Singapore Journal of Legal Studies
[2012] 457–466

THE POWER OF LEGAL PROCESSES AND SECTION 377A OF THE *PENAL CODE*

Tan Eng Hong v. Attorney-General[1]

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I. INTRODUCTION

On 21 August 2012, the Court of Appeal issued a landmark decision that elucidates the conditions under which a person has legal standing to challenge legislation for being in violation of a constitutional right in Singapore. In allowing the appeal and finding that the appellant in the case of *Tan Eng Hong* had *locus standi* to argue that s. 377A of the *Penal Code*[2] infringes art. 12 of the *Constitution of the Republic of Singapore*[3], the decision enabled the fate of a contentious criminal provision to be determined by a full hearing. As doctrinal analysis of this decision will undoubtedly be forthcoming and abundant, this commentary will examine its implications from a different angle.

Drawing from socio-legal perspectives on the power of law, I offer the following analysis: *Tan Eng Hong* highlights the power of legal processes to mobilise *away* potential legal disputes: some controversies do not develop into legal disputes, not because they do not exist, but because legal procedures have constructed it out of the courts' domain. By reversing the High Court's decision, the Court of Appeal seized an opportunity for the judiciary to take a stand on an issue that challenges fundamental liberties, one that Parliament sidestepped in 2007 with a compromising policy to retain s. 377A as a reflection of "mainstream" values, but not to enforce it in consensual, private situations, out of sympathy for its injustices.[4] Otherwise, the

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1 [2012] 4 S.L.R. 476, [2012] SGCA 45 [*Tan Eng Hong*].

2 Cap. 224, 2008 Rev. Ed. Sing., s. 377A. Section 377A reads:

> 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.

3 *Constitution of the Republic of Singapore* (1999 Rev. Ed.), art. 12 [*Constitution*].

4 Sing., *Parliamentary Debates,* vol. 83, col. 2354 at 2469 (23 Oct. 2007) (Mr. Lee Hsien Loong). However, Prime Minister Lee's point makes assumptions about what "mainstream" values are and the social processes through which they are contested and claimed, while neglecting the counter-majoritarian nature of rights that should be protected by the courts (though he referred to advice from the Attorney-General that the provision was not unconstitutional).

Court would have effectively endorsed the legitimate use of discretionary powers by law enforcement and the prosecution in a way that results in their inadvertent control over the development of constitutional law—which and how laws are constitutionally challenged—when such decisions should rightfully reside with the judiciary in exercise of its judicial power.[5] That would have been an especially undesirable result—no matter how unintentionally—in s. 377A's case, given that the legislature had chosen a political compromise, thus leaving the judiciary as the only formal institutional route to address social injustices stemming from the impugned provision.

After setting out the background of the case and the judgment, I first explain two relevant perspectives in socio-legal research on the power of law. The first concerns the mobilisation of bias by the law to facilitate or suppress disputes from being heard and resolved via the judiciary. The second relates to the punishing power of law in the criminal justice process, before an accused person ever has his or her guilt determined in open court. Based on these perspectives, I then analyse how *Tan Eng Hong* highlights the legal power and potential implications that police and prosecutorial discretion bear on the development of constitutional jurisprudence under the inevitable guise and legitimacy provided by legal processes.

II. Background of the Case and the Judgment Below

On 2 September 2010, Tan was charged under s. 377A for having oral sex on 9 March 2010 with another man in the restroom of a shopping mall. On 24 September 2010, Tan filed an Originating Summons to challenge the constitutionality of the provision on the ground that it violated, among others, arts. 9 and 12 of the *Constitution* respectively on the right to life and liberty and right to equality.[6] However, after being investigated on the basis of s. 377A for almost seven months, on 15 October 2010, the Attorney-General substituted the charge to one of public obscenity under s. 294(a) of the *Penal Code*,[7] and then moved to strike out Tan's Originating Summons. The Assistant Registrar granted the strike-out application on 7 December 2010 under O. 18 r. 19 of the *Rules of Court*,[8] which allows pleadings to be struck out on the grounds that "(a) it discloses no reasonable cause of action; (b) it is scandalous, frivolous or vexatious; (c) it may prejudice, embarrass or delay the fair trial of the action; or (d) it is otherwise an abuse of the process of the Court". Tan pleaded guilty to the s. 294(a) charge a week later, and was fined $3,000.[9] Meanwhile, Tan appealed the Assistant Registrar's strikeout decision to the High Court, where it was affirmed by Justice Lai Siu Chu.

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5 *Supra* note 3, art. 93.

6 *Supra* note 3, arts. 9, 12.

7 *Supra* note 2, s. 294. Section 294 states:

> Whoever, to the annoyance of others —
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> (a) does any obscene act in any public place; or
>
> (b) sings, recites or utters any obscene song, ballad or words in or near any public place,
>
> shall be punished with imprisonment for a term which may extend to 3 months, or with fine, or with both.

8 Cap. 322, R. 5, 2006 Rev. Ed. Sing., O. 18 r. 19.

9 The charge in relation to Tan's co-accused was similarly substituted, and the co-accused also pleaded guilty under s. 294(a).

The High Court decision essentially turned on whether Tan had *locus standi,* and demonstrated "real controversy" for the court to resolve.[10] This two-part criterion comes from a set of requirements, articulated in *Karaha Bodas Co. LLC v. Pertamina Energy Trading Ltd.*,[11] which a court should consider when determining whether to grant declaratory relief, such as that claimed by Tan. Justice Lai determined that Tan had *locus standi* by satisfying the "sufficient interest" test laid out in *Chan Hiang Leng Colin v. Minister for Information and the Arts*.[12] She emphasised that actual prosecution was not necessary to fulfill the test, and that it could be met by showing the presence of an unconstitutional law or the "spectre of future prosecution",[13] accepting the Hong Kong Court of Appeal decision of *Leung T C William Roy v. Secretary for Justice*.[14]

However, Justice Lai found that Tan failed to show "real controversy", because the facts concerning prosecution under s. 377A "were merely hypothetical".[15] She distinguished *William Leung* on several grounds, but the most crucial one was based on there being "nothing at stake" for Tan,[16] since he had pleaded guilty to a lesser charge. This is curious, since it appears to contradict her position on *locus standi* where she recognised that future possibilities of prosecution—which would be hypothetical—were sufficient to show infringement of constitutional rights, which should be a real *and* important controversy for the court to address.[17] Tan appealed to the Court of Appeal.

III. Judgment of the Court of Appeal

In a 106-page opinion, the Court of Appeal considered, among others, the following issues relevant to this commentary:[18]

(1) The applicable test for *locus standi* in cases involving constitutional rights;
(2) Whether any constitutional rights were at stake in Tan's case; and
(3) Whether there existed a "real controversy", which forms part of the *locus standi* test clarified earlier in the judgment.

The Court held that Tan indeed had *locus standi* to seek declaratory relief on the constitutionality of s. 377A, as he had fulfilled the three-part test laid down in *Karaha Bodas*. It found that:[19]

(a) Tan met the requirement that a personal right must be in violation, as constitutional rights are personal, and he demonstrated such violation flowing from the reasoning in (b);

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[10] *Tan Eng Hong v. Attorney-General* [2011] 3 S.L.R. 320, [2011] SGHC 56 [*Tan Eng Hong HC*].
[11] [2006] 1 S.L.R.(R.) 112, [2005] SGCA 47 [*Karaha Bodas*].
[12] [1996] 1 S.L.R.(R.) 294, [1996] SGCA 7.
[13] *Tan Eng Hong HC*, *supra* note 10 at para. 20.
[14] [2006] 4 H.K.L.R.D. 211, [2006] HKCU 1585 [*William Leung*].
[15] *Tan Eng Hong HC*, *supra* note 10 at para. 25.
[16] *Ibid.* at para. 26.
[17] The Court of Appeal similarly noted such contradictions by Justice Lai in its judgment: see *Tan Eng Hong*, *supra* note 1 at paras. 15, 16.
[18] *Tan Eng Hong*, *supra* note 1.
[19] *Ibid*.

(b) Tan fulfilled the requirement of having a "real interest" in bringing the action as he had "sufficient interest", having made out *prima facie* that there was a violation of his constitutional rights. Such violation may arise from the existence of an allegedly unconstitutional law and/or a real credible threat of prosecution under an allegedly unconstitutional law. In Tan's case, the Court further held that he had fulfilled both requirements. On the existence of alleged constitutional violations, the Court accepted the argument that s. 377A was arguably inconsistent with art. 12 of the *Constitution*.[20]

(c) He showed the existence of a real controversy arising from a combination of two factors. First, he was on the outset arrested, investigated, detained and charged exclusively under s. 377A, and the substitution of the charge by s. 294(a) did not excise any potential infringement—arising from the potential unconstitutionality of s. 377A—of his right to life and liberty save for detention "in accordance with law" within the meaning of art. 9(1) of the *Constitution*.[21] Second, he faced a "real and credible threat of prosecution" as the Attorney-General confirmed the police practice of issuing stern warnings to others who had to be first detained and investigated under s. 377A, and hence prosecution could not be taken as mere spectre.[22]

While the Court appears unclear as to whether both elements under "real controversy" must be fulfilled in future cases, it did find that *lis* arose at the point of detention under the impugned provision, indicating that being charged was not a necessary condition.[23] Further, its emphases on the very existence of allegedly unconstitutional law and the "real and credible threat of prosecution" suggest that actual arrest and detention are also not required (though they would strengthen the case for making out *lis*). This point is supported by the Court's finding that no individual should have to break the law to access justice,[24] regardless of whether the contravening act results in actions taken by law enforcement or prosecution, which lie beyond the individual's control.

IV. Law and the Mobilisation of Bias

One of the key aspects of the Court's decision hinges on the determination that a claimant need not to be charged, much less prosecuted, under a particular provision in order to qualify for seeking declaratory relief on the constitutional status of that law. As we saw in the Court's judgment, one of its core concerns lies with whether real controversy can stem from the threat of prosecution or an arguable violation of constitutional rights, rather than actual prosecution. This point goes to the heart of my analysis about how this case avoided unintentionally letting the police and Attorney-General control the development of constitutional jurisprudence.

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[20] The Court of Appeal found that art. 9 was only engaged by the arrest, detention and investigation under an allegedly unconstitutional law. It did not find any violation of art. 14, for which the arguments were not elaborated in full by the Appellant anyway.

[21] *Supra* note 3, art. 9(1).

[22] *Tan Eng Hong*, *supra* note 1 at paras. 183, 184.

[23] *Ibid.* at para. 164.

[24] *Ibid.* at para. 178.

Sociology generally identifies at least four ways in which sources of power assume form and exert themselves. For this commentary, we are most concerned with what is often known as the second form or dimension of power ("P2"),[25] or the "mobilisation of bias".[26] According to sociological studies on P2, power can take effect even before a dispute is adjudicated and its outcome determined. The party with weaker resources, financial or otherwise, may be discouraged from trying to seek redress for his or her grievance, or may believe that his or her interests would not prevail in the dispute, and thus decide not to enter into dispute with the party against whom he or she would have made claims. Further, rules of a formal process may prevent one party from even initiating the process and bringing up the dispute against the other party. In other words, power extends beyond the parties actually involved in resolving their disputes; it also prevents some grievances from being contested as disputes in particular formal arenas in the first place. The implication is that an aggrieved party by default loses out by not being able to air his or her grievance in a formal arena that could have provided redress.

Law, as a source of power, can exert itself by taking on the different forms of power, including P2. Through the lenses of P2, one line of research in socio-legal studies has examined extensively the power of rules and procedures in the litigation process to shape an area of jurisprudence, even skew its development in favour of particular social groups or interests. In his classic article, Marc Galanter divides litigating parties into one-shotters and repeat players.[27] One-shotters, such as aggrieved employees or citizens, usually litigate single lawsuits in which they are personally implicated, and usually have fewer resources than repeat players to endure the tedious and consuming process of litigation. For example, they may not have the money to hire lawyers for a lawsuit that could take months, even years, or afford the time to go to court as they still need to work, or care for their families. On the other hand, repeat players, such as big corporations and government agencies, litigate multiple lawsuits in the same area of law over and over, and have more resources to sustain litigation. Repeat players, therefore, enjoy advantages to outlast one-shotters when the two meet in dispute. They are able to push the cases they want to challenge all the way through trials and appeals. For cases that appear more contentious or less favourable to them, they are able to pressure one-shotters into settling out of court, by enticing one-shotters with generous settlements or lesser penalties; between immediate enticements and the consuming process of litigation coupled with unknown outcomes, one-shotters often opt for the former.

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[25] Steven Lukes, *Power: A Radical View* (New York: Palgrave Macmillan, 1974); John Gaventa, *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley* (Urbana: University of Illinois Press, 1980); Peter Digeser, "The Fourth Face of Power" (1992) 54 The Journal of Politics 977. The first type of power is exerted through obvious force or constraints; the third type of power prevents conflict from becoming obvious and thus arise as conflict (whereas conflict is observable in the second type of power, P2, but is prevented from being contested); and, the fourth type of power draws from Foucaultian notions of power in which power creates subjects, who participate in their own creation and thus perpetuate power through their own participation.

[26] Elmer Eric Schattschneider, *The Semi-Sovereign People: A Realist's View of Democracy in America* (Hinsdale, Illinois: Dryden Press, 1975).

[27] Marc Galanter, "Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 L. & Society Rev. 95.

Over time, repeat players are able to influence legal development in the directions that they prefer through procedures and discretion provided by law. This is because judicial decisions, especially appellate ones, in common law jurisdictions wield strong influence over legal development. In particular, disputes that are adjudicated by the courts and reported are the cases that are studied, cited, applied and followed. What this conversely means is that the influence of conflicts that do not appear in front of judges in open court—the guilty pleas and settlements—and do not wind up in law reports are excluded.

Building on Galanter's arguments, Catherine Albiston's empirical study on the litigation process finds such consequences to be a "paradox of losing by winning".[28] Individual one-shotters "win" when they settle their individual disputes out of court, or plead to lesser charges with lighter penalties. However, as a whole for the relevant areas of law, one-shotters lose. The disputes that most exemplify the typical factual scenarios for which the law clearly intended, or contain controversies that affect their interests (such as s. 377A in this case), are weeded out of the litigation process by virtue of plea bargains and settlements. Hence, these disputes are left out of the historical records of common law jurisprudence.[29]

Conversely, the cases that are tried, appealed and reported are often the type that *repeat players* want to litigate, desiring to shape the law in their favour in those specific areas, or determine they have a good chance of doing so. In wielding such influence and power, however, repeat players are doing nothing illegal, for they are making use of legal procedures or exercising discretion to which they are lawfully entitled. Therein lies the inadvertently insidious power of procedures and discretion: certain conflicts are reticent in courtrooms, law reports and law books not because they are absent from reality, but because procedures and discretion possess inherent capacity to mobilise *away* certain conflicts, by preventing them from being heard and addressed in and by formal institutions of law.

V. The Criminal Justice Process and the Power to Punish

In addition, the legal procedures through which criminal justice is administered, such as arrest, pre-trial detention, interrogation and investigation, wield penal power in themselves, long before an accused person ever faces trial in an open court to determine his or her guilt, leading to sentencing and legal sanctions, that is, what is formally recognised as punishment under law. In his classic work, Malcolm Feeley calls such phenomena, "the process is the punishment".[30] Feeley's empirical study reveals that relatively few lower court defendants made use of due process protections newly put in place in the United States at the time, such as the right to an attorney. Feeley attributed such findings to the actual costs imposed by the criminal justice process on both the innocent and guilty, bearing in mind that guilt has yet to be determined at these stages: arrest, pre-trial detention, and prosecution incur direct

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[28] Catherine Albiston, "The Rule of Law and the Litigation Process: The Paradox of Losing by Winning" (1999) 33 L. & Society Rev. 869.

[29] Catherine Albiston, *Institutional Inequality and the Mobilization of the Family and Medical Leave Act: Rights on Leave* (New York: Cambridge University Press, 2010).

[30] Malcom Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (New York: Russell Sage Foundation, 1979).

monetary expenses, such as bail and attorney fees, as well as indirect ones, such as lost work time. Hence, defendants usually choose to shorten their entanglement with the process by pleading guilty or skipping their court dates entirely. In fact, no defendant in Feeley's study elected for trial.

Pecuniary costs aside, the discomfort of being arrested and placed in pre-trial detention are forms of physical punishment that are inflicted on both the innocent and guilty, prior to conviction and sentencing.[31] Interrogation and investigation may also subject the defendant to verbal abuse and mental stress, if not psychological abuse. In *Tan Eng Hong*, the Court of Appeal repeatedly pointed out that the effects of s. 377A were inflicted as early as the process of detention.[32] Such treatments and sufferings echo the old police saying, "you can beat the rap, but you can't beat the ride".[33] Informal punishment—and to some, informal justice—is already meted out long before open trial can take place, and all according to legally sanctioned conduct and procedures.

VI. The Power of Legal Procedures and Process in *Tan Eng Hong*

These insights from socio-legal studies inform the significance of *Tan Eng Hong*. From the perspective of law's power to effect mobilisation of bias or P2, the Attorney-General is a repeat player, whereas Tan resembles a one-shotter. If the Court had ruled in favour of the Attorney-General, it would have meant that the executive arm of government, not the judiciary, now determines the constitutional fate of s. 377A—by obstructing it from being settled by the courts, thus maintaining its current existence. Such an unintended consequence would inevitably vest more power within the prosecution and police than constitutionally provided.

Instead, this decision rightly prevents the police and prosecution from having their cake and eating it. No longer can they detain, investigate, and even initially charge, a defendant under s. 377A, and then proceed to trial with a less contentious provision, without also living with the possibility that the prosecution may have to answer to s. 377A's constitutionality in open court. The Attorney-General is not bound by the informal policy of non-enforcement and enjoys constitutionally conferred powers of prosecutorial discretion.[34] In fact, during oral arguments, the Attorney-General even alluded to the informal policy of non-enforcement by stating that it would not impose a s. 377A charge, *but* coupled it with a separate argument that the existence and current validity of s. 377A allows the police to conduct lawful investigations

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[31] Jennifer Earl, "'You Can Beat the Rap, But You Can't Beat the Ride': Bringing Arrests Back into Research on Repression" (2005) 26 Research in Social Movements, Conflicts & Change 101.

[32] *Supra* note 1 at para. 110, 122.

[33] *Supra* note 31.

[34] Prosecutorial discretion is a constitutionally conferred power under art. 35(8) of the *Constitution*. Since the decisions of *Law Society of Singapore v. Tan Guat Neo Phyllis* [2008] 2 S.L.R.(R.) 239, [2007] SGHC 207 and *Ramalingam Ravinthran v. Attorney-General* [2012] 2 S.L.R. 49, [2012] SGCA 2, though it is clear that prosecutorial discretion may still be subject to judicial review, there exist a strong presumption of good faith and a challenging threshold of proving that the prosecution somehow had taken into account biased and irrelevant considerations. The line of cases on judicial review of prosecutorial discretion also endorses a wide berth for the prosecution to choose the offenses with which to charge a particular defendant, and to charge defendants involved in the same case with charges of different severity.

under the provision.[35] A decision in their favour would have allowed the police and prosecution to continue to enjoy the coercive force of s. 377A, such as by leveraging on its severity and stigma[36] to obtain a guilty plea on a lesser charge, without also accepting the consequences of possibly having to defend its validity. The penalty under s. 377A is significantly more severe than a provision such as s. 294(a): a maximum of two years' imprisonment under s. 377A compared to three months under s. 294(a). An accused person, therefore, may feel compelled to plead guilty to the lesser charge rather than risk a s. 377A trial; hence, the prosecution would be able to obtain a "win" by using s. 377A but without ever having to brave its challenge in open court. Or, they could use it as a threat to coerce certain future behaviour by issuing stern warnings after detaining and investigating individuals engaged in consensual conduct caught by the provision.[37]

The reasons for withdrawing a s. 377A charge may not be malicious or *mala fide*, and may be as mundane as efficiency and time management. But the point is that, if the Court had ruled the opposite, it would have ironically ceded power to the executive branch to set the course of constitutional development. The police and prosecution would effectively have had legal impunity to control the judiciary's exercise of its constitutionally endowed powers to determine the application and constitutionality of s. 377A (or any other controversial law in the future). For Tan and other gay men who were or may be apprehended, threatened and investigated with s. 377A but short of ever proceeding to trial with it, they would have been silenced from ever speaking out against s. 377A in the historical annals of common law. Meanwhile, they would have to continue facing the prospects of "the process is the punishment" if ever arrested or investigated (though eventually not charged or tried) under s. 377A. For example, by way of bail requirements, the prosecution would be able to punish the appellant with s. 377A and then withdraw the charge before ever proceeding to open court. In this case, Tan had to pay a bail of $8,000 as he was initially charged under s. 377A: an amount that might not have been imposed by a lesser charge such as that of s. 294(a), had that been the original charge.[38]

While the police and prosecution ought to retain discretionary power over which cases to pursue and deploy valuable resources, the prerogative to shape Singapore's constitutional jurisprudence should not be removed prematurely from the judiciary by endowing their powers with the ability to do so. It is particularly significant for cases such as *Tan Eng Hong* for two connected reasons: it is a case in which a one-shotter has been able to amass sufficient resources to ameliorate somewhat the severe imbalance of power opposite a repeat player as formidable as the Attorney-General; hence, it presents a pivotal opportunity for the courts to consider a serious question of constitutionality upon which politicians refused to act decisively in 2007.

First, unlike previous one-shotters persecuted with s. 377A—meaning they may have been investigated and threatened with this provision, but not eventually charged

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[35] *Tan Eng Hong*, *supra* note 1 (Respondents' oral argument).

[36] *Ibid*. at para. 184.

[37] *Ibid*. at para. 183.

[38] *Ibid*. (Appellant's further arguments at para. 53). Further, as pointed out by the appellant's further arguments, the Subordinate Courts' Bail Guidelines stipulate the minimum bail for s. 294 as $2,000 and s. 377A as $5,000: see The Subordinate Courts of Singapore, "Subordinate Courts' Bail Guidelines", online: The Subordinate Courts of Singapore <http://app.subcourts.gov.sg/Data/Files/File/BailGuidelines.pdf> at 7.

under it—Tan is a one-shotter who was finally able to improve his disadvantages, and create an opportune moment to challenge s. 377A, one that may not surface readily in the future. With his legal counsel, arguably a repeat player,[39] and the altruistic support of friends,[40] Tan has managed to sustain this case all the way through the Court of Appeal. Galanter specifically highlights that the imbalance of power weighed against one-shotters can be addressed by increasing their access to the quality and quantity of legal services, especially with lawyers who are repeat players in particular areas of law. Further, he points out that one-shotters can be reorganised and aggregated into repeat players, such as unions and representation by interest-sponsor groups, allowing them to act with more coordination, play for long-term strategy, and benefit from better legal services.[41] In the local context, although such formal organisations are unavailable, particularly since gay advocacy groups have been banned under the *Societies Act*,[42] informal support and personal friendships have at least contributed to Tan's improved situation.

Second, despite acknowledgements of injustice, the reluctance of Parliament to repeal the provision legislatively and its articulation of non-enforcement in 2007 means that the Judiciary is the only other branch of government left to determine the constitutional fate of s. 377A. The Court of Appeal pronounced unequivocally that the "principle of access to justice calls for nothing less" than to allow Tan to present full substantive arguments on the law's invalidity,[43] and acknowledged the harmful effects of the law's very existence.[44] Prime Minister Lee, in his Parliamentary speech following the petition seeking its repeal in 2007, noted that gays in Singapore face a tougher environment compared to their straight-identified fellow citizens and said, "We should not make it harder than it already is for them to grow up and to live in a society where they are different from most Singaporeans".[45] Although he insisted on s. 377A's constitutional validity,[46] the non-enforcement policy toward private, consensual situations inherently doubts the fairness of penalising such conduct. Shortly after the High Court of Delhi ruled that a similar provision in *The Indian Penal Code*[47] ought to be read down to exclude the criminalisation of consensual, private conduct,[48] then Law Minister K. Shanmugam stated to the media: "We have the law. We say it won't be enforced… And the way the society

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[39] Tan's counsel, M. Ravi, has represented appellants in recent constitutional law cases, including *Yong Vui Kong v. Public Prosecutor* [2010] 3 S.L.R. 489, [2010] SGCA 20, and *Shadrake Alan v. Attorney-General* [2011] 3 S.L.R. 778, [2011] SGCA 26.

[40] Personal communication with informants from my larger research project in Lynette Chua, "Pragmatic Resistance, Law, and Social Movements in Authoritarian States: The Case of Gay Collective Action in Singapore" (2012) 46(4) L. & Society Rev. 713 ["Pragmatic Resistance, Law, and Social Movements in Authoritarian States"]. Book manuscript under contract with Temple University Press.

[41] *Supra* note 27.

[42] Cap. 311, 1985 Rev. Ed. Sing. On the banning of formal gay organisations under the *Societies Act,* see Lynette Chua, "Pragmatic Resistance, Law, and Social Movements in Authoritarian States" at *supra* note 40.

[43] *Supra* note 1 at para. 186.

[44] *Ibid.* at para. 184.

[45] *Supra* note 4.

[46] *Ibid.* However, no public document on this advice has been made available.

[47] *The Indian Penal Code* (No. 45 of 1860), s. 377.

[48] *Naz Foundation v. Govt. of NCT of Delhi* [2009] 160 D.L.T. 277 (High Court of Delhi). The decision is now under appeal, see *supra* note 1 at para. 30.

is going, *we don't think it's fair* for us to prosecute people who say that they are homosexual".[49] Non-enforcement is essentially a political compromise to appease what a single party-dominated Parliament perceives to be the danger of jeopardising electoral support for the party if it were to repeal s. 377A, while brokering sympathy for the gay community. Politically, such a position is understandable. No political party wants to lose votes, whether the perception is baseless or not. But whether this is a fair and just outcome, and whether it violates fundamental constitutional liberties are separate matters that fall upon the judiciary to confront and decide. Even if s. 377A ultimately should remain a constitutionally valid law, the prerogative should remain with the courts to declare it so.

VII. Conclusion

Law is not only shaped by what appears before the court and is adjudicated. It is shaped also by what the court does not hear and see, conflicts that are prevented from entering the courtroom, suppressed by seemingly innocuous and legitimate application of procedures and discretionary power. What appears to be procedurally in order, however, may not be appropriate for Singapore's constitutional future and its citizens' fundamental liberties. As considered above, socio-legal research finds that the litigation process can end up influencing the law more in favour of the "haves": repeat players such as large corporations and government agencies.

In other words, the power of procedures to control law's development legitimately and lawfully by the book can sanction a powerful party such as the Attorney-General to exclude the less powerful, everyday citizens, from ever raising certain kinds of conflict in the courts, and allowing their outcomes the opportunity to influence and shape the law in ways that more accurately reflects their struggles. Unfortunately, it is the reality and inadequacy of the adversarial legal system and litigation process. But it is dangerous for constitutional jurisprudence, when fundamental liberties meant to protect everyday citizens may be violated, and courts are constitutionally designated as the arbiter. It is even more acute for this case and s. 377A, when Parliament has retreated into inaction with the non-enforcement policy, and cut off legislative repeal as a foreseeably viable route. Whatever the outcome of an eventual, substantive challenge of s. 377A may be, the Court rightly decided in *Tan Eng Hong* that the grievances of Singapore's gay citizens, such as Tan, should at least be narrated, heard, and preserved in the records of its constitutional jurisprudence.[50]

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[49] Y.N. Hoe, "Singapore Won't Repeal Homosexual Sex Law" *Channel NewsAsia* (05 July 2009), online: Channel NewsAsia <http://www.channelnewsasia.com/stories/singaporelocalnews/view/440540/1/.html> [emphasis added].

[50] As this case commentary went to press, a gay couple, Lim Meng Suang and Kenneth Chee Mun-Leon, filed an Originating Summons in the High Court to challenge s. 377A as being in violation of art. 12 of the *Constitution* (Originating Summons, 30 November 2012).