NATIONAL SECURITY AND CONSTITUTIONAL RIGHTS
The Internal Security Act 1960

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The Malaysian Constitution is in a sense unique because it was born during a state of Emergency on 31 August 1957, a consequence of the communist insurgency that lasted from 1948 to 1960. The British ruled Malaya from 1948 – 1957 under an emergency proclamation issued on 13 July 1948. This proclamation continued through independence and was ended only on 29 July 1960.

Consequently the usual constitutional guarantees in respect of fundamental liberties that one would normally expect in a constitution of an independent nation came to be subjected to the overhanging dark cloud of special emergency powers and powers against subversion. Since independence, these special powers have in fact become tighter and wider in scope arising from a series of constitutional amendments. These have had the effect of curtailing fundamental liberties and human rights according to international standards.

Article 150 – Emergency (Overlapping Emergencies)

In fact for the major part of its post-independence period, the nation has existed under a continuous state of Emergency except for the period 1960 to 1964. More curiously, the nation now exists under four overlapping Proclamations of Emergency.

The first of the currently subsisting proclamation was made on 3 September 1964 due to the confrontation with Indonesia; the second on 14 September 1966 in the state of Sarawak to deal with the political crisis that arose from the

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efforts of the federal government to replace the Chief Minister of Sarawak; the third on 15 May 1969 due to racial riots; and the fourth on 8 November 1977 in the state of Kelantan, again to deal with a political crisis caused by the effort of the party in power at the federal level to impose on the state a Chief Minister of its own choice.

Article 150(2) of the Constitution brought about by an amendment in 1981 confers upon the Yang di Pertuan Agong:

> 'the power to issue different Proclamations on different grounds or in different circumstances, whether or not there is a Proclamation or Proclamations already issued ... and such Proclamation or Proclamations are in operation'.

Two or more proclamations may therefore validly overlap. It is necessary for Parliament to specifically annul a Proclamation of Emergency and till then, the state of Emergency would subsist and the laws promulgated under it would continue to apply.

In the first Report by the Human Rights Commission of Malaysia ('SUHAKAM') to Parliament, the Commission expressed its serious concern that none of these four proclamations have been revoked resulting in a 'perpetual state of emergency' which 'enables the Government to promulgate emergency regulations even though both Houses of Parliament are sitting and the events that occasioned the states of emergency had come to pass'[1].

The emergency regulations which are still invoked and applied are the Emergency (Essential Powers) Ordinance 1969; the Essential (Security Cases) Regulations 1975 (ESCAR) and the Emergency (Essential Powers) Act 1979. These undoubtedly constitute a blot on our system of parliamentary democracy.

Article 149 – Special powers against subversion

The Article 149 Special Powers Against Subversion permit the violation of

[1] Annual Report 2000 of the Human Rights Commission of Malaysia ('SUHAKAM'), p 14.

fundamental rights contained in Articles 5 (relating to personal liberty), 9 (relating to prohibition of banishment and freedom of movement), 10 (relating to freedom of speech, assembly and association) and 13 (relating to rights of property).

These powers which curtail fundamental liberties are triggered by the simple expedient of a magical incantation in the form of a 'recital' in an Act of Parliament that 'action has been taken or threatened by any substantial body of persons, whether within or outside the federation' to cause fear of subversion[2].

'Subversion' has been defined in Article 149 (1) to refer to the following: causing people to fear organised violence; exciting disaffection against the government; promoting feelings of ill-will between classes of the population in such a way as is likely to cause violence; procuring alteration, otherwise than by lawful means of anything by law established; prejudicing the maintenance of any supply or service to the public; or causing prejudice to public order or national security.

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[2] Constitution, Article 149.
(1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation -
(a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or
(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or
(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or
(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.
(2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power Parliament to make a new law under this Article.

It is evident that this definition of subversion 'is of such a broad catch-all nature that even vigorous criticism of official polices, industrial action like strikes and call to taxpayers to withhold payment could conceivably fall within the parameters of subversion. Only the good sense of those in power is a safeguard against overzealous use of the law's omnipotence'[3].

It is Article 149 which is the parent of preventive detention laws such as the Internal Security Act 1960 (ISA) and the Dangerous Drugs (Special Preventive Measures) Act 1985. The other law which provides for preventive detention is the Emergency (Public Order and Prevention of Crime) Ordinance 1969. This paper will deal specifically with the ISA.

The Internal Security Act 1960 ('ISA')

Under this law the Minister of Home Affairs may detain a person for a period not exceeding two years (and renewable for two year periods indefinitely) on the suspicion or belief that the detention of that person is necessary in the interest of public order or security. Further, no grounds need to be given by the Minister for the initial order or the extension[4]. It is significant to note that in law this is an executive detention order and not a detention pursuant to a judicial decision.

This is underscored by the highest judiciary in the land which pronounced 'the ISA is a peculiar law, and is peculiar to our country' and further that the 'judges in the matter of preventive detention relating to the security of the Federation are the executive'.

This judicial abdication was pronounced in the hallmark case of *Theresa Lim Chin Chin & Ors v Inspector General of Police* (1988) 1 MLJ 293. The appellants were detained in a police crack-down code-named 'Operation Lalang'

[3] Prof Dr Shad Saleem Faruqi, 'Special Powers Legislation And The Courts', paper presented at the 11th Malaysian Law Conference, 2001.
[4] The Federal Court recently held in *Gurcharan Singh v Minister of Home Affairs* (unreported) that no grounds are required for the initial two year detention and subsequent renewals.

and were among the 106 citizens including the leader of the Opposition, Members of Parliament, civil-society advocates, academicians, social workers and religious leaders who were put away by executive action in one of the largest and widest ISA swoops in independent Malaysia, marking one of the darkest episodes in the chapter of human rights abuses in the country.

This case gave life to the ghost of *Liversidge v Anderson* (1942) AC 206 and affirmed that it is not the function of the court to review the discretionary executive decision and the grounds upon which they came to the belief that it was necessary or desirable to hold a person in detention for national security.

In fact, the court extended the haunt of the ghost from the Ministerial detention order under s 8[5] to the initial police power of arrest and detention under s 73[6]. It held that both the initial police arrest and detention 'pending enquiries' and the final ministerial detention could not be separated. Its reasons may be summarised by referring to this passage in the judgment:

> 'Looking at the provision relating to preventive detention, we cannot see how the police power of arrest and detention under s 73 could be separated from the ministerial power to issue an order of detention under s 8. We are of opinion that there is only one preventive detention and that is based on the order to be made by the Minister under s 8. However, the Minister will not be in a position to make that order, unless information and evidence are

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[5] Section 8 ISA.

(1) If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as a detention order) directing that that person be detained for any period not exceeding two years.

[6] Section 73(1) ISA.

(1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe:
   (a) that there are grounds which would justify his detention under s 8; and
   (b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

> brought before him, and, for this purpose, the police is entrusted by the Act to carry out the necessary investigation and, pending inquiries, to arrest and detain a person, in respect of whom the police have reason to believe that there exists grounds which would justify the detention of such person under s 8. There can be no running away from the fact that the police power under s 73 is a step towards the ministerial power of issuing an order of detention under s 8, which the Attorney-General referred to as the initial stage in the process leading to preventive detention.'

Before we discuss some of the consequences of allowing the executive to be the judge of national security without judicial supervision, we will consider the scheme of detention under the ISA.

Detention pending enquiries

The *first stage* is a detention pending enquiries by the police under s 73. This usually lasts for 60 days which is the maximum period permissible under that section. During that time the detainees are housed in gazetted cells and denied access to lawyers and family members for such period as the police deem fit.

The Right to Counsel

In *Theresa Lim*, the Supreme Court asked itself the question: 'When should a detainee arrested under s 73 of the Internal Security Act be allowed to exercise his right under Art 5(3) of the Constitution to consult a counsel of his choice?' The court answered characteristically: '… The matter should best be left to the good judgment of the authority as and when such right might not interfere with police investigation.'

This issue has visited the courts again when in another recent crackdown, the police arrested and detained seven reformasi activists under s 73(1) of the ISA. This time there were two conflicting decisions of the High Court.

In *Mohamad Ezam v Inspector General of Police* (2001) 2 MLJ 481, the court found itself bound by the *Theresa Lim case* and dismissed the applicant's habeas corpus motion on the grounds inter alia that police action in denying the applicant legal access was in accordance with law and the test to determine the validity of detention was subjective both for the initial police detention and the subsequent ministerial order. This case went on appeal to the Federal Court.

In *Abdul Ghani Hassan v Ketua Polis Negara* (2001) 2 MLJ 689, the Learned Judge declined to abdicate. He held that: '... Since the day of arrest, the lawyers engaged by the families, have been denied access. Such a denial is not only cruel, inhuman and oppressive, it is also a blatant violation of the applicants' constitutional rights under Art 5(3) of the Constitution which stipulates:

> "Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice …"

… Now, if the applicants truly believe that they have done no wrong at all and that from their standpoint they have been framed or persecuted, how are they to present their case in the best possible manner if they are not allowed access to counsel? This denial to counsel is not only unjust: it also makes a mockery of the right to apply for habeas corpus as guaranteed by Art 5(2) of the Constitution'.

This is formidable reasoning and resounding justice. Unfortunately, the Federal Court in the *Mohammed Ezam case* has recently decided in its judgment on 6 September 2002 that the test propounded by the *Theresa Lim Case*, ie the 'good judgment of the authority as and when such rights might not interfere with police investigation' would apply. The Federal Court did however say that 'to stretch that denial throughout the duration of the 60-day period makes a mockery of Art 5(3)' but again went on to say that 'A complaint by a person while under lawful detention that he has been refused access to counsel ... will not have the effect of rendering his detention unlawful ...'[7] To say the least, the current position appears to be one of confusion. Are the police obliged to give

the detainees the right to legal counsel on the 2nd or 59th day and if access is denied throughout what happens? Nothing. The detention remains lawful.

Right of Detainees to be present during habeas corpus hearing

Another burning issue is whether detainees have the right to be present at the hearing of their habeas corpus motions. The Learned Judge in the *Abdul Ghani case* ruled that by virtue of Cl (2) of Art 5 of the Federal Constitution, the right to apply to the High Court for a writ of habeas corpus was not merely a legal right, but also a constitutional right available to any person who believes that he has been unlawfully detained. Since the right is a constitutional right, he has every right to be present in court at the hearing of his application[8].

However in the morning of that day, before the applicants could be produced, the Attorney-General sought for and obtained a stay from the Federal Court of the 'notice to produce' the applicants. The Federal Court subsequently reversed the Learned Judge's ruling on the primary argument that 'As the proceedings are to be by way of affidavit evidence, it implies, therefore that there would be no legal right for a detained person to be produced at the hearing of the habeas corpus proceeding … In other words, no oral evidence is required in the habeas corpus proceeding and the issue of the detainee being prejudiced would not arise. He had the benefit of counsel'[9].

One may ask of what benefit can counsel be if they are denied access to their client and have to take instructions only from the family members, who themselves are denied access!

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[7] *Mohamad Ezam v Inspector General of Police* (Federal Court Case No 05-8-2001, unreported), judgment of Siti Norma Yaakob, FCJ.
[8] *Abdul Ghani Haroon v Ketua Polis Negara* (2001) 6 MLJ 203.
[9] *Ketua Polis Negara v Abdul Ghani Haroon* (2001) 4 MLJ 11 at 18.

Importance of Affidavits by detainees

In fact, in the *Mohamad Ezam case* which went on appeal to the Federal Court (by which time the detainees were no longer under police custody as the Minister had ordered them to be detained under s 8 of the ISA), the detainees applied for and obtained leave to file Affidavits which were not available in the High Court because access to Counsel was denied. Upon leave being granted, they filed Affidavits which disclosed that police investigations and interrogation during the 60-day detention had nothing to do with national security.

They were on[10]:

(a) political views;
(b) involvement in creating turmoil/disturbances;
(c) Dato Seri Anwar Ibrahim sexual activities;
(d) opposition parties and their leaders;
(e) sexual allegation;
(f) street demonstration;
(g) Lunas by-elections;
(h) source of funding of Keadilan.

Based on their new Affidavits filed in the Federal Court, the court held that the arrest and detention by the police was mala fide in that it was 'not for the dominant purpose of s 73, ie to enable the police to conduct further investigation regarding the appellant's acts and conduct which are prejudicial to the security of Malaysia, but merely for intelligence gathering which is unconnected with national security'[11].

The Federal Court thereupon issued the writ of habeas corpus for the appellants to be set at liberty and be released.

[10] *Mohamad Ezam v Inspector General of Police* (Federal Court case No 05-8-2001, judgment of Mohamed Dzaiddin, CJ) (Unreported).
[11] Ibid.

Academic habeas corpus

Then came the bombshell. The Federal Court ruled that because the habeas corpus was issued in respect of the police arrest and detention under s 73 and the detainees were currently detained pursuant to the Ministerial Order under s 8, they could not be set free. Counsel were advised to file for a fresh habeas corpus motion in respect of the Ministerial Order of two year detention.

This decision has sparked outrage in civil society and in legal circles. The argument is that the *Theresa Lim* formulation of the inextricable link between s 73 and s 8 would mean that the ministerial order being the fruit of the poisonous tree is contaminated and the continued detention must be bad in law.

However the Federal Court in *Mohd Ezam* held that 'although s 73(1) and s 8 are connected they can nevertheless operate quite independently of each other under certain circumstances. Section 8 is not necessarily dependent on s 73(1) and vice versa. In the circumstances, it cannot therefore be that they are inextricably connected'[12]. By that logic, the detainees remain in detention under the ISA although their arrest and detention under the Act have been held to be mala fide and an abuse and misuse of the Act!

The Ministerial s 8 Order

The *second stage* of detention under s 8 relating to the ministerial order is subject to s 8B(l) of the ISA which deals with the ouster of the jurisdiction of the courts. It reads:

> 'There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act save in regard to any question on compliance with any

[12] *Mohamad Ezam v Inspector General of Police* (Federal Court Case No 05-8-2001, judgment of Steve Shim Lip Kiong, CJ (Sabah & Sarawak))(Unreported)

procedural requirement in this Act governing such act or decision'.

Hence we are back to *Liversidge v Anderson* and the subjective satisfaction of the Minister who needs give no grounds.

The Advisory Board

The *third stage* provides for representations to the Advisory Board against the detention order pursuant to s 11. Sections 12 and 13 provide respectively that the Advisory Board shall make their recommendation to the Yang di Pertuan Agong and that the Advisory Board shall conduct a review of the detention at least once every six months. Section 14 provides that the Advisory Board shall, subject to s 16, have all the powers of a court for summoning and examination of witnesses and production of documents.

However *s 16* provides that: 'Nothing in this Chapter or in any rules made thereunder shall require the Minister or any member of an Advisory Board or any public servant to disclose facts or to produce documents which he considers it to be against the national interest to disclose or produce'.

Abuse of the ISA

The history of the ISA is replete with abuse and misuse and questions have been raised whether the ISA is a shield against terrorism or is in fact an instrument of oppression. The Parliamentary debates in the Dewan Rakyat in June 1960 reflect that the ISA was enacted for the sole purpose of fighting the communist insurgency and it was intended as a temporary measure until that threat was removed. In fact that threat has been removed since the Malaysian Communist Party laid down its arms and gave up its struggle officially after the signing of the Bangkok Accord on 24 December 1989.

It is a notorious fact that the ISA has been invoked and applied to circumstances and occasions not contemplated when the statute was enacted.

For example in the recent past the ISA has been invoked or threatened to be invoked in respect of those alleged to have spread rumours, forged passports, cloned hand phones, breached copyrights, counterfeited coins and documents. There is significant body of public opinion that the ISA has persistently been used to stifle legitimate opposition and silence lawful dissent[13].

One grotesque example of its abuse can be seen in the case of Dr Munawar Aness who was arrested under the ISA in 1998 ostensibly for matters relating to national security but was then speedily charged for an offence under s 377D of the Penal Code for gross indecency, leaving the public stunned and puzzled as to how an alleged act of sodomy can be seen as a matter of national security to justify an arrest under the ISA[14].

Another instance of abuse was the case of Anwar, the former Deputy Prime Minister. He was arrested in his home on 20 September 1998 by the Police Special Task Force with balaclava and an armoury of fire-power as if they were storming a terrorist fortress. He was not initially arrested under the ISA but his detention was subsequently converted into an ISA detention in the middle of the night, which meant that the police did not have to produce him before the Magistrate the next morning as stipulated in Art 5(4) of the Constitution. It is now public knowledge that in fact, in the middle of the night he lay in his cell bloodied and bludgeoned by the hand of the Chief of Police. We have to question whether in this instance the ISA was actually invoked as an instrument of state terror to cover up a crime perpetrated by the Chief of Police[15].

We also cannot ignore the very credible first party accounts of the brutal manner in which the ISA has been used as an instrument of torture. One only has to refer to the Affidavit of Yeshua Jamaluddin filed for his habeas corpus

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[13] Memorandum on the Repeal of Laws relating to Detention without Trial by the Malaysian Bar to the Prime Minister dated 10 December 1998.
[14] S Sothi Rachagan, Human Rights and the National Commission, Kuala Lumpur: HAKAM, 1999, p 115.
[15] Ibid, p 115.

hearing in October 1988[16], the shocking disclosure in Parliament in March 1989 by the former Sarawak State Assemblyman Abdul Rahman Hamzah[17] and the more recent Affidavit by Dr Munawar Anees in 1998[18], to name only some examples. Any honest and objective inquiry into the ISA cannot simply ignore these travesties and inhumanities committed in the name of national security. Recent attempts by the executive to justify the continued use of this unjust law as a shield against 'terrorism' are less than convincing considering that in recent history the ISA has been seen by a large cross-section of society as an instrument of state terror.

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[16] Yeshua Jamaluddin was detained for being a Malay Christian convert. His affidavit at his habeas corpus hearing in October 1988 read: 'I was not allowed to sleep for days at a stretch and was warned that I would not get any food if I did not cooperate. One Inspector Yusoff also threatened to disturb my girlfriend if I did not give any information. I was assaulted by Inspectors Yusoff, Zainuddin, Ayub and another officer on a number of occasions. On one occasion I was knocked to the ground and injured my back. Since then, I have been passing blood in my urine and have been suffering from pains in my lower back constantly... On another occasion during interrogation, Inspector Yusoff forced me to strip naked and to enact the crucifixion of Jesus Christ. Inspector Yusoff also forced me to crawl on the floor in a naked state ... A police constable forced me to stand on one leg with both my arms outstretched holding my slippers. He made me remain in this position for two hours. He then called in a woman constable and her young daughter and asked them to look at me saying, 'This Malay is not aware of who he is. He changed his religion. He has no shame!' (Kua, K S, '445 Days Behind The Wire', Oriengroup 1999: 194)

[17] The March 1989 sitting of the Malaysian Parliament heard this disclosure of torture inflicted on Abdul Rahman Hamzah, a former Sarawak State Assemblyman: 'I was tortured by various means ...at anyone time there were always three officers present but on one occasion, seven officers tortured me by kicking, punching, slapping and by hitting me with broom sticks. I lost consciousness a few times. I was asked to duck walk, frog jump, crawl all over the room, corridor and bathroom, urinate like a dog, given the air-condition treatment after a cold shower, forced to do hundreds of push-ups... A tin was used to cover my head and at the same time the tin was hit with a stick. The sound of hitting of the tin deafened one's hearing and cut and bruised my head, cheeks and ears. This caused my head and upper face to swell. My interrogators would sometimes lift my body by throttling my throat with their hands and at the same time forcing me up. When this was done, my throat protruded and saliva would come out of my mouth. At the same time I was being hit over the cheeks and jaw areas... They twisted my wrist and body round several times before swinging me violently against the wall. I was forced to do mock sexual acts before my sneering torturers who also used stretched elastic bands to flick at my ears and nipples... My head was pushed into a filthy squat toilet bowl while it was flushed repeatedly... I was also poked with a floor mop used for cleaning the toilet... The interrogators would appear to be possessed by the devil. When they interrogated me, their lips, hands and fingers would quiver. At times like this, I was frightened as I felt I was in the hands of people who had lost their reason'. (Ibid)

The position taken by civil society groups and a significant cross-section of Malaysian society is that the ISA is a draconian and obnoxious law which undermines the rule of law and fundamental principles of human rights. Given its history of oppression and injustice perpetrated in its name, nothing short of a repeal will satisfy the cause of human rights and the rule of law.

Recommendations

Preventive Detention Laws are a challenge to the rule of law and the Judiciary has a crucial role in softening the effect of these restrictive laws through interpretation and application of the principles of justice and equity[19]. The latest Federal Court decision of *Mohamad Ezam* has ameliorated to some extent the hands-off approach of *Theresa Lim* but the issuance of the academic habeas corpus with no judicial bite has serious consequences on the role of the courts in protecting and upholding the rule of law. It may be perceived as a signal to the executive that the court's pronouncements in respect of security laws can safely be ignored, thus undermining the judiciary's perceived status as the ultimate defender of fundamental liberties and human rights against the excesses of the executive.

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[18] Dr Munawar Anees' experience of torture can be seen in his 36-page statutory declaration which is available on the web (search: Affidavit/Statutory Declaration of Dr Munawar Anees). Parts of it read: 'By the end of the second day the long hours of interrogation, the lack of sleep, and the lack of decent food had left me completely disoriented and exhausted... Lying there curled up in that foetal position I could only replay in my mind what my captors had repeatedly drummed into me, the sex acts they asked me to act out the vulnerable person I was in… One of the four screamed at me to stand up. I did so. All four came from behind the table and surrounded me in a very aggressive manner as if they were about to assault me. One of them literally had his face in mine. They all screamed at me, in my ears, loudly again and again and again that I had (had sexual intercourse) with Anwar. They screamed and screamed and screamed, in my ears, at my face, at me, again and again, over and over asking me to say 'yes' until I gave in and broke down saying yes, yes. They stopped screaming. That was what they wanted to hear. They were not interested that it was untrue'. (Kua, K S, 'The ISA As An Instrument of State Terror', paper presented at a Forum on ISA on 25 October 2001).

[19] *Justice in Jeopardy: Malaysia 2000*, Report by a mission comprising representatives of the International Bar Association, the Centre for the Independence of Judges and lawyers of the International Commission of Jurists, the Commonwealth Lawyers' Associations and the Union Internationale des Avocats; p 89.

In fact *Justice In Jeopardy*: *Malaysia 2000*, a report of a mission by legal and judicial luminaries concluded that the danger to the rule of law in Malaysia 'appears to lie in the actions of the various branches of an extremely powerful executive, which has not acted with due regard for the other essential elements of a free and democratic society based on the just rule of law. Such due regard requires both a clear grasp of the concept of the separation of powers and also an element of restraint by all branches of the executive. These have not always been evident'[20]. It concluded that the judiciary should play its role in checking the demands of executive power with fundamental liberties and human rights.

The report recommended that:

(1) the proclamations of emergency should be revoked or annulled under the provisions of Article 150(3) of the Constitution;
(2) Article 149 of the Constitution should be repealed;
(3) the ISA and other preventive detention laws should be repealed and rights of due process guaranteed.

Aftermath of September 11

The September 11 terrorist attack on the US has provided a new impetus to the use of the ISA in cracking down on alleged terrorist and militant actions in Malaysia[21].

Sixty-three suspected Islamic militants described as members of the Malaysia Militant Group (KMM) with the alleged object of waging war to overthrow the government by violent means have been recently detained under the ISA. On 28 September 2002, the Police announced they were looking for at least eight more leaders of the KMM. The KMM is alleged to have links with

[20] Ibid, p 77.
[21] The *New Straits Times*, 28 September 2002, p 1, 4; *The Star*, 28 September 2002, p 1, 10; *Malaysiakini*, webnews, 27 September 2002. This paper was prepared before the Bali bombing on 12 October 2002.

the Singapore-based Jemaah Islamiyah (JI) which is accused of plotting attacks on western targets in Singapore. JI in turn is believed to be linked to Osama bin Laden's al-Qaeda group, blamed for the September 11 attacks.

The Singapore Government, in the week before, announced the arrest of 21 suspected terrorists, 19 of them allegedly JI members, including some who had allegedly undergone military training at the al-Qaeda camps in Afghanistan.

The government announced that these suspected terrorists were planning to cripple military and other strategic targets as part of a plan to overthrow the Malaysian government and create an Islamic State. This was alleged to be the first step towards their ultimate goal of an Islamic State in Singapore, the southern Philippines island of Mindanao and Brunei.

In the context of the aftermath of September 11, the question is whether preventive detention is a necessary evil in our laws to protect democracy. The argument is that conventional law relying on the concept of deterrence and punishment is simply irrelevant to combat 'suicide missions' and given the modern weapons of mass destruction which are readily available to terrorist groups, even one slip-up can devastate a nation. Hence the need for preventive detention laws for national security.

Even the established democracies such as United Kingdom and Canada have enacted such laws and other nations such as Australia and Philippines are in the process of enacting them. The United States responded swiftly with the Patriot Act 2001. But none of these laws or intended laws come close to the rigours and arbitrariness of the ISA.

In the United Kingdom (Terrorism Act 2000) the police may detain suspected terrorists for 48 hours extendable for five days and in Canada (Anti-Terrorism Act 2002), for 24 hours extendable for a further 48 hours.

In Australia the ASIO Bill which is currently being debated proposes detention up to a maximum of seven days with guaranteed access to legal

advice after the first 48 hours of detention[22].

The Philippine Anti-Terrorism Bill of 2002 proposes detention of suspected terrorists for up to 72 hours[23].

In the United States, the Patriot Act 2001 which provides for six months' detentions which are renewable, are targeted at 'inadmissible aliens' and not citizens.

Thus it can clearly be seen from the illustrations above that the ISA is truly 'a peculiar law' and 'peculiar to our country'. Although many countries have resorted to preventive detention to combat terrorism, none of the measures taken or proposed come close to the ISA.

The question therefore arises whether the aftermath of September 11 justifies the continuation of the ISA.

The experience in Malaysia shows that if preventive detention law is a necessary evil, then in any event:

(i) the specific law must be clearly defined and restricted in scope for the mischief it is to remedy;
(ii) judicial detention is preferable to executive detention;
(iii) the detainees should be represented by lawyers and have the right to apply to court and appear in court to challenge their detention;
(iv) the detaining authority must clearly state the grounds of detention and the particulars for the purpose of satisfying the court of the basis of the detention;

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[22] Prof George Williams, 'New Anti-Terrorist Laws for Australia? Balancing Democratic Rights. The Philippines After September 11, 2001', paper presented at the Workshop on 'NationalSecurity and Constitutional Rights in the Asia Pacific Region', 8 – 9 October 2002, Australia National University.
[23] Prof Roland G Simbulan, 'The Real Threats To National Security And Constitutional Rights. The Philippines After September 11, 2001', paper presented at the Workshop on 'National Security and Constitutional Rights in the Asia Pacific Region', 8 – 9 October 2002, Australia National University.

(v) the test for detention should be the objective and not subjective test;
(vi) upon expiry of the detention period, which must be reasonable, the detainee should either be charged in court or released;
(vii) there should be a sunset clause in the enabling Act so that the statute would not be invoked and applied by the authorities even after the conditions that gave rise to it have ceased and abated.

Therefore, even if a preventive detention law is found to be necessary in the context of extraordinary circumstances to protect democracy, given the fundamental safeguards necessary to prevent its abuse and misuse, the ISA should still be repealed. Given its history, it is beyond redemption.

Conclusion

At the core of public perception of the Rule of Law is a sense of justice and fairness. Preventive Detention Laws like the ISA, by their very nature, challenge and undermine the essentials of a free and democratic society. The Executive would justify such laws as a necessity to defend freedom but the record of its use, rather misuse, in recent history betrays the fact that the so-called cure can be indistinguishable from the disease.