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. R. Rajah’s article Section 377A: An Impeccant 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 political, 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 prospectively 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 containing virus-transmissions.

Mr Rajah argues that the state should not criminalise consensual sexual conduct between adults and asserts that homosexuality is an inate trait, not chosen behaviour. But “consent” cannot be the final basis for governing the private sexual activity of two or more consenting adults if we were to take it in its logical conclusion other laws such as section 386G Penal Code, which prohibits consensual adult incest, should be repealed.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 voice. 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 Psychological 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 Prince ton 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 laws should not regulate innate or genetically determined behaviours or traits, for example, addictive or murderous tendencies.

Further, it should be clear that Section 377A does not criminalise human beings, but human behaviour. Some might find this shocking, 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 practicities 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, judiciously 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 unclected judges invoking their subjective moral preferences to “create” unenumerated rights. This practice is concerning since “the more you go along type of non-leg islative law-making.”

To assert by judicial fiat that there is a “fundamental right” which the Constitution does not expressly recognise in its text rests the question. Which rights are funda mental, who decides this, using what criteria? How might an alleged “fundamental right” undermine competing rights and interests?

To assert that something is a patently 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 “jurisprudence”, whereby judges are seen to act as a super judge by illegitimately interfering with political 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 “in the guise of constitutional interpretation”. This accepts that Parliament is best positioned to holistically examine the breadth of morally contentious issues such as sex-based discrimination and viewpoint diversity, such as the debate whether to repeal or keep 377A.

To assert the values underlying a law are inconsistent with a “multi-religious secular society” strongly assumes that the law’s sole purpose is to entrench religious or religious views. The courts have found through examining the historical record, that 377A, where it existed in 1938, served a clear purpose: It provided societal moral reassurance.

It complemented section 23, Nicotine and Tobacco Act, and Section 377, Penal Code, by extending the criminalisation of public indecency behaviour between males, and extending the range of behaviour caught by section beyond private homoSexual acts to include less serious, grossly indecent acts between minors.

The law clearly identified its target – male homosexual conduct which was narrowly rationalised to and advanced to clear purpose (to not legitimise this conduct). Thus, the Court of Appeal upheld the constitutional validity 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. While it is true that the majority of the world’s religious groups condemn same-sex marriage, to construe the majority’s views as binding on society, simply because of the majority’s influence does not confer legitimacy to an opinion that is bad moral and legal.

In countries where sodomy has been decriminalised and same-sex marriage elevated to a constitution right of equality (which accepts the doctrine that homosexuality and heterosexuality are equivalent), arguments based on this model of “equality” have been used to trump freedom of religion. Opinions disagreeing of the homosexual lifestyle or same-sex marriage (but which do not incite physical harm) are deemed “hate speech”, chilling free speech and viewpoint diversity. In secular democracies, laws which serve solely to entrench religious dogmas are problematic, as laws must serve the good general.

But a secular state does not preclude religion or religious views from public debate; it is a matter of reason and conscience. It is prudent in public society to communicate views persuasively, in a manner that may understand so the merits of each view and how it relates to the common good may be critically evaluated.

Why 377A Cannot be Considered Inclusion

Some argue that pointing to the negative consequences that have been made is an attempt to delegitimise 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 to participate in public debate, regardless of which side, attempting to obscure or diminish the consequences. All consequences are reasonable to be feared and not speculative, both in terms of empirical evidence and theoretical developments and other jurisdictions and in terms of public awareness and development of right perceptions of the law.

Further, gay activists in Singapore have publicly listed their demands which go well beyond replicating 377A; these include having rights to adopt children, to same-sex marriage, and to same-sex couples to adopt children, to same-sex marriage, and to same-sex couples to adopt children. This is a straight line between decriminalising the conduct (not legitimising same-sex marriage) and marriage. Both rest on the same premise that homosexuality should be seen to be on a par with heterosexuality in terms of public morality and legal norms.

Gay activists in Singapore have publicly listed their demands which go well beyond replicating 377A; these include having rights to adopt children, to same-sex marriage, and to same-sex couples to adopt children. This is a straight line between decriminalising the conduct (not legitimising same-sex marriage) and marriage. Both rest on the same premise that homosexuality should be seen to be on a par with heterosexuality in terms of public morality and legal norms.

Homosexual activists have pointed out societies cannot pro-
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 – however, are all equally deserving of social approval? According to this is an important policy question. ST FILE PHOTO

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 – however, are all equally deserving of social approval? According to this is an important policy question. ST FILE PHOTO

“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.

STAFF PHOTO

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?

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 homosexual- 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.