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Section 377A: A contemporary, important law

The law criminalising sex between men draws a clear line that homosexual acts are not on a par with heterosexual ones. Remove that, and traditional marriage and family norms – and one day, even freedom of religion to object to homosexuality – will come under threat.

Thio Li-ann
For The Sunday Times

Former attorney-general V. K. Rajah's article Section 377A: An Impotent Anachronism (Sept 30, The Sunday Times) contains some contestable statements, while raising interesting constitutional issues about the separation of powers and the court's role in addressing politicised, morally controversial questions.

My argument here is that section 377A of the Penal Code prohibiting sex between men is a law of contemporary relevance and substantive importance. It goes beyond mere symbolism or placating religious views. The policy that section 377A will not be proactively enforced departs from the prior policy of proactively raiding gay groups. It falls within the executive's discretion to determine what resources to commit to enforcing various offences.

Mr Rajah argues that the state should not criminalise consensual sexual conduct between adults and asserts that homosexuality is an innate trait, not chosen behaviour.

But "consent" cannot be the final basis for governing the private sexual activity of two or more consenting adults; if it were taken to its logical conclusion other laws such as section 376G Penal Code, which prohibits consensual adult incest, should be repealed. This has happened in Spain and France; there are calls in Denmark and Germany to decriminalise incest on the basis of "the fundamental right of adult siblings to sexual self-determination". I doubt Singapore wants to move down that path.

"Consent" while important is not an absolute value – for example, you cannot consent to sell your kidneys or your vote. Another philosophical rationale is needed to determine the scope and limits of permissible "consent" arguments.

Whether homosexuality is genetically innate, chosen behaviour, or a mix, is a highly complex matter. The science here is not cold and hard, but hotly politicised. For example, the American Psychiatric Association decided in 1973 to remove homosexuality from the list of Mental Disorders in the Diagnostic and Statistical Manual (DSM) not on the basis of hard scientific evidence for the genetic or neurological basis for homosexual orientation but due to political pressure exerted by gay lobbyists within the APA, as recounted in Ronald Bayer's book entitled Homosexuality And American Psychiatry: The Politics Of Diagnosis (1987) published by Princeton University Press.

Gay activists decided that if APA policy could be changed, all other mental health organisations would follow. They used intimidating strategies like violent protests, disruption of meetings and interrupting speeches to force a review on whether homosexuality should be a disorder.

Mr Rajah argues that laws criminalising innate traits are not justifiable, but as the science behind the innateness or otherwise of homosexuality is politicised and contested, are courts the right venue to lead social reform from the bench, contrary to case precedent and representative democracy? In any case, whether homosexuality is innate or not, it certainly does not follow that the law should not regulate innate or genetically determined behaviours or traits, for example, addictive or murderous tendencies.

Further, it should be clear that S377A does not criminalise human beings, but human behaviour. Some might fault this reasoning, while others consider it reductionist to assume "we are what we do". While all human beings have intrinsic worth, not all human conduct is equally worthy.

THE ROLE OF JUDGES

While the India decision declaring its equivalent Section 377 to be unconstitutional has attracted much attention worldwide, Singapore courts do not follow the activist proclivities the Indian Supreme Court has demonstrated. Indian courts have expansively construed the right to "life" to include the right to livelihood, education and a certain standard of living. While these are good things, in the absence of express, judicially enforceable constitutional right to these goods, it is for Parliament and the executive to attend to matters like housing and public education, not the courts, in respecting the separation of powers.

Many consider it illegitimate for unelected judges invoking their subjective moral preferences to "create" un-enumerated rights. This sustains the suspicion that "make it up as you go along" type of non-legal reasoning is being deployed.

To assert by judicial fiat that there is a "fundamental right" which the Constitution does not expressly recognise in its text begs the question: Which rights are fundamental, who decides this, using what criteria? How might an alleged "fundamental right" undermine competing rights and interests? To assert that something is a putative right because one thinks it is valuable is not an argument, but an asserted preference. More compelling reasoning is required.

One key aspect of the rule of law is that judges should not engage with political questions, as this degrades the rule of law to "rule by judges". This phenomenon, called "juristocracy", where judges are seen to be acting as a super-legislature by illegitimately interfering with politicised issues, undermines the constitutional separation of powers principle.

Singapore Courts have consistently affirmed they will not make law from the bench and refrain from usurping Parliament's job "under the guise of constitutional interpretation". This accepts that Parliament is best positioned to holistically examine the depth and breadth of morally contentious issues with far-reaching social consequences, such as the debate whether to repeal or keep 377A.

To assert that the values underlying a law are inconsistent with a "multi-religious secular society" wrongly assumes that the law's sole purpose is to entrench dogmatic religious views. The courts have found through examining the historical record, that 377A, where it was enacted in 1938, served a clear purpose: It protected societal morality.

It complemented section 23, Minor Offences Ordinance and section 377, 1936 Penal Code, by extending the criminalisation of public indecent behaviour between males to private acts and broadening the range of behaviour caught by section 377 beyond anal-penetrative sex to include less serious grossly indecent acts between males.

The law clearly identified its target (male homosexual conduct) which was rationally related to and advanced its clear purpose (to criminalise this conduct). Thus, the Court of Appeal upheld the constitutionality of 377A, which satisfied the "reasonable classification" test.

THE ROLE OF RELIGION IN THE DEBATE

It is a red herring to invoke the apparently religious origins of a law to divert attention from the real issue: Whether the law serves the common good of society as a whole today, and secures the liberties of others. In countries where sodomy has been decriminalised and same-sex marriage elevated to a constitutional right of equality (which accepts the ideology that homosexuality and heterosexuality are equivalent), arguments based on this model of "equality" have been used to trump freedom of religion. Opinions disapproving of the homosexual lifestyle or same-sex marriage (but which do not incite physical harm) are demonised as "hate speech", chilling free speech and viewpoint diversity.

In a secular democracy, laws which serve solely to entrench religious dogma are problematic, as laws must serve the general good.

But a secular state does not preclude its religious citizens from participating in democratic processes. To exclude religiously influenced views from public debate is a form of militant secularism which is unfair and anti-democratic, serving to privilege secular humanist values by getting rid of competing views.

"Religious" and "secular" values may overlap, such as condemning murder and rape. All citizens have equal rights to participate in public debate, whatever the source of their values, articulating views according to their reason and conscience. It is prudent in a plural society to communicate views persuasively, in a manner all may understand so that the merits of each view and how it relates to the common good may be critically evaluated.

WHY 377A CANNOT BE CONSIDERED IN ISOLATION

Some argue that pointing to the negative consequences that have taken place in other jurisdictions decriminalising sodomy is a "slippery slope" argument and that one should just consider the narrow, discrete issue of whether 377A is just or unjust in prohibiting homosexual sex. This is a red herring in seeking to obscure or diminish the consequences of repeal; these consequences are reasonably forseeable and not speculative, both in terms of empirically observing developments in other jurisdictions and in terms of legal principle as there is a straight line between decriminalising sodomy and down the line, legitimating same-sex marriage: Both rest on the same premise that homosexuality should be seen to be on a par with heterosexuality in terms of public sexual morality norms.

Further, gay activists in Singapore have publicly listed their demands which go way beyond repealing 377A; these include having registered societies to promote the homosexual agenda and ensuring children receive homosexuality-affirming "accurate sex education".

It is pivotal to their cause to repeal 377A as a first step to advance a broader agenda to normalise same-sex relationships, which demonstrates that 377A is not merely symbolic but substantive.

Homosexual activists have pointed out societies cannot pro-

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The annual Pink Dot event has been organised to celebrate inclusiveness, diversity and the freedom to love regardless of one's sexual orientation. The writer says there are numerous types of sexual orientations but whether all are equally deserving of social approval is an important policy question. ST FILE PHOTO

mote criminal activity and thus 377A inhibits the promotion of their ideological agenda and demands that society conform to their vision of sexuality.

377A stands in the way of demands to positively portray, even celebrate same-sex relationship through vehicles such as free-to-air media programming and in school curricula, to fuel agitation to legalise same-sex marriage and child adoption by same-sex couples. The consequences of repeal are intertwined with the call for repeal and demand strict scrutiny, rather than being tactically ignored, minimised or misrepresented.

The consequences of repeal are not something which should be addressed "after" repeal, but in conjunction with the question of retention/repeal, to which they are inextricably linked.

The radical social changes that accompanied repeal of equivalent laws elsewhere is something to be considered seriously rather than waved away as a "slippery slope". Indeed, we put up signs to warn people about the real dangers of slippery slopes, lest they injure themselves. This is not done lightly or without reason.

The experience of other jurisdictions shows that decriminalising sodomy does often lead to subsequent activism for policy and legal changes towards the progressive normalisation of same-sex relationships in the name of "equality" and non-discrimination, coercively mandating the equation of homosexuality and heterosexuality.

In Canada, the refusal of a religious tertiary institute to support a non-traditional definition of marriage became grounds for legal action in the name of "marriage equality". Christian bakers whose conscience shaped their refusal to bake cakes with pro-gay messages, regardless of who the customer is, have been sued on the basis of anti-discrimination legislation. In the UK, persons who do not believe homosexuality is normative are not permitted to be foster parents.

Many more examples of how the homosexual rights agenda erodes the freedoms of others exist. This is the end game that the current debate must consider.

This is why it is important for Section 377A to stand and be upheld explicitly. Laws criminalising sodomy convey the message that society does not view homosexual acts on a par with heterosexual ones, drawing a distinction between both. If this distinction is erased, there is little basis to continue depriving this category of individuals the right to "marriage", as redefined. This entails departing from the conjugal view of marriage as a committed union of a man and woman which is intrinsically ordered towards procreation. This views sex as both unitive and procreative in nature and sees the family as the basic unit of society for child-bearing and rearing. Proponents seeking the repeal of 377A in substance propose a different vision of sexual couplehood, family and society.

To point to the colonial origins of a law is a misleading distraction; it says nothing about whether the law is good or bad. While 377A was brought into the colony of Singapore in 1938, it was retained as Singapore law after independence in 1965; it was thoroughly debated and ratified by Parliament in 2007 in an exercise of self-determination in contouring a sovereign nation's political, economic and social system. In a sense, it adopted 377A afresh.

There are numerous types of sexual orientations – however, are all equally deserving of social approval? This is an important policy question. For now, incest is clearly disapproved, but if the traditional marriage framework is abandoned, where do we draw the line?

It may be helpful if the individual component parts of the lesbian, gay, bisexual, transgender, queer, intersex (LGBTQI) political alliance could clarify what each part is seeking, so that their specific demands can be better understood and evaluated.

Those lobbying for the repeal of 377A advance a political agenda, which like all political projects, seek to seize political power, displace their competitors who resist repeal and bring about legal change, with radical, deleterious social consequences.

To be fully informed, concerned citizens and responsible parliamentarians must ask: What consequences will any legal change engender?

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