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Larger issues at stake in unnatural sex debate

TAN SEOW HON

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The recent debate about the criminal prohibition of oral sex provides an occasion for considering larger, related issues. However prevalent the practice of oral sex and however archaic Section 377 of the Penal Code seems to those pushing for its repeal, the arguments offered have tended to take a piecemeal approach and display an ignorance of or disregard for the larger interests at stake.

First, the debate over such a law, whether in its applicability to oral sex, sodomy or bestiality, is hardly novel. The abolition of sodomy laws was famously debated by legal philosophers Lord Devlin and H.L.A. Hart in the 1960s, and the issue of legislating morals by, among others, John Stuart Mill more than a century ago.

Mill articulated what has become the liberal's mantra: 'The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.'

One argument offered for the repeal of Section 377 is that morals are relative or not discoverable by humans. Hence, legislating morals is 'wrong' as it imposes mere personal preferences of one group on all of society. But the premise on which this is based is highly controversial. The argument also contradicts itself: an assertion that something is 'wrong' invokes morality, the very objectivity, discoverability and knowability of which are being denied.

The Nov 10 commentary in The Straits Times, 'Oral sex law demeans the individual', cites the United States Supreme Court's view that 'liberty presumes an autonomy of self that includes certain intimate conduct'. The writer, Mr Paul Tan, asserts that to 'say that an individual may not choose how to express himself sexually within a relationship is to demean the inherent value of the individual.' This argument invokes objective principles of morality (that human beings are equal, have value, and are free to choose) even while such objectivity is denied.

Mr Tan offered no substantive vision of humanity to justify his views, but if he did, he would have ended up doing what he wished to avoid, namely resort to arguments based on the nature of Man. He claims to be 'especially suspicious of arguments that resort to 'nature' ', but there is thus no escaping arguments that resort to 'nature'. His view is but one such contending argument.

As for the idea that such arguments have a bad history of justifying xenophobia and Nazism, German law professor Gustav Radbruch pointed out that it was legal positivism's refusal to acknowledge law's necessary connection with morality that allowed someone like Hitler to prevail. Natural-law arguments seem to offer the best justification for post-Holocaust war crime tribunals.

PRIVATE ACTS

ANOTHER argument for repeal suggests, following Mill's argument, that private consensual acts between adults, not harming others, should not be the subject of legislation restricting personal liberty.

This argument assumes a certain definition of harm.

If X has consented to Y killing him, that consent is irrelevant to the prosecution of Y for murder. In murder, a physical harm with irrevocable consequences is committed.

If 'harm' includes every act contrary to nature, and if sexual behaviour such as sodomy is considered such an act, consent becomes irrelevant. Mill's principle, even if adopted, does not foreclose argument. Elucidation of what amounts to 'harm' is critical.

In any case, Mill's principle is not consistently applied in statutory law. Princeton professor Robert George cites the example of legislation requiring motorcyclists to wear helmets. Laws like these should be repealed, if acts not harming others should never be the subject of legislation.

Following the Mill argument, it also could be argued that suicide pacts, assisted suicide, bestial sexual behaviour in which the person considers sexual intimacy with an animal intrinsic to his dignity, and incest between consenting adults, are all private matters which should not be law's concern.

This is not to say that these behaviours can be equated to one another, but merely to point out that adopting Mill's principle has far-reaching consequences.

Liberalism suggests that in a pluralistic society where individuals have different visions of the good life, each should be left to pursue his conception of the good. Liberalism claims to be neutral among conceptions of the good, but fails in two respects.

First, a liberal society is not completely neutral among all conceptions of the good. Individuals are subject to institutional and social influences. Political structures enabling certain views to prevail in civil society limit the range of conceptions of the good that the individual might pursue.

Second, critics of liberalism suggest that it does not have a neutral starting point. That each individual should be allowed to pursue his own conception of the good is a distinct conceptualisation of the good that cuts out competing conceptualisations such as the natural-law view that there exists a good common to all humans.

Mr Tan, for instance, argues that pluralism requires the recognition of the reasonable expectations and rights of all, citing the example of abortion: 'Whether or not foetal rights exist, or whether they are the mother's to trump, we leave these decisions to the individual, because no one else can make these decisions for her.'

These statements are assertions. On what basis is a foetus not a person? He accuses natural-law arguments of leading to atrocities against humans, but one worries that his view could pave the way for the negation of the rights of newborn babies, handicapped persons, the intellectually challenged, and minority groups.

The consequences of any repeal or amendment of Section 377 must also be considered. In any society, and all the more in a highly structured society like Singapore, laws are often an indication of moral norms, or at least of what is acceptable.

When long-existing laws rooted in morality are repealed, the effect on members of society who are hitherto neutral, and on impressionable youths, may be disastrous. The withdrawal of a criminal sanction is likely to be perceived as an endorsement of behaviour once subject to the sanction.

PUBLIC OPINION

THE allusion to the number of people apparently supporting repeal is naive. Apparent support can be due to the 'cascade effect' which University of Chicago law professor Cass Sunstein writes extensively about.

A large-scale social movement can result from the behaviour of a few early movers who are followed by many others. In an informational cascade, people cease to rely on their own information and opinion, and decide based on the signals conveyed by others. In a reputational cascade, people think they know what is right but silence themselves to maintain the good opinion of others, even when they privately abhor the views they believe are held by others.

Some identify the term 'cosmopolitan' with the ways of the West, 'tolerance' with the acceptance and, indeed, embrace of every lifestyle, and 'democracy' and 'openness' with sexual permissiveness, whether manifested in a flourishing of the arts in this area, or bringing in magazines of a certain nature.

There seems, unfortunately, to be a peculiarly Singaporean fear of being seen to be narrow-minded. This has the ironic effect of making us unthinking, the articulation of competing perspectives suppressed for fear of being labelled bigoted or unreasonable. Genuine debate is thus foreclosed.

An important aspect of freedom lies in a deliberative democracy that engages as many of its citizens as possible in dialogue. But this is not necessarily a society that embraces every position just because it is a minority or morally permissive one.

In the end, we do not want to be seen as readily changing our positions on matters such as sexual morality, without proper consideration of the myriad of issues. It would be sad if we became libertine in matters of sexual morality, but remained indifferent to leading what philosophers call an examined life. Would we have imbibed only the worst of 'progressive' societies?