

Section 377A and a new modus vivendi

The law can provide structure and rules, but cannot imbue us with the values and norms to build bridges across differences



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In a significant decision last month, Singapore's apex court ruled that as the three appellants who are homosexual men do not face any real and credible threat of prosecution at this time, they did not have the requisite standing to pursue their constitutional challenges to Section 377A of the Penal Code (S377A).

Nevertheless, the ruling is, arguably, the most important for providing sexually active homosexual men with the full measure of accommodation contemplated by the Government and expressed by Prime Minister Lee Hsien Loong in Parliament during the S377A debates in 2007.

The ruling also preserves the legislative status quo on S377A, reserving the matter of its retention or repeal for Parliament's further consideration at an appropriate time. The judgment will give impetus to a new modus vivendi for a uniquely Singaporean arrangement, whereby the contending groups can not only coexist but also actually thrive despite their deeply held differences.

First enacted in 1938 by the British colonial authorities, S377A criminalises consensual sexual activity, in public or in private, between two male persons. Offenders may be jailed for up to two years for any act of gross indecency with another male.

PROTECTING LEGITIMATE EXPECTATIONS

The court's decision was premised on two fundamental considerations. The first is the exceptional circumstances surrounding the general policy of not enforcing S377A.

Parliament had struck a "political compromise" in 2007 to pragmatically balance the maintenance of the legislative status quo on "a vexed area of socio-political policy while accommodating the concerns of those directly affected by the legislation in question".

The court observed that the political branches of government gave the assurance that although S377A was retained, it would not be proactively enforced. This



Last month's ruling by Singapore's Court of Appeal – dismissing the challenges brought by three men who argued that Section 377A of the Penal Code should be struck down as it violates their constitutional rights – preserves the legislative status quo on S377A, reserving the matter of its retention or repeal for Parliament's further consideration at an appropriate time. PHOTO ILLUSTRATION: REUTERS

live-and-let-live approach sought "to avoid driving an irrevocable wedge within our diverse society".

Second, within the specific context of S377A, the law should give legal effect to Attorney-General Lucien Wong's 2018 representations, which are broadly aligned with the political compromise. These guidelines on the exercise of prosecutorial discretion affirmed that it would not be in the public interest to prosecute two consenting male adults engaged in a sexual act in a private place.

The court stated that it recognises and will protect the legitimate expectations of such individuals.

Otherwise, they would be exposed "to the grave threat of prosecution and the attendant deprivation of liberty". The court's decision goes some way towards ensuring that homosexual men would be free from harassment and live without fear in our society. Moreover, the 2019 amendments to the Maintenance of Religious Harmony Act provide for enhanced protection for both the LGBT+ and religious individuals and groups, where any attack or threat on them based on their identity attributes will be an offence.

FORGING A SINGAPOREAN CONSENSUS ON A DIVISIVE ISSUE

In the past few weeks, Home Affairs and Law Minister K. Shanmugam and Social and Family Development Minister Masagos Zulkifli made statements on the court's judgment during their ministries' Committee of Supply

debates. Their remarks are helpful in giving an insight into the Government's thinking.

Mr Shanmugam indicated that the Government was keeping an open mind on the "best way forward" considering the changes in the social landscape since 2007. This aspiration to be "an inclusive society where mutual respect and tolerance for different views and practices are paramount" is grounded on "gradual evolution" and on "traditional families".

He observed that social attitudes towards homosexuality had gradually shifted. He noted that what upset the LGBT+ community was society's lack of recognition or even denial of an LGBT+ person's experience of hurt and rejection.

On the other hand, among those who sought to preserve the overall tone of society, "their concern is not S377A per se, but the broader issues of marriage and family" and that even within this group, there was support for decriminalising consensual homosexual sexual acts between two men.

The minister's remarks are probably the most accommodating remarks towards the LGBT+ community since 2007, bearing in mind the symbolic importance of S377A for those who regard the heterosexual stable family as the "social norm" reflecting societal norms, values and attitudes.

For them, the repeal of S377A is the bright line that should not be crossed, for it may signal even bigger threats to the moral norms of society, such as legalising gay marriages.

A week later, Mr Masagos reiterated that the Government

would uphold the traditional family in its policies and laws in areas such as marriage, parenthood, adoption, fertility treatment and housing.

He emphasised that Singapore needed to find its "own unique way forward" on S377A without creating "sudden shifts and deep division" in society.

It is clear that the Government will not unilaterally advocate or promote the retention or repeal of S377A. It will be informed by societal attitudes towards homosexuality.

Mr Shanmugam emphasised the imperative of "continued discussion and open-ended resolution within the political domain" to forge consensus, rather than in win-lose outcomes in court.

LIVING AND THRIVING DESPITE DEEP DIFFERENCES

It should not be a surprise if public opinion eventually shifts in favour of repealing S377A.

One view is that S377A unfairly targets people for an innate attribute that they have no control over and which they are unable to change. Another line of argument is that S377A perpetuates the stigma and discrimination against LGBT+ people, creating a class of "criminals", and contributing to their psychological, emotional and physical abuse.

If S377A is eventually repealed or amended, then the focus must shift to making sense of and preparing for a post-S377A Singapore.

How do we manage the hard questions that arise when

exercises of religious freedom seem to discriminate unfairly? Religious freedom in Singapore is protected under the Constitution. Discrimination is also wrong.

Given that deep differences are unavoidable and co-existence is more about tolerance, we ought to foster a conducive culture and develop a facilitative process in which we can seek common ground of shared existence: that we can live and thrive despite deep and sometimes irresolvable differences.

Litigation and contestation outside the courtroom alike mask the real issues at stake. It is not about discrimination of LGBT+ people per se, but about fundamentally different, perhaps irreconcilable, notions of sex, marriage, parenting and family.

These different views on the human condition must find shared existence even as each "side" remains protective of its own values, beliefs and aspirations.

Looking ahead, Singapore urgently needs to strengthen its constitutional culture, especially the freedom of religion and the freedom of speech. In turn, this requires constitutional commitments, and a civic culture that recognises and safeguards legitimate differences and collective action in support of what Singaporeans individually and collectively believe in.

Equally fundamental is to have confidence in our own beliefs and values, a humble mindset and patient disposition enabling us to engage charitably with others. This does not paper over our deepest disagreements with others or surrender our deep commitments, beliefs and values.

People who strongly disagree need to find common ground, while sharing their differences with care and respect. The highest court, the Attorney-General and Parliament have shown how we can live with S377A and its legacy. Fostering a community of reason is essential to avoid the silos and echo chambers of those who disagree and agree with us, respectively.

How do we love our neighbour who does not share our values? The law and the legal system can provide the structure and rules, but they cannot imbue us with the requisite values and norms to build bridges across differences.

Faith and non-faith perspectives must demonstrate their relevance in navigating the big issues of our existence, particularly that of religious liberty and non-discrimination vis-a-vis controversies over sexuality, and deeply held beliefs and values. People unlike us are here to stay, but we can all thrive under the Singapore sun.

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