

2016

Legacies of Exceptionalism and the Future of Gay Rights in Singapore

Stewart Chang

University of Nevada, Las Vegas -- William S. Boyd School of Law

Follow this and additional works at: <http://scholars.law.unlv.edu/facpub>

 Part of the [Human Rights Law Commons](#), [International Law Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Chang, Stewart, "Legacies of Exceptionalism and the Future of Gay Rights in Singapore" (2016). *Scholarly Works*. 1104.
<http://scholars.law.unlv.edu/facpub/1104>

This Article is brought to you by the Scholarly Commons @ UNLV Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact david.mcclure@unlv.edu.

LEGACIES OF EXCEPTIONALISM AND THE FUTURE OF GAY RIGHTS IN SINGAPORE



Stewart Chang*

This article analyses how the ties between Singaporean exceptionalism and its Western colonial and neocolonial roots explain why the Singapore's legislature and judiciary have retained its anti-sodomy statute under s 377A of the Penal Code. After decolonisation, restrictive laws pertaining to sexual conduct, originally justified by colonial lawmakers as bringing superior Western moral order to the uncivilised Asian territories, evolved into an "Asian values" moral exceptionalism that distinguished Singapore from the overly liberal West. This exceptionalism, however, also illustrates an Oedipal angst of the Singaporean Government to overcome and overtake the old colonial father in its attempt to redefine itself as an authoritarian state father, which manifests in a Freudian cycle of repression of taboo and retreat to normative family structures. Rather than embrace the normativity found in families, this article suggests alternative strategies of subaltern counterpublics to effectuate gay rights in Singapore.

1. Introduction

This article analyses how the recent retention and upholding of Singapore's anti-sodomy statute, s 377A of the Penal Code, by the legislature and judiciary are rooted in postcolonial and neocolonial legacies of exceptionalism and what they mean for the future of gay rights in Singapore. In 2007, the Singapore Parliament denied a petition to have s 377A removed during a reform of the Penal Code. Subsequently, two cases were brought before the Singapore High Court challenging the constitutionality of s 377A, *Tan Eng Hong v Attorney-General*¹ and *Lim Meng Suang v Attorney-General*.² Both constitutional challenges lost at the High Court level in 2013, and were consolidated on appeal. In October 2014, the Court of Appeals also upheld the constitutionality

* Assistant Professor of Law, Whittier Law School and Assistant Professor of English (by courtesy), Whittier College.

¹ [2013] 4 SLR 1059.

² [2013] SGHC 73.

of s 377A,³ and the law currently remains valid. The societal morals justification for upholding the statute, both at the legislative and judicial levels, reveals ties between Singapore's postcolonial sensibility and its history of colonial domination which must be considered and overcome in order to effectively advocate for gay rights in the future.

The first of these cases began in March 2010, when Tan Eng Hong was arrested for having oral sex with another man in a public restroom stall in a shopping mall and charged under s 377A. Tan immediately challenged the constitutionality of s 377A as violations of equal protection, liberty and the freedom to associate. In October 2010, the Attorney General dropped the s 377A charge against Tan, charged him instead under the public obscenity statute, and moved to dismiss the constitutional challenge to s 377A for lack of standing.⁴ The trial court granted the Attorney General's motion to dismiss, and the Singapore High Court affirmed the trial court decision on appeal.⁵ In August 2012, however, the Singapore Court of Appeal overturned the decision, ruling that Tan had standing to sue based on the "real and credible threat of prosecution under an allegedly unconstitutional law".⁶ The Court of Appeals remanded the case to the High Court to rule on the equal protection and liberty challenges, though it sustained the dismissal of the freedom of association challenge.⁷ This ruling on Tan's standing to sue despite the dropped charges allowed Gary Lim Meng Suang and Kenneth Chee Mun-Leon, a committed gay couple who had been together for over 15 years, to file their own challenge to s 377A in November 2012,⁸ even though neither had been arrested or charged under this section. They primarily argued that s 377A was a violation of their equal protection and liberty rights. Lim and Chee, however, contended that their liberty interest was primarily an issue of individual privacy and autonomy, which was different from the general liberty argument Tan was making in his challenge.⁹

Though filed after Tan's original challenge, the High Court ruled on *Lim* first in April 2013. Judge Quentin Loh issued the decision, which upheld s 377A as not violating equal protection, finding that the regulation served a valid state purpose of maintaining the moral conservatism of Singaporean society.¹⁰ The High Court ruled on *Tan* in October 2013,

³ *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26.

⁴ *Tan Eng Hong* (n 1 above), [6]–[7].

⁵ *Ibid.*, [8].

⁶ *Tan Eng Hong v Attorney-General* [2012] SGCA 45, [115].

⁷ *Ibid.*, [130].

⁸ *Lim Meng Suang* (n 2 above).

⁹ *Lim Meng Suang* (n 3 above), [43].

¹⁰ *Lim Meng Suang v Attorney-General* [2013] SGHC 138, [138].

with a decision also written by Judge Quentin Loh that upheld the constitutionality of s 377A. After the ruling, Tan Eng Hong applied to have his case consolidated with the Lim and Chee appeal.¹¹ The Court of Appeal did consolidate the appeals and treat them together.¹² In October 2014, the Court of Appeal rejected all arguments by Tan, Lim and Chee, and upheld the High Court decisions, saying that the original intent of the law to preserve societal morality remained valid, and that change should be handled by the legislature rather than by the judiciary.¹³

On the one hand, retention of s 377A by Singapore's Government structures represents a postcolonial affirmation of "Asian values" as a regional exception from observing Western-dominated international norms regarding individual freedoms. The Singapore Government sees itself as a state father, who instills good cultural values in its citizen children through authoritarian discipline for their own benefit, as juxtaposed to Western democracies that are figured as overly permissive fathers in respect to their citizens who then become decadent and unruly. In this respect, retention of s 377A represents Singapore's autonomy and resistance to neocolonial Western pressures that seek to dilute the morals of the nation. On the other hand, retention of s 377A also represents a retreat to old colonial structures that foster stability, which are regarded as the foundation of Singapore's exceptional growth in the region, as the judicial decisions to uphold s 377A defer to the intent of Parliament to maintain the will of the former colonial lawmaker and its methods of stabilisation and control.

Singapore also sees itself as an exception within the Southeast Asian region due to its neo-liberal economic development and ties to the West. When Singapore first became an independent nation in 1965, the country was in a very precarious economic state. The new People's Action Party (PAP) Government, under the leadership of Lee Kuan Yew, chose to reject socialism and embrace capitalism in order to attract foreign investment, resulting in rapid economic growth. To accomplish this, Singapore deployed a hybridised form of democracy that partially embraces Western principles that promoted accelerated economic expansion, but with heavy restrictions on individual civil liberties

¹¹ *Lim Meng Suang* (n 3 above), [18]; see also Terry Xu, "S377A—Tan Eng Hong Will Have His Day in Court" *The Online Citizen* (10 October 2013, 2:27 PM), available at <http://www.theonlinecitizen.com/2013/10/s377a-tan-eng-hong-will-have-his-day-in-court/>.

¹² *Lim Meng Suang* (n 3 above), [18]; see also Selina Lum, "Appeals of Two Section 377A Challenges Will Be Heard Together" *The Straits Times* (10 October 2013, 4:39 PM), available at <http://www.straitstimes.com/breaking-news/singapore/story/appeals-two-section-377a-challenges-will-be-heard-together-20131010?page=2#sthash.QXH1W3rFdpuF>.

¹³ *Lim Meng Suang* (n 3 above), [171], [176].

that are more characteristic of the East as to maintain social stability and protect that economic growth. For example, Singapore kept its commercial laws unchanged from the colonial era to promote economic development,¹⁴ but in the areas of criminal law, constitutional law and administrative law, Singapore reformatted the laws to reflect Asian values, using Confucian models of population control and public order.¹⁵ Thus, Singapore exceptionalism remains strongly linked to legacies of colonialism and Western influence. Ultimately, retention of s 377A represents a paradoxical resistance against neocolonialism through the upholding of an old colonial law, which reveals the colonial paternalistic specter behind the Asian values justification.

2. The Evolution of s 377A from a Colonial Regulation to an Expression of Postcolonial Asian Values

The British Colonial Government first implemented anti-sodomy regulations in Singapore in 1871 with s 377 of the Penal Code of the Straits Settlement, the colonial version of the Britain's Buggery Act. The statute had been imported across the colonies, beginning with India, to regulate sexuality of colonial subjects and ensure normativity of colonial families. Native populations were demonised as sexually licentious and therefore posed a risk to the integrity of the white colonisers.¹⁶ However, s 377 neither differentiated between men and women, nor between heterosexuals and homosexuals. In 1885, British Parliament enacted the Labouchere Amendment to the criminal code in England, which specifically targeted acts between men. The Labouchere Amendment was subsequently brought to the Straits Settlement in 1938 with s 377A. Attorney General Charles Gough Howell argued that the amendment was necessary to specifically address a rash of male homosexual conduct.¹⁷ Howell also discussed the inadequacy of s 377 as it stood to address the problem of male homosexual conduct, and the necessity of extending enforcement to private as well as public conduct. During decolonisation, Singapore retained both ss 377 and 377A when the Legislative Council

¹⁴ Chua Beng Huat, *Communitarian Ideology and Democracy in Singapore* (London: Routledge, 1995) p 59.

¹⁵ Li-ann Thio, "Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore" (2002) 20 *UCLA Pac Basin LJ* 1, 8.

¹⁶ Sujitha Subramanian, "The Indian Supreme Court Ruling in *Koushal v Naz*: Judicial Deference or Judicial Abdication?" (2015) 47 *Geo Wash Int'l L Rev* 711, 724; George Baylon Radics, "Decolonizing Singapore's Sex Laws: Tracing Section 377A of Singapore's Penal Code" (2013) 45 *Colum Hum Rts L Rev* 57, 61–63.

¹⁷ *Lim Meng Suang* (n 3 above), [119].

established the Penal Code. These laws would remain unchanged for several decades.

In 2007, the Singapore Parliament reformed the Penal Code and eliminated s 377.¹⁸ The reason for this change was because societal values had changed regarding consensual oral and anal sex between heterosexual adults.¹⁹ A petition to repeal s 377A was also considered but ultimately did not pass, though not without extensive debate.²⁰ During the Parliamentary debate to repeal s 377A, Prime Minister Lee Hsien Loong proposed a compromise where s 377A would remain the law, but unofficially the Government would not proactively enforce it against private consensual sexual conduct.²¹ In his speech, he affirmed that Singapore was a conservative society with traditional views on family, different from the West.²² He also noted that although other parts of the world were becoming increasingly accepting of same-sex relationships, Singapore was different, and he made a renewed appeal to Asian values as a point of resistance against Western influence in the area of public morality, as his father Lee Kuan Yew had done in the past. He stated:

“Singapore is basically a conservative society. The family is the basic building block of our society ... And by ‘family’ in Singapore, we mean one man one woman, marrying, having children and bringing up children within that framework of a stable family unit ... It is not so in other countries, particularly in the West, anymore, but it is here”.²³

Years prior, former Prime Minister Lee Kuan Yew had joined other Southeast Asian leaders in resisting pressures to conform to Western-dominated international norms, which he considered neocolonial.²⁴ Lee proposed that allowing individual freedoms prevalent in liberal democracies was not a luxury that poor, postcolonial, developing countries could afford; rather, strict authoritarian rule was a more effective means of achieving economic progress and securing the welfare of the populace.²⁵ Thus, Singapore exercises paternalism as a state father who must protect its citizen children from freedoms that could be potentially

¹⁸ Singapore Parliamentary Debates, Official Report (22 October 2007), vol 83, col 2175.

¹⁹ *Ibid.*

²⁰ *Ibid.*, col 2121.

²¹ Singapore Parliamentary Debates, Official Report (23 October 2007), vol 83, cols 2469–2472.

²² Singapore Parliamentary Debates (n 18 above), cols 2397–2398 (Lee Hsien Loong, Prime Minister and Minister for Finance).

²³ *Ibid.*

²⁴ Wiktor Osiatynski, “Human Rights for the 21st Century” (2000) *St Louis-Warsaw Transatlantic LJ* 29, 38.

²⁵ Molly Elgin, “Asian Values: A New Model for Development?” (2009) 10(2) *Stanford J East Asian Affairs* 135, 136.

harmful for their own good.²⁶ In this respect, Singapore engages in a form of exceptionalism by limiting freedoms such as free speech²⁷ and association²⁸ that are otherwise deemed fundamental by the international community. Singapore exceptionalism to international human rights somewhat resembles American exceptionalism, where the United States views itself as a leader in determining standards for the international community yet exempt from adhering to those standards.²⁹ American exceptionalism derives from a sense of moral superiority,³⁰ where the United States views itself as a leader in human rights with the privilege of evaluating other countries while remaining exempt from scrutiny.³¹ Singapore bases its exception to international standards on a similar belief in the moral superiority of Asian values, in contrast to the overly permissive nature of liberalism upon which much of international human rights are based.³² Thus, Singapore aligns itself with a regional Asian moral code which values communitarianism over individualism, where the good of the many outweigh the needs of the few, and the sacrifice of individual freedoms ensures the survival of the entire population as a nation. Authoritarian rule is a manifestation of a regional Asian style of governance that should remain untouched by the West.

3. Sexual Regulations and Legacies of Western Exceptionalism

Though largely abandoned following the Asian economic crisis in the 2000s, remnants of Asian values persisted within Singapore exceptionalism as an expression of independence and autonomy from Western influence which once dominated the region through colonial power. On the one hand, Singapore distinguished itself as exceptional from the West as an

²⁶ Geraldine Heng and Janadas Devan, "State Fatherhood: The Politics of Nationalism, Sexuality, and Race in Singapore" in Andrew Parker et al. (eds), *Nationalisms and Sexualities* (1992) pp 343, 343–364.

²⁷ Constitution of the Republic of Singapore 9 August 1965, pt IV, §14.

²⁸ Public Order Act, 2009, c 257A, pt II, §5 (Sing); Aihwa Ong, *Flexible Citizenship: The Cultural Logics of Transnationality* (Durham, NC: Duke University Press, 1999).

²⁹ Natsu Taylor Saito, "Human Rights, American Exceptionalism, and the Stories We Tell" (2009) 23 *Emory Int'l L Rev* 41, 42.

³⁰ Steven G. Calabresi, "A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law (2006) 86 *BU L Rev* 1335; Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* (New York: WW Norton & Co., 1996) p 18.

³¹ See Michael Ignatieff, "Introduction: American Exceptionalism and Human Rights" in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (2005) pp 1, 3; Aaron X Fellmeth, *Leading from (A Bit) Behind: The United States and International Human Rights Law* (2015) 40 *NC J Int'l L & Com Reg* 977.

³² See Laurence Wai-Teng Leong, From "'Asian Values' to Singapore Exceptionalism" in Leena Avonius and Damien Kingsbury (eds), *Human Rights in Asia: A Reassessment of the Asian Values Debate* (2008) pp 121, 133.

independently successful Asian country that was able to evolve differently from the liberal democratic model. In his strategy for economic development, Lee Kuan Yew engaged Singapore in a period of neo-Confucianism and re-Sinification, which promoted Asian communitarianism and a sense of family over Western individualism as vital to national success.³³ Singaporean national identity became tied to the metaphor of a traditional Asian family, with the Government as authoritarian father and the citizenry as obedient children. Limitations on individual freedoms pronounced by the state father were for the good of the family, ensuring stability and protecting it from outside corruption. The survival and welfare of the nation required strict parenting models of the East rather than permissive parenting models of the West. Neo-Confucianism and re-Sinification were also intended to resurrect cultural nationalism in response to past dilution of ethnic culture during the colonial era and continuing pressures to adopt Western individualism during Singapore's industrialisation.³⁴

On the other hand, Singapore also sees itself as exceptional within Southeast Asia. Although geographically located in Southeast Asia, Singapore regards itself as, and in fact is, more developed than other nations in the region.³⁵ Singapore achieved this exceptional standing because of its embrace of Western capitalism and was subsequently accepted by the West. Many of its authoritarian policies are geared towards maintaining this Westernised economic exceptionalism. Thus, Singapore exhibits a hybrid of exceptionalism in its relationship to the West and to Asia.³⁶ Singapore keeps both East and West at a distance in its public international dealings. It is a Southeast Asian country unlike other Southeast Asian countries for its appeal to Western capitalistic ideologies, and yet because of its Asianness, it is a democracy unlike other democracies in the West. In this respect, Singapore has been characterised as an illiberal democracy, where Asian values and the fragility of Singapore's capitalist expansion was played up in order to justify and calcify authoritarian restrictions for the sake of stability.³⁷ Moral superiority of the culture is paired with the vulnerability of its economic superiority to justify the exceptional state.

³³ Chua Beng Huat, "Culture, Multiracialism, and National Identity in Singapore" in Kuan-Hsing Chen (ed), *Trajectories: Inter-Asia Cultural Studies* (1998) pp 186–205, 197; see also Aihwa Ong (n 28 above), p 69.

³⁴ Arif Dirlik, "Critical Reflections on 'Chinese Capitalism' as Paradigm (1997) 3(3) *Identities: Global Studies in Culture and Power* 303, 306; see also Arif Dirlik, *Confucius in the Borderlands: Global Capitalism and Reinvention of Confucianism* (1995) 22 *Boundary* 229, 239.

³⁵ Eric C Thompson, "Singaporean Exceptionalism and Its Implications for ASEAN Regionalism" (2006) 28(2) *Contemporary Southeast Asia* 183.

³⁶ Leong Yew, *Asianism and the Politics of Regional Consciousness in Singapore* (London and New York: Routledge, 2013).

³⁷ Jothie Rajah, *Authoritarian Rule of Law: Legislation, Discourse and Legitimacy in Singapore* (New York: Cambridge University Press, 2012) pp 270–271.

Singapore exceptionalism, however, also raises the specter of British exceptionalism that was previously deployed to justify conquest and empire.³⁸ British exceptionalism operated as a similar form of nationalism where England initially distinguished itself from the rest of Europe in its method of government to justify its superior position as an empire of destiny.³⁹ This sentiment continued through World War II,⁴⁰ and into the era of decolonisation; British exceptionalism survives even into the present day with Great Britain's selective exemption from the European Union. Like other forms of exceptionalism, British exceptionalism is premised on the belief in cultural moral superiority. During the colonial era, British exceptionalism manifested in the paternalistic enterprise of empire, where conquest was justified as bringing British enlightenment to savage populations.⁴¹ Imperial rule was justified through a metaphor of paternalism, with the image of the authoritarian white father disciplining native children into the ways of civilisation.⁴² In order to accomplish this, the government also engaged in the larger European colonial practice where the settler government disempowers and supplants the native father in the colonised social structure to become the dominant colonial father.⁴³

In order to maintain this hierarchy, British colonial governors were concerned with maintaining purity of the white colonial family; as Durba Ghosh notes, the possibility of "interracial sex and families disrupted the social and racial fabric of colonialism and complicated the state's claims as a protector of paternal rights".⁴⁴ As miscegenation with natives became a growing concern in the colonies,⁴⁵ the native population was increasingly demonised as decadent threats to the decency of white settler families. Thus, the Colonial Government imported Victorian norms toward sexuality into the colonies. The settler population needed to be protected from contamination by the native culture, both genetically and morally.

³⁸ Philippa Levine, "What's British about Gender and Empire? The Problem of Exceptionalism" (2007) 27 *Comparative Studies of South Asia, Africa and the Middle East* 273, 273.

³⁹ See JR Maddicott, *The Origins of the English Parliament, 924–1327* (2010) p 376.

⁴⁰ Eberhard Bohne, "EU and US Security Strategies from the Perspective of National and European Identities" in David J Eaton (ed), *The End of Sovereignty? A Transatlantic Perspective* (Berlin: LIT Verlag, 2006) p 176.

⁴¹ See Clive Whitehead, "The Medium of Instruction in British Colonial Education: A Case of Cultural Imperialism or Enlightened Paternalism?" (1995) 24 *History of Education* 1.

⁴² Durba Ghosh, "Gender and Colonialism: Expansion or Marginalization?" (2004) 47 *The Historical J* 737, 748.

⁴³ Elizabeth Thompson, *Colonial Citizens: Republican Rights, Paternal Privilege, and Gender in French Syria and Lebanon* (New York: Columbia University Press, 1999).

⁴⁴ Ghosh (n 42 above), pp 747–748.

⁴⁵ See Mitra Sharafi, "The Marital Patchwork of Colonial South Asia: Forum Shopping from Britain to Baroda" (2010) 28 *Law & Hist Rev* 979, 989.

Native sexuality was cast as especially deviant yet also alluring, which threatened the integrity of the white colonial nuclear family.

However, restrictive laws concerning sexuality were geared at disciplining not only native populations, but also the settler population into colonial morality. Desire for native sexuality was a mark of deviance, and colonial laws functioned to illicit shame, repression, and retreat into family structures sanctioned by the colonial power. This form of discipline, however, pushed sexuality into the realm of the private, so that sexuality became secretive, unspoken and unseen.⁴⁶ As Michel Foucault suggests in his critique of Victorian sexual mores, the scrutiny of sexuality during this era became a method of population control and discipline.⁴⁷ Yet the mechanism of power nevertheless resembled repression to maintain the integrity of the colonial family. In his justification for s 377A, Attorney General Howell argued that stricter laws were necessary to protect the population against a perceived epidemic of licentious native sexuality that was invading private spaces.⁴⁸ The statistics regarding media coverage of early prosecutions under s 377A that George Baylon Radics has collected indicate that the Colonial Government was more concerned with keeping Europeans from being corrupted by aberrant native sexuality than regulating the native population itself.⁴⁹

Although private action was the justification that Attorney General Howell brought up to justify the importation of s 377A, the statute has not been used to prosecute private, consensual sex acts.⁵⁰ To maintain consistency with this history, during the Parliamentary debates to repeal s 377A Prime Minister Lee assured that though the law would officially remain in effect, that the Government would not proactively enforce it in cases of private, consensual sex.⁵¹ Indeed, the only cases prosecuted under s 377A following the 2007 debates were for acts done in public. Enforcement of s 377A, only against publicly obscene acts, maintains the semblance of Singapore as a strict, conservative Asian values nation, where deviant sexuality is repressed from public view. Gay sex is theoretically viable only as a purely private and consensual action, pushing it further into the realm of the domestic and unseen. In this way, the unofficial compromise regarding s 377A engages in a type of repression reminiscent

⁴⁶ See Michel Foucault, *The History of Sexuality Volume 1: An Introduction*, Robert Hurley trans. (New York: Vintage Books, 1978) p 5.

⁴⁷ *Ibid.*

⁴⁸ Lim Meng Suang (n 3 above), [135].

⁴⁹ Radics (n 16 above), pp 66–72.

⁵⁰ Singapore Parliament Reports (22 October 2007), vol 83, col 2175.

⁵¹ Singapore Parliament Reports (23 October 2007), vol 83, col 2402.

of the Victorian era. As Foucault posits in this criticism of the repressive hypothesis, sex was not prohibited during the Victorian era, only made unseen and consigned to the private realm of the nuclear family.⁵²

In the case of how s 377A was retained, there was also a strange transformation of the will of the colonial father into the will of the state father, and a transformation of colonial western norms into Asian values norms. Advocates for repeal of s 377A had suggested that Singapore, as a postcolonial nation, no longer be bound by an old colonial law.⁵³ Prime Minister Lee acknowledged the role of colonialism in the origins of the law,⁵⁴ but he ultimately reframed the question of retention as a matter of Asian versus Western values. The decision to retain s 377A during Parliamentary debates was intended as a symbolic gesture of nationalism to distinguish Singapore from the West in its preservation of traditional Asian values with a focus on family,⁵⁵ but the rhetoric deployed retained elements of colonial domination. The metaphors used by proponents of retention during the Parliamentary debate contained the same rhetoric of “Othering” used by colonial lawmakers to justify s 377A, where unnatural native sexuality was constructed as a threat to families that needed to be contained, though this time in the reverse. As George Baylon Radics has noted, “While before, the European implemented Section 377A to protect himself from the over-sexualized Asian, now the Singaporean uses it to protect himself from the ‘wild wild West.’”⁵⁶ Family was again emphasised as the vehicle of stability for the nation, which needed to be protected from corruption, but this time the outsiders rather than the natives were the savages who posed the threat. The Asian values justification for retention of s 377A contained the same Victorian sensibilities and authoritarian voice as the original colonial lawmaker.⁵⁷ Ironically, the call to defend Asian values against the West was performed through a voice that eerily sounded like the West. In the *Lim Meng Suang* decision that ultimately upheld s 377A, Justice Andrew Phang even returned to the original colonial intent of Attorney General Howell.⁵⁸

The retention of s 377A illustrates how Singapore as a postcolonial government deploys the same paternalistic mechanisms of exceptionalism that was utilised to justify colonial domination. As morally exceptional

⁵² Foucault (n 46 above), p 10.

⁵³ Singapore Parliamentary Debates (n 21 above), col 2363 (Baey Yam Keng, Member of Parliament).

⁵⁴ *Ibid.*, col 2402 (Lee Hsien Loong, Prime Minister and Minister for Finance).

⁵⁵ *Ibid.*, cols 2397–2398.

⁵⁶ Radics (n 16 above), p 77.

⁵⁷ Eng-Beng Lim, *Brown Boys and Rice Queens: Spellbinding Performance in the Asias* (New York: New York University Press, 2013), p 132.

⁵⁸ *Lim Meng Suang* (n 3 above), [119]–[143].

from the West, the role of the government is to safeguard the morality of its citizen children from corrupting influence. The Singapore Government deploys the same metaphor of family to justify restrictive legislation, but the colonial white father that originally usurped the role of the father within the nuclear family is now supplanted and replaced by the authoritarian Asian father of the postcolonial government, even while the old modes of power are replicated.⁵⁹ As Geraldine Heng and Janadas Devan suggest, the Singapore Government's "State fatherhood specifically requires...the intimate articulation of the traditional family with the modern state, and the ostensible homology of the one to the other".⁶⁰ This, in turn, "facilitates and guarantees the transfer of the paternal signifier from the family to the state, the metaphor of state as family then rendering 'natural' an 'omnipotent government'".⁶¹

4. The Oedipal Angst of the State Father

The Singapore Government establishes power as a state father within its own imagined family structure as the means of resolving an Oedipal desire to overcome the colonial father. According to Freud, in order for a male child to develop he must resolve the Oedipal complex.⁶² In the process of repressing the Oedipus complex, the male child unconsciously internalises and replicates the idea of the punitive father, which governs the child's actions and sense of morality, and carries into his own role as the father of his own family. In the process, however, the male child acknowledges and legitimises the power of his father, and the methods of his rule. For Jacques Lacan, the Oedipal complex resolves not simply through repression of taboo thoughts but through the mutual recognition of law, which Lacan identifies as the "Name of the Father". Through the symbolic representation of law, specifically the law of the father, consciousness is expressed through speech acts that are inherently phallogocentric and dominated by men.⁶³ The postcolonial subject must speak the language of the paternalistic coloniser, under the terms set by the coloniser, to overcome the coloniser. In order to emerge as a state father, the Singapore Government might be able to figuratively overcome the colonial father figure of the West, but does so by acknowledging the

⁵⁹ See Geraldine Heng and Devan (n 26 above), p 355.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, pp 355–356.

⁶² See Sigmund Freud, *The Interpretation of Dreams* (New York: Basic Books, 1900); Sigmund Freud, *Totem and Taboo: Resemblances between the Psychic Lives of Savages and Narcotics* (New York: WW Norton & Co., 1918) pp 189–193.

⁶³ See generally Jacques Lacan, *Écrits: A Selection* (New York: WW Norton & Co., 1977) p 218.

same instruments of rule, of recognising the symbolic phallus of the father and replicating it for its own system of governance.

The gay community in Singapore, in its strategy of resistance, is caught in this cycle of recognising and enabling the authority of the state father, and in turn the absent colonial father. Gay activism in Singapore engages in the same pattern of repression and retreat to the nuclear family as a means of ensuring stability. The strategy of pragmatic resistance, which Lynette Chua describes as the process of advancing positive representations of gay individuals to gain greater acceptance in society without antagonising the state, employs the same rhetoric of fragility as the state does regarding the economy.⁶⁴ The stability of the movement depends on acquiescence and cooperation with the state, since the state has traditionally extinguished movements that it considers threatening to greater stability of society. This strategy affirms the power of the state father and also maintains the hierarchy of patriarchal domination by casting gay subjects as willfully obedient children who recognise and fear the discipline of the father.

As such, the gay community has also replicated the state father's suppression of gay sex into the private realm in the way that the constitutional challenge was handled. When Tan Eng Hong initially challenged the constitutionality of s 377A immediately following his arrest in March 2010, the gay community reacted with mixed feelings, with many viewing Tan's challenge as possibly subverting the advances made through pragmatic resistance. For many gay activists in Singapore who wanted to challenge the stereotypes of gays as sexual deviants with campaigns like Pink Dot that sought to normalise gay relationships in society, Tan Eng Hong represented the image of stereotyped sexual deviance they were seeking to avoid. Upon news of Tan's constitutional challenge, the prominent Singaporean gay activist group People Like Us stated:

"[We] do not condone sex in public spaces where conflict with other members of society can occur. At no time do we say that these should not be prosecutable offences. We have however long held the view that should the State wish to prosecute, it should do so using gender-neutral laws, so that whether the specifics are same-sex or opposite-sex, there is parity in treatment".⁶⁵

⁶⁴ Lynette J Chua, *Mobilizing Gay Singapore: Rights and Resistance in an Authoritarian State* (Philadelphia: Temple University Press, 2014) p 719.

⁶⁵ "On the Prosecution of Mr Tan Eng Hong under Section 377A and the Challenge to the Law's Constitutionality" People Like Us (27 September 2010), available at <http://www.sayoni.com/articles/activism/2171-on-the-prosecution-of-mr-tan-eng-hong-under-section-377a-and-the-challenge-to-the-laws-constitutionality>.

Rather than rally behind Tan's constitutional challenge, gay activists presented a more publicly sympathetic test case through Gary Lim Meng Suang and Kenneth Chee, a committed gay couple of over 15 years who became the positive face of gay rights in Singapore. Their constitutional challenge was based on an equal protection argument, that because they were like other normative Singaporean couples, they should be treated the same. Although Tan's challenge occurred simultaneously, Tan was disassociated from their legal challenge as well as from the larger public movement. In 2013, during the height of both constitutional challenges, Gary Lim and Kenneth Chee were elected as the flag bearers for Pink Dot while Tan Eng Hong was excluded and hidden from the event altogether.

By setting Gary Lim and Kenneth Chee as the representative couple for gay rights advocacy, the gay rights movement in Singapore replicates the cycle of Freudian repression by retreating to the normative nuclear family model set forth by the state father. Those who deserve recognition and protection by the state are individuals like Gary Lim and Kenneth Chee and the organisers of Pink Dot who acknowledge the rule of law and seek the approval of the state father, to the exclusion of people like Tan Eng Hong, who are then pushed further to the margins. In this respect, the gay community disciplines itself and creates an unequal hierarchy among the ranks of gay Singaporeans. Katherine Franke notes how gay rights have played out in the United States:

“Recall that Freud teaches us that the healthy resolution of the Oedipal complex for the beaten female child is sadomasochistic in form, yet masochistic in satisfaction. Yet, in a way, can't the same be said of the same-sex marriage litigation? To some degree, the delight gained from a success in this kind of litigation comes from having an authority figure, the Supreme Court of Iowa, discipline the bigoted legislators who were refusing to extend the marriage laws to deserving same-sex couples. On a deeper level, in their testimonial confession to a dignity-deprived sense of low self esteem, these cases represent a profound form of self hatred and judgment about the per-version and shame of a sexual and intimate life outside of marriage”.⁶⁶

By excluding Tan Eng Hong, Pink Dot engaged in a type of self-hatred and shaming by hiding the shame of the seedy bathroom encounters and replacing it with the clean image of the committed gay couple. Yet, this rewriting forgets that fear and shame are what pushed gay sex to the bathrooms in the first place and created the closet.

⁶⁶ Katherine M Franke, “Eve Sedgwick, Civil Rights, and Perversion” (2010) 33 *Harv J L Gend* 313, 318.

The equal protection litigational strategy became enmeshed in the same discourse and politics of shaming as the Parliamentary debate. In essence, Gary Lim and Kenneth Chee were appealing to the conservatism and hegemony of Singaporean society. The mainstream gay rights movement set Lim and Chee as a representative couple to compare themselves to normative families like other Singaporean families, who embrace conservative Asian values like monogamy, stability and privacy. They deserve equal rights precisely because they are unlike gays like Tan Eng Hong, who are monolithically stereotyped as leading decadent lifestyles characterised by promiscuity, instability and public excess. For the mainstream gay community, there was less of an objection to the prosecution of Tan's very public crime, but more of a desire for equal treatment for equally situated Singaporean couples who share similar values.

As Franke continues, the gay community performs the will of the disciplinarian father in its own self-regulation:

“We now see the movement embracing that sexual moralism as the basis of a civil rights strategy and demanding, no, begging, that its members be regulated and disciplined by the legal and moral structure of the normative institution of marriage”.⁶⁷

By appealing to obedience and normalisation, pragmatic resistance risks ultimately bowing to the will of the state father and seeking his approval to the exclusion and domination of others. This strategy also legitimises the hierarchy of the normative family structure, which is centred on the power of the patriarch. Thus, the strategy affirms rather than challenges the will of the state father to uphold conservative family structures that its power is based upon. By hiding it within the privacy of the domestic family space, the movement removes the sex from sexuality. Campaigns such as Pink Dot that are geared at demonstrating how gay individuals are just like all other normal Singaporean families sanitises the gay movement as a fight for love rather than sexual identity rights.

Ironically, without Tan Eng Hong, Gary Lim and Kenneth Chee would not have been able to challenge s 337A in the first place. Tan Eng Hong's standing case allowed Lim and Chee to sue on the realistic probability of prosecution, which also reveals a paradox in the law and original colonial intent behind the law. Lim and Chee would have never been prosecuted because their relationship had been shamed into complicit secrecy. Although s 377A theoretically extended into private spaces, it was never

⁶⁷ *Ibid.*

meant to actually invade private domestic spaces. Even though Attorney General Howell had stated that he desired to extend s 377A to regulate private behaviour, only public behaviour was ever prosecuted. Rather, the effect of s 377A was to keep gay sex private and unseen through the mechanism of public shame. Similarly in 2007, the Singapore Parliament reached a compromise with the effect of keeping gay sex in private, unseen spaces. At that time, Parliament indicated that it was unwilling to change the law because Singapore had not arrived at a place where gay sex was accepted as normal in the same ways that heterosexual anal and oral sex had been.

5. Breaking the Repressive Cycle of Shame and the Future of Gay Rights in Singapore

Even if normalisation is the best means by which gay sex will eventually be accepted in the same way that heterosexual anal and oral sex are accepted, it must still be moved out of the realm of the private and public consciousness. Guy Hocquenghem says of the potential for anal sex to be revolutionary:

“Fuck me in the ass, Hocquenghem writes, and I will magically transform your catachretic phallus into a penis once more, a tool of free-flowing desire and not merely the simulacrum of power that that phallus is supposed to incarnate: by deprivatizing the anus, by refusing the social concealment, the grand renferment will come to an end”.⁶⁸

Liberation occurs not entirely through concealment and acquiescing to the privatisation of gay sex, but of challenging the politics of shame. Rather than repress sex, which ultimately enables the paternalistic politics of the state father and continues the legacy of the absent colonial father, the gay movement in Singapore may be better served by putting the sex back into sexual identity.

This is not to say that the gay movement should strictly identify with Tan Eng Hong and challenge the law through disobedience. Even sex liberationist Pat Califia admits, “I do not believe that we can fuck our way to freedom.”⁶⁹ That is, the road to liberation does not solely reside in the realm of transgressive sex. Given the Singapore Government’s willingness to repress destabilising movements, the strategy of pragmatic resistance is wise to assume a cautionary stance. However, it would be

⁶⁸ Lawrence R Schehr, “Defense and Illustration of Gay Liberation” (1996) *Yale French Studies* 139, 144.

⁶⁹ Pat Califia, *Macho Sluts: Erotic Fiction* (New York: Alyson Books, 1994) p 15.

useful to at least disengage from the cycle of repression that assumes and ultimately perpetuates the hegemony of heteronormative nuclear family models and instead recognise the heterogeneity of gay identity. In this respect, it would be useful to create intragroup dialectics within what Nancy Fraser calls “subaltern counterpublic” which are “parallel discursive arenas where members of subordinated social groups invent and circulate counterdiscourses, which in turn permit them to formulate oppositional interpretations of their identities, interests, and needs”.⁷⁰ Fraser’s conception of counterpublic space critiques the tendency of public discourse, which looks to the “common good”, to converge on homogeneous interests and bracket away marginal interests.

Fraser warns that counterpublic movements should ever be wary of “practicing their own modes of informal exclusion and marginalization”.⁷¹ In Singapore, the gay rights movement has attempted to create a counterpublic space through the strategy of pragmatic resistance. However, that space ultimately runs the danger of falling back to homogenous interests of survival and stability, which then appeals to the normative structures of the nuclear family. This strategy, in turn, replicates and enables the approach taken by the postcolonial government to justify its paternalistic, authoritarian policies. When the gay rights movement converges monolithically upon Gary Lim and Kenneth Chee as its representative models for conformity and emulation, it brackets away other expressions of gay identity such as Tan Eng Hong.

As Michael Warner argues, “A counterpublic maintains at some level, conscious or not, an awareness of its subordinate status.”⁷² The ultimate goal of a counterpublic movement is not in achieving rights of equality, but rights despite inequality. The High Court and Court of Appeals made clear through their applications of the intelligible differentia test that gay Singaporeans constituted a reasonably different classification of citizen,⁷³ and the only constitutional question was whether the differential treatment served a valid state purpose.⁷⁴ The courts and the legislature have already deemed the gay community different from heterosexuals. Thus, rather than futilely seek equal identification with normative families, to the exclusion of large parts of the gay community who are more like Tan Eng Hong, it is perhaps more useful to embrace commonality and camaraderie with Tan Eng Hong’s marginalised position. In the end, if the

⁷⁰ Nancy Fraser, “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy” (1990) 25 *Social Text* 56, 67.

⁷¹ *Ibid.*, p 67.

⁷² Michael Warner, “Publics and Counterpublics” (2002) 14 *Public Culture* 49, 86.

⁷³ *Lim Meng Suang* (n 2 above), [28], [48].

⁷⁴ *Ibid.*, [67].

gay community will continue to be discriminated against, it is important that they experience that discrimination together with solidarity. Only then there is the possibility of emerging outside the cycle of shame and repression created by the state father and the absent colonial father.

To increase its effectiveness, gay rights in Singapore must expand to include not only the rights of palatable members like Gary Lim and Kenneth Chee in unseen, private space, but also the rights of unpalatable members like Tan Eng Hong in open, public space. By this type of counterpublic, full citizenship rights materialise not through hegemonic identification within normative nuclear family structures, but in recognising and maintaining different cultural identities. Rather than seek sameness with a small segment of heterosexual couples, and thus enable a narrow and monolithic conception of gay rights as obtainable only when gay couples resemble normative families, the gay movement should recognise the heterogeneity of gay identity. In so doing, the gay community may become more aware of the heterogeneity of oppression, and thus open up other counterpublics and discover more fellow comrades in the struggle.

