Asian Courts and LGBT Rights

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Courts have played an integral part in advancing the rights of lesbian, gay, bisexual, and transgender (LGBT) communities in many parts of Asia. Yet courts in other parts of Asia have entrenched LGBT subordination. A vast expanse separates Asia’s most progressive LGBT judicial decisions from the most oppressive. This chapter starts by providing an overview of the divergent roles that Asian courts have played with respect to LGBT rights. It then highlights—and offers preliminary answers to—three questions prompted by the judicial development of LGBT rights in Asia: (1) What factors have contributed to the divergence among Asian jurisdictions? (2) How should recent developments in Asia inform existing narratives about the development of LGBT rights? (3) How do politics and public opinion affect courts’ ability to advance LGBT rights in Asia?
Introduction

Courts have played an integral part in advancing the rights of lesbian, gay, bisexual, and transgender (LGBT) communities in many parts of Asia. For example, Taiwan’s highest court ruled in 2017 that it is unconstitutional to exclude same-sex couples from marriage (J.Y. Interpretation No. 748, 2017). After the ruling, a majority of Taiwanese voters expressed disapproval of same-sex marriage in a referendum; however, the referendum cannot override the court judgment and Taiwan is still expected to become the first jurisdiction in Asia to legalize same-sex marriage by the court’s deadline of May 2019 (Drillsma 2018). Among judicial decisions from Asia, Taiwan’s marriage ruling has gone the farthest in affirming same-sex relationships, but it is not alone in vindicating the rights of gay men, lesbians, and bisexuals. Courts in Asia have also advanced transgender rights. For example, in National Legal Services Authority (NALSA) v. Union of India (2014), the Indian Supreme Court stated that transgender persons have a right to select gender markers on identity documents based on their self-determination. The judgment also directed the government to implement affirmative action programs to support transgender communities. With its NALSA decision, the Indian Supreme Court broke new ground, not only for Asia but for the world.

While LGBT rights advocates have celebrated these court victories, litigation to advance LGBT rights has failed in other parts of Asia. Indeed, courts in some parts of Asia have entrenched LGBT subordination. A vast expanse separates Asia’s most progressive judicial decisions from the most oppressive. The landscape of judicial decisions is further complicated by the fact that it continues to change at a rapid clip. This chapter examines this mixed and quickly changing landscape of judicial developments concerning LGBT rights in Asia.
This chapter starts by providing an overview of the divergent roles that Asian courts have played with respect to LGBT rights. It then highlights—and offers preliminary answers to—three questions prompted by the judicial development of LGBT rights in Asia: (1) What factors have contributed to the divergence among Asian jurisdictions? (2) How should recent developments in Asia inform existing narratives about the development of LGBT rights? (3) How do politics and public opinion affect courts’ ability to advance LGBT rights in Asia?

Divergence within Asia

Commentators sometimes treat Asia as though it were a monolithic region, but Asian courts’ positions on LGBT rights belie this reductionist portrayal. An appreciation of the divergence among Asian courts is important to understanding the region. This section of the chapter highlights developments that illustrate this divergence. This section will first address both ends of the spectrum. It will discuss some of the most conservative judicial developments, which entrench LGBT subordination, and then it will draw a stark contrast by discussing some of the most progressive judicial developments. The section will then close by discussing a few jurisdictions that fall between both ends of the spectrum.

Entrenchment of subordination

Many commentators view decriminalizing same-sex intimacy and decriminalizing non-normative gender expression to be important precursors to achieving further LGBT rights (e.g., Eskridge, 1999-2000). In recent years, some courts in Asia have reinforced the subordination of LGBT communities by upholding such criminal prohibitions against constitutional challenges. For example, in Lim Meng Suang v. Attorney General (2014), Singapore’s highest court entrenched antigay bias by upholding Section 377A of Singapore’s Penal Code, whichcriminalizes sexual intimacy between men. The court dealt a setback to LGBT rights by rejecting arguments that
Section 377A violated constitutional guarantees of privacy and equality. Although Singapore has only enforced Section 377A occasionally in recent years, the government’s preservation of this criminal provision is a gesture that condones antigay prejudices.

In some parts of Asia, criminal prohibitions of same-sex intimacy do not only remain on the books; courts have played a role in enforcing the prohibitions through extreme violence. For example, since 2017, Islamic courts in Aceh, Indonesia have punished men for having gay sex by subjecting them to public canings (Human Rights Watch, 2018). Likewise, in 2018, an Islamic court in Terengganu, Malaysia sentenced two women to public caning because they attempted to have sex with each other (Ramzy, 2018).

Malaysia also provides an example regarding gender expression. In 2015, Malaysia’s highest court—the Federal Court—rejected three transgender women’s constitutional challenge to a criminal ban on cross-dressing.\(^2\) The Court of Appeal in Malaysia had ruled that the criminal provision violated constitutional rights (Muhamad Juzaili bin Mohd Khamis & Others v. State Government of Negeri Sembilan & Others, 2015). The Federal Court, however, ultimately dismissed the applicants’ challenge on procedural grounds (State Government of Negeri Sembilan & Others v. Muhammad Jazaili Mohd Khamis & Others, 2015).

*Forefront of reform*

In striking contrast to the courts just discussed, other courts in Asia have taken big strides to protect LGBT rights. Judgments from the highest courts of Taiwan, Hong Kong, India, and Nepal exemplify this divergence. As mentioned earlier, the Taiwan Constitutional Court (TCC) ruled in favor of same-sex marriage. It directed Taiwan’s legislature, the Legislative Yuan, to legalize same-sex marriage by 2019 (J.Y. Interpretation 748, 2017). The TCC stated that, if the legislature fails to pass relevant legislation, same-sex marriage will become legal automatically.
The TCC’s same-sex marriage decision is remarkably progressive, not only because it positions Taiwan to become the first Asian jurisdiction to legalize same-sex marriage, but also because of the decision’s reasoning. The equality clause in Taiwan’s constitution explicitly lists sex, religion, race, class, and party affiliation as protected categories. Although the constitution does not explicitly mention sexual orientation, the TCC reasoned that the constitutional text’s list of protected categories is not exhaustive, and that sexual orientation is protected as well. Accordingly, the TCC declared that governmental discrimination based on sexual orientation must satisfy “heightened scrutiny.” This legal test makes it extremely difficult for the government to justify treating people differently based on sexual orientation. The TCC concluded that the exclusion of same-sex couples from marriage could not satisfy heightened scrutiny.

The US Supreme Court serves as a foil that illuminates the progressiveness of the TCC. Although the US Supreme Court legalized same-sex marriage in *Obergefell v. Hodges* (2015), some commentators fault that decision for not going far enough because it did not declare sexual orientation to be a protected category that triggers heightened scrutiny. (e.g., Nicolas, 2015). Had the US Supreme Court done so, it would have established a stronger legal precedent for combatting sexual orientation discrimination in future litigation.

Hong Kong’s highest court has also ruled in favor of legally recognizing same-sex relationships, but under limited circumstances. In *QT v. Director of Immigration* (2018), the Hong Kong Court of Final Appeal (HKCFA) held that a same-sex couple who registered their domestic
partnership abroad must be extended immigration visa rights that were previously limited to different-sex couples. This decision adds to a growing number of cases in which Hong Kong’s courts have vindicated sexual orientation rights, including cases concerning inequalities under criminal law and a case that rejected anti-gay bias in media regulation (Petersen, 2013). Commentators believe that QT has set precedent that paves the way for further protection of same-sex couples’ rights (e.g., Loper, 2019). Hong Kong’s constitutional documents do not explicitly mention sexual orientation. However, like the TCC, the HKCFA has declared that sexual orientation discrimination warrants the same rigorous judicial review that is applied to discrimination based on race, sex, and other protected categories (Loper, 2019). LGBT rights advocates are now eagerly awaiting the HKCFA’s decision in the Leung Chun Kwon v. Secretary for the Civil Service, a pending case that will address whether same-sex couples have the right to be legally recognized for the purposes of civil servant employment benefits and tax filings.

Although the apex courts of Taiwan and Hong Kong are among Asia’s most rights-protective regarding sexual orientation, they have not been at the forefront of protecting transgender rights. The TCC has yet to hear a case directly concerning transgender issues. Meanwhile, the HKCFA advanced transgender rights in W v. Registrar of Marriages (2013), but its ruling was much more modest than India’s NALSA decision. Pursuant to the constitutional right to marry, the HKCFA ruled that a transgender woman was entitled to be recognized as a woman for marriage purposes. The HKCFA gave Hong Kong’s Legislative Council one year to enact legislation to stipulate the criteria that transgender persons must satisfy, and the process that they must undertake, to be recognized in their current sex for marriage purposes. The legislature, however, failed to act. As a result, Hong Kong defaulted to requiring that transgender people complete so-called “full” sex-reassignment surgery for legal recognition (Yap, 2019). This surgical
requirement contradicts the position, taken by other courts and human rights experts, that a surgical requirement is too onerous and violates human rights (Lau, 2019).³

Unlike W, India’s NALSA decision makes clear that surgery cannot be required. Indeed, the NALSA decision is at the forefront of advancing transgender rights. It is deeply progressive in at least four regards. First, the Indian Supreme Court adopted the self-determination model of gender identity.⁴ In other words, it stated that individuals have a constitutional right to determine how to classify their own sex and gender, and this right is not contingent on any medical diagnosis or treatment. Second, the court ruled that individuals are entitled to be recognized in a third sex category if they do not self-identify within the male-female binary. Third, the court stated that gender identity discrimination is a form of sex discrimination that is encompassed by the constitution’s explicit prohibition of sex discrimination. Fourth, the court directed the government of India to devise reforms to address social inequalities suffered by transgender communities, such as affirmative action in education, measures to provide healthcare, and social welfare programs. In this regard, the court sought to advance the substantive equality of transgender communities, not just formal equality. Although implementation of the NALSA decision has been slow and frustrating to many, NALSA was indeed groundbreaking.

India has not been as much of a frontrunner with respect to sexual orientation rights. In 2014—the same year that the Indian Supreme Court decided NALSA—it also rejected a constitutional challenge to Section 377 of India’s criminal code, which criminalized same-sex sexual intimacy among other sexual acts (Suresh Kumar Koushal v. Naz Foundation, 2014). It was not until the 2018 case of Navtej Singh Johar that the Supreme Court overturned the 2014 decision and deemed Section 377 to be unconstitutional to the extent that it prohibited consensual sex between adults of the same sex. While decriminalizing same-sex intimacy in the year 2018 does
not itself position India as a frontrunner in Asia, the Johar decision is remarkable in other regards. For example, the judgment—consisting of four concurring opinions adding up to nearly 500 pages—is incredibly comprehensive and contains soaring passages about LGBT persons’ rights to privacy, equality, expression, and dignity (Narrain, 2018).

India’s NALSA opinion built upon earlier court cases from around the world, including cases from Pakistan and Nepal that had recognized constitutional rights to non-binary gender recognition (Dickson & Sanders, 2013). The case of Sunil Pant v. Nepal (2007), decided by the Nepal Supreme Court, was itself groundbreaking. The court stated that individuals have a right to be recognized as a third gender based on “self-feeling.” In response, the government eventually added a third gender category to government-issued identity documents. Nepal became the first country in the world to include a third gender category on its national census (Editors, 2017). The court also called on Nepal to identify and abolish all laws that discriminate against LGBTI persons, and it directed the government to form a commission to study the possibility of legalizing same-sex marriage. The Pant opinion, however, was unclear about whether individuals have a constitutional right to change their legal gender from male to female, or vice versa, instead of opting for the third gender category.

While the Pakistan Supreme Court has also recognized the constitutional right to non-binary gender recognition, its jurisprudence is considerably less progressive than that of India and Nepal because it is not grounded in a self-determination model of gender. While it recognized the rights of the third gender, it also pathologized the third gender. The Court stated that third-gender hijras suffer from “gender disorder,” and it permitted government authorities to administer medical tests to identify members of the third gender. Subsequently, however, Pakistan enacted legislation
that allows individuals to self-identify as male, female, or a third gender based on self-determination (Hashim, 2018).

Middle of the road

This chapter has thus far examined two ends the spectrum from conservative to progressive. Having discussed these two ends of the spectrum, it is worth acknowledging that many Asian jurisdictions lie somewhere in between. South Korea, the Philippines, and Japan are three examples of jurisdictions that occupy this in-between space: Court decisions in each of these countries have advanced LGBT rights, but not to the greater extent of the progressive jurisdictions discussed earlier; some courts in these jurisdictions have also produced setbacks for LGBT rights.

South Korea does not maintain any outright ban on same-sex sexual intimacy, but it does criminalize same-sex sexual intimacy among military personnel. On three separate occasions, the Constitutional Court of Korea has upheld such criminal prohibitions: in 2002, 2011, and 2016. The 2016 case concerned a male servicemember who used his hands to touch another male servicemember’s genitals, which violated a ban on “indecent conduct” in the military (Case on the Constitutional Complaint against Article 92-5, 2016). The KCC said that the criminal provision was not unconstitutionally vague and did not excessively impinge upon gay servicemembers’ rights to sexual self-determination, privacy, physical freedom, or equality. In its analysis of equality, the court applied a legal standard that is deferential to the legislature, echoing its 2011 decision, which stated that sexual orientation discrimination does not require the same level of judicial scrutiny as discrimination based on sex, religion, or social status (Cho, 2014).5

Although these cases in the military context are setbacks for LGBT rights, Korean courts have protected LGBT rights in other domains. For example, in 2017, the Supreme Court of Korea ruled that it was unreasonable for the Ministry of Justice to reject the registration of an LGBT
organization named “Beyond the Rainbow” (In re Rejection of Organization Registration, 2017). In 2013, the Supreme Court dismissed the appeal of a lower court ruling that the Korea Media Rating Board was biased against a gay film (In re Screening of Movie “Just Friends?”, 2013). In 2006, the Supreme Court held that transgender individuals who have undergone genital surgery have a right to change their gender in Korea’s Family Registry (In re Change of Name and Correction of Family Register, 2006). Subsequently, the Seoul Western District Court ruled that genital surgery is not necessary to change one’s gender designation in the Family Registry (Landmark Legal Ruling, 2013).

The Philippines has also had successful LGBT rights litigation, but it has not been at the vanguard of change. In 2010, the Supreme Court of the Philippines held that the Philippines Elections Commission violated rights to expression, association, and equality when it denied accreditation to Ang Ladlad (Out of the Closet), a political party formed by individuals who openly identified as LGBT. The court said that the denial could not even satisfy “rational basis” review that is deferential to the legislature (Ang Ladlad LGBT Party v. Commission on Elections, 2010). The decision dodged the question of whether sexual orientation discrimination could ever trigger the more rigorous judicial scrutiny that applies to other grounds of discrimination, such as race and sex. This past summer, the Supreme Court heard oral arguments in a same-sex marriage case, and the court’s decision is pending. A ruling in favor of same-sex marriage would make Philippines a leader, along with Taiwan, in terms of judicial support for same-sex marriage in Asia.

On transgender rights, the Philippines Supreme Court delivered a setback in 2007. It ruled that neither the civil code nor principles of equity provided a right for a post-operative transwoman to change her first name and modify her birth certificate to comport with her gender identity (Silverio v. Republic of the Philippines, 2007). The court did not consider any constitutional
arguments. Interestingly, that same year, the Supreme Court ruled that an intersex individual had the right to change her gender markers from female to male because the individual experienced physiological changes from “simply let[ting] nature take its course” (Republic of the Philippines v. Jennifer Cagandahan, 2008). In contrast, the court said the transgender applicant changed gender through so-called “unnatural” means such as elective surgery (UNDP & Commission on Human Rights of the Philippines, 2018).

Japan is yet another example of modest judicial protection of LGBT rights. Japan’s Supreme Court has long had a reputation for being reluctant to declare laws and government actions to be unconstitutional, although that has recently begun to change (Matsui, 2019). Accordingly, it is perhaps unsurprising that the Supreme Court’s only ruling on constitutional law concerning LGBT rights was a setback for the LGBT community; it rejected a constitutional challenge to Japan’s surgical requirement for transgender gender recognition (Associated Press, 2019). Still, there have been some judicial victories for LGBT rights. For example, in a widely cited case from 1997, the Tokyo High Court held that the local government violated rights to free association, equality, and education when it prohibited an LGBT youth group from staying at a government-owned hostel (In re Futyu Hostel). More recently, the Tokyo High Court ruled that a golf course had impermissibly discriminated against a post-operative transwoman by rejecting her membership application (X v. Y, 2015). The court held that the golf course committed a tortious act, in light of the non-discrimination norms in the Japanese Constitution and the International Covenant on Civil and Political Rights. In 2013, the Supreme Court also ruled to protect a post-operative transgender man’s right to become an adoptive parent to a child born to his wife (Saikō Saibansyo, 2013). This ruling was, however, based on the enforcement of Japan’s gender recognition law, which has been criticized for placing stringent criteria on transgender persons.
who seek to change their legal gender as reflected on government identity documents (Human Rights Watch, 2016). These requirements include psychiatric diagnosis and genital surgery among other conditions. As noted earlier, the surgical requirement’s constitutionality was challenged in court, but ultimately upheld.

It is worth noting that in both the Philippines and Japan, there has been progress protecting LGBT rights outside of the courts. For example, the city of Tokyo and numerous local government entities in the Philippines have passed legislation to prohibit discrimination based on sexual orientation and, in some cases, gender identity (Osumi, 2018; Manalastas, 2018). In addition, several ward governments in Tokyo and several city governments in Japan now offer limited recognition of same-sex unions in the form of partnership certificates (Amnesty International, 2017). These developments serve as reminders that law reform to protect LGBT rights are not always rooted in judicial action.9

Factors Contributing to the Divergence

The divergence among courts in Asia prompts the question: what animates this divergence? A host of factors seem to contribute to the strikingly different results of LGBT rights litigation in Asia. These factors provide fertile ground for developing research. This section of the chapter offers some preliminary observations about some of the factors that help to explain the divergence among Asian apex courts, specifically with respect to their consideration of LGBT constitutional rights.10 Some patterns exist that may not be readily apparent to observers who are not familiar with Asian courts. When one looks closely, one sees that the outcomes in constitutional cases have been shaped in large part by courts’ philosophies about judicial review and globalization. In this sense, constitutional adjudication on LGBT rights has been a mirror that reflects larger dynamics that are not specific to LGBT issues.
Recall that both Taiwan and Hong Kong are leaders in Asia with respect to judicial protection of same-sex couple rights. Prior to deciding cases concerning sexual orientation discrimination, these jurisdictions had already developed robust judicial review (Law, 2015). Their courts had significant experience with striking down laws. They had chosen not to always defer to the other branches of government. Considering Taiwan’s and Hong Kong’s history of robust judicial review, their apex courts were well-positioned to declare that sexual orientation is prohibited ground of discrimination that triggers rigorous judicial review and ultimately reject laws that disadvantaged same-sex couples.

We can contrast the apex courts of Hong Kong and Taiwan with that of Singapore, which upheld Section 377A, Singapore’s ban on sexual intimacy between men. Singapore serves as a paradigmatic example of weak judicial review. Indeed, constitutional scholar Po Jen Yap has called judicial review in Singapore “merely symbolic” (Yap, 2016). Throughout its history, only once has the Supreme Court struck down legislation as unconstitutional. In that case, however, the decision to strike down the law was made by the Supreme Court’s High Court (lower division), and was eventually overturned by the Supreme Court’s Court of Appeal (upper division) (Taw Cheng Kong v. Public Prosecutor, 1998). In light of this history, it is not all that surprising that Singapore’s Supreme Court chose to uphold Section 377A.

Although Singapore’s constitution establishes the judiciary as a co-equal branch of government, judges still face pressure from Singapore’s ruling party to exercise great deference to the political branches of government (Yap, 2016). This is evident in Court of Appeal’s opinion in the Section 377A case, Lim Meng Suang v. Attorney General. The opinion is peppered with dicta about the court’s limited power and its effort to avoid becoming a “mini-legislature.” The opinion
also used a highly deferential legal standard to evaluate Section 377A (Lee, 2016; Neo, 2016; Lee, 2015). This deference contrasts with the rigorous judicial review in Hong Kong and Taiwan.\(^{11}\)

Recall that India’s and Nepal’s apex courts were leaders in the domain of legal gender recognition. They are also known to be among the most activist courts in the world—sometimes criticized for overreaching into political matters (Malagodi, 2019; Sathe, 2002). They stand in contrast to Malaysia’s apex court—the Federal Court—which this chapter had mentioned earlier for declining to strike down a ban on cross-dressing. Unlike India and Nepal, Malaysia’s Federal Court is known to be extremely deferential to the political branches of government, although such deference may recede in coming years considering Malaysia’s regime change of 2018 (Tew, 2019).

In addition to robustness of judicial review, judicial philosophy on globalization has also been a factor in apex court adjudication on LGBT rights. The highest courts of Taiwan, Hong Kong, India, and Nepal are all known to be receptive to foreign law as persuasive authorities when interpreting their own constitutions. The latter three jurisdictions—Hong Kong, India, and Nepal—have substantial experience citing foreign law (e.g., Law, 2015; Malagodi, 2018; Thiruvengadam, 2013). Indeed, these three courts cited international and comparative law in their groundbreaking decisions on LGBT constitutional rights. Meanwhile, the TCC does not cite foreign law frequently because, following the civil law tradition, the TCC cites very few sources overall. Nonetheless, the TCC’s justices regularly consult foreign law. (Law, 2015). The TCC’s same-sex marriage judgment comports with the court’s willingness to draw inspiration from abroad. The opinion openly cites Obergefell v. Hodges, the same-sex marriage case from the United States. Commentators have also noted further similarities between the TCC’s decision and U.S. jurisprudence (Kuo & Chen, 2018).
We can contrast these examples with Singapore and Malaysia. Both jurisdictions have long displayed a reluctance to draw inspiration from abroad. In a series of cases, Singaporean courts adopted the “four walls doctrine” that was first articulated by Malaysian courts, dictating that the constitution is to be interpreted “within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America, or Australia.” (Chan v. Public Prosecutor, 1994; State of Kelantan v. Government of the Federation of Malaya, 1963). Commentators have suggested that the four walls doctrine has weakened over time in Singapore; nonetheless, Lim Meng Suang reflects Singapore’s reluctance to engage the large body of comparative and international law that calls sodomy bans into question (Thiruvengadam, 2016).

By the time Singapore’s Court of Appeal grappled with Lim Meng Suang, countries around world had already developed a large body of jurisprudence to support decriminalization of same-sex intimacy and to extend additional protections to sexual orientation minorities (Novak, 2018). To be sure, there have been some exceptional cases that upheld criminal prohibition of same-sex intimacy (e.g., Quansah, 2004), but most of the case law around the world supports decriminalization. In addition, United Nations treaty bodies have interpreted human rights treaties to require decriminalization, as have regional human rights bodies (Novak, 2018). Singapore’s Court of Appeal, however, chose to hardly engage these foreign and international developments. Lim Meng Suang summarily stated that foreign law “should be approached with circumspection because they were decided in the context of their unique social, political and legal circumstances.” (para. 48). The court failed to consider the possibility that similarities across jurisdictions might outweigh differences.

There is also a considerable body of comparative law that supports striking down bans on cross-dressing (International Commission of Jurists, 2011). Because Malaysia’s Federal Court
dismissed its cross-dressing case on procedural grounds, it did not engage substantive law from foreign jurisdictions. It still waits to be seen whether the Federal Court would engage foreign law if and when it hears a new case concerning the constitutionality of cross-dressing bans.

To be sure, other factors beyond philosophies of judicial review and globalization also influence judicial outcomes in LGBT cases. For example, it is perhaps unsurprising that the courts of India and Nepal were pioneers in articulating a constitutional right to non-binary gender recognition based on self-determination. Both India and Nepal have long cultural traditions of recognizing non-binary gender categories. (Knight, 2015; Nanda, 1996). As the Indian Supreme Court noted: “Historical background of Transgenders in India … [is such] that they were once treated with great respect, at least in the past, though not in the present.” (NALSA v. Union of India, 1996, para. 44). In that spirit, Kyle Knight has explained that “the third-gender category’s legal battle [in Nepal] gained traction in part because it carried historical echoes of South Asia’s hijara culture.” (Knight, 2015).

Note, however, that cultural traditions alone cannot explain the fragmentation of Asian jurisprudence. For example, there are many cultural similarities among Taiwan, Hong Kong, and Singapore. All three jurisdictions are home to predominantly ethnic Chinese populations with living standards of highly developed economies. In addition, public opinion polling from 2017 suggests that only a small minority of people in all three jurisdictions disagree with the statement: “It is possible to respect my culture and be accepting of people who are romantically or sexually attracted to people of the same sex.” The percentages of the public disagreeing with that statement in Taiwan, Hong Kong, and Singapore were 17, 20, and 21 percent, respectively (ILGA-RIWI, 2017). Yet, the judicial development of same-sex couple rights has been remarkably different with
Taiwan and Hong Kong on one hand and Singapore on the other. Divergence in philosophies about judicial review and globalization helps to explain these contrasting judicial outcomes.

**Challenging Conventional Narratives**

How do the judicial developments in Asia relate to existing narratives about the development of LGBT rights? This section offers several observations in response to this question. It explores three ways in which courts in Asia have challenged conventional narratives about the development of LGBT rights. First, Anglophone literature has presented and critiqued the fact that protections of gender identity rights lag behind protections of sexual orientation rights. (e.g., Minter, 2000; McGill, 2014). However, certain parts of Asia, especially South Asia, present major aberrations to this description about the order in which rights become protected. Some parts of Asia have protected gender identity rights before protecting sexual orientation rights, and their courts have been integral to this development. For example, over a series of decisions, Pakistan’s Supreme Court ordered the government to recognize a third gender category and take affirmative steps to protect third-gender persons in contexts including education, employment, law enforcement, and voting. (Dickson & Sanders, 2013). Subsequently, Pakistan enacted legislation to recognize gender identity based on self-determination and to protect people against discrimination based on gender identity (Hashim, 2018). However, as Dickson and Sanders have observed, while Pakistan is at the vanguard of protecting gender identity rights, “its society and legal institutions remain notably hostile toward homosexuality as such. Sodomy is still criminalized, and gay/lesbian groups operate in the shadows.” (Dickson & Sanders, 2013, 341).

Gender identity rights also preceded sexual orientation rights in India. The Indian Supreme Court handed down its sweeping NALSA ruling on transgender rights in 2014. Recall, however, that in the same year the Court rejected a constitutional challenge to India’s criminalization of
same-sex sexual intimacy. It was not until 2018 that the Indian Supreme Court struck down the criminalization of same-sex sexual intimacy. As discussed earlier, South Asia has a long cultural history of conceptualizing gender beyond two rigid categories. This context may help to explain why India and Pakistan present challenges to the narrative about sexual orientation rights preceding transgender rights.

The second narrative that Asian jurisdictions challenge concerns the sequential order of developing sexual orientation rights. Commentators have observed that the development of sexual orientation rights often follows a familiar sequence. Kees Waaldijk (2000, 2003) observed that European countries tended to follow a similar path: first a country would decriminalize sodomy, then equalize age-of-consent laws for same-sex and different-sex sexual activity, then pass national antidiscrimination legislation pertaining to sexual orientation, then offer same-sex couples some form of legal recognition short of marriage, followed by full marriage equality. Drawing on Waaldijk’s research, scholars such as William Eskridge (1999-2000) and Yuval Merin (2012) wrote that a similar pattern might be expected in the United States. The early European experience became conventional wisdom. Over time, however, the United States deviated from the European sequence (Lau, 2018). Likewise, some Asian jurisdictions have veered from the European trajectory. This deviation may be indicative of how other Asian jurisdictions will evolve in the future.

Consider, for example, the example of Hong Kong, where courts have played a pivotal role in advancing LGBT rights. Recall that the HKCFA ruled that Hong Kong must recognize, for immigration visa purposes, the union of same-sex couples who entered a civil partnership abroad. Commentators believe that this case has paved the way for the HKCFA to rule in favor of recognizing same-sex relationships for a host of other rights as well (e.g., Loper, 2019). Although
Hong Kong’s courts have ruled that sexual orientation is a prohibited ground of discrimination under constitutional law, those constitutional provisions do not regulate private contexts. Meanwhile, Hong Kong’s government has declined to ban sexual orientation discrimination in private domains through legislation. Because Hong Kong’s law reform has been led by courts applying constitutional rights, Hong Kong seems poised to continue expanding same-sex couples’ recognition rights before addressing discrimination in contexts such as private employment, which would require legislative action. This sequence stands in contrast to the sequence from Europe and is more akin to the situation in the United States. The US Supreme Court legalized same-sex marriage nationwide in 2015, but there is no federal law prohibiting sexual orientation discrimination in the private sector; a majority of states within the US also lack legislation banning sexual orientation discrimination in the private sector (Lau, 2018).

The situation in Taiwan also challenges the European narrative. Unlike the European countries studied by Waaldijk, Taiwan is poised to legalize same-sex marriage without first going through a substantial period of time where civil partnerships (or some other alternative to marriage) are provided as a compromise. Only some Taiwanese municipalities had established domestic partnership registries, and they conferred nominal legal rights. (Kuo & Chen, 2018). Taiwan is more like the United States than Europe (Lau, 2018). When Waaldijk studied Europe, the countries that had legalized same-sex marriage had done so through legislation without prompting by courts. In the United States and in Taiwan, however, courts have been much more integral to the legalization of same-sex marriage. These courts have been comfortable skipping the so-called stepping stone of civil partnerships on the path to same-sex marriage.

A third familiar narrative states that legal protections of LGBT rights begin in the West, and then the rest of the world subsequently imports these legal constructs. Indeed, writers
sometimes describe the development of LGBT rights protections around the world as a form of “westernization” (Lau, 2013). Such westernization narratives, however, are riddled with flaws. To be sure, by some important measures, the so-called West leads in developing protections against sexual orientation and gender identity discrimination. For example, most countries that have extended marriage rights to same-sex couples are part of the Western world. Nonetheless, there are significant aberrations in westernization narratives.

As mentioned earlier, courts in South Asia have been at the vanguard of prohibiting discrimination based on non-binary gender identities. On this issue, the apex courts of Nepal, Pakistan, and India were early leaders among courts from around the world (Dickson & Sanders, 2013). India’s decision in NALSA is also perhaps the most extensive judicial opinion that supports the self-determination model of gender identity. Westernization narratives regrettably imply that knowledge is transferred unidirectionally from the West to the rest of the world. They thus obscure the fact that Western jurisdictions could learn from non-Western jurisdictions regarding certain LGBT issues. For example, courts in the West could benefit from noting that South Asian jurisdictions unsettle assumptions about the binary nature of sex and gender categories.

India provides another example of Asia disrupting westernization narratives. The Indian Supreme Court’s long (over 500 page) judgment decriminalizing same-sex intimacy cited legal cases from other parts of the world, including but not limited to the West. To characterize the decision as “westernization,” however, would be deeply flawed. First off, the criminal provision at issue had been established by colonial British rulers. Thus, in a sense, Navtej Singh Johar was an undoing of earlier Western influence. Moreover, while the judgment drew on case law from the west to support its conclusion, it also transcended those earlier western cases. The Indian decision is more comprehensive when compared to landmark cases from the West, such as
Lawrence v. Texas (2003) from the United States. It went further than Lawrence in describing the constitutional infirmities of sodomy bans and the harms that such laws inflict. Accordingly, Navtej Singh Johar disrupts the narrative that Asia simply imports LGBT rights as legal constructs from the West. Instead, Asia is a site of knowledge production concerning LGBT rights.

Popular and Political Constraints on Courts

To what extent do politics and public opinion constrain judicial power to advance LGBT rights in Asia? This section of the chapter begins to explore this question. Consider some of the Asian jurisdictions that have gone the farthest in advancing LGBT rights, starting with Taiwan and Hong Kong. In Hong Kong, courts have debated the role that public opinion should play. Lower courts in Hong Kong have explicitly invoked public opinion to reject LGBT constitutional rights (W v. Registrar of Marriages, 2012; Leung Chun Kwong v. Secretary for the Civil Service, 2018). The HKCFA, however, has rejected this approach, stating in the transgender marriage case of W: “Reliance on the absence of a majority consensus as a reason for rejecting a minority’s claim is inimical in principle to fundamental rights” (W v. Registrar of Marriages, 2013, para. 116).

Yet, even if courts do not explicitly invoke public opinion to reject LGBT rights, public opinion may influence the way that courts seek to remedy rights violations. For example, in Taiwan’s same-sex marriage case, the TCC did not order the government to immediately begin registering and recognizing same-sex marriages. Instead, the TCC granted a remedial grace period (Kuo & Chen, 2018). The Legislative Yuan was given two years to enact legislation to extend “equal protection of the freedom of marriage” to same-sex couples (J.Y. Interpretation No. 748, 2017). As scholars have suggested, remedial delays of this sort can sometimes mitigate concerns about courts moving too far ahead of public opinion (Lau, 2016; Jacobi, 2006). The courts may enhance the perceived legitimacy of their decision if they are able to elicit the political branches’
cooperation in legalizing same-sex marriage. Controversy over the issues of same-sex marriage may also diminish over the course of time as cultural mores shift. As Kuo and Chen have suggested, the two-year remedial delay “testifies to the TCC’s cognizance of the controversial nature of same-sex marriage and its concern about the judgment’s legitimacy in the public eye” (2018).

How the remedial delay will ultimately affect public opinion remains to be seen. One can argue that the remedial delay has actually made same-sex marriage more controversial in Taiwan. During the grace period, opponents of same-sex marriage were able to put the issue on a referendum, and a majority of voters rejected same-sex marriage. Ultimately, this vote was only symbolic because it cannot override the TCC’s ruling in favor of same-sex marriage (Drillsma, 2018). Nonetheless, the symbolism is potent. One might argue that, by granting a grace period in its same-sex marriage ruling, the TCC exacerbated any perceived illegitimacy of its decision; the grace period enabled the referendum through which voters expressed their disapproval of same-sex marriage. As the situation in Taiwan continues to play out, it will warrant examination among scholars of courts, politics, and public opinion.

The HKCFA also delayed the remedy in one of its major LGBT cases. In the transgender marriage case of W, the Court held that a transgender woman had a right to be recognized as a woman for the purpose of marriage. Due to lack of public opinion data, it is unclear how controversial that ruling was. The Court perhaps mitigated controversy, however, by suspending its declaration that Hong Kong’s marriage law violated Ms. W’s constitutional rights. The HKCFA gave the Legislative Council (LegCo) one year to enact legislation to clarify what criteria a transgender individual must satisfy to be recognized, for marriage purposes, as the gender that
comports with their gender identity. The HKCFA also suggested that LegCo adopt comprehensive legislation to protect transgender persons against discrimination.

One year passed with LegCo failing to enact any relevant legislation. The HKCFA’s judgment in W foresaw this possibility and specified that, if LegCo were to do nothing, at the very least Ms. W would have the right to marry as a woman at the end of the one-year remedial grace period. In addition, any transgender person similarly situation to W—meaning that anyone who undergoes so-called “full” male-to-female sexual reassignment surgery—would be legally recognized as a woman for marriage purposes. The HKCFA seemed to acknowledge, however, that this default leaves constitutional questions unresolved. It stated: “If such legislation does not eventuate, it would fall to the Courts, applying constitutional principles, statutory provisions and the rules of common law, to decide questions regarding the implications of recognizing an individual’s acquired gender for marriage purposes as and when any disputed questions arise” (W, 2013, para. 147). Other jurisdictions have held that requiring a transgender person to undergo surgery to be recognized in their gender identity violates human rights (Lau, 2019a).

Even in cases where courts are more aggressive in demanding reform, there is the threat that other branches of government will resist compliance with the courts’ orders. Two landmark opinions from South Asia illustrate this point. As discussed above, the Indian Supreme Court’s NALSA decision was groundbreaking for demanding sweeping reforms related to gender identity. The court set a short six-month deadline for the government to implement the court’s ruling, but years have passed and little reform has been implemented (Jyoti, 2017). Similarly, in 2007, the Supreme Court of Nepal had ordered the government of Nepal to take steps to address discrimination against LGBTI persons and allow individuals to be recognized as a third sex based
on “self-feelings.” Implementation has, however, been slow. It was not until 2011 that Nepal’s census included a category for the third sex (Knight, 2015).

These examples are reminders that the power of courts is limited. Courts play an important—sometimes leading—role in galvanizing reforms to protect LGBT rights, but full realization of LGBT rights requires cooperation from other branches of government. However, even when such cooperation is lacking, it is important to acknowledge that judicial recognition of LGBT rights can serve an expressive function, what some may call “discursive justice” that amplifies the dignity of LGBT communities (cf. Webster, 2017). There are sometimes even silver linings to losing in court. Commentators have explained that activists can sometimes “win through losing” (e.g., NeJaime, 2011). Win or lose, well-publicized litigation can thrust an issue into the public square and galvanize public education and discourse in important ways. A loss in court can also inspire greater social mobilization fueled by discontent. In this vein, Lynnette Chua and Michael Hor have observed that LGBT rights activism in Singapore and other parts of Asia have “persisted and grown in spite of and perhaps because of the intransigence” (Chua & Hor, 2017, emphasis added).

References

Judicial Opinions


In re Change of Name and Correction of Family Register, 2004 Seu 42 (Korea 2006).

In re Futyu Hostel, Tokyo High Court, Civil 4th Division, (Japan 1997).

In re Rectification of Registers, 2014HoPa1842, Seoul Western District Court, 25 May 2016 (South Korea 2016).

J.Y. Interpretation 748 (Taiwan 2017).


Suresh Kumar Koushal v. Naz Foundation, 1 SCC 1 (India 2014).


Lawrence v. Texas, 539 U.S. 558 (United States 2003).

Leung Chun Kwong v. Secretary for the Civil Service, [2018] HKCA 318 (CA) (Hong Kong).


National Legal Services Authority (NALSA) v. Union of India, 5 SCC 438 (India 2014).


In re Rejection of Organization Registration, 2017 Seu 41283 (Korea 2017).

In re Screening of Movie “Just Friends?” 2011 Seu 11266 (Korea 2013).


Justice Puttaswamy (Ret’d) & Another v. Union of India and Others, Writ Petition (Civil) No. 494 of 2012 (India 2017).

QT v. Director of Immigration [2018] HKCFA 28 (Hong Kong 2018).


Saikō Saibansyo, Supreme Court, Hei 25 (kyo) no. 5, 67 (9) (Japan 2013).


W v. Registrar of Marriages [2012] 1 HKC 88 (CA) (Hong Kong).

W v. Registrar of Marriages, [2013] 16 HKCFAR 112 (CFA) (Hong Kong).

X v. Y, 60 JYIL 457 (2017), Tokyo High Court (Japan 2015).

Secondary Sources


日本の結婚は不平等 同性カップルが裁判に訴える理由


Human Rights Watch (2016, February 17). Legal Recognition of Transgender People in Japan [Complaint submitted to Juan Méndez (UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment) and Dainius Pūras (UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health)]. Retrieved from https://www.hrw.org/news/2016/04/01/hrw-allegation-letter-un-special-rapporteurs.


LGBT rights and intersex rights are connected in meaningful ways. This chapter, however, focuses on LGBT rights to comport with the scope of the edited volume in which the chapter appears. Accordingly, this chapter uses the acronym “LGBT” instead of “LGBTI.”

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2 “Malaysia has 13 states and 3 federal territories. All have state-enacted Islamic laws that criminalise trans women based on their gender identity and gender expression, while some criminalise trans men.” (Asia Pacific Transgender Network & Seed Malaysia, 2017, 30).

3 The surgical requirement in Hong Kong is currently being challenged in a case pending before the Hong Kong High Court, Court of First Instance (HKCFI). It is worth noting that the HKCFI recently ruled that it was “unreasonable” to deprive a transgender inmate of her hormone treatment; however, the court also ruled that the transwomen did not have a right to be housed in a correctional facility for men (Recasa v. Commissioner of Correctional Services & Commissioner of Police, 2017).

4 For background on the “self-determination” model of gender identity, as well as the “medical model,” see Romeo (2005).

5 In 2013, the government amended the Military Criminal Act so that “indecent act” is now defined as anal intercourse. The 2016 ruling did not address this revised version of the law. LGBT rights advocates are now in the process of challenging this revised version of the act in court.

6 LGBT organizations existed legally in South Korea prior to this ruling. They generally did not feel the need to register themselves with any government ministry.

7 An additional Korean case worth noting is In re Rectification of Registers (2016), in which the applicants argued that the term “marriage” in Korean laws should be interpreted to encompass same-sex marriages. The Seoul Western District Court ruled against the applicants, and the applicants have decided not to appeal.

8 At the time of this writing, a same-sex couple in Japan is preparing to file a lawsuit for the right to marry (Furata 2019). This case may eventually require the Supreme Court to decide the constitutionality of excluding same-sex couples from marriage.

9 Thailand is an example of a country pursuing notable law reform unprompted by litigation. At the time of this writing, Thailand’s legislature appears poised to legislate civil partnership rights for same-sex couples (Fullerton 2018).

10 This section of the chapter draws from my previous writing in “Sexual Orientation” (2019).

11 In late 2018, new litigation was filed to challenge again the constitutionality of Section 377A in Singapore (Qin 2019). For this constitutional challenge to succeed, Singapore’s Supreme would need to depart from the Court’s history of weak judicial review and overrule Lim Meng Suang.

12 This section of the chapter draws from my previous writing in “Sexual Orientation and Gender Identity Discrimination” (2018).

13 In response to the Taiwan Constitutional Court’s same-sex marriage ruling, Taiwan’s legislature might seek to develop a civil partnership system for same-sex couples in lieu of legalizing same-sex marriage; however, the Constitutional Court would probably quickly deem such legislation to be insufficient. The TCC had stated that the government of Taiwan must pass legislation to respect same-sex couples’ “equal protection of the freedom of marriage” and “[i]f the amendment or enactment of relevant laws is not completed within the said two-year timeframe, [same-sex couples] . . . may, pursuant to the provisions of the Marriage Chapter, apply for marriage registration . . . .” (J.Y. Interpretation No. 748, 2017).

14 A government may also choose to develop a civil partnership registry, or some other alternative to marriage, at the same time as (or after) it extends marriage rights to same-sex couples. For example, South Africa began allowing same-sex and different-sex couples to register as civil partners at the same time that it began allowing same-sex couples to marry legally (Lau, 2017).

15 The boundaries of “the West” are contested and some commentators have criticized the use of the term. See, e.g., Hugh Gusterson (2005).

16 It is worth noting that many parts of Asia either never criminalized same-sex sexual intimacy, or decriminalized it prior to decriminalization in parts of this West (Lau, 2011). This fact further disrupts westernization narratives.

17 Sonia Katyal previously made the same observation about the Naz Foundation case, in which the Delhi High Court struck down part of Section 377 (Katyal, 2010).