



Strategic litigation in the “soft-authoritarian” state of Singapore: Attempts to decriminalize sodomy from 2010-2020

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Abstract

From 2010 to 2020, several efforts to decriminalize sodomy have taken place in Singaporean courts. Although these efforts have been largely unsuccessful, the cases have highlighted how courts can serve as a space to push for rights in a city-state that some have labelled “soft-authoritarian” – a state with democratic institutions in place, but with an under-developed set of democratic ideals and practices. This article argues that strategic litigation to decriminalize sodomy is forcing institutions in Singapore to evolve, become more democratic and responsive to a rising cultural backlash particularly with regards to sexuality. This article will examine some of the incremental changes that have come about due to the legal challenges, such as the strengthening of the court, the modification of laws to protect minorities, and the growth and diversification of civil society.

Key words

Strategic litigation; anti-sodomy laws; LGBT; human rights

Resumen

Entre 2010 y 2020, los tribunales de Singapur han intentado despenalizar la sodomía en varias ocasiones. Aunque estos esfuerzos han sido en gran medida infructuosos, los casos han puesto de relieve cómo los tribunales pueden servir como un espacio para presionar por los derechos en una ciudad-estado que algunos han etiquetado como “autoritario blando” – un estado con instituciones democráticas, pero con un conjunto subdesarrollado de ideales y prácticas democráticas. Este artículo sostiene que el litigio estratégico para despenalizar la sodomía está obligando a las

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instituciones de Singapur a evolucionar, a ser más democráticas y a responder a una creciente reacción cultural, especialmente en lo que respecta a la sexualidad. Este artículo examinará algunos de los cambios graduales que se han producido debido a los desafíos legales, como el fortalecimiento de los tribunales, la modificación de las leyes para proteger a las minorías y el crecimiento y la diversificación de la sociedad civil.

Palabras clave

Litigio estratégico; leyes contra la sodomía; LGBT; derechos humanos

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1. Introduction

As the world experiences a wave of “backlash politics” –or retrograde, extraordinary, public discourses (Alter and Zürn 2020), the “soft authoritarian” state falls back into focus. In the past decade, the world has seen the emergence of, often, right-wing majoritarian and populist sentiments that have led to Brexit, the election of Donald Trump, and in Southeast Asia, the rise of Duterte and an anti-western moral panic in Indonesia. In response to the legalization of gay marriage in the United States, and Barack Obama and Hillary Clinton’s push to recognize LGBT rights as human rights in the early 2010s, Indonesian politicians have described such policies as part of a “proxy war to conquer Indonesia” (Wijaya 2016). Singapore, too, has experienced its own extreme reaction to what is perceived as Western intervention into sovereign policy through LGBT rights. In response to the popularity of the Singapore’s annual gay pride event “Pink Dot,” a “wear white” movement has emerged amongst religious conservatives, and even the state has stepped in to prohibit foreign support and participation. In honor of the International Day Against Homophobia (IDAHOT) when the U.S. embassy in Singapore flew a rainbow flag and hosted an invitation-only webinar that was co-organized with a local-NGO entitled, “The Economic Case for LGBT Equality: Exploring Global Trends,” the Ministry of Foreign Affairs issued a stern reminder to all foreign missions “not to interfere” with domestic and social matters. While the West is experiencing a rise of anti-LGBTQ sentiment as part of the far right’s agenda of stoking irrational fears to trigger a populist and majoritarian response, Singapore and much of the region is also experiencing populist and majoritarian pressures as the “West,” gay marriage, and cultural wars are now the irrational fears in the region. In both cases, LGBT rights are under threat.

This article argues that despite Singapore’s purportedly “soft authoritarian” context (Means 1996), and a growing cultural war particularly with regards to sexuality, the courts offer an opportunity to push back against the backlash politics. Through strategic litigation to decriminalize sodomy, concerned citizens, as well as the Singaporean government, can stand against an increasingly conservative and culturally retrogressive wave sweeping the world.¹ This article will begin with a discussion on how sexuality in Asia, despite the region’s pluralistic history, has become a target in today’s cultural war and backlash politics. Next, it will examine the literature on strategic litigation in the United States and in Europe, to examine their utility in the Singaporean context. Finally, the article will end by examining some of the incremental changes that have come about due to the legal challenges, such as the strengthening of the court, the modification of

¹ It should be noted that in January 2023, the Singapore Parliament officially repealed Section 377A of the Penal Code, Cap. 224. This article only covers the events leading up to the repeal and not the role of strategic litigation in encouraging this repeal. On 21 August 2022, during his National Day speech, Prime Minister Lee Hsien Loong stated, “We’ve seen several court challenges to 377A seeking to declare the law unconstitutional. None have succeeded so far. However, following the most recent judgment in the Court of Appeal, the Minister for Law and the Attorney General have advised that in a future court challenge there’s a significant risk of section 377a being struck down on the grounds that it breaches the equal protection provision in the constitution. We have to take that advice seriously. It would be unwise to ignore the risk and do nothing. For these reasons, the government will repeal Section 377A and decriminalize sex between men. I believe that is the right thing to do and something that most Singaporeans will now accept.” Parliament subsequently debated the issue in November 2022, with 93 out of 96 voting in favor of the repeal.

laws to protect minorities, the merging of interests for sexuality and gender activists, and the growth and diversification of civil society.

2. Sexuality in Asia: Backlash politics and the “soft authoritarian” State

Southeast Asia has a rich tradition of pluralism with respect to gender and sexuality. Thus, when the Portuguese, Dutch, Spanish, British, and French began to colonize the region between seventeenth and nineteenth centuries, such Southeast Asian gender norms clashed with Christian morality and notions of civilized behavior. As a result, the British subsequently passed Section 377, prohibiting sex against the “order of nature” in Brunei, Malaysia, Myanmar, and Singapore—with Singapore eventually also implementing Section 377A, a code specifically targeting gay males (Radics 2021b). In colonial Philippines, the Spanish decreed that sodomites be sentenced to death by fire, and replaced the *babaylans*, or transgendered religious figures, with *datus* (heads of clan) as village leaders (Garcia 2008). The French and the Dutch had less interventionist policies to deal with sexual plurality, though they nevertheless saw Asian gender and sexual norms as a threat to European racial purity and public health (Stoler 1989). Ultimately, colonial attitudes towards sexuality in the region was one of regulation and eradication, with Western values seen as superior and non-Western values seen as toxic.

It is no wonder that the same concept of a cultural hierarchy becomes reproduced in the post-colonial era. When a man was charged and convicted under Section 377 in *Annis bin Abdullah v Public Prosecutor* for receiving oral sex, intense public debate concerning the archaic and regressive nature of Section 377’s regulation of consensual sexual conduct led to its removal from the Penal Code in 2007 (Fong and Sim 2003). But when it came to Section 377A, Prof. Li-Ann Thio, as a nominated member of parliament went on to argue that “we cannot say a law is ‘regressive’ unless we first identify our ultimate goal. If we seek to ape the *sexual libertine ethos of the wild wild West*, then repealing section 377A is progressive. But that is not our final destination” (Speech by Li-Ann Thio, 2007; emphasis mine). Prime Minister Lee Hsien Loong in his speech to parliament retaining Section 377A, he went on to say,

We were right to uphold the family unit when Western countries went for experimental lifestyles in the 1960s – the hippies, free love, all the rage... But I’m glad we did that because today, if you look at Western Europe, where marriage as an institution is dead, families have broken down, the majority of children are born out of wedlock and live in families where the father and the mother are not the husband and wife living together, bringing them up. And we’ve kept the way we are. (Speech by Lee Hsien Loong, 2007)

Lee Hsien Loong’s words echo the sentiments of the “Asian Values” debate. His father, former Prime Minister Lee Kuan Yew as early as 1971 bemoaned the Western youth culture of “violent demonstrations in support of peace, urban guerrillas, free love and hippieism” and emphasized how “the traditional importance of the Asian family unit” could prevent the excesses associated with contemporary Western mores (Barr 2000, 318). Thus, the cultural hierarchy that posited the values of the colonial masters against the wayward Asian influence has now been inverted. The “wild wild West,” where “marriage is dead, families have broken down,” and children are “borne out of wedlock,” is no longer the “final destination.”

But the inversion of values can be seen not just as a post-colonial manifestation. This anti-Western rhetoric can also be seen as the residual effects of the successful rhetoric of the Asian Values discourse that was meant to push back against the growing democratization and human rights promotion of the United States in the 1990s (Finkel *et al.* 2007). The more “conservative” and “traditional” view on sexuality tied to the Asian Values discourse made sex and sexuality a “taboo” topic of discussion. In Singapore, despite evidence that comprehensive sexual education tends to better inform students of the consequences of unprotected sex, Singapore’s sexuality education instead promotes the more conservative “abstinence-only-until-marriage education” (Liew 2014). Furthermore, sexuality outside of heterosexual unions is discussed mainly in the context of Section 377A even though the law only covered a limited range of conduct and is supposed to remain unenforceable (see Leong 2012). Despite this very conservative interpretation of sexuality education, religious groups have aggressively policed schools, at one point even taking over AWARE, Singapore’s main feminist organization out of fear that the organization was promoting homosexual lifestyles and abortions (Chong 2011a, 2011b).

Terence Chong (2011a) and Daniel Goh (2010) astutely observe how the rise of conservative, religious movements in Singapore emerged in response to changing political and economic issues in Singapore. But what can account for the reception and extreme interpretation of Christianity, or why did Christianity, globally, become so conservative over the past three decades? Alter and Zürn (2020) provide an interesting potential explanation through “backlash politics”: a particular and extraordinary political movement worthy of special study not only because of its contemporary relevance considering the dramatic events such as Brexit, or the elections of Donald Trump and Rodrigo Duterte, but also because it can instigate substantial change in societies and political systems. They assert that backlash politics today include the elements of a (1) retrograde objective, and (2) extraordinary goals and tactics that have (3) reached the threshold level of entering mainstream public discourse. They add that retrograde objectives often generate emotional appeals, including nostalgia and negative sentiments such as anger and resentment. Extraordinary objectives inspire taboo breaking to underscore the urgency of claims. Reaching the threshold level of entering mainstream public discourse often reshapes institutions through formal means (court cases, laws, politics) or informally (reinterpreting existing rules and processes).

Another theoretical frame to make sense of what is happening today is the return to the study of authoritarianism. Throughout the world, we are seeing a deterioration of hard-fought democratic freedoms and rights. The surprise election of Donald Trump in the United States, the British vote to withdraw from the European Union (Brexit), and the growing political polarization in both regions, including the increased participation by extreme left- and right-wing groups in European politics, all signal a surging populist sentiment in the West. Yet populism is not new, nor is it found exclusively in the United States and Europe. In Southeast Asia, Filipinos elected Rodrigo Duterte as president in 2016 partially based on his support for “death squads” that engaged in extrajudicial killings of drug addicts and other criminals; and in May 2022, Bongbong Marcos—son of former dictator Ferdinand Marcos who arrested nearly 50,000 people immediately after declaring Martial Law (Amnesty International 1976, 4)—was elected president. Thailand and Myanmar both experienced military dictatorships in 2014 and 2021

respectively, resulting in the suppression of dissent, the deposing of democratically elected leaders, and the crackdown on media and journalists. Due to political infighting, Malaysia is currently on its third prime minister in 3 years with 39 members of parliament switching parties (Bernama 2022). The political upheaval has led to the arbitrary arrest of critics of the government, the rise of anti-migrant policies, and threats against lesbian, gay, bisexual, and transgender (LGBT) people (Human Rights Watch – HRW – 2022).

But is what is happening in Singapore an example of the rise of authoritarianism, populism, and deterioration of democracy? According to Michael Barr (2000, 309) Lee Kuan Yew “launched the concept [of Asian Values] from Singapore as part of a self-serving effort to justify Singapore’s paternalistic and illiberal system of government and to argue that Asian cultures are so different from western cultures that they are exempt from considerations of human rights.” He also cites Joseph Chan (1998), who highlights how the “Asian values” discourse tends to emphasize the censorship of pornography, strengthen marriage laws, and prevent the decriminalisation of homosexuality as a reaction to the “liberal” approach of the West (Barr 2000, 320). Although it may seem that the repeated failure of activists to remove Section 377A from the Penal Code, Cap. 224, along with the rising cultural war emerging in Singapore and the region, that the democratic institutions and rights involved are eroding, this article argues that the recent 377A challenges are forcing Singapore to become more democratic and responsive to a rising cultural backlash particularly with regards to sexuality. It highlights how the courts can play a role in allowing the space to push for the rights of minorities, it can help to protect a nation against populist and authoritarian sentiments.

3. Strategic litigation: Section 377A and the courts from 2010–2020

Van der Pas (2021) in “Conceptualising strategic litigation” provides a useful overview of the literature on strategic literature. References to Chen and Cummings (2013) and Ramsden and Gledhill (2019) led to a rich description of the way in which “strategic litigation” has emerged, been used, and can be defined. These two references highlight how strategic litigation can take many forms, but generally fall into the overlapping categories of public interest lawyering, cause lawyering, and impact litigation (or test-case litigation). In addition, Van de Pas (2021) adds a fourth category of strategic human rights litigation. Of all four categories, public interest lawyering has the most robust definition involving the provision of services to underrepresented clients, with a motivation to serve interests beyond the client, and with institutional support (i.e. practice site and legal skills). Beginning with the *Brown v Board of Education*—a 1954 decision desegregating American schools—similar cases emerged in the United States to push for greater social and political rights (Cummings and Trubek 2009). While strategic litigation started off as mainly exhausting local remedies, over the past few decades, international instruments such as the nine UN human rights treaty bodies or the European Union Court of Human Rights have also become part of strategy to push for change through litigation (Ramsden and Gledhill 2019).

But outside of the United States, or the European Union, how does strategic litigation take place? Although numerous non-Western examples of strategic litigation can be identified, many of these lawsuits are either funded by “Rule of Law” initiatives, connected with major global institutions like the World Bank and United Nations, or are

lodged by international political organizations such as the Open Society Justice Institute, Human Dignity Trust, or Amnesty International. With the rising fears of “foreign interference” in the region and in Singapore, foreign-supported or -led lawsuits are less feasible. Furthermore, given the difficulty to register non-governmental organizations in Singapore, particularly for a population still criminalized under the law, the lawsuits discussed in the next section seem less organizationally driven, and more along the lines of cause lawyering—initiated due to “subjective motivation of an individual lawyer” and their political or moral values (Van der Pas 2021, S129).² In her coverage of the first set of 377A lawsuits, Lynette Chua (2017) explored the relational dynamics of collective litigation and legal subjectivities of the social actors involved, highlighting how social positions and strategic interests shaped their interactions and decisions on litigation. This article builds on her work by looking beyond the first set of cases, and at the larger social ramifications of the past 12 years of litigations, in particular: 1) enhancement of the legal capacity of lawyers and social actors to engage the courts; 2) emergence of religious extremism and government efforts to restore social harmony; and, 3) the evolution of the LGBT community to become more cognizant of its fractures, enjoined in gender struggles, and regionally connected.

3.1. Tan Eng Hong, twelve years of constitutional lawsuits, and maturing legal institutions

In 2007, debates surrounding Section 377 of the Penal Code—or the law criminalizing sex against the order of nature—took place. Upon updating the 1985 Penal Code, in response to *Annis bin Abdullah v Public Prosecutor*, where the District Court, after applying section 377, found Abdullah guilty of a crime when a young woman performed fellatio upon him while on a date, intense public debate concerning the archaic nature of s 377’s regulation of consensual sexual conduct (Fong and Sim 2003). Section 377A of the Penal Code, the provision criminalizing consensual sex between males, however, did not receive the same fate. Member of Parliament Siew Kum Hong submitted a public petition to repeal Section 377A, and over a three-day period in October 2007, 2,519 Singaporeans signed it. In response, over 15,560 Singaporeans signed a competing petition to retain the section (Radics 2013, 80). In the end, Parliament that same year decided to maintain Section 377A to placate “conservative” Singaporeans. In his speech upholding the law, Prime Minister Lee stated that “there are gay bars and clubs (...). The Government does not act as moral policemen. And we do not proactively enforce section 377A on them” (*ibid.*). This arrangement was put to the test three years later in March 2010, after Tan Eng Hong was caught committing an act of “gross indecency” in a public restroom and charged under section 377A. Tan, under the advice of his attorney, M. Ravi, decided to challenge the law.

On September 24, 2010, Tan filed suit challenging the constitutionality of Section 377A arguing that Section 377A was inconsistent with articles 9 (right to life and liberty), 12 (equal protection), and 14 (freedom of association) of Singapore’s Constitution. After the Attorney General (AG) amended the charge to public obscenity, the Assistant Registrar

² Cause Lawyering, also known as public interest law, has a long history of important scholarship. As a term of art, it is necessary to highlight some of the significant work in this area, such as Granfield (2007) and Cummings (with Trubek, 2009). I have also written about this topic in my own work on the Philippines (Radics and Pontanal 2022).

dismissed the case. Tan appealed the Assistant Registrar's decision to the High Court, Singapore's intermediate appellate court, which dismissed the appeal with costs awarded to the AG (*Tan Eng Hong*, [2011] SGHC 56, paras. 24, 43). Shortly thereafter, Tan then appealed the High Court's decision to the Court of Appeal, Singapore's court of last instance. Reversing the High Court, in a landmark decision, the Court of Appeal opened the door for any Singaporean to challenge what they perceive as unconstitutional laws and held that a violation of a constitutional right makes a prima facie sufficiency of interest, that every constitutional right is a personal right, and that a "violation of constitutional rights may be brought about by the very existence of an allegedly unconstitutional law in the statute books (...) and/or by a real and credible threat of prosecution" (*Tan Eng Hong* [2012] SGCA 45, para. 115). The Court remanded the case to the High Court to determine whether Section 377A does in fact violate article 9 and 12 of the constitution (*Tan Eng Hong* [2012] SGCA 45, para.185).

On remand, because *Tan Eng Hong v Attorney-General* expanded the legal standing requirement, a second set of plaintiffs, Lim Meng Suang and Kenneth Chee Mun-Leon, were also able to file suit to challenge to Section 377A at the High Court (*Tan Eng Hong v Attorney-General*, [2013] SGHC 199). Ultimately, the High Court and the Court of Appeal ruled against both parties, holding that article 9 mainly pertains to capital punishment and incarceration, and that the language is not vague or arbitrary, but clear: Sexual acts between males are to be prosecuted (*Lim Meng Suang and Another v Attorney-General* [2014], SGCA 53 at para. 43). Regarding article 12, the court held that the law was justified to enforce "morals of the community," by targeting acts that were deemed particularly offensive, such as gay male sex, and prohibiting such activities not just in public, but in private as well (*Lim Meng Suang and Another* [2014] paras. 132–149). The Court ultimately punted the case back to Parliament, stating that the duty of the Court was to only interpret the law and not legislate (*Lim Meng Suang and Another* [2014] paras. 155–161).

Although this may seem like the end of the story, because *Tan Eng Hong* opened the door to a second set of plaintiffs, a third, fourth, and fifth plaintiff emerged again in 2018 to challenge Section 377A. Not only presenting new arguments and evidence, all three plaintiffs continued to raise the profile of the issue. The plaintiffs—Johnson Ong Ming, a media executive and former Pink Dot³ ambassador, Bryan Choong Chee Hong and social worker and former executive director of Oogachaga, one of Singapore's most prominent LGBT counseling organizations, and Dr Roy Tan Seng Kee, medical professional and important LGBT activist—all received much media attention circumventing strict media laws that prohibit the promotion of "alternative [i.e. homosexual] lifestyles" (iMDA 2013, 1.1). Although their challenges were ultimately unsuccessful, the fact that so many lawyers had stepped up to represent LGBT clients pro bono highlights how the issue is no longer taboo among certain sectors and how segments of the population are interested in working towards change. In addition to M. Ravi's and Remi Choo Zhengxi's relentless efforts, both of whom worked on the first set of cases that concluded in 2014, Harpreet Singh Nehal, Jordan Tan, Victor Leong, Priscilla Chia, Wong Thai Yong, Eugene Thuraisingam, Suang Wijaya, Johannes Hadi, and Joel Wong En Jie all lent their time and energy to strike down the law in 2018. In the

³ Annual event in Singapore akin to gay pride.

first challenge, Violet Neto, Peter Cuthbert Low, Indulekshmi Rajeswari, Deborah Barker SC, Ushan Premaratne and Ng Junyi all served as attorneys as well. Many of these lawyers worked on other important cases relevant to the LGBT community, such as Harpreet Singh who successfully convinced the Court of Appeal to hold that a gay couple could adopt their child born through a surrogate in *UKM v Attorney-General*, [2018] SGHCF 18. Some of the attorneys also came from very prominent legal and political backgrounds. Deborah Barker, for instance, is managing partner of one of the largest law firms in Singapore and the daughter of the late E. W. Barker, a long-serving Law Minister in the Singapore Cabinet under Prime Minister Lee Kuan Yew. Beyond these high-profile attorneys, the lawyers involved in these cases also involved a long list of young, ambitious attorneys developing the capacity to work on constitutional cases in the future.

Additionally, the challenges also highlighted the role of the constitution and the judiciary in safeguarding rights. In the first challenge in 2012, equal protection, freedom of association, and what liberty meant were all widely discussed and argued. Legal interpretations from the United States and India were introduced, although ultimately rejected, to redefine fundamental liberties such as a right to life or privacy (*Lim Meng Suang and Another* [2014] para. 48). The new challenges in 2018 engaged the same clauses of the constitution, but also reiterate to the court—and the public—the historical roots of behind the law. Bryan Choong Chee Hong’s lawyers, for instance, produced recently declassified documents demonstrating that the introduction of Section 377A in 1938 was to criminalize “rampant male prostitution” when Singapore was under British colonial rule, and was not meant to prosecute gay males generally. Moreover, in an era where science in many parts of the world is being impugned, Johnson Ong Ming’s attorney introduced expert scientific evidence on the nature of sexual orientation, emphasizing how homosexuals cannot wilfully change their orientation thereby leading to discrimination in violation of the Constitution. On this point, experts from both sides agreed in court that genetic and non-social environmental factors contribute to sexual orientation, with “little if any” scientific evidence supporting the proposition that social environmental factors play any role in sexual orientation (Lam 2019). Lastly, Dr Roy Tan Seng Kee argued that the anti-sodomy law implicates other laws such as Section 424 of the Criminal Procedure Code, or the duty to report knowledge of a crime. He attacked the basis that a law can remain “unenforced” and still be considered constitutional. He also reiterated to the court and the public, that Section 377A infringes the right to equality, life, personal liberty and expression under Singapore’s Constitution—fundamental rights afforded to all.

Even though all three challenges failed to repeal the law, the Court of Appeal’s final decision also provided a glimpse of hope. Acceding to the Attorney General’s argument that any repeal of the law should be left up to the legislature, the Court referred to the 2007 speech by Lee Hsien Long and stated that,

First, the political package was clearly intended to assure homosexual men that they have a place in our society and that they would not be “harass[ed]” despite the retention of s 377A. Second, Parliament made a deliberate and considered choice to retain s 377A as part of the political package. *Tan Seng Kee v Attorney-General and other appeals*, [2022] SGCA 16, paras. 111–112.

Part of the “political package” therefore, was to keep the law on the books but not enforce it as a compromise to both sides of the debate.⁴ Also, in addressing Dr Roy Tan Seng Kee’s argument regarding the implication of other laws, such as Criminal Procedure Code section 424 and the duty to report for the general public, and sections 119 and 176 and the duty to report as an agent of the state (i.e. police officers), the court stated, “given the signal importance of the political compromise on section 377A that was struck in 2007, the court should strive to honour and give legal effect to that compromise [which was to NOT enforce 377A] as far as practicable” (*Tan Seng Kee* [2022] SGCA 16, para. 110). Lastly, starting with the “role of the courts” the Court of Appeal referenced the famous U.S. case, *Roe v Wade*, 410 U.S. 113 (1973), and argued that if a court “short-circuit[s] the process of democratic, organic change” it could “defer stable settlement [and create] an intractable issue.” Thus, although the court stated from the outset that its role is not to create “design policy,” it learned from the U.S.’ experience of arguably moving too quickly on certain issues, as opposed to allowing the political sentiments to eventually swing in favor of striking out 377A. While this may seem frustratingly slow and against the interests of minorities who may not have political clout, as will be seen in the next two sections, a decade and half since Section 377 was struck out, and after over a decade of legal challenges to strike out 377A, the government’s and civil society’s positions on the issue may be shifting.

3.2. Government response to religious fundamentalism

It is no secret that much of the resistance to the repeal Section 377A emerges from the religious segments of the population. Daniel Goh (2010) argues that with the decline of liberal Christianity, hastened by political events such as the 1987 Marxist Conspiracy in which the Catholic Church was accused of harboring a “new hybrid pro-Communists” aiming to “subvert the state,” Pentecostal Christians filled the void and engaged in “spiritual warfare.” Aggressively expanding, these groups assiduously played to government interests, launching “LoveSingapore” — a movement with several prayer events tied to National Day, and discouraging emigration through statements like “God forbid that you should emigrate... The heritage of this land belongs to you. Christians, more than anyone, should love Singapore” (Goh 2010, 80). These groups, however, over time became increasingly hostile and aimed to influence government policy — particularly with regards to homosexuality. In January 2009, evangelical church leaders staged an overthrow of the existing leadership of Singapore’s leading feminist organization, the Association of Women for Action and Research (AWARE). In the months leading up to the Annual General Meeting (AGM), Christian women surreptitiously joined AWARE. On the night of the AGM, in a dramatic vote consisting of largely unfamiliar individuals, 9 out of 12 executive committee positions were captured by evangelical Christian women, 6 of whom came from the Church of Our Saviour (Chong 2011b). COS is known for its conversion therapy tactics and for being vehemently anti-gay, claiming on their website that they “help people recover their God-intended sexual identity” (Lee 2021, 522). Upon taking over AWARE, the new board

⁴ Although this may seem like a political compromise, it should be noted that despite not being enforced, it is well documented that despite being “unenforced” anti-sodomy laws lead to mental health issues (Mays and Cochran 2001), higher rates of police harassment (Eskridge 2008), and instances of blackmail (Radics 2013).

released statements criticizing “neutral” language that was not sufficiently negative regarding homosexuality in the AWARE’s sex education syllabus that was being used by Ministry of Education’s (MOE) Comprehensive Sex Education program. On this issue they stated, “this is something which should concern parents in Singapore (...). Are we going to have an entire generation of lesbians?” (Hussain 2009). Under pressure, MOE suspended AWARE’s comprehensive sex education program (Othman 2009).

Initially, the government was careful not to interfere. M Shanmugam, Singapore Law Minister, stated “the rules are all clear and one assumes that [AWARE] will act according to the law and to their own internal constitution. We don’t really get involved in this. It is for the members to sort it out” (Ramesh and Lim 2009). Minister of for Community Development, Youth and Sports Vivian Balakrishnan, however, gently cautioned against such tactics, stating “we want to protect and nurture the special place religion has in our society (...) [but] we don’t want [such organizations to] be damaged by the hurly-burly of politicking which appears on the ground. It is not a good idea” (*ibid.*). Deputy Prime Minister and Home Affairs Minister, Wong Kan Seng added, “If religious groups start to campaign to change certain government policies, or use the pulpit to mobilise their followers to pressure the Government, or push aggressively to gain ground at the expense of other groups, this must lead to trouble” (Straits Times 2009). Eventually, Pastor Derek Hong of the Church of Our Saviour apologized for aggravating the situation by instructing his church members from his Sunday pulpit to “go forth and support their Christian sisters [at AWARE]” (Chong 2011b). After the old board called Extraordinary General Meeting, the evangelical Christians were voted out six weeks after the surprise takeover, AWARE returned to the “old guard” and quickly amended its constitution to prevent such hostile takeovers in the future.

One could ask, how is the AWARE saga connected to impact litigation? First, the AWARE saga forged deeper connections between gender equality and sexuality movements. Even though AWARE’s position on LGBT issues was always neutral, by 2009, the attempted takeover led to AWARE’s greater support of Pink Dot, Singapore’s annual LGBT celebration, which was first launched two weeks after the AWARE Extraordinary General Meeting (Leow 2021). Thus, despite being criticized in the past for not including LGBT issues in their programs and mandates, the AWARE Saga demonstrated “the intermeshing of feminist and queer identities and agendas” (Weiss 2013, 153). This deep intermeshing of agendas has manifested in AWARE serving as an open critic of the court’s decisions to uphold Section 377A. In response to the first court challenge, AWARE released a statement highlighting how the Court’s narrow interpretation of the equal protection clause not only deprived the gay community of constitutional rights, but also violates Singapore’s legal obligations under the Convention on the Elimination of All forms of Discrimination against Women since the narrow interpretation implicates the same section of the constitution that was supposed to protect women (Radics 2021a, 147).

Secondly, it highlighted the growing antagonism and overreach of certain evangelical Christians in Singapore. A few years after the AWARE Saga, the Christian lobby started to target Pink Dot, forging alliances with religiously conservative Muslims through the “Wear White” campaign. Pastor Lawrence Khong of Faith Community Baptist Church noted that he and his church wear white to “send a message to LGBT activists that there

is a conservative majority in Singapore who will push back and will not allow them to promote their homosexual lifestyle and liberal ideologies” (Han 2018, 44). Social Scientist Sam Han adds, “it is rather unusual to see such open antagonism and politicking by religious organizations” (*ibid.*). This is because religion and politics has had a fraught relationship in the Singapore’s past, leading to violence, riots, and arguably the split between Singapore and Malaysia. Tong Chee Kiong (2007, 240) states, “the state’s official premise is that if any religious group does enter the political arena, others may follow suit to protect their interests... thus, in Singapore...mutual abstention from competitive political influence is an important aspect of religious tolerance and harmony.”

This surge of political religiosity targeted specifically at LGBT and feminist communities ultimately forced the government to respond. While it is true that the courts have upheld Section 377A, both the Supreme Court and the Attorney General have reiterated and clarified that homosexual men “have a place in our society and that they would not be “harass[ed]” despite the retention of s 377A” ([2022] SGCA 16, para. 111). Thus, in direct response to the rise of religious fundamentalism, the Maintenance of Religious Harmony Act was amended in 2019 to make it an offence to urge violence on religious grounds and to incite hatred or ill-will through one’s religion (Maintenance of Religious Harmony (Amendment) Bill of 2019, sections 17[E][F]). In addition to the amendments, an explanatory note was added that stated “the target group [of protection] need (...) may be made up of individuals... who share a similar sexual orientation (...)” (MRHA Bill, 2019: Explanatory Statement). In Parliament, when the new amendments and the explanatory statements were queried, members of parliament raised numerous examples of LGBT discrimination, harassment, and conversion therapy. Assoc Prof Walter Theseira (Nominated Member) highlighted that “in recent years, some religious leaders have established clear positions against the repeal of section 377A of the Penal Code (...). The language used has, sometimes, been alarmist and unaccommodating. Some have also stigmatised those whose personal lives do not conform to religious precepts, including single parents and persons of different sexual orientations” (Speech by Walter Theseira, 2019). Ms. Anthea Ong (Nominated Member) raised an example regarding the 2016 case in which a religious man “threatened to ‘open fire’ at the LGBTQ community” in Singapore (Speech by Anthea Ong, 2019). While many of the examples discussed were also non-LGBT related it was stated that the amendments were aimed at protecting minorities from religious trauma, or when religion is “weaponised to cause guilt, shame and a feeling of unworthiness in people” (*ibid.*). None of the Members of Parliament took issue with this statement or contested that such attacks had been targeted against LGBT people.

Lastly, while many of those who spoke out in parliament specifically against LGBT discrimination were “nominated members,” or appointed members on limited terms, their views were important, nevertheless. Even though the official position of the government is to maintain the political compromise of not enforcing 377A, we see a similar pattern of those whose role in the government is limited or concluded, speaking out in support of LGBT rights. An important example is that of veteran and former diplomat, Tommy Koh, who encouraged the second round of litigants to challenge Section 377A in 2018, and wrote a piece that same year in Singapore’s main periodical, *The Straits Times*, entitled “Section 377A: Science, religion and the law.” The subtitle to the piece directly addressed the religion and politics issue: “religious leaders may view

homosexuality as a sin, like adultery and fornication, but there's no reason for the state to make it a crime" (Koh 2018). In his opinion, he first states that "Singaporeans are a rational people. We make our policies and laws based on facts, science and reason," and then proceeds to highlight studies that state the homosexual is a normal variation of sexuality, science points to genetic factors as the cause of homosexuality, and how the World Health Organization removed homosexuality from its list of mental disorders. Getting to the point of the title he states that,

There is an important point which I wish to make to the Christian and Islamic authorities. I would respectfully remind them that Singapore is a secular state. It is not a Christian country or a Muslim country. It is not the business of the state to enforce the dogmas of those religions. In Singapore, there is a separation between religion and the state. Church leaders and Islamic leaders should respect that separation.

Former Chief Justice of the Supreme Court Chan Sek Keong, also came out in support of the repeal of Section 377A. In a 72-page law review piece, Chan (2019) argued that the Section 377A was enacted for the purpose of dealing with the male prostitution which was rife in 1938, and not because of morality. Under an equal protection (Article 12) analysis in Singapore, if a law has any reasonable purpose, it shall be deemed constitutional. Since the purpose of Section 377A was meant to address an issue that is no longer relevant, the law should fail under the Article 12 test. Chan's analysis mainly relied on historical records and constitutional interpretation, but with regards to religion and politics, Chan notes that "in the context of Singapore, with its diversity of people and religions, disapproval of male homosexual conduct *per se* by Parliament or a conservative section of Singapore society is not, in itself, sufficient legal basis to discriminate against male homosexuals" (Chan 2019, 802). He adds that Constitutional rights are not majoritarian rights.... they cannot be curtailed or taken away by the majority in society only because a majority of society may disapprove of or find such conduct unacceptable on the basis of their moral values" (*ibid.*). Therefore, even though the Supreme Court has decided to uphold the law, sustained media attention over the next 12 years created rifts between "conservative" elements and society, religiously fundamentalist attacks forged deeper connections between gender equality and sexuality movements, and former members of the government began to speak out in favor of science and rights under the constitution—these can all be considered major accomplishments for democracy and human rights.

3.3. *The evolving LGBT community*

Finally, over a decade of 377A lawsuits have pushed for the evolution of the LGBT community—one that is cognizant of its own fractures, forging alliances domestically and regionally, and becoming more reliant on the language of rights. In the first set of lawsuits, Lynette Chua (2017) documented quite carefully the concerns of a trepidatious LGBT community, one concerned about image, affiliation with established individuals to not be dismissed as a "frivolous, fringe nutcase," and generally embroiled in a tense battle between "homonormativity" and sexual freedom. To be clear, much of this attention was inadvertently the result of government efforts to allow gays and lesbians to serve openly in the civil service in 2003, and then its decision to keep Section 377A on the books in 2007, both of which Weiss (2013, 153) highlights was "not at the behest of LGBT activists." Yet the backlash from fringe conservative elements, such as religious

fundamentalists, have forced the LGBT community to not only become more cohesive, aligned with other civil society organizations, but also integrated into the state.

Although many of the problems within the LGBT community that emerged in 2010 remain, over the years, efforts have emerged to address these issues. For instance, Pink Dot, an LGBT organization that was organizing events as early as 2009, at the time of the 2010 lawsuits was attacked by some for “promoting homonormativity, mainstreaming gay men to make them more palatable to the rest of society while sidelining the poorer and less educated criminal who was cruising in public” (Chua 2017, 450). Vanessa Ho, founder of Project X (an organization that provides social and legal support for sex workers in Singapore), once stated that her proposal of setting up a booth at Pink Dot was met with apprehension because the event was meant to be “family friendly” and that Pink Dot had “corporate sponsors” they had to be accountable to (Han 2020). Since then, Project X has had a booth at every Pink Dot, a piece by Ho (2014) entitled “Transgender People Deserve to be Treated Equally in Society” was published on Pink Dot’s website, and the organization released a statement in support of a transgender student who experienced discrimination by the Ministry of Education (MOE), encouraging the government to “affirm the existence of transgender students and work with students and parents to ensure that their education is not disrupted while they undergo medical treatment” (Pink Dot 2021). Additionally, when the government banned “foreign sponsors” on the basis that “foreign entities should not fund, support, or influence events that relate to domestic issues, especially political issues or controversial social issues with political overtones,” Pink Dot had to reassert its claim that it was a homegrown and local event (Ministry of Home Affairs – MHA – 2016). In 2017, it secured over 120 local companies to support the event after 13 multinational companies were forbidden by the new regulations from doing so (Red Dot for Pink Dot 2022). The next year, when security restrictions were enhanced and non-Singaporeans were banned from participating, over 20,000 Singaporeans participated (Radics 2021a).

Navigating the fear of “foreign interference,” has become even more difficult since the 2016 and 2017 amendments to the Public Order Act that restricted foreign support for, and participation in, Pink Dot. In 2019, the government passed the Protection from Online Falsehoods Act and in 2021 the Foreign Interference (Countermeasures) Act. Both laws not only potentially limited freedom of speech, but also underline the scrutiny which foreign influences endure in Singapore—with homosexuality constantly being targeted as a “foreign” concept or lifestyle. In 2014, in response to a networking dinner for LGBT students, Goldman Sachs was chastised by then Minister of Social and Family Development Chan Chung Sing and informed that foreign companies “should not venture into public advocacy for causes that sow discord amongst Singaporeans” (Barsotti 2014). The same logic emerged in 2016 and 2017 amendments to the Public Order Act limiting foreign participation in Pink Dot, and in 2021 when the United States flew a rainbow a rainbow flag outside of its embassy in honor of the International Day Against Homophobia and Transphobia (IDAHOT) Day on May 17 and hosted a webinar with a local organization. In response to the 2021 incident, the Ministry of Foreign Affairs stated, “[it] has reminded the US Embassy that foreign missions here are not to interfere in our domestic social and political matters, including issues such as how sexual orientation should be dealt with in public policy” (Ganapathy 2021).

While highlighting local support is crucial, regional support has also been helpful in circumventing the fear that homosexuality is a tool of “foreign interference.” In countries like Indonesia that explicitly discusses LGBT rights as part of a proxy war led by Western forces, the selectively targeted comments towards the United States Embassy and multinational companies highlight that “foreign,” particularly regarding sexuality, refers to the “wild wild West.” In contrast, Singapore shares the same legal history as Malaysia, Brunei, and Myanmar, with many of them still maintaining Section 377, a broader law that criminalized sex “against the order of nature.” It is instructive that when Mahathir’s political rival Anwar Ibrahim was charged and convicted under the law, many regional leaders boycotted the ASEAN summit in 1998, with Prime Minister Lee Kuan Yew expressing his concern over the treatment of Anwar in prison (Radics 2021b). In Brunei and Myanmar, the rise of Shariah laws that further criminalized LGBT identities and the increased policing of LGBT activism in these countries respectively, have been met with the rise of regional NGOs such as ASEAN SOGIE Caucus, which released statements denouncing the state of affairs and provided human rights training in these countries (Chua 2015, Langlois *et al.* 2017). Additionally, as was seen in the AWARE Saga, many of these countries that shared the same political rhetoric of “Asian Values” are also starting to see the merging sexuality and gender issues. For instance, Malaysia’s NGOs Sisters in Islam and Justice for Sisters both criticizing the strict enforcement of Shariah laws and its rigid policing of gender through provisions on “cross dressing” and “impersonating women.” On this issue, Goh and Kananatu (2019) discuss how these two NGO’s spoke out in defense of trans women or *mak nyahs* who—along with a rising number of pro bono attorneys—argued that these laws were dehumanizing. In Indonesia, feminists and LGBT activists—like in Singapore—both found themselves the target religious and conservative political forces using the “family” as a means to police women and LGBT people in efforts to further distinguish the nation’s values from the “West” (Wijaya 2020, 342). As the fourth wave of feminism—focusing on empowerment, digital technology, and intersectionality—enters the region, and the emergence of regional organizations such as the ASEAN People’s Forum, these regional organizations, along with LGBT and pro-bono human rights attorneys, can continue to build regional alliances and networks of support to not just promote LGBT rights, but the rights for all across the region (see Yeoh 2022).

4. Conclusion

From Western laws to regulate “unruly” Asian sexuality in the colonial era, to Asian leaders protecting “traditional” family values from Western moral degradation in the post-colonial era, despite Southeast Asia’s rich and historical sexual diversity, LGBT identities have been the target of overt regulation and institutional discrimination since the promulgation of Section 377A in 1938, and even earlier with the importation of 377 in the Straits Penal Code of 1872. Moreover, the politics of “Asian Values,” borne in retaliation of Western pressures to “democratize” and promote human rights at the end of the Cold War has ironically forced the same governments who espoused the rhetoric, to now shore up laws to protect the LGBT community against the weaponization of “tradition” and “Asian values” by religious extremists. Existing theoretical frameworks have caused us to ask: is the return to “Asian values” an example of backlash politics

and the rise of authoritarianism? This article has argued that the answer is a lot more complicated.

As Southeast Asia, and the world, fends off the rising tide of authoritarianism, countries like Singapore can still rely on the judiciary to counter attacks on fundamental rights. While this article is not meant to delve deep into a comparative analysis between states on this issue, and as authoritarianism and populism throughout the region have led to the deterioration of LGBT rights, Singapore is similarly vulnerable. Former Chief Justice Chan Sek Keong's argument that the constitution is meant to fend off majoritarianism—and not enable it—shows that the 377A lawsuits have highlighted how fighting for the rights of a specific community can help protect the rights for all minorities. Tommy Koh's comments on the law and reminder that "Singaporeans are a rational people," who make policies based on "facts, science and reason" directly addresses the populist sentiments sweeping the world—from the US and the UK to Singapore and Southeast Asia. And lastly, with NMPs Anthea Ong and NMP Walter Theseira raising the stigmatization, violent threats, and presence of conversion therapy of LGBT people in Singapore's Parliament, LGBT issues are back in focus. Over a decade of fighting an archaic anti-sodomy law has revealed the harmful effects of enforcing an idealized notion of the "family," not just for LGBT people, but anyone who does not conform to the expectations. Therefore, despite the Supreme Court's refusal to strike out 377A, monumental changes have taken place. The court has reiterated that "homosexual men have a place in our society and that they would not be "harass[ed]" despite the retention of s 377A." The government has also amended the laws to ensure that the incitement of hatred or ill-will through one's religion specifically on the basis of sexual orientation will be strictly regulated. Thus, although Section 377A remains on the book, the 377A cases have made significant strides in revealing what the "political compromise" of keeping the law on the books and not enforcing it looks like. Only time will tell how long this compromise will hold.

Ultimately, this article explored the slow and arduous process of coming to terms with foreign laws that have taken a life of their own in post-colonial societies. In Southeast Asia, a lingering fear of foreign ideas and concepts continue to plague the region, making "human rights," or "LGBT rights," a difficult concept to uncritically accept. Moreover, nations that clung to notions of traditional families ended up marginalizing not just LGBT people, but women as well, forging alliances between both. What emerges in this context, therefore, are local and regional definitions and alliances with a distinctly ASEAN perspective. As strategic litigation continues to push for greater social change and recognition of the rights of all people, there is hope that the 377A challenges and its legacy will continue to stimulate democratic growth on local terms and in response to local conditions for Singapore and the Southeast Asian region.

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