EMERGENCY AND PREVENTIVE DETENTION POWERS: STRIKING A LEGITIMATE BALANCE - A COMPARATIVE ANALYSIS

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Introduction

The existence of emergency and preventive detention powers are common features that appear in almost every country in the world. This article attempts to analyse and compare the different jurisprudential basis behind the existence and exercise of emergency and preventive detention powers between selected Asian countries and that of their western counterpart (represented by the USA). The second part of this article will focus specifically on the Malaysian aspect i.e. a comparison will be made between the original intent of the emergency and preventive detention powers and the current emergency and preventive detention that exist in Malaysia. Finally, this article will look into ways to improve the current emergency and preventive detention powers in Malaysia. An attempt will be made to find the right balance between justifying the government's action in exercising its preventive detention and emergency powers whilst ensuring that the individual's rights are adequately protected whilst these powers are exercised.

The Basis of Emergency Powers

In *Bhagat Singh v King Emperor,*[1] Lord Dunedin attempted to define an "emergency situation" as 'a state of matters calling for drastic action'.

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1 *Bhagat Singh v King Emperor* AIR 1931 PC 111 (PC) 111-112.

During emergency situations, there exist a latent and permanent war between the state on one side and an enemy who is identified within *[and/or from without]*[the italics are added by the writer] the people, on the other. The characterization of subversion as the enemy is wide and limitless. The scope of subversion is not merely an objective emergence of an armed group. The phenomenon of subversion is much more complex, profound and global.

When the state of emergency exists, emergency powers within the state are activated to prevent any threat to the stability of the nation or to preserve the existence of its society.

The basis for the existence of any emergency powers lies in the "doctrine of state necessity".[2] Chitty stated that 'necessity knows no law'[3] whilst Bracton observed that 'necessity makes lawful that which is unlawful'.[4]

The main rational for the doctrine of necessity is expressed in two Latin maxims i.e. "salus populi est suprema lex" (the safety of the people is the supreme law) and "salus republicae est suprema lex" (safety of the State is the supreme law).[5] Both these Latin maxims are based 'on the implied agreement of every member of society that his own individual welfare shall, in cases of necessity, yield to that of the community: and that his property, liberty, and life shall, under certain circumstances be placed in jeopardy or even sacrificed for the public good."[6]

The law of necessity was expressed by Lord Mansfield in the following way:

2 Cyrus V Das, *Governments & Crisis Powers: A Study of the Use of Emergency Powers under the Malaysian Constitution and Parts of the Commonwealth* (Malaysian Current Law Journal 1996) 16.

3 *In Re Special Reference PLD* 1955 SC 435, 485.

4 Stanley Alexander De Smith, 'Constitutional Lawyers in Revolutionary Situations' (1968) 7 W Ontario LR 93, 97.

5 Das (n 2) 11.

6 William James Byrne, *Broom's Legal Maxims* (9th edn, Sweet & Maxwell 1924) 1.

> It must be very imminent, it must be very extreme, and in all they do, they must appear clearly to do it with a view of preserving the whole…If the governor [commits] twenty illegal acts, that will not be a justification of it;…the intervention must tend to the preservation of [society].[7]

In *Phillips v Eyre,*[8] Wiles J explicitly furnished the justification for the existence of emergency powers in dealing with the powers of the civil authority to quell rebellion:

> …To act under such circumstances within the precise limits of the law of ordinary peace is a difficult and may be an impossible task, and to hesitate or temporize may entail disastrous consequences…It is manifest, however, that there may be occasions in which the necessity of the case demands prompt and speedy action of the maintenance of law and order at whatever risk…The governor may have, upon his own responsibility,…[to] procure at the moment , to arm loyal subject, to seize or secure arms, to intercept munitions of war, to cut off communication between the disaffected, to detain suspected persons, and even to meet armed force by armed force in the open field. If he hesitates, the opportunity may be lost of checking the first outbreak of insurrection…In resorting to strong measures he may have saved life and property out of all proportion to the mistakes he may honestly commit under information which turns out to have been erroneous or treacherous."[9]

Because emergency powers are created to prevent any threat to the stability of the nation or to preserve the survival of its society, almost all of the emergency

[7] *Proceedings Against George Stratton & Ors* [1779] 21 State Trials 1046.
[8] [1870] LRQB 1.
[9] ibid 16-17.

powers that exist grant the Executive an almost totalitarian powers to act in times of emergency. Kenneth Wheare once concluded that 'crisis or emergency government can seldom be constitutional government.'[10] Schlesinger observed that emergency governments should be recognised 'for what it is: an extra-constitutional resort to raw political power, necessary but not lawful'.[11] Locke also expressed a similar view when he wrote in his *Second Treaties of Government* that 'a strict and rigid observation of laws [in some cases] may do harm. The executive must have a power to act according to discretion, for the public good, without the prescription of law, and sometimes even against it.'[12]

The Exercise of Emergency Powers (A comparison between ASEAN and US Constitutions)

A study of the constitutions in various countries (US, Indonesia, Brunei, Thailand, Indonesia, Philippines, Malaysia, Singapore and the Islamic Law) leads one to the following submission - that the rationale or ideology and the application of emergency laws in the US differs from that of the ASEAN countries although emergency laws in the these countries may have the same aim; which is to protect their respective communities.

The US Approach (Western Constitutionalism)

In the US, it is submitted that emergency laws are practised based on three principles.

[10] John E Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (Oxford University Press 1991) 30.
[11] Arthur M Schlesinger Jr, *The Imperial Presidency* (Houghton Mifflin Harcourt 2004).
[12] Finn (n 10) 17.

First principle

Emergency laws are seen as weapons which are used to defend or safeguard the state from a perceived threat coming from outside or external forces.[13]

For the US, emergency laws are seen as measures to prevent anticipated dangers, which may affect the whole social or political movement or government of the US. Thus treason, incitement or anyone found engaging in any rebellion or insurrection against the authority of the United States[14] shall amongst others be imprisoned. Other crimes may include any attempt to overthrow, put down or destroy the government of the United States.[15]

In *US v Rosenberg*,[16] the Supreme Court allowed the conviction for atomic espionage against the accuseds - Julius Rosenberg, Ethel Rosenberg and Morten Sobell - and they were respectively given the death penalties and a 30 year sentence.

In *Schenck v United States*[17] the accused was charged under the Espionage Act 1917 which amongst others include an attempt to cause insubordination in the military and naval forces of the United States and obstructing the recruiting and enlistment service of the United States by printing and circulating documents to that effect, when United States were at war with the German empire. The accused in his defence, raised his constitutional right in the First Amendment[18] which forbids

[13] Victor P Karunan, *Human Rights situation in Asia: National Security v People's Security* <http:///www.humanrights.or.kr/HRLibrary> accessed 2001.
[14] US Constitution, Article 18.
[15] US Constitution, Article III, Section 3, Clause 1 provides: 'Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort….'
[16] *US v Rosenberg* 195 F (2d) 583, 611 (CC A 2d 1952), cert. den., 344 US 838(1952).
[17] *Schenck v United States* 249 US 47, 39 S Ct 247, 63 L Ed 470 (1919).
[18] US Constitution, Amendment I provides: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press or the right of the people peaceably to assemble, and to petition the government for a redress of grievance.'

Congress to make any law abridging the freedom of speech or of the press. The Supreme Court in dismissing the defence decided as follows:

> But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution…The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent…When a nation is at war many things that might be said in time of peace…that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right…[19]

In *Abrams v United States,* [20] the defendants were charged under the same Act[21] for publishing abusive language about the form of government with the intent of bringing the government into contempt. Justice Holmes in his decision said the following:

> The United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace…It is only present danger of immediate evil or an intent to bring about that warrant Congress in setting a limit to the expression of opinion." [22]

[19] Norman Dorsen, et al, *Emerson, Haber and Dorsen's Political and Civil Rights in the United States Vol.1* (4th edn, Little Brown & Co 1967) 52.
[20] *Abrams v United States* 250 US 616 (1919).
[21] Espionage Act 1917 [now 18 USCA 2388] (US).
[22] Dorsen (n 19) 52-53.

In *Communist Party v Subversive Activities Control Board,*[23] amongst the issues raised before the Supreme Court was that the First Amendment to the constitution prohibits Congress from requiring the registration and filing of information, including membership list, by organisations substantially dominated by a foreign power. Justice Frankfuter speaking for the Supreme Court held that although generally individual liberties are fundamental to the American institutions, however when the existing government is menaced by a world –wide integrated movement and Congress is seeking to reconcile competing values within society (as in the current situation), Congress' decision must be respected.

Thus, it is submitted from the cases stated above that emergency powers are used to prevent outside forces from affecting the government or country; e.g. *Communist Party v Subversive Activities Control Board; Schenck v United States* and *Korematsu v United States,*[24] or from affecting the fabric or stability of the government, e.g. *US v Rosenberg*, and *Abrams v United States*.[25]

Other examples which support the above contention includes the exercise of emergency powers by several presidents of the US which includes President Woodrow Wilson who applied emergency powers enormously during World War 1, in areas of defence, war and the economy; Franklin D. Rossevelt who used emergency powers during the economic crisis of the Great Depression and Harry S Truman who invoked emergency powers during the Korean War.[26]

[23] *Communist Party v Subversive Activities Control Board* 367 US 1 81 S Ct 1357, 6 L Ed 2d 625 (1961.

[24] *Schenck* (n 17). See also *Korematsu v. United States (*1944) 323 US 214, 65 S Ct 193, 89 L Ed 194. In *Korematsu v. United States,* the Supreme Court upheld an Executive Order directing all persons of Japanese descent to leave California; including American citizens of Japanese ancestry on the ground that there was evidence of disloyalty on the part of some of the American Japanese whilst the US was at war with the Japanese Empire; it was not because of hostility towards the Plaintiff nor his race.)

[25] (n 18 and n 21).

[26] Essays on Emergency Powers, <http://www.newnetizen.com/presidential/emergency powers.htm> accessed 2001

Second and Third Principle

The second principle in the exercise of emergency powers lies upon the respect for human dignity which is the cornerstone of Western constitutionalism. Western Constitutionalism as portrayed by the US places great emphasis on the protection of human liberty, thus restraining the powers exercised by the government (including emergency and preventive detention powers).

The reason for such emphasis lies in the third principle i.e. the Western world's perception of "a government". Under the social contract theory (as expounded by John Locke and Thomas Hobbes, amongst others) it can be seen that a government derives its powers from the people. This "bottom- up" structure results in the people or the individuals as its final source of authority.[27]

Therefore, pursuant to this theory, the exercise of any emergency powers in constitutional states must be measured against the benchmark of individual dignity. It leads to the fact that legislative interventions are only constitutionally justified if it deals with any rights which are abused. The rights themselves must not be curtailed.[28] As such the courts will act very strictly or critically toward statues or emergency powers or any law intending to curtail human rights which are protected by the constitutions.[29]

Although the Supreme Court in *United States v Spock*[30] recognised that the government had an interest in amongst others, deterring substantive crimes and the

[27] For an in depth study of the social contract theory, see Social Contract Theory (Internet Encyclopedia of Philosophy) < http://www.iep.utm.edu/soc-cont/> accessed 2010.

[28] *De Jonge v Oregon* 299 US 364, 365.

[29] *Elfbrandt v Russell* (1966) 384 US 11, 86 S Ct 1238.

[30] In *United States v Spock* 416 F 2d 165 (1st Cir 1969), a number of academic and professional persons gathered at a press conference to oppose the government's involvement in the Vietnam War. They collected the cards nationwide and burnt them in Arlington Street in Boston. They further had demonstrations and similar gatherings in various states.

advocacy of revolution via the Defendant's action in demonstration and gatherings; yet the Supreme Court upheld the Defendants First Amendment rights of free speech by holding that the government must prove the specific intent of the Defendant i.e. satisfy the criminal intent of which the government had failed to achieve. Thus, the Defendant's condemnation of the war and draft was upheld under the First Amendment to the Constitution. The Court decided that:

> …Indeed, this is the substantive purpose of all conspiracy law, which is directed only at those who intentionally agreed to further an illegal job…the protection for the innocent could be adequately accomplished by requiring that the defendants' specific illegal intent be proved to the degree [of]…criminal intent…[and it must be judge strictssimi juris].[31]

In *Brandenberg v Ohio,*[32] a film showed a group of people carrying firearms and uttering derogatory statements of Negroes and Jews stating amongst others that they will be marching four hundred thousand strong to Congress. The film was later broadcast nationwide.

The accused was convicted under a local statute[33] of 'advocat[ing]…the duty, necessity...of crime sabotage, violence or unlawful methods of terrorism as mans of accomplishing industrial or political reform…'. On appeal, the Supreme Court holding that the statute had infringed the freedoms guaranteed by the First and Fourteenth Amendment of the US Constitution said:

> …constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or

[31] Dorsen (n 19) 69.
[32] (1969) 395 US 444, 89 S Ct 1827, 23 L Ed 2d 430.
[33] Ohio Criminal Syndicalism Statute 1919 (US).

> producing imminent lawless action and is likely to incite or produce such action…mere abstract teaching…for a resort to force and violence is not the same as preparing a group for violent action and steeling it so such action.

Mere membership in the Communist Party (i.e. a person's right of association) is protected by the First Amendment.[34] Thus it must be shown that this right was abused. In *United States v Robel,*[35] the Supreme Court said:

> …Assuming that some members of the Communist Party…had illegal aims and engaged in illegal activities, it cannot be automatically inferred that all members shared the their veil purposes or participated in their illegal conduct…

ASEAN Approach

In a stark contrast with the Western approach towards emergency powers, it is submitted that Asian countries have adopted and applied emergency powers as a form of "nationalism" i.e. emergency powers are seen as fundamental principles to safeguard and protect "Asian Values". The protection of "Asian Values"[36] includes the following:

(a) The protection of the community and nationhood together with its strong moral values and family ties. In other words, the protection of the family and social unit[37] cf. Western emphasis on individual rights and adversarial politics.

[34] *Boorda v Subversive Activities Control Board,* 421 F 2d 1142 (DC Cir 1969).
[35] (1961) 389 US 258, 263.
[36] For an in depth reading of "Asian Values" please see the article by Errol P Mendes, 'Asian Values and Human Rights: Letting The Tigers Free', Human Rights Research and Education Centre <http://www.cdp-hrc.uottawa.ca/eng/publication/centre/asian_values.php> accessed 2010.
[37] Goh Chok Tong, 'Social Value, Singapore Style' Current History (Dec 1994) 417-22. See also Goh Chok Tong, 'Social Value, Singapore Style' *The Far Eastern Economic Review* (Hong Kong, 1 August 1996) 38.

(b) To protect a heterogeneous society and avoid overt conflict in social relations in view of the fact that Asian countries are made up of multiracial, multireligious, multicultural and multilingual communities. Thus the threat is seen not only from external forces but also from *within society*. To quote Dr Mahathir Mohamed: 'The threat is from the inside….So we have to be armed, so to speak. Not with guns, but with the necessary laws to make sure the country remains stable.'[38]

(c) To ensure that the system of the country is stable; which will in turn provide for the right to subsistence and development. In view of this, the use of emergency laws could be legitimately applied to sacrifice individual rights at the altars of the right to subsistence and development.

Furthermore it is submitted that the governments of Asian countries are often established in a "top-down" model i.e. the government does not derive its powers from the people; even if it does, once the government is formed, they should be respected (i.e. a respect for hierarchy and authority). [39]

It is submitted that although the ASEAN countries in practice approach the justification of emergency and preventive detention in different ways nevertheless, their aims are encapsulated in either one or a more of the "Asian Values".

Thailand

Prior to the written constitution in 1932, Thailand was ruled by an absolute Monarch; following the principles taken mainly from Buddhism. The Monarch's overall role was to ensure the national security and survival of the people's

[38] Interview with Dr. Mahathir Mohamed in *The Far Eastern Economic Review*, (Hong Kong, 28 October 1996) 18-27, in particular 19-21.

[39] Goh (n 37) 39. Goh states: '…More important, it is the sense of idealism and service born out of a feeling of social solidarity and national identification. Without these crucial factors, we cannot be a happy or dynamic society.'

wellbeing and happiness. In the traditional Thai society concept, the Monarch was the centre of the universe and the status of his subjects are dependent upon their relationship with him. The King was the sole owner of all the lands and the lives of the people within his kingdom. Thus the Monarch's capability of solving problems and alleviating hardships was more important than its capability to defend the freedom and basic rights of the people.

This perception indicates that the ruling power (government) does not belong to the people but only to the King (or the elite.). This also implies that the ruler does not need a mandate from the people and conversely the people have no right to demand specific duties from him. Thus, no one could question the legitimacy of his powers and how he uses it. Furthermore, the concept of power to the Thai society had the quality of indivisibility i.e. that the power cannot be severed and neither can the power be checked.[40]

Although the formal structure of the traditional value has been terminated following the creation of the Thai Constitution, however the informal structure of patron-client relationship and all perception of the Thai society towards a ruler still survive. Power had merely been transferred from the King to the legislature and executive exercising the powers in the name of the King and clarified in the Constitution.[41] Section 218 of the Constitution of Thailand allows the Executive to pass a royal executive decree during parliamentary recess. It allows the Prime Minister with the consent of the Council of Ministers and the National Policy Council to use his executive powers to act on any problems concerning national

[40] Kanok Wongtrangan, 'Executive Power and Constitutionalism In Thailand' in Carmelo V Sison (ed), *Constitutional and legal systems of ASEAN countries* (Academy of ASEAN Law and Jurisprudence, University of the Philippines Law Complex 1990) 295, 297.

[41] Constitution of Thailand Section 3 provides: 'The sovereign power belongs to the Thai people. The King as Head of the State shall exercise such power through the National Assembly, the Council of Ministers and the Courts in accordance to the Constitution.' International Constitutional Law <http://www.servat.unibe.ch/icl/th00000_.html> accessed 2010.

security, interest, economy, peace, public health; Section 222 of the Thai Constitution allows the Executive to declare Martial Law. Because of this concept of "rule from above" it is submitted that the basic rights of the Thailand's constitutionalism is mainly determined by the elite and not masses.[42] Thus, in times of emergency, the executive can quite easily exercise its powers to restrict individual rights.

Philippines

Although the language and spirit of the constitution of Philippines is transplanted from the US, nevertheless, the exercise of the constitution is significantly modified to suit the conditions of the Philippines; which it is submitted is the Asian way.

The structure of the Filipino society revolves around the traditional landowning elite which are largely shaped by the realities of a feudal society. The landlords become the role-models of latter day politicians. Further, leadership depends upon the personality and charisma of the leader rather than on issues. Thus, this inevitably leads to a situation in which citizens are beholden to politicians - helplessly awaiting their patrons instead of vigilantly defending their rights under the constitution.

Because of the Filipino's personalist and centralist approach, this has created a strong and supreme executive in the constitutional and political system of the Philippines.

[42] Constitution of Thailand Section 28 provides: 'A person can invoke human dignity or exercise his or her rights and liberties in so far as it is not in violation of the rights and liberties of other persons or of other persons or contrary to this Constitution or good morals.' Further, Constitution of Thailand Section 66 provides: 'Every person shall have a duty to uphold the Nation, religions, the King and the democratic regime of government with the King as Head of the State under this Constitution.' International Constitutional Law <http://www.servat.unibe.ch/icl/ th00000_.html> accessed 2010.

History has shown that the executive arm of Philippines has exercised its emergency powers to prevent the Philippines from external threat during the Second World War; four years after the Philippines constitution went into force. During the period of September 1939 to December 1941, a total of five emergency powers were enacted in the Philippines.[43]

In addition, emergency powers particularly the suspension of the writ of habeas corpus in the Philippines was exercised by the then president Ferdinand E Marcos from August 1971 to January 1972 which was later replaced by martial law in September 1972 to prevent rebellion coming from within the Philippines.

The rebellion was partly caused by the Communist guerrilla movement (a Maoist group) within Philippines who believed that the social and economic problems which plagued the Philippines after their independence would be solved under a Communist government. The Communist group intended to achieve their aim through violence. Furthermore the Filipino government was also facing a threat by the Muslim movement for separatism in Mindanao and Sulu - which if was successful - would result in the dismemberment of Mindanao. These Muslim threats came into being because of their dissatisfaction with the administration of the Christian leadership.[44]

Thus, emergency laws were applied throughout Philippines to, *inter alia*, 'maintain law and order throughout Philippines.'[45]

[43] Under the Commonwealth Act Nos. 496, 499, 500 and 620 where the Philippines President was granted amongst others the powers to take over, for use or operation by the government any public service or enterprise, to prescribe penalties for interfering with the exercise by the government of its authority and to appropriate the necessary funds therefore, to make rules and regulations and to take over necessary steps to effectuate such policy prescribing penalties for violations of the rules and regulations issued by the President. For further reading on the other powers which was given to the President see Enrique M Fernando, *Governmental Powers and Human Rights* (Romita Publication 1978).

[44] ibid 25-33.

[45] Fernando (n 43) 33-34.

Indonesia

For the Indonesians, one can see that the State should be accorded great or full authority (i.e, the totality of the State) which respected both the individual and public interest. This opposes the concept of individualism adopted by Western Constitutionalism viz the US. The totality of the State is adopted for the following reasons:

(a) The totality of the State adheres to the concept of social life adopted by the Indonesian people. (i.e. that of mutual cooperation or "gotong-royong" or concept of collective spirit). The Indonesians give the highest respect to harmony and stability in all aspect of social life. To achieve harmony and stability the Indonesian government adopts a concept called "musyawarah" and "mufakat" (discussion and consensus) between the society and the government; which forms the basic philosophy of the Indonesian Constitution;

(b) The "Pancasila", which forms the state ideology, *inter alia*, stresses on the unity of Indonesia which is democracy by close contact with the people through consultation, social justice for the entire Indonesian people and the duty of the state to protect the whole of the Indonesian people and their entire land based upon unity.

From subpoint (a) and (b) above, it is submitted that the rights of society is given a higher regard as opposed to the rights of the individuals.

It is seen that even prior to Indonesia's independence, through history, Indonesia already has various groups consisting of diverse nationalities, customs, and religions. This had led to the conflict between three different groups i.e. the nationalists, Muslims and the youth - whose conflict was finally solved when they

agreed to adopt the "Pancasila" as the state ideology,[46] which is the nearest approach to an official Indonesian philosophy.

Emergency powers were applied during Sukarno's guided democracy because amongst others there existed rebellions and political instability in West Java, and the apprehension felt by the islands outside Java, which resulted in Socialist and Christian parties.[47] Thus emergency powers are also adopted to ensure that the unity of the multiculture Indonesia is maintained.

Also, the then Indonesian government had to fight against the insurrection of communism coming from within Indonesia itself i.e. Java during the regional rebellion in 1957-1958.[48]

The government has created the "Kopkamtib" - an institution established by the government to restore security and order and is used by the government against those classified as "subversive elements". The "Kopkamtib" has, *inter alia*, the powers to interrogate and arrest peopie, seize good and issue prohibitions on mass media. In short, the body is given the authority over all sectors of society.[49]

Emergency powers are adopted and exercised without much resistance from society via guided democracy under Sukarno and semi democratic rule under Suharto because there exists a powerful Executive in Indonesia. The powerful Executive can be traced to the ideas, powers and status of Kings in ancient Indonesia who were known as "Dewa Raja" because of the belief that the Kings derived their powers from the gods and not the people. Therefore the King has authoritative power over the people, which again is a top-down power structure

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[46] Amir Santoso, 'Government and Constitution: The Case of the 1945 Constitution In Indonesia' in Carmelo V Sison (ed), *Constitutional and Legal Systems of ASEAN countries* (Academy of Asean Law and Jurisprudence, University of the Philippines Law Complex 1990) 88.

[47] ibid 93-94.

[48] Santoso (n 46) 93.

[49] Santoso (n 46) 108.

Because the rights of society are given higher regard as opposed to the rights of the individuals, the insurrection within Indonesia, the existence a multiculture population together with the top-down structure, it makes the exercise of emergency powers easier to justify and be adopted in Indonesia.

Brunei

Brunei belongs to the genre of South East Asian Sultanate based on the Islamic concept of the ruler functioning as God's representative or "kalipatullah". The Sultan or Yang Dipertuan is the symbol of supreme authority that holds absolute power theoretically.

In the 1950's, Brunei experienced conflict within its kingdom between the monarch, led by Sultan Omar Ali Saifuddin III and a mass based nationalist cum socialist political party - the Parti Rakyat Brunei (PRB) lead by AM Azahari. The conflict resulted in a revolt by the PRB against the monarchist.[50]

The revolt was finally crushed by the Sultan when he declared a state of emergency and outlawed the PRB with the help of the British. The Brunei Constitution of 1959 granted the Sultan wide sweeping powers which includes the declaration of emergency whenever he deemed that a grave danger exist threatening the security of the state. However the state of emergency is only limited for a 2 year duration, during which time the normal freedom or rights enjoyed by the citizens are curtailed by sections 83 and 84 of the Brunei Constitution 1959.[51]

[50] The revolt started when the PRB organised a mass rally in June 1961 calling for the monarch to call for an election. When the monarch failed to call for an election as promised, PRB threatened to conduct political violence. DS Ranjit, 'Executive Power and Constitutionalism in Asean States: The Brunei Experience', in Carmelo V Sison (ed), *Constitutional and Legal Systems of ASEAN countries* (Academy of Asean Law and Jurisprudence, University of the Philippines Law Complex 1990).

[51] ibid.

Singapore

Singapore's written constitution consists of three basic documents, i.e. the Constitution of Singapore (including amendments made after Singapore's separation); the Republic of Singapore Independence Act 1965 (No. 9 of 1965) and the Constitution of Malaysia made applicable by the Republic of Singapore Independence Act 1965.[52]

Certain provisions of the Malaysian Constitution in particular provisions relating to fundamental liberties and emergency powers i.e. Article 149, Article 150 and Article 151 of the Malaysian Constitution were made applicable to Singapore via section 6 of the Singapore Independence Republic Act 1965.[53]

Also it can be seen that the Malaysian preventive detention law of the Internal Security Act 1960 was extended to Singapore via L.N. 231 of 1963 and later Cap. 115, Singapore Statutes, Rev. Ed. 1970.

It is submitted that the Singaporean government has justified and used emergency laws which was granted to her via the Singapore Independence Republic Act 1965 for the following purpose:

(a) To reaffirm the attitude of paternalism by the population towards the government. Because Singapore is predominantly Chinese, the political traditions have laid great stress on the deference of authority. The concept of deference of authority can in turn be traced to the traditional elements of

[52] Republic of Singapore Independence Act 1965 Section 6 provides: 'The provisions of the Constitution of Malaysia, other than those set out in subsection (3) shall continue in force in Singapore subject to such modifications, adaptations and qualifications and exceptions as may be necessary to bring them into conformity with the independent status of Singapore upon the separation from Malaysia.'

Confucianism which adopts the concept of the "Mandate of Heaven".[54] It is submitted that this view is similar to the view adopted in by the traditional Thai society.

(b) Furthermore, the concept of Confucianism emphasises on community and commonality as opposed to the Western Constitutionalism which emphasises on individual rights, thus making emergency laws tougher to implement from within the country.

(c) The third justification for emergency laws is the aspect of "crisis mentality" – an essential concern for order and the belief that social transition is a period of vulnerability. Thus, people need to prepare for their new roles and in the process they should accept these laws as necessary without too much questioning.

(d) Because Singapore is a multi-racial country thus the government's main objective is to contain and eradicate any attempts to destroy the multi-racial nature of Singapore which may finally destroy the fabric of Singapore's society.[55]

(e) Finally the Singaporean government justify the existence of emergency powers against subversion within the country in particular Communism which had advocated overthrowing the government and other groups which are deemed to have threatened the security of the country.

[54] Andrew Phang Boon Leong, *The Development of Singapore law: Historical and Socio-legal Perspectives* (Butterworths 1990) 261.

[55] See Singapore Prime Ministers' parliamentary debates Hansard vol 44 cols 1811-1812 (24 July 1984) where he states: '…the basic parameters of what Singapore is about the independence and sovereignty of Singapore, its multi-racial, multi-religious, multi-lingual, multi-cultural character. They are not for argument. We start arguing about that, we are tearing out our entrails..

The Application of Emergency Law in the Malaysian Context

The application of emergency and preventive detention laws in Malaysia will be examined in two periods i.e. the original intention of the Reid Commission and the current application of the emergency and preventive detention laws.

The Original Intent of the Reid Commission

During the Communist insurgency[56] from 1948-1960, the British government invoked emergency rule in Malaya via initially the British Military Administration (Essential Regulation) Proclamation 1948 which was later replaced by the Emergency Regulation Ordinance 1948 and the Emergency Regulation 1951.

One of the features of the British emergency rule included harsh actions particularly detention without trial (under the Emergency Regulations 1851) and punishing the entire village for rendering assistance to the Communist.[57] The principal reason for such actions was psychological. The British, wanting to win the hearts and minds of the Malayan people, categorised the Communist as bandits and insurgents, who opposed the rule of law, whilst the British were invoking the rule of law against them. Thus, the British made sure that 'every action had a legal basis and enforcement of the law applied equally to friend or foe'.[58]

[56] Although the communist represented by the Malayan Peoples Anti-Japanese Army initially supported the British to harass the Japanese, however, they were displeased with the development under the Federation of Malaya Act 1948 and since then had been fighting to establish a "Communist Malaya." Richard L Clutterbuck, *Conflict and Violence in Singapore and Malaysia, 1945-1983* (Westview Press 1985) 39.

[57] Das (n 2).

[58] Chandran Jeshurun (ed), *Governments and Rebellions in Southeast Asia,* (Singapore, Institute of Southeast Asian Studies, Regional Strategic Studies Programme 1985) 163.

It was against this backdrop of emergency rule which was still being enforced and subsisting that the Reid Commission was formed to create a draft constitution for Malaya.[59]

Based on the existing situation then, the Commission recommended the following characteristics and conditions for emergency and preventive detention provisions to be included in the proposed Constitution of Malaya:

(a) The context of emergency is specific and narrow. It includes war or 'such serious internal disturbance as constitute an immediate threat to the life of the nation, security or economic life of the country or any part of it.'[60]

(b) The emergency powers should be temporary in nature i.e. it should continue to be in force for one year and after one year, if it is necessary to keep it, it should be permitted by the resolution of both Houses of Parliament.[61]

(c) The report recognises the importance of fundamental rights. It recommended that once the Proclamation has declared an end to the emergency, all emergency legislation should cease to have effect in so far as it authorises infringement of fundamental rights or State rights.[62]

(d) That Parliament should have the power to enact any provisions; even though it infringes fundamental rights, designed to prevent attempts by any substantial body or persons to organised violence against persons or property. Also, the

[59] Colonial Office, *Federation of Malaya Constitutional Commission, 1956-1957 Report;* (Colonial No 330, 1957, HMSO). Reid Commission Report, para 13 reads: 'At a comparatively early stage in our work we found that various practical difficulties might arise if we remained in Malaya to prepare our Report.... Further, para 173 reads: 'We must take note of the existing emergency. We hope that it may have come to an end before the new Constitution comes into force...'.

[60] ibid [172] and [175].

[61] (n 59) [173].

[62] ibid.

report recommended that an aggrieved person or party should be able to apply to the court on grounds that the provision was not applied to prevent any of the above threats.[63]

(e) If Parliament is not sitting when the Proclamation is made, then the government is allowed to make laws ("ordinance") during that time but Parliament must be recalled within 15 days. The report acknowledges that the government must be given the liberty and power to make laws immediately to deal with the emergency. Simultaneously, to prevent the government from abusing its powers, the report imposed a duty on the government to recall Parliament to approve any legislation passed by the government during the interim period.[64]

(f) The report impliedly acknowledged the need for preventive detention by recommending that the citizen should not be detained under any emergency laws for more than three months unless an advisory board appointed by the Chief Justice has reported that in its opinion there is sufficient cause for such detention. Consonant with the respect for individual rights, the report recommended that the detainee be given as full an opportunity to submit his case and that the detainee should be told of his grounds and allegations of fact on which he has been detained, subject to the right of the detaining authority to withhold facts against him which in the authorities opinion is against national interest.[65]

On perusal of the above mentioned recommendations, it is submitted that even though the Commission recognises the importance of the rights and security of the country over the individual's rights in times of emergency, the Commission still ensured that the rights of the individual are respected and secured when emergency and preventive detention powers are exercised.

[63] (n 59) [174].

[64] (n 59) [176].

[65] ibid.

The Commission in para 138 also recommended that the Yang di-Pertuan Besar should be the person issuing the Proclamation of Emergency.[66] This recommendation was adopted with a slight modification in the Merdeka Constitution.[67]

It is submitted that the Yang di-pertuan Agong himself (although he is a constitutional monarch) and not the Prime Minister who should be responsible to declare a state of emergency in Malaya because of the following reasons:

(a) In the political system of the traditional Malay State, the apex of authority in society was the Ruler, the Yang di-pertuan, Raja or Sultan. His role was to personify, to an extent preserve the unity and welfare of the state. Further, only the Ruler alone had powers to issue decrees.[68] This role of the Ruler was reiterated in para 59 of the Reid Commission wherein they had recommended that the Yang-di pertuan Besar shall devote himself to promoting the unity and welfare of the country in many ways.

(b) The notion that the King being the apex of society and is above politics is not only held by the Malay community but also the Asian society at large. Thus the Yang di-pertuan was given the role to maintain 'a cordial inter ethnic relationship' in the country.[69] The latter view is reflected in paragraph 58(1) of the Reid Commission.[70]

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[66] (n 59), [138].

[67] Art 138 of the proposed constitution of Malaya reads: 'If the Federal Government was satisfied that a grave emergency exist…the Yang di-Pertuan Besar may issue a Proclamation.' The Merdeka Constitution reads: '…If the Yang di-Pertuan Agong is satisfied that a grave emergency exist.'

[68] Alfred P Rubin, *The International Personality of the Malay Peninsula: a study of the international law of imperialism* (Penerbit Universiti Malaya 1974) 314.

[69] Azmi Abdul Khalid, 'Role of the Monarch: Influences Upon the Development of Parliamentary Government' *ALIRAN* (Penang, 1988) 44-45.

[70] The Yang di pertuan Besar will be the Head of the State. He will be the symbol of unity of the country.

The current emergency and preventive detention powers in the Constitution

The provision dealing with Emergency and preventive detention powers (i.e. Article 150, Article 149 and Article 151) ranks one of the most highly amended provisions in the Malaysian Constitution; each being amended on six occasions, twice and on four occasions, respectively.[71]

The various amendments have radically altered the original concept and principle of emergency and preventive detention powers proposed by the Reid Commission. The cummulative effect of these amendments has resulted in the government of the day armed with unbridled powers to act. This makes it highly possible for the government to create a perpetual emergency in Malaysia and legally possible to exercise their powers to suppress the constitutional rights of the individual.

A summary of the list of amendments to Article 150, Article 149 and Article 151 of the Federal Constitution and its effect is listed herein below:

Amendments to Article 150

(a) Amendment to Article 150 (3) via The Constitution (Amendment) Act No. 10 of 1960

This first amendment on Article 150(3) had altered the Reid Commission's proposal Constitution in two aspects i.e. the duration of the emergency and parliamentary control over the proclamation and of emergency laws.

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[71] Act No.10 of 1960; Act No. 26 of 1963; Act No. 68 of 1966; Act No A514 of 1981 Act No. A 566 of 1983 and Act No. A 584 of 1984 Article 149 amended via Act 442 of 1978; Act 10/1906 and Act A514 of 1981 ; Art 151- Act A26 of 1963; Act A354 of 1976; Act 566 of 1990 ;Act A885 of 1994.

As regards the duration, the amendment had reversed the process of ending or extending an emergency. Whereas previously, there was legal duty imposed upon the government to convene Parliament to debate and approve the Proclamation and emergency laws enacted within the interim period within 15 days, now, there is no time period for seeking Parliamentary approval.[72] Furthermore, the Explanatory Statement of the bill in Parliament stated '…[that] the Article should be amended in order to permit a Proclamation or ordinance to continue in force until revoked by His Majesty or annulled by resolution of both Houses of Parliament.'

Therefore, if an emergency is proclaimed when both Houses of Parliament are not sitting, the state of emergency can theoretically continue indefinitely until the Executive sees it fit to convene Parliament. In *Khong Teng Khen's case*[73] the Federal Court observed that the two Houses of Parliament do not sit at the same time.

An emergency was proclaimed throughout the Federation after the race-riots broke out on 13 May 1969. Parliament had by then been dissolved for purposes of general election but was not convened until 20 February 1971.

(b) Amendment to Article 150 (1),(5) and (6) and the Addition of Clause (6A) by Act 26 of 1963

The amendment to article 150(1) widened the circumstance in which an emergency could be declared by deleting the words 'whether by war or external aggression or internal disturbance', thus leaving the phrase 'is threatened'. It has been suggested that the phrase - 'any event threatening the security' - is very wide and it may also

[72] Constitution (Amendment) Act 1960, Section 29 (Malaysia) provides: 'Proclamation of Emergency and any ordinance promulgated under clause (2)….if not sooner revoked, *shall cease to have effect if resolutions are passed by both Houses annulling such Proclamation or ordinance*, but without prejudice to anything previously done by virtue thereof or to the power of the Yang di-Pertuan Agong to issue a new Proclamation…' [emphasis added].

[73] [1976] 2MLJ 166, 172 F.

include a strike by workers.[74] Therefore the government may declare an emergency so long as it is satisfied that an event is threatening the security or economy of the country.[75]

Article 150(5) was also amended to enlarge Parliament law making powers during an emergency. The Reid Commission limited the law making powers of Parliament during the emergency to affect only fundamental rights.[76] However, the amendment to clause 5 removed all limitations of Parliament to make law (procedurally) in times of emergency. Thus, under such situations, States become virtually non-existent, constitutionally speaking, because Parliament can 'make law with respect to any matter'. Further, an emergency law under clause (5) now does not need the consent of the Rulers, the assent of the Yang di-pertuan Agong and the Concurrent List are both inapplicable.[77]

The effect of the amendment to Article 150 (6) to replace 'inconsistency with the provision of Part II and Article 79' with '…shall be invalid on ground of inconsistency with any provision of this Constitution' was to give a general overriding quality to emergency legislation.[78] In the light of the amendments it seems today that emergency legislation prevails over the Constitution in times of emergency.

[74] GTS Sidhu, 'Emergency Powers under Article 150 of the Constitution' (1990) xxi(1) INSAF (June) 79.

[75] The original Article 150 (1) of the Federal Constitution reads: 'If the Yang di-Pertuan Agong is satisfied that ….the security….of the Federation or any part thereof *is threatened, whether by war or external aggression or internal disturbance*…he may issue a Proclamation of Emergency' [emphasis added]. The amended Art 150 (1) reads: 'If the Yang di-Pertuan Agong is satisfied that ….the security….of the Federation or any part thereof *is threatened*, he may issue a Proclamation of Emergency' [emphasis added].

[76] (n 59) [174].

[77] Clause 5 reads: 'Subject to clause 6A, while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this constitution make laws with respect to any matter, if it appears to Parliament that the law if required by reason of emergency: and Article 79 shall not apply…*nor shall any provision of this Constitution or of any written law which requires any consent or concurrence to the passing of a law or any consultation with respect thereto…*' [emphasis added].

[78] See Reid Commission Report recommendation that that Parliament should have the power to enact provisions infringing fundamental rights only. See (n 64).

(c) Amendment to Article 150 by the Constitution (Amendment) Act A514 of 1981

This amendment to Clause (1) has increased the grounds on which an emergency could be declared in addition to the words "public order" after "economic life".[79]

The term "public order" is wider than "internal disturbance"; as proposed by the Reid Commission. In *Re Tan Boon Liat,*[80] a case on preventive detention, authorised the Minister of Home Affairs to make a detention 'if he is satisfied it is necessary to do so to prevent any person acting in any manner prejudicial to public order'. His Lordship Abdoolcader J (as he then was) said:

> Danger to human life and safety and disturbance of public tranquillity must necessarily fall within the purview of the expression…it is used in a generic sense…and is wide enough to include consideration of public safety in its significance.

The amendment to clause 2 has effectively further reduced the role of Parliament. The removal of clause 2 discharges the duty cast upon the government to convene Parliament "as soon as practicable" and imposes no time limit for the government to convene Parliament.[81]

Further, the government may even proclaim an emergency even before the actual occurrence of the event which constitutes a threat to the security of the

[79] The amended clause 1 to Article 150 reads: 'If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life or public order in the Federation or any part thereof is threaten…'.

[80] [1976] 2 MLJ 83.

[81] Amended Article 150(2) reads: 'A Proclamation of emergency ….may be issued before the actual occurrence of the event which threatens the security…..in the Federation or any part thereof if the Yang di-pertuan Agong is satisfied there is imminent danger…" Whereas the Reid Commission proposed that "If Parliament is not sitting when the Proclamation is made, then the government is allowed to make laws ("ordinance") during that time but Parliament must be recalled within 15 days…'. See (n 67).

Federation amongst others. Thus it is now possible for the government to act on intelligence reports alone and declare an emergency as a preventive measure.

The addition of Clause 8 ousts the powers of the courts as regards to judicial review in respect of the declaration of the state of emergency and its continuance together with any promulgation of any emergency ordinance and its continuance. This amendment directly conflicts with the proposal recommended by the Reid Commission[82] by shutting out completely the avenue available to an individual alleging that the government may be abusing its powers.[83]

Amendment to Article 149 Constitution

The amendment to article 149 via Act 10/1960 and Act 442 has generally increased the scope of the application of the article and extending it to conducts which incite the disaffection against the Yang di-pertuan Agong or the Government, to promote feelings of ill will and hostility between different races or classes of the population, to procure the alteration of anything established by law, otherwise than by lawful means, anything 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 which is prejudicial to public order in or the security of the Federation.[84]

[82] See para 174 of Reid Commission Report, (n 65).

[83] The amended clause 8 reads: 'Notwithstanding anything in the Constitution (a) the satisfaction of the Yang di-Pertuan Agong mentioned in clause (1) and [2B] *shall be final and conclusive and shall not be challenged or called in question in any court on any ground* and (b) no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form , on any ground, regarding the validity of (i) a Proclamation under Clause (1) or of a declaration made in such Proclamation to the effect stated in Clause (1); (ii) the continued operation of such Proclamation….(iv) the continuation in force of any such ordinance.' [emphasis added]

[84] See original Reid Commission Report's proposal, (n 65) reads: 'That Parliament should have the power to enact any provisions; even though it infringes fundamental rights, designed to prevent attempts by any substantial body or persons to organised violence against persons or property'.

Thus another amendment to Article 149 has taken away the burden of the government to repeal such acts. Thus such acts will only be repealed if resolutions are passed by both Houses of Parliament annulling such law.

The Internal Security Act 1960 (ISA) and its kindred legislation[85] were enacted pursuant to Article 149 which authorises the passing of legislation notwithstanding its inconsistency with fundamental liberties contained in Articles 5, 9, 10 and 13 of the Constitution.

It can be seen that the common threads that run along these Acts are as follows:

(i) These Acts allow individual(s) to be detained by the authority, although the period of detention may differ (be it the police or the Minister) if according to the subjective view of the detaining authority, the individual is fit and proper to be detained.[86]

(ii) Arresting of individuals without warrant with a view of detaining a suspect;[87]

[85] Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EPOPCO); (Dangerous Drugs (Special Preventive Measures) Act 1985 (DDSPMA); The Police Act 1967; section 27 (TPA).

[86] Refer to Section 8(2) of the ISA which states that if the act of the person has prejudiced the security of the country or any part thereof. ISA allows the Minister to arrest 'if he thinks fit…'. Section 3(2) of EPOPCO states that if the perceived criminal act of the suspect cannot be proved in court. Under section 6 of the DDSPMA if the police suspects that a subject has committed dangerous drug-related offences. Other Acts of Parliament includes the Immigration Act 1959 on immigration confinement and the Universities and University Colleges Act 1971.

[87] See ISA; Police Act; EPOCO and its respective sections; (n 88).

(iii) Judicial Review in whatever form was disallowed in these Acts.[88]

Amendment to Article 151

The amendment to this Article has radically changed the Reid Commission's proposal. It has inter alia allowed the individual to be detained for more than 3 months and it is submitted, sometimes indefinitely. This can be achieved because the Yang di-pertuan Agong may now allow a longer period for the advisory board to make recommendations to his highness. Further, the advisory board is no more compelled to report to Yang di-pertuan Agong within the stipulated period.[89]

Although the government today has at its disposal vast powers incapable of being checked or controlled; it is submitted that the government has so far applied the emergency powers correctly and with justification on 4 occasions – on 3 September 1964 (the confrontation with Indonesia); 14 September 1966 (the political deadlock in Sarawak); on 15 May 1969 (the racial riots); and on 8 November 1977 (in Kelantan).

However, as regards to preventive detention powers there were various allegations that the government has abused its powers; thereby sacrificing the rights of the individual at the alleged altar of community. It has been alleged that the government has over the years used the ISA to silence the opposition individuals

[88] Please refer to the Internal Securities (Amendment) Act 1989; Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EPOPCO) and the Dangerous Drugs (Special Preventive Measures) Act 1985 (DDSPMA). For example, section 8B(1) of the ISA 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 powers 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.'

[89] See Article 151(b) which reads: 'No citizen shall continue to be detained under that law or ordinance unless an advisory board…has considered any representations made by him…and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or *within such longer period as the Yang di-Pertuan Agong may allow*.'[emphasis added]

and politicians alike.[90] Further the continued implementation of preventive detention (viz ISA) has become an excuse for the government to administer the country on an emergency basis, announcing at various times that the country is still under severe security threats.[91]

In spite of the various criticisms, emergency and preventive detention powers are still needed today to combat "subversion" which rears its head in various forms. As such, it is submitted that the ISA and its kindred legislation were rightly used to prevent further or anticipated threats to the security or public order in Malaysia in the recent times[92] thereby rightly upholding community rights over the individual. Nevertheless, as the constitution and the various act now stand, there is a high possibility that these powers may also be abused by the executive.[93] In such a situation, the exercise of such powers by the government must be balanced against the rights of the individual (i.e. the individual rights in those circumstances must still be protected.

[90] See *ISA & Keselamatan Negara (ISA & National Security)* (ALIRAN 1988) 19-20, wherein it stated that Lim Kit Siang, leader of DAP and opposition leader in Parliament was arrested and detained under the ISA on two occasions (1971-1973&1987-1989). Anwar Ibrahim was also detained under the ISA in 1976 when he was leading ABIM and again in 21/9/98 together with a large group of his followers; during the Operation Lalang in 1987 106 leaders were arrested under the ISA; Prof. Dr. Syed Husin Ali, a notable university professor was detained for about 6 years under S8; Deputy Ministers were also detained under the ISA in 1979, Abdullah Majid and Abdullah Ahmad & Aziz Ishak. See Abdul Aziz Ishak, *Special Guest: The Detention in Malaysia of an Ex-Cabinet Minister* (OUP 1977) 60, 70.

[91] Rais Yatim, 'Detention Without Trial-Has The Time For Abolition Come?' (1998) xxvii (2) INSAF 25.

[92] Examples include the spreading of Shi'ite teaching in Nov 1997 which was deemed detrimental to national security where religion plays an important part in society; the arrest of Anwar Ibrahim & his Reformasi movement in Sept 1998 for threatening peace and public order amongst others and the arrest of suspected Kumpulan Mujahidden Malaysia members on 5/11/01 on suspected activities which are detrimental to national security.

[93] Recently in 2008, Teresa Kok, an MP from the Democratic Action Party (DAP), was held without charge under the ISA. She was accused of campaigning for a mosque to lower the volume of its call to prayer. Similarly at the same time a *Sin Chew Daily News* reporter Tan Hoon Cheng and Raja Petra Kamarrudin were arrested under the ISA. See 'MP free as Malaysia tensions grow' *BBC News* (London, 19 September 2008) <http://news.bbc.co.uk/2/hi/asia-pacific/7625002.stm> accessed 2010.

Striking a legitimate balance?

In order to allow the government liberty to act in times of emergency or perceived emergency whilst at the same time ensuring that the fundamental rights of the citizen is respected and not made illusory, it is submitted that following proposals or reforms may be adopted as regards the exercise of emergency and preventive detention powers in Malaysia:

(a) The remedy of Judicial Review must be allowed if preventive detention or emergency powers are exercised. However, because the courts are not qualified to assess sensitive and national security matters, it has been suggested that the Minister or detaining authority in charge could at least furnish facts by way of affidavits to the judge in chambers. To this end the judge could be made to assess the "national security or threat to national security" on a need to know basis only. Furthermore, the judge may be compelled in law not to divulge the matters in court.[94]

It is submitted that through this method, the right of the detainee would be real and respected. Also this would be partially reverting back to the proposal of the Reid Commission[95]

(b) The courts should take a pro-active stand to refer and adopt the international principles of proportionality on emergency laws and apply the same in Malaysia; although Malaysia is not one of its signatories. In accordance to

[94] (n 91) 27.

[95] Reid (n 65).

international standards, the government is allowed to derogate from its constitutional obligation only to the extent necessary to meet the exigency.[96]

(c) We could revert back to the original proposal of the Reid Commission thereby imposing a duty on the government to reconvene Parliament within a stipulated time if it was not called when the emergency was proclaimed. This would act as a restrain against the government from abusing its powers. Not only that, this practice would be in consonant with other countries e.g. United Kingdom and New Zealand.[97]

(d) Furthermore Parliament could be made to approve a state of emergency and all laws made therein including laws allowing preventive detention by an enhanced majority.[98]

(e) As regards the area of preventive detention, it is submitted that Malaysia may adopt the approach taken by Singapore [via their Article 151(4) amended in 1991]. The Yang di-pertuan Agong may be vested with a veto power/ casting vote in this area (i.e. here he is able to act at his absolute discretion) only if there exist conflicting recommendations between the Pardon's Board and the Minister.

In conclusion, the various amendments to the Federal Constitution of Malaysia has (like its ASEAN counterparts) produced a strong Executive, which is capable of exercising its emergency and preventive detention powers unchecked.

[96] According to Article 4(1) of the International Covenant on Civil & Political Rights, it is only in public emergency which threatens the life of a nation 'that the government is allowed to derogate from its constitutional obligation.' Office for the United Nations High Commissioner for Human Rights <http://www2.ohchr.org/english/law/ccpr.htm#art4> accessed 2010.

[97] Section 1(2) Emergency Powers Act 1920 (UK); Parliament must be summoned within 5 days. Section 2(2) Public Safety Conservation Act 1952 (NZ); New Zealand Parliament must be summoned within 7 days.

[98] Das (n 2) 397.

This came into being because Malaysia, like its other ASEAN counterparts is a multiracial country and the government had not only to combat internal subversion but also ensure that its multiracial population is kept intact.

Postscript

The world was shocked with the disaster that struck the US on 9 September 2001 or "9-11" (as it is better known) when the attack on the World Trade Centre in New York and Pentagon had taken thousands of lives. One of the possibilities, it is submitted which had contributed to this catastrophe is the perception of American constitutionalism towards national security (i.e. that it is an external threat and not internal) and the high regard they have for the individual's rights as opposed to the community's right. Owing to this perception, they did not foresee that the threat would be coming from within the US itself. Pursuant to the disaster, the US government had in lightning speed passed the PATRIOT Act. This Act has curtailed certain individual rights. Amongst others, the Act has allowed the government to monitor the individual's use of his computer (thus allegedly infringing his constitutional rights); allowed the government to use secret evidence to deport a person, investigating Americans without evidence of criminality and in certain circumstances taking away the right of habeas corpus (thus allowing preventive detention).[99] It was reported in *the Sun* newspaper (Malaysia) that the Executive Director of the National Economic Action Council, Datuk Mustapa Mohammed mentioned that developed countries that used to attack Malaysia's use of the ISA against individuals citing internal security to trump individual rights are now adopting the same measures to safeguard their own national security.[100] The US, it appears, is also trying to strike a legitimate balance of the opposite kind.

[99] '*USA Patriot Act*', EPIC <http://epic.org/privacy/terrorism/usapatriot/#introduction> accessed 2010.

[100] *The Sun* (Kuala Lumpur, 14 October 2001).