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Signposting as a principle in lawmaking

Laws, even when not enforced, shape the moral ecology of the society we live in

Tan Seow Hon

For The Straits Times

In the debate over Section 377A of the Penal Code, which criminalises private and public acts of gross indecency between male persons, it is often said that there is no point keeping the law if the Government does not intend to enforce it.

More accurately, during the parliamentary debates on the Penal Code review in 2007, then Senior Minister of State Ho Peng Kee said that the police had not been proactively enforcing Section 377A and this stance would continue.

Prime Minister Lee Hsien Loong noted then that "everybody knows" where the gay bars and clubs were

and they did not have to go underground but were left alone.

The suggestion that a law will not be proactively enforced presumably means that state resources will not be put into wiping out the conduct addressed by the section, in contrast to, say, the Central Narcotics Bureau and the police carrying out operations to bust activities related to drugs.

Strictly, this does not amount to a representation that it will never be enforced.

Even so, those concerned with the rule of law might suggest that there should be congruence between laws as announced and official action, as was advocated by the late Harvard professor Lon Fuller.

When a law is made, it gives rise to legitimate expectations of people that if an act is done, particular consequences would follow.

However, Prof Fuller's concern from the rule of law point of view was really with scenarios such as officials in corrupt nations not enforcing a law against a scion who bribed them, or those with mistaken interpretations of the law.

He did not address the different

issue of what the legitimate functions of law were – whether, for example, laws could serve to enforce moral norms or serve a signposting function.

LEGITIMATE FUNCTION OF LAWS

Some argue that alternative provisions exist for the types of conduct the Government chooses to prosecute, so Section 377A is unnecessary. For example, in the 2014 case of Mr Tan Eng Hong, who brought a constitutional challenge of Section 377A, Mr Tan was eventually charged under Section 294(a) of the Penal Code for committing an obscene act in a public place. Supporters of Section 377A suggest, however, that it remains necessary for signposting.

If a longstanding law is abolished, it would send the signal, as PM Lee noted in 2007, that "our stance has changed". Section 377A opponents seek repeal precisely because the law serves a signalling purpose that homosexual acts are not morally acceptable, and it follows that activists for change cannot propose more rights for gay couples, for example, that marriage in

Singapore be extended to same-sex couples.

Opponents seek repeal precisely in the hope that decriminalisation would serve to render the conduct more acceptable.

Can laws legitimately serve a signposting function? Princeton philosopher Robert George observed in his book, *Making Men Moral*, that laws profoundly affect societal notions of what is "morally acceptable, forbidden and required".

Laws (and governmental decisions) shape the moral ecology within which people live and make their choices. Take the then Media Development Authority's (MDA) decision in 2013 to ban extramarital dating website Ashley Madison. If such agencies were allowed to freely advertise on public transport, children growing up in such a milieu might develop quite different beliefs about what is normal or acceptable conduct.

The fact that not all immorality is criminalised is not reason in itself for repealing any law that does criminalise certain acts some consider immoral. There may exist

overriding prudential reasons for not subjecting a particular act to criminal sanctions.

For instance, the norm against extramarital affairs is upheld through MDA's decision, rather than criminalisation.

A prison sentence would only further alienate the straying spouse and possibly decrease the chances of marital reconciliation, while a monetary penalty might be trivial to a rich person.

'SLIPPERY SLOPE' CONCERNS

Supporters of Section 377A point to developments in other countries that follow upon the repeal of similar laws. Some of these developments were in fact facilitated by what the repeal of such laws entailed. Repeal involves rejection of the principle on which Section 377A is based and the adoption of a contrary principle.

Those who oppose Section 377A may do so for various reasons, but they cannot logically claim to be moral sceptics – who believe there is no such thing as moral truth or justice – as that would defeat their claim that it is unjust to treat homosexual acts in this manner.

If there were no moral truth, it would not be unjust to criminalise homosexual acts.

Opponents of Section 377A suggest criminalising homosexual acts is unjust as individuals have the right to be left alone, in particular "the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity", as Justice Harry Blackmun put it when he dissented in the United States Supreme Court case of *Bowers v Hardwick* which upheld a similar law in 1986.

Does repeal mean that individuals have the right to decide for themselves what forms of sexual activity to engage in, as long as they are consensual and cause no harm to others? If so, arguably, the government cannot in principle criminalise adult consensual incest.

Section 377A also assumes the wrongness of some sexual acts and that there are good reasons to criminalise them.

If repeal proceeds on the further basis that homosexual acts are not wrong, more might follow upon repeal. For if such acts are morally acceptable, should not society then allow such lifestyles to be promoted?

If so, school curricula might have to change to normalise homosexual lifestyles. In many countries, alternative family structures and other rights of homosexual couples have been recognised.

And if repeal is argued on the basis that it is wrong to discriminate against gay couples, it might give rise to what has happened elsewhere, where refusing to offer certain services that in one's view are tantamount to celebrating or endorsing the homosexual lifestyle could result in lawsuits on grounds of discrimination.

As such, it would be unrealistic and imprudent to address the question of repeal of Section 377A alone without attending to the question of whether one is prepared for further developments.

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A Pink Dot event at Hong Lim Park in July. The writer warns that repealing Section 377A may give rise to more demands for social acceptance and recognition of homosexual lifestyles, and that "it would be unrealistic and imprudent to address the question of repeal of Section 377A alone without attending to the question of whether one is prepared for further developments". ST FILE PHOTO