

JURIS

I L L U M I N A E

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From
the
Chief
Editor

So this is the new year! Some may dread returning to the mugging of yore, but for many, especially our freshies who have yet to be broken into the routine of legal study, it is a year filled with new and exciting opportunities.

The Singapore Law Review would not be starting the year with a whimper – we bring to our fellow friends in law school our very first *International Writing Symposium*. It promises to be an eye-opening experience for those who attend with a broad range of topics that we Singaporeans tend to overlook. This issue of *Juris* brings a snapshot of some of our contestants from around the world. Get to know more about who they are and what they are presenting by coming down to the Symposium on 25 and 26 August itself!

I am however more excited about the new team helming *Juris* this year. Led by Sook Zhen, the new team is replete with members with an interest in journalism. I am sure they will bring a new approach to *Juris* that would interest, excite and humour our readers, with an acumen to point out what matters in our ever-changing legal landscape. With the renewed support from our sponsors *Colin Ng & Partners LLP*, there is much to look forward to.

Juris is also committed to encouraging law students to discuss legal issues. Look out for announcements from the *Juris* team as to how you can be a part of our exciting new year! ☺

Ang Hou Fu
CHIEF EDITOR

GAYS ON TV: S'PORE VS HK

MOHAN GOPALAN

Recent events have brought into sharp focus the difference in attitudes towards screening television programmes involving homosexuals in two Asian countries: Hong Kong and Singapore.

When Hong Kong TV station RTHK screened a programme about homosexuality in July last year, it earned a stern warning from Hong Kong's Broadcasting Authority, for allegedly breaching local broadcasting regulations. However, in May this year, Hong Kong's Court of First Instance quashed the Authority's decision.

Shot in documentary style, the programme "focused on the day-to-day lives of two gay couples, looking to the difficulties encountered in their lives, their fears and their aspirations." The participants also "spoke of their hopes that one day the law in Hong Kong would be changed to recognise a civil union between gay couples."

Members of the public complained, alleging that the programme was biased towards homosexuality, exerted a bad influence on children, was unfair to Christians, did not contain a warning caption and "did not mention the undesirable aspects of homosexuality such as AIDS".

The Broadcasting Authority considered the latter three grounds unsubstantiated, but agreed that the programme should not have been broadcast within the 4pm to 8.30pm time-belt. "Children and young viewers watching the programme might have no knowledge of homosexuality and might be adversely affected by the partial contents of the programme if parental guidance was not provided," it noted.

Continued on Pg 2...

As the programme dealt with the issue of same-sex marriages, which are not yet legal in Hong Kong, the Authority also considered that it was a "factual programme dealing with matters of public policy or controversial issues of public importance in Hong Kong". Accordingly, the programme was subject to a rule in the Authority's code of practice that required such programmes to be presented with "due impartiality". RTHK was alleged to have breached this rule, as "the programme presented only the merits of homosexual marriage and featured only the views of three homosexuals on the legislation of homosexual marriage." RTHK was therefore "strongly advised" to observe the code more closely.

Hong Kong's Legislative Council swiftly passed a motion denouncing the Authority's decision, calling it "discrimination on the ground of sexual orientation". Meanwhile, Cho Man Kit, a gender studies PhD student who was featured in the programme, sought to challenge the Authority's decision by way of judicial review.

The case was tried in Hong Kong's Court of First Instance before Justice Hartmann, who found that the programme was "not, in any way a 'political' programme attempting to advance any sort of public cause. The issue of same-sex marriage was an incident in the programme; a material one, yes, but not in any way 'promoted' in the active and political sense that the word intends by either those in the programme or those who made it."

He noted that although the programme did not incorporate opposing points of view on the issue of same-sex marriage, "on any reasonable viewing, the programme manifestly was not designed as a vehicle to 'advocate' any particular point of view". "As a study of gay people involved in stable, long-term relationships, it naturally recorded matters that they considered important, such as the hope that one day their unions may receive some form of legal recognition." This, however, did not amount to advocacy.

He also pointed out that "invariably any portrayal of the human condition will reflect some sympathy with the subject. Such sympathy, however, often no more really than an instinctive empathy, is not to be read as a form of active 'promotion' of any aspiration that arises in the course of the portrayal."

The programme was therefore in no way impartial and the Authority had been wrong to think so.

Examining the language of the Authority's statements, Hartmann J also thought that it had unwittingly come to its decision simply because of the beliefs of some viewers that homosexuality was "offensive". He thus found himself satisfied that the Authority's finding had arisen out of a misunderstanding of its own code of practice. This misunderstanding had resulted in "an impermissible restriction

on the freedom of speech, a restriction founded materially on a discriminatory factor; namely, that homosexuality, as a form of sexual orientation, may be offensive to certain viewers."

Accordingly, the Authority's decision had to be quashed.

In Singapore, restrictions on broadcasting gay content remain as strict as ever.

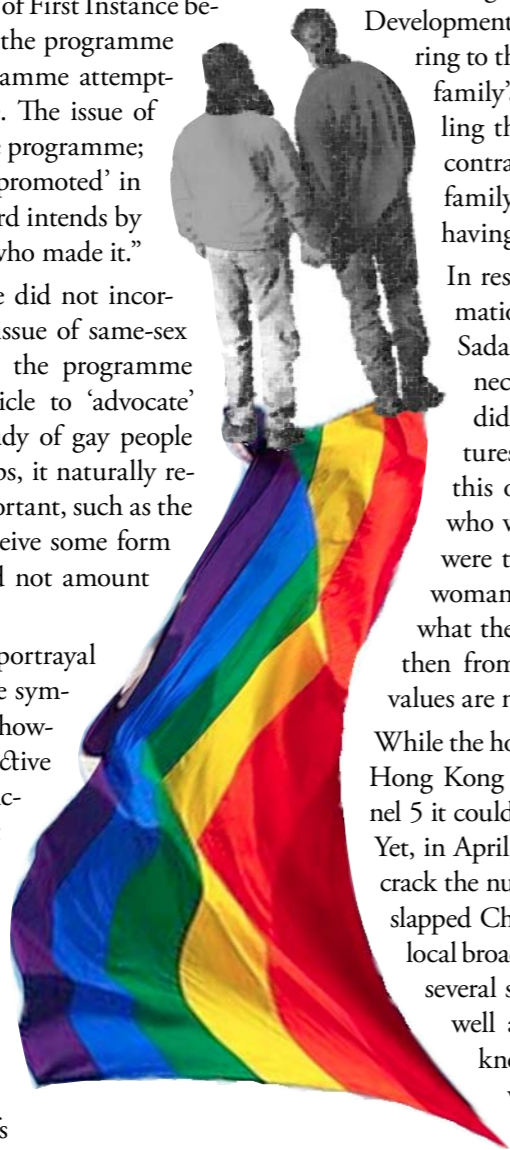
In January this year, Channel 5 screened an episode of a home and decor show in which a gay couple redecorated a nursery for their adopted child. Straits Times reader Bennie Cheok wrote in, asking the TV station to be more selective in its programming. "Allowing a show that depicts a gay married couple as a family nucleus on national television may be acceptable in Western society, but it may not be appropriate in the context of our Eastern culture", he said. "The absence of the opposite gender in the family nucleus will, no doubt, leave young viewers bewildered."

Nominated MP Thio Li-ann took up Cheok's case in Parliament, asking what steps had been taken by the Media Development Authority to remedy the situation. Referring to the programme, she said "it undermines the family's importance as a basic social unit, signalling that same sex parenting is acceptable. This contradicts our family values and conception of family where a man and woman marrying and having children is normative."

In response, Senior Minister of State for Information, Communication and the Arts, Balaji Sadasivan, stressed that a "balanced view" was necessary. He noted that the objections raised did not relate to the programme's main features but to an "incidental feature found in this one episode," which was that "the people who were going to live in the redesigned home were two men and a child, not the usual man, woman and child." "The viewer can extrapolate what the relationship of the two men may be and then from the extrapolation conclude that family values are not being upheld", he said.

While the homosexual theme was at the forefront in the Hong Kong programme, in the show aired by Channel 5 it could have been described as tangential, at best. Yet, in April, the proverbial sledgehammer was used to crack the nut when the Media Development Authority slapped Channel 5 with a \$15,000 fine for breaching local broadcasting guidelines. "The episode contained several scenes of the gay couple with their baby as well as the presenter's congratulations and acknowledgement of them as a family unit in a way which normalises their gay lifestyle and unconventional family setup", its press statement said. ♡

Mohan is a third year law student and a Senior Editor of the SLR.



CONSTITUTIONAL LAW AND THE SIGNIFICANCE OF EQUALITY

LYNETTE LIM

Fifty years ago, race-based classifications were considered legally valid categories in places like the American South and apartheid South Africa.

While opponents to these regimes essentially fought a political battle, they fell back continuously on constitutional arguments to demonstrate that the laws which supported such policies were legally unjustifiable.

This only proves that constitutional law finds its place in almost every tenet of the law, which in turn, is prevalent in every area of life.

In a recent interview on 16 July, 2008 at the National University of Singapore (NUS) Faculty of Law Bukit Timah Campus with the Singapore Law Review, As/P Thiruvengadam highlighted the challenges of Constitutional Law.

In his opinion, constitutional Law is somewhat unique, different from the other areas of law like that of Contract or Tort, in that it deals with macro issues that are more controversial and are not capable of being resolved quickly.

"Other areas of law, say Contract Law, are relatively more straight forward as people would respect the basic tenets of the law for reasons of finality and efficiency," he said.

In constitutional law, however, these imperatives do not necessarily lead to easy acceptance of efficient but unjust results. In order to find broader support and legitimacy, solutions to constitutional disputes cannot simply be forced upon people in the name of efficiency or commercial soundness.

Such solutions must be in tune with deeper societal values, and must also respect the legitimate interests of the affected individuals in a reasonable, just and sensitive manner. Here, more so than in other areas of law, knowledge of the 'black-letter' law is insufficient, and a far greater appreciation and understanding of local socio-political and cultural factors is required.

Such are the challenges of constitutional law, and As/P Thiruvengadam believes that discrimination serves as a good example to highlight these very challenges.

The fact that such political victories fifty years ago were secured over race-based legal categories only underscores the difficulties in this area of the law, because racism continues to exist today in more sophisticated forms, and the law has to constantly evolve to effectively address these new variants.

In our time, class-based classifications have become more insidious – they are harder to detect, and require more sophisticated legal models to be created in response.

To illustrate the complexities involved, As/P Thiruvengadam raised the simple example of the thin line between meritocracy and class-based discrimination in Singapore.

"How do we know that a student who secures good grades does so because of her intrinsic 'merit' or because she is fortunate to come from a privileged background that allows her to take advantage of attributes - such as private tuition classes or greater ease with the English language - that come with an upper class background?" he asked.

"When and to what extent should we take such backgrounds into account to prevent us from crossing that line?" ♡

As/P Thiruvengadam has taught Public Law the NUS Faculty of Law for three years. In August 2008, he shifts his focus, and will be teaching an elective course on comparative constitutional law.

Lynette is a second year law student and the Deputy Chief Editor of the Singapore Law Review.



WHAT WOULD YOU SAY TO OUR FINALISTS COMING DOWN TO PRESENT THEIR PAPERS AT THE SYMPOSIUM?

"First, I would congratulate them for having been short-listed. Given the competition involved, this by itself is quite an achievement.

Having closely studied the intricacies of discrimination law in their own jurisdiction, I would encourage them to use this opportunity to look at the laws in other jurisdictions, and to examine how and why they differ from the laws in their home countries.

This will demonstrate, in a very practical way, the usefulness of looking at others.

At the same time, having to defend your own legal system's position to others will allow them to see how one is viewed by others. The metaphor of a legal 'mirror' comes to mind."

THE INAUGURAL IWS: A STARTLING GATHERING OF BUDDING JURISTS

TAN AN QIANGIE

As students gather come August 25th for the launch of the inaugural International Writing Symposium, they will witness the Singapore Law Review (“SLR”) takes one giant step - that is, if the student editorial board of SLR gets its way.

Just a year ago, SLR decided to incorporate the symposium into its annual SLR Writing Competition for the first time, a bold move, albeit with a sound objective of giving contestants a chance to defend and discuss their papers under the scrutiny of distinguished judges.

A year on, SLR took another big leap by catapulting the Writing Competition to an international platform.

A first of its kind in Asia in terms of scale and format, the International Writing Symposium (“IWS”) - wholly organized by the student editorial board of SLR with the support of the Singapore Academy of Law and the NUS Faculty of Law - has drawn entries by students from different universities spanning 5 continents. These include: University of Glasgow, University of Auckland, University of Sydney, University of Malaya, National Law School of India University, University of Philippines, NALSAR University of Law, University of Western Ontario, National Law School of India University and of course, National University of Singapore.

Fortuitously, although entries were bound by the theme of discrimination, all entries explored different issues on the same subject and a wide range of legal issues was covered.

In this prelude to the launch of the IWS, *Juris Illuminae* gives you an insight into the profile and personal interests of some of the finalists. Do come down to the moot court on 25th - 26th August 2008 to see them live!

SHATADRU CHAKRABORTY

4th Year, National Academy of Legal Studies And Research (NALSAR), Hyderabad, India

Essay Title: Discrimination against Workers under the Special Economic Zones Act, 2005 – A Hindrance to India’s Development

Research Interest: Public International Law, Maritime Law

Shatadru examines in his paper how the *Special Economic Zones Act 2005* enacted by the Indian Parliament and the concomitant rules framed by the Central Government create a differential regime for worker’s rights in Special Economic Zones. He argues that the disregard for core worker’s rights is a hindrance rather than a help to economic development.

Shatadru enjoys reading, watching movies, listening to music and debating on social issues.

Q: Why did you choose this particular theme for your article?

A report online on the condition of workers in Special Economic Zones in China and the fear of a similar predicament for those in India. I was prompted to think of a solution to the global conflict between economic growth and human rights after I read Amartya Sen’s *Development As Freedom*. The theme of Labour rights versus Economic development or rather Labour rights with Development through the concept of the recent SEZ legislation in India thus offered the perfect opportunity for an application of the first principles. My reading of the literature of the transnational labour movement only helped me to add legalistic credibility to my approach.

Q: What was the push factor to join the SLR IWS?

The chance of getting an internship with T.S. Oon & Bazul particularly since I have worked on Maritime Law before, in addition to the opportunity of doing an LLM at NUS.

Q: How do you think this symposium will further your legal education and growth?

The possibility of a discussion on my own presentation is sure to be a learning experience in so far as my success or failure at the same will depend not only on my research but also perhaps on my ability to think on my feet.



NICK SIM SHI QIANG & AMARDEEP SINGH

Year Three, National University of Singapore

Essay Title: Discrimination: Help or Hindrance? – Listening to the Battered Woman’s Silent Screams



Nick (left) and Amardeep (right) may be familiar faces to you in NUS Law School. They collaborated to produce an essay on the battered women syndrome, where abused women suffering from it are not presently able to rely on it as a defence for the murder of their abusers. They have proposed a reformulation of the existing criminal law defences so as to allow abused women to plead defence under one of the existing defences in criminal law.

Q: Why did you choose this particular theme for your article?

Nick: We saw a need for an article, written by Singaporeans, which explores the controversies surrounding the battered women’s syndrome. Local jurisprudence and literature on the issue is lacking. We were hoping that our work could provide some information to parties who may be interested in finding out more about battered women, and the circumstances which drive them to kill.

Amardeep: Criminal law has always fascinated me. Reading the accounts of these battered women really moved me. I couldn’t believe that animals whom these women are accused of killing could treat their wives so cruelly. And yet, the very same law which is supposed to protect these women punishes them for something which they should not be guilty of.

Q: What was the push factor to join the SLR IWS?

Nick: The IWS would be a great opportunity for us to test our ideas and opinions; and to defend them against scrutiny. We were also eager to have our work published.

Amardeep: I guess the possibility of having our work published and reaching a mass audience and being able to share with them our thoughts on the law. After all, if we the people whom the law affects do not talk about it and point out its deficiencies, then who will?



EMMI OKADA

5th Year, University of Sydney

Essay Title: The Indigenous, the Imperial and the International: A Contextual Comparison of Laws Concerning the Ainu of Japan and Australian Aborigines

Research Interests: Social movements, indigenous and minority rights

Emmi’s essay examines the national and international laws applying to two groups of indigenous peoples: the Ainu of Japan and the Australian Aborigines. She suggests possible avenues by which international law can spearhead the development of the rights of indigenous peoples by playing a significant role in supervising indigenous-state negotiations.

Emmi’s interests include reading, traveling, playing the piano, creative writing and being socially active. She is also passionate about indigenous issues.

Q: What was the push factor to join the SLR IWS?

I received an email from Sydney University law faculty office, and thought to myself that I had a perfect topic for the essay theme.

Q: What do you look forward to in your trip to Singapore?

I’ve never been in the country before except for a transit stay, so I’m looking forward to soaking up the atmosphere, trying out the different food (within vegetarian limits), mixing with interesting and energetic Singaporean students and generally learning about a new place. ☺

An Qi is a third year law student and a Senior Editor of SLR.



DISCRIMINATION ENSHRINED IN THE LAW: A SHORT COMMENTARY

NG SOOK ZHEN

“Regardless of race, language or religion...” Our national pledge reminds us constantly that discrimination is not tolerated in Singapore. Yet, pry further into a statute as basic as the Constitution and we find that discrimination is enshrined in the law.



Source: www.theonlinecitizen.com

In direct defiance to our pledge, for instance, is s. 152 of the Constitution which title reads: “Minorities and special position of Malays.”

In s. 152(2), the law exerts: “The Government shall exercise its functions in such manner as to recognise the special position of the Malays, who are the indigenous people of Singapore, and accordingly it shall be the responsibility of the Government to protect, safeguard, support, foster and promote their political, educational, religious, economic, social and cultural interests and the Malay language.”

Racial discrimination approved by the law? Perhaps when this provision was first introduced, discrimination on paper manifested itself as an environment for anti-discrimination in reality. Yet, now that we have moved on and left history behind, the question of whether we still need express laws to display

discrimination – this cosmopolitan society begs to be answered.

Another overt display of discrimination in the law is the notorious example of s. 377A of the Penal Code, which reads: “Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years.”

This legislation may be paralleled to s. 118F of the Crimes Ordinance in Hong Kong where “A man who commits buggery with another man otherwise than in private shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 5 years.” In reviewing this legislation in a case where two males were charged with engaging in sodomy in a car park, Hong Kong’s Court of Final Appeal, the highest court in the territory had ruled unanimously last July that s. 118F of their Crimes Ordinance was discriminatory, unconstitutional and thus could not apply.



Source: www.gettyimages.com

Despite cries for s. 377A to be repelled last year during the Penal Code review process, the section remains and the discrimination continues.

But society is not totally ignorant of discrimination that exists in the law.

Take for instance the rescinded “Graduate Mother’s Priority Scheme”, introduced in 1984 and removed the following year. The scheme institutionalised the priority given to children of university educated mothers who had three or more children, giving them a first-hand pick during primary school registration.

The differential treatment based on the educational level of the parent- like other differential treatment schemes - was rejected by society. The legislation, following a public outcry over the obvious discriminatory practices, moved quickly to resume fairness in this area of the law.

In conclusion, examples in the past and present have illustrated that discrimination is an outdated concept – there is no need for it, at least not in a country we hope to call open and equal. Bias planted in the law should also be uprooted so that the law may serve as a

guiding ray for promoting fairness and justice in a growing and diverse society. ☺

Sook Zhen is a second year law student and the Editor of Juris Illuminae.

HORIZON TOWERS: MINORITY RIGHTS IN EN BLOC SALES

Lo Pui Sang and Others v. Mamata Kapildev Dave and Others (Horizon Partners Pte Ltd, intervener) and Other Appeals [2008] SGHC 116

TAN AN QIANGIE

What happens when you are in a minority group of 20% and the law dictates that your rights may be subjugated to the decision of the majority 80% group? The instinctive reaction from a third party is probably predictable - “Of course, majority wins!”

What happens when you are in a minority group of 20% and the law dictates that your rights may be subjugated to the decision of the majority 80% group? The instinctive reaction from a third party is probably predictable - “Of course, majority wins!”

The legal system, being conscious of notions of equality and fairness, does not always concur with the simple “majority-wins mantra” to the extent that it violates the right of the individual person to be protected by the law. The inherent vulnerability of the minority weighs heavily on the conscience of the law to warrant the institution of statutory protection in various forms: for example Sections 216 and 216(A) of the Companies Act (Cap. 50, 2006 Rev. Ed.) aimed at protecting minority shareholders; and Article 12 of the Constitution of the Republic of Singapore (1999 Rev. Ed.) which enshrines the right of all persons to equal protection by the law.

However, discrimination is definitely not taboo in the eyes of the law because it is not necessarily synonymous with inequality.

Lord Diplock in the seminal case of *Ong Ah Chuan v. Public Prosecutor* [1989] 1 AC 648 (“Ong Ah Chuan”) stated logically that what Article 12 of the Constitution assures the individual is the right to equal treatment with other individuals in similar circumstances [only]. Inequality can occur where the unlike are treated with like. It is also precisely through discrimination of the desirable and undesirable that our legal system is able to administer justice to meet the expectations of the people.

Therefore, where statutory provisions provide for the majority to trump the minority, the question is not whether the minority have been discriminated against, but rather, was the discrimination arbitrary and without any reasonable basis.

In this case, Mr KS Rajah, S.C. submitted on behalf of the appellants (minority shareholders) that the 80% rule in Sections 84A and 84B(1)(B) of the Land Titles (Strata) Act (Cap. 158, 1999 Rev. Ed.) are unconstitutional as they discriminated against the minority such that the majority has a choice as to where they wished to live while the minority would be deprived of that same choice.

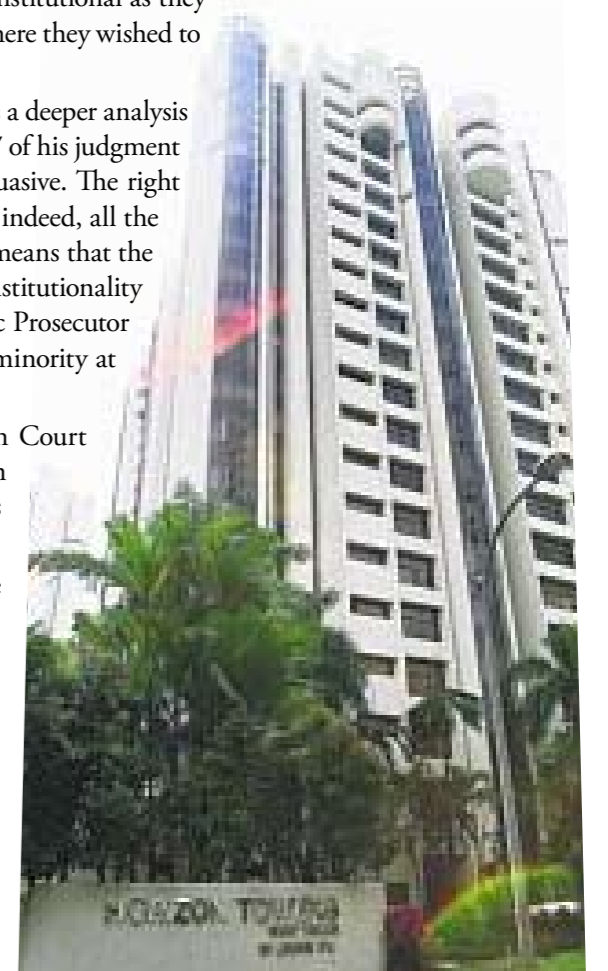
It is submitted that Justice Choo was correct to point out that the law requires a deeper analysis than this, and the counter-arguments proffered by His Honour at paragraph 7 of his judgment to support his view that the provisions do not infringe Article 12 were persuasive. The right to equal protection under Art 12(1) must be determined from the outset and indeed, all the home owners had equal opportunity to sell their houses under the law. This means that the appellants’ argument failed at the first stage of the three-stage test for the constitutionality of discrimination under Article 12 formulated in *Taw Cheng Kong v. Public Prosecutor* [1998] 1 SLR 943 at [33], since the law was not discriminatory against the minority at the outset.

(Although the Singapore Court of Appeal subsequently overruled the High Court decision to strike out a statutory provision as unconstitutional, the formulation of the three-stage test remains a good expression of the test used by the courts following *Ong Ah Chuan*).

A differentiating factor in the legislation may not be discriminating to the people affected, depending on whether there has been a real classification from the outset. Broadly-speaking, differentiation is the modus operandi of the law and discrimination between people in different circumstances is impeccable insofar as the differentiating factor, in the words of Lord Diplock, bears a “reasonable relation to the social object of the law”.

It remains to be seen whether the minority home owners of Horizon Towers would appeal against the judgment which denied their claim of discrimination. ☺

An Qi is a third year law student and a Senior Editor of SLR.



Source: www.straitstimes.com

22ND ANNUAL SINGAPORE LAW REVIEW LECTURE DELIVERED BY AG WALTER WOON SC

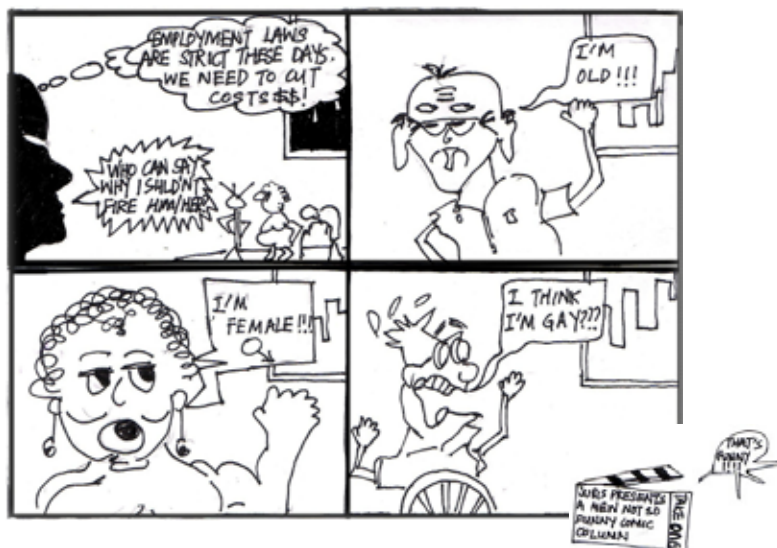
On 19 September 2008, the Singapore Law Review has the honour of having the Honourable Attorney-General of The Republic of Singapore, Professor Walter Woon SC, deliver the Singapore Law Review's 22nd Annual Singapore Law Review Lecture. The Honourable AG will be delivering a lecture on "Crime and Punishment: The Problems of Sentencing" where he will discuss issues and developments concerning criminal sentencing in Singapore. This year's Lecture is made possible through the kind support of one of Singapore's largest premier law firms, KhattarWong.



The Lecture will be held at the Viewing Gallery on Level 8 of the Supreme Court from 6-8pm with a post-lecture dinner reception. On 19 September 2008, the Singapore Law Review has the honour of having the Honourable Attorney-General of The Republic of Singapore, Professor Walter Woon SC, deliver the Singapore Law Review's 22nd Annual Singapore Law Review Lecture. The Honourable AG will be delivering a lecture on "Crime and Punishment: The Problems of Sentencing" where he will discuss issues and developments concerning criminal sentencing in Singapore. This year's Lecture is made possible through the kind support of one of Singapore's largest premier law firms, KhattarWong.

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DISCRIMINATION AS A SHIELD



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