

THE “LIMITED” ASSISTANCE OF FOREIGN JURISPRUDENCE: LESSONS FROM INDIA AND THE UNITED STATES ON SEXUALITY AND GOVERNANCE

MAGDALENE LAM*

INTRODUCTION

At the heart of Singapore’s political identity lies a paradox: Singapore’s reliance on liberal foreign policy¹ while maintaining an insular, conservative socio-political landscape.² This inconsistency forms a thorn in Singapore’s otherwise pristine image as a “model country,”³ with close economic partners expressing concern over the

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¹ NARAYANAN GANESAN, REALISM AND INTERDEPENDENCE IN SINGAPORE’S FOREIGN POLICY 88–89 (2005); AMITAV ACHARYA, SINGAPORE’S FOREIGN POLICY: THE SEARCH FOR REGIONAL ORDER 17–18 (2007) (pointing to Singapore’s reliance on foreign trade as a driver of GDP growth).

² Past policies implemented by the People’s Action Party have gravitated toward the preservation of “traditional Chinese” values. Joseph B. Tamney, *Conservative Government and Support for the Religious Institution in Singapore: An Uneasy Alliance*, 53 SOCIO. ANALYSIS 201, 203–04 (1992). Although these programs have been scrapped, some of these values are still reflected in modern-day society. Mathew Mathews et al., *Religion, Morality and Conservatism in Singapore* 66–68 (Inst. of Pol’y Stud., Working Paper No. 34, 2019).

³ Singapore remains one of the freest economies in the world, scoring 89.4 on the 2020 Index of Economic Freedom published by the Heritage Foundation. *2020 Index of Economic Freedom*, HERITAGE FOUND., <https://www.heritage.org/index/country/singapore> [<https://perma.cc/65GR->

city-state's respect for human rights. In important respects, the political and legal identities of LGBTQ+ persons best illustrate this political paradox. In its 2019 motion for a non-legislative resolution on the Partnership and Cooperation Agreement between the European Union and Singapore, the European Committee on Foreign Affairs expressed its concern over the lack of protection afforded to fundamental freedoms by the Singaporean legal system. The consent motion called for the Singaporean government to “abolish the laws penalising sexual relationships between people of the same gender.”⁴ Alongside pressure from international partners, the push for abolition of anti-sodomy laws in Singapore finds critical support in internal LGBTQ+ movements as well.⁵ The increasing willingness of Singaporean youth to challenge conservative ideology, which forms the foundation of the nation-state's “cohesive identity,”⁶ suggests that Singapore's anti-sodomy law may be ripe for repeal.

CMHH]. Singapore also tops the World Bank Human Capital Index, which measures labor productivity. *The World Bank in Singapore*, WORLD BANK (Apr. 9, 2019), <https://www.worldbank.org/en/country/singapore/overview> [<https://perma.cc/35DC-AVJN>].

⁴ Committee on Foreign Affairs, *Report Containing a Motion for a European Parliament Non-Legislative Resolution on the Draft Council Decision on the Conclusion, on Behalf of the European Union, of the Partnership and Cooperation Agreement Between the European Union and Its Member States, of the One Part, and Singapore, of the Other Part*, EUR. PARL. DOC. A8-0023, para. 6 (Jan. 24, 2019), https://www.europarl.europa.eu/doceo/document/A-8-2019-0023_EN.html [<https://perma.cc/G52D-V7M5>].

⁵ Pink Dot, a non-profit movement that has called for the repeal of anti-sodomy laws since its inception, experiences a regular increase in annual participation. See Nurul Azliah, *Pink Dot Singapore 2016 Attendance 'Exceeds' Hong Lim Park's Capacity*, YAHOO NEWS (June 4, 2016), <https://www.yahoo.com/news/pink-dot-singapore-2016-attendance-exceeds-hong-013751978.html> [<https://perma.cc/4PU9-E2AB>]. Petitions calling for the repeal of anti-sodomy laws have also gained traction in recent years. See Sue-Ann Tan, *More than 4,000 Sign Online Petition to Repeal 377A*, STRAITS TIMES (Sept. 10, 2018), <https://www.straitstimes.com/singapore/more-than-4000-sign-online-petition-to-repeal-377a> [<https://perma.cc/99Q4-FSW2>]; *Ready for Repeal (#Ready4Repeal)*, GOPETITION (Sept. 9, 2018), <https://www.gopetition.com/petitions/ready-for-repeal.html> [<https://perma.cc/4XG9-7V2U>] (indicating over 50,000 signatures).

⁶ Penal Code (Amendment) Bill 2007 (Bill 38 of 2007), https://sprs.parl.gov.sg/search/topic?reportid=018_20071023_S0003_T0002 [<https://perma.cc/LZG3-67VR>].

However, little progress has been made on this front. Section 377A of the Penal Code (hereinafter “377A”),⁷ which criminalizes acts of “gross indecency” between men, has withstood successive constitutional challenges in the Supreme Court of Singapore.⁸ In the 2020 case *Ong Ming Johnson v. Attorney-General*,⁹ the High Court refused to return a favorable judgment for the plaintiff, emphasizing its lack of institutional competence in adjudicating matters of policy.¹⁰ This is consistent with the “understanding of separation of powers as deference in Singapore,” whereby a presumption of constitutionality is grounded “on claims of functional division, superior expertise and democratic legitimacy.”¹¹ Nonetheless, the *Ong Ming Johnson* ruling stands in sharp contrast to the assertive role played by both American and Indian courts in abolishing anti-sodomy laws.¹² While repeal remains a theoretical possibility, inaction by Parliament imposes a greater responsibility on the Supreme Court to enact change.¹³ Against this backdrop, this Note argues that a reconceptualization of 377A challenges is necessary, and aims to achieve two objectives.

First, this Note contextualizes the arguments advanced in two seminal decisions that successfully struck down local anti-sodomy laws in the United States and India,

⁷ Penal Code (Cap 224, 2020 Rev Ed) § 377A.

⁸ See, e.g., *Lim Meng Suang v. Att’y-Gen.* [2013] 3 SLP 118 (HC); see also *Lim Meng Suang v. Att’y-Gen.* [2014] SGCA 53 (CA).

⁹ [2020] SGHC 63.

¹⁰ *Id.* at [192].

¹¹ Jaelyn Ling-Chien Neo, *Autonomy, Deference and Control: Judicial Doctrine and Facets of Separation of Powers in Singapore*, 5 J. INT’L & COMPAR. L. 461, 475 (2018).

¹² See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321.

¹³ The government’s official stance is that of non-enforcement, rather than repeal. *Singapore Parliamentary Debates, Official Report* (22 October 2012) vol 83 at cols 2175, 2242, https://sprs.parl.gov.sg/search/topic?reportid=024_20071022_S0004_T0007 [<https://perma.cc/7GDH-JTFF>]. See also, Richard C. Paddock, *Singapore’s Latest Ruling on Gay Sex Is ‘Cold Comfort,’ Activists Say*, N.Y. TIMES (Feb. 28, 2022), <https://www.nytimes.com/2022/02/28/world/asia/singapore-gay-sex-law.html> [<https://perma.cc/R36L-TS7N>] (“Singapore’s prime minister, Lee Hsien Loong, has long said that his small, Southeast Asian island nation is conservative and not ready for the changes that repealing the law would bring.”).

*Lawrence v. Texas*¹⁴ and *Navtej Singh Johar v. Union of India*,¹⁵ and applies them in a Singaporean context. The comparison across the three jurisdictions is crucial because of the historical, sociological, and legal similarities between Singapore, India, and the United States. Nonetheless, because of the differences in substantive provisions of law across jurisdictions, the *Lawrence* and *Navtej* strategies will be distilled insofar as they remain applicable within Singapore's legal system. Part II of this Note begins with a brief overview of the state of law in Singapore. Part III provides comparative analyses of legal challenges to anti-sodomy laws in the United States and India. Besides similar textual protection afforded to personal liberty and equal protection across these jurisdictions,¹⁶ temporal similarities between the American, Indian, and Singaporean approaches to safeguarding LGBTQ+ equality strengthen the case for drawing inspiration from foreign jurisdictions.

Second, this Note argues that the failure of previous challenges, based on traditional understandings of Singaporean judicial review, should not hinder future opportunities for abolition. A reconceptualized approach to striking down 377A will be provided in Part III, with its effectiveness assessed against the High Court's recent pronouncements in *Ong Ming Johnson*. Although the rigidity of "hard law" may be difficult to counteract, past cases do not militate a future constitutional strike-down, as a textual reading of the Constitution does not prove, *prima facie*, that the arguments laid down in Part II of this Note are flawed. Part III therefore argues that the hindrance to abolition of 377A lies in the reluctance of judges to engage in dynamic interpretation and to deviate from originalist judicial attitudes when adjudicating on controversial legislation. Ultimately, this Note proposes holistic reform as a strategy to striking down 377A.

I. State of 377A Prior to *Ong Ming Johnson*

As a British colony, Singapore's legal system was heavily influenced by legislative developments in the West.¹⁷ The passage of the Labouchere Amendment

¹⁴ *Lawrence*, 539 U.S. 558.

¹⁵ *Navtej Singh Johar*, AIR 2018 SC 4321.

¹⁶ See CONST. OF THE REPUBLIC OF SINGAPORE (1999 Reprint), arts. 9, 12; U.S. CONST. amend. XIV, § 1; INDIA CONST. art. 14.

¹⁷ See generally J.Y. Chua, *The Strange Career of Gross Indecency: Race, Sex, and Law in Colonial Singapore*, 38 L. & HIST. REV. 699 (2020). See also, Eugene K. B. Tan & Gary Chan, *The Singapore Legal System*, SING. L. WATCH (Sept. 2015), <https://www.singaporelawwatch.sg/About-Singapore->

in Britain, which criminalized “acts of gross indecency” between men, laid the foundation for anti-sodomy laws in Singapore. Singapore’s Labouchere equivalent, 377A, came into being in 1938 via its inclusion in the Straits Settlements Penal Code.¹⁸ The provision states:

Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years.¹⁹

Two key features stand out. First, contravention of 377A requires an “act of gross indecency.” This term has been interpreted without reference to legal norms and based solely on the “customs and morals” of society that inform the perception of said acts by “any right thinking member of the public.”²⁰ Second, 377A may be violated regardless of whether participants have consented to the act, and regardless of where it was performed.²¹ The absurdity of 377A will be discussed in later sections of this Note. Suffice to say, this introduction merely wishes to flag the absurdity of 377A’s encroachment upon private choices made by Singaporean citizens.

These features therefore present corresponding problems. First, if an “act of gross indecency” is to be determined against developments in society’s moral values,

Law/Overview/ch-01-the-singapore-legal-system [https://perma.cc/8KSR-8X6N] (“From its founding by Sir Thomas Stamford Raffles of the British East India Company in 1819 to its independence in 1965, Singapore’s legal development had been intricately linked with its British colonial master.”).

¹⁸ Chua, *supra* note 17, at 699.

¹⁹ Penal Code (Cap 224, 2020 Rev Ed) § 377A.

²⁰ Ng Huat v. Pub. Prosecutor [1995] 2 SLR(R) 66, at 76.

²¹ According to *Sentencing Practice in the Subordinate Courts* (2d ed. 2003), consenting adults who have committed the offense in private are punished with a few weeks’ imprisonment. See also, Lynette J. Chua Kher Shing, *Saying No: Sections 377 and 377A of the Penal Code*, SING. J. LEGAL STUD., July 2003, at 209, 210, <https://www.jstor.org/stable/pdf/24868200.pdf> [https://perma.cc/6CX4-CMPS] (“Consent of the parties performing the sexual act was irrelevant; the law expressed the majority’s abhorrence of particular sexual acts. Section 377A bans ‘gross indecency’ between males both in public and private.”).

the increasing acceptance of LGBTQ+ relations²² should render 377A obsolete. Second, the decision to criminalize sodomy, regardless of whether consent has been given, presents an affront to the values of personal choice and autonomy. Paternalism, propagated by 377A, abrogates the choice afforded to individuals to engage in sodomy, even though engaging in the act may increase one's overall happiness and self-fulfillment.²³ These underlying concerns have spurred successive challenges to the constitutionality of 377A, which must be studied before a recontextualized challenge to 377A can be proposed.

A. *Tan Eng Hong v. Attorney-General* (2013) in the High Court

First, in *Tan Eng Hong v. Attorney-General*,²⁴ the plaintiff (Mr. Tan) brought a challenge against 377A on the basis that the provision contravened Articles 9 and 12 of the Singapore Constitution.²⁵ Article 9 safeguards the right to life and liberty, while Article 12 guarantees equal protection.²⁶ Mr. Tan had been arrested for engaging in oral sex with another man in a public restroom.²⁷ As the law stood, the High Court had only interpreted Article 9's right to life and liberty to preserve an individual's freedom from unlawful incarceration,²⁸ with an express distinction between the meaning of "liberty" under the Singaporean Constitution and that of other jurisdictions.²⁹ Further, a provision could withstand an Article 12 equal protection challenge only if it passed the "reasonable classification" test expressed

²² See *infra* Part II.

²³ The English philosopher John Stuart Mill argues that government intervention is only warranted "to prevent harm to others." John Stuart Mill, *Essay on Liberty*, in ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 1 (R. McCallum ed., 1946).

²⁴ [2013] 4 SLR 1059 (HC).

²⁵ *Id.* at 1059.

²⁶ Constitution of the Republic of Singapore (2020 Revised Edition) Arts 9, 12.

²⁷ *Tan Eng Hong* [2013] 4 SLR at 1059.

²⁸ *Lo Pui Sang v. Mamata Kapildev Dave* [2008] 4 SLR(R) 754 at [6].

²⁹ *Id.*

in *Public Prosecutor v. Taw Cheng Kong*:³⁰ (1) the law must differentiate amongst classes of individuals, (2) the differentiation must be founded on an “intelligible differentia,” and (3) the basis of differentiation must bear reasonable relation to the object of the statute. Criteria (2) and (3) were of primary concern in *Tan Eng Hong*.³¹

Mr. Tan challenged 377A on two levels. First, 377A contravened Article 12(1) as its differentia was “arbitrary and unreasonable”³² and bore no rational relation to the object of the statute. 377A, Mr. Tan argued, penalized men for “immutable attribute[s]”³³ and did not “reduc[e] under-age, non-consensual or public sex.”³⁴ Second, 377A contravened Art. 9(1) by standing contrary to the “fundamental rules of natural justice.”³⁵ Mr. Tan premised his latter argument on the belief that laws failing to comport with natural justice are void.³⁶ Since 377A “undermines access to justice” in cases involving non-consensual sexual contact and/or domestic abuse, 377A contravenes natural justice principles by depriving victims of legal protection (“rule of law” argument).³⁷ Further, extending his characterization of sexual orientation as a “natural and immutable attribute,” Mr. Tan argued that penalization based on one’s sexual preferences is “absurd and entirely arbitrary” (“absurdity” argument).³⁸

The court remained unpersuaded by these arguments. First, contrary to Mr. Tan’s Article 12(1) propositions, the court found that the object of 377A was to “enable the prosecution of acts of gross indecency by male homosexuals both in public and

³⁰ Pub. Prosecutor v. Taw Cheng Kong [1998] 2 SLR(R) 489 at [58] (CA).

³¹ *Tan Eng Hong*, [2013] 4 SLR at [16].

³² *Id.* at 1059.

³³ *Id.* at [41].

³⁴ *Id.* at [99].

³⁵ *Id.* at [19].

³⁶ *Id.* at 1059–60.

³⁷ *Id.* at [22].

³⁸ *Id.*

in private because such acts are not acceptable or desirable in Singapore society.”³⁹ Hence, 377A’s differentia between heterosexuals and non-heterosexuals bore “rational relation” to its object. Further, the court rejected Mr. Tan’s submission that this object was unsound, as it relied on a general “separation of powers” argument that justified the delegation of political powers to Parliament.⁴⁰ In essence, the High Court deemed Parliament, by virtue of its institutional competence, lawfully empowered to legislate on controversial issues.

Second, the court endorsed Lord Diplock’s dicta in *Haw Tua Tau*, which suggests that socio-political developments may influence rules of natural justice.⁴¹ In a constitutional setting, the development of natural justice principles under Article 9 had only proceeded in the context of the “conduct of a fair trial.”⁴² Further, the court rejected Mr. Tan’s absurdity argument, as 377A—read against its “clear social purpose” of discouraging engagement in same-sex intercourse—was not arbitrary.⁴³ The court rejected Mr. Tan’s characterization of sexual orientation as an immutable characteristic and the conclusion that 377A was absurd, citing the indeterminacy of scientific literature.⁴⁴ Finally, the court rejected Mr. Tan’s alternative “rule of law” argument, stating that the same-sex acts in question did not form the basis of a complaint in domestic abuse or sexual assault.⁴⁵ As the court explains, there is no deprivation of access to justice simply because one fears “that the authorities will realise that he has committed an offence.”⁴⁶

³⁹ *Id.* at [100].

⁴⁰ *Id.* at [94].

⁴¹ *Id.* at [32].

⁴² *Id.* See also THIO LI-ANN, A TREATISE ON SINGAPORE CONSTITUTIONAL LAW para. 12.022 (2012).

⁴³ *Tan Eng Hong*, [2013] 4 SLR at [40].

⁴⁴ *Id.* at [63].

⁴⁵ *Id.* at [71]–[79].

⁴⁶ *Id.* at [73].

B. *Lim Meng Suang v. Attorney General* (2013) in the High Court

A second plaintiff (Mr. Lim) brought an independent challenge against 377A in *Lim Meng Suang v. Attorney-General*,⁴⁷ contending that the provision was contrary to the equal protection provision of Article 12 for being “absurd, arbitrary and unreasonable.”⁴⁸ As alternatives to the arguments brought by Mr. Tan in *Tan Eng Hong*, Mr. Lim argued that 377A: (1) was not founded on an intelligible differentia, as the phrase “gross indecency” is excessively vague, and (2) did not bear rational relation with its object, as 377A is both over- and under-inclusive.⁴⁹

Consistent with its attitude in *Tan Eng Hong*, the court expressed its reluctance to strike down 377A. First, it maintained a narrow interpretation of the word “intelligible,” meaning “something that may be understood or is capable of being apprehended by the intellect or understanding.”⁵⁰ By presenting a low bar for 377A to meet, the court emphasized that the problem of vagueness was simply one of “statutory interpretation” that did not entail, *prima facie*, striking down a legislative provision.⁵¹

Moving on to Article 12(1)’s “rational relation” criteria, the court confirmed that the object of 377A was to eradicate the “regrettable state of affairs” created by “males . . . engag[ing] in grossly indecent acts with other males.”⁵² The question thus posed was whether 377A was broadly proportional to this aim.⁵³ Given the “complete coincidence,” or direct overlap, of sexual conduct between men and

⁴⁷ [2013] 3 SLR 118 (HC).

⁴⁸ *Id.* at [20].

⁴⁹ *Id.* at [21]–[24]. 377A is both over-inclusive because it covers a greater number of acts than the legislature would have otherwise criminalized and under-inclusive because it “criminalises only male homosexual conduct and not female homosexual conduct.”

⁵⁰ *Id.* at [47]. The *Lim Meng Suang* Court endorsed *Tan Eng Hong*. *Id.* at [172]–[73].

⁵¹ *Id.* at [132].

⁵² *Id.* at [67].

⁵³ *Id.* at [94].

377A's object of criminalizing said conduct, the court concluded that the "rational relation" test was satisfied and affirmed the constitutionality of 377A.⁵⁴

C. Tan Eng Hong and Lim Meng Suang's Joint Appeal (2014) in the Court of Appeal

Given the plaintiffs' dissatisfaction with the results of the cases above, the Court of Appeal heard a joint appeal by both Mr. Tan and Mr. Lim, and reiterated key principles relating to Articles 9 and 12 in its decision.⁵⁵ The Court explained that Article 9 does not include a general "right to privacy" and "personal autonomy."⁵⁶ Three features of Article 9 supported the Court's assertion. First, Singapore jurisprudence had only applied Article 9 in cases of unlawful incarceration or detention.⁵⁷ Second, on a "whole act" reading of Article 9, the procedural safeguards encapsulated in subsections (2) through (4) only apply to the "arrest and detention of a person."⁵⁸ Third, Article 9's derivation from the Indian Constitution reflects a deliberate refusal by the framers to adopt a reading of "liberty" akin to that of the United States Fourteenth Amendment.⁵⁹ Further, acts of "gross indecency" are not so vague that they deprive 377A of its legal value.⁶⁰ The provision primarily applies to "sexual acts between males," and, given the lack of certainty as to the "immutability of a person's sexual orientation," the Court held that the provision was neither arbitrary nor absurd.⁶¹ 377A also survived the "reasonable classification" test under Article 12(1). Notwithstanding the parties' attempt to recharacterize the

⁵⁴ *Id.* at [100].

⁵⁵ See *Lim Meng Suang v. Att'y-Gen.* [2014] SGCA 53 (CA). The Supreme Court of Singapore consists of a lower (High Court) and upper (Court of Appeal) division. *Role and Structure of the Supreme Court*, SING. CTS., <https://www.judiciary.gov.sg/who-we-are/role-structure-supreme-court/> [https://perma.cc/9XHQ-L8CX].

⁵⁶ *Id.* at [44].

⁵⁷ *Id.* at [45].

⁵⁸ *Id.* at [46].

⁵⁹ *Id.* at [47].

⁶⁰ *Id.* at [51].

⁶¹ *Id.* at [51]–[53].

intention of the framers as passing 377A to curb male prostitution,⁶² the Court was adamant that 377A curbed sexual acts between men in general and bore “rational relation” to this object.⁶³

A crucial feature of the Court of Appeal judgment is the explicit distinction drawn between morality and legality.⁶⁴ The Court of Appeal seemed to characterize previous constitutional challenges to 377A as relying on a party’s “feel[ing] that the prevailing societal morality is wrong,”⁶⁵ rather than one grounded in legal principle. The Court suggests that a vindication of the parties’ rights would be an abrogation of Parliament’s competence⁶⁶ in violation of a “separation of powers” ideal.⁶⁷

In sum, the 377A cases pre-*Ong Ming Johnson* clarified that: (1) Article 9 applies solely to cases of unlawful detention and incarceration; (2) 377A fulfilled the Article 12(1) “reasonable classification” test as it completely coincided with its object of criminalizing sexual acts between men; and (3) courts have seemingly abrogated their ability to adjudicate on 377A matters, out of fear that this would encroach on Parliament’s competence. These principles would later be challenged in *Ong Ming Johnson*, which is analyzed in Part III.

II. Lessons from the United States and India

While Singapore struggled with the constitutionality of 377A on its shores, the movement to abolish anti-sodomy laws gained traction in two jurisdictions: the United States and India.⁶⁸ The latter seemed to motivate the 2020 challenge to 377A

⁶² *Id.* at [131].

⁶³ *Id.* at [82].

⁶⁴ *Id.* at [88].

⁶⁵ *Id.* at [173].

⁶⁶ *Id.*

⁶⁷ *Id.* at [189].

⁶⁸ *See* *Lawrence v. Texas*, 539 U.S. 558 (2003); *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321.

in *Ong Ming Johnson*, which incorporated arguments from *Navtej Singh Johar v. Union of India*.⁶⁹

Part II is divided into two sections, examining anti-sodomy challenges in the United States (Section II.A) and India (Section II.B). In each section, this Note first flags historical and modern similarities between Singapore and the foreign jurisdiction, followed by an analysis of the seminal decision that abolished anti-sodomy laws within that jurisdiction.

By going beyond the technical argumentation introduced in *Lawrence* and *Navtej*, this Note argues that, in addition to textual similarities in constitutional provisions, historical and modern socio-political developments strengthen the case for reliance on these foreign authorities. The landmark decisions from both foreign jurisdictions will be distilled into strategies that Singaporean litigants may adopt in future 377A challenges. The liberal, decontextualized approach to *Lawrence* in the United States is an effective way to challenge the constitutionality of 377A under Article 9(1), while the contrasting, contextualized approach to *Navtej* in India serves to question the traditional application of Article 12(1)'s "reasonable classification" test to 377A. Therefore, it is instructive to frame a challenge to Singapore's 377A by building upon the successes in the American and Indian contexts, drawing from those two campaigns in ways that are most legally and culturally relevant to the Singaporean context.

A. United States

The convergence between the Singaporean and American social climates strengthens the case for adopting *Lawrence v. Texas*'s framework in future 377A challenges. This Note explains this socio-political convergence in Section II.A.1. An analysis of *Lawrence* follows in Section II.A.2, focusing on the U.S. Supreme Court's reliance on the Due Process Clause of the Fourteenth Amendment and the Fourteenth Amendment's textual similarities with Article 9(1) of Singapore's Constitution. The former reads: "[N]or shall any State deprive any person of life,

⁶⁹ *Ong Ming Johnson v. Att'y-Gen.* [2020] SGHC 63 at [10], [222], [262].

liberty, or property, without due process of law”⁷⁰ The latter states: “No person shall be deprived of his life or personal liberty save in accordance with law.”⁷¹

Although both provisions derive from Clause 39 of the Magna Carta⁷², Singaporean courts have fervently denied any connection between the American and Singaporean life and liberty clauses for “fear of importing a, possibly, ‘unruly horse’ of ‘due process.’”⁷³ As such, this Note does not insist on assimilating American and Singaporean constitutional interpretation, but instead focuses on independent justifications for an expansive reading of Article 9(1), as discussed in Section III.A.1. Similarities between the Singaporean and American clauses are presently relevant because of their common objects of protection: life and liberty.

1. Socio-Political Convergence

At first glance, it may be counterintuitive to suggest that the treatment of LGBTQ+ individuals in Singapore mirrors that of the United States. Singapore’s desire to preserve “Asian values,” leading to sexual governance,⁷⁴ has shaped the way Singaporeans view gender and sexuality. Compared to the liberal undertones of gender discourse in the United States,⁷⁵ Singaporeans tend to take a more

⁷⁰ U.S. CONST. amend. XIV, §1.

⁷¹ CONST. OF THE REPUBLIC OF SINGAPORE (1999 Reprint), art. 9(1).

⁷² See *infra* Section III.A.1. See also, *Magna Carta: Muse and Mentor*, LIBR. OF CONG., <https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/due-process-of-law.html> [<https://perma.cc/S5BB-L3SA>] (“[Due process] traces its origins to Chapter 39 of King John’s Magna Carta The Fifth and Fourteenth Amendments to the Constitution . . . incorporated the model of the rule of law that English and American lawyers associated most closely with Magna Carta for centuries.”). Both the United States and Singapore share a common colonial past.

⁷³ T.K.K. Iyer, *Article 9(1) and “Fundamental Principles of Natural Justice” in the Constitution of Singapore*, 23 MALAYA L. REV. 213, 215 (1981).

⁷⁴ Laurence Wai-Teng Leong, *Asian Sexuality or Singapore Exceptionalism?*, 33 LIVERPOOL L. REV. 11, 15–16 (2012).

⁷⁵ See generally R.W. Connell, *The State, Gender, and Sexual Politics: Theory and Appraisal*, 19 THEORY & SOC’Y 507 (1990) (noting that Western democracies have utilized liberal conceptions of rights in enriching discourse on gender).

conservative approach.⁷⁶ To illustrate, in 2020, a student-run sex education group from the National University of Singapore faced backlash after promoting a talk on rope bondage.⁷⁷ The Singaporean public started an online petition, leading to the cancellation of the program that aimed to raise awareness of safe sex practices.⁷⁸ The governance of sexuality is thus manifested on two levels: through legislative enactments by Parliament and self-governance from the Singaporean public.

However, a comparative view of Singaporeans' current and past attitudes toward LGBTQ+ individuals suggests that Singapore is moving in a direction of increasing LGBTQ+ acceptance, as has been the trend in the United States.⁷⁹ This Note does not contend that there is complete acceptance of LGBTQ+ identities in Singapore. For example, the Ministry of Education was accused of interfering with a transgender student's hormone therapy in January 2021.⁸⁰ But the public outcry generated by the injustice faced by the transgender student, which led to the arrest of protesters outside the Ministry of Education headquarters,⁸¹ symbolizes a renewed commitment to gender activism by Singaporean youth.

⁷⁶ Justin Ong, *Singapore Still Conservative on Moral, Sexuality Issues, but More Liberal Since 2002: IPS Survey*, STRAITS TIMES (Feb. 3, 2021), <https://www.straitstimes.com/singapore/community/singapore-still-conservative-on-moral-sexuality-issues-but-more-liberal-since> [<https://perma.cc/5PGM-R6XJ>].

⁷⁷ Nabilah Awang, *NUS Student-Run Group Cancels Event on Rope Bondage After Claims It Promoted Violent Sex*, TODAY ONLINE (Sept. 1, 2020), <https://www.todayonline.com/singapore/nus-student-run-group-cancels-event-rope-bondage-after-claims-it-promoted-violent-sex> [<https://perma.cc/5EE4-HY9Y>].

⁷⁸ *Id.*

⁷⁹ Ong, *supra* note 76.

⁸⁰ *MOE Says 'Not True' That It Interfered with Transgender Student's Hormone Therapy*, CHANNEL NEWS ASIA (Jan. 16, 2021), <https://www.channelnewsasia.com/news/singapore/transgender-student-hormone-therapy-moe-education-ministry-13974584> [<https://perma.cc/46NQ-WC9V>].

⁸¹ Daryl Choo, *Teachers, Social Workers Urge MOE to Implement Clear Policy Supporting Transgender Students*, TODAY ONLINE (Jan. 29, 2021), <https://www.todayonline.com/singapore/teachers-social-workers-urge-moe-implement-clear-policy-supporting-transgender-students> [<https://perma.cc/8PXX-YRXB>].

The evolution of Singaporean and American stances on LGBTQ+ relations may be analyzed according to two main developments: increasing activism and the increasing number of legal challenges sought against anti-sodomy laws.

First, the proliferation of LGBTQ+ movements within the respective jurisdictions evinces a shift in public morality. This shift was achieved in the United States through a normalization of LGBTQ+ relationships in literature and a galvanization of identity groups, which increased visibility and acceptance of LGBTQ+ relations.⁸² As Professor Bronski explains, “progressive politics of the late 1960s were predicated on the principle that a person had complete autonomy and control over her or his body. This included . . . [the] ability to engage in any consensual sexual behavior.”⁸³ An emphasis on the right to govern one’s body led to a rise in sexuality studies and literature, notably including Alfred Kinsey’s publication of the Kinsey Scale, which raised public consciousness of non-heteronormative behavior.⁸⁴ Simultaneously, a concerted LGBTQ+ movement emerged and grew rapidly,⁸⁵ informed by a Marxist understanding that “homosexuals [formed] a distinct and oppressed class of people” with a duty to combat cultural prejudices.⁸⁶ This reconceptualization of LGBTQ+ groups as political organizations had a lasting impact on organizing aimed at vindicating rights to sexual autonomy.

⁸² See generally *LGBTQ Rights Milestones Fast Facts*, CNN (Oct. 31, 2021, 8:04 AM), <https://www.cnn.com/2015/06/19/us/lgbt-rights-milestones-fast-facts/index.html> [<https://perma.cc/RXQ8-TEVU>] (noting that organizations like the Society for Human Rights and the Mattachine Society defined the founding moments of the modern-day movement). See also Vern L. Bullough, *Alfred Kinsey and the Kinsey Report: Historical Overview and Lasting Contributions*, 35 J. OF SEX RSCH. 127, 130–31 (1998) (“Kinsey was the major factor in changing attitudes about sex in the twentieth century He changed the nature of sexual studies, forced a reexamination of public attitudes toward sex, challenged the medical and psychiatric establishment to reassess its own views, influenced both the feminist movement and the gay and lesbian movement, and built a library and an institution devoted to sex research.”).

⁸³ MICHAEL BRONSKI, *A QUEER HISTORY OF THE UNITED STATES* 207 (2011).

⁸⁴ *Id.* at 177–79 (“Kinsey devised a simple scale of sexual experience . . . rang[ing] from 0, indicating exclusively heterosexual encounters, to 6, for a person who has experienced only homosexual encounters.”).

⁸⁵ *Id.* at 179 (noting that the Mattachine Society was founded as a result of its members’ shared interest in the Kinsey Report).

⁸⁶ *Id.* at 179–80.

In the early 2000s, the Singaporean government's desire to attract foreign investment provided the necessary impetus for liberalization.⁸⁷ As a small nation-state, Singapore's lack of natural resources and comparative advantages compelled it to rely heavily on foreign investment for economic growth.⁸⁸ Thus, "[b]efore it actually became liberal and economically vibrant, the state had to first construct a façade that made it appear so."⁸⁹ The promise of recognition of LGBTQ+ rights served as an effective foreign policy tool in other nations,⁹⁰ and Singapore may have been encouraged to adopt the same approach.⁹¹ Singapore's "liberalization" in the early twenty-first century followed a trajectory similar to the United States'. First, normalization in the media played a major role in increasing visibility of LGBTQ+ individuals, through the "employ[ment of] openly queer civil servants" and "produc[ti]on of] gay-themed movies."⁹² Secondly, the galvanization of support for LGBTQ+ individuals through public gatherings "cast queers . . . as living, breathing members of one's own family."⁹³ This may have been a corollary of government-initiated liberalization, as it is possible that "local activists . . . [took] cues from the state's liberalizing attitudes towards homosexuality to push their own agenda."⁹⁴

⁸⁷ Chris Tan, *Pink Dot: Cultural and Sexual Citizenship in Gay Singapore*, 88 ANTHRO. Q. 969, 975 (2015). I use the term "liberalization" in a broad sense, referring mainly to liberal economic policy.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See Katherine Franke, *Dating the State: The Moral Hazards of Winning Gay Rights*, 44 COLUM. HUM. RTS. L. REV. 1 (2012) (exploring the politicization of LGBTQ+ rights in five countries: Israel, Romania, Poland, Iran, and the United States).

⁹¹ Tan, *supra* note 87, at 976 ("[T]he discourse of national survival can also aid progressive politics, provided that the state sees such politics as economically beneficial."). Unlike Professor Franke's proposition that "[s]o long as a state treats its homosexuals well, the international community will look the other way when it comes to a range of other human rights abuses," Singapore leveraged LGBTQ+ rights for economic development, not to divert attention from human rights abuses. Franke, *supra* note 90, at 5.

⁹² Tan, *supra* note 87, at 975.

⁹³ *Id.* at 984.

⁹⁴ *Id.* at 975–76. Although Singapore adopted a top-down approach to LGBTQ+ inclusivity, as compared to the United States' ground-up activism, the crucial similarity between Singapore and the United States is both countries' emboldened activist culture.

Crucially, increased participation in Pink Dot, an LGBTQ+-centric event where “eventual repeal of the anti-sodomy law is the event’s unstated goal,” reflects strengthening allyship between members of the LGBTQ+ and heterosexual communities.⁹⁵ “The number of [Pink Dot] participants grew rapidly from 2,500 in 2009 to 26,000 in 2014.”⁹⁶ While the principles driving regionalized LGBTQ+ movements remain distinct, the trajectories mapped by both countries appear to foster a more inclusive landscape for LGBTQ+ individuals.

While the Singaporean government remains reluctant to revert to the liberalizing attitude of the 2000s that it has since abandoned,⁹⁷ the evolution of socio-political ideologies spurred an independent movement driven by citizens, rather than political stakeholders, for legal recognition of LGBTQ+ rights.⁹⁸ This movement emphasized the significance of legal structures, which provide a self-propelling mechanism for states to recognize citizens’ negative rights.⁹⁹ In the United States, litigants capitalized on the efficacy granted by the legal system, and launched a myriad of challenges against state anti-sodomy laws.¹⁰⁰ The initial patronizing attitude adopted by the U.S. Supreme Court in *Bowers v. Hardwick*,¹⁰¹ which upheld anti-sodomy

⁹⁵ *Id.* at 984.

⁹⁶ *Id.*

⁹⁷ *Id.* at 977. (“This illegality exposes the Janus-faced state’s hypocrisy: queers are welcomed for their economic productivity, but their refusal to partake in *re* productive marital life renders them partial citizens.”).

⁹⁸ *See generally id.*

⁹⁹ Because of the Singaporean government’s policy of “unenforcement,” citizens have brought numerous constitutional challenges to 377A in the last two decades. *See, e.g., Ong Ming Johnson v. Attorney General*, GLOB. FREEDOM OF EXPRESSION COLUM. UNIV., <https://globalfreedomofexpression.columbia.edu/cases/ong-ming-johnson-v-attorney-general/> [<https://perma.cc/7CYC-TSR6>] (noting the profile of citizens that brought *Ong Ming Johnson* before the High Court).

¹⁰⁰ *See, e.g., History of Sodomy Laws and the Strategy That Led Up to Today’s Decision*, ACLU, <https://www.aclu.org/other/history-sodomy-laws-and-strategy-led-todays-decision> [<https://perma.cc/TX68-9VJU>].

¹⁰¹ *Bowers v. Hardwick*, 478 U.S. 186, 189–91 (1986) (declining to recognize a same-sex couple’s right to engage in sodomy); Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1400–01, 1408 (2004) (recognizing that *Bowers* manifested “particular forms of

laws, progressively softened in subsequent cases at state,¹⁰² and subsequently federal,¹⁰³ levels. Similarly, as explained in Part I, the Singapore Supreme Court has handed down several anti-LGBTQ+ court decisions.¹⁰⁴ Although *Ong Ming Johnson* (explained in detail in Part III) struck down a 2020 constitutional challenge to 377A, the decision hints at a path forward for litigants seeking to abolish 377A, as the High Court did not expressly reiterate the narrow vision of Article 9(1) presented by the Court of Appeal in *Lim Meng Suang*, which foreclosed the possibility of applying Article 9(1) to cases beyond unlawful incarceration.¹⁰⁵ While the court's failure to consider this *prima facie* limit on Article 9(1) does not, on its own, constitute an affirmative case for a broader reading of the article, there may be good reason for the Court of Appeal¹⁰⁶ to reconsider this hard limit.

Unlike its American counterpart,¹⁰⁷ the Singaporean judiciary does not have a clear framework for departing from its past decisions.¹⁰⁸ However, as noted by Professor Chng, a crucial factor which Singaporean courts have found to warrant a departure from precedent is “flawed legal reasoning,” meaning reliance on

homophobia and heterosexism” by refusing to recognize traditional family and marital values as compatible with homosexuality).

¹⁰² *Powell v. State*, 270 Ga. 327 (1998) (reviewing a claim brought by consenting, heterosexual partners and concluding that a Georgia anti-sodomy statute was contrary to the Due Process Clause of the Fourteenth Amendment).

¹⁰³ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives.”).

¹⁰⁴ See, e.g., *Tan Eng Hong v. Att’y-Gen.* [2013] 4 SLR 1059 (HC); *Lim Meng Suang v. Att’y-Gen.* [2013] 3 SLR 118 (HC).

¹⁰⁵ *Ong Ming Johnson v. Att’y-Gen.* [2020] SGHC 63.

¹⁰⁶ Since *Ong Ming Johnson* was decided by the High Court, which is bound by vertical *stare decisis* by the decisions of the Court of Appeal, it is acknowledged that only decisions of the Court of Appeal can expand the reach of Article 9(1).

¹⁰⁷ See Kenny Chng, *Judicial Precedent in Emerging Constitutional Jurisdictions: Formulating a Doctrine of Constitutional Stare Decisis for Singapore*, 7 J. INT’L & COMPAR. L. 127, 133–35 (noting that the U.S. Supreme Court adopts a factor-based approach to departing from previous precedent).

¹⁰⁸ *Id.* at 137–45.

“precedents which are inconsistent with prevailing precedents at the time of the decision, and/or with the Constitution and fundamental constitutional principles.”¹⁰⁹ *Lim Meng Suang*’s holding with regard to Article 9(1) is arguably inconsistent with fundamental constitutional principles, as a narrow reading of “personal liberty” under Article 9(1) is inconsistent with its historical origins and contemporaneous understandings. As a preliminary point, noted by Dr. Lee (quoting *Ong Ah Chuan*), the Constitution should be treated in a “sui generis [way, and calls] for principles of interpretation of its own, suitable to its character . . . without necessary acceptance of all the presumptions that are relevant to legislation of private law.”¹¹⁰ Thus, the generality of Article 9(1)’s liberty clause should not be restricted by use of typical legislative interpretation tools, especially in light of Article 9(1)’s historical significance. Article 9(1)’s liberty clause is derived from the Magna Carta, which has traditionally been understood as a “shield” to governmental tyranny by encapsulating ideas of substantive due process.¹¹¹ This will be addressed further in Section III.A.1.

There is thus a rooted understanding of “personal liberty” as something that goes beyond physical limitations and that is crucial in situations not limited to “unlawful detention.” The need for an expansive reading of Article 9(1) is also bolstered by the lack of factual basis in *Lo Pui Sang*, a landmark decision that places a contextual “unlawful detention” limit on Article 9(1)’s application.¹¹² *Lo Pui Sang* did not cite any authority for “adopting a narrow interpretation of [Article 9(1)]”¹¹³ although it was asserted by the *Lo Pui Sang* court that “[Article 9(1)] has always been understood to refer only to the personal liberty of the person against unlawful incarceration or detention.”¹¹⁴ As explained by Professor Chng, the Court of Appeal

¹⁰⁹ *Id.* at 140.

¹¹⁰ Jack Tsen-Ta Lee, *The Limits of Liberty: The Crime of Male Same-Sex Conduct and the Rights to Life and Personal Liberty in Singapore: Lim Meng Suang v. Attorney-General* [2015] 1 SLR 26, 46 H.K. L. J. 48, 55–56 (2016).

¹¹¹ *See infra* Section III.A.1.

¹¹² *Lo Pui Sang* was cited with approval in *Lim Meng Suang* [2014] SGCA 53 at [45].

¹¹³ Tsen-Ta Lee, *supra* note 110, 51.

¹¹⁴ *Lo Pui Sang v. Mamata Kapildev Dave* [2008] SGHC 116 at [6].

has previously weighed “factual accuracy” when overturning other Article 9 cases,¹¹⁵ and the lack of legal support for a cabining of Article 9(1) in *Lo Pui Sang* may warrant revisiting this limit.

This Note argues that future litigants should pursue a “right to privacy,” as gleaned from the U.S. Supreme Court’s decision in *Lawrence v. Texas*. In the past, courts have refused to engage with the right to privacy, which has been characterized by the *Ong Ming Johnson* court as an “unenumerated right.” Specifically, the court explained that “many rights enshrined in the Constitution are qualified and not absolute, and unenumerated rights are not capable of specific protection.”¹¹⁶ However, this argument neglects the fact that enumerated rights may also encompass corresponding, implicit rights.¹¹⁷ Therefore, if litigants can successfully delineate a right that falls within Article 9(1)’s purview, by arguing for a right to privacy as a corollary entitlement to “personal liberty” under Article 9(1), the Court may be convinced of its status as an implied right.

2. U.S. Supreme Court Methodology in *Lawrence* and Possible Application to Singapore

In *Lawrence v. Texas*, the U.S. Supreme Court grappled with the constitutionality of a Texas statute that prohibited “sexual intercourse with another individual of the same sex.”¹¹⁸ The question for the Court, as framed by Justice Kennedy, was whether the Texas statute violated a right to privacy that was protected

¹¹⁵ Chng, *supra* note 107, 144 (“[F]actual arguments which formed the justifications for a constitutional precedent can be validly revisited, as illustrated in *Tan Chor Jin*.”).

¹¹⁶ *Ong Ming Johnson* [2020] SGHC 63 at [283].

¹¹⁷ See, e.g., Thio Li-Ann, *Westminster Constitutions and Implied Fundamental Rights: Excavating an Implicit Constitutional Right to Vote*, SINGAPORE J. LEGAL STUD. 406 (2009) (considering the existence of an implicit constitutional right to vote, even though not expressly enumerated in the Constitution). See also Feng Zheyi, *The Nature and Scope of the Right to Vote in Singapore*, 7 JURIS ILLUMINAE 1 (2015/16) (noting the possible existence of an implicit constitutional right to vote); Vellama d/o Marie Muthu v. Att’y-Gen. [2013] 4 SLR 1, at [79] (noting, in dicta, that voters are “entitled to have a Member representing and speaking for them in Parliament” under Article 49 of the Constitution).

¹¹⁸ TEX. PENAL CODE ANN. § 21.06(a).

by the Due Process Clause of the Fourteenth Amendment.¹¹⁹ The Supreme Court answered this question in the affirmative, ruling that individuals have a “right to engage in [private] conduct without intervention of the government.”¹²⁰ The Court noted the relevance of changing practice, namely that there was evolving consensus surrounding the permissibility of LGBTQ+ relations, and, therefore, the “statute further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”¹²¹

The Supreme Court thus undertook a liberal and decontextualized approach in striking the Texas anti-sodomy law down as unconstitutional. First, the Court’s liberal methodology is evinced by its rejection of the characterization that sodomy merely encompassed a “right upon homosexuals to engage in sodomy.”¹²² Instead, the Court took an expansive view of liberty under the Fourteenth Amendment, deeming that the Texas statute “[sought] to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals,”¹²³ and failed to “appreciate the extent of the liberty at stake.”¹²⁴ The Court resisted a narrow interpretation of the right allegedly infringed upon by the Texas statute, instead perceiving the statute to infringe upon a more general right to privacy.¹²⁵ Secondly, the Court decontextualized anti-sodomy laws by separating the matter of acceptability of LGBTQ+ relations from individuals’ decisions about “how to conduct their private lives in matters pertaining to sex.”¹²⁶ The Court thus

¹¹⁹ *Lawrence*, 539 U.S. at 564. See also JODY FEDER, CONG. RSCH. SERV., RL31681, HOMOSEXUALITY AND THE CONSTITUTION: A LEGAL ANALYSIS OF THE SUPREME COURT RULING IN LAWRENCE V. TEXAS 4 (2005).

¹²⁰ *Lawrence*, 539 U.S. at 578.

¹²¹ *Id.* at 576, 578.

¹²² *Id.* at 566–67.

¹²³ *Id.* at 567.

¹²⁴ *Id.*

¹²⁵ FEDER, *supra* note 119, at 4–6. The right to privacy was similarly strengthened in other areas of law related to gender and sexuality. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

¹²⁶ *Lawrence*, 539 U.S. at 572.

disentangled itself from the “reflection of social norms” argument propagated by Chief Justice Burger in his *Bowers* concurrence,¹²⁷ framing sodomy as a matter of sexual autonomy rather than orientation. Even if the *Lawrence* Court agreed that sodomy was a purely “homosexual” matter, the Court contested the strength of Chief Justice Burger’s “condemnation of homosexuality” argument,¹²⁸ denying that there was a “longstanding history” of laws governing non-heteronormative conduct in the United States.¹²⁹ *Lawrence* may thus be viewed as establishing a “broad constitutional right to sexual privacy,” although not extending to a “formal recognition” of same-sex relationships.¹³⁰ As Professor Franke notes, the distinction drawn by Justice Kennedy between “freedom” and “liberty” suggests that the latter is restricted by its spatial dimension and does not extend to a general right to define one’s lived experiences.¹³¹

In the Singaporean context, future 377A challenges may adopt a similar liberal and decontextualized “right to privacy” as a protected “liberty” right under Article 9(1). This requires an acknowledgment that: (1) sodomy is not a narrowly defined right but is backed by a general “right to engage in [private conduct] without intervention of the government,”¹³² and (2) this change in understanding should be bolstered by evolving socio-political contexts, not viewed solely through historical lenses. Although this challenge may resemble that of *Tan Eng Hong*—discussed in Section I.A—which contests 377A as an affront to natural justice, the “right to privacy” approach signals a departure from general Blackstonian “natural law” considerations. Instead, the “right to privacy” finds its textual foothold within the meaning of “liberty” under Article 9(1). Further, the spatial dimension implied within a “right to privacy” delineates the boundary of the protected right, allaying

¹²⁷ *Bowers v. Hardwick*, 478 U.S. 186, 196–97 (1986) (Burger, C.J., concurring); *Lawrence*, 539 U.S. at 572–75 (addressing the flaws of Chief Justice Burger’s historical argument).

¹²⁸ FEDER, *supra* note 119, at 5.

¹²⁹ *Lawrence*, 539 U.S. at 568.

¹³⁰ *Id.* at 578. *See also* FEDER, *supra* note 119, at 9.

¹³¹ Franke, *supra* note 101, at 1402–03 (noting that liberty provides limited protection, as it only guards against “unwarranted government intrusions into a dwelling or other private places”) (quoting *Lawrence v. Texas*, 123 S. Ct. 2472, 2475 (2004)).

¹³² *Lawrence*, 539 U.S. at 578.

the *Ong Ming Johnson* Court's concern about an overly inclusive interpretation of Article 9(1).

However, a limit to this proposed solution lies in the disparity between the constitutional principles underlying the Fourteenth Amendment and Article 9(1) of the Singapore Constitution. As Professor Eskridge explains, the *Lawrence* Court could rely on the change in societal consensus regarding LGBTQ+ relations because of the “legality,” “equality,” and “liberty” principles underlying the Fourteenth Amendment.¹³³ First, legality required “state officials . . . [to] follow the rule of law,” rather than “their own arbitrary whim or caprice.”¹³⁴ Second, equality, which encompasses both rationality and anti-class legislation, requires that “state differentiations be reasonably connected to legitimate public policies,”¹³⁵ and the state is debarred “from creating a subordinate underclass without very good justification.”¹³⁶ Third, liberty imposes “substantive limits on government regulation” placed on private activities that pose “no discernible third-party effects.”¹³⁷ Against this framework, it appears that the liberal and decontextualized analysis in *Lawrence* was substantially based on the principle of equality underlying the Fourteenth Amendment. To determine what constituted “legitimate public policies,” the Court was given leeway in deviating from its role as a faithful Congressional agent, as it adjudicated the case against modern developments within the LGBTQ+ community. The Supreme Court's appeal to contemporary changes is contrasted by the Singaporean constitutional framework, which is dominated by originalism and does not embed dynamic “equality” elements within Article 9(1).¹³⁸

¹³³ William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1052–57 (2005).

¹³⁴ *Id.* at 1053.

¹³⁵ *Id.* at 1053–54.

¹³⁶ *Id.* at 1054.

¹³⁷ *Id.*

¹³⁸ For further explanation, see *infra* Part III; Yap Po Jen, *Uncovering Originalism and Textualism in Singapore*, in CONSTITUTIONAL INTERPRETATION IN SINGAPORE: THEORY AND PRACTICE 117, 121 (Jaclyn L. Neo ed., 1st ed. 2016) (acknowledging the oddity of Article 9(1) jurisprudence, namely the desire of courts to harmonize natural justice and the state of law while maintaining a narrow interpretation of Constitutional rights).

Regardless, the proposed solution of a “right to privacy” does not adopt the U.S. Supreme Court’s analysis on evolving socio-political contexts, as it focuses on the right to privacy as an isolated, protected liberty interest under Article 9(1). This is not to say that the discussion in Section II.A.I is irrelevant. Section II.A.I’s significance lies in its explication of the increased acceptance of LGBTQ+ relations in Singapore and the United States, rendering the characterization of sodomy as a right to engage in private sexual acts more convincing by bridging the gap between sodomy and mainstream sexuality.

B. India

In contrast to the United States, the persuasive force of argumentation advanced in *Navtej Singh Johar v. Union of India* stems from the common, historical roots of the Indian and Singaporean Penal Codes. Given India and Singapore’s common colonial history (explained in Section II.B.1), Singaporean Courts reviewing 377A challenges have considered the relevance of Indian jurisprudence in a local context.¹³⁹ The following analysis of *Navtej* in Section II.B.2 will center on the plaintiff’s equal protection argument, as both jurisdictions adopt a similar “reasonable classification” framework as a test for constitutionality.

1. Historical Roots of the Penal Code

As explained by Justice Quentin Loh in *Lim Meng Suang*, the Singaporean “Penal Code originates from India,” and although the British provision that inspired 377A was not imported into the Indian Penal Code, it made its way into Singaporean law nonetheless.¹⁴⁰ Interestingly, 377A derives from the United Kingdom’s Labouchere Amendment, which was introduced to enhance protection of males above the age of thirteen from acts of gross indecency.¹⁴¹

¹³⁹ *Lim Meng Suang v. Att’y-Gen.* [2013] 3 SLR 118 at [45], [89], [99], [130] (HC) (acknowledging that Article 12 is “obviously based” on Article 14 of the Indian Penal Code and considering Indian jurisprudence in interpreting constitutional rights under Article 12). *See also* *Tan Eng Hong v. Att’y-Gen.* [2012] 4 SLR 476 at 490–91 (CA).

¹⁴⁰ *Lim Meng Suang*, [2013] 3 SLR at [66].

¹⁴¹ *Id.* at [63].

The Indian Penal Code (IPC) was an “important experiment in the larger colonial project . . . to apply the collective principles of common law in British India.”¹⁴² The IPC was thus the “first example of a law criminalizing sodomy in a colonial setting,”¹⁴³ which was subsequently transplanted in Singapore as part of the Straits Settlements Penal Code.¹⁴⁴ Section 377 of the IPC (hereinafter “377 IPC”) formed the basis of then-Section 377 of the Singaporean Penal Code,¹⁴⁵ both of which banned “carnal intercourse against the order of nature” until the Singaporean legislature amended its law in 2007.¹⁴⁶ In 1938, the British government passed 377A to clamp down further on sex between men in Singapore.¹⁴⁷ The limitations of Section 377, primarily the difficulty in proving penetration had occurred beyond a reasonable doubt,¹⁴⁸ prompted the enactment of 377A’s broader “catch-all” offense banning “any act of gross indecency.” The colonial government, in a bid to reduce the incidence of male prostitution (which was deemed a greater evil than female prostitution), limited the application of 377A to acts between male partners.¹⁴⁹

¹⁴² Alok Gupta, *Section 377 and the Dignity of Indian Homosexuals*, 41 *ECON. & POL. WKLY.* 4815, 4815 (2006); see also *Tan Eng Hong*, [2012] 4 SLR at 491 (explaining that Section 377 of the Indian Penal Code follows from a “historical umbilical cord between the ‘parent’ English legislation and the legislation enacted in British colonies at the time”).

¹⁴³ George Baylon Radics, *Decolonizing Singapore’s Sex Laws: Tracing Section 377A of Singapore’s Penal Code*, 45 *COLUM. HUM. RTS. L. REV.* 57, 64 (2013).

¹⁴⁴ *Tan Eng Hong*, [2012] 4 SLR at 490.

¹⁴⁵ Radics, *supra* note 143, at 65. The Singaporean Penal Code is the successor of the Straits Settlements Penal Code. See *Tan Eng Hong*, [2012] 4 SLR at 490.

¹⁴⁶ Indian Penal Code, 1860, § 377; Penal Code (Amendment) Bill 2007 (Bill 38 of 2007) (specifying that Section 377 only applied to sexual penetration of a human corpse). Concurrently, Section 377B (“sexual penetration with living animal”) was enacted to fill the gap left by Section 377’s amendment. Penal Code (Cap 224, 2020 Rev Ed) § 377B.

¹⁴⁷ Radics, *supra* note 143, at 65. (“While a provision similar to the Labouchere Amendment never appeared in the IPC, it was enacted in the successor to the Straits Settlements Penal Code.”).

¹⁴⁸ Chua, *supra* note 17, at 713.

¹⁴⁹ See generally *id.* at 703–04. The same argument was presented in *Lim Meng Suang*, although the Court found that the object of 377A was not merely limited to the restriction of male prostitution. [2015] 1 SLR 26 at [125]–[27], [131]–[43] (CA).

Despite their differences, Singapore's rationale for enacting 377A suggests that the provision serves a similar function to 377 IPC in criminalizing acts of indecency.

377 IPC reads: "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."¹⁵⁰

This criminalization of "acts against the order of nature" includes the act of sodomy.¹⁵¹ The main difference between 377A and 377 IPC is that the latter does not specify the sex of the offenders, extending the prohibition to men, women, and animals. Despite this difference, this Note proposes that 377 IPC is the functional equivalent of 377A, and arguably presents a harder case for constitutional challenge due to a lack of discrimination between the sexes. The result of *Navtej*, where 377 IPC was declared unconstitutional, shows that Singaporean litigants need not premise their challenges on the "male vs. female" differentia imbued in 377A to enhance their chances of success.

This raises the question: Does the textual difference between 377A and 377 IPC affect the applicability of *Navtej*'s arguments in a Singaporean context? This Note has established that 377A and 377 IPC seek to criminalize sodomy and acts of indecency, with the only difference between them lying in the gendered restrictions included in the former. This proposition gained support in the 2007 Parliamentary debate on the repeal of 377A, during which then-Nominated Member of Parliament Mr. Siew Kum Hong summarized the effect of repealing Section 377: "The Amendment Bill amends 377 to legalise private, consensual anal and oral sex between heterosexual adults. But 377A which criminalises the same acts between men is retained."¹⁵² The explanatory note under then-Section 377 of the Singapore Penal Code explains that "[p]enetration is sufficient to constitute the carnal

¹⁵⁰ Indian Penal Code, 1860, § 377.

¹⁵¹ Alok Gupta, *supra* note 142, at 4815.

¹⁵² *Singapore Parliamentary Debates, Official Report* (22 October 2012) vol 83 at cols 2175, 2242, https://sprs.parl.gov.sg/search/topic?reportid=024_20071022_S0004_T0007 [<https://perma.cc/7GDH-JTFF>]. Similar support can be gleaned from *Tan Eng Hong* [2012] 4 SLR 476 at 493. See also Lynette J. Chua et al., *Decriminalisation of Same-Sex Relations and Social Attitudes in Singapore: An Empirical Study*, 47 H.K. L.J. 793 (2017).

intercourse necessary to the offence.”¹⁵³ Thus, although 377A and Section 377 (and by extension 377 IPC) appear textually distinct, they are nonetheless functionally similar when viewed in their historical contexts, strengthening the case for reliance on Indian jurisprudence in abolishing 377A.

2. Indian Court’s Methodology in *Navtej* and Possible Application to Singapore

a. The Challenge

The plaintiff in *Navtej Singh Johar & Others v. Union of India* sought a declaration that 377 IPC was unconstitutional,¹⁵⁴ arguing, inter alia, that individuals had a “right to sexuality,” to “sexual autonomy,” and a “choice of a sexual partner” under the liberty clause in Article 21 of the Indian Constitution,¹⁵⁵ and that 377 IPC violated the equal protection clause in Article 14 of the Indian Constitution for being vague and lacking an intelligible differentia.¹⁵⁶ The crucial part of the plaintiff’s analysis stems from his characterization of a right to engage in consensual sexual acts as a “natural corollary of gender identity.”¹⁵⁷

In response, the Indian Supreme Court adopted a more localized and contextual approach to the “reasonable classification” test under Article 14 of the Constitution, which states: “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”¹⁵⁸

The Court began by addressing the concept of “transformative constitutionalism,”¹⁵⁹ and acknowledged that the criminalization of sodomy presents

¹⁵³ Indian Penal Code, 1860, § 377.

¹⁵⁴ AIR 2018 SC 4321.

¹⁵⁵ *Id.* at 11.

¹⁵⁶ *Id.* at 25.

¹⁵⁷ *Id.* at 22.

¹⁵⁸ INDIA CONST. art. 14.

¹⁵⁹ *Navtej Singh Johar*, AIR 2018 SC 4321 at 65–74.

a unique challenge to the LGBTQ+ community.¹⁶⁰ Crucially, the Court noted the “collateral effect” of 377 IPC on the LGBTQ+ community who, owing “to some inherent characteristics defined by their identity and individuality, have been woefully targeted.”¹⁶¹ The Court thus accepted the plaintiff’s characterization that sexual orientation remains an immutable and integral part of one’s identity. This forms the same characterization of sexual orientation that the Singaporean courts have rejected in previous challenges under Article 9(1)’s right to life and liberty.¹⁶²

b. Application in Singapore

The problem with the Singaporean courts’ rejection of sexual orientation as an “immutable” trait lies in their failure to recognize that, as Professors Rosky and Diamond explain, “immutability claims are unscientific.”¹⁶³ Given the inability of science to prove whether sexual orientation is immutable, Singaporean courts should not be able to evade their responsibility of explaining why a higher standard of review is unwarranted, merely by giving weight to contrasting studies that suggest sexual orientation is a mutable characteristic.¹⁶⁴ Ironically, the court in *Tan Eng Hong* (2013) refused to accept testimony by the LGBTQ+ community,¹⁶⁵ despite acknowledgments that an accurate understanding of scientific data can only be

¹⁶⁰ Contrast this with *Lawrence v. Texas*, where the decontextualized approach adopted by the U.S. Supreme Court framed the act of sodomy as a private right to conduct one’s own affairs.

¹⁶¹ *Navtej Singh Johar*, AIR 2018 SC 4321 at 146–47. For a similar argument, see Pratik Dixit, Navtej Singh Johar v. Union of India: *Decriminalising India’s Sodomy Law*, 24 INT’L J. HUM. RTS. 1011, 1019–21.

¹⁶² See, e.g., *Tan Eng Hong v. Att’y-Gen.* [2013] 4 SLR 1059 at [63] (HC).

¹⁶³ Clifford J. Rosky & Lisa M. Diamond, *Scrutinizing Immutability: Research on Sexual Orientation and U.S. Legal Advocacy for Sexual Minorities*, 53 J. SEX RSCH. 363, 365–66 (2016).

¹⁶⁴ See, e.g., *Tan Eng Hong*, [2013] 4 SLR at [57]–[62]. Instead of immutability of sexual preferences providing the moral impetus for change, American courts have considered that the “political disenfranchisement of LGB individuals and their exposure to forms of hostility and prejudice that had no rational basis” warranted greater protection of the LGBTQ+ community. Rosky & Diamond, *supra* note 163, at 374.

¹⁶⁵ *Tan Eng Hong*, [2013] 4 SLR at [46]–[47].

achieved when put into the perspective of individual circumstances.¹⁶⁶ Although the Court refuses to engage with individual testimony, it appears that doing so would be the only way the Court can continue to rely on the scientific data proffered. In the absence of individualized circumstances, the contrasting studies mentioned by the Court only show that “some individuals perceive a role for choice in their sexual orientation” but do not speak to their “capacity for same-sex desire.”¹⁶⁷

Singaporean judges seem to recognize this limitation, eventually retreating to a “separation of powers”-type argument that, in light of inconclusive evidence on sexual orientation, legalization of sodomy is a purely political question that should be answered by Parliament.¹⁶⁸ As explained in Section II.A.2, however, sodomy is not a “purely political question” because it may implicate a constitutional right to privacy which must be informed by social morality. Still, if the Singaporean Court remains adamant in its characterization of sodomy as a purely political question, constitutional morality may provide the key to a reconceptualization of 377A. As explained by the Indian Supreme Court, there is a difference between constitutional morality and social morality, and the Constitution directs the State “to undertake affirmative action to eradicate the systematic discrimination against . . . the expulsion and censure of . . . vulnerable communities,”¹⁶⁹ regardless of public sentiment. It is therefore up to the Singaporean judiciary to safeguard constitutional morality, instead of equating it with social morality and deferring to Parliament.

Further, the Indian Supreme Court’s acceptance of sexual orientation as immutable is only part of the Court’s unique contribution to the abolition of 377 IPC. The Indian Supreme Court’s pronouncement of a broader non-discrimination principle embedded within the Indian Constitution is a second victory for the LGBTQ+ community. The Court’s reasoning rests on the assertion that 377 IPC treats the “LGBT community as a separate class of citizens,”¹⁷⁰ which renders the provision contrary to Article 14 of the Indian Constitution. This was explained using

¹⁶⁶ Rosky & Diamond, *supra* note 163, at 370.

¹⁶⁷ *Id.* at 371.

¹⁶⁸ *See, e.g., Tan Eng Hong*, [2013] 4 SLR at [94].

¹⁶⁹ *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321, 80.

¹⁷⁰ *Id.* at 146–47.

the “reasonable classification” test.¹⁷¹ First, there is no reasonable nexus between 377 IPC and its object, as the LGBTQ+ community’s engagement in same-sex intercourse is “neither harmful to children nor women.”¹⁷² Instead, the activity is exclusively engaged in by members of the LGBTQ+ community. Second, the Court emphasized that “equality is a dynamic concept” that cannot be “cribbed, cabined and confined” by “traditional and doctrinaire limits,”¹⁷³ thereby rejecting the legal formalism that plagued Article 14’s “reasonable classification” test. The Court thus implied that although “reasonable classification” is a useful indicator of constitutionality, the Court should be free to strike down statutes for inequality. Because 377 IPC “trenches a discordant note in respect of the liberty of persons belonging to the LGBT community by subjecting them to societal pariah and dereliction,”¹⁷⁴ 377 IPC was declared violative of Article 14. This marked a turning point in Indian jurisprudence because for the first time, a broader principle of indirect discrimination was incorporated into Article 14 of the Indian constitution.¹⁷⁵ By focusing on the disproportionate effect of 377 IPC on the LGBTQ+ community, the Indian Supreme Court was able to adhere to the “spirit of the Constitution” even without an explicit reference to same-sex intercourse under the statute.

As presented in Part I, the Equal Protection Clause under Article 12(1) of the Singaporean Constitution also relies on a “reasonable classification” test, which was derived from Indian jurisprudence. Further, the functional similarity between 377A and 377 IPC, as explained in Section II.B.1, suggests that Singaporean litigants may be able to adopt a similar, contextual approach when challenging 377A. This requires the Singaporean courts to acknowledge that: (1) 377A disproportionately affects LGBTQ+ community members, and (2) that the equal protection clause may be reinterpreted as embedding a general “indirect discrimination” principle. The latter removes the ability of courts to defend discrimination by relying on a provision’s justifiable purpose.

¹⁷¹ Singapore and India adopt a common “reasonable classification” test, as explained in Section II.B.

¹⁷² *Navtej Singh Johar*, AIR 2018 SC 4321 at 146–47.

¹⁷³ *Id.* at 145.

¹⁷⁴ *Id.* at 148.

¹⁷⁵ *Dixit*, *supra* note 161, at 1013.

III. Applying *Navtej* and *Lawrence* to Reframe Article 9 and 12 Rights

Global developments in gender and sexuality law are not lost on the Singaporean population. In 2020, members of the LGBTQ+ community pursued another challenge against 377A in *Ong Ming Johnson v. Attorney-General*.¹⁷⁶ The plaintiffs predicated their case on three main arguments. First, 377A contravened Article 9(1) because it was “absurd and arbitrary in criminalising persons for their identity,”¹⁷⁷ an argument bearing similarities with those proposed in *Lim Meng Suang* and *Tan Eng Hong*. Second, 377A contravened Article 12(1), as it contained “no intelligible differentia, and fail[ed] to bear rational relation to its legislative objective.”¹⁷⁸ Lastly, 377A was contrary to Article 14(1)(a)’s freedom of expression, as it “limited the ability of homosexual men to freely express their sexual orientation and exchange ideas pertaining to sexuality and sexual orientation.”¹⁷⁹

Part III of this Note examines the effectiveness of the proposed *Lawrence* and *Navtej* methodologies in light of the most recent pronouncements by the Supreme Court in *Ong Ming Johnson*, focusing on Articles 9(1) and 12(1). As an initial point, the High Court presided over *Ong Ming Johnson* and was thus bound by the Court of Appeal’s decision in *Lim Meng Suang* as a matter of precedent. Nonetheless, as established in the Introduction, this Note aims to provide a holistic method of reform to abolish 377A rather than focus on technical points of law established by previous jurisprudence. To do so requires consideration of textual limitations and principles of judicial review. Part III begins by mapping the failure of the *Ong Ming Johnson* plaintiffs’ arguments, followed by a summary of what can be gained from *Lawrence* and *Navtej*. Part III then concludes with an assessment of the *Lawrence* and *Navtej* arguments against the existing Singaporean legal framework.

A. Article 9(1) and *Lawrence v. Texas*

The plaintiffs in *Ong Ming Johnson* relied on similar Article 9(1) arguments as those proposed in *Lim Meng Suang* and *Tan Eng Hong*: sexual orientation is

¹⁷⁶ [2020] SGHC 63.

¹⁷⁷ *Id.* at [8], [18].

¹⁷⁸ *Id.* at [8], [14].

¹⁷⁹ *Id.* at [8], [15].

immutable, and thus, 377A violates Article 9(1) by attaching liability “on account of . . . ingrained identity or sexual orientation.”¹⁸⁰ Consistent with its approach in *Tan* and *Lim*, the court rejected this argument on two grounds. First, 377A was not “absurd or arbitrary” because insufficient evidence was adduced to prove that sexual orientation is linked to one’s identity.¹⁸¹ Second, as alluded to in Part II, the court found that the plaintiffs attempted to import an overly broad meaning of “liberty” under Article 9(1), inconsistent with previous decisions which limited constitutional protection to enumerated rights.¹⁸² The court thus framed the plaintiffs’ challenge as a general request to confer “constitutional protection to homosexuals on the basis of their homosexual identity.”¹⁸³

To avoid this characterization, litigants may replicate the decontextualized approach adopted by the *Lawrence* Court,¹⁸⁴ which deviates from a traditional focus on gender identity to one on sexual privacy. The *Ong Ming Johnson* Court, unlike its predecessors, did not expressly limit the application of Article 9(1) to cases of unlawful incarceration and detention,¹⁸⁵ therefore removing a preliminary obstacle to an examination of Article 9’s liberty clause. Further, the court’s concern that granting *Ong*’s challenge would mean to confer constitutional “protection . . . on the basis of . . . homosexual identity”¹⁸⁶ suggests that the real concern of the court, if the plaintiffs’ application was granted, was that Article 9(1) might devolve into a flexible, all-encompassing provision contrary to the tradition of narrow interpretation adopted by Singaporean courts.¹⁸⁷ Unlike commentators who have advocated for a wider, free-standing interpretation of “liberty” under Article 9(1),¹⁸⁸

¹⁸⁰ *Id.* at [280].

¹⁸¹ *Id.* at [273], [281].

¹⁸² *Id.* at [283].

¹⁸³ *Id.*

¹⁸⁴ *See infra* Section II.A.2.

¹⁸⁵ *Ong Ming Johnson*, [2020] SGHC 63.

¹⁸⁶ *Id.* at para. 283.

¹⁸⁷ *See, e.g.*, *Tan Eng Hong v. Att’y-Gen.* [2012] 4 SLR 476 at 524 (CA).

¹⁸⁸ *See, e.g.*, Siddarth Jasrotia, *The Homophobic Courts – Revisiting Ong Ming Johnson & Choong Chee Hong v. Attorney General*, NAT’L L. UNIV. JODHPUR L. REV. J. & BLOG (June 18, 2020),

this Note suggests that, by expanding the definition of “liberty” to a limited extent to include an implicit right to privacy, litigants can strike a balance between protection of LGBTQ+ communities and the courts’ disdain for liberal interpretation. Due to the normalization of LGBTQ+ relations in Singapore,¹⁸⁹ there is a stronger case for sexual activity between men to fall under a broad umbrella of “sexual privacy,” as members of the LGBTQ+ community are no longer viewed as “exceptions” to a larger demographic that engages in private sexual acts. Although the court in *Ong Ming Johnson* acknowledged that the right to privacy formed a substantive argument in the plaintiffs’ case,¹⁹⁰ this was given surprisingly little attention in the judgment, which will be supplemented by the following assessment.

The assessment of a “right to privacy” argument will be divided into three strands: (1) whether a right to privacy can be accommodated by the text of Article 9(1); (2) whether a right to privacy is recognized in Singapore; and (3) if the preceding questions are answered in the affirmative, whether judicial attitudes permit the abolition of 377A.

1. Whether a Right to Privacy Can Be Accommodated by the Text of Article 9(1)

First, “liberty” under Article 9(1) can include a right to privacy. “[P]ersonal liberty” is spelled out in a general fashion within the provision. There is nothing in the text of the Singapore Constitution to limit the application of Article 9(1) to cases of unlawful detention and incarceration. Although the qualifier “save in accordance with law” may act as a ceiling on the definition of Article 9(1), the word “law” may be interpreted to mean either: (1) established common law, which is Singapore’s position, or (2) “rule of law” values, including that of substantive due process, which is the United States’ position.¹⁹¹ The only support for a narrow application of Article

<http://www.nlujlawreview.in/the-homophobic-courts-revisiting-ong-ming-johnson-choong-chee-hong-v-attorney-general/> [<https://perma.cc/2XUA-3MQQ>]; see also Indrasish Majumder, *An Analysis of Singapore High Court’s Judgment on Homosexuality*, CRIM. L. RSCH. & REV. BLOG (June 30, 2020), <https://crlreview.in/an-analysis-of-singapore-high-courts-judgment-on-homosexuality/> [<https://perma.cc/UM4Z-RQ2Y>].

¹⁸⁹ See *infra* Section II.A.1.

¹⁹⁰ *Ong Ming Johnson*, [2020] SGHC at [16].

¹⁹¹ See Yap, *supra* note 138, at 118–19 (arguing for a more liberal reading of Article 9(1) and noting that in *Yong Vui Kong v. Public Prosecutor*, the Court of Appeal declined to read into Article 9(1) an

9(1) lies in a “whole Act” reading of Article 9, where subsections (2) through (6) seem to be applicable only in a detention context.

However, the specific framing of Articles 9(2)–(6) can be explained by the historical roots of Article 9, which derives from Clause 39 of the Magna Carta. Clause 39 lists situations in which protection should be guaranteed, beginning with cases of detention and incarceration.¹⁹² Subsections (2) through (6) thus compensate for the generality of Article 9(1), illustrating how the provision may be applied to cases of unlawful imprisonment. This does not necessitate the conclusion that the enactment of Articles 9(2)–(6) narrowed the scope of protection afforded by Article 9(1). If Clause 39 of the Magna Carta was intended to apply only to procedural detention rights, protection attributed to “the law of the land” would be mere surplusage. Early Magna Carta case law confirms the potential for substantive due process rights to be developed as a “substantive limitation on government,” traditionally in response to the tyranny of monarchs.¹⁹³ That the Singaporean Constitution retains such protection “save in accordance with law”¹⁹⁴ suggests that there is a historical basis for expansive interpretations of “liberty” under Article 9(1).

The major obstacle for litigants who wish to contest the narrow interpretation of “liberty” is convincing the court that foreign cases are persuasive in a Singaporean context. Reliance on foreign authority is necessary, given the limited jurisprudence

exemption from inhuman forms of punishment, as the drafters of the Constitution did not “expressly include such a prohibition”).

¹⁹² Magna Carta, cl. 39, in A.E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* 43 (1964) (“No free man is to be arrested, or imprisoned . . . or in any other way ruined . . . except by the lawful judgment of his peers or by the law of the land.”); Yap, *supra* note 138, at 125 (acknowledging that the “historical understanding” of “life and personal liberty” included a prohibition on “acts of amputation and mutilations”).

¹⁹³ See generally Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585 (2009).

¹⁹⁴ Jack Tsen-Ta Lee, *The Limits of Liberty: The Crime of Male Same-Sex Conduct and the Rights to Life and Personal Liberty in Singapore: Lim Meng Suang v. Attorney-General* [2015] 1 SLR 26, 46 H.K. L.J. 49, 57 (2016) (“Clause 39 of Magna Carta, relied upon approvingly by the Court, has been understood by some commentators to protect a wide range of rights and liberties.”).

in Singapore.¹⁹⁵ Article 9(1) jurisprudence is arguably underdeveloped in Singapore, and case law supporting the restriction of “liberty” to unlawful incarceration and detention is unsatisfactory. However, as the Court in *Lim Meng Suang* stated: Foreign cases “should be approached with circumspection because they were decided in the context of their unique social, political and legal circumstances.”¹⁹⁶

The pronouncement in *Lim Meng Suang*, although intuitive, does not apply as readily in a 377A context. As established in Section II.A.1, the socio-political circumstances of Singapore and the United States may be more convergent than originally envisioned by the judiciary, resulting in *Lawrence* falling outside of the *Lim Meng Suang* qualification. The comparative analysis is justified by an additional implication of the *Lim Meng Suang* Court’s statement: that socio-economic/political factors play a legitimate role in constitutional interpretation.¹⁹⁷ Further, Singaporean courts should place persuasive weight on foreign authority for two reasons: First, as Dr. Lee argues, Singaporean courts’ adherence to the “four walls doctrine,” which rejects reliance on foreign authority in order to safeguard constitutional text, is only warranted where the constitutional text is clear.¹⁹⁸ Where the text of the constitution embodies “broad statements of principle,” it is “inaccurate to declare that foreign law can shed no light on their texts.”¹⁹⁹ Second, as explained in Section II.B, Singaporean courts have relied on foreign jurisprudence when interpreting other constitutional rights, including those embodied in Article 12(1).²⁰⁰ This Note does not suggest that the Singaporean judiciary should be bound by the results achieved by the Supreme Court of the United States. Instead, the Note argues that American anti-sodomy case law may be of persuasive value in light of the lacunae in Article 9(1) jurisprudence.

¹⁹⁵ See, e.g., Jack Tsen-Ta Lee, *Interpreting Bills of Rights: The Value of a Comparative Approach*, 5 INT’L J. CONST. L. 122, 123 (2007).

¹⁹⁶ *Lim Meng Suang v. Att’y-Gen.* [2014] SGCA 53 at [48].

¹⁹⁷ *Id.* (noting that India takes “an expansive view of the right to life to include an individual’s right to health and medical care” because of “India’s social and economic conditions”).

¹⁹⁸ Tsen-Ta Lee, *supra* note 110, at 128.

¹⁹⁹ *Id.* at 129.

²⁰⁰ See also *Victor v. Ramraj*, *Comparative Constitutional Law in Singapore*, 6 SING. J. INT’L & COMPAR. L. 302, 309–10 (2002).

2. Whether a Right to Privacy Is Recognized by Singaporean Law

As Professor Franke explains, American privacy jurisprudence has “evolved . . . to a less situated or territorial notion of protecting a zone of personal autonomy and decisional privacy.”²⁰¹ This lack of spatial restriction may explain the reluctance of courts to find a “right to privacy” in the Singaporean Constitution, for fear of embedding an overly expansive definition of “liberty” within Article 9(1). This may also have been what the *Lim Meng Suang* Court had in mind when it rejected the plaintiff’s argument based on a right to privacy, saying, “the private law relating to privacy was a developing one . . . [one] cannot obtain by the (constitutional) backdoor what they cannot obtain by the (private law) front door.”²⁰² However, in light of recent developments in personal data protection laws, this Note argues that it may be time for the Court to revisit its stance on privacy and its position on Article 9(1).

The 2020 amendments to Singapore’s Personal Data Protection Act (hereinafter “PDPA”) acknowledge the increased value of personal data and privacy within Singaporean society.²⁰³ In his opening remarks at the MCI Insights Conference, the Minister for Communications explained the aims of the Bill which, inter alia, served to increase transparency of corporate use and access to personal data.²⁰⁴ Part VIIIA of the Bill introduced new offenses for mishandling personal data, including Sections 35B (unauthorized disclosure of personal data) and 35C (improper use of personal data).²⁰⁵ Even so, amendments to the Singaporean data protection regime may not be an adequate indicator of a strengthening privacy regime. As Professor Chesterman explains, the “right to privacy is generally understood as *limiting* government powers

²⁰¹ Franke, *supra* note 101, at 1403–04.

²⁰² *Lim Meng Suang*, [2014] SGCA 53, at [49].

²⁰³ See Personal Data Protection (Amendment) Act 2020 (No. 40 of 2020).

²⁰⁴ Press Release, Ministry of Commc’ns & Info., Opening Remarks by Minister for Comm’cns & Info. S. Iswaran at MCI Insights Conf. 2020 (Nov. 16, 2020), <https://www.mci.gov.sg/pressroom/news-and-stories/pressroom/2020/11/opening-remarks-by-minister-s-iswaran-at-mci-insights-conference-2020> [<https://perma.cc/G98Q-KY9A>].

²⁰⁵ Personal Data Protection (Amendment) Act 2020, s 35(B), s 35(C).

that might otherwise interfere with reasonable respect for a private life,”²⁰⁶ compared to data protection which “requires an *expansion* of government powers to monitor compliance of both government and third parties that collect, use or disseminate personal data.”²⁰⁷

Nonetheless, the difference flagged by Professor Chesterman relates primarily to the method in which privacy is to be respected. The amendments to the PDPA are underlaid by a consensus that the right to privacy is integral to one’s identity, and the collection and use of personal data pose a concern because they interfere with an individual’s way of life. To illustrate, unlawful disclosure of an individual’s race may subject one to discrimination by potential employers, which can only be combatted through increased monitoring of communications between job-seeking agencies and external companies.²⁰⁸ The crucial similarity between data protection and a liberal conception of the right to privacy lies in the right of individuals to engage in the pursuit of self-actualization without fear of external intrusion. The 2020 amendments to Singapore’s PDPA appear to support the proposition that there is an increasing recognition of a right to privacy in Singaporean law. While it is acknowledged that these changes confer statutory privacy protections, rather than a constitutional right, the development of PDPA’s privacy regime provides a “front door” for courts to consider expanding Article 9(1)’s privacy protection.

While it may be possible to derive a theoretical right to privacy from these sources, a realist might argue that the right to privacy remains illusory at best, given the mass surveillance adopted by the Singaporean government.²⁰⁹ However, this

²⁰⁶ Simon Chesterman, *From Privacy to Data Protection*, in DATA PROTECTION LAW IN SINGAPORE 13, 25 (2d ed. 2018).

²⁰⁷ *Id.*

²⁰⁸ Parallels may be drawn to the implementation of Article 8 of the European Convention on Human Rights, which safeguards a right to privacy, under the General Data Protection Regulations in the European Union. The European Union Agency for Fundamental Rights notes that, to safeguard rights to privacy, positive obligations may be imposed on controllers and processors of data by governing bodies. EUR. UNION AGENCY FOR FUNDAMENTAL RTS., HANDBOOK ON EUROPEAN DATA PROTECTION LAW 101–03 (2018).

²⁰⁹ See, e.g., Agence France-Presse, ‘Dystopian World’: Singapore Patrol Robots Stoke Fears of Surveillance State, GUARDIAN (Oct. 6, 2021), <https://www.theguardian.com/world/2021/oct/06/dystopian-world-singapore-patrol-robots-stoke-fears-of-surveillance-state> [https://perma.cc/LK37-3M9G].

argument mistakes the role of “rights” in legal discourse. As explained by James Madison, rights are important because they act as safeguards during “occasions on which . . . evil may spring from” government.²¹⁰ The premise of Madison’s observation, therefore, is that rights are constructed *in response* to government tyranny and are crucial for this reason. That the Singaporean government engages in mass surveillance does not serve as proof that the right to privacy does not exist. In fact, it is a reason *why* the court should acknowledge such a right. Rights may stem from understandings of natural law or as a token of exchange within the social contract,²¹¹ but rights are never defined by empirical observations on whether states respect said rights, as that would mistake the nature and importance of rights.

3. Whether Judicial Attitudes Permit the Abolition of 377A

The final hurdle that the *Lawrence* approach must overcome is the judicial reluctance to enlarge the scope of Article 9(1)’s “liberty” interest. 377A jurisprudence reveals a dominant originalist framing of constitutional issues, with a judicial deference to the intention of the framers of the Constitution. In *Lim Meng Suang*, the Court explained that the exclusion of the phrase “without due process of law” in Article 9(1) suggested that the framers of the Indian Constitution, and by extension the Singaporean Constitution, only intended to protect against unlawful detention.²¹² This contention is supported by the enactment of additional detention-related provisions under Article 9.

The problem with this argument is twofold. First, as explained in Section III.A.1, there is no textual restriction to the expansion of Article 9(1)’s protection. Secondly, there is no historical indication that originalism should dominate the Singaporean courts’ interpretive theory.²¹³ Conventional originalist theory may be inapplicable in a Singaporean context, due to the unique way the original constitution came into

²¹⁰ Stephen D. Solomon, *Madison-Jefferson Letters on Advisability of a Bill of Rights, 1787 – 1789: 17 October 1788*, FIRST AMEND. WATCH (Feb. 2, 2018), <https://firstamendmentwatch.org/history-speaks-madison-jefferson-letters-on-advisability-of-a-bill-of-rights-1787-1789/> [https://perma.cc/DXU4-P36D].

²¹¹ See generally, JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1823).

²¹² *Lim Meng Suang v. Att’y-Gen.* [2014] SGCA 53 at [47].

²¹³ See, e.g., Yap, *supra* note 138, at 118 (arguing that Singaporean courts’ adoption of textualism and originalism is the “consequence of normative choices made by . . . judges,” not legal tradition).

being. Rather than deliberately ratifying constitutional provisions, as exemplified by the drafters of the United States Constitution, the Singapore legislature “simply made most fundamental liberties provisions found in the Malaysia Federal Constitution applicable to Singapore via the Republic of Singapore Independence Act.”²¹⁴ After the breakdown of the relationship between Singapore and Malaysia’s governments, Singapore had little time to establish itself as an independent nation-state and was not afforded the luxury of extensive deliberation on constitutional matters.²¹⁵ The best defense of originalism in this context, which lies in the idea of tacit ratification, is of minimal value since the “mere enactment of the law does not provide us with a clue as to the original meaning that the framers attached to [the] very provisions they adopted.”²¹⁶ Further, while the Singaporean judiciary relies heavily on textualism as a tool of statutory interpretation, a broader statutory reading can be accommodated by a “faithful agent” conception of textualism.²¹⁷ As Professor Yap explains, “textualism has . . . been harnessed by Singapore judges to justify a more liberal and democratic reading of the Singapore Constitution.”²¹⁸

In sum, the decontextualized “right to privacy” approach adopted by the U.S. Supreme Court in *Lawrence v. Texas* may prove successful in 377A challenges. First, the textual features of Article 9(1) do not hinder courts from adopting a liberal interpretation of “liberty” and, given its historical connection with the Magna Carta, Article 9(1) should be interpreted expansively. Secondly, there is a growing

²¹⁴ *Id.* at 119–20.

²¹⁵ See *Passed Without Debate: S’pore Republic Bill*, STRAITS TIMES, Dec. 23, 1965, at 5 <https://eresources.nlb.gov.sg/newspapers/Digitised/Article/straitstimes19651223-1.2.20> [<https://perma.cc/G7EJ-ZKCV>] (“Both Bills were passed without debate.”). See also *Legal and Constitutional History of Singapore*, SING. ACAD. OF L., <https://www.sal.org.sg/Resources-Tools/Legal-Heritage/Legal-and-Constitutional-History-of-Singapore> [<https://perma.cc/FMR2-TASS>] (“Following separation, the temporary constitution adopted by Parliament on 22 December 1965 was the only operational constitution Singapore has had since independence.”).

²¹⁶ Yap, *supra* note 138, at 119–20.

²¹⁷ See Yap, *supra* note 138 (noting that judges in Singapore adopt two prevailing theories of interpretation: originalism and textualism). “Faithful agent” textualism aims to interpret the intent of lawmakers by reference to the ordinary public meaning of words at the time of enactment. See, e.g., Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565, 1568 (2010).

²¹⁸ *Id.* at 130.

recognition of a “right to privacy” within the Singaporean legal system, which may be encapsulated by Article 9(1). The main obstacle to abolition of 377A thus lies in the reluctance of the Singaporean judiciary to veer away from originalist understandings of the Constitution. However, as will be argued in Section III.B.1, there are few reasons for originalism to dominate interpretive theory given Singapore’s unique historical background.

B. Article 12(1) and *Navtej Singh Johar v. Union of India*

The *Ong Ming Johnson* plaintiffs argued that 377A was inconsistent with Article 12(1) of the Singapore Constitution.²¹⁹ As the court noted, the plaintiffs must therefore prove that (1) there is no intelligible differentia or (2) the differentia is not rationally related to 377A’s object.²²⁰

First, the plaintiffs argued that 377A did not contain an intelligible differentia as the “manifest purpose of Section 377A is to discriminate [against males]” by outlawing sexual conduct between men while permitting it between women and between opposite-sex individuals.²²¹ The problem with this argument, as the High Court acknowledged, was that the differentia was “capable of being apprehended by the intellect or understanding.”²²² The burden, therefore, was on the plaintiffs to prove that the differentia was “so unreasonable as to be illogical and/or incoherent.”²²³ The plaintiffs ultimately failed to discharge their burden of proof, according to the court, because common practice in Singaporean law distinguished between men and women.²²⁴

Regarding the second prong of the test, the plaintiffs argued that 377A did not bear rational relation to its object, raising, inter alia, arguments that the court

²¹⁹ *Ong Ming Johnson v. Att’y-Gen.* [2020] SGHC 63 at [7].

²²⁰ *Id.* at [167].

²²¹ *Id.* at [168].

²²² *Id.* at [170].

²²³ *Id.*

²²⁴ *Id.* at [172].

previously dealt with in *Lim Meng Suang* and *Tan Eng Hong*.²²⁵ In addition, the plaintiffs brought up a new submission to be addressed for the first time in the High Court: that the “reasonable classification” test was unsatisfactory. The plaintiffs relied on Chief Justice Chan’s extra-judicial criticism of the test, which stated: “If the purpose of the law is to create the differentia, then they will always coincide, and the reasonable classification test can never be unsatisfied.”²²⁶ The court found the comment unpersuasive in a 377A context, as the purpose of 377A was not to create a differentia between gay men and the heterosexual community, but rather to safeguard public morals.²²⁷ In anticipation of the court’s response, the plaintiffs argued that Article 12(1) had to offer “substantive protection” to the LGBTQ+ community by combatting “majority oppression,”²²⁸ which 377A would contradict by discriminating against gay men. The plaintiffs offered a “proportionality” model as an alternative to the “reasonable classification” test, citing authorities from India and the United States in support of their argument.²²⁹ The High Court resisted the plaintiffs’ propositions, retreating to its stance that, by adjudicating on the permissibility of the means by which the legislature chose to meet its ends, the court risked undermining parliamentary sovereignty by acting as a “mini-legislature.”²³⁰ In sum, the High Court re-emphasized the applicable constitutional test to be adopted under Article 12(1), which was “reasonable classification,” and the restrictions placed upon its judicial role.

In view of the pronouncements above, the *Navtej* Court’s methodology may serve as useful guidance in challenging both prongs of the Article 12(1) test. The following proposals suggest that a Singaporean litigant must not only focus on

²²⁵ Plaintiffs presented alternative objects of 377A, including criminalization of commercial sex between men, which was dealt with in *Lim Meng Suang*. *Id.* at [179]. Plaintiffs also argued that 377A was over and under-inclusive (arguments proposed in *Lim Meng Suang*), which was decisively rejected by the court. *Id.* at [179], [183]–[89].

²²⁶ *Id.* at [190] (citing Sek Keong Chan, *Equal Justice Under the Constitution and Section 377A of the Penal Code: The Roads Not Taken*, 31 SING. ACAD. L. J. 773, 817-18 (2019)).

²²⁷ *Ong Ming Johnson*, [2020] SGHC at [191].

²²⁸ *Id.* at [206].

²²⁹ *Id.* at [218]–[28].

²³⁰ *Id.* at [207], [216], [222] (stating that *Navtej* resulted from the over-stepping of judicial boundaries).

challenging the application of constitutional principles to his case, but also formulate a constitutional challenge that contests the basis of constitutional principles.

Firstly, the contextual approach adopted in *Navtej* may prove that the differentia in 377A is “so unreasonable as to be illogical.”²³¹ Rather than basing the differentia of 377A on a strict textual reading of the provision, which only criminalizes sexual conduct between men and not between women, Singaporean litigants may argue that the 377A differentia lies in its disproportionate effect on the LGBTQ+ community. This was the same proposition adopted by the Indian Supreme Court in *Navtej*, where it examined the effect of 377 IPC on marginalized groups. Thus, it is possible to argue that a heterosexual vs. non-heterosexual divide is patently unreasonable, especially in the absence of any other Singaporean laws expressly targeting same sex acts. The *Ong Ming Johnson* court’s affirmation that Article 12(1) is capable of safeguarding gender equality (although to the satisfaction of the “reasonable classification” test) strengthens the value of applying Article 12(1) protections to alienated sexual and gender minorities.²³²

Secondly, as the plaintiffs in *Ong Ming Johnson* argued, it may be possible to abandon the “reasonable classification” test altogether. However, this Note proposes that instead of relying on an alternative “proportionality” test, as the *Ong Ming Johnson* plaintiffs did, the Article 12(1) inquiry should be based on a general “indirect discrimination” principle. As explained by the plaintiff in *Navtej*, the problem with relying on a formulaic test in a constitutional framework is that it overlooks a “powerful statement of values—of the substance of equality before the law and the equal protection of laws.”²³³ Reliance on an “indirect discrimination” principle would also circumvent the criticism levied against the proportionality test, which requires the judiciary to assess the propriety of a legislature’s chosen “means” in achieving a stated “end.” Singaporean courts may be more amenable to pronouncements of the Indian court, as reflected by its past consideration of Indian jurisprudence in Article 12(1) interpretation.²³⁴

²³¹ *Id.* at [170].

²³² *Id.* at [202]–[05].

²³³ *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321, 29–30 (submissions on behalf of the respondents and other intervenors).

²³⁴ *Lim Meng Suang v. Att’y-Gen.* [2013] 3 SLR 118 at [45], [89], [99], [130] (HC) (acknowledging that Article 12 is “obviously based” on Article 14 of the Indian Penal Code and considering Indian

1. Originalism as a Hurdle

Adopting the two-pronged *Navtej* approach, however, poses problems within Singapore's legal framework. As previously mentioned, Singaporean courts have predominantly relied upon originalist interpretive theory, which solves problems of democratic illegitimacy as judges "are merely enforcing the original meaning of the constitutional text that was duly enacted by the people via their representatives"²³⁵ In an Article 12(1) context, judicial reliance on originalism intertwines with the judiciary's respect for parliamentary sovereignty, resulting in: (1) a discouragement of sexual conduct between men as the object of 377A, (2) that only the legislature can amend.²³⁶

The problem with relying on originalism is twofold. First, the judiciary assumes that by declaring 377A unconstitutional under Article 12(1) the judiciary abrogates Parliament's powers in enacting law. However, this concern is misguided. By striking down statutory provisions that are unconstitutional, the judiciary is merely delineating the boundaries of Parliament's legislative competence, in line with traditional understandings of separation of powers. The purpose of forming a tripartite government (legislative, executive, and judiciary), according to Montesquieu's traditional theory, is that the branches hold one another accountable to prevent encroachment on citizens' liberty.²³⁷ Modern accounts of the tripartite government, although deviating from a need to entrench pure separation of powers, permit overlap only insofar as liberty is still preserved.²³⁸ In Singapore, Montesquieu's liberty-preserving objective is manifested through a "duty [of courts] to declare invalid any exercise of power, legislative and executive, which exceeds

jurisprudence in interpreting constitutional rights under Article 12). *See also* Tan Eng Hong v. Att'y-Gen. [2012] 4 SLR 476 at 490–91 (CA).

²³⁵ Yap, *supra* note 138, at 118.

²³⁶ Lim Meng Suang v. Att'y-Gen. [2013] 3 SLR 118 at [153] (HC).

²³⁷ Marius Dumitrescu, *Rational Structures of the Politics in Montesquieu's The Spirit of the Laws Part II: The Separation of the Three State Powers – The Essence of Citizens' Liberty*, 4 AGATHOS: INT'L REV. HUMANS. & SOC. SCIS. 15, 17–18 (2013) (interpreting BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (1748)). *See also* THE FEDERALIST NO. 27 (James Madison).

²³⁸ *See, e.g.*, Eric Barendt, *Separation of Powers and Constitutional Government*, in THE RULE OF LAW AND THE SEPARATION OF POWERS 275, 282 (Richard Bellamy ed., 2005) (recognizing that the separation of powers is "only a means to achieve [the] end" of preventing "arbitrary government, or tyranny").

the limits of the power conferred by the Constitution.”²³⁹ The excessive deference displayed by the judiciary in previous 377A challenges thus amounts to an abdication of judicial responsibility in a constitutional system. Indeed, the High Court in *Lim Meng Suang* was aware of the danger posed by excessive Parliamentary deference and enumerated situations where the judiciary must declare statutory provisions unconstitutional.²⁴⁰

The problem with these yardsticks, and specifically the absurdity argument presented by the plaintiffs in *Lim Meng Suang*, *Tan Eng Hong* and *Ong Ming Johnson*, is the originalist notions embedded in their application. As formulated by the Court of Appeal in *Yong Vui Kong* and accepted by the High Court in *Lim Meng Suang*, the question is whether the legislation was “of so absurd or arbitrary a nature that it could not possibly have been contemplated by our constitutional framers as being ‘law’ when they crafted the constitutional provisions protecting fundamental liberties.”²⁴¹ The theory of “transformative constitutionalism” is a better alternative to originalism. The Indian Supreme Court in *Navtej* emphasized this, positing that the Constitution should be “comprehended only by a spacious, social-science approach, not by pedantic, traditional legalism.”²⁴² Transformative constitutionalism has been crucial in fostering “just, egalitarian, inclusive, and caring” legal systems.²⁴³ This fostering of just legal systems has occurred most notably in South Africa, where the Constitution expresses a commitment to social transformation.²⁴⁴ While the stance of the Singaporean government is that courts do not “view themselves as a driver of social change or transformation” and should thus refrain from recognizing

²³⁹ Chan Hiang Leng Colin v. Pub. Prosecutor [1994] SGHC 207 at [50].

²⁴⁰ *Lim Meng Suang*, [2013] 3 SLR at [116] (“Where a piece of legislation does not satisfy the requirement of legitimacy of purpose, the terms “capricious”, “absurd” and “*Wednesbury* unreasonableness” come to mind.”).

²⁴¹ *Lim Meng Suang*, [2013] 3 SLR at [112].

²⁴² *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321, 65.

²⁴³ Dennis M. Davis & Karl Klare, *Transformative Constitutionalism and the Common and Customary Law*, 26 S. AFR. J. HUM. RTS. 403, 509 (2010).

²⁴⁴ *Id.* at 404–05. Although there have been “[m]ore than a few heroic judgments” attributed to transformative constitutionalism, Davis and Klare acknowledge that judicial attitudes pose an unyielding obstacle in sustaining the inclusivity of legal frameworks. *Id.* at 509.

transformative constitutionalism,²⁴⁵ this Note argues that the normative value derived from transformative constitutionalism in a 377A context is well-fitted to preserve the liberty that the separation of powers seeks to attain. The executive-legislative concern about the courts becoming “driver[s] of social change” is premised upon the need for a clear separation of powers between branches of government, but “separation of powers” would be redundant if not for the ends it seeks to meet.

Secondly, even if it is conceded that the striking down of 377A constitutes a legislative function, the premise relied on by the *Lim Meng Suang* court—that the Singaporean system is predicated on a clear separation of powers²⁴⁶—does not hold true. Instead, as previously alluded to, the legislative-executive overlap in a Singaporean system necessitates greater empowerment of the judiciary to meet the objectives described by Montesquieu and Madison. As Professor Barendt explains, independence of the three branches is not the ultimate aim of the “separation of powers” theory.²⁴⁷ Instead, “[t]he allocation of functions between three, or perhaps more, branches of government is only a means to achieve that end.”²⁴⁸ While previous commentators have already explained the need for an emboldened judiciary,²⁴⁹ this Note applies the comparative methodology adopted in the previous parts of this Note by looking at the role of courts in the United Kingdom to prove that an emboldened judiciary is not as ludicrous a solution as the Singapore courts may characterize it to be.

²⁴⁵ Wong Pei Ting, *Attorney-General’s Chambers on 377A Challenges: Constitutional Rights Do Not Include Sexual Freedom or Privacy*, TODAY ONLINE, (Nov. 21, 2019) <https://www.todayonline.com/singapore/attorney-general-377a-challenges-constitutional-rights-do-not-include-sexual-freedom-or> [<https://perma.cc/A48L-MMEG>].

²⁴⁶ *Lim Meng Suang*, [2013] 3 SLR at [110]; *Ong Ming Johnson v. Att’y-Gen.* [2020] SGHC 63 at [158].

²⁴⁷ Barendt, *supra* note 238, at 282.

²⁴⁸ *Id.*

²⁴⁹ *See, e.g.*, Tsen-Ta Lee, *supra* note 110.

2. Rethinking the Role of the Judiciary: Looking to the United Kingdom

Singapore, a member of the Commonwealth, derives many of its legal characteristics from the United Kingdom.²⁵⁰ Of relevance to this section is the overlap between executive and legislative branches of government. As explained by Professor Thio, the Singaporean Cabinet's dominance over Parliament, coupled with the acquiescence of Members of Parliament who prioritize party loyalty over legislative debate, has rendered the "[legislature] unable to hold the [executive] accountable."²⁵¹ A similar problem has manifested in the United Kingdom, with Lord Hailsham claiming that the British constitution produced an "elective dictatorship" due to the nature of the first-past-the-post electoral system (which Singapore adopts) and party discipline maintained during and outside Parliamentary proceedings.²⁵²

In response, the judiciary of the United Kingdom has increasingly strengthened its role within the legal system. Starting with the landmark case of *Anisminic v. Foreign Compensation Commission*, the House of Lords refused to give effect to a legislative clause restricting judicial scrutiny of delegated legislation, contrary to the clearly expressed wish of Parliament.²⁵³ This was followed by the development of a "common law constitutionalism" doctrine in the 2000s, under which judges looked to the common law as a source of rights.²⁵⁴ In effect, what the British courts have done is to prioritize pronouncements in previous judgments, based on a need to preserve the "rule of law," over more recent legislation enacted by the legislative and executive branches. The British courts, understanding their duty to combat the increasing overlap between the legislative and executive branches, have qualified the

²⁵⁰ See Andrew Phang, *The Singapore Legal System – History, Theory and Practice*, 21 SING. L. REV. 23, 26–33 (2001).

²⁵¹ Thio Li-Ann, *The Post-Colonial Constitutional Evolution of the Singapore Legislature: A Case Study*, SING. J. LEGAL STUD. 80, 84–87 (1993).

²⁵² See QUINTIN HOGG HAILSHAM OF ST. MARYLEBONE BARON, ELECTIVE DICTATORSHIP / LORD HAILSHAM (1976).

²⁵³ [1969] 2 AC 147 (HL).

²⁵⁴ AXA Gen. Insurance Ltd. v. Lord Advoc. [2011] UKSC 46 [2012] 1 AC 868 at [51]; R (Cart) v. Upper Tribunal [2011] UKSC 28 [2012] 1 AC 663 at [89]. See also R (HS2 Action All. Ltd.) v. Sec'y of State for Transp. [2014] UKSC 3 at [11].

traditional Diceyan understanding of parliamentary sovereignty to increase the accountability of both branches.²⁵⁵ This Note urges the Singaporean courts to take cues from their British counterparts in adopting a less deferential attitude toward the legislative-executive coalition.

CONCLUSION

In conclusion, this Note has laid out the history of 377A challenges and possible avenues for abolition of anti-sodomy laws in Singapore. This Note began with an explanation of the integral role of courts if 377A is to be struck down, due to the inertia exhibited by Parliament in repealing the provision. Next, this Note considered the cases of *Tan Eng Hong* and *Lim Meng Suang* in both the High Court and Court of Appeals, which attempted to contest the constitutionality of 377A under two articles of the Constitution: Article 9(1), the right to life and liberty, and Article 12(1), equal protection. The failure of constitutional challenges in Singapore stands in stark contrast to the success of plaintiffs in the United States and India. Thus, this Note analyzed the methodologies of the courts and plaintiffs in *Lawrence v. Texas* and *Navtej Singh Johar v. Union of India* to reformulate current approaches to 377A challenges.

First, the U.S. Supreme Court's decision in *Lawrence v. Texas* may persuade a Singaporean court to adopt a decontextualized approach in finding a "right to privacy" within Article 9(1) of the Singapore Constitution. This approach is consistent with the increasing acceptance of LGBTQ+ relations in Singapore and a growing sensitivity to the right to privacy. Second, the Indian Supreme Court's decision in *Navtej* may be adopted in a Singaporean context given the historical similarities between 377 IPC and 377A and the common use of a "reasonable classification" test in determining constitutionality under equal protection clauses. In line with the contextualized approach in *Navtej*, litigants may argue that 377A does not rest on a "women v. men" differentia, but rather a "homosexuals v. heterosexuals" distinction that does not form an "intelligible differentia" under Article 12(1). A more ambitious plaintiff may also argue for the abandonment of the "reasonable classification" test altogether in favor of a general "indirect discrimination" principle.

²⁵⁵ Dicey's idea of parliamentary sovereignty is grounded in the notion that no one can lawfully override, derogate from, or set aside an Act of Parliament. See ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (London, MacMillan & Co. 1885).

While these arguments remain possible in theory, there are corresponding problems with their application within Singapore's legal framework due to the judiciary's adoption of originalist interpretive theory and respect for the separation of powers. First, under Article 9(1), there has been a general reluctance to grant "liberty" an expansive reading. Nonetheless, there is no good reason to cling onto originalism in a 377A context given the provision's unique legislative history. Second, originalism, along with a respect for parliamentary sovereignty, facilitates judicial passivity in refusing to deviate from flawed legal tests under Article 12(1). However, the arguments for legislative deference are based on a "pure" understanding of a separation of powers that does not apply in the Singaporean context. Instead, Singapore's allocation of powers resembles that of the United Kingdom, where judges command an increasingly significant role through judicial review. Singapore would thus benefit from a similar degree of judicial scrutiny and empowerment.

Although the American and Indian decisions may prove useful in challenging points of law within the Singaporean legal framework, it appears that more must be done in reshaping judicial attitudes for the abolition of 377A to remain a possibility.

APPENDIX

1. Relevant Provisions from the Singapore Constitution

Article 9: Liberty of the person

(1) No person shall be deprived of his life or personal liberty save in accordance with law.

(2) Where a complaint is made to the General Division of the High Court or any Judge sitting in the General Division of the High Court that a person is being unlawfully detained, the General Division of the High Court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the General Division of the High Court and release him.

(3) Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

(4) Where a person is arrested and not released, he shall, without unreasonable delay, and in any case within 48 hours (excluding the time of any necessary journey), be produced before a Magistrate, in person or by way of video-conferencing link (or other similar technology) in accordance with law, and shall not be further detained in custody without the Magistrate's authority.

(5) Clauses (3) and (4) shall not apply to an enemy alien or to any person arrested for contempt of Parliament pursuant to a warrant issued under the hand of the Speaker.

Article 12: Equal Protection

(1) All persons are equal before the law and entitled to the equal protection of the law.

(2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens of Singapore on the ground only of religion, race, descent or place of birth in any law or in the appointment to any

office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

(3) This Article does not invalidate or prohibit —

(a) any provision regulating personal law; or

(b) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion.

2. Relevant Provisions from the Indian Constitution

Article 14: Equality before law

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

3. Relevant Provisions from the United States Constitution

Fourteenth Amendment:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.