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EQUAL JUSTICE AND THE PROSECUTORIAL POWER

This article considers the many novel propositions raised in the Court of Appeal's judgment in *Tan Seng Kee v Attorney-General* [2022] SCGA 16. The Court of Appeal ruled, among other things, that the appellants lacked *locus standi* because the Attorney-General, in recognition of the Government's "political compromise" in not repealing and not proactively enforcing s 377A of the Penal Code, had undertaken not to enforce the law. Such undertaking amounted to representations that engendered a substantive legitimate expectation that s 377A would not be enforced, which led the Court to declare that s 377A was unenforceable in its entirety. This article offers alternative interpretive approaches to these propositions, including the application of the reasonable classification test to s 377A and Art 12(1) of the Constitution, and further argues that there was no convincing basis for the Court not to address the primary issue in the appeals, *viz*, the constitutionality of s 377A.

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I. Introduction

1 In *Tan Seng Kee v Attorney-General*[1] ("*Tan Seng Kee*"), the Court of Appeal ("CA2022") delivered a judgment ("Judgment") dismissing the appeals of the three appellants and declined to address the constitutional questions raised before it on the ground that they had no standing "at this time".

2 The CA2022's holding that the appellants had no standing at this time was a surprise to the appellants, having regard to the following circumstances:

1 [2022] 1 SLR 1347.

(a) the appeals were a continuation of the High Court proceedings in *Ong Ming Johnson v Attorney-General*[2] ("*Johnson Ong*"), where they had standing;

(b) the parties to the appeals had made full submissions on the constitutional questions as the issue of standing was not raised by the CA2022 during the oral hearing;

(c) the CA2022 had jurisdiction, and could have addressed the constitutional questions;[3] and

(d) the constitutional questions on Arts 9(1) and 12(1) had been decided by the High Court ("HC2013") in *Lim Meng Suang v Attorney-General*[4] *("Lim Meng Suang HC*") and affirmed on appeal by the Court of Appeal ("CA2015") in *Lim Meng Suang v Attorney-General*[5] ("*Lim Meng Suang CA*").

3 The reasons for the CA2022's holding that the appellants had no standing at this time are set out in the Judgment as follows:[6]

(a) The Government struck a political compromise in 2007, which was echoed and elaborated on by the Attorney-General Lucien Wong SC ("AG Wong") in 2018.

(b) AG Wong's representations engendered legitimate expectations that deserve legal protection so that the political compromise on section 377A of the Penal Code ("s 377A") may be properly upheld.

(c) To give full effect to the political compromise and, in turn, AG Wong's representations in a legally acceptable manner, the entirety of s 377A is unenforceable unless and until the AG of the day provides clear notice that he, as the Public Prosecutor ("PP"): (i) intends to reassert his right to enforce s 377A proactively by way of prosecution; and (ii) he will no longer abide by his representations made as the AG.

(d) The appellants "do not face any real and credible threat of prosecution under s 377A at this time and therefore do not

2 [2020] SGHC 63.

3 The CA2022 held, *obiter*, that s 377A of the Penal Code (Cap 224, 2008 Rev Ed) does not violate Arts 9(1) and 14(2) of the Constitution (1985 Rev Ed, 1999 Reprint). This article is not concerned with this holding. If the CA2022 decided the constitutional issues, whatever the outcome might be, the question of the appellants' standing would have been irrelevant.

4 [2013] 3 SLR 118.

5 [2015] 1 SLR 26.

6 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [330].

have standing to pursue their constitutional challenges to that provision".

4 The CA2022 also addressed other "important questions of public interest",[7] including the separation of powers, the Attorney-General's ("AG's") prosecutorial power, the doctrine of substantive legitimate expectations, the purposive interpretation, the reasonable classification test and the scope of s 377A. The constitutional question that was not addressed is whether s 377A violates Art 12(1) ("the Constitutional Question").

A. Purpose of article

5 This article proposes alternative arguments and views from a purely legal perspective on the following issues addressed in the Judgment:

(a) The political compromise and its significance.

(b) The prosecutorial power and AG Wong's representations.

(c) The doctrine of substantive legitimate expectations ("DSLE").

(d) The appellants' standing in the appeals.

(e) The purposive interpretation under s 9A(1) of the Interpretation Act ("IA").

(f) The meaning and scope of s 377A.

(g) The reasonable classification test and its application to Art 12(1).

(h) The constitutionality of s 377A having regard to its legislative purpose or object.

(i) The status of s 377A as an existing law under Art 162.

(1) The political compromise and the political package

6 The CA2022's decision that the appellants had no standing *at this time* (but not, be it noted, *before this time*) rests on the socio-political significance that the CA2022 placed on the "political compromise", and the "political package" relating to s 377A. The CA2022 held that it was imperative to accord legal effect to AG Wong's representations under the DSLE in order to give effect to the political compromise:[8]

7 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [331].
8 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [154].

> We end this section by reiterating that our recourse to the doctrine of substantive legitimate expectations should be regarded as wholly exceptional – necessitated only by the imperative of according legal effect to AG Wong's representations, and a consequence of the congruent positions of Parliament, the Government and the AG. Section 377A has not been repealed, but neither can it be enforced.

The meanings of the relevant terms are discussed below.

(a) The "political compromise"

7 The CA2022 defined the term "political compromise" as follows:[9]

> The merits of retaining s 377A were subject to robust and lengthy debate in Parliament in 2007, culminating in a uniquely Singaporean resolution: *a political compromise in which s 377A would be retained* because it was thought to bear important symbolic weight for the conservative mainstream in Singapore. Exceptionally, this was *on the basis that s 377A would not be proactively enforced*, so as to accommodate our homosexual kith and kin. To our knowledge, no other country has struck a similar *political compromise* in respect of laws resembling s 377A.
>
> The aforesaid political compromise was conceived with the express intention of accommodating divergent interests, avoiding polarisation and facilitating incremental change. Its purpose was to keep s 377A as a matter within the democratic space. There are consequences in removing issues of such profound public and moral significance from the realm of democratic decision.
>
> Importantly, the political compromise on s 377A that was forged in 2007 and that has been upheld since then has radically altered the complexion of this provision, in terms of both its constitutionality and its consequences for those whom it might affect. Any discussion on the constitutionality of s 377A therefore *cannot* ignore the terms, the purpose and the consequences of this political compromise.
>
> [emphasis added]

In short, the political compromise refers to the Government's policy of "no repeal, no proactive enforcement of s 377A" (hereafter also called the "G377A policy").

9 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [8]–[10].

B. The "political package"

8 The term "political package" is described as follows:[10]

> However, the political compromise took on a new legal significance in 2018, when *AG Wong articulated a general policy of not prosecuting s 377A offences*. The political compromise forged in 2007 and *AG Wong's representations* in 2018 (as mentioned at [8] and [19] above respectively) collectively form the *political package* surrounding s 377A today … AG Wong's representations are of legal significance and we elaborate on this below.
>
> In our judgment, it would be contrived and unrealistic to ignore the totality of the political package when assessing the legality of s 377A. This is because the political package has, in effect, significantly altered both the way in which s 377A practically affects the lives of homosexual men and what the provision means in Singapore today. As we made clear to the parties, in particular, to Mr Singh:
>
> > Menon, CJ: At the end of the day … the legislative act that we ended up with in 2007 in relation to Section 377A was, I think---if I could put it in these terms, it was a political compromise. It was what you described as a difficult balance. … I don't think it's right to assess [section] 377A, whatever its meaning is, without reference to the reality of that political compromise. In other words, we shouldn't be looking at [section] 377A and its constitutionality today, I suggest to you, ignoring the fact that undertakings have been given in Parliament and subsequently by [AG Wong] in relation to whether it will be enforced or not … We need to factor into the equation the entirety, the package as it exists.
>
> The parties (apart from Mr Thuraisingam) agreed at the hearing that the constitutionality of s 377A could not be divorced from the political package. Mr Tan noted that it was 'not controversial' that the political package forms part of the relevant legal framework that informs our assessment of whether s 377A is constitutional. Mr Singh likewise acknowledged that '[t]he [c]ourt cannot take a blinkered approach and ignore what happened in 2007'. In the same vein, Ms Tan conceded that we ought to 'look at the context in which the constitutionality of [s 377A] is being challenged'. Moreover, in analysing how the political package has affected the constitutionality of s 377A under Art 12, she effectively intimated that the political package could and did have a bearing on whether s 377A is constitutional. Although Mr Thuraisingam questioned the relevance of the political package to the present appeals, there was an air of unreality in the approach that he urged us to adopt, namely, to assess the constitutionality of s 377A in total disregard of the political package. As we have already mentioned, the political package has rendered s 377A radically

10 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [66]–[68]. The political compromise is also discussed or mentioned at *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [65]–[69], [83], [96], [102]–[104], [110]–[112], [114]–[115], [135]–[136], [140], [148] and [150].

> different in meaning and significance from any other provision of the PC. The precise terms and the legal consequences of the political package thus merit careful consideration.
>
> [emphasis added]

As stated in the Judgment,[11] the "political package" consists of the "political compromise" combined with AG Wong's representations made in 2018 in the Attorney-General's Chambers press release of 2 October 2018 ("Press Release") and *The Straits Times*'s article of 6 October 2018.

9 Notwithstanding the concessions of counsel for some of the parties, it is difficult to understand how the constitutionality or legality of s 377A is necessarily affected by the political package. However, these passages – especially the Chief Justice's statement that "we shouldn't be looking at the constitutionality of s 377A today" – gave early warning of where the CA2022 was headed, and that the constitutional questions might no longer be relevant, having regard to "undertakings ... given in Parliament and subsequently by the AG in relation to whether s 377A will be enforced or not".

10 In view of the significance placed on these "undertakings", we now examine what they were and who made them in Parliament during the debate on 22 and 23 October 2007 on Nominated Member of Parliament Mr Siew Kum Hong's petition to repeal s 377A ("Petition"), in conjunction with the debate on the Penal Code (Amendment) Bill 2007 ("2007 Amendment Bill").

C. The parliamentary debate on the petition to repeal section 377A

11 All the Members of Parliament who spoke on the Petition rejected it, except NMP Siew. Factually, the political compromise or the G377A policy was not struck in Parliament in 2007 but was made in response to the strong public reaction to the 2003 case of *PP v Anis bin Abdullah*.[12] In his speech, Mr Hri Kumar referred to the statement issued by Ministry of Home Affairs on 7 November 2006 that s 377A would not be "proactively" enforced against adult males engaging in consensual sex with each other in private. The political compromise was thus a *fait accompli* even before

11 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [66].

12 In *Tan Eng Hong v Attorney-General*, the Court of Appeal at [32] referred to the public disquiet on *Annis bin Abdullah v Public Prosecutor* [2003] SGDC 290, which was reported in *The Straits Times* (see Tanya Fong & Glenys Sim, "Oral Sex Ruling Vexes Many" *The Straits Times* (8 November 2003) at p H1).

the first reading of the 2007 Amendment Bill. The debate itself had no legal significance since no vote was taken on it.

12 In his Second Reading speech, Senior Minister of State for Home Affairs, Associate Professor Ho Peng Kee ("SMSHA") spoke on the G377A policy as follows:[13]

> Sir, section 377A which criminalises *acts of gross indecency between two male adults* will be retained. Public feedback on this issue has been emotional, divided and strongly expressed with the majority calling for its retention. Sir, Singaporeans are still a largely conservative society. *The majority find homosexual behaviour offensive and unacceptable.* Neither side is going to persuade or convince the other of their position. We should live and let live, and let the situation evolve, in tandem with the values of our society. This approach is a pragmatic one that maintains Singapore's social cohesion. Police has not been proactively enforcing the provision and will continue to take this stance. But this does not mean that the section is purely symbolic and thus redundant. There have been convictions over the years involving cases where minors were exploited and abused or where male adults committed the offence in a public place such as a public toilet or back-lane. Sir, whilst homosexuals have a place in society and, in recent years, more social space, repealing section 377A will be very contentious and may send a wrong signal that Government is encouraging and endorsing the homosexual lifestyle as part of our mainstream way of life. [emphasis added]

13 In his speech, the Prime Minister explained the rationale of the Government's G377A policy as follows:[14]

> I take my legal advice from the Attorney-General and his advice to the Government is quite clear. The continued retention of Section 377A would not be a contravention of the Constitution.[15]
>
> … What is our attitude towards homosexuality? 'Our' meaning the Government's attitude and Singaporeans' attitude, too; and how should these attitudes and these values be reflected in our legislation.
>
> Many Members have said this, but it's true and it's worth saying again: Singapore is basically a conservative society.
>
> The family is the basic building block of this society.
>
> It has been so and by policy, we have reinforced this, and we want to keep it so. And by family, in Singapore we mean one man, one woman marrying, having children and bringing up children within that framework of a stable family unit ... I acknowledge that not everybody fits into this mould. Some are single,

13 Singapore Parl Debates; Vol 83; Col 2198; [22 October 2007].
14 Singapore Parl Debates; Vol 83; Cols 2401–2402; [23 October 2007].
15 It may be noted that the AG advised that "[the] continued retention of Section 377A would not be a contravention of the Constitution", and not that s 377A did not contravene the Constitution.

> some have more colourful lifestyles, some are gay. But a heterosexual, stable family is a social norm.
>
> … And I think the vast majority of Singaporeans want to keep it this way, want to keep our society like this, and so does the Government.
>
> But at the same time, we should recognise that homosexuals are part of our society. They are our kith and kin ...
>
> In Singapore ... there is a small percentage who have homosexual orientations and they include people 'who are often responsible, invaluable and highly respected contributing members of society'. …
>
> They too must have a place in this society and they too are entitled to their private lives. We shouldn't make it harder than it already is for them to grow up and to live in a society where they are different from most Singaporeans.
>
> … we should strive to maintain a balance: to uphold a stable society with traditional heterosexual family values, but with space for homosexuals to live their lives and to contribute to the society ...
>
> … The current legal position in Singapore reflects these social norms and attitudes. It is not legally neat and tidy ... But it is a practical arrangement that has evolved out of our historical circumstances …
>
> … Among the conservative Singaporeans, the deep concerns over the moral values of society will remain. And among the gay rights activists, abolition isn't going to give them what they want because what they want is not just to be free from Section 377A, but more space and full acceptance by other Singaporeans. And they said so.
>
> … And abolishing Section 377A, were we to do this, is not going to end the argument in Singapore.
>
> So … I suggest to the Members of the House, we keep this balance, leave Section 377A alone.
>
> … I think there is space in Singapore and room for us to live harmoniously and practically all as Singapore citizens together.
>
> [reference added]

14 The two speeches stated clearly that the purpose of the G377A policy was to "uphold a stable society with traditional, heterosexual family values" and, at the same time, to allow "space for homosexuals to live their lives and contribute to the society". It was a "live and let live" policy.

15 The formulation of the G377A policy is within the Government's exclusive competence to make or unmake in its assessment of what the public interest requires. But it is nonetheless a *policy* and thus not justiciable in law. It does not create or destroy any legal rights in the public, and is thus not subject to judicial review nor is it entitled to any judicial assistance or intervention to effect. By its nature, the G377A policy is an

automatic, self-executing policy. It is not relevant to the question as to whether s 377A violates the Constitution. It is also not concerned with the prosecution of s 377A offences, which is the exclusive preserve of the AG.

D. The meaning of "proactive"

16 The nature of the G377A policy is underscored by the Government's careful use of the word "proactive" whenever it is referred to. When someone, or a policy, is "proactive", that means that steps are taken to prevent things from happening, rather than reacting after the fact. In this context, the word "proactive" refers to the law enforcement agencies taking steps to deter offences from being committed. What these steps are depend on the nature of the offence. Conceptually, this means "proactive policing", a well-established policing practice in many countries. Examples of proactive policing include deploying policemen or police cars to patrol the streets or carrying out raids on massage parlours or gambling dens, or using technology to surveil, or agent provocateurs to entrap offenders.

17 The Prime Minister explained the meaning of "not proactively enforce section 377A" as follows:

> There are gay bars and clubs. They exist. We know where they are. Everybody knows where they are. They do not have to go underground. We do not harass gays. The Government does not act as moral policemen. And we do not proactively enforce section 377A on them (23 October 2007 Debates at col 2401).
>
> 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. (23 October 2007 Debates at col 2402).

In this connection, the CA2022's statement in the Judgment that the Prime Minister did not specify what he meant by the words "proactively enforce" is incorrect.[16] The AG confirmed the Prime Minister's meaning in his Press Statement (see para 36 below.)

16 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [81].

18 The CA2022 has also used the expression "proactive enforcement in relation to the prosecution of offences:[17]

> Given that representations were made by the Government and, subsequently, *by AG Wong to the effect that s 377A would not be proactively enforced*, it would be entirely artificial to ignore that fact and to analyse the constitutionality of s 377A as if this provision were liable to be enforced in the same manner as any other provision of the PC. Significantly, the representations made by the Government and AG Wong would have a practical impact on the lives of homosexual men, which cannot be disregarded. [emphasis added]

This usage is inappropriate since the act of prosecution is necessarily reactive. It is not possible to "proactively" prosecute any offender. The CA2022 noted:[18]

> Before us, Ms Tan confirmed that the PP still maintains the general position of not *proactively enforcing s 377A* and that this position is broadly in line with what was set out in Parliament in 2007. [emphasis added]

19 It should be noted that the Prime Minister did not refer to the investigation of offences by the police in his speech. This is the duty of the police under the Criminal Procedure Code. The Government may not interfere with this statutory duty. Neither can the AG, except to direct further investigations if the initial investigation was inadequate. AG Wong has made clear in para 3 of the Press Release that "if there are reports lodged by persons of offences under section 377A, for example, where minors are exploited and abused, the Police will investigate" (see para 30 below). Law enforcement power is distributed to investigation and prosecution branches to ensure that the criminal justice system is fair to all.

E. The "legality" of the political compromise

20 The CA 2022 appears to have held in the Judgment that the political compromise is subject to judicial review as regards its legality or constitutionality:[19]

17 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [63]. See also *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [149] and [330].
18 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [86].
19 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [13].

> Counsel for the Attorney-General … Ms Kristy Tan SC, contends that whether s 377A should be repealed is a matter that falls within Parliament's constitutional role. She acknowledges, however, that while the court cannot evaluate the policy merits of s 377A, it may determine the *constitutionality* of that provision. We agree. **In our judgment, the legality of the political compromise that was struck in 2007 as regards s 377A similarly falls within the court's institutional sphere.** The fact that an impugned action is of a political nature or has socio-political significance does not, in and of itself, mean that the *legality* or *constitutionality* of that action cannot be assessed by the court – in fact, quite the contrary. **The inherently political nature of the compromise reached on s 377A does not preclude the existence or application of *legal standards* against which its legality or constitutionality can be judged.** [emphasis in italics in original; emphasis in bold added]

This holding is incorrect in law as the G377A policy is not justiciable. The courts have no jurisdiction over policy decisions and therefore there is no legal standard against which the legality or constitutionality of the G377A policy can be judged.

II. The prosecutorial power and the Attorney-General's representations

A. The nature and purpose of the prosecutorial power

21 The meaning of the AG's representations cannot be fully understood without an appreciation of the AG's vital role as the PP in the criminal justice system. He has or is vested with a constitutional duty or responsibility to enforce the criminal law to combat and check the growth of crime in society, to protect and maintain public order, public safety and to maintain and social stability, with the assistance of the police. This duty or responsibility is vested in AG under Art 35(8),[20] which provides:

> The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence.

Article 35(8) does not, however, give the AG absolute power in how he exercises his prosecutorial discretion. Its purpose is to protect his independence in exercising the prosecutorial discretion.[21]

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20 Article 35(8) was part of the draft 1957 Constitution of the Federation of Malaya, prepared by the Reid Commission, whose members included Lord Reid, a Law Lord and Sir Ivor Jennings, a leading constitutional lawyer. They would have been familiar with the Shawcross Statement.

21 See Kumaralingam Amirthalingam, "Prosecutorial Discretion and Prosecutorial Guidelines" [2013] SJLS 50 at 52.

B. The prosecutorial discretion is "almost" inviolable

22 In *Tan Eng Hong v Attorney-General*,[22] the Court of Appeal agreed that the AG's prosecutorial discretion is "almost" inviolable, in that "that no binding assurance could be given that no future prosecutions would ever be brought under s 377A":[23]

> An even more fundamental point ought to be raised. As acknowledged by Mr Abdullah, ministerial statements do *not have the force of law* and do not bind the AG, who exercises his prosecutorial discretion independently. While we are confident that the AG will consider general governmental policy in exercising his discretion, this cannot be a fetter on his exercise of that discretion. *Before this court, it was made abundantly clear that no binding assurance could be given that no future prosecutions would ever be brought under s 377A*. Moreover, even if an assurance from the AGC were forthcoming, as demonstrated in *PP v Knight Glenn Jeyasingam* [1999] 1 SLR(R) 1165 ('*Glenn Knight*'), a representation by an incumbent Attorney-General cannot bind future Attorney-Generals. In *Glenn Knight*, where it was revealed that the then Attorney-General had decided to commence a prosecution against the respondent in that case despite a purported letter promising him immunity from future prosecution, the court held that that decision could not be impugned due to 'the almost inviolable discretion of the AGC to prosecute' (at [70]) (for a more in-depth analysis of the constitutional status of the prosecutorial discretion and its limitations, see *Ramalingam Ravinthran* ([171] *supra*), especially at [27], [28], [44], [45] and [51]–[53]).
>
> Further, there is nothing to suggest that the policy of the Government on s 377A will not be subject to change. Just as the AG cannot fetter his discretion on policy matters, the Executive cannot fetter its discretion on the same. Ministerial statements in Parliament on policy matters do not invariably bind a future or even the same government. The Executive's discretion to determine policy remains unfettered and it has the right to change its policy with regard to the enforcement of s 377A. Therefore, as long as s 377A remains in the statute books, the threat of prosecution under this section persists, as the facts of this case amply illustrate.
>
> [emphasis in original]

23 In *Public Prosecutor v Knight Glenn Jeyasingam* ("*Glenn Knight*"), Yong Pung How CJ said:[24]

> As a branch of government, the judiciary has the decision-making power to affect whatever concerns the administration of justice. This is circumscribed only to the extent that Art 35(8) vests prosecutorial discretion in the AGC. In fact, the revision below which questioned the exercise of the AGC's discretion in prosecuting the accused despite a purported letter promising immunity

22 [2012] 4 SLR 476.
23 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [181]–[182].
24 [1999] 1 SLR(R) 1165 at [70].

> from future prosecution, confirmed the almost inviolable discretion of the AGC to prosecute.

Yong CJ held as follows:

> (a) that the prosecutorial discretion was "almost" inviolable, except in plea bargaining where the "representations" of the accused to the PP are confidential and may not be relied on by the PP in a subsequent prosecution;[25] and
>
> (b) "the process of plea negotiations brings immeasurable benefit to the criminal justice system. In order for such a process to be effective, the confidentiality of representations made during plea negotiations must be protected".[26]

24 The decision in *Glenn Knight* implies that the AG's decision in entertaining a plea bargain and accepting it is no different from the exercise of his prosecutorial discretion in not prosecuting an offender or reducing the charge in the public interest. The plea bargain is not an exception to the AG's inability to fetter his prosecutorial discretion. There are cogent legal and public policy reasons why, in all other circumstances, the PP may not fetter his prosecutorial discretion. In this connection, it may be recalled that the Prosecution reduced the s 377A charge against Tan Eng Hong to a charge under s 294(*a*) of the Penal Code for committing an obscene act in a public place, to which Tan pleaded guilty and was fined.[27]

C. The prosecutorial discretion is subject to judicial review

25 However, the PP may not exercise prosecutorial discretion contrary to law. Hence, it is subject to judicial review, but on limited grounds. As the CA2022 said:[28]

> It is a matter of settled law that the PP makes all prosecutorial decisions without interference from other parts of the Executive and that his decisions can only be challenged on limited grounds such as unconstitutionality and abuse of prosecutorial power (see [*Ramalingam* at [17]], citing *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [149]).

26 In *Ramalingam Ravinthran v Attorney-General*[29] ("*Ramalingam*"), the Court of Appeal reviewed the decisions in *Ong Ah Chuan v Attorney-*

25 *Public Prosecutor v Knight Glenn Jeyasingam* [1999] 1 SLR(R) 1165 at [70].
26 *Public Prosecutor v Knight Glenn Jeyasingam* [1999] 1 SLR(R) 1165 at [71].
27 See *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [27] and [42]–[48].
28 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [101].
29 [2012] 2 SLR 49.

General[30] ("*Ong Ah Chuan*"), *Teh Cheng Poh v Public Prosecutor*,[31] *Sim Min Teck v Public Prosecutor*[32] and *Thiruselvam s/o Nagaratnam v Public Prosecutor*[33] on the exercise of the PP's prosecutorial discretion, and held:[34]

> It is important to note that in *Sim Min Teck*, this court did not decide that the Prosecution could never contravene Art 12(1) in exercising its prosecutorial discretion in a particular case. On the contrary, it recognised, by quoting from [56] of *Teh Cheng Poh*, that there could be such a contravention. In contrast, this court went further in *Thiruselvam* (as stated above at [36]) and, in so doing, almost appeared to have held that no exercise of the prosecutorial discretion could possibly breach Art 12(1) because of the width of that discretion. In our view, this is not the law (as the court of 3 Judges stated in *Phyllis Tan* ([14] *supra*) at [149] (reproduced at [17] above)). If it were the law, the prosecutorial discretion would override the fundamental liberties conferred by Pt IV of the Constitution. This outcome is not acceptable because an exercise of an executive decision-making power, even one with a constitutional status, cannot be allowed to override a fundamental liberty enshrined in the Constitution.

27 The Court of Appeal went on to restate these principles as follows:[35]

> The Attorney-General is the custodian of the prosecutorial power. He uses it to enforce the criminal law not for its own sake, but for the greater good of society, *ie*, to maintain law and order as well as to uphold the rule of law. Offences are committed by all kinds of people in all kinds of circumstances. It is not the policy of the law under our legal system that all offenders must be prosecuted, regardless of the circumstances in which they have committed offences. Furthermore, not all offences are provable in a court of law. It is not necessarily in the public interest that every offender must be prosecuted, or that an offender must be prosecuted for the most serious possible offence available in the statute book. Conversely, while the public interest does not require the Attorney-General to prosecute any and all persons who may be guilty of a crime, he cannot decide at his own whim and fancy who should or should not be prosecuted, and what offence or offences a particular offender should be prosecuted for. The Attorney-General's final decision will be constrained by what the public interest requires.

30 [1981] AC 648.
31 [1979] 1 MLJ 50.
32 [1987] SLR(R) 65.
33 [2001] 1 SLR(R) 362.
34 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [41].
35 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [53].

D. The Attorney-General has a duty or responsibility to enforce the criminal law

28 Any failure by the AG to enforce the criminal law when there is sufficient evidence to prosecute (in the absence of any countervailing public interest) is a breach of his constitutional duty or responsibility. In *Gouriet v Union of Post Office Workers*,[36] Lord Wilberforce stated the principle as follows:

> When Parliament decides to prohibit certain conduct (e.g., delaying the mail) it enacts legislation defining the prohibited act (e.g., Post Office Act 1953, sections 58, 68). To violation or disregard of the prohibition it attaches a sanction - prosecution as for a misdemeanour with a possible sentence of two years' imprisonment. Enforcement of the law means that any person who commits the relevant offence is prosecuted. So it is the duty either of the Post Office itself, or of the Director of Public Prosecutions or of the Attorney-General, to take steps to enforce the law in this way. *Failure to do so, without good cause, is a breach of their duty* (for a recent formulation of this duty see the statement of Sir Hartley Shawcross AG (1951) in Edwards, *The Law Officers of the Crown* (1964), p. 223).

The legal position in Singapore, it is submitted, is the same as that stated in Lord Wilberforce's judgment.[37]

29 It is against this constitutional context of the AG's prosecutorial power that the meaning and intent of AG Wong's representations should have been considered.

E. The 2018 Attorney-General's Chambers press release

30 On 2 October 2018, the AG issued the Press Release, which read:

> GOVERNMENT HAS NOT REMOVED OR RESTRICTED PROSECUTORIAL DISCRETION FOR SECTION 377A, PUBLIC PROSECUTOR RETAINS FULL PROSECUTORIAL DISCRETION
>
> Former Attorneys-General, Professor Walter Woon and Mr VK Rajah, have recently suggested that it is not desirable for the Government and Parliament to direct the Public Prosecutor (PP) not to prosecute offences under section 377A of the Penal Code, or to create the perception that they are doing so. Such comments may give rise to the inaccurate impression that the exercise of the PP's discretion has been removed or restricted in respect of section 377A.

36 [1977] 3 WLR 310.

37 See Kumaralingam Amirthalingam, "Prosecutorial Discretion and Prosecutorial Guidelines" [2013] SJLS 50 at 56–60.

2 Under Article 35(8) of the Constitution, the discretion to institute, conduct or discontinue any proceedings for any offence is vested in the Attorney-General as the PP. In exercising this discretion, the PP seeks only to advance the public interest, taking into account all the facts and circumstances of the case, and other matters such as the recommendations of the investigating agencies and the expressed intention of Parliament.

3 The Government's position on section 377A is that the Police will not proactively enforce this provision, for instance by conducting enforcement raids. However, if there are reports lodged by persons of offences under section 377A, for example, where minors are exploited and abused, the Police will investigate.

4 Where the Police conducts investigations into an offence under section 377A, the Police will decide whether or not there is sufficient basis to refer the case to the PP. It will then be for the PP to determine whether to prosecute. In doing so, the PP exercises his independent discretion on whether to charge the offender, solely on the basis of his assessment of the facts, the law, and the public interest. While the PP is entitled to consider public policies in exercising his discretion, these do not fetter the exercise of prosecutorial discretion.

5 These fundamental principles have been repeatedly affirmed by past and present Attorneys-General and have also been recognized and respected by the Government and Parliament. As an illustration, in 2008, the (then) Deputy Prime Minister and Minister for Home Affairs, Mr Wong Kan Seng, explained that in the case of an offender who had been charged under section 377A of the Penal Code, a police report was lodged by a 16-year-old male who had oral sex with the suspect. The Police referred the case to the PP after completing investigations, and '*[t]he Public Prosecutor decided to charge the accused under section 377A after taking into account all the facts and circumstances of the case, including the complainant's age and the fact that the offence had taken place in a public toilet*'. The Minister also *made clear* that: '*… for any report disclosing an offence, Police will place the evidence before the Public Prosecutor for a decision as to whether or not to proceed with prosecution.*'

6 The Police's exercise of its enforcement or investigative powers should therefore not be conflated or confused with the PP's exercise of discretion to commence prosecution. *The PP's exercise of prosecutorial discretion has always been, and remains, unfettered. In the case of section 377A, where the conduct in question was between two consenting adults in a private place, the PP had, absent other factors, taken the position that prosecution would not be in the public interest.* This remains the position today.

[emphasis added]

F. The Straits Times*'s article*

31 On 6 October 2018, the AG published an article in *The Straits Times* ("the ST Article"), excerpts of which read:[38]

> (a) First, "the Government's position that the police will not proactively enforce Section 377A with respect to private acts had been made public since at least 2006".
>
> (b) In addition, the PP had "consistently taken the position that, absent other factors, prosecution under Section 377A would not be in the public interest where the conduct was between *two consenting adults in a private place*" [emphasis in original]. AG Wong reiterated that this prosecutorial policy had existed "when Mr [VK] Rajah [SC] was the PP and remains so today".

G. The Court of Appeal's conclusions on the 2018 Attorney-General's Chambers press release and The Straits Times*'s article*

32 The CA2022 reviewed the AG's statements in the Press Release and *The Straits Times*'s article ("AG's Statements") and concluded:[39]

> In our judgment, AG Wong's statements are legally significant in three respects. First, they contain guidelines on the exercise of prosecutorial discretion in relation to s 377A offences, which is a matter within the PP's purview. These guidelines, in substance, constitute representations that s 377A will generally not be enforced in cases of sexual conduct between consenting adult men in private (that is to say, acts falling within the Subset as defined at [19] above).
>
> Second, these guidelines and the policy stance they embody are broadly aligned with the public policy and public interest expressed by the Prime Minister during the s 377A Debates. AG Wong was, however, specifically concerned with the enforcement of s 377A by way of prosecution. In that sense, he appears to have been addressing an issue distinct from, although related to, enforcement in the sense of police investigations (see [74] above). This much is evident from para 6 of the 2018 AGC Press Release, where AG Wong stated that '[t]he Police's exercise of its enforcement or investigative powers should … not be conflated or confused with the PP's exercise of discretion to commence prosecution'.
>
> Third, AG Wong stated that the PP's position was consistent with the Government's stance that s 377A would not be proactively enforced. Paragraph 5 of the 2018 AGC Press Release explicitly states that the fundamental principles pertaining to the PP's exercise of his prosecutorial discretion in relation to s 377A offences 'have been repeatedly affirmed by past and present Attorneys-

38 Tanya Fong & Glenys Sim, "Oral Sex Ruling Vexes Many" *The Straits Times* (8 November 2003) at p H1).

39 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [88]–[90].

> General and have also been recognised and respected by the Government and Parliament'. This seeming alignment of positions was later reiterated in the 2018 Straits Times article. We add that the PP's position, as enunciated by AG Wong, is aligned with not only that of the Government but also that of Parliament, given that Parliament chose to retain s 377A in 2007.

33 It is respectfully submitted that the AG's Statements do not have the legal significance attributed to them by the CA2022. They have been given a meaning that is the very opposite of the AG's intent. The AG's Statements should be read simply as a statement of the AG's role as the PP and of his constitutional power as such. Nothing more was intended. An alternative view is provided below.

H. The Attorney-General's Statements were published for information

34 First, the AG's Statements were public clarifications intended to correct any perception (created by two former AGs): (a) that the PP's discretion to prosecute s 377A offences had been removed or restricted by the Government; and (b) to reiterate the AG's independence as the PP in discharging his duty or responsibility to enforce the criminal law. This is clearly spelt out in capital letters in the title of the Press Release (see para 30 above). Paragraphs 2 to 5 spell out the AG's prosecutorial power under Art 35(8) and the fundamental principles applicable to its exercise, which have been repeatedly affirmed by past and present Attorneys-General and recognised and respected by the Government and Parliament, and provide an example of how the prosecutorial discretion was exercised in one case. Paragraph 6 explains the difference between the investigative role of the police and the prosecutorial role of the AG, and reiterates that the PP's prosecutorial power "has always been, and remains, unfettered".

35 Except for the last sentence in para 6 of the Press Release and excerpt (ii) of the ST Article, the AG's Statements iterate the same principles stated by UK Attorney General, Sir Hartley Shawcross in the UK Parliament in 1951 (the "Shawcross Statement") when explaining the nature of the prosecutorial power.[40] The Shawcross Statement has been adopted and applied by a very large number of common law jurisdictions. The policy is that not every offence must be prosecuted. The policy is that the AG has a duty or responsibility to prosecute where there is sufficient evidence to prosecute, and there is no countervailing or overriding

40 The classic statement on prosecutorial discretion was made by Sir Hartley Shawcross, the UK Attorney General in 1951 (see United Kingdom, *House of Commons Debates* (29 January 1951) vol 483 at cols 679–690 (Mr Ungoed-Thomas)).

public interest militating against prosecution. What the public interest is, or requires, depends on the circumstances of the case. Each decision is made on a case-by-case basis, and not on a blanket basis covering a whole class of offences or offenders. The elements of the Shawcross Statement are also stated in *Ramalingam* (see para 26 above).

I. The meaning and intent of the Attorney-General's Statements

36 In publishing the AG's Statements, AG Wong would have known what his constitutional power was under Art 35(8). That explains why he made it clear in the Press Statement that the exercise of enforcement and investigative powers relating to offences are the responsibility of the Police, and should not be conflated with his prosecutorial power. Proactive enforcement of the law, *ie*, proactive policing, is a matter for the police and does not concern the PP. The police has the duty or responsibility to investigate offences. However, proactive policing is not a statutory obligation – that is a matter of good governance. Hence the G377A policy (which concerns only proactive policing and not police investigation) is not aligned to the AG's prosecutorial power. Without investigation papers, the PP has no evidence to make a prosecutorial decision. With investigation papers, he can do so on a case-by-case basis.

37 AG Wong would have been fully aware of the nature and extent of the prosecutorial power and discretion vested in him. He reiterated in his Press Statement that "[t]he PP's exercise of prosecutorial discretion has always been, and remains, unfettered", consistent with the Court of Appeal's position in *Tan Eng Hong v Attorney-General*. However, in the same breath, he states that: "In the case of section 377A, where the conduct in question was between two consenting adults in a private place, the PP had, absent other factors, taken the position that prosecution would not be in the public interest. This remains the position today.". These two statements, if read separately, contradict each other. It is illogical for AG Wong to assert that he cannot fetter his prosecutorial discretion, and immediately assert that he has done so, or intends to do so, in relation to the Subset offences[41] and offenders under s 377A. Given the legal nature of the prosecutorial power and discretion, these two statements should be read harmoniously. So read, what para 6 means is that even though AG Wong saw no public interest in prosecuting such offences (for whatever reason, which he has not given), if evidence of a prosecutable case is presented to him after any police investigation, he will, as he must, prosecute. Furthermore, AG Wong's representations are also not unconditional. The words "absent other factors" should be noted.

41 This is defined in *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [19].

The CA2022 interpreted AG Wong's prosecutorial policy as a stand-alone unconditional and unqualified statement without regard to his preceding statement that the prosecutorial discretion remains unfettered. It is submitted that AG Wong did not intend and could not have intended his prosecutorial policy to fetter his prosecutorial discretion in the manner interpreted by the CA2022.

38 The CA2022 was aware of the constitutional position that the courts may not interfere with the exercise of the prosecutorial power and that the prosecutorial discretion may not be fettered.[42] Thus, the CA2002 was careful to state:[43]

> Hence, and most exceptionally, giving effect to the legitimate expectations that have arisen as a result of the political package does not risk curtailing the PP's prosecutorial discretion or offending the doctrine of the separation of powers.

39 With respect, by giving effect to the DSLE in respect of the political package, the CA2022 risks curtailing the PP's prosecutorial discretion and offending the separation of powers. The CA2022 held and reiterated:[44]

> … it remains open to AG Wong to indicate with reasonable notice that he does after all intend to exercise the AG's prosecutorial prerogative in relation to the additional matters covered by our holding. Until such time, our holding would have the effect of: (a) providing homosexual men with the full measure of accommodation contemplated by the Government and expressed by the Prime Minister during the s 377A Debates; (b) minimising the prevailing legal untidiness and avoiding most of the uncertainties that would persist if we were to adopt a more restricted solution, as we explain at [152] below; and (c) preserving the legislative status quo on s 377A and reserving the matter of its retention or repeal for further consideration by the Government and Parliament at an appropriate time.
>
> …
>
> We have held that to give full effect to the political compromise and, in turn, AG Wong's representations in a legally acceptable manner, the entirety of s 377A is unenforceable unless and until the AG of the day provides clear notice that he, in his capacity as the PP: (a) intends to reassert his right to enforce s 377A proactively by way of prosecution; and (b) will no longer abide by the representations made by AG Wong in 2018 as to the prosecutorial policy that applies to conduct falling within the Subset.

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42 It was for that reason, that the CA2022 stated that "homosexual men may face the threat of prosecution under s 377A in the future" (see *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [97]).

43 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [136].

44 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [151] and [330].

40 Given that AG Wong was aware of the nature of the prosecutorial power, it is most unlikely that he would have intended to represent to the public that he had decided on a blanket policy not to prosecute the Subset offences or offenders. Such a representation would imply (a) the existence of such power; and (b) that he could apply the same policy in respect of any and every offence under Singapore's criminal law whenever he considered it in public interest to do so. It is submitted that the AG has no such power. It would be contrary to the rule of law and/or public policy to give the public or any member of the public a free pass to commit any offence.[45]

41 In this connection, the CA 2022 also said:[46]

> Second, there is nothing to suggest that AG Wong wishes to depart from the position that he articulated in 2018. It is clear, however, that AG Wong or a future AG cannot be prevented from changing that position in the future (see [97] above). While any potential change in the AG's position is not an issue before us, it seems to us that, in such an event, what would be required as a matter of fairness is that the AG provides, in clear and unambiguous terms, reasonable notice of his intention to resile from the representations previously promulgated by AG Wong in 2018.
>
> This follows from the notion that adequate notification of a relevant change in policy destroys any expectation founded upon an earlier policy (see H W R Wade & C F Forsyth, *Administrative Law* (Oxford University Press, 11th Ed, 2014) at p 454), as illustrated by the Privy Council's decision in *Fisher v Minister of Public Safety and Immigration and Others (No 2)* [1999] 2 WLR 349.

It is respectfully submitted that the need to give reasonable notice does not apply to the prosecutorial power. Since its exercise may not be fettered, there is no change of policy should the PP decide to prosecute the Subset offences where sufficient evidence exists. If he must give reasonable notice before he can prosecute, he would already have fettered his prosecutorial discretion until such time as he gives notice to unfetter it. The AG has stated in unambiguous terms that "[t]he PP's exercise of prosecutorial discretion has always been, and remains, unfettered". For this reason, no expectation, much less legitimate expectation, can be engendered by the AG's prosecutorial policy.

42 There are sound policy reasons why the PP's prosecutorial power may not fetter his prosecutorial discretion of his own volition.

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45 See *Chng Suan Tze v Minister of Home Affairs* [1988] SGCA 16.

46 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [138]–[139].

J. The Attorney-General may not abstain from enforcing the criminal law

43 If AG Wong's prosecutorial policy has the effect of legally binding himself not to prosecute the Subset offences for any period of time, he would have voluntarily abstained from enforcing the criminal law during this period of time. This would be inconsistent with his constitutional duty or responsibility to enforce the criminal law. He has no such abstention power under Art 35(8) or any legislation or the common law.

K. The Attorney-General may not suspend the law

44 If AG Wong's prosecutorial policy is a blanket policy not to prosecute the Subset offences or offenders, it would be tantamount to the AG having suspended s 377A to this extent since October 2018, something he had no power to do. It would be *ultra vires* his prosecutorial power and inconsistent with his duty or responsibility to enforce the criminal law. It is also submitted that such a policy would be contrary to public policy since it could encourage more of such offences to be committed. In this connection, it may be noted that even Parliament has no power to suspend any legislation that is in force. And this is also the case where a proclamation of emergency is declared under Art 150 of the Constitution, Parliament may not suspend any law. Ours is a government of laws.

L. The Attorney-General has no power to grant offenders immunity from prosecution

45 Similarly, if AG Wong's prosecutorial policy is a blanket policy not to prosecute the Subset offences or offenders for any period of time, it would be tantamount to the AG granting immunity to such offenders or would-be offenders from prosecution for committing such offences during this period of time. If so, it is submitted that the AG does not have such power under the Constitution, or statute or the common law.

M. The Attorney-General may not exercise his prosecutorial power in violation of Article 12(1)

46 The CA2022 states:[47]

> It is a matter of settled law that the PP makes all prosecutorial decisions without interference from other parts of the Executive and that his decisions can only

47 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [101].

> be challenged on limited grounds such as unconstitutionality and abuse of prosecutorial power (see … '*Ramalingam*' at [17] …).

In *Ramalingam*, the Court of Appeal held that the challenge could be made against the exercise of its prosecutorial discretion *even in a particular case*, a principle that was acknowledged by the Court of Appeal in *Syed Suhail bin Syed Zin v Attorney-General*[48] ("*Syed Suhail*").

47 It is submitted that if AG Wong's prosecutorial policy itself, as interpreted by the CA2022, violates Art 12(1) as follows:

> (a) in immunising males who commit the Subset offences from prosecution, it discriminates against other males who commit the Subset offences in public, since they are not immunised from prosecution; and
>
> (b) in immunising males within the same class who commit Subset offences, it discriminates the same males if they commit the Subset offences in public, since they are not immunised from prosecution.

It is submitted that the political compromise, whatever its socio-political significance, cannot provide a legal basis for AG Wong's prosecutorial policy, if it has such legal effect, given that Art 12(1) "assures to the individual is the right to equal treatment with other individuals in similar circumstances".[49]

N. The court has no power to declare a statute or a provision thereof unenforceable

48 The CA2022 held s 377A to be unenforceable in its entirety.[50] The CA2022 has not articulated any principle of law or referred to any judicial authority or statement in any Commonwealth jurisdiction to justify this ruling. It is submitted that the CA2022 has no constitutional, statutory or common law power to declare any statute unenforceable. A statute is either valid or constitutional, or invalid (if it is not passed in accordance with the prescribed procedures under the Constitution) or unconstitutional (if it is a post-Constitution law that is inconsistent with the Constitution). In the case of an existing (*ie*, pre-Constitution) law like s 377A, it continues in force under Art 162, but "shall" be construed to conform to the Constitution. If an existing law cannot be construed to

48 [2021] 1 SLR 809. See paras 152 *ff* below.
49 See discussion at paras 120 *ff* below.
50 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [149], [151]–[153], [237] and [329]–[330].

conform to the Constitution, then it is a dead law which a court will not enforce because it does not conform to the Constitution. It is only in that sense that the law may be said to be unenforceable, because it would be contrary to the rule of law for the court to enforce it.

O. The date of unenforceability of section 377A

49 The CA2022 also declared s 377A unenforceable in its entirety, without specifying exactly when it ceased to be enforceable. There are multiple possibilities: (a) the date of the Press Release or the ST Article; (b) the date on which a relevant male, relying on the AG's Statements, committed a Subset offence; (c) the date of the Judgment; or (d) the date after the Judgment when a relevant male person relies on the AG's Statements and commits a Subset offence. If the Judgment operated retrospectively, the date would be either (a) or (b). Otherwise, the date is either (b) or (c). It should be noted that the CA2022's decision is that the appellants had no standing *at this time*, and *not before this time*. This suggests that the decision does not have retrospective effect. That being so, the appellants had standing before judgment was delivered.

50 We now consider the legal status of the DSLE under Singapore law, and whether the AG's representations satisfy its the requirements.

III. The doctrine of substantive legal expectations

A. Is the doctrine of substantive legal expectations part of the common law of Singapore?

51 A substantive legitimate expectation is an expectation induced by a public authority that an individual will be granted or retain some substantive benefit. The expectation may arise from an express promise or undertaking or from past conduct on the part of the public authority in order for it to be recognised as legitimate or reasonable. In *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority*[51] ("*Chiu Teng*"), the High Court, after reviewing the law on the DSLE in England, Australia, Canada and Hong Kong, rejected the submissions of the AG and applied the DSLE to the representations made by the Singapore Land Authority ("SLA") to the appellant in respect of how the premiums on state leases should be calculated.[52] On the basis of the fair administration by public authorities, it is difficult to disagree with this decision.

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51 [2014] 1 SLR 1047.

52 The AG submitted that the DSLE should not be adopted in Singapore for three reasons:

(cont'd on the next page)

52 However, in *SGB Starkstrom Pte Ltd v Commissioner for Labo*,[53] the Court of Appeal held that the decision in *Chiu Teng* raised "some thorny issues" but decided not to affirm nor overrule *Chiu Teng*. In these appeals, the CA2022 reiterated its concerns with *Chiu Teng*,[54] but nevertheless decided that a limited recognition of the DSLE was warranted for reasons set out at paras 70–72 below. The CA2002 also said:[55]

> For the doctrine of substantive legitimate expectations to be successfully invoked, it is not enough that an expectation is found to exist – the expectation must also be legitimate and worthy of legal protection. In this regard, we agree broadly with the analytical framework that was set out in *Chiu Teng* at [119].

B. The requirements of the doctrine of substantive legal expectations

53 The requirements of the DSLE in *Chiu Teng* are as follows:[56]

> (a) The applicant must prove that the statement or representation made by the public authority was unequivocal and unqualified;
>
> > (i) if the statement or representation is open to more than one natural interpretation, the interpretation applied by the public authority will be adopted; and
> >
> > (ii) the presence of a disclaimer or non-reliance clause would cause the statement or representation to be qualified.

> (a) First, the doctrine was developed in England against the backdrop of the Human Rights Act 1998 and the pressure to assimilate European doctrine into the common law.
> (b) Second, the underlying rationale of the doctrine is that of abuse of power, which is not principled.
> (c) Third, the doctrine is inconsistent with the doctrine of separation of powers as enshrined in the Singapore Constitution.

The High Court rejected the submission for the following reasons (*Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [111]–[112]):

> It cannot be argued, therefore, that the doctrine of substantive legitimate expectation should not be law in Singapore simply because Singapore has a written constitution while England, which recognises the doctrine, does not. Instead, this issue should be looked at from first principles.
> If private individuals are expected to fulfil what they have promised, why should a public authority be permitted to renege on its promises or ignore representations made by it? If an individual or a corporation makes plans in reliance on existing publicised representations made by a public authority, there appears no reason in principle why such reliance should not be protected.

53 [2016] 3 SLR 598.

54 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [128]–[130].

55 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [141].

56 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [119].

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

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

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

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

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

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

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

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

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

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

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

C. The doctrine of substantive legal expectations is not satisfied by the political package

54 The requirements of the DSLE cannot be satisfied in these appeals for the following reasons:

(a) the appellants were not charged with committing any Subset offence, and therefore the DSLE cannot affect their substantive or procedural rights to have the constitutional questions decided by the CA2022;

(b) even if they were notionally held to have relied on AG Wong's prosecutorial policy, the policy is ambiguous, qualified and contradictory, and AG Wong has explained otherwise; and

(c) even if the requirements of the DSLE were met, the prosecutorial policy has no legal effect for the reasons set out at

paras 43–48 above, *ie*, the DSLE cannot apply to commission of a criminal offence.

D. Limited recognition of the doctrine of substantive legal expectations (or any legal doctrine) is problematic

55 The CA2022 has given the following reasons for according a limited recognition to the DSLE:

> (a) "[T]he exceptional circumstances surrounding the general non-enforcement of s 377A call for a limited recognition of the doctrine of substantive legitimate expectations as the basis for imbuing AG Wong's representations with legal force".[57]
>
> (b) "[A] limited recognition of this doctrine is both permissible and warranted in the specific context of s 377A".[58]

It is submitted that since AG Wong's prosecutorial policy does satisfy the requirements of the DSLE, it cannot be imbued with legal force, and therefore the question of giving the DSLE a limited recognition does not arise.

56 The CA2022 has explained the meaning of "limited recognition":[59]

> … the DSLE should be recognised to the limited extent warranted by the present context. For the avoidance of doubt, we do not, by this judgment, import the doctrine into Singapore law in any wider context. We leave that matter open for consideration on a future occasion when it is necessary for us to make a determination and when we have had the full benefit of counsel's submissions.

57 The "limited extent warranted by present context" is explained as follows:[60]

> Nevertheless, our recognition of the doctrine of substantive legitimate expectations is an extremely limited one and is shaped by two fundamental considerations. First, in the specific context of s 377A, a failure to recognise the legal effect of AG Wong's representations may expose some individuals to the grave threat of prosecution and the attendant deprivation of liberty. In the light of the severe repercussions that might follow if AG Wong's representations are not accorded legal effect, there is a strong impetus for recognising the doctrine of substantive legitimate expectations – albeit to a limited extent – in this specific context.

57 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [117].
58 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [118].
59 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [140].
60 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [133].

> Second, and more importantly, the circumstances surrounding the general policy of not enforcing s 377A are exceptional. A decision was made in Parliament to strike a balance by preserving the legislative status quo on a vexed area of socio-political policy while accommodating the concerns of those directly affected by the legislation in question. This was done in order to avoid driving an irrevocable wedge within our diverse society. The first part of that balance, namely, the decision not to repeal s 377A, was effected by Parliament. What we are now concerned with is the second part of that balance, namely, the proper contouring of the accommodation that has been extended to homosexual men, which is well within our ambit to determine. This issue has not been judicially considered because, as we have explained, AG Wong's representations post-date our decision in *Lim Meng Suang (CA)*. In our judgment, by invoking the doctrine of substantive legitimate expectations in these unique circumstances, we would be upholding the public interest in maintaining the legislative status quo along the lines delineated by Parliament in 2007 and affirmed by AG Wong in 2018. Such an approach would also be consistent with avoiding a precipitous resolution of the issue of whether or not s 377A should be removed from our statute books, which Parliament itself had eschewed in 2007.

58 It is respectfully submitted that these reasons are neither relevant nor material to (a) the AG's duty or responsibility to enforce the criminal law; or (b) the Constitutional Question. It is further submitted that the CA2022 has put the cart before the horse. If the court had addressed the Constitutional Question and found s 377A unconstitutional, no homosexual would be exposed to any threat of prosecution or deprivation of his liberty. Furthermore, there would be no need to repeal s 377A, and therefore the concern with the precipitous repealing of s 377A (whatever it may be) would not arise. If, on the other hand, the CA2022 had decided that s 377A did not violate the Constitution, then the concern for the well-being of some individuals, although well-meaning, would have been misplaced, and such persons could not complain that they had been deprived of any rights. Had the CA2022 decided the Constitutional Question, the issue of the appellants' standing would not have arisen, whatever the outcome.

59 As it stands, the CA2022's decision to give a limited recognition to the DSLE is an *ad hoc*, one-off decision, without any underlying legal principle.

E. The doctrine of substantive legal expectations does not and cannot apply to the prosecutorial power

60 The CA2022 has not referred to any judicial authority or statement from any Commonwealth jurisdiction to support its holding that the DSLE applies to the exercise of the prosecutorial power. The CA2022 has equated an administrative decision with the exercise

of the prosecutorial power. A public authority does not have to make enforceable representations to the public. The AG as the PP cannot make representations to the public to fetter his prosecutorial discretion. For the reasons given at paras 43–48 above, the DSLE cannot apply to the AG's prosecutorial power or discretion. To apply the DSLE to the prosecutorial power or discretion goes beyond the legitimate purpose of the DSLE and is inimical to public policy for the same reasons. The AG holds a high constitutional office which requires him to enforce the criminal law. The peace, good order and stability of society depend on the AG enforcing the criminal law. He is vested with an inviolable prosecutorial discretion to do so, except on limited grounds. Applying the DSLE to fetter the AG's prosecutorial power or discretion in enforcing the criminal law is not in the public interest as it undermines the rule of law.

IV. The appellants' standing in the appeals

A. The appellants have standing in the appeals before and after the Judgment

61 For the reasons given above, it is respectfully submitted that the appellants have standing in the three appeals, *before and after* the date of the Judgment.

B. Standing affects discretion but not jurisdiction

62 In any event, it is established law that a party's lack of standing does not affect the court's jurisdiction or power to decide a legal question if it is important or in the public interest to do so. In *Tan Eng Hong v Attorney-General* the Court of Appeal said:[61]

> We agree instead with the analysis in *Zamir & Woolf* ([17] *supra*) at para 4-98:
>
> > The courts will not grant declarations which are of no value but, if a declaration will be helpful to the parties or the public, the courts will be sympathetic to the claim for a declaration *even if the facts on which the claim is based or the issue to which it relates can be described as theoretical.* [emphasis added]
>
> Where the circumstances of a case are such that a declaration will be of value to the parties or to the public, the court may proceed to hear the case and grant declaratory relief even though the facts on which the action is based are theoretical. We do not necessarily see this as an exception to the 'real controversy' requirement as we are of the view that it can logically be said that where there is a real *legal* interest in a case being heard, there is a real controversy to be

61 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [143]–[145].

> determined. Further, as noted above at [17], a declaration by the court which determines the controversy between the parties is *res judicata*. 'Legal' interest is used here in contradistinction to a mere socio-political interest, and may be said to arise where there is a novel question of law for determination, as in the present case. While a legal interest may suffice to satisfy the 'real controversy' requirement, mere socio-political interest will *not* suffice in itself. The court is well placed to determine legal questions but not socio-political questions. The court's function is instead to ensure, as the guardian of the Constitution, that the Constitution is upheld inviolate.
>
> We emphasise that we are in no way stating that the court will always hear cases even where there is no *lis* between the parties *inter se*, but merely that the court may exercise its discretion to do so in a proper case. …

63 It is respectfully submitted that the public interest in having a definitive ruling on the Constitutional Question is difficult to gainsay for the following reasons:

(a) Parliament devoted two days to debate the Petition which was grounded on the argument that s 377A was unconstitutional.

(b) Three courts have decided the Constitutional Question.

It may be recalled that in *Tan Eng Hong v Attorney-General*,[62] the Court of Appeal said that the court's function is "to ensure, as the guardian of the Constitution, that the Constitution is upheld inviolate."

V. The purposive interpretation under section 9A of the Interpretation Act

64 Section 9A(1), which came into force on 16 April 1993, provides:

> **Purposive interpretation of written law and use of extrinsic material**
>
> 9A(1) In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) is to be preferred to an interpretation that would not promote that purpose or object.[63]
>
> [reference added]

62 [2012] 4 SLR 476 at [143].

63 Section 9A came into force on 16 April 1993. This article does not discuss the meaning of ss 9A(2)–9A(4). Section 9A(2) is reproduced below:

> (2) Subject to subsection (4), in the interpretation of a provision of a written law, if any material not forming part of the written law is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material —

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65 In his Second Reading speech, the Minister for Law said:

> Sir, this Bill seeks to amend the Interpretation Act to enable the Courts to have recourse to the use of Ministerial statements made in Parliament when interpreting any statute in order to ascertain the intention of Parliament should the statute be ambiguous or obscure in its purpose or if a literal reading of the statute would lead to an absurdity.
>
> .....
>
> In the United Kingdom, the House of Lords there, in a very recent decision known as *Pepper (Inspector of Taxes) v Hart*, made a significant departure from their traditional English practice of not referring to the use of Hansard, by allowing its use for the purpose of resolving an ambiguity or obscurity or avoiding an absurdity if such Parliamentary materials consist of clear statements by a Minister or promoter of the Bill.
>
> Sir, the amendment before the House also seeks to highlight the importance of adopting what is known as a purposive approach in the course of the Courts' interpretation of statutes in order to promote the underlying purpose behind the legislation. That is the main amendment. Apart from that, there are other amendments which seek to clarify the ambit of certain existing provisions in the Act for the avoidance of any doubt.

It is clear from the Minister's speech that the purpose of enacting s 9A was partly to give statutory recognition to the ruling in *Pepper v Hart*, and to the purposive interpretation as set out in s 9A(1). In *Dorsey James Michael v World Sport Group Pte Ltd*,[64] the Court of Appeal approved the finding of the High Court in *Public Prosecutor v Low Kok Heng*[65] ("*Low Kok Heng*") that the purposive approach mandated by s 9A(1) "is paramount and must take precedence over any other common law principles of statutory interpretation including the plain meaning rule."

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; or

(b) to ascertain the meaning of the provision when —

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law leads to a result that is manifestly absurd or unreasonable.

Sections 9A(1) and ss 9A(2)–9A(4) are based on s 15AA and s 15AB, respectively: see *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 at [40].

64 [2013] 3 SLR 354.

65 [2007] 4 SLR(R) 183 at [56]–[57].

A. The ruling in Pepper *v* Hart

66 The ruling in *Pepper v Hart*[66] is confined only to the abolition of what was known as the exclusionary rule prohibiting the use of parliamentary speeches to interpret legislation. Lord Browne-Wilkinson, delivering the lead judgment, said:

> … subject to any question of parliamentary privilege, that the exclusionary rule should be relaxed so as to permit reference to parliamentary materials where: (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied on consists of one or more statements by a minister or other promoter of the Bill together, if necessary, with such other parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied on are clear. …

67 The exclusionary rule originally applied to parliamentary materials but was later extended to permit other extrinsic evidence to be referenced to interpret the purpose of any statute. In *Pepper v Hart*, Lord Browne-Wilkinson said:

> The exclusionary rule was later extended so as to prohibit the court from looking even at reports made by commissioners on which legislation was based: *Salkeld v. Johnson* (1848) 2 Exch. 256, 273. This rule has now been relaxed so as to permit reports of commissioners, including law commissioners, and white papers to be looked at for the purpose solely of ascertaining the mischief which the statute is intended to cure but not for the purpose of discovering the meaning of the words used by Parliament to effect such cure: *Eastman Photographic Materials Co. Ltd. v. Comptroller-General of Patents, Designs and Trademarks* [1898] A.C. 571 and *Assam Railways and Trading Co. Ltd. v. Commissioners of Inland Revenue* [1935] A.C. 445, 457-458. Indeed, in *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd*. [1990] 2 A.C. 85 your Lordships' House went further than this and had regard to a Law Commission report not only for the purpose of ascertaining the mischief but also for the purpose of drawing an inference as to Parliamentary intention from the fact that Parliament had not expressly implemented one of the Law Commission's recommendations.

68 Lord Griffiths, in his judgment, also said:

> The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted. Why then cut ourselves off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before Parliament.

66 [1992] AC 593.

69 In the famous case of *Liversidge v Anderson*,[67] Lord Macmillan interpreted Regulation 18B of the Defence (General) Regulations 1939 (UK) purposively at p 252:[68]

> The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote rather than to defeat its efficacy for the defence of the realm. That is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peace time as well as in war time.
>
> It is, therefore, proper to consider with what object the regulation was made.

70 In Singapore, after the ruling in *Pepper v Hart*, but before the enactment of s 9A(1), the High Court had already referred to extrinsic evidence in *Public Prosecutor v Lee Ngin Kiat*[69] and *Tan Boon Yang v Comptroller of Income Tax*[70] to ascertain the purpose of the relevant legislation. After s 9A was enacted, the High Court held in *Raffles City Pte Ltd v The Attorney-General*[71] ("*Raffles City*") that s 9A(1) was a declaratory enactment, and that the court could refer to extrinsic evidence even where the provision was not ambiguous or obscure, relying on the "parallel ... common law rule set out in *Pepper v Hart*".

71 Section 9A(1) requires the court to prefer an interpretation of a provision of the law that would promote the purpose or object of the underlying written law, rather than the provision itself. In *Attorney-General v Ting Choon Meng*[72] ("*Ting Choon Meng*"), the Court of Appeal (by a majority) interpreted the word "person" in s 15 of the Protection from Harassment Act[73] ("PHA") to promote the purpose of the PHA.

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67 [1942] AC 206.

68 *Liversidge v Anderson* [1942] AC 206 at 252. In following cases, other extrinsic evidence was used by the English courts to ascertain the purpose of legislation: Lord Diplock in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850; and Lord Diplock and Lord Simon (referring to it as "the golden rule of construction") in *Maunsell v Olins* [1975] AC 373 and in *Farrell v Alexander* [1975] AC 373.

69 [1993] 2 SLR 181.

70 [1993] 2 SLR 48.

71 [1993] 3 SLR 580.

72 [2017] 1 SLR 373.

73 Section 15 reads:

> **False statements of fact**
>
> **15.**(1) Where any statement of fact about any person (referred to in this section as the subject) which is false in any particular about the subject has been published by any means, the subject may apply to the District Court for an order under subsection (2) in respect of the statement complained of.
>
> (2) Subject to s 21(1), the District Court may, upon the application of the subject under subsection (1), order that no person shall publish or continue to publish the statement complained of unless that person publishes such

(cont'd on the next page)

The framework of s 9A(1) is applicable to ordinary legislation, such as the PHA which has one main purpose. It may not be applicable to a code of laws, such as the Penal Code or a code of fundamental laws such as the Constitution, which has an overarching broad purpose, and a multitude of provisions with their own specific purposes. It may not necessarily be appropriate to apply a provision like s 377A of the Penal Code which was enacted for a very specific purpose about 68 years after the Penal Code was enacted.

B. The three-step framework in Tan Cheng Bock v Attorney-General

72 In *Tan Cheng Bock v Attorney-General*[74] ("*TCB*"), the Court of Appeal ("CA2017") adopted a three-step framework, ("*TCBf*") to give effect to s 9A(1). The *TCBf* is based on the framework applied in the minority judgment in *Ting Choon Meng*. The CA2017 stated:[75]

> The correct approach to purposive interpretation under s 9A was summarised following close analysis in the judgment of the minority in [*Ting Choon Meng*], a recent decision of this court on which both the parties and the Judge relied heavily. Although we refer principally to the minority judgement, there was no disagreement on the broad steps to be taken in purposively interpreting a legislative provision. It was noted at [59] that the court's task when undertaking a purposive interpretation of a legislative provision involves three steps:
>
> (a) First, ascertain the possible interpretations of the provision, having regard not just to the text of the provision but also to the context of that provision within the written law as a whole.
>
> (b) Second, ascertain the legislative purpose or object of the statute.
>
> (c) Third, compare the possible interpretations of the text against the purposes or objects of the statute.
>
> These steps mirrored, and set out in greater specificity, the approach taken by the majority in *Ting Choon Meng*, which also began by interpreting the text of the legislative provision in question in the context of the statute as a whole before considering its legislative purpose (see *Ting Choon Meng* at [19]).

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notification as the District Court thinks necessary to bring attention to the falsehood and the true facts.

…

74 [2017] 2 SLR 850.

75 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [37].

73 Step (a) requires the interpreter to ascertain the meaning of the provision textually and contextually, not its purpose. The Court of Appeal in *Ting Choon Meng* adopted this approach. In that case, Ting had published a false statement concerning MINDEF's actions in certain court proceedings by Ting's company against MINDEF for breach of copyright. MINDEF applied for a correction order under s 15 of the PHA. The issue was the meaning of the word "person" in s 15 of the PHA. The majority judges held that it meant "natural person" contextually, as that would promote the object of the PHA to protect individuals from acts of harassment. However, Sundaresh Menon CJ disagreed and held that it meant or included the Government as a corporate entity as s 15 was a stand-alone provision, whose object was to protect the Government from being harassed or maligned by false statements.[76]

74 As pointed out above, the wording of the mandate in s 9A(1) may not be appropriate for certain types of legislation. For example, the Penal Code (which contains more than 500 provisions), or the Constitution (which, as a fundamental law, contains more than 160 provisions on different subjects), has to have an overarching purpose of sufficient broadness to accommodate or subsume the specific purposes of the provisions. For this reason, whatever the purpose of s 377 or s 377A might be, it would inevitably fall within the umbrella of the Penal Code and promote its overarching purpose. This problem was discussed in *TCB* as follows:[77]

> The distinction between the specific purpose of a provision and the general purpose of a statute is a significant one. The same point was made by the Federal Court of Australia in *Evans v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 276 ['***Evans***']when it observed at [16] that '[u]nder the umbrella of the general object is a multitude of objects of specific provisions', and by the New South Wales Court of Appeal in *Edwards v AG* (2004) 60 NSWLR 667 when it observed at [72] that 'it may be said that there is an underlying object of the Act as a whole and there may be a separate object of discrete parts of it, subject of course to the purpose of the whole'. We note from the use of the phrases '[u]nder the umbrella of the general object' and 'subject of course to the purpose of the whole', that these cases appear to contemplate that the specific purpose can *never* be contrary to the general purpose. We need not go quite as far given that this issue does not arise in this case; for present purposes we prefer to leave it on the footing that in a truly exceptional

76 See *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [112]–[120]. Since the purpose of the PHA was to protect persons from harassment, it was not likely that Parliament would have enacted s 15 as a standalone provision with a specific purpose alien to the general purpose. Hence, either the majority or minority judgment was correct, but not both simultaneously. Parliament subsequently enacted the Protection from Harassment (Amendment) Act 2019 which, *inter alia*, affirmed the majority judgment.

77 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [41].

> case, it may be that the specific intention of Parliament is so clear that the court should give effect to it even if it appears to contradict, undermine, or go against the grain of the more general purpose. Such cases would, however, be rare (as noted in *Ting Choon Meng* at [60]), if they ever occurred at all. The court must begin by *presuming* that a statute is a coherent whole, and that any specific purpose does not go against the grain of the relevant general purpose, but rather is subsumed under, related or complementary to it. The statute's individual provisions must then be read consistently with *both* the specific and general purposes, so far as it is possible.

75 The CA2017 did not agree with the position in *Edwards v AG* that the specific purpose could never be contrary to the general purpose. It left open the question as to whether, in an exceptional case, such a contradiction could occur. Of course, whilst Parliament could legislate such a contradiction, there would be no plausible reason for it to do so. No example of such a provision exists, unless s 15 of the PHA is considered one such example.

VI. The meaning and scope of section 377A

A. Section 377A

76 Section 377A provides:

> **Outrages on decency**
>
> 377A. Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years.

It is plain from the title that the object of s 377A was to protect public and private decency (of a gross indecent nature) in Singapore, *ie*, societal decency which may be subsumed under the more general value of societal morality. However, instead of enacting s 377A to criminalise all acts of gross indecency committed by all and sundry, the Legislative Council limited s 377A to male–male acts only, and did not include male–female and female–female acts of gross indecency. To understand why, it is necessary to consider what the law on safeguarding public decency in Singapore was before 1938.

B. Section 377 and section 23 of the Minor Offences Ordinance 1906[78]

77 Before 1938, the laws criminalising indecent conduct in Singapore were enacted in s 377 of the Penal Code and s 23 of the Minor Offences Ordinance 1906 ("MOO"). Section 377 was an original provision of the Penal Code of the Straits Settlements enacted in 1870, based substantially on the Penal Code of India of 1860. The Penal Code of the Straits Settlements came into force in 1871.

78 Section 377 of both Codes provided:

> 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 necessary to the offence described in this section.

79 Initially, the Indian courts held that the offence of "carnal intercourse against the order of nature" in s 377 covered only anal sex (sodomy).[79] However, from 1924 to 1934, three Indian courts successively rejected this interpretation and held that s 377 also covered oral sex (fellatio) as it involved penetration *per os*.[80] Hence, by the time of the enactment of s 377A, the law in India was that s 377 criminalised both anal sex and oral sex ("penetrative sex"). This fact would have been known to the Attorney-General of the Straits Settlements, Mr CG Howell ("AG Howell").

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78 Section 23 of the Minor Offences Ordinance 1906, as it stood in 1938, read:
> Any person who is found drunk and incapable of taking care of himself, or is guilty of any riotous, disorderly or indecent behaviour, or of persistently soliciting or importuning for immoral purposes in any public road or in any public place or place of public amusement or resort, or in the immediate vicinity of any Court or of any public office or police station or place of worship, shall be liable to a fine not exceeding twenty dollars, or to imprisonment for a term which may extend to fourteen days, and on a second or subsequent conviction to a fine not exceeding fifty dollars or to imprisonment for a term which may extend to three months.

79 *Government v Bapoji Bhatt* (1884) 7 Mysore LR 280.

80 *Khanu v Emperor* AIR 1925 Sind 286 at 286; *Khandu v Emperor* AIR 1934 Lahore 261; and *Lohana Vasantlal Devchand v The State* AIR 1968 Gujarat 252.

C. Section 377A and the Penal Code (Amendment) Bill 1938

80 The Penal Code (Amendment) Bill 1938 (the "1938 Amendment Bill") which, *inter alia*, contained s 377A was introduced by AG Howell as follows:[81]

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

81 AG Howell's speech is short and succinct. He made three points:

(a) grossly indecent acts were brought to the authorities' attention;

(b) section 23 of the MOO could not deal with such acts (because it criminalised only indecent acts, and not *grossly* indecent acts), and then only where the indecent acts were committed in public; and

(c) section 377A, which was taken from s 11 of the Criminal Law Amendment Act 1885,[82] would bring Singapore law in line with English law on gross indecency, and *strengthen the law*, *ie*, the law on indecency in criminalising grossly indecent acts wherever in public and providing for higher punishments than s 23 of the MOO.

D. The Objects and Reasons[83]

82 AG Howell did not refer to s 377 in his speech. It is submitted that he did not do so because s 377 criminalised carnal intercourse against the order of nature acts, and not grossly indecent acts as such. However, since the s 377 offences are by their nature grossly indecent, the Objects and Reasons ("O/R") made clear that s 377A was not intended to punish unnatural offences punishable under s 377, so that it could not be misinterpreted to overlap with s 377. The O/R read:

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81 See *Proceedings of the Legislative Council of the Straits Settlements* (13 June 1938) at p B49.

82 c 69 (UK).

83 Under current legislative drafting, the term "Explanatory Note" is used.

> 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 O/R states clearly that s 377A makes punishable acts of gross indecency between male persons which did not amount to an unnatural offence under s 377, *ie*, penetrative sex. Section 377A would make punishable only non-penetrative sex acts which were not punishable under s 377.

83 The O/R makes clear what a purposive interpretation of s 377A would also have done. Since s 377 punished penetrative sex offences between males much more harshly than if they were to be criminalised under s 377A, there was absolutely no reason for the Legislative Council to enact a weaker law in place of or in addition to a more muscular one. Section 377A would then serve no purpose and might even encourage more s 377 offences to be committed.

E. Meaning of "act of gross indecency" in section 377A

84 In *Ng Huat v Public Prosecutor*[84] ("*Ng Huat*"), the appellant, a radiologist, was convicted of committing an act of gross indecency under s 377A against Koh for touching Koh's penis, chest, nipples and buttocks, without his consent, in the X-ray room of Alexandra Hospital while performing his duties as a radiographer. The appellant argued that what he did was not grossly indecent. Yong CJ rejected the argument and said:[85]

> *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

84 [1995] 2 SLR(R) 66. In that case, one Koh complained the appellant, a radiologist, touched his penis, chest, nipples and buttocks without his consent in the X-ray room of Alexandra Hospital while performing his duties as a radiographer. Although Yong CJ referred to "the acts complained of" in his judgment, it may be inferred that touching the penis of the complainant was the most serious instance of indecency amounting to gross indecency under s 377A. *A fortiori*, masturbation would be an act of gross indecency under s 377A, and so would cunnilingus (if s 377A were applicable to females).

In *R v Stringer* [2000] NSWCCA 293, Adam J said at [56]:

> 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.

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

> in the present case would be considered grossly indecent by any right-thinking member of the public.

Although Yong CJ referred to "the acts complained of" in his judgment, it may be inferred that touching the penis of Koh would be the most serious instance of indecency amounting to gross indecency under s 377A. Sexual touching of the buttocks would be another instance, as would masturbation.

F. Meaning of "unnatural offence" in section 377

85 In *Public Prosecutor v Kwan Kwong Weng*[86] ("*KKW*"), the issue was whether oral sex was criminalised under s 377. In the High Court,[87] Amarjeet Singh JC, after tracing the historical roots of buggery (sodomy) in England,[88] interpreted s 377 to criminalise sodomy as a form of unnatural carnal intercourse, but not oral sex (fellatio) which had never been condemned as an abomination. He suggested that as fellatio involved gross indecency, it could be an offence under s 377A.[89]

86 On appeal, the Court of Appeal and the High Court held, following the Indian authorities, that fellatio was an unnatural offence under s 377, as it was "designed to bring sexual satisfaction or euphoria to a man performed on another man or a young boy".[90] The court did not comment on Singh JC's statement that fellatio could be a s 377A offence. However, it could reasonably be argued, on the basis of legal logic, that if oral sex was a s 377 offence, there would be no reason for it to be, at the same time, a s 377A offence.

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86 [1997] 1 SLR(R) 316.

87 [1996] SGHC 208.

88 At para 8.2, Singh JC said:

> … The common law offence of Buggery which was the crime not to be named was codified as early as 1533 in an Act called An Act for the Punishment of the Vice of Buggery by Statute 25 Hen. 8, c 6. It is referred to as such in 9 George IV c 31 <1828> (Statutes at Large, UK Vol 29). This latter Statute repealed the 1533 law and re-enacted it in its para. XV thus making 'the abominable crime of buggery committed either with mankind or with any animal' punishable by death as a ***felon***. The 1828 provision was later repealed and re-enacted in s 61 of the Offences against the Person Act 1861, 24 & 25 Vict. Cap 100 as set out earlier and *in exactly the same terms* save that the punishment was reduced to penal servitude for life or a term of not less than 10 years. It was at about that time that the Indian Penal Code of 1861 and its s 377 became law, the same section being incorporated into our Code in 1871.

89 The judgment did not refer to the O/R.

90 *Public Prosecutor v Kwan Kwong Weng* [1996] SGHC 208 at [25].

G. The law in 1997 on "unnatural offence" in section 377 and "gross indecency" in section 377A

87 In the light of these decisions, the law in Singapore up to 1997 was that s 377 criminalised anal and oral sex (which involved penetration) and s 377A criminalised acts of gross indecency (which did not involve penetration).

H. The Penal Code (Amendment) Bill 2007

88 In 2007, s 377 was repealed. In his Second Reading speech on the Penal Code (Amendment) Bill 2007 (the "2007 Bill") in relation to s 377, the SMSHA said:[91]

> Sir, we will be removing the use of the archaic term, 'Carnal Intercourse Against the Order of Nature' from the Penal Code. By repealing section 377, any sexual act including oral and anal sex, between a consenting heterosexual couple, 16 years of age and above, will no longer be criminalised when done in private. 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. This is clear from the public reaction to the case of *PP v Anis Abdullah* in 2004 and confirmed through the feedback received in the course of this Penal Code review consultation.

89 Some of the offences in s 377 were re-enacted under different names.[92] However, consensual penetrative sex between male persons in public or in private, which were formerly offences under s 377, were not re-enacted. Consequently, offences of such character were decriminalised.

I. The statutory and constitutional questions in 2007

90 Up to the time of the 2007 amendments to the Penal Code, the following questions of law had not been raised in the courts:

> (a) whether s 377A criminalised unnatural acts criminalised under s 377; and
>
> (b) whether s 377A was inconsistent with Art 12(1) by reason of its discriminatory nature.[93]

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91 Singapore Parl Debates; Vol 83; Col 2198; [22 October 2007].

92 See s 376 and ss 376A–376E of the Penal Code 1871 (2020 Rev Ed).

93 The validity of s 377A could not be challenged in a court of law (unless it was inconsistent with an applicable Imperial Legislation).

91 Question (a) is relevant to the Constitutional Question because the meaning, scope and/or purpose of s 377A was that which was intended by the legislature at the date of enactment in 1938 (see paras 123–125 below). Question (b) is relevant because upon the commencement of the Constitution of the State of Singapore 1963 on 16 September 1963, the fundamental rights under the Federal Constitution of 1963 applied to Singapore, one of which was equal justice under Art 12(1).[94]

92 These questions were answered by the courts as follows:

(a) In *Lim Meng Suang HC*, the HC2013 decided that s 377A did not violate Art 12(1).

(b) In *Tan Eng Hong v Attorney-General*,[95] the HC2013 decided that s 377A did not violate Art 9(1).

(c) In *Lim Meng Suang CA*, the CA2015 affirmed the decision of the HC2013 *in Lim Meng Suang HC*, and further held that s 377A criminalised s 377 offences.

(d) In *Johnson Ong*, the HC2020 decided (i) that s 377A criminalised s 377 offences; and (ii) that it did not violate Arts 9(1), 12(1) and 14; and (iii) that it was bound by the decision in *Lim Meng Suang CA*.

(e) In *Tan Seng Kee*, *ie*, these appeals, the CA2022 held, *obiter*, that s 377A did not violate Arts 9(1) and 14, but not Art 12(1).

J. Meaning of "gross indecency" in Lim Meng Suang v Attorney-General[96]

93 In *Lim Meng Suang CA*, the CA2013 held that the term "gross indecency" included penetrative sex:[97]

> … 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*'.

94 See *Ong Ah Chuan v Attorney-General* [1981] AC 648 and *Public Prosecutor v Taw Cheng Kong* [1998] 1 SLR(R) 78.
95 [2013] 4 SLR 1059.
96 [2015] 1 SLR 26.
97 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [133].

The syllogistic holding in this passage, that s 377A covered penetrative sex, is illogical since the preceding sentence stated that "*s 377A would (like s 23) cover even 'grossly indecent acts' which fell short of penetrative sex*". If s 377A covers grossly indecent acts which fall short of penetrative sex, it must follow that it does not cover penetrative sex. If this holding is logical, s 23 of the MOO would also cover penetrative sex, since the same sentence states that s 377A is like s 23, which further confirms its illogicality.

K. Meaning of "gross indecency" in Ong Ming Johnson v Attorney-General[98]

94 In *Johnson Ong*, the HC2020 also held that "gross indecency" covered penetrative sex for the following reasons:

> (a) The first sentence in the O/R and AG Howell's speech must be read together as AG Howell desired to align Singapore law with English law (*ie*, s 11 of the Criminal Law Amendment Act 1885). Section 377A should thus have the same meaning as s 11 of the Criminal Law Amendment Act 1885.[99]
>
> (b) The Wolfenden Committee stated that "gross indecency" … appears "to cover *any act involving sexual indecency between two male persons*", and Hyam similarly noted that s 11 of the Criminal Law Amendment Act 1885 "made illegal *all types of sexual activity between males* (not just sodomy, as hitherto), and irrespective of either age or consent"[100] [emphasis added].
>
> (c) "*The broad scope of s 11 of the 1885 UK Act is borne out by actual examples of the use of the provision to prosecute offences where sodomy was involved*. Its use was not confined to cases involving non-penetrative sexual activity, or to commercial sexual activity involving male prostitutes"[101] [emphasis added].
>
> (d) "One such case was *The King v Barron* … cited by the defendant. The appellant had been indicted on a charge of gross indecency. He pleaded *autrefois acquit* on the basis that he had been previously indicted on the same facts on a charge of sodomy with the same boy. He was initially convicted on the sodomy charge, but that conviction was quashed on appeal as evidence had been wrongly admitted. He eventually pleaded guilty to

98 [2020] SGHC 63.
99 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [48]–[49] and [121].
100 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [122].
101 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [123].

the charge of gross indecency but repeated the plea of *autrefois acquit* on appeal."[102]

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

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

(f) "Section 11 of the 1885 UK Act was used to prosecute Oscar Wilde for 25 offences involving gross indecencies and conspiracy to commit gross indecencies, which included alleged acts of sodomy. Mr Choong conceded that Oscar Wilde's gross indecency charges did involve penetrative sex."[103]

95 With respect, the reasoning in these passages is problematic on the facts and the law:

(a) The HC2022 gave no meaning to the remaining clear words of the O/R.

(b) The Wolfenden Report confirmed that s 11 of the Criminal Law Amendment Act 1885 did not cover sodomy.

(c) The only actual examples referred to in the judgment were the prosecutions of Barron and Oscar Wilde under s 11 of the Criminal Law Amendment Act 1885, both of which did not involve sodomy.

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102 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [124].

103 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [126]. Since Oscar Wilde was not charged with sodomy or fellatio under s 11 of the Criminal Law Amendment Act 1885, it is not clear what Choong actually conceded.

(d) Barron was acquitted on his first trial for sodomy under the Buggery Acts.

(e) The second trial of Barron under s 11 of the Criminal Law Amendment Act 1885 did not involve sodomy. He pleaded guilty after the CCA rejected his plea of *autrefois acquit* precisely because the elements of the offence did not include sodomy.

(f) Oscar Wilde was not charged with sodomy or fellatio under s 11 of the Criminal Law Amendment Act 1885 but for acts of gross indecency. The charges against Oscar Wilde which the CA2022 found that Choong had agreed that they involved penetration, have not been produced in the judgment. In any case, Choong's concession is not relevant to the meaning of s 11 of the Criminal Law Amendment Act 1885.

96 The two examples relied on by the HC2020 refuted its own premise that s 11 of the Criminal Law Amendment Act 1885 was used to prosecute offences involving sodomy. Since s 11 of the Criminal Law Amendment Act 1885 did not criminalise sodomy, on the HC2020's own reasoning, s 377A would not cover sodomy. Penetrative sex is, by its nature grossly indecent, but the reverse that gross indecency involves penetration is not true: see *Ng Huat*. In any event, whatever may be the position under s 11 of the Criminal Law Amendment Act 1885, the law under s 377A is clear beyond any shadow of doubt, in the light of the O/R and *Kwan Kwong Weng*.

97 Proceeding on the false premise that s 11 of the Criminal Law Amendment Act 1885 was used to prosecute acts of gross indecency involving penetrative sex (together with giving no meaning to the material words of the O/R), the HC2020 said:[104]

> The ordinary meaning of 'gross indecency with another male person' is expansive but not so vague or ambiguous that on any reasonable reading, it must give rise to various differing interpretations of the scope of s 377A. On its face, it is wide enough to cover both penetrative and non-penetrative sexual activity between male persons. The words do not connote any limitation to activities involving male prostitution or to non-penetrative sexual activity only.
>
> Section 377A is located in the Penal Code Chapter on 'Sexual Offences' which deals with a wide range of sexual offences. These include outrages on decency involving male persons and outrages of modesty involving females. A further point that merits consideration is that s 377A was paired with s 377, with both offences grouped under the descriptive heading of 'Unnatural Offences'. Section 377 imposes no requirement that the 'unnatural offence' involving penetrative sexual activity between male persons must be limited to commercial

104 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [94]–[96].

> male homosexual activity. In the application of s 377, as well as s 23 MOO, there has been no such known restriction. There is no reason why a special limitation should be introduced to s 377A.
>
> The text and context of s 377A within the Penal Code then in force would indicate that it was intended to be of general application. It was aimed at male homosexual practices generally, to enforce a stricter standard of societal morality in 1938.

98 It is submitted that the above reasoning is problematic for the following reasons:

> (a) First, the conclusion – that because the words "acts of gross indecency" do not "*connote any limitation to activities involving male prostitution or to non-penetrative sexual activity*" – does not lead to the inexorable conclusion that they must include penetrative sex acts within the meaning of s 377A. The expression "male prostitution" does not describe the indecent nature of the act, but the provision of sexual services for payment. It does not follow that because s 377A applies to male prostitution, it must necessarily cover penetrative sex in every case.
>
> (b) Second, the question whether s 377A covers s 377 offences cannot be answered by holding that s 377A is of general application, as this puts the cart before the horse. If, for instance, s 377A does not cover penetrative sex acts criminalised under s 377, it could not be said to be of general application.
>
> (c) Third, s 377A is also not of general application since it does not apply to acts of gross indecency committed by males with females, and females with females. In fact, s 377A is of limited application as it criminalises only male–male acts of gross indecency.

L. Meaning of "gross indecency" in Tan Seng Kee v Attorney-General[105]

99 The CA2022 gave a textual (but not a contextual) meaning to the words "gross indecency" and held that they included penetrative sex:[106]

> In our judgment, the only possible interpretation of the words 'gross indecency' is one that: (a) includes penetrative sex acts; [(b)…] On a plain reading, the term 'gross indecency' cannot sensibly be limited to non-penetrative sex acts and must extend to penetrative sex acts. We echo our observation in *Lim Meng Suang (CA)* (at [133]) that '[a]ny other interpretation would be illogical since

105 [2022] 1 SLR 1347.
106 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [167].

> it cannot be denied that acts of penetrative sex constitute the most serious instances of the possible acts of "gross indecency"'.

100 The CA2022 also held:[107]

> … In our view, the [O/R] do[es] not lead inexorably to the conclusion that Mr Singh contends for. The [O/R] state[s] that s 377A 'makes punishable acts of gross indecency between male persons which do not amount to an unnatural offence within the meaning of section 377'. Acts of gross indecency could, however, be made punishable in two ways: (a) by creating a new offence which criminalized *only* non-penetrative sex acts (such that there would be no overlap between ss 377 and 377A); or (b) by creating a new offence that covered *both* penetrative and non-penetrative sex acts (such that penetrative sex acts would be covered by both ss 377 and 377A). The plain language of both the [O/R] and s 377A itself is wide enough to support conclusion (b), and there is nothing to suggest that what the Legislative Council intended was conclusion (a).
>
> Further, if s 377A was intended to cover only non-penetrative sex acts … AG Howell's allusion to the need to supplement s 23 of the MOO would be puzzling.
>
> The [O/R], on the other hand, articulate[s] a need to supplement s 377, which criminalised penetrative sex, whether committed in public or in private. Section 377A therefore simultaneously supplemented s 377 by criminalising acts of gross indecency which fell short of penetrative sex.

101 It is submitted that the reasoning in these passages is flawed for these reasons:

(a) First, the O/R plainly means that unnatural acts (which by their nature are grossly indecent) punishable under s 377 are not punishable under s 377A.

(b) Second, 377A could not reasonably or purposively read to enact a new offence that included penetrative and non-penetrative sex. The CA2022 has not given any reason why the Legislative Council should be so irrational as to re-enact in s 377A, offences already punishable under s 377 with much higher penalties, and which would naturally be more effective in safeguarding societal morality or decency.

(c) Third, AG Howell's allusion to the need to supplement s 23 of the MOO is not puzzling at all because s 377A *supplements* s 23 of the MOO by making punishable (i) acts of gross indecency (which were not punishable under s 23 of MOO as such); and (ii) such acts committed in private (which were not punishable under s 23 of the MOO).[108]

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107 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [205]–[207].
108 See *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [206].

(d) Fourth, the O/R did not use the word "supplement".[109] All it said was that s 377A would not punish unnatural offences punishable under s 377. The word "supplement" means "add something". In the context of s 377A, it meant criminalising acts not punishable under s 377, and not re-enacting acts already punishable under s 377 offences.

(e) Fifth, the HC2020 reiterated the illogical reasoning of the CA2015 regarding the words "*acts of gross indecency which fell short of penetrative sex*". *If s 377A covers grossly indecent acts which fall short of penetrative sex, then such act must necessarily exclude penetrative sex.* It should also be noted that the phrase "*fell short of penetrative sex*" bears a striking resemblance to the phrase "*falling short of buggery*" which is used in the Wolfenden Report in exactly the opposite sense used by the CA2015 (see para 107 below).

102 The scope of s 377A is also discernible from the structure of s 377 and s 377A. Read sequentially:

(a) Section 377: "Whoever has carnal intercourse … shall be punished with imprisonment for life or 10 years ..."

(b) Section 377A: "Any male person who … commits … any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years."

Any person who commits a s 377 offence is punishable for life or 10 years. Any male who commits a s 377A offence with another male shall be punished with imprisonment of up to 2 years. An offender punishable under s 377 is not punishable under s 377A, and *vice versa*. The offences in s 377 and s 377A are thus mutually exclusive.

103 The fallacy in the CA2015's interpretation of s 377A lies in the assumption that because sodomy is by its nature grossly indecent, it must necessarily fall within s 377A. The CA2015 failed to appreciate that unnatural acts criminalised under s 377 required penetration, whereas acts of gross indecency under s 377A did not require penetration: *eg*, masturbation or sexual touching.[110]

109 See *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [207].

110 See *Ng Huat v Public Prosecutor* [1995] 2 SLR(R) 66 at para 84 above and *The King v Barron* [1914] 2 KB 570 at para 94(d) above.

M. The Court of Appeal's view of the decision in The King v Barron

104 The CA2022 made some baffling comments[111] by according no weight to cases such as *The King v Barron* ("*Barron*") in deciphering the legislative purpose of s 11 of the Criminal Law Amendment Act 1885 because of the possibility that the UK courts were not interpreting s 11 of the Criminal Law Amendment Act 1885 to give effect to its legislative intention. The CA2022 also took the opposite view to that of the HC2020 on AG Howell's speech in this respect. Everything is possible, of course. However, no convincing reason or judicial or academic writing was cited to show that the Court of Criminal Appeal's ("CCA") decision in *Barron* was contrary to the legislative intention of s 11 of the Criminal Law Amendment Act 1885.

105 The CA2022 also held that *Barron* contradicted Mr Singh's position that s 11 of the Criminal Law Amendment Act 1885 and, hence s 377A, criminalised only non-penetrative sex acts and continued:[112]

> It is unclear to us why the appellant could not have been convicted of gross indecency at the first trial despite having been acquitted of sodomy. Mr Singh argues that this was because the offences of sodomy and gross indecency did not overlap; therefore, the jury could not have convicted the appellant of gross indecency at the first trial on the facts upon which his indictment for sodomy had been founded. This, however, is incorrect. As we noted above, the English Court of Criminal Appeal held that 'sodomy *involves gross indecency* and something else' [emphasis added]. In our view, this suggests that the two offences overlap and that sodomy is an aggravated form of gross indecency … what is crucial is that the appellant was convicted of gross indecency at the second trial, on the very same facts which underpinned his indictment for sodomy at the first trial. This shows beyond peradventure that penetrative sex acts could constitute acts of gross indecency under s 11 (UK), and we see no reason why the position under s 377A should be any different.

106 The reasoning in these passages is hard to follow because:

(a) Mr Singh's position that s 11 of the Criminal Law Amendment Act 1885 did not criminalise penetrative sex was not based on *Barron* but on the argument that since penetrative sex acts were already criminalised under s 377, no purpose would be served in criminalising them again.[113]

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111 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [190]–[191].

112 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [192] and [194].

113 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [163], the CA2022 said:

> Mr Singh's submissions on the proper interpretation of s 377A are twofold. First, he argues that s 377A was intended to cover only non-penetrative sex

(cont'd on the next page)

(b) Barron could not be convicted of committing acts of gross indecency at the first trial because he was charged with committing sodomy, which required penetration, and not an act of gross indecency, which did not. He was acquitted of the sodomy charge because penetration was not proved.

(c) The new charge under s 11 of the Criminal Law Amendment Act 1885 made on the same facts could not possibly involve penetration, otherwise, Barron would have been convicted of sodomy. It is therefore not meaningful for the CA2022 to assert that because "sodomy involves gross indecency and something else", penetrative sex acts *could* therefore constitute acts of gross indecency under s 11 of the Criminal Law Amendment Act 1885. It could, of course, but not because of or from *Barron*. Indeed, both Ms Tan and Mr Singh submitted that oral sex could be an offence under s 11 of the Criminal Law Amendment Act 1885, but ironically, the CA2022 rejected both submissions, despite its own conclusion.[114]

N. The Wolfenden Report on section 11 of the Criminal Law Amendment Act 1885

107 The CA2022 concluded from its examination of the Wolfenden Report ("WR") that s 11 of the Criminal Law Amendment Act 1885 covered both penetrative and non-penetrative sex:[115]

> Ms Tan highlights the Wolfenden Committee's observation (at [WR [105]) that the offence of gross indecency usually took one of three forms, one of which was 'oral-genital contact', meaning *penetrative oral sex* [emphasis added].
>
> According to Mr Singh, however, the [WR] shows that the offence of gross indecency (under s 11 (UK)) did not overlap with the offence of sodomy; accordingly, s 377A does not overlap with s 377. His argument may be summarised as follows:
>
> > (a) Paragraph 107 of the [WR] states that s 11 (UK) "*merely extended to homosexual indecencies* ***other than buggery****, the law which previously applied to buggery*" [emphasis added in italics and bold italics]. Mr Singh contends that this paragraph shows that s 11 (UK) was not intended to cover sodomy.
> >
> > (b) Buggery, which was originally criminalised under the Buggery Act 1533 (c 6) (UK) and later criminalised as sodomy under s 61 of the Offences Against the Person Act 1861 (c 100) (UK)

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acts and not penetrative sex acts as well, as the latter were already criminalised under s 377 when s 377A was enacted in 1938 …

114 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [194].

115 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [198]–[203].

> ("the UK OAPA"), meant anal penetration *only*; it did not include oral penetration. The fact that the [WR] states that gross indecency under s 11 (UK) covered oral-genital contact, but *omits* to state that it covered sodomy, shows that sodomy and gross indecency were non-overlapping offences.
>
> (c) The fact that s 11(UK) covered oral penetration does not buttress Ms Tan's case. Although sodomy (under s 61 of the UK OAPA) meant *anal* penetration *only*, s 377 had been interpreted to cover *both* oral penetration and sodomy by the time s 377A was enacted. As mentioned, sodomy (under s 61 of the UK OAPA) and gross indecency (under s 11(UK)) were non-overlapping offences since only the latter covered oral penetration. In the same vein, the offences under ss 377 and 377A did not overlap – *only* the former covered oral penetration.

Curiously, neither Mr Singh nor Ms Tan referred to the following paragraphs of the [WR], which we find enlightening:

> 88. Other arguments of a more general kind have … been adduced in favour of the retention of buggery as a separate offence. It is urged that there is a long and weighty tradition in our law that this, the "abominable crime" (as earlier statutes call it), is in its nature distinct from *other forms of indecent assault or gross indecency* …
>
> 106. Buggery and attempted buggery have long been criminal offences, wherever and with whomsoever committed; but, in England and Wales at least, *other acts of gross indecency committed in private between consenting parties first became criminal offences in 1885*. Section 11 of the [the 1885 UK Act] contained the provisions now re-enacted in Section 13 of the Sexual Offences Act, 1956. [emphasis added]

The aforesaid paragraphs of the [WR] speak with one voice – buggery and attempted buggery *were* acts of gross indecency, which explains the reference to s 11 (UK) criminalising 'other' acts of gross indecency. In the same vein, para 88 of the [WR] discusses whether there was even a need to retain buggery as a separate offence when it was but one of many forms of indecent assault or gross indecency. *The [WR] thus confirms that the acts of gross indecency criminalised under s 11 (UK) include penetrative sex acts such as buggery (or, in other words, sodomy).* [emphasis added.]

It appears that Mr Singh misunderstood the sentence in (WR [107]) – namely, that s 11 (UK) 'merely extended to homosexual indecencies *other than buggery the law which previously applied to buggery*' [emphasis added in italics and bold italics] – to mean that s 11 (UK) covered acts of gross indecency *except for* buggery (see [199(a)] above). On the contrary, it is clear from our foregoing analysis that the Wolfenden Committee intended to convey that s 11 (UK) was a *widening* provision. Section 11 (UK) expanded the law which had previously applied to buggery by creating a wider offence that criminalised both buggery and acts of gross indecency *falling short of buggery* (which had not hitherto been criminalised). Furthermore, and unlike what Mr Singh suggests, it is

> immaterial that s 11 (UK) did not explicitly cover sodomy. There was simply no such need because sodomy could simultaneously be a stand-alone offence under s 61 of the UK OAPA and fall under the less serious but wider offence of gross indecency under s 11 (UK).
>
> We note that [WR [105]] states that the offence of gross indecency under s 11 (UK) '*usually [took] one of three forms: either … mutual masturbation; or … some form of intercrural contact; or oral-genital contact*'. Although the last of these is a form of penetrative sex, nothing much turns on this. Simply put, the fact that the offence of gross indecency under s 11 (UK) 'usually' assumed the form of these sex acts does not mean that that was invariably or necessarily the case, or that the offence did not or could not extend to other forms of penetrative and non-penetrative sex acts. Hence, even though Ms Tan and Mr Singh each submitted on the significance of the fact that s 11 (UK) appeared to cover oral penetration, we place little weight on those submissions.
>
> In summary, while we are unable to draw a firm conclusion as to the legislative purpose of s 11 (UK), there is on balance more support for the position that the provision covered penetrative sex acts. Before us, the parties did not expend much energy or time on the legislative purpose and proper interpretation of s 11 (UK). We thus say no more on s 11 (UK), beyond noting that nothing in the foregoing analysis alters our finding that s 377A covers both penetrative and non-penetrative sex acts.

108 It is respectfully submitted that the CA2022's reasoning in these passages is based on an incorrect reading of the WR's statements:

> (a) First, the WR at para 106 made a clear distinction between buggery (or attempted buggery) and "other acts of gross indecency … first criminalised in 1885". These were separate offences which were re-enacted in s 12 and s 13 of the Sexual Offences Act 1956 ("1956 Act").[116]
>
> (b) Second, the CA2022 misunderstood the meaning of the WR's statement that s 11 of the Criminal Law Amendment Act 1885 merely extended to homosexual indecencies *other than buggery*.
>
> (c) Third, the discussion referred to at para 88 of the WR was whether buggery should be retained as a *separate* offence as

116 Sections 12 and 13 of the Sexual Offences Act 1956 (c 69) (UK) provided:

> **12 Buggery**
>
> (1) It is felony for a person to commit buggery with another person or with an animal …
>
> **13 Indecency between men**
>
> It is an offence for a man to commit an act of gross indecency with another man, whether in public or private, or to be a party to the commission by a man of an act of gross indecency with another man, or to procure the commission by a man of an act of gross indecency with another man.

it was only one form of indecent assault[117] or gross indecency. Sodomy was an "abominable crime" and was in its nature distinct from other forms of indecent assault or gross indecency. The discussion was not on whether *to exclude buggery from other acts of gross indecency*. The decision was to re-enact buggery (sodomy) as a separate offence from other forms of gross indecency in s 12 of the 1956 Act, in acknowledgment of its historic origin. By inference, sodomy was not criminalised under s 11 of the Criminal Law Amendment Act 1885. The conclusion reached by the CA2022 thereto is a *non sequitur*.[118] It is the exact opposite of what para 88 of the WR meant.

(d) Whilst s 11 of the Criminal Law Amendment Act 1885 may be described as a *widening* provision, it is so only in the sense that it created the new offence of gross indecency which were not offences under the Buggery Acts, such as mutual masturbation and oral-genital contact. Section 11 of the Criminal Law Amendment Act 1885 did not *re-enact* sodomy as a lesser offence.

O. Section 11 of the Criminal Law Amendment Act 1885 offences were misdemeanours

109 If irrefutable evidence is needed to prove that s 11 of the Criminal Law Amendment Act 1885 did not include sodomy, it is found in the provision itself:

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

110 Under English law, "a Misdemeanour is in truth any crime less than a FELONY, and the word is generally used in contradistinction to Felony".[119] In England, "a felony at common law was 'Every crime, the perpetrator of which is, by any statute, ordained to have judgment of life or member' is a Felony: although the word Felony be not contained in the

117 Currently, s 376 of the Penal Code 1871 (2020 Rev Ed).
118 See the last sentence of *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [200].
119 See *Stroud's Judicial Dictionary of Words and Phrases* vol 2 (Daniel Greenberg & Alexandra Millbrook eds) (Sweet & Maxwell, 6th Ed, 2000).

statute").[120] Sodomy was first criminalised as a felony under the Buggery Act 1533.[121]

111 The offence of misdemeanour under s 11 of the Criminal Law Amendment Act 1885 could not possibly include sodomy. Whilst the larger could be construed to include the smaller, the reverse is not possible under any known principle of interpretation.

112 To recapitulate the alternative views:

(a) section 11 of the Criminal Law Amendment Act 1885 did not criminalise sodomy (see *Barron*), but could include fellatio; and

(b) section 377A does not include penetrative sex acts that were punishable under s 377.

113 It is necessary to make two observations on s 377A before proceeding to the next issue:

(a) First, the decriminalisation of penetrative sex between males in public or in private, following the repeal of s 377 (see para 21 above), does not affect the meaning, scope or purpose of s 377A in 1938 because s 377A has not been amended to date.

(b) Second, whether or not s 377A includes penetrative sex does not affect the Constitutional Question because the discrimination in s 377A lies not in the nature of the offence but in the classification of the offenders.

P. The textual and contextual meaning of section 377A

114 The CA2022 also held that the interpretation of s 377A today, excludes s 377 as context:[122]

> Mr Singh's reliance on s 377 to interpret s 377A at the first stage of the [*TCBf*] is, with respect, similarly misplaced. While s 377A should be interpreted with regard to not only its text but also its context within the PC, s 377 was repealed in 2007. In other words, the PC that forms the relevant context when interpreting s 377A today *excludes* s 377.

120 Dwar 673, citing 1 Inst 391; 2 Inst 434; and 3 Inst 91.

121 Buggery remained a capital offence in England and Wales until the enactment of the Offences against the Person Act 1861. The buggery laws were repealed in 1967.

122 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [169]–[170].

> Having regard to the text of s 377A and its context within the PC as a whole, we conclude that the ordinary meaning of the term 'gross indecency' unambiguously includes penetrative sex acts and is not limited to male prostitution.

It is not clear what follows from this holding. The law is clear that the meaning of a provision of the law is determined as at the date of its enactment, and not the date of interpretation. Provided that the provision has not been amended (as in the case of s 377A), its enacted meaning remains the same. Therefore, the repeal of s 377 in 2007 has no effect on the meaning of s 377A. If s 377A did not include penetrative sex in 1938, it would not include penetrative sex today.[123]

115 In any event, on the basis of the CA2022's ruling,[124] the court must still determine whether s 377A includes the sexual offences in s 376 (criminalising non-consensual penetrative sex acts between males) and those in ss 376A–376E and ss 376F–376G, as context. If it does, s 377A would contradict the legislative intention of the amendments. If it does not, it demonstrates the incoherence of the CA2022's holding that s 377A covers penetrative sex acts.

VII. The Reasonable Classification Test and section 377A

116 The two-limb Reasonable Classification Test ("RCT") came from India. As formulated in the Indian cases, it states:[125]

> In order...to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differential which distinguishes persons or thing that are grouped together from others left out of the group and (ii) that the differential must have a rational relation to the object sought to be achieved by the statute in question.

123 See the following authorities:
(a) *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [93];
(b) *Re Constitutional Reference No 1 of 1988* at [17], citing *The Attorney-General v Lamplough* (1878) 3 Ex D 214 and EA Driedger, *Construction of Statutes* (2nd Ed, 1983) at p 87;
(c) *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [18] where the court said "*it is trite* to state that one has to ascertain what the Parliamentary intention underlying s 15 was at the time when it was promulgated"; and
(d) *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [24], where the CA2015 referred to the HC2013's statements in *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118.

124 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [169].

125 Durga Das Basu *et al*, *Shorter Constitution of India* (LexisNexis Butterworths, 14th Ed, 2009) at p 87. The RCT was applied by the Court of Appeal in *Lee Keng Gua v Public Prosecutor* [1977] SGCA 2 where the constitutional challenge was not concerned with class discrimination.

117 In *Ong Ah Chuan*, the Privy Council applied a one-limb RCT ("*OAC/RCT*"). In *Public Prosecutor v Taw Cheng Kong*[126] ("*Taw Cheng Kong (CA)*"), the Court of Appeal formulated a three-limb RCT. However, in *Lim Meng Suang HC*, the HC2013 preferred the two-limb RCT formulated by the Court of Appeal in *Tan Eng Hong v Attorney-General* ("*TEH/RCT*"). The *TEH/RCT* was endorsed on appeal by the CA2015 in *Lim Meng Suang CA* and applied by the HC2020 in *Johnson Ong*. The proposition in this article is that, in the interest of simplicity and ease of comprehension, the courts should consider adopting the *OAC/RCT* as the applicable RCT for Art 12(1) challenges.

A. The one-limb Reasonable Classification Test

118 In *Ong Ah Chuan*, Ong and Koh were charged and convicted under s 3 of the Misuse of Drugs Act ("MDA") for trafficking in 209.84g and 1,256g of heroin respectively. Section 29 imposed the mandatory death sentence for persons convicted of trafficking in 15g or more of heroin, but imprisonment for persons convicted of trafficking in a lower quantity of heroin, *ie*, the differentia (or dissimilarity) was the quantity of heroin trafficked.

119 The relevant ground of appeal for present purposes was that s 29 of the MDA violated Art 12 (1) on the ground that:[127]

> A denial of equal protection of the law guaranteed by article 12 (1) of the Constitution arises not only where there is unequal treatment of equals but also where there is equal treatment of unequals. The article requires that legislative classifications should not be over-or under-inclusive. The defendant relies on *State of Kerala v. Haji* AIR 1969 (56) SC 378; *Murthy Match Works v. Assistant Collector of Central Excise* AIR 1974 (61) SC 497 and *Rajendra Prasad v. State of Uttar Pradesh* [1979] 3 SCR 78. The equal protection provision is offended where, as here, there is no rational legislative purpose to explain or justify one class of offenders being denied the right to plead in mitigation.

And:[128]

> The constitutionality of the mandatory death sentence falls to be considered with reference to article 12 (1). There is a *prima facie* case of denial of equal protection of the law because of the combination of the four elements: *viz*., the sweeping breadth of the offence; the extreme nature of the penalty; the fact that the penalty is determined by the amount of the drug rather than by the heinous nature of the crime; and the mandatory sentence. There is a

126 [1998] 1 SLR(R) 78.
127 *Ong Ah Chuan v Attorney-General* [1981] AC 648 at 658.
128 *Ong Ah Chuan v Attorney-General* [1981] AC 648 at 662.

wide range of reasonable alternatives by which the legislature could achieve its legitimate aims.

120 The Privy Council rejected the appellants' arguments on both Arts 9(1) and 12. *Apropos* Art 12(1), Lord Diplock delivered a judgment using a one-limb RCT:[129]

> All criminal law involves the classification of individuals for the purposes of punishment, since it affects those individuals only in relation to whom there exists a defined set of circumstances - the conduct and, where relevant, the state of mind that constitute the ingredients of an offence. Equality before the law and equal protection of the law require that like should be compared with like. *What article 12 (1) of the Constitution assures to the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits laws which require that some individuals within a single class should be treated by way of punishment more harshly than others; it does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed.*[130] [emphasis added; reference added]

> The discrimination that the defendants challenge in the instant cases is discrimination between class and class: the imposition of a capital penalty upon that class of individuals who traffic in 15 grammes of heroin or more and the imposition of a penalty, severe though it may be, which is not capital upon that class of individuals who traffic in less than 15 grammes of heroin. The dissimilarity in circumstances between the two classes of individuals lies in the quantity of the drug that was involved in the offence. The questions whether this dissimilarity in circumstances justifies any differentiation in the punishments imposed upon individuals who fall within one class and those who fall within the other, and, if so, what are the appropriate punishments for each class, are questions of social policy. Under the Constitution, which is based on the separation of powers, these are questions which it is the function of the legislature to decide, not that of the judiciary. *Provided that the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law, there is no inconsistency with article 12 (1) of the Constitution.* [emphasis added]

> The social object of the Drugs Act is to prevent the growth of drug addiction in Singapore by stamping out the illicit drug trade and, in particular, the trade

129 *Ong Ah Chuan v Attorney-General* [1981] AC 648 at 674–675.

130 However, in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26, the CA2015 gave little or no weight to the Privy Council's holding that Art 12(1) confers real constitutional rights, and held at [90]:

> To recapitulate, the analysis proffered above at [73]–[74] is that Art 12(1) appears to be more of a declaratory (as well as aspirational) statement of principles, as opposed to a set of specific legal criteria as such … However, it is perhaps precisely because Art 12(1) is framed at such a general level that it does not furnish the *specific* legal criteria which can guide the courts in determining, in specific fact situations, whether a particular statute violates Art 12.

> in those most dangerously addictive drugs, heroin and morphine. The social evil caused by trafficking which the Drugs Act seeks to prevent is broadly proportional to the quantity of addictive drugs brought on to the illicit market. There is nothing unreasonable in the legislature's holding the view that an illicit dealer on the wholesale scale who operates near the apex of the distributive pyramid requires a stronger *deterrent* to his transactions and deserves more condign punishment than do dealers on a smaller scale who operate nearer the base of the pyramid. It is for the legislature to determine in the light of information that is available to it about the structure of the illicit drug trade in Singapore, and the way in which it is carried on, where the appropriate quantitative boundary lies between these two classes of dealers. No plausible reason has been advanced for suggesting that fixing a boundary at transactions which involve 15 grammes of heroin or more is so low as to be purely arbitrary.

121 The first passage sets out the two basic principles of equality underlying Art 12(1). The first is "like should be compared with like", *ie*, Art 12(1) assures the individual the right to equal treatment with other individuals in similar circumstances. The second is that Art 12(1) "does not forbid discrimination in punitive treatment between one class of individuals [Class A traffickers] and another class [Class B traffickers]) in relation to which there is some difference in the circumstances of the offence that has been committed".

122 The second passage explains that the dissimilarity that is challenged in the appeals is discrimination between two classes, *ie*, the imposition of capital punishment on Class A traffickers and imprisonment on Class B traffickers. The difference or dissimilarity in circumstances between the two classes lies in the quantity of the drug trafficked. Whether such dissimilarity justifies the differentiation in the punishments imposed, and, if so, what the appropriate punishments are for each class, are questions of social policy for the legislature to decide, not the judiciary. If the dissimilarity adopted is not purely arbitrary but bears a reasonable relation to the social object of the law, there is no inconsistency with Art 12 (1).

123 The third passage identifies the social object of the MDA, which:

> … is to prevent the growth of drug addiction in Singapore by stamping out the illicit drug trade and, in particular, the trade in those most dangerously addictive drugs, heroin and morphine, deter drug traffickers from importing larger quantities of drugs into Singapore … The social evil caused by trafficking which the Drugs Act seeks to prevent is broadly proportional to the quantity of addictive drugs brought on to the illicit market.

124 As (a) on the evidence, "[n]o plausible reason has been advanced [by Ong] for suggesting that fixing a boundary at transactions which involve 15 grammes of heroin or more is so low as to be purely arbitrary"; and (b) the classification "bears a reasonable relation to the social

object of the law", the Privy Council held that s 29 of the MDA was not inconsistent with Art 12(1).

B. The two-limb Reasonable Classification Test as applied in Lim Meng Suang v Attorney-General[131]

125 In *Lim Meng Suang HC*, the HC2013 held that a discriminatory law must satisfy the *TEH/RCT* as follows:[132]

> (a) the classification prescribed by the legislation is founded on an intelligible differentia ('the First Limb'); and
>
> (b) the differentia bears a rational relation to the object sought to be achieved by that legislation ('the Second Limb').

126 The HC2013 explained the requirements under the two limbs as follows:[133]

> *The First Limb – intelligible differentia*
>
> 47 The First Limb requires that the classification prescribed by the impugned legislation must be based on an intelligible differentia. 'Intelligible' means something that may be understood or is capable of being apprehended by the intellect or understanding, as opposed to by the senses. 'Differentia' is used in the sense of a distinguishing mark or character, some attribute or feature by which one is distinguished from all others …
>
> 48 Applying this to the present case, it is quite clear that the classification prescribed by s 377A – viz, male homosexuals or bisexual males who perform acts of 'gross indecency' on another male – is based on an intelligible differentia. It is also clear from the differentia in s 377A that the section excludes male-female acts and female-female acts. There is little difficulty identifying who falls within this classification and who does not. The Court of Appeal seemed to say as much in *Tan Eng Hong* at [125]-[126]. In my view, the First Limb is satisfied and few can cavil with this conclusion.
>
> *The Second Limb – rational relation to the object of the legislation*
>
> 49 The Second Limb requires an ascertainment of the object or purpose of the statutory provision in question followed by a determination of whether the differentia underlying the classification prescribed by that legislation bears a rational relation to the object or purpose of the provision. Both these elements are more complex than they appear.

127 In relation to Limb (a), the ordinary meaning of "intelligible" is "capable of being understood or comprehended" by the intellect.

131 [2013] 3 SLR 118.
132 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [46].
133 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [47]–[49].

No instance of any unintelligible differentia persons or things has been found in the decided cases (including the Indian cases). A differentia would, by definition, be intelligible, otherwise, it would not be a differentia. Differentiating drug traffickers by classifying them into Class A traffickers and Class B traffickers, as in *Ong Ah Chuan*, is intelligible, but it says nothing about the legislative object of s 29 of the MDA. Similarly, differentiating males who are punishable from males who are not punishable under s 377A is intelligible, *but it tells us nothing about its purpose or object*.

128 Applying Limb (a) to s 377A, the HC2013 found that the differentia underlying the classification of acts of gross indecency punishable and not punishable under s 377A was intelligible.[134] Next, applying Limb (b), the HC2013 found that the purpose or object of s 377A was to prosecute such male homosexual conduct.[135] Hence, *the purpose or object of s 377A was the same as the differentia*. Given the finding that A=B and B=A, it was unsurprising (in fact it would be surprising if it were otherwise) that the HC2013 concluded that 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".[136]

129 The circularity in the finding is obvious. It renders the RCT redundant since the RCT would always be satisfied. It would also mean that Parliament could lawfully discriminate against half of Singapore's population in terms of criminal liability simply by replacing by law the expression "person" or "party", wherever they occur in all criminal legislation, with the words "male person" or "female person" as the case may be.

130 Nevertheless, the CA2015 applied the *TEH/RCT*[137] and affirmed the HC2013's finding that there was "a complete coincidence in the relation between that differentia and that purpose and object".[138]

134 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [47]–[48].
135 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [63]–[70].
136 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [67] and [100].
137 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [60].
138 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [153].

C. The differentia explained in Ong Ming Johnson v Attorney-General[139]

131 The HC2020 explained the meaning of the differentia as follows:[140]

> s 377A undoubtedly provides a clear differentia: it is targeted at homosexual acts between males, as opposed to sexual acts between females or between males and females. The key question is thus whether targeting of male-male sexual conduct as opposed to male-female sexual conduct or female-female sexual conduct is so unreasonable as to be illogical and/or incoherent. *Put another way, the inquiry looks at whether there is no reasonable dispute as to the unreasonableness of the differentia concerned from a moral, political and/or ethical point of view.* [emphasis added]
>
> I find that the differentia is not so patently unreasonable. There are certain areas within Singapore law where distinctions are drawn between men and women. For example, women are excluded from caning under s 325(1)(*a*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ('CPC'). This was challenged in *Yong Vui Kong (caning)*, where the Appellant argued that the punishment of caning violated Art 12(1) of the Constitution, and that there was no valid justification for the differential treatment of males and females with respect to caning. The Court of Appeal disagreed with his contention, stating that there were 'obvious physiological differences between males and females which we think Parliament was legitimately entitled to have taken into account' (at [110]).
>
> Another example of gender-based differential treatment may be found in s 69 of the Women's Charter (Cap 353, 2009 Rev Ed) which deals with spousal maintenance. A court may, on the application of a wife, and on due proof that her husband has neglected or refused to provide reasonable maintenance for her, order the husband to pay a monthly allowance or a lump sum for the maintenance of that wife. In contrast, an application for maintenance may only be made by an incapacitated husband under s 69(1A).
>
> Given the above, s 377A, seen in the broader context of Singapore law, cannot be said to be an outlier in the way in which distinctions are drawn based on gender. Moreover, the issue of the intelligibility of the differentia in s 377A was specifically decided in *Lim Meng Suang CA* (at [110]–[111]), and the differentia was found to be sufficiently intelligible.
>
> …
>
> I am thus of the view that the differentia in s 377A was not so unintelligible to the extent that there is no reasonable dispute as to its unreasonableness *ie* its illogicality and/or incoherence based on moral, political or ethical grounds. As the Court of Appeal found in *Lim Meng Suang CA*, the differentia in s 377A was logical and coherent. It therefore cannot be said that there was no intelligible differentia in s 377A.

139 [2020] SGHC 63.

140 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [171]–[178].

132 With respect, the key question is not whether the differentia is "so unreasonable as to be illogical and/or incoherent" "from a moral, political and/or ethical point of view". As we have seen, the differentia tells us nothing about the purpose or object of s 377A. The key question is whether the differentia bears a rational relation to the purpose or object of s 377A (which, the HC2020 found, was to safeguard public morality). This question is not answered in these passages. Furthermore, relying on the two instances of gender-based differentia in s 325(1)(*a*) of the Criminal Procedure Code[141] and s 69 of the Women's Charter, whose constitutionality was not challenged, to conclude that the gender-based s 377A must be also constitutionally valid, is a classic *non sequitur*.

VIII. The constitutionality of section 377A having regard to its legislative purpose or object

133 The HC2020 found that s 377A was of general application and that its purpose or object was to safeguard public morality:[142]

> The purpose or object of s 377A was to safeguard public morals generally, through enabling enforcement and prosecution of all forms of gross indecency between males, covering penetrative and non-penetrative homosexual activity whether in public or in private and with or without consent. It was not limited to commercial male homosexual activity or to non-penetrative sexual activity between males when it was enacted in 1938 …

134 The HC2020's holding[143] gives s 377A a broader application and purpose than is warranted by the text of s 377A itself. The heading of s 377A is "Outrages on decency" and the provision proscribes any act of gross indecency. It may be recalled that the CA2022 said:[144]

> We emphasise that the legislative purpose or object of a statutory provision should ordinarily be gleaned from the text of the provision in its statutory context. Primacy ought to be accorded to the text of the provision and its statutory context over any extraneous material (see *TCB* at [43] and [54(c)(ii)]).

135 Given the primacy of the text, the purpose or object of s 377A is properly that of safeguarding "societal decency" and not public morality (since it also punished acts committed in private). However, the question as to whether the purpose of s 377A was to safeguard societal morality or societal decency, does not affect the constitutionality of s 377A nor the application of the RCT to it.

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141 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [172].
142 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [146(d)].
143 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [133].
144 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [172].

136 On the basis that the purpose of s 377A was that found by the HC2022, it has to be conceded that the purpose of criminalising male–male acts of gross indecency has a rational relationship to the purpose of s 377A in safeguarding public morality. But, equally, so does criminalising male–female and female–female acts of gross indecency. In failing to criminalise these two classes of acts, the purpose of safeguarding societal morality or decency is obstructed and may even be undermined. This omission raises the issue as to whether the legislative classification is under-inclusive, and its effect on the constitutionality of s 377A.

A. The effect of under-inclusiveness on the Reasonable Classification Test

137 It is settled law that legislative classifications should not be over- or under-inclusive. As explained in *Lim Meng Suang HC*:[145]

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

138 It is also settled law that "there is no need for a perfect coincidence between the differentia used and the object sought to be achieved".[146] It would be legislatively impractical to require the enactment of a provision to be seamless and perfect to cover every contingency.[147]

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145 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [96]–[97].

146 *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [116].

147 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [81]. The requirement of under-inclusiveness may be trumped by a higher principle. In *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489, the classification under s 37(1) of the Prevention of Corruption Act was based on citizenship. Singapore citizens, but not permanent residents, who committed corrupt acts abroad were punishable as if the acts were committed in Singapore. Taw argued that the classification was under-inclusive as the corrupt acts of permanent residents abroad would also affect the object of deterring corruption in Singapore. The Court of Appeal dismissed the argument at [81]:

> In any event, we also found the learned judge's criticisms of the differentiation in s 37(1) unfounded. If s 37(1) was under-inclusive in that it failed to capture corrupt non-citizens whose corrupt acts outside Singapore have consequences

(cont'd on the next page)

139 The HC2020 referred to the issue of under-inclusiveness in s 377A as follows:[148]

> The plaintiffs' argument on s 377A being under-inclusive is premised on the notion that s 377A concerns only male homosexual conduct while other purportedly immoral conduct such as female homosexual conduct or adultery is not criminalised. In this regard, the fundamental rubric of 'like should be treated alike', which concerns how individuals in similar circumstances should be treated alike, would purportedly be breached due to the differing treatment of persons who engage in different types of immoral conduct.
>
> However, as I have found above, the very purpose of s 377A is the criminalisation of male homosexual conduct to safeguard public morals generally and reflect societal morality. The differentia in s 377A serves to criminalise only acts of gross indecency between male persons. This was the same conclusion reached by the Court of Appeal in *Lim Meng Suang CA*. There would, as a result, be a complete coincidence in the differentia and object of the legislation.

140 It is apparent from these two passages that, in holding that it was bound by the CA2015's decision in *Lim Meng Suang CA*, the HC2020 did not consider the significance of under-inclusiveness in s 377A. Further, it is submitted that, the HC2020's finding that the purpose of s 377A is to safeguard public morality undermines the complete coincidence between the object of s 377A and the differentia.

141 It submitted that the legislative classification in s 377A is clearly under-inclusive by any standard. Acts of gross indecency may be committed by the following classes of persons: (a) homosexual males ("HOMs") with males; (b) bisexual males ("BISs") with males and females; (c) heterosexual males with males and females ("HEMs"); and (d) females, whether homosexual, bisexual or heterosexual, with other males or females ("Fs"). All such acts will result in obstructing and undermining the purpose of safeguarding societal morality if they are not criminalised and punished. Punishing only one out of four classes of offences or offenders must be grossly under-inclusive, since they all promote the same object.

142 Article 12(1) "assures to the individual is the right to equal treatment with other individuals in similar circumstances".[149] HOMs are clearly not treated equally with BISs, HEMs and Fs since they are the only class of persons targeted by s 377A for punishment for committing

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in Singapore, that was because of the overriding need to observe international comity since Parliament had chosen to frame s 37(1) in very wide language.

148 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [188]–[189].

149 See para 120 above.

the same kinds of acts that the other classes may commit without any punishment.

143 It may also be noted that BISs form a class of its own. Mr A can commit a s 377A offence with another male, but not with a female in respect of an identical act of gross indecency. He has one persona in the first case, but another persona in the second case. This type of "Dr Jekyll and Mr Hyde" split personality discrimination is neither a one-class discrimination as in *Ramalingam*, nor a two-class discrimination as in *Ong Ah Chuan* or a multiple-class discrimination as in the present case. It is submitted that this kind of discrimination in s 377A is self-evidently irrational, and arbitrary, in the context of Art 12(1).

B. Framing the legislative purpose to conform with Article 12(1)

144 The CA2022 also makes the following observations:[150]

> The present appeals likewise illustrate how casting the legislative object of a statutory provision differently may well yield different results under the 'reasonable classification' test. If one were to frame the legislative object of s 377A as the expression of societal disapproval of male-male sex acts, as Ms Tan asserts, there would necessarily be a perfect coincidence between the differentia embodied in and the legislative object of s 377A. On the other hand, if one were to cast the legislative object of s 377A more broadly as the expression of societal disapproval of homosexual conduct in general or the safeguarding of public morality generally, that would strengthen the case that s 377A falls afoul of the 'reasonable classification' test. In this setting, s 377A would appear to be under-inclusive because it does not criminalise female-female homosexual conduct, for instance. One could then conclude that the differentia embodied in s 377A (namely, male-male sex acts) lacks a rational relation to the legislative object of reflecting societal disapproval of homosexual conduct in general or safeguarding public morality generally. The framing of the legislative object of a statutory provision could, of course, cut both ways. For example, if Dr Tan and Mr Choong had been able to argue successfully in their respective appeals that the legislative object of s 377A is targeted specifically at male prostitution only, they might have succeeded in showing that as s 377A applies to categories outside the narrow category just mentioned (namely, male prostitution), it is over-inclusive and, hence, unconstitutional under Art 12.

145 With respect, it is not clear what point was meant to have been conveyed in this discussion. The Constitutional Question was on appeal before the CA2022 because the HC2020 had determined the object of s 377A to be that of safeguarding public morality, and decided the Constitutional Issue against the appellants. Instead of rejecting or

150 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [324].

upholding the HC2020's decision, the CA2022 provided an academic discourse on the issue and decided neither.

146 The CA2022 also made the following observations:[151]

> First, equality before the law and the equal protection of the law are such fundamental rights that the court should shun the 'austerity of tabulated legalism' when applying the 'reasonable classification' test, so that individuals can enjoy the 'full measure' of their Art 12 rights (see *Ong Ah Chuan* at p 670). Second, whether a statutory provision breaches Art 12 is a matter for the court's determination. If the 'reasonable classification' test were too diluted, that would undermine the court's constitutional role in safeguarding individuals' Art 12 rights. The court should therefore be chary of construing or applying the 'reasonable classification' test in a manner that effectively denudes Art 12 of real force.

147 The first observation is laudable. Given that the RCT has been diluted in the decisions leading to these appeals, it is unfortunate that the CA2022 passed up this opportunity to make a definitive ruling on the construction or application of the RCT that would give real force to Art 12(1), so that all individuals can enjoy the full measure of equal justice that Art 12(1) guarantees to them.

C. The one-limb Reasonable Classification Test is not applicable to discrimination within the same class

148 The RCT applies to discriminations of a statutory or administrative nature. Both kinds of discrimination may not violate Art 12(1). However, the RCT assumes the existence of different classes of persons or things being treated unequally by legislation or administrative acts or decisions. The *OAC/RCT* was not formulated to apply to unequal treatment of persons within the same class, but to unequal treatment of persons between different classes.[152]

149 In *Ramalingam*, Ramalingam and Sundar were arrested for joint trafficking in more than 500g of cannabis. The threshold quantity for the death penalty was more than 500g of cannabis. The PP charged Ramalingam for trafficking in 5,560.1g of cannabis and 2,078.3g of cannabis mixture, and Sundar for trafficking in only 499g of cannabis. Ramalingam argued that the charge against him violated Art 12(1) because he was not treated alike with Sundar.

151 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [326].
152 See *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at para 26 above.

150 The issue was whether the PP's decision to prosecute Sundar with a lower offence was arbitrary or an abuse of power. The Court of Appeal held that no such evidence was before the court:[153]

> The crucial issue is whether a decision of this nature is within the limits of the prosecutorial discretion accorded to the Attorney-General under the law. In our view, provided that such a decision is made for legitimate reasons, it is and has always been permitted under the common law, and Art 35(8) of the Constitution has merely incorporated that position.

151 The test in same-class discrimination under Art 12(1) was first considered in *Howe Yoon Chong v Chief Assessor*[154] ("*Howe Yoon Chong*"). There, the Privy Council held that the test was whether "there is deliberate and arbitrary discrimination against a particular person … Arbitrariness implies the lack of any rationality". This test was applied by the Court of Appeal in *Eng Foong Ho v Attorney-General*[155] and the High Court in *Public Prosecutor v Ang Soon Huat*.[156]

152 In *Syed Suhail*,[157] the Court of Appeal held that the *Howe Yoon Chong* test set too low a standard of protection in cases where life and liberty were at stake, and reformulated the test as follows:[158]

> (a) whether it resulted in the appellant being treated differently from other *equally situated* persons; and
>
> (b) whether this differential treatment was reasonable in that it was *based on legitimate reasons*. Legitimate reasons were those that bore a sufficient rational relation to the object for which the power was conferred… [for example,] the differential treatment was based on plainly irrelevant considerations or was the result of applying inconsistent standards or policies without good reason: at [57], [61] and [62].

This reformulated test is similar to the test applied in *Ramalingam*[159] (see para 150 above), which concerned a life and death situation. However, *Syed Suhail* was not such a case.

153 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [65].
154 [1990] 1 SLR(R) 78.
155 [2009] 2 SLR(R) 542 at [30].
156 [1990] 2 SLR(R) 246 at [23].
157 [2021] 1 SLR 809.
158 [2021] 1 SLR 809 at headnote 7.
159 See *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [65].

D. The approaches in Lim Meng Suang v Attorney-General[160] *and* Syed Suhail bin Syed Zin v Attorney-General[161]

153 In its Judgment, the CA2022 said, "[s]ince the decision in *Lim Meng Suang (CA)*, another approach to the application of the 'reasonable classification' test has emerged in our decision in *Syed Suhail*"[162] and proceeded to examine the relative merits of the *Lim Meng Suang CA* and the *Syed Suhail* approaches in the context of the RCT.[163] It is respectfully submitted that the comparison is not meaningful because the RCT does not apply to the issue in *Syed Suhail* for the following reasons:

(a) First, *Syed Suhail* involved the legality of an alleged administrative decision by the Singapore Prison Authority in not complying with an execution schedule applicable to condemned prisoners based on the date of conviction. In contrast, *Lim Meng Suang CA* involved the constitutionality of a statutory discrimination under s 377A.

(b) Second, the issue in *Syed Suhail*, at the highest, gave rise to the equal treatment of condemned prisoners with respect to procedural rights under an administrative execution schedule. The issue in *Lim Meng Suang CA* gave rise to a substantive constitutional right to equal justice under Art 12(1). The test of legality in *Syed Suhail* is thus not the same as the test of constitutionality in *Lim Meng Suang CA*.

154 The Court of Appeal said:[164]

> When applying this test, the court would have due regard to the nature of the executive action in question. Since the present case was concerned with a decision which was necessarily taken on an individual rather than a broad-brush basis, and one which affected the appellant's life and liberty to the gravest degree, the court had to be searching in its scrutiny.

160 [2015] 1 SLR 26.

161 [2021] 1 SLR 809.

162 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [313].

163 The need to compare the two approaches is puzzling since the RCT is not mentioned in or relevant to *Syed Suhail*. Paragraph 63 of the judgment in *Syed Suhail* reads: "When applying *this test*, the court would have due regard to the nature of the executive action in question." [emphasis added]. In contrast, *Tan Seng Kee* at [327], which refers to *Syed Suhail*, reads: "This court held (at [63]) that: When applying [*the 'reasonable classification'*] test, the court would have due regard to the nature of the executive action in question." [emphasis added]. It is not clear why the *Syed Suhail* test has been changed into a RCT.

164 *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 at [63].

It is submitted that this statement is incorrect. Syed Suhail's expectation to fair treatment did not arise under Art 12(1) as his life was already forfeited by his conviction and sentence. His petition to the President for clemency had been duly considered and rejected. After that, he only had, at the highest, an expectation to fair and equal procedural treatment with other condemned prisoners under the execution schedule.

IX. Article 162 and "existing laws"

155 Article 162 provides:[165]

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

156 If s 377A is inconsistent with Art 12(1), it must be construed to conform to Art 12(1). It is not clear whether the word "construed" in Art 162 simply means "interpreted" or if it requires some form of judicial rewriting.[166] Whatever it means, the construction is limited to making s 377A *conform to Art 12(1)*.[167]

157 Section 377A may be modified to conform to Art 12(1) as follows:

(a) By reading out (omitting) the word "male" so that s 377A applies to public and private acts of gross indecency of all persons:

> 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.

165 Article 2 defines "existing law" as "any law having effect as part of the law of Singapore immediately before the commencement of this Constitution".

166 See Article 105(2) of the State of Singapore Constitution where the word "modification" was expressly defined to include amendment, adaptation and repeal. Article 105(2) was omitted from the 1980 Reprint of the Constitution.

167 Or to Articles 9(1) and 14(2) (if s 377A is also inconsistent with these provisions).

(b) By reading out (omitting) the words as shown, so that s 377A applies only to public acts of gross indecency of all persons:

> 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.

158 Scenario (a) ensures equal justice to all persons. However, it criminalises acts of gross indecency of males with females, and females with females, in public or in private. This was not the intention of s 377A.

159 Scenario (b) decriminalises private acts of gross indecency, and also ensures equal justice to all persons who commit acts of gross indecency in public. Section 377A was enacted to augment s 23 of the MOO to safeguard public decency further by increasing the punishment and criminalising consensual private acts as well. Since private consensual penetrative sex (the most serious instance of gross indecency) between adult male homosexuals was already decriminalised in 2007, there is no public policy against construing s 377A to criminalise grossly indecent conduct of all persons in public, instead of only those of male homosexuals. No plausible reason has been given as to why grossly indecent acts of bisexual males and females committed in public should not be punished, since punishing them would certainly promote the object of safeguarding public (or societal) morality or decency; not doing so will almost certainly obstruct or undermine it.

160 The possibility that an existing law that is inconsistent with the Constitution might not be construable to conform with the Constitution was discussed in *Tan Eng Hong v Attorney-General*.[168] There, the Court of Appeal suggested that such an existing law would be void under Art 4(1) as the principle of constitutional supremacy must apply to all laws, whether they pre- and post-date the Constitution. It is submitted that this view is not sustainable because it contradicts the express constitutional arrangement set out in Arts 4(1) and 162 respectively. Article 4 applies only to laws enacted after the commencement of the Constitution. Article 162 applies only to existing laws. The two provisions are mutually exclusive. Under Art 4(1), if a post-Constitution law is declared inconsistent,

168 [2012] 4 SLR 476 at [143].

it automatically becomes void to the extent of the inconsistency.[169] Under Art 162, an existing law remains as such if it cannot be construed to conform to the Constitution, because Art 162 is not expressed to void it.

161 It is submitted that if s 377A cannot be construed to conform to the Constitution, it will remain an existing law, but it cannot be enforced since it would be contrary to the rule of law, and/or beyond the court's judicial power to enforce a law that is inconsistent with the Constitution.

162 Given that s 377A was intended to also safeguard public decency, it is submitted that in these appeals, the CA2022 missed a unique opportunity to declare s 377A inconsistent with Art 12(1) and to construe it to conform to the Constitution in a manner that would safeguard public decency.

X. Summary of propositions

163 The propositions advanced in this article may be summarised as follows:

(a) The appellants have standing in the appeal, before and after the date of the Judgment. In any event, the CA2022 had jurisdiction and could have addressed the Constitutional Question.

(b) The political compromise, whether or not packaged with the AG's representations, is not justiciable, and has no legal significance.

(c) The AG's representations were information, and not representations intended to engender legitimate expectations under the DSLE. In any event, requirements of the DSLE were not satisfied on the facts, and also on the law in that the DSLE does not apply to the prosecutorial power. Further, the CA2022 has no power to declare a subsisting law unenforceable.

(d) The courts are not bound under s 9A(1) to apply the *TCBf* to interpret s 377A, and may refer to any relevant extrinsic evidence to interpret legislation under the common law.

(e) Section 377A, properly construed, does not criminalise penetrative sex punishable under s 377 (repealed in 2007).

169 On a strict application of the doctrine of separation of powers, a court may declare a law inconsistent with the Constitution, but may not declare it void, as that would intrude into the legislative power. However, if a law is declared inconsistent with the Constitution, it automatically becomes void, to the extent of the inconsistency.

(f) The RCT was not properly applied in *Lim Meng Suang HC*, *Lim Meng Suang CA* and *Johnson Ong*.

(g) The classification of male–male acts of gross indecency in s 377A is under-inclusive in relation to the purpose or object of s 377A, and accordingly s 377A is inconsistent with Art 12(1).

(h) If s 377A is inconsistent with Art 12(1), it may be construed pursuant to Art 162 to conform to the Constitution in a manner that would safeguard public decency. If it cannot be construed to conform to the Constitution, it remains an existing law that cannot be enforced.
