(2022) 34 SAcLJ 529
(Published on e-First 30 December 2021)

RIGHTISM, REASONABLENESS AND REVIEW: SECTION 377A OF THE PENAL CODE AND THE QUESTION OF EQUALITY – PART TWO

In an article that was published recently,[1] this author argued against the desirability of a "rightism" oriented approach towards construing fundamental liberties in general, fueled by values-based reasoning. In the context of broadly framed equality clauses, arguments for expansive readings of existing rights or declaration of new rights warranting stricter degrees of scrutiny are driven by the values of egalitarian liberalism. The nature of the reasonable classification test and its reasonableness as a mode of constitutional adjudication is also discussed, in the light of the interplay between constitutional principles like the separation of powers, rule of law and democracy, where rights are taken reasonably, balanced against competing norms and interests, rather than being taken "seriously" as Dworkinian trumps which valorise individual autonomy. This article continues the discussion and focuses upon the specificities of the Art 12 challenges towards the constitutionality of s 377A of the Penal Code (Cap 224, 2008 Rev Ed) ("s 377A"), engaging how legislative purpose retained in pre-Independence laws should be construed and arguing that scoping equality through the reasonable classification test remains appropriate within a communitarian polity. This test confides morally controversial questions with far-reaching social consequences to the legislative province where a holistic scrutiny of all issues may be afforded and political compromises made, as distinct from narrowly framed rights-based legal arguments before courts which may obscure broader implications of how changes to a law may affect competing rights, duties and public goods. The amendability of the Constitution, the wide-ranging reach of equality to any differentiating law, and constitutional principles of separation of powers, rule of law and democracy may be enlisted in defence of the reasonableness of the reasonable classification test, and the normative desirability of resisting the juristocratic path of rightism.

1 Published on e-First 22 December 2021 <https://journalsonline.academypublishing.org.sg/e-First/Singapore-Academy-of-Law-Journal>.

THIO Li-ann
BA (Hons) (Oxford), LLM (Harvard), PhD (Cambridge);
Barrister (Gray's Inn);
Provost Chair Professor, Faculty of Law, National University of Singapore.

I. Introduction

1 Part II of this article contests the argument that s 377A fails to satisfy the reasonable classification test, particularly because it serves no purpose or an inadequate purpose given its original rationale, as well as arguments that a rational nexus does not exist between the differentia and legislative purpose. Much turns on whether a "thin" or "thick" reading is attributed to s 377A's purpose, which is explored. Part III considers calls to revise the reasonable classification test in favour of more rigorous tests of judicial review, allied with promoting a preferred theory of substantive equality, whose content is parasitic on external standards independent of the constitutional text, historical intent and principles. It has been argued that "equality before the law", distinct from "equal protection under the law", under Art 12(1), should effectively be accorded the status of a super-right, warranting a heightened standard of review such as tiered scrutiny or proportionality review.[2] This article argues that this constitutes an unwelcome invitation to "rightism" and "living tree" construction which attempts to utilise "equality" as a mantra and trump[3] over competing rights and public interests, to advance an egalitarian liberal theory of the good. Part IV reflects on how the reasonable classification test reflects an autochthonous view of the separation of powers between co-equal branches, where it is considered undesirable for courts to be enmeshed in "the center of the culture wars".[4]

II. Applying the reasonable classification test to section 377A

2 Challenges against the constitutionality of s 377A on the basis of equality assume the form of two broad types of arguments, the first of which relates to the appropriateness of the existing reasonable classification test and presumption of constitutionality. To give due weight to equality rights, a more stringent test of scrutiny is called for.[5]

---

2 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 107.

3 Peter Westen, "The Empty Idea of Equality" (1982) 95 Harv L Rev 537 at 592–596.

4 Sundaresh Menon, "Executive Power: Rethinking the Modalities of Control" [2019] 29 *Duke Journal of Comparative and International Law* 277 at 297.

5 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 90, discussed in Part III below.

A. First limb of the reasonable classification test: Dissensus and reasonable dispute

3 The first set of arguments relate to the application of the reasonable classification test. The courts have held that s 377A easily satisfies the first limb, providing an "intelligible differentia", in clearly distinguishing between acts falling within and without its scope.[6] There is a "complete coincidence"[7] between the differentia and the legislative object, which criminalises the act of males engaging in grossly indecent acts with other males. The first limb would not be satisfied if it could be shown that s 377A, by not criminalising heterosexual or female–female sexual conduct, was "so unreasonable as to be illogical and/or incoherent",[8] and that no one could reasonably dispute this assertion. While controversial, the differentia was not unintelligible, illogical or incoherent, as it provided a basis for parties on either side of the "cavernous divide" to join issue.[9]

4 Clearly, reasonable dispute does exist; the issue why s 377A did not cover lesbian acts was raised during the 2007 Penal Code amendments parliamentary debates; that Parliament decided to retain s 377A in its present form indicates it did not assume the moral equivalence of male and female homosexual conduct or that both equally impacted public morality.[10] Its reason for retention, which affirmed the purpose of s 377A as articulated by Attorney-General Howell in 1938, was that

---

6 Quentin Loh J noted there was "little difficulty" in identifying who does and does not fall within the classification under s 377A, which excludes male–female and female–female acts: *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [48].

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

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

9 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [111]. Chan Sek Keong in "*Equal Justice* under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 76 argues that if the purpose was to create a differentia, that is, to discriminate, the reasonable classification test would always be satisfied. However, this did not apply to s 377A whose purpose was not to discriminate against male homosexual conduct but to safeguard public morals though criminalising such conduct: *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [191]. One cannot equate "criminalisation" with illegitimate "discrimination" as opposed to legitimate differentiation; otherwise, the entirety of criminal law would constitute discrimination.

10 Public morality is a recognised constitutional norm (Arts 14(2) and 15(4) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint)). It transcends majority or minority opinion, although legislative norms can be evidence of it. See Derek Edyvane, "What is the Point of a Public Morality?" (2012) 60 *Political Studies* 147. The Court of Appeal in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [167] distinguished public or societal morality (a common good theory of justice) from "popular morality" (bare majoritarianism). See generally Robert P George, *Making Men Moral: Civil Liberties and Public Morality* (Clarendon Press, 1993).

"Singapore was a conservative society where the majority did not accept homosexuality", as evident from constituents' feedback.[11]

5 It was fair to conclude that there was "no significant change in the degree of societal disapproval" towards male, as opposed to female, homosexual conduct. Although there are divergent positions on this issue, the fact of dissensus supports the High Court's finding in *Ong Ming Johnson v Attorney-General*[12] ("*Johnson*") that the differentia was "not so patently unreasonable".[13]

B. Second limb of the reasonable classification test: "Thin" and "thick" section 377A arguments

6 The difficulties arise at the second stage of the test: Firstly, in determining whether the degree of over- or under-classification means that the differentia does not bear a rational relation to the purpose, such that s 377A *fails* the test. Secondly, that the test is *wrongly or cannot be applied*, based on a restrictive reading of the original purpose of s 377A. The purpose of s 377A is thus "critical"[14] to its constitutional validity. Those seeking to repeal s 377A argue that the purposes it served in 1938 must continue to exist, be reasonable in 2013 or 2020 (when it was impugned in the judicial forum) and serve a legitimate state interest.[15] Otherwise, there would "no longer exist a purpose that could have a rational relation to the differentia".[16]

7 This section examines what the text, context and historical materials reveal about the legislative purpose of s 377A, followed by a discussion of whether the classification it adopts passes legal muster.

(1) "Thin section 377A"

8 The "thin" view of s 377A is that when introduced in 1938, s 377A was enacted not because male homosexual conduct was then unacceptable in Singapore society; instead, it was only intended to apply

11 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [85].
12 [2020] SGHC 63.
13 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [172].
14 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 45.
15 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 46.
16 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 79.

to the mischief of male prostitution, then rife, involving male homosexual conduct.[17]

9 Further, since oral and anal sex were already covered as unnatural offences under s 377 of the Penal Code[18] ("s 377"), originally introduced through the 1872 Straits Settlement Penal Code, it is assumed that s 377 and s 377A should not overlap[19] in terms of conduct covered. As such, s 377A only covered non-penetrative homosexual sex acts, such as masturbation, sexual touching and lewd acts. This will be described as the "thin s 377A reading", in terms of both the actors and action it targeted.

10 If s 377A only addressed a specific category of actors, that is, male prostitutes, then it could be argued that the original purpose no longer exists ("no purpose" argument) in the changed social conditions of 21st century Singapore. If it did exist, it did in so decimated a fashion that it would be an inadequate purpose (*ie*, the inadequate purpose argument) today. There would be no purpose or no sufficient purpose to which a classification can be rationally related to.

11 If s 377A does not cover male anal and oral sex, when Parliament repealed s 377 in 2007, the liberal project of agitating for the decriminalisation of consensual male penetrative homosexual sex acts committed in private would have then been unwittingly accomplished.[20]

(2) "Thick" section 377A

12 The "thick" view of s 377A is that it has, from 1938, covered both penetrative and non-penetrative acts between any two male persons,

---

17 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 35. This is an artificial distinction, as male prostitution involves homosexual conduct, and does not make sense in the light of s 377, which s 377A was introduced to strengthen, and the fact that unnatural offences include homosexual conduct. It is tantamount to suggesting commercial sodomy was not socially approved, but non-commercial sodomy was.

18 Cap 224, 2008 Rev Ed; Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at paras 12–13.

19 Raised in *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [13] and *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [144].

20 This would mean that Parliament and the Government were labouring under "the mistaken belief", as Chan Sek Keong asserts, that homosexual anal and oral sex was punishable under s 377A, and that the Attorney-General's Chambers before and after 2007 acted wrongly in prosecuting oral sex acts committed between non-male prostitutes under s 377A. See Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at n 61.

commercial or otherwise, and is not limited to non-penetrative sex acts with male prostitutes. The legislative purpose is to uphold societal morality, of which curbing male prostitution was or is a subset. Indeed, male prostitution would include anal-penetrative sex, as well as "lesser" offences short of penetrative acts.

13 It is to this point we now turn, which implicates the inter-relationship between s 377 and s 377A, after which the question of classification and purpose is examined, with the conclusion that the relevant materials sustain a "thick s 377A reading".

14 Alternatively, if Parliament in 2007 intended to keep the criminalisation of homosexual penetrative sex on the statute books and if this was not effected by retaining s 377A after repealing s 377 because of a "thin s 377A reading", the courts may arguably rescope the provision and give effect to Parliament's clear intent by a rectifying construction. This would draw from the 2007 parliamentary debates, the Bill's explanatory statement and other relevant material, as explored below.

C. Identifying the legislative purpose of section 377A

15 Identifying legislative purpose is not always a "straightforward"[21] exercise, as it can be framed at various levels of generality and specificity,[22] such that the statutory objects and purposes could be described "in whatever terms as would support one's preferred interpretation".[23] Whether a differentia is found to be rationally related to the legislative purpose "depends on how broadly or narrowly" legislative purpose "is framed".[24]

16 The vintage of a statutory provision may affect how its ordinary meaning is understood. The difficulties in construing purpose not only lie in the relative dearth of legislative materials for s 377A and its English precursor, but also the aversion to discussing and drafting taboo subjects with precision; it was the practice to seek refuge in euphemisms like

21 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [50].

22 Quentin Loh J in *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 raised a series of related issues and concerns at [50]. See the narrow and broader framing of s 37(1) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) in the High Court and Court of Appeal in *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78 (HC) and *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 (CA), as discussed in *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [52]–[57].

23 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [60]–[61], *per* Sundaresh Menon CJ.

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

the "sin of Sodom" (*coitus per anum*) and the "sin of Gomorrah" (*coitus per os*),[25] as merely mentioning such things were thought to corrupt.

17 In general, Parliament's intent is to be discerned "at or around the time the law is passed".[26] Further, whether a new purpose can substitute for a no longer applicable or acceptable original purpose remains unsettled.[27]

(1) Discerning purpose: Tan Cheng Bock *framework*

18 Section 9A of the Interpretation Act[28] ("IA") mandates a purposive approach above other statutory interpretation approaches. Article 2(9) of the Constitution provides that the IA applies in interpreting the Constitution and requires the court "to give effect to the intent and will of Parliament";[29] in this process, due regard is to be given to the "integration of text and context".[30] Where two or more possible interpretations of a provision exist, the one promoting the legislative purpose is to be preferred.

19 The three-step framework as applied in *Tan Cheng Bock v Attorney-General*[31] ("*Tan Cheng Bock*") in relation to purposive interpretation is to (a) ascertain the possible interpretations of the provision, considering text and context; (b) ascertain the legislative object; and (c) compare the possible interpretations of the text with the statutory object or purposes.[32]

---

25 *Khanu v Emperor* AIR 1925 Sind 286.

26 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [27]; *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [18]. In some circumstances, parliamentary intent is discerned "when it subsequently reaffirms the particular statutory provision in question": *Constitutional Reference No 1 of 1995* [1995] 1 SLR(R) 803 at [44]. Chan Sek Keong in "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 50 argues that purpose is determined and fixed at the time of enactment.

27 It was discussed briefly in *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [87], where both counsel agreed that a new purpose, such as curbing the spread of HIV or AIDs which did not exist in 1938, could be substituted as a valid purpose of s 377A. Quentin Loh J observed in *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [97] that it would be a "stretch" to read into the October 2007 parliamentary debates that the intent behind retaining s 377A was to prevent and mitigate HIV.

28 Cap 1, 2002 Rev Ed.

29 *Constitutional Reference No 1 of 1995* [1995] 1 SLR(R) 803 at [44]. Approved in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [35].

30 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [18]; *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [73].

31 [2017] 2 SLR 850.

32 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [37], applied in *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [32].

20 This framework seeks to limit the extraneous materials not forming part of the written law, in ascertaining what a statutory provision means. Sundaresh Menon CJ elaborated on how to apply s 9A(2) of the IA, which sets out three situations, all of which involve first determining the ordinary meaning[33] of the relevant provision within its statutory context:[34]

> In the first situation, pursuant to s 9A(2)(*a*), extraneous material performs a *confirmatory* function, serving to endorse the correctness of the ordinary meaning. It is also 'useful for demonstrating the soundness – as a matter of policy – of that outcome' … The second and third functions are essentially *clarificatory* in nature. Under s 9A(2)(*b*)(i), resort to extraneous material can be had where the provision on its face is ambiguous or obscure. Under s 9A(2)(*b*)(ii), extraneous material can be referred to where the ordinary meaning of the text is absurd or unreasonable in the light of the underlying object and purpose of the written law. [emphasis in original]

21 If the court relies on extraneous material to confirm, not alter a provision's meaning, it must then decide how much weight to accord the material, guided by the desirability of persons being able to rely on the text's ordinary meaning in its context: s 9A(4) IA. Menon CJ noted in *Attorney-General v Ting Choon Meng*[35] that substantial weight be accorded the relevant material as an interpretive aid provided it was "clear in meaning[36] and directly pertinent to the disputed issue".[37]

22 It was argued in *Johnson*[38] that s 9A(2)(*b*)(i) was engaged as the term "any act of gross indecency" in s 377A was allegedly vague. However, in applying the *Tan Cheng Bock* framework, the High Court found that it confirmed the Court of Appeal's conclusions in *Lim Meng Suang v Attorney-General*[39] ("*LMSCA*") on the purpose and object of s 377A, which had not changed from its 1938 purpose.

---

33 The Court of Appeal in *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [76] noted that a good starting point for apprehending "ordinary meaning" is the "proper and most known signification" of a word, that which "comes to the reader most naturally by virtue of its regular or conventional usage in the English language, and in the light of the linguistic context in which that word or phrase is used".

34 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [71].

35 [2017] 1 SLR 373.

36 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [70]–[71]. It must be clear in the sense of disclosing "the mischief aimed at [by the enactment] or the legislative intention lying behind the ambiguous or obscure words": *Pepper v Hart* [1993] AC 593 at 634.

37 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [72].

38 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [34].

39 [2015] 1 SLR 26.

(2) Ordinary meaning of section 377A: Text and context

23 In applying the first stage of the *Tan Cheng Bock* framework, the High Court in *Johnson* found that "gross indecency with another male person", while expansive, was not so vague as to give rise to multiple interpretations of the scope of s 377A on any reasonable reading. The words themselves do not restrict the application of s 377A to male prostitution or non-penetrative sex; on a plain reading, "gross indecency" is wide enough to encompass both penetrative and non-penetrative sex between male persons.[40]

24 Contextually, s 377A is located in the "Sexual Offences" Penal Code chapter. When introduced in 1938, "s 377A was paired with s 377" and both offences were grouped under the "Unnatural Offences" heading as composite parts thereof.[41] Section 377 itself and s 23 of the Minor Offences Ordinance[42] ("MOO") did not contain terms limiting the commission of unnatural offences between males to commercial homosexual activity, as s 377 was intended to have general application. There was "no reason" why a "special limitation" should be introduced to s 377A. From the text and context, s 377 and s 377A were meant to be of general application to male homosexual practices, sharing the purpose of enforcing "a stricter standard of societal morality in 1938".[43]

(3) Extraneous materials: Purpose and object of sections 377 and 377A

25 The scope of s 377A is shaped by its relation with s 377; to see whether a "thin" or "thick" reading of s 377A is supported, the legislative and other relevant materials need to be examined.

26 Section 377A is a "direct copy"[44] of s 11 of the UK Criminal Law Amendment Act 1885[45] ("1885 UK Act"), also known as the "Labouchere Amendment". It does not define "gross indecency" and provides no illustrations.

40 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [94].
41 "[Section] 377A may be seen as a subset of s 377, covering a specific class of persons, *viz*, men who participate in sexual conduct with other men": *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [30].
42 Act 13 of 1906.
43 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [96].
44 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [142].
45 48 & 49 Vict, c 69.

27 Section 377, which was derived from the 1860 Indian Penal Code ("IPC"), was adopted into the Singapore Penal Code in 1872[46] and repealed in 2007 after a comprehensive review of the 1985 Penal Code. The Penal Code (Amendment) Bill 2007 was debated before Parliament on 22 to 23 October 2007 ("October 2007 debates").

28 Section 377 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 ten years, and shall also be liable to fine.
>
> Explanation: Penetration is sufficient to constitute the carnal intercourse necessary for the offence in this section.

29 Although the IPC may have had a bias towards English criminal law, it was not meant to codify English criminal law principles of that time,[47] under which oral sex did not constitute "sodomy".[48] Indeed, the use of the "all-embracing"[49] provision of "carnal intercourse against the order of nature" ("carnal intercourse") meant that the IPC framers intended this should cover "all 'unnatural offences'", "more than just the offences

46 Penal Code (Ord 4 of 1871). Its earliest English precursor was the 1533 Buggery Act which criminalised "the detestable and abominable Vice of Buggery committed with Mankind or Beast". Buggery related only to anal intercourse by a man with a man or woman or intercourse per anum or per vaginam by a man or woman with an animal: *R v Jacobs* (1817) Russ & Ry 331. Other forms of "unnatural intercourse" may amount to gross indecency or indecent assault but did not constitute buggery. In England, the term "gross indecency" in s 13 of the UK Sexual Offences Act 1956 (4 & 5 Elizabeth II, c 69) covers masturbation by one man in view of another male spectator: *R v Preece* [1977] QB 370. Buggery remained a capital offence until s 61 of the Offences against the Person Act 1861 (24 & 25 Victoria, c 100) (UK) provided for ten years to life imprisonment. Carnal knowledge would be deemed complete upon proof of penetration without any need for "actual emission of seed": s 63. Buggery laws relating to consensual acts in private were repealed in 1967.

47 *Public Prosecutor v Kwan Kwong Weng* [1997] 1 SLR(R) 316 at [17].

48 *R v Samuel Jacobs* (1817) Russ & Ry 331, as followed by the Mysore Chief Judge in *Government v Bapoji Bhatt* (1884) 94 Mysore LR 280 at 281–282. The Singapore Court of Appeal rejected *Bhatt* which held that oral sex did not fall within s 377 of the Indian Penal Code, noting that subsequent Indian cases also did not rely on *Bhatt*: *Public Prosecutor v Kwan Kwong Weng* [1997] 1 SLR(R) 316 at [18]. They further noted at [19] that using the term "carnal" rather than "sexual" was intentional and pejorative.

49 *Public Prosecutor v Kwan Kwong Weng* [1997] 1 SLR(R) 316 at [17].

of sodomy and bestiality".[50] It covered all "sex other than heterosexual penile-vaginal [sex]".[51]

30 It is clear from Singapore case law that oral sex between two persons falls within the s 377 meaning of unnatural carnal intercourse, if it was a substitute for coitus, rather than a mere prelude to it.[52] Oral sex or any act "designed to bring sexual satisfaction or euphoria to a man performed on another man or a young boy" was against the order of nature as "there can be no union or coitus of the male and female sexual organs"; this, from a sensible biological perspective, is the "only natural sexual intercourse which is in the order of nature".[53]

31 There was "no single or uniform standard" for a s 377 offence, as it covered a range of offences for which consent was not an element.[54]

---

50 *Public Prosecutor v Kwan Kwong Weng* [1997] 1 SLR(R) 316 at [17]. The Prosecution contended that "any form of sexual activity other than sexual intercourse between a willing man and a consenting woman capable of giving legal consent" was against the order of nature: at [12].

51 The Delhi High Court in *Naz Foundation v Government of NCT of Delhi* WP(C) No 7455 of 2011 (2 July 2009) noted this of s 377 of the Indian Penal Code, on which the Singapore s 377 is based, as the Court of Appeal noted in *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [30].

52 The court in *Public Prosecutor v Kwan Kwong Weng* [1997] 1 SLR(R) 316 at [22], while rejecting the theory that sexual intercourse was only meant for procreation, nonetheless stated "without hesitation" that "the orifice of mouth is not, according to nature, meant for sexual or carnal intercourse"; thus, putting a penis in a victim's mouth to satisfy the accused's sexual appetite would be an act of carnal intercourse against the order of nature: at [31]. Indian cases which support this view include *Khandu v Emperor* (1934) 35 Cri LJ 1096 and *Lohana Vasantlal Devchand v The State* (1968) Cri LJ 1277. What actually took place between two persons, whether oral sex was foreplay or substituted for coitus, would be a "question of fact" for the court: at [32].

53 *Public Prosecutor v Kwan Kwong Weng* [1997] 1 SLR(R) 316 at [25]. The court stated at [28] that aside from sexual intercourse in the order of nature involving "the coitus of the male and female sexual organs", for whatever purpose, "any other form of sexual intercourse" would be "carnal" in the sense that "it is lustful", and "against the order of nature".

54 Young children and animals are unable to consent to a s 377 offence: *Public Prosecutor v Kwan Kwong Weng* [1997] 1 SLR(R) 316 at [26]. As Lai Kew Chai J noted, while consenting adults did indulge in unnatural acts "which any civilised society would find abhorrent and revolting", such acts had to be criminalised irrespective of whether the parties fully consented: *Public Prosecutor v Tan Kuan Meng* [1996] SGHC 16. Notably, under s 1 of the English Sexual Offences Act 1967 (c 60), a statutory defence was created to the offence of gross indecency set forth in s 13 of the Sexual Offences Act 1956 (4 & 5 Elizabeth II, c 69) (which was worded in substantially similar terms as Singapore's s 377A though not *in pari materia*) provided the act was a homosexual act done in private between two consenting males above the age of 21. The court noted in *Ng Huat v Public Prosecutor* [1995] 2 SLR(R) 66 that Singapore has no "consenting adults" defence and there was no need to follow the post-1967 English approach as the Singapore Parliament "has

(cont'd on the next page)

Thus, "different criteria and different principles" would apply to each individual unnatural sex offence, which varied in gravity. Sentencing guidelines considered factors like whether a "chronic paedophile" or two consenting adults were involved.[55]

32 There are "varying degrees of gross indecency" under s 377A, which provides for up to two years imprisonment; sentencing is calibrated by factors like whether an act is committed in public or private.[56] What constitutes a grossly indecent act depends on whether it would be considered grossly indecent "by any right-thinking member of the public", after "the customs and morals of our times".[57]

33 It was argued that since s 377 covers anal and oral sex ("penetrative sex"), "thin s 377A" does not overlap with s 377 and only covers non-penetrative acts of gross indecency between two male persons.[58] Further, if s 377A was enacted to deal with the specific problem of male prostitution in 1938, this is no longer a problem (or negligible at best) in the Singapore of the 21st century (2007 or 2013 or 2020).[59] As such, there

---

not seen the wisdom or the necessity to keep in step with the changes in English legislation": at [11], [18] and [23].

55 *Lim Hock Hin Kelvin v Public Prosecutor* [1998] 1 SLR(R) 37 at [15] and [35].

56 In *Abdul Malik bin Othman v Public Prosecutor* Magistrate's Appeal No 429/93 (unreported), referenced by Yong Pung How CJ in *Ng Huat v Public Prosecutor* [1995] 2 SLR(R) 66 at [33], six months imprisonment was imposed for an act done in a public swimming complex. For performing a grossly indecent act during the course of his employment as a hospital radiographer, the accused was sentenced to three months imprisonment under s 377A.

57 *Ng Huat v Public Prosecutor* [1995] 2 SLR(R) 66 at [27], citing William Egbert J, Supreme Court of Alberta, *R v K* (1957) 21 WWR 86. Counsel in *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [82] had challenged s 377A, arguing that what constituted "gross indecency" was vague and uncertain as it was not known whether "kissing, holding of hands, or even merely hugging" would fall within s 377A, until the statutory provision was applied to the case facts. However, Quentin Loh J pointed out that even obvious words are disputed by counsel and that does not in itself make a statutory provision vague and uncertain. In *Public Prosecutor v N* [2004] SGDC 52, the accused, then a Boy Scouts leader, was charged under both s 354 of the Penal Code (Cap 224, 2008 Rev Ed) (outrage of modesty) and s 377A for various indecent acts: The former acts related to hugging and kissing, while the latter involved acts of touching a boy's penis.

58 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 28 argues that what falls under s 377A would include "masturbation, cunnilingus or sexual touching of the private parts of another male". This is inaccurate as far as cunnilingus is concerned, which would involve a female person.

59 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [24]. Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 51(b) argues that the original problem s 377A was introduced to address was the mischief of male prostitution and these "causal conditions" ceased to exist before 2007. He asserts it would be "surprising" if

(cont'd on the next page)

is no purpose left for s 377A to serve, *ie*, the "no overlap, no purpose" argument. The reasonable classification test is not satisfied if there is no legitimate purpose for the differentia to be rationally related to.

34 It is argued that the historical materials and canons of interpretation support a "thick s 377A reading" of legislative purpose which, in 1938, was to uphold societal morality, and not merely to address male prostitution, which purpose continued in 2007 and continues today.

35 In this respect, a key point to note is that in practice, charges of fellatio between two men have been brought under s 377A,[60] as well as s 377,[61] which points to a "thick s 377A reading". Indeed, whether fellatio is made the subject of a s 377 or s 377A charge "is a matter of prosecutorial discretion".[62]

D. The case for a "thick section 377A reading"

(1) Historical origins and purposes: English roots and the 1885 Labouchere Amendment

36 The court in *LMSCA* noted that identifying the legislative purpose of s 377A "does not admit of that clear an answer",[63] although it concluded from the "available objective evidence" that s 377A was intended to be of general application, not limited to male prostitution.[64] The High Court in *Johnson* held likewise, after reviewing the "significant new evidence" the plaintiff advanced to supported a "thin" reading of s 377A.[65]

---

conditions in a "so well-governed" Singapore in 2007 would call for the enactment of s 377A if it did not already exist. This is hypothetical and discounts the nature of political compromise and the history of the clause.

60 *Lim Hock Hin Kelvin v Public Prosecutor* [1998] 1 SLR(R) 37. The High Court noted this point about pre-2007 cases, where s 377A was used to prosecute acts of fellatio: *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [129].

61 The statement of facts pertaining to the charges under s 377A showed that the appellant had committed oral sex or fellatio with the five young victims (noted in *Adam bin Darsin v Public Prosecutor* [2001] 1 SLR(R) 709 at [10], of *Lim Hock Hin Kelvin v Public Prosecutor* [1998] 1 SLR(R) 37 at [36]).

62 *Public Prosecutor v Tan Ah Kit* [2000] SGHC 254 at [23], *per* Tay Yong Kwong JC, a case which dealt with charges relating to anal intercourse and fellatio.

63 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [116].

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

65 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [21]. The new material was considered "neutral or indeterminate at best" in relation to the "male prostitution" argument, and some material appeared to provide support for the "thick s 377A" understanding: at [118].

37 The legislative intent underlying both s 11 of the 1885 UK Act and s 377A with respect to their object and purpose appear ambiguous, compounded by the relative dearth of reliable legislative or historical materials. This is complicated by the high tolerance for imprecise euphemistic words and the possible inappropriateness of strictly applying current statutory interpretation principles to examine legislative intent in an era "governed by very different social and political mores".[66]

38 To recap, while Singapore's s 377 was based on the IPC, no provision similar to s 377A was ever enacted in the IPC.[67] Section 377A was based on s 11 of the 1885 Labouchere Amendment[68] which became part of the Singapore Penal Code[69] in 1938 by way of s 3 of the Penal Code (Amendment) Ordinance 1938.[70] While s 377 was gender-neutral, dealing non-exhaustively with the offence of buggery, s 377A was gender-specific and extended to private acts.

39 The original object and purpose of s 11 of the 1885 UK Act may have been "mysterious and arcane" when enacted: the amendment was introduced at the eleventh hour, had nothing to do with the main thrust of the 1885 UK Act[71] and was not debated by the UK Parliament.[72] Nonetheless the relevant English authorities understood it to be meant "for broad and general application",[73] as recognised in *LMSCA*.[74]

66 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [89].

67 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [27].

68 Henry Labouchere was the parliamentarian who introduced the amendment which reads: "*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 misdemeanor" [emphasis added] and liable to up to two years imprisonment.

69 Cap 20, 1936 Rev Ed. The successor to the 1872 Straits Settlement Penal Code.

70 Act 12 of 1938.

71 The UK Criminal Law Amendment Act 1885 (48 & 49 Victoria, c 69) was "An Act to make further provision for the Protection of Women and Girls, the suppression of brothels, and other purposes".

72 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [117]. Quentin Loh J in *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [63] noted the original intent behind s 11 of the UK Criminal Law Amendment Act 1885 (48 & 49 Victoria, c 69) was narrower and meant to protect any person from certain types of indecent assault "of the kind here dealt with." The eventual formulation was broader and gender-specific; while the original purpose was obscure, s 11 was in fact implemented and enforced, including the notorious Oscar Wilde trial: at [64]. When s 11 of the UK Act was adopted locally as s 377A of the 1936 Penal Code, although "laconically expressed", the provision's purpose was "quite clear": at [69].

73 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [142].

74 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [135].

40 Noting that s 377A was adopted some 53 years after s 11 of the 1885 UK Act, the Court of Appeal opined that it did not logically follow they would share the same purpose and object, compounded in that both provisions had unclear purposes.[75] Section 11's purpose was a "secondary guidepost" which may elucidate s 377A's meaning where the primary guideposts are silent or unclear, but must be used with "extreme caution".[76] Ultimately, it held that the relevant historical documents referred to acts of gross indecency "in a very general sense",[77] contrary to a "thin s 377A reading". There was therefore nothing in the legislative background of the UK s 11 and s 377A to suggest that the situation covered was only limited to male prostitutes or non-penetrative homosexual acts.[78]

(2) The 1938 Amendment Bill and contemporaneous legislative materials

41 One reason for difficulties in identifying s 377A's object and purpose were the apparent inconsistencies arising from reading the extraneous "limited contemporaneous legislative materials"[79] surrounding the 1938 Amendment Bill.

42 The two main sources serving as "primary goalposts"[80] were Attorney-General Charles Gough Howell's Second Reading speech introducing the Bill ("AG Howell's speech"), and the accompanying Explanatory Note on Objects and Reasons ("Objects and Reasons").

43 In addition, reference was made to various crime reports[81] in *LMSCA*, and further "new" materials in the form of books, letters,

75 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [118].

76 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [70]. Statutory provisions from foreign jurisdiction may be adopted with modifications or undergo amendments before enactment. Care must be taken to ascertain differences in the foreign jurisdiction such as the legislative history of a provision or the "special needs" of that jurisdiction.

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

78 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [148].

79 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [37].

80 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [70].

81 Chan Sek Keong in "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 disagrees with *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [125] that the crime reports were only "of possible relevance"; he considers at para 55 that the police authored crime reports (1936–1938) are the "best evidence" why s 377A was enacted. Certainly, in dealing with public decency offences, the police tackled the problem of prostitutes soliciting in public, including "male prostitution and other forms of beastliness": at paras 17–19. At most, this indicates that male prostitution was included within the scope of indecent behaviour, though not exhaustively so.

minutes and reports were later placed before the High Court in *Johnson*.[82] These did not constitute legislative materials under the *Tan Cheng Bock* framework[83] and were not considered reliable or relevant interpretive aids; nonetheless, probably given the high signature attached to any constitutional challenge to s 377A, the court generously reviewed the materials, assuming they could be considered, taking the plaintiff's case at its highest.[84] The High Court concluded they did not provide evidence confirming that s 377A's sole purpose was to address male prostitution.[85]

44 The apparent inconsistencies lay in references to different statutes which s 377A was meant to supplement. While AG Howell's speech referred to the need to supplement s 23 of the MOO,[86] the Objects and Reasons clause and the June 1938 Crime Report referred to the need to supplement s 377.

82 Ong Ming Johnson v Attorney-General [2020] SGHC 63 at [60].

83 Ong Ming Johnson v Attorney-General [2020] SGHC 63 at [52] and [90]. This framework sought to give proper effect to the purposive approach by ensuring judicial interpretation of a statute is "an objective and disciplined exercise", precluding statutory interpretation as "an exercise in intuition or impression", based on personal views, producing "a subjective and visceral interpretation".

84 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [50].

85 The Malayan Prosecutions Memo which the UK Government declassified in 2016 had an Addendum which discussed the cases of two colonial officers who had associated with "catamites", young, pubescent boys kept by a man in a paederastic relationship. This was under the heading "Sexual Perversion Cases" rather than a more specific reference to male prostitutes. The Memo contained no reference to the "commercial" nature of the associations and it could not be assumed that a "catamite" was synonymous with a male prostitute. Male prostitutes were not necessarily young boys. If indeed s 377A was adopted to deal with the problem of male colonial civil servants and their associations with catamites and/or male prostitutes, rather than having a general provision like s 11 of the UK Criminal Law Amendment Act 1885 (48 & 49 Victoria, c 69), a more "targeted" approach dealing specifically with civil servants could have been adopted: *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [70]–[74] and [114]. Overall, the Memo suggested "far wider concerns", given the "outbreak" of "sexual perversions" (or homosexual activity) noted in the Addendum, pointing to "the degenerating state of public morality": at [115].

86 Section 23 of the Minor Offences Ordinance No 13 of 1906 provided: "Any person who is found … guilty of any … indecent behaviour, or of persistently soliciting or importuning for immoral purposes … in any public place or place of public amusement or resort, or in the immediate vicinity of any Court or … shall be liable to a fine not exceeding twenty dollars, or to imprisonment for a term which may extend to fourteen days, and on a second or subsequent conviction to a fine not exceeding fifty dollars or to imprisonment for a term which may extend to three months." Its current incarnation is found in s 20 of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed).

(i) AG Howell's speech

45 AG Howell in his "extremely cryptic"[87] speech with respect to cl 4 (later enacted as s 3 of the 1938 Penal Code (Amendment) Ordinance) stated it was unfortunate that "acts of the nature described have been brought to notice". Under the existing law, only acts of indecent behaviour "committed in public" were punishable under the MOO, under which the punishment was "inadequate"; further, "the chances of detection [were] small".

46 The intent in introducing s 377A was "to strengthen the law" and bring it in line "with English Criminal Law, from which this clause is taken".[88] The law would be strengthened by "extending it to reach the private domain".[89] See Kee Oon J in *Johnson* noted that AG Howell's speech could have been "less obscure", as it did not identify the acts in question nor stipulate a specific English criminal law provision. However, such "reticence" was understandable given the fear of such taboo subjects offending "prevailing moral sensibilities".[90] Victorian-influenced sensibilities demurred from precisely describing immoral activities, as being "too disgusting to allow for any discussion".[91]

47 Nonetheless, there are "reasonably clear indicators" from AG Howell's statements to discern the Legislative Council's intent: Clause 4, which became the new s 377A, would cover acts involving "indecent behaviour" which s 23 of the MOO dealt with if committed in public; further, the English criminal law reference was to s 11 of the 1885 UK Act, as explicitly stated in the Objects and Reasons clause.[92]

87 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [120].

88 Attorney-General Howell, *Proceedings of the Legislative Council of the Straits Settlements* (13 June 1938) at p B49.

89 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [28]; *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [135].

90 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [42].

91 Gautam Bhatia, "Case Comment: Navtej Singh Johar v Union of India: The Indian Supreme Court's Decriminalization of Same-Sex Relations" (2019) *Max Planck Yearbook of United Nations Law Online* at pp 218–233, especially at p 220; Alok Gupta, "Section 377 and the Dignity of Indian Homosexuals" (18 November 2006) 41 *Economic and Political Weekly* 4815.

92 *Proceedings of the Legislative Council of the Straits Settlements* (25 April 1938) at p C81, reproduced in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [121].

(ii) The Objects and Reasons clause and "no overlap argument": Only male prostitutes and non-penetrative acts?

48 The Objects and Reasons clause stated that s 377A punishes "acts of gross indecency between male persons *which do not amount to an unnatural offence* within the meaning of section 377 of the [1936] Penal Code" [emphasis added].

49 Based on this, it has been argued that unnatural offences under s 377 (anal and oral penetrative sex) were intended to be excluded from s 377A, even if they might fall within the ordinary understanding of acts of gross indecency. These provisions were mutually exclusive in terms of content,[93] as it would serve no legislative purpose to enact in s 377A offences already subject to heavier punishment under s 377.

50 With the repeal of s 377, Chan has argued that penetrative sex would only be punishable if committed in public under s 20 of the Miscellaneous Offences (Public Order and Nuisance Act)[94] or s 294(*a*) of the Penal Code.[95]

51 Further, it was argued that since s 377A was adopted specifically to deal with male prostitution in 1938,[96] and since this purpose was no longer valid in 2007, it had "ceased to exist" or be relevant to the reasonable classification test.[97]

52 See J in *Johnson*[98] held that the "no overlap" argument glossed over the first sentence in the Objects and Reasons clause, which expressly stated that cl 4 or s 377A was based on s 11 of the 1885 UK Act, which refers to "any male person".

93 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 22 argues that there can be no overlap of offences between ss 377A and 377 as, otherwise, both provisions would be "inconsistent with each other", and that later laws would abrogate earlier contrary laws such that s 377A would "impliedly" repeal similar offences in s 377. This ignores that two provisions in the same statute can cover the same subject matter but provide for different penalties: *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [130].

94 Cap 184, 1997 Rev Ed.

95 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 32.

96 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [131].

97 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 51(c).

98 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [48].

53 While the phrase ("do not amount to an unnatural offence") from the Objects and Reasons clause could arguably support a "thin s 377A reading", this could only be done if read in isolation and in disregard of other contemporaneous materials, by implying the word "only" to read "this section [only] 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".

54 This is "not the only reasonable understanding" of that phrase.[99] When considered in light of the ordinary meaning of "gross indecency", the better view would be that the Objects and Reasons clause simply stated that s 377A had extended the scope of sexual acts criminalised in the 1936 Penal Code and range of punishments.

(iii) Supplementing what? Reconciling AG Howell's speech and the Objects and Reasons clause

55 The Court of Appeal in *LMSCA* reconciled the reference to s 23 of the MOO in AG Howell's speech and to s 377 in the Objects and Reasons clause in finding that s 377A *simultaneously* supplemented[100] both statutory provisions; any inconsistency was more apparent than real.[101] This supports a reading that, like s 11 of the 1885 UK Act, s 377A should be read as having general application.

56 Section 23 of the MOO was not confined to male prostitution. It contained two distinct limbs of an offence in the form of any person "persistent[ly] soliciting or importuning for immoral purposes"[102] and the more generally phrased "indecent behaviour", for which first time offenders could be fined or imprisoned for 14 days. Both limbs remain

99 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [131].

100 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at [42] criticises as "not logical" the use of the term "supplement" which means to "add to", *ie*, that s 377A broadened the range of acts of gross indecency by criminalising non-penetrative acts, as the main offence s 377 addressed were penetrative acts. This does not mean that the reference to "acts of gross indecency" under s 377A does not encompass anal and oral sex, as two penal provisions may overlap, with lesser and more serious versions attracting different punishment.

101 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [122].

102 The Court of Appeal in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [132] pointed out that counsel's focus on "persistently soliciting or importuning for immoral purposes" was selective, ignoring the other aspects of the problem relating to indecent behaviour.

two separate sections in today's equivalent provisions.[103] That s 377A supplements s 377 is consistent with the second limb of s 23 of the MOO which proscribed "indecent behaviour" or "grossly indecent" acts *in public*. Section 377A is broader than s 23 of the MOO in applying to grossly indecent acts between males committed *in private*.[104]

57 With respect to the Objects and Reasons clause and the June 1938 Report,[105] s 377A simultaneously supplements s 377 by broadening what was "hitherto covered by s 377", that is, homosexual oral and anal sex in public or private, whether consensual or not, by including "other (less serious) acts of 'gross indecency'",[106] beyond penetrative sex acts. Section 377A, in 1938, filled the gap of "some unnatural offences" falling beyond the scope of s 23 of the MOO and s 377. It minimally had to extend to "all forms of non-penetrative sexual activity regardless of whether they involve male prostitutes or whether the acts were done in public or in private", which is consistent with the ordinary meaning of "gross indecency" in s 377A.[107] This does not "inexorably" lead to the conclusion that s 377A only dealt with male prostitutes or non-penetrative sexual activity.[108]

58 What s 377A did was to broaden the range of acts captured by gross indecency and the range of penalties available for such offences in general.[109]

---

103 Sections 19 and 20 of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed): *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [132].

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

105 "Report on an Ordinance to amend the Penal Code (Chapter 20 of the Revised Edition). (No 12 of 1938)" dated 21 June 1938, which was not cited by Chan Sek Keong in his article or the plaintiffs in *Ong Ming Johnson v Attorney-General* [2020] SGHC 63, but was raised and dealt with by the Court of Appeal in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26. The relevant portion of the June 1938 Report mirrors the Objects and Reasons clause, and is set out below:

> Section 3 [of the 1938 Penal Code Amendment Ordinance] introduces a new section *based on section 11 of the Criminal Law Amendment Act 1885 (48 and 49 Vict c 69). The section makes punishable acts of gross indecency between male persons which do not amount to an unnatural offence within the meaning of section 377 of the [1936 Penal] Code.* [emphasis added]

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

107 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [109].

108 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [108].

109 The court in discussing sentencing guidelines for paedophiles in *Lim Hock Hin Kelvin v Public Prosecutor* [1998] 1 SLR(R) 37 at [23] noted that the offence of unnatural carnal intercourse in the form of anal intercourse under s 377 "represents the gravest form of sexual abuse". Similarly, in *Public Prosecutor v Rahim bin Basron* [2010] 3 SLR 278 at [58], the offences which took place in 2006 had "progressed in gravity" from fondling of buttocks, instructing a boy to masturbate the accused's penis by hand (a s 377A charge), to digital anal penetration and, finally, penile anal

(cont'd on the next page)

59 This reading is consistent with the reference in AG Howell's speech to the MOO, the need to capture private acts and the fact that s 377A is based on English law; it resolves any inconsistency between AG Howell's speech, the Objects and Reasons clause and the crime reports.[110] Aside from the "plain words"[111] of s 377A, the two primary sources of legislative materials thus indicated "cogently and unambiguously" that the legislative intent in 1938 was to import existing English criminal law, that is, s 11 of the 1885 UK Act.[112]

(iv) Crime reports

60 Chan has argued that the 1936–1938 crime reports demonstrated that male prostitution was rife in certain parts of Singapore, causing social order problems. He argued s 377A was enacted to deal with these activities, which s 23 of the MOO could not adequately deal with, as referenced in AG Howell's speech.[113]

61 The crime reports after 1936 may have highlighted the rising problem of male prostitution and the growing concern over matters of social morality,[114] perhaps prompting the adoption of s 377A in 1938. However, the crime reports do not conclusively point to male prostitution as the sole mischief s 377A was meant to address.[115] The 1938

---

penetration (a s 377 charge). Similarly, the act of the accused performing fellatio on his victims was "at the bottom of the scale of gravity", which should be reflected in the sentencing; coercing or cajoling a young victim to perform fellatio on the accused would be an offence of intermediate gravity and the most serious would be subjecting a young victim to anal intercourse: *Adam bin Darsin v Public Prosecutor* [2001] 1 SLR(R) 709 at [21]–[22].

110 The High Court treated the crime reports as "objective records": *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [54].

111 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [49].

112 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [49].

113 "With regard to clause 4 [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]: Attorney-General Howell, *Proceedings of the Legislative Council of the Straits Settlements* (13 June 1938) at p B49.

114 While prostitution in general was reported under the heading of "Social Services" in the 1934–1936 crime reports, from 1937–1938, it was reported under the new heading "Public Morals". The term "beastliness" first emerged in the 1938 crime report: *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [58].

115 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [142]; *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [92].

crime report, for example, refers to the stamping out, where opportune, of "male prostitution and other forms of beastliness". The reference to "beastliness" would be otiose, if it was not read to contemplate "a far more extensive range of other intolerably 'beastly' male homosexual activities", beyond male prostitution alone. In early 20th century usage, "beastliness", the High Court noted, could refer to "(male) masturbation and/or homosexual activity".[116] Further, the crime reports refer to acts *between male persons*, in a general sense, which militates against the argument that s 377A was enacted solely to combat "rampant male prostitution".[117]

62 As a matter of logical necessity, the Court of Appeal held that s 377A would "*necessarily cover acts of penetrative sex as well*", as such acts "constitute *the most serious* instances of the possible acts of '*gross indecency*'" [emphasis in original] committed between *males*,[118] and there was no exclusionary intent otherwise.[119]

(v) Unnatural offences and general application: The overlap of sections 377 and 377A

63 That s 377 was meant for general application is evident from examining its language and historical context.[120] Its precursors were cll 361 and 362 of the draft IPC, which is cast in general terms:

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

64 The underlying purpose was to "enforce societal morality",[121] evident from the Indian Law Commission's squeamish observations

116 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [57]–[58].
117 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [59]. This argument was raised and rejected in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [147]–[149].
118 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [133]–[134] and [143].
119 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [146].
120 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [137].
121 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [138].

describing cll 361 and 362 as belonging to "an odious class of offences respecting which it is desirable that as little as possible should be said".[122] True to Victorian sensibilities, any ambiguity in the purpose and scope was deliberate, as public discussion "on this revolting subject" was to be avoided by not putting anything in the text and notes. Preventing the "injury" to "the morals of the community" caused by open discussion outweighed any benefits derived from framing more precise legislation.[123]

65 Various factors militate against a thin s 377A reading. First, this would be inconsistent with the asserted generally framed purpose of s 377 to guard against "injury … to the morals of the community".[124] If s 377A was meant to supplement s 377, it ought to be accorded "the same general application as s 377".[125]

66 Second, when s 377A was introduced in 1938, it was included with s 377 under the "broad and general heading 'Unnatural Offences'".[126]

67 Third, the relevant historical documents were also framed in general terms[127] and the crime reports of 1937–1938 spoke of the police safeguarding public morals in a general sense, which would include acts associated with male prostitution, including anal and oral sex.[128]

68 Other historical materials were "neutral" and related to suppressing prostitution and brothels in general.[129] That Oscar Wilde had been charged under s 11 of the 1885 UK Act for engaging in sexual activity with men who may have been male prostitutes does not preclude s 11's

---

122 *Introductory Report upon the Indian Penal Code* in *The Works of Lord Macaulay: Speeches – Poems & Miscellaneous* vol XI at pp 3–198, especially at p 144, cited in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [138].

123 *Introductory Report upon the Indian Penal Code* in *The Works of Lord Macaulay: Speeches – Poems & Miscellaneous* vol XI, pp 3–198, especially at p 144), cited in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [138]. Such prevailing sensibilities against taboo subjects and solicitude for societal morality persisted in "post-Victorian 1938 in colonial Singapore": *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [139]–[140].

124 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [139].

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

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

127 Objects and Reasons referred to "acts of gross indecency between male persons", as did some colonial correspondence dated 21 June 1938 reporting on the 1938 Penal Code Amendment Ordinance: noted in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [121] and [123]–[124].

128 The heading of the section which discussed male prostitution, *inter alia*, was "Public Morals", in relation to the 1937 and 1938 *Annual Report on the Organisation and Administration of the Straits Settlements Police and on the State of Crime: Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [125]–[127], [142] and [146].

129 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [147].

application to more general situations. Further, the trial was "neutral" in so far as Wilde was charged for acts done with men who were not male prostitutes, some of whom he had sexually groomed.[130] The evidence showed that some charges of gross indecency involved sodomy, although Wilde was not charged with the offence of sodomy. In sum, the Oscar Wilde trial showed that s 11 prosecutions did involve alleged penetrative acts and did not always involve male prostitutes,[131] taking place at a time in Britain where there was a "rabid detestation of male homosexuality".[132]

69 If s 377A was meant to deal only with male prostitution, AG Howell could have clearly indicated this; however, there was no mention of male prostitutes in the text or legislative materials, nor of any intent to ensure s 377A did not overlap with s 377 or s 23 of the MOO.

70 According to statutory interpretation rules, extraneous materials cannot be used to contradict the ordinary meaning of a statutory term. Thus, the Objects and Reasons clause cannot be used to argue that s 377A only covered non-penetrative homosexual acts as this would contradict s 377A's ordinary meaning, as "gross indecency" in 1938 was a euphemistic reference to any sexual act between two men.

71 There was thus no reason in interpreting s 377A to reject the ordinary meaning and adopt a strained interpretation to reconstruct and realign legislative intent to concerns Parliament did not articulate.[133]

---

130 See *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [148] and *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [126]–[128], discussing how s 11 of the UK Criminal Law Amendment Act 1885 was used to prosecute Oscar Wilde for 25 offences, involving gross indecencies including alleged acts of sodomy. There is at least one English reported case where a guilty plea on a charge of gross indecency (most likely under s 11 of the 1885 UK Act) for acts constituting homosexual sodomy was upheld (*The King v Barron* [1914] 2 KB 570). The dearth of cases in Singapore and the UK where s 377A is interpreted as covering homosexual sodomy, as opposed to oral sex, is not surprising given both jurisdictions had targeted provisions on homosexual sodomy (s 377 in Singapore and the offence of buggery under s 12 of the Sexual Offences Act 1956 (c 69) (UK)) which carried heavier sentencing.

131 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 adopts the false premise that s 11 of the UK Criminal Law Amendment Act 1885 was only used to prosecute acts of gross indecency not involving sodomy: *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [127]–[128].

132 Francis Barrymore Smith, "Labouchere's Amendment to the Criminal Law Amendment Bill" (1976) 17 *Historical Studies* 165 at 165 and 171, cited in *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [63].

133 Quoting Belinda Ang Saw Ean J in *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [43] and *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [110].

72 The Straits Settlement legislative council could have more directly amended s 23 of the MOO to apply to the activities of male prostitutes, wherever conducted,[134] or to craft a bespoke legislative provision[135] dealing with the "singularly precise problem"[136] of male prostitutes. Even if male prostitution was the prime reason for enacting s 377A, it does not follow it was the sole reason.

73 In strengthening Singapore law and aligning it with English criminal law, it would be "confounding" if the colonial government was not prepared to apply s 377A in the same way the English had used s 11 of the 1885 UK Act for the past 53 years.[137] The 1957 Wolfenden Report[138] contained the observation that "gross indecency" appeared to cover "any act involving sexual indecency between two male persons",[139] of which homosexual sodomy was considered an egregious form.[140]

74 The interpretation of s 377A should "embrace both the spirit and the letter of the law" and should not be "conveniently detached" from its "practical application in England since 1885". The "plain intent" must have been to encompass in the Singapore provision all acts of gross indecency covered by s 11 of the 1885 UK Act, to ensure "a consistent and harmonious set of laws" in the UK and Singapore.[141] Although sodomy was punishable under s 61 of the UK Offences Against the Person Act

134 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [149].

135 The fact that the legislative council had not done so, to target a "much narrower mischief" was "highly significant" and "cannot simply be glossed over". Further, adopting s 11 of the UK Criminal Law Amendment Act 1885 could have been with the intent to not only deal with male prostitution while facilitating prosecution of other forms of non-commercial acts of gross indecency: *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [137]–[138].

136 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [112].

137 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [111].

138 Paragraph 104 of *The Wolfenden Report – Report of the Committee on Homosexual Offenses and Prostitution* (Stein and Day, 1963) at p 67, noted in *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [122].

139 A gross indecency would be committed even absent actual physical conduct, where two males acting in concert behave in an indecent manner. From police reports, "gross indecency between males" usually took one of three forms: mutual masturbation, intercrural contact or oral-genital contact: paras 104–105 of the *Report of the Departmental Committee on Homosexual Offences and Prostitution* (Cmnd 247, 1957) at p 38. A similar observation about s 11 of the UK Criminal Law Amendment Act 1885, that it made illegal "all types of sexual activity between males", not just sodomy, irrespective of age or consent, was made in Ronald Hyam, *Empire and Sexuality: The British Experience* (Manchester University Press, 1990) at p 65, noted in *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [122].

140 United Kingdom, *Report of the Departmental Committee on Homosexual Offences and Prostitution* (Cmnd 247, 1957) at paras 78 and 89.

141 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [121].

1861,[142] the equivalent of Singapore's s 377, s 11 of the 1885 UK Act has also been used to prosecute cases involving sodomy.[143]

75 The Court of Appeal in *LMSCA*[144] noted that before s 377 was repealed, the Prosecution had the option of bringing a charge concerning penetrative sex acts under s 377 or s 377A. After s 377's repeal, there was "no reason in principle"[145] why a s 377A charge could not be brought for male penetrative sex acts.

76 Section 377A strengthened the existing law by addressing the impediments to a successful s 377 prosecution of private acts of gross indecency; these were difficult to detect and prove, given the lack of witnesses able to provide direct evidence and lack of co-operation.

77 Section 377A provided charging and sentencing options to handle concerns about inadequate punishments. By not requiring proof of sexual penetration between two males,[146] s 377A would facilitate the "easier detection and prosecution"[147] of grossly indecent conduct falling short of s 377. Section 377A, but not s 377, would cover the type of case described in the Moses Report,[148] where Moses, a civil servant, was found in a hotel bed with two known catamites and charged with attempted sodomy. The s 377 offence was not proved, in the absence of proof that penetrative sexual activity had occurred. The police statement indicated that three male persons, including Moses, whose penis was not erect, were found naked in bed. Moses admitted sodomy had not yet taken place and would have, if there was no police intervention. The statement did not clarify that the catamites were indeed male prostitutes [149] and there was no evidence both terms were synonyms "in the climate of the 1930s".[150]

142 24 & 25 Victoria, c 100.

143 The Court of Criminal Appeal stated that the "graver charge of sodomy involves gross indecency and something else", and while penetration was essential to sodomy, "neither the act of penetration nor the intention to penetrate is an essential element of the offence of 'gross indecency'": *The King v Barron* [1914] 2 KB 570 at 576, cited in *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [124] and [125].

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

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

146 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [105].

147 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [70].

148 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [75]–[79]. The Moses Report was declassified by the UK in 2014 and concerned an explanation of why Mr Moses resigned from the Prison Service.

149 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [75]–[80]. Thus, the problem of male civil servants associating with catamites was distinct from that of male prostitution: at [113].

150 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [79].

This points to a reading of s 377A which does not see male prostitution as the sole mischief it addressed.

78 As a s 377A charge carries a lower punishment, this would provide an incentive for an accused person to plead guilty or to co-operate with investigations to secure a charge with a "lesser" offence, making it "easier … to secure confessions for a s 377A offence".[151]

79 Thus, the argument that ss 377 and 377A could not overlap was "hardly compelling". Indeed, the Penal Code has numerous examples of overlapping offences which the High Court listed,[152] where the one drafted more widely carried a lower punishment than the narrower one, "proscribing similar types of conduct across a spectrum of culpability".[153]

80 In summary, the relevant extraneous materials do not contradict the ordinary meaning of s 377A and do not show that its sole purpose was to combat male prostitution. Like s 377, the purpose of s 377A was to safeguard public morality in general.

E. "Thick" section 377A and the significance of the 2007 Penal Code amendments

(1) Consensus and dissensus: Heterosexual and homosexual penetrative sex

81 In 2007, after a comprehensive review to update the Penal Code norms to "reflect our society's norms and values",[154] s 377 was repealed by the Penal Code (Amendment) Act 2007,[155] while s 377A was retained. The Government decided to decriminalise oral and anal sex between

151 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [106] and [134]. As to the point of "reverse discrimination" raised by Chan Sek Keong in "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 that homosexual men could be charged with the lesser s 377A offence, while heterosexual couples would be reverse discriminated against in being charged under s 377, the High Court noted that no issue arose as there was nothing to prevent homosexual oral and anal sex from being subject to a s 377 charge: [2020] SGHC 63 at [26] and [135].

152 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [130]. In *Tan Liang Joo v Attorney-General* [2020] 5 SLR 1314 at [35], the High Court noted that while Parliament shuns tautology, some overlap in enacted legislation was to be expected, such as ss 323 and 325 which deal with voluntarily causing hurt or grievous hurt under the Penal Code (Cap 224, 2008 Rev Ed). Where a more serious offence is made out, the elements of the lesser offence is inevitably also satisfied.

153 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [130].

154 Singapore Parl Debates; Vol 83; Cols 2175–2176; [22 October 2007].

155 Act 51 of 2007.

consenting heterosexual couples in private as Singaporeans largely did not find this "offensive or unacceptable".[156] This was clear from feedback and public reaction to *Annis bin Abdullah v Public Prosecutor*,[157] where the conviction of the 25-year-old accused under s 377 for engaging in fellatio with a 15-year-old female victim sparked "intense public debate".[158] In contrast, public opinion over the decriminalisation of homosexual conduct between two men was fiercely divided, emotional and acrimonious.[159]

82 Although a difficult task, it falls to Parliament to determine the requirements of public morality at any one point in time,[160] in deciding whether to maintain or change legislatively embodied social norms.[161]

83 Senior Minister of State for Home Affairs Ho Peng Kee ("Snr Minister Ho") noted that with the repeal of s 377, new offences would be enacted to cover some of the actions previously within s 377's ambit.[162] Section 377A would be retained as Singapore is still "a largely conservative society" where "the majority find homosexual behaviour offensive and unacceptable". While homosexuals had a place in society and increasing social space, repealing s 377A would be "very contentious"

156 Singapore Parl Debates; Vol 83; Cols 2175–2176; [22 October 2007]. The High Court noted that this represented "a major shift in morality and principle": *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [136].

157 [2003] SGDC 290 (DC); [2004] 2 SLR(R) 93 (HC). The case involved a s 377 charge involving a 27-year-old man having carnal intercourse against the order of nature with the 16-year-old female victim by engaging in the act of fellatio. The High Court halved the two years jail sentence. See Dominic Chan, "Oral Sex – A Case of Criminality or Morality?" *Singapore Law Gazette* (September 2004) <https://v1.lawgazette.com.sg/2004-9/Sep04-feature2.htm> (accessed 15 August 2021).

158 As in *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [32].

159 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [154] and [190].

160 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [171]. Quentin Loh J in *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [106] noted that social perceptions "of sexual and other morals change over time", and some changes are "generational in nature".

161 The UK Parliament abolished the UK equivalent of s 377A, influenced by the *Report of the Departmental Committee on Homosexual Offences and Prostitution* (Cmnd 247, 1957) ("Wolfenden Report"), through legislative action in the form of the Sexual Offences Act 1967 (c 60).

162 "Some of the acts that were previously covered within the scope of the existing section 377 will now be included within new sections 376 – Sexual assault by penetration, 376A – Sexual penetration of minor under 16, 376B – Commercial sex with minor under 18, 376F – Procurement of sexual activity with person with mental disability, 376G – Incest and 377B – Sexual penetration with living animal. New offences will be introduced to clearly define unnatural sexual acts that will be criminalised, that is, bestiality (sexual acts with an animal) and necrophilia (sexual acts with a corpse)": Singapore Parl Debates; Vol 83; Cols 2199–2200; [22 October 2007].

and "may send the wrong signal that the Government is encouraging and endorsing the homosexual lifestyle as part of our mainstream way of life".[163] The amendments were put through a "robust process of public consultation"[164] with input from relevant stakeholders, pursuant to the modalities of political constitutionalism.

84 Section 377A underwent a careful, full debate in response to a petition put forward by a Nominated Member of Parliament ("NMP") calling for the repeal of s 377A on the basis that it was unconstitutional in violating Art 12(1), because while "private consensual anal and oral sex between heterosexual adults" would be permitted, "the same private and consensual acts between men will remain criminalised".[165] The petition was debated over two days by Members of Parliament, none of whom contested the above statement on the scope of s 377A. Indeed, the petition provided the occasion for clarifying what parliamentary intent was, in the form of the Prime Minister's ("PM") speech where he confirmed the decision to retain s 377A; this carried the support of the overwhelming majority of the House.[166] The retention of s 377A was a reaffirmation of moral values, inasmuch as repealing it would send the wrong moral signal,

163 Singapore Parl Debates; Vol 83; Col 2200; [22 October 2007].

164 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [72].

165 Petition presented by Nominated Member of Parliament Siew Kum Hong: Singapore Parl Debates; Vol 83; Col 2121; [22 October 2007]. This petition was signed by 2,341 individuals. In response, a group of more than 15,560 filed a counter-petition: *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [84(a)].

166 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 argues that there is no or insufficient evidence that the majority of Members of Parliament ("MPs") endorsed the purpose of s 377A or that Singapore society disapproved of private homosexual conduct to the extent of wanting the State to continue criminalising this (Ng Jun Sen, "Section 377A Doesn't Criminalise Gay Sex and its Purpose No Longer Exists, Argues Former Chief Justice" *Today* (17 October 2019)). Even if they had supported keeping s 377A, Chan argues that they would had done so on the "mistaken" basis that it covered penetrative sex, and that Parliament reaffirmed "the wrong purpose": at paras 35 and 50(d). Not every MP spoke on the Bill, some may have been intimidated from doing so, given the aggressive tactics of activists. Only the NMP who put forward the petition requested that his dissent be registered: Singapore Parl Debates; Vol 83; Col 2444; [22 October 2007] (*Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [153]). While no formal vote was taken, "it was clear" that the majority of the parliamentarians supported retaining s 377A, as noted in *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [75(d)]. As the sole prayer in the petition was that s 377A be repealed, the decision to pass the Bill, which retained s 377A, effectively disposed of the need for a separate vote to be taken on the petition. Parliament, whose individual members may have differing views, has authority to enact an authoritative law as a collective body following established procedures. Further, the morality embodied in legislation, whether enacted or retained, is indicative of at least majority support, as expressed through elected representatives.

and proceeded on a "thick s 377A" understanding. This is supported by the original meaning of the provision as well as extraneous material. The purpose of s 377A in 2007 when it was reviewed was the same purpose it had in 1938, to safeguard societal morality.[167]

85 With the repeal of s 377 in 2007, charges involving male penetrative sex acts, which constitute "the most serious instances" of possible acts of gross indecency, could be brought under s 377A.[168]

(2) After 2007: Sections 376(1) and 377A

86 Even accepting a "thick s 377A reading", Chan, in his article, made a point hitherto not raised before the courts,[169] pertaining to the legislative effect of s 376(1) upon s 377A.

87 Section 376(1) provides for up to 20 years imprisonment for sexual penetration by assault without consent, whether between a man and a woman or between a man and a man. If s 377A is "thin", there is no clash with s 376(1), but if it is thick, both would clash or overlap, in so far as they would deal with forcible, non-consensual oral and anal sex acts between two male persons.

88 Chan argues that with the repeal of s 377 and the enactment of s 376(1) in 2007, the s 377A offence of consensual penetrative sex in

167 "Parliament in 1938 and likewise in October 2007 affirmed the purpose and object of s 377A" which turned on "an issue of morality and societal values": *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [94], *per* Quentin Loh J; *cf* Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 55(d).

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

169 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 33. Notably, this was not one of the arguments advanced in *Ong Ming Johnson v Attorney-General* [2020] SGHC 63.

private[170] was impliedly repealed, to the extent it was inconsistent[171] with the new s 376(1), although no statement was given in Parliament to this effect.[172]

89 However, s 377A is not redundant in the light of s 376(1)(*a*).[173] Indeed, during the 2007 debates, s 377A was reconsidered, and retained, rather than repealed. With its heavier punishment, s 376(1)(*a*) deals with forcible oral and anal sex and is non-gender-specific, whereas s 377A deals with something different, being gender-specific and covering consensual acts. There is no problem in principle with a partial overlap between two Penal Code offences in terms of content, which differ in terms of punishment.[174] Parliament is entitled to distinguish between forcible and consensual penetrative acts.

F. In the alternative: New scope in 2007 via rectifying construction

(1) A candidate for a rectifying construction

90 Legislative intent is generally discerned at the time of legislative enactment.[175] However, this is subject to two rules of statutory interpretation allowing later legislative acts to impact statutory interpretation, *ie*, a rectifying and updating construction.[176]

---

170 It would remain an offence if committed in public, whether between a man and a woman or between a man and a man coupling under s 20 of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed) or s 294(*a*) of the Penal Code (Cap 224, 2008 Rev Ed). Chan Sek Keong in "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at paras 126–132 argues that following Art 162 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint), s 377A could be read down to read "male" as person, and delete "in private", such that s 377A would apply to acts of gross indecency committed between any persons, regardless of sex, in public, which would overlap with s 294(*a*) ("doing any obscene act in any public place" which annoys others, attracting a maximum three months term of imprisonment).

171 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 33.

172 As noted in Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at n 60.

173 Section 376(1)(a) of the Penal Code (Cap 224, 2008 Rev Ed) provides: "Any man (A) who … (*a*) penetrates, with A's penis, the anus or mouth of another person (B) …". The reference to B is gender neutral.

174 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [130].

175 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [18]; *Public Prosecutor v Lam Leng Hung* [2018] 4 SLR 659 at [170].

176 "[T]he focus on the intention to be attributed to Parliament when it enacted the legislation is … subject to any later legislative intervention": Diggory Bailey, "Interpreting Parliamentary Inaction" (July 2020) 79(2) *Cambridge Law Journal*

(cont'd on the next page)

91 In amending the Penal Code in 2007, s 377A was rescoped or repurposed,[177] to ensure the inclusion of homosexual penetrative sex acts formerly falling within s 377.

92 In repealing s 377 with its "archaic" language of unnatural offences, Parliament clearly articulated its intent to decriminalise heterosexual sodomy or oral sex while retaining homosexual sodomy or oral sex as crimes, which it understood to be covered by retaining s 377A. This was the understanding of parliamentarians during the 2007 debates, the "repeal 377A" petition and the PM in his speech specifically setting out the Government's position on s 377A, given under the Attorney-General's Chambers' advice.

93 Indeed, the clarity of the intent was enhanced by the Government's intentional response to the petition and the thorough debate this "non-amendment"[178] elicited, taking place under proper parliamentary processes.[179] If so desired, the Government could have expressly announced the decriminalisation of homosexual anal and oral sex.

94 Additionally, offences formerly falling within s 377 would be rehomed elsewhere, *eg*, bestiality under s 377B. After 2007, the "new" s 377 was refurbished to address necrophiliac acts. Section 377A inherited what the "old" section 377 used to cover, minus what was explicitly removed or transferred to other provisions. The Penal Code sexual offences thus underwent a substantial revamp after substantive deliberation. It was not a technical tinkling, a simple matter of deleting some provisions and retaining others "as is". New crimes were introduced and what was to be retained and jettisoned carefully thought through. The content of s 377A, assuming it was confined to a "thin" s 377A,

245 at 253. On updating construction, see *Comptroller of Income Tax v MT* [2006] 3 SLR(R) 688 at [44].

177 The "new purpose" would be discerned from the 2007 parliamentary debates. Whether the new purpose could substitute for the old purpose is an open question: *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [74(b)] and [87]. The Court of Appeal in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 expressed no view on this matter. The courts have cautioned against using post-enactment materials which would be "unhelpful" in most situations; the court should not ascribe meaning that arises post-enactment or was not present in the minds of those who enacted the law: *Zhao Hui Fang v Commissioner of Stamp Duties* [2017] 4 SLR 945 at [107], citing Oliver Jones, *Bennion on Statutory Interpretation* (LexisNexis, 6th Ed, 2012) at p 654; see also *Comptroller of Income Tax v HY* [2006] 2 SLR(R) 405 at [17].

178 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [33].

179 The High Court in *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [67] and [78] and *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [154] did not find the 2007 parliamentary process in any way defective.

would have been expanded to encompass all forms of gross indecency, complementing other overlapping Penal Code provisions.[180]

95 Chan argues[181] that these parties, and the courts, were all labouring under a misapprehension that s 377A covered penetrative sex acts. If so, then a legal mistake was made to this effect. This would also mean that judicial decisions[182] prior to and after 2007 based on s 377A covering penetrative sex acts, and prosecutorial choices to prefer charges for penetrative sex acts under s 377A, were made on a wrong legal basis.

96 If Parliament's manifest intention to retain homosexual oral and anal sex as an offence is clear, it can be argued that because the words do not carry the intent effectively, the court can remedy this by rectification (by adding or substituting a word) to correct the Legislature's "obvious drafting errors" and "plain cases of drafting mistakes".[183] This only makes sense if the words "gross indecency" are not given their ordinary meaning

180 Section 376(1)(*a*) and (*b*) of the Penal Code (Cap 224, 2008 Rev Ed) dealing with forcible, non-gender specific oral and anal sex, and s 294(*b*) dealing with obscene acts in public places.

181 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at paras 34 and 133, suggesting that in so far as the cases have proceeded on the assumption that s 377A covers penetrative sex, they were given *per incuriam* and not binding on lower courts.

182 Section 377A has been interpreted as covering homosexual fellatio even though that is a form of penetrative sex (*eg*, see *Lim Hock Hin Kelvin v Public Prosecutor* [1998] 1 SLR(R) 37 at [5] and [36]; comment on *Abdul Malik bin Othman v Public Prosecutor* Magistrate's Appeal No 429/93 (unreported) in *Ng Huat v Public Prosecutor* [1995] 2 SLR(R) 66 at [34] and *Public Prosecutor v Chan Mun Chiong* [2008] SGDC 189 at [2]; see also discussion of this point in *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [129]). The Barras principle, an accepted rule of construction under English law, provides that where Parliament enacts a word or phrase which has been the subject of previous judicial interpretation in the same or similar context, it intends the word or phrase to be given the same meaning (see Oliver Jones, *Bennion on Statutory Interpretation* (LexisNexis, 6th Ed, 2012) at section 24.6). It is clear from the 2007 parliamentary debate over Penal Code reforms and the "repeal 377A petition" that Parliament would have indecency endorsed the reading that "gross" under s 377A included penetrative homosexual sex. While the Barras principle typically applies to judicial interpretations *before* a statutory provision is enacted to be relevant to the interpretation of that principle, it is suggested in *Public Prosecutor v Lam Leng Hung* [2017] 4 SLR 474 at [111] that this might be extended to give weight to judicial interpretations after enactment, provided there is "a clear indication from Parliament through the proper process". Additionally, there is a presumption that Parliament is presumed to know the law and to legislate in the light of this knowledge, which extends to earlier judicial decisions about the meaning of legislation that uses same or similar wording. Parliament may reverse a decision, and if it does not, this indicates it is satisfied with that decision: *Campbell v Gordon* [2016] AC 1513 at [44], *per* Baroness Hale of Richmond.

183 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [63].

because of the historical relationship between ss 377 and 377A, and the assumption of no overlapping content.

97 It may be argued that a rectifying construction[184] to correct an inadvertent drafting error may be applied to the later legislative amendment, to achieve the Act's purpose.[185] This would correct the wording of s 377A, to give effect to Parliament's intention through the 2007 amendments to the 1985 Penal Code to rescope s 377A, on the basis that Parliament's omission to amend s 377A in 2007 to expand its scope to homosexual penetrative acts was a drafting error, arising from a mistake of law.

98 The three-step test is set out thus:[186] First, with respect to s 377A, it is possible to determine what the parliamentary intent was in 2007. Parliament sought to retain the criminalisation of homosexual, but not heterosexual penetrative sex. This purpose can be gleaned from the Ministry of Home Affairs' *Consultation Paper on the Proposed Penal Code Amendment*,[187] the terms of the "repeal 377A" petition[188] and the understanding of parliamentarians and Ministers debating s 377A. The intent with retention was to signal society's continued moral disapproval of male homosexual conduct. In passing this Bill which retained s 377A, Parliament may be seen to affirm the understanding that it encompassed consensual private male homosexual acts.

99 Second, given the clear intent to maintain the criminalisation of consensual homosexual penetrative acts notwithstanding the repeal and rescoping of s 377, the lack of an expansion to the scope of s 377A in 2007

184 The Singapore courts have followed the UK case of *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 where the court stressed their constitutional role was interpretative, not legislative. Rectifying construction has been applied in cases like *Kok Chong Weng v Wiener Robert Lorenz* [2009] 2 SLR(R) 709.

185 The paradigm use of a rectifying construction is with respect to drafting defects when a statutory provision was enacted. However, one may argue that it can also be applied to address drafting defects arising from later legislative interventions. The case of *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 may support this view in so far as no objections were raised in principle against the use of a rectifying construction on legislative acts taking place after the enactment of Art 49(1) in 1965, that is the 1988 amendments to the Constitution of the Republic of Singapore and Parliamentary Elections Act.

186 *Nam Hong Construction & Engineering Pte Ltd v Kori Construction (S) Pte Ltd* [2016] 4 SLR 604 at [55].

187 8 November 2006. Paragraph 10 of the Consultation Paper states: "We intend to repeal s 377, re-scoping it such that anal and oral sex, if done in private between a consenting adult *heterosexual* couple aged 16 years old and above, would no longer be criminalized."

188 Text of petition: <https://web.archive.org/web/20071011034137/http://www.repeal377a.com/letter/sign/> (accessed 15 August 2021).

was a drafting mistake; Parliament and the draftsman inadvertently overlooked and failed to deal with the eventuality that given the historical interrelationship between s 377 and s 377A, the legal meaning of "gross indecency" was not its ordinary meaning. This would be an "error of meaning", where the words of a statute are ineffective because of the drafter's misunderstanding, due to a mistake of law or fact.[189]

100 Third, it is possible to state with sufficient certainty what additional words the draftsman would have inserted, but for the inadvertence, which Parliament would have approved.[190] It is clear it would not have redeployed "carnal intercourse" given the intent to remove archaic language, nor would it include terms referring to offences formerly within s 377 where these were rehomed under other sections. A "template is ready to hand"[191] as follows:

> 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, *including the penetration, with his penis, of the anus or mouth of* another male person, *or to permit his anus or mouth to be penetrated by the penis of another male person*, shall be punished with imprisonment for a term which may extend to 2 years.

101 Thus, assuming *arguendo* that s 377A does not cover penetrative acts, the rule of a rectifying construction should provide the courts with a legal basis to rectify s 377A, so as to give effect to parliamentary intention as expressed during the 2007 Penal Code debates.

(2) Previous judicial interpretation representing new purpose

102 The new scope of s 377A from the 2007 parliamentary debates, assuming the "thin s 377A reading" was correct, may also draw support from the Barras principle, an accepted English rule of construction. This provides that where Parliament enacts a word or phrase which has been

189 "*Errors of meaning*: Rectification of a more substantial kind may be required where the meaning is vitiated by some error on the part of the drafter which is not apparent on the face of the text. He may have misconceived the legislative project, or based the text on a mistake of fact. Or he may have made an error in the applicable law, or mishandled a legal concept." F A R Bennion, *Bennion on Statute Law* (Longman Group UK Ltd, 3rd Ed, 1990) at p 175; Oliver Jones, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 6th Ed, 2013) at p 791.

190 The Court of Appeal in *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 declined to apply a rectifying construction to a constitutional provision; one factor that it highlighted was that while parliamentary intent was clear, there were various possibilities of how the outcome could be effected: at [47] and [54].

191 *Nam Hong Construction & Engineering Pte Ltd v Kori Construction (S) Pte Ltd* [2016] 4 SLR 604 at [58].

the subject of previous judicial interpretation in the same or similar context, it intends the word or phrase to be given the same meaning.[192]

103 While the principle typically allows judicial interpretations *before* the enactment of a statutory provision to be relevant to its interpretation, *Public Prosecutor v Lam Leng Hung*[193] ("*Lam*") suggests that it could be extended to give weight to judicial interpretations *after* the enactment of the statutory provision, provided there is "a clear indication from Parliament through the proper process" that it endorsed such an interpretation.[194]

104 Applying *Lam*, it can be argued that Parliament repurposed s 377A through the 2007 Penal Code amendments. Firstly, before 2007, the courts had interpreted s 377A to cover all male homosexual conduct, penetrative and non-penetrative.[195]

105 Secondly, the October 2007 parliamentary debates on the Penal Code amendments clearly demonstrate that Parliament intended s 377A to cover all male homosexual acts.

106 Thirdly, the indication of Parliament's intent must have taken place through proper parliamentary processes. While it is unclear what this requires, there can be no real doubt that it is satisfied here. The High Court in *Johnson*[196] and *LMSHC*[197] attached legal significance to the October 2007 parliamentary debates which thoroughly debated the issue of s 377A; further, no procedural issue relating to how the petition or Bill was presented and debated has been raised.

---

192 Diggory Bailey & Luke Norbury, *Bennion on Statutory Interpretation* (Lexis Nexis, 7th Ed, 2019) at p 596.

193 [2017] 4 SLR 474.

194 *Public Prosecutor v Lam Leng Hung* [2017] 4 SLR 474 at [111].

195 Local cases have interpreted s 377A as covering homosexual fellatio, a form of penetrative sex (*eg*, see *Lim Hock Hin Kelvin v Public Prosecutor* [1998] 1 SLR(R) 37 at [5] and [36]; comment on *Abdul Malik bin Othman v Public Prosecutor* Magistrate's Appeal No 429/93 (unreported) in *Ng Huat v Public Prosecutor* [1995] 2 SLR(R) 66 at [34] and *Public Prosecutor v Chan Mun Chiong* [2008] SGDC 189 at [2]; see also discussion of this point in *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [129]).

196 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [154]. The court held that the presumption of constitutionality should operate and be given full weight in respect of s 377A because that section was retained by Parliament after it was "extensively debated and comprehensively considered by Parliament".

197 In *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118, the court held that the original purpose of s 377A (to "strengthen the criminal law and enable it to prosecute males engaging in … grossly indecent acts even if the acts were committed in private") had been reaffirmed by Parliament in 2007 (at [67] and [78]).

107 Adopting a rectifying construction and/or applying the *Lam* test or applying the Barras principle is also desirable for public policy reasons, as it would signal to Parliament that the courts give weight to its continual deliberation on the purpose and scope of existing statutory provisions, treating statutes not as ossified but capable of yielding new meanings.

108 In turn, actors seeking change on morally controversial issues will be incentivised to utilise political processes such as petitioning their Members of Parliament ("MPs"), knowing the courts attach legal significance to parliamentary action or even inaction, and recognise the primacy of the legislative role over such matters.

G. Inadequate purpose: The fate of "morals legislation" in Singapore

109 A further argument against the validity of s 377A is whether it still serves an adequate purpose today.

110 If public or societal morality is the "sole reason" for maintaining the law as an expression of majority disapproval of male homosexual conduct, this would arguably be an inadequate purpose and not serve a legitimate state interest,[198] being nothing other than bare animus towards a targeted group.[199] In other words, the underlying critique is that the State should not legislate morality. It is clear that s 377A reflects societal and moral values.[200] The issue here is whether the promotion of majoritarian sexual morality or public morality is a legitimate state interest able to survive reasonable classification, or not, portending "the end of all morals legislation".[201]

198 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 49(e).

199 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [33]. The argument that s 377A makes homosexuals "unapprehended felons in the privacy of their own homes" (*Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [184]), being under constant threat of potential criminal investigations, depends on a moral assumption of the innocuousness of the relevant conduct. Deterrence, including the threat of criminal investigation for criminal acts like drug trafficking, is a criminal law function. Further, the State has always intruded into the "private" realm, *eg*, the law criminalises sex between two consenting brothers or a father with his adult daughter, as well as underage sex. The public or private divide is a liberal construct and not a self-evident line of demarcation. The more fruitful inquiry is what should fall under state regulation.

200 While recognising that homosexuals have a place in society and are entitled to their private lives, "homosexuals should not set the tone for Singapore society", that is, homosexuality should not be mainstreamed: Prime Minister Lee Hsien Loong in Singapore Parl Debates; Vol 83; [23 October 2007].

201 *Lawrence v Texas* 539 US 558 at 599 (2003), *per* Justice Scalia (dissenting).

111 If "public morality" is understood as bare majoritarianism or majority animus, that would be a very parlous, misleading conception, casting it as being something "against" rights and liberties, or even justifying institutionalised discrimination.[202]

112 The concept of public morality accepts that morals are not always a matter for private judgment, but may entail collective judgment if society is affected. It is a public good relating to a polity's moral ecology,[203] based on a common good conception of justice; it is concerned with character and promoting a civilising "ethic of decency or civility".[204] This promotes public weal in moderating the excessive individualism and sensualism liberal society tends to promote. It seeks to safeguard against a certain type of harm, whether direct or indirect, tangible or intangible.

113 This implicates the question of what "harm"[205] and the function of law is, beyond the Austinian "command and control" model. Law also has a role in affirming community standards and shaping community identity.[206] Public morality may be strengthened by religiously influenced ethics, but must serve civic interests.[207] Society may use the law to preserve a recognised morality, in the same way law is deployed to safeguard anything deemed existentially essential to society.[208]

114 While communitarian polities may more overtly espouse a brand of "common good constitutionalism", liberal polities also espouse a liberal theory of the good, albeit perhaps covertly given the profession of state neutrality. However, the liberal state in permitting the pursuit of personal preferences does not merely *protect* but *produces* liberal individuals. Further, ideological liberalism mandates the deployment of expansive

---

202 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [76], asserting that "public morality" has in times past been used to enforce slavery and to discriminate against racial and religious minorities and women.

203 Robert George, "The Concept of Public Morality" (2000) 45 *American Journal of Jurisprudence* 17. The idea of a moral ecology is evident in the "prohibited material" listed under the Media Development Authority's Internet Code of Conduct acting under the Broadcasting Act (Cap 28, 2012 Rev Ed). This includes material advocating "homosexuality or lesbianism" or depicting "incest, paedophilia, bestiality and necrophilia".

204 Harry M Clor, "The Death of Public Morality" (2000) 45 Am J Juris 33 at 36.

205 The Millian idea of harm as something physical and direct is idiosyncratic: *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [169]. "Harm" can entail intangible goods.

206 The social value of law is that it is "a potential source of correct or preferable norms of human conduct" framed against a conception of the common good: Peter Cane, "Taking Law Seriously: Starting Points of the Hart/Devlin Debate" (2006) 10 *The Journal of Ethics* 21 at 26.

207 Harry M Clor, "The Death of Public Morality" (2000) 45 Am J Juris 33 at 35.

208 Lord Devlin, *The Enforcement of Morals* (Oxford University Press, 1965) at p 11.

state powers to advocate a particular understanding of morality which is "intrusively moralistic",[209] chilling debate by painting dissent to liberal dogmas as oppressive and divisive.[210]

115 If legislative morality cannot furnish a legitimate state interest for a law criminalising homosexual sodomy, then anyone making a moral argument for such a law is just displaying "animus". With the end of "morals legislation", criminal laws against deviant sexual behaviour like adult incest, bigamy, bestiality and obscenity would not survive rational basis review and would have to be repealed.[211]

116 The people would no longer be able to influence the content of law by reference to their moral code, as a product of democratic deliberation; this would be replaced by the moral preferences of an elite judicial caste.

117 In his article, Chan asserts that subject to express qualification, constitutional rights are "not majoritarian rights": the majority cannot curtail the fundamental rights of a minority because they "may disapprove of or find such conduct unacceptable on the basis of their moral values".[212] Chan "suggests" that in Singapore "with its diversity of people and religions",[213] disapproval of male homosexual conduct "by Parliament or a conservative section of Singapore society" in itself is not "sufficient legal basis" to discriminate against male homosexuals under Art 12(1). In other words, societal morality is not good enough reason for retaining s 377A; the State has no business legislating morality in relation to sexual conduct, which should be treated as the subject of personal choice, consonant with liberal tenets.

118 While diverse viewpoints over moral issues exist, Parliament is not precluded from legislating one vision of morality, though competing views may shape political compromises. The Government cannot discount the views of citizens who oppose homosexuality on religious or non-religious grounds.[214] While a healthy democracy permits the

209 James Kalb, "Tyranny of Liberalism" (2000) *Modern Age* 241 at 244.

210 James Kalb, "Tyranny of Liberalism" (2000) *Modern Age* 241 at 244.

211 *Lawrence v Texas* 539 US 558 (2003), *per* Justice Scalia (dissenting).

212 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 49(f).

213 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 49(f).

214 Former Law Minister Professor S Jayakumar noted in *Governing: A Singapore Perspective* (Straits Times Press, 2020) at p 107 that the Government has to balance the LGBT movement's demands with "hard political realities and sensitivities", noting there is "a core of Muslims as well as conservative Christians who strongly oppose homosexuality", as well as "other conservative Singaporeans who oppose homosexuality on grounds unconnected with religion". It cannot be assumed that

(cont'd on the next page)

articulation of all views, whether based on religious or humanistic convictions,[215] the adopted view must be justified to the general citizenry, not just one particular sector.

119 Chan suggests that public morality cannot outweigh the "constitutional right of equality before the law".[216] This is a rhetorical statement which requires deeper analysis into what equality requires; further, it is true only if equality is a trump.

120 It is disingenuous to argue against "legislating morality" in the name of liberal neutrality,[217] as every law has a moral underpinning[218] (some more profound that others), although law itself is a minimum, necessary and incomplete standard for public morality.[219] There is no unanimity on moral questions in a plural society. If Chan's reasoning is correct, this may delegitimate laws criminalising consensual adult incest, which enjoys democratic support. This must then yield to the preferred sexual choice prerogatives of, say, a vocal pansexualist minority. This itself is an ethical position to take, and impose.

121 Arguments directed at repealing s 377A are not about removing legislative or public morality, but about displacing one brand of public morality and replacing it with another one based on egalitarian liberalism, perhaps framed in terms of categorical "rights", as a new kind of "secular religion".[220] Choice in matters of sexual morality requires the

---

because race and religious pluralism is respected, that all aspects of pluralism are respected, rather than contested, *eg*, sexuality. Each issue which lays claim to being an expression of pluralism must be discretely assessed.

215 To preclude religious convictions from being articulated in the public sphere is a form of undemocratic censorship and bigotry against religion. See Li-ann Thio, "Religion in the Public Sphere of Singapore: Wall of Division or Public Square" in *Religious Pluralism and Civil Society: A Comparative Analysis* (Bryan S Turner ed) (Bardwell Press, 2008) pp 73–104 and Meera Rajah, "The Curious Interplay between Religion, Equality and Private Male Homosex in Singapore: Time to Cut the Gordian Knot?" (2017) 21(9) *International Journal of Human Rights* 1417.

216 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 49(f).

217 The "stealth" quality of the asserted neutrality of liberalism gives it an advantage in public discussion by keeping "the substantive moral views it enforces invisible, thus removing moral disputes from politics and so preventing challenges to its own position from even being raised": James Kalb, "Tyranny of Liberalism" (2000) *Modern Age* 241 at 242.

218 Singapore courts recognise that s 377A is "an issue of morality and societal values" and that Parliament may legislate on morally controversial issues: *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [94].

219 Christopher F Mooney, "Public Morality and Law" (1983) 1(1) *Journal of Law and Religion* 45.

220 Anthony Julius, "Human Rights: The New Secular Religion" *The Guardian* (19 April 2010). Liberalism in locating the source of moral obligation in human will establishes

(cont'd on the next page)

proposition of "a theory of essential human nature",[221] no less contentious than any other theory of the good. Morality is legislated, whether overtly, or stealthily, protestations of liberal agnosticism notwithstanding.

122 Liberalism is a good critic, skeptical towards moral distinctions and virtue theory, but a poor governor. A liberal governor may want to permit homosexual erotic liberty, while restraining consensual adult incest, but it is unclear on what principled basis this may be done. In making moral choices with pervasive whole of life implications,[222] liberalism ceases to be neutral, or liberal.

123 As Justice Scalia noted in *Lawrence v Texas*,[223] many Americans did not want persons who openly engaged in homosexual conduct "as scoutmasters for their children, as teachers in their children's schools" not because of bare hostility, but because they view this as "protecting themselves and their families" from what they considered an "immoral and destructive" lifestyle. Traditional moral beliefs are then labelled as "discrimination" by a court imbued with the American legal profession's "anti-anti-homosexual culture". This exemplifies the culture wars, with the court taking sides.

124 If "animus" entails ill-will or dislike for an ideology or practice, where controversial matters are involved, animus may be located on both sides of the divide. To invoke animus is a bare claim which must be argued for, not merely asserted.

125 To argue that "public morality" merely constitutes hostility towards a group assumes a law has no other reason than to shield some from shock or offence based on a petty, irrational dislike or spite.[224] This entirely discounts the consequences of jettisoning societal morality

---

a religious outlook, "the religion of man as the creator and judge of all things": James Kalb, "Tyranny of Liberalism" (2000) *Modern Age* 241 at 243 and 251.

221 James Kalb, "Tyranny of Liberalism" (2000) *Modern Age* 241 at 249.

222 While liberalism claims to have no goal other than to ensure no one is coerced, empirically, liberal systems have brought about the destruction of traditional institutions like family and marginalised religious traditions: Yoram Hazony, "Conservative Democracy: Liberal Principles Have Brought Us to a Dead End" *First Things* (January 2019).

223 539 US 558 at 602–603 (2003).

224 To Lord Devlin, mere disgust towards certain conduct would not suffice to limit individual freedom of choice; rather there must be "a real feeling of reprobation". The presence of disgust, where deeply felt and not manufactured, indicates that the limits of toleration are being reached; since not everything is to be tolerated, society cannot do "without intolerance, indignation and disgust", which are "the forces behind the moral law": "Enforcement of Morals" (1959) 45 *Proceedings of the British Academy* 129 at 143.

and causing moral harm. It ignores matters a legislature might take into consideration, such as public health and the potential undermining of other rights and goods. Indeed, to disparage adherence to traditional morals as bigotry and to suggest animus "is nothing short of insulting".[225]

126 The central harm of pornography, for example, which appeals to "the prurient interest in sex by arousing carnal desire unintegrated with the procreative and unitive good of marriage",[226] is not merely offensive; it causes moral harm to "character", erodes "the disposition to act uprightly" towards human goods such as marriage and the family as "the fundamental building block out of which larger social structures can be stably constructed".[227] Pornography undermines a cultural structure whose values, like traditional marriage values, will shape the quality of life.[228] The adultery-promoting Ashley Madison website was not allowed to operate in Singapore, not merely because the vast majority of persons are against approving and normalising adultery.[229] Offences against "moral sensibilities" is an injury that tends "to make men morally callous", thereby weakening "a social order based on self-government".[230] Why is this any less worthy of protection and the consideration of responsible decision-makers, than other acts injuring society and its members?

127 Public morality theorists do not accept the blanket proposition that what two consenting adults do in private can never constitute a social harm.[231] If so, private acts of vice, such as recreational drug use, should

225 *Romers v Evans* 517 US 620 at 652 (1996), *per* Justice Scalia.

226 Peter Cane, "Taking Law Seriously: Starting Points of the Hart/Devlin Debate" (2006) 10 *The Journal of Ethics* 21 at 26.

227 Parliament of Singapore, *Shared Values* (Cmd 1 of 1991) at para 12.

228 In defending a moral right to pornography based on equality, Dworkin identified the public nature of the damage to community interests thus: a legal right to pornography would "sharply limit the ability of individuals consciously and reflectively to influence the conditions of their own and their children's development. It would limit their ability to bring about the culture structure they think best, a structure in which sexual experience generally has dignity and beauty, without which their own and their families' sexual experience are likely to have these qualities in less degrees". Ronald Dworkin, "Do We Have a Right to Pornography?" in *A Matter of Principle* (Harvard University Press, 1985) at p 349; Robert P George, *Making Men Moral: Civil Liberties and Public Morality* (Clarendon Press, 1993) at pp 99 and 113.

229 InfoComm Media Development Authority, "Ashley Madison Website Not Allowed to Operate in Singapore" (8 November 2013).

230 James Kalb, "Tyranny of Liberalism" (2000) *Modern Age* 241 at 249.

231 The petition to repeal s 377A was predicated on privatism, asserting: "No harm was done to society when consenting heterosexual adults had sex in private. Why should it be any different when it came to sex between two men in private? The correct basis for determining the criminality or otherwise of sexual acts between adults should be consent" (*Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [76(h)]).

not be criminalised; however, as no man is an island, private action can impact the public weal, altering mindsets and societal character.

128 It trivialises the issue of whether to retain or repeal s 377A to caricature it as something maintained to placate majoritarian sensibilities or animus, as opposed to vindicating minority desires.[232] There are significant social and legal consequences that attend the issue, as repealing s 377A is the first step in spearheading a radical social revolution in law and society, both as a matter of logic and comparative empirical observation.

129 Logically, if distinctions based on heterosexual and homosexual conduct, which underlies s 377A, are not permissible, then maintaining marriage as a male–female relationship cannot be sustained.[233] The activist demand for "marriage equality", or more accurately, the project to redefine marriage[234] to eliminate the criteria predicated on opposite sex relations, is eminently foreseeable and has sparked litigation elsewhere.[235] Such demands have already been made in the local context, reflecting a shift from erotic liberty or "sex rights" to "love rights" in terms of partnership benefits.[236] It is lazy to caricature this undermining "heterosexist" paradigm project as a "slippery slope" concern, as "slippery

232 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 76(d).

233 *Lawrence v Texas* 539 US 558 at 604–605 (2003), *per* Justice Scalia. Judicial redefinitions of marriage may be prevented by constitutionally defining marriage or family: "Russian Voters Back Referendum Banning Same-Sex Marriage" *NBCnews.com* (3 July 2020); see also "Hungary Amends Constitution to Redefine Family, Effectively Banning Gay Adoption" *NBCnews.com* (15 December 2020). The Interpretation Act (Cap 1, 2002 Rev Ed) under s 2(1) defines "monogamous marriage" as "a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage". This is inconsistent with conceptions of unisex "open" marriages.

234 Claims to "same sex marriage" as a form of "marriage equality" seek to harness the rhetorical force of "equality", deflecting attention from the nature of marriage and its social value. See Sherif Girgis, Robert P George & Ryan T Anderson, "What is Marriage?" (2010) 34(1) *Harvard Journal of Law & Public Policy* 245.

235 In South Africa, for example, the decriminalisation of sodomy sparked a spate of litigation demanding the extension of spousal benefits to same-sex partners regarding immigration permits, financial benefits, joint adoption by homosexual couples and same-sex marriage: *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (1999) 1 All SA 643 (C); *Satchwell v President of the Republic of South Africa* 2002 (9) BCLR 986 (CC); *Du Toit v Minister for Welfare and Population Development* 2002 (10) BCLR 1006 (CC) and *Minister of Home Affairs v Marie Adriana Fourie* 2006 (1) SA 524 (CC).

236 Robert Wintemute, "From 'Sex Rights' to 'Love Rights': Partnership Rights as Human Rights" in *Sex Rights: The Oxford Amnesty Lectures 2002* (Nicolas Bamforth ed) (Oxford University Press, 2005) at pp 186–224.

slope" arguments have their place as a predictive factor in both legal and political discourse.[237]

130 While repealing s 377A would not automatically lead to legalising same-sex marriage, this is a pivotal step[238] towards that goal and would certainly clear the legal path for this, not only by changing social mores; family law scholars have recognised same-sex marriage is not possible[239] as long as male acts of gross indecency remain criminalised. Indeed, Justice Scalia, in the 2003 US Supreme Court decision which decriminalised a Texas sodomy law, rejected the majority's view that there was no reason to fear the "judicial imposition of homosexual marriage", as in Canada,[240] because other reasons existed to promote the institution of marriage beyond "mere moral disapproval of an excluded group".[241] He presciently remarked that the immediate case did not involve homosexual marriage "only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court".[242]

---

237 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at n 110; Deborah Barker SC took pains to point out that her clients' case in challenging the constitutionality of s 377A was not about other legal rights, such as same-sex marriage: *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [9] and Eric Lode, "Slippery Slope Arguments and Legal Reasoning" (1999) 87(6) *California Law Review* 1469.

238 The *Harvard Law Review* summarised the necessary process towards legalising same-sex marriage thus: "the decriminalization of homosexual conduct precedes the prohibition of discrimination on the basis of sexual orientation, which precedes the affirmative extension of various economic and social rights to gay men and lesbians" ("Developments in the Law: The Law of Marriage and Family" (2003) 116(7) *Harvard Law Review* 1996 at 2009). The linkage between s 377A and the recognition of same-sex marriage is made in the observation that since marriage partners "clearly have a sexual dimension to their relationship", while s 377A was on the statute books, a same-sex marriage between two male parties which may be valid by the application of choice of law rules, will be found invalid in Singapore "even if permitted by the laws of their domiciles": Debbie Ong, *International Issues in Family Law in Singapore* (Academy Publishing, 2015) at pp 90–91, para 3.72.

239 Leong Wai Kum, "Towards the Elimination of Prescriptive Sexual Regulation in Family Law in Singapore" (2016) 46 *Hong Kong Law Journal* 131 at 142. Section 12(1) of the Women's Charter (Cap 353, 2009 Rev Ed) would also have to be amended as it provides that only parties of the opposite sex have the capacity to marry.

240 *Halpern v Toronto* 2003 WL 34950 (Ontario Ct App).

241 *Lawrence v Texas* 539 US 558 at 584 (2003), *per* Justice O'Connor.

242 *Lawrence v Texas* 539 US 558 at 578 (2003), *per* Justice Scalia. A little over a decade later, the Supreme Court in *Obergefell v Hodges* 576 US 644 found that the Fourteenth Amendment required the State to issue licences for same-sex marriage. This flowed from their remarks in *Lawrence v Texas* at 574 that the Constitution afforded protection to personal decisions relating to things like marriage and that persons in homosexual relationships "may seek autonomy for these purposes, just as heterosexual persons do".

H. Non-(proactive) enforcement, legitimate state interest and the roles of law

(1) From proactive to reactive

131 Chan has argued that the Government in adopting a policy of the non-enforcement of s 377A offences against private consensual male homosexual acts in 2007 undermines the finding of legitimate state interest in criminalising or prosecuting such conduct; this constituted "a repudiation of the legitimacy of the same purpose attributed to s 377A in 1938".[243] If so, s 377A might be redundant.

132 First, it must be made clear that it is mischievous and misleading[244] to inaccurately describe the Government's policy as one of non-enforcement of s 377A, to fuel arguments that this makes the law absurd or to advance the view that it serves no purpose, or a suspect purpose at best. Government policy is clearly that of non-proactive enforcement,[245] as judicially recognised,[246] which is of a "totally different complexion from 'no enforcement'".[247]

133 Proactive enforcement harks back to the time active police raids were conducted in known public haunts of homosexual activities.[248] This has ceased. The police do not proactively crash into bedrooms to check whether adults are committing sodomy, which would spark serious prudential concerns. While the police do not take "active enforcement measures" to seek out "homosexual activities between consenting adults that take place in a private place with a view to prosecution", they will "act upon the complaint" of an alleged s 377A offence; they will place evidence before the Public Prosecutor who will decide whether to proceed with prosecution.[249] This same approach was adopted with respect to the

243 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 50(e). The argument was also canvassed in *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [293]–[298].

244 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [18] and [284].

245 "If we retain it, we are not enforcing it proactively": PM Lee Hsien Loong in Singapore Parl Debates; Vol 83; Cols 2401–2405; [23 October 2007].

246 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [285].

247 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [180].

248 *Tan Boon Hock v Public Prosecutor* [1994] 2 SLR(R) 32 (outraging modesty offence under s 354 of the Penal Code (Cap 224, 1985 Rev Ed)).

249 Singapore Parl Debates; Vol 84; Col 2923; [21 July 2008] ("Case of Mr Chan Mun Chiong (Charge under section 377A of Penal Code)").

"reactive" enforcement of safe distancing measures under the COVID-19 (Temporary Measures) Act 2020[250] and Regulations.[251]

134 During the 2007 parliamentary debates, Snr Minister Ho noted that the police had not been "proactively enforcing the provision" and would continue to take this approach, though this did not mean s 377A was "purely symbolic and thus redundant". There have been s 377A convictions involving minors or public acts of gross indecency.

135 That s 377A still has practical utility is evident from the Attorney-General's press release of 2 October 2018. While it clarified that "absent other factors" the prosecution of two consenting adults engaged in homosexual conduct in a private place would "not be in the public interest", s 377A prosecutions could still take place, as where minors are exploited or abused[252] or complaints are lodged.[253] The reactive enforcement policy does not constitute a "binding assurance" that no future prosecutions under s 377A would ever be brought, nor could such a policy fetter prosecutorial discretion.[254]

(2) From sanctions to signals

136 A more sophisticated understanding of law is needed to appreciate the range of legal functions beyond enforcement.[255] Law has a preventive and deterrent function, can promote dialogue and

250 Act 14 of 2020.

251 While not proactively conducting residential checks, the police would investigate flouting of safe distancing measures if they came across this while attending to other incidents like family disputes in residential units: Singapore Police Force, "False Rumour about Police Conducting Checks at Residential Units to Enforce Safe Distancing" (16 April 2020) <https://www.gov.sg/article/false-rumour-about-police-conducting-checks-at-residential-units-to-enforce-safe-distancing> (accessed 15 August 2021).

252 In 2007, reportedly more than half the s 377A convictions involved a victim under 18 years old (two of four persons convicted in 2005 and four of seven persons in 2006): Singapore Parl Debates; Vol 83; Col 1287; [17 July 2007] ("Convictions under Penal Code (Section 377A)").

253 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [85] and [95]. The police responded to a teenager's complaint of having oral sex in a public toilet with a male adult: Singapore Parl Debates; Vol 84; Col 2923; [21 July 2008] ("Case of Mr Chan Mun Chiong (Charge under section 377A of Penal Code)").

254 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [181].

255 The latest challenge to s 377A comes in the form of an argument that the *Attorney-General*'s position on the non-enforcement of s 377A renders the law otiose, serving no practical purpose. The remedy prayed for is for the High Court to issue a mandatory order for the Cabinet to move a Bill in Parliament to abolish s 377A: "LGBT Activist Seeks Court Order for Bill on Repealing Law on Gay Sex" *The Straits Times* (5 December 2020).

relational welfare,[256] and is educative in intentionally signalling socially desirable behavioural norms.[257] Symbolic actions and legal institutions have an important function in expressing a shared understanding. For example, the Government adopted the imperfect, ineffective method of symbolically banning 100 porn sites as a "statement of our values".[258]

137 Singapore has "long recognised the importance of statutory provisions in reflecting public sentiment and beliefs", and courts have found that the statutory legal regime for regulating casino gambling indicated that gambling remained contrary to public policy.[259]

138 The signalling function of law, even for hard to enforce laws, is well known to Singapore law and practice. For example, it is an offence under s 27A of the Miscellaneous Offences (Public Order and Nuisance) Act[260] to appear nude in a public or private place exposed to public view. This provision was spurred by public outrage over a visibly nude couple in their public housing flat. Section 27A(3) authorises police officers to enter a private place to arrest an offender, and although the Minister moving this Bill acknowledged enforcement difficulties, he explained that a person's right to privacy in his own home must not come at the expense of "public decency and morality, especially in high-rise housing estates where persons from all communities live next to each other".[261] Similarly, despite the difficulty of enforcing extraterritorial offences, these were added to the Maintenance of Religious Harmony Act[262] when amended in

256 Thio Li-ann, "Singapore Relational Constitutionalism: The 'Living Institution' and the Project of Religious Harmony" [2019] Sing JLS 72.

257 These functions are evident, for example, in the Maintenance of Religious Harmony Act (Cap 167A, 2001 Rev Ed) after its 2019 amendments. The Act not only sanctions legal wrongs but provides for preventative restraining orders, as well as promoting reconciliation through the Community Remedial Initiative. See Brian Burge-Hendrix, "The Educative Function of Law" in *Law and Philosophy* (Michael Freeman & Ross Harrison eds) (Oxford University Press, 2007) at pp 243–254.

258 Singapore Parl Debates; Vol 73; Col 557; [9 March 2001]; "Singapore Bans Two Porn Websites in Symbolic Move" *Reuters* (23 May 2008). A government MP has described s 377A as belonging to the class of laws "not made, or kept, to be strictly enforced. They are a symbol to show what Singapore stands for": Singapore Parl Debates; Vol 85; Col 2348; [9 February 2009] ("Budget Head L: Ministry of the Environment and Water Resources").

259 *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129, in relation to the Casino Control Act (Cap 33A, 2007 Rev Ed), discussed in *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [296]. This accords with Lord Devlin's view that the function of some crimes is "simply to enforce a moral principle and nothing else", serving as a social behaviour marker: "Enforcement of Morals" (1959) 45 *Proceedings of the British Academy* 129 at 135.

260 Cap 184, 1997 Rev Ed.

261 Chan Sek Keong, "Cultural Issues and Crime" (2000) 12 SAcLJ 1 at para 39.

262 Cap 167A, 2001 Rev Ed.

2019, as this "signals our commitment to protect our religious harmony, even when threats originate beyond our shores".[263]

140 Even with the non-proactive enforcement policy, s 377A continues to serve the purpose of "safeguarding public morality by showing societal moral disapproval of male homosexual acts".[264] Repealing it will weaken the message it conveys. The test for whether a law is effective goes beyond questions of enforcement; it may be assessed also in "what it prevents beyond the act criminalised".[265]

141 Section 377A has normative and educative value in indicating the social norm, *ie*, heterosexuality. This is why PM Lee defined what was normative in terms of "family" and "marriage" during the October 2007 debates, as he appreciated that the social environment would be impacted by the advancing homosexual agenda and its assault against "heteronormativity". This agenda commences with decriminalising homosexual activity, followed progressively by demands for expanded civil rights.

142 Keeping s 377A on the statute books "continues to signal public sentiment" against consensual homosexual conduct even in private, and to uphold the heterosexual paradigm of sexual relations and family. This has considerable impact: It shapes the content of public sexuality education, regulates the law on societies,[266] is consistent with a traditional understanding of marriage,[267] and supports the judicial finding that public policy is against "the formation of same-sex family units".[268] One

263 "Second Reading Speech for the Maintenance of Religious Harmony (Amendment) Bill – Speech by Sun Xueling, Senior Parliamentary Secretary, Ministry of Home Affairs and Ministry of National Development" *Ministry of Home Affairs* (7 October 2019) <https://www.mha.gov.sg/mediaroom/parliamentary/second-reading-speech-for-the-maintenance-of-religious-harmony-amendment-bill---speech-by-sun-xueling-senior-parliamentary-secretary-ministry-of-home-affairs-and-ministry-of-national-development> (accessed 15 August 2021).

264 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [298].

265 Christopher de Souza, see Singapore Parl Debates; Vol 83; [22–23 October 2007] ("377A Hansard"), referred to in *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [298].

266 A society which promotes sexual orientation issues is a specified society under the Societies Act (Cap 311, 2014 Rev Ed), and under s 4, is not entitled to automatic registration.

267 Section 12(1) of the Women's Charter (Cap 353, 2009 Rev Ed) provides that marriages solemnised in Singapore or elsewhere between persons "who, at the date of the marriage, are not respectively male and female", shall be void.

268 *UKM v Attorney-General* [2019] 3 SLR 874 at [206]. The prevailing social norm is of "a man and woman marrying and having and bringing up children within a stable family unit", which the Government encourages and reflects through policies supporting parenthood within marriage: Singapore Parl Debates; Vol 94; [14 January

(cont'd on the next page)

signal can carry a host of implications which affects the tenor of social mores, policy and law.

143 Some have questioned the efficacy of a law in upholding societal morality, which is not to be proactively enforced. However, it should not be assumed that a criminal offence must be enforced to fulfil its function "of signalling that certain conduct is undesirable and should not be practised openly".[269] Not all criminal provisions operate the same way; Parliament's judgment that this approach "is adequate to fulfil the purpose of s 377A" should be respected. Any challenge to s 377A's ability to signal disapprobation of male homosexual conduct without active enforcement would need to be substantiated by "compelling or cogent material or factual evidence".[270]

144 One might argue that the approach is broadly effective; since the 2007 parliamentary debates where retaining s 377A with its reactive enforcement policy became widely known, LGBT activists have held an annual "Pink Dot" demonstration at Speakers' Corner, whose goals include agitating for repeal of s 377A. The objective here is not to terminate law's signalling function, but to replace it with another signal, to promote or mandate societal approval of the homosexual lifestyle.[271]

I. A question of classification: Over and under

145 Section 377A has been challenged for being both over- and under-inclusive; such classifications may in principle fail the reasonable classification test but are not in themselves fatal, as perfect legislative classifications are not required. Courts should not be dogmatic in assessing the permissibility of classifications.[272]

(1) Over-inclusiveness

146 In principle, over-inclusiveness could result in the test of rational relation between classification or purpose not being met.[273] In *Johnson*, it

2019] ("Government's Position on Court Ruling to Award Adoption to Man in Same-sex Relationship").

269 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [101].

270 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [101].

271 "[T]he task of gay rights proponents is to move the center of public discourse along a continuum from the rhetoric of disapprobation, to rhetoric of tolerance, and finally to affirmation": Andrew M Jacobs, "The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969–1991" (1993) 72 *Nebraska Law Review* 723 at 724.

272 *Datuk Haji bin Harun Idris v Public Prosecutor* [1977] 2 MLJ 155, *per* Suffian LP.

273 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [99].

was argued that s 377A was over-inclusive for targeting private conduct which did not harm public morals.[274] This is based on the assumption that "conduct in private can be divorced from precepts of public morality".[275] It is obvious that Singapore law does not accept this premise, given the existence of laws "where private acts are criminalised" owing to concerns about "the degeneration of public morality",[276] such as acts of incest (s 376G of the Penal Code[277]) and bestiality (s 377B of the Penal Code[278]), wherever they take place. Section 377A thus does not fail the reasonable classification test on grounds of an over-inclusive classification.

(2) Under-inclusiveness

147 The courts agree that s 377A clearly does not include male–female and female–female acts.[279] It has been argued that s 377A is under-inclusive in applying to the relevant acts between two male persons, but not between a man and a woman or between two female persons "who engage in same-sex sexual conduct".[280] The petition to repeal s 377A in 2007 asserted that s 377A was discriminatory "because the same act of 'gross indecency' between heterosexual couples was permitted, but it was criminalised if performed between homosexual and bisexual men".[281]

148 In his article, Chan frames the issue in terms of differentiation between three classes: male–male, male–female and female–female.[282] Section 377A criminalises acts of gross indecency "between males, whether homosexual or bisexual" ("class (a)"). It does not criminalise "similar acts" committed between "bisexual or straight males and females" ("class (b)") or "between females, whether homosexual, bisexual or straight" ("class (c)"). He argues that "class (a)" males are treated unequally under s 377A as "class (b)" males and "class (c)" females "who engage in similar acts of gross indecency" commit no s 377A offence.

149 Three preliminary points may be made. First, sexual orientation, the centrepiece of contemporary "identity politics", as a personal trait or status, upon which ground discrimination may be proscribed, is irrelevant

274 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [179].
275 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [193(d)].
276 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [193(d)].
277 Cap 224, 2008 Rev Ed.
278 Cap 224, 2008 Rev Ed.
279 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [126]; *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [48]; *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [111].
280 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [193(d)].
281 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [76(b)].
282 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 4.

to committing a s 377A offence.[283] A male person who identifies as heterosexual who has experimental sex with another male person may be prosecuted under s 377A. His self-identity is irrelevant to the offence,[284] which focuses on conduct.

150 Second, there is a hidden assumption that the acts committed by persons in classes (a), (b) and (c) are similar and/or share moral equivalence and social impact. This needs to be interrogated, given the argument that it is not clear how state interest is served by discriminating against males engaged in homosexual sodomy and those engaged in heterosexual sodomy.[285]

151 Third, the arguments raised in challenging Art 12 in *LMSHC* or *LMSCA* and *Johnson* focused on what s 377A did not cover in terms of purpose (the "thin s 377A" argument) and actors (not including female homosexual conduct);[286] it was not argued that s 377A was under-inclusive because heterosexual oral and anal sex was decriminalised in 2007.[287] By retaining s 377A on the understanding that it covered consensual male penetrative sex, one might fairly conclude that Parliament considered there was "no significant change in the degree of societal disapproval towards male homosexual conduct".[288]

---

283 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [282]; *Ng Huat v Public Prosecutor* [1995] 2 SLR(R) 66 at [31].

284 While s 377A is "sexual orientation neutral" when it comes to male persons, it may be argued that it will disproportionately affect men who identify as having a homosexual (or pansexual) orientation, as s 377A refers to conduct which is "closely correlated with being homosexual", such that s 377A is directed at homosexual men as a class. However, the same may be said of a law targeting public nudity, as Justice Scalia pointed out in *Lawrence v Texas* 539 US 558 at 601 (2003), which targets "the conduct that is closely correlated with being a nudist" and therefore targets nudists as a class. A distinction must be maintained between conduct (the act) and identity (the actor), as the law targets only the former.

285 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 80.

286 The Court of Appeal in *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [125] found that there as an "arguable" case that s 377A affected Art 12(1) rights by not satisfying the second limb of the reasonable classification test as "there was no obvious social objective that could be furthered by criminalising male but not female homosexual intercourse". See also *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [188]. An argument was raised at [183] that s 377A was under-inclusive in not including immoral conduct like "adultery", but this assumes that "adultery" and "sodomy" belong to the same category of crimes; no one provision of a criminal code purports to encompass the entirety of immoral conduct. This is addressed discretely, in terms of offence elements and types of punishment.

287 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [80].

288 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [177].

(i) Heterosexual and homosexual conduct, not biological sex

152 The appropriate comparator is not to focus on class (a) or class (b) males who are defined by their sexual orientation or preference. Rather, the focus should be on the nature, social significance and impact on public morality, of the sexual conduct in question, that is, a man who has anal or oral sex with another man (homosexual activity) and a man who has anal or oral sex with a woman (heterosexual activity). In other words, Parliament drew a distinction and saw a "reasonable differentia"[289] between heterosexual and homosexual sex acts; as such, the "treat like cases alike" principle did not apply. In this context, heterosexuality as normative[290] informs how "gross indecency" is apprehended and construed in relation to public sexual morality.

(ii) Excluding female homosexual conduct from section 377A?

153 It has been argued that if the legislative purpose is to uphold public morality,[291] excluding female homosexual conduct from the ambit of s 377A is impermissibly under-inclusive and its purpose, illegitimate.[292]

154 This only holds true if male and female homosexual conduct fall within the same class, such that the fundamental rubric of "like should be treated alike" applies. The argument rests on the latent assumption that female homosexual activity should be or is "subject to the same degree of

289 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [138]. This differentia distinguished between consensual heterosexual anal and oral sex, which was "acceptable", while "the same conduct" between two consenting males "was repugnant and offensive". This accepts the view that sexual behaviour involves moral choices, and rejects the liberal tenet that consent be the basis to determine the criminality of sexual acts between adults, which the repeal s 377A petition called for: at [76(h)].

290 It was argued that retaining s 377A helps "to preserve the heterosexual family as the social norm in Singapore", which is part of the political balance the Legislature adopted: *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [29].

291 Lewd and immoral conduct in public, whether committed by men or women, falls under s 294(*a*) of the Penal Code (Cap 224, 2008 Rev Ed).

292 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [117]. In relation to the argument in Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 4 that there is discrimination in treating males and females differently on the point of procurement, it may be that there is little or no evidence that women are involved in procuring these sorts of activities between men. If the evidence has changed or indicates otherwise and women are actively involved in s 377A related procurement, under-inclusiveness is not necessarily fatal. The courts may urge Parliament to amend the law appropriately or, possibly, give effect to an updating construction: see *Comptroller of Income Tax v MT* [2006] 3 SLR(R) 688 at [44].

societal disapproval"[293] as male homosexual conduct, although this is not axiomatic, and must presumably be dealt with the same way.

155 The High Court in *Johnson* held that while one might find "intuitive appeal"[294] in such an argument, this fell to Parliament to determine, not the courts. Indeed, an examination of history and context provides a strong basis for understanding why male and female homosexual conduct are treated differently, as where the latter may be "less prevalent or perceived to be less repugnant"[295] than the former, justifying dissimilar treatment.[296]

156 As noted in *LMSHC*, the common law never criminalised lesbian sex acts or female homosexual conduct,[297] although there was a failed statutory attempt to do so before the House of Lords in 1921.[298] The proposed clause was seen as creating a new offence which the House of Lords considered did not warrant "serious attention".[299]

157 Historically, female homosexual acts were never the target of s 377A or its English precursor. The Wolfenden Report in detailing homosexual offences only included one paragraph on indecent assaults by females on females, which included convictions where a woman aided

293 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [192].

294 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [192].

295 The respondent argued along these lines in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [21].

296 If male and female homosexual conduct is alike in terms of moral equivalence and social impact, then the courts may either find s 377A to breach the equality clause by not treating like alike, as established in *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710, and strike it down, undermining the Government's stated objective of not mainstreaming the homosexual lifestyle as contrary to public morality. Alternatively, pursuant to Art 162 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint), they could construe the reference to "male" in s 377A as meaning "persons", to capture both male and female acts of gross indecency. Further, if s 377A is read down to delete reference to private acts, men and women would be equally positioned in relation to indecent acts in public, although this offence is already covered in other laws and Penal Code provisions, rendering s 377A superfluous.

297 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [119]–[120].

298 The proposed clause read: "Any act of gross indecency between female persons shall be a misdemeanour, and punishable in the same manner as any such act committed by male persons under section eleven of the Criminal Law Amendment Act 1885", referenced in *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [120].

299 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [120].

a man to commit indecent assault on another female.[300] This indicates it was not considered a serious enough social problem to warrant a dedicated offence. Furthermore, the lack of attention to lesbian acts is also reflected in Quentin Loh J's view in *LMSHC* that buggery laws were not gender-neutral[301] given the "basic physiological differences between men's and women's genitalia", which meant "our s 377 and English sodomy laws were not gender-neutral".[302] If the act of sodomy entails "penile penetration *per anum*, then two women cannot sodomise one another".[303] The explanation to Singapore's s 377 was also framed in terms of anal-penetrative sex.

158 The term "buggery" is thus not gender-neutral and is older than the later term "carnal intercourse against the order of nature", which came by case law to be understood as encompassing oral sex, *ie*, fellatio.[304]

159 Loh J in *LMSHC* identified two primary factors solidifying his conclusion that the purpose of s 377A in criminalising male but not female homosexual conduct was legitimate.

160 First, the existence of long-standing historical practices in the form of laws which criminalised male homosexual conduct. This suggests there was a basis for these laws. A court would require a "justification of proportionate magnitude" to pronounce such laws flawed and wrong. If absent, the matter should be left to Parliament to effect any legal

300 United Kingdom, *Report of the Departmental Committee on Homosexual Offences and Prostitution* (Cmnd 247, 1957) at para 103. The Committee also reported it "found no case in which a female has been convicted of an act with another female which exhibits the libidinous features that characterise sexual acts between males". This was referenced in *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [120].

301 In so doing, he differed from the view of the Court of Appeal in *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [26] who considered England's buggery laws gender-neutral, in contrast to the gender-specific s 11 of the UK Criminal Law Amendment Act 1885.

302 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [122].

303 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [124].

304 Oral sex, where "fellatio and cunnilingus" is performed "as a stimulant" to sexual urges, as a prelude to and not substitute for sex, would not be considered an unnatural offence punishable under s 377. In every other instance, "the act of fellatio between a man and a woman" will be punishable under s 377: *Public Prosecutor v Kwan Kwong Weng* [1997] 1 SLR(R) 316 at [31]. Quentin Loh J in *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [125] observed that cunnilingus was only mentioned once in the judgment in *Public Prosecutor v Kwan Kwong Weng*, and when the Court of Appeal stated what amounted to "carnal intercourse", it only mentioned fellatio. The court appeared to deliberately avoid saying cunnilingus fell within s 377, which could include the possibility of female to female sex acts within its ambit. Loh J concluded that even in interpreting s 377 to include oral sex, "female homosexual conduct was never the issue".

changes.[305] In exploring why the common law tradition only proscribed male homosexual conduct, Loh J considered it could be because of religious or customary beliefs in the English context, where the Judeo-Christian tradition rooted in the Bible emphasised the proscription of sodomy, compared to the fewer references to lesbian acts.[306]

161 Second, with respect to the local context, another reason could relate to the "deep-seated feelings" of some sectors "with regard to procreation and family lineage". In Chinese tradition, parents look forward to the family name being carried on through their children marrying and producing offspring; since male homosexuals cannot naturally have children, this would disappoint their parents. Such traditions may account for a culture disapproving of male homosexuality. Lesbians cannot naturally have children but as descent in traditional Chinese culture is patrilineal, it would not be considered equally significant. Loh J would be "slow to find" there was "no basis whatsoever" for Parliament to have chosen to only criminalise male homosexual conduct,[307] given the existence of a "plausible justification" for the legislative purpose, which Parliament considered a valid choice.[308]

162 Is it then reasonable to treat male and female homosexual conduct differently? Seen in context, the abstract assumption that male-male and female–female homosexual acts are equally offensive, carry equal social impact or are viewed as posing equal threats to the public good, does not hold water. This assumption warrants careful analysis, in normative and empirical terms, which the courts bear no special expertise in. Writing in 1970, Green noted that it seemed that in many countries "male homosexuality, at least at the time the law developed, was more immoral and repulsive than lesbianism".[309] As noted above, under British criminal law, as reflected in most Commonwealth countries, only male homosexual acts have been regarded as criminal.[310]

163 Societies have viewed male and female sexuality differently in social and legal terms. When John Stuart Mill wrote *The Subjection of Women* in 1869, it was widely accepted that men and women were naturally different and that men were innately superior. This was reflected in laws denying women voting rights or preventing married women from

305 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [119].
306 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [121].
307 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [127]–[130].
308 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [127].
309 Leslie Green, "Law and Morality in a Changing Society" (1970) 20(4) *University of Toronto Law Journal* 422 at 437.
310 Offences Against the Person Act 1861 (24 & 25 Vict, c 100) (UK).

owning property in their own right.[311] Women's "subordinate" social and legal status impacted views and knowledge of female sexuality.

164 Further, homosexuality as a taboo subject was not openly discussed in 19th century England. Blackstone considered buggery "the infamous crime against nature" which should not be named;[312] how much more the impulse not to discuss female sexuality, let alone to subject it to legal regulation.

165 The failed attempt to criminalise female acts of gross indecency under the English criminal law testifies to the "invisibility" of female sexuality. This is unsurprising, as sex between two women was once unimaginable; further, it was thought unnecessary to criminalise lesbian sex acts as such "trivial" actions did not warrant legal regulation. These were at least considered less significant than criminalised male homosexual acts, which were considered a more aggressive threat to social norms in an androcentric society.

166 One cannot be offended by what one knows little or nothing about. Lord Chancellor Birkenhead apparently argued that 999 women out of 1,000 had "never even heard a whisper of these practices".[313]

---

311 Women in the UK could only vote in 1918. It was not until the Married Women's Property Acts of 1870, 1882 and 1893 that married women were allowed to keep possession of their own earnings and property owned before marriage, previously denied by the common law doctrine of coverture under which a married woman had no legal persona. See, *eg*, *Married Women and the Law: Coverture in England and the Common Law World* (Timothy Stretton & Krista J Kesselring eds) (McGill-Queen's University Press, 2013) and Harold L Smith, *The British Women's Suffrage Campaign 1866–1928* (Routledge, 2nd Ed, 2009).

312 "I will not act so disagreeable a part, to my readers as well as to myself, as to dwell longer upon a subject the very mention of which is a disgrace to the human nature. It will be more eligible to imitate … the delicacy of our English law, which treats it in its very indictments as a crime not fit to be named": Sir William Blackstone, *Commentaries on the Laws of England* vol IV (Philadelphia, 1897) at p 215. See *History of Homosexuality in Europe & America* (Wayne R Dynes & Stephen Donaldson eds) (Routledge, 1992).

313 Laura Doan, *Fashioning Sapphism: The Origins of a Modern English Lesbian Culture* (Columbia University Press, 2001) at pp 56–60. See also Fatma E Marouf, "The Emerging Importance of 'Social Visibility' in Defining a 'Particular Social Group' and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender" (2008) 27(1) *Yale Law & Policy Review* 47 at 85 noting that lesbians were able to "pass as heterosexual more easily than gay men" because of stereotypes of women "as passive objects of male desire" which contributed to "the invisibility of female sexuality in general and lesbian sexuality in particular". Marouf notes that in Western society, there have been fewer explicit prohibitions on female homosexual behaviour largely due to "disbelief that women engaged in such behavior". It was "widely rumoured" that the UK never criminalised female homosexual behaviour "because Queen Victoria did not believe that sex between women was possible".

(cont'd on the next page)

The prevailing mindset, evident in the 1921 House of Lords debate, was the fear that giving publicity to such matters, through debate and publishing "such horrid facts",[314] would provoke harmful experimentation, outweighing any benefits of criminalising such acts.

167 In the 21st century where women's social status and legal rights have made great strides, these mindsets may well no longer hold sway. During the 2007 Penal Code amendment parliamentary debates, concerns were raised about why s 377A did not cover female homosexual conduct;[315] this assumed that male and female homosexual acts were of equal gravity and impact.

168 However, no new specific offence criminalising lesbian sex acts was put forward, nor was there an articulated public demand to criminalise female homosexual acts, whether from ignorance, indifference or the persisting invisibility of female sexuality in a conservative Asian society. Other considerations of political prudence or strategy may have recommended maintaining the *status quo*, rather than raising the apparent inequality of not criminalising female homosexual conduct under s 377A, which could be legislatively addressed either by repealing s 377A, or expanding the content of s 377A to capture such acts. One might fairly infer from this lack of legislative initiative and the fact that Parliament spent little time discussing this point, that this was perceived to be a lesser harm.

169 That something is criminalised is evidence it is considered contrary to public morality[316] as retaining s 377A indicates, with respect to the more serious problem of male homosexual conduct and its negative social impact.[317] Female homosexual conduct continued by default

---

It was assumed that lesbianism did not exist and until relatively recently, "Western observers and scholars remained largely silent on the topic of female sexuality."

314 At a homosexuality trial in Lancester, the judge expressed grief that "the untaught and unsuspecting minds of youth should be liable to be tainted by hearing such horrid facts" and prohibited note taking and the presence of young people in the courtroom (quoted in A D Harvey, "Prosecutions for Sodomy in England at the Beginning of the Nineteenth Century" (1978) 21(4) *Historical Journal* 939 at 942, cited in Ari Adut, "A Theory of Scandal: Victorians, Homosexuality and the Fall of Oscar Wilde" (July 2005) 111(1) *American Journal of Sociology* 213 at 223–224.

315 *Eg*, Hri Kumar Nair raised questions of consistency while Charles Chong asserted "women are as capable as men of committing such acts [of gross indecency]": see Singapore Parl Debates; Vol 83; [22–23 October 2007] noted in *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [175]–[176].

316 Conversely, where something has not been criminalised, "generally accepted public morals" have been seen as "not been convincingly transplanted into the realm of law": *Ang Ladlad v COMELEC* (GR No 190582, 8 April 2010) (Supreme Court of the Philippines).

317 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [177].

to be regulated by general public nuisance laws, which presumably were considered adequate, complemented by other policies promoting traditional families within a heterosexual paradigm.

170 If not endorsing the homosexual lifestyle "as part of our mainstream way of life"[318] is the goal, both male and female homosexual conduct may threaten the heterosexual paradigm of public sexual morality. However, Parliament can differentiate between these acts and take the view that these do not pose equal threats or bear similar social impacts. It may recognise "degrees of harm" and "confine its restrictions to those cases where the need is deemed to be the clearest".[319] American courts in applying the rational review test have held that an "all or nothing" approach in addressing a multifaceted problem is not required. Instead, the Legislature may select one part of a field, perhaps the most urgent part of the problem, and deal with it first or incrementally.[320]

171 Parliament is not obliged to adopt the same regime for male–male and female–female sex acts. Viewed holistically, criminal law is one prong in a multipronged approach to maintaining community mores, where legal sanctions work in tandem with promotional standards, policies or educative measures which uphold heterosexual normativity. While there may be a better way of realising the legislative objective, the reasonable classification test is satisfied provided the objective is sufficiently served, even if by gender-specific laws, which are not an outlier in the Singapore context.[321] Laws are political compromises based on factors which may not be legal in nature, and the court in applying reasonable classification

318 PM Lee Hsien Loong in Singapore Parl Debates; Vol 83; [23 October 2007].

319 *Shri Ram Krishna Dalmia v Shri Justice S R Tendolkar* AIR 1958 SC 538, *per* Das CJ, referenced in *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [56]. This case is also cited in *Lee Keng Guan v Public Prosecutor* [1977–1978] SLR(R) 78 at [19]–[20] and by Aedit Abdullah SC in *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [31].

320 *Williamson v Lee Optical of Okla Inc* 348 US 483 at 489 (1955).

321 Discrimination on the basis of gender is permissible, even if under-inclusive or over-inclusive. For example, the operationalisation of compulsory military service under the Enlistment Act (Cap 93, 2001 Rev Ed) is based on a differentiation between males and females and may be both under and over-inclusive (excluding combat-fit females and including combat-unfit males). Other examples may include s 69 of the Women's Charter (Cap 353, 2009 Rev Ed) on spousal maintenance or s 325(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) which excludes women from caning. Gender equality does not mean that men and women are equal in every respect or should be treated the same in every respect, *eg*, maternity protection only benefits pregnant women, which the Convention on the Elimination of all Forms of Discrimination Against Women ("CEDAW") expressly allows for. Section 310 of the Penal Code (Cap 224, 2008 Rev Ed) which is gender-specific provides that in certain circumstances, where a woman causes the death of her child under the age of 12 months, she would be guilty not of murder, which carries a death penalty under

(cont'd on the next page)

should give due leeway to Parliament which must wrestle with such "practical constraints".[322]

172 In Singapore, this includes negotiating the tricky political waters around s 377A which was inherited and has been adapted. The "legal untidiness" and "ambiguity" flow from the Government's understanding that in keeping the *status quo* by retaining s 377A, it is not starting *tabula rasa* in "trying to design an ideal arrangement", but neither is it "proposing new laws against homosexuality".[323] The judicial recognition of legislative leeway also accords with the presumption of constitutionality, which recognises the primacy of the Legislature's role in addressing politically sensitive issues.

III. A new more rigorous test and the fate of the presumption of constitutionality?

A. Should the reasonable classification test be replaced or retained?

173 The established reasonable classification test applies to all constitutional challenges under Art 12(1). This singular test applies to all persons, regardless of "gender, sexual orientation and gender identity", or any other personal trait.[324] This threshold test is minimally substantive in ensuring against illogical and incoherent classifications, with the primary focus being to ensure consistency in how similarly situated persons are treated.

174 As noted in *LMSCA*, the appellants were not arguing that they had not been treated as "equal before the law" because s 377A was only applied to them but not others committing the same conduct; the argument was not about unequal treatment. So too, they were not seeking "equal protection under s 377A", but rather, "protection from prosecution under s 377A".[325]

---

s 302, but with infanticide, which under s 311, attracts up to life imprisonment and/or a fine.

322 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [88].

323 PM Lee Hsien Loong in Singapore Parl Debates; Vol 83; [23 October 2007].

324 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [187]. The High Court in *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [204] accepted that gender equality and the protection of linguistic minorities must stem from Art 12(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) as these grounds are not encompassed in the list of Art 12(2) grounds. Article 12(1) does not preclude all gender-based differentia, only those which fail the reasonable classification test: at [205].

325 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [74].

175 The object of challenge was the legitimacy of the legislative purpose itself, with arguments that the modest, deferential standard of review embodied in the reasonable classification test, be replaced with a more substantive review test which would provide criteria for assessing the legitimacy, fairness or justness of legislative purpose.[326]

176 The barrier to this proposal is the understanding that Art 12(1) does not accord "free-standing substantive rights", nor lend itself to creating categories for substantive protection, independent of the Art 12(2) enumerated grounds.[327] If new categories prohibiting discrimination were read expansively into Art 12(1), it would render Art 12(2) otiose, summoning the "mini-legislature" spectre.[328]

177 The challenge may also be expressed in the desire for a more rigorous review test which would limit legislative discretion in selecting the method for achieving the purpose, such as a proportionality or tiered scrutiny test which would require a tighter means or end fit for specified traits.

178 There is room in applying reasonable classification to accommodate the deployment of careful scrutiny, where weighty interests like Pt IV rights are involved,[329] as part of the balancing exercise. The court may require the Government to articulate reasons for subjecting certain individuals to differentiating legislation.[330]

326 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 90.

327 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [205] and [207].

328 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [208]; *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [93].

329 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [113].

330 A differentiating law or an executive act which offends Art 12 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) is discriminatory; otherwise, "it is just a differentiating law": *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [59].

179 Here, no fundamental liberty is engaged as homosexual sodomy is not a recognised privacy right[331] to erotic liberty under Art 9;[332] such a right would certainly shape the content of the category of "public morality".

180 Thus, there have been calls to adopt a more interventionist test applying heightened scrutiny to Art 12,[333] which may involve considering extra-legal factors. Singapore courts have rejected that there might be "another stricter test" for "other special circumstances" such as where immutable traits are concerned.[334] Two new tests proposed in legal and political discourse are discussed below.

B. Proportionality review

181 It was argued in *Johnson* that a broader test of proportionality should replace the "flawed" reasonable classification test, and that s 377A would fail a proportionality test.[335]

---

331 Originally, privacy was understood to mean freedom from unreasonable search and seizures, wiretapping, and limits on speech impugning another's honour. The first time it was used to encompass a judicially created right of sexual autonomy was in the US Supreme Court decision of *Griswold v Connecticut* 381 US 479 (1965). See also *Dudgeon v United Kingdom* (European Court of Human Rights, Series A, No 45, 23 September 1981) and *Navtej Singh Johar v Union of India, THR Secretary and Ministry of Law and Justice* AIR 2018 SC 4321; Writ Petition (Criminal) No 76 of 2016, where a "right to sexual autonomy" under Art 21 of the Indian Constitution was declared.

332 "Personal liberty" under Art 9 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) has been more restrictively construed, drawing content from its historical precursors dating back to the Magna Carta: *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [16]–[23].

333 It was argued that the test for constitutionality of an impugned statute under Art 12 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) "was not confined to the reasonable classification test" and that a more expansive interpretation was warranted to Art 12(1) which, in applying to all persons, was framed more broadly than Art 12(2) which applied only to citizens: *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [33] and [93].

334 *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [90]–[91].

335 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [195]. It is not necessarily the case that s 377A would be found unconstitutional through proportionality review, as this standard can be applied in a deferential manner in the equality context, as in *Fok Chun Wa v Hospital Authority* [2012] 2 HKC 413 at [74]–[76] where the test of manifest unreasonableness was applied, and which the UK Supreme Court has noted is "little different from the domestic test of *Wednesbury* unreasonableness": *Humphreys v Revenue and Customs Commissioners* [2012] 1 WLR 1545 at [27]. The Hong Kong Court of Final Appeal noted at [77] that the deferential test would apply to cases involving "a mere question of general, social or economic policy", as distinct from a "core value". Core values, particularly those relating to protected personal characteristics, will vary across societies.

182 The limited nature of the reasonable classification test was not reason itself to reject it; nonetheless See J examined the operation of proportionality review in other common law jurisdictions like Malaysia, India, the US and Hong Kong.[336] He rejected the Indian view that the reasonable classification test "encompasses the doctrine of proportionality"[337] as the Indian courts have applied the European test of proportionality which requires the adoption of the "least restrictive choice of measures"[338] when regulating fundamental rights. The Hong Kong brand of proportionality review was also considered an inappropriate import, given the heavy influence of the Covenant on Civil and Political Rights, which Singapore is not party to.[339] These tests assess the legitimacy of state interests, which entails value judgments and considering other non-legal factors like science and statistics, which Singapore courts are loathe to reach conclusive determinations on.[340]

183 The proportionality test is a more searching test of judicial review where the courts assess the balance struck by a law or decision and the relative weight accorded to the interests involved, as opposed to ascertaining whether the law or decision falls within the range of reasonable decisions.[341] The High Court considered that it ought not to be applied to equal protection clauses as it would "necessarily" involve reviewing the legitimacy of a statutory objective.[342] While debates about what test of judicial scrutiny to apply to allegedly unconstitutional laws may "find some currency in discourses on political philosophies", Singapore constitutional law operates "on a slightly different plane". Subject to the need to protect equality rights, the Constitution accords "political autonomy" and "a specific degree of latitude" to Parliament to enact differentiating laws.[343]

336 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [212]–[237].
337 *Om Kumar v Union of India* AIR 2000 SC 3689 at 32, discussed in *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [219].
338 *Om Kumar v Union of India* AIR 2000 SC 3689 at [27]–[28].
339 *Secretary for Justice v Yau Yuk Lung Zigo* (2007) 10 HKCFAR 335, discussed in *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [230]–[235].
340 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [177].
341 Donald L Beschle, "No More Tiers? Proportionality as an Alternative to Multiple Levels of Scrutiny in Individual Rights Cases" (2018) 38(2) *Pace Law Review* 384; Suzanne B Goldberg, "Equality Without Tiers" (2004) 77 *Southern California Law Review* 481.
342 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [216]. the court noted that unlike India, the Singapore courts adhere to the traditional principles of review, of which proportionality is not a ground: at [221].
343 *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [89].

184 Adopting a proportionality test, an open-ended technique which imports uncertainty,[344] would entail shifting the balance of power from Parliament to the courts.[345]

C. Judicially declared categories and variable intensities of review

(1) The tiered scrutiny approach

185 Under a tiered scrutiny approach to reading equality clauses, courts have categorised various interests and assigned different intensities of review to them.

186 The US Supreme Court has constructed three tiers of scrutiny, the laxest of which is rational basis review,[346] to which a presumption of constitutionality applies. This applies to matters relating to economic regulation, requiring that a legitimate state interest be rationally or plausibly related to the legal classification.[347] While this test appears to comport with Singapore's reasonable classification test, the High Court pointed out that the US courts directly engaged in determining whether "legitimate state interests" were involved.[348]

187 The highest standard of review the US courts use to evaluate the constitutionality of government differentiation is strict scrutiny,

344 Proportionality tests may range from the requiring of the "least restrictive alternative" in choice of method to tests that accord "some leeway to the legislator", requiring not perfection but that the choice falls within the range of reasonable alternatives: *RJR-Macdonald Inc v Canada (Attorney General)* [1995] 3 SCR 1999 at [160]. Thomas Poole in "The Reformation of English Administrative Law" (2009) 67 CLJ 142 at 146 points out that proportionality is "plastic and can in principle be applied almost infinitely forcefully or infinitely cautiously, producing an area of discretionary judgement that can be massively broad or incredibly narrow – and anything else in between". See also Julian Rivers, "Proportionality and Variable Intensity of Review" (2006) 65(1) CLJ 174.

345 It is suggested that the proportionality test is more value neutral in not directly focusing on the legitimacy of state interest, but on the method adopted to achieve that purpose. Nonetheless value judgments are still involved, even if more subtly, in assessing whether an objective is sufficiently important to justify infringement upon a right: see Jack Tsen-Ta Lee, "Equality and Singapore's First Constitutional Challenges to the Criminalization of Male Homosexual Conduct" (2015) 16(1–2) *Asia-Pacific Journal of Human Rights and the Law* 150 at 177–179 and 184.

346 Under rational basis review, the state interest need only be legitimate and the law must be rationally or plausibly related to that state interest.

347 *Lindsley v Natural Carbolic Gas Co* 220 US 61 (1911). This provides that "any state of facts" which can "reasonably be conceived" to sustain an impugned legislation when it was enacted must be assumed.

348 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [226], discussing *Romer v Evans* 517 US 620 at 631–632 (1996).

which requires a differentiating law to be "narrowly tailored to achieve a compelling government interest";[349] there must be no less discriminatory method to accomplish the purpose. This applies to "suspect" classes involving race or fundamental rights.[350] Strict scrutiny operates to protect "discrete and insular minorities",[351] which are historically disadvantaged or politically weak groups. These minorities are identified by race or nationality traits, and "more searching judicial inquiry" is applied on their behalf where laws affect them, as an exception to the presumption of constitutionality.

188 Intermediate scrutiny requires that an important interest be substantially related to the classification, and applies to quasi-suspect classes like gender.[352]

189 This multi-tier review test is a product of judicial activism in creating a hierarchy of values and interests, which has been criticised as arbitrary and unpredictable,[353] a rule in search of a justification, importing rigidity in the face of complexity. These tiers have no basis in the constitutional text or original meaning and are a judicially invented "political solution" to "navigate internal factions at the Supreme Court".[354]

(2) Singapore courts and the rejection of tiered scrutiny and special rights or protection for groups

190 Singapore courts have not advocated moving to a strict scrutiny test based on suspect classes and fundamental rights.[355] Apart from

349 *Federal Election Commission v Wisconsin Right to Life, Inc* 551 US 449 at 464 (2007), *per* Roberts CJ.

350 There must be a compelling state interest and the classification must be necessary to serve it: first applied in *Korematsu v United States* 323 US 214 (1944). Strict scrutiny also applies to national origin (*Oyama v California* 332 US 633 (1948)) and alienage (*Graham v Richardson* 403 US 365 (1971)). See Stephen A Siegel, "The Origin of the Compelling State Interest Test and Strict Scrutiny" (2006) 48(4) *American Journal of Legal History* 255.

351 The term itself arose from *United States v Carolene Products Co* 304 US 144 (1938) at n 4. See Louis Lusky, "Footnote Redux: A 'Carolene Products' Reminiscence" (1982) 82(6) *Columbia Law Review* 1093.

352 Quasi-suspect classes include gender, alienage and legitimacy: *Orr v Orr* 440 US 268 (1979); *Craig v Boren* 429 US 190 at 197 (1976) and *Trimble v Gordon* 430 US 762 (1977).

353 Jud Mathews & Alec Stone Sweet, "All Things in Proportion? American Rights Review and the Problem of Balancing" (2011) 60 *Emory Law Journal* 797 at 800.

354 Joel Alicea & John D Ohlendorf, "Against the Tiers of Constitutional Scrutiny" *National Affairs* (No 49, Fall 2019) <https://www.nationalaffairs.com/publications/detail/against-the-tiers-of-constitutional-scrutiny> (accessed 15 August 2021).

355 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [113]; *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [113]–[116].

Art 12(2), there is no legal criteria in Art 12(1) from which to judicially fashion categories of groups to which special protection ought to be offered, to prevent the majority oppression of a minority. This argument has been raised before the courts[356] but they have desisted from devising such categories.

191 "Minority" in relation to a majority suggests a numerically inferior group. Not every minority group is legally recognised and protected by special measures. Despite substantive equality arguments calling for the recognition of special protection for homosexuals on the basis of their homosexual identity,[357] such as an unqualified constitutional right to personal liberty,[358] Singapore courts do not recognise "sexual minorities" as a legal category,[359] which is a problematic, vague term.

192 Apart from Art 12(3), which exempts religious minorities from Art 12(1) in relation to personal and religious affairs, Arts 12(1) and 12(2) refer to individuals, not groups. The Singapore Constitution does not recognise minority rights in the sense of special rights over and above the rights all individuals enjoy; only "racial and religious minorities" are constitutionally recognised under Art 152, which is a non-justiciable minority protection clause. Homosexuals are not considered to be minorities with special rights.[360]

193 Arguments that claim "minority" status and special rights for a group,[361] such as the argument that s 377A violated "constitutional

356 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [206]; *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [76].

357 This rests on the assertion that homosexuality is immutable, which the courts refuse to make a conclusion about, given competing perspectives and scientific dissensus, although sometimes apparently inconsistent claims are made on the basis that homosexual rights should be protected on the basis of choice and "sexual self-determination", irrespective of assertions of immutability: see *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [29]–[30].

358 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [283].

359 In contrast, Indian courts have recognised the "LGBT community" as a "sexual minority": *Navtej Singh Johar v Union of India, THR Secretary and Ministry of Law and Justice* AIR 2018 SC 4321; Writ Petition (Criminal) No 76 of 2016 at [58], [81], [145] and [162].

360 PM Lee Hsien Loong stated that the Government did not "consider homosexuals a minority, in the sense that we consider, say, Malays and Indians as minorities, with minority rights protected under the law": Singapore Parl Debates; Vol 83; [23 October 2007].

361 Submissions that s 377A "specifically targets practising male homosexuals", as raised in *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [90], were an attempt to frame the issue in terms of putative group rights, to sustain the argument that the Art 12(1) rights of the target group, of which Tan was a member, had arguably been violated by "the mere existence of s 377A in the statute books": at [126]. This

(cont'd on the next page)

supremacy" as a state could not "deprive minorities of their fundamental liberties" simply because of "popular moral sentiment",[362] are simply rhetorical chaff. Clearly, Singapore courts have not in the name of equality arrogated the power to define what constitutes a "minority" warranting special legal protection. To do otherwise would position the courts so would place the courts in danger of creating a special legal regime for a category of persons or group which the authors of the Constitution never contemplated. It bears reiterating that the Constitution may be amended to confer legal protection to any group through parliamentary processes.

D. Does the presumption of constitutionality still have a place? Pre- and post-colonial laws

194 The presumption of constitutionality that attaches to the reasonable classification test serves as a starting point that legislation "will not presumptively be treated as suspect or unconstitutional"; it cannot be used to meet an objection of unconstitutionality, as this would "entail presuming the very issue which is being challenged".[363] Nonetheless, impugned legislation should be supported "if it is reasonable to do so".[364]

195 This presumption is rooted in the view that "Parliament knows best" what the people need, and legislates "to address the problems made manifest by experience"; it is thus assumed that differentiating laws are "based on adequate grounds",[365] buttressed by the presumption that the Legislature does not enact legislation inconsistent with the Constitution.[366]

---

sort of statement is often used to suggest there are no good reasons for laws which criminalise homosexual acts other than animus towards a "group" or "minority" whose members are prosecuted because of their status or personal identity, rather than their conduct: *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [33]. This oppressor or oppressed framing is a common trope deployed to advance identity politics narratives, as is the controversial conflation of conduct with identity. Notably, the court in *Tan Eng Hong v Attorney-General* appeared to describe those subject to s 377A in terms of their conduct rather than status at [30], referring to "a specific class of persons, viz, men who participate in sexual conduct with other men", which in not referring to sexual orientation, is to be preferred.

362 As raised by Deborah Barker SC in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [29]. Further, just because the law recognises one group or minority, does not mean that this can be cited as the basis for recognising another group or minority, which should be examined on its own merits. It is puzzling why counsel cited the 1966 Report of the Constitutional Commission, which dealt with racial and religious minorities, in so far as this was referenced in support of an argument against the discrimination of a homosexual minority: at [87]–[88].

363 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [154].

364 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [104].

365 *Shri Ram Krishna Dalmia v Shri Justice S R Tendolkar* AIR 1958 SC 538, cited in *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [79].

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

Some argue the presumption should not apply to fundamental rights,[367] as this would preclude according a generous interpretation to rights.[368]

196 Given this presumption, the issue then is how to confer "proper weight"[369] to Parliament's views, as embodied in the legislation, particularly where the legislation is pre-Independence, as a colonial legislative council does not represent the people's will.

197 In *LMSCA*, the court stated that pre-Independence laws were not "inferior"[370] to laws enacted by an independent Parliament; by dint of Art 162, they were "part of the corpus of Singapore law".[371] The presumption of constitutionality should still apply to colonial era legislation,[372] but should not "operate as strongly"[373] as it would to legislation adopted by an independent Parliament, where presumably the elected legislature "fully considered all views".[374]

198 If the goal is to give weight to democratic will, the strength of the presumption may vary with how democratic a process surrounding a statute is, in terms of participation and representative debate.

199 The High Court in *Johnson* distinguished between two types of colonial-era legislation that remain in force after 1965. There are colonial laws which just remain in the statute book "without subsequent consideration and debate in Parliament",[375] and colonial

367 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at paras 109, 111 and 125.
368 *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710 at [23].
369 *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103 at [73].
370 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [106].
371 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [106].
372 In contrast, the Indian Supreme Court in *Navtej Singh Johar v Union of India, THR Secretary and Ministry of Law and Justice* AIR 2018 SC 4321; Writ Petition (Criminal) No 76 of 2016 (J2 at [90], *per* Nariman J), held that no presumption of constitutionality applied to pre-constitutional statutes like the Indian Penal Code, as there was no independent Parliament acting to serve the needs of the people. Chan in "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 112 criticised the High Court and Court of Appeal in *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 (HC); [2015] 1 SLR 26 (CA) for holding the presumption applied without an explanation.
373 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [107]. This was described as a "viable middle ground", noting that the court in applying the presumption of constitutionality would always have regard to all the case circumstances, including the text and context of the relevant statute.
374 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [106]–[107].
375 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [153].

laws[376] which are robustly and thoroughly debated and reaffirmed by Parliament, such as s 377A. See J considered that the "full weight" of the presumption of constitutionality should apply to s 377A, as the parliamentary representatives of a free people had "extensively debated and comprehensively considered"[377] the decision to retain s 377A. As such, the presumption of constitutionality applied "with equal (if not greater) force to s 377A, as it does to post-Independence laws".[378] This accords legal significance to the 2007 debates.

200 While it falls within the judicial purview to examine whether the Constitution is violated, See J stated that it is "not untoward"[379] that the courts recognise "as an underlying premise" and rebuttable presumption, that the Legislature is "best placed to understand and represent the interests of Singapore", in terms of institutional competence. See J considered that the presumption of constitutionality is valid and should continue to apply in constitutional adjudication. It is "intimately tied"[380] with the separation of powers principle and deference to elected representatives in applying calibrated review to moral questions.

201 It is condescending to pejoratively label a colonial-era law[381] as a "colonial relic", when it has been thoroughly deliberated upon by a post-Independence Parliament,[382] retained and thereby endorsed, in an exercise of political self-determination, not inertia.[383]

202 This is evident too in the apprehension of s 325(1) of the Criminal Procedure Code[384] ("CPC"), which dates back to the 1827 Penal Code and whose precursor provision statutorily excluded women from caning. The Court of Appeal in *Yong Vui Kong v Public Prosecutor*[385] ("*Yong*")

376 See Kee Oon J in *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 noted at [154] that s 377A was considered as part of a petition rather than a Bill; nonetheless it was "extensively debated and comprehensively considered by Parliament", resulting in Parliament confirming its decision to retain it. Hence the presumption of constitutionally should be "given full weight".

377 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [154].

378 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [152].

379 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [159] and [163].

380 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [110].

381 *Eg*, see Douglas E Sanders, "377 and the Unnatural Afterlife of British Colonialism in Asia" (2009) 4 *Asian Journal of Comparative Law* 163.

382 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63 at [154].

383 PM Lee Hsien Loong: "The continued retention of section 377A would not be a contravention of the Constitution. The Government has not taken this matter lightly. We had a long discussion amongst the Ministers. We had an extensive public consultation on the Penal Code amendments and we decided on this issue – to leave things be." in Singapore Parl Debates; Vol 83; [23 October 2007].

384 Cap 68, 2012 Rev Ed.

385 [2015] 2 SLR 1129.

noted that this was because "the moral sense of the community would not allow it to be inflicted".[386] In *Yong*, it was argued that differentiating between males and females in relation to criminal law punishment was unjustified.

203 This was rejected on two bases: first, the "obvious physiological differences" between males and females, and second, the "moral sense" in so far as it was thought barbaric to inflict violence on women or to violate their decency. The law was not "so manifestly discriminatory" as to fail the intelligible differentia test, and the Court of Appeal thought it inappropriate "to pass judgment on the soundness or rationality of such gendered social attitudes".[387]

204 Further, it cannot be said that the exemption "no longer represents prevailing opinion", as s 325(1)(*a*) was "re-enacted when the CPC was amended in 2020 (*vide* Act 15 of 2010)"; this ratified attitudes towards the "relative acceptability" of inflicting corporal punishment on men *vis-à-vis* women.[388] What matters is not the vintage of pre-constitutional law, but its merits and whether it has contemporary utility.

E. Parsing Article 12(1) and finding a "super-right" and "higher law"?

205 The constituent elements of Art 12(1) have English and American roots. "Equality before the law" ("EBL") is from the English common law whose focus is on ensuring that all classes of persons, regardless of rank, are equally subject to the law, prohibiting different treatment on the basis of special privileges.[389]

206 "Equal protection of the law" ("EPC") derives from the US Fourteenth Amendment[390] and was designed to ensure that emancipated black slaves enjoyed rights as full citizens, by making unconstitutional discriminatory laws which restricted their rights to own property, enter contracts and imposed harsher criminal punishment on them compared

386 *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [108].
387 *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [110]–[111].
388 *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [111]. The thoughtfulness underlying the legislative regime is also reflected in the "clear legislative effort" to inject parity into the sentencing regime in other ways, such as replacing caning, where a person is so exempted for medical reasons, with a term of imprisonment. This ensures that criminals "of equal culpability" are given different sentences that nonetheless "reflect their culpability": at [112]–[113].
389 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [35].
390 The US Fourteenth Amendment reads: "No state shall … deny to any person within its jurisdiction the *equal protection of the laws*." [emphasis added]

to whites.[391] The Fourteenth Amendment also ensured that other races enjoyed the same civil rights whites enjoyed.[392]

207 Before Singapore had an Independence constitution in 1965, EBL and EPC were already part of the law of the land as part of the "wider doctrine of the rule of law",[393] with roots in the Magna Carta.

208 In relation to criminal law classification, Lord Diplock in *Ong Ah Chuan v Public Prosecutor*[394] stated that "[e]quality before the law and equal protection of the law require that like should be compared with like", that is, consistent, equal treatment of individuals in similar circumstances. Article 12(1) does not prohibit different punitive treatment between two classes where there is some difference in the circumstances of the offences committed. In other words, Singapore courts see no difference between EBL and EPC as constitutional rights,[395] which do not provide any criteria for advancing a theory of substantive equality.

209 If the reference to "law" under the first and second limb of Art 12(1), EBL and EPC respectively, referred to the law in general, then this is no more than a "declaratory statement" which is self-evident in nature.[396] If the reference to "law" relates to the impugned statute, such as s 377A, EBL provides little assistance to what concept of equality is at hand. The Court of Appeal in *LMSCA* pointed out that the first limb did not provide the legal criterion a court can apply in determining whether a particular person or group had not been "accorded equality of treatment in relation to s 377A".[397] Presumably anyone falling within the scope of s 377A, say, male persons committing sodomy, would be considered "equal" before s 377A. This is not an argument the appellants in *LMSCA* would want to rely on. Formal equality would be impugned if the appellants, but not other similarly situated male persons, were charged with a s 377A offence, which is a "distinct argument".[398]

---

391 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [36].

392 *Yick Wo v Hopkins* 118 US 356 (1886), discussed in *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [36].

393 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [52]. The EBL and EPC as part of the law of England would have been part of Singapore by 1938 when s 377A was enacted, imported via the Second Charter of Justice (1826).

394 [1979–1980] SLR(R) 710 at [35] and [37], approved in *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [54].

395 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773, noted this also of the Indian and Malaysian courts: at para 101.

396 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [73]–[74].

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

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

300 With respect to EPC, if the law refers to s 377A, this also would not help the appellants who sought not equal protection under s 377A, but "protection from prosecution under s 377A".[399] The object of challenge is the legislative validity of s 377A, to argue that it does not comport with a theory of substantive equality, *eg*, equality of lifestyle. Neither EBL nor EPC can assist this challenge, without drawing content from an anterior philosophy.

301 In parsing Art 12(1) in his article, Chan demurs from the view that EBL and EPC be treated the same and that EBL is declaratory in nature, in not providing "specific legal criteria" to guide the court in determining whether a particular statute has violated Art 12.[400] He draws a distinction between EBL and EPC and idiosyncratically characterises EPC as a "second order right" to which the reasonable classification test may be appropriate; EBL is anointed as a "first order right" which warrants a more intensive standard of scrutiny, which he recommends that the court develop to give "full effect" to the EBL right.[401]

302 He effectively claims a "Super-Right" status for EBL, and supplies the content for the empty container of "equality" in EBL, presumably through accessing some kind of "higher law" beyond positive state law or the constitution.[402] While EBL means that no one is above the law, that the law of the land applies equally to all,[403] this does not speak to the content of the "law" or whether differentiation is legitimate, as the phrase is itself pitched at the level of abstract generality.

303 Unless equality is an absolute norm, which it is not in the context of Art 12 jurisprudence, these issues have to be discretely identified and concretised, whether by processes of constitutional amendment, parliamentary legislation or judicial interpretation, and not just by any one individual's declaration. When Chan enumerates criteria for what

399 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [74].

400 In addition to the reasonable classification test, Art 12(2) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) provides concrete legal criteria which helps determine when a statute is discriminatory within the scope of Art 12(2), thus contravening the concept of equality in Art 12: *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [90].

401 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at paras 96 and 107.

402 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 93.

403 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 93.

EBL requires, this is his preferred subjective prescription which is not self-evident.[404] This argument merits careful examination.

304 As a preliminary point, it is worth noting that in the history of the ideal of equality and in the international human rights context, there is a specific understanding of what "equality before the law" means. EBL is understood to be directed at how the law is enforced by judges and administrative authorities, that they not act arbitrarily. It does not give rise to a claim of substantive equality of whatever nature, but "solely to a formal claim that existing laws be applied in the same manner to all those subject to it".[405] This is considered one of the "fundamental achievements" of the bourgeois revolutions of the 18th and 19th centuries.[406] "Equal protection of the law" is directed at the obligation of national legislatures to ensure substantive equality by way of legislation,[407] through negative and positive measures.

(1) Of "first order" and "second order" rights

305 Chan advances a novel argument that instead of viewing Art 12(1) as containing aspirational principles,[408] the courts should appreciate that Art 12(1) grants EBL and EPC as "positive rights".[409] Unlike negative rights which are couched in the form of prohibitions, positive rights are generally understood as requiring state action, *eg*, such as the provision of legal aid. This in itself says nothing about the type of affirmative action needed to fulfil the demands of "equality".

306 Furthermore, EBL should be understood as a "discrete right", which is "separate and distinct" from the entitlement to EPC.[410]

---

404 "Hence, the law shall not discriminate against any person (or any citizen) on the basis of birth (descent), gender, race, religion, position or other personal attributes": Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 93. These exceed the grounds listed in Art 12(2) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint). Why not add additional grounds like nationality or film tastes?

405 Manfred Nowak, "Article 26" in *UN Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel, 1993) pp 458–479 at pp 466–467. In other words, "objectively equal fact patterns" are to be "treated equally".

406 Manfred Nowak, "Article 26" in *UN Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel, 1993) pp 458–479 at p 466.

407 Manfred Nowak, "Article 26" in *UN Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel, 1993) pp 458–479 at pp 468–469.

408 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [90].

409 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 96.

410 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 96.

Chan argues that EBL is a "first order right" while EPC relates to "second order rights" and that while the rational review test and presumption of constitutionality may be appropriate to EPC, EBL requires a more rigorous test of judicial scrutiny.

307 Implicitly, a framework akin to tiered, variable scrutiny drives this argument. This could be understood by examining Chan's basis for distinguishing between first and second order rights, which is not without its problems, in seeking a coherent understanding of the nature of constitutional rights.

308 Firstly, first order rights are granted by the Constitution.[411] EBL and EPC both share Art 12(1) as the source of their constitutional status. However, EBL is distinct from EPC and a first order right, according to Chan, because it "exists as a constitutional right without any legislative or executive action".[412] EBL is thus some kind of self-executing *constitutional* right.

309 In contrast, EPC plays no "constitutional role", unless unequal laws are enacted, as it is an "entitlement to equal laws" and "contingent" upon such laws being enacted. Without legislation, EPC is not engaged;[413] the constitutional entitlement to EPC "is meaningless if there are no unequal laws".[414] EPC constitutes a "constitutional command" to Parliament, when enacting laws dealing with socio-economic development to promote the public welfare to ensure that people are treated equally, absent a state interest which justifies unequal treatment.[415] In other words, such regulatory laws, in imposing economic burdens and benefits, create statutory rights; the function of EPC is to ensure equal treatment of all persons in relation to these statutory rights, unless unequal treatment is justified by a state interest.

310 Statutory rights, in Chan's schema, are "second-order rights" as these are granted by legislation.[416] As statutory rights and burdens operate in the realm of socio-economic matters, it is appropriate to defer

411 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 96.
412 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 96.
413 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 97.
414 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 97.
415 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 98.
416 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 98.

to the Legislature and to apply the presumption of constitutionality when it comes to social legislation, because here, "Parliament knows best".[417] Stronger tests of judicial scrutiny are appropriate beyond the realm of socio-economic rights and burdens. This resounds with the operating value assumptions of tiered scrutiny approaches, as "second order rights" appear to fall neatly into what would be caught by the American rational basis review test, which is applied primarily to socio-economic regulations, though it has also upheld a governing majority's belief that certain sexual behaviour is "immoral and unacceptable" as a rational basis for regulation.[418]

311 To recap, EPC differs from EBL because while EBL deals with first order self-executing constitutional rights, EPC is non-self-executing and deals with second order statutory rights. This is a little puzzling, to say the least.

312 Chan characterises EPC, stemming from the US Fourteenth Amendment, as not granting any rights[419] but requiring US states not to deny "to any person within its jurisdiction the equal protection of the laws". That is, it is a legislative directive rather than an individual right.[420] The same can be said for Art 14 of the Indian Constitution,[421] in contradistinction with the Malaysian and Singapore Arts 8(1) and 12(1) respectively.[422] Chan criticises the Malaysian courts for following the Indian decisions which see no difference between EBL and EPC, chastising them and the Singapore courts for not considering the "structural difference" between their equality guarantees and the Indian Art 14; in considering EBL and EPC the same, they have treated "a first order right of equality before the law granted by the Constitution" as "a second order right to equal treatment under statutory laws".[423]

---

417 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 98.

418 *Williams v Pryor* 240 F 3d 944 at 949 (11th Cir, 2001). Legitimate state interests may relate to safeguarding public morality, and are not confined to demonstrable harms.

419 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 94.

420 It would be more than odd to conceptualise the US First Amendment as a directive to Congress, rather than as justiciable constitutional rights, given it is cast in the form: "Congress shall make no law … prohibiting the free exercise (of religion) … or abridging the freedom of speech."

421 Article 14 of the Indian Constitution provides: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

422 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 95.

423 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 103, criticising the

(cont'd on the next page)

313 But why cannot EPC be conceptualised as a *constitutional* right of citizens to equal treatment in the enactment and administration of regulatory laws? As a right, EPC exists as much as EBL exists, even if only operationalised when an unequal law is legislated into existence. So too, it could be said that EBL is not "meaningful" unless there is an act which violates it, whereupon, it kicks in, through a finding of unconstitutionality. Furthermore, if EBL rights exist and are not contingent on any intervening action, and if EBL rights are positive rights,[424] then EBL rights are not meaningfully realised in the absence of affirmative state action. Further, the mere invocation of EBL does not provide any criteria to guide decision-makers as to what projects of substantive equality are constitutionally mandated. We come back to the proposition that "equality" is parasitic on an exterior political philosophy; the term cannot be populated through legal interpretation, only political imputation.

314 Chan argues that the courts should recognise a distinction between first and second order rights, particularly in the field of criminal legislation, which he contrasts with regulatory legislation. While the former by its nature "curtails or limits" constitutional and statutory rights, he describes regulatory law as creating rights and distributing benefits to one class of persons, but not another. However, regulatory law can also curtail constitutional and statutory rights. For example, licensing laws may facilitate or impede free speech and assembly rights under Art 14 or the right to a religious procession under Art 15.

315 Having set forth his view on first and second order rights, Chan states that Art 12(1) is "self-evident"[425] in granting EBL as a constitutional right to all persons, male and female. This is the conventional binary division of humanity which it is not sensible to cavil with.[426]

High Court in *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [44] and the Court of Appeal in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [73].

424 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 96. In contrast, the Court of Appeal has held that Art 9 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) is a negative right and does not impose any duty on the State to take affirmative measures to promote the enjoyment of a person's life and personal liberty: *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [14].

425 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 105. To assert that something is self-evident may accord it a greater weight than warranted.

426 LGBT proponents of non-binary gender identity may object that this is not self-evident to them as they consider gender identity to be fluid and diverse. Facebook, for example, has more than 50 custom gender options for those who do not identify as "male" or "female". Will Oremus, "Here are All the Different Genders You Can Be on Facebook" *slate.com* (13 February 2014) <https://slate.com/technology/2014/02/facebook-custom-gender-options-here-are-all-56-custom-options.html> (accessed 15 August 2021).

316 From the proposition that males and females are equal before the law, he "suggests" that s 377A in only criminalising males who engage in homosexual conduct (his "class (a)" of homosexual or bisexual males) but not class (b) (bisexual or heterosexual males and females) and class (c) females (whether homosexual, bisexual or straight)[427] violates the right to equality of class (a) males. The argument is that members of class (a) are treated unequally under s 377A because only they, and not class (b) males or class (c) females, are punishable for committing acts of gross indecency.

317 This argument is problematical for various reasons. First, there is a hidden assumption that homosexual penetrative sex is morally equivalent to heterosexual penetrative sex, or for that matter, female-female sex acts.[428] Whether or not we are dealing with "similar acts" of gross indecency is contestable, not a truism.[429] To declare this is to purport to be the author of some kind of "higher law", filling the empty container of "equality". Parliament is entitled to make moral distinctions between these different types of conduct, and treat what is unlike in a dissimilar manner.

318 Second, females were historically never the target of gross indecency laws. Even if it is accepted that females can commit analogous acts, Parliament may in upholding public morality apply multiple methods to handle different aspects of the problem, according to the perceived degrees of harm. This will involve value judgments and will provoke disparate viewpoints, but it is submitted that Parliament is a better forum than the courts for making difficult value choices.

319 Third, it is a *non sequitur* to reason from the premise that "all persons" includes males and females, to conclude that male homosexual conduct is equal to heterosexual conduct; biological sex (male and female identity) is not coterminous with sexual conduct, *ie*, homosexual and heterosexual conduct. "Sex" is not the same thing as conduct which flows from or is closely identified with "sexual orientation", even though ideologues may conflate the two.[430]

---

427 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 105.

428 This hidden assumption is evident in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [29] (that s 377A criminalised acts that were "legal for non-male homosexuals", *ie*, lesbians).

429 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 106.

430 *Eg*, David L Mundy, "Hitting Below the Belt: Sex-Ploitive Ideology & The Disaggregation of Sex and Gender" [2001–2002] 14 *Regent University Law*

(cont'd on the next page)

320 Fourth, the law is not differentiating between males in class (a) or class (b) or females in class (c), but is drawing distinctions between different types of conduct, *ie*, homosexual (male–male) and heterosexual (male–female) sex acts, and what these represent in relation to community mores. Further, to say that males and females are equal to one another under the law does not mean that the law cannot differentiate between males and females, as it clearly does. Equality is neither self-evident nor absolute. Whether a particular law which differentiates on the basis of sex is legitimate or illegitimate requires another conversation; the question of when laws can distinguish between males and females, young and old, is not resolved by merely chanting the mantra of "equality". Whose vision of equality?

321 Chan ultimately seeks to argue that the courts must give effect to Art 12(1) as a "substantive right, and not as an aspirational ideal".[431] The reasonable classification test, he argues, was formulated for EPC not EBL. The formidable question of course is, according to what substantive theory?

322 If EBL is a substantive first order right and if Art 12(1) is open-ended in not providing any concrete legal principles for developing the right, Chan argues that it falls to the courts to do so, to give "full effect" to the right, including a test that allows the legitimacy of the state interest to be judicially assessed. This harkens to the strict scrutiny for fundamental rights type argument associated with a tiered scrutiny approach, which attracts the criticism that the construction of categorical tiers by applying subjective judicial values constitutes judicial overreaching, an approach Singapore courts have disfavoured.[432]

323 Chan further draws a distinction between criminal law and civil law and suggests that as criminal law affects fundamental rights,[433] it must satisfy a more stringent test than that of reasonable classification, which applies to EPC, in order to ensure EBL is observed. He argues that men and women are equal in terms of their capacity to commit crimes

Review 215 (arguing that treating sex as a social construct is contrary to biological and anthropological evidence).

431 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 107.

432 *Eg*, the rejection of a defence to political defamation in the form of categorical exceptions for "political communication" in *Review Publishing v Lee Hsien Loong* [2010] 1 SLR 52; the espousal of a balancing rather than categorical approach in determining the justiciability of foreign policy matters in *Lee Hsien Loong v Review Publishing* [2007] 2 SLR(R) 453.

433 Capital punishment and imprisonment can take away life and personal liberty, but some punishments can be in the form of a fine.

and equal in terms of criminal liability. He asserts there is no "objective" difference between men and women in the criminal law context and concludes that a criminal law discriminating against a class of persons on the basis of their "sex or gender"[434] would violate the fundamental right of equality before the law. [435]

324 This is an overstatement. The criminal law, like the civil law, does draw distinctions between men and women in various respects. For example, women, unlike men, are exempted from caning as a form of punishment under s 325(1) of the CPC. It is unclear what Chan means by stating that men and women are equals in term of legal capacity to commit offences.[436] If he means that they can be criminally liable, as legal persons, that is an indifferent point. If he means that they share equal capacity to perform the same crime, such as murder or rape, this may have a different impact depending on the social roles they occupy. The commission of the same crime by different persons, whether a recidivist or first-timer, a trusted authority figure or stranger, may attract different sentences, as this factor affects the complexion of the gravity of the act.

325 If a law draws a differentiation on the basis of sex, the classification must be reasonable. Chan's argument is that a law criminalising a "gender-neutral act" (an act anyone can commit, like homicide) as a "gender-specific offence" in the context of EBL, may discriminate against a class of specified offenders by sex or offender.[437] In relation to sodomy, for example, this is not a gender-neutral act as women cannot bugger each other. In relation to oral sex, while this may be gender-neutral, if the focus is not merely on *who* commits the indecent act but with *whom* it is committed, there is no reason why the Legislature, seeking to promote heteronormativity, may not choose to maintain that, for example, heterosexual and homosexual oral sex have differing social impacts and may be treated differently. After all the role of the criminal law is to uphold social order and public decency, which includes intangible harms to the moral ecology.[438] It all really depends on the theory of substantive equality adopted.

---

434 It is not clear what the reference to "sex or gender" means, whether Chan Sek Keong sees these as synonymous with "sexual orientation".

435 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 83.

436 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 83.

437 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 87.

438 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 82; *Public Prosecutor v Kwong Kok Hing* [2008] 2 SLR(R) 684 at [17].

326 In arguing for a higher standard of review where fundamental liberties are curtailed while maintaining the reasonable classification test where economic interests are concerned,[439] Chan invents a new theory in parsing Art 12(1) to find first order constitutional rights (EBL) and second order rights (EPC), where the presumption of constitutionality applies to the latter, not the former. He declares that the "equality of men and women is a first-order constitutional right" which warrants greater protection as a super fundamental right of sorts.

327 What would the impact of this proposition be, for example, on how compulsory military service is operationalised, since, as a matter of long practice, women are not so subject?[440] He seems to invite American-style tiered scrutiny approach in rhetorically declaring there is "no reason to believe" that "fundamental rights under the Constitution are of less value to Singaporeans and are given less protection than fundamental rights in the US Constitution".[441] This seems to entirely discount the different weighing of competing rights, duties and goods in a balancing process shaped by the extant political philosophy in any one jurisdiction, whether the accent is on liberal, communitarian or statist values.

328 To embark upon Chan's suggested approach would be to depart from an interpretive approach which focuses on text, history, precedent and theory, towards one more akin to a "living tree" values-oriented approach. The courts would become the articulator of the "higher law" from whence to derive the substantive content to give shape to what EBL requires, such as a pansexualist ethic supportive of equality of lifestyle, for example. This would take the court into the realm of politics as a second legislative chamber, ushering in an age of juristocracy.

329 One might even argue that because equality is so subjective a concept and prone to politicisation, that a strong presumption of constitutionality is warranted in evaluating the reasonableness of a legislative classification, as an expression of the Singapore separation of powers principle.

439 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para [89]–[90].

440 The Enlistment Act (Cap 93, 2001 Rev Ed) is cast in sex or gender-neutral terms as the Act refers to "[e]very person … who is fit for national service" under s 13.

441 Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019) 31 SAcLJ 773 at para 90.

IV. Political constitutionalism, equality and concluding observations on the case for the deferential review of moral questions

330 The lofty ideal of "equality" in the abstract has a potentially extensive reach, in so far as it may apply to, or challenge, any right or norm set forth in the law. The devil is in the details of practical implementation, given that human beings have disparate needs, and are "not equal by nature, attainment, circumstances and conditions".[442] Courts, depending on their philosophical inclinations and sense of institutional role, competence and propriety, may adopt an approach towards equality which is far-ranging in reach, or restrained.

331 Singapore courts operate within a constitutional order which reflects a mix of political and legal constitutionalism;[443] the former favours holding the Government to account through political institutions and actors,[444] while the latter favours judicial review, which may sustain rightism, with activist judges tempted to elevate contested political claims to the status of constitutional rights through values-driven interpretation.

332 In adopting the reasonable classification test, Singapore courts have embraced a paradigm of judicial restraint and eschewed judicial adventurism. In being a threshold test, it relies heavily on the "sweet reasonableness" of Parliament, as a site where "the confrontations which exist in modern, multi-interest society"[445] are expressed, scrutinised and managed. This appreciates that intelligent and responsive policymakers can incorporate considerations of proportionality and reasonableness in crafting limits on rights[446] and that Parliament can be a forum for safeguarding important individual and social interests. In matters outside the law,[447] in relation to "what is acceptable, reasonable or proportionate

442 S M Huang-Thio, "Equal Protection and Rational Classification" [1963] PL 412 at 413.

443 In extreme versions, legal constitutionalists consider there is no constitutional problem a court cannot solve: Adam Tomkins, "The Role of the Courts in the Political Constitution" (2010) 60(1) *University of Toronto Law Journal* 1 at 3.

444 In this context, Singapore administrative law has been judicially and extra-judicially described as reflecting a "green light approach": *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [123] and Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at paras 29–30.

445 Edmund Marshall, *Parliament and the Public* (Palgrave Macmillan, 1982) at p 134.

446 Adam Tomkins, "The Role of the Courts in the Political Constitution" (2010) 60(1) *University of Toronto Law Journal* 1 at 5.

447 The Singapore courts have developed a working distinction between legal and extra-legal factors such as rhetorical argument and philosophical debate, statistical studies and surveys, science or public health matters. Where conflicting scientific views exist over questions like whether homosexuality is immutable or inborn (even if

(cont'd on the next page)

policy-making",[448] "why should judges purport to know better than the rest of us?"[449]

333 Aside from questions of statutory interpretation, challenges towards the constitutionality of s 377A stem from a certain liberal philosophy and "cult of liberal egalitarianism", which through a "living tree" construction overtly champions erotic liberty as a "privacy" right; more covertly, its arguments on "equality of lifestyle", whether invoking sex or gender or sexual orientation, rest on what may be occulted substantive assumptions, veiled by the projection of liberal agnosticism. However, no constitutional provision has enacted John Stuart Mill's *On Liberty*, or any other school of social thought.[450]

334 When Parliament debated a 2007 petition urging the repeal of a law introduced in 1938, the decision to retain it without proactively enforcing it was a product of an uneasy and "untidy"[451] political compromise, where "homosexuals must be accommodated and given a place in our society,

---

something is immutable, *eg*, kleptomania, it does not mean it is "moral" or should be exempt from criminal sanction: "Kleptomania Analogy" *Spherical Model* (2 August 2013) <sphericalmodel.blogspot.com> (accessed 15 August 2021)), the courts consider that such matters fall within the legislative province: *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [157]–[159], [169] and [176]. See Ronald Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis* (Princeton University Press, 1987) and Charles W Socarides, *Homosexuality: A Freedom too Far* (Adam Musgrave Books, 1995) at 74 and 79. The immutability narrative is disrupted by persons who, as a "minority within a minority", testify to leaving the homosexual lifestyle, some of whom oppose the homosexualism agenda: Gwen Aviles, "Ex-gays Descend upon DC to Lobby Against LGBTQ Rights" *nbcnews.com* (31 October 2019) <https://www.nbcnews.com/feature/nbc-out/ex-gays-descend-upon-d-c-lobby-against-lgbtq-rights-n1074211> (accessed 15 August 2021). Although their views are contested, their perspectives and claimed "right to sexual re-orientation" cannot be discounted without unfair censorship: see *changed.movement.com* and *truelove.is*. See also Robert L Spitzer, "Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation" (2003) 32(5) *Archives of Sexual Behaviour* 403.

448 Adam Tomkins, "The Role of the Courts in the Political Constitution" (2010) 60(1) *University of Toronto Law Journal* 1 at 6.

449 V K Rajah, "Interpreting the Constitution" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) pp 23–31 at p 27.

450 As Roberts CJ (dissenting) remarked in *Obergefell v Hodges* 135 S Ct 2584 at 2622 (2015), of Judge Henry Friendly's comment about the Fourteenth Amendment. See further John Lawrence Hill, *The Prophet of Modern Constitutional Liberalism: John Stuart Mill and the Supreme Court* (Cambridge University Press, 2020) at pp 55–136.

451 PM Lee Hsien Loong in Singapore Parl Debates; Vol 83; [23 October 2007], describing s 377A as "a practical arrangement that has evolved out of our historical circumstances. We are not starting from a blank slate, trying to design an ideal arrangement; neither are we proposing new laws against homosexuality. We have what we have inherited and what we have adapted to our circumstances".

but should not be allowed to advance the normalisation of homosexuality or to campaign for more extensive rights".[452] Those who identified with homosexuality were to be given space to lead their private lives,[453] but homosexuality was not to be mainstreamed. Were s 377A to be repealed, this would entail the loss of a moral signpost and usher in negative social consequences. The pragmatic decision to retain s 377A as the "desired social norm" was linked with the policy of promoting parenthood within marriage and the traditionally defined family unit as the building block of society.[454] The Government seeks to foster these values, rather than allowing them to be weakened.[455]

335 The focus of the courts is on deciding cases on the basis of facts and arguments advanced before them, which does not extend to

452 *UKM v Attorney-General* [2019] 3 SLR 874 at [207].

453 PM Lee Hsien Loong, in his 2007 speech before Parliament (Singapore Parl Debates; Vol 83; [23 October 2007]), displayed no animus towards homosexuals as "our kith and kin". While invoking "animus" (which can exist on both sides of the political divide) is a useful political tactic to galvanise support for the justice of one's cause (the "politics of emotion"), it can be a red herring, designed to deflect attention from the substantive reasons underlying an adopted course of action (the "politics of reason"): see Robert C Solomon, "The Politics of Emotion" in *The Joy of Philosophy: Thinking Thin* versus *the Passionate Life* (Oxford University Press, 1999) at p 39. In 2020, PM Lee, at a tech forum, in the context of seeking to attract tech talent noted that gay and lesbian people were "valued members of society" and welcome to work in Singapore, but stated it would be unwise to force the issue of decriminalising homosexual conduct "because there will be a push back and you'll end up with polarization and be in a worse place than we are": Yoolim Lee, "Singapore's Leader Welcomes LGBTQ People in Tech Talent Pitch" *Bloomberg.com* (18 November 2020) <https://www.bloomberg.com/news/articles/2020-11-18/singapore-s-leader-welcomes-lgbtq-people-in-tech-talent-pitch> (accessed 15 August 2021). PM Lee added there was "no reason why, if you are a member of this community, you should not fit in in Singapore". See also Ng Jun Sen, "With Diverse Tech Talent Needed, Singaporeans and Foreigners Need to 'Make the Effort' to Address Social Friction: PM Lee" *Today* (18 November 2020) <https://www.todayonline.com/singapore/diverse-tech-talent-needed-singaporeans-and-foreigners-need-make-effort-address-social> (accessed 15 August 2021).

454 *UKM v Attorney-General* [2019] 3 SLR 874 at [188]. See also Singapore Parl Debates; Vol 83; Cols 2397–2400 and 2406–2407; [23 October 2007]. While s 377A "by itself does not bring about" family values or ensure its continuity, it supports or at least does not hinder the cultivation of these societal mores and norms: *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [84] and [86].

455 During the 2019 debate on the Criminal Law Reform Bill (Second Reading), MP Christopher de Souza noted the "multiple legal challenges in various jurisdictions which seek to redefine marriage, gender, adoption rights, spousal rights and what is taught in schools. Retaining s 377A, even if unenforced, continued to be a "good approach", "relevant and necessary", as it best serves to preserve the "traditional family unit" which provides the best environment to children which supports the State in "creating the best environment for the upbringing of children". This should be protected, we should "build it up, and not tear it down": Singapore Parl Debates; Vol 94; [6 May 2019].

the broader consequences a decision might have. Singapore courts have insisted that they will not consider extra-legal arguments but only those arguments which are "legally relevant"[456] to interpreting constitutional provisions. All other arguments should be canvassed "in the appropriate fora (whether of a legislative, academic or some other public (but non-judicial) nature)".[457]

336 While, as was argued, the constitutional challenge to s 377A was not about "other legal rights" (such as the right to same-sex marriage)[458] and while the Court of Appeal observed that there was "no necessary connection" between a judicial decision on s 377A and "any positive rights" which the Legislature alone may grant,[459] it would be naïve to wilfully ignore the legal and social impact of removing a law like s 377A.

337 The linkages between laws akin to s 377A and the broader homosexualism agenda, including same-sex marriage, are evident from empirical observations of developments in foreign jurisdictions, socio-legal academic analysis, the demands of activists and common sense.

338 Those who discount these linkages or disdain them as "slippery slope arguments" may do so for tactical reasons to obscure the consequences, so that these are not factored into decision-making processes. Responsible decision-makers need to dig beyond the surface to accurately appreciate what is at stake, in terms of other competing rights and public goods. Parliament is the best site for such inquiries into complex social issues.

A. What is at stake: Section 377A, narrow legal questions and the broader social dimension

339 Altering the criminal law is the first step to advancing civil law changes, including lowering the age of consent,[460] legislating anti-discrimination laws, promoting the moral equivalence of homosexuality with heterosexuality in public education, civil partnerships, ultimately

456 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [10].
457 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [10].
458 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [9].
459 Lim Meng Suang v Attorney-General [2015] 1 SLR 26 at [9].
460 For example, the age of consent for homosexual men was 21 but 16 for heterosexual couples under the Crimes Ordinance in Hong Kong. This was held, *inter alia*, unconstitutional for violating equal protection on grounds of sexual orientation in *Leung TC William Roy v Secretary of Justice* [2006] HKLRD 211, noted in *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [29].

leading to same-sex marriage.[461] If equality means "identical treatment in all manner of life", the legalisation of same-sex marriage would seem to be "the only logical conclusion" as civil unions which mimic "marriage in every aspect except the name" raises the suspicion that "same-sex couples are treated as second-class citizens under a second-class institution".[462]

340 Then the law shifts focus "from regulating the behaviours of homosexual citizens to that of members of the public";[463] transgressors failing to treat gays and lesbians equally are sanctioned, such as through hate speech legislation and mandatory "LGBT sensitivity training" in public and private sectors.[464] This is intrusively moralistic and infringes upon the rights of free conscience, religious freedom, free speech and parental rights over the education of their children in public schools.[465]

---

461 Decriminalisation, anti-discrimination legislation and partnership legislation were identified as three milestones in the incremental move towards same-sex marriage: Kees Waaldijk, "Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe" (2000) 17 *Canadian Journal of Family Law* 62.

462 Man Yee Karen Lee, *Equality, Dignity and Same-Sex Marriage; A Rights Disagreement in Democratic Societies* (Martinus Nijhoff, 2010) at pp 8–9.

463 Man Yee Karen Lee, *Equality, Dignity and Same-Sex Marriage; A Rights Disagreement in Democratic Societies* (Martinus Nijhoff, 2010) at pp 8–9.

464 Political correctness codes stifle free speech and constitute a form of cultural totalitarianism, contrary to democratic pluralism. Terms like "Husband" and "Wife" may be outlawed for being insensitive to same-sex couples. University professors like Jordan Peterson are warned they might fall foul of university and Canadian human rights codes on gender identity discrimination for refusing to use alternative pronouns like "they" as trans staff and students demand, instead of "he" and "she": Jessica Murphy, "Toronto Professor Jordan Peterson Takes on Gender-Neutral Pronouns" *BBC News.com* (4 November 2016) <https://www.bbc.com/news/world-us-canada-37875695> (accessed 15 August 2021); Elizabeth Tyree, "Pro-LGBT Bills, Like Replacing 'Husband and Wife' With Gender Neutral Terms, Pass Senate" *Abc13News* (25 January 2020) <https://wset.com/news/at-the-capitol/pro-lgbt-bills-like-replacing-husband-and-wife-with-gender-neutral-terms-pass-senate> (accessed 15 August 2021) and Benjamin Kentish, "Malta to Legalise Gay Marriage and Ban Gendered Words in Legislation" *The Independent* (4 July 2017) <https://www.independent.co.uk/news/world/europe/malta-gay-marriage-same-sex-legalise-gendered-word-ban-legislation-law-a7822226.html> (accessed 15 August 2021).

465 The "vast majority" of Singapore and the Government want the traditional model of marriage and family to be taught in schools and were against "putting homosexual couples on par with normal heterosexual couples who conceived children and formed the basic building blocks of families in our society": *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [84]. This would be thwarted by "LGBTQ-inclusive" curricular modules advocating the equality of lifestyles and alternative conception of family. Supporters may celebrate this as it suits their "progressive" ideology, while detractors may oppose this as indoctrination replete with Orwellian redefinitions: Paul Twocock, "At Last a Generation of Schoolchildren Will Grow Up Knowing It's OK to be LGBT" *The Guardian* (5 September 2019) <https://www.theguardian.com/commentisfree/2019/sep/05/schools-teach-lgbt-september-2020-new-regulations> (accessed 15 August 2021); Majorie King, "Queering the Schools:

(cont'd on the next page)

The homosexual rights agenda while expanding freedom for one sector of society, restricts the constitutional rights of others.

341 If s 377A were repealed, it is likely homosexualism activists would be able to form societies and otherwise lobby even more aggressively for an expansion of their agenda, which will heighten social polarisation and hasten the erosion of liberties like expressive[466] and religious freedoms, as has happened in other liberal jurisdictions.[467] Militant advocacy has seen people losing their jobs or being pressured to resign because they do not agree with the homosexualism narrative or take social conservative positions like opposing same-sex marriage. The Chief Executive Officer of Mozilla was so pressured into resigning[468] and similar vengeful tactics have been adopted by local activists,[469] spawning a noxious culture of bullying and intimidation to silence dissenters.

342 This view is hardly far-fetched. PM Lee in 2007 noted that homosexualism activists were not content merely with repealing s 377A – their agenda included "to change what is taught in the schools, to advocate same-sex marriages and parenting, to ask for, to quote from their letter, '… exactly the same rights as a straight man or woman'" pursuant to the "full acceptance" they demand from other Singaporeans.[470] Aggressive gay campaigning would elicit strong "push back" from social conservatives,

---

Gay Activist Groups, with Teachers' Union Applause, are Importing a Disturbing Agenda into the Nation's Public Schools" *City Journal* (Spring 2003) <https://www.city-journal.org/html/queering-schools-12411.html> (accessed 15 August 2021) and "One School's Sweeping LGBT Indoctrination" *christianconcern.com* (26 July 2019) <https://christianconcern.com/news/one-schools-sweeping-lgbt-indoctrination/> (accessed 15 August 2021).

466 For example, in the 2019 debate over amendments to the Maintenance of Religious Harmony Act (Cap 167A, 2001 Rev Ed) which include offences caused by wounding "religious feelings", NMP Anthea Ong called for hate speech laws to protect "homosexual feelings" as a form of idiosyncratic "psychological violence", which would silence any criticism of the homosexual lifestyle: Singapore Parl Debates; Vol 94; [10 July 2019] (Second Reading, Maintenance of Religious Harmony (Amendment) Bill); see also Daryl W J Yang, "'Everyone Should Feel Safe in Singapore': The New Offence of Inciting Violence and Hatred" *Singapore Public Law* (19 February 2020) <https://web.archive.org/web/20200421204622/https://singaporepubliclaw.com/2020/02/19/symposium-on-the-2019-mrha-amendments-everyone-should-feel-safe-in-singapore-the-new-offences-of-inciting-violence-and-hatred/> (accessed 1 December 2021).

467 *Religious Freedom and Gay Rights: Emerging Conflicts in the United States and Europe* (Jack Friedman, Timothy Shah & Thomas Farr eds) (Oxford University Press, 2016).

468 Heather Kelly, "Mozilla CEO Resigns over Anti-Same-Sex-Marriage Controversy" *CNN Business* (3 April 2014) <https://money.cnn.com/2014/04/03/technology/mozilla-ceo/index.html> (accessed 15 August 2021).

469 "Flak from Gay Groups See IKEA Relook Tie-up with Pastor" *Today Online* (20 April 2015).

470 Singapore Parl Debates; Vol 83; [23 October 2007].

fuelling agonistic social relations. A former senior Minister observed that it is one thing to decriminalise homosexual acts, but if the repeal of s 377A is "just the start of new pressures to go further on gay marriage or adoption", these claims for ever-expanding bundles of rights may set Singapore on a trajectory of "far-reaching changes, which are contentious and divisive, even in the West".[471]

343 In the absence of s 377A, the constitutionality of rules regulating homosexual content[472] could be challenged, and equal protection challenges against traditional marriage could be brought, on the basis that the distinction between homosexuality and heterosexuality is impermissible. Elsewhere, there has been litigation against foster care programmes run by Catholic charities in the US which do not place children with same-sex couples, reflecting a clash between the religious freedom to run a mission in accordance with religious values, and gay equality rights.[473] LGBTQ activists have pushed for state-sponsored homosexual parenthood and gender reassignment procedures, raising important public policy questions of commercial surrogacy, a child's right to genetic ancestry and connection, and the relevance of biology to personal identity.[474] Those who value religious freedom and the right to live according to deeply held beliefs, including about traditional sexuality, have good reason to fear the trampling of their religious liberties.[475]

---

471 S Jayakumar, *Governing: A Singapore Perspective* (Straits Times Press, 2020) at p 108.

472 Section 4 of the Internet Code of Practice, issued under the Broadcasting Act (Cap 28, 2012 Rev Ed), includes within "prohibited materials" the guideline "(e) whether the material advocates homosexuality or lesbianism, or depicts or promotes incest, paedophilia, bestiality and necrophilia". This would be consonant with the Art 14 public morality derogation clause.

473 *Fulton v City of Philadelphia, Pennsylvania* No 19-123 (17 June 2021) (holding that the free exercise clause of the First Amendment was violated by the refusal of Philadelphia to contract with a Catholic agency to provide foster care services unless the agency agreed to certify homosexual couples as foster parents).

474 Sandrine Amiel, "France Debates Controversial Bill to Extend IVF to Lesbian Couples and Single Women" *Euronews.com* (24 September 2019) <https://www.euronews.com/2019/09/24/france-debates-controversial-bill-to-extend-ivf-to-lesbian-couples-and-single-women> (accessed 15 August 2021); Michael Dresser, "Bill Would Require Fertility Benefits for Lesbians" *The Baltimore Sun* (18 March 2015) <https://www.baltimoresun.com/features/bs-md-in-vitro-benefit-20150317-story.html> (accessed 15 August 2021). See Johann J Go, "Should Gender Reassignment Surgery be Publicly Funded" (2018) 15(4) *Journal of Bioethical Inquiry* 527.

475 Roger Trigg, *Equality, Freedom and Religion* (Oxford University Press, 2013) at pp 127–138; Bill Muehlenberg, *Dangerous Relations: The Threat of Homosexuality* (Culturewatch Books, 2014).

344 US Supreme Court justices[476] pointed out the "ruinous consequences"[477] the same-sex marriage decision would have on religious liberty,[478] warning that the majority's opinion would be used by courts, governments, employers and schools to vilify and marginalise those who believe in traditional marriage based on their religious convictions as "bigots";[479] if the sentiment that "turnabout is fair play" prevails, this would cause "bitter and lasting wounds".[480] In turn, it is easier to dismiss the religious liberty concerns of demonised citizens, which is "fast becoming a disfavored right".[481]

345 Slippery slope arguments, whether based on principle or empirically-based predictions, should not be discounted out of hand, as they have the virtue of forcing decision-makers to focus on the future implications of what is being done today.[482] Where a proposed change would impact major values and involve undesirable outcomes, it is irresponsible not to engage in reflection. Differing views towards the strength of a slippery slope argument, which presumes a standard for measuring regress or progress, are ultimately rooted in ideological conflict. What might be disdained as a "parade of horribles" can become with "dizzying rapidity, realities";[483] allowing a step downslope logically may commit us to the slope bottom, as no rationally defensible line can be drawn, or entails considerations of the likelihood that the Government or courts would allow further downward steps involving other objectionable

476 Statement of Justice Clarence Thomas, joined by Justice Samuel Alito, *Kim Davis v David Ermold* No 19-926 (5 October 2020) <https://www.law.cornell.edu./supremecourt/text/19-926> (accessed 15 August 2021).

477 *Obergefell v Hodges* 135 S Ct 2584 at 2639 (2015), *per* Justice Thomas (dissenting).

478 Chief Justice Roberts (dissenting) noted that the Solicitor General had testified that the tax exemptions of some religious institutions would be questioned if they opposed same-sex marriage: *Obergefell v Hodges* 135 S Ct 2584 at 2625 (2015). In the South African context, the court addressed the potential threat that the recognition of same-sex marriage posed to religious liberty by affirming the right of churches, mosques and synagogues not to celebrate unions against their religious beliefs, which formed part of the public realm.

479 *Obergefell v Hodges* 135 S Ct 2584 at 2642 (2015), *per* Justice Alito (dissenting) (discussing how analogising traditional marriage laws to laws denying African Americans equal treatment would be exploited "to stamp out every vestige of dissent").

480 *Obergefell v Hodges* 135 S Ct 2584 at 2643 (2015), *per* Justice Alito (dissenting).

481 With the advent of same-sex marriage, Justice Alito considered that the pressing question facing US society is whether it "will be inclusive enough to tolerate people with unpopular religious beliefs". "Supreme Court Justice Samuel Alito Suggests Religious Liberty is Under Threat by Same-Sex Marriage and COVID-19 Restrictions" *Businessinsider.com* (14 November 2020).

482 Eric Lode, "Slippery Slope Arguments and Legal Reasoning" (1999) 87(6) *California Law Review* 1469 at 1525.

483 Eric Lode, "Slippery Slope Arguments and Legal Reasoning" (1999) 87(6) *California Law Review* 1469 at 1521–1522.

practices.[484] Either way, this may provide grounds for resisting the case at the top of the slope.

346 Such arguments have a place in legislative debate, but it is notable that the US Supreme Court has recognised the desire to prevent a slide down a slippery slope as a legitimate state interest, where a legislative classification is rationally related to some legitimate end, such as a law banning assisted suicide.[485]

B. Taking judicial notice of the broader dimensions of an issue?

347 The judicial function is to address legal issues in concrete cases, to engage in "the retrospective adjudication of rights and liabilities arising out of a past event",[486] and to end a dispute within a certain time period by producing winners and losers at the close of an adversarial process. This is unsuited to deciding the desirability of far-reaching social revolutions, as adjudication cannot with finality resolve "sincere disagreements over deep matters of social conscience" involving "incommensurable competing conceptions of the 'good'".[487] The judicial method is ill-suited to devising policies to govern future conduct.

348 Pursuant to rightism, resort is made to the Judiciary to resolve morally controversial matters by declaring new or expanded rights. This places the court at greater risk of being seen as a forum not just for litigation, but "the continuation of politics by other means".[488] Singapore courts endeavour not to be drawn into "the sphere of even broader … debate, in particular, on the possible legal as well as extra-legal consequences"[489] that would flow from any decision on s 377A's constitutionality.

---

484 "Rational basis" slippery slope arguments based on principle may be distinguished from empirical slippery slope arguments based on prediction: Eric Lode, "Slippery Slope Arguments and Legal Reasoning" (1999) 87(6) *California Law Review* 1469 at 1483–1498.

485 In *Washington v Glucksberg* 521 US 702 at 732–733 (1997), the fear was that if assisted suicide was permitted, this would lead down the road to voluntary and perhaps involuntary euthanasia. If a judge fails to address the claims of some slippery slope arguments, they may "neglect their responsibility to the future": Eric Lode, "Slippery Slope Arguments and Legal Reasoning" (1999) 87(6) *California Law Review* 1469 at 1528.

486 Sundaresh Menon, "Executive Power: Rethinking the Modalities of Control" [2019] 29 *Duke Journal of Comparative & International Law* 277 at 300.

487 Sundaresh Menon, "Executive Power: Rethinking the Modalities of Control" [2019] 29 *Duke Journal of Comparative & International Law* 277 at 297.

488 Sundaresh Menon, "Executive Power: Rethinking the Modalities of Control" [2019] 29 *Duke Journal of Comparative & International Law* 277 at 297.

489 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [9].

349 It would be undesirable for courts to discount the broader dimensions of morally controversial issues. As these implicate practical, polycentric and political considerations, modest review which supervises legality while deferring to parliamentary and political processes where broader consequences can be fully canvassed is appropriate.

C. Political constitutionalism and the parliamentary mindset

350 When debating complex, contentious issues such as whether to repeal or retain s 377A, parliamentarians can take a holistic approach in considering the varied implications and wide-ranging social consequences of a decision, engaging public sentiment and a diversity of legal and non-legal considerations. Such issues should be freely and fully debated in the court of public opinion and legislative chamber, rather than obscured by the narrow framing of issues in a court of law. Parliament may consider the concerns of parties not advanced before a court, and anticipate future problems arising from exercising a new right or repealing a law.

351 Legislators are expected to be well informed on the relevant arguments and competing interests, and positioned to handle "all manner of social, economic and political questions" through commissioning studies, consulting with citizens and experts, and tapping civil service assistance. As a "great deliberative chamber",[490] Parliament can debate competing visions of the good and fashion political compromises, rather than utopian solutions.[491]

352 With s 377A, the Government is not working *tabula rasa*, but is pragmatically grappling with what exists by dint of Singapore's colonial and republican history, to manage a polarising issue.

353 The reasonable classification test affords Parliament the leeway to identify different degrees of harm emanating from a common or related problem, and to adopt varying responses in differentiating between the social impact of male and female homosexual sex acts. By letting the people, rather than the courts, regulate matters of public morality, "the people, unlike judges, need not carry things to their logical conclusion".[492]

---

490 Sundaresh Menon, "Executive Power: Rethinking the Modalities of Control" [2019] 29 *Duke Journal of Comparative & International Law* 277 at 299.

491 Unlike judges, legislators do not place a premium on drawing non-arbitrary lines as legislation often dictates an arbitrary dividing line, such as making the speed limit 60km/h rather than 61km/h.

492 Justice Scalia (dissenting) elaborated thus: "The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts – and may legislate accordingly" (*Lawrence v Texas* 539 US 558 at 604 (2003)).

D. Democracy as open-ended process for negotiating change and continuity

354 Where decisions are made, even those disappointed can be better reconciled to this, if they have had their say in a fair and honest debate, and are secure in the knowledge that they can continue to press for change in hopes of cultivating political support. This promotes systemic stability.

E. Thwarting the democratic process

355 Where courts make pronouncements on intractable moral and political questions of profound public significance like same-sex marriage, abortion or euthanasia, aside from the real danger of judicial politicisation, they remove questions from the democratic process and its associated advantages, such as allowing citizens the opportunity to engage in persuasive debate. This hubristically demeans public debate in presuming that voters cannot decide sensitive issues on "decent and rational grounds",[493] undermining democratic principles such as "no social transformation without representation".[494]

356 Prematurely overriding the democratic process can cause alienation over "stolen" issues portending drastic change; it does not terminate debate or resolve the issue, and may exacerbate political rifts. This is evident in the rejection by American pro-lifers today of the 1973 *Roe v Wade*[495] decision on abortion.[496]

357 The dissenting judges in *Obergefell v Hodges*[497] criticised the majority decision as stealing the decision from the people at a time of ongoing "serious and thoughtful public debate",[498] with some state legislatures redefining marriage to include unisex couples.[499] Rather than short-circuiting the democratic process, the People through deliberation over the "same-sex marriage question" could have considered "the religious liberty implications of deviating from the traditional definition", and sought accommodation for religious believers by tying "recognition to protection for conscience rights".[500] Through political processes,

493 *Schuette v BAMN* 572 US 291; 134 S Ct 1623 at 1637; 188 L Ed 2d 613 (2014).
494 *Obergefell v Hodges* 135 S Ct 2584 at 2629 (2015), *per* Justice Scalia (dissenting).
495 410 US 113 (1973).
496 Adam Liptak, "Supreme Court to Hear Abortion Case Challenging *Roe v Wade*" *The New York Times* (27 May 2021) <https://www.nytimes.com/2021/05/17/us/politics/supreme-court-roe-wade.html> (accessed 15 August 2021).
497 135 S Ct 2584.
498 *Obergefell v Hodges* 135 S Ct 2584 at 2624 (2015), *per* Roberts CJ (dissenting).
499 *Obergefell v Hodges* 135 S Ct 2584 at 2615 (2015), *per* Roberts CJ (dissenting).
500 *Obergefell v Hodges* 135 S Ct 2584 at 2643 (2015), *per* Justice Alito (dissenting).

the People can hold a referendum to determine national issues, or constitutionalise a definition of marriage to reflect their values, which may prove a better path by garnering broad popular support for a legislative proposal.

F. Equality and modalities for change: Legal or political?

358 The only constant in life is change and the equality ideal leads the charge for socio-legal reform. The question then is, what are the modalities for change, in dealing with social equalities and discrimination?

359 In Singapore, the preferred route in exploring what substantive equality theory to adopt lies in the methods and processes of political constitutionalism, rather than the legal constitutionalist's preference for social change through judicial review. For example, in 2020, the Government announced a comprehensive review of issues affecting women and gender equality and intent to engage in active consultation.[501] This process rests on the commitment to dialogue with reasonable citizens and the faith that parliamentary representatives in promoting equal justice will act responsibly and reasonably in devising classifications for law and policy.

360 While some may urge judges to be activist "bold spirits" rather than "timorous souls" in interpreting Art 12(1),[502] this is not a virtue in itself. When it comes to morally contentious questions, there is no consensus on what policy is "progressive" (or regressive): that is left to political processes. As such, there is both principle and prudence in recognising the limits to judicial law-making, as courts require a legal basis to act with "judicial boldness", to achieve a "substantively just and fair result"[503] in the immediate case. Judicial circumspection is warranted when it comes to matters "uniquely within the sphere of the Legislature".[504]

361 Consistent with the practice of separation of powers, Singapore courts may recommend changes as an interlocutor, but should not arrogate to themselves the role of a second legislature. The better path is

501 Tan Tam Mei, "Singapore to Conduct Review of Women's Issues to Bring About Mindset Change for Gender Equality" *The Straits Times* (20 September 2020) <https://www.straitstimes.com/singapore/singapore-to-conduct-review-of-womens-issues-to-inculcate-mindset-change-for-gender> (accessed 15 August 2021).

502 As coined by Denning LJ in *Candler v Crane, Christmas & Co* [1951] 2 KB 164, cited in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [80].

503 *Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179 at [80]–[81].

504 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [81].

for the courts to be "wise spirits",[505] to defend their turf and uphold the rule of law, while rendering to the Legislature, the things that belong to the Legislature.

505 *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2018] 2 SLR 866 at [12] (in relation to whether to recognise the torts of malicious civil prosecution and abuse of process).