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MALAYSIA AND THE INTERNAL SECURITY ACT: THE INSECURITY OF HUMAN RIGHTS AFTER SEPTEMBER 11

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This article seeks to illuminate the history of the Internal Security Act and its uses against terrorism and political opposition in Malaysia. Recent applications of the ISA and developments in judicial review are highlighted, revealing the disturbing implications of September 11 on human rights in the country.

I. INTRODUCTION

In times of international conflict, individual liberties are often sacrificed for the benefit of national security. The war on terrorism is no exception. In the aftermath of September 11, 2001, governments from the United Kingdom to Zimbabwe scrambled to amend their legal systems to accommodate the threat of global terrorism. The United Kingdom sought to detain foreign nationals indefinitely without trial, and Zimbabwe sought to create a new crime of "terrorism" punishable by death.[1] United Nations High Commissioner for Human Rights Mary Robinson labeled human rights a "victim on September 11" while admonishing world leaders not to use the war on terrorism as an excuse to roll back civil liberties.[2]

But as other countries scrambled, Malaysia stood ready to manage terrorist elements on its soil with the Internal Security Act ("ISA").[3] A controversial law first drafted to combat communist violence, the ISA has since become an integral component of the Malaysian political landscape wielded against legitimate and illegitimate political dissenters alike. This paper traces the evolution of the ISA and seeks to understand how this potent weapon came to be ensconced in the government's arsenal.

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1 Amnesty International, *Amnesty International Report 2002* (Amnesty International Publications, 2002).

2 "Robinson urges rights protection" *CNN.com* (6 June 2002), www.cnn.com/2002/WORLD/europe/06/06/un.robinson/index.html (accessed on 7 June 2002).

3 Act 82 of 1960, Statutes of Malaysia. See generally Abu Bakar Munir, "Malaysia" in Andrew Harding and John Hatchard eds, *Preventive Detention and Security Law: A Comparative Survey* (Boston: M. Nijhoff, 1993) 131.

Examination of this history and the recent use of the ISA against Islamic militancy not only reveals a bleak portrait of the state of human rights in the medium term, but clarifies the challenges that lie ahead in protecting personal liberty in Malaysia after September 11. This article will begin by discussing how the executive branch has used the ISA since its inception. It will then go on to treat the legislative and judicial branches together and assess how they have safeguarded individual liberty against this wide-reaching law. Particular attention is given to a May 2001 High Court decision to release two ISA detainees.

II. EXECUTIVE BRANCH

Rising communist violence in 1947 prompted the British colonial government to enact the Emergency Regulations Ordinance 1948,[4] from which the ISA derives its origins. In times of emergency, this statute gave wide-ranging powers to the High Commissioner.[5] Section 4(1) empowered him to make any regulations considered to be desirable for the public interest, including ones that altered ordinary criminal procedure. Section 4(2)(p) empowered him to modify, amend, supersede or suspend any written law. He could also impose curfews,[6] censor media publications[7] and detain persons without trial.[8]

The High Commissioner declared a state of emergency on 12 July 1948 and wielded his expanded powers against the communists, who sought to overthrow the government to establish a communist republic. The ensuing 12-year struggle came to be known as the Malayan Emergency. An estimated 6,710 terrorists and 1,865 members of the security forces were killed by the time the Emergency was declared officially over on 31 July 1960.[9] The Emergency Regulations lapsed with the state of emergency, and the ISA was introduced to replace it.

Enacted under Article 149 of the Federal Constitution, the ISA was a permanent statute that could only be repealed by an act of Parliament.[10]

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4 Ordinance No 10/1948.

5 The High Commissioner headed the British colonial administration and also served as Governor of the Straits Settlements, which comprised Singapore, Penang, and Malacca.

6 *Supra* note 4 at s 4(2)(c).

7 *Supra* note 4 at s 4(2)(a).

8 Regulation 20. By the end of 1948, 11,779 people were held in detention.

9 RO Winstedt, *A History of Malaya* (Singapore: Marican & Sons, 1982) at 253.

10 Under art 149, any law designed to stop or prevent the following actions is valid, notwithstanding that it is inconsistent with basic liberties (*ie*, freedom of movement, assembly, and speech) provided for by articles elsewhere in the Constitution:

(a) to cause, or to cause a substantial number of citizens to fear, organized violence against person 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

Thus the restrictive provisions of the Emergency Regulations were codified into Malaysia's everyday law, and the executive continued to hold powers that restricted freedoms of speech, association, and the press. Section 73 deals with the initial period of arrest while section 8 provides for extended detention without trial. Section 73 empowers a police officer to detain any person who:

> 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.

This period of initial arrest may not exceed 60 days, at which time the person must either be released or be issued an order of detention under section 8, which allows the Minister for Home Affairs to direct a person to be detained for a period not exceeding two years. Detention may be extended indefinitely at two-year increments, and grounds for extension do not have to be the same as the grounds cited in the original order.[11]

Then Deputy Prime Minister Tun Abdul Razak justified the enactment of the ISA in 1960 by citing the threat posed by 583 remaining armed terrorists in northern Peninsular Malaysia.[12] But this original intent was lost as the executive expanded its domain. It is estimated that 20,000 people have been arrested under section 73 in the first 30 years of the ISA.[13] To date, over 4,000 have been detained under section 8.[14] Some internal security exercises appear to have targeted legitimate political dissent. In October 1987, police arrested 107 persons in "Operation Lallang", including prominent leaders and parliamentarians of opposition Parti Islam SeMalaysia (PAS), the Democratic Action Party (DAP), and the Barisan Nasional (BN) coalition.[15] Detainees reported inhumane treatment and

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(d) to procure the alteration, otherwise than by lawful means, or 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.

11 *Supra* note 3 at s 8(7).

12 *Parliamentary Debates: Dewan Rakyat* (House of Representatives), 21 June 1960.

13 Rais Yatim, *Freedom under Executive Power in Malaysia* (Kuala Lumpur: Endowment, 1995) at 244.

14 "Malaysia detained 4,190 under security law since 1960, minister says" *Agence France Presse* (24 July 2001). After reporting this data, Deputy Home Minister Zainal Abidin went on to say that despite the official surrender of communist party insurgents in 1989, the ISA was still relevant "to deal with threats posed by…identity card forgers, *reformasi* activists and the like."

15 For a detailed account of "Operation Lallang", see Lawyers Committee for Human Rights, *Malaysia: Assault on the Judiciary* (New York: Lawyers Committee for Human Rights, 1989) at 11-4.

psychological harassment, and international human rights groups roundly condemned the crackdown as a politically motivated action.[16]

It had been a difficult year for Prime Minister Mahathir Mohamad. The country faced a severe economic downturn and several financial scandals almost unseated him in the April 1987 intraparty elections. With control of the internal security apparatus, Mahathir was able to consolidate his political base and successfully undermine the rival faction of his ruling United Malays National Organisation (UMNO) party. All detainees were released by April 1989, but the judicial decisions that derived from this episode continue to resonate today. These developments will be discussed in Part III.

Tunku Abdul Rahman, Malaysia's first Prime Minister, commented:

> The ISA introduced in 1960 was designed and meant to be used solely against the communists…My cabinet colleagues and I gave a solemn promise to Parliament and the nation that the immense powers given to the government under the ISA would never be used to stifle legitimate opposition and silence lawful dissent.[17]

History repeated itself during the regional financial crisis of 1997, when differences over economic policy led to the arrest of then-Deputy Prime Minister Anwar Ibrahim on charges of sodomy and corruption.[18] Anwar was charged, tried, and convicted in a legal process the US State Department labeled "politically motivated and patently unfair."[19] Amnesty International has classified him as a prisoner of conscience. Dozens of Anwar's political associates and other supporters of the *reformasi* movement were also detained in the sweep.[20]

Today, Anwar remains in prison and the government continues to rely on the ISA to restrict political freedom. In April 2001, prior to a planned demonstration marking the second anniversary of Anwar's sentencing, Malaysian police detained 10 *reformasi* activists for allegedly taking steps

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[16] Conditions of detention are regulated by the Internal Security (Detained Persons) Rules 1960, including frequency of visits, regular medical examinations, and punishment for offences committed during detention. However, breach of these regulations does not affect the validity or *vires* of the detention. *Supra* note 3 at LN 189.

[17] Democratic Action Party, *The Real Reason: Operation Lallang ISA Arrests* (Petaling Jaya: Democratic Action Party, 1988) at 8. Tunku Abdul Rahman made these statements as part of an affidavit filed on behalf of Dr Chandra Muzaffar after the activist's October 1987 arrest.

[18] For more on this incident, see Tey Tsun Hang, "Malaysia: The Fierce Politico-Legal Backlash" (1999) 3:1 Singapore Journal of International and Comparative Law 1.

[19] US Department of State, *Country Reports on Human Rights Practices 2001* (4 March 2002), www.state.gov/g/drl/rls/hrrpt/2001/eap/8342.htm (date accessed 28 May 2002).

[20] Amnesty International, "Human Rights Undermined: Restrictive Laws in a Parliamentary Democracy" (1 September 1999).

to obtain explosives, including bombs and grenade launchers.[21] No evidence was presented to support these charges, and affidavits from the detainees described interrogation sessions that focused on their political beliefs and personal lives rather than the offenses for which they had been arrested.[22] At time of writing, six remain at the Kamunting Detention Centre, where they are serving two-year detention orders. The United States considers these men to be political prisoners,[23] and the Human Rights Commission of Malaysia has called for their immediate release.[24]

By June 2002, the government had arrested 62 persons under the ISA for alleged terrorist activity and ties to the Kumpulan Mujahidin Malaysia (KMM) militant group.[25] Nineteen were arrested in sweeps before September 11, including Nik Adli, the alleged leader of KMM and son of PAS spiritual leader and Chief Minister of Kelantan Nik Aziz Nik Mat.[26] Because the government was not forthcoming with evidence to publicly substantiate the arrests of Adli and other members of PAS, political opponents and critics accused Mahathir of using the ISA as a political tool.[27]

UMNO was weak. Haunted by a struggling economy and the Anwar affair, Mahathir was being written off as a political force.[28] The arrests in 2001 seemed to be a heavy-handed ploy to maintain political control, prompting growing rumbles within the ruling party and the general public for a need to review the more restrictive provisions of the ISA.[29] In May 2001, local human rights groups formed a new umbrella organization to campaign for the abolition of the ISA,[30] and a High Court judge urged

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21 See Tony Emmanuel, "Mass violence planned" *New Straits Times* [Malaysia] (12 April 2001) at A1. Seven of the 10 detained were leaders of opposition Parti Keadilan Nasional (National Justice Party), a political organization founded by Anwar's wife, Dr Wan Azizah Wan Ismail. The remaining three were a leader of a prominent human rights NGO, a media columnist for alternative news source www.malaysiakini.com, and the director of the Free Anwar Campaign. Inspector-General of Police Tan Sri Norian Mai said the detainees were members of a "secret cell" that sought to violently overthrow the government.

22 See www.hakam.org for affidavits from all 10 detainees describing their experiences of detention and interrogation.

23 *Supra* note 19.

24 Suhakam, "ISA Arrests" Press Statement (11 April 2001).

25 "Mahathir denies detention-without-trial law used on his opponents" *Deutsche Presse-Agentur* (17 May 2002).

26 Nik Adli is a veteran of the Afghan war against the Soviets and received a *madrasah* education in Pakistan. For more on the arrests of PAS members and Kuala Lumpur's charges against them, see "Militants received guerrilla training in Afghanistan" *New Straits Times* [Malaysia] (6 August 2001) at 1.

27 Barry Desker and Kumar Ramakrishna, "Forging an Indirect Strategy in Southeast Asia" (Spring 2002) 25:2 *The Washington Quarterly* 161.

28 "Born-again Mahathir keeps the faith – and his job" *Australian Financial Review* (5 January 2002) at 16.

29 Brendan Pereira, "Pulling the reins on ISA" *The Straits Times* [Singapore] (22 July 2001) at 34.

30 The AIM (Abolish ISA Movement) comprises 82 non-governmental organizations in Malaysia.

Parliament to review the ISA and minimize its abuses.[31] At the end of July 2001, High Court solicitor Sivarasa Rasiah said:

> One can see a momentum building in the public's sphere of society, saying that this law is archaic, anachronistic, and is being abused obviously…and I think that call will grow.[32]

But dust from the fallen World Trade Center towers stifled this movement and breathed new life and credibility into Malaysia's ruling party. The terrorist threat became more tangible, and citizens were more willing to give Kuala Lumpur the benefit of the doubt. In three separate sweeps after September 11, the government detained 43 militants with alleged connections to KMM. Twenty-three suspects were apprehended from December 2001 to January 2002 for their involvement with Jemaah Islamiah (JI), an extremist group that seeks to establish an Islamic union of Malaysia, Mindanao and Indonesia.[33] These arrests coincided with the detention of 13 JI militants in Singapore.[34] Malaysia rounded up 14 more KMM members in April, and there was little public outcry compared to the criticism following the 10 *reformasi* arrests one year before. Detentions since September 11 have not included PAS members, and the police have ascribed this to the discovery of several independent cells of KMM.[35]

Meanwhile, Mahathir has capitalized on the fear of Islamic militancy and launched a media campaign to remind his people that the country is no stranger to Islamic militancy. In February 2002, the government broadcasted a 20-minute documentary of a 1985 armed clash at Memali, Kedah.[36] This violence had resulted in the deaths of 18 people – including the group's leader, PAS strongman Ibrahim Mahmud – whom the villagers buried as martyrs for Islam. It is believed that a group of young Muslims, vowing to continue Mahmud's work, formalized the KMM group three

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31 *Abdul Ghani Haroon v Ketua Polis Negara* [2001] 2 MLJ 689.

32 Karuna Shinsho (CNN Anchor), "Malaysia's Human Rights Commission will investigate government's detention of seven people without trial" CNN International, *Asia Tonight*, Transcript No 072605cb.k16 (26 July 2001).

33 Eileen Ng, "Alleged terror network in Southeast Asia widens" *Agence France Presse* (24 January 2002).

34 For more on the region's experience with terrorism post-September 11, see Davinia Filza Binte Abdul Aziz, Gérardine Goh Meishan and Ernest Lim Wee Kuan, "South East Asia and International Law" (2001) 5:2 Singapore Journal of International and Comparative Law 814.

35 *Supra* note 33.

36 "Malaysia to air Muslim extremist film despite opposition criticism" *Agence France Presse* (31 January 2002).

years later.[37] In other efforts to paint PAS as a party of extremist fanatics,[38] government-owned television stations in January aired videos that interspersed scenes of the annual PAS party congress with footage of the Taliban. The 90-second clip was played nightly leading up to a by-election in Indera Kayangan, where UMNO achieved a robust victory.[39]

Indications of institutional ties between PAS and KMM are weak, although the party encompasses many different strains of fundamentalist Islam.[40] It is not inconceivable that some of its members may be sympathetic to the means and goals of KMM. However, those links are most likely personal rather than official. While PAS seeks to implement an Islamic state governed by *sharia* religious law – an idea opposed by all other political parties in the country – its leadership has not endorsed the use of violence to overthrow the Malaysian government.[41] PAS has achieved a membership of 800,000, the control of two states, and 27 seats in Parliament through the ordinary democratic process. PAS youth leader Mahfuz Omar said:

> If you believe the government, there are militants all around the country. The government wants to link us to KMM and make the non-Muslims frightened of PAS. But why should we resort to violence when we are getting more popular with the people?[42]

What remains certain is that September 11 has given Mahathir more political space in which to exercise his powers. He simultaneously disposed of militant elements and political opponents, and it is questionable whether some of these detainees sought to violently overthrow the government.[43] Since its inception, the ISA repeatedly has been called upon to provide an

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37 In another incident, the Al-Ma'unah cult raided a military armoury in July 2000 and killed two hostages before military commandos overpowered them in the jungle. For a discussion of Malaysia's Islamic resurgence and growing problem with extremist violence, see Andrew TH Tan, *Armed rebellion in the ASEAN states: persistence and implications* (Canberra: Strategic and Defence Studies Centre, Australian National University, 2000) at 95.

38 PAS Parliament Member Syed Azman said, "[t]he event of September 11 has basically put a blast point for [Mahathir] to corner us and [portray] us in a very extreme manner, to portray us as Taliban as possible and to portray us as a very dangerous and fanatical political party that should be wiped out." *National Public Radio*, "Fallout from the arrest of terrorist subjects in Malaysia" (22 January 2002).

39 Rohan Sullivan, "Malaysian political party demands withdrawal of TV clip showing Afghan execution" *Associated Press* (15 January 2002).

40 Brendan Pereira, "Origins of Muslim radicalism in Malaysia" *The Straits Times* [Singapore] (24 September 2001) at A14.

41 Personal interview with Lim Guan Eng, DAP Central Executive Committee member (9 June 2002).

42 *Supra* note 40.

43 See Barry Wain, "Is Malaysia using the war on terror as a political tool?" *Asian Wall Street Journal* (12 December 2001) at 1.

expedient, though heavy-handed, reply to political inconveniences. Malaysia's *de facto* law minister Rais Yatim wrote in 1995:

> The ISA's role in suppressing political, academic and social activities and above all constructive social pressure groups, is admittedly successful when judged by reference to the 231 leaders in these fields who have been arrested and detained in the past two decades.[44]

Human rights in Malaysia are now newly endangered by an international community and a Malaysian public that is more willing to prioritize national security interests over individual liberties.[45] The terrorist attacks on the United States quelled the growing momentum for a review of the ISA, and thus the ISA's potential for oppression looms in some ways larger than before.

III. JUDICIAL AND LEGISLATIVE BRANCHES

Malaysia's courts traditionally have been conservative in safeguarding individual liberties against an expanding executive power. A spurt of judicial activism in the late 1980s led to the 1988 sacking of Lord President Tun Salleh Abas, head of the Supreme Court, and two other high-ranking judges.[46] Subsequent statutory intervention also limited the power of the bench,[47] creating conditions conducive to a weak judiciary that is malleable to the political agenda of the moment. Because the executive has used Parliament to restrict judicial power through legislative action, it is convenient to treat the two branches together.

A. *Judicial Review*

Judicial review of the ISA in Malaysia has trod a tumultuous path since 1960. This section traces its major developments. Section 8(1) of the ISA reads:

> 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

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[44] *Supra* note 13 at 299. These observations were made before Dr Rais Yatim joined the Prime Minister's Department as the *de facto* law minister. In his book, he called for the repeal of the ISA; he has since recanted and says he believes in its deterrent value.

[45] John Burton, "Malaysia's Mahathir wins US support for crackdown: Washington has watched with approval as the moderate Islamic regime has tackled Muslim extremists" *Financial Times* [London] (3 May 2002).

[46] Scholarship on the judicial crisis is abundant. For a detailed account of the political events that led to Tun Salleh's removal, see Andrew Harding, "The 1988 Constitutional Crisis in Malaysia" (1990) 39 ICLQ 57. See also Mohamed Salleh bin Abas, *May Day for Justice: The Lord President's Version* (Kuala Lumpur: Magnus Books, 1989).

[47] See below for discussion on "Legislative Intervention".

> the security of Malaysia or any part thereof or to the maintenance of essential services therein or 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.

The courts have customarily sided with the executive and applied a subjective test of ministerial satisfaction, as first laid out by *Liversidge v Anderson*.[48] In this case, the House of Lords construed the words "reasonable cause to believe" in the (UK) Emergency Powers (Defense) Act 1939 to indicate a purely subjective condition of mind. Rejecting Lord Atkin's sole dissent, the House of Lords refused to review the factual bases on which a detention order had been issued, asserting that the "satisfaction" of the appropriate authority did not need to be supported by external fact or evidence.

The first local case to reach the Federal Court on this issue was *Karam Singh v Menteri Hal Ehwal Dalam Negeri*.[49] The appellant was detained under section 8 of the ISA and applied for *habeas corpus* on grounds that the Minister of Home Affairs had adopted a "casual and cavalier"[50] attitude toward his matter of detention. The applicant had been furnished with a written statement that listed only one ground for detention, namely that the detainee had been involved in activities prejudicial to the security of Malaysia. The detention order had listed three grounds; counsel argued this discrepancy evidenced insufficient consideration of the matter by the Minister. Furthermore, the allegations of fact presented to the applicant were "too vague, insufficient and irrelevant"[51] for the preparation of his defense. The applicant argued that this amounted to *mala fides*, or bad faith, on the part of the detaining authority. The court rejected this argument, affirming that the sufficiency or relevance of the detention order was a matter decided solely at the discretion of the executive. Thus, the court entrenched the *Liversidge* doctrine of "subjective satisfaction" in Malaysia, and *Karam* continues to be a binding precedent today.

The subjective approach significantly narrows the gap through which an application for *habeas corpus* may successfully proceed. Proving *mala fides* is one of the few ways to circumvent this test. But this avenue was made exceedingly difficult by *Yeap Hock Seng v Minister for Home Affairs Malaysia*,[52] which placed the onus of proving bad faith on the applicant, who often cannot access documents relevant to the case. Detaining authorities can justify non-disclosure of information by reason of national

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48 [1942] AC 206.
49 [1969] 2 MLJ 129.
50 *Ibid*, at 129.
51 *Ibid*, at 129.
52 [1975] 2 MLJ 279.

interest.[53] The court held in *Yeap Hock Seng* that a detention order could only be vitiated when there is "proof of improper or bad motive…and not mere suspicion."[54]

As Malaysian courts continued to rule in favor of the executive, Commonwealth courts elsewhere already had abandoned the *Liversidge* doctrine in favour of Lord Atkin's dissenting judgment.[55] In *Nakkuda Ali v Jayaratne*, the Privy Council applied an objective test to review whether the Controller of Textile "had reasonable grounds to believe" the appellant was unfit to work as a textile dealer.[56] The Privy Council adopted the same approach when it granted *habeas corpus* to an appellant detained under the Emergency Powers Regulation 1967 in *A-G of St Christopher, Nevis and Anguilla v Reynolds*.[57]

It was not until the late 1980s that Malaysian court decisions began to migrate toward the objective approach. In *Tan Sri Raja Khalid bin Raja Harun*,[58] a bank director was prosecuted for committing a criminal breach of trust. The arresting police officer believed the substantial losses incurred by the bank would lead to organized violence by depositors who belonged to the armed forces. A writ of *habeas corpus* was granted when the judges found little reason to believe the bank director's actions were a threat to national security. Thus, the court applied the objective test even while expressly affirming the subjective approach in its decision. Otherwise, it could not have substituted its own satisfaction for that of the arresting officer.

In *Karpal Singh v Menteri Hal Ehwal Dalam Negeri*,[59] Justice Peh Swee Chin granted the applicant a writ of *habeas corpus* after determining that one of six charges against him was factually not true and outside the scope of the ISA. The grounds of detention stated in the detention order were open to judicial review, although the allegations of fact upon which the subjective satisfaction of the minister is based remained outside the purview of the court. It was clear the courts were moving away from their conventional role of sanctioning arbitrary state action, and the government responded swiftly. Karpal Singh was re-arrested nine hours after his release and served with a new detention order.

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53 *Supra* note 3 at s 16. This section states: "Nothing in this Chapter or in any rules made thereunder shall require the minister or any member of an Advisory Board of any public servant to disclose facts or to produce documents which he considers it to be against the national interest to disclose or produce."

54 *Supra* note 52 at 279.

55 For a detailed treatment of the legacy of *Liversidge v Anderson*, see HF Rawlings, "*Habeas Corpus* and Preventive Detention in Singapore and Malaysia" (1983) 25 Malaya Law Review 324.

56 [1951] AC 66.

57 [1980] AC 637.

58 [1988] 3 MLJ 29.

59 [1988] 1 MLJ 468.

But the precedent had been set, and the decision was followed in *Minister for Home Affairs v Jamaluddin bin Othman*:

> This court was of the view that it would be naïve to preclude the judge from making his own evaluation and assessment from an obvious statement of fact.[60]

The momentum was building. Judges in *Merdeka University Bhd v Govt of Malaysia*[61] and *Yit Hon Kit v Minister of Home Affairs*[62] had also expressly stated their preference to discard the subjective approach.

B. *Legislative Intervention*

Alarmed by these developments, Mahathir moved to curb the powers of the judicial branch. Under Malaysia's Westminister model of government, members of the executive branch are all members of the Parliament, and the executive introduces all the bills. Combined with the ruling party's overwhelming majority in the Parliament, the legislature is often a rubber stamp for executive policies. On 18 March 1988, Parliament passed constitutional amendments to articles 121 and 145, which shifted questions of jurisdiction to the legislature[63] and empowered the body to make laws limiting or prohibiting judicial review.

Armed with its new authority, Parliament enacted a major amendment to the ISA on 16 July 1988,[64] which had immediate ramifications for a pending case involving DAP leader Lim Kit Siang. Arrested in "Operation Lallang" the year before, Lim had applied for a writ of *habeas corpus* on grounds of illegal detention. He had been detained in a detention center different from the one originally specified in the detention order signed by the Minister of Home Affairs on 18 December 1987. The detention order was served on 19 December, but Lim was not brought to the Kamunting Detention Centre until 21 December. Thus, Lim contended he had been illegally detained for three days. Lim's hearing was repeatedly postponed until 13 July 1988 – four days after Parliament passed an amendment validating any place of detention prescribed by the Minister. The judge admitted in his ruling:

> However, in passing, I wish to state that had it not been for Act A705, the detention of the applicant in Kuala Lumpur before he was formally

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60 [1989] 1 SCR 311 at 315.

61 [1981] 2 MLJ 356.

62 [1988] 2 MLJ 638.

63 Amended art 121 states: "There shall be two High Courts and such inferior courts as may be provided by federal law; and [the courts] shall have such jurisdiction and powers as may be conferred by or under federal law."

64 Internal Security (Amendment) Act 1988, Act A705.

> detained at the detention Centre on 21 December 1987 would have been illegal.[65]

In response to *Karpal Singh* and a similarly activist decision in Singapore,[66] Parliament passed a second major amendment to the ISA in 1989, abolishing judicial review on all substantive matters:

> There shall be no judicial review in any court, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong [the King] 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 procedural requirement in this Act governing such act or decision.[67]

Thus, persons arrested under the ISA are essentially left with no legal recourse to appeal their detentions.[68] These amendments leave very little space for maneuver, but the courts may yet exploit the vague divide between substantive and procedural review.[69]

C. *Abdul Ghani Haroon v Ketua Polis Negara*[70]

On 30 May 2001, Judge Hishamudin Mohamad Yunus made a bold ruling that sought to restore judicial review of ISA cases, notwithstanding the provisions of the 1989 amendment. The facts of the case were not exceptional. Two leaders of the Keadilan opposition party were arrested prior to a planned demonstration commemorating the second anniversary of "Black 14", the day of Anwar's sentencing.[71] Abdul Ghani bin Haroon and Gobalakrishnan a/l Nagappan were two of 10 *reformasi* activists detained

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65 Cited *supra* note 13 at 289. (Rais Yatim provides a detailed description of *Lim Kit Siang & Ors v Menteri Hal Ehwal Dalam Negeri Malaysia* and cites the case as [1988] 2 MLJ 95, but the decision appears to be unreported.) The Penang High Court also affirmed the constitutionality of Act A705 in *Lim Kit Siang & Ors v Menteri Hal Ehwal Dalam Negeri Malaysia*, Criminal Application No 54-8-88 (unreported).

66 In *Chng Suan Tze v The Minister of Home Affairs* [1989] 1 MLJ 69, Chief Justice Wee Chong Jin advocated the objective test and expressly supported Lord Atkin's dissenting judgment in *Liversidge v Anderson*. He stated that the "evidence of the President's satisfaction must be such evidence as would be admissible at trial."

67 S 8B(1) as amended by the Internal Security (Amendment) Act 1989, Act A739.

68 See Kevin YL Tan and Thio Li-Ann, *Constitutional Law in Malaysia and Singapore* (Singapore: Butterworths Asia, 1997) at 664 for a brief discussion on the constitutionality of this legislative intervention.

69 For an examination of the state of judicial review in Malaysian ISA cases, see Gan Ching Chuan, "The Implementation of the Internal Security Act of Malaysia: An analysis of the protective measures available and their effectiveness" (February 1995) 1 Current Law Journal cxxxvii and Gan Ching Chuan, "Judicial Review of Preventive Detention in Malaysia" (1994) 1 Malayan Law Journal cxiii.

70 *Supra* note 31.

71 "Anwar jailed for six years" *New Straits Times* [Malaysia] (15 April 1999) at 1.

under section 73 in the April 2001 sweep.[72] Their families applied for writs of *habeas corpus* on their behalf, and their cases were heard together.

The court determined the detentions to be unlawful, finding that the arresting police officer had failed to justify the arrest according to section 73(1). While the judge couched the police officer's offensible action as a procedural error, it is submitted that the court was actually applying the objective test:

> The arresting officer must, in his affidavit, furnish, not necessarily detailed particulars, but some reasonable particulars not only for the purpose of satisfying the court that he has some basis for the arrest, but also to be fair to the detainee.[73]

The court went on to affirm its power to evaluate an officer's purpose for extending a detainee's detention under section 73(3) paras (a), (b), and (c). Insufficient reasons provided for this extension also made the detention unlawful.

Previous case law such as *Tan Sri Raja Khalid*[74] and *Theresa Lim Chin Chin & Ors v Inspector General of Police*[75] had determined that the initial period of arrest under section 73 could not be separated from the detention ordered under section 8. Thus, the subjective test applies to both phases. Judge Hishamudin made no allusion to these cases as he departed from their precedent. Also noticeably absent were any mentions of *Karam* and *Liversidge*, the seminal cases that laid the foundation for the non-justiciability of ministerial satisfaction. However, an excerpt of Lord Atkin's vindicated dissent was called upon to underscore the judge's belief in his position as an upholder of fundamental liberties.[76]

The court employed a strict interpretation of the ISA and safeguarded constitutional rights not explicitly withdrawn by the act. Article 5(3) of the Constitution reads:

> 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.

The court determined the arresting officers' failure to inform the detainee of the grounds of arrest and the denial of access to counsel rendered the detention unlawful. Denial of access to counsel and family members was

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[72] Two already had been released by the police unconditionally within 60 days of their arrest. The remaining six would receive two-year detention orders to be served at Kamunting Detention Centre.

[73] *Supra* note 31 at 699.

[74] *Supra* note 58.

[75] [1988] 1 MLJ 293.

[76] *Supra* note 31 at 697.

"cruel, inhuman and oppressive" and amounted to *mala fides*. In the interest of expediting police investigation, detaining authorities usually do not allow access to counsel during the initial 60-day arrest. Judges traditionally have placed the onus on the detainee to prove the police acted in bad faith when obstructing him from exercising this right,[77] but Justice Hishamudin shifted this burden of proof to the police:

> Those police officers responsible for the detention of the applicants must wake up to the fact that the supreme law of this country is the Constitution and not the ISA…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.[78]

This judgment expanded the discretion of the judiciary at the expense of executive power. But judicial reform is a gradual process – even more so when it must contend with unaccommodating rival branches of government. In a judgment that forebodes the minimal precedent value of the *Abdul Ghani Haroon* decision, High Court Judge Jeffrey Tan ruled on similar facts in a case involving a religious teacher at a *madrasah*, who was also a member of PAS:

> What appears rather is that the police had refused visitation by relatives and counsel pending ongoing but yet unfinished investigations. That was not any denial of the right to counsel.[79]

Delivered three months after Justice Hishamudin's decision, this opinion is indicative of future rulings that most likely will choose not to follow the spirit of *Abdul Ghani Haroon*:

> Our judges seem to prefer cases like *Karam Singh* [and] *Theresa Lim*…It is therefore fair to conclude that the precedents created by the pioneer judges…yield no joy to any supporter of human rights.[80]

Wary of the heavy police presence outside the courtroom and the government's history of immediately detaining successful *habeas corpus* applicants, Judge Hishamudin issued a court order forbidding re-arrest within 24 hours after release.[81] To date, the appellants have not been re-arrested, and the government has not appealed the decision. Judge

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77 See *Ooi Ah Phua v Officer-in-Charge of Investigations, Kedah/Perlis* [1975] 1 MLJ 93 and *Theresa Lim Chin Chin v Inspector General of Police* [1988] 1 MLJ 293.

78 *Supra* note 31 at 706.

79 *Noor Ashid bin Sakib v Ketua Polis Negara* [2002] 5 MLJ 22 at 34.

80 Tommy Thomas, "Human Rights in 21st Century Malaysia" (2001) 30:2 INSAF at 103.

81 *Abdul Ghani Haroon v Ketua Polis Negara and another application (No 4)* [2001] 6 MLJ 198.

Hishamudin, however, was not rewarded for his judicial prudence. Instead, Mahathir berated the judge and said that judges who do not agree with the laws of Parliament should excuse themselves from hearing such cases.[82] The judge has since been transferred to a commercial High Court in Kuala Lumpur.[83]

D. *The State of the Judiciary*

The *Abdul Ghani Haroon* decision has been hailed by some observers as symptomatic of an emerging trend of judicial independence since Chief Justice Mohamad Dzaiddin Abdullah took office in December 2000.[84] He has urged judges to lift professional standards and warned that an unreliable court system discouraged foreign investors from engaging with Malaysia's economy.[85] Public confidence in the judiciary was at an all-time low after what was largely perceived as judicial complicity in Anwar's prosecution. A series of decisions in commercial cases, namely *Ayer Molek Rubber Co Bhd & Ors v Insas Bhd & Anor*,[86] had also greatly undermined the credibility of Malaysia's courts.[87] Justice Sheik Daud Ismail made the following observation in a speech delivered on 9 January 2001:

> All along people were confident that the last place they could get justice is in the courts but in the light of certain cases before the courts and certain goings on in some courts, they realized that the courts have let them down miserably. It used to be that the tinting of judges' cars was for security but now I say it is to hide my embarrassment.[88]

Observers cite the *Abdul Ghani Haroon* and two other decisions as evidence of the judiciary's efforts to resuscitate its reputation. On 8 June 2001, a High Court judge nullified a Sabah state election and ousted its victor, an UMNO party member.[89] A 27 June ruling quickly followed, allowing Zainur bin Zakaria – a member of Anwar's defense counsel – to appeal a contempt conviction.[90] But this optimism may be premature. Chief

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82 Suara Rakyat Malaysia (Suaram), "Overview of Malaysian Civil and Political Rights in 2001: Executive Summary", www.suaram.org (date accessed 9 June 2002).

83 Conversation with Registrar's Office, Bahagian Dagang 6 (Commercial High Court, section 6) (12 June 2002).

84 See Raja Aziz Addruse, "One step back for the judiciary" (November 2001), www.hakam.org/statementsnov01.htm (date accessed 30 May 2002).

85 Arjuna Ranawana, "Daring to rule" *Asiaweek* (29 June 2001).

86 [1995] 2 MLJ 734.

87 For more on the 1995 Ayer Molek affair, see David Samuels, "Malaysian Justice on Trial" (November 1995) 49:2 International Commercial Litigation 10.

88 "Judicial system hammered left and right" (2001) 21:2 *Aliran Monthly* 13.

89 *Harris Mohd Salleh v Ismail bin Majin, Returning Officer & Ors* [2001] 3 MLJ 433. See Thomas Fuller, "Judge nullifies election of ex-minister in Malaysia" *International Herald Tribune* (9 June 2001) at 2.

90 *Zainur bin Zakaria v Public Prosecutor* [2001] 3 MLJ 604.

Justice Dzaiddin retires later this year, and it is unclear who his successor will be. Moreover, these cases are aberrations in a system that more often than not sides with the executive. The government's post-September 11 emphasis on the threat of Islamic militancy has relegated the revival of judicial activism in ISA cases to the realm of the near impossible. The judicial system is organized in a manner that is institutionally not conducive to impartiality and independence on the bench.[91] The High Courts have no constitutionally entrenched original jurisdiction, and advancement in the judicial service is dependent on the executive.[92]

IV. CONCLUSION: LOOKING AHEAD

Fashioned as a weapon in the government's anti-communist armoury, the Internal Security Act is an all-encompassing piece of legislation that has been used repeatedly to suppress political dissent in its legitimate and illegitimate manifestations. Though it derives its origins from the emergency powers of the British colonial government, the ISA has been a permanent feature of everyday law since the end of the Malayan Emergency in 1960. Its scope is wide and the recourse from its imposition is narrow.

The events of September 11, 2001 sent aftershocks across the globe, dismantling civil liberties in its wake. In Malaysia, however, the legal system quietly trudged on as before. The Internal Security Act, amended more than a dozen times since its inception, was more than adequate for managing the transnational terrorist threat. Alleged militants were arrested under the ISA, and members of opposition political parties continued to be detained under section 8. Just as before, political exigencies determined the state of human rights in Malaysia.

While the anti-terrorism law and its applications have not changed, the executive can flex its power in much more political space than before. Capitalizing on fear of Islamic militancy and using it to justify the government's use of the ISA against this threat, Mahathir has been rewarded by an audience with US President George W Bush and resurging popularity at home.[93] Malaysians previously skeptical of ISA arrests are now willing to give him the benefit of the doubt.

Human rights have not significantly deteriorated in Malaysia since September 11 simply because the erosion of civil liberties so decried by human rights activists took place long before 2001. The threat of terrorism is simply the latest cloak beneath which the tactics inimical to civil liberties

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91 See International Commission of Jurists, "Attacks on Justice 2000 – Malaysia", www.icj.org (date accessed 31 May 2002).

92 *Ibid.* Under s 122B(1) of the Constitution, the Yang di-Pertuan Agong (King) appoints judges to the Federal Court, the Court of Appeal, and the High Court with the advice of the Prime Minister and consultation with the Conference of Rulers.

93 Jonathan Manthorpe, "Washington fetes Malaysian PM in war on terrorism" *Vancouver Sun* (18 May 2002) at A16.

can be exercised. But the potential for a steep decline in the protection of constitutional rights is greater now that there is less scrutiny from an international community consumed with the war on terror.

The most significant challenge ahead, then, is to put human rights in a position of prominence in Malaysia's political landscape. Otherwise, civil liberties will continue to lose ground:

> The residue of liberty just gets smaller and smaller, until eventually, in some areas, it is extinguished altogether, with freedom becoming no more than the power to do that which an official has decided for the time being not to prohibit.[94]

Kuala Lumpur has proudly proclaimed the country's leadership in using the ISA, citing the USA PATRIOT Act[95] as an example of an American concession to Malaysian foresight.[96] Mahathir's recent political maneuvering has won him high regard as the embodiment of moderate Islam. Classifying suicide bombers as terrorists while condemning the US bombing campaign against Afghanistan, he has smartly navigated the political minefield between the West and the Muslim world. But these may amount to nothing more than Pyrrhic victories. Unless duly addressed, unresolved issues of human rights within Malaysia will fester and come to menace the political respect Mahathir has worked so hard to achieve.

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94 KD Ewing & CA Gearty, *Freedom under Thatcher: Civil Liberties in Modern Britain* (Oxford: Clarendon Press, 1990) at 9.

95 The PATRIOT Act of 2001 (Provide Appropriate Tools Required to Intercept and Obstruct Terrorism) became Public Law 107-56 on 26 October 2001 and enhanced the US government's powers of surveillance and investigation for the purpose of counter-terrorism.

96 "Malaysia minister says US endorses detention law" *Deutsche Presse-Agentur* (12 May 2002).