Tan Eng Hong
v
Attorney-General

[2012] SGCA 45

Court of Appeal — Civil Appeal No 50 of 2011
Andrew Phang Boon Leong JA, V K Rajah JA and Judith Prakash J
27 September 2011

Civil Procedure — Striking Out
Constitutional Law — Equal Protection of the Law
Constitutional Law — Fundamental Liberties
Courts and Jurisdiction — Court Judgments — Declaratory — Standing to Seek Declaratory Relief

21 August 2012 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 Ought an action which is not certain to fail, brought by an applicant who has *locus standi*, be peremptorily struck out by the High Court even though it accepts that it has jurisdiction to hear the action? This is one of the pivotal issues at the heart of this appeal by Tan Eng Hong ("Tan") against the decision of the High Court judge ("the Judge") in *Tan Eng Hong v Attorney-General* [2011] 3 SLR 320 ("the Judgment") striking out his application in Originating Summons No 994 of 2010 for declaratory relief ("the Application").

2 The Application under O 15 r 16 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") was brought by Tan to ask the court to declare s 377A of the Penal Code (Cap 224, 2008 Rev Ed) ("the current Penal Code") unconstitutional under the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint). For ease of reference, this version of the Constitution of the Republic of Singapore as well as its predecessor versions (where relevant) will hereafter be denoted as either "the Constitution" or "the Constitution of Singapore", as may be appropriate to the context.

3 We ought to also emphasise at the outset that the present appeal does *not* deal with the substantive issue of the constitutionality of s 377A of the current Penal Code ("s 377A"), but only concerns the *preliminary* issue of whether the Application was correctly struck out under O 18 r 19 of the Rules ("O 18 r 19") on the basis that it disclosed no cause of action and/or was frivolous and/or was an abuse of the process of the court (referred to hereafter as "an abuse of court process" for short).

Background to the dispute

4 On 9 March 2010, Tan and another male person ("the co-accused") were arrested for engaging in oral sex in a cubicle in a public toilet of a shopping complex. Both parties are adult males in their forties.

5 In due course, Tan and the co-accused were separately charged under s 377A with the commission of "[an] act of gross indecency with another male person". Tan was charged on 2 September 2010 and the co-accused was charged on 1 September 2010.

6 On 24 September 2010, Tan brought the Application to challenge the constitutionality of s 377A under the Constitution. Counsel for Tan, Mr M Ravi ("Mr Ravi"), prayed for the following declarations:

(a) s 377A is inconsistent with Art 9 of the Constitution ("Art 9") and is therefore void by virtue of Art 4 of the Constitution ("Art 4");

(b) s 377A is inconsistent with Arts 12 and 14 of the Constitution ("Art 12" and "Art 14" respectively) and is therefore void by virtue of Art 4; and

(c) for these reasons, the charge brought against Tan under s 377A is void.

7 Not long after this, on 15 October 2010, the Prosecution informed Tan that the s 377A charge against him had been substituted with one under s 294(*a*) of the current Penal Code ("s 294(*a*)") for the commission of an obscene act in a public place. The charge against the co-accused was similarly substituted.

8 The Attorney-General ("the AG") then applied via Summons No 5063 of 2010 to strike out the Application pursuant to O 18 r 19 and/or the inherent jurisdiction of the court. At the hearing before the assistant registrar ("the AR"), Tan abandoned prayer 3 of the Application (*ie*, the prayer for the declaration set out at [6(c)] above) as there was no longer a s 377A charge to be voided. On 7 December 2010, the AR struck out the Application on the grounds that it:

(a) disclosed no reasonable cause of action; and/or

(b) was frivolous or vexatious; and/or

(c) was an abuse of court process.

9 Tan appealed via Registrar's Appeal No 488 of 2010 ("RA 488/2010") against the AR's decision to strike out the Application. That appeal formed the subject matter of the Judgment.

10 Tan subsequently pleaded guilty to the substituted charge under s 294(*a*) on 15 December 2010, and was convicted and sentenced to a fine of $3,000. The co-accused had earlier pleaded guilty, and had similarly been convicted and sentenced to a fine of $3,000.

The decision below

11 In RA 488/2010, the Judge had to determine whether the Application could be struck out under O 18 rr 19(1)(*a*), 19(1)(*b*) and/or 19(1)(*d*) for, respectively, disclosing no reasonable cause of action, being frivolous or vexatious and/or being an abuse of court process. Mr Aedit bin Abdullah ("Mr Abdullah"), who appeared on behalf of the AG, did not rely on O 18 r 19(1)(*c*) (*viz*, prejudice to, or embarrassment or delay of the fair trial of an action) as a ground for striking out.

12 Although the Judge unequivocally found that Tan had *locus standi* to bring the Application, she also found that the Application disclosed no real controversy to be adjudicated (see [25] of the Judgment). For this reason *alone*, she dismissed Tan's appeal in RA 488/2010 and upheld the AR's striking-out order.

13 In arriving at her decision, the Judge examined the three grounds under O 18 r 19 that the AG sought to rely on and considered the elements in each ground. Her rulings on these grounds were as follows:

(a) *Vis-à-vis* O 18 r 19(1)(*a*) (the "no reasonable cause of action" ground), the Judge found that an action could be struck out where the applicant was unable to establish *locus standi* (see *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287 (cited at [5(a)] of the Judgment)).

(b) *Vis-à-vis* O 18 r 19(1)(*b*) (the "frivolous or vexatious" ground):

(i) The Judge found that an action could be deemed frivolous where it was incapable of legally sustainable and reasoned argument (see *Chee Siok Chin and others v Minister for Home Affairs and another* [2006] 1 SLR(R) 582 ("*Chee Siok Chin*") at [33] (cited at [5(b)] of the Judgment)). The Judge further held that an action could be deemed vexatious where it was without foundation and/or could not possibly succeed (see likewise [5(b)] of the Judgment, citing *Chee Siok Chin* at [33]). An action could also be said to be vexatious where the party bringing the action was not acting *bona fide* but merely wished to annoy or embarrass his opponent, or where the action was not calculated to lead to any practical result (see *Goh Koon Suan v Heng Gek Kiau and others* [1990] 2 SLR(R) 705 at [15] (cited at [5(b)] of the Judgment)).

(ii) As the Application was for declaratory relief, the Judge considered that if the court could not grant the declaratory relief sought, it was arguable that the Application was frivolous and vexatious as it would have no practical value (see the Judgment at [6]). The Judge then considered and applied the test elucidated in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and another appeal* [2006] 1 SLR(R) 112

("*Karaha Bodas*") at [14] for determining whether declaratory relief could be granted.

(c) *Vis-à-vis* O 18 r 19(1)(*d*) (the "abuse of court process" ground), the Judge found that an action could be struck out where it: (i) effected a deception on the court; (ii) used the court's processes for some ulterior or improper purpose or in an improper way; (iii) was manifestly groundless or useless or served no useful purpose; or (iv) was one of a series of multiple or successive proceedings which caused or were likely to cause improper vexation or oppression (see *Chee Siok Chin* at [34] (cited at [5(c)] of the Judgment)).

14 From this, the Judge distilled the four key issues below that, in her view, would determine the outcome of RA 488/2010 (see the Judgment at [7]):

(a) Did Tan have *locus standi* to bring the Application?

The Judge reasoned that if Tan did not have *locus standi* to bring the Application, the Application could be struck out under either O 18 rr 19(1)(*a*) or 19(1)(*b*). The Judge found that Tan had satisfied the "substantial interest" test for *locus standi* laid down in *Chan Hiang Leng Colin and others v Minister for Information and the Arts* [1996] 1 SLR(R) 294 ("*Colin Chan*") as it was arguable on the facts that Tan's constitutional rights under Art 12 had been violated (see the Judgment at [19]–[21]). The Judge thus held that the AG's striking-out application could not be granted on this ground.

(b) Was there a real controversy to be adjudicated?

(i) The Judge held that if there was no real controversy to be adjudicated, the Application could be struck out under either O 18 rr 19(1)(*b*) or 19(1)(*d*). (As noted earlier at [12] above, the Judge struck out the Application on this ground alone.) While there were specific facts involving specific parties, the Judge found that the facts were "merely hypothetical" (see [25] of the Judgment).

(ii) Although Tan raised an argument based on the Hong Kong case of *Leung v Secretary for Justice* [2006] 4 HKLRD 211 ("*Leung*") that there could be adjudication on hypothetical facts in "exceptional cases", the Judge found that *Leung* could be distinguished (see [26] of the Judgment). First, the Judge noted that *Leung* was based on the International Covenant on Civil and Political Rights, a treaty which had no force of law in Singapore. Second, she found that the court's reasoning in *Leung* – *viz*, that if the court were to refuse to hear the application on the ground that it concerned a hypothetical scenario, it would mean that the applicant could only gain access to justice by breaking the law – was less persuasive in Singapore as compared to Hong Kong, given the referral mechanism provided for in Art 100 of the Constitution of Singapore ("Art 100") apropos questions on the effect of any constitutional provision. The Judge opined that the possibility of convening a tribunal ("the Constitutional Tribunal") under Art 100 was "an established procedure through which guidance [might] be obtained [on constitutional questions] in the absence of specific facts" (see [26(b)] of the Judgment). Further, the Judge expressed concern that the criterion of "exceptional

cases" was too vague and might open the floodgates to constitutional challenges (see [26(a)] of the Judgment).

(iii) In addition, the Judge found that there was "nothing at stake for Tan" (see [26(c)] of the Judgment) as Tan had already pleaded guilty and been convicted under s 294(*a*). In the Judge's view, Tan's conduct in pursuing the Application "[went] against the spirit of the adversarial process where the parties' conduct [was] conditioned by the possibility of gain and/or loss" (see likewise [26(c)] of the Judgment).

(iv) The Judge also expressed concern that since the s 377A charge against Tan had been dropped, there were "no subsisting facts upon which there [could] be *res judicata*" (see the Judgment at [27]) and the Application thus had "no real practical value" (see likewise [27] of the Judgment).

(c) Was Tan's claim certain to fail?

The Judge held that if Tan's claim was certain to fail, the Application could be struck out under either O 18 rr 19(1)(*b*) or 19(1)(*d*). Pertinently, the Judge found that Tan's case was *not* certain to fail, and in fact raised many novel issues that deserved more detailed treatment (see the Judgment at [30]–[31]):

> 30 … Tan's case was not completely without merit, especially on the ground of Art 12. Furthermore, his case raised many novel issues that deserved more detailed treatment, for example:
>
> (a) whether an unconstitutional law in itself can constitute an injury or

> violation to one's constitutional rights; and
>
> (b) whether Art 14 can encompass a right to express one's homosexual sexual orientation.
>
> 31 The AG had submitted that Tan was certain to fail given that he had no *locus standi* to seek a declaration that s 377A of the [current] Penal Code contravened the Constitution. This argument was dealt with under the issue of *locus standi*. Here, the issue is whether the case is so weak, as gleaned from the pleadings, that it should be struck out because the result is a foregone conclusion. ***This threshold has not been satisfied***.
>
> [emphasis added in bold italics]

The Judge therefore did not grant the AG's striking-out application on this ground.

(d) Did the court have jurisdiction to declare s 377A unconstitutional in view of the fact that Tan had not come to court by way of s 56A of the Subordinate Courts Act (Cap 321, 2007 Rev Ed) ("the SCA")?

The Judge reasoned that if Tan's failure to have recourse to s 56A of the SCA amounted to an abuse of court process, the Application could be struck out under O 18 r 19(1)(*d*). While the Judge found that it was more likely than not that s 56A of the SCA was meant to be an exclusive regime, she also noted (at [42] of the Judgment) that it could not be said that it was a "very clear case" that this was so. She thus ruled that the AG's striking-out application could not be granted on this ground.

15 At this juncture, we will confine ourselves to a few brief preliminary remarks on the Judgment, which we will elaborate on later in our decision

when discussing the requirement (*vis-à-vis* applications for declaratory relief) that there must be a "real controversy" for the court to resolve (see [143] below). *The anomalous result brought about by the Judgment – specifically, the Judge's ruling that there was no real controversy to be adjudicated – is that a claim which was not certain to fail and which was brought by an applicant who had* locus standi *was struck out by a court which had jurisdiction to hear the claim.* With respect, we find it difficult to reconcile the Judge's findings that, on one hand, "Tan's constitutional rights [might] arguably have been violated" (see the Judgment at [19]) and "Tan's case was not completely without merit" (see the Judgment at [30]) with her finding that, on the other hand, the Application did not disclose a real controversy to be adjudicated. We note that on the Judge's view, it appears that: (a) a real controversy refers solely to a real controversy *on the facts*; and (b) a real controversy of *law*, even one which possibly has merit and which is brought by a person with *locus standi*, remains within the realm of the merely hypothetical.

16 One of the Judge's chief concerns in coming to her conclusion that there was no real controversy to be adjudicated was that subsisting facts were necessary for a judgment to be *res judicata* (see the Judgment at [25], and the Judge's reiteration at [27]), and that unless that condition was satisfied, the court should not hear a matter. With respect, if this were correct, then it would never be possible to seek a declaratory order on the law. In our view, this would be an undesirable state of affairs. There is, undoubtedly, much value in having judicial determinations in appropriate cases on debatable points of law of public interest, not just for the benefit of the parties concerned, but also (and primarily) for the benefit of the public. Clear judicial pronouncements on what the law is help to ensure that the rule of law is upheld. The rule of law

requires that the law be capable of fulfilling its function of guiding the behaviour of persons living under the law. For persons to be able to be guided by the law and to act on it, they need to first know what the law is, and it is thus essential that principles of law are correctly and authoritatively decided. This is especially so where the point of law to be clarified is, as in the present case, one of high constitutional importance.

17 Moreover, as *Zamir & Woolf: The Declaratory Judgment* (Lord Woolf & Jeremy Woolf eds) (Sweet & Maxwell, 4th Ed, 2011) ("*Zamir & Woolf*") aptly states at para 1-07:

> A declaration by the court is not a mere opinion devoid of legal effect: the controversy between the parties is determined and is res judicata as a result of the declaration being granted.

In the present case, a judicial decision on the Application would bind the Government, and not just Tan. Further, such a decision would be based on the underlying facts of the case, in particular, Tan's arrest, detention and charge under s 377A (see [151]–[154] below). This determination would also address the Judge's concerns about *res judicata*. We thus disagree with the Judge that Tan's claim has "no real practical value" (see the Judgment at [27]).

The issues on appeal

18 The following issues were raised on appeal:

(a) Does Tan 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")? This is a new issue which was raised by the AG on appeal.

(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* ("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 Tan have *locus standi* to bring the Application ("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 Tan'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")?

19 The AG, quite correctly, is not pursuing the issue of whether Tan's failure to have recourse to the mechanism provided for in s 56A of the SCA

was an abuse of court process as there are no longer any subsisting proceedings in the Subordinate Courts. As was the case in the court below (see [31] of the Judgment), in this appeal, the AG is confining his arguments on certainty of failure to Tan's lack of *locus standi*. Therefore, the issue of certainty of failure now *pivots* on the issue of *locus standi*, *and not on the merits of the Application*.

20 We add that it must be remembered that this is an appeal against a striking-out order, and the threshold for striking out is a high one. As this court emphasised in *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [21]:

> As long as the statement of claim discloses some cause of action, or raises some question fit to be decided at the trial, *the mere fact that the case is weak and is not likely to succeed is no ground for striking it out.* [emphasis added]

Similarly, in *The "Tokai Maru"* [1998] 2 SLR(R) 646 at [44], this court held:

> A reasonable defence means one which has some chance of success when only the allegations in the pleadings are considered: *per* Lord Pearson in *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094, cited with approval by Rubin J in *Active Timber Agencies Pte Ltd v Allen & Gledhill* [1995] 3 SLR(R) 334. The hearing of the [striking-out] application should not therefore involve a minute examination of the documents or the facts of the case in order to see whether there is a reasonable defence. To do that is to usurp the position of the trial judge and the result is a trial in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way (see *Wenlock v Moloney* [1965] 2 All ER 871). *The mere fact that the defence is weak and not likely to succeed is no ground for striking it out, so long as the pleadings raise some question to be decided by the court* (see *Attorney-General of The Duchy of Lancaster v London and North Western Railway Co* [1892] 3 Ch 274). In short, the defence has to be obviously unsustainable on its face to justify an application to strike out. [emphasis added]

21 Therefore, all that Tan has to show is that he has on the facts and law an arguable case. We add that, for the purposes of a striking out application, even if the statement of claim is inadequately drawn up, an opportunity to amend will be given, unless the court is satisfied that the defect cannot be cured by an amendment (see see *Singapore Civil Procedure 2007* (G P Selvam gen ed) (Sweet & Maxwell Asia, 2007) at para 18/19/2). This is particularly so where there are substantive merits in the matter.

22 Before we turn to consider the issues on appeal proper, we will first set out the legislative history of s 377A so as to give body to the context of our decision. In this regard, it should be noted that the Indian Penal Code 1860 (Act 45 of 1860) ("the IPC"), which sired Singapore's Penal Code, was not enacted British law, but rather, a code derived from British legal doctrines and policies that were then viewed as necessary to maintain social order among the colony's natives.

The legislative history of s 377A

23 Section 377A provides as follows:

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

24 To provide a more accurate understanding of the legislative origins of s 377A, we will also examine its sister provision, *viz*, s 377 of the Penal Code (Cap 224, 1985 Rev Ed) ("the 1985 Penal Code"). Section 377 of the 1985

Penal Code ("s 377") has now been repealed (see below at [31]–[32] for the reasons for its repeal). It provided as follows:

Unnatural offences

> **377.** Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animals, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.

25 The earliest version of s 377, which was modelled on the English offence of buggery, was enacted in Singapore in 1872 by the Penal Code (Ord 4 of 1871) ("the Straits Settlements Penal Code") when Singapore was part of the Straits Settlements. The Straits Settlements Penal Code, which was the earliest precursor of the current Penal Code, was derived from the IPC. Section 377 of the Straits Settlements Penal Code was *in pari materia* with s 377 of the IPC. In *Naz Foundation v Government of NCT of Delhi and Others* WP(C) No 7455 of 2001 (2 July 2009) ("*Naz*"), a decision of the High Court of Delhi, the court considered the legislative history of s 377 of the IPC in some detail as follows:

> *HISTORY OF THE LEGISLATION*
>
> 2. … The legislative history of [s 377 of the IPC] indicates that the first records of sodomy as a crime at Common Law in England were chronicled in the Fleta, 1290, and later in the Britton, 1300. Both texts prescribed that sodomites should be burnt alive. Acts of sodomy later became penalized by hanging under the Buggery Act of 1533 which was re-enacted in 1563 by Queen Elizabeth I, after which it became the charter for the subsequent criminalisation of sodomy in the British Colonies. Oral-genital sexual acts were later removed from the definition of buggery in 1817. And in 1861, the death penalty for buggery was formally abolished in England and Wales. However, sodomy or buggery remained as a crime "not to be mentioned by Christians."
>
> 3. [The IPC] was drafted by Lord Macaulay and introduced in 1861 in British India. Section 377 [of the] IPC is

> contained in Chapter XVI … [and] is categorised under the sub-chapter titled "Of Unnatural Offences" …

26 Pertinently, the above extract shows the historical umbilical cord between the "parent" English legislation and the legislation enacted in British colonies at the time. A year after s 377 of the IPC was enacted, the maximum penalty for buggery in England was amended from the death penalty to that of life imprisonment (see s 61 of the Offences Against the Person Act 1861 (c 100) (UK) ("the UK Offences Against the Person Act 1861")), bringing the position under English law into line with that under the IPC. Following this, s 11 of the Criminal Law Amendment Act 1885 (c 69) (UK) (commonly known as "the Labouchere Amendment" after Henry Labouchere, the Member of Parliament who introduced it) was passed. Section 377A can be traced to the Labouchere Amendment, which provided as follows:

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

It is clear that the Labouchere Amendment was unlike the offence of buggery in two respects. First, the buggery laws were gender neutral, whereas the Labouchere Amendment focused on sexual conduct between *male* homosexuals. Second, the Labouchere Amendment expressly extended to private acts. The next legislative development of note came in the form of a report published in 1957 (*viz*, *Report of the Departmental Committee on Homosexual Offences and Prostitution* (Cmnd 247, 1957) (Chairman: Sir John Frederick Wolfenden) ("the Wolfenden Report")), which ignited a vigorous debate that eventually led to the passage of the Sexual Offences Act 1967

(c 60) (UK) ("the UK Sexual Offences Act 1967"). The UK Sexual Offences Act 1967 amended s 12(1) of the Sexual Offences Act 1956 (c 69) (UK) ("the UK Sexual Offences Act 1956") to partially decriminalise consensual homosexual acts, including anal intercourse. Following the enactment of the Criminal Justice and Public Order Act 1994 (c 33) (UK) ("the 1994 UK Act"), non-consensual anal intercourse in England was classified as rape (see s 142 of the 1994 UK Act). English law currently no longer criminalises consensual heterosexual and homosexual anal intercourse in private, nor acts of "gross indecency" in private between consenting males, subject to limits such as an age of consent (see, *eg*, s 12 of the UK Sexual Offences Act 1956, s 1 of the UK Sexual Offences Act 1967 as well as ss 142 and 143 of the 1994 UK Act). In other words, English law no longer has provisions corresponding to s 377 and s 377A in its statute books. We note that on this issue, Scottish law was brought into line with that of England and Wales through the Criminal Justice (Scotland) Act 1980 (c 62) (UK), and the law of Northern Ireland was brought into line with that of the rest of the United Kingdom after the decision in *Dudgeon v The United Kingdom* [1981] ECHR 5. Interestingly, of the great colonial powers of Western Europe (*viz*, Britain, France, Germany, the Netherlands, Portugal and Spain), only Britain and France left the legacy of s 377 to its colonies (see Douglas E Sanders, "377 and the Unnatural Afterlife of British Colonialism in Asia" (2009) Asian Journal of Comparative Law vol 4, issue 1, article 7 ("Sanders") at p 1). This, it also bears mention, happened during a period in which parallel prohibitions were eliminated in the other major European colonial powers except Germany (see Sanders at p 15).

27 Although provisions equivalent to s 377 were enacted in both the Straits Settlements and British India, the same cannot be said of s 377A. While a provision similar to s 377A was never enacted in the IPC, such a provision

was enacted in the successor to the Straits Settlements Penal Code (*viz*, the Penal Code (Cap 20, 1936 Rev Ed) ("the 1936 Penal Code")) by s 3 of the Penal Code (Amendment) Ordinance 1938 (No 12 of 1938) ("the Penal Code (Amendment) Ordinance 1938"). During the second reading of the Penal Code (Amendment) Bill 1938 (*viz*, the Bill which was subsequently enacted as the Penal Code (Amendment) Ordinance 1938) in the Straits Settlements Legislative Council, Mr C G Howell ("Mr Howell"), the then Attorney-General, made the following comments on the decision to enact a provision *in pari materia* with s 377A (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 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 Gibralter where conditions are somewhat similar to our own. [emphasis added]

28 Prior to the enactment of s 377A of the 1936 Penal Code, the law making "gross indecency" between male homosexuals an offence only targeted public conduct, and Mr Howell's comment on how small the chances of detection were was probably stated in this context. As private acts were largely out of the law's reach, Mr Howell stated that the Legislature desired to "strengthen the law" (see *Proceedings of the Legislative Council of the Straits Settlements* (13 June 1938) at p B49) by extending it to reach the private domain. Section 377A of the 1936 Penal Code thus expressly provided that acts of "gross indecency", whether committed "in public or private", were

equally to be treated as offences. *It appears from this that the enactment of s 377A of the 1936 Penal Code was a calculated move to criminalise private sexual conduct between males.*

29 As Mr Howell referred to the position in Hong Kong, we will add a few brief words on the same. Hong Kong previously had a section equivalent to s 377A in the form of s 51 of the Offences Against the Person Ordinance (Cap 212, 1981 Rev Ed) (HK) ("s 51"). Section 51 was located in a chapter entitled "Abominable Offences". That chapter also included the offence of buggery under s 49, which, like the corresponding English provision, was gender neutral. The provisions on "Abominable Offences" were introduced into Hong Kong law in 1865 when the UK Offences Against the Person Act 1861 was adopted. In 1983, the Law Reform Commission of Hong Kong ("the Commission"), in its report dated 15 April 1983 entitled "Laws Governing Homosexual Conduct (Topic 2)", recommended that the law should not prohibit consensual sexual conduct between adults of the same sex in private (at para 11.50). The Commission defined "in private" as a situation where not more than two persons were present. These proposals were not implemented by the Hong Kong government. In 1990, with the imminent passage of the Hong Kong Bill of Rights Ordinance (Cap 383) (this was eventually passed in 1991), the Hong Kong Legislative Council held a debate and the Chief Secretary of Hong Kong noted that the laws against homosexual conduct would soon be "open to challenge under the [proposed] Bill of Rights" (see *Hong Kong Legislative Council, Official Report of Proceedings* (11 July, 1990)). Following the debate, the Crimes (Amendment) Ordinance (No 90 of 1991) (HK) was passed, decriminalising consensual sexual conduct between two homosexual adults, with adults defined as persons of 21 years and above. The relevant provisions of the Crimes Ordinance (Cap 200) (HK) ("the Hong

Kong Crimes Ordinance") were subsequently challenged in *Leung* (see below at [96]), and were found to be unconstitutional as they infringed the right to privacy and equality. The Hong Kong Court of Appeal found (at [51(2)] of *Leung*) that there was no justification as to "why the minimum age requirement for buggery [was] 21 whereas as far as sexual intercourse between a man and a woman [was] concerned, the age of consent [was] only 16".

30 Developments in the law have not been confined to England and Hong Kong. There have also been further developments in both Singapore and India with regard to the ambit of, respectively, s 377 and s 377A (where Singapore is concerned) and s 377 of the IPC (where India is concerned). In *Naz*, the High Court of Delhi noted (at [2]) that s 377 of the IPC was extremely broad as it criminalised all "sex other than heterosexual penile-vaginal [sex]". Further, consent was not a defence, and there were no distinctions made as to the age of the participants. Acts which amounted to "sexual perversity" (see *Calvin Francis v Orissa* 1992 (2) Crimes 455 and *Fazal Rab Choudhary v State of Bihar* AIR 1983 SC 323), including oral sex, anal sex and penetration of other orifices (see *Lohana Vasantlal Devchand and others v The State* AIR 1968 Guj 252), were caught by s 377 of the IPC. This would have included both *heterosexual and homosexual* oral sex and anal sex. We note that based on such an interpretation (as applied to the Singapore context), s 377A may be seen as a subset of s 377, covering a specific class of persons, *viz*, men who participate in sexual conduct with other men. In *Naz*, the court (at [132]) read down s 377 of the IPC to only govern "*non-consensual* penile non-vaginal sex and penile non-vaginal sex involving *minors*" [emphasis added]. We note that *Naz* has since been challenged through public interest

litigation before the Supreme Court of India, and at the time of writing this judgment, the appeal has yet to be determined.

31 In Singapore, the predecessor versions of s 377 and s 377A were absorbed unchanged into the Penal Code (Cap 119, 1955 Rev Ed). As alluded to above at [24], s 377 was subsequently repealed by the Penal Code (Amendment) Act 2007 (Act 51 of 2007) ("the 2007 Amendment Act"). During the parliamentary debates on 22 and 23 October 2007 ("the October 2007 parliamentary debates") regarding the Bill which later became the 2007 Amendment Act (*viz*, the Penal Code (Amendment) Bill 2007 (Bill 38 of 2007)), the then Senior Minister of State for Home Affairs, Assoc Prof Ho Peng Kee ("Assoc Prof Ho"), explained the decision to repeal s 377 as follows (see *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at cols 2198–2200):

> *Updating Penal Code provisions to reflect societal norms and values*
>
> …
>
> *Section 377*
>
> Next, Sir, we will be removing the use of the archaic term, "Carnal Intercourse Against the Order of Nature" from the [1985] Penal Code. By repealing section 377, any sexual act including oral and anal sex, between a ***consenting*** heterosexual couple, 16 years of age and above, ***will no longer be criminalised when done in private. As the [1985] Penal Code reflects social norms and values, deleting section 377 is the right thing to do as Singaporeans by and large do not find oral and anal sex between two consenting male and female [persons] in private offensive or unacceptable***. This is clear from the public reaction to the case of [*Annis bin Abdullah v Public Prosecutor* [2003] SGDC 290] in [2003] and confirmed through the feedback received in the course of this Penal Code review consultation.
>
> Sir, offences such as section 376 on sexual assault by penetration will be enacted to cover non-consensual oral and

> anal sex. Some of the acts that were previously covered within the scope of the existing section 377 will now be included within new sections 376 – Sexual assault by penetration, 376A – Sexual penetration of minor under 16, 376B – Commercial sex with minor[s] under 18, 376F – Procurement of sexual activity with person with mental disability, 376G – Incest and 377B – Sexual penetration with living animal. New offences will be introduced to clearly define unnatural sexual acts that will be criminalised, that is, bestiality (sexual acts with an animal) and necrophilia (sexual acts with a corpse).
>
> [emphasis added in bold italics]

32 It can thus be seen that the over-breadth of s 377, which criminalised consensual *heterosexual* oral and anal sex in private, was a key reason for its repeal. The gender neutrality of s 377 was affirmed in *Public Prosecutor v Kwan Kwong Weng* [1997] 1 SLR(R) 316 ("*Kwan Kwong Weng*"), which held (at [17]) that s 377 was an "all-embracing provision concerning 'unnatural offences'". The scope of s 377 was clarified by this court to cover more than just the offences of sodomy and bestiality (at [17]), and to include *consensual* fellatio between a man and a woman where fellatio did not lead to consensual sexual intercourse (at [31]). Where fellatio was a substitute for "natural sexual intercourse", the woman's consent to perform the act of fellatio "[could not] save it from being an offence under s 377" (at [32]). *Kwan Kwong Weng* was followed in the later case of *Annis bin Abdullah v Public Prosecutor* [2003] SGDC 290 ("*Annis bin Abdullah*"), which Assoc Prof Ho referred to in the October 2007 parliamentary debates (see above at [31]). In *Annis bin Abdullah*, the accused engaged in the act of fellatio with a female ("the complainant"). The fellatio did not lead to sexual intercourse. The complainant subsequently lodged a police report, and the accused was charged under s 377. He pleaded guilty, and was convicted and sentenced to two years' imprisonment, a sentence which was subsequently lowered to one year's imprisonment on appeal (see *Annis bin Abdullah v Public Prosecutor* [2004]

2 SLR(R) 93). The charge sheet and the statement of facts stated that the complainant was 16 years old at the time of the offence. While there was a side issue regarding the complainant's age (it was subsequently revealed that the charge sheet and the statement of facts were erroneous, and that the complainant was actually 15, rather than 16, years old at the time of the offence), this had no effect on the accused's conviction under s 377. The complainant's age would only have been relevant to the accused's conviction if the complainant's consent had been a defence to the charge under s 377 (the age of consent is 16 years of age). Pursuant to *Kwan Kwong Weng*, the District Court in *Annis bin Abdullah* held (at [2]) that consent was irrelevant to a charge under s 377 where fellatio was performed "as a substitute for natural sexual intercourse". Nonetheless, the fact that the complainant had voluntarily performed fellatio on the accused was published by the media, leading to an intense public debate (see, *eg*, Tanya Fong & Glenys Sim, "Oral sex ruling vexes many" *The Straits Times* (8 November 2003) at p H1). The tenor of the views publicly expressed was largely supportive of the repeal of s 377, and this did not go unnoticed by the Legislature, which consequentially undertook the updating of the 1985 Penal Code to "reflect societal norms and values" (see *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at col 2198). The archaic wording of s 377 was also found to be too vague to be effective, and more precise provisions were enacted to cover cases which were thought to be deserving of criminal sanction and which would formerly have been within the ambit of s 377 (see now ss 376A–376G and 377B of the current Penal Code).

33 As is well known, and as the facts of the present case attest, while s 377 was repealed by the 2007 Amendment Act, the then equivalent of s 377A (*viz*, s 377A of the 1985 Penal Code) was retained. While it was

uncontroversial that the 2007 Amendment Act was timely and necessary, the issue which attracted the most press and public debate was, ironically, a non-amendment, *viz*, the retention of the then equivalent of s 377A. With this overview of the relevant legislative history in place, we will proceed to examine the issues on appeal set out at [18] above.

Issue 1

34 As noted above, what has to be ascertained with regard to Issue 1 is whether Tan has 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*" [emphasis added]. This is a new issue raised on appeal by the AG that was not before the Judge. The crux of this issue is whether laws enacted prior to the commencement of the Constitution can also be voided under Art 4 (hereafter called "the Art 4 issue").

The AG's case

35 On behalf of the AG, Mr Abdullah contends that Art 4 *cannot* be relied on to invalidate s 377A. Given that s 377A was enacted (in the form of s 377A of the 1936 Penal Code) by the Penal Code (Amendment) Ordinance 1938 (see above at [27]), *ie*, well *before* the commencement of the Constitution on 9 August 1965, Mr Abdullah submits that Tan may not rely on Art 4 to have s 377A declared void. Mr Abdullah thus submits that the Application discloses no reasonable cause of action under Art 4 and must be struck out under O 18 r 19(1)(*a*).

36 According to Mr Abdullah, the proper constitutional provision under which a constitutional challenge against s 377A can be brought is Art 162 of the Constitution ("Art 162"). He emphasises that the material difference

between Art 4 and Art 162 is that *only* the former provides for the voiding of unconstitutional laws. While Mr Abdullah concedes that it is open to Tan to argue for the modification, *etc*, of s 377A under Art 162, he contends that it is incumbent on Tan to distinctly state the modification, *etc*, which he seeks in the Application itself as his standing depends on the precise modification, *etc*, sought. As Tan did not do so in the Application, Mr Abdullah argues that it is "fatally deficient, discloses no reasonable cause of action, and ought to be struck out".[1]

Tan's case

37 Before us, Mr Ravi stated that he did not intend to address the Art 4 issue as it was a new point which was raised only on appeal. As such, he confined himself to stating that Art 4 stressed the supremacy of the Constitution and that Art 162 should be read subject to it.

Our analysis and decision

38 As noted above at [34], the Art 4 issue is a new issue that the AG has raised on appeal. Under O 57 r 9A(4)(*b*) of the Rules, where a party intends to introduce on appeal a new point not taken in the court below, it is incumbent on that party to state this clearly in its Case. This was not done in the present appeal: the Respondent's Case filed by the AG does not clearly disclose the Art 4 issue as a new point. Be that as it may, O 57 r 13(4) of the Rules provides that even if the requirements of O 57 r 9A are not met, this court may make "any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the

[1] See the Respondent's Case filed on 27 July 2011 ("the Respondent's Case") at p 13, para 27.

parties". An appellate court should only hear a new point on appeal where it is competent *and* where it is "expedient, in the interests of justice" to do so (see *Connecticut Fire Insurance Company v Kavanagh* [1982] AC 473 at 480 (cited in *Feoso (Singapore) Pte Ltd v Faith Maritime Co Ltd* [2003] 3 SLR(R) 556 ("*Feoso*") at [28])). One of the factors going to an appellate court's competency to hear a new point on appeal is whether the new point can be disposed of without deciding questions of fact (see *Feoso* at [28]). If the new point cannot be disposed of without deciding questions of fact, the appellate court will be in a less advantageous position to determine that point than the court below. In the present case, the Art 4 issue is purely a question of law, and given that it is a novel issue of constitutional interpretation, we find that it is expedient and in the interests of justice for us to proceed to determine the issue.

39 On our understanding, Mr Abdullah's submissions on the Art 4 issue amount to a claim that Art 4 and Art 162 create exclusive parallel regimes under which:

(a) laws enacted *after the commencement of the Constitution*, and *only* such laws, may be voided for incompatibility with the Constitution (pursuant to Art 4); and

(b) *all* laws shall be construed to bring them into conformity with the Constitution, regardless of when they come into force (pursuant to Art 162).

40 To decide if this is indeed the correct interpretation of Art 4 and Art 162, we will examine the respective scopes of these two Articles and the relationship between them.

The relevant constitutional provisions

41 Article 4 provides as follows:

> **Supremacy of Constitution**
>
> **4.** *This Constitution is the supreme law* of the Republic of Singapore and 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.
>
> [emphasis added]

The date of the "commencement of this Constitution" is defined in Art 2(1) of the Constitution ("Art 2(1)") as 9 August 1965.

42 Article 162 provides as follows:

> **Existing laws**
>
> **162.** Subject to this Article, *all existing laws shall continue in force* on and after the commencement of this Constitution and all laws which have not been brought into force by the date of the commencement of this Constitution may, subject as aforesaid, be brought into force on or after its commencement, but all such laws shall, subject to this Article, be *construed* as from the commencement of this Constitution with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution.
>
> [emphasis added]

For the purposes of Art 162, the term "existing law" is defined in Art 2(1) as "any law having effect as part of the law of Singapore immediately before the commencement of this Constitution", and the term "law" is defined (likewise in Art 2(1)) as including, *inter alia*, "written law and … the common law in so far as it is in operation in Singapore". In the context of Art 162, existing law thus includes the common law that was in operation in Singapore prior to the

commencement of the Constitution (see *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 1 SLR(R) 791 at [57]).

The position in Malaysia with regard to the Art 4 issue

43 Certain provisions of the Federal Constitution of Malaysia 1963 ("the Constitution of Malaysia", which expression will also include, where appropriate, the relevant predecessor version of the Federal Constitution of Malaysia 1963), including the then equivalent of Art 4 and Art 162, continued to be in force in Singapore post-independence pursuant to s 6 of the Republic of Singapore Independence Act 1965 (Act 9 of 1965), which provided as follows:

> **Continuance in force of provisions of the Constitution of Malaysia and exercise of powers thereunder**
>
> **6.**—(1) The provisions of the Constitution of Malaysia, other than those set out in subsection (3), shall continue in force in Singapore subject to such modifications, adaptations and qualifications and exceptions as may be necessary to bring them into conformity with the independent status of Singapore upon separation from Malaysia.
>
> (2) The provisions of the Constitution of Malaysia referred to in subsection (1) may in their application to Singapore be amended by the Legislature.
>
> …
>
> (5) In this section, "amendment" includes addition and repeal.

44 The following table shows a comparison of the relevant Articles of the Constitution of Malaysia with Art 4 and Art 162 of the Constitution of Singapore:

Article number	The Constitution of Singapore	The Constitution of Malaysia
4	**4.** This Constitution is the supreme law of the Republic of Singapore and 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.	**4.** (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day [*viz*, 31 August 1957] which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void. …
162	**162.** Subject to this Article, all existing laws shall continue in force on and after the commencement of this Constitution and all laws which have not been brought into force by the date of the commencement of this Constitution may, subject as aforesaid, be brought into force on or after its commencement, but all such laws shall, subject to this Article, be construed as from the commencement of this Constitution with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution.	**162.** (1) Subject to the following provisions of this Article and Article 163, the existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modifications as may be made therein under this Article and subject to any amendments made by federal or State law. … (6) Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution. (7) In this Article "modification" includes amendment, adaptation and repeal.

45 Article 162 of the Constitution of Malaysia provides for two avenues to deal with existing laws that are unconstitutional. The first, provided for by Art 162(1), is legislative – such laws may be repealed by legislation. The second, provided for by Art 162(6), is judicial – such laws may be applied by the courts with the necessary modifications to bring them into accord with the Constitution of Malaysia.

46 We note that there are four differences between the wording of Art 162 of the Constitution of Singapore and its Malaysian counterpart. The first difference is relatively minor, namely, that Art 162 of the Constitution of Singapore only expressly provides for judicial interpretation and makes no mention of legislative repeal. We find this difference to be minor as it is trite that the Singapore legislature has the power to repeal or modify any law (Arts 38 and 58 of the Constitution of Singapore vest the legislative power in Singapore's legislature), and this must apply with particular force where the law in question is unconstitutional. The second difference is that Art 162 of the Constitution of Singapore provides that all laws shall be *construed* with the necessary modifications, *etc*, to bring them into conformity with the Constitution, whereas Art 162(6) of the Constitution of Malaysia speaks instead of *applying* existing laws with the necessary modifications. As both the construction and the application of the law involve a process of judicial interpretation, we do not find this difference to be material. The third difference is that Art 162 of the Constitution of Singapore provides that the courts *shall* construe all laws with the necessary modifications, *etc*, to bring them into conformity with the Constitution, whereas Art 162(6) of the Constitution of Malaysia provides that the courts *may* apply existing laws with the necessary modifications. This difference may be more apparent than real as the word "may" was interpreted by the Privy Council in *B Surinder Singh*

Kanda v The Government of the Federation of Malaya [1962] MLJ 169 ("*Surinder Singh*") (at 171) to mean "must", which aligns the positions under the two Constitutions in this respect. The fourth difference is that the Singapore courts' power of modification, *etc*, under Art 162 of the Constitution of Singapore applies to *all* laws, and is thus broader than the Malaysian courts' corresponding power under Art 162(6) of the Constitution of Malaysia, which is expressly limited to "*existing* law" [emphasis added]. For our purposes, the relevance of this fourth difference is that it shows that under the Constitution of Singapore, there is no stark dichotomy between the Singapore courts' power to deal with, respectively, unconstitutional *existing* laws and unconstitutional laws enacted *after* the commencement of the Constitution. Both types of laws fall under Art 162 and can be construed with the appropriate modifications, *etc*, to bring them into conformity with the Constitution. The question that we now have to decide is whether both types of laws also fall under Art 4 such that they can be held to be void to the extent of their inconsistency with the Constitution.

47 While this is the first time that the Singapore courts have had to confront the Art 4 issue, it has previously arisen for decision in Malaysia. We will thus begin by considering the line of Malaysian cases which have interpreted the equivalent provisions of Art 4 and Art 162 in the Constitution of Malaysia. While we have noted certain differences between the relevant constitutional provisions of Singapore and Malaysia (see above at [46]), we find that these differences do not detract from the Malaysian cases as a helpful reference point. These cases were not cited to us by the AG, perhaps because they do not speak with one voice. Upon a close scrutiny, we find that the tenor of these cases *does not* go so far as to support the position contended for by the AG. We now proceed to analyse these cases.

48 In *Surinder Singh*, the applicant, a police inspector, challenged his dismissal as being unconstitutional for a failure to adhere to the constitutionally-stipulated procedure. For our purposes, the relevant issue in *Surinder Singh* arose from two sets of legislation prescribing conflicting procedures for the dismissal of police officers. There is a need to go into a fair level of detail to appreciate the import of the case. The overarching framework for the dismissal of members of the police service was stipulated in Art 135(1) of the Constitution of Malaysia, which provided that such dismissal could only be carried out by a person who had the power at that time to also appoint officers of the same rank as that of the officer whom he sought to dismiss. In other words, the power of appointment and the power of dismissal went hand in hand. The Privy Council thus had to determine who had the authority to appoint persons of the applicant's rank. Here is where we come to the two conflicting sets of legislation. The first set consisted of ss 9(1) and 45(1) of the Police Ordinance 1952 (M'sia) ("the Police Ordinance 1952"), an existing law which pre-dated the Constitution of Malaysia. Section 9(1) of the Police Ordinance 1952 provided that the Commissioner of Police could appoint superior police officers, including police inspectors, and s 45(1) provided that the Commissioner of Police could dismiss (*inter alia*) police inspectors. The second set of provisions was constitutional, *viz*, Arts 140(1) and 144(1) of the Constitution of Malaysia. Article 140(1) set up the Police Service Commission, and Art 144(1) provided that it had the duty to appoint members of the police service. As the applicant had been dismissed by the Commissioner of Police rather than the Police Service Commission, the procedure for dismissal had failed to comply with the constitutional provisions, and this was the source of the applicant's complaint. However, his dismissal was in line with the existing law (*viz*, s 45(1) of the Police Ordinance 1952). Given that Art 144(1) of the Constitution of Malaysia

expressly provided that it was "*[s]ubject to the provisions of any existing law*" [emphasis added], the respondent in *Surinder Singh* argued that the Constitution of Malaysia was subject to the existing law, and not *vice versa*. Therefore, it was sufficient that the applicant's dismissal had been in line with the existing law, even though this inevitably led to a failure to comply with the conflicting constitutional provisions.

49 This argument was rejected by the Privy Council. Lord Denning, who delivered the judgment of the Privy Council in *Surinder Singh*, unequivocally upheld the supremacy of the Constitution of Malaysia, stating (at 171):

> In a conflict of this kind between the existing law and the Constitution [*viz*, the Constitution of Malaysia], *the Constitution must prevail*. [emphasis added]

Therefore, to give effect to the Constitution of Malaysia, the court's power under Art 162(6) was exercised to apply the existing law with such modifications as were necessary to bring it into accord with the Constitution of Malaysia. As noted earlier at [46] above, the Privy Council stated (at 171) that modification of unconstitutional law "must" be carried out. On the facts of the case, the necessary modification applied was that since Merdeka Day, it was the Police Service Commission, and not the Commissioner of Police, that had the power to appoint members of the police service. As the applicant had been dismissed by the Commissioner of Police, his dismissal was void.

50 We observe that the Privy Council's "modification" to the existing law in *Surinder Singh* involved a substitution *in toto* of the words "Police Service Commission" in place of the words "Commissioner of Police". This demonstrates a broad understanding of the court's power of modification. The breadth of the court's power of modification meant that the Privy Council did

not have to consider a situation where modification of an existing law was impossible, and whether, in such a case, that law could be voided under Art 4 of the Constitution of Malaysia, an argument which was raised in the later case of *Assa Singh v Mentri Besar, Johore* [1969] 2 MLJ 30 ("*Assa Singh*").

51 *Assa Singh* also involved the alleged unconstitutionality of an existing law. The applicant in that case had argued that modification of the relevant law under Art 162(6) of the Constitution of Malaysia was impossible because it would involve a complete re-writing of that law. While the Federal Court of Malaysia agreed with the applicant that the existing law in question was inconsistent with a constitutional provision, the court unanimously found that modification was possible. The relevant constitutional provisions were thus read into the existing law to bring it into line with the Constitution of Malaysia. Therefore, the court's comments on the Art 4 issue were *obiter*. Ong Hock Thye CJ (Malaya) opined (at 35D) that since Art 4 of the Constitution of Malaysia only spoke of laws passed after Merdeka Day, "the validity or otherwise of the pre-Merdeka [law] w[ould] have to be considered solely by reference to article 162". Ong CJ went on to affirm the distinction between Arts 4 and 162 of the Constitution of Malaysia, namely, that Art 162 did not provide for the voiding of unconstitutional laws (at 35E, quoting from the submissions of the respondent in *Assa Singh*):

> As to post-Merdeka law, the Constitution [*viz*, the Constitution of Malaysia] is supreme and if any of that law is inconsistent with the provisions of the Constitution, to the extent of such inconsistency that law shall be void – article 4(1). But as regards pre-Merdeka law, such law shall continue to be in force until repealed; in the meantime its continuity and enforceability is subject to modification, firstly, by a Legislative Act or Enactment or, secondly, by process of judicial interpretation, the executive order of the Yang di-Pertuan Agong to modify the same having expired – article 162(1) and (6). It must be noted that article 162 does not use the expression that pre-Merdeka law shall be void to the extent of

> the inconsistency but, instead, it expressly states that the law shall continue to be in force.

52 In so far as Ong CJ's comments relate to the differences between Arts 4 and 162 of the Constitution of Malaysia, and how Art 162 does not *itself* provide for the voiding of unconstitutional laws, we share his views. We note, however, that while Ong CJ said that unconstitutional existing laws would continue in force until and unless they were modified by the Legislature (under Art 162(1)) or by the Judiciary (under Art 162(6)) where a constitutional challenge was brought, he did not discuss the extent of the court's powers when faced with an unconstitutional existing law which *could not be modified*.

53 Suffian FJ echoed Ong CJ by stating (at 40A of *Assa Singh*) that any existing law prior to Merdeka Day would continue in force on and after Merdeka Day "even if it [was] inconsistent with the Constitution [of Malaysia]". He referred to *Surinder Singh* in support of this proposition, stating that the relevant legislation in *Surinder Singh* had openly conflicted with the Constitution of Malaysia, and yet, it had not been held to be void. As noted above, the reason why the relevant existing law in *Surinder Singh* was not held to be void was that this was not necessary after the modification was effected. As such, we understand Suffian FJ to be saying that existing laws which are inconsistent with the Constitution of Malaysia will remain in force *until a constitutional challenge is mounted against them*. Once such a challenge is mounted, if the law is found to be unconstitutional, the courts must then remedy the unconstitutionality by making the necessary modifications (see *Surinder Singh* at 171). Further, given that *Surinder Singh* held that an action taken under an unconstitutional law was void, Suffian FJ cannot be understood as saying that actions taken under unconstitutional laws

would be allowed to have effect. We also note that Raja Azlan Shah J stated in *Assa Singh* that while existing laws were not allowed to stand in the way of the exercise of fundamental rights, such inconsistent laws "[were] not wiped off the statute book" (at 46C) as to do so "would be to give fundamental rights a retrospective effect which the law [held] they [had] not" (likewise at 46C). Such inconsistent laws would instead be unenforceable. We respectfully diverge from this view as we find that the modification or voiding of an existing law which impinges on constitutionally-protected fundamental rights does not give such rights a retrospective effect so long as the action to modify or void that law is taken after the Constitution in question comes into effect. Once a Constitution comes into effect, the protection of the fundamental rights guaranteed by that Constitution also comes into effect. There is nothing "retrospective" about this.

54 *Assa Singh* was applied in the later case of *Jamaluddin bin Mohd Radzi & Ors v Sivakumar a/l Varatharaju Naidu (claimed as Yang Dipertua Dewan Negeri Perak Darul Ridzuan), Election Commission, intervener* [2009] 4 MLJ 593 ("*Jamaluddin*"). *Jamaluddin* also involved an existing law, *viz*, a provision of the Constitution of the Malaysian state of Perak. The Federal Court of Malaysia referred to Ong CJ's holdings in *Assa Singh* (see above at [51]) in support of the finding (at [8] of *Jamaluddin*) that "[p]re-Merdeka laws [could] never be declared as void". With respect, we find this conclusion rather puzzling, given that Ong CJ did *not* say in *Assa Singh* that pre-Merdeka laws could never be declared to be void. What Ong CJ appeared to say was that pre-Merdeka laws could not be voided *under the regime of Art 162 of the Constitution of Malaysia*. Further, there is difficulty reconciling the court's stance in *Jamaluddin* with the unequivocal view expressed by the Privy Council in *Surinder Singh* (see above at [49]).

55 In our view, apart from *Jamaluddin*, the Malaysian cases cannot be taken as support for the AG's contention that existing laws can never be voided under Art 4. As we explained in the preceding paragraph, it appears that *Jamaluddin* is itself out of kilter with the approach adopted in earlier cases such as *Surinder Singh* and *Assa Singh*. We align ourselves with the latter two cases, and find that while those two cases hold that modification of unconstitutional existing laws must be carried out, this is only in so far as modification is possible. *Surinder Singh* and *Assa Singh* leave open the position which the courts should take where modification is impossible, *viz*, whether the courts can then void the unconstitutional existing law under Art 4. It is this question that we must now turn to, looking at the Constitution of Singapore. Before we do so, we note that our views correspond with those of the authors of the *Report of the Federation of Malaya Constitutional Commission* (11 February 1957) (Chairman: Lord Reid) ("the Reid Report") and also with those of leading constitutional experts who have studied the Constitution of Malaysia. The Reid Report at para 161 recommended the inclusion of fundamental rights in the Constitution of Malaysia as only a Constitution, as the supreme law, was able to guarantee fundamental rights:

> The guarantee afforded by the Constitution [of Malaysia] *is the supremacy of the law* and the power and duty of the Courts to enforce these rights and to annul any attempt to subvert any of them whether by legislative or administrative action or otherwise. [emphasis added]

56 The same point was noted by Datuk Ahmad Ibrahim (see "Interpreting the Constitution: Some General Principles" in *The Constitution of Malaysia, Further Perspectives and Developments: Essays in honour of Tun Mohamed Suffian* (F A Trindade & H P Lee eds) (Oxford University Press, 1986) at p 19), who commented that the Reid Report took the view that fundamental rights must be guaranteed by the Constitution of Malaysia as the guarantee

afforded by that Constitution was the supremacy of the law. In the commentary on Art 162 of the Constitution of Malaysia in Dato K C Vohrah, Philip T N Koh & Peter S W Ling, *Sheridan & Groves: The Constitution of Malaysia* (Malayan Law Journal, 5th Ed, 2004), *Surinder Singh* is cited (at p 708) for the proposition that "inconsistent existing laws must give way to the Constitution [of Malaysia] even where an Article or the Constitution [of Malaysia] was expressed to be 'subject to existing laws'". R H Hickling, *Malaysian Public Law* (Pelanduk Publications, 1997) at p 50 also refers to *Surinder Singh* as upholding the supremacy of the Constitution of Malaysia. The strongest statement of support for our view comes from Harry E Groves, *The Constitution of Malaysia* (Malaysia Publications, 1964), who wrote that the Constitution of Malaysia continued existing laws "provided such laws were not inconsistent with [that] Constitution" (at p 36), and that existing laws which were inconsistent with the Constitution of Malaysia and which "[had] not been modified in one of the available ways *must be held void*" [emphasis added] (at p 37, citing *Surinder Singh*).

The position in Singapore with regard to the Art 4 issue

57 As mentioned earlier (see above at [47]), this is the first time that the Art 4 issue has arisen for decision by our courts. While our courts have modified existing laws to bring them into conformity with the Constitution pursuant to Art 162, thus far, there have not been any decisions on whether existing laws can be voided under Art 4.

58 This is an important issue as Art 162 may not provide an adequate remedy in every case. While Art 162 imposes a duty on the courts to construe modifications, *etc*, into unconstitutional existing laws, it is clear that there are *limits* to construction. It is a trite principle of statutory construction that the

interpretation adopted cannot be inconsistent with the express statutory wording. The same goes for the construction of constitutional provisions. In our view, Art 162 only directs that all laws be read in conformity with the Constitution *as far as this is possible*. Even so, it will be remembered that the Malaysian courts' power of "modification" under Art 162(6) of the Constitution of Malaysia was given a wide scope in *Surinder Singh* (see above at [50]). It seems to us that a similarly broad reading of the power of modification under Art 162 should likewise be adopted in Singapore, given that the distinction between "apply" in Art 162(6) of the Constitution of Malaysia and "construed" in Art 162 of the Constitution of Singapore is not a material one (see above at [46]). Further, there are hints in our case law that a similar breadth might be accorded to Art 162. For instance, in *Butterworth & Co (Publishers) Ltd and others v Ng Sui Nam* [1985–1986] SLR(R) 33, an existing statute was construed so as to be in line with the Constitution even though this "[led] to a somewhat bizarre result" (at [25]). As such, it may well be an exceptional case where the necessary modifications, *etc*, cannot be effected to bring an unconstitutional law into line with the Constitution.

59 In the event that construing a modification into an unconstitutional law is impossible, the supremacy of the Constitution must continue to be upheld, and the offending legislation will be struck down under Art 162 read harmoniously with Art 4. *To the extent that any law does not conform to and cannot be reconciled with the Constitution through a process of construction, it is void.* Article 4 provides for the unconstitutional portion of the law to be severed while retaining the remaining part of the law in the statute books. In other words, the court's power to void laws for inconsistency with the Constitution under Art 4 *can* be interpreted to include the power to void laws which *pre-date* the Constitution.

60 In our view, this interpretation of Art 4 is consistent with Art 162. A purposive approach towards the interpretation of these two constitutional provisions should be adopted pursuant to s 9A read with s 2 of the Interpretation Act (Cap 1, 2002 Rev Ed). Section 9A(1) provides that an interpretation which promotes "the purpose or object underlying the written law … shall be preferred to an interpretation that would not promote that purpose or object", and s 2 includes the Constitution in the definition of "written law". Article 4 provides for one of the most important features of the Constitution, *viz*, that it is the supreme law of Singapore. The supremacy of the Constitution is necessary for the purposes of the Constitution to be protected as it ensures that the institutions created by the Constitution are governed by the rule of law, and that the fundamental liberties under the Constitution are guaranteed. Therefore, we find that the supremacy of the Constitution cannot be dependent on when a law was enacted: constitutional supremacy must apply equally both to laws which pre-date and laws which post-date the enactment of the Constitution (see *Surinder Singh* above at [49]).

61 On our understanding, Art 4 and Art 162 *share this overarching aim of upholding the supremacy of the Constitution*. Nonetheless, the two Articles *have different, although not conflicting, means of doing so*. As stated above (at [52]), we agree with Ong CJ's observation in *Assa Singh* that there is a difference between the two Articles, and that Art 162 does not itself provide for the voiding of unconstitutional laws. Article 162 is clearly a transitional provision which specifically deals with existing laws (in the Constitution, Art 162 is found under Part XIV, which is headed "Transitional Provisions"). The purpose of Art 162 was to expressly provide for the continuity of existing laws in order to: (a) prevent lacunas in the law from arising as a result of the doctrine of implied repeal; and (b) eliminate the need to re-enact the entire

corpus of existing laws when Singapore became an independent republic. At the time when the Constitution of Malaysia and the Constitution of Singapore were respectively enacted, the two States already each had a system of law in place: an existing corpus of legislation as well as the common law. While the respective Constitutions vested the legislative power of the States in their respective newly-constituted Legislatures, these new legislative organs could not, within a reasonable period of time, provide the respective States with the complete framework of law necessary for the functioning of the States. Therefore, it was necessary to provide that the existing laws remained in force, and Art 162 was enacted in Singapore for this purpose. In addition to preserving existing laws, Art 162 also provides for the supremacy of the Constitution to be upheld by stipulating that all laws (including existing laws) shall be construed in conformity with the Constitution. Given that Art 162 is concerned with preserving existing laws while keeping them in line with the Constitution through implementing the necessary modifications, *etc*, there is no need for it to also provide for the power to *void* unconstitutional existing laws as this is not within the ambit of its subject matter. The fact that Art 162 does not itself provide for the voiding of unconstitutional existing law does not mean that such law cannot be voided under another provision, *viz*, Art 4.

62 To hold otherwise, in accordance with the AG's argument, means that when the limits of statutory construction are reached, a law will survive despite being in conflict with the Constitution. While this appears to have been the view in *Assa Singh*, as we have explained (see above at [52]–[53]), the unconstitutional law will only survive *as long as* the Legislature and/or the Judiciary do not take measures to bring the law into line with the Constitution. We add that we find it counter-intuitive that the Constitution would itself provide (via Art 162) that unconstitutional laws which have existed in our

statute books since before 9 August 1965 – and which have infringed constitutional rights since that time – are preserved in our statute books. This cannot be the case. We thus find that the mere accident of vintage should not place an unconstitutional law which pre-dates the Constitution beyond the potency of Art 4.

63 Additional support for our view is found in the *Report of the Constitutional Commission* (27 August 1966) (Chairman: Wee Chong Jin CJ) ("the Wee Report") and the parliamentary debates on the Wee Report. The Wee Report recommended at para 73 that a constitutional supremacy clause should be included in the Constitution:

> If the recommendations that we have made in the earlier Chapters of this Report are to be meaningful and to be effective safeguards against the abuse of majority power, then it is necessary that the Constitution must also contain a provision which requires more than ordinary legislation for altering any of its provisions. We also think it is desirable, *for the avoidance of doubts as to the status of the Constitution as the supreme law*, to spell out in the Constitution itself that it is the supreme law of Singapore and that if *any other law is inconsistent with it, that other law shall, to the extent of the inconsistency, be void*. [emphasis added]

The supremacy clause is found today in Art 4. As can be seen, the reason for the inclusion of the supremacy clause was to ensure that the Constitution managed to perform its functions of, in the words of para 73 of the Wee Report, providing "meaningful" protection of fundamental rights (the subject matter of the recommendations in the Wee Report) and ensuring "effective safeguards against the abuse of majority power". This accords with our view (see above at [60]) that the supremacy of the Constitution is necessary for the purposes of the Constitution to be protected. We note that when the Wee Report was debated in Parliament, one Member of Parliament, Mr Ho Kah Leong, expressed his understanding of the report on this issue in the following

manner (see *Singapore Parliamentary Debates, Official Report* (15 March 1967) vol 25 at col 1305):

> The [Wee Report] has also advanced constructive recommendations such as those relating to provisions which will ensure the Constitution as the supreme law in the Republic of Singapore, and *any other law* which contradicts the Constitution will be invalid. [emphasis added]

In our view, "any other law" is clearly broad enough to cover existing laws. While there was no discussion in the parliamentary debate on the Wee Report as to whether unconstitutional existing laws could be declared invalid, we note that there were no proclamations to the contrary. If existing laws had been thought to be an exception to the supremacy of the Constitution, one would expect such an important point to have been debated specifically in Parliament, particularly when the debate on the Wee Report spanned four days (from 14 to 17 March 1967). It is also worth noting that although there was debate on the *method* of entrenchment that should be employed in the Constitution, there was unanimity over the need for entrenchment. The reason for the entrenchment of constitutional provisions was stated by the then Minister for Law and National Development, Mr E W Barker, as follows: "*the Constitution is to be the supreme law of the land and its status as such is to be protected*" [emphasis added] (see *Singapore Parliamentary Debates, Official Report* (17 March 1967) vol 25 at cols 1438–1439).

64 We ought to add that *even if* the AG is right such that Art 162 alone applies to any issue relating to the constitutionality of s 377A on the basis that it is an existing law, it is plain that the AG's objection can be met by a simple amendment to the Application. The AG's case is simply that since the Application makes no express reference to the modification, *etc*, sought under Art 162, it should be struck out. We see absolutely no merit in this argument

as a ground for striking out the Application as it is an arid procedural objection. It is trite that a court will not strike out proceedings if they can be procedurally remedied by an amendment (see above at [21]). In this case, even assuming that Art 162 is the only relevant route by which the constitutionality of s 377A can be challenged, a court would readily give Tan leave to include a prayer based on Art 162 in the Application were it necessary to do so. In short, the AG's objection on this aspect of the Application is readily curable procedurally and does not address the pith and substance of the matter. Therefore, even though we find that Tan may rely on Art 4, it would not matter even if we had agreed with the AG on the Art 4 issue.

Issue 2

65 We turn now to Issue 2, *viz*, what test for *locus standi* is to be applied in cases involving constitutional rights. The determination of the applicable test for *locus standi* in this specific context is logically a prior issue to the determination of whether that test has been satisfied on the facts of this case (which is Issue 3).

Tan's case

66 Mr Ravi submits that the *Karaha Bodas* test for standing is satisfied on the facts of the present case. In the alternative, he submits that even if the *Karaha Bodas* test is not satisfied, Tan still has standing by way of an exception to the *Karaha Bodas* test. For the purposes of Issue 2, we are interested in whether this alternative submission, which is set out in the next paragraph, is open to Mr Ravi.

67 Mr Ravi interprets *Eng Foong Ho and others v Attorney-General* [2009] 2 SLR(R) 542 ("*Eng Foong Ho*") as laying down the proposition that a

lower threshold of standing is applicable in constitutional cases by way of an exception to the *Karaha Bodas* test. He even goes so far as to contend that Tan need not have suffered a violation of his personal rights in order to have standing. Further or in the alternative, he submits that applicants in constitutional cases who wish to challenge the constitutionality of a particular law do not need to be prosecuted under that law before they are found to have standing, citing *Colin Chan* and a number of Commonwealth cases in support of his submission.

The AG's case

68 Mr Abdullah argues that the test for *locus standi* in constitutional challenges is the *Karaha Bodas* test. He contends that Tan's submission of a lower threshold rests on a misapprehension of *Eng Foong Ho* and *Colin Chan*, and that there was no indication in *Colin Chan* that a different test of standing was being applied. He argues that far from obviating the requirement of a violation of personal rights or a personal injury, *Colin Chan* instead stands for the proposition that the threshold of "sufficient interest" must be met even in constitutional challenges. Further, Mr Abdullah argues that the criterion of "sufficient interest" stated at [14] of *Colin Chan* is a general concept which the court will need to apply to the specific facts of each case, and it thus cannot be said that "sufficient interest" is necessarily a more lenient standard than that set out in *Karaha Bodas*.

Our analysis and decision

69 In *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 at 27, the majority of the Malaysian Supreme Court ruled that to possess *locus standi*, an applicant must show that he had a private right which had been infringed. If a

public right was involved, the applicant must show that he had suffered special damage as a result of the public act being challenged and that he had a genuine private interest to protect or further. It is not disputed that in the present appeal, the rights concerned are not public rights. To clarify the terminology used here, a public right is one which is held and vindicated by public authorities, whereas a private right is one which is held and vindicated by a private individual. Therefore, despite being a matter of public law, a constitutional right is a private right as it is held and can be vindicated by individuals on their own behalf.

70 The crux of Issue 2 is whether the test for *locus standi* in applications involving constitutional rights is different from, and less strict than, the *Karaha Bodas* test. This is an enormously significant matter as the courts have a heavy responsibility to sieve the wheat of merit from the chaff of frivolity. That is to say, while access to justice must not be impeded, the court's processes must not be allowed to be abused by those with improper collateral motives.

The Karaha Bodas *test*

71 In *Karaha Bodas*, which involved two appeals, the applicant sought a declaration under the then equivalent of O 15 r 16 of the Rules (*viz*, O 15 r 16 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed)) that a monetary debt be held by the respondent in the second appeal on trust for the respondent in the first appeal, and an order that the former repay the said sum to the latter in Hong Kong. It can be seen that the private rights involved in *Karaha Bodas* were not constitutional rights.

72 The *Karaha Bodas* test provides that the following elements must be met in order for an applicant to possess *locus standi* to bring an action for a declaration under O 15 r 16 of the Rules ("O 15 r 16"):

(a) the applicant must have a "real interest" in bringing the action (at [19]);

(b) there must be a "real controversy" between the parties to the action for the court to resolve (at [19]); and

(c) the declaration must relate to a right which is personal to the applicant and which is enforceable against an adverse party to the litigation (at [15], [16] and [25]).

73 The relationship between *locus standi* and the "real controversy" requirement will be examined under Issue 4, along with the issue of whether there is a real controversy to be adjudicated on the facts of this case. For the purposes of Issue 2 and Issue 3, we will focus on the "real interest" requirement and the requirement that there must be a violation of a right personal to the applicant. In respect of the latter requirement, it should be noted that by "violation", we mean an actual or arguable violation, and the words "violation", "violate" and their derivatives as used hereafter should be understood in that light except where there is express indication to the contrary.

74 We will now consider whether *Eng Foong Ho* and *Colin Chan* (cases involving alleged violations of constitutional rights) accepted and applied the *Karaha Bodas* test, or whether they set a lower threshold for constitutional challenges.

Whether the test for standing in the context of constitutional rights differs from the Karaha Bodas *test*

75 As stated above at [73], at present, we are concerned with the requirement of "real interest" and that of a violation of a right personal to the applicant. We turn to consider these *seriatim*, beginning with the latter.

(1) Whether a violation of a right personal to the applicant is a necessary requirement in constitutional cases

76 In *Eng Foong Ho*, this court held as follows (at [18]):

> With respect to the issue of *locus standi*, the respondents have also argued that because the [applicants] have proceeded by way of O 15 r 16 and not O 53 r 1 of the Rules of Court [*viz*, the Rules as defined at [2] above], they must satisfy a stricter test for *locus standi* as decided by this court in *Karaha Bodas* … The argument seems to be that a higher standard of *locus standi* is required for an application under O 15 r 16 than that under O 53 r 1. This argument has no merit whatsoever. *Karaha Bodas* was not concerned with the pursuit of constitutional rights. In our view, it does not matter what procedure the [applicants] have used. The substantive elements of *locus standi* cannot change in the context of the constitutional protection of fundamental rights.

Tan's case is that the above passage lays down the proposition that constitutional challenges form an exception to the *Karaha Bodas* test. Against this, the AG contends that the only issue which the court was addressing in the above passage was whether a different standard of *locus standi* applied to cases brought under O 15 r 16, as opposed to cases brought under O 53 r 1 of the Rules ("O 53 r 1"). On this issue, we accept the AG's reading of *Eng Foong Ho*, *ie*, the intent of the excerpt above was to unify the threshold of *locus standi* for cases brought under O 15 r 16 and cases brought under O 53 r 1.

77 We find that *Eng Foong Ho* does *not* support Tan's case that applicants in constitutional cases need not demonstrate a violation of their personal rights in order to be granted standing. In *Eng Foong Ho*, the applicants were granted standing as they had demonstrated that their personal rights had arguably been violated. The applicants in that case were devotees of a temple ("the Temple") who were seeking a declaration under O 15 r 16 that the compulsory acquisition of the property on which the Temple stood ("the Temple Property") violated Art 12. The Temple was subject to a trust for religious purposes ("the Trust"), and the trustees, who were the legal owners of the Temple, were not parties to the case. Although the applicants had no proprietary interest in the Temple Property, they were members of San Jiao Sheng Tang Buddhist Association ("the Buddhist Association"), which was the beneficiary of the Trust. It was held (at [17]) that the applicants' *membership* of the Buddhist Association gave them standing to pursue the action for declaratory relief. In our view, although the applicants' membership of the Buddhist Association was crucial to the finding that they had *locus standi*, such membership did not go to the *existence* of the applicants' Art 12 rights, but rather, went to showing the arguable *violation* of such rights (see below at [81]). On the facts of *Eng Foong Ho*, the applicants had a beneficial, although not a legal, right to the Temple Property. It thus cannot be said that the court in *Eng Foong Ho* obviated the requirement that declaratory actions can only be brought in respect of a violation of an applicant's personal rights.

78 Therefore, in so far as Mr Ravi contends that applicants in constitutional cases need not demonstrate a violation of or an injury to their personal rights in order to be granted standing, this argument must be rejected. No case in Singapore, including *Colin Chan*, has accepted such a far-reaching proposition. In fact, *Colin Chan* implicitly accepted that a violation of

personal rights was necessary to establish standing, and focused on the determination of *what* constituted such a violation (at [13]–[14] *per* M Karthigesu JA):

> 13 … If a constitutional guarantee is to mean anything, it must mean that any citizen can complain to the courts if there is a violation of it. The fact that the violation would also affect every other citizen should not detract from a citizen's interest in seeing that his constitutional rights are not violated. *A citizen should not have to wait until he is prosecuted before he may assert his constitutional rights.*
>
> 14 There is thus no need for the [applicants] to show that they are office holders in [the International Bible Students Association ("the IBSA")] or members thereof. Their right to challenge Order 405/1994 [which prohibited the importation, sale and distribution of the IBSA's publications] arises not from membership of any society. *Their right arises from every citizen's right to profess, practise and propagate his religious beliefs*. If there was a breach of Art 15 [of the Constitution], *such a breach* would affect the citizen *qua* citizen. *If a citizen does not have sufficient interest to see that his constitutional rights are not violated, then it is hard to see who has.*
>
> [emphasis added]

79 As can be seen, the court in *Colin Chan* clearly stated at [13] that "any citizen can complain to the courts *if there is a violation* of … *his constitutional rights*" [emphasis added]. The court thus accepted that an applicant for declaratory relief needs to have suffered a violation of *his* constitutional rights, *ie*, only a violation of a right personal to the applicant will suffice.

80 We emphasise that the court in *Colin Chan* considered that constitutional rights are personal to each citizen, as can be seen from its affirmation (at [14]) of "*every citizen's right* to profess, practise and propagate *his* religious beliefs" [emphasis added]. As such, a citizen whose constitutional rights are violated can, without more, satisfactorily demonstrate a violation of

rights personal to himself as *every violation of constitutional rights is a violation of personal rights*.

81 Constitutional rights are personal to each and every Singapore citizen by virtue of his or her citizenship, and are not contingent on membership of any society. Therefore, in the event that there is a violation of any constitutional right, a citizen's right to bring a constitutional challenge "arises not from membership of any society" (see *Colin Chan* at [14]). Although this seems to give rise to an apparent contradiction between *Colin Chan* and *Eng Foong Ho*, we find that these two cases do speak with one voice. *Colin Chan* is not to be understood as laying down the proposition that membership of the group targeted by the allegedly unconstitutional law or ministerial order is irrelevant; instead, it simply holds that such membership is not necessary to demonstrate the *existence* of a personal right. The issue of membership remains relevant at the later stage of determining whether there is a *violation* of the alleged right (see [93]–[94] below). Even though the court in *Eng Foong Ho* seemed to suggest that the applicants in that case were granted standing only because of their membership of the Buddhist Association, the correct interpretation of that case is that the applicants had Art 12 rights by virtue of their citizenship, but were only able to demonstrate the arguable violation of their Art 12 rights through their membership of the Buddhist Association, which was affected by the compulsory acquisition of the Temple Property. In our view, on the facts of *Eng Foong Ho*, a Buddhist who was not a member of the Buddhist Association would not have been held to have sufficient standing to mount a similar challenge.

82 It can be seen from the foregoing analysis that the *mere fact of citizenship in itself* does not satisfy the standing requirement for constitutional

challenges. We agree with the holding in *Colin Chan* that an applicant must demonstrate a *violation* of *his* constitutional rights before *locus standi* can be granted. This will prevent "mere busybodies" whose rights are not affected from being granted standing to launch unmeritorious constitutional challenges (see *Regina v Greater London Council, Ex parte Blackburn and Another* [1976] 1 WLR 550 at 559D). It is only where a person's rights have been or are threatened to be violated that that person ceases to be a "mere busybody".

(2) Whether a "real interest" is a necessary requirement in constitutional cases

83 We now come to the "real interest" requirement. Pursuant to *Colin Chan* at [13]–[14], the question of "sufficient interest" must be judged in relation to the rights which are the subject matter of the application. Given the importance of constitutional rights, a citizen will *prima facie* have a "sufficient interest to see that his constitutional rights are not violated" (see *Colin Chan* at [14]). Therefore, the view expressed in Kevin Y L Tan & Thio Li-ann, *Constitutional Law in Malaysia and Singapore* (LexisNexis, 3rd Ed, 2010) at p 551 – *viz*, that "[w]here constitutionally-guaranteed liberties are at stake, locus standi is established without the need to show sufficiency of interest" – is not entirely accurate. Sufficiency of interest still needs to be shown, but this is *prima facie* made out once there is a violation of a constitutional right.

84 In view of the above, the crux of the standing requirement in constitutional cases is that there must be a violation of a constitutional right. The key question is thus what constitutes a violation of a constitutional right.

What constitutes a violation of a constitutional right?

(1) Whether constitutional rights can only be violated by a subsisting prosecution under an allegedly unconstitutional law

85 In the court below, the Judge relied on *Colin Chan* for the proposition that a subsisting prosecution under an allegedly unconstitutional law was not an essential requirement to show a violation of constitutional rights (see the Judgment at [18]):

> The AG had argued that with the [s 377A] charge being dropped, Tan was unable to prove his case. *This was a mistaken view.* While the act of prosecution itself can be a violation of one's constitutional rights, *it does not follow that a violation cannot occur without a prosecution.* Karthigesu JA made this abundantly clear in *Colin Chan* at [13], "A citizen should *not have to wait until he is prosecuted before he may assert his constitutional rights".* [emphasis added]

86 Tan's case builds on *Colin Chan*, and he contends that apart from a subsisting prosecution under an allegedly unconstitutional law, there are two additional ways in which constitutional rights may be violated. First, a constitutional right may be violated by the very existence of an allegedly unconstitutional law in the statute books. Second, a constitutional right may be violated by a threat of future prosecution under an allegedly unconstitutional law.

87 The AG's case, in contrast, is that the finding in *Colin Chan* that the applicants had standing to bring a constitutional challenge regardless of whether or not they faced prosecution is confined to the facts of that case, and is not a proposition of general application. Mr Abdullah submits that the general principle remains that a person may only challenge a law as unconstitutional if the Executive first expresses a definite intention to enforce the law against that person. He further submits that in the context of a penal

provision such as s 377A, "enforcement" refers only to a prosecution. Mr Abdullah argues that since the discretion to bring criminal prosecutions is vested in the AG (pursuant to Art 35(8) of the Constitution), unless and until this *executive discretion* is exercised, there is no violation of an individual's rights.

88 Mr Abdullah seeks, somewhat diffidently, to distinguish *Colin Chan* on the basis that it concerned an executive act (*viz*, a ministerial order issued by the Minister for Information and the Arts ("the Minister")), whereas the instant case centres on a legislative act (*viz*, a statutory provision). *Colin Chan* arose from a ministerial order which banned the importation, sale and distribution of publications of a religious group to which the applicants belonged ("the Ban") (see *Colin Chan* at [1]). According to Mr Abdullah, the ministerial order demonstrated the Minister's *intention to exercise his executive powers* to enforce the Ban, which exercise no doubt directly affected the applicants as members of the targeted religious group. Mr Abdullah distinguishes a ministerial order from a law on the basis that the latter is "not intended to be invariably and inflexibly enforced".[2]

89 With respect, we find the purported distinction puzzling as it rests on an implicit suggestion that ministerial orders are intended to be invariably and inflexibly enforced, which cannot be the case. The enforcement of ministerial orders requires an act of executive discretion. The decision to enforce a ministerial order in the event of its breach and the decision to prosecute based on a breach of a law *both* rest on further exercises of executive discretion. We

[2] See the Respondent's Case at p 41, para 67.

thus fail to see how challenges to laws can be distinguished from challenges to ministerial orders in this respect. Further, we note that the constitutional challenge in *Colin Chan* was not based on the enforcement of the ministerial order in question (*ie*, the Ban), but arose instead from the very existence of the ministerial order itself. Karthigesu JA even went so far as to opine (at [19] of *Colin Chan*) that the fact that the applicants were facing prosecution for being in possession of prohibited publications was "an irrelevant consideration in an application for leave to issue *certiorari* proceedings" as the applicants already possessed standing based on the alleged violation of their constitutional rights to freedom of religion and expression brought about by the implementation of the Ban. We agree with this view. The principle that a prosecution under an allegedly unconstitutional ministerial order is not a necessary requirement for standing in an action to declare that ministerial order unconstitutional is equally applicable to instant case, *ie*, a prosecution under an allegedly unconstitutional law should not be a necessary requirement for standing in an action to declare that law unconstitutional.

90 Perhaps, the argument based on the distinction between ministerial orders and legislation relates more to the aspect of *specificity of targeting*. Mr Abdullah points out that *Eng Foong Ho* arose from an executive order to compulsorily acquire land in which the applicants had an interest, and emphasises that the compulsory acquisition order was "specifically targeted at a plot of land".[3] As for *Colin Chan*, Mr Abdullah contends that although the Ban was framed generally, it "necessarily and specifically impacted each of

[3] See the Respondent's Case at p 48, para 77.

the [applicants]' ability to profess their religion"[4] as they were members of the targeted religious group. With respect, this submission overlooks the point that it is *precisely this specificity of targeting* which Tan is relying on to support his claim that s 377A violates his Art 12 rights, *viz*, that s 377A specifically targets practising male homosexuals. We thus find that there is no relevant basis on which *Colin Chan* may be distinguished from the instant case, and the finding in *Colin Chan* that a prosecution is not necessary to found standing is applicable here.

91 Further, as will be elaborated on at [151] below, we find that violations of constitutional rights may occur not only at the point in time when an accused person is prosecuted under an allegedly unconstitutional law, but also when a person is *arrested and/or detained and/or charged under an allegedly unconstitutional law*.

92 The proposition that constitutional rights may be violated without a prosecution under an allegedly unconstitutional law is a negative one which does not answer the question of what, then, is necessary to show a violation of constitutional rights. Here, we come back to Mr Ravi's two submissions (see [86] above), *viz*, that a constitutional right may be violated by the very existence of an allegedly unconstitutional law in the statute books and/or by a threat of future prosecution under an allegedly unconstitutional law.

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[4] *Ibid*.

(2) Whether the very existence of an allegedly unconstitutional law in the statute books suffices to show a violation of constitutional rights

93 Every citizen has constitutional rights, but not every citizen's constitutional rights will be affected by an unconstitutional law in the same way. For example, if there is a law which provides that it is an offence for any person of a particular race to take public buses, this law would clearly violate Art 12. It is uncontroversial that such a law would affect the Art 12 rights of a person belonging to that race in a way that would not apply to the Art 12 rights of a person of another race. This does *not* detract from the fact that constitutional rights, including Art 12 rights, are personal to *all* citizens. However, the mere holding of a constitutional right is insufficient to found standing to challenge an unconstitutional law; there must also be a *violation* of the constitutional right. In this fictitious scenario, the only persons who will have standing to bring a constitutional challenge against the unconstitutional law for inconsistency with Art 12 will be citizens who belong to the race that has been singled out as only their Art 12 rights will have been violated. Persons of other races will not have suffered violations of their Art 12 rights and will thus have no standing to bring a constitutional challenge in this scenario.

94 The fictitious scenario above illustrates that while an applicant who wishes to challenge an allegedly unconstitutional law must demonstrate that his constitutional rights have been violated by that law, such violation may be more easily demonstrated where the law specifically targets a group and the applicant is a member of that group. Whether the very existence of an unconstitutional law in the statute books suffices to show a violation of constitutional rights depends on what exactly that law provides. It is conceivable that the very existence of an unconstitutional law in the statute

books suffices to show such violation (and, thus, to found standing) in an extraordinary case, although we caution that no such case has ever been brought to the attention of the courts here.

95 Mr Ravi relies on cases from other jurisdictions which have accepted that a prosecution under an allegedly unconstitutional law is not necessary to found standing to challenge that law. For instance, in *Croome and Another v The State of Tasmania* (1996–1997) 191 CLR 119 ("*Croome*"), the applicants were allowed to bring an application challenging the constitutionality of Tasmania's sodomy laws despite the fact that they had not been prosecuted under the relevant provisions.

96 In *Leung*, the applicant, a 20-year-old homosexual man, successfully challenged the constitutionality of certain provisions in the Hong Kong Crimes Ordinance which made "[h]omosexual buggery with or by [a] man under 21" [emphasis in original omitted] an offence. The Hong Kong Court of Appeal found at [29(2)] that a prosecution was not the only way to show a violation of the applicant's rights:

> Notwithstanding the fact that a prosecution is *neither in existence nor in contemplation* … it is clear on the facts that [the applicant] and many others like him have been seriously affected by the *existence of the legislation under challenge*. [emphasis added]

As can be seen, the lack of a contemplated prosecution was not found to be fatal by the court in *Leung*, which went on to hold that the applicant's rights were affected by *the existence of the legislation itself*.

97 The decision in *Leung* that a prosecution was not necessary for the applicant in that case to have standing to challenge the legislative provisions in question stemmed from the court's concern that the applicant should not have

to break the law and trigger a prosecution before he could be granted standing to challenge the law. If it were otherwise, "access to justice ... could only be gained by the applicant breaking what [was] according to the statutory provisions in question, the law" (at [29(2)]). The court then referred approvingly to the opinion of Advocate-General F G Jacobs in *Union de Pequeños Agricultores v Council of the European Union (supported by Commission of the European Communities)* [2003] QB 893 ("*UPA*") at [43] that "[i]ndividuals clearly cannot be required to breach the law in order to gain access to justice".

98 Although the decision of the European Court of Justice ("the ECJ") in *UPA* was not referred to by the court in *Leung*, for completeness' sake, we should mention that the ECJ differed from Advocate-General Jacobs on the requirement of "individual concern" set out in Art 230(4) of the Treaty Establishing The European Community ("the Treaty"). In brief, Art 230(4) of the Treaty (available in *Official Journal of the European Union* (29 December 2006) C321 at p E/146) provides that an individual may institute proceedings to challenge the legality of, *inter alia*, an executive decision which is "of direct and individual concern" to him. Underlying the divergence in approach between the ECJ and Advocate-General Jacobs in *UPA* was the difference in view as to whether the Treaty had established a complete system of legal remedies. The ECJ took the view that the Treaty had established a complete system of legal remedies and thus saw no need to relax the "individual concern" standing requirement. Advocate-General Jacobs, on the other hand, was of the view that individuals did not have adequate alternative remedies under the Treaty and thus sought to relax the "individual concern" standing requirement. It can be seen from this that *the availability of adequate alternative remedies* is a factor to be considered in determining how broadly

the standing requirements should be cast. Where no adequate alternative remedies are available, this might point in favour of relaxing the standing requirements.

99 Further, we note that in applications for judicial review, the exhaustion of alternative remedies is a factor that the court takes into account in deciding whether to grant *locus standi* (see *Kang Ngah Wei v Commander of Traffic Police* [2002] 1 SLR(R) 14 at [19]–[20]). As noted above at [76], we find that the threshold of *locus standi* for applications under O 15 r 16 is the same as that for applications under O 53 r 1, and, thus, it stands to reason that similar factors can be taken into consideration for both types of applications.

100 In the present case, the Judge was of the view that Art 100 provided Tan with an adequate alternative remedy, and thus found at [26(b)] of the Judgment that there was no need to relax the standing requirements:

> In Singapore, it is arguable that individuals are not compelled to resort to such extremes [of breaking the law]. They can request the President to refer the issue to the Constitutional Tribunal under Art 100 of the Constitution. As there is an established procedure through which guidance may be obtained in the absence of specific facts, there is no reason to relax the "real controversy" requirement in order to avoid the situation where individuals break the law in order to obtain standing.

101 The Judge's reference to Art 100 was to distinguish *Leung* as the Constitution of Hong Kong (*viz*, the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China) does not have an equivalent of this Article. The Judge thus reasoned that the pressing need to relax the requirements of *locus standi* in Hong Kong did not exist in Singapore.

102 Article 100 provides as follows:

> **Advisory opinion**
>
> **100.**—(1) The President may refer to a tribunal consisting of not less than 3 Judges of the Supreme Court for its opinion any question as to the effect of any provision of this Constitution which has arisen or appears to him likely to arise.
>
> …

103 With respect, we find that there are at least four reasons why the Art 100 mechanism is *not* an *adequate* alternative remedy which individuals may utilise to raise constitutional issues. First, as the Judge noted, one interpretation of Art 100, expressed by no less than Chan Sek Keong CJ extra-judicially, is that it was enacted only for the purposes of resolving actual and potential disputes *between constitutional organs*, and is not intended to allow *individuals* to "obtain advisory opinions on hypothetical cases from the courts" (see "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at p 471). Second, although individuals may petition the President to convene the Constitutional Tribunal under Art 100, it is clear that individuals have no means of compelling the President to do so. Third, reading Art 100 with reference to Art 21 of the Constitution, it is clear that the President has no power to convene the Constitutional Tribunal on his own initiative. Article 21(1) directs the President, in exercising his functions, to "act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet", unless expressly specified otherwise in the Constitution. The power to convene the Constitutional Tribunal is not among the expressly specified functions listed in Art 21(2) in respect of which the President may act in his own discretion. Fourth, the findings of the Constitutional Tribunal are *not binding* on the Government. Therefore, even if an individual manages to trigger the Art 100 mechanism to convene the

Constitutional Tribunal, and even if the Constitutional Tribunal gives a favourable opinion, the practical impact of such an opinion could be limited.

104 The absence of an adequate alternative remedy in the present case is brought home by an examination of the decision in *Croome*. According to Mr Abdullah, the decision in *Croome* was premised on the long-standing practice in Australia of the Attorney-Generals of the various States seeking declarations of the constitutionality of various legislative provisions. Mr Abdullah submits that it was "with one eye to that reality that the Court [in *Croome*] adopted a *quid pro quo* approach and arrived at the view that individuals would be able to avail themselves [of] the same".[5] As no such practice exists in Singapore, Mr Abdullah submits that this court should not be as ready as an Australian court might be to grant Tan standing to bring the Application.

105 While we accept that in Singapore, the AG does not have the practice of seeking declarations on the constitutionality of various legislative provisions, we find that this points *towards*, rather than away from, the adoption of the court's approach in *Croome*. As noted above at [98], the absence of alternative remedies favours a relaxation of the standing requirements, and given that the court in *Croome* relaxed the standing requirements in that case despite the availability of an alternative remedy, the Singapore courts should *a fortiori* consider a relaxation of our standing requirements.

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[5] See the Respondent's Case at p 44, para 71.

106 We now turn to consider three arguments that the AG has raised against the proposition that the very existence of an allegedly unconstitutional law in the statute books can show a violation of constitutional rights and thereby found standing to challenge the law in question. The first argument is that the court would have to answer legal questions in the abstract, where the answer would not affect the rights of any person before the court. With respect, we find that this argument overlooks the fact that in this scenario, an applicant will only be granted standing *if his rights have been violated* by the law alleged to be unconstitutional. As such, the argument that no one's rights will be affected where the court answers a legal question in this scenario is a *non sequitur*. We reiterate that it will be a rare case where a person's constitutional rights are violated by the very presence of an allegedly unconstitutional law in the statute books without more.

107 The AG's second argument is that if the very existence of an allegedly unconstitutional law in the statute books can show a violation of constitutional rights and thus found standing to challenge the law in question, every piece of legislation could potentially come before the court for a judicial imprimatur of validity before it is enforced, and such judicial endorsement would come to seem necessary. We think that such concerns should not be overstated. Singapore has adopted the model of parliamentary sovereignty and has inherited the common law tradition of positivism – it is a foundation of our legal system that laws declared by Parliament are valid by virtue of their enactment. It is trite that such laws remain valid unless and until they are declared void. There is thus no necessity for a judicial pronouncement on the validity of legislation (and no one can seriously contend that there is such a necessity) before legislation is accepted as being valid.

108 Tied to the AG's second argument above is the third argument based on floodgates. Mr Abdullah contends that "[t]he floodgates will be opened to capricious and whimsical constitutional litigation"[6] if applicants are able to bring constitutional challenges based on the very existence of an allegedly unconstitutional law in the statute books. This appears to us to be an undue overstatement. We wish to make clear what the floodgates argument is *not* about. It does not imply that constitutional litigation can be attributed to sheer belligerence on the part of applicants. Where an applicant's constitutional rights have been violated, he is justified in bringing a constitutional challenge, and the fact that the alleged violation would also affect a great number of other people, even "every other citizen[,] should not detract from a citizen's interest in seeing that his constitutional rights are not violated" (see *Colin Chan* at [13]).

109 Having said that, we are aware of the need to ensure that granting some applicants greater access to justice by relaxing the requirements for standing does not have the converse effect of restricting access to justice for others. While we find that a deluge of constitutional challenges is unlikely if the standing requirements are relaxed, we accept that an increase in unmeritorious cases which does not amount to a "deluge" may still have the effect of delaying access to justice for other claimants. On the other hand, strict standing requirements will not just delay access to the courts, but may *deny* access altogether for some claimants. As such, keeping in mind the need for a balance, we will *not* lay down a general rule that the very existence of an allegedly unconstitutional law in the statute books suffices to demonstrate a

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[6] See the Respondent's Case at p 36, para 59.

violation of an applicant's constitutional rights. Each case must turn on its own facts, and the courts must remain mindful that lax standing rules could "seriously curtail the efficiency of the Executive in practising good governance" (see "Judicial Review – From Angst to Empathy" at p 481).

110 At the same time, and for the avoidance of doubt, we state conclusively that we also reject the proposition that a subsisting prosecution under an allegedly unconstitutional law must be demonstrated in every case before a violation of constitutional rights can be shown. A law is either constitutional or it is not. The effects of a law can be felt without a prosecution, and to insist that an applicant needs to face a prosecution under the law in question before he can challenge its constitutionality could have the perverse effect of encouraging criminal behaviour to test constitutional issues. Even though a violation of constitutional rights may be most clearly shown where there is a subsisting prosecution under an allegedly unconstitutional law, we find that a violation may also be established in the absence of a subsisting prosecution. In certain cases, the very existence of an allegedly unconstitutional law in the statute books may suffice to show a violation of an applicant's constitutional rights.

(3) Whether there is a need for a real and credible threat of prosecution under an allegedly unconstitutional law

111 The need for a real and credible threat of prosecution under an allegedly unconstitutional law can be seen as the midpoint between Tan's position and the AG's position. Mr Abdullah argues that even if this court is minded to accept that there is no necessity for a subsisting prosecution under an allegedly unconstitutional law in order to found *locus standi* to challenge that law, at the very least, the court should institute a requirement that an

applicant must face a real and credible threat of prosecution under that law. As we have already found that the existence of an allegedly unconstitutional legislation in itself may in certain cases suffice to show a violation of an applicant's rights, we can dispose of this point quite briefly.

112 In the court below, the Judge accepted that "[t]he spectre of future prosecution" ([at 20] of the Judgment) was sufficient for an arguable violation of Tan's constitutional rights to be found. She noted that this was accepted in *Croome* and *Leung*. In *Croome*, Brennan CJ, Dawson and Toohey JJ opined (at 127) that the applicants had engaged in homosexual conduct that would render them "liable to prosecution … [and] [t]he fact that the Director of Public Prosecutions [did] not propose to prosecute [did] not remove that liability". As noted earlier at [96] above, *Leung* goes even further and states that even if no prosecution under an allegedly unconstitutional law is contemplated, an applicant may still be granted standing provided that the law in question itself violates his constitutional rights. We agree with the Judge in so far as a threat of future prosecution under an allegedly unconstitutional law, where the threat is real and credible and not merely fanciful, will suffice to show a violation of constitutional rights.

113 We add that while there is no right not to be prosecuted, there is a right not to be prosecuted under an unconstitutional law. Persons who act in ways that may cause them to be liable under an allegedly unconstitutional law are in the unenviable position of waiting to see whether a prosecution will be brought against them despite the alleged unconstitutionality of the law. The waiting and the uncertainty in itself can be said to be a form of suffering, as can be seen from the court's acceptance in *Leung* at [29(2)] that the applicant

in that case and many others like him had been living under a "considerable cloud" as a result of the legislative provisions in question.

114 To summarise, if an applicant is able to show that he is facing a real and credible threat of prosecution under an allegedly unconstitutional law, this may suffice to show that his constitutional rights have arguably been violated and that he should thus be granted standing to vindicate his rights.

Summary of our ruling on Issue 2

115 In conclusion, in respect of Issue 2, the test for *locus standi* in constitutional challenges remains the *Karaha Bodas* test. As noted earlier at [72] above, *Karaha Bodas* lays down three elements which have to be satisfied in order to establish *locus standi*, namely: (a) a real interest in bringing the action; (b) a real controversy between the parties concerned; and (c) a violation of a personal right. The element of a real controversy, however, goes to the court's discretion and not jurisdiction (see below at [137]). For the "real interest" requirement, we have found (at [83] above) that sufficiency of interest is *prima facie* made out once there is a violation of constitutional rights. For the requirement that there must be a violation of a personal right, as every constitutional right is a personal right, demonstrating that a constitutional right has been violated will suffice (see above at [80]). We have further found that a violation of constitutional rights *may* be brought about by the very existence of an allegedly unconstitutional law in the statute books (see above at [110]) and/or by a real and credible threat of prosecution under an allegedly unconstitutional law (see above at [114]).

Issue 3

116 We will now turn to Issue 3, which entails applying the test for *locus standi* (as set out above at [115]) to the facts of the present case to determine if Tan meets the threshold for *locus standi*.

117 It is common ground that Tan does not face a subsisting prosecution under s 377A. Even so, we have decided (see above at [110]) that a subsisting prosecution under an allegedly unconstitutional law is not a necessary requirement to show a violation of constitutional rights. The central issue here is whether it can be argued that Tan's constitutional rights were arguably violated on the facts of the case.

Are there any constitutional rights at stake in this case?

118 Tan's case is that s 377A violates his rights under Art 9, Art 12 and Art 14. We will consider each of these constitutional provisions in turn, beginning with Art 9.

Article 9

119 Article 9(1) provides as follows:

> No person shall be deprived of his life or personal liberty save in accordance with law.

120 Mr Ravi has contended that the protection accorded by Art 9 does not only cover "mere existence"[7] and "must extend to all those faculties by which

[7] See the Appellant's Case dated 27 June 2011 ("the Appellant's Case") at p 39, para 124.

life is enjoyed",[8] including "privacy, human dignity, individual autonomy and the human need for an intimate personal sphere".[9] However, as the Judge noted (at [15] of the Judgment), "our courts have eschewed such wide interpretations" of the terms "life" and "personal liberty" in Art 9(1). The Judge referred to the High Court's decision in *Lo Pui Sang and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and other appeals* [2008] 4 SLR(R) 754 ("*Lo Pui Sang*"), where it was stated (at [6]) that "personal liberty" in Art 9(1) referred "only to the personal liberty of the person against unlawful incarceration or detention". Although *Lo Pui Sang* was overturned on appeal (see *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109), the constitutional issues were not considered on appeal and the High Court's *dicta* in *Lo Pui Sang* on the interpretation of Art 9(1) thus remains good law. We affirm this interpretation of Art 9(1).

121 For the above reasons, we find that Tan's rights under Art 9(1) are not engaged by the *very existence* of s 377A in the statute books.

122 However, although the very existence of s 377A in the statute books does not engage Tan's Art 9(1) rights, we find that those rights *were* engaged *on the facts of this case* as Tan was purportedly arrested and detained under s 377A. Even on the interpretation of a right to personal liberty stated above at [120], an accused person has a right not to be detained under an unconstitutional law. As we are of the view that s 377A is *arguably* unconstitutional for inconsistency with Art 12 (see below at [125]–[127]), it

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[8] *Ibid*.

[9] See the Appellant's Case at p 39, para 125.

flows from this that Tan's right to personal liberty under Art 9(1) would have been violated by his arrest and detention under s 377A if the same were indeed unconstitutional (elaborated on below at [151]–[153]).

Article 12

123 Article 12(1) provides as follows:

> All persons are equal before the law and entitled to the equal protection of the law.

124 The test for constitutionality under Art 12 was laid down in *Yong Vui Kong v Public Prosecutor and another matter* [2010] 3 SLR 489 at [109], where it was held that a differentiating measure prescribed by legislation would be consistent with Art 12(1) only if:

(a) the classification was founded on an intelligible differentia; and

(b) the differentia bore a rational relation to the object sought to be achieved by the law in question.

125 Applying this test, the Judge found at [16] of the Judgment that s 377A engaged Tan's rights under Art 12(1). Although s 377A satisfied the first limb of the test as it was founded on an intelligible differentia (it applies to sexually-active male homosexuals), she found it arguable that s 377A failed the second limb as there was no obvious social objective that could be furthered by criminalising male but not female homosexual intercourse. We concur that there is an arguable case that s 377A engages Tan's rights under Art 12(1).

126 It is uncontroverted that s 377A is a law which specifically targets sexually-active male homosexuals. The plain language of s 377A excludes

both male-female acts and female-female acts. Tan professes to be a member of the targeted group, and the AG has not disputed this claim. Therefore, since we have found that s 377A arguably violates the Art 12(1) rights of its target group, as a member of that group, Tan's rights have arguably been violated by the mere existence of s 377A in the statute books (see above at [94]). We also accept that there is a real and credible threat of prosecution under s 377A (see below at [175]–[183]).

127 We emphasise that we are *not* deciding here that s 377A *is* inconsistent with Art 12 as that goes to the merits of the Application, but are instead merely deciding that it is *arguably* so, which suffices for the present appeal on the preliminary issue of whether the Application should be struck out.

Article 14

128 Article 14 will not be examined in detail as Mr Ravi omitted to make any submissions on this ground. It suffices to briefly state that for the reasons set out below at [130], we find no merit in the argument that Tan's Art 14 rights were engaged by s 377A.

129 Article 14(1) provides as follows:

> Subject to clauses (2) and (3) —
>
> (*a*) every citizen of Singapore has the right to freedom of speech and expression;
>
> (*b*) all citizens of Singapore have the right to assemble peaceably and without arms; and
>
> (*c*) all citizens of Singapore have the right to form associations.

130 Section 377A does not violate any of the three limbs of Art 14(1). Even if any Art 14(1) rights are engaged by s 377A, these rights are expressly

stated to be subject to the need to preserve (*inter alia*) public order (see Art 14(2)(*a*)–14(2)(*c*)). In so far as s 377A criminalises "gross indecency" between males *in public*, the public order rationale applies. The same rationale applies to preserve the constitutionality of s 294(*a*), which criminalises "any obscene act in any public place". In so far as s 377A also criminalises "gross indecency" between *male homosexuals in private* but does not criminalise the same between *female* homosexuals, this is more properly dealt with under Art 12 rather than under Art 14.

131 In conclusion, on Issue 3, as we have found that s 377A is arguably inconsistent with Art 12, Tan's constitutional rights are at stake and Tan thus has *locus standi* to bring the Application. As noted above at [19], in the present case, the issue of certainty of failure pivots solely on the issue of *locus standi*. As we have found that Tan has *locus standi*, Tan's case is not certain to fail. Tan, however, will still need to establish that the facts of the case disclose a real controversy to be determined, and it is to this issue (which is Issue 4) that we now turn.

Issue 4

132 The need for the existence of a real controversy between the parties to an action stems from the function of the courts to adjudicate on and determine disputes between parties. Without a *lis*, the courts may find themselves being called on to give advisory opinions on abstract, hypothetical and/or academic questions instead of deciding on real disputes. In *Salijah bte Ab Latef v Mohd Irwan bin Abdullah Teo* [1996] 2 SLR(R) 80 ("*Salijah*") at [57], the court explained the rationale underlying the "real controversy" requirement as follows (citing *Russian Commercial and Industrial Bank v British Bank for Foreign Trade, Limited* [1921] 2 AC 438 at 448):

> The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.

The court continued at [60] of *Salijah*:

> The editors of Zamir and Woolf [*The Declaratory Judgment* (2nd Ed, 1993)] have identified one rationale for the reluctance of the courts to deal with theoretical issues – that it distracts the courts from deciding real, subsisting problems. A stronger reason is that if there is in fact no real issue subsisting, then the matter would not be *res judicata*, nor the issue merged in judgment. In that event, it would be open for the issue to be reopened again and again. The need for the existence of a contested dispute is to ensure that there is finality in the court's judgments as well.

133 In our view, the "real controversy" requirement has been met in the present case. The facts before us disclose that a *lis* has been constituted in two ways, namely:

(a) Tan's arrest, investigation, detention and charge under s 377A; and

(b) the real and credible threat of prosecution under s 377A.

Does the "real controversy" requirement go to jurisdiction or discretion?

134 Before launching into our analysis of Issue 4 proper, we will first deal with the preliminary issue of whether the "real controversy" requirement goes to the court's *jurisdiction*, or whether it is a factor that the court takes into account in exercising its *discretion*. While this court has opined in *Salijah* at [59] that there is "little practical difference between the two positions", as the AG has argued that the "real controversy" requirement goes to the court's jurisdiction, we will address this point.

135 Jurisdictional requirements delimit the power of the court to hear a case. If any of the jurisdictional requirements are not met in a particular case, the court shall not hear that case. A court which does so will be acting *ultra vires*.

136 On the other hand, if a factor goes to the court's discretion to hear a case, the court will consider all the circumstances of the case and weigh the factors in favour of hearing the case against those in favour of not hearing it. Therefore, if the existence of a real controversy is a factor in favour of the court exercising its discretion to hear a case, the absence of a real controversy may not be fatal as there may be other factors in favour of the case being heard. While the court is obliged to take all relevant considerations into account, the weight accorded to each factor depends on the precise circumstances of each case. If good reasons can be shown as to why a court should proceed to hear a case despite the absence of a real controversy, a court which so proceeds will not be acting *ultra vires*.

137 This issue has been considered in *Zamir & Woolf*, and the following is stated as a general principle at para 4-36:

> It can now safely be said that even if a particular action for declaratory relief *only involves hypothetical issues* this does *not deprive the court of jurisdiction*, and if declaratory relief is refused on the grounds that the issues are hypothetical, the refusal is properly classified as being on *discretionary* grounds. [emphasis added]

Therefore, the absence of a real controversy does not invariably deprive the court of its jurisdiction, and the court may exercise its discretion to hear hypothetical issues in appropriate cases. How the court determines what constitutes a proper case for the exercise of its discretion in this regard will be considered later (see [144]–[146] below).

138 That the courts have the power to hear cases involving hypothetical issues has been authoritatively established by a line of English authorities, which the learned editors of *Zamir & Woolf* have referred to. In *Regina v Secretary of State for the Home Department, Ex parte Salem* [1999] 1 AC 450 ("*Salem*") at 456G, the House of Lords (*per* Lord Slynn of Hadley) held as follows:

> … [W]here there is an issue involving a public authority as to a question of public law, your Lordships have a *discretion* to hear the appeal, *even if* by the time the appeal reaches the House *there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se.* [emphasis added]

It can be seen that the House of Lords did not view the existence of a real controversy as a jurisdictional requirement. Regardless of whether there is a *lis* between the parties *inter se*, the court can exercise its discretion to hear a case, particularly where the issue to be decided is one of public law. Given that constitutional law is a part of public law, the *dicta* in *Salem* is applicable to the instant case.

139 In *Rolls-Royce plc v Unite the Union* [2010] 1 WLR 318 ("*Rolls-Royce*") at [44]–[46], Wall LJ referred to *Birmingham City Council v R and others* [2007] 2 WLR 1130 and *Bowman v Fels (Bar Council and others intervening)* [2005] 1 WLR 3083 ("*Bowman v Fels*"), and observed that the courts in those cases had been prepared to grant declarations on academic but important points. In *Bowman v Fels*, the fact that the point was one of general importance was considered by the court as a factor pointing in favour of its exercising its discretion to hear the case.

140 These developments are not confined to the English courts. In *Leung*, the Hong Kong Court of Appeal directly considered the question of whether

the courts had the jurisdiction to grant relief in "cases which involve[d] future events which [might] or [might] not occur and which [were] therefore sometimes said to be hypothetical" (at [28]). Ma CJHC opined (likewise at [28]) that in such cases, "*the court clearly has jurisdiction but it must be carefully exercised*" [emphasis added]. Ma CJHC went on to analyse a line of cases where claimants had sought declaratory relief on hypothetical matters, and expressed his conclusion at [28(8)] as follows:

> Ultimately, I am persuaded that where academic or hypothetical issues are involved, the question is not really one of jurisdiction but of discretion.

141 Even so, we note that not all of the common law jurisdictions have been of one voice on this issue. In particular, we note that American jurisprudence has developed in the other direction, *viz*, that the need for a real controversy goes towards jurisdiction and not discretion. As mentioned at [134] above, this is also the position taken by the AG in this appeal. In his submissions on this point, Mr Abdullah referred to *Lujan, Secretary of the Interior v Defenders of Wildlife et al* 504 US 555 (1992), where the US Supreme Court held at 560 that:

> … [T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III [of the Constitution of the US]. …
>
> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, … and (b) "actual or imminent, *not 'conjectural' or 'hypothetical …'*" …
>
> [emphasis added]

As no one would argue that standing is anything but a jurisdictional requirement (as opposed to being a factor that the court can take into account

in exercising its discretion), and as standing is viewed as a function of controversy in the US, it follows that the existence of a real controversy is an element that goes to the US courts' jurisdiction.

142 The view that the "real controversy" requirement is an element of jurisdiction in the US is undergirded by the express references to "Cases" and "Controversies" in s 2 of Art III of the Constitution of the US, which sets out the scope of the judicial power in the US. As the very delineation of the scope of the judicial power in the US imports the requirement of a controversy, it is clear that the judicial power of the US courts cannot be exercised in the absence of a controversy. In contrast, Art 93 of the Constitution of Singapore, which vests the judicial power of Singapore in our courts, does not make express reference to controversies. For this reason, we do not find the American cases on this issue persuasive. We are unable to agree with the AG that this distinction is "inconsequential".[10] The courts should be slow to read in jurisdictional requirements which limit the sphere of their judicial power as such requirements restrict access to justice.

143 We agree instead with the analysis in *Zamir & Woolf* at para 4-98:

> The courts will not grant declarations which are of no value but, if a declaration will be helpful to the parties or the public, the courts will be sympathetic to the claim for a declaration *even if the facts on which the claim is based or the issue to which it relates can be described as theoretical.* [emphasis added]

Where the circumstances of a case are such that a declaration will be of value to the parties or to the public, the court may proceed to hear the case and grant

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[10] See the Respondent's Case at p 32, para 52.

declaratory relief even though the facts on which the action is based are theoretical. We do not necessarily see this as an exception to the "real controversy" requirement as we are of the view that it can logically be said that where there is a real *legal* interest in a case being heard, there is a real controversy to be determined. Further, as noted above at [17], a declaration by the court which determines the controversy between the parties is *res judicata*. "Legal" interest is used here in contradistinction to a mere socio-political interest, and may be said to arise where there is a novel question of law for determination, as in the present case. While a legal interest may suffice to satisfy the "real controversy" requirement, mere socio-political interest will *not* suffice in itself. The court is well placed to determine legal questions but not socio-political questions. The court's function is instead to ensure, as the guardian of the Constitution, that the Constitution is upheld inviolate.

144 We emphasise that we are in no way stating that the court will always hear cases even where there is no *lis* between the parties *inter se*, but merely that the court may exercise its discretion to do so in a proper case. We now come to the issue of *how* the court should exercise its discretion in this regard and what factors it should take into account in deciding what constitutes a proper case.

145 In *Salem* at 457A, Lord Slynn sagaciously cautioned that even in the area of public law, the courts should be circumspect in exercising their discretion to hear hypothetical issues, and should not do so "unless there is a good reason in the *public interest* for so doing" [emphasis added]. As can be seen, the key factor in favour of the court hearing an academic issue is that it is in the public interest for the court to do so. This key concern was echoed in *Michael Victor Gawler v Paul Raettig* [2007] EWCA Civ 1560 at [37], where

the English Court of Appeal's approach to the exercise of its discretion was expressed as follows (*per* Sir Anthony Clarke MR):

> All will depend upon the facts of the particular case and … I do not intend to be too prescriptive. However, such cases are likely to have a number of characteristics in addition to *the critical requirement that an academic appeal is in the public interest*. They include the necessity that all sides of the argument will be fully and properly put: see eg *National Coal Board v Ridgeway* [[1997] 3 All ER 562], per Bingham LJ at page 604f and *Bowman v Fels* at [12] and [15]. It seems to me that in the vast majority of such cases, this must involve counsel being instructed by solicitors instructed by those with a real interest in the outcome of the appeal. [emphasis added]

146 The need for caution was also emphasised in *Rolls-Royce* at [59], where Wall LJ expressed concern that the court was "being asked to decide an issue which [was] likely to affect a large number of people who [would] have had no say in [the court's] decision". For this reason, the English Court of Appeal approached the matter on a narrow basis in that case (see *Rolls-Royce* at [60]). We add a similar caveat to the present appeal. It cannot be overstated that each case turns on its particular facts, and we adopt a similar narrow basis in our approach.

The relevant facts in the present appeal

147 With that, we now turn to consider the facts of the present appeal. The two key facts before us are that: (a) Tan was arrested, investigated, detained and subsequently charged under s 377A; and (b) the s 377A charge was later substituted with a charge under s 294(*a*). We will deal with each of these facts *seriatim*.

The arrest, investigation, detention and charge under s 377A

(1) Tan's case

148 Tan's case is that his arrest and detention were expressly made pursuant to s 377A, and there was no indication that a s 294(*a*) charge was even considered to be appropriate until much later when the original s 377A charge was substituted. There was therefore no indication that there was a concurrent investigation under s 294(*a*). Mr Ravi further submits that the existence of an alternative legitimate ground for depriving Tan of his personal liberty (*viz*, s 294(*a*)) did not make the purported deprivation of personal liberty under s 377A lawful. Further or in the alternative, Mr Ravi submits that the deprivation of personal liberty under each provision is not identical or interchangeable.

(2) The AG's case

149 The AG's case is that the mere fact that Tan was initially arrested and detained for the purposes of investigations into his conduct on 9 March 2010 did not create a *lis* and did not furnish him with *locus standi* to bring the Application. Mr Abdullah highlights that at the preliminary stage of the investigations, all that the police did was to investigate Tan's conduct to determine if any offence had been disclosed. Mr Abdullah emphasises that investigations are a fact-finding exercise which do not always result in sufficient evidence for a charge to be preferred, or for another charge to be preferred in place of the original charge for which the investigations were carried out. According to Mr Abdullah, the very nature of police investigations means that while investigations are ongoing, there can be no firm indication that the suspect has committed any specific offence. While investigations were ongoing in Tan's case, there would have been a whole range of possible

offences that Tan could have been charged with, including the offence under s 294(*a*). While Mr Abdullah accepts that there is a need to *identify* one or more of the offences that a suspect might have committed, he characterises this as being done for the purpose of *classification*, and asserts that even though a suspect may be informed that he is being investigated for a particular offence, any such intimation is necessarily provisional.

150 The AG thus argues that the s 377A charge against Tan only crystallised when Tan was charged in court. However, even if we accept this argument, we have difficulty seeing how this furthers the AG's case as it is clear that Tan *was indeed charged under s 377A*. With respect, the argument that there was no *lis* at the time when Tan was charged under s 377A is unconvincing. In fact, Mr Abdullah has stated that if there was a real controversy at the point of Tan being charged under s 377A, the matter should have been raised at that point. It is clear to us, however, that Tan did just that by bringing the Application for declaratory relief after he was charged under s 377A. If this had been the end of the matter in the present case, we would have no difficulty finding that the "real controversy" requirement has been satisfied. However, it is equally clear that the s 377A charge against Tan was subsequently substituted by the s 294(*a*) charge, a point which we will deal with below at [165]–[172].

(3) Our analysis and decision

151 We are unable to agree with the AG that violations of constitutional rights only occur when a person is prosecuted under an allegedly unconstitutional law. *It is clear that violations of constitutional rights may occur earlier,* viz*, when an accused is arrested and detained under an allegedly unconstitutional law*. When a person is arrested and detained, he is

deprived of his Art 9(1) right to personal liberty. However, if such deprivation is done "in accordance with law", there is no breach of Art 9(1). For ease of reading, Art 9(1) is reproduced as follows:

> No person shall be deprived of his life or personal liberty *save in accordance with law*. [emphasis added]

152 The wording of Art 9(1) makes it clear that every detention must be effected under a valid law. In our view, it is plain that "law" under Art 9(1) cannot be interpreted as encompassing an unconstitutional law. It is absurd to read Art 9(1) as sanctioning unconstitutional deprivations of personal liberty as to do so would be to render the protection offered by Art 9(1) nugatory, with the result that it would be a "misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties" (see *Ong Ah Chuan and another v Public Prosecutor* [1979–1980] SLR(R) 710 at [26]).

153 In short, while a person has no right not to be detained under a law which has been validly passed, he has a right not to be detained under an unconstitutional law. As stated earlier at [125]–[127], we find that there is an arguable case that s 377A is inconsistent with Art 12. Therefore, Tan's right to personal liberty under Art 9(1) would have been violated by his arrest and detention under s 377A if s 377A were indeed unconstitutional.

154 Although we accept Mr Abdullah's point that while investigations into a suspect are ongoing, there are a range of possible offences that may be considered, there was no indication by the Attorney-General's Chambers ("the AGC") in this case that a charge under s 294(*a*) was even considered to be appropriate at the time of Tan's arrest, investigation and detention. We note that all the documents relating to Tan's arrest and bail expressly indicated

s 377A – the tag that was used to identify Tan's belongings after he was detained at the police station indicated that he had been detained in respect of a possible s 377A charge, and the document for police bail indicated that bail was likewise for a s 377A charge. We thus find that even though Tan eventually posted police bail, he was detained while investigations under s 377A were pending. The fact that the s 377A charge against Tan was subsequently replaced approximately six weeks later by the s 294(*a*) charge cannot negate the crucial historical fact that Tan was at the outset detained, investigated and then charged under s 377A. To state otherwise would be to bury the facts.

155 *However*, the quirk here is that even though Tan *was* arrested, investigated and detained under s 377A, the same *could have been* effected under s 294(*a*). As such, the power to detain could have been lawfully exercised had it proceeded under s 294(*a*), the constitutionality of which cannot be impugned. If a law is constitutional and validly passed, it is clear that the police may arrest, investigate and detain suspects under that law. The issue is thus whether the existence of *alternative legitimate means* under which a detention could have taken place negates any unconstitutionality that the detention might suffer from. If the Executive is legally empowered to take the relevant action in any case through alternative legitimate means, it is arguable that the fact that an illegal procedure happened to be utilised may not give rise to cause for complaint. On the facts of the present appeal, although Tan's detention under s 377A might have violated his Art 9(1) rights, the detention could equally have proceeded under s 294(*a*), with the corollary that Tan's constitutional rights would not have been affected. In other words, Tan would have been detained *regardless* of whether the detention proceeded under s 377A or s 294(*a*).

156 As the parties did not address this point, we asked for further submissions on the following question:[11]

> Assuming *arguendo* that there is an arguable case *apropos* the constitutionality of s 377A of the [current] Penal Code, can it nevertheless be said that [Tan] has no cause for complaint since some other legitimate means of legally investigating, apprehending, charging and convicting [him] were concurrently extant (e.g. under s 294(a) of the [current] Penal Code)? Counsel are requested to consider *inter alia* the case of *Regina (Lumba) v Secretary of State for the Home Department (JUSTICE and another intervening)* [2011] 2 WLR 671.
>
> Counsel are advised that this is a distinct issue from that of the alleged extinguishment of the real controversy by the substitution of the s 377A charge with [the charge under] s 294(a) of the [current] Penal Code.

157 One of the issues that arose for determination in *Regina (Lumba) v Secretary of State for the Home Department (JUSTICE and another intervening)* [2011] 2 WLR 671 ("*Lumba*") was whether the tort of false imprisonment was committed by the UK Home Secretary's unlawful exercise of the power to detain, given that it was "certain that the claimant could and would have been detained if the power had been exercised lawfully" (at [71]). The majority of the Supreme Court of the United Kingdom held that where a public law authority made a decision to detain that was tainted by a public law error, it was not a defence to an action for false imprisonment to show that a lawful decision to detain the claimant in question *could and would have been made*. Lord Dyson JSC, who delivered the leading judgment for the majority, concluded as follows at [71]:

> Where the detainer is a public authority, it must have the power to detain and the power must be lawfully exercised. *Where the power has not been lawfully exercised, it is nothing*

[11] See the Supreme Court's letter to the parties dated 5 October 2011.

> *to the point that it could have been lawfully exercised. If the power could and would have been lawfully exercised, that is a powerful reason for concluding that the detainee has suffered no loss and is entitled to no more than nominal damages. But that is not a reason for holding that the tort [of false imprisonment] has not been committed.* [emphasis added]

158 The AG has submitted that the majority's findings in *Lumba* are confined to an exposition of whether the elements of the tort of false imprisonment were made out in that case as "a technical matter"[12] and cannot be subjected to wider application. Although *Lumba* arose from a breach of a public law duty by the UK Home Secretary, the case concerned a civil law action for damages for false imprisonment and did not involve a decision on standing in a public law action. On this basis, the AG seeks to distinguish *Lumba* from the present case.

159 We accept the AG's submissions in so far as they relate to the distinctions between the factual matrices of *Lumba* and the present appeal, *viz*, *Lumba* was primarily concerned with a private law claim for the tort of false imprisonment, whereas the present appeal concerns the standing requirements in an application for declaratory relief which involves constitutional rights. We express *no view* on whether Tan can successfully maintain any action for the tort of false imprisonment *vis-à-vis* his arrest and detention under s 377A if that section is indeed unconstitutional.

160 Even so, we respectfully disagree with the AG that the principles elucidated in *Lumba* should be so narrowly confined. The issue of causation which was analysed in *Lumba* – *viz*, whether the unlawful nature of a

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[12] See the Respondent's Further Submissions filed on 28 October 2011 ("the Respondent's Further Submissions") at p 9, para 9.

deprivation of personal liberty is lost when the deprivation could have proceeded in a lawful manner – is applicable to the present case. As Lord Dyson stated at [62] of *Lumba*, the issue of whether a defence of causation should be recognised is a *common issue* in both the tort of false imprisonment and public law:

> The introduction of a causation test in the tort of false imprisonment is contrary to principle both as a matter of the law of trespass to the person and ***as a matter of administrative law***. ***Neither body of law recognises any defence of causation*** so as to render lawful what is in fact an unlawful authority to detain, by reference to how the executive could and *would have* acted if it had acted lawfully, as opposed to how it *did in fact* act. [emphasis in original in italics; emphasis added in bold italics]

Therefore, while the elements of unlawful detention under the tort of false imprisonment may not be identical to the elements of unconstitutional deprivation of personal liberty in breach of Art 9(1), the former elements pitch the issue of causation at a higher level of generality, and we find that they are applicable to the present appeal.

161 We now go on to examine the principles elucidated in *Lumba* on the issue of whether the unlawful nature of a deprivation of personal liberty is lost when the deprivation could have proceeded in a lawful manner. Lord Kerr of Tonaghmore JSC, as part of the majority, expressed views on this issue which are instructive (at [239]–[243]):

> 239 … The fact that a person *could have been* lawfully detained says nothing on the question whether he *was* lawfully detained.
>
> 240 … An ex post facto conclusion that, had the proper policy been applied, the [applicants] would have been lawfully detained cannot alter that essential fact [that the proper law was not so applied].

> 241 The inevitability of the finding that the detention was unlawful can be illustrated in this way. If, some hours after making the decision to detain the [applicants] (based on the application of the unpublished policy), it was recognised that this did not constitute a legal basis on which they could be held, could their detention be said to be lawful before any consideration was given to whether the application of the published policy would have led to the same result? ***Surely, at the moment that it became clear that there was no lawful authority for the detention and before any alternative basis on which they might be detained was considered, their detention was unlawful.***
>
> 242 It is, I believe, important to recognise that lawful detention has two aspects. First the decision to detain must be lawful in the sense that it has a sound legal basis and, secondly, it must *justify* the detention. This second aspect has found expression in a large number of judgments, perhaps most succinctly in the speech of Lord Hope in *R v Governor of Brockhill Prison Ex p Evans (No 2)* [2001] 2 AC 19, 32D where he said "it is of the essence of the tort of false imprisonment that the imprisonment is without lawful justification". It seems to me to be self evident that the justification must relate to the basis on which the detainer has purported to act, and not depend on some abstract grounds wholly different from the actual reasons for detaining. As Mr Husain [counsel for one of the applicants] put it, the emphasis here must be on the right of the detained person not to be detained other than on a lawful basis which justifies the detention. ***Detention cannot be justified on some putative basis, unrelated to the actual reasons for it, on which the detention might retrospectively be said to be warranted.*** Simply because some ground for lawfully detaining may exist but has not been resorted to by the detaining authority, the detention cannot be said, on that account, to be lawful.
>
> 243 … As Professor Cane put it in "The Temporal Element in Law" (2001) 117 LQR 5, 7 "imprisonment can never be justified unless *actually* [as opposed to hypothetically] authorised by law". …
>
> [emphasis in original in italics; emphasis added in bold italics]

162 As can be seen from the above extract, Lord Kerr focused on the fact that a lawful decision to detain was *not* in fact made in *Lumba*, and it was this crucial fact of unlawful detention that gave rise to the necessity of the grant of a remedy.

163 We agree with the foregoing analysis, and add that it is not right to say that the detention which Tan faced was the *same* regardless of whether it proceeded under s 377A or s 294(*a*). The critical difference lies in the *legality* of the actual detention. Further, it is only through a strained process of *ex post facto* rationalisation adopted by the AG that one can say that an alternative lawful avenue for detaining Tan was available at the material time, and that had it been utilised, there would have been no violation of Tan's constitutional rights. This process of *ex post facto* rationalisation does not negate the fact that assuming, *arguendo*, that s 377A is unconstitutional, *there was an actual violation of Tan's constitutional rights* at the time of his detention under that section.

164 We thus find that there was a *lis* at the point when Tan was detained under s 377A.

*The substitution of the s 294(*a*) charge for the s 377A charge*

165 We come to the second key fact of this case, *viz*, that a s 294(*a*) charge was subsequently substituted for the s 377A charge against Tan. Mr Abdullah's submissions before this court centre on the fact of this substitution, and on the fact that Tan *pleaded guilty* to the substituted charge. However, we find that the focus on Tan's plea of guilty to the s 294(*a*) charge is a red herring. When questioned on whether the AG would have pursued the "no real controversy" argument if Tan had claimed trial to the s 294(*a*) charge instead of entering a plea of guilty, Mr Abdullah rightly acknowledged that the AG would have raised the same argument regardless of the plea of guilty. Therefore, our focus will not be on Tan's plea of guilty to the s 294(*a*) charge, but on the substitution of the original s 377A charge itself.

166 As to the substitution of the s 377A charge, the AG's case is that since the decision sought to be impugned (*ie*, the decision to charge Tan under s 377A) has been substituted by a fresh decision (*ie*, the decision to charge Tan under s 294(*a*)), it is the latter decision that forms the subject matter of review because a challenge to the initial decision becomes "pointless".[13] In support of this position, the AG has cited the cases of *R v Secretary of State for the Home Department, ex parte Turgut* [2001] 1 All ER 719 ("*Turgut*") and *The Queen on the Application of Rathakrishnan v Secretary of State for the Home Department* [2011] EWHC 1406 (Admin) ("*Rathakrishnan*").

167 The fundamental difficulty that we have with the AG's contention is that it is not the AG's decision to proceed with a s 377A charge against Tan which is being impugned here. This case has never been about a challenge to the exercise of the AG's prosecutorial discretion. Instead, what is being impugned here is s 377A itself.

168 Further, we find that neither *Turgut* nor *Rathakrishnan* are applicable to the present case. In *Turgut*, the court was asked to consider the correct approach to a challenge against a public law decision which had been replaced by a further subsequent decision. The court concluded at 735–736 as follows:

> Where however the second decision is to the same effect as the first decision and the applicant challenges the legality of the second decision the question then arises as to what is the proper approach of the court. Further litigation on the first decision will generally be pointless. In general it will be convenient to substitute the second decision for the first decision as being the decision challenged in the proceedings.

[13] See the Respondent's Further Submissions at p 16, para 19.

As can be seen, the second decision in *Turgut* had the *same effect* as the first decision. We understand "effect" to mean the legal effect of the decisions. As the two decisions in issue in *Turgut* had the same effect, the applicant was not prejudiced by the substitution of the second decision for the first decision in the judicial review proceedings. We find no difficulty with the ruling in *Turgut*. However, it is not applicable to the present case as the legal effect of s 377A and that of s 294(*a*) are not the same, given that the former is arguably unconstitutional while the latter is undoubtedly constitutional.

169 *Rathakrishnan* involved a challenge to a refusal to grant asylum. The procedural history of the case is crucial to a proper understanding of the decision which the court arrived at. In *Rathakrishnan*, the applicant's initial claim for asylum was rejected, and following this rejection, he made fresh representations. The UK Secretary of State declined to treat the applicant's fresh representations as a fresh claim for asylum, and the applicant challenged that decision ("the impugned decision") by way of judicial review proceedings. After the judicial review proceedings were commenced, the UK Secretary of State decided that she would no longer rely on the impugned decision as she acknowledged that she might indeed have failed to properly consider the substance of all the points raised by the applicant in his representations. The UK Secretary of State invited the applicant to agree to the court disposing of the judicial review proceedings by quashing the impugned decision and ordering her (the UK Secretary of State) to reconsider his representations. The applicant was unwilling to agree and instead sought to have the judicial review proceedings stayed. It appeared that his thinking was that if the judicial review proceedings were merely stayed instead of disposed of conclusively by the court, then in the event that the UK Secretary of State's fresh decision on his asylum claim was unfavourable to him and thus (from his

perspective) arguably unlawful, that fresh decision could be challenged within the same judicial review proceedings (see *Rathakrishnan* at [5]). The court declined to allow the judicial review proceedings to remain on foot for the reason that if the UK Secretary of State's error were to be repeated in her reconsideration of the applicant's representations, it could be the subject matter of fresh judicial review proceedings (see *Rathakrishnan* at [15]). The court's concern was that judicial review proceedings might again be initiated after the UK Secretary of State delivered her pending fresh decision on the applicant's asylum claim following her reconsideration of his representations. In that scenario, if the existing judicial review proceedings were not terminated, there would be two sets of judicial review proceedings *vis-à-vis* the applicant's asylum claim: the existing judicial review proceedings in respect of the impugned decision, and new judicial review proceedings in respect of the UK Secretary of State's fresh decision on the asylum claim. In the court's view, "[t]o have two decisions that [were] the subject of challenge on partly the same and partly different grounds [led] to muddle" (see *Rathakrishnan* at [15]). The court thus held (at [17]) that "where a fresh decision ha[d] yet to be made and [was] going to be made, the existing proceedings should normally end".

170 We find that the ruling in *Rathakrishnan* is not applicable to the present case as there is no pending fresh decision to speak of here. The court's concern in that case – namely, to avoid a situation where two judicial review proceedings are launched on "partly the same and partly different grounds" (see *Rathakrishnan* at [15]) against two decisions involving the same subject matter (*viz*, the applicant's asylum claim in *Rathakrishnan*) – does not apply to the present case.

171 Furthermore, what is being challenged in the present case is neither the original decision (to charge Tan under s 377A) nor the fresh decision (to charge Tan under s 294*(a)* instead). As noted above at [167], what is being challenged is the constitutionality of s 377A itself. Assuming, *arguendo*, that s 377A is unconstitutional, we have found that the very existence of s 377A in the statute books arguably violates Tan's constitutional rights *without* the need for any violation through executive action (see above at [126]). It is here that the difference between challenging an executive decision and challenging a law can be seen. *Rathakrishnan* was concerned with the constitutionality of an executive decision, while the present case is concerned with the constitutionality of a law. A law exists on a different plane from an executive decision. Executive decisions are taken under laws and, thus, are subject to legal limits (see *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 at [86]). All prosecutions are instantiations of the AG's executive decisions. Where a prosecution is brought under an unconstitutional law, all decisions to prosecute under that law will also be unconstitutional. The unconstitutionality of the law is not derived from the unconstitutionality of the prosecutions brought under it; instead, it is the other way around. We pause to add that the unconstitutionality of a prosecution may also arise apart from the unconstitutionality of a law (see *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 ("*Ramalingam Ravinthran*") at [17]).

172 We are here faced with a third situation distinct from that in *Turgut* and that in *Rathakrishnan*. In the present case, there has been a fresh decision, and this fresh decision had a different legal effect from the initial decision. *If* the fresh decision extinguished the initial decision, the initial decision would no longer be open to challenge as it would have ceased to have any effect.

However, where the initial decision had *real consequences* during the interim between the initial decision and the fresh decision, and where those consequences were not ameliorated or extinguished by the fresh decision, the initial decision would remain open to challenge. *In the present case, while the s 377A charge against Tan can be said to have been extinguished by the substitution of the s 294(*a*) charge in the sense that the s 377A charge ceased to exist from the time the substituted charge was preferred, the violation of Tan's Art 9(1) rights in the interim period before the substituted charge was preferred was not remedied by the mere fact of the substitution in itself.* As the violation of Tan's constitutional rights has not been and is not capable of being excised or extinguished by the preferring of the substituted charge anymore than it is capable of being excised by the fact that Tan's arrest and detention under s 377A could have lawfully proceeded under s 294(*a*) (see above at [163]), we find that the *lis* created by the initial decision to charge Tan under s 377A remains in existence despite the substitution of the s 377A charge.

Is there a real and credible threat of prosecution under s 377A?

173 On behalf of Tan, Mr Ravi submits that as long as s 377A exists, the police are at liberty to arrest based on it and the AGC is at liberty to charge based on it. Therefore, "no amount of non-binding reassurance from the executive about the non-enforcement will be sufficient".[14] Mr Ravi notes that there has not been any executive order to the effect that s 377A must not be used to charge consensual private acts between male homosexuals. Further, during the hearing before this court, Mr Ravi stated that there had been two

[14] See the Appellant's Case at p 34, para 107.

recent cases where the police issued stern warnings under s 377A for private consensual sex between male homosexuals after arresting the individuals concerned.

174 The AG's case is that there is no real and credible threat of prosecution under s 377A for the sphere of acts that Tan is interested in, *ie*, private consensual sexual acts between two adult males. Even if there is a threat of prosecution, this is a mere spectre. As for the instances where stern warnings under s 377A were issued, Mr Abdullah submits that after stern warnings are issued, the police do not check for continued compliance with the warnings and the persons concerned are, for all intents and purposes, left alone. We note that Mr Abdullah, however, has not refuted Mr Ravi's statement that there have been cases of arrests resulting in stern warnings under s 377A for consensual sexual acts conducted in private (see above at [173] as well as below at [183]).

175 Just as individuals have a right not to be arrested, investigated and detained under an unconstitutional law, they also have a right not to be prosecuted under an unconstitutional law. In *Ramalingam Ravinthran*, it was held by this court at [17] that "a prosecution in breach of constitutionally-protected rights would be unconstitutional". Individuals who act in ways that may render them liable under unconstitutional laws ought not be placed in the unenviable position of waiting for an unconstitutional sword of Damocles to fall upon their fundamental rights.

176 The AG's arguments as to the threat of prosecutions under s 377A being merely fanciful was also raised by the respondent in *Leung* (*viz*, the Hong Kong Secretary for Justice) in the following manner (at [26]):

> The applicant may or may not in the future be prosecuted but that is a purely hypothetical situation which may never occur and the Court ought not grant declarations relating to hypothetical events in the future.

177 To this, the Hong Kong Court of Appeal curtly responded by stating at [28] that it "clearly [had] jurisdiction but [jurisdiction] must be carefully exercised". The court held that even though future events or proposed conduct was involved, in "exceptional cases" (at [28(2)]), it would grant the appropriate relief. The court went on to refer to *Airedale NHS Trust v Bland* [1993] AC 789, where, notwithstanding that the declarations sought dealt with the legality of future conduct, Lord Goff of Chieveley opined as follows (at 862H–863A):

> It would, in my opinion, be a deplorable state of affairs if no authoritative guidance could be given to the medical profession in a case such as the present, so that a doctor would be compelled either to act contrary to the principles of medical ethics established by his professional body or to risk a prosecution for murder.

178 It can thus be seen that one of the reasons why a real and credible threat of prosecution may be seen as giving rise to a *lis* is that individuals should not be compelled to act against what is, on the face of it, the law, and thereby risk the actualisation of the threat of prosecution. This was acknowledged in Lord Woolf & Jeffrey Jowell, *de Smith, Woolf & Jowell: Judicial Review of Administrative Action* (Sweet & Maxwell, 5th Ed, 1995) at para 18-002 as follows:

> [A declaration] is increasingly being used to pronounce upon the legality of a future situation and in that way the occurrence of illegal action is avoided.

We add that the notion that individuals cannot be required to breach the law in order to gain access to justice (expanded on above at [96]–[105] in the context

of standing) is broad enough to encompass both breaches of the law which do and breaches of the law which do not result in prosecutions. The decision to bring a prosecution is at the sole discretion of the AG and lies outside an individual's control.

179 Further, if a law is unconstitutional, selective prosecution under that law is not an answer as no prosecutions whatsoever should be brought under an unconstitutional law. Although the existence of a *lis* is clearer when a prosecution has been brought under an allegedly unconstitutional law, the very fact of a real and credible threat of prosecution under such a law is sufficient to amount to an arguable violation of constitutional rights, and this violation gives rise to a real controversy for the court to determine.

180 There have been ministerial statements in Parliament indicating that the Government's policy towards s 377A is that this provision will not be "proactively" enforced (see *Singapore Parliamentary Debates, Official Report* (23 October 2007) vol 83 at col 2401; see also *Singapore Parliamentary Debates, Official Report* (21 July 2008) vol 84 at col 2923). However, "no proactive enforcement" is, in our view, of a totally different complexion from "no enforcement". No Minister has gone so far as to state that there will be no enforcement of s 377A. The phrases "active"/"proactive"/"vigorous" enforcement are broad phrases which can comfortably bear a spectrum of meaning. At one end of the spectrum, the lack of active enforcement may suggest that the police will not charge consenting adult males who engage in homosexual activities in private, whatever the circumstances. At the other end, it may simply mean that the police will not purposely seek out adult males who carry out such activities with a view to charging them, but if they happen to come across such activities being committed or if they receive complaints

of such activities, they will then arrest and charge the relevant persons under s 377A. One can conceive of a situation where a neighbour of a homosexual couple calls the police to lodge a complaint that offences under s 377A are being committed in the privacy of that couple's home. In such a situation, if the police respond to the call and proceed to arrest and charge the couple under s 377A, would this be "active" enforcement, or "reactive" enforcement? If it is the latter, it will not be covered by the statements in Parliament.

181 An even more fundamental point ought to be raised. As acknowledged by Mr Abdullah, ministerial statements do *not have the force of law* and do not bind the AG, who exercises his prosecutorial discretion independently. While we are confident that the AG will consider general governmental policy in exercising his discretion, this cannot be a fetter on his exercise of that discretion. *Before this court, it was made abundantly clear that no binding assurance could be given that no future prosecutions would ever be brought under s 377A.* Moreover, even if an assurance from the AGC were forthcoming, as demonstrated in *Public Prosecutor v Knight Glenn Jeyasingam* [1999] 1 SLR(R) 1165 ("*Glenn Knight*"), a representation by an incumbent Attorney-General cannot bind future Attorney-Generals. In *Glenn Knight*, where it was revealed that the then Attorney-General had decided to commence a prosecution against the respondent in that case despite a purported letter promising him immunity from future prosecution, the court held that that decision could not be impugned due to "the almost inviolable discretion of the AGC to prosecute" (at [70]) (for a more in-depth analysis of the constitutional status of the prosecutorial discretion and its limitations, see *Ramalingam Ravinthran*, especially at [27], [28], [44], [45] and [51]–[53]).

182 Further, there is nothing to suggest that the policy of the Government on s 377A will not be subject to change. Just as the AG cannot fetter his discretion on policy matters, the Executive cannot fetter its discretion on the same. Ministerial statements in Parliament on policy matters do not invariably bind a future or even the same government. The Executive's discretion to determine policy remains unfettered and it has the right to change its policy with regard to the enforcement of s 377A. Therefore, as long as s 377A remains in the statute books, the threat of prosecution under this section persists, as the facts of this case amply illustrate.

183 We also find that the threat of prosecution under s 377A is not merely fanciful, even for the type of conduct that Tan professes to regularly participate in,namely, private consensual sexual acts between two adult males. As noted earlier at [173] above, stern warnings have been issued by the police under s 377A for such conduct. As stern warnings are only issued after investigations have been carried out with regard to the offence in question, the individuals who have received stern warnings under s 377A would have been arrested and detained under an arguably unconstitutional law. When Mr Abdullah was asked about the stern warnings issued by the police under s 377A, he stated that there is sometimes a necessity for suspects to be investigated even though their sexual acts seem consensual. This might occur where suspects have been arrested for another criminal offence (*eg*, drug consumption) and the facts also disclose a possible s 377A offence. In such cases, while the police are aware of the facts giving rise to a possible s 377A charge, they may decide not to proceed with that charge if the sexual activities were between consenting adult males. We find that the fact that stern warnings have been issued under s 377A for private consensual acts between adult males suggests that there is not just a mere spectre of prosecutions under that

provision. A stern warning is a way of informing the individual who is warned that if he continues to indulge in the type of conduct circumscribed by s 377A, leniency may no longer be forthcoming in future and he may well be charged under s 377A if he is found engaging in such conduct in the future. Further, there is a real possibility that the individual police officer or Deputy Public Prosecutor handling a case may decide not to proceed with a stern warning, but to instead prefer a charge under s 377A. That appears to be precisely what has happened here.

184 Without going into the merits of the Application, 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 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)).[15]

The issues in controversy in the present case

185 To end our analysis and discussion of Issue 4, we frame the following arguable issues for the court below to determine on the merits:

whether s 377A violates Art 12 in terms of:

(a) whether the classification 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.

Summary

186 In the result, we affirm the Judge's determination (albeit on different grounds) that Tan has *locus standi* to make the Application (see [125]–[127] above). The way in which this case has been argued ties the issues of *locus standi* and certainty of failure together, and, thus, we find that the Application is not certain to fail, given that Tan has *locus standi* to pursue it. Further, we also find that that there is an arguable case on the constitutionality of s 377A that ought to be heard in the High Court (see [185] above). We emphasise that our finding of the existence of a real controversy to be determined in this case arises from a combination of two factors. Firstly, Tan was at the outset

[15] See the Appellant's Supplementary Bundle of Authorities at Tab 15.

arrested, investigated, detained and charged exclusively under s 377A. This squarely raises the issue as to whether Tan's initial detention and prosecution were "in accordance with law" within the meaning of Art 9(1) as s 377A was the only provision relied on by the investigators and the Prosecution at all material times prior to the substitution of the s 377A charge with the s 294(*a*) charge. The subsequent substitution of the s 377A charge only after the Application was filed could not excise any earlier "wrong" which might have been committed *vis-à-vis* Tan (see [163] and [172] above). Secondly, there is a real and credible threat of prosecution under s 377A (see [173]–[183] above). Our finding that there is a real controversy to be adjudicated in this case removes the anomaly referred to at [15] above as now, Tan, an applicant who has *locus standi* based on a finding of an arguable violation of his constitutional rights, will be allowed to vindicate his rights before the courts. The principle of access to justice calls for nothing less.

Conclusion

187 We thus allow the present appeal and grant Tan leave to amend the Application to include a prayer that he ought not to have been arrested, investigated, detained and charged under s 377A, as well as to make the appropriate references to Art 162 for the sake of completeness. We hold that Tan has standing to pursue his claim for declaratory relief subject to the requisite amendments to the Application being made. For the avoidance of any doubt, we reiterate (see also above at, *inter alia*, [3] and [127]) that we are *not* deciding here that s 377A *is* inconsistent with Art 12 as that goes to the merits of the Application. We are merely deciding that it is *arguably* so, which suffices for the present appeal on the preliminary issue of whether the Application should be struck out.

188 There will be no order as to costs here and below.

Andrew Phang Boon Leong	V K Rajah	Judith Prakash
Judge of Appeal	Judge of Appeal	Judge

M Ravi (LF Violet Netto) for the appellant;
Aedit bin Abdullah SC, Teo Guan Siew, Seow Zhixiang and Serene Chew (Attorney-General's Chambers) for the respondent.