

CONSTITUTIONAL LAW

377A in the spotlight again

Court of Appeal overturns High Court decision, allows challenge of provision that criminalises sex between men

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SINGAPORE – Declaring the issue to be “of real public interest”, the Court of Appeal has overturned a High Court decision and allowed an application to proceed to challenge the constitutionality of Section 377A of the Penal Code which criminalises sex between men.

In a ruling issued yesterday, which observers believe could reignite a heated debate on the provision, the Court of Appeal — comprising Justice V K Rajah, Justice Andrew Phang and Justice Judith Prakash — referred to Article 12 under the Constitution, which guarantees to all persons equality before the law and equal protection of the law.

Delivering the 106-page written judgment, Justice Rajah said: “We

emphasise that we are not deciding here that Section 377A is inconsistent with Article 12 as that goes to the merits of the Application, but are instead merely deciding that it is arguably so, which suffices for the present appeal on the preliminary issue of whether the Application should be struck out.”

The judge added: “The constitutionality or otherwise of Section 377A is thus of real public interest. We also note that Section 377A has other effects beyond criminal sanctions. One unwanted effect of Section 377A is that it may also make criminals out of victims.”

The application arose after an unemployed man, Tan Eng Hong, 49, was initially charged under Section 377A with performing fellatio on another man in a public toilet at CityLink Mall in 2010. After the application was made by Tan’s lawyer, Mr M Ravi, the Attorney-General’s Chambers (AGC) replaced the charge with one of committing an obscene act in public. Tan and his partner were subsequently fined S\$3,000 under the replaced charge.

Tan’s application to challenge the constitutionality of Section 377A in

the High Court was struck out after the AGC applied to do so. Tan’s appeal against the High Court decision was heard in September last year.

In the Court of Appeal judgment, Justice Rajah said: “Without going into the merits of the Application, we want to acknowledge that in so far as Section 377A in its current form extends to private consensual sexual conduct between adult males, this provision affects the lives of a not insignificant portion of our community in a very real and intimate way.”

He added: “Such persons might plausibly assert that the continued existence of Section 377A in our statute books causes them to be unapprehended felons in the privacy of their homes.”

‘THREAT OF PROSECUTION PERSISTS’ UNDER SECTION 377A

The Attorney-General’s case is there is “no real and credible threat of prosecution” under Section 377A for private consensual sexual acts between two adult males, Justice Rajah noted.

377A in the spotlight

But the judge pointed out that, as long as the provision “remains in the statute books, the threat of prosecution under this section persists”.

“It is uncontroverted that Section 377A is a law which specifically targets sexually-active male homosexuals,” said Justice Rajah.

The judge noted that, according to submissions by the Attorney-General, in instances where stern warnings under Section 377A were issued, “the police do not check for continued compliance with the warnings and the persons concerned are, for all intents and purposes, left alone”.

But Justice Rajah pointed out: “A stern warning is a way of informing the individual who is warned that, if he continues to indulge in the type of conduct circumscribed by Section 377A, leniency may no longer be forthcoming in future and he may well be charged

under Section 377A if he is found engaging in such conduct in the future.”

Justice Rajah also said that ministerial statements made in Parliament indicating the law will not be “proactively” enforced can “comfortably bear a spectrum of meaning”.

Not only do such statements not have the force of law, they also do not bind a future or even the same government, said Justice Rajah, adding that no minister “has gone so far as to state that there will be no enforcement of Section 377A”.

When contacted yesterday, the AGC said it is studying the judgment. The date of the hearing for the application has not been fixed.

Constitutional experts TODAY spoke to noted the significance of the Court of Appeal judgment and expects it to reignite a debate that had erupted during the Government’s review of the Penal Code in 2007.

Singapore Management University’s (SMU) Assistant Professor Jack Lee said: “This will no doubt be seen as a significant step by the applicant and those seeking to have Section 377A invalidated as it’s the first time the Singapore courts will have to decide this



The threat of prosecution persists under Section 377A as long as it remains in the statute books, said Justice Rajah. REUTERS



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issue. However, we’ll have to wait and see what the courts think of the substantive arguments in the case.”

Assistant Professor Eugene Tan, also from SMU’s law faculty, pointed out: “The non-legal question is whether the forthcoming litigation on Section 377A will galvanise the various stakeholders ... to become engaged in the legal dispute.”

He added: “To be sure, contestation and debate are to be expected. The key question is how will it be conducted this time. Will we reach a new consensus?”

*** EXTRACT OF COURT OF APPEAL JUDGMENT**

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Such persons might plausibly assert that the continued existence of Section 377A in our statute books causes them to be unapprehended felons in the privacy of their homes. The constitutionality or otherwise of Section 377A is thus of real public interest.

We also note that Section 377A has other effects beyond criminal sanctions. One unwanted effect of Section 377A is that it may also make criminals out of victims. We will list three illustrations to highlight this point.

First, a man who suffers domestic abuse at the hands of his male partner may be reluctant to report it to the police as police investigations may reveal that he (i.e. the victim of domestic abuse) is guilty of an offence under Section 377A.

Second, if a man who has been sexually assaulted by another man reports this to the police, he may

lay himself open to a Section 377A charge as Section 377A is silent on consent. While a charge in such a scenario may be unlikely, the fear of being charged may be sufficient to deter some victims from coming forward.

Third, lest it is thought that these scenarios are fanciful, we refer to a reported incident where a man who was robbed after having sex with another man reported the theft to the police and received a warning under Section 377A (see “This teacher was caught having sex in public, police tells school”, The New Paper (Feb 21, 2005)).