Tan Eng Hong
v
Attorney-General

[2013] SGHC 199

High Court — Originating Summons No 994 of 2010
Quentin Loh J
18 January; 20 February; 5–6 March; 16 April 2013

Constitutional Law — Equal Protection of the Law — Equality Before the Law
Constitutional law — Fundamental Liberties — Right to Life and Personal Liberty
Constitutional Law — Constitution — Interpretation

2 October 2013 Judgment reserved.

Quentin Loh J:

Introduction

1 In these proceedings, Originating Summons No 994 of 2010 ("OS 994"), the plaintiff, Tan Eng Hong ("the Plaintiff"), seeks to challenge the constitutionality of s 377A of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code") on the grounds that it infringes his rights to: (a) life and personal liberty; and (b) equality before the law and equal protection of the law under Arts 9(1) and 12(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution") respectively. These Articles will hereafter be referred to as "Art 9(1)" and "Art 12(1)" for short.

2 There are two earlier decisions which have a bearing on this case. The first, *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 ("*Tan Eng Hong (Standing)*"), is the Court of Appeal's decision on a striking-out application earlier in the lifespan of these proceedings. The second, *Lim Meng Suang and another v Attorney-General* [2013] 3 SLR 118 ("*Lim Meng Suang*"), is my decision in another application concerning the constitutionality of s 377A where I held that s 377A was not inconsistent with Art 12(1).

The facts

3 The facts relevant to OS 994 have already been set out in *Tan Eng Hong (Standing)*, but I shall briefly summarise below the essential facts to provide the necessary context to the legal issues discussed in this judgment.

4 On 9 March 2010, the Plaintiff and another male were arrested for engaging in oral sex in a toilet cubicle inside Citylink Mall, an underground public shopping mall. The Plaintiff was charged on 2 September 2010 under s 377A of the Penal Code ("s 377A"). Section 377A reads:

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

5 On 24 September 2010, the Plaintiff commenced these proceedings challenging the constitutionality of s 377A. One of the prayers sought by the Plaintiff was for the s 377A charge brought against him to be declared void.

6 Shortly after this, the Prosecution substituted the s 377A charge against the Plaintiff with a charge under s 294(*a*) of the Penal Code ("s 294(*a*)") for the commission of an obscene act in a public place. Section 294(*a*) reads:

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

7 The defendant in OS 994, the Attorney-General ("the Defendant"), then applied via Summons No 5063 of 2010 to strike out OS 994 pursuant to O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) and/or the inherent jurisdiction of the court. At the hearing of the summons before the assistant registrar ("the Assistant Registrar"), the Plaintiff abandoned his earlier prayer in OS 994 for the s 377A charge against him to be declared void since that charge had been substituted with a s 294(*a*) charge. On 7 December 2010, the Assistant Registrar allowed the Defendant's application and struck out OS 994.

8 The Plaintiff appealed against the Assistant Registrar's decision via Registrar's Appeal No 488 of 2010 ("RA 488"). He also pleaded guilty to the substituted charge under s 294(*a*), and was accordingly convicted and fined $3,000. On 15 March 2011, RA 488 was dismissed by the High Court judge in *Tan Eng Hong v Attorney-General* [2011] 3 SLR 320. The Plaintiff then appealed via Civil Appeal No 50 of 2011 ("CA 50") against the decision of the High Court judge.

9 On 27 September 2011, the Court of Appeal heard CA 50, and on 21 August 2012, it handed down its decision in *Tan Eng Hong (Standing)*. The Court of Appeal distilled (at [18] of *Tan Eng Hong (Standing)*) the various issues canvassed before it as follows:

> (a) Does [the Plaintiff] have a reasonable cause of action under Art 4, given that, on the face of it, Art 4 only applies to "any law enacted by the Legislature after the commencement of this Constitution" ("Issue 1")? …
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> (b) Is the test for *locus standi* in applications involving constitutional rights different from, and less strict than, the test for *locus standi* laid down in [*Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112] ("the *Karaha Bodas* test") ("Issue 2")? The following sub-issues were raised under this issue:
>
> > (i) whether a subsisting prosecution under an allegedly unconstitutional law is a necessary element to found *locus standi* to challenge the constitutionality of that law; and
> >
> > (ii) if there is no need for an actual subsisting prosecution under the allegedly unconstitutional law to found *locus standi*, whether there is at least a need for a real and credible threat of prosecution, or whether the very existence of the allegedly unconstitutional law in the statute books suffices.
>
> (c) Has the applicable test for *locus standi* (as determined in Issue 2) been satisfied on the facts, *ie*, does [the Plaintiff] have *locus standi* to bring [OS 994] ("Issue 3")? The following sub-issues were raised under this issue:
>
> > (i) whether any constitutional rights are at stake in the instant case; and
> >
> > (ii) whether [the Plaintiff]'s constitutional rights were violated on the facts.
>
> (d) Do the facts of the present case raise any real controversy to be adjudicated ("Issue 4")?

10 In short, the Court of Appeal found that the Plaintiff had *locus standi* to make the application in OS 994, and that the case raised a real controversy to be adjudicated. The Court of Appeal accordingly allowed CA 50. The appeal having been allowed, I heard OS 994 on 6 March 2013.

Preliminary issues

The presence of academics in chambers during the hearing

11 At the start of the hearing, Mr M Ravi ("Mr Ravi"), counsel for the Plaintiff, applied for permission for Assistant Professor Jack Lee ("Asst Prof Lee") from the Singapore Management University's School of Law and Assistant Professor Lynette Chua ("Asst Prof Chua") from the Law Faculty, National University of Singapore, to sit in for the hearing. Both Asst Prof Lee and Asst Prof Chua were part of Mr Ravi's legal team and had assisted him with OS 994. This was similar to an application made during the hearing of *Lim Meng Suang* by the counsel for the plaintiffs in that case.

12 No objections to this application were raised by Mr Aedit Abdullah SC ("Mr Abdullah SC"), counsel for the Defendant. I accordingly allowed both Asst Prof Lee and Asst Prof Chua to sit in during the hearing. As in *Lim Meng Suang*, I felt that they would be able to make valuable contributions to the hearing via Mr Ravi.

The further hearing on 16 April 2013

13 After I delivered my judgment in *Lim Meng Suang*, I called for the parties to see me in chambers on 16 April 2013. I informed the parties that I had released the judgment in *Lim Meng Suang*, and that I would give them two weeks or such further time as they might require to submit further arguments, if they so wished, on any other points in the light of their analysis of my reasoning in *Lim Meng Suang*. I specifically informed the parties that they could submit that I was wrong on any of the points decided in *Lim Meng Suang* in order to persuade me that I should arrive at a different conclusion in the present case. I also informed the parties that they were not constrained by

anything they had previously submitted at the hearing before me on 6 March 2013.

14 Both Mr Ravi and Mr Abdullah SC declined to tender further arguments; they informed me that they stood by their earlier submissions and did not have any further arguments or additional submissions to make.

The issues to be decided in OS 994

15 Important to my decision here are the Court of Appeal's findings in *Tan Eng Hong (Standing)* on the *locus standi* issue. Although the Court of Appeal stressed (at [3] of *Tan Eng Hong (Standing)*) that it was not deciding the substantive merits of OS 994, it nevertheless decided that the mere *existence* of s 377A in the statute books did not engage, much less offend, the Plaintiff's rights under Arts 9(1) and 14 of the Constitution: see *Tan Eng Hong (Standing)* at [120]–[121] and [128]–[130]. However, the Court of Appeal also stated that *if* s 377A were found to be unconstitutional, the Plaintiff's rights under Art 9(1) would be "engaged *on the facts of this case* as [he] was purportedly arrested and detained under s 377A" [emphasis in original] (see *Tan Eng Hong (Standing)* at [122]). In other words, the Court of Appeal held that if s 377A was indeed unconstitutional for inconsistency with Art 12(1), it meant that the Plaintiff's Art 9(1) rights were violated by his arrest and detention under s 377A.

16 The Court of Appeal framed the issues in controversy in OS 994 as being (see *Tan Eng Hong (Standing)* at [185]):

> Whether s 377A violates Art 12 in terms of:
>
> > (a) whether the classification [adopted in s 377A] is founded on an intelligible differentia; and

> (b) whether the differentia bears a rational relation to the object sought to be achieved by s 377A.

The above test for determining the constitutionality of s 377A (and, for that matter, any other law) will hereafter be referred to as "the 'reasonable classification' test".

17 Notwithstanding that the Court of Appeal in *Tan Eng Hong (Standing)* framed the issues in controversy as relating to Art 12(1), Mr Ravi raised a further argument at the hearing before me, *viz*, that s 377A did not even meet the minimum requirements to qualify as "law" for the purposes of Arts 9(1) and 12(1) as the nature and/or operation of s 377A was contrary to the fundamental rules of natural justice.

18 It is useful at this juncture to reproduce Arts 9(1) and 12(1) to better appreciate the context in which this argument was made:

> **9.**—(1) No person shall be deprived of his life or personal liberty save in accordance with *law*.
>
> …
>
> **12.**—(1) All persons are equal before the law and entitled to the equal protection of the *law*.
>
> …
>
> [emphasis added]

19 Accordingly, the issues raised by Mr Ravi for my decision are as follows:

> (a) whether a law which does not observe the fundamental rules of natural justice is unconstitutional for being inconsistent with Arts 9(1) and 12(1), and if so, whether the nature and/or operation of s 377A in fact contravenes the fundamental rules of natural justice ("the Natural Justice Issue"); and

(b) whether s 377A fails the "reasonable classification" test and is consequently in violation of Art 12(1) ("the Art 12(1) Issue").

20 I am compelled to consider the Natural Justice Issue because Mr Ravi has framed this issue in such a way that it does not fall outside the litigation boundary delineated by the Court of Appeal in *Tan Eng Hong (Standing)*. It will be recalled that the Court of Appeal found that *if* s 377A was void for violating the right to equality before the law and equal protection of the law under Art 12(1) and therefore unconstitutional, the Plaintiff's rights under Art 9(1) would be engaged on the facts of this particular case since his arrest and detention under s 377A had deprived him of his personal liberty.

21 Mr Ravi's argument on the Natural Justice Issue proceeds on the premise that *all* laws enacted by Parliament must pass muster under the fundamental rules of natural justice. Laws that fail to do so will not be "law" for the purposes of Arts 9(1) and 12(1). Therefore, if s 377A is found to contravene the fundamental rules of natural justice and is, accordingly, not "law", the Plaintiff's arrest and detention under that section would have resulted in a deprivation of his personal liberty in a manner which was not justified by any law, and would have been unconstitutional. It also bears mention that an order "that the Plaintiff's arrest, investigations, detention and charge under Section 377A are contrary to Article 9"[1] was specifically prayed for by the Plaintiff, even after OS 994 was amended on 17 December 2012 after the decision in *Tan Eng Hong (Standing)* was delivered. I note, for completeness, that Mr Abdullah SC did not object to Mr Ravi raising the Natural Justice Issue.

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[1] Originating Summons No 994 of 2010 amended on 17 December 2012 at para 2.

Analysis of the Natural Justice Issue

Mr Ravi's submissions

22 Mr Ravi made four broad submissions in respect of the Natural Justice Issue:

(a) Mr Ravi's first argument, upon which his next three arguments are predicated, is that the formal validity of an Act of Parliament which deprives a person of his or her right of liberty or equal protection of the law under Arts 9(1) and 12(1) respectively must, apart from being formally valid, comply with the fundamental rules of natural justice for it to be constitutional.[2]

(b) Mr Ravi's second argument is that s 377A actively undermines access to justice in two situations: first, where a male is forced to have non-consensual sexual intercourse with another male; and secondly, where a male suffers domestic abuse by his male partner. In the former situation, the language of s 377A makes the consenting male and the non-consenting male equally guilty of an act of gross indecency. In the latter situation, the victim of abuse in seeking legal help might be fearful of conviction under s 377A in respect of previously committed acts of gross indecency with his partner (if proven). The victims in such situations are severely dis-incentivised from reporting the incidents to the police.[3] Section 377A therefore creates a class of victims who are most in need of – but are yet

[2] Plaintiff's submissions at paras 25–30.

[3] Plaintiff's submissions at paras 32–39.

discouraged from accessing – the law's protection. It is therefore contrary to the fundamental rules of natural justice.

(c) Mr Ravi's third argument is that s 377A is patently vague because it is impossible on the plain wording of the provision to know what is meant by "gross indecency". Section 377A is therefore "inherently unintelligible" and amounts to a breach of the fundamental principles of natural justice, which demands certainty and predictability, amongst other precepts.[4]

(d) Mr Ravi's fourth and last argument is that s 377A, by criminalising a natural and immutable attribute, is absurd and entirely arbitrary. Citing a string of what he called "comparative constitutional jurisprudence", Mr Ravi submitted that sexual orientation is and has been recognised by various courts, professional medical organisations, ex-gay leaders and governments as a natural and immutable attribute which a person does not have conscious choice over. Thus, s 377A is analogous to laws which criminalise individuals merely for having blue eyes, or being 1.67m tall, or being left-handed. Such laws, Mr Ravi argues, are patently absurd and therefore contrary to the fundamental rules of natural justice.[5]

My decision

23 Although the Plaintiff's case on the Natural Justice Issue brought to the fore many fundamental questions of constitutional law, Mr Ravi's submissions

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[4] Plaintiff's submissions at paras 41–46.

[5] Plaintiff's submissions at paras 47–104.

on this issue were surprisingly brief. They nevertheless presented the following questions:

(a) whether the meaning of "law" under Arts 9(1) and 12(1) of the Constitution includes the fundamental rules of natural justice;

(b) if question (a) is answered in the affirmative, what the applicable fundamental rules of natural justice are; and

(c) whether any of the applicable fundamental rules of natural justice determined in (b) above are breached by the nature and/or operation of s 377A.

Does the meaning of "law" under Arts 9(1) and 12(1) include the fundamental rules of natural justice?

24 Mr Ravi submitted that the "formal validity of an Act of Parliament is not sufficient to constitutionally deprive the Plaintiff of personal liberty under Article 9(1), or to accord the Plaintiff equal protection under Article 12(1)".[6] On its own, there is nothing controversial with this proposition. As Mr Ravi pointed out, this was stated by Lord Diplock in the seminal Privy Council case of *Ong Ah Chuan v Public Prosecutor* [1979]–[1980] SLR(R) 710 ("*Ong Ah Chuan*") at [24]–[25]:

> 24 Accordingly their Lordships are unable to accept the narrow view of the effect of Arts 9(1) and 12(1) for which counsel for the Public Prosecutor contended. This was that since "written law" is defined in Art 2(1) to mean "this Constitution and all Acts and Ordinances and subsidiary legislation for the time being *in force* in Singapore" and "law" is defined as including "written law", the requirements of the

[6] Plaintiff's submissions at para 25.

> Constitution are satisfied if the deprivation of life or liberty complained of has been carried out in accordance with provisions contained in any Act passed by the Parliament of Singapore, however arbitrary or contrary to fundamental rules of natural justice the provisions of such Act may be …
>
> 25 Even on the most literalist approach to the construction of the Constitution this argument in their Lordships' view involves the logical fallacy of *petitio principii*. The definition of "written law" includes provisions of [any] Act passed by the Parliament of Singapore only to the extent that they are "for the time being *in force* in Singapore"; and Art 4 provides that "any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void". **So the use of the expression "law" in Arts 9(1) and 12(1) does not, in the event of challenge, relieve the court of its duty to determine whether the provisions of an Act of Parliament passed after 16 September 1963 and relied upon to justify depriving a person of his life or liberty are inconsistent with the Constitution and consequently void.**
>
> [emphasis in original in italics; emphasis added in bold]

25 Importantly for Mr Ravi's argument, Lord Diplock went on (at [26] of *Ong Ah Chuan*) to state that the references to "law" within Arts 9(1) and 12(1) must include "fundamental rules of natural justice":

> In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to "law" in such contexts as "in accordance with law", "equality before the law", "protection of the law" and the like, in their Lordships' view, *refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution*. It would have been taken for granted by the makers of the Constitution that the "law" to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords "protection" for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by Art 5) of Arts 9(1) and 12(1) would be little better than a mockery. [emphasis added]

This proposition was accepted by the Court of Appeal in *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [101].

26 Notwithstanding, Mr Ravi has, with respect, adopted the judgment of Lord Diplock on the meaning of "law" incorrectly. Any interpretation of or reliance on Lord Diplock's references to "law" in the various contexts mentioned in *Ong Ah Chuan* must be treated with some care. On a plain reading of the wording of Arts 9(1) and 12(1), a distinction must be made between how "law" is used in each of these constitutional provisions. In Art 9(1), where *a* law sanctions the deprivation of life or personal liberty, such deprivation is justified. Conversely, where *that* law is subsequently found to be invalid law for the purposes of the Constitution, then any deprivation of life or personal liberty carried out pursuant to that "law" would be in breach of Art 9(1). "Law" in Art 9(1) is the source of both the deprivation of life or personal liberty *and* the guarantee of fundamental liberties: "[n]o person shall be deprived of his life or personal liberty save in accordance with law". Lord Diplock adopted this usage of "law" – with special emphasis on the latter – in his analysis of Art 9(1), as is evident in *Ong Ah Chuan* at [25], which bears repeating:

> … So the use of the expression "law" in Arts 9(1) and 12(1) does not, in the event of challenge, relieve the court of its duty to determine whether the *provisions of an Act of Parliament* passed after 16 September 1963 and relied upon to justify depriving a person of his life or liberty are inconsistent with the Constitution and consequently void. [emphasis added]

27 The use of "law" in Art 12(1) is slightly different. Under Art 12(1), a law must adhere to the standard of equality: "[a]ll persons are equal before the law and entitled to the equal protection of the law". Unlike in Art 9(1), "law" as used in Art 12(1) does not refer to any specific law; the protection or deprivation (as the case may be) of the right to equality does not *depend* on the

validity of *a law*. Instead, the source of the right to equality under Art 12(1) is Art 12(1) itself. "Law" in Art 12(1) does not have any normative content that is independent from the substantive right accorded under the phrases "equal before the law" and "equal protection of the law".

28 It would be incorrect to import into the word "law" in Art 12(1) a requirement that the "law" in question must be in accordance with the fundamental rules of natural justice. The jurisprudence on Art 12(1) makes it clear that the mere formal enactment of a law may contravene the equal protection afforded under Art 12(1) if that law fails the "reasonable classification" test: *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489; *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103 ("*Nguyen Tuong Van*"); *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 ("*Yong Vui Kong (MDP)*"); and *Tan Eng Hong (Standing)*. I adopted the same approach in *Lim Meng Suang*. Indeed, in *Ong Ah Chuan*, after the Privy Council's comments on the fundamental rules of natural justice, the board went on further to discuss whether the differentiation made by the statutory provision in that case (*viz*, the imposition of a capital penalty upon the class of individuals who trafficked in 15g of heroin or more and the imposition of a non-capital penalty on the class of individuals who trafficked in less than 15g of heroin) was inconsistent with Art 12(1) according to the "reasonable classification" test. To say that "law" as used in Art 12(1) must adhere to the fundamental rules of natural justice is to impute into Art 12(1) an additional layer, namely, that Art 12(1) provides for not only equality before the law and equal protection of the law, but also something more. However, this is either superfluous or untenable. As pointed out by Professor A J Harding ("Prof Harding") in his article "Natural Justice and the Constitution" (1981) 23 Mal L Rev 226 at p 235:

> *A law, if considered under Article 12(1), must either offend or not offend that provision. If it offends, it is void under Article 4 so that any incidental inconsistency with natural justice is immaterial. If it does not offend, in the sense that it provides a reasonable classification having a nexus with the purpose of the statute, can it be argued that it is still void because it offends natural justice? Such an argument in my submission is wrong, because it means that any law which does not offend Article 12(1) because it does not involve unconstitutional discrimination can nonetheless be void for inconsistency with natural justice*; ***in other words any Act of Parliament whatsoever is open to being struck down on the ground that it offends natural justice***. This cannot have been the intention of the Privy Council because such a position would render the lengthy discussion of the scope of Article 9(1), which is the whole thrust of both the recent decisions [of *Ong Ah Chuan* and *Haw Tua Tau and others v Public Prosecutor* [1981]–[1982] SLR(R) 133], totally irrelevant. I therefore conclude that Lord Diplock has not fully appreciated the sweeping potential of his linkage of equality with natural justice, and intended to refer to Article 12(1) only by way of comparing its usage of the word law … [emphasis added in italics and bold italics]

29 A law is either impermissibly discriminatory because it is found to discriminate (*ie*, it fails the "reasonable classification" test), or it is not. It cannot be that although the differentiation made pursuant to a particular law is permissible because the differentia adopted is intelligible and bears a rational relation to the purpose of the legislation, that law is at the same time unconstitutional for violating the fundamental rules of natural justice, whose content may have nothing to do with equality. Reading into Art 12(1) the additional requirement that "law" must be law which conforms to the fundamental rules of natural justice would, as Prof Harding has alluded to, run contrary or, at the very least, detract from the very essence of Art 12(1), which is equality. It did not help that Mr Ravi's submissions, which bordered on the general, offered me little direction or assistance in this regard.

30 To return to *Ong Ah Chuan*, Lord Diplock's population of "law" with the notion of the fundamental rules of natural justice is more understandable in

the context of Art 9(1). This is because the purpose of Art 9(1), as the jurisprudence has established consistently, is to guarantee that the protection of life and personal liberty is taken seriously. If the mere act of Parliament passing a law is sufficient to justify the deprivation of these fundamental liberties, the constitutional guarantee of life and personal liberty would offer very little assurance. As is patently clear from Lord Diplock's judgment in *Ong Ah Chuan* (see [25] above), it is for this reason that it is necessary and indeed obvious that "law" in the phrase "save in accordance with law" in Art 9(1) connotes something *more* than just the existence of a formally valid legislative provision which deprives a person of life and/or personal liberty. That "something *more*" is the fundamental rules of natural justice. I think this construction of Art 9(1) must be right.

31 Accordingly, it is necessary for me to address this notion of the fundamental rules of natural justice further. In my view, the authorities are not definitive on a number of difficult aspects, in particular: (a) what is the concept of the fundamental rules of natural justice in a constitutional setting; and (b) what is the scope of the fundamental rules of natural justice? The dearth of binding authority on these issues appears to indicate some reluctance to venture forth into this unchartered territory, lest it proves even worse than the metaphorical unruly horse.

32 Lord Diplock's judgment in *Haw Tua Tau and others v Public Prosecutor* [1981]–[1982] SLR(R) 133 ("*Haw Tua Tau*") suggests that the notion of the fundamental rules of natural justice is an evolving concept (at [26]):

> **Their Lordships recognise, too, that what may properly be regarded by lawyers as rules of natural justice change with the times.** The procedure for the trial of criminal offences in England at various periods between the abolition of the Court

> of Star Chamber and High Commission in the 17th century and the passing of the Criminal Evidence Act in 1898 involved practices, particularly in relation to the trial of felonies, that nowadays would unhesitatingly be regarded as flouting fundamental rules of natural justice. Deprivation until 1836 of the right of the accused to legal representation at his trial and, until 1898, of the right to give evidence on his own behalf are obvious examples. Nevertheless, throughout all that period the rule that an accused person could not be *compelled* to submit to hostile interrogation even in trials for misdemeanours, at which he was a competent witness on his own behalf, remained intact; and if their Lordships had been of the opinion that there was any substance in the argument that the effect of the amendments made to the Criminal Procedure Code by Act 10 of 1976 was to create a genuine *compulsion* on the accused to submit himself at his trial to cross-examination by the Prosecution, as distinguished from creating a strong *inducement* to him to do so, at any rate if he were innocent, their Lordships, before making up their own minds, would have felt it incumbent on them to seek the views of the Court of Criminal Appeal as to whether the practice of treating the accused as not compellable to give evidence on his own behalf had become so firmly based in the criminal procedure of Singapore that it would be regarded there by lawyers as having evolved into a fundamental rule of natural justice by 1963 when the Constitution came into force. [emphasis in original in italics; emphasis added in bold]

33 In this context, it is therefore not entirely surprising, considering the lack of clarity with regard to the somewhat amorphous and nebulous concept of the fundamental rules of natural justice, that there has been extremely limited development of the scope of these rules in a constitutional setting. In Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) ("*Thio Li-ann*"), which is currently the most updated textbook on Singapore constitutional law, Professor Thio Li-ann ("Prof Thio") observes (at para 12.022) that "[a]s far as the constitutional concept [of the fundamental rules of natural justice] has developed, this relates largely to the conduct of a fair trial". Indeed, it seems that the fundamental rules of natural justice have been left to "gradual or incremental development through case by

case exposition" (see *Thio Li-ann* at para 12.024, and also generally at paras 12.021–12.045).

34 I should state that while the Natural Justice Issue was one of the two key planks of Mr Ravi's case, it did not help that his submissions did not provide substantive and substantial elaboration on the relevant points. Mr Abdullah SC did not make any submissions on these issues. The fundamental rules of natural justice recognised by the Privy Council in *Ong Ah Chuan* and *Haw Tua Tau*, the two apposite cases which delved into natural justice in a constitutional context in some detail, are also irrelevant in the present case and did not shed much light on the path which I should take. Indeed, Mr Ravi has not referred to the rules recognised by the Privy Council in either case. Instead, Mr Ravi submits that the fundamental rules of natural justice prohibit absurd and arbitrary laws, while also ensuring that all legislation enacted adheres to the rule of law.[7] I shall deal with his submissions on absurd and arbitrary laws and the rule of law in turn.

Absurd and arbitrary laws

35 In making his submission that the fundamental rules of natural justice prohibit absurd and arbitrary laws, Mr Ravi relied heavily on *Yong Vui Kong (MDP)*, where then Chief Justice Chan Sek Keong suggested that the fundamental rules of natural justice encompassed the notion that laws must not be absurd or arbitrary (at [16]):

> … However, beyond what was actually decided in *Ong Ah Chuan* itself, it is not clear what the Privy Council had in mind *vis-à-vis* the kind of legislation that would not qualify as "law"

[7] Plaintiff's submissions at paras 28–29.

> for the purposes of Art 9(1). Perhaps, the Privy Council had in mind colourable legislation which purported to enact a "law" as generally understood (*ie*, a legislative rule of general application), but which in effect was a legislative judgment, that is to say, legislation directed at securing the conviction of particular known individuals (see *Don John Francis Douglas Liyanage v The Queen* [1967] 1 AC 259 at 291), or *legislation of so* ***absurd or arbitrary*** *a nature that it could not possibly have been contemplated by our constitutional framers as being "law" when they crafted the constitutional provisions protecting fundamental liberties* (*ie*, the provisions now set out in Pt IV of the Singapore Constitution). [emphasis added in italics and bold italics]

36 It will be noticed that the Court of Appeal in *Yong Vui Kong (MDP)* acknowledged that the Privy Council in *Ong Ah Chuan* was not very clear in explaining what kind of legislation would not qualify as "law" for the purposes of Art 9(1). The Court of Appeal however, refrained from commenting further on that issue other than to postulate two possible types of legislation which the Privy Council might have had in mind: (a) legislation of the type seen in *Don John Francis Douglas Liyanage v The Queen* [1967] 1 AC 259, which was a piece of legislation aimed at securing the conviction of particular individuals (*ie*, legislation which was effectively legislative judgment); or (b) laws that were absurd or arbitrary.

37 On the strength of *Yong Vui Kong (MDP)*, which is a Court of Appeal decision and therefore binding on me, there is merit in Mr Ravi's proposition that in order for a law to pass muster under the fundamental rules of natural justice, it must not be arbitrary or absurd. What then is an arbitrary law? When one speaks of a law as arbitrary, it would only make sense if one is speaking of the law *in the context* of its purpose. A law looked at in the abstract may appear arbitrary. In *Yong Vui Kong (MDP)*, one of the arguments raised by the plaintiff's counsel (who was incidentally, Mr Ravi) was that the mandatory

death penalty under the then Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("MDA") was arbitrary. The Court of Appeal addressed it this way (at [86]):

> We would add that, in so far as this limb of the Article 9(1) challenge rests on the argument that the objectionable element in MDP legislation is the absence of judicial discretion in imposing the punishment prescribed by law (from the viewpoint that MDP legislation requires the courts to impose the MDP in an arbitrary, absurd or mindless manner on different offenders regardless of the different circumstances of each offender's case), *it raises an issue which is, in essence, no different from the question of whether MDP legislation is consistent with the right under Art 12(1) of the Singapore Constitution, ie, the right to equal protection of the law*. In other words, Mr Ravi's objection to the MDP provisions in the MDA on the ground that these provisions are arbitrary and thus inconsistent with Art 12(1) overlaps with the objection based on Art 9(1) (*viz*, that Art 9(1) does not sanction an arbitrary law that takes away an individual's life). In the context of Art 9(1), the argument is that the MDP provisions in the MDA impose the MDP on convicted drug traffickers in so arbitrary and absurd a manner that these provisions cannot constitute "law". In the context of Art 12(1), the argument is that the MDP provisions in the MDA, which make the 15g differentia the only criterion, to the exclusion of all other considerations, for determining whether or not the MDP is to be imposed for trafficking in diamorphine, are arbitrary and thus do not accord to convicted drug traffickers equal protection of the law. We shall address this point below (at [111]–[119]) when we consider the Art 12(1) challenge.

38 As it promised, the Court of Appeal went on to consider the arbitrariness of the 15g trafficking threshold beyond which the death penalty would be mandatory *within the context* of the "reasonable classification" test. In holding that the 15g threshold was not arbitrary, the Court of Appeal apart from referring to the social object of the MDA also cited with approval (at [112]) the following in *Ong Ah Chuan*:

> It is for the legislature to determine in the light of the information that is available to it about the structure of the illicit drug trade in Singapore, and the way in which it is carried on, where the appropriate quantitative boundary lies between these two classes of dealers.

39 These points follow from the above. In so far as a law is challenged as being inconsistent with Art 9(1) by being arbitrary, the assessment of arbitrariness is directed at the purpose of the law. In *Yong Vui Kong (MDP)*, the Court of Appeal considered the arbitrariness of the 15g threshold within the legal matrix of the "reasonable classification" test. Even if there is some basis to argue that the merger of the two challenges in that case was due to the unique circumstances present there, and that there is reason to divorce the two, I do not think that the outcome would be any different since the focus in any event, is on the purported arbitrariness of the purpose of the challenged provision.

40 To that end, as I explained in *Lim Meng Suang*, s 377A is not arbitrary for the purpose of Art 12(1) because the Legislature has articulated a clear social purpose for which s 377A is its chosen and fitting mechanism for implementation. The Legislature deemed the prevalence of grossly indecent acts between males – whether in public or in private – a regrettable state of affairs that was not desirable: *Lim Meng Suang* at [67]–[68]. The Court of Appeal in *Yong Vui Kong (MDP)* did not think that there was a need to inquire behind the Legislature's prerogative for determining that 15g was the appropriate threshold. Likewise, given that I have found in *Lim Meng Suang* (at [119]–[129]) that the purpose of s 377A is not illegitimate, and Mr Ravi declined to utilise the opportunity I had granted to him and Mr Abdullah SC to address me on any further argument they might have after I had issued *Lim Meng Suang*, I do not see any justification for me to now find that s 377A is arbitrary for the purpose of Art 9(1).

41 I turn then to Mr Ravi's argument that s 377A is absurd because it targets homosexual orientation, which is a natural and immutable attribute.

Whether s 377A is absurd because it targets homosexual orientation which is a natural and immutable attribute

42 Whether homosexuality, as a form of sexual orientation, is a natural and immutable attribute of a person is a factual question. Like all questions of fact, it can only be resolved by evidence. I was mindful of this and, on 18 January 2013, informed the parties to provide all such evidence and supporting scientific literature as was necessary for them to prove their respective cases. Although s 59(2) of the Evidence Act (Cap 97, 1997 Rev Ed) permits me to take judicial notice of appropriate documents on matters of science, given the gravity of the matter and the contentious nature of Mr Ravi's proposition that homosexuality is a natural and immutable attribute, I have to be and was extremely cautious about reviewing the material.

(1) Legal definition of "immutable"

43 Mr Ravi did not define the meaning of "immutable". The plain and ordinary meaning of "immutable", according to the online *Oxford English Dictionary*, is "unchanging over time or unable to be changed". *Chambers Concise Dictionary* similarly states that "immutable" means "unchangeable" and "changeless". However, Mr Ravi's use of the concept of immutability is for the specific purpose of demonstrating an alleged breach of the Constitution. In that context, "immutable" may carry other meanings. Indeed, the word appears to have another dimension in US constitutional law jurisprudence. In *Frontiero v Richardson* 411 US 677 (1973), the US Supreme Court held (at 686) that for a trait to be immutable, it must be "determined solely by the accident of birth". The same court also held in a subsequent case

that the possessor of an immutable attribute will be "powerless to escape or set aside" the attribute: see *Regents of University of California v Bakke* 438 US 265 (1978) at 360. This latter meaning accords with the dictionary meanings cited above, *viz*, unchanging or unable to be changed. These requirements are eminently sensible, and I would interpret an immutable attribute for the present purposes as one that is: (a) innate or inborn; *and* (b) unchanging or unable to be changed.

44 I do not think that Mr Ravi can have any quarrel with this definition of immutability, unless the premise of his argument is *only* that any attribute that is "unchanging over time or unable to be changed" cannot be legislated against; it does not matter that the attribute was not innate or inborn. I do not understand his case to be so extreme. Indeed, the premise of this aspect of the Plaintiff's case under Art 9(1) is that laws which criminalise acts that arise "purely out of an individual's natural and immutable characteristic"[8] are unconstitutional. The principle here, according to the Plaintiff, is that laws should not target characteristics which are natural in that they are innate or inborn, and immutable in that they are unchanging or unable to be changed. These are two distinctly different qualities for a characteristic can be unchanging but not innate, and *vice versa*, but that is not the Plaintiff's case.

45 Thus, on the Plaintiff's own case, in order for his argument here to succeed, he must demonstrate two facts, *viz*, homosexuality is inborn *and* unable to be changed. With this, I turn to the evidence which Mr Ravi submitted to show that a person's sexual orientation is natural and immutable.

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[8] Plaintiff's submissions at para 47.

(2) Pro- and anti-homosexual groups and individuals

46 Statements by both pro-homosexual and anti-homosexual groups and individuals are usually self-serving and cannot be authoritative for that simple reason. For instance, Mr Ravi cited a speech given by Prof Thio during the Parliamentary debates in October 2007 (*Singapore Parliamentary Debates, Official Report* (22–23 October 2007) vol 83 at cols 2175–2305 and 2354–2445) ("the October 2007 Parliamentary Debates") in which she opined that homosexuality was a "gender identity disorder" and that "change [was] possible", as proved by instances of homosexuals who had overcome this "disorder" (see the October 2007 Parliamentary Debates at col 2272). To counter Prof Thio's view, Mr Ravi submitted that that view – which he acknowledged was shared by others – had "been *shown to be utterly false*, through official statements by professional medical bodies, *and testimonies by 'ex-gays'*" [emphasis added].[9] With all due respect, I do not see how testimonies by "ex-gays" – which I understand Mr Ravi to mean apparently reformed homosexuals who are in fact still practising homosexuals – can demonstrate Prof Thio's position to be utterly false. It would be unfair to either side if statements from the opposing side are taken to be proof one way or the other.

47 Hence, I shall not place any weight on such testimonies by either pro- or anti-homosexual groups or individuals in determining whether homosexuality is a natural and immutable attribute. I shall also not place any weight on statements from the individuals referred to by Mr Ravi. These persons, some of whom are Singapore government officials, are not properly

[9] Plaintiff's submissions at para 55.

qualified to give a credible opinion on this factual issue. Indeed, most of them were not professing to do so in the statements which Mr Ravi relied on. I turn now to pronouncements from other sources such as court decisions and the medical and other scientific bodies which Mr Ravi cited to me.

(3) Court decisions

48 Mr Ravi referred to the following seven court decisions to support his proposition that homosexuality is a natural and immutable attribute: *HJ (Iran) v Secretary of State for the Home Department and another action* [2011] 1 AC 596 ("*HJ (Iran)*"); *Vriend v Alberta* [1998] 1 SCR 493 ("*Vriend*"); *Leung TC William Roy v Secretary for Justice* [2006] 4 HKLRD 211 ("*Leung*"); *Naz Foundation v Government of NCT of Delhi and Others* WP(C) No 7455 of 2001 (2 July 2009) ("*Naz Foundation*"); *Perry v Schwarzenegger* 704 F Supp 2d 921 (ND Cal 2010) ("*Perry*"); *Sunil Babu Pant and Others v Nepal Government, Office of the Prime Minister and Council of Ministers and Others* [2008] NLJLJ 262 ("*Sunil Babu Pant*"); and *The National Coalition for Gay and Lesbian Equality v The South African Human Rights Commission* (1999) 1 SA 6 ("*National Coalition*").

49 First, as a matter of principle, I find it difficult to accept that the decisions of foreign courts can be relied on without more as *evidence* of the *correctness* or *truth* of a fact, *viz*, that homosexuality is a "natural [and] immutable attribute".[10] Secondly, quite apart from the fact that these decisions are at best persuasive and not binding on the Singapore courts, the decisions of these foreign courts are, with utmost respect, but the opinions of the individual

[10] Plaintiff's submissions at para 48.

judges sitting in their respective courts. Learned and thoroughly considered opinions as they are, such opinions are not substitutes for *evidence* of a fact. Thirdly, in most of the seven foreign cases cited by Mr Ravi, the court was not asked to decide, as a finding of fact, that sexual orientation was a natural, immutable attribute. Accordingly, the court was not presented with expert evidence on the issue. The respective observations made in these foreign cases must be appreciated in the light of that context.

50 In *HJ (Iran)*, a decision of the UK Supreme Court, Lord Hope of Craighead and Lord Rodger of Earlsferry (with whom Lord Walker of Gestingthorpe, Lord Collins of Mapesbury and Lord Dyson agreed) opined separately that sexual orientation was immutable, innate and incapable of being changed. However, their Lordships' opinions must be read in their proper context. *HJ (Iran)* was a case concerning two homosexuals who were seeking asylum in the UK. The issue before the court was whether these two individuals fell within a protected "social group" under Art IA(2) of the 1951 Convention relating to the Status of Refugees ("the Refugee Convention"), read with the 1967 Protocol relating to the Status of Refugees, on account of their sexual orientation. Their Lordships thought that they did. That was the focus of their decision. Once this context is understood and appreciated, it is clear that their Lordships were making a *legal* characterisation of a particular social group (*viz*, homosexuals) for the purposes of establishing a protective claim under the Refugee Convention. They were not, at any time, determining the characteristics and traits of that social group as a matter of *fact*. There was no evidence tendered to or relied upon by their Lordships as to the characteristics and traits of homosexuals as a social group.

51 In *Vriend*, six of the eight Canadian Supreme Court justices endorsed a holding by La Forest J in the same court in *Egan v Canada* [1995] 2 SCR 513

("*Egan*"), who said (at [5] of *Egan*) that sexual orientation was a deeply personal characteristic that was "either unchangeable or changeable only at unacceptable personal costs". *Egan* concerned the constitutionality of a legislation providing for spousal pension payment. The complaint brought by the applicants, who were a homosexual couple, was that the legislation was in contravention of their right to equality under s 15 of the Canadian Charter of Rights and Freedoms ("Canada's s 15") as the definition of "spouse" in the legislation restricted allowances only to spouses in a heterosexual union. La Forest J's statement on the difficulty of changing sexual orientation was made as a substantiation of his view that sexual orientation was analogous to the enumerated grounds under Canada's s 15 (*viz* race, national or ethnic origin, colour, religion, sex, age and mental or physical disability), and should thus fall within the ambit of the protection afforded by that section. No evidence was presented to the court, and it is clear that La Forest J was not determining the immutability of sexual orientation. Further, contrary to Mr Ravi's suggestion, I do not read La Forest J as justifying his observation that sexual orientation fell within the ambit of Canada's s 15 on the basis that like the other grounds enumerated in that section, sexual orientation was a natural and immutable attribute. To regard the grounds enumerated in Canada's s 15 as natural and immutable attributes would be odd because a person's religion, which is one of the enumerated grounds, would not ordinarily be described as a natural attribute, and even much less so as being immutable.

52 Mr Ravi next relied on *Leung*, where the Hong Kong Court of Appeal, endorsed (at [48]) the first instance judge's statement that anal intercourse is the "only way" of sexual expression for male homosexuals. I cannot see how this supports Mr Ravi's argument. All the court was saying is that the only form of sexual intercourse which male homosexuals can engage in is anal

intercourse, in contradistinction to a male and female heterosexual couple who can, in addition, engage in vaginal intercourse. The court was not and did not pronounce that sexual orientation (or expression) was a natural and immutable attribute. At best, it had stated the obvious, namely, that it was immutable that male homosexuals could only engage or only engaged in anal intercourse. Again, no evidence on the nature of sexual orientation as a phenotypical expression was adduced.

53 Similarly, in *National Coalition*, the South African Constitutional Court's observations (at [28] and [101]) that sexual orientation was a facet of "human personality", and that gay men who sought to engage in sexual conduct did so as part of their "experience of being human" were not made after considering evidence relating to the immutable or mutable nature of sexual orientation. In fact, the court never stated that sexual orientation, even as a facet of "human personality", was immutable. While Ackermann J (with whom Sachs J agreed with substantially) was influenced by Professor Edwin Cameron, who argued in "Sexual Orientation and the Constitution: A Test Case for Human Rights" (1993) 110 South African LJ 450 at p 460 that homosexuality was widely accepted by psychologists as being generally immutable, neither Ackermann J nor Sachs J accepted that as being *factually* true. On the contrary, Ackermann J noted (in the footnote to [21] of *National Coalition*) that there were others who took the position that sexual orientation was "not necessarily immutable".

54 The Nepalese Supreme Court's decision in *Sunil Babu Pant* likewise does not really advance Mr Ravi's case on the naturalness and immutability of homosexuality as a form of sexual orientation. The particular excerpt from *Sunil Babu Pant* which Mr Ravi relies on is the court's observation (at 274) that "sexual orientation is a natural process in [the] course of physical

development of a person including self-experience rather than due to the [*sic*] mental perversion, emotional and psychological disorder". This broad statement does not support Mr Ravi's main argument that homosexuality is a natural, immutable attribute; neither does the rest of the judgment.

55 I come now to *Perry* and *Naz Foundation*. I agree with Mr Ravi that these two cases are instructive, although not for the conclusion which Mr Ravi presses for (as to the naturalness and immutability of homosexuality as a sexual attribute), but for their approach to the determination of this issue. In *Perry*, the US District Court had regard to expert evidence in arriving at its conclusion (at [46]) that:

> … [i]ndividuals do not generally choose their sexual orientation. No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation.

The US District Court relied extensively on the evidence of one Professor Gregory Herek, an expert in social psychology with a focus on sexual orientation, who was called by the plaintiffs, a lesbian couple. To the extent that the court's conclusion was premised on the taking and acceptance of expert evidence, the *approach* in *Perry* differs from that in the other foreign cases discussed above, and is one with which I agree. However, I note that the defendants in *Perry* did not call on any expert to give evidence on the issue of sexual orientation. Therefore, leaving aside the non-binding nature of foreign judgments for the moment, it would still be inappropriate for me to treat the finding in *Perry* as conclusive of the naturalness and immutability of a person's sexual orientation without corroboration from more objective evidence such as studies from medical and other scientific bodies.

56 In *Naz Foundation*, the High Court of Delhi, like the US District Court in *Perry*, did consider objective medical and scientific evidence. Its conclusion (at [67]–[68]) that homosexuality was not a disease or mental illness that needed to be, or could be, "cured" or "altered" was premised on its anterior finding that "[t]here is almost unanimous medical and psychiatric opinion that homosexuality is not a disease or a disorder". However, with respect, even if I accept the court's finding that homosexuality is not a disease or disorder, I find it difficult to make the connection that homosexuality is therefore a natural and immutable attribute. The evidence which the court in *Naz Foundation* relied on does not go so far. Just as is the case with *Perry*, it would be inappropriate for me to agree with the Delhi High Court's conclusion without more. In my view, it is the available objective evidence from medical and other scientific bodies which is of greater importance to the Plaintiff's case, and it is to that that I now turn.

(4) Medical and other scientific bodies

57 Mr Ravi provided me with several statements and actions by medical and other scientific bodies which, he submitted, showed that the science community approached homosexuality as a natural and immutable human attribute, and not as some kind of mental disorder. Amongst the organisations referred to by Mr Ravi are the American Psychiatric Association, the World Health Organisation and the Royal College of Psychiatrists in the UK.[11]

58 Against the evidence provided by Mr Ravi is a study done by the Wee Kim Wee School of Communication and Information at Nanyang

[11] Plaintiff's submissions at paras 65–76.

Technological University ("the NTU Study"), which Mr Abdullah SC brought to my attention. In that study, which surveys Singaporeans' and Singapore Permanent Residents' attitudes towards homosexuals in Singapore, the authors note that the cause of homosexuality is "contentious" and that no consensus has been reached:

> Studies have tried to determine the exact causes of homosexuality, but *no consensus has been reached on this contentious issue* (Haider-Markel & Joslyn, 2008; Tygart, 2000). Some individuals attribute homosexuality to lifestyle choices while others believe homosexuality has biological origins. Gay rights advocates have often adopted the argument that homosexuality is immutable, because homosexuality has been legally penalized and morally condemned, and legal and ethical systems tend to reduce responsibility for actions or identities that are not choices (Halley, 1989). [emphasis added]

59 The matter before me is of great constitutional significance. While the NTU Study is Mr Abdullah SC's sole basis for contending that homosexuality is not clearly an immutable trait, this is not a bean-counting exercise. In fact, there is an abundance of scientific literature both for and against the theory of homosexuality being immutable in the sense that I have defined above (at [43]).

60 Literature supportive of the argument that homosexuality is not immutable includes William Byne & Bruce Parsons, "Human Sexual Orientation: The Biologic Theories Reappraised" (1993) 50 Arch Gen Psychiatry 229; Richard Friedman & Jennifer Downey, *Sexual Orientation and Psychoanalysis: Sexual Science and Clinical Practice* (Columbia University Press, 2002) at p 39; James Haynes, "A Critique of the Possibility of Genetic Inheritance of Homosexual Orientation" (1995) 28(1/2) Journal of Homosexuality 91; and George Rice *et al*, "Male Homosexuality: Absence of Linkage to Microsatellite Markets at Xq28" (1999) 284(5414) Science 665.

61 On the other side, literature supportive of the immutability theory includes Richard Pillard, "Homosexuality, Nature and Biology: Is Homosexuality Natural? Does it Matter?" in *Homosexuality: Research Implications for Public Policy* (John Gonsiorek & James Weinrich eds) (Sage Publications, 1991); Joseph Harry, "Sexual Orientation as Destiny" (1984) 10(3/4) Journal of Homosexuality 111; Andrea Camperio-Ciani *et al*, "Evidence for Maternally Inherited Factors Favouring Male Homosexuality and Promoting Female Fecundity" (2004) 271 Proceedings: Biological Sciences 2217; Francesca Iemmola & Andrea Camperio-Ciani, "New Evidence of Genetic Factors Influencing Sexual Orientation in Men: Female Fecundity Increase in the Maternal Line" (2009) 38 Arch Sex Behaviour 393; and Robert Pool, "Evidence for Homosexuality Gene" (1993) 261(5119) Science 291.

62 The above are but a sampling of the indeterminacy of the medical and other scientific literature on the issue of whether homosexuality is a natural and immutable attribute. There are probably countless other commentaries on either side of the argument. The fact that there is plausible evidence in support of either side must mean that this issue is at least arguable and debatable. In *Jackson v Abercrombie* 884 F Supp 2d 1065 (2012) ("*Jackson*"), the US District Court declined to declare s 23 of Art 1 of the Hawaiian Constitution, which states that "[t]he legislature shall have the power to reserve marriage to opposite-sex couples", unconstitutional. One of the reasons provided by the court (at 1115–1116) was that both the plaintiffs and the defendants had presented evidence supporting their side as well as casting doubt on the other side's argument on the rationality of the legislation. In the light of such conflicting evidence, the court held that the rationale of the legislation was at least debatable and, therefore, sufficient to deny the motion sought by the

plaintiffs. Although this aspect of *Jackson* is more directly relevant to an Art 12(1) argument, the point remains that because the medical evidence on the naturalness *and* immutability or otherwise of homosexuality is ambivalent and therefore debatable, Mr Ravi has not established his case that sexual orientation *is* a natural and immutable attribute, the criminalisation of which may bring about inconsistency with the fundamental rules of natural justice encapsulated under Art 9(1).

63 In summary, having perused some of the past and contemporaneous medical and other scientific literature available, I am unable to agree with Mr Ravi that homosexuality is, on a balance of probabilities, a natural and immutable attribute. I am satisfied that the medical and scientific evidence has been for some time and remains to this day divided and inconclusive at best. A full appreciation of the controversy in this field leads me to the inevitable conclusion that given the way the Plaintiff has chosen to conduct his case, I am simply not in an appropriate position to pronounce on whether homosexuality is a human attribute or a result of nurture or a lifestyle choice, much less on whether it is immutable or not.

64 Consequently, since I am unable to find for Mr Ravi on the factual assertion that homosexuality is a natural, immutable attribute, the next stage of Mr Ravi's submission – *viz*, that legislation criminalising conduct which is tied to a natural and immutable human attribute is absurd and against the fundamental rules of natural justice – is moot.

The rule of law

65 Mr Ravi further submitted that the fundamental rules of natural justice, apart from prohibiting arbitrary and absurd laws pursuant to *Yong Vui Kong*

(MDP), required compliance with the rule of law. In this regard, Mr Ravi cited *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR (R) 525 ("*Chng Suan Tze*"), which, he argued, linked the *Ong Ah Chuan* rules prohibiting arbitrariness to the broader concept of the rule of law.[12] From there, Mr Ravi submitted that the rule of law demanded that laws could not: (a) allow for arbitrariness; (b) restrict access to justice; and (c) be vague and uncertain. The first point is similar to Mr Ravi's earlier submission on absurdity and arbitrariness under *Yong Vui Kong (MDP)* and has already been dealt with. I shall proceed to deal with the second and third points after I address a preliminary issue.

66 I find it difficult to see how Mr Ravi's reliance on the concept of the rule of law as applied in *Chng Suan Tze* takes his case further than a singular reliance on the fundamental rules of natural justice. In *Chng Suan Tze*, the four appellants were arrested in 1987 for being involved in a Marxist conspiracy to subvert and destabilise the country so as to establish a Marxist state, and were issued with detention orders under s 8(1)(*a*) of the Internal Security Act (Cap 143, 1985 Rev Ed) ("the ISA"). The detention orders were suspended, but the suspension orders were subsequently revoked pursuant to s 10 of the ISA and the appellants were rearrested. They applied for leave to issue writs of *habeas corpus*, arguing, *inter alia*, that: (a) the exercise of the discretionary power under ss 8 and 10 of the ISA was subject to an objective test and was thus reviewable by a court of law; and (b) to discharge its burden of justifying the legality of detentions under the ISA , the Executive had to satisfy the court that there were objective facts in existence which justified the Executive's decision to exercise its power under ss 8 and 10 of the ISA.

[12] Plaintiff's submissions at para 29.

67 The case advanced by the Minister for Home Affairs ("the Minister") was that the discretion of the President and that of the Minister under ss 8 and 10 of the ISA respectively was subjective and, consequently, not reviewable by the court. The Court of Appeal agreed with the appellants (at [86] of *Chng Suan Tze*) that the discretion conferred on the Executive by ss 8 and 10 of the ISA could be examined by the court because that was what the rule of law demanded. Ostensibly, "rule of law" in that context meant that the court retained the final power to re-examine the exercise of the Executive's discretion. The Executive was therefore subject to the rule of law. Unlike the respondents in *Chng Suan Tze*, it is not the Defendant's case in the present proceedings that s 377A is not reviewable by the court. I am therefore unable to see how bringing in the concept of rule of law *as used* by the court in *Chng Suan Tze* adds anything.

68 In any event, the context in which Mr Ravi raised the principles of access to justice and legal certainty is such that I do not have to consider whether, as a matter of law, the fundamental rules of natural justice encompass these two principles (whether or not I have regard to the rule of law, which, as I just indicated, is superfluous in the context of this case). As I shall elaborate shortly below, the two other submissions made by Mr Ravi on the Natural Justice Issue at [22(b)] and [22(c)] above, which are premised on these two principles, are not made out on the facts.

(1) Access to justice

69 Mr Ravi submitted that s 377A was contrary to the fundamental rules of natural justice because it undermined access to justice by criminalising victims of homosexual assaults and homosexual domestic abuse. It is, however, somewhat difficult to understand the context in which Mr Ravi made

the submission. First, Mr Ravi argued that men who were subject to sexual assaults by other men were themselves open to prosecution under s 377A, whereas women who were sexually assaulted by men were not. This, however, is more a point on equal protection of the law rather than access to justice *per se*. Secondly, after elaborating on how s 377A undermined access to justice, Mr Ravi concluded by stating that "s 377A, by making criminals of victims most in need of the law's protection, is patently arbitrary, *over-inclusive* and irrational"[13] [emphasis added]. Again, this seems to suggest that the point is made in reference to the right to equal protection of the law under Art 12(1) instead. It is, therefore, difficult to understand exactly what point Mr Ravi is trying to make.

70 If Mr Ravi's argument is more contained in that men who suffer domestic abuse or sexual assault at the hands of other males might be deterred from reporting their predicament to the authorities, and that such a circumstance constitutes a breach of the fundamental rules of natural justice, he would have the benefit of the Court of Appeal's observations, albeit *obiter*, in *Tan Eng Hong (Standing)* at [184]:

> Without going into the merits of [OS 994], we want to acknowledge that in so far as s 377A in its current form extends to private consensual sexual conduct between adult males, this provision affects the lives of a not insignificant portion of our community in a very real and intimate way. Such persons might plausibly assert that the continued existence of s 377A in our statute books causes them to be unapprehended felons in the privacy of their homes. The constitutionality or otherwise of s 377A is thus of real public interest. We also note that s 377A has other effects beyond criminal sanctions. *One unwanted effect of s 377A is that it* ***may*** *also make criminals out of victims.* We will list three

[13] Plaintiff's submission para 40.

> illustrations to highlight this point. First, a man who suffers domestic abuse at the hands of his male partner may be reluctant to report it to the police as police investigations ***may reveal*** *that he (*ie*, the victim of domestic abuse) is guilty of an offence under s 377A.* Second, if a man who has been sexually assaulted by another man reports this to the police, he may lay himself open to a s 377A charge as s 377A is silent on consent. *While a charge in such a scenario may be unlikely, the fear of being charged may be sufficient to deter some victims from coming forward. Third, lest it is thought that these scenarios are fanciful, we refer to a reported incident where a man who was robbed after having sex with another man reported the theft to the police and received a warning under s 377A* (see "This teacher was caught having sex in public, police tells school", *The New Paper* (21 February 2005)). [emphasis added in italics and bold italics]

71 The Court of Appeal's observations may, at first blush, seem to support Mr Ravi's argument that s 377A undermines access to justice. However, upon closer examination, s 377A neither undermines nor restricts access to justice.

72 The first category of persons who may be dis-incentivised by s 377A from bringing a legitimate complaint to the relevant authorities are victims of domestic violence, as Mr Ravi submitted, or victims of other crimes, as the Court of Appeal in *Tan Eng Hong (Standing)* noted from a media report. In these two situations, the fact of male homosexual acts having taken place does not form the premise for a complaint. It is the potential that investigations may reveal prior instances of male homosexual acts which may deter the bringing forth of a complaint. While there may be genuine reasons to be sympathetic to the victims in these situations, I cannot consider them to be deprived of access to justice. Justice is available and open to them. They can prosecute the complaint if they so wish.

73 I do not accept that a person can complain of being "deprived" of access to justice because he fears that the authorities will realise that he has

committed an offence, *viz*, for the present purposes, engaging in male homosexual acts in contravention of s 377A. That would be akin to saying, for example, that an overstayer who has yet to be discovered by the police and who gets robbed and is afraid of reporting the robbery for fear of being exposed as an overstayer can complain of being denied access to justice. Worse still, in Mr Ravi's paradigm, the overstayer can claim that a law which detains overstayers is inconsistent with Art 9(1) and therefore unconstitutional precisely because it denies overstayers access to justice in the aforementioned scenario. The flaw in that logic is self-evident.

74 Although the Court of Appeal in *Tan Eng Hong (Standing)* noted the incident of a man who, after being robbed subsequent to having sex with another man, reported the theft to the police and, as a result, received a warning under s 377A as a possible "unwanted effect" of this provision (see *Tan Eng Hong (Standing)* at [184]), the court did not go so far as to say that that man's access to justice had been curtailed. That is not an insignificant omission. For the reasons I have given, it would be a leap to extrapolate from the Court of Appeal's observation that s 377A denies access to justice. Mr Ravi's argument would only work if the cart is put before the horse and s 377A is assumed to be unconstitutional and, therefore, male homosexual acts are not offences. But, that is precisely what is in issue. Thus, victims of domestic violence and other crimes who have previously engaged in male homosexual acts cannot claim to have their right to access to justice undermined by virtue of s 377A. Accordingly, I find this argument to be untenable.

75 The other category of persons who may claim to be denied access to justice are male victims of sexual assaults by other males. Like the Court of Appeal in *Tan Eng Hong (Standing)*, I appreciate that victims of such sexual

assaults are in an invidious situation because they may be charged with an offence under s 377A. However, these victims are not as powerless as one might think. The premise of Mr Ravi's argument is that the s 377A offence is made out regardless of whether there is proof of consent. He cited the High Court's decision in *Ng Huat v Public Prosecutor* [1995] 2 SLR(R) 66, where Yong Pung How CJ held that consent was not an element of the offence (at [24]):

> My sympathies lie with those perfectly respectable gentlemen who may well be innocent "victims" of a grossly indecent act. It is true that they may find themselves named within the charge as persons "with" whom the offence of gross indecency has been committed. Nevertheless, I do not see any real cause for concern. If they did have any homosexual tendencies, they would almost invariably have been charged with the offence as well. The very fact that they are not similarly charged can only attest to their innocence of the act. No aspersions are being cast on their sexual proclivities. *Technically, of course, as consent is not an element of the s 377A offence, they could also be charged with the offence*, but I am confident that the judicious exercise of prosecutorial discretion will prevail to ensure that such travesties of justice do not occur. *There will be no distress or embarrassment,* ***much less any injustice, as long as the law is understood*** *and enforced on a clear and unambiguous basis*. [emphasis added in italics and bold italics]

76 Yong CJ is correct in his observation that consent is not an element of the s 377A offence. I made the same observation in *Lim Meng Suang* at [63] and [65]. However, while consent is not expressly stated to be a prerequisite for establishing the offence, it does not follow that *male victims* of sexual assaults by other males would be caught by s 377A. I should preface the following discussion of this point with the qualification that the matter before me does not involve a criminal charge under s 377A, where I would ordinarily have the benefit of full arguments from the Public Prosecutor and defence counsel (if any); as such, my views on the interpretation of s 377A must be read against that qualification. Be that as it may, with the greatest of respect to

those who think otherwise, there are two reasons why, in my view, there is at least some scope for an argument that male victims of sexual assaults by other males may be outside the reach of s 377A.

77 The first reason is based on a purposive interpretation of s 377A. It is trite that in interpreting the language of a statutory provision, s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) requires the court to have regard to the purpose of the provision. I have elucidated the purpose of s 377A in *Lim Meng Suang* at [66]–[67]. It bears repeating what the then Attorney-General, Mr C G Howell ("AG Howell"), stated during the second reading of the Bill which later became the Penal Code (Amendment) Ordinance 1938 (No 12 of 1938) ("the Penal Code (Amendment) Ordinance 1938"). Section 3 of that Ordinance enacted the very first predecessor of s 377A. AG Howell stated (see *Proceedings of the Legislative Council of the Straits Settlements* (13 June 1938) at p B49):

> With regard to clause 4 [*viz*, the clause which subsequently became s 3 of the Penal Code (Amendment) Ordinance 1938] 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]

78 In my view, the language used by AG Howell is noteworthy. He was pushing for a more extensive and robust piece of legislation to *punish* the *commission* of male homosexual acts which, up till then, could only be dealt with by a more limited statute and were difficult to detect in the first place. It is difficult to reconcile these intentions with an intention that the male

offender and the male victim of a sexual assault would *both* be equally guilty of an offence under s 377A. The language chosen and used by AG Howell is more consistent with the idea of dealing with the seemingly higher incidence of *consensual* male homosexual acts.

79 The second reason why it is arguable that male victims of sexual assaults by other men fall outside the ambit of s 377A, which is connected to the first reason, is the choice of words used in s 377A. The provision reads:

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

The words chosen by Parliament are framed in strong terms: "commits", "abets" and "procures". These are not words which can be associated with a victim. Even if "commit" may sound neutral, "abet" and "procures" – which indubitably also inform the interpretation of the entire section – are particularly telling. I cannot see how one can call a victim of sexual assault under s 377A an abettor or procurer of the crime. Subject to the qualification made above at [76], I am not inclined to the view or suggestion that s 377A indisputably extends to male victims of sexual assaults by other males.

(2) Vagueness and uncertainty

80 It is unclear how the Plaintiff's argument that the rule of law forbids vague and uncertain laws fits under Art 9(1). Mr Ravi submitted that s 377A used "extremely vague language that has the potential to be infinitely broad"

and is hence "inherently unintelligible".[14] He then went on to submit that the "vagueness in the law, in *violating the 'intelligible differentia' requirement*, violates the fundamental principles of natural justice and the rule of law which demand, among others, certainty and predictability" [emphasis added]. [15]

81 This argument suggests that there is a breach of the fundamental rules of natural justice *where* the first limb of the "reasonable classification" test in Art 12(1) – *viz* that the differentia made in the impugned law must be intelligible – is not satisfied. But, this presupposes that there is even a breach when the Art 12(1) Issue has not arisen yet at this stage of Mr Ravi's submissions. In any event, as I found in *Lim Meng Suang* at [48], the differentia adopted in s 377A – *viz*, that of males who perform acts of gross indecency on other males – is intelligible. The acts which are captured and the acts which are not captured (*ie*, male-female sexual acts and female-female sexual acts) are clearly identifiable.

82 Mr Ravi then posed the following question: would s 377A encompass acts of "kissing, holding of hands, or even merely hugging"?[16] According to him, there is "no way to know" until an individual is charged and convicted. With respect, this hypothetical is misconceived in at least two ways. First, it cannot be that a statutory provision which is seldom invoked is inherently vague and uncertain. Mr Ravi's argument, when broken down, is that because the words of a statutory provision (in this case, s 377A) are open to interpretation, certainty only ensues after the court has determined the

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[14] Plaintiff's submissions at para 41.

[15] Plaintiff's submissions at para 43.

[16] Plaintiff's submissions at para 42.

application of that statutory provision to the particular facts of the case before it (*viz*, Mr Ravi's hypothetical example of acts of kissing, holding hands and hugging). The flaw in this argument is immediately apparent. All words are, to one extent or another, open to interpretation. Even seemingly obvious words are often disputed by counsel. That fact alone cannot and does not render a statutory provision vague and uncertain. Part of the common law system in which Parliament operates and enacts laws is the development of a body of jurisprudence to guide future court decisions. If Mr Ravi is right, many under-utilised laws containing words which are open to interpretation would invariably be unconstitutional. Needless to say, I cannot agree.

83 Secondly and perhaps more pointedly, it is trite that in interpreting the language of a statutory provision, the court is to have regard to the purpose of the provision. I have elucidated the purpose of s 377A at length in *Lim Meng Suang*. It should be evident from the considerations which were extant in 1938 (when the earliest predecessor of s 377A was enacted) that there is at least an arguable case that the conduct in the hypothetical example given by Mr Ravi would *not* constitute an offence under s 377A. In fact, it is quite telling that none of the more than a hundred case authorities cited by Mr Ravi was of a decision by the Singapore court convicting two males for kissing, holding hands or hugging. In my view, Mr Ravi's bare assertion that s 377A may or may not capture the hypothetical example that he used and that one cannot know for certain until a court pronounces on it, is nothing more than a tautology which is unsupported by any logical reasoning.

84 Therefore, I am not persuaded that s 377A is as vague and uncertain as Mr Ravi has submitted. In sum, Mr Ravi has not shown me how the nature and/or operation of s 377A is inconsistent with the fundamental rules of

natural justice. This disposes of the Natural Justice Issue. I turn now to the Art 12(1) Issue.

Analysis of the Art 12(1) Issue

***The reasons in* Lim Meng Suang**

85 Although I decided in *Lim Meng Suang* that s 377A was not inconsistent with Art 12(1), some of the arguments canvassed by Mr Ravi were not raised before me in *Lim Meng Suang*. I shall therefore set out the salient parts of my reasoning in *Lim Meng Suang* first before discussing those of Mr Ravi's arguments which were not canvassed in *Lim Meng Suang* (for convenience, I shall refer to these arguments as the Plaintiff's "additional arguments"). The Defendant's arguments in this case largely mirrored those which it made in *Lim Meng Suang*.

86 I took the view in *Lim Meng Suang* that s 377A was not inconsistent with Art 12(1) for the following reasons:

(a) The differentia underlying the classification in s 377A covered acts of gross indecency between males, but not acts of gross indecency between males and females and acts of gross indecency between females. The classification prescribed by s 377A was therefore based on an intelligible differentia: at [47]–[48].

(b) The purpose and object of s 377A when its very first predecessor was enacted in 1938 was to respond to a prevalence of grossly indecent acts between males – whether in public or in private – which the Legislature deemed a regrettable state of affairs that was not desirable: at [67]–[68].

(c) The purpose and object of s 377A remains the same today: at [77]–[78].

(d) Under the two-stage "reasonable classification" test which applies in Singapore for determining the constitutionality of a statutory provision, the purpose and object of s 377A bears a rational relation to the differentia underlying the classification made by that provision, *viz*, male homosexual conduct. In fact, the differentia produces a classification which mirrors the object of s 377A. The classification is therefore at least broadly proportionate, and is not under- or over-inclusive: at [100].

(e) The "strict scrutiny" test applied by the US courts in cases such as *Korematsu v United States* 323 US 214 (1944) should not be applied in the face of issues concerning disadvantaged groups, suspect classification or classifications which impinge on fundamental rights. Notwithstanding this, if the object of a piece of legislation is illegitimate (for instance, if it is capricious, absurd or unreasonable in the *Wednesbury* sense), the court can strike down the legislation even if the classification adopted by that legislation produces a rational relation to its object: at [113]–[116].

(f) The purpose and object of s 377A cannot be said to be illegitimate. Parliament had some basis and justification when it decided to criminalise only male homosexual conduct: at [119]–[129].

87 It is against the above backdrop of reasons that I turn now to the Plaintiff's additional arguments.

The Plaintiff's additional arguments and my decision thereon

More stringent test than "rational relation"

88 Mr Ravi submitted that where a statute purported to classify an individual only on the basis of a natural and immutable attribute, the court ought to apply a test that was more stringent than the "rational relation" limb of the "reasonable classification" test.[17] The argument for this heightened scrutiny is that certain attributes such as gender are founded on natural and immutable traits which an individual has no conscious control over. To support his argument, Mr Ravi cited "Equal Protection and Sexual Orientation" [1995] 16 Sing LR 228 ("*Jack Lee Tsen-Ta*"), an article by Asst Prof Lee, who now teaches (*inter alia*) constitutional law. The excerpt from the article which Mr Ravi relied upon argues that the primary aim of legislation is to influence people's choices and activities, and that criminalisation of specific activities is aimed at deterring persons from engaging in those activities. However, where an activity is a consequence of an immutable trait over which an individual has no control, it may be "unfair to inflict legal burdens" (see *Jack Lee Tsen-Ta* at 239). If the Legislature differentiates between persons on the basis of such immutable traits, this may suggest that it is acting in bad faith.

89 As I have stated earlier at [46]–[64] above, I am unable to conclude that sexual orientation is a natural and immutable attribute. Mr Ravi's impetus for a heightened scrutiny approach should therefore end here. Even if I were wrong, I would still have declined to apply Mr Ravi's suggested approach. While the debate over the level of scrutiny which a court should engage in

[17] Plaintiff's submissions at para 108.

when it is faced with allegedly unconstitutional laws may find some currency in discourses on political philosophies, the Constitution and our constitutional law operate on a slightly different plane. The court is not in a position to decide on the purported "unfairness" – which is by itself a nebulous concept – of legislation which imposes legal burdens based on immutable characteristics of individuals in the abstract; this question must be considered with regard to the legal framework provided by the Constitution and, from the perspective of the High Court, binding case law, if any. Our Constitution provides a specific degree of latitude to Parliament to legislate for certain conduct and to address or cater for the self-evident truth that members of our society are not all born the same (see *Lim Meng Suang* at [40]–[44]). That latitude is delineated by the fundamental rights accorded by the Constitution. Article 12(1) sets out one of these fundamental rights. In Singapore, whether *any* legislation is discriminatory in the sense of contravening Art 12(1) depends on the intelligibility of the differentia adopted by the classification and the nexus between the differentia used and the purpose of the legislation. Inherent in this test is a balance between, on the one hand, the protection of the fundamental right to equality and, on the other, the political autonomy afforded to Parliament to legislate within the bounds of the Constitution.

90 Thus, with the greatest respect, I am unable to follow the foreign authorities cited to me by Mr Ravi on this point. Interesting as they are, the decisions of these foreign courts, which have adopted a more zealous approach, factor in legal and extra-legal social, economic, cultural and political considerations which are unique to their respective jurisdictions. I am satisfied, and indeed bound to hold, that the "reasonable classification" test which I applied in *Lim Meng Suang* applies to *all* constitutional challenges based on Art 12(1) in Singapore. Mr Ravi's submission that I am not bound

because there has so far been no Singapore Court of Appeal decision which concerns legislation differentiating between individuals based on immutable traits is misplaced. It presupposes that there is, in the first place, a dual-track system. I cannot agree with that. Even though Mr Ravi is right in that there is so far no Court of Appeal decision on the constitutionality of legislation of the type just described, the decisions in *Nguyen Tuong Van* (at [70]) and *Yong Vui Kong (MDP)* clearly indicate that the applicable test for constitutional challenges based on Art 12(1) is the "reasonable classification" test. There is no suggestion that this is the test for some types of Art 12(1) cases, and that there could be another stricter test for other special circumstances.

91 This is the framework which I find applies before me. It would be a stretch for me to accept a new principle of Singapore constitutional law which requires me to apply, in the context of an application to strike down a piece of legislation for being inconsistent with Art 12(1), a separate, broader, and more zealous test when immutable traits are concerned.

92 I therefore do not accept the Plaintiff's argument that a higher standard of scrutiny should be used in the present case.

The advancement of morality is not a sound social object

93 Mr Ravi submitted that because homosexuality was not an incontrovertible immorality and did not harm public order, the advancement of morality as the underlying justification for s 377A was not a sound social object.[18] The nub of his argument is that there are (so to speak) different types of morals. While there is a "core" of incontrovertible morals (such as the

[18] Plaintiff's submissions at para 132.

moral proposition that theft is wrong), there are also a host of moral conduct and propositions which are fiercely contested. In this latter sphere, given the spectrum of and the room for disagreement, the advancement of morality *vis-à-vis* a specific conduct is not a normatively strong social object worthy of being advanced. Homosexuality, Mr Ravi claims, is an example of a conduct which falls into this penumbra of contested values. He urged the court to take judicial notice of the fact that various religious personalities had made statements to the effect that they supported the decriminalisation of homosexual activity. Thus, he argued that at the very least, the proposition that "homosexual acts are immoral" is *not* incontrovertible. In so far as the object of s 377A advances the proposition that male homosexuality is immoral, it is an unsound – or, to use the nomenclature consistent with *Lim Meng Suang*, an illegitimate – object.

94 Mr Ravi's submission, is ultimately premised on the notion that Parliament is not allowed to legislate on an issue where the morality of that issue is controversial, and that, in my opinion, cannot be right. Parliament has the mandate under our Constitution and system of law to make decisions on and surrounding controversial issues, subject always to the legal safeguards and limitations set out in the Constitution and review by the courts for compliance with those safeguards and limitations. I said in *Lim Meng Suang* (at [144]) that the basis underlying s 377A's existence is, in the final analysis, an issue of morality and societal values. Parliament in 1938 and likewise in October 2007 affirmed the purpose and object of s 377A. Its choice in favour of one view in the spectrum cannot be said to be undeniably wrong. I would also add that Parliament can take steps to amend legislation to "reflect societal norms and values" if it occurs to Parliament that the tide of social and public opinion has shifted, as was the case with the repeal of s 377 of the Penal Code

(Cap 224, 1985 Rev Ed), a provision which previously criminalised consensual heterosexual oral sex. This was noted in *Tan Eng Hong (Standing)* at [32]. It may be different if it is so clear, incontrovertible and undisputable that male homosexuality is not considered to be immoral by Singapore society, but that is not the argument presented before me. In such circumstances, I am unprepared to say that Parliament should defer to the views of the court on this issue.

95 I therefore reject the Plaintiff's argument that the advancement of morality as the underlying object of s 377A is illegitimate.

HIV prevention and mitigation is not an object of s 377A

96 On the issue of whether HIV prevention and mitigation is a relevant consideration in this matter, the Plaintiff's case here differs from that of the plaintiffs in *Lim Meng Suang*. There, both the plaintiffs and the defendant accepted that the court could include HIV prevention and mitigation as a new purpose of s 377A, even if that purpose had not been considered when the earliest predecessor of s 377A was enacted in 1938: see *Lim Meng Suang* at [87]. Here, Mr Ravi contended that HIV prevention and mitigation was a non-factor, and should therefore not be accepted as a purpose and object of s 377A. Moreover, even if HIV prevention and mitigation were a purpose and object of s 377A, the legislation in fact undermined that very objective.

97 I agree with Mr Ravi that HIV prevention and mitigation was not a purpose and object of s 377A when its very first predecessor was enacted in 1938. It would also be a stretch to read into the October 2007 Parliamentary Debates an intention by Parliament to retain 377A for the purpose of HIV prevention and mitigation. Nevertheless, this argument does not lead to the

conclusion that s 377A therefore fails the "reasonable classification" test. My decision in *Lim Meng Suang* that s 377A was not inconsistent with Art 12(1) was not predicated on the premise that one of its purposes and objects was the advancement of public health through the prevention and mitigation of HIV.

98 Therefore, even though I agree with Mr Ravi on this count, this argument by the Plaintiff does not establish the unconstitutionality of s 377A pursuant to Art 12(1).

Section 377A fails the second limb of the "reasonable classification" test because it only goes "some distance" towards securing the object

99 Mr Ravi submitted that if the classification adopted in a piece of legislation only went "some distance" towards meeting the purpose and object of the legislation, it did not satisfy the rational relation limb (*ie*, the second limb) of the "reasonable classification" test.[19] In support of this argument, Mr Ravi referred to the Court of Appeal's observation in *Yong Vui Kong (MDP)* at [111] that a legislative provision which imposed the mandatory death penalty on "short-haired" drug traffickers was contrary to Art 12(1) because the length of a drug trafficker's hair clearly did not bear any rational relation to the social object of the statute under challenge in that case (*viz*, the MDA), which was to eradicate the illicit drug trade. Mr Ravi contended that the hypothetical statutory provision in *Yong Vui Kong (MDP)* was analogous to s 377A because the latter did not employ any differentia that was "rationally related to the objects of reducing under-age, non-consensual or public sex."[20]

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[19] Plaintiff's submissions at para 194.

[20] Plaintiff's submissions at para 198.

100 Contrary to Mr Ravi's submissions, the purpose and object of s 377A, as I have found in *Lim Meng Suang*, is to enable the prosecution of acts of gross indecency by male homosexuals both in public and in private because such acts are not acceptable or desirable in Singapore society. In my view, as stated in *Lim Meng Suang*, there is a complete coincidence between the differentia adopted in s 377A (*viz*, male homosexual conduct) and the purpose and object of the provision (*viz*, making male homosexual conduct an offence because such conduct is not desirable). The differentia adopted in s 377A is therefore, at the very least, broadly proportionate to the purpose and object of this provision; the differentia does not just go "some distance" towards fulfilling such purpose and object.

101 I therefore cannot accept the Plaintiff's argument that the differentia adopted in s 377A only goes "some distance" towards meeting the purpose and object of this section.

Section 377A is over-inclusive in that it makes criminals of family and friends of gays

102 Finally, Mr Ravi submitted that s 377A was over-inclusive in that it made criminals of family and friends of male homosexuals who supported, comforted and encouraged the latter. This is because under s 107(*a*) of the Penal Code, the offence of abetment is made out where there is "active support, stimulation or encouragement" of an offence.[21]

103 I am unable to accept this argument. The point that s 377A is over-inclusive has been grossly overstated. The offence of abetment applies to

[21] Plaintiff's submissions at paras 201–202.

every abetted offence, and an abettor is subject to criminal sanction because of his or her role in the commission of the abetted offence. It cannot be that all laws criminalising an act are over-inclusive and, therefore, unconstitutional simply because they open up the possibility that there are others who may be guilty of supporting, stimulating or encouraging that act. Perhaps, the implied suggestion behind Mr Ravi's argument is that abettors of homosexual acts are, unlike abettors of other offences, less blameworthy because supporting or encouraging a person in relation to his sexual orientation is innocuous. However, this argument assumes what it seeks to prove because the suggestion that abettors of the s 377A offence are less blameworthy rests on the premise that gross indecency between male homosexuals should not be an offence in the first place.

104 I therefore also reject the Plaintiff's argument that s 377A is over-inclusive in that it makes criminals out of persons who show support and encouragement to male homosexuals.

Conclusion

105 In the ensuing interval between handing down my judgment in *Lim Meng Suang* and writing this judgment, I have not changed my grounds or my views set out and expressed in the former. They apply fully to this case as well.

106 As I said in *Lim Meng Suang*, we are, like many other societies around the world, in the midst of change. It is an undeniable fact that society's perceptions of sexual and other morals change over time. However, these changes, to varying degrees, take time, some of which can be accurately characterised as generational in nature.

107 In conclusion, for the reasons set out above, the Plaintiff has failed to impugn s 377A as being inconsistent with Art 12(1) of the Constitution, nor have his Art 9(1) rights been infringed. I therefore decline to grant the orders sought by the Plaintiff in OS 994.

108 I shall hear the parties on costs.

Quentin Loh
Judge

M Ravi (L F Violet Netto) for the plaintiff;
Aedit Abdullah SC, Jeremy Yeo Shenglong and Sherlyn Neo Xiulin
(Attorney-General's Chambers) for the defendant.