

Section 377A: Moving beyond slippery slopes to a rational consensus

Take a hard look at the science on homosexuality, and monitor public opinion closely, before deciding whether to repeal law criminalising gay sex

Simon Tay
For The Sunday Times

Debate swirls about Section 377A of Singapore's Penal Code after India's Supreme Court ruled its country's equivalent provision unconstitutional. In Singapore, when the issue was debated in 2007, a compromise was struck to keep the law on the books but not enforce it. This chafes some.

Three questions bear consideration. How should our judges consider the matter? Should we focus on repealing S377A which makes sex between men a crime, or must possible future outcomes be considered, such as that legalising homosexual acts may end with a society legitimising and promoting gay marriage? Can the present compromise continue?

CONSTITUTIONALITY, NOT PREFERENCE

India's Constitution and penal code share the same roots as ours.

But there are significant differences, especially in the judicial cultures of interpretation for the words in the Constitution and laws. In this case from India, the right to privacy was construed without explicit wording in the Constitution to mean a right to be left alone.

In the Singapore Constitution, there is a promise to protect personal liberty in Article 9. However, Singaporean courts are consistently more restrained in their interpretation and have not extended this to create a right of privacy.

At other times, executive action is checked or a law ruled unconstitutional but our judges generally presume legislation is constitutionally consistent.

There is also the rule of precedent that obliges a court to follow previous decisions. In the 2014 case of *Lim Meng Suang*, our Court of Appeal upheld S377A. Arguments that the section is inconsistent with the Constitution, and especially Article 12 which ensures equal protection of the law, were rejected.

Some like Professor Tommy Koh hope that the court might reconsider this position and still strike out S377A. However, unless there are new and compelling arguments, there is no blank page on the issue. A judge's decision is based on the Constitution and not personal preferences or his view about what policy is best, one way or the other.

DECriminalISATION ONLY OR DOWN SLIPPERY SLOPES

In contrast, public views differ greatly about morality and religious

belief. Much depends on how we frame the issue.

Some focus on decriminalisation. Others warn broadly about "slippery slope" consequences that might follow. Professor Thio Li-Ann, for instance, warns against "a broader agenda to normalise same-sex relationships", as seen in many Western societies.

Consequences merit consideration. There is a line, however, between reasonable precaution and fear mongering, otherwise slippery slope arguments unnecessarily restrict freedoms. Indeed, in her other writings, Professor Thio argued that defamation law suits create an unwarranted "chilling effect" on free speech.

Who should draw the line between the immediate issue of decriminalisation and possible future consequences?

A court's traditional focus is to do justice in the case before it. Acting alone, judges do not have the tools to fully consider questions of social choice and policy. Such questions should normally and primarily belong with Parliament and Government.

Society too has a role. The relationship of law to social norms is not only about what is criminal. Activities may be legalised, like gambling, when casinos are allowed despite opposition by religious groups. Yet gambling remains a concern; some groups – like our civil service – restrict access for their members.

There remain real differences between what is endorsed, and what is merely permitted. Communities of faith are growing in number and influence across Singapore and followers can be guided by their own conscience and beliefs. But should criminal laws mandate punishment for what religions prohibit?

Professor Thio is right that religious values and secular laws can overlap, such as in the condemna-

tion of murder. But, besides murder, only one other of the Ten Commandments is now subject to criminal sanction – stealing – while the law of slander partly mirrors the edict against bearing false witness. Other Commandments remain issues between the faithful and their God. The very first Commandment – the foundational Christian belief that there is no other god – clearly cannot be made into law. Singapore is a multi-religious society and one is even free to hold no religion at all. We do not want a society bereft of values and morals. But there can be danger if a religious group uses criminal law to enforce their beliefs on others who do not share their faith.

ASSURANCES AND MOVING FORWARD

In debates on S377A, there is often anger and fear. We would do well to provide assurances, where there are reasonable fears.

While the Government has promised not to enforce the law, it is now clear that the discretion ultimately lies with the Attorney-General, as the current office-holder, Mr Lucien Wong, has asserted. Could he take a further step to state the circumstances when he would bring a case? Could the scope of "indecent acts" covered by S377A be specifically defined? Short of a parliamentary repeal, such assurance would add to the Government's promise.

Assurances could also be offered about the slippery slope. Fears include that churches might be compelled to officiate gay union rituals or, as cited by Professor Thio, that a Christian baker might be required to bake wedding cakes for gay couples or face censure for discriminating against gay people.

This seems unlikely in Singapore's legal system. As noted, our courts have already rejected the argument that equality of protection for persons engaging in homosex-



Participants with lighted torches at a Pink Dot event in Hong Lim Park. The writer says that perhaps more people support decriminalisation while fewer would agree on gay marriage. There might well be differences on this, even among the lesbian, bisexual, gay, transgender, queer community, and professional, in-depth surveys should be conducted periodically on the issue. ST PHOTO: ALPHONSUS CHERN

ual acts should be extended on par with race and religion. This constitutional interpretation would continue even if S377A is decriminalised by Parliament.

However, if fears about the slippery slope are widely held, a government statement might provide assurance about scope of freedom of religious institutions and the discre-

tion of private establishments in deciding what services they wish to provide to individuals.

SCIENCE-BASED PUBLIC POLLS

Perhaps there is no agreement to change the law at present. But fear and anger in the debate can be lessened. Moving forward, a better process might rely more on two fac-

tors: science and public opinion.

Studies about whether homosexuality is natural were cited by both Professors Koh and Thio. The former cites these studies positively especially as they have been accepted by the World Health Organisation (WHO). Nevertheless, Professor Thio says such studies are "hotly politicised".

Science is often used selectively. For decades, tobacco companies suppressed studies about the harmful effects of smoking. There are better ways to assess science in making policy. One example is climate change, where the work of an independent panel established by governments objectively assesses science, leading most countries to

take action (although President Donald Trump's America is reversing the course).

Applying this to S377A, if some will not accept the WHO, should our Government commission an independent and hard-headed look at the science on homosexuality?

Another effort would be to more closely monitor public opinion. Law and Home Affairs Minister K Shanmugam called on laws to keep pace with changes in societal views. Parliament – unlike the courts – can and should take public opinion into consideration.

Perhaps more people support decriminalisation while fewer would agree on gay marriage. There might well be differences on this, even among the lesbian, bisexual, gay, transgender, queer community. Nor should we assume all religions favour keeping S377A; some Buddhist leaders support repeal and so might some Christians. Professional, in-depth surveys should be conducted periodically on the issue.

Some may ask my personal views. For what one person's view is worth, I think we would over-burden the courts to act alone on the basis of the Constitution and make up our minds for us on such a difficult and potentially divisive issue. I also caution against acting on suppositions of what the majority believe, driven by fear and anger and listening only to those who are vocal when controversies arise.

Government and Parliament should put in place a process that reviews social acceptance as science evolves.

Then – even if some never change their minds – we might decide on whether or not to repeal S377A clearly and rationally.

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