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EQUAL JUSTICE UNDER THE CONSTITUTION AND SECTION 377A OF THE PENAL CODE

The Roads Not Taken

This article takes a fresh look at s 377A of Penal Code (Cap 224, 2008 Rev Ed), and critically considers its scope and object against the backdrop of the Court of Appeal's and High Court's decisions in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 and *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059. Through a close examination of the legislative history of s 377A, it argues that s 377A is not concerned with male-male penetrative sex covered by the repealed s 377 (sex against the order of nature), but with other acts of gross indecency. The article also (a) argues that the proper application of Art 12(1) – especially in the case of penal statutes – requires the court to first find a justifiable cause for discrimination, and then to apply the "reasonable classification" test against the impugned law; and (b) examines other issues relating to constitutional adjudication, such as the presumption of constitutionality, and the relationship between equality before the law and entitlement to equal protection of the law, and the scope of Art 162 of the Constitution of the Republic of Singapore (1999 Reprint).

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I. Introduction

1 In 1938, the Legislative Council of the Straits Settlements enacted s 377A of the Penal Code[1] ("s 377A").

2 On 16 September 1963, when Singapore became a State of the Federation of Malaysia, "the fundamental liberties of the Malaysian Constitution fell like the gentle rain from heaven upon the new

1 Cap 224, 2008 Rev Ed.

member-State of Singapore".[2] These fundamental liberties ceased to apply to Singapore on 9 August 1965 when Singapore became an independent and sovereign nation, but they were restored (minus the right to property) with retroactive effect to 9 August 1965 by the Republic of Singapore Independence Act,[3] which came into force on 23 December 1965.[4] The fundamental liberties are now set out in Pt IV of the Constitution of the Republic of Singapore[5] ("Constitution") as Arts 9–16.

3 Article 12(1) of the Constitution ("Art 12(1)") and s 377A provide as follows:

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

4 Section 377A criminalises acts of gross indecency *between males, whether homosexual or bisexual* ("class (a)"), but not similar acts committed *between bisexual or straight males and females* ("class (b)") or *between females, whether homosexual, bisexual or straight* ("class (c)"). Section 377A also criminalises abetments, procurements and attempted procurements of the criminalised acts only by males but not by females. Class (a) males are treated unequally under s 377A since class (b) males and class (c) females who engage in similar acts of gross indecency commit no offence under s 377A. Additionally, males are treated unequally *vis-à-vis* females, in relation to the offence of abetment, procurement or attempted procurement of the acts of gross indecency under s 377A. Accordingly, s 377A, on its face, differentiates between males and females in these aspects.

5 The question arises whether, in the light of such unequal treatment of class (a) males, s 377A violates the fundamental rights of all persons to (a) equality before the law; and (b) equal protection of the law, under Art 12(1). In *Lim Meng Suang v Attorney-General*[6] ("*Lim Meng Suang HC*") and *Tan Eng Hong v Attorney-General*[7] ("*Tan Eng*

2 R H Hickling, *Liberty and Law in Singapore – Essays in Singapore Law* (Pelanduk Publications, 1992) at p 186.
3 Act 9 of 1965; 1985 Rev Ed.
4 See *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [31].
5 1999 Reprint.
6 [2013] 3 SLR 118 (HC).
7 [2013] 4 SLR 1059 (HC).

Hong HC"), the High Court ("the Judge") held that s 377A does not violate Art 12(1) on the ground that s 377A satisfies the reasonable classification test. Both decisions were affirmed by the Court of Appeal in *Lim Meng Suang v Attorney-General*[8] ("*Lim Meng Suang CA*").

6 This article, *inter alia*, examines the findings of fact and law and the reasoning of the High Court and the Court of Appeal (hereinafter referred to collectively as "Courts") in the three judgments in respect of the following areas:

(a) the scope and purpose of s 377A (statutory interpretation);

(b) the nature and purpose of the reasonable classification test;

(c) the meaning of Art 12(1) and its effect on s 377A (constitutional interpretation); and

(d) the nature of the presumption of constitutionality, and its role in constitutional adjudication.

It will also examine the scope of Art 162 of the Constitution which the Courts did not have to consider, as they held that s 377A did not violate Art 12(1), or, to put it another way, s 377A already conformed to the Constitution at the date of its commencement.

7 This article is in nine parts. The first part is the Introduction. The second part provides a brief account of the criminal law regime in Singapore on offences relating to indecent conduct before the enactment of s 377A in 1938.[9] The third part deals with the regime after 1938 up to 2007.[10] The fourth part examines the scope of s 377A.[11] The fifth part examines the purpose of s 377A, and the repeal of s 377 and the enactment of s 376(1)(*a*) in 2007.[12] The sixth part examines the nature and role of the reasonable classification test.[13] The seventh part examines the scope of Art 12(1), with particular reference to equality before the law.[14] The eighth part examines the nature and the role of the presumption of constitutionality in constitutional adjudication.[15] The ninth part examines the scope of Art 162 of the Constitution.[16] The

8 [2015] 1 SLR 26 (CA).
9 See paras 8–13 below.
10 See paras 14–35 below.
11 See paras 36–44 below.
12 See paras 45–56 below.
13 See paras 57–92 below.
14 See paras 93–107 below.
15 See paras 108–125 below.
16 See paras 126–131 below.

article concludes with a summary of this article's conclusions and submissions on the critical findings of the Courts in the three judgments.[17]

II. Criminal law relating to indecent conduct in Singapore before 1938

A. Criminal law regime prior to 1938

8 Prior to the enactment of s 377A, the criminal law regime already had two provisions that criminalised indecent conduct, *viz* s 377 of the Penal Code ("s 377")[18] and s 23 of the Minor Offences Ordinance 1906[19] ("s 23").[20] Both laws were gender neutral, that is, they were applicable to men and women alike. Given the backdrop, it is necessary to find out why and the purpose for which s 377A was enacted in 1938 to criminalise male homosexual conduct, *viz*, (i) acts of gross indecency between class (a) males; and also (ii) abetments and procurements of such conduct by males, but not similar acts between class (b) bisexual or straight males and females, or between class (c) females and females, or, in the case of abetments, *etc*, by females. It should be noted that abetments or procurements of acts of gross indecent conduct are not, *per se*, grossly indecent.

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17 See para 132 below.

18 The Penal Code was enacted as Ordinance 4 of 1871 by the Legislative Council. The Ordinance was amended in 1872, and came into operation on 16 September 1872. The Penal Code was a re-enactment of substantially all the provisions of the Indian Penal Code of 1862 ("IPC"). The IPC was drafted by a Law Commission chaired by Lord Macaulay. It was enacted in October 1860 and brought into force on 1 January 1862.

19 Ordinance 13 of 1906. Section 23 of the Minor Offences Act 1906 has now been re-enacted in ss 19 and 20 of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed).

20 Another provision, s 294(*a*) of the Penal Code (Cap 224, 2008 Rev Ed), criminalised "obscene acts" in public. It provides:

> **294.** Whoever, to the annoyance of others —
>
> (*a*) does any obscene act in any public place; or
>
> …
>
> shall be punished with imprisonment for a term which may extend to 3 months, or with fine, or with both.

The word "obscene" is defined in s 42 of the Penal Code as follows:

> The word 'obscene', in relation to any thing or matter, means any thing or matter the effect of which is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

An obscene act may be indecent behaviour under s 23 of the Minor Offences Act 1906 (Ordinance 13 of 1906). In 2010, the Public Prosecutor discontinued the s 377A charge against Tan Eng Hong, and charged him again under s 294(*a*), to which he pleaded guilty.

9 The scope of ss 23 and 377, that is, the kinds of offences they cover, is material to the determination of the scope of s 377A, that is, the kinds of offences covered by the phrase "any act of gross indecency". The scope of s 377A will, in turn, be helpful in ascertaining its purpose or object in the context of the reasonable classification test.

(1) Scope of s 23 of the Minor Offences Ordinance 1906

10 Section 23 provided:

> Any person who is found … guilty of any … indecent behaviour, or of persistently soliciting or importuning for immoral purposes … in any public place or place of public amusement or resort, or in the immediate vicinity of any Court or … shall be liable to a fine not exceeding twenty dollars, or to imprisonment for a term which may extend to fourteen days, and on a second or subsequent conviction to a fine not exceeding fifty dollars or to imprisonment for a term which may extend to three months.

Section 23 criminalised, *inter alia*, indecent behaviour and persistent solicitation or importuning for immoral purposes (that is, prostitution). The word "indecent" is not defined, but it has been interpreted in other common law jurisdictions. In *R v Coffey*,[21] Callaway JA observed that indecent acts "are as various as human imagination can make them". In *R v Stringer*,[22] Adam J said:[23]

> The test of indecency has been variously stated as whether the behaviour was unbecoming or offensive to common propriety … or an affront to modesty … or would offend the ordinary modesty of the average person …

(2) Scope of section 377 (before its repeal in 2007)[24]

11 Section 377 provided as follows:

> Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animals, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.
>
> Explanation. Penetration is sufficient to constitute the carnal intercourse.

21 [2003] 6 VR 543 at [22].
22 [2000] NSWCCA 293.
23 *R v Stringer* [2000] NSWCCA 293 at [56].
24 Section 377 was repealed in 2007 by the Penal Code (Amendment) Act 2007 (Act 51 of 2007).

12 Section 377 enacted s 377 of the Indian Penal Code ("IPC"). Initially, the Indian courts interpreted "carnal intercourse against the order of nature" (that is, "unnatural offences") in s 377 of the IPC to criminalise only anal sex (sodomy). In *Government v Bapoji Bhatt*,[25] the Chief Judge of Mysore held that s 377 of the IPC did not cover fellatio (oral sex) because the provision was based on the offence of sodomy which, under English law, required penile penetration *per anum*. However, in 1925, the Sind High Court in *Khanu v Emperor*[26] ("*Khanu*") held that the decision in *Government v Bapoji Bhatt* was wrong to apply English law to interpret s 377, and that under s 377, fellatio was "the sin of Gomorrah [and] is no less carnal intercourse than the sin of Sodom".[27] *Khanu* was followed in *Khandu v Emperor*[28] ("*Khandu*"). These two decisions were approved in *Lohana Vasantlal Devchand v The State*[29] ("*Lohana*").

13 Hence, in 1938 when the Legislative Council enacted s 377A, it was already established law in India that s 377 of the IPC covered anal and oral sex ("penetrative sex") between males, and between males and females in public or in private, with or without consent. As the Penal Code is based on the IPC, the then Attorney-General of Singapore, G C Howell ("AG Howell"), should have been familiar with the decisions of the Indian courts on s 377 of the IPC, given that he was instrumental in the enactment of s 377A in 1938.

III. Criminal law regime after the enactment of section 377A

A. AG Howell's speech in the Legislative Council

14 AG Howell made a short speech in moving the Penal Code (Amendment) Bill 1938 ("1938 Bill") to its third reading in the Legislative Council, which passed it without debate. AG Howell said:

> [1] With regard to clause 4 [s 377A] it is unfortunately the case that acts of the nature described have been brought to notice. [2] *As the law now stands, such acts can only be dealt with, if at all, under the Minor Offences Ordinance, and then only if committed in public.* [3] Punishment under the Ordinance is inadequate and the chances of detection are small. [4] It is desired, therefore, to strengthen the law and to bring it into line with the English Criminal Law, from which this clause is taken, and the law of various other parts of the Colonial Empire of which it is only necessary to mention Hong Kong and

25 (1884) 7 Mysore LR 280.
26 AIR 1925 Sind 286.
27 *Khanu v Emperor* AIR 1925 Sind 286 at 286.
28 AIR 1934 Lahore 261.
29 AIR 1968 Gujarat 252.

> Gibraltar where conditions are somewhat similar to our own. [emphasis added]

15 AG Howell's concise speech made four points (which are numbered within square brackets as shown above). Point 1 refers to "acts of the nature described" in cl 4 (s 377A). Point 2 is that such acts, as the law then stood, could only be dealt with, *if at all*, under s 23, and then only if the act was committed in public. Point 3 is that s 23 was inadequate to deal with those kinds of acts (because the punishment was low). Point 4 refers to "English Criminal Law", which is a reference to s 11 of the UK Criminal Law Amendment Act 1885[30] ("s 11" or "the Labouchere Amendment") as stated in the 1938 Bill.

16 AG Howell referred to "acts of the nature described", that is, acts described in cl 4 as acts of "gross indecency" between males, but he did not elaborate on what these acts were. He only explained that the law had to be strengthened to deal with them. It is likely that the members of the Legislative Council would have been briefed on the factual background. AG Howell would have been familiar with the facts, and also the background materials, which were available to him. There were contemporary crime reports prepared annually by the police on the state of crime in Singapore called the "Annual Report on the Organisation and Administration of the Straits Settlements Police". The Crime Reports of 1936 to 1938 ("Crime Reports") would be the best evidence of the reasons for the enactment of s 377A.

B. The Crime Reports 1936–1938

17 The Crime Reports were produced in the oral hearing before the Court of Appeal in *Lim Meng Suang CA*, and extracts were referred to in the judgment.[31] However, the Crime Reports are not referred to in the judgments of the High Court appealed from, which suggests that they were not produced to the Judge. If so, the Judge's decisions on the constitutional issue would have been made without knowing the full factual background that led to the enactment of s 377A.

18 The extracts of the Crime Reports reproduced below are quoted in the Court of Appeal's judgment in *Lim Meng Suang CA*:

30 c 69.

31 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [125]–[127].

[Crime Reports 1936]

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

[Crime Reports 1937]

Public Morals

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

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

…

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

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

[Crime Reports 1938]

Public Morals

45. The duty of the Police in safeguarding public morals is limited to enforcing the law. The slightest deviation from such a policy, in this matter more than in any other, would lead to the risk of very serious persecution or connivance. The law of the Colony is based on the law of the United Kingdom, and that human nature is not subject to climatic variations is well proved by a visit to, for instance, Jermyn Street, the dock area of Southampton, or street corners at

> Woolwich or Sandhurst at the recognised hours. The only difference is to be found in the text of the law in the words 'persistently' solicits. The courts have to be satisfied on this point by evidence independent of the Police. This evidence has not been forthcoming in the city of Singapore.
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> 46. Action against the local brothels – 2 women living together – was continued, but rapid changes of addresses and fines of $1 make matters difficult.
>
> 47. Action was taken against pimps and traffickers whenever evidence was forthcoming.
>
> 48. *Male prostitution and other forms of beastliness were stamped out as and when opportunity occurred.*
>
> [emphasis added]

19 The Crime Reports reveal that prostitution, especially male prostitution, was rife in certain areas of Singapore during this period. The reports documented the activities involving or associated with male prostitution, such as sodomy, "acts of beastliness", "lewd activities", and public indecencies such as persistent soliciting in public (including amusement parks and the port area) and "pimping and trafficking". The reports also point out the danger of sodomy to "adolescents", exposure to blackmail, and the demoralising effect on "disciplined forces" and the local population. These activities were causing problems for social order, public morality and wholesome government. The police were determined to stamp out "this evil". In his speech, AG Howell explained why s 23 was inadequate to deal with these activities, and s 11 was enacted as a counter-measure to deal with them. AG Howell said that s 11 was part of the criminal law of Gibraltar and Hong Kong "where conditions are somewhat similar to our own".[32]

C. Scope of section 11, aka the Labouchere Amendment

20 AG Howell's speech does not mention the legislative history of s 11, which was passed by the UK Parliament in 1885 in somewhat obscure circumstances. The phrase "gross indecency" therein was not defined, and there was some uncertainty as to its scope.[33] Section 11 was used to prosecute male homosexual conduct short of sodomy,

32 It is interesting to note, and arguably material to the constitutional position in Singapore, that the Court of Appeal found that both Hong Kong and Gibraltar have abolished their equivalent of s 377A in 1991 and 1993, respectively (see *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [150]–[152]).

33 See *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476; *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 (HC); and *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 (CA), where the history of the UK Criminal Law Amendment Act 1885 (c 69) is examined.

particularly involving boys. The best known case was the prosecution of Oscar Wilde for sodomy and for acts of gross indecency under s 11.[34] Although s 377A enacted s 11, it does not necessarily follow that they cover exactly the same offences because the term "act of gross indecency" is not defined, and its meaning would depend on the legislative intention.[35] In 1938, Singapore already had a much stronger law than s 377A, *viz*, s 377 since 1872, to deal with acts of gross indecency. Section 377 then criminalised penetrative sex as unnatural offences, and offenders were liable to be imprisoned for up to ten years. In drafting cl 4, the draftsman helpfully provided a note in the 1938 Bill to spell out the offences s 377A would not criminalise.

34 In *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [64], Quentin Loh J said:

> Victorian society at the time of Oscar Wilde's trial … felt it a great depravity and immorality to have men like Oscar Wilde in society seducing young boys and men into leading their way of life, and felt that this kind of conduct deserved the clearest condemnation. Smith (in *F B Smith* at 165) writes that 'within the decade there developed in the British public a rabid detestation of male homosexuality' …

Oscar Wilde was initially charged for sodomy and acts of gross indecency. Wilde was acquitted on the sodomy charge, but was convicted under s 11 of the UK Criminal Law Amendment Act 1885 (c 69) and given the maximum sentence. It is interesting to note that contemporary accounts of the trials, consonant with Victorian moral sensibilities, did not describe the specific acts of gross indecency for which Wilde was prosecuted. However, recently, Wilde's grandson (Merlin Holland), in collaboration with a playwright (John O'Connor), produced a play called *The Trials of Oscar Wilde*, which was performed in 2014. The play is based on an original transcript of the libel trial (which only came to light in 2000). The play provided descriptions of acts, such as "certain operations with his mouth", "used his mouth on him", "kissed him" and "placed his penis between my legs and satisfied himself", "masturbated him during a walk, and taken him to bed". These were acts short of sodomy, but they would include fellatio. See Marcus Field, "Is Oscar Wilde's Reputation Due for Another Reassessment?" *Independent* (5 October 2014).

35 The Court of Appeal in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [118] said:

> That having been said, it *does not logically follow that the purpose and object of s 377A would necessarily be the same as that of the UK s 11 – especially when we take into account the fact (already mentioned) that s 377A was enacted some 53 years after the latter provision*. Unfortunately, what *objective* evidence we have on the purpose and object of s 377A is *itself unclear*. [emphasis in original]

D. "Objects and Reasons" in the 1938 Bill[36]

21 The note in the "Objects and Reasons" of the 1938 Bill ("the explanatory note") reads:

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

The explanatory note is absolutely clear. It states unambiguously that s 377A makes punishable (that is, criminalises) acts of gross indecency between males *which do not amount to an unnatural offence under s 377*. Therefore, unnatural offences under s 377 were intended to be excluded from the scope of s 377A. Unnatural offences under s 377 covered penetrative sex; therefore, such offences would not be criminalised under s 377A, even though they might be the most serious kinds of acts of gross indecency.

22 A contextual interpretation of s 377A would have given the same result. No legislative purpose would have been served by enacting in s 377A offences already punishable under s 377 with far heavier punishments. Why then did the draftsman provide the explanatory note? It is suggested that it was done *ex abundanti cautela*, to make clear that there would be no overlap of offences between ss 377A and 377, as that would have made the two provisions inconsistent with each other, and resulted in s 377A impliedly repealing similar offences in s 377, in accordance with the maxim *leges posteriors contrarias abrogant* (later laws abrogate earlier contrary laws).[37]

23 As a matter of fact, AG Howell did point to the limited scope of s 377A. Point 2 of AG Howell's speech is that "the acts of the nature described" in cl 4 (that is, s 377A) "could only be dealt with, *if at all*, under section 23" [emphasis added]. The words "*if at all*" meant that

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36 The purpose of the "Objects and Reasons" in the Penal Code (Amendment) Bill 1938 was to explain its scope and purpose. The Australian Law Reform Commission explains the function of an objects clause as follows:

> An objects clause is a provision – often located at the beginning of a piece of legislation – that outlines the underlying purposes of the legislation and can be used to resolve uncertainty and ambiguity. Objects clauses have been described as a 'modern day variant on the use of a preamble to indicate the intended purpose of legislation'. … Objects clauses may assist the courts and others in the interpretation of legislation.

See Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice Report* (Report 108, May 2008) at p 281.

37 In *R v Davis* (1783) 1 Leach 271, it was held that a statute creating a capital offence was impliedly repealed by a later Act carrying a penalty of £20.

such acts could only be dealt with as indecent behaviour under s 23, and therefore could not be dealt with under s 377. Presumably, they were not sufficiently serious to justify punishment of up to ten years' imprisonment.

24 It may also be pointed out that if s 377A were interpreted after the commencement of the Constitution to cover penetrative sex, it would have resulted in a reverse discrimination of class (b) males and class (c) females, as these two classes of persons would continue to be liable to up to ten years' imprisonment under s 377, whereas class (a) males would have the benefit of being subjected to only up to two years' imprisonment for committing similar offences of gross indecency. Such interpretation might result in s 377 being in violation of Art 12(1).

E. Public Prosecutor v Kwan Kwong Weng

25 In 1997, the Court of Appeal held in *Public Prosecutor v Kwan Kwong Weng*[38] ("*Kwan Kwong Weng*"), following the Indian decisions in *Khanu*, *Khandu* and *Lohana*, that fellatio was an unnatural offence under s 377. The court said:[39]

> *In any case any act (fellatio included) designed to bring sexual satisfaction or euphoria to a man performed on another man* or a young boy, as in the Indian cases we have referred to, *must* ipso facto *be against the order of nature* because in those cases there can be no union or coitus of the male and female sexual organs, they being of the same sex. [emphasis added]

F. Limited scope of s 377A

26 For the reasons given above,[40] it is clear that s 377A covers only non-penetrative sex, but not penetrative sex, of a grossly indecent nature.

G. Meaning of "any act of gross indecency" in section 377A

27 Like s 11, s 377A does not define the meaning of the term "act of gross indecency". The phrase has been interpreted by the High Court in 1995 in *Ng Huat v Public Prosecutor*.[41] In that case, the appellant was convicted under s 377A for gross indecency by touching, without consent, the penis, chest, nipples and buttocks of one Koh in the X-ray

38 [1997] 1 SLR(R) 316.
39 *Public Prosecutor v Kwan Kwong Weng* [1997] 1 SLR(R) 316 at [25].
40 See paras 14–25 above.
41 [1995] 2 SLR(R) 66.

room of Alexandra Hospital while performing his duties as a radiographer. He appealed. Yong Pung How CJ dismissed the appeal, and said:[42]

> In counsel's other main ground of appeal, he invited the court to consider what would amount to a grossly indecent act. He submitted that the magistrate had erred in ruling without legal authority that the act of touching the penis was a grossly indecent act. He argued that the cases on gross indecency all involved some highly repugnant forms of immorality. The acts complained of in the present case did not fall into those categories of gross indecency. In my opinion, this submission was unmeritorious. *What amounts to a grossly indecent act must depend on whether in the circumstances, and the customs and morals of our times, it would be considered grossly indecent by any right-thinking member of the public* (*per* Egbert J in the Supreme Court of Alberta, *R v K* (1957) 21 WWR 86). The court does not sit to impose its own moral standards or precepts, but to enforce the morals of the general public. From the evidence, I have no doubt that the acts complained of in the present case would be considered grossly indecent by any right-thinking member of the public. [emphasis added]

28 Applying the test in the above case, sexual acts such as masturbation, cunnilingus or sexual touching of the private parts of another male would be the most serious acts of gross indecency under s 377A.[43]

H. Parliamentary debate in 2007

29 The next event relevant to s 377A is the debate in Parliament on 22–23 October 2007. The Senior Minister of State for Home Affairs, Assoc Prof Ho Peng Kee, in moving the Penal Code (Amendment) Bill 2007[44] in Parliament, said that the Bill would amend 77 provisions and repeal four provisions, including s 377, but not s 377A.[45] Nominated Member of Parliament ("NMP") Siew Kum Hong submitted a document signed by 2,341 individuals to petition Parliament to repeal s 377A ("the Petition"):[46]

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42 *Ng Huat v Public Prosecutor* [1995] 2 SLR(R) 66 at [27].

43 In England, the term "gross indecency" in s 13 of the UK Sexual Offences Act 1956 (c 69) covers masturbation: see *R v Preece* [1977] QB 370. See also Lynette J Chua Kher Shing, "Saying No: Sections 377 and 377A of the Penal Code" [2003] SingJLS 208 at 261 for a list of prosecutions for masturbation in 1998–2003.

44 Bill 38 of 2007.

45 *Singapore Parliamentary Debates, Official Report* (22 October 2007), vol 83 at col 2175.

46 *Singapore Parliamentary Debates, Official Report* (22 October 2007), vol 83 at col 2121.

> Sir, the material allegations contained in the Petition concern the unconstitutionality of section 377A of the Penal Code. If and when the Penal Code (Amendment) Bill is passed, private consensual anal and oral sex between heterosexual adults will be permitted, but the same private and consensual acts between men will remain criminalised, due to the retention of section 377A.
>
> The petitioners argue that this is an unconstitutional derogation from the constitutional guarantee of equality and equal protection of the law as set out in Article 12(1) of the Constitution. The petitioners ask this House to repeal section 377A in light of this.

A group of more than 15,560 persons filed counter-petitions against the Petition. The Petition was debated by the Members of Parliament ("MPs") over two days. NMP Siew's statement of the scope of s 377A was not challenged by any MP.

30 Altogether, 12 MPs and NMPs spoke on the Petition. The extracts below set out the gist of their views on the Petition.

> (a) "As the Penal Code reflects social norms and values, deleting section 377 is the right thing to do as *Singaporeans by and large do not find oral and anal sex between two consenting male and female in private offensive or unacceptable* … offences such as section 376 on sexual assault by penetration will be enacted to cover non-consensual oral and anal sex. Some of the acts that were previously covered within the scope of the existing section 377 will now be included within new sections 376 ..."[47] [emphasis added]
>
> (b) "*The truth of the matter is that if we do repeal section 377A, what is in private will not remain private.* There are far-reaching consequences. If it is repealed, arguments can be made that rights accorded to heterosexual couples must be accorded to homosexual couples."[48] [emphasis added]
>
> (c) "Homosexual activities, although undoubtedly exist, are still considered a lifestyle outside the mainstream society. *From a secular point of view, it is something personal and I feel that it is good to leave it as such.* But many of my constituents and community leaders have given feedback that by making the activity not considered as an offence, it can be seen as an endorsement or support and this will divide society."[49] [emphasis added]

47 *Singapore Parliamentary Debates, Official Report* (22 October 2007), vol 83 "Penal Code (Amendment) Bill" (Assoc Prof Ho Peng Kee, Senior Minister of State for Home Affairs).

48 *Singapore Parliamentary Debates, Official Report* (22 October 2007), vol 83 "Penal Code (Amendment) Bill" (Christopher de Souza).

49 *Singapore Parliamentary Debates, Official Report* (22 October 2007), vol 83 "Penal Code (Amendment) Bill" (Zaqy Mohamad).

(d) "The Amendment Bill amends 377 to legalise private, consensual anal and oral sex between heterosexual adults. But 377A which criminalises the same acts between men is retained … The amendment of 377 permits heterosexual adults to engage in private, consensual oral and anal sex. By definition then, we are saying that there is no harm arising from such private and consensual acts between heterosexual adults … Why should it be any different when those acts are performed between adult men? What is the differentiating factor that leads to harm? There is none … This discriminates against homosexual and bisexual men."[50]

(e) "In this case, the public reaction has shown that the majority of Singaporeans do not agree with or accept homosexual behaviour. I think it will be fair to say that most Singaporeans do not want to see somebody jailed for homosexual practices, but most would definitely not want to see any public demonstration of the conduct. *They may be prepared to tolerate it if it is done in private, but they do not wish to see it in public and, very importantly, they do not wish to have their children see it in public.* Then, of course, the argument comes, 'OK, fine, if we do not do it in public, what if we just do it in private?' And that is where the signalling concern comes in, because people are concerned about the impact that a repeal of section 377A would send."[51] [emphasis added]

(f) "Sir, there are no constitutional objections to retaining 377A while de-criminalising heterosexual oral and anal sex. Three legal points are worth making. First, there is no constitutional right to homosexual sodomy … Anal-penetrative sex is inherently damaging to the body … Opposite-sex sodomy is harmful …"[52]

(g) "Sir, I accept that even if a law is difficult to enforce, it can still serve a legitimate purpose in its underlying message, and section 377A sends the message that those who engage in homosexual activities are criminals. But at the same time, we have been saying that our society will not reject those with alternative lifestyles. We have even said that such individuals have a place in our civil service … I say there is another way to test the issue: assume we are here debating whether to include section 377A into our Penal Code, would we do it? I am not sure we would, because we would hesitate about passing laws to deal with private acts in the bedroom. But because it is already there, we are comfortable living in there [*sic*]."[53]

50 *Singapore Parliamentary Debates, Official Report* (22 October 2007), vol 83 "Penal Code (Amendment) Bill" (Siew Kum Hong).

51 *Singapore Parliamentary Debates, Official Report* (22 October 2007), vol 83 "Penal Code (Amendment) Bill" (Indranee Rajah).

52 *Singapore Parliamentary Debates, Official Report* (22 October 2007), vol 83 "Penal Code (Amendment) Bill" (Prof Thio Li-ann).

53 *Singapore Parliamentary Debates, Official Report* (22 October 2007), vol 83 "Penal Code (Amendment) Bill" (Hri Kumar Nair).

(h) "Let us look at this issue in a hypothetical scenario. Singapore was never a British colony and we did not inherit section 377A. Today's debate then becomes one of justifying the introduction of a new piece of legislation which states that, 'It is an offence for any male person, who in public or private, commits an act of gross indecency with another male person.' The rationale will be that since Singapore is a generally conservative society, we should single out and criminalise all sexual activities between two men while accepting that the same activity of anal and oral sex between a heterosexual couple and sexual activity between two women need not be offences."[54]

(i) "The true crux of the matter is whether Singaporeans are ready to openly accept homosexuality into mainstream society. Although a vocal segment of society has garnered much support for the repeal of section 377A, the majority of Singaporeans have unequivocally rejected these cries to decriminalise homosexuality. *The overwhelming sentiment of Singaporeans is that they are not prepared to compromise their conservative family values by opening up to alternative sexual behaviour, nor allowing it to permeate across time honoured boundaries into the conventional family sanctity.*"[55] [emphasis added]

(j) "The Chinese-speaking Singaporeans are not strongly engaged, either for removing section 377A or against removing section 377A. Their attitude is: live and let live … We are not starting from a blank slate, trying to design an ideal arrangement; neither are we proposing new laws against homosexuality. We have what we have inherited and what we have adapted to our circumstances. And as … pointed out, we inherited section 377A from the British, imported from English Victorian law – Victorian from the period of Queen Victoria in the 19th century – via the Indian Penal Code, via the Straits Settlements Penal Code, into Singapore law … Asian societies do not have such laws, not in Japan, China and Taiwan. But it is part of our landscape. We have retained it over the years. So, the question is: what do we want to do about it now? Do we want to do anything about it now? If we retain it, we are not enforcing it proactively. Nobody has argued for it to be enforced very vigorously in this House. If we abolish it, we may be sending the wrong signal that our stance has changed, and the rules have shifted … Therefore, we have decided to keep the status quo on section 377A. *It is better to accept the legal untidiness and the ambiguity.* It works, do not disturb it."[56] [emphasis added]

(k) "Therefore, if we do retain section 377A … *then we should exclude criminalising acts done in private between consenting adults of full capacity* … Is it really the business of Government to regulate acts

54 *Singapore Parliamentary Debates, Official Report* (23 October 2007), vol 83 at col 2363 (Baey Yam Keng).

55 *Singapore Parliamentary Debates, Official Report* (23 October 2007), vol 83 at col 2377 (Ong Kian Min).

56 *Singapore Parliamentary Debates, Official Report* (23 October 2007), vol 83 at cols 2401–2405 (Lee Hsien Loong, Prime Minister and Minister for Finance).

> between consenting adults born with different sexual orientations in the privacy of their bedrooms? … Sir, if we have intended the retention of section 377A in the Penal Code as an expression of our conservative values, rather than to be proactively enforced, as some have suggested, then I think we have come out short even in this respect. The section criminalises act of gross indecency in public and in private only if it is engaged between men. Surely, the Minister must acknowledge that women are as capable as men of committing such acts. Is section 377A therefore, as it stands, a correct statement of our values and principles? Or are there no lesbians in Singapore? ... This is a rare case of the Penal Code providing more protection to men than it does to women. It is unfair and may even be unconstitutional that women do not, in this respect, currently have the same sort of protection that men have under the law … *So, ultimately, my question, as asked by the other Members, is: if we did not have section 377A in the Penal Code today, would we think it fit and proper to enact a provision in exactly the same terms*? Would we not be seen as being narrow-minded, perhaps even bigoted in our philosophy towards people who are born different and engage in practices not approved by the majority, even if no harm is done to others?"[57] [emphasis added]
>
> (l) "I believe that the majority of Singaporeans do not condemn a homosexual or a gay simply because of his lifestyle. Nor do they wish to criminalise a homosexual. However, the messaging or signpost is important. As MPs, we have to send the message that Singapore is a conservative society whereby the family unit is still seen as the basic structure of society. I believe, Sir, we have not accused gays of being criminals, nor do I know of any petition to enforce section 377A."[58]

31 The above extracts show that different MPs expressed different views on the Petition. Some MPs argued that s 377A should be retained as Singapore was a conservative society where the majority did not approve of the lifestyle of the lesbian, gay, bisexual and transgender ("LGBT") community. Various public surveys, constituency interviews and media statements were referred to as evidence that a majority of Singapore society disapproves of penetrative sex even among consenting adults, whether in public or in private. Some MPs argued that the law should not criminalise male homosexual acts between consenting adults in private. Some MPs expressed concerns that repealing s 377A would encourage the LGBT community to clamour for same-sex marriage which would undermine the traditional family unit of Singapore society. Other MPs viewed s 377A as a colonial legacy of the Victorian era, and

57 *Singapore Parliamentary Debates, Official Report* (23 October 2007), vol 83 at cols 2413–2415 (Charles Chong).

58 *Singapore Parliamentary Debates, Official Report* (23 October 2007), vol 83 at col 2421 (Lim Biow Chuan). See *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [75] and [77].

many Asian societies do not have such a law. The Government's position was to retain the law for the time being, but not enforce it, except as otherwise expressed.

I. Legal effect of repealing section 377 and enacting section 376(1)(a)

32 At the conclusion of the debate, Parliament passed the 2007 Bill, but did not vote on the Petition. Section 377 was repealed and new provisions were enacted in its place, which included ss 376 (sexual assault by penetration), 376A (sexual penetration of a minor), 377 (sexual penetration of a corpse) and 377B (sexual penetration with a living animal). The repeal of s 377 meant that penetrative sex was no longer punishable as an unnatural offence. However, penetrative sex would still be punishable if committed in public under s 20 of the Miscellaneous Offences (Public Order and Nuisance) Act[59] and s 294(*a*) of the Penal Code.

33 What was even more consequential for the criminal law regime were the terms of s 376(1) which provides:

> **376.**—(1) Any man (A) who —
>
> (*a*) penetrates, with A's penis, the anus or mouth of another person (B); or
>
> (*b*) causes another man (B) to penetrate, with B's penis, the anus or mouth of A,
>
> shall be guilty of an offence if B did not consent to the penetration.

The meaning of s 376(1)(*a*) is clear.[60] Since person (B) in sub-s (1)(*a*) may be a male or a female, it follows that anal and oral sex between (A), a male, and (B), a male or a female, as the case may be, is not an offence, except where the act is committed without (B)'s consent. The effect of

59 Cap 184, 1997 Rev Ed.

60 In his Second Reading speech, Assoc Prof Ho said that repealing s 377 was the right thing to do as "Singaporeans by and large did not find oral and anal sex between two consenting male and female in private offensive or unacceptable" (as made clear from the public reaction to the case of *Annis bin Abdullah v Public Prosecutor* [2004] 2 SLR(R) 93 in 2004 and confirmed through the feedback received in the course of this Penal Code review consultation). In the next paragraph, he also said that s 376 "*will be enacted to cover non-consensual oral and anal sex*. Some of the acts that were previously covered within the scope of the existing section 377 will now be included within new sections 376 – Sexual assault by penetration" [emphasis added] (*Singapore Parliamentary Debates, Official Report* (22 October 2007), vol 83 at col 2197). Assoc Prof Ho did not clarify that s 376(1)(*a*) of the Penal Code would legalise consensual oral and anal sex between males.

sub-s (1)(*a*), read with the repeal of s 377, is that consensual anal and oral sex between same-sex (male) couples and opposite-sex couples are no longer offences under Singapore law, except under s 20 of the Miscellaneous Offences (Public Order and Nuisance) Act or s 294(*a*) of the Penal Code, if performed in public. Section 376(1)(*a*) had no legal effect on s 377A, since s 377A did not criminalise penetrative sex, but it would have the effect of impliedly repealing s 377A if s 377A did cover penetrative sex, to the extent of the inconsistency.[61]

34 It would appear that s 376(1), or its legislative effect, also escaped the attention of counsel and the Courts in the three proceedings, since there is no discussion of these issues in the judgments. The question therefore arises as to the precedent status of the three judgments in so far as the finding that s 377A does not violate Art 12(1) is based on the interpretation (mistaken) that s 377A continued to criminalise penetrative sex after (a) the repeal of s 377; and/or (b) the enactment of s 376(1). It is arguable that the three decisions had been given *per incuriam*,[62] and will not bind lower courts with respect to future prosecutions for penetrative sex under s 377A, and also for prosecutions for non-penetrative sex under s 377A. Because the judgments were focused primarily on the finding that the purpose of s 377A was to criminalise penetrative sex between males, different legal points would have been raised as to the constitutionality of s 377A if it only covered non-penetrative sex, in the context of the reasonable classification act.[63]

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61 See para 22 above. It may well be that Parliament repealed s 377 of the Penal Code (Cap 224, 2008 Rev Ed) in the mistaken belief that penetrative sex between males was punishable under s 377A. But, even so, it cannot change the legal effect of s 376(1)(*a*) as a legislative act.

62 A *per incuriam* (literally "through lack of care") judgment refers to a judgment of a court which has been decided without reference to a statutory provision or earlier judgment which would have been material. In *Huddersfield Police Authority v Watson* [1947] 2 All ER 193, Lord Goddard CJ said:

> Where a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in *per incuriam*.

The statutory provision in the present case is s 376(1)(*a*) of the Penal Code (Cap 224, 2008 Rev Ed). A *per incuriam* decision does not bind lower courts.

63 In *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [101]–[102], the Court of Appeal held that a decision is also *per incuriam* if that decision was decided on grounds or points not advanced before the court in the current proceedings. The Court of Appeal said:

> Counsel also submitted that in the light of *Ong Ah Chuan*, the decision in *Karam Singh* can be considered as having been made *per incuriam* as the constitutional points advanced before us were not raised in *Karam Singh*.
>
> We agree that for the above reasons, *Karam Singh* cannot be considered to be still binding on us with respect to the question whether the discretions under ss 8 and 10 of the ISA are subjective (and hence

(*cont'd on the next page*)

35 For these reasons, it is submitted that the Judge's finding that Parliament endorsed the purpose of s 377A by not repealing it is not sustainable. The parliamentary speeches do not support a finding that the majority of the MPs endorsed the purpose of s 377A in 2007, and in any case, if they did so, they would have done so on the basis (mistaken) that s 377A covered penetrative sex. Furthermore, there was also insufficient evidence to show Singapore society (or a majority) disapproved of or found consensual male homosexual conduct in private unacceptable, to the extent that the State should continue to criminalise such conduct. No one knows what the MPs would have said or decided if they had known that s 377A criminalises only non-penetrative sex of a grossly indecent nature, such as masturbation and other forms of sexual touching.

IV. Scope of section 377A as decided by the Courts

A. *Court of Appeal's decision in* Tan Eng Hong v Attorney-General

36 In *Tan Eng Hong v Attorney-General*,[64] the Court of Appeal gave leave to Tan Eng Hong to proceed with his declaratory action in the High Court that s 377A violated Art 12(1) and that his prosecution under s 377A for committing oral sex in public was unconstitutional. It follows that the court would have given leave on the basis that s 377A criminalised oral sex between males. The action commenced by Lim Meng Suang and his partner, Kenneth Chee, for a similar declaration would have been made on the same basis.

B. *High Court's decision in* Lim Meng Suang HC *and* Tan Eng Hong HC

37 *In Lim Meng Suang HC*, the Judge held that the purpose of s 377A was to criminalise "male homosexual conduct" because it was not acceptable or desirable in Singapore society. The Judge defined the phrase "male homosexual conduct" to mean acts of "gross indecency" between males, but did not define the phrase "act of gross indecency".[65] However, there are sufficient indications in his judgments that he

unreviewable) or objective (and hence reviewable). We have therefore decided not to follow the decision in *Karam Singh*.

64 [2012] 4 SLR 476.

65 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [9] reads:

> References to 'male homosexual conduct' in the context of this judgment refer to acts of 'gross indecency' between males, and likewise, references to 'female homosexual conduct' refer to acts of 'gross indecency' between females.

interpreted the phrase to cover penetrative sex, and that his decision was based on that premise.[66] The Judge quoted the Petition without commenting on the correctness or otherwise of the assertion in the Petition that s 377A covered penetrative sex, and made findings on the parliamentary speeches that opposed the Petition. Further, neither party in the case argued to the contrary.

38 In *Tan Eng Hong HC*, the Judge dismissed Tan's action based on Art 12(1)[67] for the reasons he had given in *Lim Meng Suang HC*. Again, no argument was put to the Judge that s 377A did not cover penetrative sex. However, the Judge rejected counsel's argument that in the light of Tan's personal circumstances as a male homosexual the court should apply a stricter test than the reasonable classification test to determine whether s 377A violated Art 12(1). This argument assumed that s 377A covered penetrative sex.

C. Court of Appeal's decision in Lim Meng Suang CA

39 It would appear that during oral arguments before the Court of Appeal, counsel for the appellants did not argue that s 377A did not cover penetrative sex. However, she made a late submission (after the conclusion of oral arguments) that s 377A did not cover unnatural

66 Quentin Loh J in *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [138] said:

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

It seems clear from this passage that the judge used the expression "male homosexuality" to cover anal and oral sex.

67 This article does not deal with the arguments and decision in *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 based on Art 9(1) of the Constitution of the Republic of Singapore (1999 Reprint).

offences within the meaning of s 377.[68] The court rejected the argument and held that s 377A covers penetrative sex. The court said:[69]

> In essence, she argued, first, that *the phrase 'gross indecency' in s 377A did* ***not*** *cover … conduct which amounted to an 'unnatural offence' under s 377. She argued that s 377A was intended, instead, to cover* ***other*** *acts of 'gross indecency'* ***apart from*** *acts of* ***penetrative*** *sex*, and that this was the meaning to be attributed to Mr Howell's Legislative Council speech (reproduced above at [119]) with regard to the ambit of s 377A.
>
> …
>
> In so far as Ms Barker's first argument is concerned, we have already explained above (at [133]) why the phrase 'gross indecency' in s 377A must necessarily cover penetrative sex as well. Indeed, it must surely be the case that male prostitution might – and, in most cases, probably would – involve penetrative sex (although, conceivably, other acts of 'gross indecency' could also be involved). On this logical and commonsensical ground alone, the first argument by Ms Barker at [144] above does not, with respect, ring true.
>
> [emphasis in italics added; emphasis in bold italics in original]

40 The court said:[70]

> … this particular limb of s 23 was broader than s 377 inasmuch as it covered 'indecent behaviour' that included but was not confined to anal and/or oral sex (hereafter referred to as 'penetrative sex'); however, it was confined to public conduct. Hence, s 377A, which would also cover 'grossly indecent' acts between males in private, would apply to situations which were outside the purview of s 23. It is also important to note that s 377A *would simultaneously supplement s 377 inasmuch as s 377A would (like s 23) cover even 'grossly indecent' acts which fell short of penetrative sex*. It should be pointed out, at this juncture, that it follows that s 377A would necessarily cover acts of penetrative sex as well. Any other interpretation would be illogical since it cannot be denied that acts of penetrative sex constitute the most serious instances of the possible acts of 'gross indecency'.
>
> As just mentioned, s 377A broadened the scope hitherto covered by s 377 to cover not only penetrative sex but also other (less serious) acts of 'gross indecency' committed between males. However, we would

68 It would appear that counsel made a different argument during the oral hearing, which was that s 377A of the Penal Code (Cap 224, 2008 Rev Ed) was enacted to combat male prostitution, based on Attorney-General Howell's reference to s 23 of the Minor Offences Ordinance 1906 (Ordinance 13 of 1906) in his speech: *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [131].

69 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [144] and [146]. It is not clear from the court's paraphrase of counsel's submission whether she also referred to the Objects or Reasons as the basis of her submission.

70 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [133] and [134].

> expect that prior to our Parliament's repeal of s 377 via the 2007 Penal Code Amendment Act, where acts of penetrative sex were involved, the accused would probably have been charged under s 377 as that section imposed a heavier penalty (compared to s 377A), although the Prosecution would also have had the option of charging the accused under s 377A instead. This is not surprising because, as we have just observed, acts of penetrative sex are the most serious instances of the possible acts of 'gross indecency'. Now that s 377 has been repealed, there is no reason in principle why a charge under s 377A cannot be brought in a situation involving acts of penetrative sex between two males (which, as we have already noted, would, *ex hypothesi*, fall within the definition of 'any act of gross indecency' within the meaning of s 377A). We note, however, that the current policy (as declared during the October 2007 parliamentary debates mentioned at [111] above) is for the Prosecution to generally not charge accused persons under s 377A, so the point just referred to is – in the practical context at least – merely academic. It is, nevertheless, an important point to make in the context of the present appeals, particularly in the light of the further written submissions which Ms Barker tendered on behalf of her clients (and which are dealt with below at [144]).
>
> [emphasis in original]

41 It may be pointed out, with respect, that findings (a) and (b) set out below are problematic:[71]

> (a) "[Section] 377A would simultaneously supplement s 377 inasmuch as it covered even 'grossly indecent' acts which fell short of penetrative sex … it follows that s 377A would necessarily cover acts of penetrative sex as well, as a matter of common sense and logic."
>
> (b) "[Section] 377A broadened the scope hitherto covered by s 377 to cover not only penetrative sex but also other (less serious) acts of 'gross indecency' committed between males."

42 Finding (a) is not logical. If s 377A covers acts of gross indecency "short of" (the phrase means "less than") penetrative sex, it necessarily follows that s 377A does not cover penetrative sex, and not the opposite. Further, the word "supplement" means "to add to". If s 377A supplements s 377, then it criminalises other acts that are not within s 377. Finding (b) is similarly problematic. Although the word "broadened" means "expanded" or "widened", s 377A cannot broaden or widen itself, unless it is an amending provision, which it is not. Further, as a matter of law, s 377 cannot be broadened by s 377A unless it is amended by s 377A, which it is not.

71 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [133] and [134].

43 The Court of Appeal interpreted the term "gross indecency" in s 377A to cover penetrative sex, that is, anal and oral sex, for the reason that it "constitute[s] the most serious instances of the possible acts of 'gross indecency'". It is suggested that the court's interpretative approach, while lexically tenable, is legally untenable, as it (a) overlooked the explanatory note; (b) omitted to interpret the section contextually; (c) failed to consider the scope of s 376(1)(*a*) and its legal effect on s 377A; and (d) failed to consider that its interpretation might have created a reverse discrimination against class (b) males and class (c) females for committing similar offences under s 377.

44 For the above reasons, it is submitted that the court's interpretation that s 377A covers penetrative sex needs to be reconsidered, in so far as it:

(a) contradicts the legislative intention of as expressed in the 1938 Bill;

(b) is inconsistent with a contextual interpretation thereof, and in any event; and

(c) is inconsistent with the effect of s 376(1)(*a*) on s 377A (*if* it covers penetrative sex).

It is therefore suggested that the court's *obiter* statement that after the repeal of s 377, penetrative sex between males continues to be punishable under s 377A is also untenable. If s 377A does not cover penetrative sex, then the repeal of s 377 in 2007 has no legal effect. However, if s 377A covers penetrative sex, then it would be inconsistent with s 376(1)(*a*) in so far as the latter provides that consensual penetrative sex between same-sex (male) couples and opposite-sex couples is no longer an offence, and therefore s 377A would have been impliedly repealed to the extent of the inconsistency.

V. Purpose or object of section 377A

A. High Court's findings in Lim Meng Suang HC

45 The purpose of a law is the object or goal it seeks to achieve – the end in view.[72] The purpose of s 377A in this sense is critical to its constitutional validity as the reasonable classification test requires the legislative classification in s 377A to bear a rational relation to the

72 In *Newton v Commissioner of Taxation* [1958] AC 450 at 465, Lord Denning says: "The word 'purpose' means, not motive but the effect which it is sought to achieve – the end in view. The word 'effect' means the end accomplished or achieved."

purpose of the law. The problem in both *Tan Eng Hong HC* and *Lim Meng Suang HC* is that s 377A was enacted in 1938 when the Legislative Council had full power to enact it, but upon the commencement of the Constitution, it had to be construed to conform to the Constitution – in this case, Art 12(1). The conundrum is that the reasonable classification test requires the court to ascertain the purpose of s 377A in order to determine whether the differentia bears a rational relationship to the purpose of s 377A *at the time the test is applied*. The question therefore arises as to the relevance of the purpose of s 377A in 1938 when the test requires the purpose of the law in its operation at the time it is impugned, which for present purposes is 2013.

46 In *Lim Meng Suang HC*, the Judge put two questions to counsel:[73]

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73 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [74]. In *Norris v The Attorney-General of Ireland* [1984] IR 36, the appellant sought a declaration that ss 61 and 62 of the UK Offences against the Person Act, 1861 (c 100), and s 11 of the Criminal Law Amendment Act, 1885 (c 69), were inconsistent with the Constitution and, therefore, were not continued in force by Art 50 thereof and did not form part of the law of the State. The Supreme Court of Ireland (by a 3:2 majority) held that the provisions were not unconstitutional. In his dissenting speech, McCarthy J referred to a previous decision of the court, *viz*, *McGee v The Attorney-General* [1974] IR 284 where the issue at the point of time governing the validity of an impugned pre-constitutional law was discussed. McCarthy J said:

> *Point of time governing test of validity*
>
> Article 50, s. 1, of the Constitution provides:- 'Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.'
>
> In *McGee v. The Attorney General* [1974] IR 284 O'Keeffe P. said at p. 292 of the report:- 'In my view, one must look at the state of public opinion at the time of the adoption of the Constitution in order to determine whether the effect of its adoption was to remove from the statute book a section of the Act of 1935: see the principles of construction applied by the Supreme Court in *O'Byrne v. The Minister for Finance* [1959] I.R. 1. …'
>
> Whilst the report of the argument of counsel for Mrs. McGee (p. 296) refers to this factor in the case, an examination of the judgments does not disclose any consensus in the Supreme Court. FitzGerald C.J., who dissented, appears to have treated the matter as a contemporaneous issue, when (at p. 300) he was dealing with the relevant facts concerning the manufacture of the particular contraceptive in question.
>
> Mr. Justice Walsh touched on the matter at pp. 306-8 of the report of *McGee's Case*. Having quoted the provisions of Article 50, s. 1, he said:
>
> > I have referred to the wording of s. 1 of Article 50 because, apart from being the foundation of the present proceedings, one of the submissions made on behalf of the Attorney General was to the effect that a statutory provision in force prior to the Constitution could continue to be in force and to be carried over by Article 50 even though its provisions were such as could not now be validly enacted by the

(*cont'd on the next page*)

(a) What is the position where, after a statutory provision is enacted, there are subsequent Parliamentary debates on the same provision? Can these be looked at to re-examine the purpose of the

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> Oireachtas because of the provisions of the Constitution. Stated as a general proposition, I find that this is in direct conflict with the very provisions of Article 50 and is quite unsustainable. However, in my opinion, there are circumstances in which the proposition could be partially correct.
>
> If a pre-Constitution statute was such that it was not in conflict with the Constitution when taken in conjunction with other statutory provisions then in existence *and with a particular state of facts then existing* [*my emphasis*] and if such other statutory provisions continued in effect after the coming into force of the Constitution and the particular state of facts remained unaltered, the provisions of the first statute might not in any way be inconsistent with the provisions of the Constitution. If, however, subsequent to the coming into force of the Constitution the other statutory provisions were repealed and the state of facts was altered to a point where the joint effect of the repeal of the other statutes and the alteration of the facts was to give the original statute a completely different effect, then the question would arise of its continuing to be part of the law. In my view, Article 50, by its very terms (both in its Irish and English texts), makes it clear that laws in force in Saorstát Éireann shall continue to be in force only to the extent to which they are not inconsistent with the Constitution; and that, if the inconsistency arises for the first time after the coming into force of the Constitution, the law carried forward thereupon ceases to be in force.
>
> The relevance of this to the present case is clear. There is no evidence in the case to indicate what was the state of facts existing at the time of the passing of the Act of 1935 and the years subsequent to it up to the coming into force of the Constitution, and even for a period after that. It appears to have been assumed, though there is no evidence upon which to base the assumption, that contraceptives were not manufactured within the State at that time or were not readily available otherwise than by sale. The validity or otherwise of a law may depend upon an existing state of facts or upon the facts as established in litigation, as was clearly indicated by this Court in *Ryan v. The Attorney General* [1965] IR 294. To control the sale of contraceptives is not necessarily unconstitutional *per se*; nor is a control on the importation of contraceptives necessarily unconstitutional. There may be many reasons, grounded on considerations of public health or public morality, or even fiscal or protectionist reasons, why there should be a control on the importation of such articles. There may also be many good reasons, grounded on public morality or public health, why their sale should be controlled. I used the term 'controlled' to include total prohibition. What is challenged here is the constitutionality of making these articles unavailable. Therefore, the decision in this appeal must rest upon the present state of the law and the present state of the facts relating to the issues in dispute. Therefore, even if it were established that in 1935, 1936 or 1937, or even 1940, contraceptives were reasonably available without infringement of the law, that would not necessarily determine that s. 17 of the Act of 1935 now continues to be in full force and effect.

> provision, and if so, what is the effect if the re-examination reveals further or new reasons for or expands upon the original purpose of the provision?
>
> (b) What happens if the original purpose of the statutory provision is no longer applicable or acceptable, but there is a new purpose which that statutory provision can still fulfil? Can that new purpose be substituted for the original purpose in ascertaining the constitutionality or otherwise of the statutory provision?

In putting forward these two questions, the Judge accepts the proposition stated by Walsh J in *McGee v The Attorney General*:[74]

> If, however, subsequent to the coming into force of the Constitution the other statutory provisions were repealed and the state of facts was altered to a point where the joint effect of the repeal of the other statutes and the alteration of the facts was to give the original statute a completely different effect, then the question would arise of its continuing to be part of the law.

Applying this principle to s 377A, it must be shown that the social conditions that caused the enactment of s 377A in 1938 continue to subsist in 2013 and are reasonable in 2013, and that s 377A continues to serve or advance a legitimate state interest.

47 The Judge answered questions (a)[75] and (b)[76] as follows:

> 77 In my judgment, *if the purpose of a provision was articulated in Parliament when it was first introduced, and at some later date, a comprehensive review of the Act containing that provision was carried out and it was decided that the provision should be retained, then absent any unusual facts or circumstances, the purpose of the provision as articulated in Parliament when the provision was first introduced will still be the purpose for which that provision was enacted.*
>
> 78 … Section 377A was considered again some 69 years later, and it was decided that the provision should be retained even though s 377 was to be repealed. That was the view taken by Parliament in 2007. *In effect, the purpose of s 377A, as articulated by AG Howell in 1938, was reaffirmed by Parliament in 2007. That purpose therefore still remains valid today (see [77] above).*
>
> …
>
> 87 The second query which I raised at [74(b)] above, arose during the course of the oral submissions before me – what if the original purpose of a statutory provision is no longer applicable or acceptable, but there is a new purpose that the provision can now

74 [1974] IR 284.
75 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [77]–[78].
76 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [87].

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

48 With respect to question (a), the Judge made the following findings:

> (i) The purpose or object of s 377A was that articulated by AG Howell in his speech in the Legislative Council.[77]
>
> (ii) The purpose was to criminalise male homosexual conduct because such conduct was not acceptable or desirable in Singapore society.[78]
>
> (iii) The 1938 purpose of s 377A remained the same in 2007 because Parliament repealed s 377 but retained s 377A.[79]

B. Analysis of High Court's findings on the purpose of section 377A

49 Points (i) and (ii) of the Judge's findings invite the following comments:

> (a) These two findings appear to be based entirely on the first sentence of his speech which reads: "With regard to clause 4 it is unfortunately the case that acts of the nature described have been brought to notice".[80] The Judge interpreted this sentence to mean:[81]

77 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [70].
78 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [67], [100] and [167].
79 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [85] and [146].
80 See para 14 above.
81 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [67].

> (a) it was 'unfortunately the case' – *ie*, it was a regrettable state of affairs or a misfortune or an undesirable thing or state of affairs – that males were engaged in grossly indecent acts with other males…;

This interpretation was then extrapolated to mean that such conduct was not acceptable in Singapore society.

(b) It is suggested that the first sentence, on a reasonable interpretation, does not imply that s 377A was enacted because male homosexual conduct was not acceptable in Singapore society. AG Howell has explained clearly in his speech that the law needed to be strengthened to deal with the acts of the nature described. Section 377A was enacted for this purpose, and not any other purpose.

(c) Penetrative sex as a variant of male homosexual conduct has been criminalised since 1872 under s 377. It is suggested that it is highly improbable that the colonial government would have waited another 57 years to criminalise the same kind of homosexual conduct because such conduct became unacceptable in Singapore society in 1938.

(d) The Judge made the finding without knowing that the Crime Reports had documented the state of crime in and before 1938, and the serious problems posed by male prostitution to law and order, public morality and wholesome government that required a stronger law to deal with them. Section 377A was enacted for this purpose, and not for the reason that male homosexuality was unacceptable in Singapore society.

(e) However, on the assumption that the Judge's finding that the purpose of s 377A was to criminalise male homosexual conduct (whether or not such conduct includes penetrative sex) because such conduct was not acceptable or desirable in Singapore society, it will give rise to the following questions: (i) whether the legislative classification (or differentia) is reasonable in that it serves or advances a legitimate state interest, if the sole reason for the law is that Singapore society or a majority thereof disapproves of male homosexual conduct; and (ii) whether criminalising anal sex between consenting males in private (which amounts to targeting a particular group of males), serves or advances a legitimate state interest. The two questions were not addressed by the Judge. He held that since the classification or differentia had a rational relation to the purpose of s 377A (to criminalise such conduct because it was not acceptable to Singapore society in 1938, which was reaffirmed by Parliament in 2007), s 377A satisfied the reasonable classification test. It is suggested that the Government's decision not to enforce s 377A with respect to

consensual male homosexual conduct in private undermines the basis of the finding in this respect.

(f) It is further suggested that, in the context of Singapore, with its diversity of people and religions, disapproval of male homosexual conduct *per se* by Parliament or a conservative section of Singapore society is not, in itself, sufficient legal basis to discriminate against male homosexuals, and to deprive them of their constitutional right of equality before the law under Art 12(1). Such purpose does not advance or serve a state interest that outweighs the constitutional right of equality before the law. Constitutional rights are not majoritarian rights, unless expressly qualified or restricted by the Constitution. They cannot be curtailed or taken away by the majority in society only because a majority of society may disapprove of or find such conduct unacceptable on the basis of their moral values. Constitutional rights act as a bulwark against majoritarian demands or wishes that may arise from time to time. They are protected by the Constitution against legislative or executive action inconsistent with them. In the context of the US Constitution, Jackson J explains the basis of fundamental rights in *West Virginia State Board of Education v Barnette*,[82] as follows:[83]

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

50 Point (iii) of the Judge's findings invites the following comments:

(a) The purpose of any law is determined and fixed at the time of enactment of the law. The fixing is a historical event, and accordingly, the purpose will remain the same forever. Hence, the purpose of s 377A did not require reaffirmation by Parliament to remain the same in 2007.

(b) Parliament's decision not to repeal s 377A does not reaffirm the purpose of s 377A. The MPs were not asked to and did not vote on the Petition because the Government had already decided well before the parliamentary sitting that it

82 319 US 624 (1943).

83 *West Virginia State Board of Education v Barnette* 319 US 624 at 638 (1943).

would not repeal s 377A, but at the same time not enforce it. The Government's position was reiterated at the parliamentary sitting so as not to send the wrong signal to the people that its position on the moral values of Singapore society had changed for the worse.

(c) The speeches of the MPs show that they had different views on different aspects of s 377A. There was no clear majority who could be said to have found all aspects of s 377A unacceptable. Only a minority found consensual penetrative sex between males abominable. A few MPs supported the Government's decision not to put s 377A in cold storage. A few MPs were not in favour of criminalising consensual male homosexual conduct in private.

(d) Parliament's decision not to repeal s 377A was made under the misapprehension that s 377A covered penetrative sex (which is the hallmark of male homosexuality). If Parliament reaffirmed the purpose of s 377A as understood by the Judge, then Parliament reaffirmed the wrong purpose.

(e) Finally, it is arguable that the Government's decision not to enforce s 377A with respect to consensual male penetrative sex in private is effectively a repudiation of the legitimacy of the same purpose attributed to s 377A in 1938, and implies that the Government recognises that no legitimate state interest would be served or advanced by criminalising or, alternatively, prosecuting such conduct. The 1938 purpose became invalid in the eyes of the Government in 2007.

C. Purpose of section 377A ceased to be relevant in 2007

51 The Judge found it unnecessary to answer question (b) because he found that the purpose of s 377A remained valid in 2007 as Parliament had reviewed and decided not to repeal it. This article argues that the purpose of s 377A in 1938 was no longer valid in 2007 for the following reasons:

(a) The Government repudiated its relevance in Singapore in 2007 as a result of its decision not to enforce it, thereby affirming that no state interest would be served or advanced by criminalising or prosecuting male homosexual conduct between consenting adults in private.

(b) The purpose of s 377A was, as confirmed by the Crime Reports, to eliminate the mischief caused by male prostitution and its associated activities to law and order, public morality and wholesome government. These problems resulted in the enactment of s 377A to deal with them. *Such causal conditions*

ceased to exist in Singapore long before 2007. In any case, no evidence that similar conditions calling for police enforcement was produced in Parliament in 2007 or in the High Court proceedings in 2013. Singapore is so well governed in terms of law and order that it would be surprising if conditions existed in 2007 that would have called for the enactment of s 377A, if s 377A had not existed.

(c) Absent any evidence to the contrary, the purpose of s 377A ceased to exist in or to be relevant for the purpose of the reasonable classification test.

D. Court of Appeal's finding of the purpose of section 377A lacks clarity

52 The Court of Appeal held, agreeing with the Judge:[84]

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

53 The purpose and object of s 377A found by the court is summarised as follows:[85]

(a) Section 377A supplements s 23, which criminalises not only solicitation and procurement for immoral purposes but also indecent behaviour.[86]

(b) Section 377A also supplements s 377. As s 377 has "general application",[87] s 377A should likewise be given the same general application.[88]

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84 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [153].

85 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [121]–[157].

86 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [132]

87 The term "general application" is not defined by the court. It can mean many things. For example, s 377 had general application because it applied to "whoever", but s 377A of the Penal Code (Cap 224, 2008 Rev Ed) is not of general application because it applies only to "any male with another male"; but it is of general application in relation to the nature of the offences because it applies to any act of gross indecency.

88 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [132] and [136].

(c) Limiting the purpose of s 377A to combating male prostitution is inconsistent with Macaulay's intention for the purpose or object of s 377 to guard against "injury … to the morals of the community".[89]

(d) The listing of s 377A under the heading "Unnatural Offences" in the Penal Code[90] "clearly militates against the very specific purpose and object canvassed by the Appellants *vis-à-vis* s 377A".[91]

(e) "Objects and Reasons" refers to "acts of gross indecency between male persons" in a general sense, which again militates against the narrow approach advocated by counsel.[92]

(f) The plain language of s 377A captures "grossly indecent" acts between males in a *general sense*, and therefore would necessarily capture the more *specific* acts relating to male prostitution, including procurement as well as abetment by third-party pimps. Further, the phrase "public morals" is the *heading* of the relevant parts of the Crime Reports, which is wholly consistent with the Attorney-General's arguments on the purpose and object of s 377A in the present appeals.[93]

(g) The available objective evidence demonstrates that s 377A was intended to be of general application, and is not intended to be confined only (or even mainly) to the specific problem of male prostitution (notwithstanding the fact that this would be covered as well).[94]

(h) AG Howell would have used more specific words if he had intended the purpose and object of s 377A to only or mainly target the problem of male prostitution, instead of speaking in far more *general* terms in his speech. Also, it might

89 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [138]–[139]. It is arguable that the court did not find that this was the purpose or object of s 377A of the Penal Code (Cap 224, 2008 Rev Ed). If it had, the finding would expose s 377A to be impugned challenge on the ground that it would be under-inclusive since grossly indecent acts committed by class (b) males with females and class (c) females with females would also injure the morals of the community.

90 Cap 119, 1955 Rev Ed.

91 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [140].

92 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [141].

93 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [142]. The court did not specify what those arguments were. However, one of the arguments the Attorney-General made in the High Court was that: "The first objective of s 377A is concerned with preserving public morality in relation to male homosexual conduct and signifying society's disapproval of such conduct."

94 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [143].

have been more direct and more relevant to have simply amended the 1906 Minor Offences Ordinance.[95]

54 The above findings form the basis for the rejection of the late submission of Lim's counsel that the purpose of s 377A was to combat male prostitution. The submission is dealt with by the court as follows:[96]

> As mentioned above at [134], Ms Barker (with the leave of this court) tendered further written submissions on behalf of her clients after the oral hearing before us had concluded. In essence, she argued, first, that the phrase "gross indecency" in s 377A did *not* cover *s 23* and conduct which amounted to an "unnatural offence" under s 377. She argued that s 377A was intended, instead, to cover *other* acts of "gross indecency" *apart from* acts of *penetrative* sex, and that this was the meaning to be attributed to Mr Howell's Legislative Council speech (reproduced above at [119]) with regard to the ambit of s 377A. Ms Barker then proceeded to argue, secondly, that the original purpose of s 377A was to *suppress male prostitution*. To support this particular argument, she cited not only the historical materials already referred to earlier in this judgment, but also further materials relating to the suppression of prostitution and brothels in the Straits Settlements.[97] [emphasis in original]

55 The court's finding of the purpose and object of s 377A invites the following comments.

(a) The parameters of the court's finding of the purpose and object of s 377A are somewhat fuzzy. Some findings relate to its scope, and others relate to its object (for example, guarding against injury to society's morals). There was no clear delineation of the offences covered by and the purposes of s 377A.

(b) However, the ultimate finding that there is "a complete coincidence in the relation between that differentia and *that purpose and object*"[98] [emphasis added] suggests that the court found that the purpose of s 377A was to criminalise all the acts mentioned therein, which is what s 377A does.

(c) The court stated that the Crime Reports were only "of possible relevance" for the purpose of finding the object of s 377A. On the contrary, the Crime Reports provided the best evidence of the reasons s 377A was enacted and its object, that is, the goal sought to be achieved.

95 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [149].
96 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [144].
97 The court also rejected the relevance of these materials.
98 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [153].

(d) The court appears to have accepted the Judge's finding in *Lim Meng Suang HC* that the purpose of s 377A was still operative in 2013, and did not consider the issue whether, if the purpose of s 377A in 1938 had ceased to exist or be relevant in 2013, s 377A would still satisfy the reasonable classification test.

56 It has been earlier suggested that the Crime Reports show that the purpose of s 377A was to eliminate "this evil" and restore order, peace and tranquillity to those areas of Singapore infested with male prostitution and its associate activities. Criminalising male homosexual conduct of a non-penetrative nature, and jailing offenders for up to two years' imprisonment, it was hoped, would reduce the incidence of such acts and deter future acts, and eliminate the "evil". Section 377A would be an additional weapon in the legal armoury of the law enforcement agencies.

VI. Reasonable classification test or rational basis test

A. Origin and purpose of the test

57 The reasonable classification test was formulated by the US courts to determine whether state laws that treated groups of persons differently violated the Equal Protection Clause of the Fourteenth Amendment, which provides:

> … [No State shall] deny to any person within its jurisdiction the equal protection of the laws.

The test, which is better known as the "rational basis test" in the US, is stated in *Lindsley v Natural Carbonic Gas Co*[99] as follows:[100]

> (1) The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary.
>
> (2) A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.
>
> (3) When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

99 220 US 61 (1911).

100 *Lindsley v Natural Carbonic Gas Co* 220 US 61 at 78–79 (1911).

> (4) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

58 The test requires legislative classification to have a reasonable basis, but is very deferential to the Legislature in that if it is reasonably conceivable that some facts may exist that sustain the classification, the classification is reasonable. If there is doubt about the utility of the classification to achieve the purpose of the legislation, the Legislature is given the benefit of the doubt. An aggrieved applicant has to show that the classification is arbitrary, that is, it has no reasonable basis.

59 The US Supreme Court has applied the test in two recent cases involving the constitutionality of state laws on homosexual offences. In *Romer v Evans*,[101] Colorado voters adopted Amendment 2 to the State Constitution to prohibit any judicial, legislative or executive action designed to protect persons from discrimination based on their "homosexual, lesbian, or bisexual orientation, conduct, practices or relationships". The Supreme Court (by a 6:3 majority) held that that did not satisfy the rational basis test on the ground that singling out one group of people and then declaring that cities could not extend protection to them served no rational government purpose. The court held that Amendment 2 was not intended to further a proper legislative purpose, and therefore failed the rational basis test. Anthony Kennedy J, writing for the court, said:

> We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause.

Kennedy J explained the rational basis test as follows:[102]

> The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons … We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end … *even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained* … In the ordinary case, a law will be sustained if it can be said

101 517 US 620 (1996).

102 *Romer v Evans* 517 US 620 at 631–633 (1996). *Romer v Evans* is not a case of sex or gender discrimination.

> to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous … *By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.* [emphasis added]

60 In *Lawrence v Texas*,[103] the issue was whether § 21.06(a) of the Texas Penal Code, which criminalised consensual deviant sex by same-sex couples, but not opposite-sex couples, violated the Due Process Clause and/or the Equal Protection Clause. The Supreme Court (by a 6:3 majority) held that the law violated the Due Process Clause, but went on to state that the alternative argument that the section violated the Equal Protection Clause was "tenable"; nevertheless, it decided to base its decision on the Due Process Clause.

61 O'Connor J joined in the majority judgment only on the alternative ground that § 21.06(a) violated the Equal Protection Clause for the following reasons:

> (a) "The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct – and only that conduct – subject to criminal sanction."[104]
>
> (b) Moral disapproval is not a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy.
>
> (c) "The State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law. The Texas sodomy statute subjects homosexuals to 'a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass … cannot be reconciled with' the Equal Protection Clause."[105]
>
> (d) "A law branding one class of persons as criminal based solely on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, *under any standard of review*. I therefore concur in the Court's judgment that Texas' sodomy law banning 'deviate sexual intercourse' between consenting adults of the same sex, but not between

103 539 US 558 (2003). *Lawrence v Texas* is also not a case of sex discrimination.
104 *Lawrence v Texas* 539 US 558 at 581 (2003).
105 *Lawrence v Texas* 539 US 558 at 584 (2003).

> consenting adults of different sexes, is unconstitutional."[106] [emphasis added]

62 Scalia J disagreed that § 21.06(a) violated the Equal Protection Clause for the following reasons:[107]

> (a) The promotion of majoritarian sexual morality is a legitimate state interest.
>
> (b) "On its face § 21.06(a) applies equally to all persons. Men and women, heterosexuals and homosexuals, are all subject to its prohibition of deviate sexual intercourse with someone of the same sex. … But this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex."[108]
>
> (c) "Even if the Texas law does deny equal protection to 'homosexuals as a class', that denial still does not need to be justified by anything more than a rational basis, which our cases show is satisfied by the enforcement of traditional notions of sexual morality."[109] [emphasis in original omitted]
>
> (d) "If moral disapprobation of homosexual conduct is 'no legitimate state interest' for purposes of proscribing that conduct, *ante*, at 578; and if, as the Court coos (casting aside all pretense of neutrality), '[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,' *ante*, at 567; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution', *ibid*?"[110]

106 *Lawrence v Texas* 539 US 558 at 585 (2003).

107 He also held that the section did not violate the Due Process Clause.

108 *Lawrence v Texas* 539 US 558 at 599–600 (2003).

109 *Lawrence v Texas* 539 US 558 at 601 (2003).

110 *Lawrence v Texas* 539 US 558 at 604–605 (2003). It should be noted that Scalia J's dissent was founded on his concern that the majority's judgment was on a slippery slope to the recognition of same-sex marriage. This came to pass on 26 June 2015 when the Supreme Court ruled (five to four) in *Obergefell v Hodges* 135 S Ct 2584 (2015) that state bans on same-sex marriage and state recognition of same-sex marriages duly performed in other jurisdictions were unconstitutional under the Due Process Clause and Equal Protection Clause.

It is necessary to point out that any "slippery slope" concern about same-sex marriage being legalised in Singapore, should Parliament decriminalise male homosexual acts committed in private between consenting males, is misplaced. Marriage in Singapore is a statutory right and not a constitutional right. The

(*cont'd on the next page*)

> (e) "Texas's prohibition of sodomy neither infringes a 'fundamental right' (which the Court does not dispute), nor is unsupported by a rational relation to what the Constitution considers a legitimate state interest, nor denies the equal protection of the laws."[111]

63 The US Supreme Court has developed two other tests to determine whether a state law violates the Equal Protection Clause. Chronologically, the first is the strict scrutiny test, so called because it applies a much higher standard of review than the rational basis test. The second is the intermediate scrutiny test, so called because it applies a standard of review of strict scrutiny in between the first and second tests.

B. Strict scrunity test

64 In 1938, the US Supreme Court suggested in a footnote in its judgment in *United States v Carolene Products*[112] that the rational basis test should not apply to any classification that implicates a constitutional prohibition.[113] Subsequently, the US courts began to apply the strict scrutiny test to any law that burdens a constitutional right or targets a suspected class.[114] The scrutiny is strict because the differentiating law is required to be "narrowly tailored to achieve a compelling government interest".[115]

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legalisation of same-sex marriage is entirely a matter for Parliament to decide. It will not be legalised if the majority of the MPs disapprove of it.

111 *Lawrence v Texas* 539 US 558 at 605 (2003).

112 304 US 144 (1938).

113 *United States v Carolene Products* 304 US 144 at 152, fn 4 (1938) reads:

> There may be narrower scope for operation of the presumption of constitutionality when *legislation appears on its face to be within a specific prohibition of the Constitution*, *such as those of the first ten amendments*, which are deemed equally specific when held to be embraced within the Fourteenth. …

It is the most famous footnote in US constitutional history.

114 See the words of Kennedy J at para 59 above.

115 The statements in this passage are adapted from Mariam Morshedi, "Levels of Scrutiny" *Subscript Law* (6 March 2018). In *Skinner v Oklahoma* 316 US 535 (1942) the Supreme Court applied the strict scrutiny test to invalidate a eugenics law enacted by the Oklahoma legislature to legalise sterilisation of any person convicted three or more times of a "felony of moral turpitude". The court said that the law, which was intended to deprive an individual of one of the most basic liberties – "a right which is basic to the perpetuation of a race" – deserved "strict scrutiny".

C. Intermediate scrutiny test – Craig v Boren[116]

65 In 1976, the US Supreme Court applied an intermediate scrutiny test to discriminatory laws based on sex or gender. In *Craig v Boren*, the Oklahoma legislature passed a law that beer with an alcohol level of 3.2% could be purchased by women at age 18 and men at age 21, based on a 19th-century law on the age of majority of men and women. Craig challenged the validity of the law on the ground that it violated the Equal Protection Clause. The State argued that far more young men were arrested for drunk driving than women, and far more young men were injured or killed in car accidents related to drinking. The State produced statistical evidence to support its case. However, the Supreme Court interpreted the evidence against the State. The court held that the fact that 2% of the men and just under 1% of the women between 18 and 21 had been arrested for alcohol-linked driving violations was not a sufficient ground for different treatment. The court held that the additional 1% could not justify the punishment of the remaining 98% who had never been arrested. The court rejected the rational basis test, and applied a higher test, that "classifications by gender must serve important governmental objectives and must be *substantially* related to achievement of those objectives"[117] [emphasis added].

66 The difference between the intermediate scrutiny test and the rational basis test is best appreciated in the decision in *Orr v Orr*,[118] where the Supreme Court struck down an Alabama law exempting women from the obligation to pay alimony (in order not to impose financial burdens on poor women) on the ground that, while the governmental objective was legitimate – providing financial relief to the poor – it was not reasonable or fair to assume that salary differentials between spouses always corresponded with gender. The law might have unfairly punished poor men and advantaged wealthy women.[119]

116 429 US 190 (1976).

117 *Craig v Boren* 429 US 190 at 197 (1976).

118 440 US 268 (1979).

119 In *Michael M v Superior Court of Sonoma County* 450 US 464 (1981), the US Supreme Court held that a California law that forbade men, but not women, over 18 from having sex with non-spousal partners under 18, was valid for the reason that the governmental objective was important – preventing teen pregnancy – and the different treatments accorded to men and women were "substantially related" to the achievement of that objective. Since men could not get pregnant (even men under 18) the law need not protect young men in the same way that it could protect young women.

Also in 1981, the US Supreme Court held in *Rostker v Goldberg* 453 US 57 (1981) that federal laws excluding women from the military draft were not unconstitutional as the use of a gender classification was "substantially related" to the achievement of an "important governmental objective". Since the primary purpose of the draft was to identify a pool of combat-capable persons, and since

(*cont'd on the next page*)

D. Difference between the three levels of scrutiny under the Equal Protection Clause

67 The differences between the three tests in terms of the level of scrutiny are:

(a) The rational basis test only requires the Government to show that the impugned classification is rationally related to serving a legitimate state interest.

(b) The intermediate scrutiny test requires the Government to show that the impugned classification serves an important state interest and that the classification is at least substantially related to serving that interest.

(c) The strict scrutiny test requires the Government to show that the impugned classification serves a compelling state interest and that the classification is necessary to serve that interest.

E. Reasonable classification test in India and Malaysia

(1) India

68 The rational basis test is known as the reasonable classification test in Indian constitutional law. It is applied to determine the constitutionality of impugned legislative or executive action under Art 14 of the Indian Constitution. In *Ajay Hasia v Khalid Mujib Sehravardi*,[120] Bhagwati SCJ said:[121]

> … *the content and reach of Article 14 must not be confused with the doctrine of classification. Unfortunately*, in the early stages of the evolution of our constitutional law, Article 14 came to be identified with the doctrine of classification because the view taken was that Article forbids discrimination and there would be no discrimination where the classification making the differentia fulfils two conditions, namely, (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action. It was for the first time in *E.P Royappa v State of Tamil Nadu*[122] that this Court … that that article embodies a guarantee against arbitrariness[123] …

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women were excluded by the military from combat, the unequal treatment of men and women was defensible.

120 AIR 1981 SC 487.

121 *Ajay Hasia v Khalid Mujib Sehravardi* AIR 1981 SC 487 at [16].

122 1974 4 SCC 3 at 38.

123 The meaning of "arbitrary" is refined by the Indian Supreme Court in *Shayara Bano v Union of India as follows*:

(*cont'd on the next page*)

> It must therefore be now be taken to be well settled that what Article 14 strikes at is arbitrariness because any action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is not a paraphrase of Article 14 nor is it the objective end of that article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting a denial of equality. *If the classification is not reasonable and* does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 is breached … In fact, the concept of reasonable and non-arbitrariness pervades the entire constitutional scheme and is the golden thread which runs through the fabric of the Constitution …
>
> [emphasis added]

69 In 2018, the Indian Supreme Court (*per* Dipak Mistri CJ) held in *Navtej Singh Johar v Union of India*[124] that s 377 of the IPC violates Art 14 of the Indian Constitution in criminalising carnal intercourse among consenting adults, whether homosexual or heterosexual, on the ground that the classification in s 377 of the IPC had no reasonable nexus with its object as other penal provisions such as s 375 of the IPC and the Protection of Children from Sexual Offences Act 2012 already penalised non-consensual carnal intercourse. *Per contra*, s 377 "subjects the LGBT community to societal pariah and dereliction and is, therefore, manifestly arbitrary, for it has become an odious weapon for the harassment of the LGBT community by subjecting them to discrimination and unequal treatment". The Chief Justice also held that the criminalising of penetrative sex between consenting adults in private violates the parties' fundamental right to privacy and also dignity under Art 21 of the Indian Constitution.

70 In the same case, Dr Dhananjaya Y Chandrachud J also said:[125]

> 26 A litany of our decisions – to refer to them individually would be a parade of the familiar – indicates that to be a reasonable classification under Article 14 of the Constitution, two criteria must be met: (i) the classification must be founded on an intelligible differentia; and (ii) the differentia must have a rational nexus to the objective sought to be achieved by the legislation. There must, in other words, be a causal connection between the basis of classification and

> The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.

124 Writ Petition (Criminal) No 76 of 2016 (India: Supreme Court, 6 September 2018).

125 *Ajay Hasia v Khalid Mujib Sehravardi* AIR 1981 SC 487 at [26]–[27].

> the object of the statute. If the object of the classification is illogical, unfair and unjust, the classification will be unreasonable.
>
> 27 Equating the content of equality with the reasonableness of a classification on which a law is based advances the cause of legal formalism. *The problem with the classification test is that what constitutes a reasonable classification is reduced to a mere formula: the quest for an intelligible differentia and the rational nexus to the object sought to be achieved.* In doing so, the test of classification risks elevating form over substance. The danger inherent in legal formalism lies in its inability to lay threadbare the values which guide the process of judging constitutional rights. …
>
> [emphasis added]

(2) Malaysia

71 Malaysia has adopted the Indian formulation of the reasonable classification test *in toto* (see the well-known speech of Salleh Abas SCJ in *Malaysian Bar* which was cited with approval by the Court of Appeal in *Public Prosecutor v Taw Cheng Kong*[126] ("*Taw Cheng Kong CA*")). However, somewhat surprisingly, in *Malaysian Bar*, the Federal Court of Malaysia applied not only the reasonable classification test but also the strict scrutiny test to determine the constitutionality of s 46A(1)(a) of the Legal Profession Act 1976.[127] This section provides that any advocate and solicitor of less than seven years' standing is disqualified from standing for election to the Malaysian Bar Council and the Bar Committees of each of the Malaysian states. The court held (by a 2:1 majority) that the provision did not violate Art 8 of the Malaysian Constitution. Azmi SCJ (for the majority) said:[128]

> The durational classification based on professional experience is clearly founded on an intelligible differentia. The question is, in what way can such differentia be argued as having no rational relation or nexus with the legislative policy or object? *Surely, it is in the public interest or to use the American parlance 'in the legitimate or compelling state or governmental interest' that the Malaysian Bar should be independent and managed by experienced lawyers, for such a Bar ensures an experienced and independent judiciary* … There is therefore a strong nexus between the durational experience classification and the legislative policy or object of the impugned legislation. [emphasis added]

72 Azmi SCJ expressed the view that the strict scrutiny test was not substantially different from the rational basis test:[129]

126 [1998] 2 SLR(R) 489 at [57].
127 No 166 of 1976; 2001 Reprint.
128 *Malaysian Bar v Government of Malaysia* [1987] 2 MLJ 165.
129 *Malaysian Bar v Government of Malaysia* [1987] 2 MLJ 165.

> [T]here is no question of discarding the traditional or simple approach in favour of the suspect classification, *for in reality both are primarily concerned with the question of whether or not there is a reasonable or permissible basis for the classification, and that for such determination the court must review the real object of the legislation*. However, as stated earlier, the United States Supreme Court has used a stricter standard of review in the area of fundamental rights or suspect classifications than in other areas, in that a compelling governmental or state interest must be shown in the classification or burden imposed on a particular group of individuals. [emphasis added]

Similarly, Salleh Abas LP (who held that s 46A(1)(a) did not satisfy the reasonable classification test) said:[130]

> In reality the treatment of suspect classification does not differ much from the traditional test as both are primarily concerned with the question of whether or not there is a reasonable basis for the classification.

The curious result of the judgments in *Malaysian Bar* is that the majority of the court held that the purpose of s 46A(1)(a) satisfied the strict scrutiny test, but that in the opinion of the minority the provision did not even satisfy the reasonable classification test. The majority and minority judgments in this case show that the reasonable classification test is an unstable test as the outcome can be easily determined on the basis of a subjective or even idiosyncratic view of the purpose of the law and whether the differentia has a rational relationship to it.

F. Reasonable classification test as applied in **Lim Meng Suang HC**

73 In *Lim Meng Suang HC*, the Judge applied the reasonable classification test stated in *Tan Eng Hong* ("*Tan Eng Hong* test") as follows:[131]

> [W]here the impugned legislation has a differentiating measure, that legislation will only be consistent with Art 12(1) if:
>
> > (a) the classification prescribed by the legislation is founded on an intelligible differentia …; and

130 *Malaysian Bar v Government of Malaysia* [1987] 2 MLJ 165.

131 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [45]. The Judge declined to apply the test applied in *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 which states as follows:

> Discriminatory law is good law if it is based on 'reasonable' … classification, *provided* that
>
> (i) the classification is founded on an intelligible differentia; and
>
> (ii) the differentia has a rational relation to the object sought to be achieved by the law in question.

> (b) the differentia bears a rational relation to the object sought to be achieved by the legislation …

74 The Judge applied the *Tan Eng Hong* test to s 377A (which is a differentiating measure) and held that the differentia is intelligible and that it has a rational relation to the purpose of s 377A:[132]

> [T]he purpose of s 377A is to criminalise male homosexual conduct. The differentia ... is that of male homosexual conduct. Therefore, there is a complete coincidence between the differentia underlying the classification prescribed by the legislation and the class defined by the object of that legislation. … In these circumstances, the relationship between the differentia underlying the classification prescribed by s 377A and the object of s 377A (or the mischief which it is designed to deter) clearly satisfies the 'rational relation' test.

75 It may be noted that the finding that the purpose of s 377A *is* to criminalise male homosexual conduct is stated in the present tense, presumably because the Judge has earlier found that it remained the same in 2007 because Parliament did not repeal it.

G. Comments on the Judge's findings

76 The Judge's findings on the nature and substance of the reasonable classification test invite the following comments.

> (a) If the purpose of s 377A is to criminalise male homosexual conduct, and if the differentia (or the basis of the classification) is male homosexual conduct (as it "excludes male-female acts and female-female acts"), it follows that the differentia and the purpose must coincide. They must coincide because the legislative classification is the same as the purpose of s 377A.
>
> (b) Framing the purpose of s 377A as the criminalisation of male homosexual conduct does not tell us what its goal is, but only what s 377A does. The act of criminalisation in itself says nothing about the object it seeks to achieve. The criminalisation itself becomes its own goal. It does not answer the question: why did s 377A criminalise such conduct? The law is a means to achieve an end. What is it in the case of s 377A?
>
> (c) Framing the purpose of s 377A as the criminalisation of male homosexual conduct renders the reasonable classification test redundant. *If the purpose of the law is to create the differentia, then they will always coincide, and the reasonable*

132 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [100].

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

(d) The Judge was aware that his formulation of the purpose of s 377A was problematic because he conceded:[133]

> [I]t is possible to conceive of cases where the object of the legislation is illegitimate.[134] The fact that such cases may be very far and few between does not preclude the possibility that they can occur. *The need for legitimacy of purpose is heightened because whether the differentia underlying the prescribed classification is found to be rationally related to the purpose of the legislation depends on how broadly or narrowly the purpose of the legislation is framed.* If the legislation in question is truly discriminating arbitrarily and without a legitimate purpose, the court cannot stand by the side lines and do nothing. Parliament cannot introduce arbitrary and unjustified discrimination by simply hiding behind the curtain of words and language used in impugned legislation, or behind statements in Parliamentary debates which will yield an apparent purpose of the legislation concerned that invariably relates rationally to the differentia underlying the

133 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [114].

134 Quentin Loh J referred to the decision of the US Supreme Court in *Takahashi v Fish and Game Commissioner* 334 US 410 (1948) ("*Takahashi*") as an example where the law satisfied the traditional reasonable classification test but was held unconstitutional because its object was illegitimate. A careful reading of the judgment in *Takahashi* shows that the law concerned (which discriminated against Japanese fisherman *because of their race*) was illegal because it was inconsistent with a federal law, and was therefore void: see *Truax v Raich* 239 US 33 (1915). The Supreme Court said at 416:

> Had the Truax decision said nothing further than what is quoted above, its reasoning, if followed, would seem to require invalidation of this California code provision barring aliens from the occupation of fishing as inconsistent with federal law, which is constitutionally declared to be 'the Supreme Law of the Land.' Const art 6, cl 2.

> classification prescribed by that legislation, thereby satisfying the 'reasonable classification' test. The courts can, and will, critically examine and test such legislation where necessary and appropriate. [emphasis added]

It is suggested that the Judge's concern is self-inflicted. His formulation of the purpose of s 377A left no room for the requirement of reasonableness of the classification or whether it serves or advances a legitimate state interest. If the purpose of s 377A was to eliminate "this evil" identified in the Crime Reports, it could be said the classification is reasonable, and that would have a rational relation to the purpose in 1938. However, it is submitted that the purpose is not necessarily reasonable if it is only to give expression to the disapproval of the majority of society, or only to meet their moral sensibilities (see the divergence of views on this issue between O'Connor and Scalia JJ in *Lawrence v Texas*). *The reasonable classification test, as its very name suggests, requires that the classification be reasonable.* Whether or not it is so depends on whether there is a legitimate state interest in discriminating against male homosexual conduct as against heterosexual or female homosexual conduct of the same nature, that is, acts of gross indecency in the social milieu of Singapore in 2007 or 2013.[135]

(e) The Judge's finding of purpose omits the criminalisation of abetments and procurements by males, but not females. Since abetments, procurements and attempted procurements, *per se*, do not constitute male homosexual conduct, the classification might arguably be under-inclusive.

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135 Ultimately, Quentin Loh J was not prepared to hold that the purpose of s 377A of the Penal Code (Cap 224, 2008 Rev Ed) was illegitimate because "the common law tradition has never criminalised female homosexual conduct": *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [119]–[129]. With respect, it is difficult to see the logic in the reasoning. The judge seems to be saying that the inequality of between males and females before the law does not violate Art 12(1) because the common law has always treated males unequally by not criminalising female homosexual conduct.

The issue is not what the common law tradition is but whether constitutional right to equality before the law has been violated by s 377A. In any case, whatever might have been the common law's toleration of female homosexual conduct in England, the legal position in Singapore is that cunnilingus is punishable under s 294(*a*) of the Penal Code (as obscene conduct) or s 23 of the Minor Offences Ordinance 1906 (Ordinance 13 of 1906) (now re-enacted in ss 19 and 20 of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed)) as indecent behaviour, if committed in public. Furthermore, under the repealed s 377, a woman who consented to anal sex with a man also committed the offence under s 377 as a joint offender or as an abettor.

H. Reasonable classification test as applied in Lim Meng Suang CA

77 The Court of Appeal affirmed that the established test in Singapore for determining the constitutionality of a statute under Art 12(1) is the reasonable classification test. The court held that "[s]trictly speaking, however, the 'reasonable classification' test … comprises only two closely-related stages",[136] as stated in *Tan Eng Hong*.

78 The court agreed with the Judge that s 377A satisfies limb (a) of the test, and that limb (b) is also satisfied because "there is, in fact, *a complete coincidence* in the relation between that differentia and that purpose and object" [emphasis in original] (as found by the court).[137] It has been earlier observed that the court's finding of the purpose of s 377A lacks clarity. It may be noted that the court did not address some of the issues raised in connection with the Judge's formulation of the purpose of s 377A.[138]

79 As mentioned earlier above,[139] the court did not consider the issue whether, if the purpose of s 377A in 1938 had ceased to exist or be relevant in 2013, s 377A would still satisfy the reasonable classification test. It is suggested that if the 1938 purpose of s 377A were no longer relevant in 2013, in that if the social conditions that caused its enactment in 1938 no longer subsisted in 2013, s 377A would not be able to satisfy the reasonable classification test, because there would no longer exist a purpose that could have a rational relation to the differential. It is arguable that court's omission to deal with this issue undermines the underlying basis of its decision that s 377A does not violate Art 12(1).

80 The court also expressed the view that there is no separate or independent test of illegitimacy beyond the reasonable classification test. The court said:[140]

> … *this element of illegitimacy is* ***not*** *an additional test over and above the 'reasonable classification' test; it is, instead, no more than an application of the 'reasonable classification' test*. The only *legal* test for the purposes of Art 12(1) is the 'reasonable classification' test, and … that in applying this test, the court would be applying a ***legal*** *test that is not based on extra-legal considerations, but rather, one that is clearly within its remit as a court of law (as opposed to acting as if it were a 'mini-legislature')*. [emphasis in original]

136 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [57].
137 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [111] and [153].
138 As set out at paras 76(a)–76(c) above.
139 See para 55(d) above.
140 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [84].

This article respectfully agrees with this view. As earlier argued, in relation to the reasonable classification test, the purpose of the law is illegitimate if it is irrational or arbitrary, and that question may be tested by determining whether it serves or advances a legitimate state interest. If, as the court says, the element of illegitimacy is no more than an application of the reasonable classification test, it follows that the legislative classification and/or the legislative object may be illegitimate. Therefore, it also follows that the legitimacy of the purpose of the impugned law is an integral part of the reasonable classification test. In the present cases, it is arguable that the purpose of s 377A as determined by the Judge is illegitimate because it is not clear how the state interest is served or advanced by discriminating class (a) males against class (b) males and class (c) females for engaging in similar acts of gross indecency.

I. Criminal and civil laws in the context of Article 12(1)

81 The written laws of Singapore may be divided into two broad categories: criminal and civil. Their societal roles are fundamentally different in the administration of the State.

82 The primary role of the criminal law is to maintain social order, and protect life, liberty, security and property by criminalising harmful conduct and punishing offenders.[141] To carry out their societal roles, criminal laws invariably curtail the fundamental liberties, statutory rights and common law freedoms. Everyone, regardless of their sex or gender, is subject to the criminal law, save for those lacking the requisite legal capacity to commit any offence.

83 Article 12(1) declares that all persons, that is, men and women, are equal before the law. But if they are equal before the law, they are also equal to each other before the law (or, as Chakravartti J said in *Anwar Ali Sarkar v State of West Bengal*[142] ("*Anwar Ali*"), "'equality before the law' is also equality of equals"). Men and women are equals in terms of legal capacity to commit, or not to commit, offences. Therefore, they are equal to each other in respect of criminal liability. Criminal legislation does not prescribe different legal capacities to commit crime based on sex or gender, but only on the basis of age, maturity of mind and knowledge or understanding of the criminal act. There is no objective difference between males and females in the context of the

141 Society will be in a state of chaos if there are no laws to restrain the "natural condition of mankind" and to punish wrongdoers. The strong will do what they can and the weak will suffer what they must, and life would be "nasty, brutish and short": Thomas Hobbes, *Leviathan* (1651).

142 AIR 1952 Cal 150 at [98].

criminal law. It follows that a criminal law that discriminates against a class of persons on the basis of sex or gender does not conform to the fundamental right of equality before the law.

84 If equality before the law is not absolute, a differentiating law based on sex or gender must have a rational basis for the classification. It is suggested that the basis should be whether it advances or serves a legitimate state interest that justifies curtailing the fundamental right of equality before the law. Suppose Parliament enacts a law that makes it an offence for women to smoke cigars in public or in private. Such a law would violate women's right to equality with men before the law, that is, their equal freedom to smoke cigars. Women may have no constitutional right to smoke cigars (or to smoke anything, for that matter), but at common law every person is free to smoke unless he or she is prohibited from doing so. If Parliament bans women, but not men, from smoking cigars, equality of all persons under Art 12(1) requires the State to justify the reasonableness of the ban. The Government may try to justify it on health grounds that women are more prone to cancer than men, or die earlier than men. If medical research shows that women are ten times more likely to contract lung cancer from smoking cigars than men, that would be a good reason for the ban, as there is a legitimate state interest in safeguarding their health, and also in reducing the economic cost of having to treat them. But, if the reason for banning women from smoking cigars is that Parliament considers it unseemly or undignified for women to smoke cigars, the court will have to consider whether Parliament's disapproval is a legitimate ground on the basis of whether it advances or serves any state interest. The case of *Craig v Boren* illustrates this point nicely.[143]

85 All human *acts* are gender neutral in that they can be done or performed by males or females alike, except for acts due to biological differences, for example, menstruation. Homicide can be committed by males and females alike. An act is gender specific if it can be performed by persons of a specific gender. Bearing a child is a good example. A law that bans women from bearing children for whatever reason will not violate equality before the law between men and women, as men cannot bear children.[144] But it may violate the equal right of women at common law to bear children unless the legislative purpose of the ban advances or serves a legitimate state interest.

86 However, an offence is gender specific only because the law defines it as such. The offence of rape is a notable example of a gender-specific offence. Section 375 of the Penal Code defines "rape" such that

143 See para 65 above.
144 See n 119 above.

only a male can commit the offence. However, if "rape" is defined as a kind of sexual assault, then it becomes a gender-neutral offence because it would then be possible for a female to assault a male sexually. Some offences in the Penal Code are expressed as gender specific, but in substance or functionally they are not. For example, infanticide is defined to mean a homicide by a woman of her child under 12 months old. But any person can kill an infant. If the killer is not the mother, he or she may be guilty of murder, which is punishable by death. If the killer is the mother, however, she is spared the death penalty because the law recognises that the homicide may be due to post-partum (or post-natal) depression. The offence is homicide in essence. It is no different from homicide caused by diminished responsibility. Another example is incest under s 376G(1). It is committed by "[a]ny man of or above the age of 16 years". However, s 376G(2) makes "[a]ny woman of or above the age of 16 years who, with consent", participates knowingly in the proscribed act, liable for incest.

87 This article argues that in the context of equality before the law, a law that criminalises a *gender-neutral* act as a *gender-specific* offence, and thereby discriminates against the class of specified offenders by sex or gender, makes that class unequal to persons (males and females) not falling within the class. Therefore, the classification violates equality of all persons before the law, and also equal protection of the law, unless the classification is reasonable, that is, it serves or advances a state interest under the reasonable classification test (or the intermediate review test, or the scrutiny test, if either is applicable).

88 In contrast, the role of the civil law in its regulatory function is to provide the social, economic and other needs of society. Laws enacted for social development and public welfare may apply differently to different classes of persons because of their different circumstances. Inequality will occur because such classifications. The Government is better placed than the courts to determine the efficiency and efficacy of its policies and programmes to achieve these objectives. It is for this reason that the courts defer to Parliament on such matters. This is the source and basis of the so-called presumption of constitutionality.[145]

89 Where civil rights are granted by the law, the equal protection of the law requires that persons who are equal should be treated equally, but not that unequal persons must be treated equally. The rational basis test was formulated by the US courts to safeguard the right to equality against any unequal legislative or executive action that violates equal protection of the law, and not equality before the law. It is suggested that judicial deference to the Legislature is only relevant to equal protection

145 See para 108 below.

of the law, but not equality before the law. It is also suggested that in the case of discriminatory criminal or civil legislation based on sex or gender, judicial deference is not appropriate, because the equality of men and women is a first-order constitutional right.

J. Higher standard of review of laws that curtail fundamental liberties

90 The rational basis test has been applied to both civil and criminal laws in US, India, Malaysia and Singapore. Only the US Supreme Court applies a higher standard of review of differentiating laws that burdens fundamental rights. The Indian Supreme Court has not done so. Save for one instance, the Federal Court of Malaysia has also not done so. Neither has the Singapore Court of Appeal, because up to now the established test is the reasonable classification test. This article argues that, as a general principle, where discriminatory civil or criminal legislation curtails fundamental liberties, the courts should subject it to a higher standard of review for unconstitutionality. The principle is sound because fundamental liberties are granted by the Constitution and not by ordinary laws, and the courts should be vigilant in protecting such liberties.[146] There is no reason to believe that fundamental rights under the Constitution are of less value to Singaporeans and are given less protection than fundamental rights in the US Constitution.

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146 In *Lim Meng Suang v Attorney General* [2013] 3 SLR 118 at [113], the Judge rejected the strict scrutiny test in response to counsel's argument that the court should adopt it. The Judge said:

> I do not advocate moving to the 'strict scrutiny' test of 'a more searching judicial inquiry' applied by the US courts when it comes to disadvantaged groups, suspect classification or impinging on fundamental rights (see *Korematsu* ([99] *supra*) and *United States v Carolene Products Co* 304 US 144 (1938) at 152 n 4). However, I would say it is only natural for our courts to scrutinise very carefully a piece of legislation and the relation between its purpose and the differentia underlying the classification prescribed therein if the court finds not only that the differentia in question appears arbitrary, but that it also appears to be discriminatorily based on factors like race or religion and *concerns the fundamental liberties* set out in Pt IV of the Constitution. [emphasis added]

With respect, the fact our courts will scrutinise such legislation very carefully in applying the reasonable classification does not provide the same degree of protection as the strict scrutiny test, as it is a deferential test and is easy to satisfy. As s 377A of the Penal Code (Cap 224, 2008 Rev Ed) curtails Lim's fundamental right of equality, it is not unreasonable to subject s 377A to a higher standard of review to determine whether there is a substantial state interest (under the intermediate scrutiny test) or a compelling state interest (under the strict scrutiny test), in differentiating between class (a) males and class (b) males or class (c) females under s 377A.

K. Section 377A is an outlier in the criminal law regime

91 Section 377A has been since 1938, and still is, an outlier in our criminal law regime. It was enacted to eliminate the mischief of male homosexual conduct involved in or associated with male prostitution. It was the product of a particular set of social conditions that existed at a particular point of time in Singapore's history. Such conditions ceased to exist in Singapore a long time ago. It is the only genuine gender-specific offence in our criminal laws.

92 This article has argued that s 377A does not criminalise penetrative sex. Leaving aside s 376(1)(*a*), non-consensual penetrative sex between same-sex (male) couples and opposite-sex couples, the question that needs to be resolved by the courts is whether the "private" element of s 377A is still relevant in Singapore society today, (a) assuming that it covers penetrative sex, but especially (b) if it covers only non-penetrative sex.

VII. ARTICLE 12(1)

A. Equality before the law and equal protection of the law

93 Article 12(1) declares that "All persons are equal before the law and entitled to the equal protection of the law". It is derived from Art 8(1) of the Malaysian Constitution.[147] The concept of equality before the law originates from English common law and means that the law of the land shall apply equally to all. No one is above the law, and everyone is equal under the law. Hence, the law shall not discriminate against any person (or any citizen) on the basis of birth (descent), gender, race, religion, position or other personal attributes.

94 The concept of equal protection of the law comes from the Fourteenth Amendment in the US Constitution ("Equal Protection Clause") which provides: "… nor shall any State deny to any person within its jurisdiction the equal protection of the laws". The Equal Protection Clause does not grant rights. It requires US states not to deny persons within their jurisdiction the same rights, privileges, and protection to all persons in any law enacted by the state legislatures.

147 Both Art 12(1) of the Constitution of the Republic of Singapore (1999 Reprint) and Art 8(1) of the Malaysian Constitution of the are worded in substantially the same language as Art 7 of the Universal Declaration of Human Rights (10 December 1948) which states: "All are equal before the law and are entitled without any discrimination to equal protection of the law."

95 Article 14 of the Indian Constitution is expressed in the same way as the Equal Protection Clause. It does not grant any rights, like the Malaysian or Singapore Constitution. It commands that: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

B. Equality before the law and equal protection of the law distinguished

96 There may be an important, but so far unrecognised, difference in the nature of these fundamental rights granted by the four Constitutions. Articles 12(1) and 8(1) respectively of the Singapore and Malaysian Constitutions grant to all persons the right to equality before the law and equal protection of the law as positive rights. Equality of all persons before the law is a discrete right granted by the Constitution, separate and distinct from the entitlement to equal protection of the law. Equality before the law exists as a constitutional right, without any legislative or executive action. It is a first-order right because it is granted by the Constitution.

97 In contrast, equal protection of the law is an entitlement to equal laws, and is contingent upon laws being enacted which grant statutory rights to the people. Equal protection is engaged when rights and liabilities are granted or imposed by unequal laws enacted by Parliament. It is only then that equal protection of the law plays its constitutional role. The constitutional entitlement to equal protection is meaningless if there are no unequal laws. The declaration that all persons are entitled to equal protection of the law is a constitutional command that when Parliament makes laws, for example, to promote economic and social development or the public welfare, such laws must treat all persons equally and accord them the same rights, privileges, and protections, unless a state interest is served or advanced in treating them unequally.

98 Statutory rights are second-order rights since they are granted by legislation. Statutory rights, along with statutory burdens, are granted or imposed by law invariably in the context of social legislation of a regulatory nature to promote economic and social development to further public welfare and advance the public good. It is accepted by the courts that there is a need to qualify rights and burdens in such kinds of legislation. Such limitation of equality to equals is essential for effective and good government. In such kinds of legislation, the Legislature is assumed to know the needs of the people, and for this reason, the courts defer to the judgment of the Legislature on such policy issues. This deference is the basis of the so-called presumption of constitutionality in the context of such kinds of legislation.

99 This article argues that our courts should make a distinction between first-order rights and second-order rights, particularly in the field of criminal legislation which, by its nature, curtails or limits constitutional or statutory rights, in contrast with legislation of a regulatory nature which, by its purpose, creates such rights and grants them to one class of persons but not to another class of persons. In the succinct formulation of Tom Bingham, "[t]he law should apply equally to all, save to the extent that objective differences justify their differentiation".[148]

100 The Fourteenth Amendment and Art 14 of the Indian Constitution do not grant equality before the law but prohibit the State from denying to persons within its jurisdiction equal treatment in state laws, unlike Art 12(1) which grants equality before the law. Equal protection of the law under the US and Indian Constitutions entitles the people to equal treatment under laws enacted by the State, similar to equal protection under Art 12(1) of the Constitution, except where unequal treatment serves or advances a legitimate state interest.

101 This distinction may explain why the Indian courts have applied only the reasonable classification test, and no other test, to determine whether a differentiating law violates Art 14. It may also explain why the Indian courts see no difference between equality before the law and equal protection of the law as constitutional rights. In *Anwar Ali* Chakravartti J said:[149]

> I may add, however, that besides the guarantee of 'equal protection of the laws', drawn from the American Constitution, Article 14 contains another guarantee which is of 'equality before the law' and which appears to have been drawn from the common law of England. *But it does not appear that for practical purposes, the additional phrase adds anything to the guarantee contained in the other expression.* One guarantees equality of status before the law, while the other guarantees equal security under it and both are aimed at attaining the common object that all shall stand before the law on equal terms. *But* '*equality before the law*' *is also equality of equals*: Article 14 does not declare that persons not in fact equal shall nevertheless be treated as equal in law or that circumstances not in fact the same shall nevertheless be regarded by law as so.

On appeal to the Supreme Court, Das J said:[150]

> Article 14 of our Constitution, it is well known, corresponds to the last portion of section 1 of the Fourteenth Amendment to the American Constitution except that our article 14 has also adopted the English

148 Tom Bingham, *The Rule of Law* (Allen Lane, 2010) at p 55.
149 *Anwar Ali Sarkar v State of West Bengal* AIR 1952 Cal 150 at [98].
150 *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75.

> doctrine of rule of law by the addition of the words 'equality before the law'. *It has not, however, been urged before us that the addition of these extra words has made any substantial difference in its practical application.* [emphasis added]

102 The Malaysian courts have followed the Indian decisions under Art 14 without considering whether the equality before the law clause is the same in both Constitutions. It is not. In *Public Prosecutor v Su Liang Yu*,[151] Hashim Yeop A Sani J referred to *State of West Bengal v Anwar Ali Sarkar*[152] and said:[153]

> … Although the Fourteenth Amendment does not contain the phrase 'equality before the law' as in the Indian Constitution *there is in fact no significant difference as a result*. As tautological as both the Indian and the Pakistan provisions our Merdeka Constitution also emerged with the provision of Article 8(1) which provision was carried in toto into the Malaysian Constitution today.
>
> The dominant idea in both the expressions 'equal before the law' and 'equal protection of the law' is that of equal justice. The meaning of these two expressions have been decided in a number of decisions of the US Supreme Courts and also the Indian Supreme Courts and certain principles have been settled and accepted …
>
> … Clause (1) of our Article 8 does not proclaim that all persons must be treated alike but only that persons in like circumstances must be treated alike

103 Our courts have also not considered the structural difference between Art 12(1) of the Constitution and Art 14 of the Indian Constitution, and also of the Equal Protection Clause. In *Lim Meng Suang HC* the Judge said:[154]

> It is now settled law that equality before the law and equal protection of the law under Art 12(1) does not mean that all persons are to be treated equally, *but that all persons in like situations are to be treated alike*: see, *eg*, *Taw Cheng Kong (CA)* and *Ong Ah Chuan*. [emphasis added]

In this passage, the Judge treats the first-order right of equality before the law granted by the Constitution as a second-order right to equal treatment under statutory laws. Equality before the law is a positive right that implies entitlement to equal protection of the law. The Judge's formulation echoes the words of O'Connor J in *Lawrence v Texas*:[155]

151 [1976] 2 MLJ 128.
152 AIR 1952 SC 75; 1952 SCR 284.
153 *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128.
154 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [44].
155 539 US 558 at 579 (2003).

> The Equal Protection Clause … 'is essentially a direction that all persons similarly situated should be treated alike.'

104 In *Lim Meng Suang CA*, the Court of Appeal also makes no distinction between equality before the law and entitlement to equal protection of the law in its analysis of equality before the law in Art 12(1) in this passage:[156]

> … Art 12(1) comprises two main limbs. The *first* states that '[a]ll persons are *equal before the law*' ... what does the phrase 'the law' in this ... limb … mean? Does it refer to *the law in general*? If so, then this … limb is no more than a *declaratory* statement that is … self-evident. … In the context of the present appeals, 'the law' would then refer to s 377A. But, even if that be the case, … on *what legal basis and on what legal criterion (or criteria)* can the court find that a particular person or group of persons has not been accorded equality of treatment in relation to s 377A? Presumably, all those who fall within the scope of s 377A would be considered to be 'equal' before that particular provision, but that would hardly be an argument which the Appellants would want to rely upon. If the Appellants seek to argue that they are not being accorded equal treatment because s 377A applies only to them (*ie*, Lim, Chee and Tan) and no other male homosexuals, that would be an entirely separate and distinct argument which would require a separate criterion (or set of criteria) for determining whether the Appellants' Art 12(1) rights have indeed been violated. [emphasis in original]

105 Article 12(1) is self-evident in granting equality before the law as a constitutional right to all persons, that is, males and females. It is suggested that if males and females are equal before the law, and equal to one another under the law, then s 377A in criminalising only male homosexual conduct violates the right to equality of class (a) males as they fall within the class of "all persons" but not class (b) males or class (c) females. It is also suggested that the appellants' complaint is not that they have not been accorded unequal treatment because s 377A applies only to them and no other male homosexuals. Their complaint is that s 377A does not apply, as it should, to class (b) males and class (c) females, in respect of acts of gross indecency, which all of them can commit. Their complaint is that s 377A treats them unequally since they, but not class (b) males or class (c) females, are punishable for committing acts of gross indecency.

106 Both declarations in Art 12(1) recognise the central idea of equal justice for all persons. Equal justice is not achieved merely because a legislative classification applies to all persons within the class. That would be like saying the law applies equally to all to whom it applies,

156 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [73].

which is clearly a circularity. The issue is whether Art 12(1) allows the State to enact a differentiating law that targets a specific class of males, *viz*, male homosexuals, with respect to acts of gross indecency, but not other classes of males or females in respect of similar acts of gross indecency.

107 The Court of Appeal also said:[157]

> … Art 12(1) … is clearly declaratory and aspirational in nature … does not really set out any concrete *legal* principles which can guide the courts, such as the 'reasonable classification' test. Indeed, the 'reasonable classification' test itself was formulated by the courts, and it does … furnish the courts with particular *legal* principles that give effect (albeit not fully) to the concept of equality embodied in Art 12(1). [emphasis in original]

While it is true that Art 12(1) is declaratory in form, it is not aspirational in the sense that it grants a right to all persons before the law – the right to be treated as equals. The court must give effect to it as a substantive right, and not as an aspirational ideal. Article 12(1) is not a preamble or a constitutional directive, but a substantive constitutional provision. While the first declaration may seem open-ended (whereas the second declaration has been thoroughly analysed in US, Indian, Malaysian and Singapore cases), the absence of concrete legal principles only means that the constitution-makers have left it to the courts to formulate the principles. Indeed, it is their duty to do so to give effect to that right against any legislative or executive encroachment. If, as the court said, the reasonable classification does not furnish the courts with particular legal principles to give full effect to the right of equality of all persons before the law, then the courts must either modify or revise the test (which is only a judicial test) or adopt another more appropriate test to give full effect to such right. In any case, as pointed out earlier, the reasonable classification was not formulated for the right of equality before the law, but for entitlement to equal protection. The difference between the two declarations in Art 12(1) requires a more intensive examination than is possible in this article.

VIII. Presumption of constitutionality

A. Role of the presumption in constitutional adjudication

108 In *Lim Meng Suang HC*, the Judge referred to *Middleton v Texas Power and Light Co*[158] ("*Middleton*") as the source of the presumption of

157 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [88].
158 249 US 152 (1919).

constitutionality. *Middleton* was approved and applied in *Chiranjit Lal Chowdhuri v The Union of India*,[159] *Public Prosecutor v Su Liang Yu*,[160] *Malaysian Bar*,[161] *Lee Keng Guan v Public Prosecutor*[162] and *Taw Cheng Kong (CA)*.[163] The Judge's findings are summarised below:[164]

> (a) There is a strong presumption that an impugned law is constitutional. The presumption stems from the wide power of classification which the Legislature has in making laws operating differently as regards different groups of persons to give effect to its policies.
>
> (b) The court *prima facie* leans in favour of constitutionality and supports the impugned legislation if it is reasonable to do so.
>
> (c) The party challenging the validity of legislation has to discharge the burden of rebutting the presumption by providing some material or factual evidence to show that it was enacted arbitrarily or had operated arbitrarily.[165]

B. There should be no presumption of constitutionality in constitutional adjudication

109 This article argues that the presumption of constitutionality has no role in constitutional adjudication, and the courts should cease to presume that differentiating laws, whether civil or criminal, that are impugned for violation of Art 12(1) are constitutional unless proven otherwise by the applicant.[166] The reasons are discussed below.

C. Rationale of presumption – Legislature knows best

110 In *Middleton*, the US Supreme Court held that the Texas Workmen's Compensation Act, which compelled employers of more than five employees to provide workmen's compensation insurance for

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159 In *Chiranjit Lal Chowdhuri v Union of India* 1950 SCR 869 at 913, Mukherjea SCJ said:

> [I]t is not disputed also on behalf of the respondents that the presumption is always in favour of the constitutionality of an enactment and the burden is upon him who attacks it, to show that there has been transgression of constitutional principles.

160 [1976] 2 MLJ 128.

161 *Malaysian Bar v Government of Malaysia* [1987] 2 MLJ 165.

162 [1977–1978] SLR(R) 78.

163 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489.

164 *Lim Meng Suang and Kenneth Chee Mun-Leong v Attorney-General* [2013] 3 SLR 118 at [103]–[104].

165 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [80].

166 The reasons are discussed at paras 93–105 above.

them, but not domestic servants, farm labourers and other specified employees and other labourers, did not violate the Equal Protection Clause and that a party who challenged the constitutionality of such a law must show that the classification was unreasonable or arbitrary. The court explained the rationale of its decision:[167]

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

This passage states the rationale on which the presumption is founded – that the Legislature understands and correctly appreciates the needs of its own people. That being the accepted wisdom, the courts should not question but defer to the judgment of the Legislature on the nitty gritty of such legislation that requires to be built into any classification. The court will presume that the law is not arbitrary in discriminating against classes of persons by classifying them for the purpose of the law. Hence, if any person challenges the constitutionality of the differentiating law, he must prove that it violates a constitutional right – in this case the entitlement of equal protection of law.

111 In *Taw Cheng Kong CA*, the Court of Appeal elaborates on the presumption as follows:[168]

> From the case above and applying the principles adopted, it seemed to us that, *unless the law is plainly arbitrary on its face*, postulating examples of arbitrariness would ordinarily not be helpful in rebutting the presumption of constitutionality. This is because another court or person can well postulate an equal number if not more examples to show that the law did not operate arbitrarily. If postulating examples of arbitrariness can always by themselves be sufficient for purposes of rebuttal, then it will hardly be giving effect to the presumption that Parliament knows best for its people, that its laws are directed at problems made manifest by experience, and hence its differentiation is based on adequate grounds. Therefore, to discharge the burden of rebutting the presumption, it will usually be necessary for the person challenging the law to adduce some material or factual evidence to show that it was enacted arbitrarily or had operated arbitrarily. Otherwise, there will be no practical difference between the presumption and the ordinary burden of proof on the person asserting unconstitutionality. In the present case, no such evidence was adduced by the respondent, and the learned judge simply postulated examples of arbitrariness in a vacuum. That, in our view, could not rebut the presumption. [emphasis added]

167 *Middleton v Texas Power and Light Co* 249 US 152 at 157 (1919).
168 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [80].

This article takes the position that there is indeed no difference between the presumption and the ordinary burden of proof on the person asserting unconstitutionality. If the challenger has the burden of proving unconstitutionality, it is difficult to understand why it is necessary for the court to presume in favour of the Legislature that the impugned law is constitutional.

D. Application of presumption to pre-constitution and post-constitution laws

112 In *Lim Meng Suang HC*, the Judge held that the presumption of constitutionality applied to s 377A without explaining why. The Court of Appeal in *Lim Meng Suang CA* also held that the presumption was applicable on the ground that pre-constitution laws are not "inferior" to post-constitution laws as they constitute part of the *corpus* of Singapore law, although they did not operate as strongly as compared to post-constitution laws which would have been promulgated in the context of an elected legislature. It is not clear what the qualification (of "not inferior") entails, but with respect, the reasoning puts the cart before the horse. A pre-constitution law constitutes part of the law of Singapore after the commencement of the Constitution *only* if it conforms to the Constitution as stipulated under Art 162. This is the very issue before the court, that is, whether s 377A conforms to the Constitution. If any pre-constitution law is presumed to be constitutional, Art 162 would serve no purpose. Furthermore, the presumption is premised on the fact that the Legislature understands the needs of the people in treating them differently. This premise is absent in the case of a pre-constitution statute.[169] It is submitted that the Courts erred in holding that the presumption of constitutionality applies to pre-constitution laws.

169 See *Navtej Singh Johar v Union of India* Writ Petition (Criminal) No 76 of 2016 (India: Supreme Court, 6 September 2018), where Nariman SCJ explained why no such presumption applied to a pre-constitution statute (at [90] of his judgment):

> The presumption of constitutionality of a statute is premised on the fact that Parliament understands the needs of the people and that, as per the separation of powers doctrine, Parliament is aware of its limitations in enacting laws … and cannot transgress the fundamental rights of the citizens and other constitutional provisions in doing so. Parliament is therefore deemed to be aware of the aforesaid constitutional limitations. Where, however, a pre-constitution law is made by either a foreign legislature or body, none of these parameters obtain. It is therefore clear that no such presumption attaches to a pre-constitutional statute like the Indian Penal Code. In fact, in the majority judgment of B P Jeevan Reddy J in *New Delhi Municipal Council v State of Punjab and Ors* (1997) 7 SCC 339, the Punjab Municipal Act of 1911 was deemed to be a post-constitutional law inasmuch as it was extended to Delhi only in 1950, as a result of which the presumption of constitutionality was raised. Ahmadi CJ's dissenting opinion correctly states that if a pre-

(*cont'd on the next page*)

E. The presumption and the fundamental principles of natural justice

113 The legal system of Singapore incorporates the adversarial trial, under which a party who asserts a fact or a claim has the legal burden of proving it, whether in civil or criminal matters. However, there is also an evidential burden of proving a particular fact. The burden of proving a particular fact may shift to the opposite party in the course of the trial. These principles were developed in common law trials and are enacted in ss 103–108 of the Evidence Act.[170]

114 In this connection, it is necessary to recall what the Privy Council said in *Ong Ah Chuan v Public Prosecutor*[171] ("*Ong Ah Chuan*") on the meaning of the word "law" in Art 9(1):[172]

> 26 In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' in such contexts as 'in accordance with law', 'equality before the law', 'protection of the law' and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by Art 5) of Arts 9(1) and 12(1) would be little better than a mockery.
>
> 27 One of the fundamental rules of natural justice in the field of criminal law is that a person should not be punished for an offence unless it has been established to the satisfaction of an independent and unbiased tribunal that he committed it. This involves the tribunal's being satisfied that all the physical and mental elements of the offence with which he is charged, conduct and state of mind as well where that

constitutional law is challenged, the presumption of constitutional validity would not obtain.

In *Norris v Attorney-General of Ireland* [1984] IR 36, two Supreme Court judges held that the presumption did not apply to pre-constitution laws (O'Higgins J at 54, McCarthy J at 95).

170 Cap 97, 1997 Rev Ed. The Evidence Act is a pre-constitution law that conforms to the Constitution.

171 [1979–1980] SLR(R) 710.

172 *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710 at [26] and [27], *per* Lord Diplock.

> is relevant, were present on the part of the accused. To describe this fundamental rule as the 'presumption of innocence' may, however, be misleading to those familiar only with English criminal procedure. Observance of the rule does not call for the perpetuation in Singapore of technical rules of evidence and permitted modes of proof of facts precisely as they stood at the date of the commencement of the Constitution. These are largely a legacy of the role played by juries in the administration of criminal justice in England as it developed over the centuries. Some of them may be inappropriate to the conduct of criminal trials in Singapore. What fundamental rules of natural justice do require is that there should be material before the court that is logically probative of facts sufficient to constitute the offence with which the accused is charged.

The above passages describe a criminal trial. The principles are the same in a civil trial, except that the standard of proof is lower. Constitutionalising the fundamental principles of natural justice gives effect to the concept of a fair trial. It may be asserted that *Ong Ah Chuan* has effectively decided that there is a constitutional right to a fair trial.

115 The presumption of constitutionality is neither a statutory nor a common law presumption. It is a judge-made presumption, like the reasonable classification test. It reflects judicial deference to the Legislature's better appreciation and knowledge of the needs of the people when enacting laws to promote the public good. However, where a law is impugned for violating the Constitution, it raises a legal issue that is within the exclusive domain of the courts. The role of the court is to apply the established principles of proof and not to presume the constitutional validity of the impugned law. The Privy Council held in *Ong Ah Chuan* that the established principles of proof are part of the fundamental rules of natural justice that were incorporated into our system of law that was in operation at the commencement of the Constitution. What are these principles of proof?

F. Principles of proof in judicial review proceedings

116 All the decisions of the US Supreme Court and the Indian Supreme Court cited by the Judge in which the presumption was applied or referred to were made in judicial review proceedings, which are in the nature of civil proceedings.[173] The latest case of *Navtej Singh Johar v Union of India* before the Indian Supreme Court was a writ petition. In such proceedings, the petitioner or the applicant, as the case may be, has the burden of producing evidence to prove his allegations of fact on a

173 For example, *Middleton v Texas Power and Light Co* 249 US 152 (1919); *Chiranjit Lal Chowdhuri v Union of India* 1950 SCR 869; and *Yick Wo v Hopkins* 118 US 356 (1886).

balance of probabilities. However, in the course of the trial, the evidential burden of proving a particular fact may shift to the other party because only that party has knowledge of such fact. To illustrate these points, suppose Parliament enacts a law that disqualifies any woman aged 50 years or above from driving any motor vehicle. Such a law facially discriminates against women within that class, *vis-à-vis* women outside the class, and also all men. The law is plainly discriminatory. Any aggrieved applicant who challenges the validity of the law for violating her fundamental right of equality before the law under Art 12(1) can discharge the burden initially of showing *prima facie* unconstitutionality by referring to the terms of the law. There is no room for the presumption to apply since the law is discriminatory on its face.[174] The challenge will succeed if the Attorney-General does not bring evidence to rebut the facial discrimination. The evidential burden of producing rebuttal evidence shifts to the Attorney-General. He can discharge the burden by adducing evidence to show that the purpose of the law is to protect such class of women drivers, and also the public, from harm (in the form of physical injury to themselves and other road users and also economic loss to affected persons). Such law would advance or serve a legitimate state interest, and the purpose of the law would be reasonable.

117 What might the evidence be? It might be, for example, official data showing that women of that class have caused more than 50% of road accidents in the past five years. This is a reasonable principle in the law of evidence because the aggrieved applicant would not have any knowledge of why the law discriminates against women of her class. The reasons for enacting the law are not within her knowledge but within the special knowledge of the defendant. Section 108 of the Evidence Act provides that: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."[175] If the Attorney-General brings no evidence to explain the purpose of the discriminatory law and that it serves a legitimate state interest, the court has no choice but to hold that the law violates the applicant's right to equality with other women and men under Art 12(1). Of course, the applicant may also respond to the rebuttal evidence that an outright ban is unreasonable if a large percentage of women drivers within the classification did not cause any traffic accidents, and that there is a better way to solve the problem. *Craig v Boren* also illustrates this point nicely.

174 See *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [115] – "unless the law is plainly arbitrary on its face".

175 In *Craig v Boren* 429 US 190 (1976), the US Supreme Court applied a higher standard of review to a case of gender classification by requiring the State to prove that the classification served a legitimate state purpose. The State failed to do so in that case (see para 65 above).

118 But even if the applicant seeks to persuade the court that there is a better way to achieve that goal, for example, imposing stricter medical, psychological and operational tests on females within the classification, the court may very well defer to the judgment of Parliament on its choice of remedy. In so doing, the court is not presuming that the law is constitutional, but rather holding that it is not in a position to hold that Parliament is wrong in its choice of remedy. It is very much a fact-centric judgment.[176]

G. Principles of proof in criminal proceedings

119 The burden of proof in criminal proceedings is even more onerous for the Public Prosecutor. Section 377A is a criminal law. If a person is charged with an offence under s 377A, the Public Prosecutor has the legal burden of proving the guilt of the defendant beyond a reasonable doubt. The legal burden does not shift to the defendant throughout the trial. Under the current Criminal Procedure Code,[177] the Prosecution has to prove a *prima facie* case that the defendant has a case to answer (under the test established in *Haw Tua Tau v Public Prosecutor*),[178] by adducing evidence which, if unrebutted, would prove the charge against the defendant. If his defence is called upon, the defendant may argue that the impugned law (say, s 377A) discriminates against him as a male *vis-à-vis* other males or females who can commit the same kinds of acts without committing an offence. Since the discrimination in s 377A is self-evident, and facially violates equality before the law under Art 12(1), the burden of producing evidence to show the purpose of the law to prove otherwise shifts to the Prosecution. The prosecutor has to produce evidence to show that the legislative classification is reasonable, that is, the purpose of s 377A is reasonable, that is, it serves a legitimate state purpose, that is, the classification has a rational relation to the purpose of s 377A. Upon the production of such evidence, it is then the function of the court to

176 In *Ram Krishna Dalmia v Justice Tendolkar* AIR 1958 SC 538 at 547, the Indian Supreme Court said (which statement was approved in Lee *Keng Guan v Public Prosecutor* [1977–1978] SLR(R) 78 at [19]):

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

177 Cap 68, 2012 Rev Ed.

178 [1979–1980] SLR(R) 266 (CCA); [1981–1982] SLR(R) 133 (PC).

decide whether, on the materials before the court, the impugned law satisfies the reasonable classification test.

120 In criminal proceedings, the Prosecution has to prove the guilt of the accused beyond a reasonable doubt, on the evidence and on the law. The accused is presumed to be innocent until proven guilty. This is better known as the presumption of innocence. In Singapore, the presumption of innocence or the criminal burden of proof is enacted in s 103 of the Evidence Act read with s 230(1)(*d*) of the Criminal Procedure Code. The legal burden of proof of guilt in criminal proceedings does not shift. For this reason, the presumption of constitutionality is incompatible with the presumption of innocence, and is displaced by it.

H. Lee Keng Guan v Public Prosecutor

121 In Singapore, the courts have applied the presumption of constitutionality against the defendant in criminal proceedings. How did that happen? It is suggested that it happened because our courts did not draw a distinction between criminal proceedings and judicial review proceedings, which are civil proceedings. In the US, all challenges to the constitutionality of state and federal laws are by way of judicial review. Similarly, all the Indian decisions where the presumption was applied were also judicial review proceedings. In Singapore, the presumption was applied by the Court of Criminal Appeal in *Lee Keng Guan v Public Prosecutor*[179] ("*Lee Keng Guan*") as a matter of course. In that case, the appellants appealed against their conviction and death sentence under s 4 of the Arms Offences Act 1973[180] which was in terms of criminal liability similar to s 324 of the Penal Code,[181] which carried a non-capital sentence. The appellants argued that s 4 was unconstitutional as it enabled the Public Prosecutor to treat offenders unequally. The Court of Appeal accepted the principles stated in the Indian Supreme Court decision in *Ram Krishna Dalmia v Justice Tendolkar*[182] (which was a civil proceeding), and said:[183]

> We accept the principles contained in these passages and we now proceed to consider whether, *in the light of these principles, s 4 of the Act ought to be struck down as violating Art 8(1) of the Constitution because it enables the executive to arbitrarily discriminate between persons similarly situate[d]*. [emphasis added]

179 [1977–1978] SLR(R) 78.
180 Act 61 of 1973.
181 Cap 103, 1970 Rev Ed.
182 AIR 1958 SC 538.
183 *Lee Keng Guan v Public Prosecutor* [1977–1978] SLR(R) 78 at [20].

122 After tracing the history of s 4, the Court of Appeal said:[184]

> 26 In our opinion, because of the history and prevailing circumstances from time to time which are matters of common knowledge and common report, successive Legislatures from 1947 have felt the need and have enacted legislation to deal exclusively with the unlawful possession, carrying and use of arms and to prescribe the appropriate punishment for these crimes.
>
> 27 Applying the principles, which we adopt and have earlier set out, laid down by the Supreme Court of India *we are of the opinion that the presumption that s 4 of the Act is constitutional has not been rebutted merely by drawing our attention to a provision in the Penal Code* (enacted over a century ago and was according to its long title, a codifying enactment 'to consolidate the law relating to criminal offences') under which a person who 'uses' or attempts to 'use' an arm can also be charged and on conviction be liable to less severe punishment than if charged under s 4 of the Act.
>
> 28 *In our judgment, it is clear that the policy of the Legislature as enacted in the Arms Offences Act 1973 is that all persons who unlawfully possess, carry or use arms should be charged and on conviction punished under the Act and therefore there is no discrimination inherent in the Act itself. In our judgment s 4 of the Act does not violate the provisions of Art 8(1) of the Constitution.*
>
> [emphasis added]

123 The decision in *Lee Keng Guan* that the Act was not inherently discriminatory is undoubtedly correct because s 4 was gender neutral, and therefore applied to all persons. But that was not the substance of the appellants' argument. Their argument was that because the Public Prosecutor had an unfettered discretion to charge the appellants either under s 324 of the Penal Code or under s 4, the power would enable him to arbitrarily discriminate between persons similarly situated.[185] This was an issue of executive (prosecutorial) decision, and not a legislative action (s 4). The presumption of constitutionality of s 4 was not relevant in *Lee Keng Guan*. It was not necessary for the court to apply the presumption to hold s 4 constitutional. The court had unwittingly applied the presumption applicable in civil proceedings to criminal proceedings without being aware of their procedural differences. The Court of Appeal in *Taw Cheng Kong CA* also failed to note this distinction in *Lee Keng Guan* in holding that "[t]he correct application of the presumption was demonstrated by this court in *Lee Keng Guan v PP*".[186]

184 *Lee Keng Guan v Public Prosecutor* [1977–1978] SLR(R) 78 at [26]–[28].

185 Similar arguments were raised and dismissed in *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 and *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49.

186 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [78].

I. Legislative validity and constitutional validity

124 In *Lim Meng Suang CA*, the Court of Appeal expressed the view that the presumption of constitutionality is "logical as well as commonsensical" as Parliament "is presumed not to enact legislation which is inconsistent with the Singapore Constitution".[187] It is suggested, with respect, that this statement is overbroad. The rationale for the presumption is well known, and is generally understood to apply to economic or welfare legislation. In the US, the presumption does not apply to laws that burden fundamental rights. It also does not apply to laws that discriminate on the basis of gender. Its applicability or otherwise is not a matter of logic, but of judicial policy. Whether or not a written law or a provision thereof violates the Constitution is within the exclusive purview of the courts to decide under the separation of powers. If the presumption is treated as a substantive doctrine, it is not possible to reconcile it with the fundamental rules of natural justice that form part of the system of law under Art 9(1) of the Constitution, which requires an impartial tribunal to adjudicate any dispute before it. In ordinary administrative law adjudication, it is unlawful for the court to presume the very outcome which is its duty to determine. It is suggested that there is good reason to take another look at the presumption of constitutionality to see whether it serves a useful purpose in constitutional adjudication.

125 It is also suggested that the presumption of constitutionality does not fit well with the principles of proof in the civil or criminal process in Singapore. If applicable at all, it would be applicable only in the interstices of the judicial process; for example, a law passed by Parliament is presumed to be valid (but not necessarily constitutional) after it has complied with the requisite legislative procedures. The presumption should be used as a figure of speech, and is no different from the presumption of innocence (which merely means that the Prosecution has the burden of proving the defendant's guilt beyond a reasonable doubt). To avoid any confusion as to its effect on a law, the court should not apply the presumption of constitutionality in judicial review or criminal proceedings. Nothing is lost to the judicial process if the presumption is discarded in constitutional adjudication. This is borne out by the fact that there has yet to be reported a case where a court has dismissed a challenge to the constitutionality of any law, whether in civil or criminal proceedings, solely on the basis that the applicant or the defendant has not rebutted the presumption.

187 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [4].

IX. Scope of Article 162

126 In contrast to Art 4 which voids any post-constitution law if it is inconsistent with the Constitution, Art 162 preserves the validity of any pre-constitution law inconsistent with the Constitution by mandating the courts to construe it to conform to the Constitution. It would appear that the constitution-makers decided on this third or middle way as a compromise between voiding all existing laws which are inconsistent with the Constitution or retaining them as valid law in spite of such inconsistency. Article 162 provides:

> [A]ll existing laws shall continue in force on and after the commencement of this Constitution ... but all such laws shall, subject to this Article, be construed as from the commencement of this Constitution with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution.

127 The operative word in Art 162 is "construed". To construe a statutory provision is to interpret written law to determine its meaning as intended by the Legislature, based on established rules of legal interpretation. The words "construe" and "interpret" are used interchangeably in statutory interpretation or construction. For this purpose, courts have employed various modalities or canons of construction such as literal or textual construction, the contextual construction and the purposive construction, or, in the case of a constitution, the living constitution construction.[188]

128 It should be noted that Art 162 requires existing laws to be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution. If the word "construe" means "interpret", how will the court go about interpreting an existing law with modifications, adaptations, qualifications and exception as may be necessary to bring them into conformity with this Constitution. It is submitted that because of the word "construed", the court cannot rewrite the text of the written law to modify, adapt, qualify, or create exceptions to it in order to make the law conform to the Constitution. It is submitted that what Art 162 does is to require the court to read the law or the words of the law in such a way that the law conforms to the Constitution. This may require the court to interpret the relevant law or the relevant words or clause to have a meaning that makes the law or provision conform to the Constitution.

188 The purposive interpretation is enacted in s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed), which also applies to the interpretation of the Constitution of the Republic of Singapore (1999 Reprint) (see Art 2(9)).

129 In *Lim Meng Suang CA*, counsel for the appellants submitted that s 377A did not conform to trends in international jurisprudence, which militated against discrimination on the basis of sexual orientation, and that s 377A should be struck down entirely or, in the alternative, "should be read down by striking out the words "or private" therein". The court held:[189]

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

130 The court did not refer to Art 162 in holding that the solution of reading down s 377A by striking out the words "in private" in s 377A is outside the powers of the court. It is clear that Art 162 does not allow words or clauses in existing laws to be struck out or rewritten because Art 162 requires such laws to be "construed". However, on the plain meaning of "construed", Art 162 permits the meaning or scope of s 377A to be modified by interpreting or reading it as if the words "in private" were not there. The words "in private" are not struck down or struck out. They will still be in s 377A but the section will be read as if those words are not there, *if it is necessary to construe s 377A such as to make it conform to the Constitution*.[190]

131 It is submitted that Art 162 is clearly intended as a middle or third way of dealing with existing laws when the Constitution was enacted – by requiring the court to construe existing laws inconsistent with the Constitution to conform to the Constitution. That is what it plainly provides, and there should be no reason why those words should not be given their plain meaning.

132 In the case of s 377A, if the court holds that it does not violate Art 12(1), Art 162 will not be engaged. However, if 377A is held to violate Art 12(1), the court must construe s 377A by reading it down, or up, as the case may be, to make it conform to Art 12(1), in line with the

189 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [180].

190 In the recent case of *Navtej Singh Johar v Union of India* Writ Petition (Criminal) No 76 of 2016 (India: Supreme Court, 6 September 2018) the Supreme Court of India read down s 377 of the Indian Penal Code of 1862 by interpreting it to exclude from its ambit anal and oral sex between consenting persons in private, instead of striking down s 377A for unconstitutionality, in order to keep alive the rest of the provision.

reason why the court has held s 377A to be inconsistent with Art 12(1). If it is the words "in private" that render s 377A inconsistent with Art 12(1), then s 377A will be read down by treating those words as no longer existing in 377A. If the reason for the constitutional violation is that s 377A applies only to males, then the word "male" will be read as "person", and so on. However, if s 377A were held to be unconstitutional in 2013 for violation of Art 12(1) because its purpose in 1938, that is, the social conditions that caused its enactment, has ceased to exist, then s 377A, in covering only non-penetrative sex between males, may have to be read in such a way that it applies to all persons who commit acts of gross indecency in public. The preservation of public morality or decency would still be a valid purpose of s 377A in 2007, 2013 or today. The construction is achieved by modifying, adapting or qualifying the words or the text to conform to Art 12(1), as mandated by Art 162.

X. Summary of conclusions and submissions on s 377A

133 The conclusions and submissions of this article on the decisions of the Courts on the constitutional validity of s 377A are as follows:

(a) Section 377A was not intended by the Legislative Council to cover penetrative sex, that is, anal or oral sex, when it was enacted in 1938 as the same offences had already been covered by s 377 since 1872. Section 377A covers only non-penetrative sex, such as masturbation and other kinds of sexual touching and "lewd" acts.

(b) In so far as the Courts have decided that s 377A does not violate the fundamental rights of equality before the law and equal protection of the law on the basis that s 377A covers penetrative sex, the decisions are not binding on lower courts as being given *per incuriam*.

(c) If so, it is open to an applicant or defendant in a new action or prosecution to contend that s 377A violates Art 12(1) on the ground that it unreasonably or arbitrarily discriminates against male homosexuals in respect of acts of gross indecency of a non-penetrative nature.

(d) If s 377A had been enacted to criminalise penetrative sex covered under s 377, it would have the effect of impliedly repealing the same offences in s 377. If s 377A had impliedly repealed those offences in s 377 in 1938, those offences criminalised by s 377A would have been impliedly repealed by s 376(1)(*a*) in 2007 to the extent of their inconsistency, that is, with respect to consensual penetrative sex between males.

(e) Under s 376(1)(*a*), consensual penetrative sex between males in private is no longer criminalised as an unnatural

offence (because s 377 has been repealed) but is punishable under s 20 of the Minor Offences Act or s 294(*a*) of the Penal Code, if performed in public.

(f) The legislative purpose or object of s 377A determined at the time of its enactment in 1938 will always remain the same thereafter. Accordingly, the retention of s 377A by Parliament in 2007 does not affirm or reaffirm its 1938 purpose.

(g) Section 377A was enacted for the purpose of dealing with the mischief of male prostitution and its associate activities (which involved male homosexual conduct) which were rife in 1938, and not because male homosexual conduct was not acceptable in Singapore society in 1938.

(h) The purpose of s 377A as described in (g) above ceased to exist or was no longer valid in 2007 or 2013, or there was no evidence that similar conditions existed in 2007 or 2013. If so, the legislative classification (or differentia) would no longer be reasonable and would not have rational relation to the purpose of s 377A (having ceased to exist). Section 377A therefore cannot satisfy the requirements of the reasonable classification test and therefore violates Art 12(1).

(i) Section 377A, being a pre-constitution law, cannot be declared void for unconstitutionality because Art 162 requires any existing law to be construed to conform to the Constitution. Accordingly, the court has to interpret s 377A by reading it to have a meaning that does not violate the Constitution. How s 377A should be construed (or read) to conform to the Constitution depends on the nature of its inconsistency with Art 12(1).

(j) If the purpose of s 377A has ceased to exist in 2007 or 2013, s 377A may be construed to conform to the Constitution by reading it as a gender-neutral provision that criminalises non-penetrative sex of gross indecency committed in public.
