

# **Section 377A in Singapore and the (De)Criminalization of Homosexuality<sup>i</sup>**

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## Abstract:

This article reviews some of the recent challenges to the legal status of homosexuality in Singapore. On July 14, 2014, the Court of Appeal of Singapore heard oral arguments from two sets of plaintiffs regarding the repeal of Section 377A of the Singaporean Penal Code: the section of the code that criminalizes gay male sex between two consenting adults. This article demonstrates how the cases on appeal uncover a trepidatious government carefully untangling itself from values left behind by Colonial rule, and an equally apprehensive court system that seeks refuge in outmoded statutory guidelines and shifting popular sentiment. The article also aims to document some of the changes over the past few decades in Singapore's landscape that have contributed to the monumental changes taking place regarding gay rights in the city-state, and how such changes may hopefully provide for the broadening of civil rights and the easing of governmental control in the near future.

Keywords: homosexuality, equal protection, courts, justice, post-colonial, Singapore

## **I. Introduction**

<1> As a prosperous and developed nation, Singapore has in a matter of half a century accomplished what very few countries on earth have been able to do. Beyond economic and political stability, Singapore has achieved phenomenal success as a nation with one of the highest GDPs per capita in the world, a formidable educational system, and safe and orderly regulated clean streets that have christened Singapore with the wry, self-inscribed title of being a “fine” city (Radics, 2014). Yet, the “march of progress” in Singapore has not been without its

sacrifices. While the nation has developed a reputation of being safe and orderly, it is also many times represented as authoritarian and oppressive. This article intends to demonstrate, however, that things are slowly changing. Tan Eng Hong's judicial challenge to 377A, the section of the penal code that criminalizes gay male sex between two consulting adults, serves as a courageous step forward in the attempt to repeal Section 377A. Now at the highest court in the land, even if the Court of Appeal chooses to maintain 377A on the books, their challenge demonstrates how Singapore is gradually moving forward, developing its civil society mechanisms, and emerging from its colonial past to a nation growing into its own – an inexorable process that afflicts many post-colonial nations of today.

<2> On the issue of morality, homosexuality is one controversial and latent area of disentanglement that former British colonies have had to encounter. Section 377A is a product of the Labouchere Amendment in the United Kingdom, which was only implemented in a select few nations within the commonwealth. On July 14, 2014, over three-quarters of a century after the law was implemented in Singapore, the Court of Appeal heard oral arguments from two sets of plaintiffs regarding the repeal of Section 377A from the Singaporean Penal Code. As the court of last instance in Singapore, the Court of Appeal's final judgment will bring to a close a long-standing legal challenge regarding the contentious legal provision that began with Tan Eng Hong's fight to repeal the law back in March 2010. This legal challenge serves a milestone in a much longer history of achieving legal recognition and protection of homosexuality in Singapore. This article will review the cases on appeal, and discuss the roots of the challenge, from the emergence of Section 377A during the British colonial rule, to the current cases on appeal.

## II. Section 377A: From British Colonial Times to the Present

<3> Section 377A of the Singaporean Penal Code stems from a set of provisions put into place by the British in 1871 and 1938 (*see Radics, 2013; Sanders, 2009*). Prior to the passage of the controversial provision, “immoral” acts within the Straits Settlements<sup>ii</sup> that contradicted Victorian values were prosecuted under Section 377 of the Straits Settlement Penal Code of 1871, which stated, “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.” (O’Kenealy, 1869).<sup>iii</sup> In 1885, Section 11 of the Criminal Law Amendment Act, commonly known as the Labouchere Amendment, was passed by the British parliament. The act stated,

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 (Criminal Law Amendment Act, 1885).

Section 11, therefore, expanded the prosecution of “immoral” acts to specifically target such acts between men not only publicly, but also privately.

<4> The Straits Settlements passed a similar amendment to its penal code in 1938, labeling it 377A, a subsection of Section 377. Mr. C. G. Howell, then Attorney General, argued that Section 377A was necessary since the existing law at that time only reached public acts (*Tan Eng Hong v. Attorney General, [2012] SGCA 45, ¶ 27*). By implementing the Labouchere Amendment in the Straits Colonies, the Attorney General’s office could prosecute both public and private acts between men, which Howell stated was needed because, “it [was] unfortunately the case that acts of the nature described have been brought to notice” (Howell, 1938).

<5> After nearly 140 years, Section 377 of the Penal Code was repealed in Singapore in October 2007 (*Tan Eng Hong v. Attorney General*, [2012] SGCA 45, ¶ 31). Its repeal was the product of overwhelming support from society after Section 377 had been used to prosecute Singaporeans for performing fellatio in the cases of *Public Prosecutor v. Kwan Kwong Weng*, [1997] SGCA 8, and *Annis bin Abdullah v. Public Prosecutor*, [2004] SGHC 52. Under this judicial precedent, consensual sexual acts such as fellatio and anal sex between heterosexual partners were considered illegal and prosecutable offenses under Section 377 if it did not result in natural sex, which was defined by the court in *Kwan* as “the coitus of male and female sexual organs.” (*Public Prosecutor v. Kwan Kwong Weng*, [1997] SGCA 8, ¶ 28) The idea that fellatio for sexual release alone, without the potential for reproduction, was considered a prosecutable offense repulsed many, and it was generally agreed that the law was no longer relevant in contemporary society.

<6> Attempts to repeal Section 377A, however, did not receive the same support. Although Member of Parliament Siew Kum Hong submitted a public petition requesting Parliament to repeal Section 377A, and 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, in response, over 15,560 Singaporeans signed a petition in an effort to retain the section (Radics, 2013). The petition also prompted former appointed Member of Parliament, National University of Singapore (NUS) professor Li-Ann Thio, to make her controversial speech in which she proclaimed, “Anal-penetrative sex is inherently damaging to the body and a misuse of organs, like shoving a straw up your nose to drink” (Thio, 2007). In the end, Parliament decided to maintain Section 377A to placate “conservative” Singaporeans. Addressing Parliament, Prime Minister Lee Hsien Loong stated,

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 (Lee, 2007: 2397).

While a number of gay activists mocked the Prime Minister's usage of the term “agenda,” and the students of NUS's law school partner New York University shunned Prof. Thio and her course on human rights, Section 377A remained in force despite Section 377's repeal (See Radics, 2013; Lat, 2009). As a concession, Prime Minister Lee noted in his speech that, “There are gay bars and clubs. They exist. We know where they are. Everybody knows where they are. They do not have to go underground. We do not harass gays. The Government does not act as moral policemen. And we do not proactively enforce section 377A on them” (Lee, 2007). Therefore, even though Section 377 was repealed and Section 377A remained indefinitely, Section 377A was to remain proactively “unenforced.”

### **III. Tan Eng Hong and the Challenge to Section 377A**

<7> On March 9, 2010, Tan Eng Hong, known to many as Ivan, was found committing an act of “gross indecency” in a toilet stall in CityLink Mall, a popular shopping center in the downtown core of Singapore. Tan was caught when two waiters from a nearby restaurant called the police to report lewd conduct in a toilet stall. When the police arrived, they arrested Tan and another

man, eventually charging them under Section 377A. Tan was taken into custody and remained in jail for one day.

<8> Ivan experienced great distress over his treatment in jail. He felt as if he had been treated like a criminal because of his sexuality. He resented the fact that he was handcuffed and placed in jail, and although ultimately he pled guilty to engaging in an obscene act in a public place and paid a fine of S\$3,000, he argued that what took place in the toilet stall was an act between two consenting adults, causing harm to no one. Therefore, to prosecute him under 377A seemed to him unfair, as it was not based on the public nature of his offense. When he was caught, he was completely honest about what he had done, submitted to the police willingly, and believed he was still treated with hostility and mistrust. While the other man he was caught with refused to challenge the law, and his family, friends, and much of the gay community chastised Ivan for taking on the case, he approached M Ravi, Singapore's preeminent human rights attorney, and decided to take the case to court.<sup>iv</sup>

<9> On September 24, 2010, Tan filed suit challenging the constitutionality of Section 377A (*see Tan Eng Hong v. Attorney General*, [2011] SGHC 56). In his complaint, Tan argued that Section 377A was inconsistent with Articles 9, 12, and 14 of Singapore's Constitution. Articles 9, 12, and 14 provide for liberty, equal protection, and freedom of association, respectively. On October 15, 2010, 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 Section 294(a) of the Penal Code. 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" (*Tan*

*Eng Hong v. Attorney General*, [2011] SGHC 56, ¶ 3). The Assistant Registrar granted the striking-out application on December 7, 2010. After pleading guilty to the public obscenity charge, he then appealed the Assistant Registrar's decision on January 26, 2011.

<10> On appeal, Judge Lai Siu Chiu of the High Court, Singapore's intermediate appellate court, determined that Tan's constitutional rights may have been violated under Article 12, thereby satisfying the "substantial interest" requirement of *locus standi* (*Tan Eng Hong v. Attorney General*, [2011] SGHC 56, ¶ 4). The High Court found, however, no real controversy since the constitutional injury had become merely hypothetical as a result of the Section 377A charge being dropped (*Tan Eng Hong v. Attorney General*, [2011] SGHC 56, ¶ 27). Moreover, the court found that Tan's case was not 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 (*Tan Eng Hong v. Attorney General*, [2011] SGHC 56, ¶ 42). Nevertheless, Judge Lai affirmed the Assistant Registrar's striking down of Tan's original case and dismissed the appeal with costs awarded to the AG (*Tan Eng Hong v. Attorney General*, [2011] SGHC 56, ¶¶ 24, 43).

<11> On June 27, 2011, Tan appealed the High Court's decision to the Court of Appeal. The Court of Appeal 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" (*Tan Eng Hong v. Attorney General*, [2012] SGCA 45, ¶ 115). The Court further found that Tan has *locus standi* because Section 377A is arguably inconsistent with Article 12 of the Constitution. Finally, in determining whether a real controversy existed, 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 (*Tan Eng Hong v. Attorney General*, [2012] SGCA 45, ¶ 185).

<12> The Court of Appeal’s decision in *Tan Eng Hong v. Attorney-General* serves as a landmark decision since it declared that a person has legal standing to challenge legislation for being in violation of a constitutional right (Chua, 2013). The monumental decision also reiterated the fact that the Court of Appeal can and will uphold fundamental liberties guaranteed in the Constitution. Lastly, it opened the door for Singaporeans who were personally affected by unconstitutional laws to file suit even without being prosecuted under the law. The mainstream media, however, paid little attention to the case. The *Straits Times*, Singapore’s highest selling newspaper, for instance, 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. The gay community, which initially had been somewhat critical of Tan’s decision to bring the case to court, became more actively and vocally interested in the second case. The next section will discuss Tan Eng Hong’s and Lim and Chee’s cases on appeal.<sup>v</sup>

### **On Remand at the High Court**

<13> On November 30, 2012, two men launched a challenge against Section 377A of the Penal Code. 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. Justice Quentin Loh heard their case on February 14, 2013 and issued his decision on April 9, 2013 (*Lim Meng Suang v. Attorney General*, [2013] SGHC 73).

<14> First, the High Court held that although they were not charged, threatened with prosecution, or in any way pressured by the State or its agents to stop or change their relationship, the case proceeded because of the holding in *Tan Eng Hong*. Next, in determining whether Lim and Chee’s equal protection rights were violated, the court applied the two-part test found in *Public Prosecutor v. Taw Cheng Kong*. 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” (*Lim Meng Suang v. Attorney General*, [2013] SGHC 73, ¶¶ 10-13).

<15> After determining that male homosexuals and bisexuals serve as classifications with intelligible differentia, the court stated 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. . .” (*Lim Meng Suang v. Attorney General*, [2013] SGHC 73, ¶ 95). Regarding whether 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” (*Lim Meng Suang v. Attorney General*, [2013] SGHC 73, ¶110). 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*.<sup>vi</sup> In this case, Justice Loh found that the purpose of Section 377A was legitimate in light of the long English tradition of prosecuting only male homosexual conduct and Singapore’s specific traditions regarding procreation and lineage (*Lim Meng Suang v. Attorney General*, [2013] SGHC 73, ¶¶ 117-130).

<16> It was not until March 6, 2013 that the High Court finally allowed Tan Eng Hong to produce his arguments in court. Although Tan requested both opinions to be released simultaneously, Justice Loh, the justice who presided over both cases, issued his opinion in Tan's case on October 3, 2013. Since many of the arguments regarding Article 9 and Article 12, or liberty and equal protection, were already addressed in the *Lim Meng Suang* case, Justice Loh mainly addressed Tan's original arguments regarding natural justice, and Tan's additional arguments that were not addressed in *Lim Meng Suang*.

<17> First, Tan argued that Section 377A must be struck down as it does not comply with fundamental rules of natural justice. In response, after first noting that the principle of natural justice as applicable to the constitution is vague, Justice Loh went on to argue that the law cannot be absurd or arbitrary because the legislature had "articulated a clear social purpose for which s 377A is its chosen and fitting mechanism for implementation" (*Tan Eng Hong v. Attorney-General*, [2013] SGHC 199, ¶ 40). Next, Justice Loh addressed the numerous cases throughout the world in which homosexuality was considered an immutable characteristic. After reviewing the cases cited by Tan from the U.K., Canada, Hong Kong, South Africa, Nepal, India and the United States,<sup>vii</sup> Justice Loh argued that none of these courts were able to make *evidence* of a fact, but rather, were making findings of fact tied to legal conclusions (*Tan Eng Hong v. Attorney-General*, [2013] SGHC 199, ¶ 49). Since the court could not make the finding that homosexuality was an immutable characteristic, the argument that the law was as arbitrary and absurd as, for instance, prosecuting individuals because of their eye color or height need not be addressed (*Tan Eng Hong v. Attorney-General*, [2013] SGHC 199, ¶ 64). Then, with regards to the argument that access to justice would be undermined in certain cases, such as in domestic violence or rape cases, the court found that those who knowingly commit an offense cannot be

deprived of justice because they fear the authorities will uncover their offence, and furthermore, that Section 377A cannot be used to prosecute those who are raped since the provision prosecutes only those who “abet,” “procure,” or “commit” sodomy (*Tan Eng Hong v. Attorney-General*, [2013] SGHC 199, ¶ 79). Lastly, the court dismissed Tan’s entreaties that the court create a more stringent test to determine whether laws violate the constitution and intervene in morally contested issues such as homosexuality (*Tan Eng Hong v. Attorney-General*, [2013] SGHC 199, ¶ 92).

### **Combined Review at the Court of Appeal**

<18> On October 9, 2013, the Court of Appeal accepted Tan’s application to have his and Lim and Chee’s case consolidated for review, and in July 2014, the Court of Appeal heard both appeals. While Tan’s counsel, the indomitable M. Ravi, continued to represent Tan’s interests, Lim and Chee had a change of counsel, with Deborah Barker, an experienced Senior Counsel member at one of the largest firms in Singapore, taking on their case. In addition, both parties were provided support from Human Dignity Trust (HDT), a non-governmental organization based in London. HDT’s Legal Panel member Debevoise & Plimpton LLP, led by Lord Goldsmith QC, assisted Lim and Chee’s case. HDT’s Chair Tim Otty QC, on the other hand, led a team from Blackstone Chambers, assisting with Tan’s case. The next section will outline the arguments made by both parties.

### **Barker’s Arguments for Lim and Chee**

<19> Barker argued that the case on appeal was an issue of equal protection under the law. She claimed that her clients were not seeking to change the Constitution, but only to enforce the

provisions found within it. She adds, “The Appellants are not asking for ‘social change’ or the affirmation that male homosexual conduct is acceptable in Singapore . . .” (Boh, 2014). She stated that she hoped the court would find that, “the majority cannot through the guise of public morality target an unpopular minority group by restricting their intimate conduct in private” (*ibid.*). Moreover, she added that the appeal is not about the “legislation of same-sex marriage or sex education, or adoption of what books about penguins children should read,” but about the infringement of human rights provided under the Constitution (*ibid.*). “The issue before the court is not an emotional one but a constitutional one of” rights to liberty, equality and life, Barker said (Tan, 2014a). If the law is not struck down, it should at least be modified so that it does not apply to consenting adults and for sexual acts done in private.

<20> On the issue of legislative intent, she pointed to a report in 1937 by Rene Onraet, then Inspector-General of Police for the Straits Settlement, who wrote that male prostitution was widespread. The report was a prelude to making such acts between men an offence so male prostitution could be policed, Barker said, pointing to historical correspondence of the Colonial Government in 1938. Section 377A, she therefore argued, was outdated as it had been enacted when social norms were vastly different. The court, she urged, should carry out its constitutional role as the guardian of the Constitution and the fundamental rights guaranteed therein (Chia, 2014).

### **M. Ravi’s Arguments for Tan Eng Hong**

<21> In his submissions, Ravi argued that homosexuality was a fundamental aspect of human personality. He noted that former Prime Minister Lee Kuan Yew, Prime Minister Lee Hsien Loong, the Singapore Ministry of Health and the Health Promotion Board have all taken the

position that sexual orientation is a fundamental attribute. Ravi said Section 377A infringes on the right to equality under Article 12 and violates the rights of gay people to life and personal liberty under Article 9 of the Constitution. He reiterated that Article 9 renders unlawful any deprivation of personal liberty unless it is authorized by a legal rule that is clear and precise. Ravi argued that Section 377A's concern of "gross indecency" between men is vague and "obviously discriminatory." This vagueness and ambiguity could raise the question of whether kissing or holding hands would fall under the provision, giving rise to difficulties for the homosexual community to regulate their conduct. As a result, "Section 377A is incapable of justifying detention because it is vague, arbitrary and absurd" (Loh, 2014).

<22> Moreover, Ravi argued that Article 12(1) provides a general guarantee of equality before the law and equal protection of the law. It applies to all persons and ensures that people in like situations are treated alike under the law. However, Ravi argued gay males and lesbians were treated differently – Section 377A only criminalizes sex between males, but not between females. He added that the law presents "prejudice within prejudice," where there appears to be more disgust with male homosexuals than female homosexuals. Lastly, Ravi argued that since Section 377 itself has been repealed by the government in 2007, section 377A cannot stand as Section 377A was meant to cover what was not covered by Section 377. Section 377 had outlawed oral and anal sex – without defining that this only applied to homosexuals.

<23> Ravi, much like Barker, also argued that he was not asking the court to decide on questions of social policy, but to deal with the issue of whether Section 377A unlawfully discriminates against a segment of society. "This case is squarely a matter of constitutional law," he said. "The legal issue the court is constitutionally mandated to determine is whether 377A unlawfully discriminates against a segment of our society" (Loh, 2014). In addition, he pressured the court

to intervene in constitutional issues such as this, stating that “to characterise the potential violation of a fundamental right against a not insignificant segment of society as a matter of social policy that is up to the legislature is to completely disregard the function of this court” (*ibid.*).

<24> Responding to the documents provided regarding the argument that Section 377A was meant to regulate male prostitution, Ravi argued that these documents could demonstrate that “that Section 377A was never intended to criminalise consensual conduct between adult males in private such as in loving homosexual relationships” (Loh, 2014). He added that, “in 1938, Section 377A was passed. It was said in the 1938 Annual Report that ‘male prostitution and other forms of beastliness were stamped out as and when opportunity occurred.’ It was clear that this was done under force of law” (*ibid.*). As such, Ravi argued that Section 377A “was indeed to capture instances of male prostitution,” and that it “was never intended to criminalise consensual conduct between adult male couples not engaged in transactional sex” (*ibid.*). He added that, “It would be inimical to justice if the court were simply to ignore documents on the historical record in construing a provision that is at best difficult for anyone to understand (including the parties to this proceeding and the Court, not to mention anyone trying to regulate their behaviour in accordance with it)” (*ibid.*).

<25> In conclusion, Ravi said the issue at hand is whether the criminalization of a segment of society based on a fundamental characteristic violates the supreme law of this land. He submitted that it clearly does, and therefore Section 377A should be struck down.

## **Attorney General Arguments**

<26> Senior Counsel Aedit Abdullah, from the Attorney-General's Chambers stated that his chambers did not have a view on acts between males, and that his chambers is merely representing the views of the legislature. As such, he argued that it was not the court's job to legislate and that the law was retained by parliament to protect public morality. Moreover, he added that while social values may or may not have shifted since the ban on gay sex was passed during the colonial era, it is parliament and not the courts that should decide if the law is retained or amended (Tan, 2014a).

<27> Moreover, Abdullah argued that Section 377A is not unconstitutionally vague and has a clear core meaning that covers consensual sexual acts between males. He said it was immaterial that the law did not cover female homosexual acts, as the legislative purpose was to signal disapproval of only male homosexual acts. He also argued that the appellants were seen to be trying to persuade the Court of Appeal to rewrite the Constitution to suit their claims. In conclusion, Abdullah argued that the dispute is “not (one) that can be solved by the court” but “should be left to the legislature” (Boh, 2014).

### **Alex Au and Contempt of Court**

<28> The case also spurred residual litigation. Perhaps due to a combination of anxiety, frustration, and Singapore's broad and strictly enforced contempt of court rules, blogger Alex Au Wai Pang was charged by the Attorney General's Chambers in November 2013 of being in contempt because he allegedly insinuated that the courts planned to rig hearing dates on the 377A challenge.<sup>viii</sup> Au was said to have alleged that there was a “plan” to deliberately manipulate hearing dates and delay the issuing of a decision in Tan Eng Hong's case so that Chief Justice Sundaresh Menon could hear another appeal first. Moreover, regarding another

pending case alleging that an employer terminated an employee based on his sexual orientation, Au stated that the Singapore judiciary is “incompetent and/or biased” when he commented in the post that he did not have “high hopes” for an application seeking a declaration that Article 12 of the Constitution prohibits discrimination against gay men on account of their sexual orientation in the course of employment. The High Court only allowed the Attorney General to proceed in prosecuting Au for the first set of remarks regarding the 377A case (Today Online, 2013).

<29> As a result, nearly 170 academics, civil activists and artists got behind a statement supporting the popular blogger (Feng, 2013a). In a statement made online, they said they were “deeply concerned” that the Attorney-General’s Chambers was given permission by the High Court to take legal action against Au after alleging that he had “scandalised the judiciary.” They added, “The right of free expression is enshrined in . . . our Constitution . . . . The AG’s action reflects an overzealous desire to police public opinion.” They argued that if the 61-year-old blogger had erred, his claims should be rebutted in public. “We agree it is important to uphold public confidence in the judiciary. However, this cannot mean that our judges should not be subject to scrutiny,” the statement said. They added, “The AG’s action, rather than enhancing confidence in the judiciary, might weaken public confidence. It also implies that the public is not allowed to form opinions on judicial processes.”<sup>ix</sup>

<30> In response, the AG argued, “The constitutional right to free speech and expression is not an absolute right, but is subject to limits which are expressly provided for in the constitution” (Feng, 2013b). It added, “As important as the right to free speech and expression is, the Constitution recognises that our society as a whole must be safeguarded against statements without basis which injure the reputation of persons or lower confidence in the administration of justice” (*ibid.*). It then subsequently appealed the High Court’s decision to only hear one of the

AG's charges, after the high court permitted the AG to only prosecute Au on the 377A comments. After nearly a year of procedural hurdles, at the end of July 2014, the Court of Appeal granted the AG's request to prosecute Au on the content of both blogs and pretrial proceedings were scheduled for August 8, 2014. There is no maximum punishment for the offense of contempt of court in Singapore (*see Attorney General v. Hertzberg Daniel and Others*, [2008] SGHC 218, ¶ 62).<sup>x</sup>

#### **IV. Conditions leading up to the 377A cases**

<31> The cases currently on appeal did not happen in a vacuum. Singapore experienced drastic changes throughout its history to allow for Tan Eng Hong's, and Lim and Chee's, challenges to 377A to take place. This final section will briefly review some of the conditions that have led up to the cases currently pending at the Court of Appeal, starting with the sting operations of the 1980s and 1990s, Singapore's "Stonewall" at Rascals on Beach Road, the rise of the "Pink Dollar," Pink Dot starting in 2009, and finally, ending with the 2014 controversy regarding the National Library of Singapore's decision to censor children's books with gay characters. While not exhaustive, this section will demonstrate some of the changes that have taken place in Singapore over the past decade regarding views on homosexuality. It will also show the ebb and flow of these views: from outright persecution, to the courting and promotion of gay "culture."

##### **Sting Operations: 1980s to 1990s**

<32> According to Leong Wai-Teng, from the early 1980s to the 1990s, arrests for homosexual activities were procured by undercover agents who dressed or behaved seductively to entice men to make advances at them (Leong, 1997). But since Section 377A involves two willing parties,

police entrapment rendered this section inappropriate. As a result, men arrested for ‘homosexual acts’ with undercover agents were mostly tried under Section 354 (molest or outrage of modesty). Punishment under this charge can range from two to six months imprisonment, and three strokes of the cane. Additionally, some men were charged under Section 19 of the Miscellaneous Offences (Public Order and Nuisance) Act, involving soliciting in a public place, and leading to fines ranging from S\$200–S\$500. Another Section of the Penal Code that some of these men were charged under was Section 294A. Originally meant to be used for ‘obscene songs,’ it was wide enough to include the commission of any obscene act in any public place to the annoyance of others, such as a symbolic gesture a person propositioning sex may use to signal sexual intention. Fines under this section have ranged between S\$200–S\$800. Lastly, some men were charged under Section 20 of the Miscellaneous Offences (Public Order and Nuisance) Act, which covers ‘riotous, disorderly or indecent behaviour’ in a public setting, subject to a fine not exceeding S\$1,000, or imprisonment not exceeding a month.

<33> In 1994, the High Court heard the case of Tan Boon Hock who was arrested in an anti-gay sting operation and sentenced by the magistrate to four months jail and three strokes of the cane. Tan appealed the sentence, and Chief Justice Yong Pung How reversed the magistrate court, substituting its sentence with a fine of S\$2,000. The Chief Justice stated, “I found it somewhat disquieting that an accused arrested as a result of such police operations should subsequently be charged with having outraged the modesty of the police officer he came into contact with” (*Tan Boon Hock v. Public Prosecutor*, [1994] SGHC 101, ¶ 8). The Chief Justice also felt that the gender of the so-called victim was important: in that case, the police decoy was not a vulnerable, unsuspecting female, but a young male out to lure other males. According to Leong, the ruling “therefore consigned S. 354 (outrage of modesty) back to its heterosexual niche for cases where

force is exercised against a woman's will" (Leong, 2008). He added, "Henceforth, the tactic of police entrapment to arrest men, who solicit men for sex, was no longer operative, and no more arrests were made."

### **Rascals and the Fledgling Gay Movement of the early 1990s**

<34> In addition to the Sting Operations in which gays were targeted by police in popular cruising areas, during the early 1990's, police frequently raided gay businesses congregated along Beach Road, where a row of popular bars and clubs were located. On May 30, 1993, the police raided a disco called Rascals, a dance club frequented by many gay patrons. On that Sunday evening, a plainclothes police officer ordered the crowd to "shut up!" and threatened to beat them. After demanding that all the patrons in the establishment produce their identification documents, the police released them. Those who did not carry their IDs with them were hauled to the police station and made to squat outside. All were released the next morning without any charges. Although this seemed to be a common occurrence in the 1990s, what transpired at Rascals that evening, according to Lynette Chua, is "often hail[ed]...as Singapore's Stonewall...galvanizing a fledgling gay movement that was quietly taking shape in the early 1990s . . ." (Chua, 2014: 3).<sup>xi</sup>

<35> Luckily, on that fateful evening, a young law school graduate was amongst the crowd. Although he had his ID with him, his flat mate did not, so after being released, he rushed home to retrieve his friend's ID. Afterwards, he immediately made his way to the police station to find his friend huddled together with the other detainees taken from Rascals. Angered by what he saw, he wrote a letter to the police stating that there was no legal basis for the harassment and detainment of patrons at Rascals that night. In his letter he stated, "It is particularly disturbing to

find Singapore law enforcement officers behaving rudely towards and verbally threatening citizens who have not committed any offenses” (*ibid.* at 4). He added, “It would also be in the public interest to clarify the powers of officers (plainclothes) to demand the production of personal particulars in cases when no offences have been committed” (*ibid.*). After a month, the law school graduate received a phone call from the assistant superintendent of the Beach Road police station stating that internal trainings had taken place, and assurance that what happened at Rascals was not to happen again. A few days later, an official letter was sent to the law school graduate stating that there were complaints of overcrowding and false IDs being used at Rascals, and that the measures taken that evening were meant to address such complaints. The letter was also apologetic for the “lack of tact in dealing with the situation” (*ibid.* at 5).

<36> The event at Rascals was monumental – it was one of the first instances of direct engagement between the homosexual community and the state in an era of frequent police raids on gay bars. This civil exchange between the parties provided hope to the nascent community of gay organizers that they could negotiate with the government to begin to recognize their rights, and as a result, began to engage in community education, forums, and other community building activities. According to Chua, Rascals helped galvanize the gay community to action so that slowly but surely, and within the confines of the law, the community could pragmatically resist its oppressive conditions (Chua, 2014).

### **Pink Dollar and the Arts Scene**

<37> By the early 2000s, the state became more tolerant of homosexuality, and certain rights afforded to all citizens were suddenly afforded to homosexuals. While the 1990s led to police raids of gay establishments, and the gay men caught cruising were publicly shamed through the

publishing of names, ages, professions, and the acts these individuals were caught doing, by the late 1990's and early 2000's, Singapore's cultural policies began to liberalize. Plays that had been banned in the past for having gay characters were now being shown, with some of the playwrights even being commissioned by the government to raise awareness of issues affecting the gay community such as HIV/AIDS (Chua, 2014). Although the government withdrew its support of these commissioned plays for depicting homosexuality as "normal," the theatre movement continued to produce plays that addressed gay issues in Singapore (See Lim, 2005). By the early 2000s, the government began to express an increasingly tolerant approach to homosexuality by announcing that gays would be allowed to work in the civil service. Such advances demonstrated Singapore's attempt to pragmatically give its image a "makeover," from its previous persona of a straitlaced and disciplined society, to one that was more creative, open, and diverse. (*ibid.*; Elegant, 2003).

<38> As a result, "queer capital" became relevant as "indices of the country's trans-national access to creative technology and cultural resources" (Lim, 2005a: 295). By the early 2000's, the government began to perceive homosexuals, as the United States and Britain did in the 1990s, as a community comprised of many well-educated individuals, with higher disposable income, and a penchant for spending money (*see* Southerton, 2011). The government's increasingly relaxed attitudes towards homosexuality coincided with what Lim points out as Singapore's agenda to reinvent itself to "exploit Asia in its autoexoticizing construction of this 'Lion City' as 'New Asia'" (Lim, 2005b: 389). Lim further argues that the "city-state's uncertain and superficial trans-formation from patriarchal father-state to 'Asia's new gay capital' in its bid to become a creative hub where queer capital is subtly used to remake it into a 'Global City for the Arts'" (Lim 2005a: 294). As a result, the promotion of "queer" art culture fed into

the government's latest economic paradigm, warranting a shifting tolerance toward its sexual minorities (*ibid*).

### **Pink Dot in 2009-2014**

<39> In 2000, as part of the government's attempt to reinvent itself as a more open and tolerant society, it created "Speaker's Corner," a place located within Hong Lim Park where citizens could apply for a permit to freely and openly express their views. By 2008, rules were relaxed even further to allow for pre-approved public demonstrations for Singaporean citizens and permanent residents. At this time, gay organizers began to consider the idea of bringing something similar to a gay pride festival to Singapore. In 2009, Pink Dot was established to invite gay and straight participants to congregate and wear pink to show their support of the LGBT community in Singapore. Pink was chosen as the color because it is the color of the Singapore Identification Cards and also the color when red and white—the colors of the Singapore national flag—is mixed. According to its website, "Pink Dot stands for an open, inclusive society within our Red Dot, where sexual orientation represents a feature, not a barrier."<sup>xii</sup>

<40> In 2009, it is reported that as many as 2,500 people participated to show their support: the largest number of people to ever congregate in Hong Lim Park since the establishment of Speaker's Corner. By 2010, 4,000 people participated; in 2011, there were 10,000 attendees; in 2012, there were 15,000 attendees, and in 2013, 21,000 people joined in to show their support. By 2014, a record number of 26,000 pink-clad people turned up. Pink Dot at this point had gained international attention and sponsorship from major corporations, including Google Inc. since 2010, Barclays Plc since 2012, and Goldman Sachs Group Inc., starting in 2014.

<41> Though Pink Dot has become a phenomenal success, there is growing resistance to the event. Recently, Singapore's Minister for Families and Social Development Chan Chun Sing publicly reprimanded the US bank Goldman Sachs for giving LGBT better employment opportunities. It is reported that Minister Chan said on his Facebook page following a networking dinner organized by Goldman Sachs that, "Singapore and Singaporeans will decide on the norms for our society. Foreign companies here should respect local culture and context" (Tan, 2014c). Moreover, various religious communities encouraged their constituents to wear white in protest of Pink Dot, and to stand in solidarity with "traditional family values" (Ng, 2014).

### **National Library Censorship of "gay-themed" children's books**

<42> In July 2014, the National Library of Singapore pulled from the shelves, and said it would "pulp," copies of three children's books entitled: "And Tango Makes Three," about a male-male penguin couple in New York City's Central Park Zoo; "The White Swan Express: A Story About Adoption," which involves a lesbian couple; and "Who's In My Family: All About Our Families." The Minister of Communications and Information Yaacob Ibrahim was reported as stating, "The prevailing norms, which the overwhelming majority of Singaporeans accept, support teaching children about conventional families, but not about alternative, non-traditional families, which is what the books in question are about" (Associated Press, 2014). In response, nearly 5,000 people signed an open letter and a petition calling for the books to be put back on the shelves. In addition, about 400 people gathered outside the National Library on Bras Basah Road to read books – including the removed titles – with their children. The read-in occurred during a "Let's Read Together." Such actions were not met without reaction. It is reported that

a group called “Singaporeans United for Family” were able to collect close to 26,000 signatures in support of the ban of the three books, though the number is hard to verify since all signatures were kept private and confidential.

<43> As a result of the controversy, Minister Ibrahim said, “I have instructed NLB not to pulp the two other titles, but instead to place them in the adult section of the public libraries. I have also asked NLB to review the process by which they deal with such books.” (Tan, 2014b) Moreover, he added, “The decision on what books children can or cannot read remains with their parents. Parents who wish to borrow these books to read with their children will have the option to do so” (*ibid.*).

## V. Conclusion

<44> Tan Eng Hong and Lim and Chee’s daring attempt to repeal 377A is the product of years of changes that have been taking place in the city-state of Singapore. While government officials have carefully and constantly taken a “conservative” approach to not offend its supposedly “conservative” society, the court system remains wary of engaging in judicial activism and veering too far from what it believes is the intent of Parliament. The cases on appeal also reveal that Singapore as a nation is experiencing growing pains, partly driven by the government’s attempt to remain in step with the increasingly globalized economy, but also as a result of emerging conflict in a society that, by clinging to the values left behind by the British, over time have appropriated them as its own.

<45> From outright persecution and shame, to chasing the “pink dollar,” to the exponential growth of Pink Dot, to the growing resistance from the religious communities and “pro-family” advocates, the shifting public perception of homosexuality is like a pendulum: as it swings in one

direction, it is destined to swing back in the other. It is important to note, however, that in a nation that for decades has been written off as docile and complacent with the government, public participation is swelling, and people are more willing to express themselves and their beliefs publicly. Moreover, the world is changing. With the economic growth and increased globalization of Singapore, it is becoming more and more difficult for the nation to shelter itself from changing views worldwide on civil rights, human rights, and homosexuality. As Singapore becomes more integrated and exposed to the systems and values of an increasingly globalized world, its citizens are beginning to demand space to express themselves and their beliefs. Perhaps as a result, the courts will have to intervene to preserve and protect the values enshrined in the nation's constitution. Fortunately, Singapore's constitution respects equality and equal protection – principles necessary to allow Singapore's citizens to continue to become engaged and to feel free and safe to openly express their beliefs, whatever they may be.

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**Notes:**

<sup>i</sup> This article was submitted for publication prior to the Court of Appeal of Singapore's final decision in October 2014. Although the Singaporean court ultimately held that Section 377A of the Penal Code is constitutional, the struggle for the advancement of gay rights in Singapore has not waned. It is the opinion of the editors of this journal that this article still presents a useful review of the developments leading up to the court's decision. Furthermore, the history of the gay rights movement in Singapore provided in this article is helpful in understanding the development of rights in Singapore. Please refer to the author's forthcoming chapter in *Contemporary Perspectives of Lesbians, Gays and Bisexuals around the World: Law and Culture*, ed. Paula Gerber. New York: Praeger Press (expected January 2016) for an updated review of the 377A case.

<sup>ii</sup> The Straits Settlements initially consisted of Singapore, Malacca, and Penang (Sidhu, 1980).

<sup>iii</sup> The Straits Settlement Penal Code was adopted in 1871 from the Indian Penal Code. Much of the language in the Straits Settlement Penal Code is identical to the language found in the Indian Penal Code of 1862.

<sup>iv</sup> Dr. Saroja Dorairajoo, from the Department of Sociology at the National University of Singapore, collected all of the data in this section during an interview conducted on April 7, 2013.

<sup>v</sup> For a more detailed description of the proceedings and the fragmentation that emerged within the gay community, refer to Radics (2013).

<sup>vi</sup> "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."

<sup>vii</sup> These cases were: *HJ (Iran) v Secretary of State for the Home Department and another action* [2011] 1 AC 596; *Vriend v Alberta* [1998] 1 SCR 493; *Leung TC William Roy v Secretary for Justice* [2006] 4 HKLRD 211; *Naz Foundation v Government of NCT of Delhi and Others* WP(C) No 7455 of 2001 (2 July 2009); *Perry v Schwarzenegger* 704 F Supp 2d 921 (ND Cal 2010); *Sunil Babu Pant and Others v Nepal Government, Office of the Prime Minister and Council of Ministers and Others* [2008] NLJLJ 262; and *The National Coalition for Gay and Lesbian Equality v The South African Human Rights Commission* (1999) 1 SA 6.

<sup>viii</sup> The Attorney General's Chambers takes contempt of court seriously. Correspondence with the Attorney General's Chambers consistently results in the same message, "We would wish to reiterate that in writing any article and deciding on its date of publication, you bear in mind our laws on contempt, especially in relation to ongoing judicial proceedings."

<sup>ix</sup> The statement can be found here: <http://www.theonlinecitizen.com/2013/11/statement-on-agc-action-against-alex-au/>.

<sup>x</sup> In March 2015, the High Court rendered its decision and Alex Au was fined S\$8,000 for "scandalizing" the judiciary. Since then, he has instructed his attorneys to file an appeal to the Court of Appeal, Singapore's court of last resort.

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<sup>xi</sup> It should be noted that Chua adds that the statement was made by activists who were referring to “Stonewall the myth—that it started everything (D’Emilio, 2002)—rather than Stonewall the socially and historically contextualized event.”

<sup>xii</sup> See <http://pinkdot.sg/>. Singaporeans sometimes refer to their country as the “Red Dot.”