

## LEGAL ANALYSIS: REPEAL OF SINGAPORE'S PENAL CODE SECTION 377A AND CONSTITUTIONAL AMENDMENTS SAID TO PROTECT THE DEFINITION OF MARRIAGE<sup>1</sup>

### I. Introduction

On 20 October 2022, two Bills were tabled before the Singaporean Parliament for their first readings:

- One to repeal Section 377A of the Penal Code;<sup>2</sup> and
- Another one to amend the Constitution of Singapore with a stated intention of "protecting the existing definition of marriage".<sup>3</sup>

The two Bills will be debated on 28 November 2022 in Parliament.<sup>4</sup>

Section 377A of the Penal Code criminalizes consensual sexual conduct between males, and has been the subject of extensive litigation challenging its constitutionality, including very recently.<sup>5</sup>

The International Commission of Jurists (ICJ) welcomes the repeal of Section 377A, a law which is discriminatory against LGBTI persons and inconsistent with human rights, including the rights to non-discrimination, privacy and freedom from arbitrary arrest and detention, and in violation of Singapore's international human rights law obligations. The ICJ has repeatedly called for the repeal of Section 377A, highlighting its detrimental effects on the human rights of LGBTI persons in Singapore.<sup>6</sup> The repeal of Section 377A is a victory for human rights defenders and lawyers in Singapore who have been tirelessly advocating for a fairer and more inclusive country.

The ICJ, however, expresses serious concern over the Constitution of the Republic of Singapore (Amendment No. 3) Bill ("Constitutional Amendment Bill"), which will severely limit independent judicial review and oversight over laws, policies and practices that discriminate against LGBTI persons in Singapore, in violation of the country's international human rights law obligations.

If the Constitutional Amendment Bill is adopted as currently formulated, it will insulate the definition of marriage as a union exclusively between a man and a woman from judicial review on non-discrimination and human rights grounds. It will also curtail judicial review of all regulations and executive actions that discriminate against LGBTI persons, under the overbroad and vague purpose of purportedly "protecting, safeguarding, supporting, fostering, or promoting the institution of marriage".<sup>7</sup>

The ouster clauses in the Constitutional Amendment Bill violate the principles of non-discrimination; the Rule of Law and separation of powers; legality; and the rights to access to justice and effective remedies; equality before the law and equal protection of the law without discrimination; and to family life. They have the effect of entrenching and promoting discrimination against LGBTI persons in State laws, policies and practices, including housing, media, and education policies. The

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<sup>1</sup> Updated as of 28 November 2022.

<sup>2</sup> Penal Code (Amendment) Bill, Bill No. 31/2022, available at: [https://www.parliament.gov.sg/docs/default-source/default-document-library/penal-code-\(amendment\)-bill-31-2022.pdf](https://www.parliament.gov.sg/docs/default-source/default-document-library/penal-code-(amendment)-bill-31-2022.pdf).

<sup>3</sup> Constitution of the Republic of Singapore (Amendment No. 3) Bill, Bill No. 32/2022, available at: [https://www.parliament.gov.sg/docs/default-source/default-document-library/constitution-of-the-republic-of-singapore-\(amendment-no-3\)-bill-32-2022.pdf](https://www.parliament.gov.sg/docs/default-source/default-document-library/constitution-of-the-republic-of-singapore-(amendment-no-3)-bill-32-2022.pdf).

<sup>4</sup> The Straits Times, "Bills tabled to repeal Section 377A, amend Constitution to protect definition of marriage from court challenge", 20 October 2022, available at: <https://www.straitstimes.com/singapore/politics/bills-tabled-to-repeal-section-377a-amend-constitution-to-protect-definition-of-marriage-from-court-challenge>.

<sup>5</sup> See, for example, the recent judgment from the Court of Appeal in *Tan Seng Kee v Attorney-General* and other appeals [2022] SGCA 16. See also, ICJ, "Singapore: Repeal section 377A of the penal code and uphold LGBTQ+ individuals' human rights", 28 March 2022, available at: <https://www.icj.org/singapore-repeal-section-377a-of-the-penal-code-and-uphold-lgbtq-individuals-human-rights/>.

<sup>6</sup> ICJ, "Singapore: Repeal section 377A of the penal code and uphold LGBTQ+ individuals' human rights", 28 March 2022, available at: <https://www.icj.org/singapore-repeal-section-377a-of-the-penal-code-and-uphold-lgbtq-individuals-human-rights/>.

<sup>7</sup> Explanatory Statement, Constitution of the Republic of Singapore (Amendment No. 3) Bill.

ouster clauses also prevent LGBTI persons from being able to access justice and effective remedies when their human rights have been violated by arbitrary laws, policies and practices.

## **II. Summary of legislative and constitutional changes**

The Penal Code (Amendment) Bill repeals Section 377A of the Penal Code<sup>8</sup> and amends the laws that reference Section 377A, including the Criminal Procedure Code 2010 and Evidence Act 1893.<sup>9</sup>

The Constitutional Amendment Bill was introduced together with the Penal Code (Amendment) Bill with the stated intention to purportedly “protect the definition of marriage from being challenged constitutionally in the courts”.<sup>10</sup>

The Constitutional Amendment Bill introduces a new Article 156 to the Constitution, which provides that:

- Parliament may “define, regulate, protect, safeguard, support, foster and promote the institution of marriage” (Article 156(1)); and
- The Government and any public authority may, “in the exercise of their executive authority, protect, safeguard, support, foster and promote the institution of marriage” (Article 156(2)).

The ICJ notes with concern that the consequences of the adoption of Articles 156(1) and 156(2), as currently formulated, will extend beyond just the question of how marriage in and of itself is defined. Both provisions may be interpreted as allowing Parliament and the Government of Singapore to address all laws, regulations, policies and practices with a view to ensuring that they purportedly “protect, safeguard, support, foster and promote the institution of marriage”.<sup>11</sup>

Under the ambiguous notion of promoting and safeguarding the institution of marriage, these vague and broadly worded terms, may, in practice, allow the retention of existing and adoption of new laws, regulations, policies and practices in such a way as to discriminate against LGBTI persons and members of their families and in violation of their human rights. In fact, the Explanatory Statement of the Constitutional Amendment Bill expressly provides that Article 156(2) encompasses “housing preferences and financial benefits for married persons, as well as education and media policies that promote and safeguard the institution of marriage”.<sup>12</sup>

Furthermore, the Constitutional Amendment Bill prevents judicial review, on the basis of the fundamental liberties protected under Part 4 of the Constitution, of:

- A law that “defines marriage as a union between a man and a woman”, or a law that “is based on such a definition of marriage” (Article 156(3)); or
- An exercise of executive authority that is “based on a definition of marriage as a union between a man and a woman” (Article 156(4)).

Notably, 156(4) appears to prevent judicial review of executive actions and regulations taken under Article 156(2), such as housing, education, and media policies, since these measures are based on the definition of marriage as being between a man and a woman.

## **III. Discrimination of LGBTI persons in Singapore’s laws, policies and practices**

The Constitutional Amendment Bill will have the effect of legitimizing institutionalized discrimination against LGBTI persons and preventing independent judicial oversight and access to justice when the human rights and fundamental liberties of LGBTI persons and members of their families have been violated.

Notwithstanding the incoming repeal of Section 377A, LGBTI persons in Singapore continue to be victims of discrimination in many facets of their lives, as has been documented by LGBTI groups

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<sup>8</sup> Section 2, Penal Code (Amendment) Bill.

<sup>9</sup> Section 3, Penal Code (Amendment) Bill.

<sup>10</sup> Prime Minister’s Office Singapore, “National Day Rally 2022”, 21 August 2022, available at: <https://www.pmo.gov.sg/Newsroom/National-Day-Rally-2022-English>.

<sup>11</sup> Article 156(2), Constitution of the Republic of Singapore (Amendment No. 3) Bill.

<sup>12</sup> Explanatory Statement, Constitution of the Republic of Singapore (Amendment No. 3) Bill.

and activists in the country.<sup>13</sup> This discrimination extends beyond just being unable to enter into same-sex marriages. Examples of existing discriminatory laws, policies and practices include:

- Restrictions on the free expression and dissemination of information regarding sexual and gender diversity in online and offline spaces, under the Broadcasting Act (1994), Internet Code of Practice (1997), Content Guidelines for Local Lifestyle Magazines (2013), and others;<sup>14</sup>
- Imposing barriers for the registration of LGBTI organizations, including through rejecting registration applications on the basis that they are “contrary to the national interest” under Section 20(2) the Companies Act;<sup>15</sup>
- Preventing LGBTI persons from purchasing public housing before the age of 35, since only heterosexual married couples are allowed to purchase public housing;<sup>16</sup> and
- Encouraging “healthy, heterosexual marriages and stable nuclear family units” in sexuality education policies in schools.<sup>17</sup>

These laws, policies and practices result in violations of a number of human rights of LGBTI persons, including the rights not to be discriminated against; to equality before the law and equal protection of the law without discrimination; to freedom of expression and information; to freedom of association; work; housing; and to education.

The discrimination faced by LGBTI persons is exacerbated by the absence of a comprehensive anti-discrimination law in Singapore. There is also a lack of clarity on whether existing anti-discrimination guidelines in the workplace<sup>18</sup> or the upcoming workplace discrimination law<sup>19</sup> will protect LGBTI persons against discrimination on the basis of sexual orientation and/or gender identity.

Moreover, Articles 156(3) and 156(4) of the Bill, if passed as currently formulated, will place additional impermissible barriers for LGBTI persons when they seek redress for violations of their human rights because they will prevent LGBTI persons from accessing justice to obtain effective remedies and protect their fundamental liberties and human rights.

#### **IV. Contravention of the Rule of Law and separation of powers**

The ouster clauses in Constitutional Amendment Bill risk further eroding the fundamental principles of the Rule of Law and separation of powers in Singapore, as articulated under Singapore’s constitutional law and international law and standards.

Under Singapore’s constitutional law, the judiciary, pursuant to its vested powers under Article 93 of the Constitution, has the “power and duty to ensure that the provisions of the Constitution are observed”,<sup>20</sup> including safeguarding the “fundamental liberties” protected under Part 4 of the Constitution. In its judgment in the case of *Chng Suan Tze v Minister for Home Affairs*, the Court of Appeal has noted that “[a]ll power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power”.<sup>21</sup> In *Yong Vui Kong v Attorney-*

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<sup>13</sup> Oogachaga and Pink Dot SG, *United Nations Human Rights Council Universal Periodic Review on Singapore, 38<sup>th</sup> Session (May 2021), Joint Stakeholder Submission*, 15 October 2020, available at: [https://pinkdot.sg/pinkie/wp-content/uploads/2021/06/Singapore\\_OCPD\\_submission\\_14.10.2020PDF-1.pdf](https://pinkdot.sg/pinkie/wp-content/uploads/2021/06/Singapore_OCPD_submission_14.10.2020PDF-1.pdf); and TransgenderSG, Sayoni and Asia Pacific Transgender Network, *Universal Periodic Review of Singapore, 38<sup>th</sup> Session of the UPR Working Group, Joint stakeholder submission*, 22 October 2022, available at: <https://transgendersg.com/universal-periodic-review-a-joint-report-on-transgender-issues/>.

<sup>14</sup> ILGA World, *State-Sponsored Homophobia: Global Legislation Overview Update*, 2020, p. 153, available at: [https://ilga.org/downloads/ILGA\\_World\\_State\\_Sponsored\\_Homophobia\\_report\\_global\\_legislation\\_overview\\_update\\_December\\_2020.pdf](https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf).

<sup>15</sup> Oogachaga and Pink Dot SG, *United Nations Human Rights Council Universal Periodic Review on Singapore, 38<sup>th</sup> Session (May 2021), Joint Stakeholder Submission*, 15 October 2020, para. 2.1 – 2.3, 2.7, available at: [https://pinkdot.sg/pinkie/wp-content/uploads/2021/06/Singapore\\_OCPD\\_submission\\_14.10.2020PDF-1.pdf](https://pinkdot.sg/pinkie/wp-content/uploads/2021/06/Singapore_OCPD_submission_14.10.2020PDF-1.pdf).

<sup>16</sup> Housing & Development Board, “Residential, Singles”, available at: <https://www.hdb.gov.sg/residential/buying-a-flat/flat-and-grant-eligibility/singles>.

<sup>17</sup> Vice World News, “Leaked Letter Shows Singapore Schools’ Promotion of ‘Heterosexual Marriages’ in Sex Ed”, 11 February 2022, available at: <https://www.vice.com/en/article/epx5ym/letter-singapore-school-sex-education-lgbtq-abstinence>.

<sup>18</sup> Heckin’ Unicorn, Facebook post on TAFEP Guidelines, 27 January 2021, available at: <https://www.facebook.com/heckin.unicorn/posts/earlier-today-we-posted-our-internship-position-on-social-media-by-afternoon-taf/852451511971028/>.

<sup>19</sup> Pink Dot SG, “Pink Dot’s Statement on the Proposed Law for Workplace Anti-Discrimination”, 10 September 2021, available at: <https://pinkdot.sg/2021/09/pink-dots-statement-on-the-proposed-law-for-workplace-anti-discrimination/>.

<sup>20</sup> *Chan Hiang Leng Colin v Public PP* [1994] 3 SLR(R) 209, at [9].

<sup>21</sup> *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86].

*General*, the Court of Appeal held that “there will (or should) be few, if any, legal disputes between the State and the people from which the judicial power is excluded”.<sup>22</sup>

Despite these judicial precedents, the courts have yet to expressly adopt a uniform approach to determine the constitutionality of an ouster clause, presumably due to a culture of judicial deference in Singapore.<sup>23</sup>

Ouster clauses that prevent judicial review of discriminatory laws, policies and practices are also incompatible with the Rule of Law under international law and standards, as reflected in the UN Human Rights Council Resolution 19/36,<sup>24</sup> which underscores that the Rule of Law, the separation of powers and respect for all human rights and fundamental freedoms are cornerstones of democracy. The resolution calls upon States to make continuous efforts to strengthen the Rule of Law by ensuring that the “principles of equal protection before the courts and under the law are respected within their legal systems and applied without discrimination to all persons within their jurisdiction”, and taking “active measures to improve the access to justice for all, including minorities, whose full exercise of human rights is impeded by [...] any discriminatory or arbitrary measures”.<sup>25</sup>

In light of this, the ICJ considers that ouster clauses, such as those featured in the Constitutional Amendment Bill, which prohibit the courts’ ability to review legislative or executive action, contravene the Rule of Law and the separation of powers.<sup>26</sup> This is especially so when the courts are prevented from reviewing whether laws, policies or practices are in violation of the “fundamental liberties” guaranteed by the Constitution, or human rights protected under international law binding on a country.

Indeed, the ouster clauses – if adopted as currently formulated in the Constitutional Amendment Bill – undermine the Rule of Law and the right to equal protection before the courts and under the law and will effectively prevent LGBTI persons from being able to access justice through judicial processes when their ability to exercise their human rights has been impeded by discriminatory and arbitrary laws, policies and practices.

The ICJ also notes that the Constitutional Amendment Bill is not the first instance in which an ouster clause has been introduced into Singapore’s Constitution and laws. For instance, the ICJ has previously expressed concern about Section 104 of the Foreign Interference (Countermeasures) Act, which prevents decisions made by the Reviewing Tribunal, Minister or other authorities from being “challenged, appealed against, reviewed, quashed or called in question in any court”, except where the review pertains to procedural requirements.<sup>27</sup> Other examples of ouster or finality clauses in Singapore include Article 149(3) of the Constitution in relation to preventive detention under the Internal Security Act 1960; Section 33B(4) of the Misuse of Drugs Act in relation to the Public Prosecutor’s determination of whether a drug trafficker has substantively assisted the Central Narcotics Bureau; Section 30 of the Criminal Law (Temporary Provisions) Act 1955; and Section 56(6) of the Housing and Development Act 1959. These provisions all threaten Singapore’s compliance with the Rule of Law and the separation of powers by undermining the role of the judiciary to carry out its constitutional functions.

## **V. Recommendations**

While noting that it was long overdue, the ICJ commends the decision by Singapore’s authorities to finally repeal Section 377A of the Penal Code, and welcomes that they have taken some steps to translate their public statements in support of protecting LGBTI persons<sup>28</sup> into concrete action.

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<sup>22</sup> *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189, at [31].

<sup>23</sup> Thio Li-Ann, *Ousting Ouster Clauses: The Ins and Outs of the Principles Regulating the Scope of Judicial Review in Singapore* [2020] Singapore Journal of Legal Studies 392 – 426.

<sup>24</sup> This has been reaffirmed in the ICJ’s Tunis Declaration 2019: see, ICJ, *The Tunis Declaration on Reinforcing the Rule of Law and Human Rights*, March 2019, available at: <https://icj2.wpenginepowered.com/wp-content/uploads/2019/04/Universal-ICJ-The-Tunis-Declaration-Advocacy-2019-ENG.pdf>.

<sup>25</sup> Human Rights Council, *Resolution adopted by the Human Rights Council 19/36 Human rights, democracy and the rule of law*, 19 April 2012, UN Doc. A/HRC/RES/19/36, paras. 16(j)(i), (k)(iii).

<sup>26</sup> It is worth noting that the preclusion of judicial review in the Constitutional Amendment Bill is limited to judicial review on the basis of the fundamental liberties protected under Part 4 of the Constitution. This means that other forms of judicial review (e.g. based on illegality and procedural impropriety) are likely to still be available.

<sup>27</sup> ICJ, “Singapore: Withdraw Foreign Interference (Countermeasures) Bill”, 13 October 2021, available at: <https://www.icj.org/singapore-withdraw-foreign-interference-countermeasures-bill/>.

<sup>28</sup> See, for instance, Channel News Asia, “Everyone will be protected here’ regardless of community and social, religious or sexual ‘beliefs’: Shanmugam”, 1 March 2021, available at: <https://www.channelnewsasia.com/singapore/lgbtq-singapore-law-protected-religious-beliefs-shanmugam-249966>.

The repeal of Section 377A marks a significant milestone towards realizing the right to equality and non-discrimination of LGBTI persons in Singapore.

Nonetheless, in light of the above-mentioned analysis, the ICJ urges Singapore's authorities to:

- Withdraw the Constitutional Amendment Bill in its current form, as it entrenches State discrimination against LGBTI persons and undermines the fundamental principles of the Rule of Law and the separation of powers;
- Review its existing laws, policies and practices that continue to discriminate against LGBTI persons, with the aim of repealing or substantially amending discriminatory provisions;
- Enact comprehensive anti-discrimination laws that protect individuals from discrimination based on sexual orientation, gender identity, gender expression or sex characteristics;
- Ensure that LGBTI persons are able to access justice and effective remedies for violations and abuses of their human rights; and
- Review its use of ouster clauses to prevent judicial review of legislative or executive actions, especially when human rights have been interfered with.

The ICJ remains available for constructive dialogue and engagement with all relevant stakeholders, with the aim of contributing to Singapore aligning its laws, policies and practices with the Rule of Law, the separation of powers and international human rights law and standards.