Constitutions, Gay Rights, and Asian Cultures: A Comparison of Singapore, India and Nepal's Experiences with Sodomy Laws[†]

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Introduction

The way we conceive of 'gay rights' today is largely a 20th century phenomenon. In 1900, the conception of a LGBT movement would have struck people as ludicrous—Oscar Wilde had just been tried for being a "somdomite" (sic), and homosexuality was still the "love that dare not speak its name". By 2000, much of the "first" and "second" world had legalized homosexuality—the debate was moving on, now, to 'gay marriage. Interestingly, and perhaps not entirely coincidentally, the battle for LGBT rights has largely been a political and legal battle. Lawyers and courts have often been at the forefront of such struggles.[1] Furthermore, the "wave of constitutionalism"[2] since World War II has meant that, as Constitutions have started incorporating a bill of 'fundamental' rights in their texts, there has been a greater degree of reliance on them in order to carve out rights and freedoms for LGBT people. Eskridge, for instance, has referred to

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[†]This article does not reflect the changes brought to the Indian equality jurisprudence post the Supreme Court's verdict in *Suresh Kumar Koushal & Anr.* v. *NAZ Foundation & Ors.*

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1 For a detailed understanding of how this struggle played out, for instance, in the United States, *see* Patricia Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, *79* VA. L. REV.1551 (1993).

2 A brief account of this is provided in Ran Hirschl, *The Continued Renaissance of Comparative Constitutional Law*, 45 TULSA L. REV. 71-2 (2011).

how LGBT communities are merely one of a series of identity-based movements that use such texts in their struggles.[3]

Constitutions have usually been considered to be uniquely 'national' texts, but cross-national discourse plays a major role when contested rights are adjudicated upon. As courts- and Constitutions, have started "talking with one another"[4], this has become a greater reality. One has only to look at European or American[5] precedents to see how strongly 'comparative' constitutional law has figured when dealing with LGBT rights- either through the prism of non-discrimination or equality of marriage. Unfortunately, the bulk of these developments have taken place in "Western" or "first world" jurisdictions, and most literature has also concentrated on these countries.

This paper seeks to examine Asian jurisprudence in regard to LGBT rights by looking at India, Nepal and Singapore. The choice of these countries is, to my mind, significant since all three are countries that have had a significant degree of tension between 'traditional values' and 'modernity', which have been reflected in their constitutional choices and various subsequent judicial and political tensions. Versteeg and Goderis[6] suggest that the texts of Constitutions are similar when countries either share a colonial past, legal origins or similar religions. This paper looks, not only at the text of

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3 William Eskridge, *Some Aspects of Identity-Based Movements in Constitutional Law in the 20th Century,* 1000 MICH. L. REV. 2061 (2002); See William Eskridge, *Channeling: Identity-Based Movements and Public Law,* 150 U. PENN. L. REV. 419 (2001).

4 Ran Hirschl, *The Rise of Comparative Constitutional Law: Thoughts on Substance and Method*, 2 INDIAN JOUR. OF CONST'L LAW 11, at 12 (2008).

5 *Lawrence* v. *Texas,* 539 U.S. 558 (2003).

6 Benedikt Goderis and Mila Versteeg, *The Transnational Origins of Constitutions: An Empirical Investigation,* (Aug 8, 2011). Copy on file with the author.

Constitutions, but also at the way Courts and political organs adjudicate upon and examine these issues. All three countries examined above are Asian countries with strong cultural similarities. All three have, however, considered issues of human rights in different ways, chiefly due to the difference in socio-political circumstances.

Singapore is considered to be uniquely isolationist, strongly emphasizing on 'communitarian' Asian values, though arguments have sought to prove that this is not an accurate reflection of the country's actual status[7]- in fact, Singapore's basic criminal law originates in the Indian Penal Code- a colonial imposition (including, verbatim, the law that criminalizes sodomy). In Nepal's case, the fact that the Constitution is in a state of flux (as of now, the country has a draft interim Constitution, rather than a formal one even after repeated extensions) has influenced its Constitutional status. As the country struggles to find its feet after years of revolution and political uprising, the Constituent assembly has adopted a liberal 'rights-based' model, though its future impact remains doubtful till now.[8] India's judiciary, conversely, has been comfortable with the use of comparative law since the promulgation of the Constitution in 1950, with the Indian Supreme Court (and others)[9] being considered one of the most progressive jurisdictions in the usage of foreign law. As the subsequent analysis demonstrates, though, the discourse on judicial activism in India has become paramount since the 1970s.

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7 *See*, for instance, Victor Ramraj, *Comparative Constitutional Law in Singapore,* 6 SING. J. INT'L & COMP. LAW 206 (2003) 209.

8 *See* the latter part of the paper, which describes constitutional developments in Nepal.

9 Including the Delhi High Court, which dealt with the issue of decriminalization of homosexuality in India in the case of*Naz Foundation* v. *Government of NCT of Delhi and Others*,2009 (160) DLT 277.

While the bulk of this analysis is descriptive, the normative aspect of this will also be looked into. Importantly, the analysis will not be confined to courts, since they are, though the most visible, not the only sites of constitutional adjudication. A recognition of what scholars call the 'judicialisation of politics'[10] has seen a movement towards the appreciation of the argument that courts are not the sole arenas where constitutional (especially rights-based) arguments take place. Hence, I plan to examine the political impact of LGBT movements as well, especially in Singapore, where Courts have taken a hands-off approach to these issues.

The commonalities and differences make a comparative examination of these countries a fascinating enterprise. The paper will open by describing briefly the constitutional and cultural attributes of each of these countries. Subsequently, the history, culture, and politics behind the struggle for LGBT rights and its outcomes will be examined. Importantly, lawyers who have argued for the legalization of these rights have, as subsequent sections will show, relied greatly on comparative foreign law precedents while judiciaries and politicians have taken conflicting stands.

In examining this, I shall look at what justifications Courts (and other Constitutional for a) have relied on when dealing either with the retention or abolition of these values. This would necessarily include a critique of the Singaporean thesis of 'Asian values', while at the same time critically examine attempts that the Delhi High Court and the Nepalese Supreme Court have made while relying on comparative law.

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[10] Ran Hirschl, *The Judicialisation of Politics,* in THE OXFORD HANDBOOK ON LAW AND POLITICS 124 (Whittington, ed., 2008).

Some preliminary notes though. The paper does not effect a fundamental distinction between gay marriage and legalization- largely because two of the jurisdictions have not yet legalized marriage, and a third does not effect such a distinction in the judgment that dealt with this issue. Similarly, the anti-sodomy and gross indecency provisions that have been referred to only deal with men who have sex with other men- lesbian women and transgendered people are not included in that analysis, though analyses of the LGBT movement in all three countries shall also refer to them.

Constitutional Texts, Polities, and 'Constitutional Cultures': A Brief Summary

A brief understanding of the culture and constitutional history of each country is significant to understand *how* decisions on LGBT rights issues are made, whether by Courts or governments. As Vicki Jackson has pointed out, the framing and interpretation of constitutional texts is significantly shaped by its context and, the values embodied in the constitution often have a strong bearing on national identities and self-expression.[11] This in turn influences the way decisions are made. Any examination of judicial and political precedent, especially in an issue as divisive as LGBT rights, would necessarily require an understanding of these basic aspects.

In examining this, I will touch upon the background to the Constitutions of all three countries (including briefly, its history and demography), and shall see each Constitutions' equivalent of the bill of rights in order to understand their *textual* provisions- significant in understanding the politics of the issue. My use of the term

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[11] Vicki Jackson, *Methodological Challenges in Comparative Constitutional Law,* 28 PENN ST. INT'L REV 319, 322.

'constitutional culture' assumes that a constitution is not defined as merely its text, but also as a wider concept which includes the polity, judicial values, and social context which informs the interpretation of the constitution, and the various narratives it gives rise to.

To first discuss the commonalities- all three countries have significantly been influenced by colonialism (though Nepal was never formally a colony, the suzerainty of the British meant that its legal system saw profound Western influence)[12], and all three Constitutions have been formulated after the United Nations Declaration on Human Rights had been ratified. All three contain a version of 'fundamental rights', and the Constitutions of both Nepal and Singapore demonstrate significant "borrowing" from the Indian experience.[13] This is not entirely coincidental, considering India's geographical and cultural closeness to Singapore (including its experience with imperialism) and Nepal's virtual dwarfing by its gigantic neighbour. Finally, this paper demonstrates that, despite the importance of constitutional texts, constitutions are much more than their text.

Singapore: 'Enlightened' Isolationalism

Singapore is one of the most diverse countries in Asia, located at the tip of the Malayan peninsula. An otherwise nondescript island, its colonization in 1819 and its significance as an international entrepôt meant that it is now home to an extensively multicultural population, with a majority of persons of Chinese origins (74%), and substantial minorities of Malay (13%) and Indian (10%) populations. Major economic booms since independence have led to Singapore being one

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12 *See*, for example, Leonhard Adam, *Criminal Law and Procedure in Nepal a Century Ago: Notes Left by Brian H. Hodgson*, 9 THE FAR E.Q. 146.

13 Thio-Li An and Kevin Tan (eds.), EVOLUTION OF A REVOLUTION: 40 YEARS OF THE SINGAPORE CONSTITUTION 53 (2009).

of the wealthiest nations in Asia, and a developed country in all senses of the term. However, there exists a dichotomy between its capitalist, liberalized economy, and its legal and political system which has continued to be authoritarian, intolerant, and not particularly strong on civil and political rights.

Singapore's legal system is broadly similar to most other Commonwealth countries, involving a common-law system with a three-stage appellate process- the Supreme Court is the final Court of Appeal. The bulk of its criminal and civil law is derived from British and colonial legislation- the Indian Penal Code, as promulgated in Singapore, forms the basis of its substantive criminal law, and the Singapore Code of Criminal Procedure is substantially similar to the code of British India, despite important differences that have emerged as it evolved an "autochthonous legal system".[14]

Singapore's Constitution, promulgated in 1965, immediately after its independence from Malaysia, provided for a continuation of the Westminster-style democracy that formed part of the British legacy, though this increasingly moved towards a one-party rule.[15] Part IV of the Constitution provides for a set of 'fundamental liberties' (an interesting terminology, considering the linguistic difference between the uses of the terms 'rights' and 'liberties').[16] That said, the content of

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[14] *See*, for instance, K Y L TAN AND THIO LI-ANN, CONSTITUTIONAL LAW IN MALAYSIA AND SINGAPORE 5(2nd ed., 1997). *Also see* WC Cheong and A Phang, *The Development of Criminal Law and Criminal Justice in Singapore,* Research Collection School of Law, Paper 191, available at http://ink.library.smu.edu.sg/sol_research/191.

[15] Thio Li-Ann, *The Post-Colonial Constitutional Evolution of the Singapore Legislature: A Case Study,* 19 SING. JOUR. LEGAL STUD. 80, 87 (1993).

[16] Given that the notion of rights is understood as something intrinsic to humanity, a 'trump' as it were. 'Liberties', on the other hand, suggest autonomous zones for citizens, strongly bounded by the state.

these liberties is similar to most other 'liberal' constitutions, providing for personal liberty[17], a right against slavery and forced labour[18], an iteration of all persons being 'equal before the law and entitled to the equal protection of the law'[19] and freedom of speech, assembly, and association.[20]

Despite these essential transnational borrowings, Singapore is considered to be a relatively isolationist country. The decision in *State of Kelantan* v. *Government of the Federation of Malaya*[21] which argued for the 'four-wall doctrine,' that "the Constitution is primarily to be interpreted within its four walls" and not according to other countries, has been cited with approval in various Singaporean judgments[22]. Ramraj suggests that Singaporean judges have been comfortable with relying on international precedents when they seem to be connected to the law by "history or descent".[23] What it has been much more cautious in doing, however, is borrowing based on a 'universalist idea of rights and constitutional law.'[24]

There are strong reasons for this. Singapore has considered the 'universal' human rights idea with skepticism, and has been a strong

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17 CONSTITUTION OF THE REPUBLIC OF SINGAPORE, art. 9

18 *Id.*, art. 10

19 *Id.* art. 12.

20 *Id.* art. 14.

21 1963 MIA 355. Quoted with approval as recently as 2005, in the case of *Chee Siok Chin* v. *Ministry of Home Affairs,* [2005] SGHC 216.

22 *See,* for example, *Chee Siok Chin* [2006] 1 S.L.R. 582, where the Singaporean court said that standards laid down could not be applied *de hors* context.

23 An example is Singapore's law on murder, which has been profoundly influenced by the Indian decision in *Virsa Singh* v. *State of Punjab,* [1958] SCR 1495, or for that matter, the bulk of Singapore's Contract law, which is influenced by British precedent; Victor Ramraj, *Comparative Constitutional Law in Singapore,* 6 SING. JOUR. IN'TL & COMP. LAW 206, 208 (2002).

24 *Id.*

proponent of the idea of a unique communitarian set of 'Asian values' that it argues are common to most Asian countries. These define values in the *collective-* collective norm, collective benefit and collective duties.[25] In this system, the state acts in a paternalistic manner, deciding what is good for the people.[26] This cannot be considered an accident- as Beng-Huat and Kuo[27] suggest, Singapore's colonial history, ethnic isolation, and its troubled absorption and expulsion as part of the Malayan Union led to an urgent need to found a country and national identity virtually from scratch. While doing so, they refer to the need to create a 'disciplined work force' as being seen as paramount by the nations' leaders.[28] While economically sound, the creation of a 'disciplined work force' does not usually permit for diversity; Singapore was no exception to the rule.

There exists a substantial body of persons, both in Singapore and abroad, who relate this with the economic development of Singapore.[29] It has been acknowledged as such by the former Prime

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25 Thio Li-Ann, *Pragmatism and Realism do not mean Abdication: A Critical and Empirical Inquiry into Singapore's Engagement with International Human Rights Law.* 8 SYBIL 41-91(2004). *See* Eugene Kheng-Boon Tan, *"We"* v. *"I": Communitarian Legalism in Singapore*, 4 AUSTRALIAN J. OF ASIAN L. 1, 11-18 (2002).

26 K.Y. Lee, *Address by then Prime Minister Lee Kuan Yew at the Opening of the Singapore Academy of Law*, (1990) 2 S. AC. L. J.155.

27 Chua Beng-Huat and Eddie Kuo, *The Making of a New Nation: Cultural Construction and National Identity in Singapore in* FROM BEIJING TO PORT MORESBY: THE POLITICS OF NATIONAL IDENTITY IN CULTURAL PROCESSES 36 (Virginia R. Dominguez and David Woo eds., 1998).

28 *Id.*, at 42.

29 Prominent among such persons is Prime Minister Lee Kuan-Yew, who has articulated this view in many for a. *See*, for instance, Fareed Zakaria, *Culture is Destiny: A Conversation with Lee-Kwan Yew,* FOREIGN AFFAIRS, (1994) No. 73, Vol II.

Minister of Singapore[30], who has advocated the use of the term 'Asian Values' in order to understand Singapore's path to development. These values derive from Confucianism - including *"reverence for the institution of a family, deference to societal interests, respect for authority, and conservatism"*.[31] These values do not support individualism, the right to dissent, or the notion of rights as claims against the state. In practice, the state acts as the custodian of "collective" morality, and the law is used as a coercive means of enforcing such morality.[32] As we see, therefore, Legislations such as Section 377-A and the Miscellaneous Offences (Public Order and Morality) Act, 1990 are used to enforce such "communal values".[33] However, the collapse of the 'tiger' economies in 1998 led to people articulating fears that these values were "finished"[34] which is hardly a ringing endorsement for their 'shared, traditional nature'.

The classification of a set of values as 'Asian Values' is problematic at the level of adjudication, since it fails to recognize Singapore's pluralist population and heritage. With a population part Chinese, part ethnic Malay and part Indian, along with a huge expatriate population, Singapore is far more diverse than its size suggests. At another level, the *content* of Asian values is also problematic- who decides what comes within the idea of Asian values?

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30 *Id.* "In English doctrine, the rights of the individual must be the paramount consideration. We shook ourselves free from the confines of English norms which did not accord with the customs and values of Singapore society".

31 *Asian Values Revisited: What Would Confucius Say Now?*, available at http://www.wright.edu/~tdung/asianvalues_economist.htm.

32 *See* Jack Donnelly, *Human Rights And Asian Values: A Defense of 'Western Universalism', In* THE EAST ASIAN CHALLENGE TO HUMAN RIGHTS (Joanne R. Bauer and Daniel A. Bell eds.,1999).

33 *Id.*

34 Frank Cheng, *Are Asian Values Finished,* 161 FAR EASTERN ECON. REV. 32, 1998.

Keeping the historical context of Singapore in mind, one sees various ways in which Singapore's economic and cultural values have migrated from traditional Hindu, Confucian or Malay notions.[35] It is not too hard to conclude that the argument of shared Asian values, à la Singapore, is a self-serving one propagated by an authoritarian regime.

Singapore's legal regime provides further evidence of this authoritarianism. Studies of the *role* of law in Singapore demonstrate that law is considered to be a coercive mechanism to bring the state to order and there is little belief in the law, especially constitutional law, as a guarantor of rights and dignities.[36] In fact, the idea of Singapore being a "Fine city"- one where there are huge fines for any behaviour considered unworthy by its political masters, for even something as innocuous as chewing gum, and the harsh penalties that are a necessary corollary to this (Singapore remains one of the few countries that still allow caning)[37] demonstrate a strong continuum with its colonial past. Conversely, Singapore's judiciary has performed well in *economic* matters- being consistently ranked in the top three most 'efficient' judicial systems in Asia in enforcing contracts. This testifies to the speed with which matters are disposed of, especially those that deal with property or criminal rights.[38] This duality, hence, is central to the conundrum of Singapore's political and economic structure- how can a Western-style liberal judiciary (in commercial law) coexist so

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35 Donelly, *supra* n. 33, 77-84.

36 R. HICKLING, ESSAYS IN SINGAPORE LAW45 (1992). *See* C. Tremevan, THE POLITICAL ECONOMY OF SOCIAL CONTROL IN SINGAPORE 23-25 (1996).

37 SINGAPORE CRIMINAL PROCEDURE CODE, 2010, Sections 335-332

38 Francis T Seow, *The Politics of Judicial Institutions in Singapore,* http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan002727.pdf. In 2010, Singapore was ranked first in the World Competitive Yearbook. *See* INTERNATIONAL INSTITUTE FOR MANAGEMENT DEVELOPMENT, WORLD COMPETITIVE YEARBOOK 1 (2010), available at http://www.imd.ch/research/publications/wcy/upload/scoreboard.pdf.

completely with a communitarian 'Asian values' oriented approach to individual rights?

In conclusion, one can see that Singapore's independence and initial fragility was coupled with little political debate on its future and few alternatives to the Lee Kwan Yew model of development, one that has been (economically, at least) remarkably successful.[39] With these facts in mind, though, one finds little evidence of a transformative 'Constitutional moment' as the Ackermanian thesis on constitutional law suggests,[40] where the judiciary attempted to evolve a constitutional rights-based framework.

The Indian Experience: Strong Rights Articulations, but Institutional Constraints

The second-largest country in the world in terms of population, India is extremely diverse. More than 80% of its population is Hindu, but it has the world's second-largest population of Muslims, and significant communities of Christians, Sikhs and Buddhist people. As a vibrant multi-party democracy, the Indian judiciary has emerged as a significant player in India's polity over the last few years.

Despite a long history of some form of 'rule of law', extending over what have been called the 'Hindu' and 'Islamic' periods of Indian history, the Indian legal system is strongly influenced by the British. Like Singapore, India is a Westminster-style parliamentary democracy

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[39] Singapore's economic growth since its independence has been immense. This, along with its strides in education, healthcare, and housing has led to commentators across the board referring to it as an 'economic miracle'. *See*, for example, Joseph Stiglitz, *Singapore's Lessons for an Unequal America,* NEW YORK TIMES, March 18, 2013.

[40] Bruce Ackerman, *Constitutional Politics/Constitutional Law,* 99 YALE L. J. 453.

which has been stable since the promulgation of its Constitution in 1950. As mentioned before, both India and Singapore share a common-law tradition, with the Indian court system, civil and criminal codes, and substantive law having a strong connection with the UK's legal system. Despite various strains due to massive overloading, the system is believed to have been reasonably successful.

Promulgated in the years immediately after the Second World War, the Indian Constitution emerged at the beginning of what has been considered the international 'age of Constitutionalism'.[41] Derived from the Government of India Act, 1935, it nevertheless contained several departures from the imperial law that had preceded it. For example, as one of the longest constitutions in the world, it had a set of 'fundamental rights' enshrined within it in Part III of the Constitution. These included the right to life and personal liberty[42], the right to equality[43], the freedom of speech and expression[44], and religious and minority rights.[45] These rights are enforceable in the Supreme Court and other high courts, and the right to judicial remedies[46] is recognized as part of the unamendable 'basic structure' (a judicial, rather than constitutional term) of the Indian constitution.

The *origins* of the Constitution might well have been colonial but such a charge cannot as easily be levied against its jurisprudence. The Indian Supreme Court has increasingly taken an 'activist' role in constitutional adjudication. This aspect has led it to be labeled one of

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41 *Supra* n. 7.
42 INDIA CONST. art. 21.
43 *Id.*, art. 14.
44 *Id.*, art. 19(1)(a); art. 19(1)(b).
45 *Id.*, art. 25-28.
46 *Id.*, art. 32.

the most powerful courts in the world,[47] especially after the 1970s, when an authoritarian government threatened to curtail civil liberties in India. In the field of human rights, its contribution has been much-acclaimed. In a series of judgments since 1978, the Court extended the right to life (couched in 'negative' terms) to include within its ambit substantive due process,[48] and a variety of socio-economic rights such as the right to health[49], education[50], work, and livelihood.[51] Further developments saw the right to privacy emerging in Indian law[52], in a manner similar to the 'penumbra rights' articulated by the US Supreme Court in *Griswold* v. *State of Connecticut.*[53] The power of the Supreme Court has been associated with various innovative steps that have been taken to enhance its jurisdiction like Public Interest Litigation (which relaxes the traditional rule of *locus standi)* and, in a recent case, a 'direction' (couched as a plea) to the Supreme Court of Pakistan[54], have been some of the most inventive strategies that the Court has adopted. As coalition governments have increased in India, the judiciary has become increasingly powerful.

As the Supreme Court has become more powerful, it has been known for the massive extent to which it has relied on comparative

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47 SP SATHE, JUDICIAL ACTIVISM IN INDIA: TRANGRESSING BORDERS AND ENFORCING LIMITS 99(2002).

48 *Maneka Gandhi* v. *Union of India,* AIR 1978 SC 597.

49 *Paschim Banga Khet Mazdoor Samity* v. *State of West Bengal,* (1996) 4 SCC 37.

50 *Mohini Jain* v. *State of Karnataka,* (1992) 3 SCC 666;*Unnikrishnan JP* v. *State of Andhra Pradesh,* (1993) 1 SCC 645. This has subsequently been made a fundamental right by an amendment of the Constitution.

51 *Olga Tellis* v. *Bombay Municipal Corporation,* [1985] 3 SCC 545; *Sodan Singh* v. *Municipal Corporaton of Delhi,*[1989] 4 SCC 155.

52 *Kharak Singh* v. *State of UP,* where the Court held that Article 21 could be broad enough to cover privacy as well; *R. Rajagopal* v. *State of Tamil Nadu,* (1994) 6 SCC 632.

53 381 US 479 [1965].

54 *Gopal Dass* v. *Union of India,* W.P. 16 of 2010. Copy on file with the author.

law, in general,[55] and comparative constitutional law in particular. Indeed, commentators have (in my opinion, unfairly) gone so far as to argue that the Indian Constitution does not have any essential jurisprudence of its own, that all its ideas have been borrowed from international precedents.[56] Other criticisms, while less trenchant, have focused on the 'unimaginative' nature of such borrowings, and the 'methodological thinness' of such approaches. These criticisms, while not entirely unfounded, have also been exaggerated. Indian Courts have by and large continued to accept the 'universalist' model of constitutional adjudication, and have, in general, supported judicial activism. In fact, a recent 'conservative' judge has asserted the importance of being "*restraintivist in economic measures, though activist in cases of civil liberties.*"[57]

As judicial activism increases, though, Indian courts have increasingly shown signs of being unable to cope. The Indian judiciary is one of the most overloaded systems in the world and the large number of pending cases has meant that the courts routinely take generations in deciding cases[58]. In fact, judges have now increasingly sought to render *locus standi* procedures stricter, detracting from the language of the Constitution.

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55 For the extent to which Indian Courts have relied on comparative law, *see* generally Adam Smith, *Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case,* 24 BERK. J. INT'L L. 218 (2006).

56 GOBIND DAS, SUPREME COURT: IN QUEST OF AN IDENTITY 1 (1987). Quoted in Arun Thiruvengadam, *In Pursuit of the Common Illumination of Our House: Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia,* 2 INDIAN JOURNAL OF CONST'L LAW 67, 79 (2009).

57 Justice Markandey Katju, *Judicial Review in the US and UK, A Comparison,* Unpublished, copy on file with the author.

58 Scott Shackelford, *In the Name of Efficiency: The Role of Lok Adalats in the Indian Justice System and Power Infrastructure,* available at http://baseswiki.org/w/images/en/e/ec/SHACKLEFORD_Indian_Lok_Adats.pdf.

Nepal: New Constitutions, New Structures

The former kingdom of Nepal, in contrast to India and Singapore, is going through a turbulent time in its history. A small Himalayan country with a population of 27,000,000, the vast majority of its population is Hindu, though Buddhists and Muslims constitute substantial minorities. In contrast to India and Singapore, Nepal has never been formally colonized since its inception in 1768, though being virtually a protectorate of the British before India's independence undoubtedly had some influence on its social and political structure.[59] However, as Siera Tamang points out, the state and bureaucratic framework that emerged in Nepal have a lesser degree of the colonial bureaucracy that is a feature of other countries in the subcontinent.[60]

As an absolute monarchy until recently, Nepal has had an interesting constitutional history. Currently governed by an interim Constitution as the drafting committee struggles with reinventing the nation as a secular democracy, it has had four (or five) Constitutional texts since the 1850s. In some ways, Nepal demonstrates both the virtues and the pitfalls of increasing constitutionalisation and borrowings on an autochthonous system, demonstrating how attempts need to be made to make constitutional structures relevant to local socio-cultural patterns if these are to sustain themselves. The first 'constitutional' text in the country, the *Muluki Ain* of 1853, can be

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59 *See,* for instance P BLAKIE ET AL, NEPAL IN CRISIS: GROWTH AND STAGNATION AT THE PERIPHERY (1992); *See* M. C. REGMI, A STUDY IN NEPALI ECONOMIC HISTORY 201 (1988).

60 Siera Tamang, *Disembedding the Sexual/Social Contract: Citizenship and Gender Studies in Nepal:* 6 JOUR. OF CITIZENSHIP STUD. 202 (2002).

considered more in the nature of a civil, political and social code[61] in accordance with traditional Hindu structures where no distinction was effected between religion and the state. Indian independence, though, saw Nepal's first attempt at formulating a modern constitution, albeit an undemocratic one.[62] This Constitution was rapidly succeeded by an interim constitution of 1951, which has been described as "*a hastily prepared adaptation of the Indian Constitution, with no thought to the lack of prerequisites...which gave meaning to the Indian document*",[63] in turn succeeded by the Constitution of 1959, the Constitution of 1962 which first established Nepal as a Hindu state, and finally, the Constitution of 1990.

The Constitution of 1990 was Nepal's first consensus-based constitution.[64] This text demonstrated heavy trans-judicial borrowing, influenced as it is from the Indian Constitution. Included within these Constitutions were a set of fundamental rights[65], the adoption of a constitutional monarchy taking on from the British model of a King-in Parliament, and a limited recognition (as Nepal continued to officially be a Hindu state) of Nepal's status as a multi-ethnic and multi-lingual state.[66] Despite initial successes, the death of the hugely popular King Birendra in 2001 and the increasingly authoritarian rule of King

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61 JOHN WHELPTON, KINGS, SOLDIERS, AND PRIESTS: NEPALESE POLITICS 1830-57 23 (1991).

62 Mara Malagodi, *Constitutional Developments in a Himalayan Kingdom: The Experience of Nepal,* (2010, SOAS Law School, Unpublished, on file with the Author).

63 BHUVAN JOSHI & LEO ROSE, DEMOCRATIC INNOVATIONS IN NEPAL 488 (2002).

64 Malagodi, *supra* n. 62.

65 With the most significant being Article 11, which guaranteed the right to equality and equal protection, and Article 88, which granted the Nepalese government the right to judicial review. *Nepal Adhirajyako Sanvidhan,* 2040 B.S. (Constitution of Nepal, 1990 AD).

66 *Id.*, Article 4.

Gyanendra led to a second revolution in 2008, which deposed the monarchy.

The current interim Constitution is a step away from the earlier Constitutions, seeking to ensure 'consensus and stability' in a multicultural state, rather than asserting and privileging earlier identities.[67] Nepal is officially a 'sovereign, secular, and fully democratic state'.[68] The fundamental rights chapter guarantees the 'right to freedom',[69] the 'right to equality,[70] and the rights of women[71], and officially allows for a 'right to constitutional remedies,' the language of which is uncannily similar to that of the Indian Constitution. While the drafting process continues to seek annual (and bi-annual) extensions,[72] the interim Constitution is increasingly filling in as a national constitution.

The Supreme Court of Nepal, established under the 1959 Constitution, has played an interesting role during this crisis, veering towards conservatism and judicial restraint at some points, tending towards liberalism at others.[73] As Malagodi suggests, the Supreme Court has been slightly activist in regard to women's rights,[74] though it

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67 Malagodi, *supra* n. 62.at 22.

68 Preamble, Interim Constitution of Nepal, http://www.worldstatesmen.org/Nepal_Interim_Constitution2007.pdf.

69 *Id.*, art. 12.

70 *Id.*, art. 13.

71 *Id.*, art. 25.

72 Kiran Chapagain, *Nepal Averts Crisis over Constitutional Deadline,* N.Y. TIMES, May 29, 2011.

73 Malagodi, *supra* n. 62.

74 *Chandra Bajracharya* v. *Secretariat of Parliament,* NKP 2053 (1996 AD) 537 (A case dealing with the rights of women in marriage and divorce); *Meera Dhungana* v. *Ministry of Law and Justice,* NKP 2052 (1995 AD) (A case dealing with Inheritance and the right of daughters to inherit property under Hindu law). *See*

has seen itself as constrained, until the promulgation of the interim constitution, by the overarching Hindu nature of the 1990 Constitution.[75] By and large, its history has been one of judicial restraint.

Post-2007 developments, though, seem to demonstrate a more assertive Supreme Court which attempts to deal with the governance deficit in Nepal. As this happens, however, worries emerge on whether the Court's strategy can backfire, in fact, commentators[76] have commented on whether the Supreme Court should wait until it becomes more powerful, entrusting potentially divisive political issues to a Constitutional Court in the meantime.

Criminalising Sodomy in Asian Countries: 'Traditional Culture' or 'Colonial Imposition'

This section takes off from the earlier understanding of the three Constitutions and legal systems to examine the legal prohibitions against homosexuality in the three countries. In doing so, I first seek to give a flavour of how homosexual relations have traditionally been perceived in these jurisdictions which gives one an interesting perspective into how colonial rule has intersected with traditional values. I look at the historical context of Section 377 (in India and Singapore) and Section 377-A in Singapore, as well as looking at the 'offences against marriage' section in the Nepalese *Muluki Ain*. This would help us understand how the *idea* of legal prohibition on sodomy

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Sapana Pradhan Mulla v. *Ministry of Law and Justice*(Unpublished, a copy on file with the author).

75 Hence a number of petitions dealing with marital rape, the rights of prostitutes, conversion rights, etc were rejected.

76 David Pimentel, *Judicial Independence at the Crossroads: Grappling with Ideology and Independence in the New Nepali Constitution,* 5 INDIAN JOURNAL OF CONST'L LAW 77 (2011).

(and, for that matter, the creation of the 'homosexual' as a distinct entity as beyond the pale of society) is a Western, rather than 'indigenous' creation. This strikes a blow for those who argue that public morality and 'traditional' values are essential reasons for criminalizing sodomy.

This is not, however, to suggest that the problem is not cultural since Section 377's colonial imposition only poses an academic counter to arguing that a prohibition on homosexuality is not traditional- societies and communities construct their own ideas of tradition. Arvind Narrain's linkage of the prohibition against homosexual intercourse and the larger Hindu nationalist project of nation-building is significant; reams have been written about how far the Hindu right conception of gender and nationality is interlinked[77]. Demonizing differences, especially religious and sexual, form a major part of this concept of nationhood. Further, an examination of *how* homosexuality has historically been viewed is significant.

Asian Cultures, Homosexual Relations, and Gendered Narratives

There exists substantial information to prove that homosexuality, if not looked upon with approval, was tolerated in India, Singapore, and the region that subsequently became Nepal. India has had a historical tradition of different sexualities which have by and large been accepted in society[78]- indeed, it is home to the largest

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77 *See* Tanika Sarkar, *Birth of A Goddess: Vande Mataram, Ananda Math, and Hindu Nationhood,* 41 (37) ECON. & POL. WEEKLY, Sept 16, 2006.

78 Alok Gupta, *Section 377 and the Dignity of Indian Homosexuals* 41 ECON. & POL. WEEKLY 4815, 4816 (2006); Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM97, 120-122 (2002), Ratna Kapur, *Post-Colonial Erotic Disruptions: Legal Narratives of Culture, Sex and Nationalityin India,* 10 COLUM. J. GENDER & L.333, 370 (2001).*See* Judith Avery Faucette, *Human Rights in Context: The*

population of transsexuals in the world![79] This kind of understanding detracts from arguments of a cultural and socio-legal prohibition of homosexuality- under the Manusmriti, which provides a 'Hindu moral and legal code', a duty of a man was to bear children and not to stray- homosexual relations were not explicitly mentioned. Contrary to those who believe that a 'Hindu' tolerance and libertarianism found its collapse under Muslim rule in India[80], there is substantial evidence of homosexual love in seminal texts of Muslim India, whether literary[81], or biographical[82].

The Nepalese example is illustrative- Sunil Babu Pant, the 'founder' of a modern gay movement in Nepal, brings out that the classical difficulty with regard to gay rights has not been a cultural opposition, but a failure to comprehend what the term 'homosexual' means- there exists no term in Nepali for 'gay' as we understand it.[83] This should not be interpreted as a way of buttressing the 'homosexuality-is-contrary-to-our-heritage' argument that rightwing conservatives make in these jurisdictions, but rather, as an assertion

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Lessons of Section 377 Challenges for Western Gay Rights Legal Refomers in the Developing World, 13 J. GENDER RACE & JUST.210, 212 (2010).

79 *Hijras*, or intersex people, are considered to be auspicious- as a result, there is a cultural significance to these communities in both India and Nepal.

80 Aniruddha Dutta, *Section 377 and the Retrospective Consolidation of Homophilia,* in LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW 162-174 (Arvind Narrain and Alok Gupta ed. 2010).

81 The poems of Shah Hussain, a 15th century mystic in Punjab, to take merely one example, are replete with his love for a Hindu Brahmin boy, hardly a love one could express in countries where any form of homosexual relations was looked upon in contempt.

82 The love of Sultan Mahmood of Ghazni for his slave Ayaz has been dealt with in various biographies of the emperor, some even commissioned when he was reigning. The physical attributes of Ayaz, described in these texts, make it clear that there is a significant homosexual undertone to the poetry.

83 Richard Ammon, *Gay Nepal: A Struggle Against History,* (2003) Unpublished, Copy on file with the author.

that, despite the existence of *homosexuality,* society did not consider the 'homosexual' as a distinct figure. The Metis of Nepal were considered to be a third gender, considered by some to be a sub-continental example of the global tradition of bedarche. In an analysis exclusively for Nepal, though equally significant for India as well, Bochenek and Knight[84] suggest that these communities have been given significant religious sanction- the concept of Shiva as Ardhanaarishva (half-man, half-woman), and Arjuna's experiences in the Mahabharata point to their religious importance.

There exists ample literature to prove that China's population (from which Singapore derives much of its famed 'Asian values'- considered homosexuality to be an aberration, but not a particularly deviant one. In fact, the Chinese term for oral sex, referenced without demonstrable contempt, is 'playing the flute'- hardly a pejorative term![85] A historical study of homosexuality in China demonstrates various literary references[86]- and the condemnation of homosexuality in contemporary China as a 'Western, capitalist phenomenon' reeks excessively of the Cultural Revolution. The legal prohibition in both Singapore and India hence, appears largely to be a colonial imposition.

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84 Michael Bochenek and Kyle Knight, *Establishing a Third Gender Category in Nepal: Process and Prognosis,* (Forthcoming Publication; Copy on file with the author).

85 Lawrence Wai-TangLeong, *Singapore,* in A SOCIO-LEGAL CONTROL OF HOMOSEXUALITY: MULTI-LEGAL PERSPECTIVES (Donald .J. West and Richard Green ed 1987).

86 Fang-Fu Ruan, *China,* 57-64, in A SOCIO-LEGAL CONTROL OF HOMOSEXUALITY: MULTI-LEGAL PERSPECTIVES (J. West and Richard Green ed. 1987).

The Long Life of Section 377 (and its Cognates) in India and Singapore: Colonial Transplantations?

Section 377 (in the Indian and Singapore Penal Code) penalises *Unnatural Offences*- imposing a maximum penalty for life, along with a fine, for any sexual intercourse *against the order of nature.*[87] The language of the section was ambiguous, as the scope of the words 'unnatural offences' were left to be defined by the Courts- as we shall see later, *any* form of intercourse (heterosexual or homosexual) came within its ambit other than male-female vaginal intercourse. This lack of specificity was not an oversight- as might appear at first instance, but rather was intended by the drafters of the code- who were of the opinion that such a "revolting subject" was too abominable to even be mentioned by name.[88]

Ironically for those in India and Singapore who have considered the legalization of homosexuality to be an assault on Asian 'traditional' values, Section 377 which criminalizes 'unnatural intercourse' in India (and did in Singapore until 2007) is itself a Western imposition. The present-day Singapore Penal Code- which criminalizes homosexuality- owes its origins directly to the Indian Penal Code, 1860, a colonial legislation relying almost completely on contemporaneous English law. It is not perhaps wholly irrelevant to

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87 The Section reads as follows: "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal shall be punished with imprisonment for life, or which imprisonment of either description for a term which: may extend for 10 years, and shall be liable to fine". The text was identical in Singapore, though now repealed.

88 *See* arguments for the prosecution in *Naz Foundation* v. *Government of NCT of Delhi,* which are available online at http://www.lawyerscollective.org/hiv-aids/anti-sodomy/18sept; THOMAS MACAULAY, THE WORKS OF LORD MACAULAY: SPEECHES, WRITINGS AND MISCELLANEOUS OPINIONS144 (Vol. 11, 1898).

this paper that the person in charge of drafting the Indian Penal code had, on an earlier occasion, announced his intention to create a set of persons nominally Indian, but *"English in taste, in opinions, in morals, and in intellect"*[89], nor that the notion of the 'civilising mission', originally propagated by France, was eagerly lapped up by all colonial powers during this period.[90]

Importantly, the colonies were considered to be 'passive laboratories' for the imposition of colonial values- the authoritarian imperial regime enabling this by discouraging any dialogues with local elites on these issues. The utilitarian movement in Britain led by Bentham and Mill, which sought to codify law[91] was also significant in its adoption, of laws such as the Buggery Act, 1533- during the Victorian era in England[92] where (as Foucault argues)[93] increasing knowledge and information about 'a science of sexuality' as it then developed; led to greater awareness and also a greater monitoring of sexual relations.

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89 With respect to the educational reforms he proposed.

90 This necessitated the imposition, not only of a set of foreign governors, but an entirely different legal and moral system. This also ties up with the Foucaultian notion of the desire for wider control over the lives of people by the State, which found a reflection in colonies across the world, whether through the propagation of the Criminal Tribes Act, 1872 in India, or through the criminalisation of sodomy.

91 Douglas Sanders, *Section 377: The Unnatural Afterlife of British Colonialism* (2000), available at www.fridae.com/download/douglas_sanders_377_unnatural_afterlife.pdf.

92 Between the period 1800-1900, an average of 90 men a year were imprisoned in England for a variety of same-sex crimes- including 'indecent assault', 'sodomy', 'solicitation' and other 'unnatural offences' *Id.*; H.G. COCKS, HOMOSEXUAL DESIRE IN THE 19TH AND 20TH CENTURY (2003).

93 Michel Foucault, *We "Other Victorians";* in THE FOUCAULT READER (Paul Rabinow, ed. 2000).

The use of the term 'unnatural offences' was not new, however. Statutes in Europe had referred to homosexuality as "*unchastity contrary to nature*" as early as 1532.[94] This notion had its origins in the ecclesiastical belief that all 'natural" sexual intercourse was to aim at procreation. Hence, carried to its logical end, the section would prohibit any sexual intercourse that had no possibility of resulting in procreation.[95] By the broadest definition of the section, even sexual intercourse between two consenting heterosexuals, one of which were infertile, would be struck by the law! However, its meaning has been limited to include anal intercourse, fellatio[96] and bestiality,[97] whether homosexual or heterosexual. This question assumed significance in Singapore in the *Anis Abdullah* case[98] where a policeman was convicted of having oral sex (while on duty) with an underage girl, though the *act* of oral sex, rather than the age of the girl, was instrumental in the conviction of the policeman. This led to an outcry, and Section 377 was ultimately abolished in Singapore after heated debate in parliament.

This, however, was little cause for celebration for the LGBT community in Singapore. An additional section, introduced as a

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94 *Constitutio Criminalis Carolina, 1532* promulgated by Charles V of the Holy Roman Empire, DAVID FGREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY 303 (1988).

95 Linnet Shing, *Saying No: Section 377 and Section 377-A of the Penal Code,* 2003 SING. J.LEGAL STUD. 209 (2003).

96 Though whether oral sex was within the ambit of Section 377 was relatively controversial, and proved an important reason for the repeal of the law in October 2007, it was nevertheless upheld in a number of cases- including *Khanuv. King-Emperor,* AIR 1925 Sind. 286, *Kanagasuntharam* v. *P.P.* [1992] 1 Sing. L.R. 81 (C.A), *P.P.* v. *Ong Li Xia and Yeo Kim Han*(July 24 2000), C.C. No. 50 of 2000 (H.C.).

97 *P.P.* v. *Kwan Kwong Weng*, [1997],1 Sing. L.R. 697.

98 *Anis Abdullah* v. *Attorney-General*. As a lower Court judgment, the case has not been reported in any official journal, though *see* BADEN 120, *infra*.

consequence of the Labouchere amendment in 1885 in the United Kingdom, was codified in Singaporean law in 1938. Now termed Section 377A, this provision further criminalizes the commission or attempt to commit '*gross indecency*'. Taking a cue from Macaulay's justification almost a century before, no attempt was made to explain *what* gross indecency would mean, though it was understood to include homosexual relations between two men, whether in public or in private. This law, ironically, was allowed to stand a debate which shall be covered extensively later.

In both India and Singapore, though, there have been few instances of the law actually being enforced for consensual sodomy. The section is mainly been used in case of rape, heterosexual oral sex,[99] and incest. In India, for example, only about 4 cases have dealt with sodomy in 150 years. Similarly, in Singapore, there has been acknowledgment that the law (Section 377-A) should continue to be unenforced,[100] though information noted in 1997 suggests that this is actually an oversimplification (over 67 *convictions* were recognized in a three year period)[101] sentences of three-six months have been common for such offences.

Being 'unenforced', however, does not necessarily mean that the law benignly lies in the statute books. As Arvind Narrain and Gautam Bhan point out, the impact of these legislations is felt outside the court-rooms[102], in the numerous ways in which people are denied their dignity, in the ways in which physical and social violence operates against LGBT people. Similarly, in Singapore, Thio Li-Ann

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99 Including the famous *Anis Abdullah* case.

100 Thio Li-Ann, *infra* n. 103.

101 *Supra* n. 99, 131-32.

102 GAUTAM BHAN AND ARVIND NARRAIN, BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA 79-81 (2008).

argues that the reason why Section 377-A should be retained is to ensure that "homosexuals and their relationships" are not treated at par with heterosexual people.[103] The Prime Minister himself has said retaining the law without enforcing it would allow homosexuals to 'live quiet lives' while preventing activism as it emerged in the West.[104] Ironically, this goes against the Singaporean Constitution's insistence on equality, equal protection, and freedom of expression. Furthermore, police entrapment is routine[105] and takes various forms. In some cases, people have been trapped by police officers, dressed in 'cruising attire', after sexual contact has taken place.[106] In India, there is evidence of police entrapment not taking the form of prosecution, but letting people off after they have been forced (with varying degrees of violence) to perform sexual favours for them.[107] This, hence, is an assault on the rights of gay people in many ways.

A recognition that there is some degree of 'consent'[108] in such entrapments by the Singapore judiciary, though reducing the severity of the sentence, reinforced the notion of homosexual citizens as third class citizens- the criminal 'act' reinforces the conception of a criminal populace- similar to legislation against transgender people and

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103 Speech of M.P. Thio Li-Ann. Sing, *Parliamentary Debates,* vol. 83, col. 2242 (Oct 23, 2007).

104 Sing, *Parliamentary Debates,* vol. 83, col. 2469-72 (23rd October 2007); Yvonne C.K. Lee, *'Don't ever take a Fence Down Unless You Know The Reason Why It Was Put Up "– Singapore Communitarianism and the Case for Preserving 377A,* SING. J. LEGAL STUD. 347, 351 (2008).

105 Thio Li-Ann, *supra* n. 103 at 132.

106 *Id.*

107 Alok Gupta, *Section 377 and the Dignity of Indian Homosexuals,* ECON. AND POL. WEEKLY, 4815-4823, Nov 18, 2006.

108 As in the case of *Tan Boon Hok* v. *PP, Singapore,* (1994) 2 SLR 150, where the punishment was reduced to a fine.

'criminal tribes' that was enforced by the British in India during the highlight of the colonial 'civilising mission'.

'Indigenous' Yet Borrowed: The Nepalese Experience

There is little literature on Nepal as distinct from India in the pre-colonial era. In some ways, the wider social and cultural system in the country was analogous to India- its giant neighbour to the south. As a Hindu country, the cultural values can largely be considered the same. The indigenous traditions of 'Hijras' and 'Metis' (transgender men) has by and large been accepted in society- there was little doubt about their place in society. Similarly, Western Nepal has a tradition of 'maarunis'[109]- men who dance in women's clothes and presumably behave in ways different from 'conventional' heterosexuality. Tibetan culture, which has influenced Nepal, also has traditions of same-sex love, as does the indigenous custom of *Mits* and *Mitnis,* referring to sexualized 'best friends' widely accepted in Nepali society.[110]

It would be a mistake, however, to characterize this situation as similar to the international gay rights movement. There was acceptance, certainly, of queer sexualities, but from a distance- there was no concept of equal rights similar to what prevails in the international human rights movement. With increasing tourism in Nepal and its growing interaction with the global human rights regime, this equilibrium is coming to a head- two contradictory movements are emerging. The first seeks to incorporate Nepali traditions within the larger framework of 'equal rights', and has culminated in the Court decision to which reference will be made

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109 Charles Haviland, *Crossing Sexual Boundaries in Nepal,* BBC NEWS, Jan 26 2005, available at http://news.bbc.co.uk/2/hi/south_asia/4202893.stm.

110 Ammon, *supra* n. 83.

subsequently, while the second has led to increased violence against LGBT groups.[111]

The prohibition on homosexuality under Nepali law is similar, in a sense to the Indian law- referring to 'unnatural' intercourse[112]. The scope of the term, however, is unclear- while the Indian preparatory texts can be used to supply context for Section 377, the *Muluki Ain* refers to unnatural intercourse immediately after proscribing any "sex with female cattle" in a Chapter that deals with 'bestiality'![113] The punishment for this unnatural intercourse is "one year, and a fine not exceeding Rs. 5000".[114]

Cognate with the Indian and Singaporean experience, the number of prosecutions under the law, if any, is minimal- the researcher was unable to find any evidence of full-fledged prosecutions that had gone to higher courts. This, however, does not mean that the law is toothless. There is evidence of the almost routine beating up of gay people, metis, and Hijras.[115] Assault, violence with batons, cigarette burns, rape, and sexual harassment has been common.[116] Interestingly, the police and the law enforcement authorities used terms like "*curse on society*" and "*pollutants*" during an incident in Lucknow.[117] Similarly, a 'gay bar' catering to tourists was raided, and

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111 *See* Bhandari *infra.* 118, 119.

112 Nepali *Muluki Ain* 2020, Chapter 16, Section 1, Copy on file with the author

113 *Id.*

114 Nepali *Muluki Ain* 2020, Chapter 16, Section 4.

115 *See Nepal: Police on Sexual Cleansing Drive,* HRW 12 Jan. 2006, available at http://news.bbc.co.uk/go/pr/fr/-/2/hi/south_asia/4610772.stm.

116 *Sexual Cleansing Continues in Nepal: 26 New Arrests.* Blue Diamond Society, March 17, 2006, available at www.bds.co.np; Sudeshna Sarkar, *Nepal Government Begins Crackdown (Again) on Gays,* HINDUSTAN TIMES, Delhi, Sept 14, 2006.

117 Saleem Kidwai, *Aliens in Lucknow,* NEW INTERNATIONALIST, available at http://newint.org/features/2002/06/01/aliens/.

Nepali people in the bar was subject to verbal and physical abuse.[118] This demonstrates how strong the bias against homosexuality has become in the region. Reports have also started coming in from rural parts of Nepal, which have hitherto maintained indigenous traditions, of a movement against those who express their sexuality in varied ways.[119] With the political instability and growth of 'Hindu fundamentalism' in Nepal, as in India, traditional structures seem to be giving way extremely fast. The question then arises- what will follow?

These facts have seen a concerted attempt by LGBT activists in all three countries to use guaranteed Constitutional rights to secure a rights-based paradigm. In all these instances, activists have relied on international human rights texts and comparative laws. The success of these, however, has differed, leading to the next aspect of the paper.

Gay Rights, Constitutional Texts, and the Struggle for Legitimacy: Different Countries, Different Methodologies

Typically, constitutions provide for a set of rights without specifying rights-holders. As these values (usually representing a substantial break with the past) are applied to pre-Constitutional legislations, or even post-Constitutional legislations, marginalised communities attempt to use these as a means of 'reclaiming constitutional texts', attempting to secure these rights for themselves.

While most constitutional struggles happen in courts, there has been criticism when considering courts to be the sole sites where

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[118] For a detailed, though depressing, account of all the brutalities that are faced by LGBT people, *see* Raja Ram Bhandari, *Documentation of Human Rights Abuse and Media Reports: A Review,* available at http://www.bds.org.np/publications/Human%20rights%20violations%20and%20media%20report_Review.pdf.

[119] *Id.*

important 'rights-based' constitutional questions are dealt with. Leckey, for instance, argues that Constitutions are not necessarily 'rule-based' texts, and that the law must be understood as a 'tool for sustaining or changing aspects of social life'.[120] He believes, in fact, that the executive is far more powerful in this regard.[121] In countries where the judiciary has largely been subservient to the wills of an elected parliament, there is little to be gained from expecting the judiciary to adopt a pro-rights stand and move away from earlier commitments that have already been made. In such countries, the narratives of Constitutional values may be put to better use in other decision-making points. However, as a constitutional challenge is currently sub-judice in the Singapore Supreme Court, the facts of that case shall also be discussed.

As the struggle for the gay rights movement grew in all three countries, innovative use was sought to be made of Constitutions and the forum where Constitutions intersect with politics- the Parliament. In India, the challenge came through the judiciary- the *Naz Foundation* case (with its chequered history) represented the first attempt that was made to deal with these issues. In Singapore, the abolition of Section 377 as a result of *Anis Abdullah* saw a major attempt made to support the elimination of Section 377-A- while the judiciary did not play a major role in this regard, a strong campaign was made by a legislator to remove the section through a massive set of petitions. In Nepal, attempts had chiefly been made by an NGO that was forced, due to lack of awareness of the issue, to masquerade as an organization working for 'male sexual health'.

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120 Robert Leckey, *Thick Instrumentalism and Comparative Constitutionalism: The Case of Gay Rights,* 40 COLUM. HUM. RTS. L. REV. 426. 552 (2009).

121 *Id.* at 453.

This paper, hence, will examine the different strategies used in India, Nepal, and Singapore- and their reliance on Constitutional texts and values- whether effected in the courts, or in parliaments and general political sites. In doing so, I will try to point out that the debates on the issue- in courts or parliament- take off not strictly from a legal point, but from the intersections between law and politics- the way the Constitutional *texts* are imagined through the creation of narratives play out in the way the polity and judiciary decide on these contested issues.

Singapore: Activism and Parliamentary Discussions

As mentioned before, Singapore has had to deal with two contradictory movements in its polity- the distinction between its "haven of modernity" image, assiduously cultivated by its political elite, along with a strongly articulated notion of the Western-ness of human rights. This has been reflected in its debates on LGBT rights- especially with regard to the repeal of Section 377-A. Ironically, despite Singapore's strong stand on homosexuality, it is also the first country in this analysis where a 'modern' LGBT-rights movement emerged.

Batocabe identifies a subtle distinction that had emerged between the indigenous, flamboyant 'lady-man' traditions of 'queer' sexuality and Singapore's Western-educated 'gay' community in the 1970s.[122] This cleavage- with economic, educational and cultural reasons- continued until the police started actively persecuting what in the Western world would be called 'gay hangouts', along with

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[122] Jan Wendell Castilla Batocabe, *Where the Bakla Fight Back: Looking at how the Collective Identity of the LGBT Movement in the Philippines and Singapore is Created and Used,* available at http://scholarbank.nus.sg/bitstream/handle/10635/29540/Batocabe JWC.pdf?sequence=1 at 36.

censorship.[123] Ironically, thus, the state *assisted* in the creation of LGBT activist groups- the lack of queer spaces ended up not only forcing people out of the closet, but also reexamining the way their intersections with law operated.[124] The first group, called People Like Us (PLU), was created in 1993, though attempts to register this were rejected twice.[125] Over the next few years, a profusion of such organizations led to creation of a substantial movement in favour of repealing Section 377-A, which received an unexpected fillip after the Anis Abdullah case.

The *Anis Abdullah* case marked a breakthrough in the debate on Section 377-A, as the matter was debated in Parliament for the first time.[126] Questions were posed on the "changed societal norms and values" and the need for reviewing or amending the legislation.[127] The spokesperson for the government, however, confined her reply to a promised 'review' and dealt with proposals that sought an amendment of Section 377, ignoring the question of Section 377-A. Subsequent arguments in Parliament, then, dealt with the 'victimless' nature of the crime, the uncertain nature of prosecutions- there was no evidence that could categorically prove that all those who had been caught were convicted, and the gender-specific nature of Section 377-A.[128] In response, the government suggested that the gender-specific nature was not unwarranted because apparently "men were usually the aggressive

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123 *Id.*

124 R.C. Heng. *Tiptoe Out of the Closet: The Before and After of the Increasingly Visible Gay Community in Singapore*in GAY AND LESBIAN ASIA: CULTURE, IDENTITY, COMMUNITY 81-98 (G. Sullivan and P. Jackson ed, 2001).

125 BADEN OFFORD, HOMOSEXUAL RIGHTS AS HUMAN RIGHTS: ACTIVISM IN INDONESIA, SINGAPORE AND AUSTRALIA 163-65 (2003).

126 *The Anis Abdullah Redux* available at http://www.yawningbread.org/arch_2005/yax-458.htm.

127 *Id.*

128 *Id. See Parliamentary Debates*, *supra* n. 103,

parties" which is an outdated concept that explains why rape in the Indian and Singapore Penal Code is defined solely from a man-raping-woman perspective.[129]

In 2007, when Section 377 was repealed, there was a further discussion- now that the naturalness of the legislation was no longer in dispute. A spirited argument took place in Parliament in this regard which, interestingly, relied on legal claims as well as political ones. Arguing 'as a lawyer', an MP argued that the law was neither clear, consistent, or concrete, and that keeping a 'toothless' law on the statute-books had little significance except to devalue citizens who happened to not be entirely heterosexual. Reference was also made to its discriminatory provisions that, for instance, it did not deal with women.

This, however, came into conflict with Singapore's Asian Values scheme, to which reference has already been made. To the argument that the law provided moral support for family values and the heterosexual life, the example of adultery and marital rape was given. Thio Li-Ann, a parliamentarian who had expressed her strong condemnation of the "homosexual agenda[130]", argued on constitutional as well as social grounds for its retention:[131] Singapore only allowed for 'racial and religious' minorities, not sexual minorities. Furthermore, as a classification of 'conduct', not of 'persons', there could be no

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[129] *See* Section376 of both penal codes. Importantly, the man referred to in the section is not the woman's husband- the Indian Penal Code has, despite amendments made in 2013, still not recognized the existence of marital rape.

[130] During the debate, she also referred to a medical justification of the law- anal sex, being a "use of the anus to which it is not suited", can lead to a number of health conditions.

[131] *Section 377-A Serves Public Morality: Thio Li-Ann*, Transcript of her Parliamentary Speech, Oct 23, 2007, http://theonlinecitizen.com/2007/10/377a-serves-public-morality-nmp-thio-li-ann/. *See Parliamentary Debates, supra* n. 93.

discrimination- as she stated. "*not all human conduct can be considered equally worthy*".

The anomaly with the legalisation of Section 377, making consensual anal sex legal amongst straight people is sought to be justified by her claim that the same standards do not apply to *heterosexual* anal sex, owing to the fact that such intercourse is not as frequent among straight people, and that straight people are less promiscuous than gay people![132] The criminalisation of such acts, thus, acts as a deterrent to the practice of sodomy. The link between higher rates of sexually-transmitted diseases and homosexuality is seen as a *cause,* not an *effect* of criminalisation, and a half-hearted attempt is made to prove homosexuals mentally abnormal, on the basis of hate mail received by her and some of her colleagues.[133] Her argument, hence, is similar to the majority of all parliamentarians who debated on the issue: Equality, a relative term, depends on the values and ethics of a particular society. A number of social surveys were referred to to demonstrate Singaporean disapproval of homosexuality.[134]While these may eventually change, until they do, "gay citizens should just put up with the discrimination they face and hope things would get better".[135]

The argument of conservatism is risible- the debates were happening in the backdrop of legislation that had been passed to allow any other form of what had hitherto been called 'unnatural' sex.[136]

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132 Speech by Professor Thio in Parliament, 2007, available at http://theonlinecitizen.com/2007/10/23/377a-serves-public-morality-nmp-thio-li-ann/#more-556.

133 *Id.*

134 *See* Wai-Tang, *supra* n. 85, 135-138 for a fuller account of the attitudes against homosexuality.

135 *When You Should Vote PAP,* April 13, 2011, available at http://yawningbread.wordpress.com/2011/03/16/when-you-should-vote-pap/.

136 *Id.*

Likewise, the idea of 'public opinion' being a valid ground for retaining the law falls short of being entirely convincing- as was pointed out, a large amount of the populace was ignorant of the ramifications of Section 377-A, and of the burdens that were placed on gay men as a result of it[137]. On a more fundamental level, the very idea of entrenching a bill of rights in constitutions is to provide for a counter majoritarian security for minority groups. By arbitrarily restricting the scope of the 'equality' provision in its interpretation, certain MPs did their own constitution a disservice.

What is most curious about the Singaporean example is its selective reading of human rights texts and foreign precedents. Often derided as 'rampant patriarchalism'[138], Thio Li-Ann brings out certain essential aspects of the Singaporean Human Rights regime which she classifies as closer to the Latin American 'dignitarian' model when compared to the Western model- an understanding that takes off from Glendon's examination of whether human rights could actually be considered to be universal.[139] These, she argues, derive from pragmatism- as a small country, change in the field of human rights will be paced *andante* and spoken *sotto voce*[140] to prevent the collapse of the country. While not ignoring the polity and judiciary's role in the securing of socio-economic rights, which has been praiseworthy,[141] Singapore remains one of the last countries where caning is allowed- and that too for minor offences.

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137 *See* Baey Yam Keng's argument, *Id.*

138 Anthony Woodwiss, *Singapore and the Possibility of Enforceable Benevolence,* in GLOBALISATION, HUMAN RIGHTS, AND LABOUR LAW IN PACIFIC ASIA 208 (1998).

139 Thio Li-Ann, *supra* n. 25, at 43.

140 *Id*, at 91.

141 *See* generally Simon Tay, *Human Rights, Culture, and the Singapore Example,* 41 MCGILL L. J. 743 (1995-96).

Singapore's legal system also displays a strong deference to the legislature, which is coupled by 'legislative authoritarianism'- in cases where the judiciary *has* taken an authoritative stand, the legislature has merely amended legislation to reach the position the judiciary considered unconstitutional.[142] The use of transnational sources is usually to posit 'anti-models' rather than to demonstrate respect for foreign constitutional law. As a country which has a strong common-law model of adjudication, foreign precedents are used liberally, including in all cases that have dealt with Section 377[143] where Indian cases have been critically engaged with in the creation of a 'traditionally' Singaporean code of morality![144] It remains to be seen, however, whether this approach will continue to be taken after the *Naz* decision- thereby providing a valuable point of departure from earlier cases.

There may be an occasion to test this soon. In March 2010, two men were found having oral sex in the toilet of a shopping centre. In a manner that reminds one of *Lawrence,* the men were caught when a policeman climbed onto a toilet bowl to peer into what was happening in an adjoining cubicle.[145] Arrested under Section 377-A, the policy of the government which does not allow Section 377-A to be used "*unless*

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142 *See*, for instance, *Chang SuanTze* v. *Minister for Home Affairs,* 1 SING. L. REV. 132 (1988). For a fuller understanding of how this plays out, refer to Thio Li-Ann, *Beyond the Four Walls In an age of Trans-national Judicial Conversations: Civil Liberties, Rights Theories, and Constitutional Adjudication in Malaysia and Singapore.* 19 COLUM. J. INT'L LAW 430, 451-55 (2006).

143 Cases like *Khanu* v. *Emperor,* AIR 1925 Sind. 286, *Nowshirwan* v. *Emperor,* AIR 1934 Sind. 206, *Government* v. *Bapoji Bhatt,*(1884 (7) Mysore L R 280) have all been used in Singapore's judiciary.

144 All earlier proceedings on homosexuality in Singapore have engaged with, and followed the precedent of, all the cases that were cited above.

145 *Singapore Man Fined S$3000 for Sex in Public Toilet,* Nov 10, 2010 available at http://www.fridae.asia/newsfeatures/2010/11/10/10428.singapore-man-fined-s-3000-for-oral-sex-in-public-toilet.

dealing with other offences"[146] meant that the prosecution carried on under Section 284 of the Singapore Penal Code, which forbids obscenity in public places. As a result of this, both men were fined S$ 3000[147]. A constitutional challenge was nevertheless mounted against Section 377-A, and a case[148] commenced.

The High Court, however, dismissed the matter out of hand-holding that, as the parties were not being charged under Section 377-A, they lacked standing to discuss the issue. Not content with this decision, one of the affected parties filed another case in the Constitutional Court, relying on various comparative texts.[149] In the petition, the challenge that was mounted argued, inter alia, that the existence of the law prevented "any group activities or community life for gay people"[150] and that, as it stood, it was an affront to Article 9 (the right to life with dignity)[151] and Article 12[152] (equality) of the Constitution. The matter is still sub-judice.

India: Constitutional Vis-À-Vis Public Morality

In stark contrast to the Singaporean experience, Indian courts have often been at the forefront of social change, especially when dealing with minority groups. Since the 1970s, which marked the

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146 *Singapore Gay Advocacy Group Questions Use of Ss. 377A.* 27th September 2010 available at http://www.fridae.asia/newsfeatures/2010/09/27/10325.singapore-gay-advocacy-group-questions-use-of-section-377a.

147 *Supra* n. 143.

148 *Tan Eng Hong* v. *Attorney-General,* High Court of Singapore OS No 994 of 2010. Copy on file with the author.

149 Including the Indian and Nepalese decisions referred to later! For an online copy of the petition, *see* http://sgwiki.com/wiki/Tan_Eng_Hong's_appeal_against_High_Court_decision_(27_Jun_11).

150 *Id.* at ¶109.

151 *Id.* at ¶124.

152 *Id.* at ¶129.

lowest point of judicial deference- the Courts ruled that the right to life could be suspended, constitutionally, under an emergency,[153] the judiciary has ruled on the rights of impoverished workers, religious minorities, and affirmative action policies, with little deference to the legislature.

Gay rights activism in India, as in Singapore, is very much a product of the 1990s, though as mentioned before, sexual minorities have occupied an important place in India's culture. The movement, however, as we know it, originated as late as 1986, with India's first conference on issues that plague *Hijras*.[154] By the early 1990s, a gay magazine had been founded (only incidentally dealing with issues of the 'community' as a whole), as had a lesbian collective.[155] Problems, however, remained of intersections- the nascent movement was split across economic lines as well as a huge urban-rural-metropolitan divide.[156] Language remained a strong schism- the English-speaking elite versus the vernacular-speaking LGBT (though they didn't know the term then!) population. While cities like Delhi, Mumbai and Calcutta have started to organize 'gay pride' marches[157] similar to those in the West, these remain a feature of the metropolises, in rural India, the *act* was not (and has not been) the problem- the construction of a homosexual identity was. In societies with extreme gendered

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153 *ADM Jabalpur* v. *Shivkant Shukla,* AIR 1976 SC 1207.

154 Arvind Narrain, *The Articulation of Rights Around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva,* in 7 (2) HEALTH AND HUMAN RIGHTS145 (2004).

155 *Id.*

156 A fascinating account of the differences is given in Alok Gupta, *Englishpur Ki Kothi: Class Dynamics in the Queer Movement in India,* in BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA. (Arvind Narrain & Gautam Bhan ed. 2008).

157 Coincidentally, the first pride march, in June 2009, was barely four days before the *Naz* verdict came out.

segregation, the possibility of homosexual encounters is obvious.[158] However, any possibility of acceptance for homosexual love remains bleak- to that extent, Section 377 can be understood to have been a successful importation of culture.

Arvind Narrain identifies the HIV-AIDS pandemic campaign for safer sexual health as marking a turning point in the history of LGBT rights. In both India and Nepal, as it turns out, NGOs dealing with homosexuality have attempted to 'sell' themselves as fighting the growing international AIDS pandemic. In this context, a crackdown on LGBT people in India in 2001, where police, acting on a tipoff about cruising areas in Lucknow, took the opportunity to close down offices of two NGOs which dealt with these 'curses upon society'.[159] Members of the NGO were arrested despite their being no evidence of sodomy having been committed- a classic case of conflation of act and person. A similar case five years later meant that people were arrested under Section 377- no evidence of any sexual act existed- but one of the accused had put his phone number on a gay dating site.[160]

This incident led to massive media and public attention, the bulk of it homophobic.[161] Recognising that there simply could not be any HIV activism as long as Section 377 was allowed to stand in India, a constitutional challenge was mounted against Section 377. An earlier

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158 As an activist said during a conference on LGBT rights in India: In traditional societies, you can have all the sex you want, as long as you don't try to assert your sexuality.

159 *Supra* n. 117.

160 *Id.*

161 Claims were made about a (fictitious) call-boy racket, and about Gay Clubsin conservative Lucknow. The police claimed that what was happening was contrary to Indian morality.

challenge, *AIDS Bhedbhav Virodhi Andolan* v. *Union of India,*[162] which had been launched to read down Section 377 in the context of prisoners, had not even come to trial- the petitioner group had disintegrated before the matter had come for hearing.[163] As a result, the second petition was filed by Naz Foundation.

This petition contained some very noteworthy aspects- it argued for a reading-down of Section 377, arguing that the law, while still applicable for forced sexual intercourse, could be read to include consent in private as an exception.[164] Furthermore, it was the first petition to argue that a prohibition against sodomy was not 'traditional' in Indian society[165]. As such, the challenge was based on the right to equality (Article 14), the right to life (Article 21) and the right to privacy- which, though not explicitly mentioned in the Constitution, has been treated as part of the right to live with dignity. While originally introduced in the Delhi High Court under a constitutional provision that allows High Courts the powers to issue writs, this was dismissed under a technicality, requiring an approach to the Supreme Court. The Supreme Court, however, remanded the matter back to the Delhi High Court.

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[162] The name of the petitioner group literally translates as the Anti-Discrimination for AIDS Patients Forum.

[163] R Dhir, *Men Who Have Sex With Men in India,* available at http://www.hri.ca/partners/le/unit/homosexuality.shtml. Also, *see* Ruth Vanita, *Homosexuality in India: Past and Present.* November 2002, available at http://www.iias.nl/iiasn/29/IIASNL29_10_Vanita.pdf *and* Gautam Bhan, *Challenging the Limits of Law, in* BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA 44 (Arvind Narrain, Gautam Bhan ed. 2008). As Narrain points out, though, there seemed little possibility that there would be any positive development, the prison simply refused to accept that any sexual intercourse could take place in male-male dorms.

[164] Narrain, *supra* n. 154 at 157.

[165] Vikram Raghavan, *Navigating the Noteworthy and Nebulous in Naz*, 2 NUJS L. REV. 397 (2009).

The judgment in the *Naz Foundation* case was groundbreaking, for a number of reasons. Not only was this the first time the Court looked at the right to life and dignity under the Constitution, but also showed a contrast from the earlier judgments when a 'medical' understanding had been taken to preclude rights for gay people[166]- here, where medical justifications were given, they supported the *decriminalization* of homosexuality.[167] Under the ambit of 'personal liberty', the Court looked at the criteria of dignity to explain that dignity meant "acknowledging the value and worth of all individuals as members of our society."[168] Section 377, then, violated the privacy and dignity aspect of constitutional rights in the following ways: *first* by criminalizing deeply personal and private expressions of sexuality,[169] *secondly,* by the deeply negative impact of such laws upon the lives of gay people,[170] and *thirdly,* by the humiliation, oppression and degrading treatment these people suffer at the hands of police officials.[171] Furthermore, Article 14's argument of equality was read in conjunction with Article 15(1)'s prohibition of discrimination on the

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166 *Naz Foundation* (at ¶5) decision deals with earlier decisions on Section 377, such as *Lohana Vasantlal Devchand* v. *State,* AIR 1968 Guj. 152 (where it was held that the 'orifice of the mouth is not, according to nature, meant for sexual or carnal enjoyment'.) or *Calvin Francis* v. *Orissa,* 1992 (2) Crimes 455 and *Fazal Rab Choudhary* v. *State of UP,* AIR 1983 SC 323 (where it was held that oral sex was symptomatic of a perverted, psychological mind.).

167 *Naz,* at ¶¶72-75.

168 *Id.* at ¶26.

169 *Id.* at ¶43.

170 *Id.*at ¶49.

171 *Id.* at ¶52. In doing so, the judge quoted from the South African judgment *The National Commission of Gay and Lesbian Unity* v. *Minister of Justice and Ors,* South African Constitutional Court C Ct. 11/98 where the court observed that "as a result of the criminal offence, gay men are at risk or arrest, prosecution and conviction simply because they seek to engage in sexual conduct that is part of their experience of being human".

basis of sex to include 'sexual orientation' as a prohibited ground under India's Constitution.[172]

The most important (or controversial, depending upon one's standpoint) aspect of the judgment, stresses on the difference between 'public' morality and 'constitutional' morality. This distinction was made in order to ensure that the "compelling state interest" argument would not be used to justify the prohibition against Section 377. In doing so, an attempt was made to synthesize all the international precedents that had been referred to before, and integrate them with India's constitutional ethos. The term, used by Ambedkar at the drafting of the Constitution, was interpreted to mean that "moral indignation, however strong, could not be used as a valid basis for overriding an individual's fundamental right of dignity and privacy"[173] *unless* it simultaneously came into conflict with some constitutional value.

This portion of the judgment is illustrative, not only for what it says about Section 377, but for what it says about the Court's conception of the Indian Constitution. Relying on the premise that the Constitution is fundamentally a social document, it stresses that its values are primarily, the creation of a liberal society which "supports, creates, and celebrates" diversity.[174] In sharp contrast to Singapore's reliance on 'Asian' values, the judgment explicitly negates the Asian-ness of the values in question, referring to literature that supports the transplantation thesis.[175] In quoting from Nehru's speech in 1947 at the beginning of the drafting process, the Delhi High Court refers to how

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172 *Naz*,at ¶104.
173 *Id.*at ¶86.
174 *Id.*at ¶80.
175 *Id.*at ¶81.

the 'fundamental rights'- values that might be considered alien by some- have their roots *"deeply ingrained in Indian society, nurtured over several generations"*[176] where those perceived as *"deviants...cannot on that score be excluded [from society]."*[177]

This portion of the judgment can be seen as the construction of a narrative of constitution-making and constitutional values- one that is, as Balkin suggests, similar to a performing art.[178] Furthermore, the idea of the Constitution being a monolithic text with a clearly defined set of values, while certainly appealing, ignores the history of India's constitution- the give-and-take that necessarily formed a part of its drafting necessarily meant that it was a product of innumerable compromises- a "site of struggle."[179] In fact, an analysis of the text of India's Constitution represents fundamental continuities with colonial laws- an analysis that is distressingly confirmed by looking at the earliest cases dealing with fundamental rights.[180] How then, is meaning to be given to such a Constitution? Bhat's argument, taking off from

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176 *Id.*at ¶71.

177 *Id.*

178 SANFORD LEVINSON & J.M. BALKIN, LAW, MUSIC, AND OTHER PERFORMING ARTS(1991).

179 *See* Rajeev Dhavan, *Book Review: Sarbani Sen, Popular Sovereignty and Democratic Transformations: The Constitution of India*, 2 INDIAN JOURNAL OF CONST'L LAW 204, 220 (2008). For a wider understanding *see* Mohsin Alam Bhat, *Speaking in the Name of the People: Constitutional Populism and Legitimacy in India,* (Unpublished, copy on file with the author).

180 An illustrative example is *A.K. Gopalan* v. *Union of India,* AIR 1950 SC 28 where a colonial-era law was used to justify preventive detention of a communist politician in newly post-Independence India. Likewise, a study of the origins of the Indian Supreme Court confirms that it was, in all but name, a continuation of the old Federal Court- very little was new.

Cover[181], is that the main tool used to construct these narratives is *interpretation.*

The question, in the context of *Naz* that then arises pertains to the role of comparative constitutional law in such exercise. The extent of comparative law used in the judgment was commented upon by many scholars of comparative constitutional law. Sujit Choudhry commented on how the court used comparative materials in a justificatory exercise to deal with the various substantive issues[182]- specifically, case law was cited *only* from the US Supreme Court and South African Constitutional Court to hold that 'public morality' could not be used as an excuse to deny the right to live with dignity, no matter how harsh the public condemnation would be.[183] India had not yet explicitly evolved such a strong understanding of human rights. Furthermore, Madhav Khosla points out that the Court also used comparative precedents, in particular from the American Supreme Court, to rule that Section 377, though ostensibly gender neutral, was *only* used against LGBT people.[184] However, Choudhry's identification of the role of these precedents is bolstered by the constitutional values that were discussed in the decision- in particular, he relies upon an analogy that was created between 'untouchability'

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181 *See* Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815, 833 (1986) ("In law to be an interpreter is to be a force, an actor who creates effects even through or in the face of violence. To stop short of suffering or imposing violence is to give law up to those who are willing to so act.").

182 Sujit Choudhry, *How to do Comparative Constitutional Law in India:* Naz Foundation, *Same-Sex Rights, and Dialogical Interpretation,* in COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA (S. Khilnani, V. Raghavan and A. Thiruvengadam eds., 2010).

183 *Naz,* at ¶¶76-78.

184 Madhav Khosla, *Inclusive Constitutional Comparison: Reflection on India's Sodomy Law,* 59 AM. J. INT'L L. 909, 916 (2011).

and Section 377's criminalization of sodomy during the arguments[185]- the constitutional and criminal prohibition on untouchability, despite the majority of India's population supporting it, was considered analogous to the creation of a criminal class through Section 377.[186] This, for him, situates the role of foreign sources- they provide a forum to "nourish and restrain the judges reading of internal constitutional law".[187] In an understanding of comparative texts that would be equally applicable to both Nepal, discussed later, and India, Madhav Khosla points out how the use of decisions from Nepal, Fiji, and Hong Kong was added to demonstrate the geographical neutrality of the values that were sought to be dealt with- thereby widening the value of the comparative exercise.[188]

Jubilation aside, the success of the *Naz* decision, however, still remains uncertain. The Government announced its intention not to challenge the verdict- thereby demonstrating tacit approval for the decision. Within weeks, though, conservatives (including representatives of all major religious groups in India) decided to challenge the verdict, arguing that this would lead to the rise of "*gay parlours, prostitution and even (horrors of horrors!) gay marriage!*"[189] The Supreme Court, where the matter is still sub-judice, refused to stay the matter.

As we have seen, Singapore and India represent very different processes of decision-making (whether in the legislature or judiciary) not due to differences in the constitutional *texts,* but in the varied way

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185 Choudhry, *supra* n. 182 at 24.

186 *Id.*

187 *Id.* at 34.

188 Khosla, *supra* n. 184, at 918.

189 *Suresh Kumar Kaushal* v. *Naz Foundation,* SLP(C) No. 15436/2009. Copy in file with the author.

that the Constitutions have been understood. Interestingly, both decisions then do not come as too much of a surprise- they represent a fundamental continuity in terms of constitutional thought in each country- as a commentator has noted, the least surprising thing in *Naz* was the actual decision.[190]

From this point, we move to a different country- one which is undergoing a state of flux as its Constitution and political text undergoes a see change. In doing so, we shall understand how the LGBT movement has been created and dealt with in its judiciary.

Something Borrowed, Something New: The Nepalese LGBT Movement:

The history of Nepal's LGBT movement demonstrates some characteristic features. *First,* there has been a massive intersection between traditional and modern expressions of non-heterosexual behaviour in the movement- the Blue Diamond Society has focused not only on gay people, but also on *Meti* and *Hijra* rights. *Secondly,* the movement has attained momentum with the political instability in the country- as the LGBT community has tried to represent itself as a significant political force. *Thirdly,* there are certain worrying trends for LGBT activists- the movement towards drafting a Constitution with equal rights for sexual minorities[191] has also had to deal with an increased right-wing condemnation of sexual minorities.

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[190] Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal for India's Minorities,* 2 NUJS L. REV. 419, 420 (2009).

[191] If eventually incorporated in the Constitution, this would make Nepal the second country in the world to have this provision - after South Africa.

The movement started in Nepal in 1993 with the creation of the Nepal Queer Group.[192] Presumably, the HIV epidemic along with tourism had a role to play in its creation. The most significant organization- and certainly the most visible- is the Blue Diamond Society (BDS) that was established in 2001. As the founder mentioned, the greatest problem it faced at the beginning was the 'invisibility' and marginalization of LGBT groups- the lack of a term in Nepali for 'gay' meant that the movement had to be created from first principles. Sunil Babu Pant, the president, has discussed how hard the registration of the NGO was- for want of a better term, the NGO had to be registered as one that dealt with sexual health.[193] Interviews with Pant repeatedly suggest that the identity politics of the LGBT movement in Nepal relies greatly on his exposure to the international 'gay scene'- though- similarly to India, the bulk of its work takes place with cross-dressing and transsexual men[194], rather than the conventionally understood MSM groups. Over the last few years, Nepal has been successful in creating an inclusive LGBT movement.

Though the work of BDS was initially confined to support, and combating police harassment and violence, it soon aroused the ire of conservative groups. A law student, Achyut Kharel, filed a petition against the work of BDS- arguing that homosexuality amounted to bestiality- a claim he seemed to base on the close juxtaposition of 'unnatural sex' and 'sex with cows' in the *Muluki Ain*.[195] This petition required the Supreme Court of Nepal to give express instructions criminalizing homosexuality. Interestingly, the petition did not only argue on the 'traditional values' that Nepal claimed to espouse, but

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192 Elizabeth Schroeder, *Nepal,* available at http://www2.hu-berlin.de/sexology/IES/nepal.html.

193 Kaveri Rajaraman, *An Interview with Sunil Pant,* available at http://himalmag.com/blogs/blog/2010/06/04/sunil-pant-interview-part-1/.

194 *About Us* available at www.bds.org.np.

195 Petition filed on 4 Asadh 2061, (July 2004 AD) by Achyut Prasat Kharel. Excerpts on file with the author.

also referred to international instruments to argue that 'homosexuality had never been considered a human right'.[196] Unfortunately, however, the bulk of international jurisprudence in recent years on the issue seemed to pass him by.

As a (then) restraintivist Supreme Court, the court ran true to type. As a conservative court, its reaction was mildly surprising. It forwarded the petition to the Home Ministry, requiring them to show cause as to why this petition would not succeed. The Home Ministry responded by stating that there had been no historical criminalization; there the matter was allowed to rest.[197] Needless to say, this decision didn't make a difference to the routine police harassment that was taking place- media reports during the period are rife with news of LGBT bashing[198] causing, among other international organizations, HRW to intervene against repeated "arbitrary arrests and police violence" against transsexual people.[199] In fact, Kyle and Bochenek[200] identify a spike in arrests and harassment of transsexual people that followed the petition, though there is little evidence of what occurred after it.

A definitive political moment came in 2006, when the LGBT community realized that grouping together could have political advantages more long-term than merely escaping violence. In April 2006, the BDS and its lesbian wing- Mitni Nepali, joined the growing republican movement against the King.[201] A significant political move, this was an attempt by the community to secure for itself a place in the

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196 *Id.*

197 Malagodi, *supra* n. 62 at 19.

198 *See* generally Bhandari, supra n. 118, for an overview of such issues.

199 Christopher Curtis, *Human Rights Watch Petitions Nepal on Transgender Rights,* available at http://archive.globalgayz.com/asia/nepal/gay-nepal-news-and-reports-200-2/#article5.

200 Kyle and Bochenek, *supra* n. 84 at 8.

201 *Nepal's Gay Community Joins Anti-King Protests,* TIMES OF INDIA, April 16, 2006, available at http://timesofindia.indiatimes.com/articleshow/1495930.cms.

Constitution drafting procedure. Another consideration, perhaps, was the importance of 'pink' money- Nepal's fragile economy depends largely on tourism, and the insurgency had sharply affected tourism. Selling itself as a gay-friendly country, then, could be a useful economic and political factor in dealing with Nepal's economic decline since the revolution.[202]

Be as it may, though, the Blue Diamond Society presented a petition to the Supreme Court of Nepal in 2007 arguing that they were oppressed by social and state mechanisms from achieving "a proper place in society".[203] This social and legal 'boycott' then operated in many ways to deny them the fundamental human rights that were granted under the interim constitution of Nepal, 2007. In threshing out the scope of the rights, the petitioners referred to Article 9 of the Interim Constitution of Nepal,[204] which does not effect a distinction between international and national law. Reference, thus, was made to the fact that Nepal was a ratifier of the UDHR, ICCPR and ICESCR- and decisions of the Canadian, South African and United States Supreme Courts were further used to buttress this argument.

As an advocacy strategy, it was thorough, though unsurprising. The surprise actually was the decision of the Supreme Court of Nepal, which anticipated the Delhi High Court by two years. This marked a

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202 *See,* for instance, *Same-Sex Marriage in the Himalayas: Nepal Targets Gay Travellers to Boost Tourism Dollars,* 3rd March 2010, available athttp://articles.nydailynews.com/2010-03-16/entertainment/27059153_1_gay-travelers-gay-tourists-gay-rights.; Deepak Adhikari, *Can Nepal Sell Itself as a Gay Wedding Destination,* TIME, July 19, 2011, available at http://www.time.com/time/world/article/0,8599,2083711,00.html.; *Nepal Traps Gay Market to Develop Tourism,* SYDNEY MORNING HERALD,Jan 25, 2010,available at http://www.smh.com.au/travel/travel-news/nepal-taps-gay-market-to-develop-tourism-20100124-msjv.html.

203 *Sunil Babu Pant and Ors* v. *Nepal Government, Office of the Prime Minister and Council of Ministers and Ors,* Writ No. 917 of 2064 BS (2007 AD). Copy on file with the author.

204 Hereafter, for this section 'Constitution'.

departure from a half-century of judicial conservatism as the Court looked into the Fundamental Rights to stress on the inclusiveness of the new constitution.[205] The petitioners' arguments dealing with the use of international instruments were accepted unquestioningly- the Court directed the executive to keep these issues in mind while decisions were being made on issues of sexual minorities. Similarly, while dealing with issues of prejudice and discrimination that were faced by transsexual people, the Court stated that as full citizens, there was no way *any* sexual minority could be criminalized or subject to anything other than the full enjoyment of all fundamental rights.[206] In doing so, it issued instructions to the executive to amend the definition of 'unnatural coition', though it stopped short of identifying what such definition would be. In fact, the question of gay marriage was also dealt with, with the Court giving directions to the executive that would allow marriage to be defined in ways other than the conventional "man-marrying-woman". This would, again, have required an amendment of the *Muluki Ain*.

Another significant aspect of the decision dealt with the articulation of the rights of transsexual and transgender people. The Court dealt with a variety of international judgments and a variety of sources (including the Cambridge Advanced Learners Dictionary!) to hold that gender identity should be determined according to persons' 'physical and psychological' conditions, rather than simply being a matter of genitalia. There was a refutation, thus, of what the judges considered to be "old ways of thinking". A distinction, hence, must be drawn between the Indian and Nepalese decision- the Delhi High Court merely 'read down' Article 377, the Supreme Court of Nepal

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[205] *Pant* v. *Nepal, supra* n. 203.

[206] The Court held that "old notions (of transsexuals and gay and lesbian people being sexual perverts) have no value if one holds the view that welfare states, dedicated to the value ofhuman rights, should attempt to protect the right to life of every citizen". *Id.*

went ahead to argue for the *substance* of constitutional rights to be made available for everyone- including transsexuals.

The massive degree of transnational influence that the decision represented was probably a significant breakthrough in what had been a restraintivist court so far. Not only Indian decisions on the role of Public Interest Litigation and fundamental rights[207] (which might have seen appropriate when seen how much the Nepalese Constitution owes to its Indian precursor), but European Court of Human Rights decisions,[208] South African decisions,[209] the famous *Lawrence* v. *Texas,*[210]Australian decisions on gender identity[211], and others were liberally quoted in the decision. An attempt, however, was made to situate these precedents as symptomatic of the universal values which the Court seemed determined to consider as its own. Article 13, which deals with the right to privacy, and Article 12, which deals with the right to live with dignity and fundamental freedoms, was interpreted in light of all these precedents. The notion of 'Asian' or 'traditional values' found little place in this decision, though a number of the property rights for women decisions referenced in the first part of this essay had referred to Nepal's status as a 'patriarchal, Hindu country' which were rejected in rejecting these petitions.

In most other countries, such a decision would have been criticized as an exercise of judicial activism 'at its worst'. Scalia, J., for instance, would have condemned it outright- it placed little emphasis on the democratic process- public opinion was completely ignored in

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207 *S.P. Gupta* v. *Union of India,* AIR 1982 SC 149.

208 *Van Kuck* v. *Germany,*(2003) 37 EHRR 51; *Goodwin* v. *United Kingdom,* (2002) 35 EHRR 18; *I* v. *United Kingdom,*(2002) 2 FLR 518.

209 *National Coalition for Gay and Lesbian Equality and Ors* v. *Minister of Justice,* 1999 (1) SA 6.

210 *Supra.* n. 5.

211 *Re Kevin,*(2001) FLC 93-087.

the decision's ethos.[212] It is important to remember the context of the decision- Nepal was being governed under an Interim Constitution as a half-decade of instability, culminating in a revolution that removed the King and altered Nepal's status as a 'Hindu' country, showed little signs of abating. This situation can be considered akin to the *Makwanyane*[213] decision in South Africa, where Ackerman, J. attempted to draw a distinction between the past and the post-Apartheid present of the Constitution. This may also be understood in a wider context. Helmke[214] has written of the Argentine Supreme Court, where she argues that the possibility of an oppressive regime falling and institutional insecurity may see the judiciary taking an assertive role to 'fill the gap', and also to ingratiate itself with the new regime. The 'narrative' that the Court tries to situate the new constitutional ethos in is one that acknowledges the dignity and worth of all people- regardless of any differences. Such an approach would obviously require that international precedents are looked at far more than indigenous ones, a sign of Nepal having 'arrived'- a break from the past.

Madhav Khosla's[215] analysis of the *Naz* decision is instructive when we try to understand the reasons for the *Pant* decision. Madhav suggests that international opinion was not entirely irrelevant to *Naz*, but that the Delhi High Court was also influenced by the impact the decision would have on India's international image.[216] When we see *Pant's* strong reliance on international precedents, this impression- that

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212 For a succinct summary of Scalia, J.'s position on the role of foreign law in national constitutional courts, *see* http://www.freerepublic.com /focus/news/1352357/posts. where he debated this with Justice Breyer on Jan 13, 2005.

213 *S* v. *Makwanyane,* 1995 (3) SA 391.

214 Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy,* 96 AM. POL. SCI. REV. 291, 293 (2002).

215 Khosla, *supra* n. 184.

216 *Id.* at 223.

the Court was playing 'with an eye to the gallery'- is undoubtedly heightened. Another reason he picks up on is the importance of conforming to international standards[217]- a fact Versteeg and Goderis[218] describe as acculturation when dealing with Constitutional 'texts'. Is it so improbable that, as judiciaries become law-makers and interpret Constitutions in their own way, the judgments they write also reflect this set of values?

The politics of the movement, in Nepal, has received a boost with Sunil Pant having been elected to the Nepalese Constituent Assembly. As such, many drafts of the Constitution have referred to an equal-rights paradigm- there have been proposals for the Constitution to include a clause specifically outlawing discrimination on the basis of 'gender identity' or 'sexual orientation'. This, however, has not gone unchallenged as questions have been raised about the cultural aspect of the issue. More uncontroversial, and mirroring an Indian law to the effect, has been the recognition of a third sex exemplified by identity cards in Nepal which now have an option other than 'male' or 'female' when dealing with sex.[219]

Amendments that have recently been proposed by the Ministry of Law, however, are worrying for those who support LGBT rights. Ironically, the Nepalese government seems be debating a proposal to criminalise homosexuality[220] explicitly, borrowing from the Indian law

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217 Khosla explicitly uses the example of Turkey's legislative reforms in order to project itself as possessing the 'values' necessary for inclusion into the European Union. Id, 224.

218 *Versteeg*, *supra* n. 6.

219 Manesh Shreshta, *Nepal's Census Recognises 'Third Gender'*, CNN World, May 31, 2011 availale athttp://www.cnn.com/2011/WORLD/asiapcf/05/31/nepal.census.gender/index.html. *See* Kyle and Bochenek, *supra* n. 84 at 14.

220 *New Law Threatens to Crush Nepal's Gays,* TIMES OF INDIA, June 11, 2011, available at http://articles.timesofindia.indiatimes.com/2011-06-09/south-asia/29638154_1_sunil-babu-pant-gay-rights-gay-bar.

at a point where the law is currently not applicable in India[221]. This perhaps, is a natural result of the steps the Court had taken- there is only so far Courts can go in the absence of a supportive executive or a strong institutional structure.

Analysis and Conclusion

The final part of the paper examines how these three judiciaries, in the opinion of the researcher, ought to deal with LGBT-rights issues and how social and moral claims should be balanced. This portion examines the benefits and pitfalls of the way all three countries have dealt with the issue, and tries to ascribe reasons for why Courts and Parliaments have done what they have done.

As the Indian and Nepalese decisions demonstrate, the courts played a strong role in the adjudication and recognition of the rights of gay people and transsexuals in both countries, often in the face of much public opposition. This may not necessarily be an accident- the very idea of embedding a set of Constitutional rights is a counter-majoritarian impulse to ensure rights get protected. Again, it depends upon the judiciary as to how it shall interpret these- the United States, over a 17 year period, threw up both *Bowers* v. *Hardwick*[222] and *Lawrence* v. *Texas*.[223] Both these decisions looked at the issue of LGBT rights in very different ways.

When we consider Singapore's example, it is important to realize *why* the Court behaved as it did. In both India and Nepal, the LGBT movement was not a sharply divisive political agenda- though there had been systematic violence against LGBT people, as discussed earlier, the 'community' in the sense in which it is understood in

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221 As, however, the matter is sub-judice in the Indian Supreme Court, there is a possibility that the Supreme Court might reinstate the law.

222 478 U.S. 186 (1986).

223 539 U.S. 558 (2003).

conventional Western understandings was largely invisible and confined to the urban areas. Further, the Indian decision, though novel in terms of the sheer depth of reliance on international standards used in the judgment, can be considered to be one in a series of judicial decisions that have been considered activist- its 'trial by fire' was in the 1970s, when the Court adopted a wider definition of the right to life in *Maneka Gandhi*[224] after being a mute spectator to the abrogation of India's fundamental rights during the emergency. The Nepalese Court, similarly, has taken advantage of the political imbalance in Nepal to attempt to define what it believes would be the values that the Nepalese constitution would espouse, a set of values that might be endangered by the attempts to introduce a law cognate to Section 377.

In contrast, we have seen that the Singaporean judiciary has simply not had the opportunity to evolve an understanding of Singaporean society different from that of the executive. Largely, this is due to excessive political control of appointments[225] Seow identifies strategies like sudden transfers, judicial accommodations by acquiescing in coercive techniques and whittling the right of habeas corpus[226] to identify the extent to which the judiciary and executive come together in dealing with political or 'social' dissidents, despite periodic claims that are made for judicial independence.[227] In fact, when the Singapore executive considered a Privy Council decision (In 1990, then largely independent from Singapore's politics) to be

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224 *Supra* n. 48.

225 Ross Worthington, *Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore,* 28 J. L. & SOC. 490, 496 (2002). *See* Francis Seow, *The Politics of Judicial Institutions in Singapore,*http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan002727.pdf and Cameron Sim, *The Singapore Chill: Political Defamation and the Normalisation of a Statist Rule of Law,* 20 PAC. RIM L. & POL'Y J.319, 321. (2001).

226 *Id.*

227 Seow, *supra* n. 225.

contrary to its interests, it eliminated all appeals to the Privy Council itself![228]

The current case being dealt with in Singapore's Supreme Court can be a path breaker- indeed, preliminary reports from the Court suggest that the Court has been much less homophobic while hearing these issues.[229] If the Court actually does this, though, it will be a historic judgment, equal if not more valuable than the Indian one. One way that the Court could do this is to question the fundamental 'notion' of human rights itself, and seek to demonstrate how these choices are no longer as sacrosanct as they were. Beck[230], who argues this point, seeks to demonstrate that, in today's world, with religion failing to provide an adequate justification of the law as well as the loss of faith in a universal ethical framework, the notion of *what* precisely comes within the ambit of rights itself becomes an Essentially Contested Concept (ECC)[231]. In such a situation, Beck argues, wherein two rights conflict, the approach that should be taken is one that recognises value pluralism- thereby supporting an understanding which allows maximum freedom of individuals. The other approach, obviously, could be that taken by the Delhi High Court

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228 As happened with Mr. Jeyaratnam, an opposition leader of Singapore who was imprisoned for libel. *See* Ross Worthington, supra. *LeeKuan Yew* v. *Jeyaretnam* JB (No. 1), 1 SING. L. REP. 688 (1990).

229 Ng Yi-Sheng, *One Step Closer to the Abolition of S377-A in Singapore,* Sept 27, 2011, available at http://www.fridae.asia/newsfeatures/printable.php?articleid=11214.

230 *See*, for instance, Gunnar Beck, *The Idea of Human Rights: Between Value Pluralism and Conceptual Vagueness,* 25 PENN ST. INT'L LAW REVIEW 615 (2006-2007). Gunnar Beck, *Human Rights Adjudication under the ECHR: Between Value Pluralism and Essential Contestability*, 2 EUR. H. R. L. REV. 214 (2008).

231 As proposed by Gallie, an Essentially Contested Concept must fulfill the following criteria. *First,* it must be an evaluative concept- by which he means there must be a 'moral' value attached to it. *Secondly,* it must be complex, and must also be capable of being rationally explicable. W.B. Gallie, *Essentially Contested Concepts*, *in* LVI PROCEEDINGS OF THE ARISTOTELIAN SOCIETY167 (1955-56).

(constitutional morality) and Nepalese Supreme Court (reliance on international texts). It remains to be seen what the Court will ultimately do.

Another aspect of this is how far the Court can and should go in this regard. The counterargument to what I have earlier identified of courts being a preferred forum may be negated if Courts go too far- the *Roe* effect as it has been called in the United States. The rise of violence against gay people in Nepal *after* the decision, and the attempts to criminalise homosexuality may be seen as the political impact of a court having ignored existing standards. This, thus, might serve to advocate a more gradual approach, especially considering Nepal's turbulent polity; the Supreme Court should attempt to save itself as far as possible.

A related feature of decisions like *Naz* and *Pant* would be the way that they would situate gay politics within the wider issues that LGBT communities deal with. In India, especially, there has been a distinction between the transgender movement and the rights of gay men- especially in the judicial arena. *Naz*, unfortunately, perhaps necessarily in keeping with the limitations of the petition, does not examine the rights of transgender people in any great detail. While much has been written about *Naz* as offering Swaraj (self-rule) to all minorities, there is little *directly* in the decision that deals with issues that these communities have to combat- Siddharth Narrain, though, has identified various points of intersection between *Naz* and India's transgender community.[232] The gap in Singapore, identified earlier in the paper, has only grown wider with time. In this context as well, *Pant* v. *Nepal* could be a trendsetter.

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[232] Siddharth Narrain, *Crystallising Queer Politics: The* Naz Foundation *Case and Its Implications for India's Transgender Communities,* 2 NUJS L. REV. 454 (2009).

In conclusion, I suggest that, as Singapore grapples with the vexed issue of Section 377-A, the Indian and Nepalese examples could-nay *must* be engaged with by the judiciary, regardless of the decision they come up with. It is only in doing so that the interests of comparative constitutional law, and by extension, constitutional law will be better served.