

**“DON’T EVER TAKE A FENCE DOWN UNTIL YOU KNOW  
THE REASON IT WAS PUT UP”<sup>1</sup>—SINGAPORE  
COMMUNITARIANISM AND THE CASE  
FOR CONSERVING 377A**

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A rare parliamentary petition which sought the repeal of section 377A of the *Penal Code* that criminalises acts of gross indecency between male adults, was presented and debated in Parliament in October 2007. This article critically examines the constitutional law dimension and issues in relation to the 377A debate in Singapore. It highlights the primary jurisprudential thrust of the competing arguments and assumptions. It advances and defends the communitarian case for preserving 377A which the author argues is both normatively desirable and empirically reflective of existing Singapore law and policy. With particular regard to the Singapore context, it reflects on how democratic societies should address questions of law and profound moral disagreement, the importance of civil debate, and whether the legislative or judicial forum is most appropriate for making decisions on morally controversial questions.

I. 377A: THE HART-DEVLIN DEBATE REDUX

For only the second time in Singapore history,<sup>2</sup> a petition was presented to Parliament on 22 October 2007, by a nominated Member of Parliament (‘MP’)<sup>3</sup> calling for the repeal of section 377A of the *Penal Code*<sup>4</sup> (‘377A’). This prohibits all acts of gross indecency, such as homosexual sodomy, in public or private, between two adult

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<sup>1</sup> G.K. Chesterton, *Heretics*, c. 1905 (U.S.A.: Filiquarian Publishing, 2007).

<sup>2</sup> The first petition, concerning parliamentary privileges, was presented by opposition MP J.B. Jeyaretnam: Sing., *Parliamentary Debates*, vol. 46 at col. 181 (23 July 1985).

<sup>3</sup> Sing., *Parliamentary Debates*, vol. 83 at col. 2121 (22 October 2007) [*Repeal377A Petition*], annexed as appendix hereto.

<sup>4</sup> *Penal Code* (Cap. 224, 1985 Rev. Ed. Sing.) [*Penal Code*].

males.<sup>5</sup> Parliament was scheduled to debate wide-ranging *Penal Code* amendments. In November 2006, the Home Affairs Ministry released a public consultation paper on this latest<sup>6</sup> review to make the “*Penal Code* more effective in maintaining a safe and secure society in today’s context”.<sup>7</sup>

The *Repeal377A Petition* targeted one government recommendation—to amend 377 by de-criminalising anal sex between consenting heterosexual adults in private,<sup>8</sup> while retaining 377A as:

Singapore remains...a conservative society. Many ... consider such acts abhorrent and deviant. Many religious groups also do not condone homosexual acts. This is why the Government is neither encouraging nor endorsing a homosexual lifestyle and presenting it as part of the mainstream way of life.<sup>9</sup>

The Singapore government affirmed its current approach not to be “proactive” in enforcing 377A in relation to consensual sex done “in private”.<sup>10</sup>

Bearing 2,341 signatories,<sup>11</sup> the *Repeal377A Petition* represented the culmination of intense lobbying efforts by homosexuality agenda activists<sup>12</sup> to de-criminalise homosexual sodomy between adult males. Prior to the two day parliamentary debate in October 2007, public forums<sup>13</sup> receiving sympathetic media treatment were held.

<sup>5</sup> S. 377A of the *Penal Code* provides:

Outrages on decency. 377A. Any male person who, in public or private, commits, or abets 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 punished with imprisonment for a term which may extend to 2 years.

<sup>6</sup> The last major review was implemented in 1984: *Penal Code (Amendment) Act*, No. 23 of 1984.

<sup>7</sup> *Consultation Paper on the Proposed Penal Code Amendments* (8 November 2006) and Annex A, *Explanatory Notes to the Proposed Amendments to the Penal Code [Penal Code Consultation Paper]*.

<sup>8</sup> The former s. 377 of the *Penal Code* was repealed:

Unnatural offences

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animals, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.

*Explanation. Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.*

The prohibitions against bestiality and incest are expanded under new sections 377B and 376G respectively.

<sup>9</sup> *Supra* note 7.

<sup>10</sup> *Ibid.*

<sup>11</sup> The Petitioners were George Hwang (a Singapore lawyer at Intelleigen Legal LLC), Stuart Koe (the chief executive of Fridae, a gay and lesbian media company with an expressed agenda to “empower gay Asia”), and Ms. Tan Joo Hymn (former president of Singapore’s Association for Awareness of Women for Action and Research and founding member of Supporting, Affirming and Empowering our LGBTQ friends and family (SAFE Singapore)).

<sup>12</sup> See Section III.A below on the homosexuality agenda.

<sup>13</sup> See *e.g.*, forum organised by pro-gay theatre group, Wild Rice, at National Library on 15 July 2007, with MP Baey Yam Keng, nominated MP (‘NMP’) Siew Kum Hong, self-professed gay activist Alex Au and Repeal377A petitioner Stuart Koe, as anti-377A speakers. The Government however revoked a licence granted to gay activist, law professor Douglas Sanders who was scheduled to give a public lecture approximately two months before the 377A debates, on the ground that foreigners are prohibited from interfering with domestic politics: see Sing., *Parliamentary Debates*, vol. 83 at col. 1697 (18 September 2007).

The flood of pro-homosexuality propaganda in cyberspace<sup>14</sup> and the print media<sup>15</sup> provoked a response from citizens<sup>16</sup> expressing support for retaining 377A, especially through publishing letters in the press. Widespread and robust debate produced split views within the Law Society,<sup>17</sup> academia and civil society. In response to another earlier online petition to repeal 377A, presented as an open letter to Prime Minister ('PM') Lee,<sup>18</sup> the Keep 377A Petition was launched on 19 October 2007, attracting 15,559 signatures within four days;<sup>19</sup> PM Lee took note of this when he spoke on the bill. 9 MPs supported retaining 377A, while 4 urged repeal.<sup>20</sup> That opposition MPs failed to take a clear stand on the issue reflects its deeply controversial nature. While some MPs indulged in emotional rhetoric and bare assertions,<sup>21</sup> 8 of the 13 speakers were legally trained MPs<sup>22</sup> who presented reasoned legal arguments relating to the legality of the provision and legitimate methods of interpreting law.<sup>23</sup> In the most comprehensive statement of government policy towards the homosexuality agenda, PM Lee maintained that 377A would be retained; while homosexuals would be accommodated and have space to lead quiet lives, the Singapore government would not "allow or encourage activists to champion gay rights as they do in the West".<sup>24</sup>

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<sup>14</sup> See e.g., YawningBread, online: <<http://www.yawningbread.org>>.

<sup>15</sup> See e.g., "MP Baey all for repealing anti-gay law" *The Straits Times* (Singapore) (16 July 2007) and Yap Kim Hao's letter, "Criminalisation of gay acts: need for equality before the law" *The Straits Times Forum* (Singapore) (22 May 2007).

<sup>16</sup> See e.g., Yvonne C.L. Lee, "Decriminalising homosexual acts would be an error" *The Straits Times Review* (Singapore) (4 May 2007) and Brian Tan Chow Eng, "Homosexuality: We need to protect our Asian values" *The Straits Times Online Forum* (Singapore) (21 July 2007).

<sup>17</sup> Law Society of Singapore, "Executive Summary of the Council's Report on Proposed Amendments to Penal Code", online: <[http://www.lawgazette.com.sg/2007-5/exec\\_summary.htm](http://www.lawgazette.com.sg/2007-5/exec_summary.htm)>.

<sup>18</sup> The online repeal 377A petition (online: <<http://www.repeal377a.com>>) started and closed on 5 October 2007 and 19 October 2007 respectively. Its deadline was twice extended, to 21 October 2007, and then to 23 October 2007, and finally closed with some 8,120 signatories. Online: <[http://web.archive.org/web/pt20071019213246/http://www.repeal377a.com/release/release\\_20071005.tml](http://web.archive.org/web/pt20071019213246/http://www.repeal377a.com/release/release_20071005.tml)>; <<http://web.archive.org/web/20071021034558/www.repeal377a.com/>>.

<sup>19</sup> Keep377A Online Petition, online: <<http://www.keep377a.com>> [*Keep377A Petition*].

<sup>20</sup> 8 MPs (Christopher de Souza; Zaqy Mohamed, Indranee Rajah, Alvin Yeo, Ong Kian Min, Muhammad Faishal Ibrahim, Lim Biow Chuan, Seah Kim Peng) and 1 NMP (Thio Li-ann) supported its retention, while 3 MPs (Hri Kumar Nair; Baey Yam Kang, Charles Chong) and 1 NMP (Siew Kum Hong) called for its repeal.

<sup>21</sup> See e.g., NMP Siew Kum Hong's speech in Sing., *Parliamentary Debates*, vol. 83 at col. 2242 (22 October 2007) [*NMP Siew's Parliamentary Speech*] for his assertion that 377A is not "right, fair and just" and his attempts to stir sympathy by recounting personal stories of some of the signatories of the online repeal 377A petition, *supra* note 18.

<sup>22</sup> MPs Souza, Rajah, Yeo, Ong, Lim, Thio, Nair and Siew.

<sup>23</sup> See e.g., MP Indranee Rajah's speech, Sing., *Parliamentary Debates*, vol. 83 at col. 2242 (22 October 2007), where she critiqued NMP Siew Kum Hong's wrongful method of interpreting the purpose of the *Penal Code*.

<sup>24</sup> Sing., *Parliamentary Debates*, vol. 83 at cols. 2469-2472 (23 October 2007) [*PM Lee's Parliamentary Speech*].

Although critics often allege that free speech is curtailed in Singapore, the 377A debate was free and full;<sup>25</sup> it was reminiscent of the Hart-Devlin debate<sup>26</sup> over the relationship between criminal law and morality and the famous 1957 Wolfenden Report.<sup>27</sup> This was facilitated by the Singapore government's decision to be "increasingly guided" by community consensus in matters of "public morality and decency".<sup>28</sup> Unfortunately, debate over morally controversial questions often takes on a polemical tone. In several situations, reasoned debate degenerated into abuse which obscures what is at stake. For example, supporters of 377A were vilified and harassed by emails, letters and in online fora;<sup>29</sup> one MP even received death threats.<sup>30</sup>

The primary thrust of the *Repeal 377A Petition* was that 377A violated Article 12 of the *Singapore Constitution*,<sup>31</sup> which guarantees equal protection under the law. Aside from this argument from equality, other constitutional arguments were raised relating to liberty claims and protection of so-called 'sexual minorities', which this article evaluates and critiques. These arguments are based on a particular brand of liberalism, distinct from the classical model. In presenting what may be characterised as the 'communitarian' case for retaining 377A, this article argues that 377A is constitutional and its underlying public philosophy is both normatively desirable and empirically reflective of existing Singapore law and policy. The converse is true of the 'liberal' case to repeal 377A.

Ultimately, the debate revolves around competing liberal and communitarian visions of the individual in society and the state's role in regulating the lives of citizens. Briefly, what unites those espousing the liberal view is a vision of the individual as atomistic and isolated in society.<sup>32</sup> Individual autonomy, based on

<sup>25</sup> A galvanisation of citizens on both sides of the fence, through letters to the press and MPs, meet-the-people sessions, cyber discussions, online hissy fits and petitions, as observed by Thio Li-ann, "Can We Disagree Without Being Disagreeable?" *The Straits Times Insight* (Singapore) (26 October 2008). For an example of an academic discussion after the parliamentary debates, see Kumaralingam Amirthalingam, "Penal Code Reform Seminar II: Policing Sexual Conduct—Dial 377 For A Crisis", Staff Seminar Series by Continuing Legal Education, National University of Singapore (14 November 2007), online: <<http://law.nus.edu.sg/cle/seminars/pcrss.htm>>.

<sup>26</sup> The Hart-Devlin debate is embodied in Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965); H.L.A Hart, "Immorality and Treason" in Richard A. Wasserstrom, ed., *Morality and the Law* (Belmont: Wadsworth Publishing Company, 1974); H.L.A. Hart, *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963).

<sup>27</sup> *The Report of the Committee on Homosexual Offences and Prostitution*, Cmd. 247 (London, Her Majesty's Stationery Office, 1957), chaired by Lord Wolfenden, recommended, *inter alia*, the de-criminalisation of private consensual homosexual sex [*Wolfenden Report*].

<sup>28</sup> PM Lee Hsien Loong's speech, "Building A Civic Society" at the Harvard Club of Singapore (6 January 2004), archived online: <<http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan015426.pdf>>.

<sup>29</sup> *Infra*, notes 261-263.

<sup>30</sup> *Infra*, note 264.

<sup>31</sup> *The Constitution of the Republic of Singapore* (1999 Rev. Ed.) [*Singapore Constitution*]; hereinafter, the words 'Articles' or 'Article' refer to the articles or article of the *Singapore Constitution* respectively.

<sup>32</sup> There are several schools of liberalism ranging from political to philosophical liberalism. See *e.g.*, Will Kymlicka, "Liberal Individualism and Liberal Neutrality" (1989) 99 *Ethics* 883 at 883. Some contemporary liberals do not view individuals as atomistic beings separate from the community. John Rawls, for example, draws from 'contractarian principles' and situates individuals within a society as a "fair system of co-operation between free and equal persons": see John Rawls, "Justice as Fairness: Political not Metaphysical" (1985) 14 *Philosophy and Public Affairs* 223. Whereas Ronald Dworkin

a faith in man's capacity for rational decision-making, is the primary value and a chief liberal tenet is that the state should not interfere with individual decisions on what constitutes the good life. This translates into an emphasis on choice and rights claims which, *in extremis*, breed radical individualism. In contrast, communitarians consider that individuals are socially situated and do not exalt individual autonomy as the ultimate value; they consider it essential to discuss theories of the common good, encompassing both rights and social duties, whose realisation the state facilitates.<sup>33</sup>

Section II highlights the primary jurisprudential thrust of the arguments and assumptions of the liberal school, articulated in the *Repeal377A Petition* and elsewhere, asserting that sex between homosexual and heterosexual couples in private warranted similar treatment, since both did not cause harm to society. It critiques the liberal assumption that a state is being 'neutral' in holding no view on what the 'good life' is. Section III advances and defends the 'communitarian' case for retaining 377A, identifying family values, public goods and the liberties of others as specific components of Singapore communitarianism, which condition the scope of rights. A communitarian approach towards criminal law and morality focuses on the social value of the law. The constitutionality of 377A is critically examined against broader considerations relating to the moral wrongs and social consequences of an advancing homosexuality agenda, drawing from foreign experience. Repealing 377A is identified as the first step in the political strategy of radical activists seeking a social revolution through reforming both criminal and civil laws relating to sexual relationships, housing, insurance, inheritance, education, marriage and child adoption. With particular regard to the Singapore context, Section IV reflects on the 377A debate and how democratic societies should address questions of law, policy and profound moral disagreement, whether the legislative or judicial forum is most appropriate for making decisions on morally controversial questions.

## II. A CRITIQUE OF THE LIBERAL CASE FOR REPEALING 377A

The liberal argument for repealing 377A claims that 377A violates equality and liberty rights guaranteed by Articles 12 and 9 respectively, and the rights of so-called 'sexual minorities'. This section highlights the primary jurisprudential thrust of the arguments and assumptions of the liberal school, articulated in the *Repeal377A Petition* and elsewhere. It criticises the liberal case and demonstrates how the assumptions underlying liberal philosophy shapes the structure and content of legal argument.

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proposes an integration of an individual with the community but suggests areas such as sex life are excluded from communal life: Ronald Dworkin, "Liberal Community" (1989) 77 Cal. L. Rev. 479.

<sup>33</sup> On the varied approaches towards communitarianism, see generally, Shlomo Avineri & Avner de-Shalit, eds., *Communitarianism and Individualism* (Oxford: Oxford University Press, 2002); Amitai Etzioni, "Communitarianism" in Karen Christensen & David Levinson, eds., *Encyclopedia of Community: From the Village to the Virtual World*, vol. 1, A-D. (Thousand Oaks, Calif.: Sage Publications, 2003) at 224-228.

### A. *The Argument from Liberty*

#### 1. *The liberal argument assumes the priority of individual autonomy*

(a) *Defining 'liberty' broadly*: The liberal argument asserts that laws like 377A in criminalising homosexual sodomy violate the personal liberty of consenting adults. As liberals prioritise individual autonomy, they assume the operating presumption that the government bears the onus of justifying restrictions to individual liberty. Certain foreign developments lend support to this argument.

For example, the reference to 'liberty' which shall not be abridged "without due process of law" in the U.S. Fourteenth Amendment has been expansively construed to include 'sexual autonomy' rights. Liberals may attempt to import such expansive readings into Article 9(1) which prohibits the deprivation of "life or personal liberty save in accordance with law" to argue that 377A violates Article 9(1).

In the U.S. context, right of privacy jurisprudence was first developed in *Griswold v. Connecticut* where Justice Douglas stated that the specific guarantees of the Bill of Rights have penumbras "formed by emanations from those guarantees that help give them life and substance" and that the right of privacy exists within this area.<sup>34</sup> Thus, privacy rights were created by judicial implication and have expanded to encompass the use<sup>35</sup> and distribution of contraceptives,<sup>36</sup> and a right to abort an unborn fetus,<sup>37</sup> without need for spousal consent.<sup>38</sup> The U.S. Supreme Court decision of *Lawrence v. Texas*,<sup>39</sup> and that of the Hong Kong Court of Appeal in *Secretary for Justice v. Yau Yuk Lung Zigo and Lee Kam Chuen*<sup>40</sup> have creatively expanded the concepts of 'liberty' and 'privacy' to include consensual sexual activity in private regardless of sexual orientation or identity. The open-ended quality of 'liberty' has allowed it to be enlisted to advance subjective desires as 'rights'; notably, related Fourteenth Amendment judgments have been criticised as thinly veiled attempts at judicial legislation.<sup>41</sup>

(b) *'Harm' as sole limit to liberty claims*: The *Repeal377A Petition* asserts 377A unjustifiably intrudes on individual liberty since "no harm is done to society when consenting heterosexual adults have sex in private."<sup>42</sup> Anti-377A academics and activists opine that the Singapore government's policy not to proactively enforce 377A suggests that 377A is not justifiable as it does not prevent any demonstrable harm.<sup>43</sup> To them, public disapproval, however strong, is not a valid basis for

<sup>34</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>35</sup> *Ibid.* at 484.

<sup>36</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>37</sup> *Roe v. Wade*, 410 U.S. 113 (1973); *Webster v. Reproductive Health Services* 492 U.S. 490 (1989); *Planned Parenthood of Southeastern PA v. Casey*, 505 U.S. 833 (1992); and *Gonzales v. Carhart*, 550 U.S. \_\_\_ (2007).

<sup>38</sup> *Planned Parenthood, ibid.*

<sup>39</sup> 539 U.S. 558 (2003).

<sup>40</sup> FACC No. 12 of 2006.

<sup>41</sup> See Section IV.

<sup>42</sup> *Repeal377A Petition, supra* note 3 at 2.

<sup>43</sup> See NMP Siew's Parliamentary Speech, *supra* note 21; Lynette J. Chua Kher Shing, "Saying No: Sections 377 and 377A of the Penal Code" [2003] Sing. J.L.S. 209; Michael Hor, "377A—To Prevent What Harm?" (10 October 2007), online: <<http://theonlinecitizen.com/2007/10/377a-to-prevent-what-harm/>>.

overriding a person's liberty and privacy rights as they believe "consent" is the "correct basis" for regulating private sexual conduct.

In identifying what 'harm' is, activists advocate that policy-makers, to be 'objective' and 'neutral', must leave their 'religious' or 'moral' convictions at home, to avoid imposing their religious or moral viewpoints on those who reject these values.<sup>44</sup> In sum, where "no sufficient harm is involved", the Singapore government "must be neutral". Criminal law academic Michael Hor has defined 'neutrality' as "allowing both parties to try to persuade the public of their views. Neutrality is not achieved by retaining 377A, but by its repeal."<sup>45</sup> In deference to individual autonomy, the Wolfenden Report recommended that criminal law be non-interventionist in relation to "private" lives, to avoid equating the "sphere of crime with that of sin". This safeguards the "realm of private morality and immorality which is ... not the law's business".<sup>46</sup> Where consensual sexual conduct does not cause what John Stuart Mill considered 'harm to others', the state should not intervene.<sup>47</sup>

## 2. *A critique of the liberal argument*

(a) *The liberal argument ignores fundamental moral questions*: The argument from liberty may be criticised for ignoring or avoiding broader societal concerns and basic moral questions, by several techniques. First, liberal philosophy assumes that man is rational and prioritises individual autonomy. This priority creates a presumption in favour of individual liberty as an analytical starting point, placing the onus on those advocating restrictive laws to justify these restrictions. This assumption translates into a rejection of alternative analytical starting points, such as evaluating the law's social value holistically.

By broadly interpreting the open-ended constitutional right of 'liberty', this term becomes indeterminate, as demonstrated by Justice Kennedy's declaration in *Planned Parenthood* that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>48</sup> This is flexible enough to accommodate any individual preference.

Logically, if choice is the ultimate value, law cannot limit all human desire. This engenders a radical liberalism knowing no moral limit, aside from not causing 'harm' to another. Where individual choice, as opposed to what is chosen, is accorded paramount status, the sole basis for legal intervention is the absence of consent. This argument is dangerous as 'consent' can legitimise any individual decision, no matter how perverse or personally and socially destructive. For example, the defence of 'consensual cannibalism', as argued in a German case, can avoid a murder charge.<sup>49</sup>

(b) *The false neutrality of the liberalism*: Liberal arguments are intellectually dishonest in perpetuating the myth that states should be neutral and can only do so by

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<sup>44</sup> See e.g., NMP Siew's views in "Three MPs weigh in" *The Straits Times* (Singapore) (11 May 2007).

<sup>45</sup> Hor, *supra* note 43.

<sup>46</sup> Wolfenden Report, *supra* note 27 at paras. 13 and 62.

<sup>47</sup> John Stuart Mill, *On Liberty*, ed. by Gertrude Himmelfarb (Harmondsworth: Penguin, 1974) at 68.

<sup>48</sup> *Supra* note 37 at 851.

<sup>49</sup> See "Manslaughter Verdict for Cannibal" *BBC News* (30 January 2004), online: <<http://news.bbc.co.uk/2/hi/europe/3443293.stm>>.

not taking sides on competing conceptions of the good life<sup>50</sup> and morality, including the sexual morality. As all law and legal policy embody specific values, it is neither possible nor desirable for a state to merely create a framework to facilitate individual choices, where these choices clash. Liberalism is unable to prioritise between conflicting claims and its substantive thinness says nothing to profound human problems.<sup>51</sup>

For example, many states deliberately adopt strong anti-drug laws or levy heavy taxes on cigarettes and alcohol to discourage consumption, even if these are consumed because an individual chooses to and no apparent 'harm' is inflicted upon third parties. In politics, making decisions on moral questions is inevitable, and any government claiming to be 'neutral' by letting the individual decide is either in denial or engaged in deception.

While purporting neutrality, the liberal school claims the exclusive right to set the terms of public engagement and debate, assuming the "role of the architectonic organizer of society" by acting as guardians of the entire social system and judges of its procedural rules.<sup>52</sup> The liberal call to a neutral state thinly disguises its advocacy that the state take positive action to implement a substantive ideology, which opposes traditional values in seeking to construct a "universal form of human association that will constitute a technically rational system for the equal satisfaction of desire".<sup>53</sup> Thus, contemporary liberal thinking is guilty of making categorical judgments about the structure and role of the government, seeking to re-arrange social life by using government machinery to instruct individuals on matters like how to understand 'marriage' and what constitutes a 'family'. Under the guise of a "procedural" approach which masks substantive claims, the liberal agenda has, in deifying personal choice, brought radical social changes into being, ranging from legalising abortion to recognising same-sex marriages.<sup>54</sup>

Given the diversity of mutually exclusive views concerning the meaning of a good life in our society, liberals seek to censor some views in the public square by identifying these as 'personal', to be left to individual judgment and exempt from public policy deliberation. 'Personal' views include religious or moral views that appeal to non-consensual sources of authority, which contradicts the liberal creed. This "method of avoidance",<sup>55</sup> based on Rawls's principle of toleration,<sup>56</sup> is radically secularist in calling for all to omit "any religious, philosophical or moral views, or

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<sup>50</sup> See *e.g.*, Chua, *supra* note 43 at 220-221.

<sup>51</sup> See *e.g.*, Ryszard Legutko, "What's Wrong With Liberalism?" *First Principles* (15 May 2008), online: <<http://www.firstprinciplesjournal.com/print.aspx?article=733&loc=b&type=cbbp>>.

<sup>52</sup> *Ibid.*

<sup>53</sup> James Kalb, "The Tyranny of Liberalism" (2000) *Modern Age* 239 at 241. For an expansion of this analysis, see James Kalb, *The Tyranny of Liberalism: Understanding and Overcoming Administered Freedom, Inquisitorial Tolerance and Equality by Command* (Wilmington, Delaware: ISI Books, 2008).

<sup>54</sup> See Section III.A.

<sup>55</sup> John Rawls, "The Idea of an Overlapping Consensus" (1987) 7 *Oxford J. Legal Stud.* 1 at 4: "In applying the principles of toleration to philosophy itself it is left to citizens individually to resolve for themselves the questions of religion, philosophy and morals in accordance with the views they freely affirm." See also, Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton: Princeton University Press, 2006), where Dworkin argues for a tolerant secular society instead of a tolerant religious society in the particular context of the U.S.

<sup>56</sup> *Ibid.* at 15.

their associated philosophical accounts of truth and the status of values” in public.<sup>57</sup> Their normative premise is that ‘secular’ and ‘religious’ views affecting how we understand the public good should be separated, assuming these do not overlap; furthermore, they dogmatically assert that so-called ‘secular’ views are ‘rational’ while non-secular views are irrational and unfit for public deliberation.

Attempts to exclude religious views from public debate by labeling these as irrational or products of religious fundamentalism demonstrate<sup>58</sup> the intolerant ethos of contemporary liberalism and its penchant for double standards. Indeed, “[i]f to be liberal is to be willing to accommodate other views, contemporary liberalism is no longer liberal”.<sup>59</sup> Ignoring its own call for ‘diversity’ and non-judgmentalism, liberalism passes moral judgments on what it deems acceptable sexual conduct. It denounces competing moral views no matter how long-established and widely accepted, insisting they be eradicated from the public square.<sup>60</sup> Its moral assumptions operate within a closed, arbitrary system which stifles debate.

(c) *The illiberal imposition of the substantive morality of hedonism*: The liberal school tries, through government, to stealthily impose<sup>61</sup> a substantive, value-laden philosophy on others, while pretending neutrality.<sup>62</sup>

To argue that interfering with the sexual conduct of consenting individuals is objectionable, the liberal school must offer a distinct theory of essential human nature, to explain, for example, why it celebrates sexual autonomy and free sexual expression over the virtue of fidelity in reserving sexual expression between a man and woman committed to each other for life. The liberal vision of sexual freedom and pluralism is premised on their particular comprehensive theory of the good, where “desire” is the only publicly recognised value. Sexual autonomy, however, can hardly be a sound basis for public philosophy. It is indeterminate, posits a controversial theory of essential human nature, and rests on a particular substantive understanding of morality. Such theory of human nature is no less contentious than theories of the good espoused by communitarians. The critical question is “whether acting on sexual impulse or living in accordance with common moral understandings that promote stable personal relationships, make us what we are. One answer would make restrictions on sexual conduct objectionable, the other lack of sexual restraint”;<sup>63</sup> one cannot remain neutral in choosing between the two.

It has been argued that 377A by legislating private morality, unjustifiably imposes subjective values. Contemporary liberals argue that the morality of private consensual homosexual sex should be left to individual, not state determination. This argument sneaks in an assertion that homosexuality and heterosexuality are morally equivalent, under the guise of moral ‘neutrality’.

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<sup>57</sup> Rawls, *supra* note 55 at 12-13.

<sup>58</sup> For example, several 377A opponents doubt the existence of a homosexualism agenda and instead, assert that a fundamentalist religious agenda poses a greater threat to public order and peace of nations, and the dignity and autonomy of individuals.

<sup>59</sup> Kalb, *supra* note 53 at 243.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.* at 242.

<sup>62</sup> See *e.g.*, Bruce A. Ackerman, “What is Neutral about Neutrality?” (1983) 93 *Ethics* 372 at 372: “There can be no politics without vision, no philosophy without commitment.”

<sup>63</sup> Kalb, *supra* note 53 at 249.

In presuming that individual desire is the only public value, it identifies “the good with what is desired.”<sup>64</sup> Thus, the liberal theory of the good is hedonism,<sup>65</sup> which is a “recipe for societal suicide”.<sup>66</sup> What is good no longer has objective value,<sup>67</sup> as this is conflated with subjective desire. However, “by giving us whatever we want, liberalism fails precisely to give what we want.” Individuals do not merely want wants, they desire their desires be thought desirable.<sup>68</sup> Consent is an inadequate basis for legal policy. Terms like ‘dignity’ and ‘tolerance’ are empty without a theory of human nature, human good and community.<sup>69</sup>

The liberal school tries to avoid debating moral questions through assuming an ‘agnostic’ attitude towards what the good life constitutes.<sup>70</sup> The philosophy, “to each his own”, undermines all non-consensual authority as oppressive, whatever the consequences.<sup>71</sup> Liberalism cannot provide a rational explanation for why an environment free from racism and sexism is a worthier goal than one free from atheism and immorality, as traditionally understood.<sup>72</sup>

The liberal school is thus idiosyncratic in how it defines ‘harm’ and in deliberately evading issues pertinent to policy-making, that is, the issue of moral wrongdoing and the social consequences of unrestrained individual choices. Harm can be both physical and intangible; indeed, existing laws punish the causing of intangible injuries and justly sanction an individual who sniffs glue or evades tax, which is conduct that may not have a demonstrable effect on others. Liberalism, as a philosophy that advances the pursuit of self-interest, offers an impoverished conception of community and is impotent in its inability to deal with any issue going beyond the life of a self-interested individual, such as child-bearing and rearing, loyalty and sacrifice, life and death.<sup>73</sup>

(d) *Singaporean communitarianism: the individual situated in community*: The Singapore version of communitarianism—which shapes law and policy—does not construe ‘harm’ narrowly to mean only physical harm to the immediate parties; it can encompass intangible or spiritual harm to third parties. Nor is individual consent the basis of laws such as the *Penal Code* in relation to sexual offences; for example, activities in the bedroom are criminalised in several situations, such as consensual or non-consensual bestiality, paedophilia or incest.<sup>74</sup>

Unlike Indian courts, which defined ‘life’ and ‘personal liberty’ very broadly to include aspects beyond physical restraint, such as the ‘right to livelihood’<sup>75</sup>, Malaysian courts have restrictively interpreted ‘personal liberty’ to relate to physical

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<sup>64</sup> *Ibid.* at 247

<sup>65</sup> *Ibid.*; and NMP Thio’s Speech, in Sing., *Parliamentary Debates*, vol. 83 at col. 2242 (22 October 2007) [*NMP Thio’s Parliamentary Speech*].

<sup>66</sup> Thio, *supra* note 25.

<sup>67</sup> Kalb, *supra* note 53 at 247-248.

<sup>68</sup> *Ibid.* at 247.

<sup>69</sup> Thio, *supra* note 25.

<sup>70</sup> Kalb, *supra* note 53 at 248.

<sup>71</sup> *Ibid.* at 246, 251.

<sup>72</sup> *Ibid.* at 248.

<sup>73</sup> *Ibid.* at 251.

<sup>74</sup> *Penal Code*, *supra* note 4, ss. 377B, 376A, and 376G, relating to bestiality, paedophilia and incest respectively.

<sup>75</sup> See e.g., *Olga Tellis v. Bombay Municipal Corp.*, A.I.R. 1986 S.C. at 193.

restraints on the individual.<sup>76</sup> Similarly, Singapore judges are not prone to judicial over-reaching and it is unlikely they would find or create sexual autonomy rights by an expansive interpretation of the ambit of ‘personal liberty’ under Article 9(1).<sup>77</sup> The judiciary defers to Parliament as the authoritative arbiter on controversial social issues.<sup>78</sup>

## B. *The Argument from Equality*

### 1. *The liberal argument that 377A violates Article 12(1)*

The *Repeal 377A Petition* claims that 377A is discriminatory and violates Article 12(1) equality guarantee.<sup>79</sup> This misunderstands and misapplies the doctrinal approach towards reading Article 12(1), by apparently attempting to draw from the substantive equality approach which has facilitated judicial (over)-activism in other jurisdictions.<sup>80</sup>

Singapore courts apply a three-stage test in interpreting Article 12, designed to prevent three types of arbitrariness.<sup>81</sup> The first stage is to ascertain whether the law prescribes different treatment amongst individuals. If so, the next stage is to ask whether this classification is founded on an intelligible differentia, that is, a consistent and clear basis for identifying the class of persons discriminated against on the basis of sex, age, race, religion, seniority of professional qualification, or area of residence. If absent, the law is invalid for violating the first form of arbitrariness. If present, at the third stage of the test where the criteria of “reasonable classification” is applied, two further questions must be posed to ensure the law is not arbitrary. First, if all persons falling within the same class are equally discriminated against, and all persons not discriminated against are equally not discriminated against, the law is not arbitrary. Second, the basis of the differentiation must be reasonably related to the legislative object. If the basis of discrimination is a reasonable means of achieving a legitimate object, the third form of arbitrariness is avoided.

<sup>76</sup> See e.g., *Government of Malaysia v. Loh Wai Kong* [1979] 2 M.L.J. 33 and *Harmenderpall Singh a/l Jagara Singh v. Public Prosecutor* [2005] 2 M.L.J. 54 (Federal Court). Cf. *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 M.L.J. 261; *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah* [1998] 3 M.L.J. 289 (Court of Appeal).

<sup>77</sup> See e.g., *Ong Ah Chuan v. Public Prosecutor* (1980-1981) S.L.R. 48 [*Ong Ah Chuan*]; *Haw Taw Tua v. Public Prosecutor* [1981] 2 M.L.J. 49; *Public Prosecutor v. Mazlan bin Maidun* [1993] 1 S.L.R. 512 [*Mazlan*]. See also *Lo Pui Sang and Others v. Mamata Kapildev Dave and Others (Horizon Partners Pte Ltd, intervener) and Other Appeals* [2008] 4 S.L.R. 754 at para. 6: ‘personal liberty’ refers only to the “personal liberty of the person against unlawful incarceration or detention”.

<sup>78</sup> *Ong Ah Chuan, ibid.*: *Rajeevan Edakalavan v. Public Prosecutor* [1998] 1 S.L.R. 815 [*Rajeevan Edakalavan*]; *Nguyen Tuong Van v. Public Prosecutor* [2005] 1 S.L.R. 103 (C.A.) [*Nguyen (C.A.)*]; *Public Prosecutor v. Nguyen Tuong Van* [2004] 2 S.L.R. 328 (H.C.) [*Nguyen (H.C.)*].

<sup>79</sup> “All persons are equal before the law and entitled to the equal protection of the law”.

<sup>80</sup> See e.g., *Lawrence v. Texas*, *supra* note 39, where the majority of the U.S. Supreme Court opined that a Texas law which criminalised the engagement in deviate sexual conduct by persons of the same gender violated the Equal Protection clause of the Fourteenth Amendment; *Yau Yuk Lung Zigo and Lee Kam Chuen, supra* note 40, where the Court of Financial Appeal, Hong Kong Special Administrative Region held that s. 118F(1) of the *Crimes Ordinance* (Cap. 2000), which criminalised homosexual buggery in public, violated the equal protection guarantee.

<sup>81</sup> The leading formulation of the test is set out in *Public Prosecutor v. Taw Cheng Kong* [1998] 2 S.L.R. 410 (C.A.) [*Taw Cheng Kong (C.A.)*] and *Taw Cheng Kong v. Public Prosecutor* [1998] 1 S.L.R. 943 (H.C.) [*Taw Cheng Kong (H.C.)*].

The argument from equality asserts that 377A fails the test of rational classification in three respects. First, 377A discriminates against male adults who engage in private consensual homosexual sex but not adults engaging in private consensual heterosexual sex. 377A opponents argue that all forms of private consensual sex should be treated alike, to meet the requirements of intelligible classification. This assumes there is no difference between homosexual and heterosexual anal sex. As 377A has only decriminalised the latter, by targeting “sex between men”, 377A “directly discriminates against homosexual and bisexual men: an act performed by a heterosexual couple is permitted, while the same act performed by a homosexual or bisexual male couple is criminalized.”<sup>82</sup> That is, they disagree with the ideological basis of legislative classification.

Second, they argue that no rational nexus exists between the 377A classification and the “legitimate aim of the *Penal Code*”, to ensure a ‘safe and secure society in today’s context’.<sup>83</sup> They assume private consensual sex between adults in their homes does not “make Singapore unsafe or less secure” and so should not be criminalised.<sup>84</sup>

Third, they argue the legislative purpose of 377A is discriminatory and therefore illegitimate. Its rationale—“Singapore is a conservative society, that the majority of Singaporeans have a negative attitude towards homosexuality”<sup>85</sup>—is a “selective reflection of public morality”.<sup>86</sup> For example, society “finds extra-marital sex to be immoral”, but does not criminalise this.<sup>87</sup> They assert that criminal law “should not reflect public morality” and argue that history demonstrates that appeals to public morality cannot justify slavery, discrimination against racial and religious minorities, and women.<sup>88</sup> This assumes public morality is not served by retaining 377A.

## 2. *The false importing of a substantive equality approach towards construing Article 12*

(a) *Article 12(1) guarantees formal and not substantive equality*: The prevailing approach towards interpreting the Article 12(1) equality clause does not assume that homosexual and heterosexual conduct is equal, morally or otherwise. It is silent, because the relevant test is that of formal, not substantive equality.

Formal equality neither assumes that all individuals are equal in fact nor asserts that they should all be equal in law in all circumstances. Instead, formal equality requires only that likes should be treated alike while unlikes should be treated unlike to the extent of their unalikehood. This test is silent on issues of sexual morality, whether to classify homosexual and heterosexual behaviour as ‘like’ or ‘unlike’. This is because the concept of equality in itself is empty<sup>89</sup> and necessarily parasitic, in drawing substance from external moral philosophy.<sup>90</sup> For example, the *Income*

<sup>82</sup> *Repeal377A Petition*, *supra* note 3 at 1.

<sup>83</sup> *Repeal377A Petition*, *ibid.* at 2. See also, *supra* note 23.

<sup>84</sup> *Repeal377A Petition*, *ibid.*; and NMP Siew’s Parliamentary Speech, *supra* note 21.

<sup>85</sup> Penal Code Consultation Paper, *supra* note 7.

<sup>86</sup> *Repeal377A Petition*, *supra* note 3 at 2.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.* at 2-3; NMP Siew’s Parliamentary Speech, *supra* note 21.

<sup>89</sup> Peter Westen, “The Empty Idea of Equality” (1982) 95 Harv. L. Rev. 537.

<sup>90</sup> *Ibid.*

*Tax Act*<sup>91</sup> differentiates between tax-paying citizens on the basis of some economic philosophy. In Singapore, those who have dependants or three or more children enjoy tax breaks.<sup>92</sup> This is motivated by a public philosophy that values the family unit and encourages procreation.

If homosexual and heterosexual behaviour is similar, then such behaviour should be treated similarly, as moral equivalents. If homosexual and heterosexual behaviour is considered dissimilar, then, they should be treated dissimilarly. This is the prior question of moral philosophy that the formal equality test does not address. This question belongs to Parliament and Singapore courts recognise this, in adopting a presumption of constitutionality in the absence of evidence proving arbitrariness in legislative enactment.<sup>93</sup> Equality is not an absolute value dictating that all individuals or all forms of behaviour warrant equal treatment.<sup>94</sup> The relevant judicial test is that legislative differentiation bears a rational nexus to a legitimate purpose. Apart from clearly immoral laws which sanction genocide, murder and torture, what constitutes a legitimate purpose is subject to political debate and determination.

Formal equality may be contrasted with judicial efforts to secure 'substantive equality' under which judges evaluate the moral basis of legislation in addition to ensuring the rational nexus test is met. Courts in Canada and the U.S. have adopted a substantive equality approach in seeking to redress historical injustices suffered by protected groups, such as those defined by race, or to promote new values such as diversity through affirmative action.<sup>95</sup>

(b) *Heterosexual and homosexual behaviour is not morally and legally equivalent*: The argument from equality falsely assumes that the state should treat all forms of private sexual conduct as morally fungible. However, how then can the law prohibit, on a principled basis, other forms of prohibited consensual sexual behavior such as bestiality, incest or sex involving minors? One cannot differentiate or equate the morality of sexual behaviour without offering some distinct theory of the good or human nature. On this matter, there is profound moral agreement which the formal equality test cannot settle.

The ideological assumption that heterosexual and homosexual behavior is morally equivalent seeks to dismantle existing legal classifications and change underlying values. This is a philosophical assault on the *status quo* which treats private consensual heterosexual and homosexual sex differently. Liberal philosophy focuses on individual choices and purports to be indifferent to the content of these choices, though intellectual honesty recognises that the morality of such behaviour is the crux of the issue at hand. This is because "if what is chosen matters not at all", "how can choice be so important", and if choice is paramount, "why is wilfulness not the greatest

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<sup>91</sup> Cap. 134, 2008 Rev. Ed. Sing.

<sup>92</sup> *Ibid.*, Fifth Schedule, "Child Relief".

<sup>93</sup> The court in *Taw Cheng Kong (C.A.)*, *supra* note 81 at para. 80, emphasised that postulating examples of arbitrariness is insufficient to rebut the presumption. *Cf. Nguyen (C.A.)*, *supra* note 78, where the court suggested that the presumption of constitutionality can only be rebutted if "comparable material" was produced to show that the legislative judgment was "insupportable". This is however a procedural aspect relating to evidence, and is not a substantive conception of equality under Article 12.

<sup>94</sup> Indeed, Article 12(3) exempts personal laws and religious affairs from equality requirements, in recognising the interests of minority communities.

<sup>95</sup> *E.g., California v. Bakke*, 438 U.S. 265 (1978) and *Gutter v. Bollinger*, 539 U.S. 982 (2003).

virtue”<sup>96</sup> The erroneous assumption is that, if heterosexuals and homosexuals are morally or legally equivalent for one purpose (*e.g.*, employment opportunities and tax matters), their behaviour is also morally or legally equivalent for all purposes (*e.g.*, private consensual sex).

A more nuanced approach is needed.

If the sole or primary public value is consent, then all sexual behaviour choices are deemed morally equivalent. This is hardly a neutral ideological shift, gravitating towards a form of radical egalitarianism which draws no distinction between consensual heterosexuality, homosexuality, lesbianism, and bisexuality. If all forms of sexual behaviour are equal, sexual orientation cannot be a basis for discrimination. Thus, a lesbian may demand the same treatment as a heterosexual female, by claiming equal entitlement to state funding for alternative reproductive methods such as *in vitro* fertilisation; a homosexual or lesbian couple may claim equal adoption rights, as the law cannot treat them differently from a heterosexual couple.<sup>97</sup> Furthermore, on this logic, there is no bar to redefining marriage to include same-sex couples, as to understand marriage as the union between man and wife would be discrimination on grounds of sexual orientation.

(c) *Equal concern and respect?*: Dworkin considers that criminalising homosexuality violates equality guarantees for failing to treat individuals with “equal concern and respect”.<sup>98</sup> If the state adopts one citizen’s view that homosexuality is morally repugnant and warrants legal sanction over another citizen’s contrary view, this treats one citizen’s conception of what is a morally worthy life as superior to that of another, undermining the right of moral independence. Therefore, the government should not criminalise acts of private immorality, such as adultery and fornication, even if such acts harm public interest.

Dworkin’s vision of what “equal respect and concern” requires informs his particular understanding of what equality requires. Effectively, this conflates the intrinsic moral worth of individuals with the value of their actions. This typical liberal manoeuvre avoids discussing moral questions by assuming their irrelevancy to the state. However, as George correctly observes, Dworkin’s argument from the principle of equality “falls apart”.<sup>99</sup> If a responsible legislator in exercising his judgment opts to retain 377A in the public interest, he is not treating a supporter differently from an opponent of 377A; what the legislator is doing is treating ideological positions differently, rather than treating people unequally.<sup>100</sup>

Not all forms of behaviour are legally or morally equal. The liberal argument in its apparent amorality rejects the possibility that certain forms of sexual behaviour might be morally repugnant, warranting differential treatment. Hence, the conduct or value in question is treated as a self-evident good, worthy of protection as a right, immunised from normative evaluation. This glosses over the question of what is good.

<sup>96</sup> Kalb, *supra* note 53 at 248.

<sup>97</sup> See Section III.A.

<sup>98</sup> Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977).

<sup>99</sup> Robert P. George, “The Concept of Public Morality” (2000) 45 *The American Journal of Jurisprudence* 17, online: <<http://www.winst.org/seminars/mfl2008readings/George%20-%20The%20Concept%20of%20Public%20Morality.pdf>>.

<sup>100</sup> *Ibid.*

(d) *Imperfect but valid classifications*: Although homosexual and heterosexual anal sex are both unhealthy,<sup>101</sup> the rational classification test, unlike the U.S. test of strict or intermediate scrutiny,<sup>102</sup> only requires some, but not the optimal, realisation of the legislative objective. To the argument that the *Penal Code* should either criminalise both homosexual and heterosexual anal sex, or neither, one must appreciate that the Singapore judicial test does not require perfect legislative classifications. It requires only a 'reasonable' or 'rational' connection between the classification and the legislative purpose.

In *Taw Cheng Kong v. PP*,<sup>103</sup> the Court of Appeal rejected the argument that section 37 of the *Prevention of Corruption Act*<sup>104</sup> violated Article 12(1). The High Court had ruled that section 37 was unconstitutional, since its classification based on Singapore citizenship went only a "little way" to achieving the legislative objective of preventing corruption from taking place outside of Singapore which had effects within Singapore.<sup>105</sup> It ultimately fell "short of its desired effect" because it was both over-inclusive (including corrupt acts of Singapore citizens which had no effect in Singapore) and under-inclusive (excluding corrupt acts of non-Singapore citizens which had an effect in Singapore). The Court of Appeal however overturned the High Court's decision by holding it was sufficient for the classification to "go some way" towards achieving the legislative objective.<sup>106</sup> Although section 37 was a less than perfect classification, the Court of Appeal allowed some leeway on the basis that international comity was a good reason to exclude non-Singapore citizens from its reach, deferring to executive foreign policy principles.

In applying a presumption of constitutionality, if a Singapore court was to decide whether 377A violated Article 12, Singapore judges are likely to maintain "a sense of perspective and proportion, avoiding a dogmatic and finical approach"<sup>107</sup> in construing it. I argue in Section III that 377A serves a legitimate social purpose and that it satisfies the rational classification test.

(e) *'Sexual orientation' is not a prohibited ground of discrimination under Article 12(2)*: The *Repeal377A Petition* mirrors liberal dogmatism in asserting that "equal protection to all Singaporeans" should be granted "in respect of their private consensual sexual conduct, regardless of their sexual orientation".<sup>108</sup>

Some 377A opponents assert that 377A discriminates against homosexual men on the basis of their sexual orientation. This draws from foreign constitutional developments, which are inappropriate imports. For example, the 1996 South African

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<sup>101</sup> See Section III.C.1.

<sup>102</sup> The strict and intermediate scrutiny tests shift the burden of proof onto the state. The former requires the state to show that the classification is necessary to achieve a compelling state interest (e.g., *Korematsu v. U.S.*, 323 U.S. 214 (1944)), whereas the latter requires the state to show that the classification is substantially related to an important state interest (e.g., *U.S. v. Virginia*, 518 U.S. 515 (1996)). The minimum or lowest tier is similar to the rational classification test, which is that the state proves only that the classification is rationally related to a legitimate state interest (e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

<sup>103</sup> *Supra* note 81.

<sup>104</sup> Cap. 241, 1993 Rev. Ed. Sing.

<sup>105</sup> *Taw Cheng Kong* (H.C.), *supra* note 81 at para. 65.

<sup>106</sup> *Taw Cheng Kong* (C.A.), *supra* note 81 at para. 81.

<sup>107</sup> *Datuk Haji Harun Bin Haji Idris v. PP* [1977] 2 M.L.J. 155.

<sup>108</sup> *Repeal377A Petition*, *supra* note 3 at 3.

Constitution expressly prohibits discrimination on ‘sexual orientation’ grounds,<sup>109</sup> after going through a process of popular deliberation in constitution-making. The *Canadian Charter of Rights and Freedoms* prohibits discrimination on express and analogous grounds, opening the door for the Supreme Court to read ‘sexual orientation’ as an analogous ground on which to prohibit discrimination under section 15.<sup>110</sup> Section 15 allows for a substantive equality approach and envisages a more activist judicial role. The Canadian courts’ declaration that ‘sexual orientation’ is a prohibited basis for discrimination draws from judicial liberal philosophy, and is not without controversy within Canada.<sup>111</sup>

Importing a new ground prohibiting sexual orientation discrimination under Article 12(1) is unworkable as Singapore courts conceive of equality in formal terms, and adopt a more modest approach in judicial review; they will not solicit political controversy by interpreting Article 12(1) to require positive state action to redress grievances of groups defined by ‘sexual orientation’ or preference, which is not a fixed trait.<sup>112</sup> Indeed, this self-restraint is evident in that Singapore courts have not judicially created any new categories of rights<sup>113</sup> as opposed to adopting expansive constructions of existing rights.<sup>114</sup>

Article 12(2) prohibits discrimination on the enumerated grounds “only of religion, race, descent or place of birth”. Judges are not empowered to find ‘analogous’ grounds forbidding discrimination. Indeed, any further additions<sup>115</sup> must be introduced by constitutional amendment<sup>116</sup> after rigorous debate in Parliament, to avoid charges of judicial activism, particularly where arguments to prohibit ‘sexual orientation’ discrimination involve controversial moral issues where legal change should rest on a clear legislative mandate.

(f) *Prohibiting ‘sexual orientation’ discrimination is not an international customary human rights norm*: A further associated claim may be that ‘sexual orientation’ is prohibited under an international customary human rights norm. As such, Article 12(1) and Article 12(2) should be interpreted to reflect this putative international norm.

<sup>109</sup> Section 9(3) of the Constitution of the Republic of South Africa of 1996, as amended by *Constitution of the Republic of South Africa Amendment Act*, No. 35 of 1997, online: <<http://www.concourt.gov.za>>.

<sup>110</sup> *Canadian Charter of Rights and Freedoms* (17 April 1982), online: <[http://canada.justice.gc.ca/loireg/charte/const\\_en.html](http://canada.justice.gc.ca/loireg/charte/const_en.html)> [*Canadian Charter*]. See the judicial expansion of s. 15(1) by reading “analogous” grounds into it in *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143. See e.g., *Egan v. Canada* [1995] 2 S.C.R. 513 (‘sexual orientation’ as an ‘analogous’ ground).

<sup>111</sup> “Restore Marriage Canada! A project by United Families International”, online: <<http://www.restoremarriagecanada.ca/restoremarriagecanada/wcf4sf.cfm>>.

<sup>112</sup> *Infra* note 144.

<sup>113</sup> *Mazlan*, *supra* note 77 at 516.

<sup>114</sup> See *Ong Ah Chuan*, *supra* note 77, where Lord Diplock called for a “generous” interpretation of fundamental liberties to avoid the “austerity of tabulated legislation” but said that Indian and U.S. cases should be “approached with caution” in interpreting fundamental liberties.

<sup>115</sup> Article 8(2) of the Malaysia Constitution, the counterpart of Article 12(2), was amended to include ‘gender’ as a prohibited ground of discrimination. The Singapore government has affirmed the protection of equality between men and women. While the Singapore government has affirmed that women enjoy equal status as men under Article 12(1) (e.g., online: <[http://app.mcys.gov.sg/web/faml\\_enablewomen.asp](http://app.mcys.gov.sg/web/faml_enablewomen.asp)>), this is subject to judicial adjudication.

<sup>116</sup> Article 5(2).

For a rule to have the status of a binding customary international law ('CIL') norm, sufficient general and consistent state practice<sup>117</sup> must be shown, together with *opinio juris* (the state conviction that a practice is legally required).

It is clear law that well established CIL norms are directly applicable in Singapore law, as affirmed in *Nguyen Tuong Van*<sup>118</sup> where the Court of Appeal acknowledged that the prohibition against cruel and inhuman treatment or punishment as embodied in Article 5 of the *Universal Declaration of Human Rights*<sup>119</sup> ('UDHR') was widely accepted as a CIL rule.<sup>120</sup> However, it found insufficient evidence to support the claim that death by hanging fell within the terms of this prohibition. It so concluded after examining material sources like a UN Commission on Human Rights Report which indicated that the number of states retaining and abolishing death penalty were almost equal.<sup>121</sup>

Thus, a Singapore court in considering whether the prohibition against discrimination on grounds of 'sexual orientation' is a CIL norm must first determine whether there is sufficient evidence of state practice and *opinio juris*. This is clearly absent. There is no international consensus that the prohibition of 'sexual orientation' discrimination is CIL, as is apparent from a consideration of the relevant international sources.

First, foreign case law does not necessarily prove widespread consensus.<sup>122</sup> These decisions are controversial domestically and criticised as illegitimate instances of undemocratic judicial legislation. The relevant foreign legislative prohibitions against discrimination on 'sexual orientation' enshrine controversial values.<sup>123</sup> The judicial adoption of such contested values in Singapore would be a form of moral imperialism by judicial fiat, without public debate.

Second, it is evident from European practice that prohibiting 'sexual orientation' discrimination is a regional norm, as reflected in European Court of Human Rights decisions<sup>124</sup> and the European Parliament's resolution on 'homophobia'.<sup>125</sup>

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<sup>117</sup> This relates to official state practice, which includes formal statements made before international bodies as well as national agencies like courts.

<sup>118</sup> *Nguyen* (C.A.), *supra* note 78 at paras. 89-94.

<sup>119</sup> GA Res. 217A(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/180 (1948) 71, online: <<http://www.unhchr.ch/udhr/>>.

<sup>120</sup> *Nguyen* (C.A.), *supra* note 78 at paras. 89-94.

<sup>121</sup> *Nguyen* (H.C.), *supra* note 78 at para. 92: *Question of the Death Penalty: Report of the Secretary-General*, E/CN.4/2003/106 (2003). The report also observed that in most States retaining the death penalty, the mode of execution is by hanging or shooting.

<sup>122</sup> See *e.g.*, *Lawrence v. Texas*, *supra* note 39; opinion by California Supreme Court and decision of Connecticut Supreme Court legalising same-sex marriage, *infra* note 281.

<sup>123</sup> An example of legislative recognition is Chapter 7, s. 9(3) of the South Africa Constitution, which stipulates 'sexual orientation' as one of the specified prohibited grounds of discrimination. Similarly, the Office of Ombudsman against Discrimination on Grounds of Sexual Orientation was set up by Sweden Parliament in 1999; see online: <<http://www.homo.se/o.o.i.s/1211>>.

<sup>124</sup> See, *e.g.*, in relation to Article 8 of the *European Convention on Human Rights*, *Dudgeon v. United Kingdom* (1981) 4 E.H.R.R. 149 (a law criminalising consensual homosexual conduct in Northern Ireland violated protections for privacy in article 8), as affirmed in *Norris v. Ireland* (1989) 13 E.H.R.R. 185.

<sup>125</sup> *Homophobia in Europe* (P6\_TA(2006)0018) (18 January 2006), online: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0018+0+DOC+XML+V0/EN>> [*European Parliament's Homophobia Resolution*].

These treaty-specific norms or resolutions are only regional standards, not universally applicable CIL.

Third, the Human Rights Committee ('HRC') has interpreted certain provisions of the *International Convention of Political and Civil Rights* ('ICCPR')<sup>126</sup> to read in a prohibition of 'sexual orientation' discrimination.<sup>127</sup> The HRC is not a judicial body and its observations and recommendations are not binding<sup>128</sup> and do not in themselves reflect consensus amongst state parties or embody a CIL norm. Moreover, Singapore is not a party to the *ICCPR*.

Fourth, efforts by certain countries to get resolutions adopted by the UN Commission of Human Rights ('CHR') and UN General Assembly in support of the homosexuality agenda have all failed. In 2003, Brazil presented a draft Resolution on Human Rights and Sexual Orientation before the CHR, calling for all UN member states to promote and protect the human rights of "all persons regardless of their sexual orientation".<sup>129</sup> Half the UN states rejected this. The resolution was twice postponed, but was not introduced again at the 2005 CHR for lack of support.<sup>130</sup> In opposing the resolution, certain Malaysians reportedly stated, "[t]here are many things happening around the world and the U.N. is helpless about them. Yet they want to be the big shot in lesbianism?"<sup>131</sup> In December 2008, a statement drafted by European states calling for the decriminalisation of homosexuality before the UN General Assembly, aroused opposition in the form of a counter statement backed by various countries such as the Arab states.<sup>132</sup> These divisions reflect the politicised nature of the issue and the fact that there are conflicting laws among UN members on this subject, indicating a lack of international consensus.

<sup>126</sup> 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976), online: <<http://www2.ohchr.org/english/law/ccpr.htm>>.

<sup>127</sup> Articles 2, 17 and 26 of the *ICCPR*: *Toonen v. Australia*, Comm. No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994) where the UNCHR found a violation of Mr. Toonen's rights under Articles 17(1) (privacy) and 2(1) of the *ICCPR* requiring the repeal of the offending law, but did not make any finding on Article 26 (equality). See also *Yau Yuk Lung Zigo and Lee Kam Chuen*, *supra* note 40, where the court construed the anti-discrimination grounds in Article 26 of the *ICCPR* (embodied in Article 22 of the Bill of Rights of Hong Kong), particularly, 'other status', to include 'sexual orientation'.

<sup>128</sup> *Supra* note 126, Article 41.

<sup>129</sup> With the support of 19 other countries (E/CN.4/2003/L.092).

<sup>130</sup> Commission on Human Rights Decision 2003/118, *Postponement of draft resolution E/CN.4/2003/L.92 and the proposed amendments thereto*, E/CN.4/2003/L.106-110. See e.g., "Muslim alliance derails UN's gay rights resolution" *The Guardian* (25 April 2003), online: <<http://www.guardian.co.uk/world/2003/apr/25/gayrights.andrewosborn>>.

<sup>131</sup> IslamOnline, "Malaysians Protest U.N. Resolution On Sexual Orientation" (9 February 2004), online: <<http://www.islamonline.net/English/News/2004-02/09/article06.shtml>>.

<sup>132</sup> See UN, 63<sup>rd</sup> *General Assembly Plenary*, (GA/10801) (18 December 2008), online: <<http://www.un.org/News/Press/docs/2008/ga10801.doc.htm>>, and Patrick Worsnip, "U.N. divided over gay rights declaration" *Reuters* (18 December 2008), online: <<http://www.reuters.com/article/worldNews/idUSTRE4BH7EW20081218>>: "Yet there is considerable opposition to this at the UN. Socially conservative countries in the Arab world and in Africa did not want anything to do with it ... the opposing document said the statement "delves into matters which fall essentially within the domestic jurisdiction of states" and could lead to "the social normalization, and possibly the legitimization, of many deplorable acts including pedophilia" ... "We note with concern the attempts to create 'new rights' or 'new standards', by misinterpreting the Universal Declaration and international treaties to include such notions that were never articulated nor agreed by the general membership.""

Lastly, there is some support for the prohibition of 'sexual orientation' discrimination in political statements such as the non-binding resolutions of regional organisations,<sup>133</sup> and aspirational guidelines of certain groups.<sup>134</sup> However, this is not generally representative.

Even if one assumes that prohibiting 'sexual orientation' discrimination reflects CIL, unless it constitutes a *jus cogens* norm in Singapore and English jurisprudence, domestic law prevails in the event of inconsistency with a CIL norm.<sup>135</sup> Presently, very few norms are undisputedly *jus cogens*, for example, the prohibition of genocide and terrorism. It is most unlikely that the prohibition of 'sexual orientation' discrimination will attain *jus cogens* status, even in the long term. The existence of national legislation criminalising homosexual sex in numerous countries underscores the absence of general, consistent state practice prohibiting such laws. 'Sexual orientation' as a specific ground for prohibiting discrimination remains deeply contested in domestic and international politics.

In fact almost everyone "on both sides of the political debate" accepts that adopting laws framed to prohibit "discrimination on grounds of sexual orientation" would require the "prompt abandonment of all attempts" to "discourage homosexual conduct" by various means such as "educational policies, restrictions on prostitution, non-recognition of homosexual "marriages" and adoptions and so forth".<sup>136</sup> These are not trivial concerns to be easily brushed aside.

Singapore embraces the core human rights contained in the *UDHR*, but not contested 'human rights' such as claims to 'same-sex marriage'.<sup>137</sup> Parliament's deliberation and retention of 377A strongly indicates that Singapore would reject the view that a norm prohibiting 'sexual orientation' discrimination enjoys CIL status.

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<sup>133</sup> UN General Assembly, Organization of American States, *Human Rights, Sexual Orientation, And Gender Identity*, AG/RES. 2435 (XXXVIII-O/08) (3 June 2008), online: <[http://www.oas.org/dil/general\\_assembly\\_resolutions\\_38\\_regular\\_session\\_colombia\\_june\\_2008.htm](http://www.oas.org/dil/general_assembly_resolutions_38_regular_session_colombia_june_2008.htm)>; Human Rights Watch, "OAS Adopts Resolution to Protect Sexual Rights States Condemn Violence Based on Sexual Orientation and Gender Identity" (6 June 2008), online: <<http://www.hrw.org/english/docs/2008/06/06/colomb19049.htm>>.

<sup>134</sup> See e.g., Human Rights Watch, "Lesbian, Gay, Bisexual, and Transgender Rights", online: <<http://www.hrw.org/doc/?t=lgbt>>; and "The Yogyakarta Principles" (2006), online: <[http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm)>.

<sup>135</sup> *Nguyen* (H.C.) and *Nguyen* (C.A.), *supra* note 78 at para. 108 and para. 94 respectively, affirming the U.K. approach in *Chung Chi Cheung v. The King* [1939] A.C. 160 (P.C.) and *Collco Dealings Ltd. v. Inland Revenue Commissioners* [1962] A.C. 1 (H.L.).

<sup>136</sup> See John M. Finnis, "Law, Morality and 'Sexual Orientation'" (1993-1994) 69 *Notre Dame L. Rev.* 1049 at 1054.

<sup>137</sup> See the speech of then Minister of Foreign Affairs and current Minister of Home Affairs, Wong Kan Seng, "The Real World of Human Rights" at the World Conference on Human Rights (16 June 1993), available online: <<http://stars.nhb.gov.sg/stars/public/>>. See also Attorney-General Walter Woon's opening speech at the first seminar organised by the Public and International Law Committee of the Law Society of Singapore (29 May 2008); Scott T. FitzGibbon, "The Formless City of Plato's Republic: How the Legal and Social Promotion of Divorce and Same-Sex Marriage Contravenes the Principles and Undermines the Projects of the Universal Declaration of Human Rights" *Issues in Legal Scholarship*, Single-Sex Marriage (2005): Article 5, online: <<http://www.bepress.com/ils/iss5/art5>>; and Dominic Chan, "What is Right and What is a Right?: The Claim to Same-Sex Marriage, the Politicization of Rights and the Morality of Law" (2004) 24 *Sing. L. Rev.* 93.

C. *The Argument that Homosexuals Warrant Special Protection as So-Called 'Sexual Minorities'*

1. *The liberal argument for expanding the category of legally recognised minorities*

The *Repeal 377A Petition* singles out "sexual orientation" as a specific ground to be protected under Article 12(1). It also likens the classification applied by 377A to the historical institutionalisation of discrimination against slavery, aliens, racial and religious minorities and women.

The law accords certain groups minority status and bestows minority rights to preserve their distinct identity and group autonomy, which are special rights which are over and above the general rights all individuals enjoy. Not all groups which are numerical minorities are recognised legal minorities. Some actor has to decide which minorities warrant special protection as a legally recognised group. This entails normative rather than mathematical judgment.

Historically, minority protection schemes applied to ethno-cultural and religious minorities who suffered harm in the form of persecution and discrimination. Minority rights at international law were designed not only to eradicate past discrimination and redress historical injustices, but to allow minority groups a space to practice their minority religion, language and cultural practices, while facilitating their participation in the public life of society at large. A legally recognised minority group is not defined numerically, as such an open-ended approach would create a category lacking practical utility.<sup>138</sup> Qualifying adjectives like national, ethnic, religious and linguistic limit the scope of 'minorities' at international law.

U.S. courts developed a doctrine of "discrete and insular minorities", which are groups that have suffered historical discrimination; in order to correct this and to achieve the goal of substantive equality, such groups are accorded special protection through applying a strict scrutiny standard in reviewing discriminatory legislation.<sup>139</sup> In the Canadian context, categories of legally recognised minorities have been extended through analogical reasoning.<sup>140</sup> Of course, it is not clear why one would expect judges to do a better job than politicians in selecting the right minority group for protection, particularly where this inspires political controversy.

The point is that homosexualism activists have sought to extend the category of legally recognised minorities to include a new grouping of 'sexual minorities' composing homosexuals, lesbians, bisexuals and transsexuals. They claim that 'sexual orientation' is an inherent or natural trait and thus, analogous to race, religion and ethnicity. As such, a group of people defined by the trait of sexual identity/behaviour are entitled, as 'sexual minorities', to claim special legal protection. Further, they

<sup>138</sup> See e.g., Thio Li-ann, *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century* (Boston: Martinus Nijhoff Publishers, 2005) at 2.

<sup>139</sup> Justice Stone first used "discrete and insular minorities" in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), which then applied to minorities having a distinct and immutable status such as race or ethnicity. This has been expanded to include 'sexual orientation'.

<sup>140</sup> E.g., the Canadian Supreme Court in *M v. H.* [1992] 2 S.C.R. 3 interpreted s. 15 of the *Canadian Charter*, *supra* note 110, to include the unwritten ground of 'sexual orientation' analogous to "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

allege that 377A embodies the 'tyranny of the majority' by oppressing homosexuals as a so-called 'sexual minority'.<sup>141</sup>

## 2. *Claiming rights and perpetuating false analogies*

Homosexualism activists attempt to expand the category of 'minorities' by strategically framing their claims in terms of rights to equal treatment, liberty, or so-called 'sexual minorities' rights. By portraying a subjective preference as a 'right', the morality of homosexuality or the science of whether this is genetic or a gender identity disorder is insulated from debate. Once a group enjoys legal status and rights, this erects significant juridical and pseudo-moral obstacles to those who might question whether groups defined by homosexual behaviour warrant legal recognition and special rights. Once these claims are established as constitutional rights, a presumption then arises in favour of these 'rights', against broader social traditions, customs and norms, and the rights of others.

Some might argue that you cannot make a moral wrong a fundamental or human right, as human rights are designed to promote human flourishing.<sup>142</sup> This indicates that these issues entail normative considerations, which communitarians do not avoid but which the liberal school evades.

The analogy drawn between homosexuals and slaves, women, racial and religious minorities is deceptive. The question whether homosexuality is a natural, genetic or inherent trait, as opposed to learned behaviour, is politically contentious.<sup>143</sup> Psychological, sociological and medical opinions remain deeply divided on whether homosexuality is innate, that a person is simply 'born gay'.<sup>144</sup> The answer one might

<sup>141</sup> *Repeal377A Petition*, *supra* note 3 at 1; NMP Siew's Parliamentary Speech, *supra* note 21.

<sup>142</sup> Stephen Hall, "The Persistent Spectre: National Law, International Order and the Limits of Legal Positivism" 12 E.J.I.L. (2001) 269 at 301-305. The use of 'rights' rhetoric prematurely ends the debate of what interest merits legal protection: Walter Woon, "A-G cautions against human rights becoming a 'religion' with fanatics" *The Straits Times* (Singapore) (31 May 2008).

<sup>143</sup> See *e.g.*, Jeffrey B. Satinover, "The Trojan Couch: How the Mental Health Guilds Allow Medical Diagnostics, Scientific Research and Jurisprudence to be Subverted in Lockstep with the Political Aims of their Gay Sub-Components", National Association for Research and Therapy of Homosexuality Conference Reports 2005, online: <<http://www.narth.com/docs/TheTrojanCouchSatinover.pdf>>; American Psychiatric Association, "Panelists Recount Events Leading to Deleting Homosexuality As a Psychiatric Disorder From DSM" *Psychiatric News* (17 July 1998), formerly available online: <<http://www.psych.org/pnews/98-07-17/dsm.html>>, now online: <<http://www.geocities.com/calgaryfathers/Disorder.html>>.

<sup>144</sup> See *e.g.*, the findings of Robert L. Spitzer, M.D., "Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation" *Archives of Sexual Behavior*, vol. 32, no. 5 (October 2003) at 403-417; and National Association for Research and Therapy of Homosexuality, "Prominent Psychiatrist Announces New Study Results: 'Some Gays Can Change'" (8 February 2008), online: <[www.narth.com/docs/spitzer2.html](http://www.narth.com/docs/spitzer2.html)>. Spitzer was the key scientific figure in the American Psychiatric Association's decision to remove homosexuality from its diagnostic and statistical manual of mental disorders in 1973: see "Homosexuality and Sexual Orientation Disturbance: Proposed Change in DSM-II", APA Document Reference No. 730008. *Cf.* Sandra G. Boodman, "Vowing to Set the World Straight: Proponents of Reparative Therapy Say They Can Help Gay Patients Become Heterosexual. Experts Call that a Prescription for Harm" *Washington Post* (16 August 2005), online: <<http://www.washingtonpost.com/wp-dyn/content/article/2005/08/15/AR2005081501022.html>>, for Spitzer's qualification that the twin hypotheses that everyone is born straight and homosexuality is a choice is "totally absurd". See however, gay activist Peter Tatchell's views, "Homosexuality: it isn't natural—Ignore those researchers

receive may depend on which scientist, psychologist or activist is questioned.<sup>145</sup> By drawing a contestable analogy between race and sexual orientation, what has happened is that the gains and moral weight of the civil rights movements led by black Americans in the 1960s have been hijacked by homosexuality activists.<sup>146</sup>

The criminalisation of sexual behaviour is not equivalent to the unjust racist treatment slaves in the U.S. suffered, in being systemically subordinated both socially and economically. A behavioural minority is a controversial notion and could well encompass sexual minorities like paedophiles; sexual orientation is too imprecise a term to serve as a defining trait for a legal minority. It is broad enough to include heterosexual and homosexual behaviour, bestiality and incest and the use of all-encompassing categories belies an attempt to avoid drawing moral distinctions between different forms of sexual conduct. Homosexuality activists dogmatically assume that protecting 'sexual minorities' is a moral imperative, which reflects a fundamentalist frame of thinking. By creating imprecise categories like 'sexual minorities', the issue of whether promoting 'sexual diversity' advances the common weal and the good of individuals is conveniently ignored.

Arguments that homosexuals are oppressed in the same manner as black Americans are at best disingenuous in the Singapore context, where homosexuals "work in all sectors, all over the economy, in the public sector and in the civil service" and "are free to lead their lives, free to pursue their social activities".<sup>147</sup>

The indiscriminate promotion of the desires and preferences of social groups as 'rights' has "drained the moral authority from the civil rights industry" which originated from racial discrimination.<sup>148</sup> If any individual or group however privileged can invoke 'discrimination' and "launch their own personalized civil rights industry", the word has been "emptied of its normative and historical content".<sup>149</sup>

The Prime Minister clearly stated during the 377A debates that homosexuals were not considered a minority "in the sense that we consider, say, Malays and Indians as minorities, with minority rights protected under the law – languages taught in schools, cultures celebrated by all races, representation guaranteed in Parliament through GRCs and so on."<sup>150</sup> The only recognised minorities under Article 152 are "racial and religious minorities". Singapore courts do not consider their role as that of leading social change and will not adopt a controversial definition of 'minority' different from what the *Singapore Constitution* identifies and what Singapore government policy and practice has affirmed. If, after extensive public debate, the *Singapore Constitution* were amended to expressly recognise a category of 'sexual minority', only then would the vague label 'sexual minority' have legal significance, even though

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who claim to have discovered a 'gay gene', says Peter Tatchell: gay desire is not genetically determined." (24 June 2008), online: <<http://www.spiked-online.com/index.php?site/article/5375/>>; <<http://www.petertatchell.net/>>.

<sup>145</sup> NMP Thio's Parliamentary Speech, *supra* note 65.

<sup>146</sup> Eugene F. Rivers & Kenneth D. Johnson, "Same-Sex Marriage: Hijacking the Civil Rights Legacy" *The Weekly Standard* (U.S.) (6 January 2006), online: <<http://www.weeklystandard.com/Content/Public/Articles/000/000/012/285fhdqe.asp>>.

<sup>147</sup> PM Lee's Parliamentary Speech, *supra* note 24. See also "Chasing the Pink Dollar \$" *The Straits Times* (Singapore) (17 August 2003) where "gays" are "seen as trendsetters with high spending power".

<sup>148</sup> Rivers & Johnson, *supra* note 146.

<sup>149</sup> *Ibid.*

<sup>150</sup> PM Lee's Parliamentary Speech and NMP Thio's Parliamentary Speech, *supra* notes 24 and 65 respectively.

definitional problems over the range of its beneficiaries might remain. Presently, the politicised term 'sexual minorities' is legally vacuous,<sup>151</sup> though politically invoked as a strategy to elicit sympathy by indulging in the politics of victimhood.

#### D. *The Weakness of the Liberal Argument—Conclusions*

The liberal argument for repealing 377A on the basis that this would properly position the state 'neutrally' fails on its own terms. It avoids the moral questions concerning heterosexual and homosexual behaviour which would be central to any communitarian enquiry into the common good. In seeking to equalise the morality of heterosexuality and homosexuality, the quest for liberal neutrality falls flat.

In the name of 'liberty', radical liberalism assumes the morality of homosexual behaviour by pretending disinterest in moral questions, thereby imposing its substantive preferences on others by "stealth".<sup>152</sup> In fact, the liberal mantra that "sexual autonomy is the way, the truth and the lifestyle"<sup>153</sup> has been religiously invoked in framing liberal arguments against 377A. This strain of liberalism is itself a kind of liberal or secular fundamentalism unable or refusing to appreciate the existence of reasonable divergent views; it especially demonises religiously informed moral views which consider homosexuality morally repugnant and unnatural. Secular fundamentalists do not see the irony of labeling their detractors as practicing "religious fundamentalism".<sup>154</sup> Nor do they appear self-aware enough to realise that their demonisation of religiously informed moral views or values derived from non-consensual sources of authority like tradition and custom, which consider homosexuality unnatural and immoral, reflects a disturbing pseudo-religious zealotry. A dogmatic animus is directed towards those who on principled grounds draw distinctions between homosexual and heterosexual sexual conduct and who consider the latter normative and the former, deviant.

Liberal intolerance towards competitor views is manifest in how they smear their detractors as "hateful", "intolerant" or "close minded" people, demonstrating the very traits they accuse their opponents of. This reveals the liberal dogma of "inclusiveness", "diversity and tolerance", to be a sham, pre-empting serious debate. In the liberal mindset, "inclusiveness" requires one to abandon one's principles and even identity.

Furthermore, the reverence liberals have for individual choice and autonomy as a basis for structuring public life obscures real concerns about the essential character of human nature, the meaning of harm (to immediate and third parties, tangible and intangible), the nature of the common good, and how to prioritise clashing rights. Contemporary liberalism stifles intellectual enquiry and undermines ideological diversity by dictating to all the type of conduct society should tolerate and the kind of diversity it should celebrate.

Clearly, the approach one adopts towards criminal law and morality turns on the philosophy one espouses. If individual autonomy is the ultimate value, the starting

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<sup>151</sup> Thio, *supra* note 25.

<sup>152</sup> Kalb, *supra* note 53.

<sup>153</sup> I thank my Public Law colleague, Professor Thio Li-ann for this observation which arose during one of many spirited conversations on the constitutionality of 377A.

<sup>154</sup> *Supra* note 58 and *infra* note 262.

point for analysis is that legal restrictions on individual freedom require justification, flowing from a presumption of liberty. The sole or major justification for restricting liberty is where demonstrable 'harm' is involved. This approach has its problems, such as how to define 'harm'. Furthermore, not everyone agrees that the presumption of liberty is the best place to start evaluating law.<sup>155</sup> A communitarian approach to law and morality is more holistic, in asking the question, what social value does the law serve? This would include preserving liberty, the rights of others and public goods, rather than a lopsided emphasis on the rights of one party only; a communitarian approach is amenable to a thick rather than flaccid conception of public morality, and to a community defined by public values which transcend human will and desire.

### III. THE COMMUNITARIAN ARGUMENTS FOR RETAINING 377A

The communitarian argument for conserving 377A to sustain the common good, directly addresses the question of what the best theory of human good and community is. Communitarians recognise that only a community without any morals can 'tolerate' all preferences and values; they insist that society should articulate what is the good life and that such articulations are both needed and legitimate.<sup>156</sup> This section fleshes out the specific components of the 'common good', which is informed by Singapore's constitutional 'culture'. This refers to a set of public values which the community considers important and seeks to honour and preserve.

#### A. *The Homosexuality Agenda and Its Challenge to the Common Good and the Concept of Community*

Before discussing the basic features of any communitarian theory, it is important at the outset to appreciate the wide-ranging, radical nature of the homosexuality agenda, and how this challenges our understandings of familial relations, personal law, and public morality, including sexual morality. The communitarian case, in seeking to conserve traditional morality, family values, to protect public health and social harmony as well as the rights of others, resists the encroachment of the homosexuality agenda into law and social morality, as harming the public good. Ultimately, this entails a clash between two competing conceptions of the good life.

The homosexuality agenda threatens existing social norms, practices and institutions in the name of securing the new 'rights' of homosexuals. The progressive advancement of the homosexuality agenda in both legislative and judicial arenas appears to have occurred in stages, as is apparent from a study of related developments in certain foreign jurisdictions.<sup>157</sup> In jurisdictions where the homosexuality agenda has taken root, the de-criminalisation of consensual homosexual sex was the

<sup>155</sup> See e.g., Peter Cane, "Taking Law Seriously: Starting Points of the Hart/Devlin Debate" (2006) 10 *The Journal of Ethics* 21.

<sup>156</sup> Etzioni, *supra* note 33.

<sup>157</sup> See e.g., K. Waaldjik, "Standard Sequences in the Legal Recognition of Homosexuality: Europe's Past, Present and Future" (1994) 4 *Australasian Gay and Lesbian Law Journal* 50 at 51-52, as quoted in Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2d ed. (London: Cornell University Press, 2003) at 240; Lee, *supra* note 16; Robert Wintemute, Seminar on the Legal Status of Lesbian and Gay

essential first legal step paving the way for a series of changes to civil law. The key stages have been identified thus:

1. The repeal of the blanket criminalisation of adult same-sex sexual activity.<sup>158</sup>
2. The equalisation of the age of consent to heterosexual and homosexual sexual activity and other aspects of the criminal law.<sup>159</sup>
3. The prohibition of discrimination based on sexual orientation against gay, lesbian, bisexual and transgender ('LGBT') individuals, in access to employment, education, inheritance and tax laws, housing, healthcare, military service, and other goods and services.<sup>160</sup>
4. The provision of equal access for same-sex couples to rights and obligations attached to marriage, including adoption of children, custody issues and/or enjoy state funded access to alternative 'reproduction' methods such as intro-vitro reproduction.<sup>161</sup> Ultimately, such provision of equal access affects the institution of marriage, which is radically reconstructed to mean something other than the union between man and woman (each party being of a minimum age and of different blood relation, with consent) to include "same-sex marriage".<sup>162</sup>

The homosexuality agenda challenges existing societal norms and demands reform in criminal and civil laws. It requires that the state take positive action to ensure social approval of homosexual sexual conduct, to guarantee them 'reproductive rights' through technological facilitation, to ensure homosexual couples enjoy the same rights of child adoption as opposite sex couples and essentially, to redefine the traditional institution of marriage and understanding of 'family'. The pervasive extent

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People: International and Comparative Perspectives, held at the Faculty of Law, National University of Singapore (12 September 2007).

<sup>158</sup> For an informal survey of the legal status in various countries of the world, see Wikipedia, "Homosexuality Laws of the World", online: <[http://en.wikipedia.org/wiki/Homosexuality\\_laws\\_of\\_the\\_world](http://en.wikipedia.org/wiki/Homosexuality_laws_of_the_world)>.

<sup>159</sup> See *e.g.*, *L. v. Austria* (2003) 36 E.H.R.R. 55; *S.L. v. Austria* (2003) 37 E.H.R.R. 39 (Austria's differing age of consent for heterosexual and homosexual relations "embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority," and violated protections against discrimination in Article 14 of the *European Convention of Human Rights*).

<sup>160</sup> *E.g.*, *Employment Non-Discrimination Act of 2007*, H.R. 3685 (U.S.); British Columbia's *Human Rights Code*, R.S.B.C. 1996, c. 210; *Smith and Grady v. United Kingdom* (1999) 29 E.H.R.R. 493; *Lustig-Prean and Beckett v. United Kingdom* (1999) 29 E.H.R.R. 548 (the United Kingdom's policy of banning homosexuals from the military violated protections for private life in Article 8 of the *European Convention*); and the European Parliament's Homophobia Resolution, *supra* note 125.

<sup>161</sup> *EB v. France* (Grand Chamber) Application No.: 00043546/02 (Eur. Ct. H.R.) (C Rozakis P) (22 January 2008) (like a single heterosexual, a single lesbian may adopt children). Nine European countries currently permit gay and lesbian couples to adopt children: Germany, Belgium, Denmark, Spain, Iceland, Norway, the Netherlands, the U.K., and Sweden. See also *Salgueiro da Silva Mouta v. Portugal* (1999) 31 E.H.R.R. 1055 (a judge's denial of child custody to a gay father on the grounds of his sexual orientation created a discriminatory enjoyment of privacy and violated Article 8); *North Coast etc. v. Super. Ct.*, S142892 (18 August 2008) (Supreme Court of California) (right of religious freedom did not exempt physicians from complying with state law that bars discrimination based on sexual orientation, and granting in vitro fertilisation treatment to lesbian), online: <<http://www.courtinfo.ca.gov/opinions/documents/S142892.PDF>>.

<sup>162</sup> Foreign jurisdictions such as Belgium, Canada, the U.S. (Connecticut and Massachusetts), Netherlands, Norway, Spain, and South Africa have legalised same-sex marriages. Lesser forms such as civil unions or domestic partnerships with varying legal rights are recognised in certain jurisdictions such as Denmark, Sweden, Norway, New Zealand and some U.S. states (*e.g.*, California, Oregon and District of Columbia).

of the homosexuality agenda and its impact on changing social norms and mindsets is illustrated in recent developments. In certain countries, homosexuals have been given special legal exemptions from general laws as well as preferential treatment on the basis of their sexual orientation. In Australia, certain cities have created special “homophobia free zones”<sup>163</sup>, and have exempted “gay hotels” from the operation of the *Equal Opportunity Act*,<sup>164</sup> in order to provide a comfortable environment for them. In 2003, New York City opened its first public gay high school in the name of promoting inclusivity.<sup>165</sup> While claiming the right not to be discriminated against on ‘sexual orientation’ grounds, homosexuals in these countries employ discriminatory tactics against those of differing ‘sexual orientation’. The shift from criminalising homosexuality to, in extreme instances, criminalising opposition to homosexuality is an example of how state-sponsored pro-homosexual dogma is oppressive to those with differing moral visions.

As homosexual activists consider the need to change criminal law as the pivotal first step to changing civil law, the decision to retain 377A by the Singapore Parliament is a key barrier to the attempt to mainstream homosexuality to usher in the full thrust of the homosexuality agenda and to reform both law and social mindsets. For example, an academic advocating the repeal of 377A correctly noted that keeping 377A would create a “logic” or basis to deny homosexual rights groups recognition under the *Societies Act*;<sup>166</sup> without 377A, it would be harder to deny homosexual groups such a licence on the grounds that the championing of the homosexuality agenda would subvert public morality. Singapore government policy is that while “gays” are given “space” in Singapore’s society, homosexuality is not to be “mainstreamed”.<sup>167</sup> The retention of 377A is thus prudent and protects communal morality.

## B. Singapore Communitarianism and the Components of the Common Good

### 1. The basic aspects of communitarianism

Communitarianism does not accord a sacrosanct status to individual autonomy; the individual is not viewed as an isolated atom but in relational terms, with bonds to family, associations and community.<sup>168</sup> The concept of ‘community’ is not to be conflated with the ‘state’, a legal structure; ‘community’ refers to the individual, intermediate social actors, and society. ‘Communitarianism’ is not synonymous with ‘statism’ and ‘collectivism’, which emphasise collective rights, the state being seen as the ultimate value.<sup>169</sup>

<sup>163</sup> “Sydney plans homophobia-free zones” *Reuters* (24 August 2008), online: <<http://www.stuff.co.nz/4667180a12.html>>.

<sup>164</sup> “Gay Aussie hotel wins right to ban heterosexuals, lesbians” *AFP* (28 May 2008), online: <[http://www.breitbart.com/article.php?id=070528090003.xafs5doi&show\\_article=1](http://www.breitbart.com/article.php?id=070528090003.xafs5doi&show_article=1)>.

<sup>165</sup> “First public gay high school to open in NYC” *CNN* (29 July 2003), online: <<http://www.cnn.com/2003/EDUCATION/07/28/gay.school.ap/>>.

<sup>166</sup> See *e.g.*, Hor, *supra* note 43.

<sup>167</sup> PM Lee’s Parliamentary Speech, *supra* note 24.

<sup>168</sup> *Supra* note 32.

<sup>169</sup> Yash Ghai, “Asian Perspectives on Human Rights” (1993) *Hong Kong L.J.* 352 at 342.

The communitarian case is premised on a philosophy of how to order the individual and society; it is interested not only in the rule of law, but “the rule of good law”.<sup>170</sup> This goes beyond formal criteria to requiring a normative assessment of the law and procedures against a conception of the common good. The goal is to promote and sustain a flourishing community composed of vibrant human groupings such as families, neighbourhoods, religious organisations, unions, corporations, associations, schools and universities.<sup>171</sup> Communitarianism thus offers a ‘thicker’ vision of the ‘common good’ beyond the isolated individual.

In resolving legal issues when adjudicating rights, a communitarian approach would first identify the individual and consider his relationship with others within the community.<sup>172</sup> Individual rights are treated as one factor to be balanced against the competing community interests and the rights of other individuals.<sup>173</sup>

To determine what serves the common good, communitarianism calls for continual conversations amongst the communities.<sup>174</sup> Unlike contemporary liberalism or radical secularism, which insists on excluding moral or religious views from public policy discourse, communitarians do not seek to enforce an artificial division between the public and private, or to strictly separate the sacred and secular. The political sphere encompasses all human activities that occur in the public life of societies and includes all communities and institutions.<sup>175</sup> The contribution of all views to public discourse, religious or non-religious, promotes and maintains a community of freedom and intellectual solidarity.<sup>176</sup> This is consonant with the free speech objectives of realising truth and promoting democracy.<sup>177</sup> To realise communal solidarity and individual freedom, a meaningful engagement with those holding contrary views is required.<sup>178</sup> An individual’s convictions can potentially contribute to public understandings or be revised in debate.<sup>179</sup>

## 2. *Communitarianism informs the public philosophy of the Singapore government*

The Singapore government adopts a communitarian public philosophy; in its 1991 *Shared Values White Paper*, it asserted that as an Asian society, Singapore has “always weighted group interests more heavily than individual ones”.<sup>180</sup> The interests of individuals and communities are maintained by allowing different communities to “live

<sup>170</sup> NMP Thio’s Parliamentary Speech, *supra* note 65.

<sup>171</sup> See generally, David Hollenbach, “Contexts of the Political Role of Religion: Civil Society and Culture” (1993) 30 San Diego L. Rev. 877 at 883.

<sup>172</sup> Avineri & de-Shalit, *supra* note 33.

<sup>173</sup> Chan Sek Keong, “Cultural Issues And Crime” [2000] Sing. Ac. L.J. 1: the State is justified in not accommodating any cultural norms or practices that cause harm to the State or the community at large or any other ethnic group. See also Wayne Gabardi, “Contemporary Models of Democracy” (2001) 33 Polity 547.

<sup>174</sup> Hollenbach, *supra* note 171.

<sup>175</sup> *Supra* notes 33 and 171.

<sup>176</sup> See e.g., *supra* note 171; Douglas G. Smith, “The Illiberalism of Liberalism: Religious Discourse in the Public Square” (1997) 34 San Diego L. Rev. 1571; George W. Dent, “Religion, Morality and Democracy: New Learning, New Challenges” (2004) 2 Georgetown Journal of Law and Public Policy 401; Jeremy Waldron, “Religious Contributions in Public Deliberation” (1993) 30 San Diego L. Rev. 817.

<sup>177</sup> Hollenbach, *supra* note 171.

<sup>178</sup> *Ibid.*

<sup>179</sup> Communitarians examine the ways shared conceptions of the good (values) are formed, transmitted, justified, and enforced: Etzioni, *supra* note 33.

<sup>180</sup> *Shared Values White Paper* (Cmd. 1 of 1991) [*Shared Values White Paper*].

in peaceful co-existence and to develop a set of ‘core’ national values essential to nation building,”<sup>181</sup> while ensuring that the individual’s rights are “respected, and not lightly encroached upon”.<sup>182</sup> This ‘thicker’ conception of the common good beyond the individual’s particularised interests and rights is also reflected in Singapore law. For example, save for the prohibition on slavery,<sup>183</sup> the fundamental liberties provisions of the *Singapore Constitution* are not expressed as absolute rights.<sup>184</sup> The principle of ‘harm’ is not narrowly confined to the acts of two individuals, but can affect the interests of third parties in securing public decency, morality, order and health.

The Singapore judicial approach towards adjudicating rights also appears to espouse a communitarian philosophy where the scope of individual rights is qualified by the rights of others<sup>185</sup> and “societal values, pluralism, prevailing social and economic considerations as well as the common good of the community”.<sup>186</sup>

### C. A Thicker Conception of Community: Evaluating the Social Value of 377A

The liberal argument that the function of criminal law should be confined to preventing demonstrable ‘harm’ to others not only begs the question of what ‘harm’ is, but also invidiously ignores the broader function or social value of criminal and civil laws and the role of social morality, which coheres and defines a community. Law not only protects public goods such as public order, health and morality,<sup>187</sup> which shapes the scope of rights; it serves an educative function.<sup>188</sup>

Thus, the communitarian starting point for evaluating the constitutionality and normative desirability of 377A is not the presumption of liberty and a peculiar conception of ‘harm’ as H.L.A. Hart advocated. The communitarian approach evaluates 377A in the light of its moral basis, social value and purposes. All these various components cumulatively inform the communitarian case for conserving 377A.

#### 1. Public health: 377A and the preservation of public health

The protection of public health is a legitimate criminal law objective. For example, the *Misuse of Drugs Act* prohibits the trafficking and consumption of certain drugs deemed to be harmful to the health of individuals, regardless of their personal preferences.<sup>189</sup>

However, those seeking the repeal of 377A either deny or gloss over the public health implications arising out of homosexual anal sex, which is inherently unhealthy,

<sup>181</sup> Chan, *supra* note 173 at 25.

<sup>182</sup> *Ibid.* at 6, para. 30.

<sup>183</sup> Article 10(1).

<sup>184</sup> See *e.g.*, Articles 9(1), 12(3), 13(2), 14 and 15(3).

<sup>185</sup> *Public Prosecutor v. Koh Song Huat Benjamin* [2005] SGDC 272 at para. 8.

<sup>186</sup> See Justice V.K. Rajah’s caution against the “clarion call for unfettered individual rights” and the radical individualism it engenders, in *Chee Siok Chin v. MHA* [2006] 1 S.L.R. 582 at para. 52.

<sup>187</sup> See *e.g.*, Articles 9(1), 12(3), 13(2), 14, 15.

<sup>188</sup> See *e.g.*, R.A. Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986) for a conception of punishment as “communicative, retributive and reformative”. *Cf.* NMP Siew’s Parliamentary Speech, *supra* note 21; and Hor, *supra* note 43.

<sup>189</sup> Cap. 185, 2008 Rev. Ed. Sing.

indicating its unnatural, harmful nature. There is a range of significant medical and health risks associated with homosexuality and the 'gay lifestyle' which often includes rampant promiscuity with multiple sexual partners and dangerous practices like 'bug-chasing'.<sup>190</sup>

The sexual practices of male homosexuals consist primarily of oral-genital contact and anal intercourse. These practices are inherently dangerous because of the proclivity to produce occult and overt physical trauma, often spreading sexually transmitted diseases, including HIV (human immunodeficiency virus), which may cause AIDS (acquired immune deficiency syndrome), an immune disorder.<sup>191</sup> The rectum is particularly vulnerable to sexual trauma, where breaks in the protective membrane barrier facilitate blood exchange and, in turn, the transfer of infectious agents. Furthermore, certain male homosexual practices, such as "fisting", *i.e.*, the insertion of the entire hand into the recipient's anal canal, are likely to cause more serious injuries.<sup>192</sup> Studies have repeatedly shown that lesbians and gay men are at increased risk of mental health problems, including depression, substance abuse, and suicidal behavior, compared to heterosexuals.<sup>193</sup>

However, homosexual activists challenge this medical evidence which harms their political agenda. Two instances demonstrate how science has been politicised to advance the homosexualism agenda. First, HIV was formerly known as gay-related immune deficiency, or GRID, and informally called the gay plague. This name change was an attempt to disassociate HIV from homosexuals.<sup>194</sup> Second, the deletion of homosexuality as a psychiatric disorder from the American Psychiatric Association's handbook *Diagnostic and Statistical Manual of Mental Disorders*<sup>195</sup> in 1973,<sup>196</sup> was primarily motivated by aggressive gay lobbying rather than objective medical opinion.<sup>197</sup>

If 377A preserves public health, and if the conduct it prohibits carries a reasonable possibility of harm to individual and public health, it serves a legitimate purpose by

<sup>190</sup> See "HIV 'bug chasers': Fantasy or fact?" *BBC News* (10 April 2006), online: <<http://news.bbc.co.uk/1/hi/health/4895012.stm>> (gay men fantasising about passing on HIV).

<sup>191</sup> See *e.g.*, Mary E. Northridge, "HIV Returns" (2003) 93 *American Journal of Public Health* 860; and Beryl A. Koblin, Ph.D., *et al.*, "High-Risk Behaviors Among Men Who Have Sex With Men in 6 US Cities: Baseline Data From the EXPLORE Study" (2003) 93 *American Journal of Public Health* 926.

<sup>192</sup> See *e.g.*, the medical opinion of Dr. John R. Diggs, Jr. (16 August 2000), in his affidavit in relation to a Massachusetts lawsuit (concerning homosexual activists' legal claims against parents who opposed sexual "orientation" education in schools), online: <[http://www.massnews.com/past\\_issues/2000/9\\_Sept/900fist3.htm](http://www.massnews.com/past_issues/2000/9_Sept/900fist3.htm)>.

<sup>193</sup> See *e.g.*, Ron Stall, Ph.D., M.P.H., *et al.*, "Association of Co-Occurring Psychosocial Health Problems and Increased Vulnerability to HIV/AIDS Among Urban Men Who Have Sex With Men" (2003) 93 *American Journal of Public Health* 6 at 939.

<sup>194</sup> John McKeller, the Canadian leader of Homosexuals Opposed to Pride Extremism, noted of gay activists: "To them, it was more important to change the name of this disease, which was originally called GRID (gay related immune deficiency), to the 'less homophobic' AIDS. To them it was more important to fight for the rights and the protection of those who suffer from this disease than to fight for the health and safety of the entire population." See online: <<http://www.pfox.org/phpbb/viewtopic.php?t=98>> (20 November 2006).

<sup>195</sup> The American Psychiatric Association is a national medical specialty society, founded in 1844, whose physician members specialise in the diagnosis and treatment of mental and emotional illnesses, including substance use disorders.

<sup>196</sup> *Supra* note 144.

<sup>197</sup> *Supra* note 143.

criminalising gross acts of indecency between male adults. 377A opponents have questioned the de-criminalisation of only heterosexual anal sex which is equally unhealthy, arguing that the classification is under-inclusive. However, perfect classification is not legally required as the rational classification test under Article 12(1) requires only that a classification goes “some way” towards the legislative purpose.

Some believe that sexual conduct including anal sex is a ‘private’ matter, affecting only consenting individuals who contract diseases such as ‘gay bowel syndrome’ (anorectal and colon). This is a sophistic view of what amounts to ‘public health’ concerns, given that the activities and diseases of individuals affect third parties beyond the immediate actors such as spouses and other sexual partners.<sup>198</sup> For example, a man may engage in homosexual sex with another man, who then has sexual relations with his wife and impregnates her.<sup>199</sup> The so-called ‘private’ consensual homosexual sex can and historically has given rise to epidemics such as HIV and AIDS; sexual interaction between heterosexuals and homosexuals will lead to a higher HIV and AIDS incidences. This will result in the need to allocate more public funds for research and medical treatment of HIV and AIDS, resulting in a decline in funding and attention towards other “unavoidable” illnesses like cancer or diabetes.<sup>200</sup>

The Singapore Health Ministry has specifically registered its concern over the rise of HIV amongst homosexuals.<sup>201</sup> In response, homosexualism activists are quick to dismiss this as entailing the “politics of fear” by “exploiting” the “fact that homosexual men, or men who have sex with men, are at a higher risk of contracting HIV/AIDS”. They support their allegation by pointing to statistics which show HIV has a higher incidence amongst heterosexuals than homosexuals. For example, in 2007, out of 400 infected through sex, 255 (63.75%) and 130 (32.5%) were heterosexual and homosexual victims respectively (‘HIV Statistics’).<sup>202</sup> Activists claim homosexual sex is therefore ‘equally’ if not less unhealthy than heterosexual sex.<sup>203</sup>

Such an assertion is flawed. It ignores the fact that homosexuals, as a numerically inferior grouping, constitute a lower percentage of the total population. The percentage of heterosexuals who contracted HIV is small, relative to the heterosexual

<sup>198</sup> See Jonathan P. Burnside, *Consent versus Community: What Basis for Sexual Offences?* (Cambridge: Jubilee Centre, 2006), online: <<http://www.jubilee-centre.org/uploaded/files/Consent%20v%20Community%20-%20What%20basis%20for%20sexual%20offences.pdf>>.

<sup>199</sup> See “Gay guy confesses: I slept with 100 men, one of them could be your hubby” *Her World Magazine* (2004), as cited in NMP Thio’s Parliamentary Speech, *supra* note 65.

<sup>200</sup> See *e.g.*, Boey Shee Lye, “Real tragedy of HIV: It is almost completely preventable” *The Straits Times Online Forum* (Singapore) (9 December 2008): “The real tragedy of HIV is that it is almost completely preventable, if only everyone—gay or straight—exercises responsibility and self-control. This message should not be obscured by arguments about blanket subsidies for treatments.” *Cf.* Salma Khalik, “Treat HIV like other diseases” *The Straits Times* (Singapore) (1 December 2008).

<sup>201</sup> Senior Minister of State, Dr. Balaji Sadsivan, at the 4th Singapore AIDS Conference (27 November 2004), online: <<http://www.moh.gov.sg/mohcorp/speeches.aspx?id=1902>>.

<sup>202</sup> See Sing., Ministry of Health, “Another 257 Singaporeans infected with HIV” (26 November 2004), online: <<http://www.moh.gov.sg/mohcorp/pressreleases.aspx?id=1418>>; Sing., Ministry of Health, “Update on the HIV/AIDS Situation in Singapore 2007” (29 April 2008), online: <<http://www.moh.gov.sg/mohcorp/diseases.aspx?id=420>>; and Sing., Ministry of Health, “HIV Statistics 1985-2007”, online: <<http://www.moh.gov.sg/mohcorp/statistics.aspx?id=246>>.

<sup>203</sup> See *e.g.*, Siew Meng Ee, “Doctor using selective material to justify own conclusion” *The Straits Times Forum* (Singapore) (10 May 2007); Wong Suan Yin, “Aids: Stop the spread of misinformation” *The Straits Times Forum* (Singapore) (24 May 2007); MP Baey Yam Keng’s speech, in Sing., *Parliamentary Debates*, vol. 83 (23 October 2007).

majority of the total population. There are no clear statistics on the number of homosexuals in Singapore.<sup>204</sup> Supposing not more than 2%<sup>205</sup> of the total population of Singapore (being 4,588,600 in 2006)<sup>206</sup> are homosexuals, 130 HIV homosexual victims constitute approximately 0.14% of 91,772 (total number of homosexuals), as compared to a much smaller percentage of 255 HIV heterosexual victims out of 4,587,682 (total number of heterosexuals). One may therefore reasonably infer from the official HIV Statistics that those engaging in homosexual sex are at a greater risk of contracting HIV, since the percentage of homosexuals who contracted HIV is large, relative to the small total number of individuals engaging in homosexual sex.

It is noteworthy that in the latest report of the U.S. Centers for Disease Control and Prevention, persons infected through male-to-male sexual contact, high-risk heterosexual conduct, injection drug use, both male-to-male sexual contact and IDU, and other contact accounted for 48.1%, 27.6%, 18.5%, 5% and 0.8% of the total number of persons living with HIV in the U.S. in 2006, respectively. Singapore's Ministry of Health has just confirmed that out of the 153 new HIV cases detected in the first six months of 2008, homosexual and bisexual transmissions accounted for 32% and 5% respectively.<sup>207</sup> While not offering conclusive medical views, which is rendered difficult by the politicisation of science, the point here is to demonstrate the reasonableness of the proposition that homosexual or male-to-male sex is a more dangerous form of sexual activity, as inferred from publicly available statistics.

Opponents of 377A claim that retaining 377A perpetuates a stigma and hence poses an obstacle towards effective 'safe' sex (or more accurately, 'safer' sex, as the element of risk is always present) education or health programmes for those engaging in male-to-male sexual contact. They argue this might possibly contribute to higher HIV rates among those infected through such sexual contact. This argument is speculative at best; it is not supported by a comprehensive study of existing sex education and its impact. Furthermore, it falsely assumes that all forms of male-to-male sexual contact are not inherently risky and can be 'safeguarded' by the use

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<sup>204</sup> This writer believes it is impossible for any accurate statistics to be obtained in any country, given the individual's privacy concerns regardless of 'sexual orientation'.

<sup>205</sup> The percentage of HIV heterosexual and homosexual victims must be viewed in light of the percentage of homosexuals and heterosexuals each in relation to total population. Statistical and sociological analysis is outside the scope of this article. The 2% benchmark is for illustration purposes only, as drawn from comparative figures obtained from Statistics Canada, "Canadian Community Health Survey 2003" (15 June 2004), online: <<http://www.statcan.ca/Daily/English/040615/d040615b.htm>>; and U.S. Census Bureau, *U.S. Census 2000 Special Reports*, Table 2—Married-Couple and Unmarried-Partner Households (percentage of same-sex unmarried couples to total coupled households is less than 2%), online: <<http://www.census.gov/prod/2003pubs/censr-5.pdf>>.

<sup>206</sup> See Statistics Singapore, *Key Annual Indicators* (2007), online: <<http://www.singstat.gov.sg/stats/keyind.html>>.

<sup>207</sup> U.S. Department of Health and Human Services, "HIV Prevalence Estimates—United States, 2006" 57:39 *Morbidity and Mortality Weekly Report* 1073 (3 October 2008), online: <<http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5739a2.htm>>; Sing., Ministry of Health, "Increase in HIV Testing in Singapore—MOH Urges At-Risk Groups to Go For Voluntary Testing" and Annex A (30 November 2008), available online: <<http://www.moh.gov.sg/mohcorp/pressreleases.aspx?id=20440>> (last visited on 9 December 2008). See also, in relation to Asia, Wong Kim Hoh, "Surge in HIV cases among gay men" *The Straits Times* (Singapore) (7 December 2008); "One in 5 Asian gays has HIV" *Today* (Singapore) (31 July 2008); and UNAIDS, "Global initiative to stop the spread of HIV among men who have sex with men" (24 July 2007), online: <[http://www.unaids.org/en/KnowledgeCentre/Resources/FeatureStories/archive/2007/20070724\\_MSMinitiative.asp](http://www.unaids.org/en/KnowledgeCentre/Resources/FeatureStories/archive/2007/20070724_MSMinitiative.asp)>.

of precautions such as condoms. The proposal to retain 377A in the interests of public health is not a call to withhold medical aid, sex education, health programmes or counselling for HIV homosexual, bisexual or heterosexual victims; rather its retention helps to protect public health by criminalising and deterring unhealthy forms of sexual behaviour, which have personal and social implications.

## 2. Public morality as a social good

An important objective of 377A is to secure public morality; this is a recognised constitutional qualification of rights.<sup>208</sup> Concerns for public health and safety, like public morality, are justificatory grounds for criminal and civil laws, but they also ground independent moral obligations.<sup>209</sup>

Public morality however remains a contested category. The argument that social cohesion and resilience depends on maintaining shared political and moral values, such that criminal law may be invoked against violations of such shared values,<sup>210</sup> is philosophically contested.<sup>211</sup> Liberals consider state interference to promote the moral well-being of individuals a form of “moral paternalism”, preferring that the state be ‘neutral’ and respect individual choice.<sup>212</sup> 377A opponents have pointed out that although the articulated objective of 377A is to reflect public morality, this was not expressly stated in the *Penal Code* amendment bill.<sup>213</sup> Ironically, the *Repeal377A Petition*, while stating public morality can be invidious in justifying immoral practices, such as slavery and gender discrimination, then undermines this assertion by claiming that prevailing public morality considers that “institutionalised discrimination” against homosexuals is now “universally recognised as being inconsistent with modern norms”, that is, “abhorrent to today’s public morality”.<sup>214</sup> Clearly, this is an appeal to the subjective preferences of a lobby group. Since the good of individuals or their rights cannot be defined without further reference to the good of others, the central question is: what moral values should the criminal law embody? In other words, which public philosophy is most persuasive, warranting legislative embodiment? The liberal argument tries to avoid moral questions by certain techniques or manner of framing arguments.

(a) *Law does not automatically follow fact*: Some liberals have argued that since there is sexual ‘pluralism’ and ‘diversity’ in Singapore, in the form of people who identify themselves as bisexuals, homosexuals, lesbians and transsexuals, and since there are groups representing their interests, the law should be changed to reflect this new social reality.<sup>215</sup> That law should follow fact. This skips over the moral question.

The fact that legally prohibited conduct like murders still occur does not require a conclusion that the law ought to be changed. Otherwise, all unobserved laws should

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<sup>208</sup> E.g., Articles 14(2)(c) and 15(4) of the *Singapore Constitution*.

<sup>209</sup> See George, *supra* note 99 at 17-31.

<sup>210</sup> Devlin, *supra* note 26.

<sup>211</sup> Cf. Hart, *supra* note 26.

<sup>212</sup> Gerald Dworkin, “Paternalism” (1972) 56 *The Monist* 64.

<sup>213</sup> *Repeal377A Petition*, *supra* note 3 at 2.

<sup>214</sup> *Ibid.* at 2-3.

<sup>215</sup> E.g., Chua, *supra* note 43 at 230.

be repealed. The facts litterbugs pollute our environment would require the removal of the unobserved offence of littering.<sup>216</sup> Ultimately, the fact that certain conduct takes place does not necessarily mean it should be free from legal sanction. A central purpose of the law is to shape social values which may influence individual conduct, by holding up what is normative and worthy. The law should not facilitate undesirable behavior and clearly, one must address rather than evade the moral question of what is and is not desirable behavior, as communitarians appreciate.

(b) *“Private” acts can have “public” consequences:* The *Repeal377A Petition* wrongly characterises certain forms of consensual sexual behaviour, specifically homosexual behaviour, as “private”, concluding that “private” acts should not be legally regulated. This characterisation is problematical because the distinction between what is “private” or “public” is contested. Singapore law criminalises certain sexual acts such as bestiality, incest, pedophilia and sexual grooming, regardless of whether such acts take place in a ‘private’ home or with individual consent. This is because so-called ‘private’ individual acts can have ‘public’ consequences, in the sense of both tangible and intangible harm.

The point is that ‘harm’ is not a self-evident concept. If individuals are the sum of society, their respective ‘private’ moralities form the aggregate public morality. Any claim that a ‘private’ act of an individual has no ‘public’ consequences is premised on an idiosyncratic definition of these terms. A ‘private’ act can undermine the “moral ecology”<sup>217</sup> of the community. For example, the public has an interest in men not engaging the sexual services of prostitutes, as this affects public morality. This is because such conduct damages “their own characters”, rendering them “less solid and reliable as husbands and fathers”, weakening “their ability to enter into good marriages and authentically model for others (including their children) the virtue of chastity on which the integrity of marriages” depends; in other words, “they set bad examples for others.”<sup>218</sup>

Private acts like viewing pornography can cause various harms. Pornographic materials invoke prurient carnal desires, undermine shared public understandings of sexual morality, and alienate the procreative and unitive goods of marriage. In a climate of sexual permissiveness, married men may engage in sex with other men, undermining marital fidelity. Damage to communal moral ecology causes harm in ways analogous to polluting the ecology of our physical environment. By weakening the disposition to act uprightly, pornography harms moral character and human goods and institutions such as marital fidelity and indeed, family values, both being building blocks of society.

Thus, the accumulation of apparently private choices of private parties has significant public ramifications. Like private corporations which, apart from considerations of legal liability, have an obligation in justice to avoid damaging people’s health by polluting air or water, people have an obligation in justice to avoid harming the character of others by facilitating access to pornographic materials. Whether directly or indirectly, the choices we make, which may harm others, are governed by moral norms which often provide conclusive reasons not to act in this manner.<sup>219</sup>

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<sup>216</sup> S. 17 of the *Environmental Public Health Act* (Cap. 95, 2002 Rev. Ed. Sing.)

<sup>217</sup> George, *supra* note 99 at 17-31.

<sup>218</sup> *Ibid.*

<sup>219</sup> *Ibid.*

If homosexual behavior is decriminalised, this will detrimentally alter what is normative in terms of sexual behaviour. This is a value judgment, but the point is, such judgments cannot be avoided in formulating law and policy.

(c) *The ideology of hedonism should be rejected as the basis of public morality:* Clearly, while insisting on state neutrality with respect to private moral choices, the liberal school of thought actually seeks to impose a particular version of sexual (im)morality on the community, as an alternative determinant of public morality.

Those who lobby for the decriminalisation of homosexual sex assert the desirability of endorsing homosexuality as an alternative lifestyle, claiming this was accepted and celebrated since ancient times (*e.g.*, ancient Greece) to buttress the argument that homosexual sexual expression is natural.<sup>220</sup> Historical fact itself does not determine moral questions. Indeed, it has been observed that the three greatest Greek philosophers, Socrates, Plato and Aristotle, considered homosexual conduct “intrinsically shameful”, “immoral” and “depraved.”<sup>221</sup> If this is accurate, it destroys the “linchpin of modern ‘gay’ ideology and lifestyle” that homosexual conduct is natural.<sup>222</sup> One homosexual activist candidly admitted no “gay gene” exists, admitting that the removal of “social opprobrium and penalties” would create a “gay-positive, homo-friendly culture” that celebrates “gay love and lust”, allowing “more people to come to terms with presently inhibited homoerotic desires”.<sup>223</sup> This is a recipe for sexual libertinism.

By seeking to enforce a new code of sexual values, the liberal argument seeks to redefine what is normative; such liberal evangelism propagates a substantive ideology of human nature, assuming the power to dictate what is considered an ‘enlightened’ and ‘progressive’ approach towards sexual behaviour and morality.<sup>224</sup>

Many consider the call to imitate and legalise the ‘sexual’ hedonism of ancient times regressive and harmful. Apart from public health concerns, it has been observed that where homosexuality is widespread and inter-male relations celebrated, the social status of women has been subordinated.<sup>225</sup> Ultimately, whether homosexual behaviour is “progressive” or “regressive” depends on the public moral philosophy one espouses.

(d) *Retaining 377A for prudential reasons:* As a matter of prudence, the Singapore government has decided to retain 377A and maintain a policy of non-proactive enforcement. 377A opponents claim that such policy proves that 377A lacks value or function, thereby making the law an ass.

<sup>220</sup> *E.g.*, Chua, *supra* note 43 at 240-241, 243-246, for her observations on Greek, Indian (Hindu) and Muslim ‘historical’ sex cultures and practices.

<sup>221</sup> See Sir Kenneth J. Dover, *Greek Homosexuality* (Cambridge, Mass.: Harvard University Press, 1989).

<sup>222</sup> Finnis, *supra* note 136: The observation by Dover, *ibid.*, was supported by Professor Robert George, a Princeton legal and political scholar. It was however contradicted by expert evidence given by Professor Martha Nussbaum in *Evans v. Romer*, 517 U.S. 620 (1996).

<sup>223</sup> See *e.g.*, Peter Tatchell, *supra* note 144.

<sup>224</sup> See *e.g.*, NMP Siew’s Parliamentary Speech, *supra* note 21. *Cf.* NMP Thio’s Parliamentary Speech, *supra* note 65: if “sexual libertine ethos” is deemed the “ultimate goal”, then repealing 377A is “progressive”.

<sup>225</sup> Dennis Prager, “Judaism’s Sexual Revolution: Why Judaism (and then Christianity) Rejected Homosexuality” *OrthodoxyToday.org*, online: <<http://www.orthodoxytoday.org/articles2/PragerHomosexuality.shtml>> .

This claim glosses over two points. First, laws and policies reflect morality and signal what is and is not acceptable. Unlike the liberal aversion to “moral paternalism”, the communitarians appreciate that the state should deliberately and publicly identify, facilitate and support the truly worthwhile (including moral virtue), and also to deter and sanction what is harmful and evil. In upholding public morality, the state should assist parents in the moral education of their children rather than undermine this parental responsibility.<sup>226</sup> The real question is not whether law should send signals on morality, but rather, what morality it should signal. This is part of the social value of law. For example, laws censoring internet pornography are difficult to enforce, but still send a valuable signal against the acceptability of treating women as sexual objects. Hard to enforce laws against insider trading reflect a social judgment of wrongful conduct.

Second, a non-proactive enforcement policy, which may be altered, does not mean 377A will not be enforced.<sup>227</sup> This policy is a concession to homosexuals that they will be left alone in their private lives, so long as they do not seek to mainstream homosexuality in the public sphere. It is a political compromise. Some who oppose 377A are “a bit emotional” or “troubled” by its “signaling” or “signposting” function,<sup>228</sup> while others applaud the signal sent. The real issue is what aspects of immorality should be subject to criminal law and sanction.

Since 377A was debated in Parliament, there has been at least one case involving a 377A charge. In *PP v. Chan Mun Chiong*,<sup>229</sup> two charges were initially brought against Chan who, knowing he had AIDS and without informing the 16 year old male with whom he engaged in oral sex, was found guilty of engaging in the relevant sexual activity without obtaining the 16 year old’s consent, under section 23 of the *Infectious Diseases Act*.<sup>230</sup> The other charge under 377A was not proceeded with, but taken into consideration for sentencing purposes. Home Affairs Minister Wong Kan Sen clarified that the policy of non-proactive enforcement relates to consensual homosexual sex in a private place. He confirmed that the police would investigate complaints made under 377A and the matter would be subject to prosecutorial discretion.<sup>231</sup> Thus, in certain situations, the Singapore government will enforce 377A to protect community interests, for example, where adults in a private HDB flat or house stage a homosexual theme party. Parents may reasonably object to their children being exposed to visible acts of homosexual sexual behaviour.

Singapore has emphatically rejected the hedonistic version of sexual morality, where human desire and will are the only limits to sexual choices. Homosexuality

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<sup>226</sup> John Finnis, “Is Natural Law Theory Compatible with Limited Government?” in Robert P. George, ed., *Natural Law, Liberalism, and Morality* (Oxford: Clarendon Press, 1996).

<sup>227</sup> Sing., *Parliamentary Debates*, vol. 83 at col. 1287 (17 July 2008): In 2005, out of four persons convicted, two cases involved victims below the age of 18. In 2006, out of seven persons convicted, four cases involved victims below the age of 18.

<sup>228</sup> See e.g., NMP Siew’s Parliamentary Speech, *supra* note 21.

<sup>229</sup> D.A.C. 20355/2008 (unreported).

<sup>230</sup> See s. 23 of the *Infectious Diseases Act* (Cap. 137, 2003 Rev. Ed. Sing.), as recently amended by the *Infectious Diseases (Amendment) Act*, No. 10 of 2008.

<sup>231</sup> Sing., *Parliamentary Debates*, vol. 84 (21 July 2008): NMP Siew had asked the Home Affairs Minister, Mr. Wong Kan Seng, to clarify the rationale for charging Chan Mun Chiong under 377A given PM Lee’s statement that 377A “is not proactively enforced”.

remains offensive to the majority of Singapore citizens, as shown by the overwhelming support of the Keep 377A Petition and feedback given to the Singapore government.

In Singapore, as underscored by PM Lee during the 377A debates, a “stable family unit” is based on the model of “one man one woman, marrying, having children and bringing up children within that framework”.<sup>232</sup> Families are appreciated as the ‘basic unit of society’,<sup>233</sup> providing the “primary source of emotional, social and financial support” for the individual and contributing to “social stability and national cohesiveness” by nurturing “socially responsible individuals”.<sup>234</sup>

As PM Lee astutely observed, on an “issue of moral values with consequences” to the “wider society”, Singapore should “decide what is right for ourselves”, considering “the impact of radical departures from the traditional norms on early movers”. He reiterated the Singapore government was right in upholding the family unit when “western countries went for experimental lifestyles in the 1960s—the hippies, free love, all the rage”, by pointing to the breakdown of marriage as an institution in Western Europe: “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.”<sup>235</sup>

The legal celebration of sexual freedom, which flows from a radical liberalism, promotes a harmful libertine ethos. 377A, by criminalising homosexual behaviour, rejects this ethos. It fences in the full implications of the homosexualism agenda by underscoring the heterosexual nature of marriage as the basis for couples uniting to raise families. Since 377A upholds the “moral ecology” of Singapore, the onus is on its opponents to prove it lacks social value and to prove the superiority of hedonism as a public ideology.

### 3. Public order: social harmony as an aspect of public order, the homosexual agenda and competing rights

(a) *The homosexualism agenda trumps competing rights: lessons from abroad:* It is instructive to regard how, in certain foreign jurisdictions,<sup>236</sup> the advance of the homosexualism rights agenda has produced constitutional litigation, where equality-based claims ride roughshod over others’ freedom of conscience, religion and speech. This section illustrates the effect of the homosexualism agenda on understandings of community and freedom and argues it would be undesirable to allow such developments to take root in Singapore.

<sup>232</sup> PM Lee’s Parliamentary Speech, *supra* note 24.

<sup>233</sup> *Shared Values White Paper*, *supra* note 180.

<sup>234</sup> See *e.g.*, the Ministry of Community Development, Youth & Sports’ website, online: <[http://app.mcys.gov.sg/web/fam\\_main.asp](http://app.mcys.gov.sg/web/fam_main.asp)>.

<sup>235</sup> PM Lee’s Parliamentary Speech, *supra* note 24.

<sup>236</sup> See Section III.C.3(c). For other examples, see *e.g.*, Hans C. Clausen, “The ‘Privilege of Speech’ in a ‘Pleasantly Authoritarian Country’: How Canada’s Judiciary Allowed Laws Proscribing Discourse Critical of Homosexuality to Trump Free Speech and Religious Liberty” (2005) 38 *Vand. J. Transnat’l L.* 443; and M.H. Ogilvie, “After the Charter: Religious Free Expression and Other Legal Fictions in Canada” (2002) *Oxford University Commonwealth Law Journal* 219.

(i) *Hate speech legislation*: Legislative provisions in certain countries provide civil and criminal sanctions for speech considered offensive or degrading to LGBT individuals. Several hate speech civil decisions and judgments evince the kind of persecution faced by those who hold contrary religious or moral viewpoints that homosexuality is morally repugnant and harms the community, and the severe curtailment of their freedom of conscience.

For example, the Swedish Constitution expressly prohibits discrimination on grounds of sexual orientation;<sup>237</sup> its *Penal Code* criminalises incitement to hatred<sup>238</sup> and unlawful discrimination based on grounds including 'sexual orientation',<sup>239</sup> specifically identifying homophobic motive as an aggravating circumstance for sentencing purposes.<sup>240</sup> Christian pastor Ake Green was convicted and sentenced by a Swedish lower court for delivering a sermon in church entitled "Is homosexuality a natural instinct or evil forces playing games with humans?", which discussed Biblical texts addressing homosexual conduct.<sup>241</sup> Subsequently, the appellate court acquitted Green albeit on varied grounds.<sup>242</sup> The Supreme Court ruled that Green had violated the *Penal Code's* prohibition on the incitement to hatred but considered that a sentence against him would violate Green's rights under Articles 9 (freedom of religion) and 10 (freedom of expression) of the *European Convention of Human Rights and Fundamental Freedoms*.<sup>243</sup> Although Green was acquitted, it must have been traumatic for him to have his civil liberties so easily trumped by rights based on 'sexual orientation', and this incident could 'chill' the free speech rights of others, in the name of pro-homosexual state enforced orthodoxy.<sup>244</sup>

(ii) *Parental rights & homosexual propaganda in schools*: A logical next step of the state endorsing homosexuality is to promote the moral equivalence of LGBT behaviour through the public education system. This has in fact been introduced in countries like Australia, Canada, the U.S. and England where homosexual rights like same-sex marriage are included in 'diversity' and 'tolerance' course curriculum.<sup>245</sup>

<sup>237</sup> *The Instrument of Government*, Chapter 1 ("The Basic Principles of the Constitution"), Section 2 (including amendments: up to and including SFS 2002:905).

<sup>238</sup> Chapter 16, Section 8 of the Swedish *Penal Code*.

<sup>239</sup> Chapter 16, Section 9 of the Swedish *Penal Code*.

<sup>240</sup> Chapter 29, Section 2 (7) of the Swedish *Penal Code*.

<sup>241</sup> Lower Court ("Tingsrätten") in Kalmar, Sweden on 29 June 2004.

<sup>242</sup> Amicus Brief of the Becket Fund for Religious Liberty (Case No. 1987-04), online: <[http://www.becketfund.org/pdfs/333\\_39.pdf](http://www.becketfund.org/pdfs/333_39.pdf)>; "Swede's Sermon on Gays: Bigotry or Free Speech? Pastor Challenges Hate-Law Restrictions" *Washington Post* (29 January 2005), online: <<http://www.washingtonpost.com/ac2/wp-dyn/A45538-2005Jan28?language=printer>>.

<sup>243</sup> Case No. B 1050-05 (29 November 2005).

<sup>244</sup> See e.g., Alberta Human Rights tribunal decisions, (S2002/08/0137) (30 November 2007) and (Remedy S2002/08/0137) (30 May 2008). The tribunal deemed the letter of Christian pastor Stephen Boisson, as "offensive publication" exposing homosexuals to "hatred" and "contempt", and ordered him to pay damages. His letter had been published by the local newspaper during the ongoing national debate about gay marriage. See also, "Pastor, Christian Coalition Violated Human Rights Law, Alberta Panel Rules" *CBCNews* (Canada) (30 November 2007), online: <<http://www.cbc.ca/canada/calgary/story/2007/11/30/boissoin-ruling.html>>; Stephen Boisson's website, online: <<http://www.stephenboissoin.com>>.

<sup>245</sup> See e.g., "Homosexuals brainwashing our children in elementary schools", online: <<http://www.massresistance.org/media/video/brainwashing.html>>; "No Outsiders", a 28-month research project in primary schools, funded by The Economic & Social Research Council, U.K., online: <<http://www.nooutsiders.sunderland.ac.uk/>>; and Sexuality Education & Sexual Diversity policies by

By downgrading heterosexuality from the normative model to merely one type of sexual orientation, the rights of parents who believe contrariwise to ensure their children are educated in accordance with their religious or moral values is undermined.

For example, the father of a 5 year old boy attending a Massachusetts school objected to the course curriculum which, in depicting familial diversities, included same-sex couples raising children. This was contrary to his faith convictions. Subsequently, the Massachusetts District Court dismissed a suit against the school board for violating Fourth Amendment due process rights to direct the moral upbringing of their children.<sup>246</sup> Judge Wolf pointed out that Massachusetts law prohibited sexual orientation discrimination.<sup>247</sup> He emphasised that the Massachusetts Supreme Court considered that banning 'same-sex marriage' was a "deep and scarring hardship" on "a very real segment of the community for no rational reason".<sup>248</sup> In the judge's mind, there was clear "value to the community" of teaching students to respect differences in their personal interactions with others, to prepare them for citizenship.<sup>249</sup> Parents were left without a say while their children were indoctrinated with a government approved radical sexual liberationist ideology.

(iii) *Academic freedom & viewpoint imposition*: The homosexualism agenda and its imposition of homosexual propaganda have also curtailed academic freedom. In 2005, the Alliance Defense Fund filed a lawsuit on behalf of a social work student at Missouri State University who was forced to participate in lobbying the state legislature for same-sex adoption and fostering as part of her course work.<sup>250</sup> This violated her First Amendment rights protecting her religious beliefs concerning the wrongness of homosexual adoption.<sup>251</sup> Although the university settled this lawsuit,<sup>252</sup> this demonstrates how the invasive reach of a homosexual rights culture can inhibit the academic freedom of those dissenting from pro-homosexual orthodoxy.<sup>253</sup>

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State of Victoria (Department of Education & Early Childhood Development) (2007), online: <<http://www.education.vic.gov.au/studentlearning/teachingresources/health/sexuality/forparents.htm#6>>.

<sup>246</sup> *David Parker, et al. v. William Hurley, et al.*, C.A. No. 06-10751-Mlw (23 February 2007) (Massachusetts District Court).

<sup>247</sup> M.G.L., c. 76, §5.

<sup>248</sup> 440 Mass. 309 (2003) at 341.

<sup>249</sup> An appeal has been made by Parker: *Complaint and Jury Demand, David Parker, et al. v. William Hurley, et al.* (27 April 2006). See online: <<http://www.davidparkerfund.org/html/blog.html>>.

<sup>250</sup> *Emily Brooker v. Michael L. Franks, et al.*, Case 06-CV-342 (17 September 2006) (District Court Western District of Missouri, Southern Division), online: <<http://www.telladf.org/UserDocs/BrookerComplaint.pdf>>.

<sup>251</sup> Alliance Defense Fund, "ADF sues university on behalf of Christian student punished for opposing homosexual adoption" (30 October 2006), online: <<http://www.alliancedefensefund.org/news/story.aspx?cid=3904>>.

<sup>252</sup> Missouri State settles lawsuit with Emily Brooker (8 November 2006), online: <<http://www.news.missouristate.edu/releases/27833.htm>>.

<sup>253</sup> See "Is There Disdain For Evangelicals In the Classroom?" *Washington Post* (5 May 2007), online: <[http://www.washingtonpost.com/wp-dyn/content/article/2007/05/04/AR2007050401990\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/05/04/AR2007050401990_pf.html)>. See also the opposition faced by academics espousing contrary viewpoints in their writings: e.g., Ty Clevenger, "Gay Orthodoxy and Academic Heresy" in "Homosexuality: Truth Be Told" (2002) 14 Regent U.L. Rev. 241, where he reveals the controversy behind the Stanford Law & Public Policy Review's refusal to publish materials that criticise orthodox gay-rights views, online: <<http://www.freerepublic.com/focus/f-news/1340030/posts>>; and Hilary White, "Canada's Human Rights Commissions a Threat to Academic Freedom: US Academic Elites" *LifeSiteNews.com* (27 August 2008), online: <<http://www.lifesitenews.com/ldn/2008/aug/08082716.html>>.

(iv) *Freedom of contract and discrimination*: The priority accorded to homosexual rights has limited the freedom of contract. The Ontario Human Rights Commission ordered a printer to provide printing services to gays and lesbians, which he had refused to, and pay general damages to the complainants. The Commission was persuaded by the complaints that the printer's actions violated the Ontario *Human Rights Code* which guarantees each person a "right to equal treatment" on various grounds including 'sexual orientation'.<sup>254</sup>

The Board accepted that its order contravened the printer's religious freedom rights under section 2(a) of the *Canadian Charter*, but held that the infringement was reasonably justified under section 1 of the *Canadian Charter*.<sup>255</sup> This priority accorded to sexual orientation rights substantially diminished the religious freedom rights of others.

(b) *Social harmony as part of public order*: The aggressive nature of the homosexualism lobby has polarised foreign societies; in Canada, a heartbroken group of Canadians issued a collective apology to the world for their legalisation of same-sex marriage,<sup>256</sup> which allowed foreign same-sex nationals to marry under Canadian law; this then forced the issue of recognising foreign same-sex marriage in their home countries.

Public order is prioritised within Singapore, and qualifies four of seven constitutional liberties.<sup>257</sup> This relates to maintaining law and order<sup>258</sup> and racial and religious harmony.<sup>259</sup> In 2007, the *Penal Code* was amended to make it an offence for individuals to utter words with the intent of hurting both religious and racial feelings, which can cause racial and religious disharmony.<sup>260</sup>

A new threat to social harmony reared its ugly head during the 377A-related debates, stemming from the actions of radical secularists who demean religionists and others opposing the homosexualism agenda. If the Singapore government should adopt legislation which adjudges Biblical or Korannic passages to constitute hate speech because they consider homosexuality sinful or morally wrongful, this would violate freedom of religious beliefs and cause communal disquiet, given that homosexuality is offensive to the majority of Singaporeans.

The abjectly nasty anti-social lobbying tactics 377A opponents adopted includes demonising supporters of retaining 377A by impugning their motives, personal

<sup>254</sup> Section 1 of the R.S.O. 1990, c. H.19

<sup>255</sup> *Brillinger and the Canadian Lesbian and Gay Archives v. Imaging Excellence Inc., et al.* (2000), online: <<http://www.ohrc.on.ca/en/resources/cases/CaseSummary.2006-06-08.9770677705/view>>.

<sup>256</sup> *Supra* note 111.

<sup>257</sup> Articles 9(6), 13(2), 14(2)(b) & (c) and 15(4) of the *Singapore Constitution*.

<sup>258</sup> See *Re Tan Boon Liat* [1976] 2 M.L.J. 83 for the definition of 'public order'.

<sup>259</sup> See *Maintenance of Religious Harmony Act* (Cap. 167A, 2001 Rev. Ed. Sing.); Deputy PM Prof S Jayakumar, "The Meaning and Importance of the Rule of Law", at the *IBA Rule of Law Symposium* (19 Oct 2007) at para. 19: "maintaining racial and religious harmony has become an important tenet for us when approaching the rule of law"; see online: <<http://notesapp.internet.gov.sg/48256DF20015A167.nsf/LookupContentDocsByKey/GOVI-785D9X?OpenDocument>>.

<sup>260</sup> *Penal Code*, *supra* note 4, ss. 298 (uttering words, etc., with deliberate intent to wound the religious or racial feelings of any person) and 298A (promoting enmity between different groups on grounds of religion or race and doing acts prejudicial to maintenance of harmony).

character and professional competence;<sup>261</sup> accusations of bigotry, religious fundamentalism,<sup>262</sup> irrationality and ignorance were hurled to intimidate and censor them.<sup>263</sup> Physical harm was threatened against one 377A supporter in at least one instance.<sup>264</sup> These pusillanimous “bully-boy tactics” inhibit free debate by seeking to squash competing views, and may be potentially defamatory and even criminal under existing laws.<sup>265</sup> Such uncivilised behaviour, if left unchecked, is likely to fracture social harmony and undermine social stability.

Responsible legislators do well to take into account the real world consequences of how an advancing homosexualism agenda will undermine the rights of others and broader societal interests. To maintain peace within a multi-racial, multi-religious society, Singapore must continue to embrace the vision of the common good held by diverse racial and religious communities, whose views should not be excluded from such public policy issues. Religious viewpoints, held by 85.2% of Singaporeans,<sup>266</sup> should be appreciated as creative sources for how we understand human good in a plural democracy.<sup>267</sup>

#### D. Conclusion: Conserving the Character of the Community

A communitarian approach does not entail the lop-sided focus on the interests of one party in reconciling rights and goods, which radical individualism produces. It squarely confronts moral questions such as whether homosexuals as a group warrant protection as a legal minority, rather than uncritically enlarging the existing category

<sup>261</sup> See *e.g.*, in relation to Lee’s views, *supra* note 16, NMP Siew Kum Hong in his public blog, “NMP Siew Kum Hong: Opinion on 938 Live, and ill-reasoned commentary 5 May 2007” insinuated that Lee “was mistaken, or she was deliberately misleading the reader”, and maintained third party blog comments such as “Yvonne Lee should be relieved of her job”, online: <<http://siewkumhong.blogspot.com/2007/05/opinion-on-938-live-and-ill-reasoned.html>>. Curiously, after the 377A debates in October 2007, NMP Siew expressed “hope” that “all participants will remain civil, and focus on the issue at hand as a secular democracy”, in “Friday Matters: The Gay Debate—An Example of Democracy At Work” *The Straits Times Insight* (Singapore) (26 October 2007). He would do well to try to live up to his own declared aspirations.

<sup>262</sup> See *e.g.*, “religious zealot” *ad hominem* used against NMP Thio Li-ann, by openly gay Australian High Court judge, Michael Kirby, “Fundamental Human Rights And Religious Apostasy: The oldest human right?”, The Griffith Lecture 2007, delivered at Griffith University (16 November 2007), online: <<http://webdiary.com.au/cms/?q=node/2185>>.

<sup>263</sup> See *e.g.*, Brian Selby’s “hysterical, homophobic and bigoted diatribe” *ad hominem* in his letter, “Professor’s views on gay prejudiced” *The Straits Times Online Forum* (Singapore) (8 May 2007) and “Gay debate takes ugly turn” *Today* (25 October 2007). For an observation of the 377A identity politics, see Andy Ho, “Identity Politics: There are gays and there are gays” *The Straits Times* (Singapore) (10 November 2007) and Thio Li-ann, “The Virtual and the Real: Article 14, Political Speech and the Calibrated Management of Deliberative Democracy in Singapore” [2008] 1 *Sing. J.L.S.* 25 at 54-56.

<sup>264</sup> See *e.g.*, “NMP Thio gets threatening note” *Today* (7 November 2007) and “Female NMP Receives Death Threat” (as translated from Chinese) *WanBao News* (Singapore) (7 November 2007) at 3.

<sup>265</sup> *Supra* note 259; *Miscellaneous Offences (Public Order and Nuisance) Act* (Cap. 184, Rev. Ed. Sing.), s. 13A (intentional harassment, alarm or distress).

<sup>266</sup> Singapore Statistics, *Singapore Census of Population, 2000*, Advance Data Release No. 2, “Religion”, online: <<http://www.singstat.gov.sg/pubn/papers/people/c2000adr-religion.pdf>>: Out of 2,494,630 resident population aged 15 years and over by religion, 85.2% profess a faith, Christians and Muslims form 14.6% and 14.9% respectively.

<sup>267</sup> Hollenbach, *supra* note 171 at 901.

of 'minorities' to encompass homosexuals. The issue of normative desirability is determined by reference to a moral public philosophy; what society tolerates or does not tolerate informs its character and conception of what serves the common good.

Several MPs in debating 377A before Parliament expressed concerns over the far-reaching effects of the radical social agenda that homosexuality lobbyists advocate.<sup>268</sup> Activists try to minimise these effects by ignoring them and by accusing their detractors of being hysterical in trotting out a 'parade of horrors', hoping that their dramatic rhetoric will distract from the observation that were 377A repealed, it stands as a responsible prospect that the homosexuality agenda would make inroads into Singapore.<sup>269</sup> Responsible legislators will not turn a blind eye to the full implications of this agenda.<sup>270</sup>

Clearly, an aggressive LGBT rights lobby has developed in Singapore.<sup>271</sup> Instead of restricting consensual homosexual sex to 'private' bedroom affairs, activists demand the right to form LGBT associations,<sup>272</sup> clamour for relaxed censorship and celebrate the arts<sup>273</sup> in relation to LGBT themes, and advocate pro-homosexuality sex education for youth.<sup>274</sup> These proposed reforms unmistakably go beyond the de-criminalisation of homosexuality in Singapore.<sup>275</sup>

<sup>268</sup> See e.g., MP Christopher de Souza's speech, Sing., *Parliamentary Debates*, vol. 83 at col. 2242; and NMP Thio's Parliamentary Speech, *supra* note 65.

<sup>269</sup> For example, some believe that the homosexuality agenda is unlikely to take place in Singapore in light of the Government's "pragmatic" and not "ideological" stance in most matters. Such belief presupposes without further explanation that no ideology underlies a "pragmatic" policy.

<sup>270</sup> Cf. Chua, *supra* note 43 at 254.

<sup>271</sup> See non-governmental organisation, Human Rights Watch's LGBT's webpage online: <<http://hrw.org/english/docs/2007/07/11/global16375.htm#70>>, which lists main LGBT activist groups in various countries including one, People Like Us, online: <[http://www.plu.sg/society/?page\\_id=5](http://www.plu.sg/society/?page_id=5)> in Singapore. See also the international movement galvanised by International Gay and Lesbian Human Rights Commission, online: <<http://www.iglhrc.org/site/iglhrc/>>. For a recent example of militant lobbying, see "DBS' charity tie up draws flak" *The Straits Times* (Singapore) (5 December 2008) concerning The Development Bank of Singapore Ltd's (DBS) withdrawal of its promotion supporting a charity, Focus on the Family, upon being pressurised by several gay or anti-Christian activists, and Matthias Chew, "Focus on the Family: Why support for group may not be advisable", *The Straits Times Online Forum* (Singapore) (11 December, 2008). See also, George Lim, "Business leaders like DBS: Should stand up to pressure groups" *The Straits Times Online Forum* (Singapore) (9 December 2008) for his views that DBS should not discriminate against the majority of pro-family consumers out of fear of offending a small group of intolerant anti-family activists.

<sup>272</sup> See e.g., "Scoping Out Societies" *The Straits Times* (Singapore) (17 July 2004) concerning gay associations which are not allowed to register under the *Societies Act* (Cap. 311, 1985 Rev. Ed. Sing.).

<sup>273</sup> See e.g., in support of charity, non-governmental organisation, Association for Women, Action and Research ('AWARE') screened 'Spider Lily', a lesbian themed film. Its president, Mrs. Constance Singam confirmed AWARE's support for the film's themes in AWARE's Comprehensive Sexuality Education, a "programme for teens that helps them develop a healthy and positive attitude towards sexuality and of themselves": "AWARE's controversial choice for charity gala premiere" *Today* (20-19 May 2007). See also the gala premiere of Oscar Wilde at Shaw Lido organised by gay activist group, *Fridae*, on 13 May 2008.

<sup>274</sup> See e.g., AWARE's Comprehensive Sexuality Education, online: <<http://www.aware.org.sg/images/aware%20cse%20info%20sheet1.pdf>>; and AWARE's promotion of rights of "queer women within the feminist movement", as part of IndigNation, a lobby platform for gay activists in Singapore (16 August 2008), online: <<http://www.plu.sg/indignation/?p=474>>.

<sup>275</sup> See observations on LGBT movements by Joseph Lo & Huang Guoqin, eds., *People Like Us: Sexual Minorities in Singapore* (Singapore: Select Publishing, 2003); Russell Heng Hiang Khng, "Tiptoe Out of the Closet: The Before and After of the Increasingly Visible Gay Community in Singapore" in Gerard Sullivan & Peter A. Jackson, eds., *Gay and Lesbian Asia: Culture, Identity, Community* (New York:

Should the criminal law be amended and 377A repealed, this is the first necessary step to effectuate alterations to civil law. Thus, the retention of 377A serves the broader purpose of preventing harmful, far-ranging social changes in Singapore. U.S. experience is cautionary. The Supreme Court in *Lawrence v. Texas* opined that the law should facilitate and remove barriers to individual choices regarding all “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education”.<sup>276</sup> Justice Scalia, in his dissent, noted that the majority had failed to follow precedent by adopting the dissenting judgment of Justice Stevens in *Bowers v. Hardwick*<sup>277</sup>—the fact that the majority in a state “has traditionally viewed a particular practice as immoral is not a sufficient reason for legislation.”<sup>278</sup> Their assertion that the “promotion of majoritarian sexual morality is not even a legitimate state interest”, “effectively decrees the end of all morals legislation.”<sup>279</sup>

The logical result would be the legalisation of homosexual marriages, notwithstanding the majority judges’ false assumption that private homosexual acts could be decriminalised without any fear of “judicial imposition of homosexual marriage, as has recently occurred in Canada”.<sup>280</sup> Since the state is unable to legislate based on majoritarian sexual morality, it must allow same-sex marriages to equalise access to a revamped conception of ‘marriage.’ Subsequent California Supreme Court and Connecticut Supreme Court decisions allowing same-sex marriage prove the truth of Scalia’s prescient observations.<sup>281</sup>

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Harrington Park Press, 2001); Laurence Wai-Teng Leong, “Singapore” in Donald J. West & Richard Green, eds., *Sociolegal Control of Homosexuality* (New York: Plenum Press, 1997).

<sup>276</sup> *Supra* note 39 at 573-574.

<sup>277</sup> 478 U.S. 186 (1986) at 216.

<sup>278</sup> *Supra* note 39 at 559.

<sup>279</sup> *Ibid.* at 599.

<sup>280</sup> *Ibid.* at 604.

<sup>281</sup> See the 4-3 majority decision of the California Supreme Court, *In re Marriage Cases*, 43 Cal. 4th 757 (15 May 2008) at 7: The state’s ban on same-sex marriage citing non-discrimination on ‘sexual orientation’ grounds like race or gender, did not “constitute a legitimate basis upon which to deny or withhold legal rights”, online: <<http://www.courtinfo.ca.gov/cgi-bin/opinions.cgi?Courts=S>>. See the 4-3 majority decision of the Connecticut Supreme Court in *Elizabeth Kerrigan et al. v. Commissioner of Public Health et al.*, S.C. 17716 (10 October 2008) where ‘sexual orientation’ formed a quasi-suspect category for equal protection under the U.S. Constitution, online: <<http://www.jud.state.ct.us/external/supapp/Cases/AROCr/CR289/289CR152.pdf>>. The decision of the California Supreme Court was however overturned in November 2008 when ‘Proposition 8’, a California State ballot proposition to change the California Constitution to eliminate the right of same-sex couples to marry in California and provide that only marriage between a man and a woman is valid or recognised in California, was passed with a more than 52% vote. See General California Election, “Proposition 8—Eliminates Right of Same-Sex Couples to Marry. Initiative Constitutional Amendment”, online: <<http://www.voterguide.sos.ca.gov/title-sum/prop8-title-sum.htm>>; and Jesse McKinley & Laurie Goodstein, “Bans in 3 States on Gay Marriage” *New York Times* (6 November 2008), online: <[http://www.nytimes.com/2008/11/06/us/politics/06marriage.html?\\_r=1&ref=us&oref=slogin](http://www.nytimes.com/2008/11/06/us/politics/06marriage.html?_r=1&ref=us&oref=slogin)>. The constitutionality of Proposition 8 is currently subject to review by the California Supreme Court: see e.g., Jesse McKinley, “Top Lawyer Urges Voiding California Proposition 8” *New York Times* (20 December 2008), online: <[http://www.nytimes.com/2008/12/20/us/politics/20marriage.html?\\_r=1&ref=politics](http://www.nytimes.com/2008/12/20/us/politics/20marriage.html?_r=1&ref=politics)> and Judicial Council of California, “Proposition 8 Cases”, online: <<http://www.courtinfo.ca.gov/courts/supreme/highprofile/prop8.htm>> (last visited on 22 December 2008).

These various social goods, including protecting rights which form part of “our well being in society”,<sup>282</sup> cumulatively inform the communitarian case for conserving 377A. Those seeking the repeal of 377A bear the onus of proving the law lacks any social value or that it otherwise violates fundamental principles. In the absence of such proof, 377A serves a beneficial public philosophy and is empirically reflected in Singapore law, practice and communitarian culture. Its retention is the right thing to do.

#### IV. LAW, DEMOCRACY AND MORAL QUESTIONS: RETAINING SECTION 377A ‘FOR GOOD REASON’

The 377A debate has thrown up deeply controversial moral issues, with intractable arguments for and against 377A, shaped by opposing public philosophies. In any sophisticated society, moral disagreement is an unavoidable fact given the disparate philosophical visions of the good life and what composes the common good.

As law embodies normative values, how then should morally controversial questions be resolved in a democratic society, in the absence of overlapping consensus? Which government body should take decisions on such issues? The *Singapore Constitution* by entrenching certain judicially enforceable fundamental liberties place these beyond bare majority will. Should additions to this list of basic rights be done through amending the Constitution, which requires a special parliamentary majority, or by allowing judges to expansively interpret existing rights to effectively create new rights?

Unlike foreign courts, Singapore judges defer to Parliament on morally controversial social policy issues which could include abortion, death penalty and matters relating to homosexuality. This calls into question the legitimacy of such judicial legislation whereby the judicial elite impose their views on the community at large. Justice Scalia denounced this cogently in his dissenting judgment in *Lawrence v. Texas*, where the majority overturned a Texas statute criminalising certain deviate sexual conduct between two persons of the same gender.<sup>283</sup> He considered the majority opinion “the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda”, whose activists seek to eliminate “the moral opprobrium that has traditionally attached to homosexual conduct”, and opined that the court had forsaken neutrality by taking sides “in the culture war”.<sup>284</sup> He noted:

Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as “discrimination” which it is the function of our judgments to deter. So imbued is the Court with the law profession’s anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously “mainstream” ...What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through

<sup>282</sup> *Rajeevan Edakalavan, supra note 78 at para. 21.*

<sup>283</sup> *Supra note 39; Penal Code, Tex. Stat. Ann. § 21.06. (2003)*

<sup>284</sup> *Supra note 39 at 602.*

the invention of a brand-new “constitutional right” by a Court that is impatient of democratic change.<sup>285</sup>

While supporters of a “living constitution” may argue judges promote democracy by interpreting the constitution to reflect evolving social mores, they ignore that this approach might entail the imposition of minority elite views, rather than communal morality. If an unelected judiciary claims to be the final arbiter on questions of law and morality, this raises the risk of removing important questions “entirely from the realm of democratic debate and decision-making”; society would be bound by predilections and dispositions of judges.<sup>286</sup> This is not likely in the Singapore context, given judicial deference to Parliament in relation to matters relating to social morality. Here, matters which concern the welfare of individuals, “of which fundamental liberties are a part,” are channeled to Parliamentarians “who are chosen by the people to address their concerns.”<sup>287</sup>

The issues associated with 377A were addressed not in a judicial setting, but debated before the courts of public opinion and Parliament.<sup>288</sup> Since the Singapore government has announced its intent to be guided by the consensus of people on public decency issues, which include sexual morality,<sup>289</sup> citizens have a role and responsibility to engage in this debate, on equal terms, to shape their own society. In a democratic setting, laws are open-ended and may change with changing majority will.<sup>290</sup> It falls to legislators, after hearing a range of views facilitated by robust free speech, to make informed, responsive and responsible decisions best serving the common good.<sup>291</sup>

Free debate should be open and inclusive, and all views evaluated on their merits. Issues should be precisely formulated and debated and bald rhetorical statements avoided, such as 377A is “not fair, just or equal”, “377A is the tyranny of the majority”, and “you are imposing your views on others”. This is because these “red herrings”<sup>292</sup> obfuscate the real issues.

<sup>285</sup> *Ibid.*

<sup>286</sup> Justice Antonin Scalia, “The Bill of Rights: Confirmation of Extant Freedoms or Invitation to Judicial Creation?” in Grant Huscroft & Paul Rishworth, eds., *Litigating Rights Perspectives from Domestic and International Law* (Oregon: Hart Publishing, 2002) at 26-27.

<sup>287</sup> Rajeewan Edakalavan, *supra* note 78.

<sup>288</sup> Thio, *supra* note 263 at 54-56.

<sup>289</sup> PM Lee’s Parliamentary Speech, *supra* note 24.

<sup>290</sup> For an argument that courts have a critical role in the protection of ‘sexual minorities’ against laws imposed by what has been called a ‘tyrannical’ majority, see *e.g.*, the editorial comments in relation to Proposition 8, *supra* note 281, in “Equality’s Winding Path” *New York Times* (6 November 2008), online: <<http://www.nytimes.com/2008/11/06/opinion/06thu1.html?ref=opinion>>:

[F]ar from showing that California’s Supreme Court was wrong to extend the right of marriage to gay people, the passage of Proposition 8 is a reminder of the crucial role that the courts play in protecting vulnerable groups from unfair treatment. ... [T]he immediate impact of Tuesday’s rights-shredding exercise is to underscore the danger of allowing the ballot box to be used to take away people’s fundamental rights.

This argument raises the tyranny of the majority as a “red herring”, *infra* note 292. It begs the question of whether so-called “sexual minorities” should be constitutionally or legally protected as “vulnerable groups” by merely assuming this should be so, as some kind of self-evident ‘truth’.

<sup>291</sup> See *e.g.*, Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 2004).

<sup>292</sup> NMP Thio’s Parliamentary Speech, *supra* note 65.

In addition, the hateful rhetoric and “bully boy”<sup>293</sup> tactics of intimidation,<sup>294</sup> which included death threats and email campaigns attacking personal and professional reputation, which certain anti-377A activists adopted, should be unequivocally rejected. How do *ad hominem* insults and name-calling advance debate?<sup>295</sup> They are an attempt to drown out rather than hear reasoned argument and exert a “horizontal chilling” effect on free speech.<sup>296</sup>

One persistent, beguiling argument dogging the 377A debate is that 377A is merely a colonial relic Singapore inherited from Britain.<sup>297</sup> This assertion is itself a form of neo-colonial (im)moral imperialism. Apart from attempting to foreclose a debate, it seeks to impose foreign western liberal or libertine values on Singaporeans.<sup>298</sup> Declarations that Singapore should free itself from ‘colonial sexual bondage’<sup>299</sup> conveniently gloss over the fact that this issue has been robustly debated within and without Parliament, and that both sides have had their say. By deciding, consciously, to retain 377A, Parliament has, with democratic majority support, affirmed its value to contemporary Singapore and the common good.

To proclaim the moral equivalence of all forms of sexual expression between consenting adults assumes that adult consent is or should be the ultimate value. This form of radical egalitarianism would logically remove every basis for classifications based on ‘sexual orientation’, including understanding marriage as the union between man and woman. Clearly, contemporary liberalism is not a neutral value-free ideology. It espouses a normative vision of man and society and a contestable theory of human good, and enlists state support to advance this preferred view. In Singapore, aside from popular support for 377A, it has also been argued that liberal philosophy, which can manifest in liberal fundamentalism, is normatively undesirable and irrational in being unable to place a coherent limit on individual autonomy and choice.

While purporting to be inclusive and tolerant, the liberal framework is precisely the opposite; it is illiberal in its intolerant assumption that ‘secular’ reasons can be binarily separated from ‘religious’ reasons, in an illiberal attempt to exclude ‘religious’ values from public debate, irrespective of their merits. This stifles intellectual inquiry and is at odds with the liberal bible, in promoting viewpoint censorship.

This article has argued that the communitarian argument supporting the retention of 377A is a superior and more honest approach to debating law and morality issues; it is normatively desirable as it directly engages with a theory of the common good and human nature. It makes no false pretenses towards ‘neutrality’, and indeed, why should a state be neutral? For example, the Singapore government heavily taxes goods like alcohol and tobacco to discourage consumption. It provides baby bonuses as an incentive for married couples. The communitarian approach is inclusive in

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<sup>293</sup> Thio, *supra* note 25.

<sup>294</sup> *Supra* notes 261-264.

<sup>295</sup> James Neuchterlein, “When insults no longer insult” 65 *First Things* 13-14 (August/September 1996), archived online: <<http://www.catholiceducation.org/articles/homosexuality/ho0032.html>>.

<sup>296</sup> Thio, *supra* note 263.

<sup>297</sup> The U.K. has however legalised sodomy.

<sup>298</sup> This assertion was made by law professor Douglas Sanders in his paper presentation “377 and the Unnatural Afterlife of British Colonialism in Asia”, at the 5th Annual Asian Law Institute (ASLI) Conference, Faculty of Law, National University of Singapore (23 May 2008).

<sup>299</sup> Chua, *supra* note 43 at 210.

hearing and evaluating all views about public issues. This richer and more grounded conception of the individual, society and state, is to be preferred.

In areas of law and moral disagreement, there is likely to be wide divergence both between and within countries engaged in these 'culture wars'.<sup>300</sup> The Singapore government in deciding to retain 377A after thorough parliamentary debate has boldly defined its own vision of state and society and what laws serve human flourishing. 377A serves a legitimate social purpose, is based on an intelligible differentia and is constitutionally unimpeachable. The debate it provoked was an important one, in allowing the self-determination of values by Singaporeans for their country, and moving the Prime Minister to issue a comprehensive, prudent ministerial statement on law, morality and the homosexuality agenda:

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.<sup>301</sup>

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<sup>300</sup> For a particular perspective of U.S. polarised political debate, see *e.g.*, Dworkin, *supra* note 55. See also the divisive and continuing debates concerning Proposition 8—the constitutional ban on same-sex marriages recently approved in three states of the U.S. (Arizona, California and Florida), *supra* note 281.

<sup>301</sup> PM Lee's Parliamentary Speech, *supra* note 24.

**APPENDIX***Repeal 377A Petition*

*(Text extracted from Singapore Parliamentary Reports, online:*

*<[http://www.parliament.gov.sg/reports/public/hansard/appendices/20071022/SiewKumHong-Petition\(latest\).pdf](http://www.parliament.gov.sg/reports/public/hansard/appendices/20071022/SiewKumHong-Petition(latest).pdf)>)*

**Presented by Siew Kum Hong (Nominated Member)**

**PETITION**

**To the Honourable Members of Parliament, Singapore, in meeting assembled.**

The humble Petition of Mr George Bonaventure Hwang Chor Chee; Dr Stuart Koe Chi Yeow; Ms Tan Joo Hymn and others of like opinion.

**SHOWETH THAT:**

The Penal Code (Amendment) Bill (No. 38 of 2007) (“the Amendment Bill”) will amend Section 377 of the Penal Code, with the result that anal and oral sex between heterosexual male-female couples will be legalized. The result is that the continued existence of Section 377A will prejudice the rights and interests of homosexual and bisexual men, in an unconstitutional manner.

Section 377A is aimed at sex between men, and covers private consensual anal and oral sex between men as well. If and when the Amendment Bill is enacted, there will be no corresponding prohibitions against private consensual anal and oral sex between heterosexual couples. This directly discriminates against homosexual and bisexual men: an act performed by a heterosexual couple is permitted, while the same act performed by a homosexual or bisexual male couple is criminalized. Such discrimination infringes the right of homosexual and bisexual men to equal treatment by and protection before the law, as set out in Article 12(1) of the Constitution of the Republic of Singapore.

Article 12(1) provides “All persons are equal before the law and entitled to the equal protection of the law.” The reason cited by the Government for retaining Section 377A does not pass the requirements for a permissible deviation from Article 12(1).

In the course of public discussions surrounding the Amendment Bill, the Government’s stated rationale for not repealing Section 377A is that Singapore is a conservative society, that the majority of Singaporeans have a negative attitude towards homosexuality, and that retaining Section 377A is necessary to reflect this.

Even if it is true that Singapore is a conservative society and the majority of Singaporeans view homosexuality negatively, the “tyranny of the majority” is precisely what Article 12(1) seeks to protect Singaporeans against. In our view, this stated rationale fails the “rational nexus” test for determining the constitutionality of a deviation from Article 12(1).

Under Singapore law, a departure from Article 12(1) is permitted if and only if it is rationally connected to a legitimate purpose of the statute in question.

According to the Public Consultation Paper on the Proposed Penal Code Amendments issued by the Ministry of Home Affairs dated 8 November 2006, the Penal Code is intended to maintain “a safe and secure society in today’s context”. The Amendment Bill is intended to “bring the Penal Code up-to-date, and make it more effective” in achieving its objective of ensuring safety and security.

The effect of Section 377A is to criminalize certain consensual sexual acts between adults in their own homes. But private sexual conducts of consenting adults do not make Singapore unsafe or less secure.

Furthermore, reflecting the public's conservative attitude towards sex is not one of the stated aims of the Penal Code, or even the Amendment Bill. Yet, the stated objective of Section 377A is to reflect public morality.

Section 377A is therefore not rationally connected with the legitimate aim of the Penal Code.

In any event, we believe that there is no legitimate aim for which Section 377A can be rationally connected with. No harm is done to society when consenting adults have sex in private. Why should it be any different if it is between two men?

The correct basis for regulating the sexual conduct in private between adults should be consent. Indeed, the raft of provisions on sexual conduct introduced by the Amendment Bill make it clear that consent (or the lack thereof) is the touchstone for determining whether sexual conduct between adults should be unlawful.

And yet, Section 377A criminalizes consensual acts between adults. It is therefore an unconstitutional derogation from the guarantee of equality and equal protection encapsulated in Article 12(1) of the Constitution.

Furthermore, if and when the Amendment Bill is enacted, the Penal Code will appear to selectively reflect public morality. It is undisputed that society finds extra-marital sex to be immoral. Yet, the Penal Code does not criminalize such activities.

Indeed, the Amendment Bill even seeks to repeal Section 498 of the Penal Code, which makes it an offence to entice, take away or detain a married woman with the intention of having illicit intercourse with her. The Ministry's explanation is that Section 498 is an archaic offence which is no longer relevant in today's context. But public morality in today's society remains firmly opposed to and disapproving of extra-marital sex.

Throughout history, public morality as a justification for discriminatory action has never stood up over time. In times past and in other countries, public morality has been cited as the basis for legislation to enforce slavery; discrimination against racial and religious minorities; and discrimination against women, including not permitting them to work or to vote.

None of these forms of institutionalized discrimination remain today. Indeed, they are universally recognized as being inconsistent with modern norms, and even abhorrent to today's public morality.

Article 12(1) of the Constitution states the principle simply, but elegantly, "All persons are equal before the law and entitled to the equal protection of the law." We are respectfully requesting that Parliament uphold this fundamental principle, and extend equal protection to all Singaporeans in respect of their private consensual sexual conduct, regardless of their sexual orientation.

By this Petition, the Undersigned pray that Section 377A of the Penal Code (Cap. 224) be repealed.

Dated 6 October 2007

Name: George Bonaventure Hwang Chor Chee Name: Stuart Koe Chi Yeow

Name: Tan Joo Hymn

No. of signatories: 2,341