Open Letter

Sunday, 14 October 2018

To:
The Prime Minister, Mr. Lee Hsien Loong
Members of Parliament
My fellow Singaporeans

SECTION 377A – A CITY, ITS WALLS AND THE OUTER FENCE

1. I am writing in my *personal* capacity as a citizen of Singapore.

2. The current debate about s377A is no longer simply about the decriminalization of homosexual sex between males. Instead, it has become a wider debate about the potentiality (or some say inevitability) of same-sex marriage, adoption of children by same-sex couples, suppression of the freedom of speech and religion of dissenters to the homosexual rights agenda, sex education in schools, proliferation of LGBT activism in mainstream media and in society, and other associated LGBT "rights".

3. In this letter, I will examine some of the key arguments for the repeal of s377A (Section A), including the critical issue of immutability, namely that sexual orientation is *immutable* (i.e. one is born with it, it is unchangeable, and is not a choice) (Section B). This argument has been raised by two highly prominent advocates of repeal, Professor Tommy Koh and V.K. Rajah, amongst others. However, based on two recent systematic research articles, including one from prominent LGB academicians, the immutability argument is clearly *not* supported by science. Without the immutability argument, the campaign to repeal s377A loses much of its force. Notwithstanding this, some of the other key arguments for repeal show that s377A does have certain aspects which are problematic.

4. This is then juxtaposed against perhaps the strongest argument raised by those who prefer to retain s377A, i.e. the floodgate argument. I will examine the likelihood, if s377A is repealed, of Singapore allowing or giving way to same-sex marriage and all other LGBT "rights" (Section C). Examined carefully, Singapore's constitutional, statutory and policy framework is wholly unprepared to contain the sudden changes that will *very likely* come if s377A is repealed (Section C.2). As such, the floodgate argument is *not* mere fearmongering conjured up by

irrational religionists or conservatives to impose their religious or conservative views on others. Rather, it is founded on cogent, rational and compelling grounds, built upon a close study of those who have gone before us (e.g. Canada, US, UK, India and Hong Kong, including considering some of the recent landmark decisions by the courts of US, UK, Hong Kong and the Indian Supreme Court decision which sparked off the s377A debate in Singapore), and the various routes they took to arrive at where they are (Section C.1).

5. Bringing all the key arguments from both sides together, on balance, Singapore is *not* ready for repeal. Even though the Government has indicated that s377A will not be amended in *this round* of amendments, there are many more steps which needs to be taken to protect and enforce the Government's explicit policy of having a society founded on traditional heterosexual marriages and family values, as well as its explicit policy that Singapore is to remain a straight society (notwithstanding the inclusion and accommodation of homosexual persons) (Section D). The failure to take such steps would be akin to removing the outer fence (if s377A is repealed in the future), without first building up the city walls, and allowing the city to be destroyed. Indeed, for the sake of Singapore and its future generations, "the Government cannot abdicate its responsibility to lead from the front".

6. Finally, in the last section of this letter (Section E), it is emphasized that those with same-sex attractions must be accepted with sensitivity, compassion and respect, and that, regardless of what happens with s377A, "no political or cultural views should discourage us from understanding the related clinical and public health issues and helping people suffering from mental health problems that may be connected to their sexuality" (Mayer & McHugh at pp.115-116). There is much research, understanding and work to be done by Singapore as a society in this regard.

Most respectfully

Dominic Chan

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A. SOME KEY ARGUMENTS FOR THE REPEAL OF S377A

7. The arguments in favour of repealing s377A have been well-documented, and there is no need to repeat them all here. We will consider only a few key ones.

The Non-Inclusion of Heterosexuals and Lesbians

8. First, perhaps the old Section 377, which criminalized unnatural sexual acts between heterosexuals, homosexuals and animals,[1] would have been the more equitable position to maintain, since even *heterosexuals* engaging in unnatural sex acts (and potentially homosexual sexual acts between *females* as well)[2] would *equally* have been in the cross-hairs of the criminal law.[3]

[1] Section 377 had criminalized "unnatural offences", "Whoever voluntarily has *carnal intercourse against the order of nature* with any man, woman or animals, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 10 years, and shall also be liable to fine." [Emphasis in italics added].

[2] The non-inclusion of homosexual acts between lesbians under the scope of s377A has been raised as an argument that s377A is under-inclusive, and is therefore unfair. I do not think that criminalizing homosexual acts between lesbians makes s377A fairer or resolves the otherwise highly complex issues (as explained in the rest of this letter) surrounding the call to repeal s377A. In any event, lesbian acts may be dealt with through other vehicles other than the criminal law, e.g. sex education.

[3] Much depended on the common law's definition of which types / permutations of unnatural sex acts would be covered under the draftsman's deliberately vague wording of the key phrase "carnal intercourse against the order of nature" under s377. Based on common law, consensual heterosexual and homosexual oral and anal sex would have been prohibited under s377, save that oral sex as foreplay followed by or finished off with heterosexual natural sexual intercourse would be an exception. See generally, "Oral Sex – a Case of Criminality or Morality", *Singapore Law Gazette* (September 2014). http://v1.lawgazette.com.sg/2004-9/Sep04-feature2.htm.

9. However, s377 was repealed in 2007,[4] which led to the intense Parliamentary debate on 22 and 23 October 2007 ("**2007 Debate**") on whether to retain s377A,[5] which was eventually retained.[6]

An Unenforced Law

10. Second, much has been said about a law which is not proactively enforced (with the Government's repeated assurances, as a position of compromise, that this will remain as such), which potentially risks bringing the law into disrepute, and the counterargument that even unenforced laws "could serve to enforce moral norms or serve a signposting function".[7]

11. It should be noted that prosecutorial discretion lies with the Attorney General ("**AG**"),[8] and *not* with the Government. The current AG has

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[4] To be clear, Section 377 was replaced with the offence of sexual penetration of a corpse, while Section 377B was also introduced, which criminalized sexual penetration with a living animal. See the Penal Code (Amendment) Act 2007 (No. 51 of 2007). https://sso.agc.gov.sg/Acts-Supp/51-2007/Published/20080128?DocDate=20080128#pr70-

[5] A convenient online link to the 2-day debate may be found here: http://the-singapore-lgbt-encyclopaedia.wikia.com/wiki/Archive_of_parliamentary_debate_on_Section_377A_(22,_23_October_2007). As a starting point, it would be good for Singaporeans to be acquainted with the diverse arguments and counterarguments raised by the members of Parliament during that debate.

[6] It was suggested by the Singapore Court of Appeal in ***Lim Meng Suang v Attorney-General*** [2015] 1 SLR 26 at [51] that s377A "prohibits, at its core, sexual acts between males". There is nothing vague about this to amount to it falling outside the classification of "law" for the purposes of Article 9(1) of the Constitution. It was also argued in this case (at [112]) that, for the purposes of Article 12(1) of the Constitution, the differentia embodied in s377A was not intelligible because it was discriminatory inasmuch as it discriminated between male homosexuals on the one hand and *female homosexuals* on the other. The Court rejected this argument (and various arguments), and concluded that s377A was not unconstitutional under Articles 9 and 12 of the Constitution.

[7] "Signposting as a principle in lawmaking", *The Straits Times* (27 September 2018). https://www.straitstimes.com/opinion/signposting-as-a-principle-in-lawmaking

[8] Article 35(8) of the Constitution provides, "The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence." The Attorney General is independent from the Government. As Professor Walter Woon argued, "So we have a very dangerous precedent here where the political authorities are saying to the Public Prosecutor - who is supposed to be independent - there are some laws that you don't enforce": see *The Straits Times* (18 September 2014) at https://www.straitstimes.com/singapore/walter-woon-tommy-koh-differ-on-377a-anti-gay-sex-law-at-nus-forum.

since come forth to emphasize that the Government has not removed or restricted prosecutorial discretion for s377A, and that the PP is entitled to consider public policies and public interest in exercising his discretion.[9]

12. What *is* certain is that "the Government's position on Section 377A is that the Police will not proactively enforce this provision, for instance by conducting enforcement raids". However, the AG also clarified that there may be instances of police investigations (and referral of the case to the PP for the PP to then decide whether to prosecute) "where minors are exploited and abused", and where the act happens in public. In other words, as it stands, private, consensual, homosexual acts between two adults will not even be investigated[10] (or referred to the PP), in which case the *PP never gets to exercise his prosecutorial discretion*. In any event, the AG has further clarified that "[t]he PP has consistently taken the position that, absent other factors, prosecution under Section 377A would not be in the public interest where the conduct was between *two consenting adults in a private place*… This was the case when Mr Rajah was the PP and *remains so today*".[11]

13. There remains, however, the theoretical possibility of being investigated and prosecuted for private, consensual, homosexual acts. Personally, I have no desire for anyone to be jailed for such acts. The current compromise position is an uneasy one.

14. However, the unease is substantially mitigated by the dual, clear and public commitment, by *both the Government* that it will not actively enforce / investigate, *and the AG* that it will not prosecute, private consensual acts between two adults. There is, therefore, no ambiguity

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[9] "Government has not curbed public prosecutor's discretion for Section 377A: A-G Lucien Wong", *The Straits Times* (2 October 2018) at https://www.straitstimes.com/singapore/courts-crime/government-has-not-curbed-public-prosecutors-discretion-for-section-377a-ag.

[10] The AG reiterated that "the Government's position that the police will not proactively enforce Section 377A with respect to private acts had been made public since at least 2006". See "Public prosecutor's stand on Section 377A consistent", *The Straits Times* (6 October 2018), at https://www.straitstimes.com/forum/letters-in-print/public-prosecutors-stand-on-section-377a-consistent.

[11] *Ibid*, footnote 10. Emphasis in italics added.

at all about the present enforcement situation.[12] This is consistent with the rule of law principle of legal certainty, which is closely connected with the doctrine of legitimate expectations.[13] With the Government and the AG's reaffirmation of their positions, the spectre of prosecution, though theoretically possible, is for all intents and purposes non-existent with respect to private consensual acts between adults.

15. This dual, clear and public commitment by both the Government and the AG of non-active enforcement and non-prosecution respectively, is unique to Singapore and sets us apart from any other country which has gone before us in terms of decriminalization.

Imposition of Religious Dogma / Tyranny of the Majority

16. Third, it has been argued that Singapore is a secular state, and that notwithstanding that homosexual acts are considered immoral to various religions,[14] it is "not the business of the state to enforce the

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[12] Contrary to V.K. Rajah's assertion that the "present enforcement situation" remains "ambiguous". See "Opinion piece reiterates prosecutorial discretion: Forum", *The Straits Times* (5 October 2018), see https://www.straitstimes.com/forum/letters-in-print/opinion-piece-reiterates-prosecutorial-discretion. See also the AG's further clarifications at footnotes 9 and 10 above. See also "Section 377A: A contemporary, important law", *The Straits Times* (7 October 2018) at https://www.straitstimes.com/opinion/section-377a-a-contemporary-important-law ("The policy that section 377A will not be proactively enforced departs from the prior policy of pro-actively raiding gay groups. It falls within the executive's discretion to determine what resources to commit to enforcing various offences".)

[13] The Singapore Court of Appeal in ***SGB Starkstrom Pte Ltd v Commissioner for Labour*** [2016] 3 SLR 598 has declined to decide whether the doctrine of substantive legitimate expectations forms a part of Singapore law. See [55]-[63]. This doctrine "seeks, in essence, to bind public authorities to representations, whether made by way of an express undertaking or by way of past practice or policy, about how these authorities will exercise their powers or otherwise act in the future, in circumstances where a representation has been made by the authority in question and relied on by the plaintiff to his detriment" (at [41]).

[14] It should be clarified that at least from the perspective of one religion, same-sex *attraction in itself* is not a sin, though it is seen as intrinsically disordered. Similarly, homosexual acts are without doubt intrinsically disordered. Nevertheless, the condition of homosexuality is seen as a complex one, and as such, culpability or personal responsibility for homosexual acts should only be judged with prudence. In any event, the living out of this orientation in homosexual activity is not a morally acceptable option, and under no circumstances can homosexual acts be approved. In summary, from the perspective of this religion, homosexual *acts* are objectively contrary to the natural law but whether it amounts to *personal sin* requires prudent judgment.

dogmas of those religions."[15] While it may be true that not every act deemed as immoral must be criminalized, it is simply inaccurate to imply or assert that religious views on the morality of an act must be excluded from consideration in a secular state (or more accurately, a multi-religious state with a secular government). There are agnostic or atheistic Singaporeans who can equally hold or take the view that homosexual acts are immoral. Same moral *conclusion*, but arrived at through different *sources*. Why discriminate against or compulsorily exclude religious sources? To do this would mean laws against murder, rape and theft should also be decriminalized, since such laws are traceable to or happen to be consistent with religious principles.

17. It can certainly be forcefully asserted that the promotion of majoritarian sexual morality is a "legitimate state interest".[16] In this regard, there are laws in Singapore which seeks to further the belief of its citizens that certain forms of sexual behaviour are immoral and unacceptable,[17] for example bigamy and adult incest. But while it remains virtually universally held in Singapore that activities such as bigamy and adult incest are immoral,[18] is the view that homosexual acts are immoral *still a majoritarian view*?[19]

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[15] Professor Tommy Koh, "Section 377A, Science, Religion and the Law", *The Straits Times* (25 September 2018).

[16] See Justice Scalia's dissenting judgment in ***Lawrence v Texas*** (2003) at part IV.

[17] Justice Scalia held in ***Lawrence v Texas*** at part IV that the Texan statute in question "seeks to further the belief of its citizens that certain forms of sexual behaviour are immoral and unacceptable… the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity."

[18] There are, of course, some people (extremely rare though it may be) who really believe that bigamy or adult incest are *not* morally wrong. Applying the logic of Professor Tommy Koh, can they not likewise cry out against the majority (who hold the opposite view) and accuse them of imposing or enforcing their moral beliefs or religious dogmas on them, and insist that the State decriminalize such acts?

[19] The reality is that over one decade, the minority view has grown in numbers and in volume, while the majority appears to have shrunk. The problem then is *not* that the majority view consists of many people who *happen to be religious*. Rather, the problem is that as a secular society (or more accurately, a multi-religious state with a secular government), even after considering religious views, we are unable to agree where the line from majoritarian sexual morality becomes *insufficiently majority* to sustain the criminalization of any given act.

18. In any event, there is certainly something beyond mere majority will. There are objective principles transcending numbers and it is inaccurate to only frame the issue as a numbers game. After all, the use of the phrase "tyranny of the majority" could be turned on its head by the majority by contending that they (the majority) ought not be subject to the "tyranny of the *minority*" (***Lim Meng Suang*** at [159]).

19. In reality, there is a need to consider not only the perspectives of those with same-sex attractions, but also the consequences to societies, the rights of others which will be adversely affected, the further fragmentation of society, and the exacerbation of division, as foreign developments have ominously demonstrated (see Section C.1 below). While the majority views do count, so does long-term wisdom bearing in mind the common good of Singapore and its future generations. Ultimately the Government has the duty to do what it considers right for the country, even if this should be unpopular.[20] In assessing the common good, the Government *needs* to ask itself this critical question: *what will it do to protect the constitutional rights of citizens which will very likely be affected if there is repeal* (see Sections C.2 and D below). Indeed, especially on this issue which has the strong potential to fragment Singapore and lead to social strife, "the Government cannot abdicate its responsibility to lead from the front".[21]

20. Fourth, central to the growth of the minority view (and the decreasing majority view) is the argument that sexual orientation is *immutable* (i.e. one is born with it, it is unchangeable, and is not a choice).[22] Left

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[20] Prime Minister Mr. Lee Hsien Loong (while he was still the Deputy Prime Minister) said the following in a 2004 Harvard Club speech titled "Building a Civic Society, "… *Civic participation must not degenerate into government by opinion polls*. The Government will seek inputs actively, but it cannot only do things which are popular… After all the consultation and participation, *ultimately it is the Government's duty to do what it considers right for the country, even if this should be unpopular*. The Government cannot seek to be popular all the time and on every policy." Emphasis in italics added. See http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN015426.pdf. Indeed, as Darius Lee argues, "the government should neither follow the majority's opinion blindly nor allow itself to be captured by narrow sectarian interests": "Good governance should uphold the common good", *Today* (24 July 2015), at https://www.todayonline.com/voices/good-governance-should-uphold-common-good.

[21] PM Lee (as then DPM) in his 2004 Harvard Club speech. *Ibid.*, footnote 20.

[22] It is beyond the scope of this letter to deal with the modified definition of immutability employed in some Western countries, i.e. it is not whether LGB individuals *can* change their sexual orientation, but rather, *should* they be compelled to do so (even if they can change) – the answer being "No", as defined in some American cases. We need not deal with this argument in

unchallenged, assumed or uncritically accepted, it is extremely powerful to shape opinions on whether homosexual acts should be decriminalized. As such, we will need to consider this argument very carefully. To this issue, we now turn.

B. THE FOUNDATIONAL ISSUE OF SEXUAL ORIENTATION IMMUTABILITY

21. We have seen in recent public discourse that prominent supporters of the repeal of s377A rely on the argument or give the impression that sexual orientation is immutable, with some referring to scientific evidence to support their argument.[23] A recent application to Court to challenge s377A appears also to be founded on the immutability argument.[24] Several of the Pink Dot declarations also assume or assert the immutability of sexual orientation.[25] The overall impression is that

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Singapore for the time being since the central argument being run is the original version of immutability being "unchangeable".

[23] See for example, Professor Tommy Koh, in arguing for repeal, "Section 377A, Science, Religion and the Law", *The Straits Times* (25 September 2018), cites scientists who "do not view [sexual orientation] as a choice", and that such scientists "favour biologically-based theories, which point to genetic factors". Professor Koh also asserts that "[s]cientific research has shown that homosexuality is a normal and natural variation in human sexuality and is not in itself a source of negative psychological effects. They also believe that there is insufficient evidence to support psychological interventions to change sexual orientation." Finally, Professor Koh ended with four propositions, the first of which is "the scientific evidence is that homosexuality is a normal and natural variation of human sexuality. It is not a mental disorder." See https://www.straitstimes.com/singapore/section-377a-science-religion-and-the-law; See also V.K. Rajah, "Section 377A: An Impotent Anachronism", *The Straits Times* (1 October 2018), where he cites Lee Kuan Yew (amongst others) having accepted that homosexuality is an "*innate genetic trait*", and that from this perspective, it is "no different from all other distinctive attributes that *each of us is born with*". He concludes that concerns about the floodgate opening if s377A is repealed "do not justify the continued criminal stigmatization for an *innate trait*". Emphasis in italics added. See http://www.singaporelawwatch.sg/Headlines/Section-377A-An-impotent-anachronism

[24] The applicant's counsel will be relying on a 2015 report by the United States Substance Abuse and Mental Health Services Administration which argues that "sexual orientation is unchangeable or suppressible at unacceptable personal costs", and that they will be "presenting medical and scientific evidence to show that sexuality is inherent and is not a choice". See https://www.tnp.sg/news/singapore/court-challenge-filed-singapore-dj-against-section-377a. I could not find the above 2015 report online, but in any event, the genesis of the above quote ("sexual orientation is unchangeable or suppressible at unacceptable personal costs") is traceable to ***Egan v Canada*** (see Section C.1 below).

[25] See Declaration 1 on standing by friends and family members who are LGBTQ "so that none of them will ever feel the need to hide *who they are*." See also Part of Declaration 8, "we need to

the immutability of sexual orientation is a settled scientific fact. *But is this really true*?

B.1 Lisa Diamond and Clifford Rosky

22. An academic research article published in 2016 by Lisa M. Diamond and Clifford J. Rosky,[26] two prominent LGB academicians,[27] clearly says the opposite. The article is a systematic review of past research. Lisa and Rosky assert that:

> "*[A]rguments based on the immutability of sexual orientation are unscientific*, given that scientific research does not indicate that sexual orientation is uniformly biologically determined at birth or that patterns of same-sex and other-sex attractions remain fixed over the life course" (p.364). [Emphasis in italics added].

23. First, Lisa and Rosky argue (at p.364) that it is particularly critical to consider bisexuality, since their existence and diversity is troubling to the distinction between homosexuality and heterosexuality on which immutability debates have been premised.[28]

24. Second, in assessing the genetic contributions to sexual orientation, Lisa and Rosky reviewed various studies on the heritability of sexual orientation (i.e. the degree to which same-sex sexuality runs in families) and the existence of specific genetic markers associated with same-sex sexuality, and concluded that such studies support a genetic

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repeal 377A, a[n] outdated law that criminalises gay men for *something so innate to them*". Emphasis in italics added.

[26] "Scrutinizing Immutability: Research on Sexual Orientation and U.S. Legal Advocacy for Sexual Minorities", *The Journal of Sex Research*, 363-391 (March 2016): https://pdfs.semanticscholar.org/72dc/40ce66723ab7a74ccf1dc29336d33d6e0755.pdf

[27] Lisa is a psychologist while Rosky is a professor of law, both at the University of Utah. Their research opinion is a fascinating example of where science and law intersect, to produce a highly nuanced view on LGBT issues.

[28] "Bisexuality is particularly critical to consider in this regard. Individuals with bisexual attractions and/or behaviors have been largely missing from both scientific and legal debates about the immutability of sexual orientation (Boucai, 2012; Rust, 2000c; Yoshino, 2000), no doubt because their very existence, and the sheer diversity of bisexual pathways and experiences, troubles the rigid categorical distinction between homosexuality and heterosexuality on which immutability debates have been premised (Firestein, 1996; Rust, 2000b, 2000c, 2009; Yoshino, 2000)."

contribution to sexual orientation, but not genetic *determination*. (pp.365-366). Lisa and Rosky forcefully assert (at p.366):

> "In essence, the current scientific revolution in our understanding of the human epigenome *challenges the very notion of being "born gay," along with the notion of being "born with any complex trait*. Rather, our genetic legacy is dynamic, developmental, and environmentally embedded." [Emphasis in italics added]

25. Third, on whether prenatal hormonal exposure in the womb may shape sexual orientation, after reviewing various studies, Lisa and Rosky conclude that the overall body of evidence is mixed, "again suggesting that prenatal hormones potentially *contribute* to same-sex sexuality in some individuals but do not *determine* it" (at p.368) (Emphasis in italics added).

26. Fourth, on whether sexual orientation can change, after assessing several studies, Lisa and Rosky conclude (at p.371) that:

> "In summary, the data on change are relatively clear: Although therapeutic attempts to change sexual orientation are not successful,[29] *patterns of self-reported same-sex and other-sex attraction sometimes change on their own*, and the overall social climate of visibility and acceptance regarding same-sex sexuality may be one of the factors influencing such change." [Emphasis in italics mine]

27. Fifth, on whether sexual orientation can be chosen, after reviewing the scientific evidence, Lisa and Rosky opine (at p.372) that "the most accurate summary of the science is that some individuals perceive a role for choice in their sexual orientation *and that we do not know what this means*" (emphasis in italics by the authors). They go on to conclude that the simplistic notion of "choice" wielded in public debates over sexual orientation "does not do justice to the complex, variable, and multidimensional nature of sexual desire as it is manifested in the mind, brain, and body".

28. After assessing the above medical and scientific evidence and studies and giving their above opinion on them, Lisa and Rosky candidly asked (at p.372) the following thought-provoking question (which Singaporeans should likewise ask ourselves):

> "Given the weight of evidence challenging (or at least complicating) the immutability argument, why does it continue to hold sway in public discourse on sexual-minority rights"?

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[29] This assertion is heavily criticized by Rosik at pp.11-13 (see footnote 34 below).

29. With great honesty, Lisa and Rosky provide the answer (at p.372, emphasis in italics added):[30]

> "Some advocates clearly believe that immutability claims are necessary to advocate effectively for sexual minorities. For example, Sullivan (1995) argued forthrightly that *to achieve equality, sexual minorities had to insist on 'the involuntary nature of their condition'* (p.170)."

> "To say the least, nothing is inherently progressive about immutability claims regarding sexual orientation. And yet, as shown by Stein (2014), the perception that immutability claims are fundamentally linked to sexual-minority civil rights is so pervasive that public figures who question immutability arguments are reflexively considered homophobic[31] (e.g., Bradner & Jaffee, 2015; Copland, 2014; Ford, 2015). *Scientists themselves (including the first author) have sometimes contributed to misconceptions about the immutability of sexual orientation by failing to challenge and unpack these misconceptions in the media, often to avoid having their statements misused by antigay activists* (see Throckmorten, 2008, 2009)."

30. Lisa and Rosky then concludes with this "stunning admission"[32] (at p.373):

> "Yet these examples simply underscore the fact that *immutability arguments have more to do with dueling cultural values than they have to do with science.*[33] Not only has the relevant science been misrepresented by both sides, but *immutability arguments rely on unspoken legal and moral premises whose validity must be questioned*." [Emphasis in italics added]

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[30] See also Lisa Diamond's lecture on 17 October 2013 at https://www.youtube.com/watch?v=m2rTHDOuUBw (see the 39 min to 44 min mark), where she expressed her relief that the US Supreme Court did not eventually utilize her research (which argued that sexual orientation is fluid, and thus cannot be used for homosexuals to be granted special status) in the ruling, despite her research being cited. She candidly described this as the dodging of a bullet.

[31] Those who question immutability arguments are "reflexively considered homophobic". May this *not* be the case for the Singapore debate.

[32] The quoted conclusion of Lisa and Rosky has been described by Rosik as a "stunning admission for LGB academicians of Diamong and Rosky's stature." (at pp.6-7).

[33] As John D'Emilio, co-author of the book which Justice Kennedy referred to in his majority judgment in ***Lawrence v Texas*** (2003), puts it: "… 'born gay' is an idea with a large constituency, LGBT and otherwise. It's an idea designed to allay the ingrained fears of a homophobic society and the internalized fears of gays, lesbians, and bisexuals. *What's most amazing to me about the "born gay" phenomenon is that the scientific evidence for it is thin as a reed, yet it doesn't matter*. It's an idea with such social utility that one doesn't need much evidence in order to make it attractive and credible." [Emphasis in italics added]. See https://isreview.org/issue/65/lgbt-liberation-build-broad-movement

31. Rosik opines[34] that the research of Lisa and Rosky "may prove to be the turning point in scientific and academic discourse regarding this crucial subject" (at p.3), and that it is a "seminal effort that should end any notion of sexual orientation as inherently immutable" (at p.10).

B.2 Lawrence Mayer and Paul McHugh

32. See also the article by Lawrence S. Mayer and Paul R. McHugh (2016).[35] This academic research article is also a systematic review of past research. The lead author asserts that he is writing "without prejudice regarding any political or philosophical debates" and that his report is "about science and medicine, nothing more and nothing less" (p.4).

33. On the issue of sexual orientation, the authors conclude at p.114 that:

> "Some of the most widely held views about sexual orientation, such as *the 'born that way' hypothesis, simply are not supported by science.* The literature in this area does describe a small ensemble of biological differences between non-heterosexuals and heterosexuals, but those biological differences are not sufficient to predict sexual orientation, the ultimate test of any scientific finding. The strongest statement that science offers to explain sexual orientation is that some biological factors appear, to an unknown extent, to predispose some individuals to a non-heterosexual orientation."[36] [Emphasis in italics added]

B.3 Conclusions on Immutability

34. "Everyone — scientists and physicians, parents and teachers, lawmakers and activists — deserves access to accurate information about sexual orientation and gender identity".[37] Indeed, with respect to

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[34] Rosik, Christopher H. (2016), "The Quiet Death of Sexual Orientation Immutability: How Science Loses When Political Advocacy Wins", *Journal of Human Sexuality*, 7:4–23. https://media.wix.com/ugd/ec16e9_b0eefb0086b84c359909e14e0cc47280.pdf

[35] "Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences", *The New Atlantis*, 50:1-144. https://www.thenewatlantis.com/docLib/20160819_TNA50SexualityandGender.pdf

[36] Mayer & McHugh, at p.7, reports their key finding on the fluidity of sexual orientation, "Longitudinal studies of adolescents suggest that sexual orientation may be quite fluid over the life course for some people, with one study estimating that as many as 80% of male adolescents who report same-sex attractions no longer do so as adults (although the extent to which this figure reflects actual changes in same-sex attractions and not just artifacts of the survey process has been contested by some researchers)."

[37] Mayer & McHugh, p.115. For the avoidance of doubt, while I have cited the research articles of Lisa & Rosky and Mayer & McHugh on the various points above, I do *not* agree with *everything*

society's understanding of sexual orientation and gender identity, "[t]here is still much work to be done and many unanswered questions."[38] In the meantime, several conclusions may be drawn.

35. First, moving forward, the "malleability of sexual orientation" should be "prominently acknowledged" (or at the very least debated, instead of immutability being presumed or imposed) by everyone engaging in public discourse, political advocacy or legal challenge pertaining to s377A and related issues.[39]

36. Second, the presumption of immutability is a disservice to those who *may* want to seek assistance for unwanted same-sex attractions.[40] In addition, the same presumption may prevent healthcare professionals from assessing how elevated rates of sexual abuse victimization among

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asserted in their articles (for example, and without limitation, Lisa & Rosky's sweeping statement (at p.371) that "therapeutic attempts to change sexual orientation are not successful", and Mayer & McHugh's finding (at p.6) that "[s]ome children may have improved psychological well-being if they are encouraged and supported in their cross-gender identification, particularly if the identification is strong and persistent over time").

[38] Mayer & McHugh, p.116.

[39] As Rosik puts it (at pp.13-14), "One intriguing premise of Diamond and Rosky's work appears to be that cultural acceptance and civil protections for LGB people has now advanced to the point where *researchers and activists can finally begin telling the truth about sexual orientation immutability*. Their observations that many advocates continue to use immutability arguments in public discourse about LGB rights—not to mention the general silence on this matter in the public pronouncements of the scientific community—implies a *significant element of disingenuousness in this movement*. While the science on sexual orientation immutability may have been nebulous a generation ago, this is no longer the case, and *there is no reason other than political calculation why the malleability of sexual orientation should not be prominently acknowledged by professional associations and gay activists in their public pronouncements and legal briefs*." [Emphasis in italics added].

[40] See for example, the Alliance for Therapeutic Choice and Scientific Integrity (ATCSI) at https://www.therapeuticchoice.com/, which is a multi-disciplinary professional and scientific organization dedicated to preserving the right of individuals to obtain the services of a therapist who honors their values, advocating for integrity and objectivity in social science research, and ensuring that competent licensed, professional assistance is available for persons who experience unwanted homosexual (same-sex) attractions (SSA); see also Rosik at pp.11-13, footnote 34 above.

the LGBT population[41] may be one factor accounting for some of the mental health disparities experienced by LGBT members.[42]

37. Third, Singapore needs to study the past and be prepared for the future. Studying other countries who have gone before us, whenever sexual orientation immutability is assumed or uncritically accepted, it has become the "scientific", political and legal foundation not only for the decriminalization of homosexual sex, but also led or substantially contributed to same-sex marriage, amongst other LGBT "rights". To this topic, we now turn.

C. FLOODGATE OR FEARMONGERING? CONSIDERING THE STORIES OF OTHER COUNTRIES

38. Does the repeal of s377A *inevitably* lead to same-sex marriage and all other LGBT "rights"?[43] Or is this mere fearmongering? The answer is closely connected to the degree to which sexual orientation immutability is unthinkingly assumed or uncritically accepted, although other arguments, post-decriminalization of sodomy laws, have also played substantial roles in the expansion of LGBT "rights" in the West.

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[41] One of Mayer & McHugh's key findings (see p.7) is that "[c]ompared to heterosexuals, non-heterosexuals are about two to three times as likely to have experienced childhood sexual abuse". See also pp.42-50 for a discussion on whether sexual abuse may sometimes be a causal contributor to having a non-heterosexual orientation. The authors conclude that more research is required to determine whether it is indeed a causal factor.

[42] Mayer & McHugh at p.85, "Other factors, such as the elevated rates of sexual abuse victimization among the LGBT population discussed in Part One, may also account for some of these mental health disparities, as research has consistently shown that 'survivors of childhood sexual abuse are significantly at risk of a wide range of medical, psychological, behavioral, and sexual disorders.'"

[43] See Yvonne C.L. Lee, "Don't Ever Take a Fence Down Until You Know The Reason it was Put Up – Singapore Communitarianism and the Case for Conserving 377A", *Singapore Journal of Legal Studies* [2008] 347-394 at pp.370-371, where she asserts that in "jurisdictions where the homosexualism agenda has taken root, the de-criminalisation of consensual homosexual sex was the *essential first legal step* paving the way for a series of changes to civil law" [emphasis in italics added]. She also states at p.372 that as "homosexual activists consider the need to change criminal law as *the pivotal first step to changing civil law*, the decision [in 2007] to retain 377A by the Singapore Parliament is a *key barrier* to the attempt [by] mainstream homosexuality to usher in the full thrust of the homosexualism agenda and to reform both law and social mindsets" [emphasis in italics added].

C.1 Cautionary Tales from Other Countries

Canada

39. In ***Egan v Canada*** (1995),[44] the Supreme Court of Canada held that sexual orientation is an analogous ground of discrimination under the equality rights provision of the *Canadian Charter of Rights and Freedoms*.[45] In arriving at this decision, the appellants' argument of sexual orientation immutability was uncritically accepted by the Court, without reference to any scientific studies. It did not help that the Attorney General of Canada *conceded* this critical point. La Forest J held at p.528:

> "… it must first be determined that s.15's protection of equality without discrimination extends to sexual orientation as a ground analogous to those specifically mentioned in the section… the respondent Attorney General of Canada *conceded this point*. While I ordinarily have reservations about concessions of constitutional issues, I have *no difficulty accepting the appellants' contention* that whether or not *sexual orientation* is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is *either unchangeable or changeable only at unacceptable personal costs*, and so falls within the ambit of s.15 protection as being analogous to the enumerated grounds." [Emphasis in italics added]

40. Less than 20 years later, the Court of Appeal for Ontario in ***Halpern v Canada*** (2003)[46] held at [155]-[156] that the existing common law definition of marriage (between one man and one woman) violated the applicants' equality rights on the basis of sexual orientation under s.15(1) of the *Canadian Charter of Rights and Freedoms*, and reformulated the definition of marriage as "the voluntary union for life of two persons to the exclusion of all others". In arriving at this decision, the Court relied on the above statement from p.528 of ***Egan v Canada***, and held that the "common law definition of marriage creates a formal

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[44] See https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1265/index.do. See p.514 (headnotes).

[45] Section 15(1) of the Charter provides that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Notice that the word "sexual orientation" is not *explicitly* found in this provision, which is why the Canadian Court had to rule that it was an "analogous" ground deserving of protection.

[46] https://www.canlii.org/en/on/onca/doc/2003/2003canlii26403/2003canlii26403.pdf

distinction between opposite-sex couples and same-sex couples *on the basis of their sexual orientation*" (emphasis in italics added), and sexual orientation is an analogous ground that comes under the umbrella of protection in s.15 of the *Charter* (see [71]-[76]).

41. In other words, the assumed immutability of sexual orientation became the foundation for same-sex marriage in Ontario. Subsequently, most of the courts in Canada's other provinces also legalized same-sex marriage in their jurisdictions before the federal government passed the Civil Marriage Act in 2005, which legalized same-sex marriage across Canada.[47]

42. In October 2016, Canada passed Bill C-16, which is an act to amend the Canadian Human Rights Act and the Criminal Code to add gender identity and gender expression to the list of prohibited grounds of discrimination.[48] It is unclear how such laws interact with the freedom of speech and religion.

America

43. In the landmark US Supreme Court decision in ***Obergefell v Hodges*** (2015)[49] which recognised a constitutional right to same-sex marriage, the immutability of sexual orientation was uncritically affirmed,[50] though ultimately, they were not invoked as the primary basis for the judgment itself.[51] Instead, the central thrust of the US Supreme Court's decision is based on the fundamental liberty or freedom to *choose* to

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[47] See https://en.wikipedia.org/wiki/Halpern_v_Canada_(AG) and https://en.wikipedia.org/wiki/Civil_Marriage_Act.

[48] https://openparliament.ca/bills/42-1/C-16/

[49] https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf

[50] "And their *immutable* nature dictates that same-sex marriage is their only real path to this profound commitment" (at p.4). "Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and *immutable*" (at p.8). Emphasis in italics added. This is part of the majority decision delivered by Justice Kennedy.

[51] See Lisa & Rosky at p.379. The authors also described the US Supreme Court's references to immutability as "casual, [and] scientifically inaccurate".

marry someone of the same sex (as derived from the Due Process Clause).[52]

44. In arriving at this conclusion, amongst other grounds, the Court made analogous arguments based on the previous US Supreme Court decision in ***Lawrence v Texas*** (2003) (which decriminalized male sodomy laws in Texas), which in turn held that "[i]t suffices for us to acknowledge that adults may *choose* to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons… The *liberty* protected by the Constitution allows homosexual persons the right to make this *choice*."[53]

45. ***Lawrence v Texas*** was cited (at p.14 of ***Obergefell***) to show how the freedom to choose to have sex with someone of the same sex (termed as "intimate association") is the very same freedom which must be extended to the freedom to *choose* to marry someone of the same sex:

> "As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act… But while *Lawrence confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability,* it does not follow that freedom stops there. *Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.*" [Emphasis in bold added]

46. Though immutability of sexual orientation was not ultimately a primary ground for the ***Obergefell*** decision, it certainly played a highly significant role in the Court's decision to ensure that the "full promise of liberty" must necessarily extend to same-sex marriage. This is evident from the Court's observation that the petitioners' "*immutable nature* dictates that same-sex marriage is *their only real path* to this profound commitment [in marriage]" (at p.4) [emphasis in italics added].

47. In the US Supreme Court decision in ***Masterpiece Cakeshop v Colorado Civil Rights Commission*** (2018),[54] the freedom of speech and free

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[52] See Lisa & Rosky at p.379 for a good summary of how the decision in ***Obergefell*** built upon the reasoning in ***Lawrence v Texas***, namely, the fundamental liberty or freedom to choose same-sex relations and relationships.

[53] Justice Kennedy's decision (as part of the majority) (at p.567). See https://supreme.justia.com/cases/federal/us/539/558/. Emphasis in italics added.

[54] https://www.supremecourt.gov/opinions/17pdf/16-111_j4el.pdf.

exercise of religion clashed with anti-discrimination laws (Colorado Anti-Discrimination Act) (CADA) in Colorado which prohibited discrimination based on sexual orientation in a "place of business engaged in any sales to the public and any place offering services… to the public." Jack Phillips, an expert baker and devout Christian, told a same-sex couple in 2012 that he would not create a cake for their wedding celebration because of this religious opposition to same-sex marriages (which Colorado did not then recognise). Phillips was found to have violated the CADA. He was vindicated on appeal, but on rather narrow grounds of improper bias.[55] In addition, the Court indicated that his actions took place before same-sex marriage was legalized in ***Obergefell***. As such, it is unclear what the result would be in future similar cases in the light of ***Obergefell***.[56] A florist (Arlene's Flowers) in a similar position was likewise vindicated by the US Supreme Court, but her case was sent back to Washington to be tried again in the light of the ***Masterpiece Cakeshop*** decision,[57] and it is unclear what the result would be.

48. The interaction between freedom of speech and the free exercise of religion in relation to non-discrimination on the grounds of sexual orientation remains highly contentious, desperately complex, socially fractious, and unsettled.

United Kingdom

49. Male homosexual sex was decriminalized in England and Wales in 1967. The Nullity of Marriage Act 1971 provided that a marriage, to

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[55] https://www.theguardian.com/commentisfree/2018/jun/06/fury-despair-masterpiece-cakeshop-ruling-misplaced.

[56] Justice Kennedy did urge that with respect to the outcome of cases like this in other circumstances, "these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market" (at p.18). However, it may well be that the next time the baker turns away a same-sex couple, he may lose his case. See http://prospect.org/article/press-wrong-on-masterpiece-cakeshop-baker-lost. In fact, shortly after the above decision, Colorado told Phillips that he violated Colorado law by declining to create a cake for a Colorado lawyer celebrating a gender transition. He has since sought declaratory and injunctive reliefs from the Colorado Court. See http://www.adfmedia.org/files/MasterpieceCakeshopComplaint.pdf

[57] http://www.scotusblog.com/case-files/cases/arlenes-flowers-inc-v-washington/

which the parties are not respectively male and female, is void.[58] The provisions of this Act were incorporated into the Matrimonial Causes Act 1973,[59] in which Section 11(c) provides that a marriage shall be void where the parties are not respectively male and female.[60]

50. By way of the Marriage (Same Sex Couples) Act 2013, same-sex marriage was legalised in England and Wales. Schedule 7 (paras 26-27) of this Act[61] repealed Section 11(c) of the Matrimonial Causes Act 1973 (i.e. removing the ground to void a marriage on the basis that the parties are not respectively male and female).

51. The very recent UK Supreme Court decision in ***Lee v Ashers Baking Company Ltd and others*** [2018] UKSC 49 (decided on 10 October 2018) deserves in-depth study.[62] In this case, the UK Supreme Court held that there was no discrimination on the grounds of sexual orientation in this case ([35]), and the objection by the appellants bakery owners to supply a cake iced with the message "support gay marriage" (which was a religious objection to gay marriage, [28]), was an objection to the *message* and not to any particular *person or persons*. The Court also held that the rights to freedom of thought, conscience and religion (article 9 of the European Convention of Human Rights ("**ECHR**")) and to the freedom of expression (article 10 of the ECHR) were clearly engaged by this case ([49]), and that they include the right not to be obliged to manifest beliefs one does not hold ([52]). The bakery owners could not refuse to provide their products to the respondent because he was a gay man or because he supported gay marriage, but that was different from

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[58] https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1972.tb01319.x

[59] https://en.wikipedia.org/wiki/Nullity_of_Marriage_Act_1971 ; http://www.legislation.gov.uk/ukpga/1973/18/pdfs/ukpga_19730018_en.pdf

[60] This is similar to Section 12(1) of the Women's Charter (Cap. 353) which provides that a "marriage solemnized in Singapore or elsewhere between persons who, at the date of the marriage, are not respectively male and female shall be void". See https://sso.agc.gov.sg/Act/WC1961#pr12-

[61] http://www.legislation.gov.uk/ukpga/2013/30/pdfs/ukpga_20130030_en.pdf; https://en.wikipedia.org/wiki/Marriage_(Same_Sex_Couples)_Act_2013#Summary_of_the_Act

[62] See https://www.supremecourt.uk/cases/docs/uksc-2017-0020-judgment.pdf (for a copy of this decision) and https://www.supremecourt.uk/cases/docs/uksc-2017-0020-press-summary.pdf (for a press summary of this decision).

obliging them to supply a cake iced with a message with which they profoundly disagreed ([55]).

52. See also [59]-[62] of this case where the UK Supreme Court discussed the ***Masterpiece Cakeshop*** case, drawing a clear distinction between refusing to produce a cake conveying a particular *message*, for any customer who wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer's *characteristics*. One can "debate which side of the line particular factual scenarios fall" (for e.g. whether making a cake for a gay wedding, even if the cake had no particular message, was expressive in itself and required strict scrutiny – see the decisions of Justices Thomas and Alito in ***Masterpiece Cakeshop***), but on the facts of the ***Ashers Baking*** case, there can be no doubt. The bakery would have refused to supply this particular cake to anyone, whatever their personal characteristics, and so therefore there was no discrimination on the grounds of sexual orientation (see [62]).

India

53. In the very recent landmark decision of ***Navtej Singh Johar & Ors v Union of India Ministry of Law and Justice Secretary*** (6 September 2018),[63] the Supreme Court of India held that s377 of the India Penal Code, insofar as it penalizes any consensual sexual relation between two adults, be it homosexuals, heterosexuals or lesbians, cannot be regarded as constitutional (p.165). This was the decision which sparked off the current debate in Singapore, fanned by Professor Tommy Koh's public invitation, "I would encourage our gay community to bring a class action to challenge the constitutionality of Section 377A".[64]

54. There are at least three important (if not critical) foundations to the Indian Supreme Court's decision.

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[63] https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf

[64] "Veteran diplomat Tommy Koh calls on S'pore's gay community to mount challenge against S377A", *Today* (7 September 2018): https://www.todayonline.com/singapore/veteran-diplomat-tommy-koh-calls-spores-gay-community-mount-challenge-against-s377a

55. First, the Court's uncritical acceptance of sexual orientation immutability as a settled scientific fact.[65] The Court cited the views or positions of the Yogyakarta Principles (p.92),[66] the American Psychological Association ("**APA**") (pp.92, 94),[67] the UNHCR (p.94),[68]

[65] "[Homosexuality] is just as much *ingrained, inherent and innate* as heterosexuality… It is as natural a phenomenon as other natural biological phenomena. What the science of sexuality has led to is that an individual has the tendency to feel sexually attracted towards the same sex, for the decision is one that is *controlled by neurological and biological factors*. That is why it is his/her natural orientation which is innate and constitutes the core of his/her being and identity" (at p.93, [143]). See also p.94 ([144]), p.160 ([253(vii)]) ("Sexual orientation is one of the many biological phenomena which is *natural and inherent* in an individual and is *controlled by neurological and biological factors*. The science of sexuality has theorized that an individual exerts *little or no control* over who he/she gets attracted to."), p.456 ([13.2]) ("Sexual orientation is an innate attribute of one's identity, and *cannot be altered*. Sexual orientation is *not a matter of choice*. It manifests in early adolescence. Homosexuality is a natural variant of human sexuality."), p.461 ([14.3]), p.467 ([15.2]), p.472 ([16.1], p.489 ([19]) ("Sexual orientation is *immutable*, since it is an innate feature of one's identity, and *cannot be changed at will*."). Emphasis in italics added.

[66] Which they claim "reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity". See https://yogyakartaprinciples.org/introduction/. These are statements of law, *not* science.

[67] As recent opinions in the press have pointed out, the APA's decision in 1973 to remove "homosexuality" from the list of mental disorder was highly politicized (with political pressure and intimidation strategies exerted by gay lobbyists within the APA), and it was not based on hard scientific evidence for the genetic or neurological basis for homosexual orientation. See https://www.straitstimes.com/opinion/section-377a-a-contemporary-important-law. Having regard to its history, as a matter of prudence, one should not uncritically accept the APA's word as the final or authoritative scientific word on the issue of sexual orientation immutability.

[68] "Whether one's sexual orientation is determined by genetic, hormonal, developmental, social and/or cultural influences (or a combination thereof), most people experience little or no sense of choice about their sexual orientation" (at p.94, [p.144]), citing the United Nations High Commissioner for Refugees' Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (23 October 2012). See http://www.unhcr.org/509136ca9.pdf. Again, these are statements of law (the Yogyakarta Principles were referenced at [7]), and are *not* statements of science.

Leonard Sax (p.95),[69] and ***Egan v Canada*** (p.95).[70] However, not a single medical or scientific study or article which contradict or at least challenge immutability was cited, let alone considered, by the Indian Supreme Court in arriving at its decision.

56. Second, in relation to the words "life or personal liberty" in Article 21 of the Indian Constitution, a previous case (***Puttaswamy***) had declared that Article 21 included a fundamental *right of privacy* (pp.103, 142). The Court in ***Navtej Singh*** held that "sexual orientation is an essential and innate facet of privacy [and this includes] the right of every individual including that of the LGBT to express their choices in terms of sexual inclination without the fear of persecution or criminal prosecution" (p.142 ([229]). The foundation has thus been laid for India to follow the "logic" of the US Supreme court decision in ***Obergefell v Hodges*** to extend the right to privacy and personal autonomy to include a fundamental right to choose to marry someone of the same-sex.

57. Third, the word "sex" in Article 15 of the Indian Constitution (non-discrimination) was read widely to include "sexual orientation" (pp.464-469). This is the same foundation / "logic" in ***Egan v Canada*** which had subsequently led to the acceptance of same-sex marriage by the Court of Appeal for Ontario in ***Halpern***.

58. The Singapore Court of Appeal rejected similar arguments which were raised by the appellants in ***Lim Meng Suang v Attorney-General*** [2015] 1 SLR 26. The Court emphasized that the issue of sexual orientation immutability is a *scientific* and *extra-legal* argument which is *outside* the

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[69] Leonard Sax in his 2005 book, *Why Gender Matters: What Parents and Teachers Need to Know about the Emerging Science of Sex Differences,* came up with the often-quoted phrase, "[b]iologically, the difference between a gay man and a straight man is something like the difference between a left-handed person and a right-handed person… Some children are destined at birth to be left-handed, and some boys are destined at birth to grow up to be gay", and this phrase was cited at p.95 ([146]) of ***Navtej Singh***. Mayer & McHugh at p.14 said that many recent "books [which make claims about the innateness of sexual orientation] often exaggerate — or at least oversimplify — complex scientific findings" and they provided the example of Leonard Sax's above quote. Immediately after quoting Sax, Mayer & McHugh criticized it heavily, "[a]s we argue in this part of the report, however, there is *little scientific evidence to support the claim that sexual attraction is simply fixed by innate and deterministic factors such as genes*. Popular understandings of scientific findings often presume deterministic causality when the findings do not warrant that presumption." Emphasis in italics added.

[70] As observed above, the Supreme Court of Canada uncritically accepted sexual orientation immutability without referring to any medical or scientific studies, and also because the Attorney General of Canada *conceded* the point.

purview of the Court, and this argument should (if at all) be addressed by the Legislature instead ([53], [176]). The Court also held that the words "life or personal liberty" in Article 9 of the Singapore Constitution does *not* include the right to privacy and personal autonomy ([44]-[49]), and cautioned that Singapore should approach foreign cases that have conferred an expansive constitutional right to life and liberty (e.g. India and US) with circumspection because they were decided in the context of their unique social, political and legal circumstances ([48]). In addition, the Court held that Article 12(2) of the Singapore Constitution (which does not have the word "sex" in it) should *not* be read or expanded to include "gender", "sex" or "sexual orientation" as new prohibited grounds of discrimination ([182]-[188]).

Hong Kong

59. In Hong Kong, male homosexual sex was decriminalized in 1991 (insofar as it is private, adult, non-commercial and consensual). The age of consent was then 21 for male homosexual sex, and 16 for heterosexuals. A lawsuit was initiated to reduce the age of consent for male homosexual sex to 16. This was successfully obtained and upheld by the Hong Kong Court of Appeal in ***Leung TC William Roy v Secretary for Justice*** (CACV317/2005).[71] The Secretary for Justice accepted that homosexuality (or more accurately, "sexual orientation") was a status for the purposes of Articles 1 and 22 of the Hong Kong Bill of Rights,[72] and that Court held that the buggery law (Section 118C of the Crimes Ordinance) infringed the rights to privacy and equality contained in these clauses (see [46]-[49]). This was so even though Articles 1 and 22 do *not* explicitly contain the words "sexual

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[71] https://legalref.judiciary.hk/lrs/common/ju/ju_body.jsp?DIS=54227&AH=&QS=&FN=&currpage

[72] Article 1 provides for "**Entitlement to rights without distinction**", and Article 1(1) provides, "The rights recognized in this Bill of Rights shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 22 provides for "**Equality before and equal protection of law**", "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." See https://www.elegislation.gov.hk/hk/cap383

orientation" as a ground of protection against discrimination (although the word "sex" is there).

60. It is important to note that in Hong Kong, it is statutorily provided in Section 40 of the Marriage Ordinance (Cap. 181) that a valid marriage is a "voluntary union for life of *one man and one woman* to the exclusion of all others".[73] Accordingly, marriage in Hong Kong is "therefore heterosexual and monogamous", and "[b]y definition, it is not a status open to couples of the same sex", as held at [25] of ***QT v Director of Immigation*** [2018] HKCFA 28.[74] Due to this provision, it was noted by the Hong Kong Court of Final Appeal that the appeal in ***QT v Director of Immigration*** "does not involve any claim that same-sex couples have a right to marry under Hong Kong law" (at [25]).

61. In addition, Article 37 of the Basic Law states that "the freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law".[75] This protection has been understood to be limited to marriage between monogamous heterosexual couples. The following extract from the Hong Kong Court of Appeal decision in ***Leung Chun Kwong v Secretary for the Civil Service*** [2018] HKCA 318[76] should be quoted and carefully considered in full (at [7]-[10]):

> "7. First and foremost, one must bear in mind that in Hong Kong, unlike, say, the United Kingdom prior to the introduction of civil partnership and then same-sex marriage, we have the Basic Law which, at the constitutional level, favours heterosexual couples in terms of access to marriage. *As the law is and has always been understood in Hong Kong, article 37 constitutionally guarantees the right to heterosexual, but not, same-sex marriage.*
>
> 8. This, in my view, defines authoritatively the legal landscape for all discussions on protecting the traditional concept and institution of marriage. *Given that the Basic Law itself inclines toward heterosexual couples in terms of access to marriage, by definition, in Hong Kong one simply cannot say it is wrong or discriminatory for marriage to exclude homosexual people. It is not necessary to ask what the traditional, social, moral or religious reasons or values that inform this preference in the Basic Law are.* Whatever they may be, these reasons or values are now embedded in our Basic Law and have found expression in article 37 in its *constitutional preference for heterosexual marriage*.

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[73] https://www.elegislation.gov.hk/hk/cap181?xpid=ID_1438402808402_002

[74] http://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfa/2018/28.html

[75] https://www.basiclaw.gov.hk/en/basiclawtext/chapter_3.html

[76] http://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkca/2018/318.html

> 9. In other words, in Hong Kong, when one says protecting the traditional concept and institution of marriage is a legitimate aim, one is not merely adopting or following what the European Court of Human Rights has said in *Karner v Austria* (2003) ECHR 395; (2004) 38 EHRR 24 about the same question, which was also adopted in the United Kingdom. *In Hong Kong, when we say the protection of the traditional concept and institution of marriage is a legitimate aim, there is a fundamental, constitutional backing to it.* Moreover, the preference in article 37 for heterosexual people over homosexual people in terms of access to marriage is there notwithstanding that the Basic Law also provides in article 25 that everybody is equal before the law. In other words, the drafters of the Basic Law were fully aware of this important, fundamental human right to equality, when granting to heterosexual people only in the same Chapter III of the Basic Law *a constitutional protection not shared by homosexual people, in terms of access to marriage. If anything, this makes the preference for heterosexual marriage in article 37 stand out all the more starkly*.
>
> 10. It is against this *constitutional backdrop, one that is not shared by jurisdictions like the United Kingdom*, that one must examine this question of protecting the traditional concept and institution of marriage as a legitimate aim, and whether and how the reservation of the civil servant spousal benefits and the tax option for joint assessment to married (heterosexual) couples as opposed to same-sex couples married overseas, would serve to protect the traditional concept and institution of marriage."
>
> [Emphasis in italics added]

As such, the applicant in ***Leung Chun Kwong*** did not challenge the notion that in Hong Kong, "marriage means heterosexual marriage", and accordingly, for the purposes of the appeal, it was proceeded on the basis that in Hong Kong, "heterosexual marriage is worthy of full protection under the law" (see [2]).

62. Despite the statutory enshrinement and constitutional preference for heterosexual marriage, same-sex couples in Hong Kong (but married outside of Hong Kong) have alleged discrimination against them with respect to the meaning of civil servant "spousal" benefits in the context of employment (***Leung Chun Kwong***) and in the context of immigration, an application for a dependant visa for a "spouse" to stay in Hong Kong (***QT v Director of Immigation***). At the risk of oversimplifying, the broad overarching question in both cases was whether "spouse" should be limited to those in a heterosexual marriage. Applying different tests/criteria, the former case held that the answer is "Yes" (i.e. there may have been indirect discrimination based on sexual orientation but this could be justified to uphold the special status of marriage in Hong Kong) while the latter said "No" (i.e. there was discrimination on the basis of sexual orientation).[77]

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[77] For a discussion on both cases, see https://www.lexology.com/library/detail.aspx?g=0711dd2d-8db5-46b0-baf3-cf644132e46e. See also https://www.internationallawoffice.com/Newsletters/Employment-Benefits/Hong-

63. Hong Kong is unique in the sense that *despite* the decriminalization of male homosexual sex, *because* of the statutory enshrinement and constitutional preference for heterosexual marriage, traditional marriage between a man and a woman remains unchallenged (although inroads have been made in the immigration context, as held in ***QT***, and possibly further inroads may be made in the future arising from this decision). It would appear that *but for* such statutory enshrinement and constitutional preference for heterosexual marriage, Hong Kong would have developed along the same lines as America, Canada or the United Kingdom in terms of the expansion of LGBT "rights" (including the legislative legalization of same-sex marriage or judicial redefinition of marriage).

Hungary

64. See also the Hungarian example, which enshrined the heterosexual definition of marriage into their Constitution. Article L.1 of the Constitution of Hungary provides as follows:

> "Hungary shall protect the institution of marriage as *the union of a man and a woman* established by voluntary decision, and the family as the basis of the nation's survival."[78] [Emphasis in italics added]

C.2 Assessing the Floodgate Argument in the Context of Singapore

65. "[I]t 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."[79] I have examined above what happened in various jurisdictions after decriminalization of same-sex acts. I will now consider the likelihood of, and the circumstances under which, such consequences occurring in Singapore.

Kong/Howse-Williams-Bowers/Preventing-employment-discrimination-versus-upholding-status-of-marriage

[78] See https://www.constituteproject.org/constitution/Hungary_2011.pdf. Article L continues: "2. Hungary shall encourage the commitment to have children. 3. The protection of families shall be regulated by a cardinal Act."

[79] "Signposting as a principle in lawmaking", *The Straits Times* (27 September 2018). https://www.straitstimes.com/opinion/signposting-as-a-principle-in-lawmaking

But before that, let us remind ourselves of the Government's vision of marriage and families in Singapore, which is similar to Hong Kong's vision, i.e. "marriage means heterosexual marriage" (***Leung Chun Kwong***).

The Government's Vision of the Heterosexual Family as Normative

66. The Prime Minister Mr. Lee Hsien Loong confirmed during the 2007 Debate that *heterosexual marriages* are the bedrock of the society of Singapore:

> "Many Members have said this, but it is true and it is worth saying again. Singapore is basically a conservative society. The family is the basic building block of our society. It has been so and, by policy, we have reinforced this and we want to keep it so. *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.*"
>
> "So, we should strive to maintain a balance, *to uphold a stable society with traditional, heterosexual family values*, but with space for homosexuals to live their lives and contribute to the society." [Emphasis in italics added]

67. PM Lee also spoke about the balance between adapting to and accommodating homosexuals in our society, but *not* approving of them actively promoting their lifestyles to others or setting the tone for mainstream society (which remains conventional and straight), and *not* to allow or encourage activists to champion gay rights as they do in the West.[80]

Likelihood in Singapore

68. If Singapore repeals s377A, will it go the way of America, Canada and the United Kingdom? In my view, studying the stories of other countries, there is a high likelihood of Singapore going the same way of the West in terms of the proliferation of LGBT "rights". Consider the following scenarios / permutations on how Singapore can easily become like the Western countries.

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[80] "Homosexuals work in all sectors, all over the economy, in the public sector and in the civil service as well. They are free to lead their lives, free to pursue their social activities. *But there are restraints and we do not approve of them actively promoting their lifestyles to others, or setting the tone for mainstream society.* They live their lives. That is their personal life, it is their space. But the *tone of the overall society*, I think, remains conventional, *it remains straight, and we want it to remain so…* I think we have also been right to adapt, to accommodate homosexuals in our society, *but not to allow or encourage activists to champion gay rights as they do in the West.*" [Emphasis in italics added].

69. First, if sexual orientation immutability is uncritically accepted or simply assumed as true, it will likely become a foundational argument for the repeal or striking down of s377A (which was what happened in the Indian Supreme Court decision of ***Navtej Singh***). Worse, if immutability is relied on as a basis or ground for s377A to be legislatively repealed or judicially held as unconstitutional, then it opens the door for analogous arguments to be made that heterosexual marriage discriminates against same-sex couples on the basis of sexual orientation – thereby risking the redefinition of marriage to include same-sex marriage (see the Canadian example). Once this happens, there is very little to stop same-sex couples from adopting children.

70. The Singapore Court of Appeal has said in ***Lim Meng Suang*** ([53], [176]) that the issue of sexual orientation immutability is something for the Legislature (and *not* the Court) to address. Thus far, the Legislature has not taken a position on this or addressed this.

71. Second, if sexual orientation immutability is accepted or assumed as true (and if s377A is repealed on that basis), it becomes the foundation or stepping stone for anti-discrimination legislation (prohibiting discrimination on the ground of sexual orientation) to be enacted, or adopted as an analogous ground protected under equality clauses.[81] For example, in America, the baker and florist examples, and in Canada, the hate-crimes legislation. This directly pits the rights / freedom of speech and religion against the "rights" of the LGBT community in a multitude of ways. Lawsuits alleging sexual orientation discrimination on the one hand, and allegations of suppression of religious freedom and the freedom of speech on the other, will proliferate. In a multi-religious and

[81] We are currently blessed with a world class judiciary with brilliant, just and fair judges who exercise judicial self-restraint. For example, the Singapore Court of Appeal in ***Lim Meng Suang*** declined (see [92] and [182]) to read words like "gender", "sex" and "sexual orientation" into Article 12(2) of the Constitution. But in the future, can we ensure that *future judges* will not begin to read words analogously into the Constitution (e.g. to read "sexual orientation" into Article 12(2)) just like how the Canadian courts have done so with respect to Section 15 of their Charter, or Hong Kong courts with respect to their Bill of Rights, or the Indian Supreme Court with respect to Article 15 of their Constitution? However, it is noted that the constitutions of Canada, Hong Kong and India all explicitly contain the word "sex" in their equality / non-discrimination articles (which was an important stepping stone to read in the words "sexual orientation", although in ***Egan v Canada***, the Supreme Court of Canada did not rely on the word "sex" to read "sexual orientation" as an analogous ground of protection), unlike Singapore's Article 12 which does *not* even contain the word "sex".

multi-cultural country like Singapore, this will tear Singapore apart along the seams.

72. While the recent UK Supreme Court decision in ***Lee v Ashers Baking*** appears to have pushed back a few steps against the force of the LGBT anti-discrimination machinery, it remains a contentious "debate which side of the line particular factual scenarios fall" for the purposes of determining legitimate objections to selling a product or providing a service which conveys a message in support of LGBT. For example, whether making a cake or providing a hand-arranged bouquet of wedding flowers for a gay wedding, *even if the cake or flowers had no particular message*, was expressive in itself to justify a refusal to provide the goods or services on the grounds of religion or conscience.

73. Third, again if sexual orientation immutability is accepted or assumed as true (and if s377A is repealed on that basis), it will become the new "norm" for sex education of young children. Would parents be able to opt out of or speak out against such new "norms"? As it stands, Pink Dot's Declaration 5 already states that they "are ready for schools to support all [their] children equally with *accurate sex education*, and to equip teachers to handle bullying in schools", and that they want their children to be "brought up in healthy, affirming school environments, *regardless of their sexual orientation or gender identity*".[82] Would anyone be able to successfully challenge school administrators and civil servants from the Ministry of Education who may then insist that sexual orientation immutability is "accurate" sex education? How would this be reconciled with Article 26(3) of the Universal Declaration of Human Rights, which provides that "[p]arents have a prior right to choose the kind of education that shall be given to their children"?[83]

74. Fourth, if sexual orientation immutability is accepted or assumed as true (and if s377A if repealed on that basis), there is absolutely nothing to stop the proliferation and promotion of the homosexual lifestyle (as normative, innate or immutable) in mainstream media. As it stands, Pink Dot's Declaration 4 states that they are "ready to see more positive portrayals of LGBTQ people *in our mainstream media without*

[82] https://pinkdot.sg/2018/07/10-declarations-for-equality/. Emphasis in italics added.

[83] http://www.un.org/en/universal-declaration-human-rights/

censorship",[84] and that they "need to [be] the positive role models among us to be seen by the public, to alter misconceptions about the LGBTQ community, to inspire those *who have realised that they are different* and have no one they can turn to".

75. Wrapping up the first four points above, "sexual orientation" is highly nebulous by definition and can mean a variety of different things.[85] In Singapore, to uncritically accept or unthinkingly assume that it is immutable, and to then begin to take steps to protect it as an alleged "fundamental right", would be an irreversible social experiment which amounts to recklessness and a complete dereliction of duty. If such a fundamental concept is still scientifically doubtful and ambiguous (and clearly unsupported by science), can anyone pursue the social experiment in good faith that it is truly the best for our society?

76. Fifth, it should be emphasized that the above freedom to choose / right to privacy argument (successfully raised in ***Texas v Lawrence***; ***Obergefell***) is substantially the same argument raised by V.K. Rajah recently as his alternative argument to the immutability argument as reasons to repeal s377A, i.e. that "it is not the province of either the State or society to regulate such *inherently private consensual conduct among adults.*"[86]

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[84] "… because we are sick and tired of being seen as tragic characters or vilified as perverts".

[85] Lisa & Rosky at pp.365, "it is important to note that sexual orientation is not easy to define or measure"… it is "a multifaceted phenomenon, incorporating sexual attractions, sexual arousal, sexual fantasy, sexual behaviour, and sexual identity", and "we want to emphasize that none of the studies reviewed here can claim to have definitely assessed the core construct of sexual orientation, given its inherently multidimensional nature"; Mayer & McHugh at p.14, "some central concepts – including "sexual orientation" itself – are often ambiguous, making reliable measurements difficult both within individual studies and when comparing results across studies". See also p.16, "[o]ne of the central difficulties in examining and researching sexual orientation is that the underlying concepts of "sexual desire," "sexual attraction," and "sexual arousal" can be ambiguous, and it is even less clear what it means that a person identifies as having a sexual orientation grounded in some pattern of desires, attractions, or states of arousal."

[86] See footnote 23 above. V.K. Rajah argues that "secular societies recognise that *a key facet of human dignity is the right to have private, consensual, non-procreative sex between adults*". In his conclusion, he said that "[e]ven if one were to insist that such a trait is not innate, it is not the province of either the State or society to regulate such *inherently private consensual conduct among adults*." Emphasis in italics added. Such an argument, which effectively urges the State to take the Hart side of the Devlin-Hart Debate, is unsustainable, at least in Singapore. If it were true, private bigamy and adult incest (insofar as they are private, consensual and between adults) should likewise be decriminalized, and there will be no reason for Singapore to block online services like Ashley Madison which provides a platform for married people to enter into private and consensual adulterous affairs or flings.

77. While the Singapore Court of Appeal (***Lim Meng Suang***) had in 2014 urged circumspection when approaching the expansive interpretation of the right to life and liberty / due process provisions in the constitutions of foreign countries like India and US, one cannot rule out *future* courts taking such an expansive interpretation to read in a fundamental "right" to privacy or personal autonomy. If s377A is repealed or struck down by the Court on the basis that there is a "right" to choose or engage in intimate association with someone of the same sex (or the "right" to privacy, as expanded by the Supreme Court of India in ***Navtej Singh***), then (following the example of the US Supreme Court in ***Obergefell***) the door is open for a *future* court or Parliament to extend this "principle" and grant or legislate for the "right" to same-sex marriage.

78. Sixth, in the absence of the statutory enshrinement and constitutional preference for heterosexual marriage as the Singapore norm (like in Hong Kong), consistent and repeated court challenges (if s377A is repealed) alleging discrimination on the grounds of sexual orientation will sooner or later very likely yield the result that heterosexual marriage (amongst other rights and policies directed or reserved for heterosexual married couples) is discriminatory to same-sex couples.[87]

79. Seventh, if decriminalization takes place, there are currently no constitutional, statutory or clear policy framework in place to "not to allow or encourage activists to champion gay rights as they do in the West," and to ensure that "the tone of the overall society… remains conventional, it remains straight, and we want it to remain so" (PM Lee during the 2007 Debate). Pink Dot's Third Declaration states "[w]e are ready for LGBT organisations to be able to register themselves under the Societies Act - so that we can have proper legal entities to support members of the LGBTQ community".[88] If and when registered under

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[87] The prescription of void marriages between persons of the same sex (in the Women's Charter), being the *negative prohibition* of homosexual marriages rather than the *positive description* of heterosexual marriages, will do little to prevent same-sex marriages in the future (for example United Kingdom, which had similar provisions like the Women's Charter on homosexual marriages being void, eventually went on to legislatively provide for same-sex marriages 50 years after the decriminalization of buggery).

[88] For completeness, the declaration continues, "… too many of our community groups have suffered because they are not recognised for the great work that they are doing".

Societies Act, there is little stopping the "activists [in] champion[ing] gay rights as they do in the West" and "actively promoting their lifestyles to others, or setting the tone for mainstream society".

80. Having regard to the above, the following caution is well-worth repeating:[89]

> "Further, gay activists in Singapore have publicly listed their demands which go way beyond repealing 377A; these include having registered societies to promote the homosexual agenda and ensuring children receive homosexuality-affirming 'accurate sex education'.
>
> It is pivotal to their cause to repeal 377A as a first step to advance a broader agenda to normalise same-sex relationships, which demonstrates that 377A is not merely symbolic but substantive.
>
> Homosexual activists have pointed out societies cannot promote criminal activity and thus 377A inhibits the promotion of their ideological agenda and demands that society conform to their vision of sexuality.
>
> 377A stands in the way of demands to positively portray, even celebrate same-sex relationship through vehicles such as free-to-air media programming and in school curricula, to fuel agitation to legalise same-sex marriage and child adoption by same-sex couples. *The consequences of repeal are intertwined with the call for repeal and demand strict scrutiny, rather than being tactically ignored, minimised or misrepresented*.
>
> The consequences of repeal are not something which should be addressed 'after' repeal, but in conjunction with the question of retention/repeal, to which they are inextricably linked."

Indeed, it will be foolish *not* to consider and to subject the consequences of repeal to the strictest possible scrutiny.

81. Will Singapore's Parliament/Legislature, Executive and Judiciary be able to stand firm against the onslaught that *will come* if s377A is repealed? The LGBT agenda has already been boldly and publicly laid down. There will be no lack of trying on the part of activists. It only takes any one or more of the three branches of the Westminster system of Government to exhibit weakness or compromise, and the Government's vision of traditional heterosexual marriages and family values as the bedrock of Singapore's society will quickly change or rapidly crumble.

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[89] See footnote 12 above: https://www.straitstimes.com/opinion/section-377a-a-contemporary-important-law.

82. In summary, it is clear from the above that the floodgate (or "slippery-slope") argument is not mere fearmongering conjured up by irrational religionists or conservatives to impose their religious or conservative views on others. Rather, it is founded on cogent, rational and compelling grounds, built upon a close study of those who have gone before us, and the various routes they took to arrive at where they are.[90]

D. THE CITY, ITS WALLS AND THE OUTER FENCE

83. Traditional heterosexual marriage and family values is our "city", and it is without doubt the declared vision of the Government, as well as the desire of the majority of Singaporeans (including free-thinkers, agnostics and atheists). S377A is the "outer fence". However, as it stands, there are virtually no walls built around the city. If the outer fence is removed without building up those "city walls", the city will in all likelihood be destroyed.

The Recommended Constitutional, Statutory and Policy Framework

84. Building Up the City Walls: Even though s377A is not included in the current round of amendments, it is humbly urged that the Government and Parliament (as the case may be) must do the following, i.e. build up the "city walls" and to shape culture along the sound paths:

    (1) "Immutability": Unequivocally reject the concept of sexual orientation immutability or at least state publicly that this is not supported by science[91] (because the uncritical acceptance or unthinking assumption of immutability may lead to claims of discrimination on grounds of sexual orientation, like it happened in Canada in ***Egan***, or form a foundation for decriminalization of same-sex acts like what happened in the Supreme Court of India decision

[90] There are, of course, *many other* arguments relied on by LGBT advocates to push for LGBT "rights" across the world, as well as *many other* arguments raised to resist the various LGBT "rights" above. I urge all Singaporeans (in particular, those trained in law, science/medicine, statistics, sociology, etc) and policy-makers to diligently study the stories of other countries, and thus arrive at a more precise and accurate understanding of the co-relationship / causality between the decriminalization of same-sex acts and the subsequent proliferation of LGBT "rights".

[91] Or at the very least, to openly acknowledge that there *are* conflicting scientific views on this, and that it is *not* possible to conclude that sexual orientation is immutable.

in ***Navtej Singh***, or lead to same-sex marriage, like it happened in Canada in ***Halpern***). The Singapore Court of Appeal in ***Lim Meng Suang*** has already emphasized that this issue is for the Legislature to address. The Legislature must no longer remain silent;

(2) "Right" of Choice/Privacy: Unequivocally state that, in the Singapore context, there is no fundamental "right" of "intimate association" or "privacy" or "choice" between homosexuals (to avoid it being used as an analogous or foundational argument for same-sex marriage - as seen in the US decision of ***Obergefell***, and to avoid it being used as a foundational or critical argument for decriminalization – as seen in the US decision of ***Lawrence v Texas*** as well as the Supreme Court of India decision in ***Navtej Singh***). There is also a need to put in a constitutional and statutory framework to reiterate this position. This will also better ensure that *future* courts will not take an expansive interpretation of the Constitution to include any "fundamental rights" of privacy, personal autonomy, intimate association and choice, which were the inroads for the rapid expansion of LGBT "rights" in the US (and soon to be, it is predicted, India);

(3) Heterosexual Marriage: Constitutionally and statutorily enshrine the definition of marriage as a voluntary union between one man and one woman for life (following the examples of Hong Kong and Hungary), and to lock this in with an "eternity" clause. In particular, Hong Kong stands out as the only country to have decriminalized sodomy laws but resisted same-sex marriage, *because* of their statutory enshrinement and constitutional preference for heterosexual marriage as the Hong Kong norm;

(4) Education / Media / Culture: Put in directive principles and an express duty in the Constitution to say that the State shall promote heterosexual marriage and family values as the Singaporean norm in schools/education, media and culture;[92]

(5) Thought/Conscience/Religion/Speech/Expression: This area needs to be meticulously studied, so that the scopes of the rights to freedom of thought, conscience, religion and speech / expression

[92] In addition, sex education in schools should be made transparent, so that parents can check on exactly what is being taught.

(for atheists, agnostics and the religious) are clarified and protected in advance (both constitutionally and statutorily), lest Singapore goes the way of other countries in the proliferation of "hate-speech" or "discrimination" litigation or proceedings (and to avoid the ***Masterpiece Cake*** and florist scenarios in America). The recent UK Supreme Court decision in ***Lee v Ashers Baking*** should also be carefully studied.

In other words, to build up a constitutional, statutory and policy framework which protects and promotes traditional heterosexual marriages and family values as the Singapore norm.

85. **If indeed the Government still believes in its vision of traditional heterosexual marriages and family values as the bedrock of Singapore's society, and that Singapore remains a straight society, it must act courageously and decisively**. Indeed, there is absolutely no reason not to do so unless the Government no longer believes in that vision. It cannot be emphasized enough that "the Government cannot abdicate its responsibility to lead from the front".

E. CONCLUSION

86. As it stands, s377A is an ineloquent defender of traditional heterosexual marriage and family values. But it remains a *necessary* defender against the *highly likely* subsequent proliferation of LGBT "rights". The floodgate argument is *not* fearmongering – the legitimate concerns about what will likely happen next are grounded in real-life examples of those who have gone before us who were ill-prepared for the floods which swept through their societies. As a matter of the common good, including future generations, much more is lost (as compared to any gains) by removing s377A.

87. Nevertheless, to mitigate the harshness of the current sentencing regime, I would recommend that the penal sanctions in s377A be reduced to a fine, with no imprisonment.[93]

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[93] I had made a similar recommendation back in 2004 about the old s377, where I had recommended that it be retained in its entirety without attempting to amend it to exempt heterosexuals for consensual heterosexual oral sex, but I suggested that as a rider, legislation should be introduced which imposes a much lighter punishment, e.g. a fine and not imprisonment, where there is consent between mature adults and the act is done in privacy. "This stance would mitigate the harshness of the current sentencing regime while at the same time

88. It is hoped that this letter (and the extensive facts and references, both legal and scientific, which comes with it), will further a fruitful, robust and rigorous debate on s377A. As PM Lee said before, "for debate to be fruitful, it has to be issue-focussed, based on facts and logic, and not just on assertions and emotions. The overriding objective is to reach correct conclusions on the best way forward for the country" (2004 Harvard Club speech). May the Singapore Government reach the correct conclusions on the best way forward for the country on the issues in this letter.

To LGBT People and Supporters of Repeal

89. I believe that those with same-sex attractions must be accepted with sensitivity, compassion and respect. I am unable to ignore or downplay the statistically higher risks of negative mental health outcomes that many of them face,[94] even if the *causes* for such increased risks remain to be accurately studied, and what ought to be the appropriate *help or remedy* for such mental health outcomes.[95]

90. Many people who support the repeal of s377A do so because they personally know someone with same-sex attractions, and can identify with or are in solidarity with them with regards to the negative mental health outcomes that they face.[96] In this regard, I am on common ground with such supporters (save that I do not support repeal).

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maintaining the moral message that the criminal law should continue to send." See footnote 3 above.

[94] Mayer & McHugh, at p.85. See pp.59-86 of their article where they discuss sexuality, mental health outcomes and social stress. Their key finding (at p.8) is that compared to the general population, non-heterosexual sub-populations are at an elevated risk for a variety of adverse health and mental health outcomes, including anxiety disorders, depression, substance abuse and suicide.

[95] See Mayer & McHugh, pp.59-85 for a detailed discussion on (and a critical analysis of the evidence in support of) the potential causes or factors which account for or explain the poor mental health outcomes experienced by LGBT people. The authors conclude this section with a call to action, "[m]ore research is needed to explore the causes of, and solutions to, these important public health challenges" (at p.85).

[96] In particular, those who know a friend or family member who has same-sex attractions and personally encountered or experienced the tragedy and devastation arising from the suicide of that friend or family member. "Given the tragic consequences of inadequate or incomplete

91. Even though my conclusion in this letter is different from those who support the repeal of s377A, I fully agree with the following statement:

> "While there is much controversy surrounding how our society treats its LGBT members, no political or cultural views should discourage us from understanding the related clinical and public health issues and helping people suffering from mental health problems that may be connected to their sexuality."[97]

As Mayer & McHugh aptly appeal, "We must find ways to relieve their suffering."[98] There is much research, understanding and work to be done by Singapore as a society in this regard.

92. To those whom I know with same-sex attractions, and those who have yet to tell me, despite my personal views above, I remain as your friend. I hope you will remain as mine. One day, when you are ready, I stand ready to hear your story and your struggles, and to offer you all the support I can possibly give.

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information in these matters and its effect on public policy and clinical care, more research into the reasons for elevated suicide risk among sexual minorities [i.e. LGBT people] is desperately needed" (Mayer & McHugh, p.70). I fully agree.

[97] Mayer & McHugh, pp.115-116.

[98] Mayer & McHugh, at p.6. As may be evident from my letter, and for the avoidance of doubt, the way to relieve their suffering does *not* include assuming or accepting the immutability of sexual orientation, endorsing or approving the homosexual lifestyle (whether in media, education, culture or otherwise), or changing the norm of traditional heterosexual marriage and family values.