of constitutionality": *Lim Meng Suang* at [134]. In addition, whether an offence is or is not prosecuted is a matter of prosecutorial discretion and on the facts, there was no complaint of arbitrary enforcement: *Lim Meng Suang* at [135]. Lastly, the plaintiffs argued that as Parliament had decriminalised oral and anal sex between heterosexual couples, there was "no logic" in continuing to do so between two consenting male adults. While this was "a major shift in morality and principle", Loh J noted that Parliament had carefully considered s 377 (which was repealed in relation to consenting heterosexual couples) and s 377A and had "endorsed the repeal of s 377 but chose to retain s 377A". He noted the dissenting opinion of US judge Scalia in *Lawrence v Texas* 539 US 558 at 604 (2003):

> 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.

1.159 As Parliament clearly considered there was a "reasonable differentia" to distinguish between the two classes (male-male and male-female anal and oral sex in private), there was "no reason" to strike down the classification prescribed by s 377A as being arbitrary or

discriminatory on the ground that it does not bear any rational relation to the purpose of s 377A. In other words, Parliament was entitled to consider acceptable oral and anal sex between a consenting man and woman but to consider repugnant and offensive the same conduct when carried out between two men, even if both were consenting parties: *Lim Meng Suang* at [138].

1.160 In a judgment which referenced academic opinion and foreign case law, the decision in this case is illuminating in its vision of how the separation of powers principle operates in the Singapore context, when it comes to "defining moral issues" which "need time to evolve and are best left to the Legislature to resolve": *Lim Meng Suang* at [142]. While society is experiencing change, a court is "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": *Lim Meng Suang* at [139]. Even where society has "clearly shifted closer to one end of the spectrum, our courts can but call on Parliament to consider changing the law": *Lim Meng Suang* at [139]. While affirming the practice of political constitutionalism where public power is checked through political means, Loh J recognised a judicial role in "dialoguing" with Parliament. He recognised in very rare instances that a court should be able to say certain principles of law were outmoded and should not be enforced, as in the case of the tort of enticement founded on the "archaic concept of women as chattels", something clearly not acceptable in modern society. Loh J also noted the disquiet of certain US Supreme Court justices in the March 2013 case concerning same-sex "marriage" over the "pace of change": *Lim Meng Suang* at [141]. He noted that the US case of *Roe v Wade* 410 US 113 (1973) which dealt with abortion as part of a judicially declared constitutional right to privacy remains doubted even today, including by "liberal" judges such as Justice Ginsberg who while not disagreeing with the merits of the decision considered that it moved "too far, too fast": *Lim Meng Suang* at [142].

1.161 While the court had a role to play in defining moral issues where these were at stake, judicial intervention could only be "exercised within established principles", and in the instant case, "heavy-handed judicial intervention ahead of democratic change" was not justified: *Lim Meng Suang* at [143]. Indeed, the reasonable classification test, settled by precedent in Singapore, recognises the broad legislative discretion Parliament enjoys as embodied in the strong presumption of constitutionality as well as the test of establishing a plausible relationship between the means/ends fit. In instances where there is a clear shift in social morality, as opposed to a polemicised stand-off, courts may have a role in the moral issues implicated, *ie*, to say a principle should no longer be enforced, in exceptional cases.

1.162 In the final analysis, the basis underlying s 377A was "an issue of morality and societal values". This had been thoroughly debated in Parliament, and although the views articulated were disparate (if not polemicised), Parliament had clearly decided to retain the law and the courts were not to "substitute their own views for that of Parliament": *Lim Meng Suang* at [144]. The decision given in 1938 when the precursor to the provision was introduced into Singapore when it was a British colony remains valid today, and was ratified by Parliament in 2007, when Singapore was an independent nation. Should the courts seek to displace an issue which has been the subject of democratic deliberation with its preferred opinion on matters of morality, this would render the system vulnerable to the judicial imposition of subjective or preferred politics, contrary to both the rule of law and the separation of powers. As Scalia J noted, there is a difference between "persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else" (*Lawrence v Texas* at 603): *Lim Meng Suang* at [145]. In other words, political agendas should be promoted by political methods or normal democratic processes. This should not be distorted by the judicial invention of novel constitutional rights by "a Court that is impatient of democratic change" (*Lawrence v Texas* at 603): *Lim Meng Suang* at [145].

1.163 Notably too, the court did not find that Art 12(1) prohibited discrimination on grounds of sexual orientation *per se*; this appreciates that the term "equality" is empty in that it is parasitic on an independent substantive ideology; indeed that the grounds of discrimination considered impermissible (quite apart from the grounds expressly recognised in the Constitution) could not be the subject of bare assertion. This would sneak in a substantive ideology guised in the language of "equality", skipping over the necessary debate on what may and may not be the subject of legitimate differentiation. Thus, Loh J dismissed the claim that s 377A was unconstitutional and infringed Art 12, and declined a declaration to that effect.

1.164 Section 377A was unsuccessfully challenged for allegedly violating both Arts 12(1) and 9(1) in *Tan Eng Hong (HC)* (above, para 1.113). Tan had originally been charged under s 377A for engaging in oral sex with another male in a toilet cubicle inside Citylink Mall. The Prosecution later changed the charge to one under s 294(*a*) for committing an obscene act in a public place, to which Tan pleaded guilty: *Tan Eng Hong (HC)* at [6]. The Court of Appeal in *Tan Eng Hong (CA)* (above, para 1.42) took a relatively liberal view of standing in finding that a real and credible threat of prosecution under an allegedly unconstitutional law sufficed to found standing and thus the issue arose as to whether the plaintiff's constitutional rights were violated on the facts, *ie*, there was a "real controversy".

1.165 The Court of Appeal in *Tan Eng Hong (CA)* (at [120]–[121] and [128]–[130]) while not deciding on the substantive merits of s 377A nonetheless decided that the mere existence of s 377A did not engage the plaintiff's rights under Arts 9(1) and 14 of the Constitution. However, it stated that if s 377A was unconstitutional for inconsistency with Art 12, the plaintiff's Art 9 rights would be violated by his arrest and detention under s 377A. This is so even if no prosecution under s 377A was eventually taken given the amended charge under s 294(*a*) of the Penal Code. The Court of Appeal framed the issue as a question of whether s 377A satisfied the "reasonable classification" test under Art 12(1) – a question answered in the affirmative in *Lim Meng Suang* (above, para 1.113). Plaintiff's counsel raised a further argument that s 377A failed to meet the minimum requirements to qualify as "law" under Arts 9(1) and 12(1), as "the nature and/or operation of s 377A was contrary to the fundamental rules of natural justice". Quentin Loh J felt compelled to address the "natural justice" issue as it did not fall without the boundary delineated by the Court of Appeal in *Tan Eng Hong (CA)*: *Tan Eng Hong (HC)* at [20].

Article 12(1) arguments

No higher standard of scrutiny

1.166 The plaintiff raised Art 12(1) related arguments not raised in *Lim Meng Suang* to the effect that a test of heightened scrutiny should apply where immutable traits were concerned; however, as discussed below, Loh J did not conclude that sexual orientation was a natural and immutable trait, and so this argument failed. Further, even if he was wrong on this point, he noted that the debate on the appropriate level of judicial scrutiny in facing allegedly unconstitutional laws "may find some currency in discourses on political philosophies", the constitution and constitutional law "operate on a slightly different plane": *Tan Eng Hong (HC)* at [89]. Courts were not positioned to decide on the "unfairness" (itself a nebulous concept) of legislation imposing legal burdens based on immutable characteristics of individuals in the abstract; such questions had to be addressed within the Singapore constitutional framework which allowed "a specific degree of latitude to Parliament to legislate for certain conduct and to address or cater for the self-evident truth that members of our society are not all born the same": *Tan Eng Hong (HC)* at [89]. The scope of this latitude was delineated by constitutionally entrenched fundamental rights such as Art 12(1); this was read against the reasonable classification test which involved a "balance" between the fundamental right to equality and "the political autonomy afforded to Parliament to legislate within the bounds of the Constitution": *Tan Eng Hong (HC)* at [89]. Foreign decisions cited by the plaintiff while "interesting" should not be followed; these had

"adopted a more zealous approach", factoring in "legal and extra-legal social, economic, cultural and political considerations which are unique to their respective jurisdictions" (at [90]). Loh J affirmed that one single uniform reasonable classification test applied to all Art 12(1) challenges in Singapore, *ie*, a single test adapted to context, as opposed to levels of scrutiny; it would be "a stretch" to accept a new principle of Singapore constitutional law requiring "a separate, broader and more zealous test when immutable traits are concerned" in relation to Art 12(1) challenges: *Tan Eng Hong (HC)* at [91].

1.167 The plaintiff also argued that because the question of the morality of homosexuality was contested, the advancement of morality as the rationale underlying s 377A was not a sound social object as it fell beyond the "core" of incontrovertible morals into the "penumbra of contested values": *Tan Eng Hong (HC)* at [93]. Effectively, this is premised on the notion that Parliament cannot legislate on controversial moral issues which "cannot be right". It may be observed that if this argument is taken to the logical conclusion, any moral issue is potentially controversial, and if so, Parliament's legislative powers would be truncated. In addition, what criteria are used to decide when a moral issue is controversial, and who is the arbiter? As Loh J correctly observed, Parliament, subject to constitutional limitations, is constitutionally mandated "to make decisions on and surrounding controversial issues": *Tan Eng Hong (HC)* at [93]. If there was clear consensus on a moral issue, the position might differ but that was not argued here and Loh J was "unprepared to say that Parliament should defer to the views of the court" on this issue: *Tan Eng Hong (HC)* at [94].

1.168 Loh J also rejected counsel's argument that s 377A was "over-inclusive" because it made criminals of supporters of male homosexuals under s 107(*a*) of the Penal Code. This was a "grossly overstated" argument as it cannot be that all laws criminalising an act are over-inclusive and unconstitutional because "they open up the possibility" that others may be guilty of supporting or encouraging the act: *Tan Eng Hong (HC)* at [103]. Loh J astutely noted that "perhaps the implied suggestion" behind this argument that abettors of homosexual acts, unlike abettors of other offences, were "less blameworthy" was because supporting a person's sexual orientation was "innocuous". But this argument "assumes what it seeks to prove" as the "less blameworthy" argument rests on the premise that gross indecency between male homosexuals should not be an offence in the first place – this is an attack on the substantive merits of the law. That is, an argument that X, a criminalised act, is unconstitutional because it should not be criminalised in the first place is a self-referential non-argument, though it could be one of many political positions taken on the issue.

Fundamental rules of natural justice argument

1.169 The plaintiff argued that all laws enacted by Parliament must be consistent with the "fundamental rules of natural justice" otherwise they would not be "law" for the purposes of Arts 9(1) and 12(1). If s 377A was not "law" so characterised, the plaintiff's arrest and detention under it would contravene Art 9(1) for being a deprivation of personal liberty in a manner "not in accordance with law": *Tan Eng Hong (HC)* at [21].

1.170 Counsel for the plaintiff, M Ravi, argued that the meaning of "law" under Arts 9(1) and 12(1) of the Constitution included fundamental rules of natural justice, which was not in itself a controversial proposition. Lord Diplock for the Privy Council in *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710 at [24]–[25] ("*Ong Ah Chuan*") stated that the expression "law" in this context did not relieve courts of deciding the constitutionality of legislation depriving a person of life or liberty, stating that "law" must include "fundamental rules of natural justice". The Court of Appeal affirmed this to be so in *Yong Vui Kong v AG* (above, para 1.148) at [101].

1.171 Loh J noted that counsel had incorrectly adopted Lord Diplock's judgment on the point of the meaning of "law", noting that it meant different things within the context of Arts 9(1) and 12(1). "Law" in the context was both the guarantee of, and source of deprivation of the right to life and personal liberty: *Tan Eng Hong (HC)* at [26]. In contrast, "law" under the Art 12(1) equal protection clause does not refer to any specific law as the protection or deprivation of equality does not depend on the validity of a law, but is rooted in Art 12(1) itself. That is, "law" under Art 12(1) does not have "any normative content" which is independent of the substantive right accorded under "equal protection of the law" and "equal before the law": *Tan Eng Hong (HC)* at [27].

1.172 Loh J stated it would incorrect to import into the "law" under Art 12(1) the requirement that "law" must accord with fundamental rules of natural justice as Art 12(1) jurisprudence is clear that the mere formal enactment of a rule may contravene the equal protection guarantee if that law fails the "reasonable classification" test: *Tan Eng Hong (HC)* at [28]. To so import would be to impute an "additional layer" into Art 12(1) which was "either superfluous or untenable": *Tan Eng Hong (HC)* at [28]. It would mean Art 12(1) provided not only for equality under the law and equal protection under the law "but also something more". This would imply that a law which satisfies the reasonable classification test may nonetheless be held unconstitutional for violating fundamental rules of natural justice, which may have nothing to do with equality, which detracts from the essence of equality, as argued in A J Harding, "Natural Justice and the Constitution" (1981) 23 Mal L Rev 226 at 235, cited in *Tan Eng Hong (HC)* at [28]–[29].

Article 9 argument

1.173 Conversely, "law" within the context of Art 9(1) must include fundamental rules of natural justice and it is "more understandable" why Lord Diplock imported it under Art 9(1) as its jurisprudence has established that the guarantee serves to ensure the protection of life and personal liberty "is taken seriously": *Tan Eng Hong (HC)* at [30]. This article would provide "very little assurance" if a mere Act of Parliament could justify the deprivation of life and liberty; "law" must transcend formal validity and include "something more", that is, fundamental rules of natural justice: *Tan Eng Hong (HC)* at [30].

1.174 Loh J noted the "dearth of authority" on the notion of the fundamental rules of natural justice, *ie*, what its scope was and what were its contours as a constitutional concept. This was indicative of judicial reticence towards "uncharted territory": *Tan Eng Hong (HC)* at [31]. The concept was nebulous and understood by the Privy Council in *Haw Tua Tau v Public Prosecutor* [1981–1982] SLR(R) 133 ("*Haw Tua Tau*") (discussed in *Tan Eng Hong (HC)* at [32]) to be an evolving concept. Citing Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012), Loh J noted the observations that the constitutional concept of fundamental rules of natural justice related largely to the conduct of a fair trial and had been left to be developed incrementally: *Tan Eng Hong (HC)* at [33].

1.175 Counsel for the plaintiff did not refer to the rules recognised by the Privy Council in the "two apposite" cases of *Ong Ah Chuan* and *Haw Tua Tau* and submitted that fundamental rules of natural justice prohibited "absurd and arbitrary law" while ensuring "all legislation enacted adheres to the rule of law": *Tan Eng Hong (HC)* at [34].

Arbitrary

1.176 The Court of Appeal in *Yong Vui Kong v AG* (above, para 1.148) at [16] postulated two possible types of legislation which would not qualify as "law" under Art 9(1), that is, legislative judgments targeted at particular individuals and laws that were "absurd or arbitrary". In deciding what an "arbitrary" law was, Loh J stated this made sense not in the abstract but "in the context of its purpose": *Tan Eng Hong (HC)* at [37]. In *Yong Vui Kong v AG* itself, the argument that the mandatory death penalty was "arbitrary" because of the absence of judicial discretion in imposing this punishment for drug trafficking crimes above 15g of the stipulated drug was considered within the context of the reasonable classification test. Reference was made to the social object of the Misuse of Drugs Act where the court approved the view that it falls to Parliament to decide the structure of the illicit drug trade in Singapore and the appropriate quantitative boundary between two

classes of dealers. In so far as the law was challenged as contravening Art 9(1) because it was "arbitrary", this was "directed at the purpose of the law": *Tan Eng Hong (HC)* at [39].

1.177 Loh J affirmed that s 377A was not arbitrary for purposes of Art 12(1), as the Legislature had articulated a "clear social purpose" for which s 377A was the "chosen and fitting mechanism for implementation", as he had decided in *Lim Meng Suang* at [67]–[68]. Similarly, he found no justification to find that s 377A was arbitrary for purposes of Art 9(1).

Absurdity

1.178 Loh J rejected the argument that s 377A is "absurd" because it targets homosexual orientation; counsel for the plaintiff had made the contentious proposition that homosexuality was a "natural and immutable" attribute. He noted that this factual question could only be resolved by evidence: *Tan Eng Hong (HC)* at [42]. Loh J considered that the term "immutable" meant "(a) innate or inborn; and (b) unchanging or unable to be changed". Counsel had argued that laws criminalising acts arising purely out of an individual's "natural and immutable characteristics" would be unconstitutional under Art 9(1). For his argument to succeed, the plaintiff would have to demonstrate that homosexuality was both inborn and unable to be changed. Loh J took note that what he described as "pro-homosexual and anti-homosexual groups" issued self-serving statements which could not be considered as authoritative, nor was it fair if statements from one side were taken as proof one way or the other. Loh J did not place any weight on the individual testimonies counsel referred to, and considered the medical and scientific bodies as well as court decisions counsel cited.

1.179 Counsel for the plaintiff mentioned seven foreign court decisions from England, Canada, Hong Kong, India, the US, Nepal and South Africa but Loh J correctly pointed out that foreign court decisions without more could not be relied on as evidence of the correctness or truth of a fact, that is, whether homosexuality as a form of sexual orientation or preference was natural and immutable: *Tan Eng Hong (HC)* at [49]. These non-binding decisions were at most persuasive and constituted merely the opinion of individual judges sitting in their respective courts. Judicial opinions are not "substitutes for evidence of a fact". Further, as the courts in most of these cases were not asked to decide as a finding of fact that sexual orientation was a natural and immutable attribute, they did not have expert evidence on the issue. One might observe that the decisions were based on ideology rather than scientific fact. In the UK decision for instance, their Lordships were making a "legal characterisation" of a particular social group (homosexuals) for the purposes of seeing whether they fell within the

protective ambit of the category of "refugee". They were not determining the characteristics of a social group "as a matter of *fact*" [emphasis in original]: *Tan Eng Hong (HC)* at [50].

1.180 Loh J pointed out that two of the cases did consider, to some extent, expert evidence. The US case of *Perry v Schwarzenegger* 704 F Supp 2d 921 (ND Cal, 2010) was instructive in so far as the decision was premised on taking expert evidence; however, only the plaintiffs, a lesbian couple had called an expert in social psychology; the defendants did not call any expert to give evidence on the issue of sexual orientation: *Tan Eng Hong (HC)* at [55]. Thus, Loh J stated it would be "inappropriate" to treaty the findings in *Perry* as conclusive on the issue of whether homosexuality was natural and immutable "without corroboration from more objective evidence such as studies from medical and other scientific bodies": *Tan Eng Hong (HC)* at [55].

1.181 As far as the Indian case of *Naz Foundation v Government of NCT of Delhi* WP(C) No 7455 of 2011 (2 July 2009) was concerned, the court considered scientific and medical evidence and opined that homosexuality was not a disease or disorder. Loh J said that even if he accepted this was so, it would be "difficult to make the connection that homosexuality is therefore a natural and immutable trait": *Tan Eng Hong (HC)* at [56].

1.182 Loh J noted that with respect to medical and scientific views, there was an abundance of literature "both for and against the theory of homosexuality being immutable" (at [59]), which he listed: *Tan Eng Hong (HC)* at [59] and [60]–[61]. There was no consensus on this contentious issue, such that a review of the literature yielded no determinate view. Loh J observed that "the fact that there is plausible evidence in support of either side must mean that this issue is at least arguable and debatable": *Tan Eng Hong (HC)* at [62]. The medical and scientific views on this issue remained "divided and inconclusive at best": *Tan Eng Hong (HC)* at [63]. Given that medical evidence was ambivalent, the plaintiff failed to make his case that sexual orientation was a natural and immutable attribute, such that criminalisation may bring such law into conflict with the fundamental rules of natural justice under Art 9(1): *Tan Eng Hong (HC)* at [62].

Rule of law

1.183 Counsel for the plaintiff sought to argue that the fundamental rules of natural justice in addition "required compliance with the rule of law", linking "the *Ong Ah Chuan* rules prohibiting arbitrariness to the broader conception of the rule of law": *Tan Eng Hong (HC)* at [65]. He then postulated that apart from arbitrariness, the rule of law demanded that laws could not restrict access to justice or be vague and uncertain.

Loh J noted that he found it difficult to see how the conception of the rule of law in *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 as invoked by counsel for the plaintiff furthered his case, as that concerned the power of courts to review executive discretion in security cases: *Tan Eng Hong (HC)* at [66]–[67]. Loh J addressed the issue of access to justice and legal certainty under the rubric of "fundamental rules of natural justice" embodied in "law" under Art 9(1).

Access to justice

1.184 Counsel for the plaintiff submitted that s 377A undermined access to justice by criminalising victims of homosexual assaults and homosexual domestic abuse: *Tan Eng Hong (HC)* at [69]. Loh J found it difficult to determine what the plaintiff was trying to argue, as the arguments appeared to relate more to the equal protection of the law (only male but not female victims of male sexual assault were themselves open to prosecution under s 377A) than access to justice: *Tan Eng Hong (HC)* at [69]. Loh J helpfully framed counsel's arguments in a "more contained" fashion, in so far as the argument might be that men suffering domestic abuse or sexual assault from other males may be deterred from making reports to the authorities, such that this situation constituted a breach of fundamental rules of natural justice: *Tan Eng Hong (HC)* at [70]. Loh J found that on closer examination, s 377A did not undermine or restrict access to justice.

1.185 In the case of victims of domestic abuse or other crimes, Loh J noted that it was not the fact of male homosexual acts taking place that formed the premise for a complaint but "the potential that investigations may reveal prior instances of male homosexual acts" which may deter the bringing of a complaint. Nonetheless, justice is still available as they could prosecute the complaint if they wished: *Tan Eng Hong (HC)* at [72]. One is not "deprived" of access to justice because of a fear that the authorities will realise that he has also committed an offence, *ie*, engaging in male homosexual acts contrary to s 377A. The flaw in the logic was self-evident as counsel's argument was tantamount to saying that an undiscovered overstayer who was robbed would be:

> … afraid of reporting the robbery for fear of being exposed as an overstayer can complain of being denied access to justice. Worse still, in Mr Ravi's paradigm, the overstayer can claim that a law which detains overstayers is inconsistent with Art 9(1) and therefore unconstitutional precisely because it denies overstayers access to justice in the aforementioned scenario. [*Tan Eng Hong (HC)* at [73]]

1.186 Furthermore, Loh J considered that it would be a "leap" to extrapolate that access to justice had been denied from the Court of Appeal's observation in *Tan Eng Hong (CA)* (above, para 1.42) of an

incident of a man who was robbed after having sex with another man and after reporting theft to the police, received a warning under s 377A. It was not "an insignificant omission" that the court did not say that the man's access to justice had been curtailed. Loh J correctly observed that counsel's argument could only succeed if the "cart is put before the horse", that is, that s 377A was first assumed to be unconstitutional, and therefore, male homosexual acts did not constitute offences. A man who commits an offence, and then has an offence committed against him, cannot expect to be exempt from the operation of the law if he is charged for the offence he committed.

1.187 With respect to male victims of sexual assaults by another male, Loh J appreciated that these victims may be placed in an invidious position as they could be charged with a s 377A offence. However, they were "not as powerless as one might think" as counsel's argument assumed that the s 377A offence was made out "regardless of whether there is proof of consent": *Tan Eng Hong (HC)* at [75]. While consent is not an element of the s 377A offence, Loh J noted that "it does not follow that male victims of sexual assaults by other males would be caught by s 377A". He offered two reasons for this.

1.188 First, a purposive interpretation of s 377A, reading the reasons for its introduction given by Attorney-General Howell in 1938, indicated it was introduced to strengthen criminal law to punish the commission of male homosexual acts which, *inter alia*, were difficult to detect: *Tan Eng Hong (HC)* at [77]–[78]. It was difficult to reconcile these intentions with an intention to treat the male offender and male victim of a s 377A assault as equally guilty, as the language of Howell "is more consistent with the idea of dealing with the seemingly higher incidence of consensual male homosexual acts": *Tan Eng Hong (HC)* at [78].

1.189 Second, the terms utilised in s 377A ("commits", "abets", "procures") were not words associated with a victim; it would not make sense to call a victim an "abettor" of a crime. In the absence of full arguments, Loh J said he was not inclined to consider the suggestion that s 377A "indisputably" extended to male victims of male sexual assaults.

Vagueness and uncertainty

1.190 It was argued that the language of s 377A was vague and potentially infinitely broad. Counsel for the plaintiff argued that this vagueness "in *violating the 'intelligible differentia' requirement*, violates the fundamental rules of natural justice and the rule of law which demand … certainty and predictability" [emphasis in original]: *Tan Eng Hong (HC)* at [80]. This faulty argument presupposed a breach of Art 12(1); at any rate, Loh J in *Lim Meng Suang* (at [48]) found the

differentia between male-male acts and male-female or female-female acts one which was clearly identifiable: *Tan Eng Hong (HC)* at [81].

1.191 Loh J rejected the "misconceived" hypothetical posited by counsel for the plaintiff, asking whether "kissing, holding of hands or even merely hugging" would constitute an act under s 377A. He argued there was no way of knowing until one is charged and convicted. Loh J pointed out that a provision seldom invoked was not "inherently vague and uncertain" and part of the common law system "in which Parliament operates and enacts laws is the development of a body of jurisprudence to guide future court decisions": *Tan Eng Hong (HC)* at [82]. Counsel's "bare assertion" that s 377A may or may not capture his hypothetical was "nothing more than a tautology" unsupported by "any logical reasoning" (at [83]). None of the more than 100 case authorities he cited was of a Singapore decision convicting two males for kissing, holding hands or hugging. Loh J was not persuaded that s 377A was vague and uncertain and the plaintiff failed to show how the nature/operation of s 377A was inconsistent with the fundamental rules of natural justice. The "natural justice" based arguments, tethered to Art 9(1), failed.