

The Endgame of Section 377A Litigation

Case Note on *Tan Seng Kee v Attorney-General* [2022] SGCA 16

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I. Introduction

1 This case is the latest instalment of more than a decade of litigation on the constitutionality of s 377A of the Penal Code (“PC”).¹ Section 377A provides:

Outrages on decency

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

2 The Court of Appeal held that s 377A is currently unenforceable in its entirety in order to give effect to the political compromise struck by the Government in 2007 and Attorney-General Lucien Wong (“AG Wong”)’s representations in 2018 that the Public Prosecutor (“PP”) would not prosecute sexual acts between two consenting adult men in private.² Section 377A will remain unenforceable unless and until the AG of the day gives clear notice that he, as PP, intends to revoke the 2018 representations and reassert his right to enforce s 377A.³ Accordingly, the appellants did not have standing to pursue their constitutional challenges to s 377A since they do not face any real and credible threat of prosecution for the time being.⁴ In the result, the court need

¹ Penal Code (Cap 224, 2008 Rev Ed). Section 377A of the Penal Code (Cap 224, 2008 Rev Ed) is *in pari materia* with s 377A of the Penal Code 1871 (2020 Rev Ed) (“Revised PC”).

² *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [83]–[87].

³ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [159], [153] & [330].

⁴ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [153], [237] & [330].

not deal with the issue of s 377A's constitutionality.⁵ Despite this, the court did make certain observations about the constitutionality of s 377A in *obiter*.

II. Facts

3 The appellants, Dr Tan Seng Kee, Mr Ong Ming Johnson and Mr Choong Chee Hong are homosexual men.⁶ All three men challenged the constitutionality of s 377A.⁷

III. Policy of non-enforcement of s 377A

4 In its judgment, the five-judge *coram* of the Court of Appeal began by clarifying what the scope of the case was about. It was not about whether s 377A should be retained or repealed (*i.e.*, the policy merits of s 377A), the moral worth of homosexual individuals, or the fundamental nature of sexual orientation because these are extra-legal considerations that are ill-suited to be resolved in a court of law.⁸

5 Instead, the case was about the constitutionality of s 377A.⁹ First, the Court of Appeal noted that litigation might not be the optimal way to resolve the differences between the various interests of society because it is a zero-sum, adversarial process.¹⁰ In contrast, the political process is more conducive to accommodate divergent interests and opinions.¹¹ Yet, to determine the constitutionality of s 377A, the court cannot ignore the political compromise that was struck between the various interests in society in 2007.¹²

⁵ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [153].

⁶ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [21].

⁷ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [22].

⁸ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [2].

⁹ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [3].

¹⁰ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [4].

¹¹ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [4].

¹² *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [10].

A. *The political compromise*

6 Parliament debated s 377A extensively in 2007. A political compromise was struck by the Government in which s 377A would be kept in the statute books because it bore important symbolic weight for the conservative mainstream in Singapore.¹³ However, s 377A would not be proactively enforced against homosexual men to accommodate their interests.¹⁴

7 The Court of Appeal explained that the political compromise is relevant in the assessment of the legality of s 377A because the political compromise affects the lives of homosexual men in Singapore as well as the meaning and significance of s 377A.¹⁵ Moreover, the political compromise took on a new legal significance in 2018 following AG Wong’s representations.¹⁶ AG Wong stated in a press release that:¹⁷

... In the case of section 377A, where the conduct in question was between two consenting adults in a private place, the PP had, absent other factors, taken the position that prosecution would not be in the public interest. This remains the position today.

Accordingly, it would be artificial and unrealistic to ignore these legislature and executive actions when assessing the legality of s 377A.¹⁸

B. *Uncertainties arising from the political compromise*

8 Despite the political compromise that s 377A would not be proactively enforced, the Court of Appeal was of the view that there remained uncertainties as to the potential liabilities of homosexual men under s 377A for the following reasons:

¹³ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [8] & [94].

¹⁴ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [8], [76], [92] and [96].

¹⁵ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [67]–[68].

¹⁶ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [66].

¹⁷ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [85], citing para 6 of the 2018 Attorney-General’s Chambers (“AGC”) Press Release.

¹⁸ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [95].

(a) First, representations made as part of the political compromise do not bind either the Government or AG, whether presently or in the future.¹⁹

(b) Second, there was some uncertainty as to the scope and source of any legal protection from prosecution under s 377A. With regards to scope, the Prime Minister's representation in Parliament was broader than AG Wong's statement in 2018, *viz.* the Prime Minister's speech suggested that s 377A will generally not be enforced, but AG Wong's statement specifically stated that only a certain category of acts caught by s 377A, *viz.* sexual conduct between consenting adult men in private, would generally not be prosecuted under s 377A.²⁰ With respect to the source of legal protection, the Court of Appeal observed that statements by the Government do not bind the PP's exercise of his prosecutorial discretion since the prosecutorial discretion is exercised independently.²¹

(c) Third, there was ambiguity as to how the political compromise would affect the enforcement of other laws. For instance, it was unclear whether a person who is aware of the commission of any act of gross indecency between homosexual men in private would be required to report the offence pursuant to s 424 of the Criminal Procedure Code ("CPC")²² as well as s 176 of the PC. Moreover, it was also ambiguous as to whether a public servant who knows that such conduct is likely to be committed is legally bound under s 119 of the PC to disclose it.²³

9 The court concluded that such legal uncertainties have left homosexual men unable to plan their lives adequately,²⁴ and may be regarded as giving rise to a sense of harassment which must be minimised to give full legal effect to the

¹⁹ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [97]–[98].

²⁰ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [99].

²¹ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [100]–[101].

²² Criminal Procedure Code (Cap 68, 2012 Rev Ed). This is *pari materia* with s 424 of the Criminal Procedure Code 2010 (2020 Rev Ed).

²³ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [107].

²⁴ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [109].

political compromise.²⁵ This is contrary to the notion that the law must be capable to guide the conduct of those that it binds.²⁶ Moreover, even if offences under s 377A were not prosecuted, there is still the issue of liability under s 424 of the CPC and ss 176 and 119 of the PC.²⁷

IV. Doctrine of substantive legitimate expectations

A. *Limited recognition of the doctrine in the context of s 377A*

10 To imbue AG Wong's representations with legal force, the Court of Appeal invoked the doctrine of substantive legitimate expectations in the context of s 377A.²⁸ In so holding, the court was guided by two fundamental considerations. First, not recognising the legal effect of AG Wong's representations may expose homosexual men to the threat of prosecution and the severe effects thereof.²⁹ Second, invoking the doctrine of substantive legitimate expectations in the present instance would uphold the public interest in maintaining the political compromise struck by the Government in 2007 and avoid the need to decide whether s 377A should be struck down as null and void, a zero-sum endeavour. In essence, the general policy of not enforcing s 377A are exceptional.³⁰

11 The court also noted that recognising the doctrine of substantive legitimate expectations is not contradictory to separation of powers, nor does it require the courts to review the substantive merits of the political compromise because the court was simply giving effect to the political compromise on s 377A.³¹ Neither does invoking the doctrine violate the PP's prosecutorial discretion because a future AG may destroy the expectation founded on AG

²⁵ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [152].

²⁶ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [109], citing Tom Bingham, *The Rule of Law* (Penguin Books, 2011) at pp 91–95).

²⁷ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [109].

²⁸ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [132].

²⁹ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [133].

³⁰ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [134].

³¹ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [135] & [140].

Wong's 2018 representations by giving clear and unambiguous notice that he intends to revoke AG Wong's representations and reassert his right to enforce s 377A.³²

12 Finally, the court reiterated that the recognition of the doctrine of substantive legitimate expectations is a limited one; whether the doctrine should be imported into Singapore law in any wider context remains an open question to be determined in a future case.³³

B. Application

13 On the facts, the Court of Appeal held that a legitimate expectation had arisen with respect to AG Wong's representation that the PP would not prosecute sexual acts between two consenting adult men in private and should be given effect. First, the representations were made by the AG in his official capacity as PP. Second, they were publicly promulgated. Third, the representations were legally significant in that they constitute guidelines on how the PP will exercise his discretion in prosecuting s 377A offences. Fourth, giving effect to the representations will not result in a breach of the law or of Singapore's international obligations. Finally, nothing suggests that giving effect to this legitimate expectation would infringe the accrued rights of anyone or that the expectation was outweighed by an overriding national or public interest.³⁴

14 The Court of Appeal then went on to hold that s 377A was unenforceable in its entirety. In doing so, the court went above and beyond the legitimate expectation engendered by AG Wong's representation that the PP would not prosecute sexual acts between two consenting adult men in private.³⁵ In other words, even conduct caught by s 377A that does not involve sexual acts between

³² *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [136] & [138].

³³ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [140].

³⁴ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [147].

³⁵ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [149].

consenting adult men in private (*e.g.*, sexual conduct involving minors or those occurring in public) cannot be prosecuted under s 377A.

15 Consequently, prosecutions under provisions such as ss 119 and 176 of the PC cannot be instituted where the underlying offence is one under s 377A. Furthermore, there is no breach of s 424 of the CPC where a person is aware of the commission or the intention to commit an offence under s 377A.³⁶

16 The Court explained that it held s 377A to be unenforceable in its entirety for two reasons:

(a) First, the holding that s 377A is unenforceable in its entirety is of modest consequence because it remains open for the AG of the day to declare that he no longer wishes to follow AG Wong's 2018 representations.

(b) Second, there is nothing to indicate that AG Wong, as PP, did not intend to limit his prosecutorial policies to sexual acts between consenting adult men in private. In any event, if the court were mistaken on this, it remains open for AG Wong to give actual notice that he does intend to prosecute sexual acts that are *not* between two consenting adult men in private under s 377A.³⁷

More importantly, holding s 377A to be entirely unenforceable resolves the legal uncertainties that have left homosexual men unable to plan their lives adequately,³⁸ minimises the sense of harassment that might be felt by homosexual men,³⁹ and accords full legal effect to the political compromise.⁴⁰

17 However, the Court of Appeal stressed that nothing in its holding affects the right of the police to investigate all conduct that may amount to an offence

³⁶ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [150].

³⁷ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [151].

³⁸ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [109] & [152].

³⁹ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [152].

⁴⁰ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [151(a)] & [152].

under s 377A.⁴¹ Moreover, the court's holding does not constrain the PP's right to prosecute sexual acts that are *not* between two consenting adult men in private under other provisions.⁴²

18 Given that s 377A is unenforceable in its entirety, the Court of Appeal held that the appellants cannot be said to face any real or credible threat of prosecution under s 377A and accordingly do not have standing to challenge s 377A's constitutionality.⁴³

V. Whether sexual orientation is immutable

19 The Court of Appeal returned to consider Mr Ong and Dr Tan's argument that sexual orientation is immutable. The court was of the view that it is not within its remit to consider whether sexual orientation is immutable because it is a scientific matter that is beyond the institutional competence of the courts.⁴⁴ The court reiterated that its function is to make findings on fact on the specific case before it, and not make general pronouncements of scientific fact.⁴⁵

20 In any event, even if sexual orientation is immutable, it does not follow that s 377A is unconstitutional. To illustrate this point, the court pointed to laws in which kleptomaniacs and paedophiles may violate. While kleptomania and paedophilia may be genetic and kleptomaniac and paedophilic attractions may be immutable, no one would seriously suggest that laws which criminalises theft and sex with minors as absurd and not "law" within Art 9(1) of the Constitution.⁴⁶

⁴¹ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [150].

⁴² For example, indecent behaviour in public may be prosecuted under s 20 of the Miscellaneous Offences (Public Order and Nuisance) Act 1906 (2020 Rev Ed) and s 294 of the Revised PC, while sexual acts involving minors may be prosecuted under provisions such as ss 376A to 376C of the Revised PC).

⁴³ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [153].

⁴⁴ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [156]–[157].

⁴⁵ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [158].

⁴⁶ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [159].

VI. The proper interpretation of s 377A

21 Next, the court turned to the proper interpretation of s 377A. This was in response to Mr Choong’s contention that s 377A was only intended to cover nonpenetrative sex acts between men because the purpose of s 377A was to suppress male prostitution.⁴⁷ To interpret s 377A, the court applied the *Tan Cheng Bock* framework.⁴⁸

A. “Gross indecency”

22 With respect to the term “gross indecency”, the Court of Appeal held that, on a plain reading, it did not make sense for “gross indecency” to be limited to non-penetrative sex acts. It must extend to penetrative sex acts. Moreover, the ordinary meaning of the term “gross indecency” is not limited to male prostitution, contrary to the appellant’s suggestion.⁴⁹

B. Legislative purpose of s 377A

23 From the plain text of s 377A in its statutory context, the Court of Appeal held that the legislative purpose of s 377A was to safeguard public morals. Even though s 377A is found under Chapter XVI of the PC which covers “Offences affecting the human body”, it is situated between the offences of sexual penetration of a corpse and sexual penetration with a living animal. This suggests that the purpose of s 377A is to uphold public morality, and s 377A was not simply concerned with the protection of bodily integrity.⁵⁰

24 With respect to counsel for Mr Choong’s reliance on extraneous material, the Court of Appeal reiterated that extraneous material can only be

⁴⁷ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [164].

⁴⁸ See *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 (“*Tan Cheng Bock*”).

⁴⁹ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [167].

⁵⁰ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [173].

used to confirm, and not to alter or supplant, that plain meaning of s 377A.⁵¹ But in the court's judgment, s 377A was not ambiguous on its face.⁵²

25 Moreover, there was a contradiction in Mr Choong's submissions because if the court were to accept that the purpose of s 377A was indeed to tackle male prostitution, then this would entail the criminalisation of penetrative sex acts. Yet, the conclusion that counsel for Mr Choong wished to draw was that s 377A was not concerned with penetrative sex acts at all.⁵³

26 Nevertheless, the court proceeded to analyse the extraneous material relied upon by Mr Choong's counsel. However, after considering all the extraneous material, the Court of Appeal found that the legislative purpose of s 377A was not to stamp out male prostitution but to safeguard public morals generally.⁵⁴

VII. Whether s 377A is unconstitutional

27 As mentioned above, the Court of Appeal held that the appellants do not have standing to challenge s 377A's constitutionality. Nonetheless, the court proceeded to express its views on the constitutionality of s 377A in *obiter*.

A. Article 9

28 The court was of the view that s 377A does not violate Art 9 of the Constitution because Art 9 was concerned with procedural safeguards in respect of the arrest and detention of persons.⁵⁵ Accordingly, the words "life or personal liberty" does not contain unremunerated rights such as the freedom to express one's sexual identity.⁵⁶

⁵¹ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [174].

⁵² *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [176].

⁵³ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [165] & [176].

⁵⁴ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [235].

⁵⁵ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [248]–[252].

⁵⁶ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [244]–[246] & [252].

29 In response to the argument that s 377A was “absurd” and therefore not “law” within the meaning of Art 9, the Court opined that the purpose of the “absurdity” test is to secure the right to a fair process in the context of a possible deprivation of life or personal liberty and therefore procedural in nature.⁵⁷ This is in contradistinction to a substantive test which imports moral considerations.⁵⁸ The court was therefore unable to examine the substantive content of s 377A. Since none of the appellants have suggested that s 377A infringes any procedural rights, it follows that s 377A is not “absurd”.⁵⁹

30 In any event, even if a substantive test of “absurdity” is adopted, s 377A is not absurd because many reasonable people do in fact see s 377A as being morally justified.⁶⁰ Moreover, it is untenable to suggest that the Government can never regulate against immutable characteristics.⁶¹

B. Article 14

31 Mr Choong and Dr Tan contended that the word “expression” in “freedom speech and expression” in Art 14(1)(a) includes acts of sexual intimacy.⁶² However, the Court of Appeal disagreed with such an interpretation as the primary right protected under Art 14(1)(a) is “freedom of speech” and not “freedom of expression”.⁶³ First, the marginal note to Art 14 reads, “Freedom of speech, assembly and association” and omits any mention of “freedom of expression” and focuses solely on “freedom of speech”.⁶⁴ Second, interpreting the term “expression” in context, it is meant to qualify and describe the fundamental right enshrined in Art 14(1)(a), viz. freedom of speech.⁶⁵ Third, a

⁵⁷ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [259].

⁵⁸ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [257].

⁵⁹ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [265].

⁶⁰ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [268]. See also [20]–[21] of this paper above.

⁶¹ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [267].

⁶² *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [274].

⁶³ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [279].

⁶⁴ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [279]–[280].

⁶⁵ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [282].

wide reading of the term “expression” would produce an impossible state of affairs because virtually any act that purports to convey meaning, opinions, beliefs or ideas could fall under Art 14(1)(a).⁶⁶

(1) *Chilling effect on gay rights advocacy*

32 The court also rejected Dr Tan’s contention that the existence of s 377A produces a chilling effect on gay rights advocacy thereby violating the right to freedom of speech under Art 14(1)(a).⁶⁷ Three reasons were given:

(a) First, the mere fact that a particular activity is illegal does not *ipso facto* create a chilling effect on the advocacy of that activity. For instance, Pink Dot Singapore, a pro-LGBTQ event, had been held annually.⁶⁸

(b) Second, general societal attitudes and not s 377A are the likely cause of any chilling effect on gay rights advocacy.⁶⁹

(c) Third, in the final analysis, the claim that s 377A has a chilling effect on gay rights advocacy is an extra-legal argument that the court cannot entertain.⁷⁰

C. Article 12

33 The court first reiterated that the established test for determining whether a statutory provision is constitutional under Art 12(1) is the “reasonable classification test”⁷¹ which has two limbs. Under the first limb, the classification prescribed by the statutory provision in question must be based on an intelligible

⁶⁶ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [285].

⁶⁷ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [295].

⁶⁸ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [296].

⁶⁹ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [297].

⁷⁰ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [298].

⁷¹ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [305].

differentia.⁷² This has been described to be a low threshold.⁷³ As for the second limb, the court examines whether the differentia bears a rational relation with the legislative object of the statutory provision.⁷⁴

34 With respect to s 377A, the Court of Appeal opined that whether s 377A violates the second limb of the “reasonable classification test” depends on how the legislative object of s 377A is being cast. If the legislative object of s 377A is the expression of societal disapproval of male-male sex acts, then there would be a perfect coincidence between the differentia in s 377A (*viz.* male-male sex acts) with its legislative object.⁷⁵ If so, s 377A would not violate the “reasonable classification test” and be constitutional under Art 12.

35 However, if the legislative object of s 377A is framed more broadly as an expression of society’s disapproval of homosexual conduct in general or the safeguarding of public morality generally, then this would bolster the case that s 377A violates the “reasonable classification test” and, hence, unconstitutional under Art 12. Here, s 377A may be under-inclusive because it does not criminalise female-female homosexual conduct and so there is no rational relation between s 377A’s legislative object and the differentia embodied in s 377A, *viz.* male-male sex acts. Alternatively, if the legislative object of s 377A is to target only male prostitution (a point which the court rejected), then as s 377A applies to not only male prostitution, it is over-inclusive and accordingly falls afoul of the “reasonable classification test”.⁷⁶

VIII. Comments

36 There are several noteworthy points from the decision which I now discuss.

⁷² *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [309].

⁷³ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [309] citing *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [65].

⁷⁴ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [311].

⁷⁵ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [324].

⁷⁶ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [324].

A. Substantive legitimate expectations

37 First, the Court of Appeal invoked the doctrine of substantive legitimate expectations. In doing so, the court referred to the framework set out in *Chiu Teng* and concluded that a legitimate expectation had arisen with respect to AG Wong’s 2018 representations.⁷⁷ However, it appears that AG Wong’s 2018 representations was not unequivocal or unqualified, a requirement under *Chiu Teng*, because AG Wong stated that “the PP had, *absent other factors*, taken the position that prosecution would not be in the public interest” [emphasis added]. But it is unclear what “absent other factors” meant since AG Wong did not explain what he had in mind. If so, given the ambiguity, the representation cannot be said to be unequivocal or unqualified.

38 Even if it were, and therefore satisfies the “unequivocal or unqualified” requirement in *Chiu Teng*, the more significant issue is that the Court of Appeal had gone above and beyond AG Wong’s representations in holding that s 377A is unenforceable in its entirety. To recapitulate, AG Wong stated that “where the conduct in question was between two consenting adults in a private place, the PP had ... taken the position that prosecution would not be in the public interest.” It is conceivable that there are instances in which the homosexual conduct in question would not fall under AG Wong’s representation of non-prosecution. Such instances include acts not carried out by two consenting adults and/or in a private place.

39 Nevertheless, the Court of Appeal’s decision to hold s 377A completely unenforceable is justifiable and commendable because doing so removes the associated legal uncertainties and allows homosexual men to adequately plan and live their lives.

40 Another issue may be the court’s consideration of the Prime Minister’s representation in Parliament in its analysis of the legitimate expectation that had arisen. Under the *Chiu Teng* framework, the representation must be made by

⁷⁷ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [146]; *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 (“*Chiu Teng*”) at [119].

someone with authority.⁷⁸ However, under Singapore’s constitutional framework, the authority to prosecute lies within the exclusive domain of the AG.⁷⁹ Despite this, as the Court of Appeal had astutely pointed out, it would be “artificial and unrealistic” to ignore the political compromise struck by the Government in 2007 in determining the legality of s 377A.⁸⁰

B. Article 9

41 This decision is also significant in clarifying what the concept of “absurdity” under Art 9 of the Constitution entails. In *Yong Vui Kong*, the Court of Appeal opined that a legislation that is “absurd” cannot be “law” under Art 9.⁸¹ However, it did not explain what qualifies as an “absurd” legislation. In the present case, the court helpfully clarified (in *obiter*) that the “absurdity” test is only procedural in nature as it is meant to ensure the right to a fair process in situations involving a deprivation of life or personal liberty. Accordingly, the courts cannot examine the substantive content of a legislation in determining whether a legislation is “absurd”.

42 This must be right since the adoption of a substantive test of “absurdity” would necessarily require the courts to consider the moral justifications of a legislation. But this is contrary to the doctrine of separation of powers as the proper role of the courts does not extend to evaluating the policy merits of a legislation. There are also questions as to the institutional competence of the courts to undertake such an endeavour.

C. Article 14

43 In rejecting the appellants’ contention that the word “expression” in “freedom of speech and expression” under Art 14(1)(a) includes acts of sexual intimacy, the court has helpfully clarified (in *obiter*) that “expression” is meant

⁷⁸ *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [119].

⁷⁹ See Art 35(8) of the Constitution.

⁸⁰ *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [95].

⁸¹ *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at [16].

to qualify and describe the freedom of speech. Accordingly, acts that are not “speech” do not fall within the scope of “freedom of speech and expression”.

44 One may argue that interpreting Art 14(1)(a) restrictively is contrary to the principle of generous interpretation. But it is submitted that this is justified because a wide reading of the term “expression” would produce an impossible situation, *viz.* any act that purports to convey meaning would fall within Art 14(1)(a). Moreover, there are limits as to how “generously” the Constitution can be interpreted since it must be constructed in context, bearing in mind the legislative purpose of the provision in question. While the court may have interpreted Art 14(1)(a) restrictively, this does not mean that it has rejected the principle of generous interpretation. Indeed, the court alluded to the principle while interpreting s 377A in the context of Art 12.⁸²

D. Article 12

45 Perhaps the most significant observation by the Court of Appeal is in relation to Art 12(1). The court’s observations provide valuable legal ammunition and guidance to those who may wish to challenge s 377A’s constitutionality should the AG revoke AG Wong’s 2018 representations. First, while the court opined that s 377A is over-inclusive if its legislative object is to target male prostitution, this line of argument should *not* be canvassed because the court had also found that s 377A’s object was not to deal with male prostitution but to safeguard public morals generally.

46 Instead, the stronger argument would be to cast s 377A as an expression of society’s disapproval of homosexual in general or to argue that s 377A’s legislative purpose is to safeguard public morality generally. This would render s 377A under-inclusive as it does not criminalise female-female homosexual conduct, and therefore unconstitutional under Art 12(1).

⁸² See *Tan Seng Kee v Attorney-General* [2022] SGCA 16 at [326].

IX. Conclusion

47 *Tan Seng Kee* is a momentous case. The court held that s 377A is unenforceable in its entirety. This is a welcome decision that gives homosexual men real and concrete protection from prosecution under s 377A. On the other hand, this also means that homosexual men no longer have standing to challenge s 377A's constitutionality. In doing so, the court masterfully avoided having to pronounce on the constitutionality of s 377A. And this is a good thing since such issues are better resolved before the political branches of government, rather than in the courts.

48 Moreover, since homosexual men no longer have standing to challenge s 377A's constitutionality, this case likely represents the "endgame" of constitutional challenges to s 377A until such time as the AG of the day decides to revoke AG Wong's 2018 representations.