

# Applying Social Contract Ethics to Singapore's Section 377A

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**Abstract.** Singapore presents an unusual case in the governance of LGBTQ+ rights, in having a law which criminalises sex between men (Section 377A of the Singaporean Penal Code) while openly stating its intent to avoid enforcement of the law. This essay examines this mindset of illiberal pragmatism through the lens of social contract ethics, and argues that ethical justifications for Section 377A are based on a static conception of public reason and a reluctance to further recognise the value of sexual diversity. Section 377A is thus emblematic of a desire to enact principles of justice for an illiberal status quo, conceptualising the just outcome as a homogenous society with less social discomfort. However, recognising that public reason is malleable supports repealing the law, to alleviate the unfairness faced by LGBTQ+ individuals and to allow for alternatives to the prevailing conception of the public interest. Such a society would seek to create a fairer social contract that allows for a heterogenous society with greater social discomfort, but a more rewarding social environment.

Singapore presents an unusual case in the governance of LGBTQ+ rights. Unlike most other states, Singapore has not decriminalised consensual sex between men. However, and unlike other states which do continue to criminalise this act, Singapore does not regularly enforce this criminalisation. In past discussions over the law which criminalises sex between men, Section 377A of the Singaporean Penal Code, government officials have cited widespread public support for continued criminalisation and the conservative nature of society as reasons for its continued existence. Using an argument rooted in appeals to pragmatism and rationality, government officials claim they seek to avoid the social conflict that changing the law would cause, thus preserving the status quo (Lee, 2007, Wong, 2015, and Mokhtar, 2018).

This paper examines the unique Singaporean context in which Section 377A exists, and through the lens of social contract ethics, provides a critique of the ethical justification for the law. In doing so, I will argue that the state's support for Section 377A is based on a flawed and static conception of public reason, as conceptualised by classical thinkers in social contract ethics. Such a conceptualisation leaves little room for change and continuously entrenches itself. A less static and time-bound conception of public reason, as conceptualised by more contemporary thinkers in social contract ethics, would instead support the repeal of Section 377A.

Such an ethical justification bears particular social relevance, as Singapore finds itself at a critical juncture on LGBTQ+ rights. There have been three legal challenges to Section 377A from civil society in the past year (Lam, 2020). Such a critique would be of value to civil society groups, especially for contesting the ethics of criminalising sex between men in the face of illiberal publics and governments. Further, authorities in Singapore have great discretion over the use and enforcement of Section 377A (Hor, 2012). Therefore, an ethical framework that critiques the law, rooted in the same core concepts as the state's justifications for it, can be influential in altering the use of Section 377A.

This paper will thus be divided into the following parts: (i) the context of illiberal pragmatism in which Section 377A exists and its similarities to social contract ethics; (ii) evaluating the individual-level fairness of Section 377A; and (iii) examining the collective-level utility of Section 377A.

## **Illiberal Pragmatism and the Social Contract**

Scholars of Singapore queer studies have described the governance of LGBTQ+ issues in the country as being rooted in illiberal pragmatics (Yue, 2012). This illiberal pragmatism is embedded in Singapore's non-liberal democracy, where the formal and liberal institutions of democracy exist in a system that doubts the rationality of the ordinary citizen and is thus anti-liberal (Chua, 1995). Such an ideology explains policies and interventions like Section 377A, which are simultaneously non-liberal and liberal: the law exists to criminalise homosexual sex, but is not regularly enforced.

These key features of Singapore's governance of LGBTQ+ issues draw parallels with concepts in social contract ethics. Social contract ethics is a consequentialist system of ethics which originates from the works of Thomas Hobbes. Hobbes conceptualised a state of nature, created by humans' self-interest, factual inequality between humans, and a scarcity of goods. The combination of these features thus results in perpetual conflict and struggle. To escape this state of nature, individuals transfer personal freedoms and powers (such as the ability to personally punish those who do wrong to them) to the sovereign, generally a state. This process is known as the social contract (Mizzoni, 2017).

A central concept of the social contract is rationality. Social contracts are created, whether implicitly or explicitly, when all who are party to the contract gain some benefit from it. Therefore, rational participants of the social contract would critically evaluate the contract to ensure that it is a just exchange of relinquished freedoms and gained benefits. This contractual approach to morality relies upon the principle of self-interest or ethical egoism, that individuals should follow their self-interest in a way that is distinct from being short-sighted and selfish. Under the social contract, individuals should restrain their desires for immediate self-benefit in favour of a collective benefit which in turn benefits themselves.

Similarly, Illiberal pragmatism justifies policy with appeals to rationality, on the basis that participation and support of such policy (whether explicit or implicit) improves economic outcomes and success in general. Further, illiberal pragmatism also expresses distrust towards short-sighted individual self-interest and thus seeks to constrain it through pragmatic and illiberal governance (Chua, 1995).

The similarities between these two systems thus make social contract ethics the ethical framework best suited to examining issues of fairness and justice in a way that is sensitive to

the Singaporean context. By using social contract ethics, we can critique Section 377A on the same grounds and reasoning used by state officials to justify it.

### **Evaluating the Fairness of Section 377A for Individuals**

Within illiberal societies, the contractual approach to morality proposed by social contract ethics raises the key question of what level of individual freedoms can justifiably be surrendered for collective benefit. This section examines these individual freedoms.

A key thinker in social contract ethics, John Rawls (1971), proposed a theory of justice to understand what constitutes a fair and just exchange between the individual and the sovereign. His concept places an individual in the hypothetical ‘Original Position’, where individuals lack knowledge of their personal circumstances, such as gender, race, class or sexual orientation, as well as lacking a personal perspective on what constitutes a good and moral life. Fair and just policies are policies which are made from this position of impartiality (behind the veil of ignorance): they do not favour any particular circumstance or perspective. Following this theory of justice, there are two main ways in which Section 377A contributes to unfairness, by (i) undermining the fairness of the justice system; (ii) demarcating the space for acceptable rights-claims.

#### *The Justice System*

Although state officials have repeatedly stated that Section 377A will not be proactively enforced (Lee, 2007), police and prosecutors retain the discretion to charge individuals with an offence under 377A (Today, 2018). This thus leaves the law as essentially representing a symbolic and societal proscription of homosexuality, as evidenced in justifications used in the recent dismissals of legal challenges against 377A where Justice See Kee Oon stated that Section 377A “serves the purpose of safeguarding public morality by showing societal moral disapproval of male homosexual acts” (Lam, 2020). Moreover, Hor (2012) argues that in the rare cases where Section 377A has been used (such as in cases of rape or cases of sex involving males who are below the age of consent), there exist alternative offences for which wrongdoers can be charged. However, while Section 376 of the Penal Code or the Children and Young Person’s Act focuses on non-consensual sex or the abuse of minors as, in Hor’s argumentation, the “true evil that is to be dealt with”, Section 377A instead pushes the focus

of a court onto the indecency of one's sexual orientation as the wrongful aspect of one's offence.

Hor (2012) highlights how Section 377A's continued existence can create illegitimate outcomes, discussing the possibility of Section 377A's use as a bargaining tool, wherein defendants, faced with being charged with an offence under the section, may accept plea bargains for other offences whose essential criteria are not necessarily met. Further, 377A could also distract authorities from the core issues of a case, such as proving non-consent of parties involved or proving a sufficient violation of public decency had taken place, with prosecutors instead focused on proving that sexual conduct had occurred between two men. Notably, such issues would only be faced by men who have sex with men, as Section 377A does not apply to other groups.

Further, on the particular issue of seeking redress for sexual crimes, Section 377A also impairs the ability of LGBTQ+ people to participate in a key aspect of the social contract: entrusting their freedom to personally punish a wrong-doer to the state. Activists in Singapore argue that the law creates an environment of fear among LGBTQ+ people around seeking help from healthcare and law enforcement services after experiencing sexual assault, as they fear Section 377A might be used against them. These activists argue that repealing the law would better allow these survivors to seek legal redress (Cheow, 2018 and AWARE, 2018).

### *Rights Claims*

The existence of Section 377A also represents an obstacle to rights-claiming. This is best summed up by Singaporean Prime Minister Lee Hsien Loong (2007) in a debate over Section 377A's repeal, "This is the way Singapore society is today. This is the way the majority of Singaporeans want it to be. So, we should strive to maintain a balance, to uphold a stable society with traditional, heterosexual family values, but with space for homosexuals to live their lives and contribute to the society."

Section 377A is thus not an obstacle in the sense that it entirely impedes all progress in attaining equal rights or access to public resources, as Singapore's system of illiberal pragmatics can allow for the expansion of economic privileges to LGBTQ+ people when this is 'pragmatic' or depoliticised (Yue, 2012). However, Section 377A presents an obstacle in the sense that it signals the exclusion of LGBTQ+ people from mainstream heteronormative society. While other groups can seek benefits such as public housing or subsidies through

performing aspects of their identity (such as heterosexuality, race or class), LGBTQ+ people cannot do so with their queerness. Indeed, LGBTQ+ people face unique challenges because of their identities. These challenges vary from securing public housing due to eligibility rules which advantage married couples, or the lack of protections from workplace harassment which are accorded to other groups (Teo, 2020). Instead, they must perform heteronormativity or produce utility, while also downplaying queerness, to attain benefits afforded to others in Singaporean society.

Under Rawls' theory of justice, this is clearly unjust, as it deepens the inequalities of natural and social lotteries and fails to meet the requisite standard of impartiality for a just law. Worse still, such a system is self-entrenching and limits the space for progress in LGBTQ+ rights. Some scholars (Tan & Lee, 2007, and Oswin, 2014) have critiqued the practice by gay activists in Singapore of strategically highlighting their civic mindedness, patriotism and heteronormativity to push for more privileges. In doing so, such activists further embed the idea that queerness is a proscribed or devalued aspect of one's identity, and that LGBTQ+ rights are gained through conforming to the mainstream or producing economic utility. While this might produce benefits for those able to do so, it comes at the cost of further impairing those who cannot conform or produce sufficient economic utility, and serves to further alienate non-heteronormativity. Those who do not or cannot conform to heteronormative norms are treated as the 'wrong kind of gay', undeserving of the rights and benefits afforded to others in Singaporean society. In limiting the space for rights claims, LGBTQ+ individuals are excluded from redefining unfair social contracts.

As a result of these two areas of unfairness, Section 377A does not constitute a fair exchange of personal freedoms as part of the social contract. A hypothetical individual in Rawls' (1971) Original Position, lacking knowledge of their place in society, would not consent to Section 377A because of the possibility that they could be queer.

### **Public Reason in Illiberal Societies**

Having examined the individual aspect of this question, we must now examine the collective aspect of the social contract. Another key thinker in social contract ethics, Gauthier (1986), presents a conceptualisation of the social contract which goes beyond Hobbes' idea of a sovereign. He argues that self-interested and rational individuals should cooperate and follow

society's agreements. Sub-optimal outcomes are created when all individuals pursue unrestrained and short-sighted self-interest, while optimal outcomes are created by taking societal consensus into account. In Singapore, we can see such a justification underlying the communitarian ideology used to support Section 377A. Government officials cite the lacking consensus necessary to repeal the law as reason for the law's continued existence (Mokhtar and Loh, 2018). Further, these officials also argue that the law reflects society's desire for a social signal that queer identities should not be part of the mainstream. Such an argument directly opposes the individual-level fairness claims outlined above.

However, this interpretation of societal consensus as being equivalent to the social contract is flawed. Muldoon (2016) argues that the concept of rational self-interest that is inherent in social contract ethics normalises and homogenises the interests of individuals across society, entrenching the status quo. Taken to its natural conclusion, a contractual approach to morality essentially calls for rational individuals to follow the morality of group consensus where possible to achieve beneficial outcomes for themselves, as doing otherwise would be suboptimal.

As a result of this, within the context of diverse societies where there are disagreements over right and wrong, as in Singapore over Section 377A, a system of ethics based on consensus gives little clear guidance. This is due to a lack of clarity on the value given to each individual's freedoms and perspectives, when weighed against the perspective of the collective. Public reason thus has difficulties accommodating divergent perspectives, as social discomfort would be generated when trying to reconcile opposing views into a singular aggregate consensus. If we value consensus and social comfort, social contract ethics thus seems to provide an ethical justification for stifling and marginalising LGBTQ+ groups in illiberal societies through laws such as Section 377A.

However, Muldoon (2018) also argues that while public reason might have difficulty accommodating diverse perspectives, the social discomfort created can also generate positive utility. He argues that gender, racial, religious and cultural diversity are ways in which more diverse perspectives are generated, resulting in greater cognitive diversity towards the solving of problems. The author argues that empirical evidence suggests that more diverse groups outperform less diverse groups in lab and real-world settings, with examples such as increased gender diversity resulting in more radical innovation on R&D teams to diverse juries being more deliberative in their decision-making.

Therefore, there are two likely outcomes:

1. A homogenous society with less social discomfort and a less rewarding social environment.
2. A heterogenous society with more social discomfort but a more rewarding social environment.

This latter outcome is acknowledged by Singaporean government policies. Obendorf (2012) describes how Singapore's explicitly stated desire to become a "Renaissance City" or "Global City of the Arts" calls for a cosmopolitan environment tolerant towards LGBTQ+ individuals. Singapore's policies follow the logic that LGBTQ+ individuals contribute to the state's economy and recognise that increased tolerance of LGBTQ+ individuals is correlated with increased foreign investment. This strategic and selective embrace of queerness thus shows a recognition on the part of the Singaporean government that diversity provides positive utility.

Ultimately, this conceptualisation of diversity within social contract ethics, which steps away from one based on consensus, helps reconcile a queer individual's self-interest with an illiberal collective consensus. With this conceptualisation, it is no longer a binary conception of a social contract either stifling opposing views or accepting similar views. This is because diversity becomes a force which can provide benefit to societies when it is acknowledged and managed. As a result, when analysed at the collective level and from a consequentialist perspective, repealing Section 377A might cause more social discomfort, but creates a more rewarding society better equipped to address social problems with greater cognitive diversity.

#### *Freezing Public Reason*

It is notable however, that even though there exists a more cosmopolitan path with the potential for greater collective utility, lawmakers in Singapore still believe that repealing Section 377A and allowing greater tolerance of queerness is too great a transgression of social norms (Ng, 2019). As a result, we see the government opting to entrench the outcome of a homogenous society with less social discomfort and a less rewarding social environment.

The freezing of changes to public reason is most evident in the regulation of representations of LGBTQ+ individuals, and the measurement of approval towards LGBTQ+ issues. Firstly, media regulations stifle possibilities for positive representations of LGBTQ+

individuals, that would thus allow for shifts in attitudes or acceptance to having a more heterogeneous society. These media regulations are justified on the basis that they serve to protect widely-supported social norms (Lee, 2007), but also serve to co-create these social norms by creating a media landscape which primarily presents either absent or negative representations of queerness (Ho et al, 2010 and Teo, 2020). As a result, we see homogeneity being used to justify and entrench homogeneity.

Secondly, the most frequently cited survey (especially in media coverage of Section 377A, see Mokhtar, 2018 and Beh, 2019) on attitudes towards LGBTQ+ issues in Singapore (IPS Working Paper No. 34 – Religion, Morality and Conservatism in Singapore, 2019) measures peoples' attitudes towards acts such as 'sexual relations between two adults of the same sex' by asking respondents how wrong such an act is. 50.4% of respondents said they thought the act was always wrong, 11.4% said they thought the act was not wrong at all, and 38.2% of respondents indicated they thought the wrongness of the act lay somewhere in between. In measuring social acceptance of LGBTQ+ issues in such a way, the study predisposes Singaporeans towards rejection of LGBTQ+ people as the default and obscures actual support for changes in legislation. A belief in the moral wrongness of sexual intercourse between those of the same sex does not equate to a belief that this should be the law of the land, and is misleadingly used to protect a binding social contract.

Ultimately, at the collective level, social contract ethics presents two divergent possibilities in dealing with diversity, with differing social discomfort and thus social environment. While a path towards greater utility does exist through repealing Section 377A, the Singaporean government has elected to instead limit diversity and thus the potential utility that could be gained from it.

## **Conclusion**

The classical approach to social contract ethics championed by Hobbes, and by lawmakers in Singapore, conceives of the public interest as largely unchanging. They therefore aim to achieve principles of justice and fairness at a specific point in time, resulting in a homogenising influence within society. Following such an approach to social contract ethics, we can see a paradox in the seeking of fairness whilst simultaneously preserving the status quo inherent in Singapore: anti-LGBTQ+ legislation which criminalises homosexuality coexists with the knowledge that LGBTQ+ citizens can and do contribute to the collective (Obendorf,

2012; Ng, 2019). Through such a lens, anti-LGBTQ+ legislation such as Section 377A is justified by the illiberal consensus in which it exists.

An alternative approach to social contract ethics championed by thinkers such as Rawls and Muldoon can resolve this by accepting that the public interest is fluid and malleable. Such an approach opts not to pursue justice as conceptualised by the current public interest. Instead, this approach argues that we should adopt an impartial framework with alternative pathways within society that allow for public reason to change, and therefore create new and more just social contracts. Through such a lens, anti-LGBTQ+ legislation such as Section 377A is *not* justified because the illiberal context in which it exists has the potential to change. Indeed, keeping Section 377A prevents the public interest from changing. Instead, understandings of the public interest must mitigate the partiality and bias present within them to achieve just outcomes.

If we accept that the public interest is fluid, then we accept the possibility of the present social consensus changing to accommodate diverse and pro-LGBTQ+ views. The hypothetical social contract in a Singapore where Section 377A is repealed becomes an important point of comparison to the status quo, because it has the potential to support a greater diversity of views and identities. This creates a more rewarding social environment where a multitude of perspectives can better resolve social issues with a greater repertoire of cognitive tools inaccessible to a homogenous society. The current approach taken by Singapore in its governance of LGBTQ+ issues implicitly supports this, in seeking to reap the benefits of diversity while simultaneously entrenching homogeneity.

Applying a consensus-based approach to social contract ethics might endorse anti-LGBTQ+ legislation on the basis of attaining justice as conceived in the illiberal status quo. However, applying a more nuanced ethical approach shows that public reason and the social contract are malleable, and greater utility is created when alternatives to the prevailing conception of public reason are not restricted, as they are in the status quo. Therefore, social contract ethics provide sound justification for the repeal of Section 377A while addressing the Singaporean government's concerns with collective utility and consensus, on the basis of lacking impartiality and that there exist alternatives — through repeal of the law and a shift in approaches to LGBTQ+ people — which not only could improve the lives of LGBTQ+ people but could also benefit society as a whole, economically and socially.

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