

Review - Others

Balancing evidence and rhetoric in law reform

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ONE of the controversial issues arising from the recent Penal Code reform exercise was the decision not to repeal Section 377A, which criminalises acts of gross indecency between males.

The controversy was heightened by the fact that 377, which criminalised unnatural offences, including anal and oral sex as well as bestiality, was repealed.

The debate was emotional and occasionally went beyond the bounds of propriety. As the dust settles, we have to deal with the post-reform framework and see what lessons the experience offers for criminal law reform.

Two points deserve attention: First, the need to focus on criminal law principles and the law itself; and next, the need to rely on empirical evidence and not be blindsided by rhetoric.

The background to the reform shows that Parliament was motivated by public outrage that consensual oral sex between heterosexual couples could be a crime. But by repealing 377, Parliament also decriminalised consensual anal sex regardless of whether the partner is male or female.

Without specifically re-enacting an offence to deal with anal sex between males, a lacuna in the law may have been created where private, consensual anal sex between males is unregulated.

Previously, one of the arguments for 377 was that it was necessary to protect males from non-consensual sodomy or male rape, as there was no specific law governing such acts. But that argument is no longer relevant, given the new Section 376(1), which specifically criminalises non-consensual oral and anal sex.

There is an assumption that 377A includes anal sex as part of the definition of gross indecency. However, the legislative history of the two provisions, as well as the existing jurisprudence and prosecutorial policy, suggests that 377A does not include anal sex.

Section 377A was not in the original Penal Code of the Straits Settlements (the precursor to the Singapore Penal Code), but was introduced in 1938 following reforms in England.

During the introduction of the Bill, it was explained that 377A 'makes punishable acts of gross indecency between male persons which do not amount to an unnatural offence within the meaning of 377 of the Code' (*italics added*). Clearly, 377 and 377A were intended to be complementary but mutually exclusive provisions.

The fact that the two provisions are aimed at different acts was highlighted in a Singapore High Court decision, *PP v Kwan Kwong Weng*, where the judge held that 377 was limited to anal sex and bestiality, excluding oral sex, which properly belonged to 377A.

The decision was overturned on appeal, where it was held that 377 could include oral sex in certain serious cases where a higher punishment was warranted. It should be noted that 377 carried a maximum life sentence while 377A has a maximum sentence of two years. While the prosecution had the discretion to prosecute oral sex cases under either 377 or 377A, there is no local authority where anal sex has been prosecuted under 377A.

The crucial question then is whether gross indecency in 377A can be interpreted to include anal sex in the light of the repeal of 377. Arguably, courts should not interpret 377A in this way, as one of the principles of statutory interpretation, particularly in criminal law, is that where there is ambiguity, the penal provision should be interpreted in favour of the accused.

Had Parliament intended to retain the crime of anal sex between males, it should have done so explicitly. Indeed, it did just that with the offence of bestiality, which having existed in the repealed 377 was re-enacted in a new 377B.

There was much rhetoric during the 377A debate about homosexuality contributing to the spread of HIV/Aids and gay men being predisposed to paedophilia. But the available evidence does not support the rhetoric.

It must be emphasised that HIV/Aids is not exclusively a gay disease. According to official UN figures, globally, women account for half of HIV infections and in sub-Saharan Africa, young women account for 75 per cent of such infections. In India, as in Singapore, the main means of transmission is heterosexual intercourse.

While men who have sex with men are among the high-risk categories in some countries, studies show that criminalisation of sex between men increases the risk of HIV infection as it, among other things, drives such activity underground and impedes access to health care, HIV screening and safe sex campaigns.

That 377 and 377A impede the fight against the spread of HIV/Aids has been affirmed locally in a recent paper by Dr Roy Chan, the director of the National Skin Centre and an expert on sexually transmitted diseases.

In terms of the alleged link between homosexuality and paedophilia, the American Psychological Association points to a study of child sex abuse cases which shows that

under 1 per cent of the molesters identify themselves as gay, and that almost 90 per cent of the molesters have had documented heterosexual relationships.

A court in Texas, in rejecting the testimony of an expert who argued that homosexuals were more likely to be paedophiles, found that the data had been distorted, and described the testimony as fraudulent and misleading.

Following a review of available empirical evidence, a research fellow at the Australian Institute of Family Studies has concluded that the link between paedophilia and homosexuality is 'more a societal myth than a reality'.

Criminal law reform on the basis of ideology and rhetoric, rather than evidence and reality, is fraught with danger. In the case of 377A, there is now an ambiguity that is unlikely to be resolved. Parliament will have no desire to clarify the law by enacting specific laws and, given that 377A will not be proactively enforced, courts may not have the opportunity to interpret 377A in the post-reform era.

We are left with a criminal law that makes no sense and which may in fact be harmful to our efforts to contain the spread of Aids as well as to combat child sex abuse.

This predicament is largely due to the fact that we took our eyes off the ball during the debate: Instead of focusing on the proper function and ambit of criminal law, we focused on homosexuality. In sports parlance, we played the man rather than the ball.

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