




377A: What Does It Really Constitute?


Dr Jack Tsen-Ta Lee, School of Law, SMU

Outline




- History of s 377A of the Penal Code.
- *Lim Meng Suang v AG* (Court of Appeal, 2014) – “extra-legal” considerations.
- If the courts have no role to play, what now?

History of s 377A




- Precursor of s 377A was s 11 of the Criminal Law Amendment Act 1885 (c 69, UK).
- Section 11 introduced by MP Henry Labouchère at a very late stage when the bill was discussed in Parliament.
- His reasons for doing so remain *unclear*. The bill was actually concerned with suppressing prostitution and preventing sexual assault against young women.


History of s 377A




- However, Labouchère was the founding editor of *Truth* magazine, which often featured stories exposing corruption and moral degeneration.
- Prominent people prosecuted under s 11 include the author Oscar Wilde and the mathematician Alan Turing (pardoned posthumously in 2013).
- Consensual homosexual acts were *decriminalized* in the UK by law in 1967.

History of s 377A


- Section 377A, which is identical to s 11, was introduced into the Penal Code by the Penal Code (Amendment) Ordinance 1938 (No 12 of 1938).
- In *Lim Meng Suang*, to find out the objective behind s 377A, the CA considered various historical documents, including the speech of the Straits Settlements Attorney-General in the Legislative Council in 1938.

History of s 377A

- The CA concluded that s 377A was introduced to **address the issue of immorality generally**, not merely male prostitution (as had been suggested by the appellants’ solicitors).

“Extra-legal” Considerations

- In the course of its judgment, the CA said that it could not take into account “**extra-legal**” considerations.
- These might be relevant for Parliament to examine when deciding whether or not s 377A should be repealed, but they were **not relevant** when deciding if the provision violates Art 12 of the Constitution.

“Extra-legal” Considerations

- These “extra-legal” considerations included:
 - ‘*Tyranny of the majority*’ – majoritarian views should not always trump minority rights. CA: by itself, this is not a practical argument. Minority can only argue that it should not be suppressed by majority if what majority does is unconstitutional. However, applying the reasonable classification test, s 377A is not unconstitutional.

“Extra-legal” Considerations

- *Absence of Harm* – the appellants’ argument that their conduct caused no harm to others reflected the Hart–Devlin debate.
 - Lord Devlin felt it was permissible for the law to sanction *private acts* to preserve the moral fabric of society.
 - Prof Herbert Hart disagreed, taking the view that since people’s *individual liberty is inviolate*, societal morality cannot justify sanctioning private conduct unless harm would result to others.

“Extra-legal” Considerations

- CA: “[T]here are no clear answers – not even at a theoretical level and, *a fortiori*, not at a practical one. This is not surprising. Interesting as these issues are as a matter of jurisprudence and legal philosophy, they are issues that lie quintessentially within the sphere of *the legislature*. The balancing of rights on a broad philosophical basis is not a task that the court can – or ought to – undertake.”

“Extra-legal” Considerations

- *Immutability and/or Intractable Difficulty of Change* – appellants argued that scientific evidence shows that homosexuality is biologically determined and thus unchangeable or very difficult to change, and thus it is unfair to discriminate against gay people. CA said that there was *no definitive evidence* of this, and in any event this was a matter for the legislature to consider.

“Extra-legal” Considerations

- *Safeguarding Public Health* – the AG had not relied on this as a justification for holding that s 377A is constitutional, and the CA said this was correct because the issue was again one that only the legislature could consider.
- The consequence of the CA’s approach is to *greatly narrow the role of the courts* when it comes to assessing the constitutionality of laws and government actions.

“Extra-legal” Considerations



- Essentially, the courts will only find that a law violates the rights to equality and equal protection if there is a **complete mismatch** between the objective of the law and the class of persons affected by the law.
- For example, if the object of the law is to reduce public drunkenness, but the law is made applicable only to non-citizens.

“Extra-legal” Considerations



- Fundamental question: what is the **role of the courts** in constitutional cases?
- Was the CA in *Lim Meng Suang* right in suggesting that the courts should only strike down laws and acts that are completely absurd?
- Or should the courts play a stronger role in assessing the constitutionality of laws and acts, to the extent of taking into account “extra-legal” considerations?

“Extra-legal” Considerations



- An alternative theory is that the judiciary, as a branch of government co-equal to the executive and legislature, should engage in a **constitutional dialogue** with the political branches.
- It is appropriate for the courts to express an independent, substantive view of whether the objective of a law is legitimate (which the CA declined to do in *Lim Meng Suang*).

“Extra-legal” Considerations



- If the courts hold the law to be void, the ball bounces back into the legislature’s court – the legislature may either decide to accept the court’s ruling, or to seek to overturn it by amending the Constitution.
- The amendment process requires a parliamentary debate, which means that the issue will be fully discussed in the light of the expert views expressed by the courts.

“Extra-legal” Considerations

- The parliamentary debate may also stimulate **public debate** outside Parliament, and the views expressed may be taken into consideration by legislators.
- Ultimately, the electorate has the opportunity to judge politicians on the issue at the **ballot box**.
- Based on *Lim Meng Suang*, this is not how the courts currently see their role.

What Now?

- After *Lim Meng Suang*, challenging s 377A as unconstitutional before the courts will not succeed, until perhaps there is a generational change in the judiciary and indications that their views on the courts’ role has shifted.
- Will Parliament take steps to repeal s 377A? The Government said “no” in 2007, but confirmed it would not “proactively enforce” the law.

What Now?

- In the short term, convincing the Government to repeal s 377A will probably be difficult. There is no strong incentive for it to risk upsetting what appears to be a largely conservative majority.

What Now?

- Perhaps efforts can be directed at ensuring **effective equality of treatment and equal protection** in daily life.
- For example:
 - If harassment should occur, take action under the Protection from Harassment Act 2014 (No 17 of 2014). A message would be sent if the courts hold that gay people are also protected by the Act.

What Now?

WHAT IS HARASSMENT?

HARASSMENT TAKES MANY FORMS.

SOME EXAMPLES INCLUDE:

- SEXUAL HARASSMENT
- ONLINE HARASSMENT
- STALKING
- BULLYING

FOR MORE DETAILS ON WHAT AMOUNTS TO HARASSMENT, YOU CAN REFER TO THE PROTECTION FROM HARASSMENT ACT 2014 WHICH CAN BE FOUND AT STATUTES.SG/CGN36

HOW CAN YOU DEAL WITH HARASSMENT?

PROTECT YOURSELF

- CALMLY AND FIRMLY TELL THE HARASSER TO STOP
- BREAK OFF ALL CONTACT WITH THE HARASSER
- PROTECT YOUR PERSONAL SAFETY AND INFORMATION

GET HELP

- FAMILY AND FRIENDS
- RELIGIOUS OR COMMUNITY LEADERS
- AUTHORITIES IN SCHOOL OR WORKPLACE
- SOCIAL ORGANISATIONS SUCH AS ASSOCIATION OF WOMEN FOR ACTION AND RESEARCH, AND COALITION AGAINST BULLYING FOR CHILDREN AND YOUTH
- MEDIATION AT THE COMMUNITY MEDIATION CENTRE

LEGAL OPTIONS

- APPLY FOR A PROTECTION ORDER
- SUE FOR DAMAGES
- MAKE A POLICE REPORT OR MAGISTRATE'S COMPLAINT

CONSIDER GETTING A LAWYER TO ADVISE YOU FIRST. IF YOU HAVE FINANCIAL DIFFICULTIES, YOU MAY BE ELIGIBLE FOR LEGAL AID. YOU MAY APPROACH THE LEGAL AID BUREAU FOR MORE INFORMATION.

MORE INFORMATION

ASSOCIATION OF WOMEN FOR ACTION AND RESEARCH
WWW.AWAR.SG OR 9779 0392

LEGAL AID BUREAU
WWW.LAW.SG/LEGAL OR 800 225 9529

COALITION AGAINST BULLYING FOR CHILDREN AND YOUTH
WWW.CABUY.SG OR 800 225 9529

SINGAPORE POLICE FORCE
WWW.POLICE.SG OR 800 225 9500

STATE COURTS
WWW.JUDICIALS.SG OR 800 547 6428

COMMUNITY MEDIATION CENTRE
WWW.COMMUNITYMEDIATION.SG OR 800 225 9529

What Now?

PROTECTION ORDERS

PROTECTION FROM HARASSMENT ACT 2014

WHAT CAN A PROTECTION ORDER DO?

- Order the harasser to stop the harassing behaviour
- Stop the spread of harassing communication by other persons who received the communication

The court may also order parties to attend counselling or mediation. In urgent cases, you may be able to get an **Expedited Protection Order**.

HOW TO APPLY FOR A PROTECTION ORDER?

APPLY → INFORM → COURT HEARING

STEP 1: APPLY

- Go to the **Crime Registry, Harassment Counter** (Level 1 of State Courts), to submit a **Formal court application** to bring on Original Summons and an affidavit.

TIP These forms have to be supervised. You can download the forms from www.singaporecourts.gov.sg and complete them beforehand. Alternatively, you may use a **self-help kiosk** located in the Crime Registry to type the forms. You may wish to bring along your own printer (due to space constraints).

Please bring along:

- Your identity card or other forms of personal identification, and
- Evidence of the harassing act (e.g. witness, photographs, police and/or medical reports, printouts of email, blog, website, photographs). Documents must be translated into English by certified translators and evidence in electronic form should be stored in read-only CD-ROM to facilitate when submitting to Court.

- You will be asked to **appear before a Judge**, who will consider your application.
- If you applied for an **Expedited Protection Order**, it may be heard at the time or on a later date if the necessary conditions are satisfied. The court may grant you the order.
- The Judge will direct you to **serve the application** on the person you are harassing. You may need to serve the application on people who are also harassing the harassed person. The Judge will tell you how you should serve the application, and when you should do so.
- The Judge will also give a **Pre-Trial Conference date** for all parties to attend.

STEP 2: INFORM

- You must **serve the application** (and **Expedited Protection Order**, if granted) on the respondent persons as directed by the court. The Expedited Protection Order takes effect **only after it has been successfully served**.
- After serving the court documents, you have to file an **affidavit of service** of the Crime Registry to confirm that service was done and to show proof (e.g. a printout of the email if the documents were served by email).
- The other parties may then file an **affidavit in reply** to your application.

STEP 3: COURT HEARING

- If the court files a **Pre-Trial Conference (PTC)**, all parties must attend the PTC. The Judge may refer parties for **mediation** to explore an amicable settlement, or for **counselling** if the case settles immediately, the case is concluded.
- If the case cannot be settled, a hearing date will be given to you. On the **day of the hearing**, you must bring all your evidence.
- If the Judge grants a **Protection Order**, you must:
 - Serve it on the other parties as directed by the Judge.
 - Where the Protection Order involves the removal of offending communication, a **notification** must be filed and thereafter served with the Order.
 - File an **affidavit of service** of the Crime Registry.
- The Protection Order **takes effect** only after it has been successfully served.
- The **breach** of a Protection Order is a serious matter and can amount to a criminal offence with a maximum fine of \$50,000 or up to 6 months' imprisonment or both.

FEES

Filing each Original Summons	\$500
Attending each Affidavit Court Hearing	Starts from \$50
Pre-trial Conference	Starts from \$50
Hearing	\$200 per day, after the 5th day

MORE INFORMATION STATE COURTS WWW.STATECOURTS.SG OR 800 547 6428

CRIME REGISTRY, HARASSMENT COUNTER WWW.CRIME-REGISTRY.SG OR 800 225 9529

What Now?

– Work towards equality in the workplace. For instance, it was reported on 31 January 2015 that the NTUC is pushing for a set of workplace harassment guidelines to be agreed by unions, employers and the Government by the end of the year:

<http://www.channelnewsasia.com/news/singapore/guidelines-to-help/1628782.html>. The guidelines will encourage employers to have policies on preventing and dealing with complaints of harassment.

What Now?

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Guidelines to help employers deal with workplace harassment in the works: NTUC

By Imelda Saad, Channel NewsAsia
POSTED: 31 Jan 2015 21:32
UPDATED: 31 Jan 2015 23:38


MADE SINGAPORE NEWS

The Labour Movement is pushing for a set of tripartite guidelines to help employers deal with workplace harassment following a new law passed last year.


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What Now?



- Can steps be taken to ensure that the proposed tripartite guidelines apply equally regardless of sexual orientation?
- Are new laws needed to guard against discrimination and hate speech? If so, should sexual orientation be included within their protection?



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ASSOCIATION OF WOMEN
FOR ACTION AND RESEARCH
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LEGAL AID BUREAU
WWW.MLAW.GOV.SG/LAB OR 1800 225 5529

COALITION AGAINST BULLYING
FOR CHILDREN AND YOUTH
WWW.CABCY.ORG.SG OR 6223 3122

SINGAPORE POLICE FORCE
WWW.POLICE.GOV.SG OR 1800 255 0000

COMMUNITY MEDIATION CENTRE
WWW.MLAW.GOV.SG/CMC OR 1800 225 5529

STATE COURTS
WWW.STATECOURTS.GOV.SG OR 1800 587 8423

PROTECTION ORDERS

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WHAT CAN A PROTECTION ORDER DO?

- Order the harasser to stop the harassing behaviour.
- Stop the spread of harassing communication by other persons who republish the communication.



The court may also order parties to attend counselling or mediation. In urgent cases, you may be able to get an **Expedited Protection Order**.

HOW TO APPLY FOR A PROTECTION ORDER?



STEP 1: APPLY



- Go to the **Crime Registry, Harassment Counter** (Level 1 of State Courts), to submit a **formal court application** by filing an Originating Summons and an affirmed affidavit.

TIP These forms have to be typewritten. You can download the forms from www.statecourts.gov.sg, and complete them beforehand. Alternatively, you may use a **self-help kiosk** located in the Crime Registry to type the forms. You may wish to bring along your own thumb-drive to save your work.

Please bring along:

- Your Identity Card or other forms of personal identification: and
- Evidence of the harassing act (e.g. witnesses, photographs, police and/or medical reports, printouts of emails, blogs, websites, photographs). Documents must be translated into English by certified translators and evidence in electronic form should be stored in read-only CD-ROM in duplicate when submitting to Court.

- You will be asked to **appear before a Judge**, who will consider your application.
- If you applied for an **Expedited Protection Order**, it may be heard at this time or on a later date. If the necessary conditions are satisfied, the court may grant you the order.
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FEES

Filing each Originating Summons	\$100
Affirming each Affidavit (with 1 exhibit)	Starts from \$15
Filing each Affidavit	Starts from \$10
Hearing	\$250 per day after the first day