

The Big Read: With a house still divided over 377A, time to seek common ground

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TODAY, 15 September 2018

More than a decade after a bruising and fractious debate that ended in a stalemate, the powder keg that is Section 377A of the Penal Code has been reignited, following a decision by India's Supreme Court to strike down a law criminalising sex between men.

That the reverberations of a judicial ruling thousands of miles away could be keenly felt here could be down to the fact that the criminal laws of Singapore and India — both former British colonies — share the same historical roots, or to India's reputation as a conservative society.

Either way, the lid on a simmering issue, which has occasionally gone off the boil, has now been taken off: In the space of a few days, prominent Singaporean figures waded into the debate, and petitions from opposing sides garnered tens of thousands of signatures. Activists also sprang into action, making rallying calls on social media, as slick videos, heartfelt pleas and essays — some bordering on hysteria and exaggeration — went viral.

For example, a video entitled "Is this the Singapore you want" which has been circulating on WhatsApp warns that repealing Section 377A could lead to the "normalisation" of homosexuality which would eventually result in gay marriage becoming acceptable in Singapore.

The video, which lasts three minutes and 20 seconds, goes further to warn that pastors who refuse to solemnise same-sex marriages — or even bakers and florists who decline to be involved in gay weddings — may be thrown into jail. The video also warns "imagine if teachers must teach that it is normal to be intimate with people of the same sex", and "teachers who refuse to do so might lose their jobs".

Support for the other camp has been vociferous as well, with LGBTQ (lesbian, gay, bisexual, transgender, questioning, queer and gender-diverse) advocacy group Pink Dot understood to be campaigning for the repeal of Section 377A in gay clubs here.

In response to TODAY's queries, the group said it has "organised multiple outreach sessions where our volunteers would go down to LGBTQ friendly businesses and events to raise awareness about the petition as well as to encourage the community to add their names to the petition (for repeal)".

Earlier, Pink Dot had taken issue with the "conspicuous omission" of Section 377A from the recent Penal Code review. This is "all the more glaring", given that the review committee's objective was to better protect vulnerable people and minorities here.

"Section 377A would have been the perfect candidate for such a review and and repeal. It is a colonial relic of Victorian values that was left behind by the British from before Singapore's independence," said Pink Dot. "The law treats an already unprotected segment of citizens as unequal by characterising them as unconvicted criminals."

Four years after the last legal challenge was squashed, and 11 years after Parliament decided to retain it, Singapore once again finds itself divided over an 80-year-old law.

Since the last major debate in 2007, the gay community here and elsewhere in the world have made great strides in the last decade.

In 2009, the Pink Dot rally was started to champion the cause of the LGBTQ community in Singapore. Its attendance has grown each year, and the annual event had attracted sponsorships from multinational firms such as Facebook and Goldman Sachs before the Government moved to bar involvement of foreign entities last year.

Meanwhile, in the Western hemisphere, the United States legalised same-sex marriage in 2015, while in Asia, Taiwan's constitutional court ruled that the constitutional right of equality mandated legal recognition of same-sex marriages.

Dr Gillian Koh, deputy director of research at local think-tank Institute of Policy Studies (IPS), said that given that laws banning gay sex and same-sex marriages have been overturned in many other countries since Singapore last reviewed its Penal Code, those advocating change will feel emboldened to push for the same here.

“And those committed to the status quo position will look to the Government for assurance that Singapore will not follow the crowd,” she added.

A RULING THAT RESONATED

It all started on Sept 6, when India's Supreme Court struck down Section 377, the country's law banning gay sex. Saying that the Indian Constitution should evolve with time and is not a “collection of mere dead” letters, Chief Justice Dipak Misra had described the law as “irrational, indefensible and manifestly arbitrary”.

In Singapore, the news was akin to stirring up a hornet's nest, as both sides of the big divide reacted differently — the LGBTQ community was inspired, while conservatives poured scorn over the ruling.

Mr Leow Yangfa, executive director of non-profit organisation Oogachaga that works with the LGBTQ community, acknowledged that the Indian court ruling played a “big part in re-igniting and re-inspiring the latest round of petitions, debates and discussions about repealing Section 377A”.

Disc jockey Johnson Ong previously had told TODAY that he was “energised” by the court ruling, prompting the 43-year-old to file a fresh constitutional challenge earlier this week.

While worded differently, both India's Section 377 and Singapore's Section 377A – which was introduced here in 1938 – share the same historical roots, legal academics said.

After all, Singapore's Penal Code was adapted from the Indian Penal Code back in the 19th century when Singapore was part of the Straits Settlements and was governed by the British.

University of Hong Kong's dean of law Michael Hor also noted another significance of the ruling: It undercuts the argument or assumption that conservative Asian societies will not support repealing such a law.

“And they can do so without exposing society to any serious harm,” he added.

A key argument made by lawyers in India was that Section 377 was legally inconsistent with the constitutional right to privacy, which was guaranteed through a Supreme Court ruling in 2017.

In Singapore, there have been three past challenges against Section 377A – in 2010, 2012 and 2014. The last case was built on the argument that Article 12 of the Singapore Constitution guarantees equal protection under the law.

However, the Court of Appeal upheld the law criminalising gay sex. It noted that Article 12 touched only on the issues of religion, race, place of birth and descent, and not gender, sex and sexual orientation.

Singapore Management University (SMU) law academic Eugene Tan noted that privacy as a fundamental right played a huge role in the Indian court ruling. Singapore currently does not recognise privacy as a fundamental right. “One way of challenging the constitutionality of Section 377A is to persuade the court that privacy should be recognised in Singapore as a fundamental liberty,” he added.

A day after the Indian court ruling, establishment-linked figures weighed in on the judgement, with veteran diplomat and international lawyer Professor Tommy Koh urging the gay community to file a class-action suit in a post on Facebook. When reminded that there had been failed attempts, he called on them to “try again”.

Chief of government communications Janadas Devan, speaking in his personal capacity, also voiced support for a repeal, describing Section 377A as a “bad law”. “Sooner or later, it will go. Pray sooner rather than later,” he wrote on Facebook.

In a subsequent Facebook post, he reiterated the Government’s position that the law remains because the majority of Singaporeans oppose a repeal.

Commenting on the Indian court ruling, Law and Home Affairs Minister K Shanmugam told reporters that Singapore is “deeply split” on the issue. While the majority oppose a repeal, a “growing minority” want it to be abolished, with the Government stuck in the middle.

And for the first time, he gave his personal views on the law, saying that when it comes to “people’s lifestyles... (and) sexual attitudes... (we) really should be careful in treating them as criminal or criminalising that”.

“But again, it would be wrong for me to impose my personal views on society or as a policymaker,” he said. “So I think, really, society has got to decide which direction it wants to go, and the laws will have to keep pace with changes in society and how society sees these issues.”

Mr Shanmugam also reiterated that while the law is there, there have generally been no prosecutions for private conduct. “People openly express themselves as gay, I mean you have got the gay parade. Police even approved the licensing for it, no one gets prosecuted for declaring themselves as gay. So, really, when was the last time someone was prosecuted?” he said.

Education Minister Ong Ye Kung has also weighed in on the issue, stressing that there is no discrimination against the LGBTQ community “at work, housing (and) education” in Singapore.

Echoing Mr Shanmugam's view that society has to decide on the direction, he added during a dialogue at the Singapore Summit on Friday: "We might be the largest animal in the jungle, but we are not the jungle. Some things we leave it to society to decide over time."

Separately, Mr Ho Kwon Ping, chairman of SMU, also backed Prof Koh's stance. It is "fundamentally untenable" for the Government to keep Section 377A without enforcing it, said Mr Ho as he questioned what the authorities are doing to the notion of "rule of law".

Speaking to TODAY, Mr Ho added: "One day, this pernicious relic of colonial taboos will be dropped. I only wish it were sooner rather than later." He and his wife, former Nominated Member of Parliament Claire Chiang, are among those who signed the repeal petition.

The Christian and Muslim communities here had previously been among the most vocal in the public discussion surrounding Section 377A.

As the latest round of debate intensified, the National Council of Churches of Singapore (NCCS) issued a statement on Thursday stressing it does not support the repeal of Section 377A, as the homosexual lifestyle "is not only harmful for individuals, but also for families and society as a whole".

Repealing the law would lead to a "normalisation and promotion" of such a lifestyle, said the NCCS, which represents about 200 churches. It added that this would lead to "undesirable moral and social consequences, a slippery slope as seen in some countries taking this step".

Meanwhile, some members of the Muslim community including Pasir Ris-Punggol Member of Parliament Zainal Sapari, have been circulating a statement from the Islamic Religious Council of Singapore (Muis) in June 2014, which stated its position on the issue.

Written by Mr Mohd Murat Aris, who is Muis' director of religious development, the statement said that council does not "agree nor approve the pervasiveness of the LGBT lifestyle, and we cannot agree to the efforts in promoting such a lifestyle".

HAVE S'POREANS' ATTITUDES SHIFTED?

In a BBC interview last year, Prime Minister Lee Hsien Loong gave his take on Section 377A: "My personal view is that if I don't have a problem, this is an uneasy compromise, I'm prepared to live with it until social attitudes change."

Over the last decade, there have been surveys assessing social attitudes here towards sexuality. Results from the Our Singapore Conversation in 2013, which aimed to get a pulse on the country's future direction, showed that liberal attitudes on gay lifestyles and same-sex marriage were largely not prevalent here.

Based on age groups, for instance, more than half of those aged 50 and above frowned on gay lifestyles. Meanwhile, about one in three Singaporeans aged between 15 and 49 rejected gay lifestyles.

Then, there was the IPS survey on Social Morality released in 2014. It found that 78.2 per cent of respondents were against sexual relations between adults of the same sex, while 72.9 per cent disagreed with the notion of gay marriage.

So far, only one study had tracked the changes in social attitudes towards homosexuality between 2005 and 2010. Published in 2013, the study conducted by academics at the Nanyang Technological University (NTU) found that Singaporeans' attitudes towards homosexuality had changed, but slightly.

Led by Associate Professor Benjamin Detenber from the Wee Kim Wee School of Communication and Information in NTU, the study found that negative attitudes towards homosexuality had decreased by 4.1 percentage points, while positive attitudes had gone up by 2.4 percentage points.

In 2005, 68.6 per cent of respondents expressed negative attitudes compared to 64.5 per cent in 2010. Those who viewed homosexuality positively went up from 22.9 per cent to 25.3 per cent in the same period. Meanwhile, the number of respondents staying neutral increased by 8.5 per cent to 14.7 per cent.

Although there might be more people accepting same-sex relationships, Assoc Prof Tan noted that it is not the same as wanting Section 377A repealed. "That law is seen by conservatives as a high-water mark or 'safe harbour' for societal values they regard as desirable and wholesome," he added.

"They are in favour of 377A but also do not want it actively enforced and for LGBTQ community to be discriminated."

Political analyst Felix Tan, an associate lecturer with SIM Global Education, noted that the shift in attitudes, however, is not as great as some might hope because there are still segments of people holding on to their conservative views – be it religious or cultural.

"For every attempt by the LGBTQ community to push their agenda onto a society that is still not ready to accept such liberal values, there will also be a stronger pushback from the conservative elements within society," said Dr Tan.

"Last, but not least, the shift is not that great because there are those who simply are not interested in taking either side and prefer a 'live and let live' mentality," he added.

IPS senior research fellow Dr Mathew Mathews, who conducted the IPS survey in 2014, noted that there will be "little shift among Christians and Muslims, who hold stronger positions" on homosexuality.

"However, I expect that among religious groups who do not have any clear prohibitions about homosexuality, there will be a gradual change in attitudes, where more become accepting of homosexuality," he added.

The influx of information through various social media platforms and people's movements — such as the #Me Too movement that galvanised women to counter sexual harassment and abuse — has also guided Singaporeans here, especially the young and educated, to view issues from different perspectives, said political analysts.

Such influences are "coming closer and closer to Singapore", said Dr Tan, prompting Singaporeans to question "what kind of society they want to see in the future".

“What the Government has been doing so far has only strengthened the narratives of the conservative, whilst allowing for alternative viewpoints to thrive independently. They are trying their best not to resist, but manage change,” he added. “But how much they can do for the minority LGBTQ community and to recognise equal rights and whether it’s enough will be an uphill task.”

GOVT KEEPING THE STATUS QUO FOR NOW

Since Mr Lee Kuan Yew’s tenure as founding prime minister, the Government has made its position on the subject clear: Section 377A remains in the books because Singapore society is still largely conservative. But the Government does not, and will not proactively enforce the law.

As Parliament debated changes to the Penal Code in 2007, the issue cropped up again, leading to a two-day debate. A total of 14 MPs rose to speak on Section 377A, with a majority of them calling for the law to be retained to prevent homosexuality from becoming mainstream and weakening key institutions such as marriage.

The House saw then Nominated MP and lawyer Siew Kum Hong – one of the vociferous voices – submit a petition calling for a repeal as the law, he said, contravened the constitutional guarantee of equality and equal protection of the law under Article 12(1) of the Constitution.

National University of Singapore (NUS) law professor Thio Li-Ann, who supported retaining the law, was equally vocal. She said that removing the law was the “first step of a radical, political agenda which will subvert social morality, the common good and undermine our liberties”.

Among the ruling People’s Action Party (PAP) MPs, Mr Charles Chong took a different stance from his party colleagues, describing the retention of Section 377A as a “blemish”.

Mr Chong said that he was “not convinced that there would be drastic consequences in our society” nor was he persuaded that Singapore would go down the slippery road if the law was removed. “The slippery road argument has less of an impact on me these days, as I have heard that sort of arguments used many times before,” he said.

Speaking on the second day of the debate, PM Lee told the House that the Government “has not taken this matter lightly”. Following a long discussion with his Cabinet ministers, and taking into account extensive public consultation on changes to the Penal Code, PM Lee said the Government had made a decision – “to leave things be”.

The Government had made the right move to uphold social and family values, he added, and at the same time accommodate homosexuals in the society. This should continue to be the approach, he noted.

“So, we will let others take the lead, we will stay one step behind the frontline of change; watch how things work out elsewhere before we make any irrevocable moves,” PM Lee said.

The 2007 parliamentary debate, which was remembered for its fiery and heart-felt exchanges, also spilled over into the public arena, getting ugly at times.

For example, MP Baey Yam Keng had his sexuality questioned when he spoke up for homosexuals. An individual had also sent an email to him, vowing not to vote for Mr Baey — who is married with three children — in the next election.

NUS law academic Yvonne Lee was flamed in blogs and had her phone number circulated, after she wrote a commentary arguing that it was wrong to decriminalise homosexual acts.

The contentious debate saw the country's biggest opposition party, the Workers' Party (WP), taking a similar stand on the issue with the ruling PAP — one of the rare occasions when the two parties saw eye to eye.

WP chairman Sylvia Lim, who was a Non-Constituency MP (NCMP) then, said that "after much deliberation, we were unable to arrive at a consensus that it should be repealed and, as such, we would not be calling for its abolition".

Asked to comment on its position now, WP spokesperson Daniel Goh, who is currently an NCMP, said the party's position "has not changed since 2007".

Among the political parties contacted, Reform Party was the only one calling outright for Section 377A to be abolished, with its secretary-general Kenneth Jeyaretnam pointing out that this was part of his party's 2011 General Election manifesto.

He labelled the law "archaic", adding that Singapore is "increasingly out of step with modern democracies and even the rest of developed Asia".

The Singapore Democratic Party did not respond to TODAY's queries, but had previously supported a repeal of the law. Other parties, however, were ambiguous in their positions.

Singapore People's Party's chairperson Lina Chiam acknowledged that the issue is "highly divisive", adding: "To move forward, it will be important for us to seek views from as many people as possible across a wide spectrum to understand national sentiment over this matter."

The People's Power Party's secretary-general Goh Meng Seng called for a referendum on the issue to get a better consensus. But he noted that for countries, including Singapore, to emulate the Indian court ruling is "just too simplistic" and that social norms and cultural differences "must be taken into careful consideration."

NUS political scientist Bilveer Singh said that the Government has chosen a safe approach by allowing the courts to decide on the fate of the law, cognisant of the fact that taking sides could have political ramifications.

The Government can rise above the issue by "doing nothing", said Assoc Prof Singh, adding: "But if it changes its tact and supports a class-action suit and follows the Indian court ruling, there will be serious political costs, especially for all the hype about Asian values," he added.

However, SMU law lecturer Benjamin Joshua Ong felt the issue will not be a political hot potato, especially during elections.

Still, he noted that perceptions of the Government could be affected not because of the ultimate conclusion it has reached on the issue, but rather its "thought process and the extent to which it engages seriously with all aspects of the debate".

Political observers were also divided on whether comments from establishment-linked figures that leaned towards a repeal are an attempt to "test the waters".

Assoc Prof Singh said: "It (the Government) can tell the electorate, 'See, I have revisited the issue and the majority still say no. Hence, the laws stay'."

On the other hand, Assoc Prof Tan dismissed such a notion, analysing the comments as "perhaps nudging people to reconsider their own positions, particularly if it is ardently for Section 377A's retention".

GETTING OUT OF THE STALEMATE

Former PAP MP Hri Kumar Nair once argued that laws must meet the "three Cs" — clear, consistent and concrete. During the 2007 debate, he pointed out that Section 377A "in some respects, falls short of what a good law is or should be".

The law lacks both clarity and substance, he added. Saying that the Penal Code is an important piece of legislation, Mr Nair noted that making some conduct criminal while stating that the law will not be enforced "simply invites attacks on the integrity of the Code".

He had also questioned the consistency of the Government's approach. While Section 377A is "often justified as being consistent with the importance society places on family values", society has "done away criminalising a whole host of other conduct which is far more damaging to family values".

Mr Nair, who is currently the Deputy Attorney-General, cited adultery as an example.

In 2014, former Attorney-General Walter Woon had also called for a repeal because of a "constitutional problem". Though the Government has repeatedly said that it will not proactively enforce the law, the power to prosecute lies with the Attorney-General under Section 35(8) of the Constitution.

This, he pointed out, sets a "very dangerous precedent". The public prosecutor is supposed to be independent, yet is being told by the Government not to enforce certain laws, Prof Woon noted.

SMU's Mr Ong explained that a key purpose of criminal law is to regulate conduct by informing people what they are and are not allowed to do.

"In other words, people should be able to look at the law, and the law alone to tell whether something is prohibited," he noted. "They should not have to look at the law plus a policy."

A policy of non-enforcement "does not have the force of law", said Mr Ong.

So, if there is no intention to criminalise certain conduct, it would give more legal clarity if the law is removed. That is better than having such a law but offering an assurance that it will not be enforced, he added.

Prof Thio, however, countered that argument by saying that Section 377A — though not proactively enforced — serves an educative function. It identifies what society should consider a norm in terms of sexual relations, which affects policies.

The law, which has a substantive effect and not just symbolic, also prevents "fuller implementation of the homosexuality agenda", she added. "If you change the criminal law, you open the doors

to change the civil law which has huge repercussions. For example, who may enter into civil marriage, what is the age of consent, for instance, for male-male sexual relations.”

She noted that the Apex Court has considered whether Section 377A has violated the test of equality and found it to be constitutional because the law is a “legitimate differentiation, not an illegitimate discrimination”.

Matters involving moral controversy should not be addressed by the courts, but by a democratically elected and accountable Parliament. Wanting the courts to do a subjective “moral” reading of the constitution would compromise the objectivity of the courts, said Prof Thio.

“If they read in views you like, they are the hero. If they read in views you do not like, they are the villain. Any appearance of objectivity, being above politics, of deciding legal questions rather than political questions, disappears,” she said. “The impartiality of the courts may be compromised, and that undermines the rule of law.”

Echoing a similar sentiment, Assoc Prof Tan noted that the Court of Appeal’s previous judgement showed no “constitutional deficiencies” with regard to Section 377A, and the “only recourse is to convince Parliament that the provision has no place in our statute books on policy grounds.”

The conservative majority hold sway over the law, said most political observers. Assoc Prof Tan noted that it will only be repealed if the conservatives are comfortable that there will not be much harm caused to society. Thus, the LGBTQ community needs to establish a rapprochement with the other side, he added.

Some observers cited the need for opposing camps to find common ground, in order to break the stalemate.

Dr Koh said there is “still a lot of work that each side needs to do” to share the pertinent concerns of each group.

“What hardships do members of the gay community face that they would want the broader society to understand? What are the deepest moral and social concerns of the conservatives and what public policy impact will they have?” she said.

“This sort of gentler approach to engagement, which may take time, can help us avert the most extreme culture war scenario.”