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LAW REVIEW

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Reprinted from
Columbia Human Rights Law Review
Vol. 45, No. 1
Fall 2013

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DECOLONIZING SINGAPORE'S SEX LAWS: TRACING SECTION 377A OF SINGAPORE'S PENAL CODE

George Baylon Radics*

On February 14, 2013 and March 6, 2013, the High Court of Singapore heard two cases challenging the constitutionality of Section 377A, the provision of Singapore's Penal Code that criminalizes "grossly indecent" acts between men. While Singapore's executive and legislative branches have overtly stated their intention to keep the provision on the books, the last branch of government, the judiciary, is left with the task of determining whether Section 377A is consistent with Singapore's constitution, and whether this remnant of Singapore's colonial past should remain in force. This article will trace the law's origin, its emergence in Singapore, and the process of deciding its fate

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I. INTRODUCTION

> All trials are trials for one's life, just as all sentences are sentences of death, and three times I have been tried. The first time I left the box to be arrested, the second time to be led back to the house of detention, and the third time to pass into prison for two years. Society as we have constituted it, will have no place for me, has none to offer; but Nature, whose sweet rains fall on just and unjust alike, will have clefts in the rocks where I may hide, and secret valleys in whose silence I may weep undisturbed. She will hang with stars so that I may walk abroad in the darkness without stumbling, and send the wind over my footprints so that none may track me to my hurt: she will cleanse me in great waters, and with bitter herbs make me whole.[1]

In 1895, Oscar Wilde was convicted under Section 11 of the United Kingdom's Criminal Law Amendment Act, more commonly known as the Labouchere Amendment, for his "grossly indecent" acts with other men. The Labouchere Amendment was not confined to Britain, and in 1938, was adopted in the Straits Settlements—the British colonies in Southeast Asia.[2] While the Labouchere Amendment was repealed in the United Kingdom in 1967, it lives on in many of these former colonies, including Singapore, Malaysia, and Brunei. On February 14, 2013 and March 6, 2013, the High Court of Singapore heard two cases challenging the

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1. Oscar Wilde, De Profundis 150–51 (Robert Ross ed., 1905).

2. The Straits Settlements consisted initially of Singapore, Malacca, and Penang. *See* Jangit S. Sidhu, Administration in the Federated Malay States 1896–1920 4 (Oxford Univ. Press 1980); *see also* C. M. Turnbull, The Straits Settlements 1826–67: Indian Presidency to Crown Colony 1–5 (Oxford Univ. Press 1972) (describing the early history of the Straits Settlements).

constitutionality of Section 377A, which is the provision of Singapore's Penal Code derived from the Labouchere Amendment.

While the objective of implementing Section 377A in the Straits colonies and not in other parts of the British Empire remains unclear, its effect on Singapore's present and future is profound. To many Singaporean citizens, the act of criminalizing any public or private "act of gross indecency," as proscribed by Section 377A, is undeniably unjust. Singaporean leaders, in contrast, have stated their hesitance to abolish the law in order to appeal to the current attitudes and values of the "majority" of Singaporeans whom leaders believe continue to maintain conservative views on homosexuality. Yet this law that purportedly represents the attitudes and values of the majority of Singaporeans actually stems from a long history distinctly foreign to the nation and region. Section 377A's continuing vitality, therefore, symbolizes the complicated process of rooting out laws from a colonial past that have become assimilated into the local landscape. Moreover, the attempt by leaders to preserve a law that supposedly represents the attitudes and values of Singaporeans also introduces new problems: pitting "conservative" Singaporeans against progressive Singaporeans and fragmenting the gay community. The law also serves as a divisive artifact that forces the nation to address complicated issues of minority rights and equal protection while performing the delicate act of preserving and defining Singaporean "values" in a rapidly changing and increasingly globalized context.

While Singapore's executive and legislative branches have stated their intention to keep the provision on the books, the last branch of government, the judiciary, retains the task of determining whether Section 377A is consistent with Singapore's constitution and whether this remnant of Singapore's colonial past should remain in force. This Article will trace the law's origin, its emergence in Singapore, and the process of deciding its fate. Part II will discuss the law's historical roots, including its basis in Orientalist views of the East and its history of implementation in the Straits Settlements. Part III will examine how the law has become assimilated, re-Orientalized, and handled by the courts. Lastly, Part IV will review the manner in which the lawsuits on remand have caused rifts within the communities of Singapore.

II. ORIENTALISM AND COLONIAL LAW IN SINGAPORE

> I crept through the midnight darkness to the palace window and, finding a silk ladder hanging from it, climbed boldly up until I gained the shelter of the lattice. Then I made my way softly through two unlighted chambers to a third, where the girl lay smiling on a silver bed. . . . As I stood speechless before her, she half rose and, in a voice sweeter than candied sugar, bade me lie beside her.[3]

Edward Said, a prominent cultural critic, academic, and writer, argues that in the system of knowledge about the Orient, the Orient is less a place than a *topos*, which he describes as a set of references, a congeries of characteristics, that seems to have its origin in a quotation, a fragment of text, a bit of previous imagining or an amalgam of all three.[4] As illustrated by the above quote from *Arabian Nights*, the imagery and language in stories from the Far East paint a picture of the opulent, sensual and mysterious East.[5] Generations of Western readers were exposed to such images as children. From the early seventeenth century to the end of the eighteenth century, *Arabian Nights* was translated into French, English, German, Italian Dutch, Danish, Russian, Flemish, and Yiddish.[6] Moreover, it was reprinted in over twenty French editions, with an additional forty editions in the nineteenth century.[7] *Arabian Nights* was so influential that Lewis Melville went on to state that *Arabian Nights* "had fired his youthful mind and held his imagination captive; their influence over him never waned all the days of his life."[8] *Arabian Nights* made such a deep impact on Western writers and their audiences that the popularity of *Arabian Nights* inspired a new genre of literature—the Oriental tale. Robert Irwin compared the influence of *Arabian Nights*

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3. J.C. Mardrus, The Book of the Thousand Nights and One Night 27 (Powys Mathers trans., St. Martin's Press 1972).

4. Edward Said, Orientalism 177 (1978).

5. Mardrus, The Book of the Thousand Nights and One Night, *supra* note 3, at 27.

6. Dwight Reynolds, *The Thousand and One Nights: A History of the Text and its Reception*, *in* Arabic Literature in the Post-Classical Period 270, 280 (Roger Allen & D. S. Richards eds., 2006).

7. *Id.*

8. Lewis Melville, The Life and Letters of William Beckford of Fonthill 21 (Duffield & Co. 1910).

on American and European literature to that of the Bible.[9] These opulent, sensual, and mysterious versions of the East, therefore, influenced the manner in which the British envisioned the East, how the British eventually governed their colonies and, arguably, how the laws in British colonies were enacted.

Some have reasoned that the cultural romance of the Oriental novel was "brutally disrupted by the great economic expansion of the European maritime countries," giving rise to what has been described as the "Colonial Novel."[10] In contrast, however, there are those who believe that the fantasies of Oriental excess that emerged from such depictions as seen in the Oriental novel had a lasting effect, and "bec[ame] tutelary; a necessary part of the management of pleasure and subjective behavior [sic]."[11] Furthermore, there has been a recent emergence of literature that attempts to shed light on "Legal Orientalism." Teemu Ruskola emphasizes that "[w]hat remains largely absent in comparative law is the study of specifically *legal* forms of Orientalism: the way in which 'the Orient'—as well as 'the West'—have been produced through the rhetoric of law."[12] This school

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9. Robert Irwin, The Arabian Nights: A Companion 237 (1994). The influence in the West of *Arabian Nights* and tales of the Orient was not limited to literature. Representations of the Orient, and the imperial nature in which Western art depicted the Orient, need to be understood through the heterogeneity of its forms, such as theatre, architecture, design, and music. *See* John M. MacKenzie, Orientalism: History, Theory and the Arts xi (Manchester Univ. Press 1995). The impact of the "Oriental myth" was also striking in the rise of travel books and travelogues. *See* Roland Mortier, *Exotic Curiosities and Mental Structures in a 'Colonial Novel,'* 15 Comparative Literary Studies No. 2. 151, 151–58 (1978); Mary Roberts, Intimate Outsiders: The Harem in Ottoman and Orientalist Art and Travel Literature 59–109 (Duke Univ. Press 2007); Han Mui Ling, *From Travelogues to Guidebooks: Imagining Colonial Singapore, 1819-1940*, 18 Sojourn No. 2 257, 257–78 (2003).

10. Mortier, *supra* note 9, at 151. The "Colonial Novel" entailed a certain "exotic mythology" that was characterized by a "panegyric of imperial grandeur . . . or as a bitter and destructive criticism." *Id.* at 153.

11. Piyel Haldar, Law, Orientalism and Post-Colonialism 82 (2008). In this excellent examination of the manner in which Oriental literature depicted the East as excessive, indulgent, and obsessed with pleasure, Haldar goes so far as to argue that "[b]anal domains of administration have always had an intimate link to a surfeit of grandeur." *Id.* at 150. Such Orientalist depictions, he argues, were part of the justification for the "rule of law" as a means to rein in and subdue Eastern excess, which was depicted as corrupt, illicit, and unfathomable in the West. *Id.* at 151.

12. Teemu Ruskola, *Legal Orientalism*, 101 Mich. L. Rev 179, 193 (2002). Part of the reason for the surge in interest in Legal Orientalism is the desire to address how minorities and minority religions are affected by the law and depicted in legal scholarship. *See* Jed Kroncke, *Substantive Irrationalities and*

of thought aims to uncover how the images as discussed above project onto the Eastern "other" what the West is not. On this point, Ruskola cites to Hegel, who stated, "The history of the world travels from East to West, for Europe is absolutely the end of history, Asia the beginning."[13] Ultimately, the point of Legal Orientalism is to uncover how colonial law drew upon a *topos* of fantasies and imaginations of the East, and how such law was meant to manage, control, and assimilate the colonized.

Orientalist views of the colonized were especially evident with regards to gender, race, and hygiene in the British colony of the Straits Settlements. According to Lenore Manderson,

> Asian men [in colonial Malaya] were represented as both morally and sexually lax, having different standards with regards to sex as well as to hygiene and sanitation . . . . Accordingly, moves to control the environment and a wide range of behaviors such as the disposal and reuse of night soil, housing maintenance, and individual behavior like spitting were as difficult to govern as were the choice, occasion and setting of sex.[14]

In Philip Holden's work, *Modern Subjects/Colonial Texts,* he observes that British Orientalists saw Malaya as feminine and believed that it feminized men.[15] Reviewing the literary work of Hugh Clifford, former Governor of the Straits Settlements, and later governor of the Federated Malay States, Holden draws a parallel between "colonial governmentality, and its incitement of the colonized

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Irrational Substantivities: The Flexible Orientalism of Islamic Law, 4 UCLA J. Islamic & Near E.L. 41, 72 ("uncritical idealizations do nothing to persuade an audience whose biases are grounded in the pseudo-rigor of Islamic legal Orientalism or to contribute to actual positive debates on what 'Islamic' is in practice or should be in Islamic societies today"); *see also* Susan Akram, *Orientalism in Asylum and Refugee Claims*, 12 Int'l J. Refugee L. 7, 39 (2000) ("new Orientalism, emerging from feminist perspectives on human rights advocacy in the asylum and refugee context threatens accurate presentations of human rights violations and victimization"); *see also* Laura A. Lee, *History Rewritten: The Story of Quock Mui Jeung*, 11 UCLA Asian Pac. Am. L.J. 75, 83 ("legal historians and scholars have unintentionally constrained the self-understanding of all Chinese American women today").

13. Ruskola, *supra* note 12, at 213 (quoting Georg Wilhelm Hegel, The Philosophy of History 103 (J. Sibree trans., 1956)).

14. Lenore Manderson, *Colonial Desires: Sexuality, Race, and Gender in British Malaya*, 7 J. of the Hist. of Sexuality No. 3, 372, 381 (1997).

15. Philip Holden, Modern Subjects/Colonial Texts 110–111 (ELT Press 2000).

to a modern, self-regulating subjectivity" and "the colonial official's own self-discipline, his harnessing the desire, wants and fears of his nominally primitive body which is reinvigorated by the regressive delights of the colonial environment."[16] Although this all may seem imagined, such beliefs translated into policies and stern recommendations to all colonial officials and Europeans in Southeast Asia. Ann Stoler, for instance, points out that "[m]edical manuals warned that people who stayed 'too long' were in grave danger of over fatigue, of individual and racial degeneration, of physical breakdown (not just illness), of cultural contamination and neglect of the conventions of supremacy and *agreement* about what they were."[17] Lastly, the Criminal Amendment Act in 1885, the "Cleveland Street Affair" of 1889, and the 1895 Oscar Wilde trials, which were covered in every major British and American newspaper, criminalized homosexuality and emphasized the importance of self-control, vigilance against vice, and self-management in domestic policy.[18] The need to modernize the colonial, while staving off temptation for the colonizer, therefore, served as a plausible reason for the implementation of Section 377A in the Straits Settlements.[19]

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16. *Id.* at 48.

17. Ann Stoler, *On Cultural Hygiene: The Dynamics of Degeneration,* 16 American Ethnologist No. 4 634, 646 (1989).

18. Holden, *supra* note 15, at 63. The "Cleveland Street Affair" refers to the first widely publicized case of prosecution under Section 11 of the Criminal Law Amendment Act. The case concerned members of the aristocracy who had procured sexual services from messenger boys at the Central Telegraph Office. *See id.*; *see also* Ed Cohen, Talk on the Wilde Side: Toward a Genealogy of a Discourse on Male Sexualities 121–25 (Routledge 1993) (describing the "Cleveland Street Affair").

19. There was also a practical reason behind such policies. With the large number of men sent to the colonies for work, the large gender imbalance led to the rise of social issues such as prostitution, and the consequence of sexually transmitted diseases. *See* James Francis Warren, *Prostitution and Venereal Disease: Singapore 1870-98* 21 J. of Se. Asian Studies 360, 361 (1990); *see also* Linda Bryder, *Sex, Race, and Colonialism: An Historiographical Review*, 20 The Int'l Hist. Rev. 806, 815 (1998) (describing how prostitutes were viewed as a necessity when large numbers of troops were sent overseas to prevent rape and homosexuality); *see also* Manderson, *supra* note 14, at 374 (describing the gender imbalance in mining areas of Singapore). However, it should also be noted that many of these attempts to curb the spread of contagious diseases were ill-informed and led to even more problems. *But see* James Francis Warren, *Ah Ku* and *Karayuki-san*: Prostitution in Singapore 1870–1940 176–77 (1993) (explaining how Singaporean government measures closing brothels did not prevent the spread of VD).

A. The Labouchere Amendment in the United Kingdom and Singapore

As stated earlier, criminalization of homosexual contact never emerged organically in Southeast Asia, nor was it crafted in direct response to the conditions found in Southeast Asia. Section 377A was a derivative of the Labouchere Amendment in the United Kingdom, and is a product of a long foreign history. This section will trace the history of Section 377A and how the law found its way to Singapore.

The first records of sodomy as a crime at common law in England were chronicled in the Fleta, the Latin treatise on the common law of England, in 1290,[20] and later in the Britton, the earliest summary of the law of England in English,[21] in 1300. Both texts prescribed that sodomites be burnt alive.[22] Acts of sodomy later became penalized by hanging under the Buggery Act of 1533, which was re-enacted in 1563 by Queen Elizabeth I as the charter for the criminalization of sodomy in the British Colonies.[23] Oral-genital sexual acts were later removed from the definition of buggery in 1817, and in 1861, the death penalty for buggery was formally abolished in England and Wales.[24] However, sodomy or buggery remained a crime "not to be mentioned by Christians."[25]

The Indian Penal Code of 1862 is the first example of a law criminalizing sodomy in a colonial setting. The Indian Penal Code (IPC) introduced Section 377, entitled "Of Unnatural Offences," and modeled on the English definition of buggery, stating, "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with transportation for life, or with imprisonment . . . for a term which may extend to ten years, and shall also be liable to fine."[26] In 1872, this law was introduced in Singapore as part of the Straits Settlement Penal Code (Ord. 4 of 1871).[27] One year after the IPC was enacted, the maximum

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20. 10 Encyclopaedia Britannica 496 (Hugh Chisholm ed., Cambridge Univ. Press. 1911).

21. *Id.* at 618; Naz Found. v. Gov't of NCT of Delhi, 160 (2009) DLT 277 ¶ 2 (India).

22. *Id*.

23. *Id.*

24. *Id.*

25. *Id.* (quoting *Trial of Roger Sweetman*, Old Bailey Online, http://www.oldbaileyonline.org/browse.jsp?div=t17850914-163 (last visited Oct. 12, 2013)).

26. J. O'Kinealy, The Indian Penal Code 177 (1869) (quoting and explaining section 377, "Of Unnatural Offences").

27. Tan Eng Hong v. Att'y Gen, [2012] SGCA 45 ¶ 25 (C.A.)(Sing.).

penalty in England was amended from the death penalty to life imprisonment,[28] bringing the English law in line with the IPC.[29]

Twenty-four years later, England passed Section 11 of the Criminal Law Amendment Act of 1885, commonly known as the Labouchere Amendment after Henry Labouchere, the Member of Parliament who introduced it.[30] The Labouchere Amendment provided as follows:

> Any male person who, in public or private, commits, or is a party to 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 guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.[31]

While a provision similar to the Labouchere Amendment never appeared in the IPC, it was enacted in the successor to the Straits Settlements Penal Code, or the 1936 Penal Code, by Section 3 of the Penal Code Amendment Ordinance 1938 (No. 12 of 1938).[32] During the second reading of the bill that proposed inserting the new provision that was to become Section 377A, Mr. C. G. Howell, then Attorney General, made the following comments on the decision to enact the provision:

> With regard to clause 4 . . . [the clause which subsequently became §] 3 of the Penal Code (Amendment) Ordinance 1938], it is unfortunately the case that acts of the nature described have been brought to notice. As the law now stands, such acts can only be dealt with, if at all, under the Minor Offences Ordinance, and then only if committed in public. Punishment under the Ordinance is inadequate and the chances of detection are small. It is desired, therefore, to strengthen the law and to bring it into line with English Criminal Law, from which this clause is taken, and the law of various

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28. *See* Offences Against Person Act, 1861, 24 & 25 Vict., c. 100, § 61 (Eng.).

29. Tan Eng Hong, SGCA 45 ¶ 26.

30. *Id.*; *see* Criminal Law Amendment Act, 1885, 48 & 49 Vict., c. 69, § 11 (U.K.) (commonly known as "the Labouchere Amendment" after Henry Labouchere, the Member of Parliament who introduced it).

31. *Id.*

32. *Tan Eng Hong*, SGCA 45 ¶ 27.

> other parts of the Colonial Empire of which it is only necessary to mention Hong Kong and Gibralter [sic] where conditions are somewhat similar to our own.[33]

Prior to the enactment of Section 377A of the 1936 Penal Code, the law only targeted public conduct of "gross indecency" between men.[34] As private acts were largely out of the law's reach, Mr. Howell stated that the Legislature desired to "strengthen the law" by extending it to the private domain.[35] Section 377A of the 1936 Penal Code thus expressly provided that acts of "gross indecency," whether committed "in public or private," were offenses to be treated equally.[36] Moreover, Section 377A explicitly focused on sexual conduct between males, signifying the need to address this specific behavior.[37]

B. The First Cases under Section 377A in the Straits Settlements[38]

Because Section 377A was enacted only three and a half years before the arrival of Japanese troops in British Malaya in December 1941, prosecution in the Straits Settlements was limited. A review of the *Straits Times* and the *Singapore Free Press and Mercantile Advertiser* from 1938 to 1941 reveals that seven high profile cases of prosecution under or related to Section 377A took place during this time. Two of the cases concerned individuals of Chinese origin, both of whom were convicted under the law. Four more involved Europeans, only one of whom was convicted. Lastly, the seventh entailed blackmail of a European arising from homosexual conduct. This section will review these cases in turn.

1. The Prosecution of Chinese under Section 377A

In September 1938, Lim Eng Kooi and Lim Eng Kok were the first to receive punishment under Section 377A in the Straits

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33. *Id.* (emphasis removed) (citing *Proceedings of the Legislative Council of the Straits Settlement* (1938)).

34. *Tan Eng Hong*, SGCA 45 ¶ 28.

35. *Id.*

36. *Id.*

37. *Id.*

38. The author acknowledges that there might have been other cases that took place that are not reported here. A search of two popular English language papers in the colony at that time, the *Straits Times* and the *Singapore Free Press and Mercantile Advertiser*, brought up these cases. A review of other newspapers or actual case logs may reveal more.

Settlements.[39] The headline in the *Singapore Free Press and Mercantile Advertiser* on September 27, 1938 read, "Well-Known Chinese Imprisoned."[40] The article reported that the two "well-known" Penang Chinese were sentenced to seven months rigorous imprisonment under Section 377A and that bail was set at $15,000 pending appeal. At trial, their counsel pled that there were extenuating circumstances, in view of the age of the accused, and because their conduct was not punishable as a criminal offense until two days before their arrest.[41] Furthermore, Lim Eng Kooi's counsel noted that in England, there had been numerous cases in which the offenders in exactly the same circumstances were bound over[42] and suggested that the case be dealt with under a public nuisance charge.[43] District Court Judge L.B. Gibson "took a serious view and saw no extenuating circumstances."[44] According to one paper, Judge Gibson "was satisfied that the accused committed the offence alleged by the prosecution."[45]

On April 2, 1941, Lee Hock Chee became the second Chinese case prosecuted under Section 377A. In this case, Lee Hock Chee was sentenced to fifteen months rigorous imprisonment for attempting to commit an act of gross indecency at Rochore Road on March 9, 1941

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39 . *Well-Known Chinese Imprisoned*, Sing. Free Press and Mercantile Advertiser, Sept. 27, 1938, at 15.

40. *Id.* A preliminary search of articles on Lim Eng Kooi shows that his family was indeed prominent. This is evident in the fact that his engagement to Miss Chan Gaik Hong was announced in the *Singapore Free Press and Mercantile Advertiser*. Sing. Free Press and Mercantile Advertiser, May 24, 1930, at 10. Marriage announcements can be construed as a sign of social status, especially in this context where a Chinese family announces their engagement in one of the main English language papers. *See* David L. Hatch & Mary A. Hatch, *Criteria of Social Status as Derived from Marriage Announcements in the New York Times*, 12 Am. Soc. Rev. 396, 396 (1947) (discussing the social significance of marriage announcements).

41. *Well-Known Penang Men Sentenced*, Sing. Free Press and Mercantile Advertiser, Sept. 27, 1938, at 3.

42. "Bound over" is the act of postponing a sentence in exchange for good behavior and a promise to not engage in the behavior again. *See Binding Over Orders*, The Crown Prosecution Service, http://www.cps.gov.uk/legal/a_to_c/binding_over_orders/#a02 (last visited Apr. 29, 2013) (citing Archbold: Criminal Pleading, Evidence and Practice § 5-114 (P.J. Richardson ed., Sweet & Maxwell 2013) (1822).

43. *Well-Known Chinese Imprisoned*, *supra* note 39.

44. *Id.*

45. *Well-Known Penang Men Sentenced*, *supra* note 41.

at 2:30 a.m.[46] Lee pled guilty after it was disclosed in court that a Malay lascar saw him molesting a Chinese boy who was sleeping in a five-foot passageway off Rochore Road.[47] Lee was seized and a struggle took place before he was overpowered and taken to the police station.[48] Criminal District Court Judge Conrad Oldham reported that he "took a very serious view of the offence because it was committed in public and one of the parties concerned was an unwilling minor."[49]

Both cases were resolved quickly and with little media coverage. The lack of details in the articles demonstrates the stark difference between the media and the public's reception of and interest in the trials of Asian individuals versus those of Europeans,[50] as discussed in the following section.

2. The Prosecution of Europeans under Section 377A

From March to May 1941, the newspapers reported a series of high profile cases concerning the prosecution of European residents under Section 377A. The first European to be prosecuted was W.D. Lambert.[51] In Lambert's case, the inspector described how, after receiving certain information, he kept watch on Lambert's house in Bukit Timah Road at midnight on January 31, 1941.[52] He stated that at about 12:30 a.m., he noticed a figure at the back of the house, and found it to be a Malay youth by the name of Kassim bin Awang, who he then arrested.[53] Kassim was then taken in and interrogated by the police. The Malay youth admitted that he was summoned by a Chinese individual on Stamford Road around 9:00 p.m., introduced to Lambert, and that the three of them took a taxi to Lambert's house in

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46. *Chinese Pleads Guilty to Indecency Charge*, Straits Times (Sing.), Apr. 2, 1941, at 10.

47. *Id.* A "lascar" is a sailor or militiaman employed on European ships from the 16th century until the beginning of the 20th century.

48. *Id.*

49. *Id.*

50. It should be reiterated that the newspapers reviewed here were the more popularly read The Straits Times and Singapore Free Press and Mercantile Advertiser, which were both written in English. Coverage may have been more extensive in the Chinese or other periodicals of the time.

51. *European Acquitted on Indecency Charge*, Straits Times (Sing.), Mar. 28, 1941, at 12.

52. *Id.*

53. *Id.*

Bukit Timah.[54] Upon their arrival, the Chinese individual then left the two alone, taking the taxi away.[55]

Lambert was initially charged under Section 377A, because Kassim pled guilty to "gross indecency" with Lambert in the Criminal District Court.[56] Lambert was ultimately acquitted of the charge, however, when Kassim later admitted that he only pled guilty because he was afraid.[57] Kassim stated that the inspector instructed him to admit his guilt or else he would have been assaulted until he was "half-dead."[58] Lambert's counsel added that "[m]y client was convinced that some pressure or inducement had been held out to Kassim to make him plead guilty."[59] On the basis of Kassim's argument that his statement was made under duress, Judge Conrad Oldham was satisfied that a *prima facie* case had not been made out against Lambert under Section 377A, and never called him for his defense.[60]

On April 29, 1941, another case against a European was brought to trial.[61] The case concerned the prosecution of a former junior assistant immigration official, Ronald Ivan McHarg, who was charged on March 19, 1941 for illegally harboring a wanted man.[62] At trial, McHarg was accused of being a public servant who knew of an order for the apprehension of a certain European charged with an offense under Section 377A and allowing that European to leave the Colony on January 18, 1941.[63]

On January 15, 1941, a written memo was circulated to immigration officials ordering the detention of a certain European described as "'British, aged 39, heavily built, bulging eyes.'"[64] From January 15 to January 18, McHarg was on night duty from 10:00 p.m. to 6:00 a.m. and was responsible for examining passengers entering or leaving through Gate 3 of Singapore Harbor Board.[65] A fellow

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54. *Id.*
55. *Id.*
56. *Id.*
57. *European Acquitted on Indecency Charge*, Straits Times (Sing.), Mar. 28, 1941, at 12.
58. *Id.*
59. *Id.*
60. *Id.*
61. *European Charged: Allegedly Harboured Wanted Man*, Straits Times (Sing.), Mar. 19, 1941, at 10.
62. *Id.*
63. *Id.* at 12.
64. *Id.*
65. *Id.*

junior assistant immigration officer, David Carruthers Robinson, testified at trial that McHarg visited him on Saturday afternoon, January 18, 1941. After a few drinks, Robinson asked whether McHarg had come across the European who was wanted by the police, and McHarg admitted that he "let the poor devil through last night" and that "[the European] seemed quite a decent fellow."[66] Loh Kim Chye, the lascar on duty under McHarg that evening, admitted on the stand that a big man who looked "rather fierce," and "who was more than 30 and less than 50," had gone into the office to meet with McHarg on January 17, and that the same man passed through the gate that night.[67]

Judge Conrad Oldham acquitted McHarg without having him called to the stand. Judge Oldham held that McHarg's alleged admission to Robinson was not made under oath and so did not need to be retracted under oath. By pleading not guilty, the judge reasoned, McHarg had retracted his admission.[68] Judge Oldham stated that such an admission when rebutted needed corroboration and that none was forthcoming.[69] He, therefore, acquitted McHarg. On appeal, the Chief Justice of the Straits Settlements Sir Percy Alexander McElwaine stated that "[t]he magistrate was entirely premature in dismissing this case" and allowed the Crown's appeal because McHarg "should have been called upon for his defense."[70] Yet, when the Chief Justice asked whether the Deputy Public Prosecutor wanted a re-trial ordered, the Deputy Public Prosecutor did not seek a re-trial and stated that he was satisfied because the Chief Justice made the points of law clear.[71]

The third case against a European concerned Captain Douglas Marr. In this case, a detective found a ticket in the possession of a Malay youth named Sudin bin Daud who was known to be a "catamite."[72] The ticket was taken to a pawnshop and it was found to relate to a watch that Marr had recently borrowed, which

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66. *Id.* In a subsequent report, McHarg was quoted as saying, "He appeared to be quite a decent chap, poor fellow." *Chief Justice Makes Point of Law Clear*, The Straits Times (Sing.), July 2, 1941, at 12.

67. *Allegedly Harboured 'Wanted' Man*, *supra* note 63, at 12.

68. *Former Immigration Official Acquitted*, Straits Times (Sing.), Apr. 29, 1941, at 10.

69. *Id.*

70. *Chief Justice Makes Point of Law Clear*, *supra* note 66, at 12.

71. *Id.*

72. *Staff Officer on Trial in Police Court*, Sing. Free Press and Mercantile Adviser, Apr. 16, 1941, at 9.

belonged to the Assistant Provost Marshal, Major Brian Kenneth Castor.[73] During a search of Marr's room, a brown shirt made of Turkish toweling that was not large enough to be Marr's was found under some clean clothes.[74]

The prosecution alleged that on March 12 or 13, Marr invited Sudin to enter his car, after which they drove to Marr's residence where Marr allegedly committed an offense under Section 377A of the Penal Code.[75] The prosecution explained that Sudin stole the watch when Marr was not looking and left his shirt behind to get out more quickly.

At the end of trial, Judge Conrad Oldham declared, "I have no doubt whatever of Capt. Marr's innocence, and he is therefore acquitted."[76] Judge Oldham based his acquittal on the unreliability of the testimony of Sudin, who "told three different stories on oath. First, he said he was frightened into admitting that he had committed the offence; then he said that no offence had been committed, and lastly he said that Marr had been guilty of the offence and he himself was innocent."[77] Marr explained that he only brought Sudin to his room because he wanted to "get some idea of the homosexual type of vice" and sought to understand "to what extent soldiers in different regiments were involved."[78] When Sudin gave him no answer, Marr sent him away with a small amount of money.[79]

On appeal, the High Court of the Straits Settlements reversed the trial court's acquittal. Justice Newnham Arthur Worley rejected "the view that no [c]ourt would reasonably have held that there was a case to meet at the close of the prosecution" and called the lower court "misdirected and confused."[80] On remand, however, the prosecution withdrew its case and entered a *nolle prosequi* against Marr.[81]

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73. *Id.*
74. *Id.*
75. *Id.*
76. *No Doubt Whatever of Staff Officer's Innocence*, Sing. Free Press and Mercantile Adviser, Apr. 17, 1941, at 9.
77. *Id.*
78. *Id.*
79. *Id.*
80. R v. Marr, [1946] 1 M.L.J 77, 81 (Sing.).
81. *Officer Acquitted*, Straits Times (Sing.), July 29, 1941, at 10. *Nolle prosequi* describes a formal notice of abandonment of all or part of a suit by either the plaintiff or the prosecutor. It is also used in the UK to describe when the Attorney General dismisses or terminates a legal proceeding. Oxford English Dictionary 1194 (3d ed. 2005).

The last reported case against a European between 1938 and 1941 was *Gunner Ernest Allen*, the only reported conviction of a European under Section 377A.[82] In this case, witness Chan Yau stated that on March 21, 1941, he and Gunner Allen committed the alleged offense in a room of a house on Anguilla Road.[83] In his defense, Allen denied the allegations and claimed that he had hired Chan Yau to get him a girl.[84] Allen also added that he had good military character and was a useful man in the Army.[85]

Speaking after Allen's conviction, Mr. F.J.C. Wilson, Assistant Superintendent of Police in charge of the Anti-Vice Branch, stated:

> [W]hat makes this particular offence more serious is that when members of His Majesty's Forces lower themselves to an animal degree like this, they are not only giving a very poor impression of themselves, but they also may lay themselves to blackmail which may not only be paid only in money. I am hinting, sir, at the possibility of espionage.[86]

At the close of trial, Judge Conrad Oldham sentenced Gunner Ernest Allen to 15 months of rigorous imprisonment.[87] In contrast to the convictions of both of the prosecuted Chinese individuals, Allen was the only one of the four Europeans was convicted. Additionally, the European cases often led to appeals, and the newspapers provided more detail and coverage for those trials. The difference in the manner in which Europeans and non-Europeans were treated, however, becomes even more evident in the Blackmail case to be described next.

3. Blackmail Case

On March 1, 1941, a series of headlines appeared in *The Straits Times* and *The Singapore Free Press and Mercantile Advertiser* regarding the alleged blackmail of a European.[88] Over the

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82. *See Prison Term for Gunner: Dangers Which His Action Courted*, Straits Times (Sing.), May 1, 1941, at 12.
83. *Id*.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *European's Evidence in Blackmail Case*, Straits Times (Sing.), Mar. 1, 1941, at 11; *Eurasian Sentenced for Attempted Blackmail*, Sing. Free Press and Mercantile Advertiser, Mar. 1, 1941, at 7.

next few days, several individuals, including a Eurasian,[89] a Negeri Sembilan Malay,[90] and a Tamil[91] were convicted for blackmail.

On April 30, 1941, the court heard the story of a European who stated that since 1928 he had been "addicted to a course of conduct which he knew constituted an offence" under Section 377A.[92] He stated that in December of 1940, he passed a young Eurasian by the name of George Minjoot while walking up the stairs to his office in Singapore.[93] He added that upon reaching his office, "he found a letter which gave him the impression that the writer had certain information regarding his past, and also certain letters of his, which the writer would return on being given financial consideration."[94] He asserted that this was the last of the letters that he could take since he had already come in contact with demands from several other men, and that he no longer could afford to pay the bribes.[95] At trial, the European confessed that he was paying out $900 to $1,000 a month in bribes, when his monthly salary was only $750 a month.[96] Since he could no longer afford the payments, the European declared that he went downstairs to meet Minjoot and tell him, "my affairs were my concern, and that [Minjoot] could do what he liked."[97]

In his defense, Minjoot stated that he had no intention of threatening the European.[98] He stated that he left the letter just to

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89. *Eurasian Sentenced for Attempted Blackmail*, *supra* note 88, at 7. A Eurasian is a descendant of intermarriage between a European and an Asian. In Singapore, however, many Eurasians were migrants from other colonies in Asia, such as British India or the Dutch East Indies. Fiona Hodgkins, *Eurasians in Singapore*, http://www.fom.sg/Passage/2012/03eurasians.pdf.

90. *N.S. Malay Sentenced for Blackmailing European*, Sing. Free Press and Mercantile Advertiser, Mar. 4, 1941, at 7; *Magistrate Imposes Maximum Sentence*, Straits Times (Sing.), Mar. 4, 1941, at 12. A Negeri Sembilan Malay is a Malay who is originally from the state of Negeri Sembilan in Malaysia. *See* Michael G. Peletz, *Comparative Perspectives on Kinship and Cultural Identity in Negeri Sembilan*, 9 Sojourn 1–53 (Apr. 1994).

91. *Paid Out Money to Avoid Exposure*, Straits Times (Sing.), Mar. 4, 1941, at 11. Most Tamils in Singapore were brought over from British India, specifically from Tamil-speaking parts of South India as laborers. *See* Riaz Hassan, *Population Change and Urbanization in Singapore*, 19 Civilisations 169, 173 (1969).

92. *European's Evidence in Blackmail Case*, Straits Times (Sing.), Mar. 1, 1941, at 11.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

inform the European that he had certain letters, and that he intended to leave the letters with the European, but that he somehow forgot to bring them that day.[99] On the stand, though, the prosecution was able to elicit that Minjoot was unemployed, and that he frequented the home of a Rex Bell, whom he knew was receiving $600 a month from the European. He also admitted to being told that the European was "addicted to certain practices," and that the European had been paying out to other people who bribed him.[100] Lastly, Minjoot admitted to never contacting the police about the ongoing blackmail between Bell and the European. On the basis of these facts, Judge L.C. Goh said he was satisfied that Minjoot had sent the letter as a prelude to extorting money from the European. He lamented, "Blackmail is a very serious and despicable offence . . . and the European was bled white because of those unfortunate practices of his."[101] Finally, Judge Goh pronounced that had the attempt at blackmail been successful, he would have considered a whipping.[102] Instead, he sentenced Minjoot to four months of rigorous imprisonment.[103]

Three days later, on March 4, 1941, Abdul Ghany bin Loyok was sentenced to eight strokes of the heavy rotan, and eighteen months of rigorous imprisonment after being convicted of three charges of extortion.[104] In this case, the blackmailed European stated that he first met Ghany in 1928 and that he began a course of conduct with him that was an offense under Section 377A.[105] Here, Ghany admitted to receiving three sums of $50 on January 15, 18, and 20, but that this was because, he argued, the European owed him money.[106] Ghany added that he came from a very influential family in Negri Sembilan and that his uncle was a Police Magistrate.[107]

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99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* Under Straits Settlement Penal Code of 1872 there were two types of imprisonment: rigorous imprisonment and simple imprisonment. Rigorous imprisonment entailed hard labor, and simple was without hard labor. 1871, c. 20, § 53. In the author's opinion, a sentence of rigorous imprisonment was common. The severity of punishment was determined by length of sentence, which ranged from several weeks for minor offenses, to several months for more major offenses. *European's Evidence in Blackmail Case*, Straits Times (Sing.), Mar. 1, 1941, at 11.
104. *Magistrate Imposes Maximum Sentence*, Straits Times (Sing.), Mar. 4, 1941, at 12.
105. *Id.*
106. *Id.*
107. *Id.*

Ghany's defense counsel, upon cross-examination of the European, was able to establish that the European had cases against eleven other people for blackmail, and that the European was never charged with violating Section 377A.[108] At the end of trial, Judge Hon Sui Sen convicted Ghany and sentenced him to the maximum sentence allowed.[109] His companion, Ong Pah Choo, who accompanied Ghany during his last visit to the European, was acquitted.[110]

On the same day, Judge Hon Sui Sen heard another case of blackmail, this time regarding an English speaking Tamil by the name of R.B. Krishna.[111] In this case, the European admitted to committing an offense under Section 377A with Krishna, whom he had known for five years and with whom he had had a relationship.[112] The European alleged that when he ceased his course of conduct with Krishna, it was from that day that he began paying Krishna against his will.[113] On June 25, 1940, Krishna came to the European's office and demanded payment.[114] At that time, the European paid in cash and had Krishna sign a receipt for it.[115] Krishna then returned on September 20, 1940, and the European again paid Krishna this time at his home and only after he insisted that he fingerprint Krishna, which he did in an attempt to prevent Krishna from making further demands.[116] In his defense, Krishna's counsel argued that the European was not able to produce any of the blackmail letters in this case and had admitted to twelve years of offenses under Section 377A.[117] Furthermore, Krishna's counsel added that the exact words demanding payment could not be remembered, nor the letters produced, thereby weakening the claim that this was blackmail.[118] Lastly, he added, "My client's demeanor in the witness box shows that he is an effeminate and miserable specimen of a human being . . . not the type of person who would have threatened a European in an influential position."[119] Judge Hon Sui Sen, however,

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108. *Id.*
109. *Magistrate Imposes Maximum Sentence*, Straits Times (Sing.), Mar. 4, 1941, at 12.
110. *Id.*
111. *Paid Out Money to Avoid Exposure*, *supra* note 91.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Paid Out Money to Avoid Exposure*, *supra* note 91.
117. *Id.*
118. *Id.*
119. *Id.*

remarked that he was satisfied that Krishna was guilty of two of the blackmail charges, amounting to approximately $50 each and therefore sentenced Krishna to eight strokes of the heavy rotan and eight months of rigorous imprisonment.[120]

In all three blackmail cases, the non-Europeans were convicted to the fullest extent of the law. Coverage of the cases tended to paint the extortionists in an unflattering light at best, with even their attorneys claiming that they were "effeminate and miserable specimen[s] of human being[s]." Even more, it seems that the evidence bar was low. In cases where Europeans were being prosecuted, circumstantial evidence was not enough for a conviction, and the word of a non-European "catamite" was unreliable. In contrast, the European's word that he paid men off in response to threats of which he had no evidence led to the harshest of punishments, which included strokes of the rotan.

These cases demonstrate that early prosecutions under Section 377A were highly biased and subject to manipulation. In the reported cases regarding Europeans, the trial court very rarely convicted, whereas when it came to the Chinese defendants, prosecution was swift and without much fanfare. In the blackmail cases, the European accused eleven men of extortion, confessed to twelve years of guilty conduct under Section 377A, yet never faced charges. Furthermore, in both reported cases where the prosecution successfully appealed the acquittal of a European, the prosecution would decide to drop the case on remand, reiterating the idea that the law was meant to threaten and remind the European of self-control and vigilance against vice. Lastly, the European characters in these cases were not entirely spotless. McHarg, for instance, seems to have been a youthful profligate who drank with great abandon, and who was previously convicted of negligent and reckless behavior behind the wheel.[121] Lambert was imprisoned once before for perjury.[122] This may indicate that Section 377A had also been used to target powerful individuals with certain vices or for those in power to humiliate or antagonize anyone who crossed them. Section 377A's history in

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120. *Id.*

121. *Planter Admits Fast Driving*, Straits Times (Sing.), Oct. 11, 1939, at 10; *Europeans Injured in Johore Crash*, Sing. Free Press and Mercantile Advertiser, Dec. 27, 1939, at 11.

122. *W.D. Lambert's Appeal Opens*, Straits Times (Sing.), Apr. 20, 1936, at 12; *Would Not Have Interfered with Heavier Sentence: Judge's Strong Comment in Lambert's Case*, Sing. Free Press and Mercantile Advertiser, Apr. 22, 1936, at 6.

Singapore was fraught with problems at its inception, and can arguably be seen as never having been consistently or fairly applied.

III. RE-ORIENTALIZATION AND THE ATTEMPT TO REPEAL SECTION 377A

In spite of the problems surrounding Section 377A, it remained on the rulebooks even after Singapore's independence in 1965. The justification for its preservation is that Singapore must protect itself from Western notions of sexual freedom.[123] Thus, the tables have turned. While before, the European implemented Section 377A to protect himself from the over-sexualized Asian, now the Singaporean uses it to protect himself from the "wild wild West."[124] This section will discuss how Section 377A has been repealed in different parts of the British Empire, while the process of uprooting or preserving it has been, and continues to be, an untidy and complicated process for Singapore.

Homosexual activity has been slowly but surely decriminalized throughout much of the former British Empire. The Sexual Offences Act of 1967 amended section 12(1) of the Sexual Offences Act of 1956 in the U.K., partially decriminalizing consensual homosexual acts, including anal intercourse.[125] Following the enactment of the Criminal Justice and Public Order Act 1994, non-consensual anal intercourse in England was classified as rape.[126] The Criminal Justice (Scotland) Act 1980 aligned Scottish law with that of England and Wales, and the law of Northern Ireland matched that of the rest of the United Kingdom after *Dudgeon v. United Kingdom*.[127]

Former British colonies similarly reformed their anti-sodomy laws. In Hong Kong, former Section 51 of the Offences Against the Person Ordinance entitled "Abominable Offences" was the equivalent

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123. *See* Remarks of Prof. Li-Ann Thio, 83 Sing. Parl. Deb. Off. Rep. 2242 (Oct. 22, 2007) ("If we seek to ape the sexual libertine ethos of the wild wild West, then repealing section 377A is progressive.").

124. *Id.*

125. Tan Eng Hong v. Attorney-General, [2012] SGCA 45 ¶ 26 (C.A.) (Sing.) (citing Sexual Offences Act, 1956, 4 & 5 Eliz. 2, c. 69, § 12(1) (Eng.), *amended by* Sexual Offences Act, 1967, c. 60, § 1 (Eng.)).

126. Criminal Justice and Public Order Act, 1994, c. 33, § 142 (U.K.), *repealed by* Sexual Offences Act, 2003, c. 42, § 139 (U.K.).

127. *Tan Eng Hong*, SGCA 45 ¶ 26; *see* Criminal Justice (Scotland) Act, 1980, c. 62; *see also* Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (1981).

to Singapore's Section 377A.[128] Hong Kong introduced these measures in 1865 via the UK Offences Against the Person Act 1861, but reversed course in 1990 by passing the Hong Kong Bill of Rights and creating the window through which courts ultimately rejected anti-sodomy laws.[129] In *Leung v. Secretary for Justice*,[130] the age of consent to engage in consensual homosexual relations was lowered to sixteen, at parity with heterosexual relations.[131]

In India, the High Court of Delhi in *Naz Foundation v. Government of NCT of Delhi and Others*[132] found Section 377 of the IPC unconstitutional, thereby decriminalizing homosexual acts between consenting adults.[133] The High Court held that Section 377 of the IPC violated Articles 21, 14, and 15 of the Indian Constitution.[134] Articles 21, 14, and 15 of the Indian Constitution pertain to the protection of life and personal liberty, equality before the law, and the prohibition of discrimination on grounds of religion, race, caste, sex, or place of birth.[135]

In contrast, the Singaporean Penal Code adopted unchanged versions of Section 377 and 377A.[136] Section 377, however, was repealed in 2007 by the Penal Code (Amendment) Act 2007.[137] During the parliamentary debates on October 22 and 23, 2007 regarding the bill, then-Senior Minister of State for Home Affairs, Associate Professor Ho Peng Kee, explained the decision to repeal Section 377 as follows:

> Next, Sir, we will be removing the use of the archaic term, "Carnal Intercourse Against the Order of Nature" from the [1985] Penal Code. By repealing section 377, any sexual act including oral and anal sex, between a consenting heterosexual couple, 16

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128. *Tan Eng Hong*, SGCA 45 ¶ 29 (citing Offences Against the Person Ordinance (1981) Cap 212, § 51 (H.K.)).

129. *Id.* ¶ 29; *see also* Hong Kong Bill of Rights Ordinance (1991) Cap 383 (H.K.).

130. [2006] 4 HKLRD 211 (C.A.) (H.K.).

131. *Id.* ¶ 57.

132. 160 (2009) DLT 277 (India).

133. *Id.* ¶ 132.

134. *Id.*

135. India Const. arts. 21, 14, 15; *See Naz Found.*, 160 (2009) DLT 277 ¶¶ 25–48, 88-90, 99–104 (citing arts. 21, 14, and 15, respectively) (India).

136. *Tan Eng Hong*, [2012] SGCA 45 ¶ 31 (C.A.) (Sing.) (citing Penal Code (1955) Cap. 119 (Sing.), *repealed by* Penal Code Amendment Act No. 51 (2007), § 69 (Sing.)).

137. *Id.* ¶ 31.

> years of age and above, will no longer be criminalised when done in private. As the [1985] Penal Code reflects social norms and values, deleting section 377 is the right thing to do as Singaporeans by and large do not find oral and anal sex between two consenting male and female [persons] in private offensive or unacceptable. This is clear from the public reaction to the case of [*Annis bin Abdullah v. Public Prosecutor* [2003] SGDC 290] in [2003] and confirmed through the feedback received in the course of this Penal Code review consultation.
>
> Sir, offences such as section 376 on sexual assault by penetration will be enacted to cover non-consensual oral and anal sex. Some of the acts that were previously covered within the scope of the existing section 377 will now be included within new sections 376 – Sexual assault by penetration, 376A – Sexual penetration of minor under 16, 376B – Commercial sex with minor[s] under 18, 376F – Procurement of sexual activity with person with mental disability, 376G – Incest and 377B – Sexual penetration with living animal. New offences will be introduced to clearly define unnatural sexual acts that will be criminalised, that is, bestiality (sexual acts with an animal) and necrophilia (sexual acts with a corpse).[138]

A key reason for the repeal of Section 377, therefore, was the breadth of its scope—Section 377 criminalized consensual oral and anal sex in private for homosexuals *and* heterosexuals. The Court of Appeal attributed the repeal in part to its clarification of the law in *Public Prosecutor v. Kwan Kwong Weng*[139] which had held that Section 377 was an "all-embracing provision concerning 'unnatural offences.'"[140] The Court of Appeal in *Tan Eng Hong v. Attorney-General* added, "The scope of § 377 was clarified by this court to cover more than just the offences of sodomy and bestiality, and to include consensual fellatio between a man and a woman where fellatio did not lead to consensual sexual intercourse."[141] *Kwan Kwong Weng* was followed by the later case of *Annis bin Abdullah v. Public Prosecutor,*

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138. *Id.* ¶ 31 (emphasis omitted); *see* 83 Sing. Parl. Deb. Off. Rep. 2198–2200 (2007).

139. [1997] 1 SLR 697.

140. *Tan Eng Hong*, SGCA 45 ¶ 32.

141. *Id.* (internal citations omitted) (emphasis omitted).

cited by Professor Ho, in which the District Court found that Abdullah was guilty of a crime when a female performed fellatio upon him. The District Court held that consent was irrelevant to a charge under Section 377 where fellatio was performed "as a substitute for natural sexual intercourse."[142]

The District Court's decision in *Abdullah* led to intense public debate concerning Section 377's archaic regulations on sex in Singapore, and such debate demonstrated public support for the repeal of Section 377. [143] This did not go unnoticed by the Legislature, which consequently undertook the updating of the 1985 Penal Code to "reflect societal norms and values."[144] The Legislature also decided that the archaic wording of Section 377 was too vague to be effective, and it enacted more precise provisions to limit the law's coverage to cases that were thought to be deserving of criminal sanction.[145]

Section 377A also sparked public debate as Parliament began to review Section 377. For the first time in over two decades, a Member of Parliament submitted a Public Petition requesting Parliament to repeal Section 377A.[146] Siew Kum Hong cited "equality" when he submitted his Petition to the Parliament clerk.[147] Over a three-day period in October 2007, 2,519 Singaporeans signed a petition in support of the Parliamentary Petition to urge the repeal of Penal Code Section 377A.[148] In response, over 15,560 Singaporeans signed a petition in an effort to retain the section.[149] The petition also prompted former appointed Member of Parliament, National University of Singapore (NUS) professor Li-Ann Thio, to make her notorious speech in which she proclaimed, "Anal-penetrative sex is inherently damaging to the body and a misuse of organs, like shoving

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142. Annis Bin Abdullah v. Public Prosecutor, [2003] SGDC 290 ¶ 2 (Dist. Ct.) (Sing.).

143. *See* Tanya Fong & Glenys Sim, *Oral Sex Ruling Vexes Many*, Straits Times (Sing.), Nov. 8, 2003, at H1.

144. *Tan Eng Hong*, SGCA 45 ¶ 32; *see* 83 Sing. Parl. Deb. Off. Rep. 2198 (2007).

145. Tan Eng Hong, SGCA 45 ¶ 32.

146. Ansly Ng, *A Rare Petition and a Spirited Debate*, Straits Times (Sing.), Oct. 23, 2007, at 1.

147. *Id.*

148. Sylvia Tan, *Singapore's Repeal s377A Petition Tops 2,500 Signatures*, Fridae (Oct. 18, 2007), http://www.fridae.asia/newsfeatures/2007/10/18/1969. singapores-repeal-s377a-petition-tops-2500-signatures?n=sea&nm=377A+ petition.

149. Statement of Prime Minister Lee Hsien Loong, 83 Sing. Parl. Deb. Off. Rep. 2472 (2007).

a straw up your nose to drink."[150] Such statements even made the news in the United States.[151] In the end, Parliament decided to maintain Section 377A to appease "conservative" Singaporeans.[152] In his speech to Parliament, Prime Minister Lee Hsien Loong remarked,

> On issues of moral values with consequences to the wider society, first we should also decide what is right for ourselves, but secondly, before we are carried away by what other societies do, I think it is wiser for us to observe the impact of radical departures from the traditional norms on early movers. These are changes which have very long lead times before the impact works through, before you see whether it is wise or unwise. Is this positive? Does it help you to adapt better? Does it lead to a more successful, happier, more harmonious society?
>
> So, we will let others take the lead, we will stay one step behind the front line of change; watch how things

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150. Statement of Prof. Li-Ann Thio, 83 Sing. Parl. Deb. Off. Rep. 2242 (2007).

151. David Lat, *NYU Professor of Human Rights: Not a Fan of Gay Rights? Also: Is Anal Sex Like 'Shoving a Straw Up Your Nose to Drink'?*, Above the Law (July 6, 2009, 3:44PM) http://abovethelaw.com/2009/07/nyu-professor-of-human-rights-not-a-fan-of-gay-rightsalso-is-anal-sex-like-shoving-a-straw-up-your-nose-to-drink/.

152. Statement of Prime Minister Lee Hsien Loong, 83 Sing. Parl. Deb. Off. Rep. 2397, 2404–05 (2007). In the Prime Minister's speech he states, "Many Members have said this, but it is true and it is worth saying again. Singapore is basically a conservative society." *Id*. at 2397. He adds,

> Among the conservative Singaporeans, the deep concerns over the moral values of society will remain and, among the gay rights' activists, abolition is not going to give them what they want because what they want is not just to be freed from section 377A, but more space and full acceptance by other Singaporeans. And they have said so. So, supposing we move on 377A, I think the gay activists would push for more, following the example of other *avant garde* countries in Europe and America, to change what is taught in the schools, to advocate same-sex marriages and parenting, to ask for, to quote from their letter, "[]exactly the same rights as a straight man or woman." This is quoting from the open letter which the petitioners wrote to me. And when it comes to these issues, the majority of Singaporeans will strenuously oppose these follow-up moves by the gay campaigners and many who are not anti-gay will be against this agenda, and I think for good reason.

Id. at 2404–05.

> work out elsewhere before we make any irrevocable moves. We were right to uphold the family unit when western countries went for experimental lifestyles in the 1960s - the hippies, free love, all the rage, we tried to keep it out. It was easier then, all you had were LPs and 45 RPM records, not this cable vision, the Internet and travel today. But I am glad we did that, because today if you look at Western Europe, the marriage as an institution is dead. Families have broken down, the majority of children are born out of wedlock and live in families where the father and the mother are not the husband and wife living together and bringing them up. And we have kept the way we are. I think that has been right.[153]

This tempered approach aimed to appease the majority of "conservative Singaporeans" while reminding homosexuals in Singapore that "[t]he Government does not act as moral policemen. And [it does] not proactively enforce Section 377A on them."[154] To many, this statement was a promise from the Prime Minister that the law would not be proactively enforced.[155] However, these expectations proved to be incorrect, as shown by the case of Tan Eng Hong.

A. Tan Eng Hong v. Attorney-General

On March 9, 2010, Tan Eng Hong, known as Ivan, was caught committing an act of "gross indecency" in a toilet stall in City Link Mall, a popular underground shopping center connecting various lines of the subway.[156] About an hour before Tan was caught, two waiters from a nearby restaurant called the police to report lewd conduct in toilet stalls.[157] By the time the police arrived, the two men had left. At 10:00 p.m., the police arrested Tan and another man and eventually charged them under Section 377A. Tan was taken into custody and remained in jail for one day.

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153. *Id*. at 2406–07.

154. *Id*. at 2401.

155. *Singapore Gay Advocacy Group Questions Use of Section 377A*, Fridae (Sept. 27, 2010), http://www.fridae.asia/newsfeatures/2010/09/27/10325.singapore-gay-advocacy-group-questions-use-of-section-377a.

156. *Lawyer Challenges Section 377A of Penal Code*, AsiaOne (Sept. 27, 2011), http://www.asiaone.com/News/AsiaOne+News/Singapore/Story/A1Story20110927-301840.html.

157. Au Waipang, *The 377A Hide-and-Seek*, Yawning Bread (Nov. 10, 2010), http://yawningbread.wordpress.com/2010/11/10/the-377a-hide-and-seek/.

On September 24, 2010, Tan filed suit challenging the constitutionality of Section 377A.[158] In his complaint, Tan argued that Section 377A was inconsistent with Articles 9, 12, and 14 of the Singapore Constitution.[159] Articles 9, 12, and 14 provide for liberty, equal protection, and freedom of association, respectively.[160] On October 15, 2010, during a pre-trial conference at the Subordinate Courts, state counsel for the Attorney General (the AG) informed Tan that the charge against him had been amended to a charge of public obscenity under a different section of the Penal Code.[161] The AG then moved to dismiss Tan's suit under Order 18, Rule 19 of the *Rules of Court*, which allows a pleading to be "struck out" on the grounds that "(i) it discloses no reasonable cause of action; (ii) it is scandalous, frivolous or vexatious; (iii) it may prejudice, embarrass or delay the fair trial of the action; or (iv) it is otherwise an abuse of the process of the court."[162] The Assistant Registrar granted the striking-out application on December 7, 2010.[163] Tan pled guilty to the public

158. Tan Eng Hong v. Attorney-General, [2011] SGHC 56 ¶ 2 (H.C.) (Sing.).

159. *Id.* ¶ 14.

160. Const. of the Rep. of Sing., Sept. 16, 1963, arts. 9, 12, 14.

> Article 9, Section 1: Liberty of the Person
> No person shall be deprived of his life or personal liberty save in accordance with law.
> Article 12, Section 1: Equality
> All persons are equal before the law and entitled to the equal protection of the law.
> Article 14, Section 1: Freedom of Speech, Assembly, and Association
> (1) Subject to [other clauses]
> (a) every citizen of Singapore has the right to freedom of speech and expression;
> (b) all citizens of Singapore have the right to assemble peaceably and without arms; and
> (c) all citizens of Singapore have the right to form associations.

161. *Tan Eng Hong*, SGHC 56 ¶ 3. The Subordinate Courts of Singapore is one of the two tiers of the court system in Singapore, with the other tier being the Supreme Court. The Subordinate Courts preside over all cases that are outside of the jurisdiction of the Supreme Court. Over 95% of all civil, criminal, family, and juvenile cases in Singapore are heard in the Subordinate Courts. Subordinate courts decisions are reviewable by the Supreme Court of Singapore. The Supreme Court consists of the High Court and the Court of Appeal, Singapore's court of final resort.

162. *Id.* ¶ 5; *see also* Lynette J. Chua, *The Power of Legal Processes and Section 377A of the* Penal Code*: Tan Eng Hong v. Attorney-General*, Sing. J. of Legal Stud. 457, 458 (2012).

163. *Tan Eng Hong*, SGHC 56 ¶ 3.

obscenity charge and was convicted and fined $3,000.[164] He then appealed the Assistant Registrar's decision on January 26, 2011.[165]

On appeal, Judge Lai Siu Chiu of the High Court stated that the court had to review applicable principles in three areas of the law to resolve Tan's appeal.[166] First, it needed to review whether the Assistant Registrar was correct in striking down Tan's original suit.[167] Next, it needed to determine if Tan had standing, or *locus standi*, to bring the suit.[168] And lastly, the court had to review whether Tan's case met the requirements for declaratory relief.[169] Since the High Court found considerable overlap between the principles relating to striking down and the granting declaratory relief, the High Court addressed the following issues: (1) whether Tan had *locus standi*; (2) whether there was a real controversy; (3) whether Tan's claim was certain to fail; and (4) whether the court had jurisdiction to declare section 377A of the Penal Code unconstitutional in light of the manner in which it was appealed.[170]

The High Court held as follows. First, the court determined that Tan's constitutional rights may have been violated under Article 12, or the equal protection clause of the Singapore Constitution, thereby satisfying the "substantial interest" requirement of *locus standi*.[171] The court, however, found no real controversy since the constitutional injury had become merely hypothetical as a result of the potentially unconstitutional charge being dropped.[172] The court did not find that Tan's case was certain to fail; it was not a "very clear case" that his suit should have been struck down for the manner in which it was brought to the court.[173] However, Judge Lai affirmed the Assistant Registrar's striking down of Tan's original case and dismissed the appeal with costs awarded to the AG.[174]

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164. *Id*.
165. *Id.*
166. *Id.* ¶ 4.
167. *Id.*
168. *Id*. The three elements needed to establish *locus standi* are: (1) a real interest in bringing the action; (2) a real controversy between the parties concerned; and (3) a violation of a personal right. Karahas Bodas Co. L.L.C. v. Pertamina Energy Trading Ltd., [2005] SGCA 47 ¶¶ 15, 19.
169. *Tan Eng Hong*, SGHC 56 ¶ 4.
170. *Id.* ¶ 7.
171. *Id.* ¶¶ 16, 21.
172. *Id.* ¶ 27.
173. *Id.* ¶ 42.
174. *Id.* ¶¶ 24, 43.

On June 27, 2011, Tan appealed the High Court's decision to the Court of Appeal.[175] In its opinion, issued on August 21, 2012 and delivered by Court of Appeal Justice V.K. Rajah, the Court addressed four issues. The first issue was whether Tan had a cause of action given that Article 4 of the Singapore Constitution, Singapore's supremacy clause, applies only to laws "enacted by the Legislature after the commencement of this Constitution," thereby raising the issue of whether the Court of Appeal can render a law that predates the constitution unconstitutional.[176] The second issue concerned the test for *locus standi* applicable in cases involving constitutional rights.[177] The third issue was whether Tan met the test laid out by the court.[178] Lastly, the court addressed whether the facts in the present case raised any real controversy to be adjudicated.[179]

After reviewing the manner in which one other former colony handled the issue and conducting a review of the legislative history behind Article 4, the Court found that "the mere accident of vintage should not place an unconstitutional law which pre-dates the Constitution beyond the potency of Art 4."[180] Next, the Court held that a violation of a constitutional right makes a *prima facie* sufficiency of interest, that every constitutional right is a personal right, and that a "violation of constitutional rights *may* be brought about by the very existence of an allegedly unconstitutional law in the statute books . . . and/or by a real and credible threat of prosecution under an allegedly unconstitutional law."[181] The Court further found that Tan has *locus standi* because Section 377A is arguably inconsistent with Article 12, or the equal protection provision, of the Constitution.[182] Finally, in determining whether a real controversy existed in this case, the Court remanded the case to the High Court to determine: (1) whether Section 377A violates Article 12 in terms of the classification being founded on an "intelligible differentia"; and (2) whether the differentia bears a rational relation to the object sought to be achieved by Section 377A.[183]

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175. Brief for Appellant ¶ 1, *Tan Eng Hong*, [2011] SGHC 56 (Civil Appeal No. 50/2011/T). For the full decision, see *supra* note 158 and accompanying text.

176. *Tan Eng Hong*, [2012] SGCA 45 ¶¶ 34-64 (emphasis removed).

177. *Id.* ¶¶ 65–115.

178. *Id.* ¶¶ 116–31.

179. *Id.* ¶¶ 132–85.

180. *Id.* ¶ 62.

181. *Id.* ¶ 115.

182. *Id.* ¶ 131.

183. *Id.* ¶ 185.

Legal academics described *Tan Eng Hong v. Attorney-General* as a landmark decision due to its elucidation of the conditions under which a person has legal standing to challenge legislation for being in violation of a constitutional right.[184] The local media stated that "[b]y declaring that the existence of § 377A affected homosexual men in a real and intimate way, the Court of Appeal opened the door for more Singaporeans to challenge the statute."[185] The Court, in its 106-page opinion, provided hope to many that it would find that homosexuals had rights in Singapore and that such rights would be upheld when it affirmed the High Court's finding that Section 377A is unconstitutional.[186] This monumental decision also reiterated the fact that the Court of Appeal can and will uphold fundamental liberties guaranteed in the Constitution.[187] Lastly, it opened the door for Singaporeans who were personally affected by unconstitutional laws to file suit even without being prosecuted under the law.

Surprisingly, however, the mainstream media paid little attention to the case. *The Straits Times*, Singapore's highest selling paper, did not increase its coverage of the case until after a second set of plaintiffs decided to take advantage of the Court of Appeal's new *locus standi* requirements for constitutional issues and challenge Section 377A.[188] The gay community, which had not entirely supported Tan's case, became more actively and vocally interested in the second case. The next section will discuss the tensions within the gay community over efforts to uproot Section 377A, thus demonstrating the messy and complicated process of "decolonizing" a nation of foreign-imposed laws.

IV. CAUSING RIFTS: TWO CASES IN THE HIGH COURT

On February 14, 2013, the High Court of Singapore heard *Lim Meng Suang v. Attorney-General* on remand and issued its opinion on April 9, 2013.[189] Nearly a month later, the court decided to

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184. *See* Lynette Chua, *supra* note 162, at 457.

185. *Tan Eng Hong's s377A Challenge to be Heard in High Court on Wednesday*, Fridae (March 4, 2013), http://www.fridae.asia/newsfeatures/2013/03/04/12256.tan-eng-hongs-s377a-challenge-to-be-heard-in-high-court-on-wednesday (last visited May 6, 2013).

186. *Id.*

187. *Tan Eng Hong*, SGCA 45 ¶ 60.

188. *Straits Times: Media Kit 2013*, Sing. Press Holdings Ltd. (2013), available at http://www.sph.com.sg/pdf/MediaKit2013/ST%20Media%20Kit%202013.pdf.

189. *See*, Lynnette Chua, *supra* note 162.

hear Tan's case on remand.[190] This section will briefly delve into the High Court's decision in *Lim Meng Suang v. Attorney-General*. It will then discuss the lives of the two sets of plaintiffs to elucidate the difference in class and personal circumstances between them. Lastly, it will detail how such differences led to very unequal treatment of the two cases in the media, the courts, and the gay community.

A. Lim Meng Suang v. Attorney-General

On November 30, 2012, two men launched a challenge against Section 377A of the Penal Code.[191] The plaintiffs, Lim Meng Suang and Chee Mun-Leon, based their case on the grounds that Section 377A infringes on their right as a gay couple to equality before the law and equal protection of the law under Article 12 of the Constitution.[192] Justice Quentin Loh heard their case on February 14, 2013.

In its decision issued on April 9, 2013, the High Court first addressed several preliminary issues, such as *locus standi*, in which Justice Loh noted that they were not charged, threatened with prosecution, or in any way faced pressure from the State or its agents to stop or change their relationship.[193] On this point, in determining whether a "real interest" was present in the case, the High Court acknowledged the Court of Appeal's opinion in *Tan Eng Hong* which recognized a violation of Tan's rights by "the mere existence of s 377A in the statute books" and "a real and credible threat of prosecution under s 377A."[194] Yet, the Court proceeded because the defendant was not disputing the plaintiffs' *locus standi.* [195] Justice Loh then addressed other preliminary matters including requests made by plaintiffs and the parties' respective arguments.[196]

In his equal protection analysis, Justice Loh began by stating that "equal protection of the law under Article 12(1) does not mean that all persons are to be treated equally, but that all persons in like

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190. *Id*.

191. Tessa Wong, *Two Launch Fresh Challenge to Anti-Gay Law*, The Straits Times (Sing.), Dec. 1, 2012.

192. Lim Meng Suang v. Attorney-General, [2013] SGHC 73 ¶ 1 (H.C.) (Sing.).

193. *Id.* ¶ 10.

194. *Id.* ¶ 11.

195. *Id.* ¶ 12.

196. *Id.* ¶ 13.

situations are to be treated alike."[197] Next, he determined whether the classification of homosexuals in Section 377A is reasonable under the two-part test from *Public Prosecutor v. Taw Cheng Kong*.[198] This two-part test requires that the court determine (1) whether there is an "intelligible differentia" in the classification, and (2) whether the classification bears a "rational relation to the object of the legislation."[199] With regard to the "intelligible differentia" part of the test,[200] the court stated that "it is quite clear that the classification prescribed by Section 377A—*viz*, male homosexuals or bisexual males who perform acts of 'gross indecency' on another male—is based on an intelligible differentia."[201] Regarding the second part of the test, the court admitted that determining whether the law bears a rational relation to the object of the legislation would be complex, especially because Section 337A began "as a provision in England in 1885, and was later introduced into Singapore in 1938." [202] The court also struggled to determine the proper meaning of "rational relation" wondering whether the court should strike down a law under the second prong of the test if the court itself was able to determine a more efficient or different classification which would better achieve the purpose or object of the legislation concerned or if the court determined that the scope of the law was over- or under-inclusive relative to its purpose.[203] In its attempts to address these questions, the court came to the conclusion that,

> The court's role and function is to not second-guess whether parliament could have or ought to have devised a *more efficacious* differentia. Instead, the court can intervene only if the differentia enacted by parliament is so clearly inefficacious that it would not even be capable of being considered *broadly*

197. *Id.* ¶ 44.

198. Public Prosecutor v. Taw Cheng Kong, [1998] 2 SLR(R) 489 (C.A.) (Sing.).

199. *Lim Meng Suang*, [2013] SGHC 73 ¶¶ 47, 49.

200. The court goes on to note that "'[i]ntelligible' means something that may be understood or is capable of being apprehended by the intellect or understanding, as opposed to by the senses. 'Differentia' is used in the sense of a distinguishing mark or character, some attribute or feature by which one is distinguished from all others." *Id.* ¶ 47.

201. *Id.* ¶ 48.

202. *Id.* ¶ 50(e).

203. *Id.* ¶ 51.

> *proportionate* to the object of the legislation in question.[204]

Lastly, on the issue of whether the law was over- or under-inclusive, the court held that:

> Given that the differentia adopted in § 377A results in a classification which mirrors the purpose of § 377A, the differentia would be, at the very least, broadly proportionate to the purpose of § 377A in terms of efficacy; it also cannot be under-inclusive or over-inclusive vis-à-vis that purpose. In these circumstances, the relationship between the differentia underlying the classification prescribed by § 377A and the object of § 377A (or the mischief which it is designed to deter) clearly satisfies the "rational relation" test.[205]

Upon deciding that the law was "reasonable," the court went on to discuss that the presumption of constitutionality is intimately tied to the idea of separation of powers, and that since this case concerned issues of morality, it would take a calibrated approach that tilts "in favour of persons who are elected and entrusted with the task of representing the people's interests and will."[206] The court added, however, that this did not mean that the court would never strike down a law in contravention of the Constitution. Justice Loh argued that the law would be struck down only if it does not serve a legitimate purpose and could be described as "capricious," "absurd" or "*Wednesbury* unreasonable."[207] In this case, Justice Loh found that the purpose of Section 377A was legitimate in light of the long

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204. *Id.* ¶ 95. Earlier, the court describes "broadly proportionate" by referencing the Court of Appeal's decision in *Yong Vui Kong v. Public Prosecutor*, [2010] 3 SLR 489 (C.A.) (Sing.), and stating "[s]o long as the differentia underlying the classification prescribed by a piece of legislation is broadly effective to achieve the object of that legislation, it is not the court's function to displace the Parliament's decision in prescribing that classification." *Id.*

205. *Lim Meng Suang*, SGHC 73 ¶ 100.

206. *Id.* ¶ 110.

207. *Id.* ¶ 116. "*Wednesbury* unreasonable" is derived from the English case *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223, in which the court stated that a public body decision could be quashed judicially when certain factors were met. In applying the holding in *Wednesbury*, the court in *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374, 410 (H.L.) (U.K.), found "*Wednesbury* unreasonableness" when the law was "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

English tradition of prosecuting only male homosexual conduct and Singapore's specific traditions regarding procreation and lineage.[208] In dispensing with Lim and Chee's other arguments, the court cited to Justice Antonin Scalia's dissenting opinion in the United States Supreme Court decision *Lawrence v. Texas*:

> One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly.[209]

Justice Loh began his conclusion with the sentence, "We are in a society in the midst of change."[210] He then discussed how monumental changes in society take time and are best left to the legislature to mandate. In reiterating his hesitation to challenge the moral values of the nation he added, "The issue in the present case is no doubt challenging and important, but it is not one which, in my view, justifies heavy-handed judicial intervention ahead of democratic change."[211]

B. Tan Eng Hong v. Attorney-General

On March 6, 2013, Justice Loh also heard Tan Eng Hong's constitutional challenge. Initially, there was some concern that his case would be dismissed given the pending constitutional challenge by Lim and Chee.[212] Fortunately, Justice Loh allowed Tan his day in court. However, given the similarity of the two challenges, Tan respectfully asked the High Court to issue both opinions at the same time.[213] The court denied the request and issued the decision in Lim and Chee's case on April 9, 2013. Shortly before this Article was

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208. *Lim Meng Suang*, SGHC 73 ¶¶ 117–30.

209. *Id.* ¶ 137 (citing Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting)).

210. *Id.* ¶ 139.

211. *Id.* ¶ 143.

212. This concern was conveyed to the author through interviews with various individuals working on Tan's case.

213. Jeanette Tan, *Lawyer Seeks Same-Time Verdict for 377A Cases*, Yahoo! News (April 2, 2013), http://sg.news.yahoo.com/lawyer-seeks-same-time-verdict-for-377a-cases-091736016.html.

published, on October 3, 2013, Judge Loh issued his opinion in Tan Eng Hong's case.[214]

C. Backgrounds of Tan, Lim and Chee

The courts have not explicitly stated a reason for their different treatment of the two cases. Perhaps the circumstances behind the two cases and their respective plaintiffs have influenced their reception by the courts and the Singaporean community. This section will discuss the biographies of the plaintiffs in both cases, and the response of Singaporeans to both sets of plaintiffs.

1. Tan Eng Hong[215]

Tan Eng Hong, or Ivan, was interested in other cultures and the arts from a young age. As a result, he pursued a career in the tourism industry rather than attending university and receiving an advanced degree. When he was not working, he spent his free time in other creative endeavors, including the theater.

Ivan always knew that he was gay, which was a particularly acute problem for him when he enrolled in the mandatory military service. When male citizens register for National Service, they are required to undergo a mandatory medical examination to determine their medical status, known as Physical Employment Status (PES). The PES is used as a guideline for vocational placement. The men then serve a 22- or 24-month period as Full Time National Servicemen (NSFs), either in the Singapore Armed Forces (SAF), Singapore Police Force (SPF), or the Singapore Civil Defense Force (SCDF).

Based on Ivan's PES, he was selected to serve as a gunman in the SAF. Ivan disclosed that he was gay to his sergeant. Generally, following a confession of homosexuality, a soldier is sent to a psychologist for a medical review and is ascribed a label of "302." The term "302" is widely known as the medical code classification from the Singapore Armed Forces Directory of Diseases that pertains to

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214. Tan Eng Hong v. Attorney-General, [2013] SGHC 199 (H.C.) (Sing.). Due to publication timing, it is not possible to go into a substantive review of this opinion.

215. Interview by Dr. Saroja Dorairajoo, Dep't of Sociology at the Nat'l Univ. of Sing., with Tan Eng Hong (Apr. 7, 2013).

"Homosexuality and Transexuality."[216] The protocol for the medical review is as follows: a doctor first asks the conscript whether they have had sex with men. The doctor then asks a series of even more probing questions pertaining to their sexual preferences, wherein the conscript is asked whether they cross-dress, are the man or woman, have anal sex, or play an active or passive role. [217] In the second stage of the medical review, one or both of the conscript's parents answer questions about the son's sexual preference and gender status. [218] When Ivan declared that he was gay, his sergeant tried to send him to jail for forty days, and accused him of attempting to get out of his gunman duties. Ivan was then sent to different departments in the Army and ended up as a clerk in the manpower office. For the last quarter of his time with the Armed forces, he was released from serving as a reservist, which in Singapore can last up to the age of forty, because of his 302 status. [219]

After Ivan's time in the military, he initially revitalized his career in the tourism industry. In his thirties, however, Ivan began working as a massage therapist. He found such work rewarding in that he was still in the service industry but also able to work creatively, finding respite from the difficulties that he faced in life.

These difficulties came to a head when Ivan was arrested and charged under Section 377A. He contacted M. Ravi, one of Singapore's most preeminent human rights attorneys. As a staunch lawyer for social change, Ravi saw the case as involving a human rights issue, and immediately took it on without regard for the act committed.

Ravi strongly protected Ivan's identity and advised Ivan to refrain from speaking with the media or other people about the case. However, it was impossible for Ivan to hide the fact that he had been arrested for "gross indecency." His family expressed disappointment when they discovered the charges, and others asked whether his actions brought on difficulties at family gatherings, such as during Chinese New Year. Many of the members of his Church, his friends,

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216. Lawrence Leong Wai-Teng, *Decoding Sexual Policy in Singapore,* 17 Social Policy in Post-Industrial Singapore 279, 291 (Lian-Kwen Fee & Tong Chee Kiong eds., 2008).

217. *Id.*

218. *Id.*

219. CIA, *The World Factbook: Singapore*, (Sept. 26, 2013), https://www.cia.gov/library/publications/the-world-factbook (accessed by selecting 'Singapore' from the 'Please select a country to view' drop-down menu, then expanding the collapsible tab labeled 'Military' seen below).

family, and other lawyers strongly encouraged him to drop the case and to stop contacting his lawyer. The local gay community, popular bloggers, and leaders all criticized Ivan and his lawyer for pushing forward, and the other man who was caught in the toilet stall with Ivan dropped the case. Ivan continued, despite the criticism and pressure he faced from his friends, family and community and never claimed that he was pursuing the case for anyone but himself. He harbors some resentment over the way the system treated him and believes that things can improve.

2. Lim Meng Suang and Chee Mun-Leon

Lim Meng Suang and Chee Mun-Leon are very different than Tan. Lim and Chee both work for a graphic design company and have advanced degrees. Although they have been "in a romantic and sexual relationship" with each other for the past sixteen years, they do not live together due to Lim's need to look after his aging parents who are not well.[220] Lim says that his parents do not know that he and Chee are gay, but his mother has recently indicated a tacit acceptance of their relationship.[221] Chee's family has never directly addressed the true nature of Lim and Chee's relationship.[222]

Lim and Chee have a life together but generally do not feel that they can be openly affectionate in public in Singapore.[223] "Both . . . grew up with the knowledge that having gay sex was illegal, but more significantly, both of them felt the social stigma of being gay as they were growing up, and this feeling of stigmatization continues to date." "[They] are also apprehensive as they have heard of male homosexuals being charged with 'gross indecency' under Section 377A of the Penal Code.[224] Lim runs TheBearProject, "an informal social group for 'plus-sized' gay men who engage in activities like hiking, movies, potluck gatherings, museum-hopping and overseas trips."[225] Lim expressed concern over getting into trouble with the authorities and claims that it will be difficult to register

220. *Lim Meng Suang* [2013] SGHC 73 ¶ 2 (H.C.) (Sing.).
221. *Id.* ¶ 3.
222. *Id.* ¶ 4.
223. *Id.* ¶ 5.
224. *Id.* ¶ 6.
225. *Id.*

TheBearProject because societies that relate to sexual orientation are not granted automatic approval.[226]

Lim experienced discrimination in school and in the army and still feels discriminated against to this day.[227] Similarly, Chee says that he has seen and experienced discrimination in school, in the army, and in society generally.[228] Both Lim and Chee feel that Section 377A's very existence acts to reinforce this discrimination by labeling them as criminals, regardless of whether or not it is enforced. Although Lim and Chee concede that they do not live in perpetual fear of being arrested, they insist that the knowledge that authorities have the power to arrest and charge them with an offense under Section 377A is always in the back of their mind.

3. Different Levels of Support

What is clear from the biographies of all parties is that to be gay in Singapore is not easy. Tan, Lim, and Chee all faced discrimination at some level and either fear or have experienced prosecution under Section 377A. However, the stark difference in how these two sets of plaintiffs are represented in the mainstream media and treated by the community demonstrates that Section 377A not only has terrorized the homosexual community, but has also torn it apart, all the while placing the community under the scrutinizing eye of the public.

The mainstream media's description of them helps to underscore this point. Lim and Chee were introduced in *The Straits Times* as "Graphic designers Gary Lim, 44, and Kenneth Chee, 37," who have been "a couple together for 15 years" and who "have been doing activist work in the gay community, like collecting signatures

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226. *Id.* In Singapore, a "society" is defined in the Societies Act as a "club, company, partnership or association of 10 or more persons, whatever its nature or object," and not already registered under any other law. Societies Act, Cap. 311 § 2 (2004) , c.311 (Sing.). "Any person who manages or assists in the management of any unlawful society shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding 5 years." *Id.* § 14(2). Moreover, "any person who is . . . a member of an unlawful society, or attends a meeting of an unlawful society, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 3 years or to both." *Id.* § 14(3).

227. *Lim Men Suang*, *supra* note 188, ¶ 7.

228. *Id.*

for the petition against Section 377A in 2007."[229] Their public persona enabled the media to focus attention on the couple, while providing gay and straight Singaporeans with plaintiffs behind whom they could rally. The article also highlighted the couple's contribution to the gay community in bringing the lawsuit and emphasized their feeling that "it was the right time to do something bigger for the community."[230] In contrast, Tan was mentioned only in passing. The same article did not credit his initial challenge as creating the possibility of the couple's suit, regardless of whether he felt altruistic or brought his lawsuit for personal vindication. His description in the article was even less flattering: "Mr. Tan, 49, had started his challenge in 2010, following his arrest for engaging in oral sex in a public toilet."[231]

Moreover, Singaporeans also received the two sets of plaintiffs differently. When Tan first filed suit challenging the constitutionality of Section 377A, he and his counsel faced immediate opposition and received little support. Soon after Tan filed his suit, a popular gay blog published an article denouncing Tan's actions that had led to his arrest and tacitly supporting criminal prosecution of "sex in public spaces."[232] Eventually, other members of society started to attack not just Tan, but also his counsel, implying that Ravi was unfit to practice law. [233] Since his suit, Tan's house has been

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229. Tessa Wong, *Two Launch Fresh Challenge to Anti-gay Law; Second Challenge in Recent Years Against the Penal Code's Section 377A*, Straits Times (Sing.), Dec. 1, 2012.

230. *Id.*

231. *Id.*

232. *On the Prosecution of Mr. Tan Eng Hong*, People Like Us (Sept. 27, 2010), http://www.plu.sg/society/?p=169. The blog adds, "We have[,] however[,] long held the view that should the State wish to prosecute, it should do so using gender-neutral laws, so that whether the specifics are same-sex or opposite-sex, there is parity in treatment." *Id.* The article then goes on to argue that prosecutors should try these offenses under Section 20 of the Miscellaneous Offenses (Public Order and Nuisance) Act. *Id.*

233. According to one blogger, "Ravi's recent Speakers Corner epic fail installation art as an example of his mental health, if the pink community wants to win, another lawyer should represent them, not Ravi." *Gays Happy Only*, Prata Politics (Aug. 23, 2012), http://pratapolitics.blogspot.sg/2012/08/gays-happy-only.html. The blogger made reference to a recent incident in which the Law Society accused Ravi of being unfit to practice law. *See Lawyer M Ravi Seeks Second Medical Opinion*, AsiaOne (July 25, 2012), http://news.asiaone.com/News/Latest+News/Singapore/Story/A1Story20120725-361213.html. *See also Romance v. Reality*, Benjamin Cheah: The Man, The Musings (Nov. 29, 2010), http://benjamincheah.wordpress.com/2010/11/29/romance-v-reality/ ("I believe Ravi's heart is in the right place. But without demonstrating a grasp of strategy, I

vandalized with spray paint.[234] Both Ravi and Tan faced potential economic hardship given the high likelihood that costs were to be ordered against both of them in their cases.[235] At a recent book launch, Ravi described Tan's case as even more difficult than challenging the death penalty because of a lack of public support.[236]

In contrast, Singapore responded to Lim and Chee's case with overwhelming support. Lim and Chee have successfully solicited online donations for their legal costs and have received technical support to create a seven-minute video that outlines their case.[237] Additionally, several articles in the mainstream media were written on the couple's case.[238] The support and attention that Lim and Chee received were grossly different than that which Tan Eng Hong received.

The different treatment of these two sets of plaintiffs reflects how the gay community of Singapore selectively supports the "discreet" and "acceptable" gay couple over the single man who, because of his crime and willingness to come forward, allowed for the challenge to take place. During Singapore's recent Pink Dot event,[239] one observer noted,

> At Pink Dot this year, couple Gary Lim and Kenneth Chee were introduced as its flag-bearers. . . . Yet, as

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highly doubt his chances of winning the challenge. So, good luck to you, Ravi—you'll need as much of it as you can get.").

234. Yi-Sheng Ng, *The Faces of the § 377A Challenge: M Ravi and Ivan Tan Eng Hong*, News & Features, Fridae (Oct. 21, 2012), http://www.fridae.asia/newsfeatures/printable.php?articleid=11279.

235. *See* Au Wai-Pang, *Constitutional Challenge to 377A to go Ahead*, Yawning Bread (Aug. 23, 2012), http://yawningbread.wordpress.com/2012/08/23/constituional-challenge-to-377a-to-go-ahead/.

236. ACuriousObserver, *M Ravi's Kampong Boy: A Book Launch part 2*, YouTube (April 28, 2013, 19:30–21:31), http://www.youtube.com/watch?v=cghmIeBbyzM.

237. Terence Lee, *Crowdfunding Campaign Raises USD 84k to Combat Singapore's Anti-Gay Law*, Tech in Asia (Apr. 19, 2013), http://www.techinasia.com/crowdfunding-campaign-raises-almost-usd-50k-in-less-than-a-day-to-combat-singapores-anti-gay-law/; *Fundraising for S377A Constitutional Challenge*, Indiegogo (Apr. 17, 2013), http://www.indiegogo.com/projects/fundraising-for-s377a-constitutional-challenge?c=home.

238. *See* Wong, *Two Launch Fresh Challenge*, *supra* note 229; *State will Contest Couple's Legal Challenge to Anti-Gay Law*, Straits Times (Sing.), Dec. 19, 2012; Tessa Wong, *Partners to Appeal Against Dismissal of Challenge to Gay-Sex Law*, Straits Times (Sing.), Apr. 19, 2013.

239. Pink Dot is a non-profit organization that hosts Singapore's version of LGBT Pride events held annually throughout the world. *See* Pink Dot SG, http://pinkdot.sg/about-pink-dot/.

> we thanked the brave couple, no one mentioned Tan Eng Hong, who first filed his constitutional challenge to section 377A on 24 September 2010, nor his lawyer M Ravi, who has doggedly championed many human rights cases in Singapore.[240]

The observer further noted, "The problem is, gay men are already unfairly associated with paedophiles, rapists, molesters etc, and constantly have to point out the basic difference. . . . Better then, to hold up the sweetness of Gary and Kenneth's fifteen-year relationship for everyone to unequivocally cheer and support."[241] While Tan's case may be slowly gaining support, Tan has undoubtedly suffered at the hands of the public, his community, and the courts without much support because of the nature of his crime, what it represents, and how society perceives him. Lim and Chee on the other hand are two filial, educated, and "discreet" men in a committed and loving relationship, and therefore have received a tremendous amount of support in their challenge.

Finally, in addition to highlighting the difference in how the media and Singaporeans at large have perceived the two sets of plaintiffs, these cases have also unleashed a series of discussions that, for better or for worse, have placed Singapore's gay community under public scrutiny. Religious groups, for instance, have put up a robust fight, with senior pastor Lawrence Khong of the Faith Community Baptist Church calling homosexuals "'a looming threat to this basic building block' of society, 'the traditional family.'"[242] In February 2013, a police report was filed against a pastor for publishing an article on his church's website entitled "Firing The First Salvo," and for asking church members to prepare for a "war" on the issue of homosexuality and to be "battle ready."[243] An editorial piece in the *Straits Times* cites Section 377A as one of the issues in the "rise and rise of social issues" in Singapore, referring to the death threats made against former member of parliament Li-Ann Thio for her speech in 2007 and the lack of opposition to Section 377A from the People's Action Party, a prominent political party in Singapore,

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240 . Lisa Li, *Pink Dot 2013 - Gary, Kenneth, and Tan Eng Hong*, Publichouse.sg (July 2, 2013), http://publichouse.sg/categories/topstory/item/897-pink-dot-2013-gary-kenneth-and-tan-eng-hong.

241. *Id.*

242. *Modern Singapore Grapples with its Archaic, British-Era Same-Sex Law*, The Nation (Thai.), Apr. 30, 2013.

243. Tessa Wong, *Police Report Filed Against Pastor*, Straits Times (Sing.), Jan. 25, 2013.

due to a lack of a consensus.[244] While some argued in favor of "trimming" the law and limit it only to public acts of homosexuality,[245] others, such as Prime Minister Lee Hsien Loong, advocate for the retention of the law.[246] These cases have thrust the issue of homosexuality into the limelight and have forced the nation to grapple with the complicated issue of defining its "moral" boundaries.

V. CONCLUSION

The purpose of this article is to demonstrate how a law, grounded in a foreign context and manifesting a foreign set of beliefs, can trigger the difficult and complex process of internalizing or uprooting said law. Section 377A represents an artifact of a long lost empire—one that has gained traction to serve as a specter of Singapore's colonial past.[247] The nation is currently challenged to understand and trace its foreign roots, while at the same time challenged to define its independent self in the shadow of its past. Additionally, Singapore's institutions, civil society, and communities are forced to confront their own respective images while the country demarcates its "moral" boundaries. As the courts waver as to whether to strike down Section 377A, the gay community carefully places its support behind plaintiffs who represent what is palatable in an ever-changing Singapore. This process of decolonizing Singapore's sex laws, therefore, is a complicated act fraught with internal conflicts and profound implications onto the nation's present and future.

Many countries are becoming increasingly tolerant of homosexuality. In light of this, we must be reminded that the process of legislating such tolerance is long and arduous. Since the emergence of the Labouchere Amendment in 1885 and its subsequent demise in the United Kingdom in 1967, 16 states and the District of Columbia in the United States have passed gay marriage legislation, and the U.S. Supreme Court has held that marriage, under federal law,

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244. Elgin Toh, *The Rise and Rise of Social Issues*, Straits Times (Sing.), Apr. 6, 2013.

245. Andy Ho, *Trimming May be Solution to Contentious Gay Sex Law*, Straits Times (Sing.), Feb. 21, 2013.

246. Kirsten Han, *Singapore's Prime Minister Says to 'Just Leave' Anti-Gay Law*, Asian Correspondent (Jan. 30, 2013), http://asiancorrespondent.com/96545/singapores-prime-minister-lee-hsien-loong-says-to-just-leave-anti-gay-law/.

247. *See* Douglas E. Sanders, *377 and the Unnatural Afterlife of British Colonialism in Asia*, 4 Asian J. Comp. L. 1 (2009).

cannot be defined as strictly between a man and a woman.[248] In the Asia-Pacific region, Thailand and Vietnam are considering legalizing gay marriage, while New Zealand has become the first nation to do so.[249] Since 1885, however, many new laws have also emerged that discriminate against homosexuals. It is the role of the judiciary to ensure that such new laws comport with the principles of personal liberty and equal protection enshrined in a nation's constitution.

Section 377A in Singapore, therefore, serves as an example of how complicated and messy it can be for a foreign law from the distant past to be brought into congruence with contemporary and evolving societal norms. Fortunately, the Court of Appeal has already enunciated its role as a protector of the constitution, of rule of law, and of fundamental liberties.[250] Hence, protection under the law in this case is not simply a matter of "moral" or "public" opinion, but rather the product of constitutional guarantees that can withstand the ebb and flow of social sentiment.

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248. United States v. Windsor, 133 S. Ct. 2675 (2013); Richard Wolf, *IRS: Married Gay Couples Can File Joint Tax Returns*, USA Today (Aug. 29, 2013), *available at* http://www.usatoday.com/story/news/nation/2013/08/29/irs-gay-marriage-taxes/2728927/.

249. Didi K. Tatlow, *New Zealand Leads Way on Same-Sex Marriage in Asia-Pacific*, International Herald Tribune (Apr. 18, 2013), http://rendezvous.blogs.nytimes.com/2013/04/18/new-zealand-leads-way-on-same-sex-marriage-in-asia-pacific/.

250. *Tan Eng Hong*, [2011] SGHC 56 ¶ 60.