

Doing the right thing for all while managing pace of social change

What the Government proposes to do with Section 377A seeks to provide a framework to accommodate competing interests, reduce polarisation while enabling both sides of the divide to work towards a common ground of shared and purposeful existence.

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At Sunday's National Day Rally, Prime Minister Lee Hsien Loong sought to forge a new consensus to "reconcile and accommodate" society's social mores and the LGBT+ community's aspiration to be respected and accepted. While affirming that repealing Section 377A was "the right thing to do", he emphasised that such a move was not intended to unleash a drastic shift in societal norms.

Parliament will repeal Section 377A of the Penal Code (S377A), which criminalises consensual sex acts in private between two adult men. The Constitution will be amended to "uphold and safeguard" the institution of marriage and measures taken to maintain the family-oriented approach and the prevailing societal norms and values. The proposed amendments will also seek to protect the current legal definition of marriage – a monogamous union of a man and a woman – from being successfully challenged in the courts.

Put simply, where marriage and family are concerned, the status quo is preserved. But Sunday's announcement goes a significant way in recognising the concerns of the gay community.

What the Government proposes to do seeks to provide a framework to accommodate competing interests, reduce polarisation, while also enabling both sides of the divide to work towards a common ground of shared and purposeful existence.

Such anticipatory constitutional and legislative action enables the state, with society, to co-create Singapore's post-S377A future while adroitly managing differences. Moreover, they can be better tailored to society's specific needs and concerns, whether in areas such as education, public housing, immigration and healthcare benefits.

The proposed political accommodation seeks to better balance different legitimate views and aspirations among Singaporeans. Most Singaporeans accept that sexual acts in private between consenting men should be decriminalised. They also see the need to retain the family as the basic unit of society comprising a man and a woman married to each other and from which children are raised.

In comprehensively laying out the concerns of the different stakeholders, PM Lee argued that a "controlled, carefully considered



The Pink Dot rally held at Hong Lim Park in June, earlier this year. The proposed measures announced by PM Lee Hsien Loong are not a call to paper over one's deepest disagreements with others, or to surrender one's deep commitments and fundamental values. Instead, it is about having civil, principled disagreements while being in community, even amid the deepest differences. ST PHOTO: GAVIN FOO

way" to repealing S377A was the best way to manage the pace of social change on a deeply divisive issue. He acknowledged that the proposed moves will not have universal endorsement but cautioned against descending into culture wars.

WHY NOW?

Why is the Government making such a significant move now despite it not likely to derive a net positive benefit from it? Why not delay acting until the courts strike down S377A for being unconstitutional, or when societal attitudes are overwhelmingly in favour of its repeal?

The Court of Appeal in the latest S377A challenge earlier this year had held that S377A cannot be enforced in its entirety. In other words, it is effectively a dead law.

Following the ruling, the Law Minister and the Attorney-General had advised that there was a significant risk of S377A being struck down in future judicial reviews, as it could be in breach of the Constitution's equal protection guarantee (Article 12). Clearly, S377A is on its last legs.

Although the apex court found no merit in constitutional challenges on the grounds of Articles 9 (life and liberty) and 14 (freedom of speech, assembly and association), it articulated its views over the appropriate level of judicial scrutiny under Article 12, including its earlier decision on it that held S377A to be constitutional.

The court's latest ruling could be interpreted to mean that the law probably will not survive another Article 12 constitutional challenge. The political branches (the executive and Parliament) are enjoined to appropriately respond, including whether amendments to the law are needed. They responded swiftly reviewing the judgment and engaged stakeholders across the divide on the best way forward.

This iterative deliberation, through the court's judgment, between the judicial and legislative branches over how constitutional commitments and national objectives can be integrated is crucial to good governance.

Crucially, the courts serve as a circuit breaker to manage a

dispute from spiralling out of control beyond the courtroom and affecting society in harmful ways. It vividly demonstrates the centrality and the workings of the separation of powers: mutual respect for the constitutional roles of the judiciary and the democratically-elected branches of government.

SEPARATION OF POWERS AND DIVISIVE ISSUES

In adjudicating constitutional challenges, the courts are concerned solely with whether the impugned law or public policy complies with the relevant constitutional and legal standards, but not the political aspects.

Our courts have consistently demonstrated restraint and accorded due deference when dealing with matters of socio-political or economic importance and national security. Judges interpret and apply laws, not make them. To be clear, this does not mean that the courts shy away from holding the Government accountable for breaches to a citizen's rights. From the experience of other

jurisdictions, the courts can only exercise restraint if the executive and Parliament fulfil their roles and deal effectively with issues like S377A when they arise. Otherwise, the courts may find it hard to restrain themselves in the absence of effective politics. It would be bad for the system if the courts become the main forum for what are fundamentally non-legal issues.

In the latest S377A judgment, Chief Justice Sundaresh Menon noted that S377A was "a lightning rod for polarisation". It had "taken on particular importance of what it is thought to signify" to both sides of the divide with no ready answers on how best to maintain harmony between different communities with "deeply held, and sometimes conflicting, views on important issues of moral conscience".

The Chief Justice was unequivocal that the law is not and cannot be the "continuation of politics by other means". Moreover, the judiciary does not take the lead in making social changes nor does it design social policy. He reaffirmed that social progress was advanced through the political process and legislative

action, and not through judicial activism.

The political process is much better suited to accommodate divergent interests and opinions for issues that are fundamentally socio-political ones. Even if politics is sub-optimal, the courts cannot discharge that function as it is beyond their constitutional role and institutional competence to mediate such differences in society. The political process can better mediate and achieve consensus unlike litigation, an adversarial process in which one side must lose.

If S377A is instead struck down by the courts, the consequent response by the political branches and society will invariably be reactionary. It would give rise to even more uncertainty on related laws and public policies.

For example, if S377A is found to infringe Article 12, then other laws and policies that ostensibly differentiate on the basis of sexual orientation or sexual preferences could be unlawful. Consequently, such unintended consequences of the courts interpreting the law could lead the pace of change being dictated to state and society, which can upset any prior delicately struck consensus.

WHAT NEXT FOR A POST-S377A FUTURE

S377A's imminent repeal makes it an imperative for Singaporeans to envision what a post-S377A Singapore could be. Enacting constitutional and legislative changes is the easy part; making them work is the real challenge. With deep differences unavoidable and the need to go beyond co-existence crucial, we urgently need to foster a conducive culture and develop a facilitative process by which we can seek common ground of how to live and let live. This requires deliberation, debate and discernment.

Any constitutional provision enacted alongside S377A's repeal could easily become fair game for post-S377A litigation, for instance, legal challenges premised on the lack of "marriage equality". To descend into endless lawsuits to force the issue, however, will only further divide society and families.

The proposed measures announced by PM Lee are not a call to paper over one's deepest disagreements with others, or to surrender one's deep commitments and fundamental values. Instead, it is about having civil, principled disagreements while being in community, even amid the deepest differences.

Singapore's pluralist vision depends on finding purposeful ways of thinking and acting not only for ourselves, but also of others who are different from us, and of society at large. The proper accommodation of divergent interests in our plural society is ultimately about people living and thriving despite seemingly unreconcilable differences. PM Lee's speech offers a good start; the opportunity must not be wasted.

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