

Happy Birthday...To Who?

The Universal Declaration of Human Rights turns a grand old age of 60 this year and while most of the world celebrates, it remains noticeably inconspicuous in Singapore. U60SG though, has hopes of changing that.

BY MUHD AIDIL & LAI FENG JUN

THIRD YEAR NUS LAW, DEPUTY EDITOR, SLR & FIRST YEAR NUS LAW, SECRETARY, SLR RESPECTIVELY

The atrocities committed during the Second World War made the flagrant disregard for human life and dignity painfully apparent and it was thus decided that a universal declaration was much needed to protect human rights and to acknowledge it as a global concern – a move welcomed by a world recovering from the ravages of war. Come December 2008, 60 years will have passed since the vision of sanctified and protected human rights was concretised with the proclamation of the Universal Declaration of Human Rights (UDHR) and the world will celebrate with commemorative activities organised by groups of likeminded individuals from each member state.

In Singapore, a group called U60SG has been taking the lead in organising the activities. Its objectives are two-fold: first, to celebrate the 60th Anniversary of the UDHR and the progress that it has made so far in the field of human rights, and

second, to raise awareness of human rights in Singapore through their various U60SG activities. Their activities include a multi-disciplinary talk on human rights, a youth forum, a film festival, story-telling sessions with children, as well as a roving educational exhibition to educate the public on various aspects of the articles in the UDHR. All these will be held at the National Library and they aim to help Singaporeans gain a better understanding of the history of the international human rights movement, its various facets, as well as how our legislation has (or has not) incorporated

Background image credit: viva_la_vibs



UN Secretary-General Ban Ki-Moon unveiling the U60 Logo



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Editorial

What exactly are “human rights”? The term has come under much public scrutiny after it was characterised as a way for foreign “fanatics” to impose their views unto Singapore. Is this the new form of colonialism by the West?

Notwithstanding the polemic views in this area, there is something universal about human rights. The best evidence of this is the Universal Declaration of Human Rights, which turns 60 this year. It arose out of a devastating world war and out of a common sentiment that if a state was left unchecked, it would exploit its citizens. In order to have freedom, peace and justice, human dignity and rights must be protected by the state.

Even so, foreign legal elements cannot simply be transplanted here. The legal context of Singapore is unique. Our distinct demographic, economic and security profile means that it is dangerous for us to claim that a certain right now exists and shall be interpreted using whatever foreign sources we can find. The right has to be harmonious with our laws or else we are not finding a solution but only admitting a new problem.

If we are to define “human rights”, it has to be our human rights, and not because someone else told us this is so or that it would be good for us. While foreign solutions can be persuasive, they must fit in the local context, and the only way we can find the best fit is through dialogue and a common appreciation that we are in this together as a nation. ☺

these ideals into our laws.

U60SG organises its activities on an inclusive basis, allowing other parties to hold complementary events under its auspices. In August 2008, the Law Society organised a series of talks on Human Rights and established a Public and International Law Committee which seeks to “promote the study and understanding of public law and public international law and to develop awareness of the extent of the application of public international law in Singapore”. NUS Law Faculty’s Pro Bono Group will also be organising similar educational events and activities, which include an interesting and novel method of blogging on a “right of the day” every day for 30 days from 6 November 2008 to 5 December 2008.

It is the fundamental principle that human rights are an intrinsic part of our lives—even if we are unaware of it—which motivates U60SG. As U60SG’s Co-Chairperson, Ms June Lim, rightly points out, “Human rights is the reason why we get to go to school (right to education), the reason why women can expect equal pay for the same jobs as men, and the reason why there are intellectual property rights.” For example, one’s right to education free from discrimination is guaranteed under Article 16 of our Constitution, although it is interesting to note that this is not an absolute guarantee of one’s right to education. With the authorities’ recent decision to allow public protests at Hong Lim Park being a possible indicator of how Singapore’s attitude towards the freedom of speech has finally come of age, U60SG is hopeful that this momentum will prompt Singaporeans to take a more active interest in human rights.

However, amidst the fanfare, there seems to be something missing at the heart of it all. Are the celebrations merely “full of sound and fury, signifying nothing”? After all, Singaporeans are known to be a pragmatic bunch who take little interest in advocating abstract ideals. As Ms June Lim concedes, it is unrealistic to “expect tangible results from the U60 celebrations”, but it is also impossible to talk “about the promotion and protection of human rights [unless] the general public has an idea of what human rights are in the first place”. The general mindset of the people that human rights is neither something close to heart nor important is precisely the reason for all the fanfare, which seek to, at the very least, arouse people’s awareness and interest in human rights. A society is shaped by its

laws – more importantly, the values, aspirations and goals of any society find expression in its Constitution. Our laws have yet to completely incorporate the ideals of UDHR but in the spirit of the U60SG celebrations, we can always hope. ☺



Universal Declaration of Human Rights. A mere declaration or document with legal effect?

Privacy Please?

Don't be too quick to dismiss the importance of the right to privacy. Looking at the way the world has evolved with technological advancements, privacy may just be our trump card to economic success.

BY NG SOOK ZHEN

SECOND YEAR NUS LAW, JURIS EDITOR, SLR

The right to privacy has often been regarded as insubstantial in the face of economic growth and communitarian values. In his 1986 National Day Rally speech, the then Prime Minister Lee Kuan Yew commented: "I am often accused of interfering in the private lives of citizens. Yet, if I did not, had I not done that, we wouldn't be here today. And I say without the slightest remorse, that we wouldn't be here, we would not have made economic progress."

Fast-forward to 2008.

We articulate our thoughts via the keyboard, publish our photo albums to the world, and display our databases in places far-removed from the dusty dossiers they were once relegated to.

New technologies have emerged and some have the ability to invade an individual's privacy. Espial of communications like email, surveillance at the workplace and public spaces, and information systems such as biometrics and identity cards are now readily available avenues which one may use to access and interfere into the private life of another. Technology has changed the way we can define our private lives as citizens of an island that is wired up in every aspect of its public and private sectors.

And the law has changed too.

Privacy is now protected in e-commerce, through legislation such as *Electronic Transactions Act*, *National Computer Board Act* and the *Computer Misuse Act*. The *Banking Act* also prohibits disclosure of financial information without the permission of the customer.

Judicially, the modern case of *Malcomson v. Mehta*, [2001] 4 Sing. L.R. 454 (*Malcomson*), most noted for creating the local tort of harassment, is a healthy indication that the courts are beginning to recognise privacy as a right. As tangential to privacy as *Malcomson* may sound, the case signifies the empowerment of the individual (through the tort of harassment) to restrain others from interference of one's personal space. Quoting International Privacy, Publicity and Personality Laws (2001) in the judgment, the court noted: "If and when this (the development in Singapore of a common law tort of intentional harassment) takes place, there would be much scope for the protection of privacy, since the tort may, if fully developed, protect against 'distress, inconvenience and discomfort'."

But the dearth of legislation or judicial decisions relating to privacy law remains startling.

Beyond the fact that the Constitution does not contain any explicit right to privacy, there is also little legislation that deals with the right to privacy. Little has been done to cope with the rapid advancement of technology.

For instance, employer monitoring of employee phone calls, e-mails, and Internet usage is permissible under Singapore law. Under local property law, workplace e-mail, telephone and computer contents are the property of the employer. If, for example, an employee loses his job because of the contents of his communications technology, he has no grounds for defense based on an invasion of privacy.

There has been clear recognition in various jurisdictions that enshrining privacy rights in law yields economic benefit. Experience in Europe and the United States has shown that such legislation is a pre-condition to increasing consumer trust, especially in online commerce. Further, many large multinational companies are hesitant about locating large-scale outsourcing operations in countries where there is no legal framework for publishing breaches of data security and data privacy.

Given that there is a pragmatic, facilitative role for privacy laws, and that the experience of such laws have been largely positive in foreign jurisdictions such as the United States, it may well be time that Singapore fills the lacuna that presently exist in her laws in order to deal effectively with the various privacy issues.

If we do not, and will not do that, we may not be here tomorrow. ☹



Go To Jail: Do Not Pass the Courts, Do Not Get A Trial

We've all probably been sent to jail arbitrarily before – while playing Monopoly, that is. But with the *Internal Security Act (ISA)*, arbitrary detentions are no longer restricted to board games.

BY DANIEL GAW
FIRST YEAR NUS LAW

It happens. We throw a dice, draw a Chance card and find ourselves in jail for no apparent reason, deprived of the \$200 we usually get when we pass 'Go'.

In Monopoly, the worst that could happen is losing three turns and \$50. But in reality, imprisonment is a grave matter and can take away years of freedom from a person. Thus, in order to ensure that no one is denied his freedom without valid reason, Article 9 of the Universal Declaration of Human Rights (UDHR) states that “no one shall be subjected to arbitrary arrest, detention or exile”.

Yet, this protection of an individual's freedom from arbitrary violations is not absolute in Singapore. Under s. 8 of the *Internal Security Act (ISA)*, the Minister for Home Affairs can order the detention of any person as long as the President is satisfied that detention is necessary to prevent the person from threatening national security or from jeopardising the maintenance of public order or essential services”. As we shall see, this affords the executive too much discretion and contravenes Article 9 of the UDHR.

The UN Commission on Human Rights considers an arbitrary detention to have occurred when a person's liberty is deprived without a final decision being taken by domestic courts in conformity with domestic law and relevant international standards (resolution 1997/50). Since detention under the *ISA* is entirely up to the discretion of the executive, it clearly fails the first limb of the test: judicial decision.

In fact, s. 8B of the *ISA* expressly limits the role of judicial review to that of ascertaining whether the procedural requirements of the Act have been complied with. This means that the courts can only decide, for example, whether the Minister has obtained the President's satisfaction before ordering a detention; they have no authority to decide whether a detention order was indeed based on national security considerations, or whether it was motivated by reasons outside the ambit of the Act. In effect, the Minister, with the President's agreement, has *carte blanche* to incarcerate anyone he likes.

The dangers of unfettered executive discretion have been vividly demonstrated recently in Malaysia, where its *ISA*—which authorises detention on broadly similar grounds—was invoked to arrest an anti-government blogger, an opposition politician and a journalist. While Malaysian officials claimed that the first two individuals were arrested for inciting racial tensions, they justified the third arrest on the ground that they had received threats against the journalist's life and needed to protect her. This was obviously a ludicrous basis for invoking the *ISA* as the *ISA* does not grant the Minister the authority to arrest people for their protection. Although the journalist was subsequently



released following tremendous public outcry, the point remains that the executive can abuse the *ISA* by arbitrarily depriving dissidents of their liberty in order to maintain its grip on power.

It is conceded that the *ISA* is useful in forestalling security threats; in recent years, it has enabled the authorities to nab extremists before they could inflict grievous damage upon Singapore. It would not be possible to apprehend these extremists under other penal laws, since they have not committed any crime. The *ISA* thus allows the government to preventively detain individuals who pose a serious threat to Singapore.

But even the spectre of terrorism does not justify granting such sweeping powers to the executive. Would the *ISA*'s utility in countering security threats be diminished if the courts were allowed to review decisions to see if they were based on legitimate grounds? Hardly. In *Chng Suan Tze v Minister of Home Affairs* [1988] SLR 132, the Court of Appeal drew a distinction between examining whether the executive's decision was in fact based on national security considerations, and questioning the executive's decision as to what national security requires. A court can do the former without doing the latter.

This approach preserves the executive's power to decide whether a detention is necessary to safeguard the security of Singapore, while ensuring that the executive does not exploit the *ISA* for its own ends. If the Minister orders detentions for legitimate purposes, there is no reason why he should fear judicial oversight in this respect.

Nonetheless, allowing judicial review is an inadequate solution as it still permits the executive to confine people who are not guilty of any crime for an indefinite amount of time. "National security" and "public order" are such amorphous grounds that they can be invoked to justify almost any detention. The executive, singlehandedly assuming the roles of judge, prosecutor and warden, does not need to provide positive evidence that the detainee poses a security threat or prove that his detention was really necessary.

Consequently, the *ISA* would still violate Article 9 of the UDHR even if the courts could ensure that it was being used in good faith. However, as the government is unlikely to repeal the *ISA* any time soon, enhancing the role of judicial review would be a small step in the right direction.

"Singapore... subscribes to the Universal Declaration of Human Rights," insisted the Ministry of Law in its response to the International Bar Association Human Rights Institute's Report on Singapore (July 2008). But mere ideological concurrence with the UDHR is meaningless when our laws clearly violate its provisions. Parliament should at least revise the *ISA* to check the unwarranted discretion it confers upon the executive.

☹



CHANCE

"Power to order detention.

8. —(1) If the President is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Singapore or any part thereof or to the maintenance of public order or essential services therein, it is necessary to do so, the Minister shall make an order —

(a) directing that such person be detained for any period not exceeding two years; or

...

(2) The President may direct that the period of any order made under subsection (1) be extended for a further period or periods not exceeding two years at a time.

Law applicable to judicial review.

8B.

...

(2) There shall be no judicial review in any court of any act done or decision made by the President or the Minister under the provisions of this Act save in regard to any question relating to compliance with any procedural requirement of this Act governing such act or decision."

– PROVISIONS UNDER THE *ISA*

There Was the Hammer, and Then the Gravel

Overshadowed by his feisty political undertakings, far too little has been said about Mr. Joshua Benjamin Jeyaretnam's contributions to the legal community.

BY KRISTLE CHIANG
SECOND YEAR NUS LAW, ASSOCIATE EDITOR, SLR

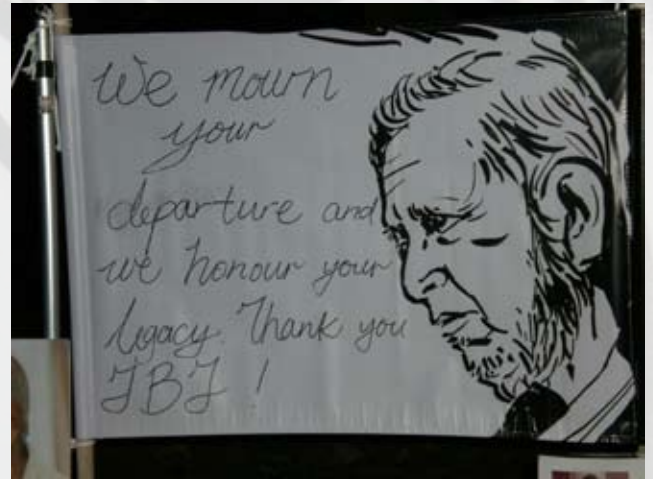
It's old news now – Mr. Joshua Benjamin Jeyaretnam has passed on.

The first time I saw him was just this year, in the bar room of the Subordinate Courts. He was completely alone, yet confidently at ease, taking leisurely sips from his coffee mug while perusing the day's news. I remember being envious of his ability to be disaffected by the socialising going on around him, while I was discomfited by the very same surroundings. An intern then, I felt like a fish out of water; but he was comfortably at home, being who he was, where he was. His easy manner hinted at his vast experience in the law, which included holding the position of First Criminal District Judge back in 1963, a fact often eclipsed by his political reputation.

Indeed, with the spotlight focused mainly on his political undertakings since his passing, little has been mentioned about his legal contributions. Yet, Mr. Jeyaretnam was a man whose life was tied inextricably to the law; whose passions were devoted to upholding and influencing the law both directly and indirectly. Throughout his lifetime, he was a lawyer, a judge, the occasional defendant, as well as a member of the legislature. His was an enriching legal journey and he had intimate dealings with every aspect of the law, from cross examining witnesses in court to engaging in fiery debates in parliament.

His most remarkable imprint on the law in Singapore lay in the law of defamation. The case of *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew*, [1992] 2 Sing. L.R. 310 defined the scope of qualified privilege, a defence to defamation. When asked to consider if this common law defence should extend to cover words spoken at an election rally, the Court of Appeal held that it should not, gleaned from s. 14 of the *Defamation Act* (Cap 75) the intention of parliament to restrict "the scope of privilege to be attached to a speech made at an election". Six years after the case concluded, Mr. Jeyaretnam, who was dissatisfied with the state of the law on defamation, sought to move a motion on 26 November 1998 to have a commission appointed to examine and recommend changes to defamation laws in Singapore. He believed that it was the right of "every citizen to ask honestly, without any malice, any questions of public officials in their conduct and discharge of public functions" (Sing. Parliamentary Debates, vol. 69, col. 1728 (26 November 1998)).

Mr. Jeyaretnam in part, if not mostly, also played the role of the catalyst in the decision to abolish appeals to the Privy Council in cases concerning disciplinary proceedings against lawyers in 1989. After the Privy Council decided in 1988 that he should be reinstated to the bar because of the "grave injustice" done him, this channel of recourse was eradicated by the government. In Parliament, Professor S Jayakumar, the then Minister for Law, reasoned that allowing such appeals opened "a loophole for lawyers who [had] been convicted of criminal proceedings in the courts and [faced] disciplinary proceedings instituted by the Law Society.



Background and above. A poster displayed at The Online Citizen's memorial service held for the late Mr. Jeyaretnam on 4 October 2008. Mr. Jeyaretnam, 82, died on 30 September from heart failure.

Shortly before his demise, he had actually helped file a class action lawsuit against Prime Minister Lee Hsien Loong for not holding a by-election in Jurong Group Representative Constituency following the death of its MP. In fact, he was set to appear before the High Court on October 15 this year, the first time in a long while that he would have donned the robes of a lawyer.

Whether he was using his brush to paint his vision of the law, or getting into a brush with the law, Mr. Jeyaretnam had always shown great fortitude and fighting spirit. His passing is a loss to many. The brief glimpse I got of Mr. Jeyaretnam might be dismissed by some as a mundane sighting, but he made his presence felt then, despite the triviality of what he was doing. I cannot help but remember Mr. Jeyaretnam.

He will be missed. 🙏



Above. Candles lit at the memorial service to remember Mr. Jeyaretnam's contributions as a veteran opposition member and relentless advocate of causes he believed in.

Test for whether default judgments to be set aside goes retro - law reverts back to the old test

A case commentary on *Mercurine Pte Ltd v. Canberra Development Pte Ltd* [2008] SGCA 38.

BY MUHD AIDIL

THIRD YEAR NUS LAW, DEPUTY CHIEF EDITOR, SLR

Uniquely Singapore. Or so it seems in *Mercurine*, where the Court of Appeal (“CA”) departed from its stricter “real prospect of success” test to one which asks whether the defendant can establish a *prima facie* defence in that there are triable issues -an approach that differs from other common law jurisdictions. The facts of the case are straightforward. The respondent obtained an O13 default judgment against the appellant who failed to enter appearance. 15 months passed before the appellant applied for the default judgment to be set aside. The Assistant Registrar granted the application but this decision was reversed by Prakash J in a Registrar’s Appeal who reinstated the default judgment. The appellant appealed to the CA, which varied the judge’s order and held that the default judgment would be deemed to be set aside if the appellant succeeds in another consolidated suit.

But the law, it seems, was far less straightforward.

In *Mercurine* the CA departed from its decision in *Abdul Gaffer v. Chua Kwang Yong* [1995] 1 Sing. L. R. 484, which applied the stricter “real prospect of success” test enunciated in *Saudi Eagle* [1986] 2 Lloyd’s Rep 221. The CA reverted to the test established in a time-honoured English case of *Evans v. Bartlam* [1937] AC 473, i.e. whether the defendant can establish a *prima facie* defence in that there are triable issues. While the merits of a defence is a highly significant factor in itself, the CA held this must be assessed against other considerations. The burden is on the defendant to show that he has a *prima facie* defence.

This decision must be correct because for a court of law to delve into the question of whether a defence has any “real prospect of success” would be to pre-judge a case without having the benefit of full evidence which can only be adduced in a trial. However, what is unclear is the exact threshold level of a *prima facie* defence qua an application to set aside a regular default judgment.

While the CA alluded to the threshold for a defendant in an O14 summary judgment application, it is clear that the analogy is not complete. If the threshold is indeed an O14 one, would it mean that the principles of whether an O14 application should be granted can be applied to the setting-aside-of-default-judgment context?

If that is the case, the plaintiff, in order to sustain the default judgment, would have to show that the defendant does not have a “fair

or reasonable probability of having a real or bona fide defence” (negative proposition of *Goh Chok Tong v. Chee Soon Juan* [2003] 3 Sing. L. R. 32). However, this is a higher threshold than a mere “prima facie” defence.

To set aside an *irregular* default judgment, the CA affirmed that the *ex debito justitiae* rule remained as the starting point. However, the court’s discretion remains unfettered (Order 2 Rule 1).

Accordingly, the test of whether the *ex debito justitiae* rule applies is whether there has been an egregious breach of the rules of procedural justice that prejudices the defendant (e.g. judgment entered prematurely) so as to warrant the setting aside of the irregular default judgment as of right. If the court decides not to apply the rule, it must consider if there are any other reasons for setting it aside.

The crucial factor to be considered pertains to the merits of the defence. The burden lies with the plaintiff to show that the defendant is “bound to lose” (*Faircharm Investments Ltd v Citibank International Plc* [1998] EWCA Civ 171 (“*Faircharm*”)) even if the irregular default judgment is set aside and the matter re-litigated. The CA did not apply *Faircharm* wholesale but rather modified it to mitigate its harshness to the defendant (its effects have been mitigated in the UK by statute).

Therefore, the burden is naturally heavier on the plaintiff who obtained an irregular default judgment because firstly, he has to satisfy the court as to why the *ex debito justitiae* rule should not apply and secondly, if the court is satisfied on the 1st limb, the plaintiff has to further show that the defendant is bound to lose and it is therefore pointless to set aside the judgment for the matter to be re-litigated. Two observations are apposite: firstly, this decision clearly demonstrates the court’s fine act of balancing two competing interests which are the need to (a) dispose cases efficiently and expeditiously and the need for (b) procedural fairness to litigants.

Secondly, the thresholds set are rather pro-defendant as it either provides a very low threshold level for the defendant to overcome to set aside the default judgment or a high threshold for the plaintiff to overcome in order to sustain the default judgment. Perhaps this can be explained by a Court’s preoccupation with the fundamental overarching duty to dispense justice regardless of procedural breaches. ☺

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Forum Illuminae

Consider the Singaporean context when suggesting reforms

ANTHONY WONG
FIRST YEAR NUS LAW

Critique of various government policies seems to be the issue at heart in the October issue of Juris Illuminae. Several articles centred on the much-debated freedom of expression, their scope spanning across the political sphere, the artistic arena, and to the online community. There were several indiscreet hints at the need for huge-stepping reforms, which more or less called for the repeal of existing regulations. ☹

Read Anthony's full response online at our website:
<http://www.singaporelawreview.org>

We can discern the wheat from the chaff for ourselves

THAM CHANG XIAN
FIRST YEAR NUS LAW

Tokenism or not, the lifting of the restrictions on the Speakers' Corner in Hong Lim Park is indeed a watershed event. The baby steps towards a freer means of expression have been taken, and this can only be a good thing. The journey of a thousand miles begins with a single step and these small shuffles represent at least an intention of moving in the right direction.

The irksome part however is still the not-quite-invisible hand of the government pull-

ing the marionette strings, despite the transfer of control from the police to the National Parks Board. It is one thing to limit the topics of protest for the purposes of "public order", but to think that Singaporeans are unable to discern the wheat from the chaff is eyebrow-raising to say the least. After all, what is the use of all this education if we could fall for the ruses of quacks selling snake oil?

Hyde Park's Speakers' Corner is a free for all, where onlookers may heckle the speakers for all their worth. Without the internet's Harry Potter cloak of invisibility to hide behind, onlookers can see for themselves the faces of the brazen few (if any) who would dare make inflammatory remarks. It would take much guts (and indeed a few shooters) to believe oft repeated rhetoric that has been rendered blasé by a certain postage pinching individual. Singaporeans in all our pragmatic glory do not suffer fools easily, and irrelevant or irreverent renditions would sooner be swept out than allowed past the door threshold.

Let those who have something to say take the stand (or mound in this case) and make their case. The public will not be so easily swayed by rustlings in the grass. ☹

Have something to say? Submit a Forum Illuminae reply to sookzhen@singaporelawreview.org and you stand to win a Borders voucher for the best response!



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