

Case Comment

SECTION 377A AND EQUAL PROTECTION IN SINGAPORE

Back to 1938?

In *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118, the High Court of Singapore upheld an Art 12 challenge against s 377A of the Penal Code (Cap 224, 2008 Rev Ed). The court held that there was a complete coincidence between the differentia underlying the classification prescribed by s 377A and the legislative purpose of the impugned provision as established in 1938, and the purpose of the law was not illegitimate. In this commentary, the author explains why s 377A cannot be upheld on the basis advanced by the learned judge.

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I. Introduction

1 Recently, in *Lim Meng Suang v Attorney-General* (“*Lim Meng Suang*”),¹ the High Court of Singapore upheld a constitutional challenge against s 377A of the Penal Code,² which criminalises any act of gross indecency between men, even where the conduct is consensual and carried out in the privacy of one’s home. The plaintiffs were two gay partners who argued that the impugned provision violated their right to equality as protected under Art 12 of the Constitution of the Republic of Singapore (“the Constitution”).³

2 According to Quentin Loh J, the impugned legislative provision did not violate the applicants’ constitutional right to equality for two main reasons. First, the object of s 377A was as stated by the then Attorney-General CG Howell (“AG Howell”) when he introduced the law into Singapore in 1938, that is, to criminalise grossly indecent acts between men, and to strengthen Singapore’s criminal law as, prior to its introduction, such sexual acts could only be criminally sanctioned if

* The author is grateful for the insightful comments provided by Cheah Wuiling and Michael Hor. All errors are the author’s own.

1 [2013] 3 SLR 118.

2 Cap 224, 2008 Rev Ed.

3 1985 Rev Ed, 1999 Reprint. Article 12(1) of the Singapore Constitution reads: “All persons are equal before the law and entitled to the equal protection of the law.”

they were committed in public.⁴ Therefore, according to the High Court, there was a complete coincidence between the differentia underlying the classification prescribed by s 377A and the purpose of the impugned provision as established in 1938.⁵ Second, the learned judge opined that the purpose behind s 377A was not illegitimate as the weight of historical practices *vis-à-vis* male homosexual conduct suggested a basis for such criminal sanctions⁶; and furthermore, some portions of Singapore society today still held certain deep-seated feelings on issues relating to procreation and family lineage.⁷

3 It is not intended in this commentary to argue conclusively that s 377A violates Art 12 of the Constitution, although some reasons why it possibly does will be sketched out. The main purpose herein, however, is merely to argue that s 377A cannot be upheld on the grounds that the learned judge had based his arguments. If s 377A is to be upheld, better reasons are needed. Both of the judge's main arguments will thus be examined in turn.

A. Rational relation between statutory differentia and original legislative purpose of s 377A as articulated in 1938

4 It is trite law in Singapore that when the courts decide whether a statutory provision is inconsistent with Art 12(1) of the Constitution, the judges would apply the "rational relation" test. Specifically, the Singapore Court of Appeal in *Tan Eng Hong v Attorney-General* ("*Tan Eng Hong*")⁸ had framed the constitutional inquiry *vis-à-vis* s 377A as follows:

- (a) whether the classification prescribed by s 377A was founded on an intelligible differentia; and
- (b) whether that differentia bore a rational relation to the object sought to be achieved by s 377A.⁹

5 In applying the abovementioned test, the High Court was undoubtedly right that the classification prescribed by s 377A was founded on an intelligible differentia, that is, one can discern and identify the legislative distinction that the law was seeking to make. Section 377A does not criminalise sexual acts between a man and a

4 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [70].

5 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [100].

6 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [119].

7 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [127].

8 [2012] 4 SLR 476. In that case, the Court of Appeal held that a gay man had the requisite *locus standi* to challenge the constitutionality of s 377A, even though he was not eventually prosecuted under the said offence.

9 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [185].

woman, nor does it sanction such acts between women. Only sexual acts between men are targeted. The legislative differentia is clear and intelligible.

6 What is, however, unusual about this decision is that the learned judge went on to hold that the inquiry into the object sought to be achieved by s 377A would be limited only to the original legislative purpose of the lawmakers when this law was first introduced into Singapore in 1938. As the learned judge observed:¹⁰

In my judgment, the purpose or object of s 377A is that articulated by AG Howell in 1938 when he spoke in the Legislative Council and introduced the provision which later became s 377A.

7 In reviewing AG Howell's statements in the Legislative Council of the Straits Settlements in 1938 when he introduced the law, the learned judge concluded as follows:¹¹

The purpose of s 377A's enactment was therefore clear. The act of males engaging in grossly indecent acts with other males was to be criminalised. The prevalence of such acts was a regrettable state of affairs and was not desirable. It was necessary to strengthen the criminal law and enable it to prosecute males engaging in such grossly indecent acts even if the acts were committed in private. This was because the then prevailing law made it difficult to detect and prosecute such acts.

8 The High Court went on to examine the speeches made during the October 2007 parliamentary debates over s 377A and concluded that "the purpose of s 377A has not changed from the purpose articulated by AG Howell in 1938",¹² though he emphasised that "there is no need"¹³ to look at the 2007 parliamentary debates to ascertain the object of the law.

9 In view of the legislative purpose articulated by AG Howell back in 1938, according to the learned judge, there was thus a "complete coincidence between the differentia underlying the classification prescribed by the legislation and the class defined by the object of that legislation".¹⁴

10 It is, however, not self-evident why the object sought to be achieved by s 377A must be confined to the original purpose of the lawmakers back in 1938 when the legislation was first passed. Counsels for the State and the plaintiffs had both argued that the court should

10 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [70].

11 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [67].

12 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [78].

13 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [78].

14 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [100].

examine post-enactment purposes, for example, HIV prevention, relevant to modern day Singapore for sustaining or rejecting this law; but these “new”¹⁵ purposes were dismissed by the learned judge.¹⁶

11 First, one must note that that an inquiry into the object sought to be achieved by s 377A is not necessarily the same as an inquiry into the original purpose of the lawmakers when the law was first passed. This judicial gloss on the “rational relation” test is a self-imposed limitation by the learned judge, and not one mandated by the Court of Appeal in *Tan Eng Hong*.¹⁷

12 Second, it is also not the usual practice of the Singapore appellate courts, in a constitutional challenge, to seize upon statements made by lawmakers during the passage of a law and deeming their original purpose final and determinative in construing the object sought to be achieved by the impugned law. The Court of Appeal had not done so in the equal protection challenge in *Public Prosecutor v Taw Cheng Kong*¹⁸ or *Yong Vui Kong v Public Prosecutor* (“*Yong Vui Kong*”),¹⁹ nor did the Privy Council of Singapore do so in the Art 12 challenge in *Ong Ah Chuan v Public Prosecutor*.²⁰ This is not to say that the original purpose of the lawmakers is irrelevant; the point being put forth here is that it should not be determinative. The original purpose of the lawmakers would be highly relevant if the legislation is of recent vintage, but local judges may prefer to be more circumspect about relying solely on the legislative purpose articulated by colonial officials on legislation passed in pre-independent Singapore.

13 Critics may argue that the High Court also looked at parliamentary debates of 2007 and concluded that the “purpose of s 377A, as articulated by AG Howell in 1938, was reaffirmed by Parliament in 2007”,²¹ and therefore that 1938 “purpose therefore remains valid today”.²² However, this line of reasoning is not without

15 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [87].

16 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [87].

17 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476.

18 [1998] 2 SLR(R) 489. In that case, the Court of Appeal upheld the constitutionality of extraterritorial legislative penal provision that applied only to Singapore citizens against an Art 12 challenge.

19 [2010] 3 SLR 489. In that case, the Court of Appeal upheld the constitutionality of the mandatory death sentence, imposed on persons who were convicted of trafficking more than a certain amount of controlled drugs in Singapore, against an Art 12 challenge.

20 [1979–1980] SLR(R) 710. In that case, the Privy Council, on an appeal from Singapore, upheld the constitutionality of the mandatory death sentence, imposed on persons who were convicted of trafficking more than a certain amount of controlled drugs in Singapore, against an Art 12 challenge.

21 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [78].

22 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [78].

problems. If the High Court was construing the term “object of the law” to mean the legislative purpose when the law was first passed, surely Parliament’s decision *not* to repeal that law in 2007 would have no bearing at all on the legislative purpose of the law when it was first enacted in 1938. If Parliament’s reason for *not* repealing the law in 2007 is relevant to construing the object of s 377A, then any other “new purpose”²³ of the law, as advanced by the State and the plaintiffs, must also be pertinent too.

14 What is also puzzling is that Quentin Loh J opined that it was wholly irrelevant that s 377A was passed prior to the enactment of the Constitution. As the learned judge opined:²⁴

Does the fact that Singapore did not have a Constitution in 1938 in some way affect s 377A’s validity once the Constitution came into being in August 1965? The short answer is no. As noted by the Court of Appeal in *Taw Cheng Kong (CA)*, equality before the law and equal protection of the law became part of the wider doctrine of the rule of law and were already an important part of the law of England when English law was imported into Singapore by the Second Charter of Justice in 1826. Equality before the law and equal protection of the law were therefore already part of the law of our land when s 377A was introduced in 1938.

15 However, the substantive effect of enacting a constitutional clause in Singapore that expressly protects the constitutional right to equality (or another fundamental liberty) cannot be the same as if no such right was expressly conferred on the citizenry at all. In any case, the learned judge’s view flies in the face of Art 162 of the Constitution which explicitly states that all pre-existing laws shall be “construed as from the commencement of this Constitution with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution.” Therefore, given the fact that s 377A was enacted without the benefit of Art 12, a constitutional right, lawmakers might not have adequately appreciated that this law could be in violation of equal protection.

16 Moreover, in deciding how the term “object sought to be achieved by the law” should be judicially construed, one may seek assistance from Indian jurisprudence on equal protection. Quentin Loh J has acknowledged that Art 12 is “obviously based”²⁵ on Art 14 of the Indian Constitution,²⁶ and our “rational relation” test is also drawn

23 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [87].

24 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [71].

25 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [34].

26 Article 14 of the Indian Constitution reads: “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

from Indian case law, which in turn was inspired by American jurisprudence.

17 Of particular relevance is the High Court of Delhi decision in *Naz Foundation v Government of NCT of Delhi*,²⁷ where the Indian court was faced with a constitutional challenge against s 377 of the Indian Penal Code,²⁸ which criminalised acts of “carnal intercourse against the order of nature”, even where the conduct was between consensual adults and occurred in the privacy of their homes. (One may note that this Indian case was referenced by the Singapore Court of Appeal in *Tan Eng Hong*.²⁹) Specifically, in deciding whether the legislative differentia bore any rational nexus to the object sought to be achieved by the law, the High Court of Delhi did not examine the original purpose of the colonial lawmakers when they first introduced it into India in 1861, but instead only examined the purported justifications for the law relevant to modern day India.³⁰

18 In the same vein, the High Court in *Lim Meng Suang*³¹ should have examined the alleged present day purposes or justifications for s 377A as advanced by the State. It is not intended herein to advance a decided view on whether s 377A is unconstitutional in Singapore; such a view would largely hinge on the veracity of the State’s current justifications for the law, for example, HIV prevention, a matter which was not closely analysed by the High Court.

19 Nevertheless, some plausible State justifications and possible problems with those arguments will be sketched out. If the State is seeking to argue that the object to be achieved by s 377A is to reduce HIV infection in Singapore by discouraging reckless male homosexual activity, one then has to examine whether the criminalisation of same-sex male intercourse would be effective in achieving this goal or such measures would only drive the infection underground, impede legal HIV prevention efforts, and in turn increase net HIV infection in the country. If the retention of s 377A would not reduce overall HIV infection in Singapore, one cannot then plausibly argue that the legislative differentia has a rational relation to the stated goal.

20 On the other hand, if the State is seeking to argue that homosexuality is morally offensive and unacceptable in conservative Singapore, and the State is entitled to criminalise same-sex behaviour to

27 WP(C) No 7455 of 2001 (2 July 2009).

28 Act No 45 of 1860.

29 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [25].

30 *Naz Foundation v Government of NCT of Delhi* WP(C) No 7455 of 2001 (2 July 2009) at [92].

31 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118.

reflect this social norm, it would run into a different set of problems. As rightly observed by Quentin Loh J in this case, “the concept of reasonableness is ... central to the inquiry into whether the ‘rational relation’ test is satisfied”³² and the “the differentia underlying the classification prescribed by a law must be *broadly proportionate* to the purpose of that law”.³³ The above proposition has also been endorsed by the Court of Appeal in *Yong Vui Kong*.³⁴ The High Court is certainly right that the prescribed differentia does not need to be the most effective means of achieving the object of the law, but if the statutory differentia is so under-inclusive that a huge segment of persons that should be targeted is legislatively omitted, one can very reasonably argue that the law is not broadly proportionate to the object of the legislation in question. If the object of the law is to display the State’s moral opprobrium against homosexuality, the legislative failure to equally criminalise sexual relations between women, a significant proportion of homosexual activity, would surely suggest that there is no rational, reasonable and proportionate connection between the statutory differentia sought to be drawn and the object of the law.

21 At this junction, it would be appropriate to turn briefly to the presumption of constitutionality, an accepted canon of constitutional interpretation in Singapore. The learned judge opined that “the court must always be mindful of this presumption when applying the ‘reasonable classification’ test”.³⁵ This may well be true, but one must note that there is another accepted canon of constitutional construction applicable in Singapore, that is, constitutional rights must be given “a generous interpretation, avoiding what has been called ‘the austerity of tabulated legalism’, suitable to give to individuals the full measure of the [fundamental liberties] referred to”.³⁶ One simply cannot pay homage to one interpretive canon without doing violence to the other. One must note that the High Court did not even cite the second interpretive maxim. Until the Court of Appeal has pronounced on how both conflicting canons can be reconciled, lower courts may inevitably have to put both interpretive canons aside when engaging in rights-adjudication, or at the very least attempt to reconcile both interpretive maxims.

32 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [93].

33 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [94].

34 *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at [112].

35 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [102].

36 *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710 at [23]; see also *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [80]–[82].

B. Purpose of s 377A is not illegitimate

22 Despite the satisfaction of the “rational relation” or “reasonable classification” test, the High Court went on to examine whether s 377A was in violation of Art 12 because the object of the law was in itself illegitimate. For this, the learned judge must be congratulated. Previously, by focusing only on the relationship between the purpose of the law and the legislative classification, this “rational relation” test failed to consider whether the legislative purpose was in itself legitimate and fair. So, for instance, if Parliament were to pass a statute that bars females from seeking public office, and the object of the law was framed as such, any gender classifications pursuant to this goal would still bear a rational nexus to the legislative purpose at hand, and could still be sustained as constitutionally valid.

23 Citing a seminal article written by Thio Su Mien,³⁷ the learned judge observed as follows:³⁸

Dr Thio addresses this issue by arguing that ‘it is conceivable that a connection may satisfy the “reasonable relation” test and yet be invalid because the object sought to be achieved is itself inherently bad’ ... I agree that this has to be the position adopted in relation to Art 12.

24 Nevertheless, the learned judge concluded that the purpose of s 377A was not illegitimate, and it is to his reasons which this commentary now turns.

25 First, he argued that the weight of historical practices *vis-à-vis* male homosexual conduct suggested a basis for those penal sanctions. As he explained:³⁹

The first reason is grounded in the idea that the courts should not be too quick to dismiss practices which have persisted and developed within the framework of a common law legal system. It is fair to presume that if a law has withstood the test of time, it cannot be devoid of any basis.

26 The above proposition may well be true, but surely if those same historical practices have been largely invalidated or repealed by those same common law systems, surely such legal developments cannot be deemed to be devoid of any basis too. The High Court argued that it was an undeniable fact that “common law has for a long time only proscribed male homosexual conduct, and not female homosexual

37 S M Huang-Thio, “Equal Protection and Rational Classification” [1963] *Public Law* 412.

38 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [115]–[116].

39 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [119].

conduct”.⁴⁰ This is true, but it is also an undeniable fact that these same common law systems have largely all repealed their sodomy laws, for example, Canada (1969), England (1967), New Zealand (1986). It is thus rather puzzling that the court only focused on the past practices of these common law systems, but failed to engage with its present state of development. Later in his judgment, the learned judge went on to bolster his argument by pointing out that countries such as Sri Lanka, Sudan, Tanzania, Yemen and the Solomon Islands also criminalised *female* homosexual conduct, such that it was unhelpful to postulate examples of how the world was changing as such examples could be countered by examples where there were shifts in the opposite direction.⁴¹ However, to the best of this author’s knowledge, there are not many instances, if at all, where the local judiciary has considered the legal practices of Sri Lanka, Sudan, Tanzania, Yemen and the Solomon Islands as persuasive authority in Singapore.⁴² On the other hand, the local law reports are replete with favourable citations⁴³ of legal authorities drawn from Australia, Canada, Hong Kong, the UK, the US and New Zealand, all of which have removed their equivalent of s 377A.

27 Second, the learned judge argued that the purpose of s 377A was not illegitimate as “some portions of Singapore society today still hold certain deep seated feelings with regard to procreation and family lineage”.⁴⁴ With respect, this is a curious argument. While many Singaporean parents would want their children to get married and continue the family line, this does not necessarily mean that they would want to jail those who do not do so. If procreation and lineage is such an important value, and if Parliament decides to imprison for up to two years fertile married couples who choose not to conceive, one wonders whether the courts would uphold such a law against an Art 12 challenge?

II. Conclusion

28 The purpose in writing this commentary is not to offer a conclusive argument that s 377A is unconstitutional; the main point is simply that s 377A cannot be upheld for the reasons advanced by the learned judge.

40 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [119].

41 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [133].

42 The only exceptions are cases where the Privy Council had handed down decisions on appeals from these jurisdictions. Needless to say, the Privy Council would be composed of British judges.

43 For constitutional law examples, see *Chng Suan Tze v Minister of Home Affairs* [1988] 2 SLR(R) 525 (CA) and *Public Prosecutor v Manogaran s/o R Ramu* [1997] 1 SLR 22 (CA).

44 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [127].

29 As concluding observations, some interesting passages in the High Court's judgment will be highlighted. In dismissing the plaintiff's numerous references to the decriminalisation of male homosexual conduct in other jurisdictions, the learned judge opined as follows:⁴⁵

With respect, I find these submissions to be of no weight. First and foremost, Singapore is an independent nation with its own unique history, geography, society and economy. What is adopted in other parts of the world may not be suitable for adoption in Singapore.

30 This statement deserves close examination. First, it is ironic that while emphasising Singapore's independence and right to chart our own legal path on one hand, the learned judge had, on the other, deemed the original legislative purpose of the colonial legislators back in 1938 to be determinative when applying the Art 12 "rational relation" test. Second, in the statement made by AG Howell in the Legislative Council in 1938, from which the learned judge also gleaned the object of the law, the then Attorney-General justified the introduction of this law in Singapore as follows:⁴⁶

It is desired, therefore, to strengthen the law and to bring it into line with the English Criminal Law, from which this clause is taken, and the law of various parts of the Colonial Empire of which it is only necessary to mention Hong Kong and Gibraltar where conditions are somewhat similar to our own.

31 Our colonial masters had introduced this law into Singapore because they had deemed the local conditions in Singapore somewhat similar to theirs for the sodomy law to apply. Even though the UK, Hong Kong and Gibraltar have now all abandoned their local equivalent of s 377A, the High Court is of the belief that Singapore's society, economy, history and geography is *now so different* from these three jurisdictions today, when compared to 1938, that this law must still be kept.

32 Truth be told, this author is not unsympathetic to the difficult bind the High Court had found itself in. As the learned judge observed:⁴⁷

We are a society in the midst of change. Some changes come fast; others evolve and take time to gain a hold and to gain currency. In the latter case, a court will be hard put, when it stands at a particular point in time between the two ends of the spectrum when the change in a particular long-held social norm has yet to gain currency, to decide whether that social norm should be retained or discarded in the face of a constitutional challenge to that social norm.

45 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [133].

46 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [66].

47 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [139].

33 Yet, interestingly, in advocating for judicial caution when courts are faced with issues where the country is in a state of moral flux, the High Court cited with approval Justice Samuel Alito Jr's comments during the oral arguments of *Dennis Hollingsworth v Kristin Perry*,⁴⁸ a case pending then before the United States' Supreme Court:⁴⁹

[Y]ou want us to step in and render a decision based on an assessment of the effects of this institution [*viz*, same sex marriage] which is newer than cellphones or the Internet?

34 Indeed, same sex marriage may be newer than cellphones and the Internet, but we are dealing herein with the criminalisation of private consensual activity between non-familial adults. Furthermore, in tethering Art 12 to the original legislative purpose of the colonial legislators back in 1938, the High Court may have returned Singapore to a world without touch-tone phones and digital computers.

48 Case No 12-144 (US SC). This case concerned an equal protection challenge against California's Proposition 8, which banned same sex marriage in the state of California.

49 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [141].

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