

Section 377A: Science, religion and the law

Religious leaders may view homosexuality as a sin, like adultery and fornication, but there's no reason for the state to make it a crime



Tommy Koh

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Singapore was part of the British empire. It was once administered by the British from Calcutta (Kolkata). Many of our laws, including the Penal Code, were imported from India. The Indian Penal Code, in Section 377, criminalises "carnal intercourse against the order of nature". Sodomy was considered a crime under Section 377.

Section 377A of the Singapore Penal Code makes it a crime for two consenting male adults to have sex with each other in private. It does not penalise sex between two consenting female adults. The first question is whether Section 377A should be repealed. The second question is whether 377A is consistent with our Constitution.

THE SCIENTIFIC EVIDENCE

Singaporeans are a rational people.

We make our policies and laws based on facts, science and reason.

What is the scientific evidence on homosexuality? Is it a form of mental disorder which can be cured? Or is it a normal aspect of human sexuality?

In 1973, the World Health Organisation (WHO) deleted homosexuality from the Diagnostic and Statistical Manual of Mental Disorders. This decision was endorsed by the general assembly of WHO in 1990 when it agreed to delete homosexuality from its list of mental disorders. In WHO's view, being LGBT (lesbian, gay, bisexual, and transgender) is not a disease.

Scientists do not know what determines a person's sexual orientation, but they theorise that it is caused by a complex interplay of genetic, hormonal and environmental influences and do not view it as a choice. They favour biologically-based theories, which point to genetic factors.

Scientific research has shown that homosexuality is a normal and natural variation in human sexuality and is not in itself a source of negative psychological effects. They also believe that there is insufficient evidence to support psychological interventions to change sexual orientation.

SODOMY AND THE WORLD

The United Nations has 196 member states. The majority, 124 states, do not criminalise sodomy. However, the minority of 72 states, including Singapore, do.

Which societies belong to the

majority? All the countries of Europe, North America and South America do not criminalise sodomy. It is of interest to point out that China, Japan, South Korea, Hong Kong, Taiwan, the Philippines and Thailand also belong to the majority. It is therefore not the case of a liberal West versus a conservative East.

Which countries make up the 72 which criminalise sodomy? They are the Arab countries, the Muslim-majority countries and, surprisingly, the former British colonies of Asia, Africa and the Caribbean.

Singapore is part of the minority mainly because we inherited from the British a penal code which criminalises sodomy. For a country which embraces science and technology, it is surprising that, on this one aspect, the law has not been updated in the light of the scientific evidence.

SIN AND CRIME

The National Council of Churches of Singapore, the Catholic Archbishop, and the Islamic authorities have issued statements against the repeal of Section 377A. They regard homosexuality as a violation of their religious dogmas and therefore a sin.

My good friend, former attorney-general Walter Woon, has pointed out that there is a fundamental difference between a sin and a crime. He said that many regard adultery and fornication as sinful but they are not criminal behaviour.

He concluded that sodomy may be a sin but it should not be made a

crime. He is also unhappy with the compromise of retaining 377A and not enforcing it because it brings the law into disrepute.

There is an important point which I wish to make to the Christian and Islamic authorities. I would respectfully remind them that Singapore is a secular state. It is not a Christian country or a Muslim country. It is not the business of the state to enforce the dogmas of those religions. In Singapore, there is a separation between religion and the state. Church leaders and Islamic leaders should respect that separation.

ROLE OF COURTS

In most cases, the antiquated sodomy laws were repealed by the legislatures of the respective states or countries. However, in a few cases, the laws were declared unconstitutional by the courts.

In 1960, every state of the United States had a law criminalising sodomy. By 2003, only 14 states, including Texas, had such laws.

In 2003, the US Supreme Court made a landmark decision in *Lawrence versus Texas*. The court held, by a majority of six to three, that the Texas law criminalising sodomy was unconstitutional.

Speaking for the majority, Justice Anthony Kennedy said: "The petitioners are entitled to respect for their private lives. The state cannot demean or control their destiny by making their private sexual conduct a crime."

The ruling in effect invalidated the anti-sodomy law in the other 13 states as well. But today, 15 years later, most of these states have not

repealed the anti-sodomy law. However, it is considered unenforceable as the Supreme Court has ruled it unconstitutional.

Earlier this month, the Indian Supreme Court overturned its earlier decision of 2013, and ruled that Section 377 of the Indian Code was unconstitutional. This was the unanimous decision of a panel of five judges.

Chief Justice Dipak Misra said that "criminalising homosexual sex is irrational, arbitrary and manifestly unconstitutional".

Another judge, Indu Malhotra, said: "History owes an apology to the LGBT people for ostracising them."

In 2014, the issue of the constitutionality of Section 377A was considered by the Singapore Court of Appeal in the case of *Lim Meng Suang versus Attorney-General*. The court ruled that the law was not unconstitutional.

I believe that the court's judgment was wrong. I hope that the Court of Appeal will overturn its 2014 decision if it is presented with an opportunity to do so.

I will conclude with the following four propositions.

First, the scientific evidence is that homosexuality is a normal and natural variation of human sexuality. It is not a mental disorder.

Second, Section 377A is an antiquated law, not supported by science, and should be repealed.

Third, Singapore is a secular state. It is not a Christian or Muslim country. The leaders of those religions should respect the separation of state and religion and refrain from pressuring the Government to criminalise conduct which they consider sinful.

Fourth, the Court of Appeal should overturn its 2014 decision and declare 377A to be unconstitutional.

stopinion@sph.com.sg

• Veteran diplomat Professor Tommy Koh is chairman of the Centre for International Law and rector of Tembusu College, both at the National University of Singapore.