"ABOA": Apellant's Bundle of Authorities
"CB": Core Bundle
"ROA": Record of Appeal"

I. INTRODUCTION

1. The Appellant, Tan Eng Hong, is appealing against the decision of the High Court decision in OS No 994 of 2010 ("the Application").

A. Facts

2. Appellant was arrested and charged in District Arrest Case No 41402 with the offence under *s 377A* ("the charge") of the *Penal Code (Cap 224, 2008 Rev Ed)* ("the Penal Code").

3. The Appellant filed the Application on 24 September 2010, praying for the orders that:

4. *Section 377A* of the Penal Code is inconsistent with *Article 9* of the Constitution, and is therefore void by virtue of *Article 4* of the Constitution; and

5. *Section 377A* is inconsistence with *Article 12 and 14* of the Constitution, and is therefore by virtue of *Article 3* of the Constitution, and

6. For these reasons the charge against the accused under *s 377A* is void

7. Following the OS, the state counsel for AG amended the charge to one under *s 294(a)* of the Penal Code.

8. The Appellant was convicted and fined in the District Court under *s 294(a)*.

9. The AG then made an application to strike out the OS, pursuant to *O 18 r 19 of the Rules of the Subordinate Court*.

10. At the hearing in front of the AR, Appellant dropped Prayer 3 of the Application, since there no longer was an *s 377A* charge to be voided. The AR struck out the Application on 7 December 2010.

11. The Appellant appealed to High Court. The High Court dismissed the appeal on 15 March 2011.

12. The Appellant now humbly petitions this Honourable Court to grant his appeal against the decision of the High Court to grant the striking out application under *O 18 r 19*.

B. Summary of Submissions

13. In this Part, The Appellant will summarise his submissions on why the striking out application should not be granted.

14. The relevant portion *of O 18 r 19* is as below:

> "(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

15. It is common understanding that the Application does not prejudice or embarrass the trial. There is also no suggestion that it delays the fair trial of the action, since the Appellant has already been convicted of s 294. Hence this ground will not be explored.

i. Appellant has reasonable cause of action

16. Appellant's action is one that is not certain to fail. Appellant has locus standi either by the standard in ***Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and another*** **[2006] 1 SLR(R) 112** ("*Karaha Bodas*"), and alternatively, in the exception to *Karaha Bodas*. Real controversy exists by the way of the Appellant's daily life being affected by *s 377A*. There is ambiguity about the issue, since there is strong persuasive precedent behind the Application, for it is not the first time a similar action has been tried in the world, and especially not Asian countries.

ii. Application is not frivolous or vexatious

17. The Application is not one that is obviously sustainable, or meant to annoy or embarrass an opponent. It is a bona fide application, as it concerns his ability to live his life freely. It has practical application, as the determination comes with real life consequences, both for the Appellant and the entire gay community.

iii. Application is not an abuse of process of court

18. Application is not an abuse of process, simply because *s 56A of the Subordinate Courts Act* was not used. It does not engage the courts in an improper manner, for it is not necessary for the Application to have proceeded by *s 56A*. Neither is it manifestly groundless, by reason of there being a reasonable chance of success.

II. APPELLANT'S APPLICATION SHOULD NOT BE STRUCK OUT UNDER *O 18 R 19 OF THE RULES OF COURT*

19. It is submitted that the Appellant's Application should not be struck out under *O 18 r 19 of the Rules of the Supreme Court*.

A. Appellant has a reasonable cause of action

20. It is submitted that the Appellant has a reasonable cause of action. A reasonable cause of action is one that is not certain to fail.

21. In ***Drummond-Jackson v British Medical Association*** **[1970] 1 WLR 689** at [1101], Lord Pearson said that "power to strike out a statement of claim as disclosing no reasonably cause of action is a summary power which should only be exercised in plain and obvious cases". He further defined "reasonable cause of action" as "a cause of action with some chance of success… when only allegations in the pleading are considered". This significantly overlaps with the ground in *O 18 r 19,* "appeal does not have a reasonable chance of succeeding". This was approved in the **"*The Endurance 1 ex Tokai Maru*" [2000] 2 SLR(R) 120; [2000] SGHC 99** at [44] ("*Tokai Maru")*.

22. For an Appellant to have a reasonable cause of action, then it is necessary to prove that should the Application proceed, it would have a reasonable chance of succeeding. Since the Application is for declaratory relief, the principles of declaratory relief are stated below:

> "(a) the court must have jurisdiction and power to award the remedy;

(b) the matter must be justiciable in the court;

(c) as a declaration is a discretionary remedy, it must be justified by the circumstances of the case;

(d) the plaintiff must have locus standi to bring the suit and there must be a real controversy for the court to resolve;

(e) any person whose interests might be affected by the declaration should be before the court; and

(f) there must be some ambiguity or uncertainty about the issue in respect of which the declaration is sought so that the court's determination would have the effect of laying such doubts to rest."

23. For the purposes of this Appeal, it is common understanding that the requirements of (a), (b), (c) and (e) are not in issue. It is submitted that the Appeal has a reasonable chance to succeed because:

(1) Plaintiff has *locus standi*

(2) There is a real controversy

(3) There is an ambiguity or uncertainty about the issue that needs a Court to adjudicate

i. <u>Appellant is a gay man whose interests are affected</u>

24. Much of the submissions rely on the fact that the Appellant is a gay man, and hence has, and wishes to continue engaging in consensual sexual acts with other adult men in private.

25. *O 18 r 19* states that no evidence is admissible for the purposes of proving that

the Application does or does not have a reasonable chance of success. As such, the assertions that the Appellant is a homosexual, and that his life is being affected, cannot be proven by actual affidavit evidence.

26. However, firstly, Appellant would invite the court to take judicial notice of the fact that it is a commonly acknowledged fact that heterosexual men ordinarily have little interest in engaging in homosexual acts. Only men who are physically attracted to other men, who may or may not identify as gay/homosexual or bisexual (collectively referred to as "gay men" from here onwards), will be interested in engaging in these acts.

27. Secondly, the fact that the Appellant is homosexual, was raised both before the AR and the High Court, and the AGC did not object or offer any counter-arguments. Hence, it must be common settled fact for the purposes of this appeal that the Appellant is gay, and wishes to engage in homosexual acts now and in the future.

28. Thirdly, the fact that the Appellant is a homosexual and was undergoing counselling sessions with a LGBT-friendly counselling agency was reported in national newspapers ("***Man fined for sex act in toilet", The Straits Times, Dec 15 2010)***. We invite the court to take judicial notice of this fact.

29. It is commonly known fact and understanding that the existence of *s 377A* affects the lives of people who identify as gay men, in Singapore. This was acknowledged in ***Naz Foundation v Government of NCT of Delhi WP(C) No.7455/2001*** at [9] ("*Naz Foundation*"), ***The National Coalition for Gay and Lesbian Equality v The Minister of Justice CCT 11/98 [1998] ZACC 15*** at [7]

("*National Coalition*") and ***Lawrence v Texas 539 U.S. 558 (2003)*** at p 510, with respect to similar provisions in their own jurisdictions.

30. Even our own Parliamentary members have acknowledged that the law affects the lives of gay people.

31. Former NMP Siew Kum Hong, in presenting his petition for repealing s 377A before the Parliament in ***Sing, Parliamentary Debates, Vol. 83, COL. 2175 at 2242 (22 October 2007) (NMP Siew Kum Hong)*** said thus:

> "But there is a very good reason why the criminal law should not reflect public morality. And that is because doing so can lead to the discriminatory oppression of minorities…..
>
> Furthermore, not proactively enforcing 377A does not mean that its retention is without cost. The Government says that it seeks to reflect the moral values of the majority, but what about the human cost to gay persons and their families? What about the cost to Singapore from those who leave Singapore because of this law? What price, this reflection and endorsement of public morality?
>
> The majority of Singaporeans seem to speak as if the non-enforcement of 377A means that everything is fine. But the majority would say that because they are not the subjects of discrimination, because they are not the minority who have to live under the threat of 377A, which is a sword of Damocles that could fall with a change of policy by the Government of the day."

32. Prime Minister Lee Hsien Loong said thus, in the same debate (***Sing,***

Parliamentary Debates, Vol. 83, COL. 2354 at 2469 (23 October 2007) (Prime Minister Lee Hsien Loong)), with respect to gay people:

> "So, too, in Singapore, there is a small percentage of people, both male and female, who have homosexual orientations. They include people "who are often responsible, invaluable, and highly respected contributing members of society". I quote from the open letter which the petitioners have written to me, and it is true. They include people who are responsible and valuable, highly respected contributing members of society. And I would add that among them are some of our friends, our relatives, our colleagues, our brothers and sisters, or some of our children.
>
> They, too, must have a place in this society, and they, too, are entitled to their private lives. We should not make it harder than it already is for them to grow up and to live in a society where they are different from most Singaporeans. And we also do not want them to leave Singapore to go to more congenial places to live."

33. Hence, the very existence of the law does affect the lives of anyone who identifies as gay.

ii. <u>Appellant has locus standi</u>

34. It is submitted that the Appellant has *locus standi*. The very existence of *s 377A* and the way it affects his life gives him a standing to challenge it. Alternatively, at the point of filing of the Application, he was charged with *s 377A*, and hence had standing.

a) Locus standi subsists by virtue of existence of s 377A

35. Appellant has *locus standi* due to the very existence of *s 377A*. Firstly, the Plaintiff has a legal right that is enforceable against the AGC. Secondly, he does not need to have suffered a violation or injury in order to have standing, and even if he does, the very existence of the law premises an injury. It is trite law that the constitutionality of both written law and executive actions can be questioned. Finally, there is a real controversy in this case to be resolved.

(1) Appellant Has Locus Standi To Seek A Declaration Under O 15 that s 377A Is Unconstitutional

36. Appellant has locus standi to seek a declaration on this matter. To have locus standi, the plaintiff must be "asserting a recognition of a right that is personal to him" per *Karaha Bodas*. In *Karaha Bodas*, the judge cited ***Gouriet v Union Post Workers & Ors* [1977] 3 All ER 98** ("*Gouriet*") and ***Guaranty Trust Co of New York v Hannay & Co* (1915) 2 KB 536** ("*Guaranty Trust Co*"), in coming to this conclusion.

37. Lord Wilberforce in *Gouriet* at p 483:

> "the plaintiff, in proper proceedings, in which there is a dispute between the plaintiff and the defendant concerning their legal respective rights or liabilities either asserts a legal right which is denied or threatened, or claims immunity from some claim of the defendant against him or claims that the defendant is infringing or threatens to infringe some public right so as to inflict special damage on the plaintiff."

38. Further, in *Gouriet* at p 501, Lord Diplock elaborated on this:

> "The only kinds of rights with which courts of justice are concerned are legal

rights; and a court of civil jurisdiction is concerned with legal rights only when the aid of the court is invoked by one party claiming a right against another party, to protect or enforce the right or to provide a remedy against that other party for infringement of it, or is invoked by either party to settle a dispute between them as to the existence or nature of the right claimed. So for the court to have jurisdiction to declare any legal right it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally on the happening of an event."

39. In *Guaranty Trust Co*, the following was said:

> "though the right to claim a declaration was not confined to cases where the plaintiff had a cause of action, such a claim could only be made at the instance of a party who was interested in the subject matter of the declaration (per Pickford LJ at 562) or if the claim related to a declaration of some right which the plaintiff maintained he had as against the person whom he had made a defendant to his suit"

40. From this, it is clear that authority points to the proposition that a "legal right" must be at stake. *Gouriet* itself points to the definition of what a legal right is, as being "enforceable as against an adverse party in litigation, either as a subsisting right or as one which may come into existence in the future conditionally on the happening of an event".

41. The issue of what consists as a "legal right" was also considered in the Court of Appeal decision in ***Salijah Binte Ab Latef v Mohd Irwan Bin Abdullah Teo*** **[1996] 2 SLR 201** at [63] ("*Salijah*"),

> "What amounts to a contest of rights is that there must be a subsisting dispute between the parties which has not been resolved by any judgment of court. "

42. The decision in the Court of Appeal related more to the issue of *res judicata*, due to the facts of the case. In *Salijah*, the wife approach the High Court for a declaration after a Syariah court made an order with respect to her marriage and matrimonial property. As such, the definition found in *Salijah* should be interpreted, within the context of this appeal, as being that there needs to be a real question that genuinely requires a Court to adjudicate.

43. There are two separate definitions that emerge from this. Whether they are considered in the alternative or conjunctively, the Appellant has a legal right. Having defined what a legal right is, it is submitted that the Appellant's legal rights are in question here, since there is both

a) A right against the adverse party

b) A real question that requires a court to adjudicate.

(i) A right against the adverse party, by virtue of the existence of the s 377A

44. While this declaration might not concern a specific criminal charge, it concerns the ability of the respondent to live freely from the constant threat of prosecution from a constitutionally unfair law. As such, this is a future right conditional upon an event, as defined in *Gouriet*.

45. In this case, though the initial *s 377A* charge was amended to another charge, the fact remains that *s 377A* is still a law that exists. It still threatens the Plaintiff, every single day, as he lives his life as a gay man. This is not his lone

predicament, but a predicament shared by thousands of gay men in Singapore, as they go about their otherwise law-abiding, tax-paying lives.

46. Even though the Plaintiff does not have a *s 377A* charge now, he has to live in fear that the police might decide to change their currently non-pro-active stance and arrest him, even in the privacy of his home.

47. There is no right to be protected from the threat of prosecution, for an average citizen. The criminal laws are what keep our society from descending into chaos. However, the provision in question is a highly suspect provision. It was declared by the Parliament that it will not be "enforced pro-actively", though it will remain on the books. While this is an inherently contradictory and uneasy stand, the very fact that this stand has to be taken, highlights the inherently unfair nature of the provision.

48. The right in question is that of being able to live knowing that he will not be prosecuted under *s 377A*. This is a right that is enforceable against the AG in the future, should they decide to prosecute him. Hence, the definition of a legal right in *Gouriet*, and hence the test in *Karaha Bodas*, is satisfied.

(ii) A real question that requires a court to adjudicate

49. The Appellant has a substantive dispute that has not been settled by a court.

50. The real question here is whether *s 377A* is unconstitutional. This is a question that has yet to be settled by the judiciary in Singapore. Whether or not there is a charge against the Appellant, the issue of *s 377A* as an unconstitutional law remains. As elaborated on later, there are very strong arguments in favour of the unconstitutionality of the provision.

(2) Appellant does not need to have suffered a violation or injury in order to have standing

51. Even if one does not accept that the test in *Karaha Bodas* is satisfied, alternatively, it is submitted that the Appellant still has standing by exception to *Karaha Bodas*.

(i) Appellant need not be prosecuted in order for there to be standing

(a) Applications relating to constitutional law have a different standard of locus standi

52. Appellant does not have to meet the stricter test to prove that he has *locus standi*.

53. The 'stricter test' for *locus standi* was elucidated in *Karaha Bodas*. In that case, the Court of Appeal held that the court's power to grant declaratory reliefs under *O 15 r 16* is subject to the requirement that the declaration be one of right (at [25]). Plaintiffs seeking declaratory relief thus have to prove that they have a 'real interest' in bringing the action, and that there was a 'real controversy' between the parties for the court to resolve.

54. However, the Court of Appeal in ***Eng Foong Ho v Attorney-General*** **[2009] 2 SLR(R) 542** ("*Eng Foong Ho*") affirmed an exception to this principle. That case held that where an Appellant seeks declaratory relief against a possible infringement of his constitutional rights, he will not be subjected to a stricter test for *locus standi* (at [18]) :

> "... the respondents have also argued that because the appellants have proceeded by way of *O 15 r 16* and not *O 53 r 1* of the Rules of Court, they must satisfy a stricter test for *locus standi* as decided by this court in *Karaha*

Bodas. The argument seems to be that a higher standard of *locus standi* is required for an application under *O15 r 16* than that under *O 53 r 1*. This argument has no merit whatsoever. *Karaha Bodas* was not concerned with the pursuit of constitutional rights. In our view, it does not matter what procedure the appellants have used. The substantive elements of *locus standi* cannot change in the context of the constitutional protection of fundamental rights."

55. It can be contended that the paragraph refers to the fact that just because the procedure used is different, that does not mean that a different standard for *locus standi* applies. This is true, to the extent that a different standard of *locus standi* applies with different procedures. However, when one examines the statement, it is clear that Applications alleging violations of Constitutional Law have different standards from private actions, such as it was in *Karaha Bodas*.

56. In *Karaha Bodas*, one of the parties was seeking a declaratory action with respect to a debt it was not party to. This is a situation in which the party has no interest in the litigation. However, in *Eng Foong Ho*, the Appellants were devotees of the Jin Long Si Temple seeking a declaration against the compulsory acquisition of the temple property by the Collector of Land Revenue. The Appellants were not Trustees of the temple and thus did not have proprietary interest over the temple property. By the *Karaha Bodas* standard, they would have been judged as not having standing, since they are "third parties" to the land acquisition action, being neither the trustee nor the Collector. Nevertheless, the court held that the Appellants, as members of the San Jiao Sheng Tang Buddhist Association, had sufficient standing to pursue declaratory relief as the defendant-Collector's act

could possibly amount to an infringement of Article 12 of the Constitution.

57. This determination, combined with the statement in *Eng Foong Ho* that the standards do not differ, mean that the test for standing for constitutional law matters is not as strict as it is in *Karaha Bodas*, of requiring direct interest.

(b) The standard for *locus standi* for constitutional law cases does not require one to be prosecuted.

58. It is submitted that the Appellant has *locus standi* notwithstanding the fact that he was eventually not prosecuted under *s 377A*. One does not need to be prosecuted in order to gain interest in a constitutional action.

59. In ***Chan Hiang Leng Colin v Minister of Information and the Arts*** **[1996] 1 SLR 609** at 614D ("*Colin Chan*"), the Court of Appeal held that "A citizen should not have to wait until he is prosecuted before he may assert his constitutional rights". In that case, the Appellants were Jehovah's Witnesses seeking judicial review against the Ministry of Information, Communications and the Arts' prohibition on the importation, sale and distribution of certain publications. The Appellants were found to have *locus standi* despite the fact that they had not been prosecuted or suffered any harm as a consequence of the defendant-Ministry's action.

60. It might be argued that *Colin Chan's* reasoning was based on the fact that the violation in that case was that the Minister ordered a ban on the magazines. The subject-matter of *Colin Chan* was not the criminal action that was initiated against them for possessing the banned materials, but the ban itself. Hence, there was an injury to their constitutional rights.

61. This is an entirely correct reading of the case, except that it does not mean that the Appellant needs to be prosecuted in order to suffer an injury. In fact, this only reinforces the point in *Colin Chan*, that being prosecuted is not the only way to gain standing. The very existence of a law that poses an injury to your constitutional rights is enough. A Ministerial Order is both an act and written law. Furthermore, the prosecutions, if sustained in *Colin Chan*, would be a direct result of the regulation/act that banned the publications. In this case, the factual matrix is exactly analogous. *S 377A* poses an injury to the constitutional rights of the Appellant, by its very existence, as he is prevented from engaging in consensual sexual activities with his chosen partners. Whether the Appellant was prosecuted or not, this would be a direct consequence of the law that is already injurious to him.

62. The principle that prosecution is not necessary for standing is a fairly well acknowledged principle, especially in Commonwealth jurisdictions. It was reiterated in ***Union de Pequenos Agricultores v Council of the European Union* [2003] QB 893**, "Individuals clearly cannot be required to breach the law in order to gain access to justice" (at [43]).

63. In ***Croome and Another v State of Tasmania* (1997) 142 ALR 397** ("*Croome*"), the Appellant was a homosexual challenging the constitutionality of Tasmania's sodomy laws, despite the fact that he had not been prosecuted under the relevant provisions. In a unanimous judgment the High Court of Australia held that the Appellant had *locus standi*. As Brennan CJ, Dawson and Toohey JJ opines at 402:

> "The plaintiffs plead that they have engaged in conduct which, if the

impugned provisions of the Code were and are operative, renders them liable to prosecution, conviction and punishment. The fact that the Director of Public Prosecutions does not propose to prosecute does not remove that liability. Liability to prosecution under the impugned provisions of the Code will be established if the court were to determine the action against the plaintiffs even if liability to conviction under those provisions cannot be determined by civil process Controversy as to the operative effect of the impugned provisions of the Code will be settled and binding on the parties. The plaintiffs have a sufficient interest to support an action for a declaration of *s 109* invalidity."

Similarly, in ***Leung T C William Roy v Secretary for Justice*** **(HCAL 160/2004)** ("*William Leung*"), the Hong Kong Court of Appeal did not make prosecution a prerequisite to establish standing for a homosexual Appellant seeking to challenge the validity of a provision penalising homosexual acts conducted by citizens of his age. At [29],

"Notwithstanding the fact that a prosecution is neither in existence nor in contemplation and there is no relevant decision which directly affects the Appellant, yet it is clear on the facts that he and many others like him have been seriously affected by the existence of the legislation under challenge...The effect of the Respondent's submissions is really that the constitutionality of the affected provisions can only be tested if the Appellant were to go ahead with those activities criminalised by the provisions in question and be prosecuted for them. In other words, access to justice in this case could only be gained by the Appellant breaking what is according to the

statutory provisions in question, the law. In my view, this is a powerful factor in favour of the court dealing with the matter now."

64. In ***Horn v Australian Electoral Commission*** **(2007) 163 FCR 585** at [22], it was said:

> "It is a misconception to suggest that, in proceedings for a declaration of invalidity of an impugned law, no law is administered unless the Executive Government has acted to enforce it."

65. Either the law is constitutional, or it is not. It is not logical to insist that there needs to be a prosecution in order for the effects of the law to be felt. In fact, such a stance would actively encourage criminal behaviour in order for the affected person to gain access to justice.

66. Furthermore, as mentioned above, the appellant engages in conduct that, were *s 377A* to be actively enforced, results in him being liable for conviction.

(ii) Appellant meets standards for standing

67. Gay/homosexual people meet the threshold in order for there to be standing because the law directly affects them

68. It is submitted that the plaintiff has legal interest that validates *locus standi* in the matter. In ***R v Greater London Council ex parte Blackburn And Another*** **[1976] 3 All ER 184** (at 192), Lord Denning MR said:

> "I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or

injures thousands of Her majesty's subjects, then anyone of those offended or injured can draw it to the attention of the court of law and seek to have the law enforced and the courts in their discretion can grant whatever remedy is appropriate."

69. In *William Leung*, the court held that the Appellant had standing to take out a declaratory judgment, as the law seriously affects them. The Appellant, the court said, has been living under a "considerable cloud". In *Croome*, "sufficient interest" was deemed to be had, because they had engaged in conduct that, "if the impugned provisions of the Code where and are operative, renders them liable to prosecution, conviction and punishment" *(Croome*, at 402). *Croome* took its guidance from ***Pharmaceutical Society of Great Britain v Dickson*** **[1970] AC 403** ("*Pharmaceutical Society*"), where the principle of necessary or sufficient interest was met as long as their "freedom of action is challenged", in order to clarify "his rights and position clarified". These cases have not been applied locally directly, but the same principle and stance can be found in local cases.

70. In *Colin Chan*, the action was for a judicial review under *O 53*, not a declaration under *O 15*. In that case, sufficient interest was met by the fact that they were citizens and Jehovah Witnesses whose interests were being impaired by the bam, and hence they were entitled to complain that their constitutional rights were being violated (*Colin Chan*, at 614). No further qualification was needed, for them to be able to do so. In fact, if one were to follow the strict reasoning that the AGC is advocating in their submission for this case, the only ones who would be able to mount a challenge in *Colin Chan* would be the owners of the banned book, who were foreign non-resident publishers. The Court of Appeal explicitly

rejected this reasoning in that case, because it would be the most bizarre of results if the only people able to challenge the decision for constitutionality were foreign non-residents, not the ones professing the faith, and were actually affected by not being able to access the books of their faith.

71. In *Eng Foong Ho*, sufficient interest was met by the fact that the petitioners seeking the declaratory judgment were members of the Association that held the property subject to compulsory acquisition, even though the petitioners had no proprietary interest in the Temple (*Eng Foong Ho*, at 547). The holding in *Eng Foong Ho* also reflects the principle elucidated in the earlier cases that one needs to be merely affected by the law in question even if they are not prosecuted.

72. The Respondent has previously argued that the "injury" present in both *Colin Chan* and *Eng Foong Ho* are actions taken by the authorities. It was contended that since there was no prosecution for the Appellant, there was no "action" for the appellant to be injured by. This is an incorrect reading of *Colin Chan* and *Eng Foong Ho*. Firstly, even if this argument was correct, there was indeed an "action" that affected the appellant, as he was initially charged with s 377A. Secondly, it is trite law that constitutional questions can be raised with respect to both actions by the government, and written law. Thirdly, neither of these actions were prosecutions. In fact, in *Colin Chan*, the "action" involved a Ministerial Order, which is actually part of written law, just as *s 377A* is.

73. Applying *Eng Foong Ho* and *Colin Chan*, in light of the foreign cases cited above, it is quite clear that any male person who practices homosexual acts has sufficient interest. The Appellant's sexual orientation is scientifically immutable aspect of his personal identity. The appellant has a personal interest in living a

dignified life free from prosecution for something that he is not able to change. Such personal interest exists even in the absence of an actual prosecution of the Appellant under the contested provision.

74. The practice of the acts is closely tied to the identity, as heterosexual men have little interest in engaging in homosexual acts. While it purports to target behaviour, what it does in essence is to target people of a certain sexual orientation. Specifically, it targets gay men.

75. When gay men engage in sexual activities with other men, this is as much as an expression of human desire as it is when a straight man chooses to have sexual activities with women. When they form relationships, that is also the same as when heterosexual people form their own relationships. Hence, when sexual activities between men are criminalised, that has the effect of criminalising their desires and by extension, their entire life.

76. For this reason, *s 377A* is not like other provisions of the criminal law, in which members of society have a real choice as to whether to commit them. One can choose to murder, steal or rape. One does not choose to be gay. To criminalise homosexual sex activities while being cognizant of the fact that homosexuality is an innate trait, is to take the extremely odd position that all gay men need to be celibate, in order to remain non-criminals.

77. The existence of the law strongly affects those in the gay/homosexual community, for they have to live in constant fear of prosecution. The law affects their constitutional rights to equality, privacy and freedom of expression, and as per *Colin Chan*, this means that they have standing to challenge the laws. Their

freedom of action is curtailed, as they have been made into unapprehended criminals for engaging in acts that are central to their identity and romantic relationships, which ties into *Pharmaceutical Society*. These acts, when performed by members of the opposite sex on each other, are obviously not criminalized.

78. The Appellant has been a practicing gay man for 25 years, to date. While he was arrested for this one incident, for 25 years, it is clear that in engaging in sexual activities, he was committing crimes his entire life. His human desire to form intimate relationships, and his innate attraction to other men will probably lead to engage in sexual activities with other men in the future.

79. As such, the Application is not about the single charge of *s 377A* that was laid upon the Appellant. It is about the indisputable fact that in living his life as a gay man, the Appellant will continue to be committing a crime, whether or not he is arrested for it. The unapprehended criminality has an effect of his ability to live his life, as he must constantly fear that he will be arrested again.

80. Hence, the law is a serious curtailment of their right to equality, privacy and freedom of expression, especially in the context of the fact that, as said above, this is an integral part of love and intimacy in the lives of gay/homosexual people.

b) Locus standi subsisted at the time of being charged

81. Alternatively, even if the Appellant is deemed not to have a right to a declaration, it is submitted that he had a right at the time of the application.

82. Even if there needs to be a criminal prosecution for there to be standing, it is

submitted that at the time the *O 15* application was filed, there was a charge pending before the courts, for the Appellant. Hence, at the material time, the Appellant would have had standing to seek the declaration that the charge was in violation of his constitutional rights.

83. It is not logical to say that a prosecution must be completed to conviction, for a constitutional challenge to arise. Conviction of the accused depends on the factual guilt of the person, but the violation of the rights has already been done in the process of the charging the accused.

84. The decision by the AGC to drop the charge under *s 377A* need not necessarily invalidate the locus standi of the plaintiff since it in no way altered the actions of the plaintiff which in first instance brought forth the initial charge. Scalia in ***Lujan v Defenders of Wildlife*** **[(1992) 119 L Ed (2d) 351** (at 364)] spoke of the "core component of standing" as "an essential and unchanging part of the case". Even though the plaintiff was charged under s 294 of the Penal Code for his misdemeanour, it is submitted that because the substantive facts remains such that the plaintiff committed an act which constitutes as an offence under *s 377A*, and was held by his misdemeanor answerable to the charge of s 377A, which was in fact raised against him, it does not matter even if the initial charge was not upheld by the election of the Attorney-General's Chambers. The plaintiff's *locus standi* on the matter therefore would remain unchanged, given that his acts, which brought about his standing on the above matter, remain unchanged.

iii. <u>There is a real controversy</u>

85. There is a real controversy present in this case. Though the Appellant is not being

prosecuted, the very existence of the law poses a non-hypothetical threat to his ability to live his life.

a) The logical link between real controversy and locus standi

86. At the outset, it has to be acknowledged that conceptually, there is a very strong link between *locus standi* and real controversy. They are actually part of the same limb in *Karaha Bodas*. It is not entirely clear that real controversy, as a limb stands on its own.

87. Conceptually, the requirements of *locus standi*, of there either being a real injury, or the existence of a law/regulation that affects the persons involved, is fairly the same as that of real controversy.

88. For there to be a real controversy, the following are the requirements. It must be noted that this does overlap quite a bit with the requirement of *locus standi*,

i) Person raising must have real interest

ii) There needs to be someone with an interest to oppose it

iii) Question must not be theoretical, which would waste the court's time, and then matter would not be *res judicata*

89. The support for this comes from ***Russian Commercial & Industrial Bank v British Bank for Foreign Trade*** **[1921] 2 AC 438**, stated the following at 448:

> "...The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought."

90. The three limbs are basically a restatement of the principles of *locus standi*. For *locus standi*, that the person needs to have been affected by a law, regulation or action. In real controversy, it is couched in terms of interest and non-theoretical questions.

91. Hence, it is not clear that they are two limbs that need to be tackled separately.

92. Even if this is not the case, there is still a real controversy with respect to this Application.

b) Appellant has real interest

93. As said above with respect to *locus standi*, Appellant's life is being affected by this law. This is not a hypothetical situation. Self-interest was defined in **Lim Kit Siang [1988] 2 MLJ 12** ("*Lim Kit Siang*"):

94. In *Lim Kit Siang* at p 27, Abdul Hamid CJ said this about self-interest:

> ...Self-interest is seen as the motivating force that will ensure that the parties present their respective positions in the best possible light. If the motivation of self-interest is non- existent so that the ensuing dispute is not with respect to contested rights and obligations of the parties themselves, then the assurance of diligent preparation and argument cannot exist....

95. According to this, there is more than enough interest for the Appellant to pursue this action. The appellant has every motivation to ensure that this Application succeeds, for it will allow him to form intimate relationships with who he chooses without fearing that the law might knock at his door. As explained above, the human desire for companionship and love is a strong motivating factor.

c) AGC has real interest to oppose

96. The AGC has an interest to oppose this as well, as they are bound to defend the law of the land. Furthermore, they decided to prosecute him under *s 377A* at first. If they wish to reserve the use of that provision, they have a real interest to make sure it is not taken out.

d) Situation is not theoretical

97. This Application does not relate to a theoretical declaration.

98. In *Salijah* at [60], Yong Pung How CJ said with respect to theoretical declarations:

> "The primary consideration in this appeal is whether there is a real contest of the legal rights. The editors of Zamir and Woolf have identified one rationale for the reluctance of the courts to deal with theoretical issues - that it distracts the courts from deciding real, subsisting problems. A stronger reason is that if there is in fact no real issue subsisting, then the matter would not be res judicata, nor the issue merged in judgment. In that event, it would be open for the issue to be reopened again and again. The need for the existence of a contested dispute is to ensure that there is finality in the court's judgments as well."

99. As mentioned above, the facts in *Salijah* amounted to the fact that there was already a determination with respect to the property rights in the Shari'ah court. The order sought by the Wife in the High Court, would hence be theoretical in nature, as there already was an order to the effect from the Shari'ah court. The proper remedy in that case would be to seek enforcement of the prior order. Indeed, in ***Paillart Philippe Marcel Etienne and Another v Eban Stuart Ashley***

and Another **[2006] SGHC 187; 1 SLR 132** at [17]**,** *Salijah* was distinguished on this basis.

100. With respect to the current situation, there is nothing theoretical about the declaration. The issue at hand has not already been determined by another court. As already mentioned, it will have immediate practical implications. It is not theoretical that the Appellant wishes and will engage in sexual activities with other men in the future, and he already has in the past. He will be a criminal for the rest of his life if the law is allowed to stand.

(1) *Even if facts are hypothetical, a declaration can still be given*

101. Furthermore, even if the situation is hypothetical, there is precedent that in some hypothetical situations, declarations can still be given. In *William Leung*, it was held that in exceptional cases, it can be allowed.

102. The High Court held that the criteria of exceptional cases in *William Leung* was very vague. However, with all due respect to the learned judge, in *William Leung*, the exceptional cases were actually quite well demarcated:

> "In a number of cases, the courts have stated that notwithstanding that future events or proposed conduct are involved, then in "exceptional cases", the courts would countenance granting appropriate relief : - see R(Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening) [2002] 1 AC 800, at 851 (paragraph 116) per Lord Hobhouse of Woodborough; R(Rusbridger and another) v Attorney General [2004] 1 AC 357, at 366-7 (paragraphs 16 to 19) per Lord Steyn, 370 (paragraph 32) per Lord Hutton. Airedale N.H.S. Trust v Bland [2002] 1 AC 800, at 851

[1993] AC 789 was just such an exceptional case. There, a patient who had been involved in the Hillsborough football ground tragedy was left with catastrophic and irreversible brain damage (he was diagnosed as being in a persistent vegetative state). With the concurrence of the patient's family, the health authority responsible for the hospital where the patient was being treated sought declarations as to the lawfulness of the hospital in the future discontinuing all life-sustaining treatment and medical support to the patient except to enable him to die in peace. There is some similarity between that case and the present appeal in that the civil courts were being asked to adjudicate on the lawfulness of an act which might otherwise have criminal sanctions and which had not taken place. Notwithstanding that the declarations sought dealt with the legality of future conduct, the House of Lords considered the facts sufficiently exceptional to justify a remedy. As Lord Goff of Chieveley put it at 862H- 863A : -

"It would, in my opinion, be a deplorable state of affairs if no authoritative guidance could be given to the medical profession in a case such as the present, so that a doctor would be compelled either to act contrary to the principles of medical ethics established by his professional body or to risk a prosecution for murder."

(3) Regarding challenges to the constitutionality of legislation, in *Rediffusion (Hong Kong) Ltd v Attorney General of Hong Kong* [1970] AC 1136, the plaintiffs challenged the legality of certain legislation (there regarding the extension of certain provisions of the United Kingdom Copyright Act 1956 to Hong Kong) that was proposed to be passed in Hong Kong. The plaintiffs sought a declaration that it would be unlawful for the Legislative Council to

pass the bill into legislation and also an injunction to restrain the Council from presenting the bill to the Governor. The Attorney General applied to strike out the action (it was commenced by originating summons) on the basis that the court had no jurisdiction to grant the relief sought and that no reasonable cause of action existed. The Judicial Committee of the Privy Council held that although the plaintiffs had sought a declaration on hypothetical and future matters, the court's jurisdiction was not to be excluded as the plaintiffs' rights were seriously affected : - see 1157H-1158C. In a sense of course, the questions raised by the plaintiffs were abstract ones but as Lord Diplock said in the majority judgment at 1158B-C that in the exercise of its discretion in the circumstances I have described : -

"the defendants [that is the Government] would have to show that the questions were purely abstract questions the answers to which were incapable of affecting any existing or future legal rights of the plaintiffs."

(4) It follows from the above that notwithstanding the absence of a relevant decision, the court may in exceptional cases deal with the matter : - see for example *R v Secretary of State for Employment Ex parte Equal Opportunities Commission and Another* [1995] AC 1, at 26G-27H (a challenge to legislation on the basis it contravened European Community law) referring to the Factortame cases (see 26H-27A).

(5) It is of course up to the court on a case by case basis to determine whether sufficiently exceptional circumstances exist to enable it to exercise the discretion to hear cases notwithstanding that future conduct or a hypothetical situation is involved. It serves no purpose to try to enumerate exhaustively these situations. I have already given some examples of this.

Further examples include situations where it would be undesirable or prejudicial to force interested parties to adopt a wait and see attitude (that is, to force persons to wait until an event occurs) before dealing with a matter : - see [1972] AC 342, at 347 (implementation of a housing scheme being subject to potential action by the Race Relations Board); [1986] AC 112 (declaration sought to prevent doctors from giving contraceptive advice to girls under the age of 16 without the parent's consent); Rediffusion (Hong Kong) Ltd.

….

(7) The reason why there is a stress on the need to show exceptional circumstances in such cases is simply that on the whole, the courts perform the function of adjudicating on real disputes and controversies and not fictitious ones. One of the recognized dangers of dealing with hypothetical or academic cases is that the court may be asked to decide important principles without the benefit of a full set of facts. There is also to be considered a practical factor : - the administration of justice would hardly be served if the courts were regularly to entertain cases which were not real but only hypothetical.

(8) Ultimately, I am persuaded that where academic or hypothetical issues are involved, the question is not really one of jurisdiction but of discretion. I am in this context grateful for the analysis contained in Zamir & Woolf: The Declarator Judgement (3rd Ed.) at paragraph 4.032."

[Emphasis ours]

103. *William Leung* cited a host of cases to illustrate the exceptional cases criteria.

They also include situations where the problem is one that can happen in the future (***Airedale N.H.S. Trust v Bland*** **[2002] 1 AC 800** ("*Airdale*")). This is further supported by the cases cited in *William Leung* - ***R(Pretty) v Director of Public Prosecutions*** **(Secretary of State for the Home Department intervening) [2002] 1 AC 800**, at 851 (paragraph 116) per Lord Hobhouse of Woodborough; ***R (Rusbridger and another) v Attorney General*** **[2004] 1 AC 357**, at 366-7 (paragraphs 16 to 19) per Lord Steyn, 370 (paragraph 32) per Lord Hutton. There is nothing vague about the way *William Leung* has defined exceptional cases, as there are concrete examples and precedents cited.

104. Hence, even in the absence of a prosecution, this can be considered an exceptional case. According to *Airedale*, even an action that has not yet happened, can be subject of a declaration. The fact that Appellant wishes to engage in consensual sexual acts with other adult men in private, in the future can be the subject of this declaration, the same way the family wished to discontinue life-sustaining measures in *Airedale*.

105. Hence, the Application should be considered as an exceptional case.

(2) *<u>There exists a full set of facts, even if Application is not an exceptional case</u>*

106. According to *William Leung*, one of the dangers of theoretical cases is litigating without a full set of facts. In this case, however, there is a full set of facts involved, since the Appellant was actually arrested and charged with s 377A. It is true that he was caught for an act of public sex, with a man. However, if the crux of his crime were only that it was in public, then the decision of the AGC to initially charge him with *s 377A* would not be logical. In fact, the fact that they

decided to charge him with *s 377A* straightaway when other provisions were available demonstrates the harm of retaining this law, because it can be used as a tool of intimidation and discrimination.

107. As long as it exists, and the police are at liberty to arrest based on it, and the AGC has the liberty to charge based on it, no amount of non-binding reassurance from the executive about the non-enforcement will be sufficient. In fact, there was no executive Order to the effect that *s 377A* must not be used to charge consensual private acts. At any given moment, the police and the AGC can start using it to harass homosexuals. The police might even stoop to entrapping. This is actually more likely to happen, as it is difficult to directly enforce *s 377A*. In fact, a cursory look at the history of the gay community in Singapore shows that police entrapment was popular in the past (***PP v Tan Boon Hock*** **[1994] 2 SLR(R) 32** at [8]; ***"12 men nabbed in anti-gay operation at Tanjong Rhu" The Straits Times, 23 November 1993***). There is nothing to stop it from resurging. When this happens, there is no way to stop them from doing it, as there is nothing binding their behavior (***Lynette Chua, "Saying No: Sections 377 And 377a Of The Penal Code" [2003] SLJS 8, at 234***).

108. The real danger lies that it is not just used for policing sexual acts, but to use it as a tool to harass people taking part in gay social and community activities, in order to pre-emptively stop the "crime" from happening, as they have in the past (***Tanya Fong, "It's no go for planned Christmas 'gay party'" The Straits Times 9 December 2004***). The possibility for abuse is very wide. Hence, it is not just about his private sex life, but the entire sphere of his expression as a gay individual.

109. Hence, it is not possible to argue that there is no real controversy, when the law is one that stifles the lives of those affected by it, in this case, the Appellant.

(3) <u>It is not possible for Appellant to take recourse to Art 100</u>

110. It was also suggested by the High Court that instead of breaking the law, individuals can always request the President to refer the question to a Tribunal under *Art 100*. However, this is not a viable option. Upon a reading of the article in question, it is quite clear that this is not the case:

> "Advisory opinion
>
> 100. —(1) The President may refer to a tribunal consisting of not less than 3 Judges of the Supreme Court for its opinion any question as to the effect of any provision of this Constitution which has arisen or appears to him likely to arise.
>
> (2) Where a reference is made to a tribunal under clause (1), it shall be the duty of the tribunal to consider and answer the question so referred as soon as may be and in any case not more than 60 days after the date of such reference, and the tribunal shall certify to the President, for his information, its opinion on the question referred to it under clause (1) with reasons for its answer, and any Judge in the tribunal who differs from the opinion of the majority shall in like manner certify his opinion and his reasons.
>
> (3) The opinion of the majority of the Judges in the tribunal shall, for the purposes of this Article, be the opinion of the tribunal, and every such opinion of the tribunal shall be pronounced in open court.
>
> (4) No court shall have jurisdiction to question the opinion of any tribunal or

the validity of any law, or any provision therein, the Bill for which has been the subject of a reference to a tribunal by the President under this Article."

111. The function of the constitutional reference is an *advisory* one. It is a not a binding precedent *on the government*, except insofar as it cannot be called into question by other Courts. Furthermore, *Art 100* does not confer upon the President discretionary powers to initiate such a reference. *Art 100* has to be read in reference to *Art 21*, which directs the President to act in "accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet", unless otherwise specified. Hence, a constitutional reference by a President can only be initiated if the executive allows it to proceed (***Thio, Working Out The Presidency: The Rites Of Passage***). Hence, there is no power on the part of the people to petition the President to initiate such an action. Furthermore, the improbability of ordinary people being able to have an influence on the President has to be noted, even if this is not the case.

112. Since *Art 100* is not a recourse for the Appellant to obtain access to justice, the only other way, if he is judged to not have standing, is to break the law. Our justice system has no interest in encouraging criminality, as such, Appellant should be able to obtain *locus standi* without being charged.

iv. <u>There is some ambiguity or uncertainty about the issue</u>

113. There is some ambiguity in this issue that needs to be settled by a competent Court of the land. The issue of whether *s 377A* is constitutional has never been considered before in the courts of Singapore. Various statements have been made by members of the legislature and executive upon the matter. When the issue is

raised in the public, there is a variety of sentiments expressed upon it. Academics have written on the matter, supporting the repeal. To make things even more complicated, the government promised not to enforce the law for private consensual acts. Not only that, similar provisions have been struck down as being unconstitutional in courts around the world.

114. Clearly, if *s 377A* was non-controversial, it will not be inviting this much legal and social ambiguity surrounding its status and application.

115. For reasons elaborated on below, it will be shown why there is a prima facie strong argument that *s 377A* is indeed unconstitutional, and hence, there is a legal ambiguity that needs to be settled.

116. The Appellant's Application has a real chance of succeeding, for there are considerable arguments to the effect that *s 377A* is unconstitutional.

(1) Historical Developments

117. The law is one with roots in religious opposition to homosexuality. Homosexuality was abhorred in ecclesiastical law. It can be traced back to the prohibition in Leviticus, which, originally part of Jewish faith, passed into Christianity as well. All the European jurisdictions maintained Leviticus-based prohibitions against homosexuality as well, from the 6th century (***Douglas E. Sanders, "377 and the Unnatural Afterlife of British Colonialism in Asia", (2009) 4(1) Asian Journal of Comparative Law Art. 7)*** ("*Sanders*").

118. It was criminalised in secular law as early 1534, in the time of Henry VIII, formulated as "buggery" with men or beasts (*Sanders*, at 1-2). In Britain, law arose after the Protestant revolution, and was originally used as part of the

legislation specially meant to persecute Catholics, especially by trumping up false charges (*Sanders,* at 4-6).

119. Britain's criminal law was a mess, and hence the Macaulay's penal code was promulgated, which never succeeded in Britain, but went on to be enacted in British colonies. S 377 was originally enacted through the *Indian Penal Code* in 1860, where the offence was reframed as "acts against the order of nature", and framed as gender-neutral. As part of the Straits Settlements at the time, Singapore inherited the *Indian Penal Code* (*Sanders*, at 8-11).

120. In 1885, an MP wanted to insert "gross indecency" to explicitly cover acts between men, whether or not it involved in penetrative sex. He succeeded, and eventually it spread to other jurisdictions, such as Malaysia and Singapore in 1938 (*Sanders*, 15-16). Malaysia, however, does not mention the gender of the person in its provision (*Penal Code*, 1936 (F.M.S. Cap 45)).

121. S 377 was removed by our own Parliament for being outdated and intrusive in 2008 (*Penal Code (Amendment) Act (No. 51 of 2007), s 70*).

122. S 377 was read down to exclude consensual male sexual activity in India in 2009 (*Naz Foundation*).

(2) Article 9

123. In interpreting the constitution, G Sri RAM JCA, speaking for the Malaysian Court of Appeal in ***Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidik & Anor*** **[1996] 1 MLJ 261** stated that:

> '[Judges] should, when discharging their duties as interpreters of the supreme

law, adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution. Such an objective may only be achieved if the expression "life" in art 5(1) is given a broad and liberal meaning.'

124. The word 'life' in *Article 9* of the Constitution should be interpreted broadly to give rise to the intention of the framers of our Constitution and the current needs of the Singaporean society at this point in time. Singaporeans enjoy a high standard of living in material terms. The government has made healthcare, housing, education, clean water and other basic needs easily accessible and affordable. However, life cannot only refer to mere existence, with only physiological needs being fulfilled. It is more than mere animal existence; it must extend to all those faculties by which life is enjoyed. Beyond physiological needs, one requires self-esteem and self-actualisation for life to be meaningful.

125. In order for one's life to be meaningful, the pursuit of happiness encompasses within it the concepts of privacy, human dignity, individual autonomy and the human need for an intimate personal sphere. Of those faculties, the most important and relevant to the case at hand is human dignity.

126. Human dignity is a difficult concept to capture in precise terms. It requires us to acknowledge the value and worth of all individuals as members of our society. At the root of human dignity is the autonomy of the private will and a person's freedom of choice and action. The Canadian Supreme Court in the case of ***Law v. Canada (Ministry of Employment and Immigration)*****, [1999 1 S.C.R. 497]** at [53] attempted to capture the concept of dignity.

"Human dignity means that an individual or group feels self-respect and self-

worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognise the full place of all individuals and groups within Canadian society."[at para 53]

127. It is clear that *s 377A* of the Penal Code penalizes private, consensual sex between adults, which impairs the expression of the human self of homosexuals, consequently violating their right to live with dignity, and hence their right to lead a meaningful life as enshrined in *Art 9* of the Constitution.

128. *S 377A* of the Penal Code harms human dignity by marginalizing male homosexuals, or MSM. It criminalizes homosexual sex, going so far as to define homosexual acts as "unnatural". All males engaging in homosexual sex are therefore engaging in unnatural acts, or acts against the course of nature. The social stigma that attaches itself to such acts cannot be understated. There cannot be psychological integrity and empowerment for such males when they believe that society at large views them as criminals, engaging in acts against the natural order of nature.

(3) <u>*Article 12*</u>

129. The criminalisation of homosexual sex fails the two-step "reasonable

classification" test for validity under *Article 12* of the Constitution.

130. The two-step "reasonable classification" test for validity under *Article 12(1)* for the Constitution enunciated in ***Ong Ah Chuan and another v Public Prosecutor*** **[[1979-1980] SLR(R) 710]** at [35] – [37] according to which a "differentiating measure" is valid if:

a. The classification is founded on an intelligible differentia

b. The differentia bears a rational relation to the object sought to be achieved by the law in question.

(i) The classification is not founded on an intelligible differentia.

131. *S 377A* targets homosexuals in its operation because the acts are closely associated with the gay identity, and it forms an integral part of their love and intimacy (*Naz Foundation*, *Lawrence v Texas*, *William Leung*, *National Coalition*).

132. Moral disapproval of majority is not cause for the differentia. Firstly, morality is subjective, and differs from person to person. Also merely morality cannot be used to criminalise - for example, adultery is not criminalised even though it would be universally disapproved of.

133. Other Asian countries which are not Muslim countries all around us are increasingly rejecting the view that moral disapproval warrants criminalisation, including India. Even countries with majority Chinese populations such as Taiwan, South Korea and Hong Kong do not have this law, which, if Asian values truly require homosexuality be disapproved of and criminalised, they would have enacted. Nepal has even legalized same-sex marriages.

134. Malaysia's laws on the subject are gender-neutral with respect to sex acts(*s 377, s 377A-D of Penal Code (Malaysia)*), and hence are not indicative that our values and morals require that homosexual sex be criminalised.

135. Religious objections cannot be used for imposing views on others. This law is based on a Judeo-Christian notion, which is shared by Islam, as said above. However, we are a secular country, and it would be entirely contrary to our principles to allow religious objections to infringe on other's freedoms when it does not concern the rights of the people holding said religious beliefs.

(ii) Even if the differentia is intelligible, it does not bear a rational relation to the object of the law in question

(a) *S377A* does not bolster family life

136. *S 377A* does not bolster family life. The percentage of gay people in any given society is small - 6-10%. It is not logical to say decriminalisation would automatically lead to family values being destroyed, even in the worst case scenario, and even assuming that there is something about homosexuality that would intrinsically destroy values, which it does not.

137. Furthermore the stigma of living under the law is what would cause families to break apart, as parents have trouble accepting their children as unapprehended criminals. Paradoxically, adultery, the one thing that is very likely to break apart families, is not criminalised. If something is required to protect family values, the proper venue to do so is through family law, not criminal law. Other societies which have decriminalised homosexuality have not reported any issues.

(b) *S 377A* does not serve object of disapproving of morality.

138. If it was homosexuality that was being targeted, then it is under-inclusive, because it does not criminalise lesbian sex.

(c) *S 377A* does not serve object of protecting public health

139. *S 377A* does not serve a purpose of protecting public health with respect to HIV/AIDS. In fact, it hinders the efforts. It prevents the authorities from educating the target group (MSM) openly, because they could be seen as promoting a criminal act. Furthermore, studies have proven that decriminalisation actually lowers the HIV/AIDs prevalence rate (**Roy Chan, *Sections 377 and 377A of the Penal Code – Impact on AIDS Prevention and Control* (2007) 34 *The Act***).

140. Furthermore, it is over-inclusive because it covers monogamous gay couples, and under-inclusive because it does not cover promiscuous heterosexuals, since it is actually more prevalent in heterosexual people. In any case, *s 377A* is completely redundant for the purposes of preventing the spread of HIV infection, since there already are laws that strongly and specifically deter the spread of HIV *(Infectious Diseases Act, Cap 137, Rev. Ed. 2003, s23)*.

(d) *S 377A* does not protect minors

141. *S 377A* does not protect minors. It is over-inclusive because not all homosexuals are paedophiles, and it is under-inclusive because it does not cover heterosexual paedophiles. And again, it is completely redundant because there are other laws that can protect minors in a gender-neutral way - s7 of *the Children and Young Person's Act* , *s 376A* of the Penal Code, both of which have stricter punishments.

142. It is also illogical because the minor would also be liable for conviction along with the perpetrator, since there are no age restrictions in the provisions.

(e) *S 377A* does not protect men from sexual assault

143. *s 377A* does not protect men from sexual assault. It is over-inclusive because it covers non-consensual situations, and under-inclusive because it does not cover assault on a man by a woman. Also, there are other provisions to cover this, namely, *s 376* of the Penal Code. Furthermore, due to the lack of a proviso relating to consent, the victim would be subject to prosecution as well.

(f) *S 377A* does not protect public decency

144. *S 377A* does not protect public decency. It is under-inclusive because it does not cover heterosexual acts, and it is over-inclusive as it also criminalises sex between people in private. Furthermore, other laws exist which can cover – *s 294* of the *Penal Code*.

(iii) International Law

145. The only countries with this law are Muslim countries and some former colonies. There is a compelling customary international interest against the criminalisation of homosexuality. In fact, in keeping this law, Singapore would be on the same page as countries like Afghanistan, Iran and Uganda. Most civilised countries of a reasonably developed nature, in fact, all civilised countries, have rejected the idea that we should be extending the reach of the state into the bedroom. This attitude not only emanated from European or American countries, but most also most Asian countries (*Sanders*).

146. The only reason countries like Uganda, Iran and Malaysia are keeping this law is

because of overwhelming religious pressures in their countries. Uganda is even introducing a bill that would introduce the death penalty for homosexuals. This is not the kind of international company Singapore should be keeping, as we are a secular, tolerant, pragmatic, forward-looking country.

147. The international community is moving towards accepting that at the very least, homosexuality should be decriminalised. Quite recently, 85 countries co-sponsored the declaration to condemn violence against LGBT people. The UN has approved LGBT organisations to work within its ranks. The Yogyakarta Principles (**Michael O'Flaherty & John Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles", HRLR 8 (2008) 207-248**), which was the result of a conference held in Indonesia, talk about the relation of international law to sexual identity and gender identity.

148. It is absolutely important that Singapore pay attention to developments in international law, lest we be left behind.

(iv) Public policy

149. This law significantly impairs our ability to recruit capable foreign talent, which Singapore relies on.

150. Singapore is a cosmopolitan country with a diverse population. Retaining the law on our books is completely at odds with our aspirations, ideals and future as a nation. If we continue to marginalise a significant percentage of the tax-paying community, it would hamper our efforts at nation-building.

B. <u>Application is not frivolous or vexatious</u>

151. The Application is not frivolous or vexatious. It has to be noted that there is actually a significant conceptual and practical overlap between this ground and "reasonable chance of success", and hence it has to be considered in the reasons given below.

152. In ***Chee Siok Chin v Ministry of Home Affairs and Another*** **[2005] SGHC 216; [2006] 1 SLR 582** at [37] ("*Chee Siok Chin*"), "frivolous and vexatious" was defined thus:

> "These words have been judicially interpreted to mean "obviously unsustainable": *Attorney-General of the Duchy of Lancaster v London and North Western Railway Company* [1892] 3 Ch 274 at 277. In *Goh Koon Suan v Heng Gek Kiau* [1990] 2 SLR(R) 705 at [15], Yong Pung How CJ opined that an action would be vexatious "when the party bringing it is not acting *bona fide*, and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result". It has also been suggested that "frivolous" and "vexatious" connote purposelessness in relation to the process or a lack of seriousness or truth and a lack of *bona fides*: see Jeffrey Pinsler, *Singapore Court Practice 2005* (LexisNexis, 2005) at para 18/19/12, p 482."

153. Frivolousness and vexatiousness is not related to *locus standi*, as is clear in the paragraph in *Chee Siok Chin*, quoted above. Rather, it is a function of whether the Application is bona fide, not meant to "annoy or embarrass" the opponent, and whether it is really obvious that there is no practical result.

154. By the definition in *Chee Siok Chin*, the Application is not "obviously

unsustainable". If the Application is allowed to proceed, there is a very good chance that the Application will succeed. Similar actions have succeeded elsewhere in the world. Both *William Leung* and *Naz Foundation* are examples of how there is a serious argument that provisions that discriminate against homosexual people can be struck down for unconstitutionality. We would adopt the arguments under the section of why the appeal has a chance of success, as above.

155. It is not meant to embarrass or annoy anyone involved in this Application, and the respondent has not put forward any evidence to prove the same.

156. Though the declaration as prayed for in the Application will not have an effect on any existing prosecution, there is an immediate practical aspect to it. In the event the Application succeeds, that will immediately liberate the gay community from having to hide. It will help people working in the AIDS movement to reach out to affected groups without worrying that they are aiding and abetting a crime. With respect to the Appellant himself, he will not have to worry that he will be prosecuted under *s 377A*, for expressing his sexuality.

157. As such, the Application is not frivolous or vexatious. There is a weighty constitutional issue that is brought up by the Application, the determination of which can affect many lives.

C. <u>Application is not an abuse of process of the court</u>

158. This application is not an abuse of process simply because the constitutional question was referred via OS and not via *s 56A* of the *Subordinate Courts Act*.

159. In *Chee Siok Chin*, abuse of process was defined as below

(i) proceedings which involve a deception on the court…;

(ii) proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;

(iii) proceedings which are manifestly groundless or without foundation or which serve no useful purpose;

(iv) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.

160. It is common understanding that the first and fourth limb is not in issue here, and hence we shall not elaborate upon them.

i. Applicant's action does not engage the court in an improper manner

161. The Appellant's action does not engage the court in an improper manner. It is common understanding that the Appellant possessed *locus standi* to challenge the constitutionality at the time it was filed. However, it is not the case that the Application seeks to frustrate the jurisdiction of the Subordinate Court, as alleged.

a) Application does not frustrate any ongoing proceedings

162. Firstly, the Application does not frustrate any ongoing proceedings, or cause any delays. In ***Johari bin Kanadi and Another v PP*** **[2008] 3 SLR(R) 422** at [9], the purpose of *s 56A* was explained:

> "This discretion, properly exercised after judicious consideration of the merits of the application, would prevent unnecessary delay and possible abuse every time a party in the proceedings purported to raise an issue of constitutional interpretation or effect."

163. The Court of Appeal in ***Ng Chye Huey v Public Prosecutor*** **[2007] SGCA 3; 2**

SLR 106 at [17] ("*Ng Chye Huey*") further stated:

> "These jurisdictional rules are essential to the orderly conduct of litigation in our courts. Without a sufficiently clear delineation of the respective spheres of dominion of each level of our hierarchy of courts, chaos would inevitably result as parties seek, willy-nilly and solely for their own advantage, to bring their applications before different levels of court in an instrumental, haphazard and legally unprincipled fashion."

164. This is an entirely correct view, and there is no question that there needs to be orderly conduct for litigation. In this case however, there is no delay, as the prosecution does not have to stop in order to consider the constitutional matter. In fact, it allows the prosecution to continue undisturbed by the consequences of this Application. If indeed, that *s 56A* of the *Subordinate Courts Act* was engaged, that would result in the case being on hold for a long time awaiting the the determination at the higher courts. In fact, the prosecution has proceeded on its own track, eventually getting amended to a different charge, and the Appellant being convicted. It is not clear what further delays taking out a separate application under *O 15 r 16* would cause, especially at this point.

165. Furthermore, in *Ng Chye Huey*, the situation was very different, for a criminal motion was brought to the Court of Appeal for a case that was already decided by the High Court, but was not an appeal against its decision. In that case, the issue was that there could potential be "two bites at a cherry", where the Court of Appeal would still have to decide on the criminal motion, as well as an appeal against J Choo's decision in the High Court, on the same issue.

166. It is quite clear that in this situation, such a violation of litigation conduct is not happening. As the charge was amended, it is not clear why one would be compelled to go under *s 56A*, since the amended charge does not relate to the Application. The prosecution of the Appellant was allowed to go forward undisturbed, while the High Court separately assesses the constitutionality of the provision that the Appellant was initially charged with. Hence, there is no need for the District Judge to exercise his discretion anymore. The framework of orderly litigation has not actually been disturbed. There is no chance that there are "two bites at the cherry", as was the problem in *Ng Chye Huey*.

b) Allegations of improper procedure are inconsistent with factual matrix

167. Secondly, the allegations of improper procedure against the Application are unfounded, and at the worst, confused. One cannot simultaneously insist that due to there being a criminal case, *s 56A* has to be used, but also that because there is no criminal case anymore, the Appellant has no standing. Either the Application has to be evaluated as it stood on the filing date, or it has to be evaluated according to the events that happened afterwards. The stance of the AGC on this matter has been inconsistent.

168. As mentioned before, after the initial charge was amended by the AGC, the Appellant dropped Prayer 3 of the Application, which was a prayer to void the *s 377A* charge. From the time the charge was dropped and the Prayer was amended, it was quite clear that the Application was going forward not on the basis that a criminal charge was to be avoided. Instead, the Application predicated on the very existence of *s 377A*, and the fact the Appellant was indeed charged at first, which in itself is an injury.

169. Hence, *s 56A* is quite irrelevant to this Application if the stance taken by the AGC that the amendment of the charge changes the factual matrix, is accepted.

c) S 56A does not have exclusive jurisdiction

170. Even if *s 56A* is applicable, it is not the case that it has an exclusive jurisdiction.

171. It is not mandatory for every constitutional question arising in a criminal case to be referred under *s 56A*. Citizens are not barred from raising the question via OS instead.

172. Whether the constitutional question was referred via *s 56A* or via the OS filed, the matter would have ended up before the High Court. Proceeding via OS is not a significantly longer or more complicated process than proceeding via *s 56A*, and therefore the courts' time and resources have not been wasted in any way. Indeed, proceeding under *s 56A* would have been more wasteful of the courts' resources, as leave would have to have been sought from the District Judge. If the District Judge had refused leave to refer the question under *s 56A*, the plaintiff would still have been entitled to refer the question via OS, thus invoking the courts' jurisdiction twice over what would have been substantially the same matter.

173. As the charge against the plaintiff has been amended, any application for the constitutional question to be referred under *s 56A* now would not succeed. Irrespective of what charge the plaintiff faces in the criminal proceedings, the plaintiff desires and indeed is entitled to challenge the constitutionality of *s 377A*. It would be absurd to say that he can do this only via *s 56A*, just because he also happens to be the subject of criminal proceedings.

ii. Application is not manifestly groundless

174. The third limb, manifest groundlessness, is an overlapping ground with "reasonable cause of action", and "no useful purpose" overlaps with the grounds for frivolousness and vexatiousness. As such, the arguments above are adopted for this section.

175. It is submitted for the reasons elaborated above, Application is not manifestly groundless.

III. CONCLUSION

176. In the matters of constitutional law, it is submitted one has to take a slightly more lenient approach, or risk cutting off access to justice. The Appellant was, and is affected by the very existence of the law.

177. For the reasons elaborated on above, it is submitted that the decision of the learned judge at the High Court was wrongly decided.