

Statement of Concern on Section 377A of the Penal Code and the Rule of Law in Singapore

1. As students concerned with the rule of law, we share the concerns regarding Section 377A of the Penal Code raised by former Attorney-General and Supreme Court judge V. K. Rajah in his commentary, "Section 377A: An impotent anachronism" ([The Straits Times](#), 30 September 2018).
2. In particular, he noted that the current non-enforcement policy is "constitutionally unsatisfactory" and "undermines the rule of law". This is because,

"The public prosecutor alone is constitutionally charged with the responsibility for enforcement. He is duty bound to consider enforcement of all laws that are infringed. Selective enforcement of laws [creates] perceptions that prosecutions can be directed by the Government or pursued on non-legal grounds."
3. This is affirmed by the Court of Appeal in ***Ramalingam Ravinthran v Attorney-General [2012] 2 SLR 49*** at [44], where former Chief Justice Chan Sek Keong observed that while "[t]he prosecutorial power is part of the executive power, under existing constitutional practice it is independently exercised by the Attorney-General as the Public Prosecutor."
4. The current legal arrangement runs contrary to the first element of the rule of law as conceived by legal scholar Professor A.V. Dicey, which refers to "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power". This concern has also been echoed by other eminent local legal scholars such as [former Attorney-General Walter Woon](#) and [Ambassador-at-large Tommy Koh](#).
5. In addition to this constitutional issue, we are concerned that the existing non-enforcement policy may undermine the rule of law in two other ways.

Other ways Section 377A undermines the rule of law

The need for clear and stable laws

6. According to legal positivist Professor Joseph Raz, the rule of law requires laws, particularly criminal law, to be clear and stable to effectively guide people in their behaviours and everyday lives. This view finds strong concurrence from across the jurisprudential spectrum even among opponents of legal positivism, such as Professor Lon Fuller. A proponent of natural law, he identified eight principles of legality that were necessary to uphold the rule of law. This includes the requirements that laws be at least minimally clear and intelligible, free of contradictions, and relatively constant.
7. In a recent commentary titled "*Signposting as a principle in lawmaking*" ([The Straits Times](#), 27 September 2018), SMU Law Professor Tan Seow Han noted that the existing non-enforcement policy in relation to Section 377A "does not amount to a representation that it will *never* be enforced". This ambiguity over what the Government means by non-active enforcement of the law generates uncertainty and anxiety among Singaporeans, especially gay and bisexual men, as to

whether and when they may be prosecuted for engaging in same-sex sexual intimacy. This ambiguous and unpredictable legal arrangement is clearly contrary to the rule of law.

The rule of law as the balancing of competing rights

8. Secondly, in ***Chee Siok Chin v Ministry of Home Affairs [2006] 1 SLR(R) 582*** at [52], Mr Rajah sitting in the High Court also observed that “[p]ermitting unfettered individual rights in a process that is value-neutral is not the rule of law.” It is against this backdrop that our society should approach “slippery slope” concerns undergirding the retention of Section 377A. For instance, in his [Pastoral Letter on S377A to Catholics](#), the Archbishop of Singapore Most Rev. William Goh explained that the Catholic Church opposes the repeal of Section 377A because it could “lead to the subjugation of the rights of Catholics to *exercise their faith values*”.
9. With respect, former Chief Justice Yong Pung How in ***Liong Kok Keng v Public Prosecutor [1996] 2 SLR(R) 683*** has held that while religious freedom is enshrined under Article 15 of the Constitution, the right to practise one’s religion is “not an absolute and unqualified right” and must be balanced against competing interests. Retaining Section 377A to prevent religious freedom from being encroached upon by others’ rights of equality and non-discrimination may therefore run contrary to the rule of law by treating religious freedom as an unfettered and absolute right.
10. Concerns over the “slippery slope” may also indicate an unfamiliarity with how laws are enacted. The repeal of Section 377A does not *necessarily* lead to any other legislative changes, such as the legalisation of same-sex marriage or adoption. For any such development to take place, the Government must first engage in a [rigorous parliamentary process](#) pursuant to the rule of law. This comprises three Readings of a proposed Bill, the scrutiny of the Presidential Council for Minority Rights and the assent of the President.

Upholding the rule of law in Singapore

11. In a speech at an event commemorating the Attorney-General Chamber’s 150th anniversary, Prime Minister Lee Hsien Loong [emphasised](#) the rule of law as a “vital national interest” for a small country like Singapore. It is clear that the retention of Section 377A and its corresponding non-enforcement policy undermine the rule of law. Laws should not be subject to unconstitutional compromises to mollify interest groups in society, especially when a critical national commitment is at stake. It is time that the Singapore Government does what is necessary to uphold the rule of law in Singapore.

About CAPE

The Community for Advocacy & Political Education (CAPE) is a student organisation founded by students from Yale-NUS College and NUS Law. We aim to increase political literacy among young Singaporeans to make civil participation more accessible.

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