

PREVENTIVE DETENTION IN MALAYSIA: CONSTITUTIONAL AND JUDICIAL OBSTACLES TO REFORM AND SUGGESTIONS FOR THE FUTURE

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I. INTRODUCTION

“I could not imagine then, that the time would come when the power of detention, carefully and deliberately interlocked with Article 149 of the Constitution, would be used against political opponents, welfare workers and others dedicated to nonviolent, peaceful activities.”¹

So wrote the British lawyer Hugh Hickling, architect of the Internal Security Act (ISA).² Originally enacted over fifty years ago in the British colony of Malaya in order to combat a Communist insurgency, the ISA was used for decades to repress the civil rights of Malaysians.³

From 1960 to 2012, the Malaysian government and its ruling party used the act and its powers of endless detention to their utmost limits to silence political dissidents and government opponents.⁴ Although the ISA gained brief legitimacy as Western nations enacted similar preventive detention laws in the wake of the terrorist attacks on September 11th, 2001,⁵ in 2011 the wave of public sentiment against the ISA reached critical mass, spurred on largely by the capricious and extrajudicial nature of high profile detentions.⁶ These detentions of leading public figures both incensed and emboldened the public, while simultaneously increasing awareness of the extensive powers granted to the Executive branch of the Malaysian government by the ISA.⁷ Following the extensive public outcry about the ISA and its use, the current Prime Minister of Malaysia, Najib Razak, bowed to the wishes of the people on September 15, 2011, in a Malaysia Day⁸ speech.⁹ He announced the end of the ISA, and the

¹ Obituary, *Professor Hugh Hickling*, TELEGRAPH, Apr. 17, 2007, <http://www.telegraph.co.uk/news/obituaries/1548788/Professor-Hugh-Hickling.html>.

² *Id.*

³ *Id.*

⁴ U.S. Dep't of State, *2009 Human Rights Report: Malaysia*, Mar. 11, 2010, <http://www.state.gov/j/drl/rls/hrrpt/2009/eap/135998.htm> [hereinafter *2009 Human Rights Report*].

⁵ Victor V. Ramraj, *Terrorism, Security and Rights: A New Dialogue*, 2002 SING. J. LEGAL STUD. 1, 11–13.

⁶ Nicole Fritz & Martin Flaherty, *Unjust Order: Malaysia's Internal Security Act*, 26 FORDHAM INT'L L.J. 1345, 1349–52 (2003).

⁷ *Id.*

⁸ A Malaysian public holiday celebrating the formation of the Malaysian Federation (the union of Malaya, Singapore, and the Borneo territories) in 1963. *See, e.g., Yeng Ai Chun, Malaysia Day Not a Public Holiday, Says PM*, STAR, Oct. 19, 2009, <http://thestar.com.my/news/story.asp?file=/2009/10/19/nation/20091019103509&sec=nation>.

reworking of its provisions into two new laws that would protect the people and also uphold civil liberties.¹⁰ It seemed like the day that all of Malaysia had been waiting for: a new era of justice and liberty beginning with the end of this draconian law. However, the promise of increased civil liberties that seemed inherent in a repeal of this hated law has not borne out.

With much fanfare, the ISA was repealed in April 2012, and replaced by the two new laws that Najib promised.¹¹ Rather than eliminating the practices that made the ISA so controversial, the new laws have codified the worst of its abuses, and as a result, use of these new laws may lead to even further injustice.¹² The history of systematic oppression that has existed since Malaysian independence in 1957 continues even as the Malaysian government boasts of its reformist credentials. Therefore the critical question on the future of Malaysia is not when specific laws will be repealed, or whether they will be replaced, because the Malaysian government has already done so. The critical question is what can be done to ensure that what replaces repealed laws like the ISA will foster civil liberties and contribute to the end of the practices that have so marred Malaysia's political and social history.

To answer that question this Note will first emphasize the need for a complete reworking of the ISA in light of the injustice perpetrated by the Malaysian government when using this act, then assess the prospect of a revised ISA that reflects a balance between freedom and security, and finally, detail steps to ensure new security laws, such as those that replaced the ISA, are used in a limited and just manner. Part II will review the creation of the ISA and other preventive detention laws, discuss the constitutional and judicial postures in relation to these types of laws, recount the events that led to the repeal of the ISA, and discuss the failures of the new "reform" laws passed by the Malaysian legislature. Part III will review and analyze Singapore's legal posture on preventive detention and the use of its own ISA (copied from Malaysia), and will also review an example of preventive detention law reform from Canada. Part IV will advocate for reform of

⁹ *PM Announces Repeal of ISA, Three Emergency Proclamations*, STAR, Sept. 15, 2011, available at <http://thestar.com.my/news/story.asp?file=/2011/9/15/nation/20110915205714&sec=nation> [hereinafter *PM Announces Repeal of ISA*].

¹⁰ *Id.*

¹¹ *New Bill to Replace ISA*, STAR, Apr. 10, 2012, <http://thestar.com.my/news/story.asp?file=/2012/4/10/nation/11077372&sec=nation>.

¹² Mickey Spiegel, *Smoke and Mirrors: Malaysia's "New" Internal Security Act*, ASIA PAC. BULL., June 14, 2012, http://www.eastwestcenter.org/sites/default/files/private/apb167_0.pdf.

preventive detention laws in Malaysia by suggesting constitutional changes and other methods to improve Malaysian civil liberties. Finally, Part V will provide concluding remarks, reemphasizing the importance of a new approach to civil liberties in Malaysia.

II. THE BACKGROUND OF PREVENTIVE DETENTION IN MALAYSIA

A. *The Internal Security Act*

In 1948, the British colonial government of Malaya responded to a Communist insurgency by declaring a state of emergency and drafting the Internal Security Act under the auspices of the Emergency Regulations Ordinance, thereby giving colonial authorities the power to arrest and detain without trial anyone they believed to be involved in anti-government action.¹³ The declared state of emergency was not lifted until July 31, 1960,¹⁴ three years after Malaysia's independence from Britain.¹⁵ The government was still fearful of the persistent Communist insurgency however, and did not want to give up the power of preventive detention, which it believed was still needed to continue the fight against the ongoing threat.¹⁶ In the place of the laws passed during the emergency, and to ensure that the "Government [did] not . . . relax its vigilance against the evil enemy who still remains as a threat on [the] border,"¹⁷ the Malaysian government re-enacted the British ISA through the Internal Security Act 1960. The Act's stated purpose being "to provide for the internal security of Malaysia, preventive detention, the prevention of subversion, the suppression of organized violence against persons and property in specified areas of Malaysia, and for matters incidental thereto."¹⁸ Although the first Prime Minister of Malaysia, Tunku Abdul Rahman, promised the nation the law

¹³ BARBARA WATSON ANDAYA & LEONARD Y. ANDAYA, A HISTORY OF MALAYSIA 271 (2d ed. 2001).

¹⁴ HUMAN RIGHTS COMMISSION OF MALAYSIA, REVIEW OF THE INTERNAL SECURITY ACT 1960, at 3 (2003), http://www.suhakam.org.my/c/document_library/get_file?p_l_id=22118&folderId=26482&name=DLFE-1501.pdf.

¹⁵ ANDAYA & ANDAYA, *supra* note 13, at 277.

¹⁶ Tommy Thomas, *Human Rights in 21st Century Malaysia: The Executive and the Legislature*, ALIRAN ONLINE, available at <http://aliran.com/archives/hr/tt1.html> (last visited Mar. 30, 2012) (during presentment of the Bill, Deputy Prime Minister Tun Razak stated "there was still a need for the people 'to be protected from communists [sic] subversion'").

¹⁷ HUMAN RIGHTS COMMISSION OF MALAYSIA, *supra* note 14.

¹⁸ Internal Security Act 1960, Preamble (Malay. 1960).

would only be used against Communists, the text of the Act makes no mention of this.¹⁹ Rather, the requirements for triggering preventive detention are embodied in general language, allowing it to be used against any group that the Malaysian Parliament believes presents a threat to the security of Malaysia.²⁰

As discussed below, the Internal Security Act was the main legal tool used by the Malaysian government to suppress civil liberties in Malaysia until its repeal in April 2012.²¹ The use and interpretation of this law throughout Malaysian history is an excellent lens through which to examine the preventive detention framework in Malaysia, and is a good indicator of how the Malaysian government will interpret these types of laws in the future, including the new “reform” laws that are being enacted.

B. Constitutional Impediments to True Civil Liberties

The Malaysian Constitution, on its face, purports to be a progressive document guaranteeing due process of law,²² freedom from arbitrary detention,²³ equal protection,²⁴ freedom of speech and assembly,²⁵ and freedom of religion.²⁶ Examining only these articles in the Constitution, it is hard to believe that a law such as the ISA exists, let alone that it is routinely used to subvert these rights. However, the Constitution contains three very important articles which allow Parliament to disregard any of these rights, or any other article of the Constitution, under certain conditions.

¹⁹ HUMAN RIGHTS WATCH, *ABDICATION OF RESPONSIBILITY: THE COMMONWEALTH AND HUMAN RIGHTS 37* (1991).

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.

Id.

²⁰ See Internal Security Act 1960, Preamble, *supra* note 18.

²¹ See *infra* Part II.E (discussing how the Malaysian government used the ISA, and the public’s response).

²² MALAY. CONST. art. 5(1).

²³ *Id.* art. 5(2)–(4).

²⁴ *Id.* art. 8.

²⁵ *Id.* art. 10.

²⁶ *Id.* art. 11.

Article 150 allows the Yang di-Pertuan Agong (Sultan) to declare a state of emergency.²⁷ During this state of emergency, the executive power “extend[s] to any matter within the legislative authority of a State,”²⁸ the Parliament is given the power to “make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency,”²⁹ and the judicial branch is stripped of all powers of judicial review.³⁰ This Article has been invoked by the Sultan four times since independence:³¹ in September 1964, as a result of a conflict with Indonesia, who protested the formation of Malaysia;³² in September 1966 after the dismissal of the Chief Minister of one of the Malaysian states and the resulting constitutional impasse;³³ in May 1969, in the aftermath of widespread racial riots and violence in the capital of Kuala Lumpur;³⁴ and in November 1977 after another constitutional crisis where a Chief Minister refused to step down after a vote of no confidence.³⁵ What is astonishing about these declarations of emergency is how long they have lasted. Najib promised in his speech that the emergency declarations would be revoked,³⁶ and on November 24, 2011, the Parliament revoked three of them.³⁷ Strangely, only the emergency declarations relating to the May 13, 1969, riots and the two constitutional crises (from 1966 and 1977) were explicitly lifted.³⁸ The earliest state of emergency relating to the conflict with Indonesia, declared in September 1964, is arguably still in effect although the Malaysian government claims that it had been implicitly revoked by the Emergency Proclamation 1969, a view propogated by the Privy Council of the United Kingdom in *Teh Cheng*

²⁷ *Id.* art. 150(1).

²⁸ *Id.* art. 150(4).

²⁹ *Id.* art. 150(5).

³⁰ *Id.* art. 150(8)(b).

³¹ Kevin Y.L. Tan, *From Myanmar to Manila: A Brief Study of Emergency Powers in Southeast Asia*, in EMERGENCY POWERS IN ASIA: EXPLORING THE LIMITS OF LEGALITY 149, 182–83 (Victor V. Ramraj & Arun K. Thiruvengadam eds., 2010).

³² *Id.* at 182.

³³ *Id.* at 183.

³⁴ *Id.* The riots led to an official body count of 196 dead and 409 injured (estimated to be far lower than the actual count), with most of the victims being Chinese, and the homes and property of 6000 mostly Chinese residents destroyed, ANDAYA & ANDAYA, *supra* note 13, at 298.

³⁵ Tan, *supra* note 31, at 183.

³⁶ *PM Announces Repeal of ISA*, *supra* note 9.

³⁷ *History Made as EOs Lifted*, STAR, Nov. 25, 2011, <http://thestar.com.my/news/story.asp?file=/2011/11/25/parliament/9973697&sec=parliament>.

³⁸ *Id.* (specifically, Emergency Proclamation 1969 (Malay.); Emergency Proclamation 1966 (Malay.); Emergency Proclamation 1977 (Malay.)).

Poh v. Public Prosecutor.³⁹ However, this interpretation is suspect for two reasons: first, the Malaysian government abolished appeals to the Privy Council on criminal and constitutional issues in 1978 and Malaysian courts do not consider themselves bound by Privy Council decisions;⁴⁰ and second, Malaysia passed a constitutional amendment allowing for concurrent states of emergency and disallowing judicial review of emergency proclamations in 1981.⁴¹ This history leaves significant room for the argument that the Emergency Proclamation of 1964 is still in effect, and future administrations may very well take this position.⁴²

Regardless of the current status of the states of emergency, they existed for decades, serving to justify the creation and use of repressive laws and practices such as the ISA,⁴³ and the government can ask the Sultan to declare a new state of emergency at any time due to the continued validity of Article 150.⁴⁴

Article 151 purports to put a safeguard on the use of preventive detention.⁴⁵ It requires that a detainee be informed of the grounds for his detention and the facts which support those grounds.⁴⁶ However, section (3) states that this rule “does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.”⁴⁷ This is not much of a safeguard because the grounds for detention could be almost anything and there is no judicial review of the reasonableness of the grounds.⁴⁸ Therefore, this article has almost no real effect on the use of the ISA.

³⁹ *Teh Cheng Poh v. Public Prosecutor* [1980] AC 458 (P.C. 1978) (appeal taken from Malay.). The Privy Council was formerly the highest court of appeal for cases from Malaysia and other former British colonies.

⁴⁰ Sharifah Suhanah Syed Ahmad, *Introduction to the Sources of Law in Malaysia*, 40 INT’L J. LEGAL INFO. 174, 185–86 (2012).

⁴¹ Constitution (Amendment) Act 1981 (Malay.).

⁴² *E.g.*, Lim Kit Siang, Parliamentary Opposition Leader & DAP Secretary-General, Motion to Revoke the Three Emergency Proclamations of 1966, 1969 and 1977 (June 28, 1979), available at <http://blog.limkitsiang.com/2011/11/25/i-have-been-waiting-for-the-revocation-of-the-three-emergency-proclamations-for-the-past-30-to-40-years/>.

⁴³ Tan, *supra* note 31, at 183.

⁴⁴ *Public Prosecutors v. Mohd Amin Mohd Razali* [2000] 4 MLJ 679, 679 (reaffirming the Sultan’s power to issue emergency proclamations under Article 150).

⁴⁵ See generally MALAY. CONST., *supra* note 22, art. 151.

⁴⁶ *Id.* art. 151(1)(a).

⁴⁷ *Id.* art. 151(3).

⁴⁸ See Internal Security (Amendment) Act 1989, § 2(8B) (Malay.) (eliminating judicial review of ISA detentions).

Both of these Articles demonstrate the ease with which a law like the ISA can be abused, but Article 149 is the key article that allows for the existence of laws restricting civil liberties and bars any question of their constitutionality.⁴⁹ Article 149 states that any law is valid, regardless of whether it conflicts with constitutional guarantees,⁵⁰ if the law seeks to stop or prevent action that may jeopardize society in one of the following ways:

- (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or
- (b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or
- (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or
- (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
- (e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
- (f) which is prejudicial to public order in, or the security of, the Federation or any part thereof . . .⁵¹

These are highly subjective factors that can be used to describe almost any activity by the citizens of Malaysia. Sections (b), (c), (d), and (f) seem particularly appropriate for suppressing protests and clamping down on criticism of the government. Any comments about the government, religion, or ethnicity can be found to excite disaffection against the government or promote feelings of ill-will between different races or classes.⁵² Section (f) is the most nebulous and subjective, as any action that a government

⁴⁹ See generally MALAY. CONST., *supra* note 22, art. 149.

⁵⁰ Specifically, regardless of the law's conflict with Articles 5 (due process), 9 (freedom from banishment), 10 (freedom of speech, assembly, and association), or 13 (right to property); *id.* arts. 5, 9, 10, 13.

⁵¹ MALAY. CONST., *supra* note 22, art. 149(1)(a)–(f).

⁵² See Johan Saravanamuttu, *Operation Lalang Revisited: A Call for the Repeal of ISA*, ALIRAN MONTHLY, no. 8, 2008; JOHN HILLEY, MALAYSIA: MAHATHIRISM, HEGEMONY AND THE NEW OPPOSITION 88–89 (2001); Karpal Singh v. Minister for Home Affairs, [1988] 1 MLJ 468, 470–71 (H.C. Malay.).

authority does not like could be labeled “prejudicial to public order.”⁵³ As demonstrated by the examples provided below, even the most mundane comments can trigger an ISA detention if they are said to certain people, or in a certain forum, or concerning a certain subject.⁵⁴ Under these provisions, even a verbal insult could be grounds for ISA detention if it sufficiently offends someone in power.⁵⁵

C. *The Subjectivity Standard and the Role of the Judiciary*

There is a recurring theme in the Malaysian Constitution and the provisions discussed above: subjectivity. As will be discussed, the laws based on Article 149 have been interpreted through the common law as reviewable only under a subjective standard.⁵⁶ This subjective standard of government detention actions comes from the seminal UK case of *Liversidge v. Anderson*, which addressed a law very similar in nature to the ISA, where the “personal belief” of a state official that someone is engaged in prohibited activity was held to be sufficient to detain that individual.⁵⁷ In *Liversidge*, a man was imprisoned on orders of the Home Minister for his “hostile associations,” and demanded his freedom.⁵⁸ A split court decided that the legality of the detention must be judged by a subjective standard, seen from the point of view of the authority ordering the detention rather than from the objective perspective of law.⁵⁹ Although Britain has since drifted away from the subjective standard established in this case and towards the objective standard voiced by Lord Atkins’s powerful dissent,⁶⁰ Malaysia and

⁵³ See Media Statement, Lim Kit Siang, Democratic Action Party Parliamentary Leader, Suhakam Has Failed Its Statutory Charter to Protect and Promote Human Rights When It Becomes a Government Apologist for Human Rights Violations as Trying to Justify Abdullah’s Threat to Use the Sedition Act Against “Those who Continue Harping on the Government’s Decision to Use English to Teach Science and Mathematics in School” (Nov. 16, 2002) [hereinafter Media Statement, Lim Kit Siang], available at <http://dapmalaysia.org/all-archive/English/2002/nov02/lks/lks1929.htm>; see also sources cited *supra* note 52.

⁵⁴ See sources cited *supra* note 53.

⁵⁵ See Joseph Sipalan, *National Laureate Probed over ‘Seditious Poem,’* Malaysiakini (June 27, 2011, 8:44 AM), <http://blog.limkitsiang.com/2011/06/28/national-laureate-probed-over-seditious-poem/>. Malaysiakini is the official website of Lim Kit Siang, the leader of the opposition Democratic Party.

⁵⁶ *Karam Singh v. Menteri Hal Ehwal Dalam Negeri* [Minister of Home Affairs], [1969] 2 MLJ 129, 139 (Malay.).

⁵⁷ *Liversidge v. Anderson*, [1942] AC 206 (H.L.), [9] (appeal taken from Eng.).

⁵⁸ *Id.* at [4].

⁵⁹ *Id.* at [9].

⁶⁰ *Id.* at [10]–[23].

Singapore have strongly embraced the subjective standard of the majority decision.⁶¹ Malaysia's highest court, the Federal Court,⁶² first took the opportunity to endorse the outcome of *Liversidge* in 1969, in the case of *Karam Singh v. Minister of Home Affairs*.⁶³ Karam Singh was detained on the personal orders of Tun Abdul Razak, the Minister of Home Affairs and also the Deputy Prime Minister at the time (and the father of Prime Minister Najib), because of Singh's membership in a Communist organization.⁶⁴ This detention was appealed to the Federal Court, which unequivocally upheld the *Liversidge* standard.⁶⁵ The Court stated that as the detention "deal[s] with matters within the province of national policy in relation to the security of the nation the subjective satisfaction of the Cabinet on those allegations cannot be substituted by an objective test in a court of law."⁶⁶

Eventually though, Malaysia's courts began to question the subjective standard. In 1988, the Federal Court decided *Re Tan Sri Raja Harun*, in which a bank fund managing director was arrested under the ISA for alleged financial improprieties that the government believed would cause public unrest and organized violence.⁶⁷ In releasing him under a writ of habeas corpus, the court explicitly challenged the ISA, stating "it is settled law that any exercise of power under a statute is subject to judicial review to ensure that the scope and limits of the power were not exceeded."⁶⁸ However, the court still endorsed the subjective standard within the text of the opinion.⁶⁹ In 1989, in *Minister of Home Affairs v. Othman*, the Federal Court released a man detained under the ISA who had allegedly been attempting to convert Muslims to Christianity.⁷⁰ The Court disregarded the subjective opinion of the Minister for Home Affairs and found that the actions of the detainee

⁶¹ *Karam Singh*, 2 MLJ at 139; *Lee Mau Seng v. Minister of Home Affairs*, [1971] SGHC 10 (Sing.).

⁶² The highest Court of Malaysia was called the Supreme Court from 1985 to 1994. Although some cases that will be discussed came from the "Supreme Court" era, for consistency and clarity, this Court will be referred to as the "Federal Court" throughout this Note. Office of the Chief Registrar Federal Court of Malaysia, *History of the Malaysian Judiciary*, <http://www.kehakiman.gov.my/?q=en/node/410> (last visited Jan. 6, 2013).

⁶³ *Karam Singh*, 2 MLJ at 139.

⁶⁴ *Id.* at 130–31.

⁶⁵ *Id.* at 139.

⁶⁶ *Id.* at 134.

⁶⁷ *Re Tan Sri Raja Khalid Bin Raja Harun*, [1988] 1 MLJ 182, 182 (Malay.).

⁶⁸ *Id.*

⁶⁹ *Id.* at 186–87.

⁷⁰ *Minister for Home Affairs v. Othman*, [1989] 1 MLJ 418, 419 (Malay.).

could in no way have caused a threat to national security and therefore, he could not legally be held under the ISA.⁷¹

Another case at this time involving a split between the trial court and the Federal Court on the issue of the subjective versus objective standard was *Karpal Singh v. Menteri Hal Ehwal Dalam Negeri [Minister for Home Affairs]*.⁷² The detainee, a member of the Malaysian Parliament, made disparaging comments about a rumored government plan to use non-Mandarin speaking teachers in Chinese schools.⁷³ In a foreshadowing to the way the ISA would later be used, especially in the 2000s, the Prime Minister at the time, Mahathir Mohamad, ordered Singh detained under the ISA for being “involved in activities that would incite racial sentiments amongst the multi-racial community of this country.”⁷⁴ The trial court found that although the reason for the Prime Minister’s decision could not be reviewed objectively, the order itself could be.⁷⁵ Finding the order was incorrect as to one point, and thus made in a bad faith manner, the judge ordered the detainee freed.⁷⁶ The Federal Court disagreed.⁷⁷ They found that regardless of the bad faith nature of the order, the trial court judge could not inquire into the cause of the detention and plainly erred when he applied an objective standard.⁷⁸ Save for the few hours he was released after the trial court’s judgment, the detainee was held from October 1987 until January 1989 for his comments.⁷⁹ It seemed the Federal Court decided anew that, as they stated in the ISA detention case of *Theresa Lim Chin Chin v. Inspector General of Police*, the “judges in the matter of preventive detention[s] . . . are the [officers of the] executive [branch].”⁸⁰

The questioning of the subjective standard by the courts in these cases was met with strong resistance from the Prime Minister and the ruling party of Parliament. In 1988 and 1989, the Parliament responded by drafting two

⁷¹ *Id.*

⁷² *Karpal Singh v. Menteri Hal Ehwal Dalam Negeri [Minister for Home Affairs]*, [1988] 1 MLJ 468 (Malay.).

⁷³ *Id.* at 470–71.

⁷⁴ *Id.* at 470.

⁷⁵ *Id.* at 471.

⁷⁶ *Id.* at 474.

⁷⁷ *Minister for Home Affairs v. Karpal Singh*, [1988] 3 MLJ 29, 32 (Malay.).

⁷⁸ *Id.* at 31.

⁷⁹ NSW, Parliamentary Debates, Legislative Assembly, 18 June 2002, 3263 (Paul Gibson, Member) (Austl.), available at <http://www.parliament.nsw.gov.au/prod/parliament/hansart.nsf/V3Key/LA20020618035>.

⁸⁰ IMTIAZ OMAR, RIGHTS, EMERGENCIES AND JUDICIAL REVIEW 54 (1996) (quoting *Theresa Lim Chin Chin v. Inspector General of Police*, [1988] 1 MLJ 293, 294 (Malay.)).

amendments to the ISA and a Constitutional amendment.⁸¹ The first amendment, passed in 1988, prohibited any suit or action filed because of procedural defects in an ISA detention order, the manner in which the order was served, or the manner of detention.⁸² Detained prisoners no longer had the option of appealing to the courts on the basis of incorrect procedure,⁸³ closing the bad faith loophole found by the trial court in *Singh*.

The second amendment, passed under the Internal Security (Amendment) Act 1989, did far more than close procedural loopholes; it permanently eliminated the power of judicial review over ISA detentions.⁸⁴ The supplied definitions of judicial review included writs of mandamus, certiorari, and habeas corpus.⁸⁵

It was the Constitutional Amendment Act, however, that had the biggest impact on the court system of Malaysia, in 1988 and today. The Constitutional (Amendment) Act 1988 removed the concept of a judicial power naturally and constitutionally vested in the Malaysian courts and instead made all judicial powers subject to the Executive Branch.⁸⁶ This amendment was intended by the Parliament to curtail what they saw as judiciary abuse of power and to codify the supremacy of the Parliament and the Prime Minister, and by extension the ruling party.⁸⁷ The judiciary was no longer able to interfere with the executive power and “intrude upon the government’s mandate to enact laws.”⁸⁸ The judiciary accepted that this amendment eliminated its separate judicial power, not even questioning this interpretation until ten years later. Then in 2007, the judiciary confirmed that the amendment had stripped the courts of their original constitutional

⁸¹ Internal Security (Amendment) Act 1988 (Malay.); The Internal Security (Amendment) Act 1989 (Malay.); Constitution (Amendment) Act 1988 (Malay.).

⁸² Internal Security (Amendment) Act 1988, *supra* note 81, §§ 3, 5.

⁸³ *Id.*

⁸⁴ Internal Security (Amendment) Act 1989, *supra* note 48, § 2(8B) (“There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with [the ISA].”).

⁸⁵ *Id.* § 2(8C).

⁸⁶ Richard S.K. Foo, *Malaysia – Death of a Separate Constitutional Judicial Power*, 2010 SING. J. LEGAL STUD. 227, 229, 232–33 (quoting Constitution (Amendment) Act 1988, *supra* note 81, § 8).

⁸⁷ *Id.* at 229–30.

⁸⁸ *Id.* at 231.

jurisdiction and the only powers and jurisdiction the court possessed were those conferred by federal law.⁸⁹

The amendments to the ISA and the Constitution discussed above put an end to judicial review of the ISA. As a result, the executive proceeded to use the ISA with impunity throughout the 1990s and 2000s.⁹⁰

D. Other Malaysian Detention Laws That Have Been Used in Conjunction with the ISA

Although the ISA has been the law most often used—and is the law seen as the most egregious by Malaysian civil society⁹¹—it is not the only law that has been used in Malaysia for the purposes of preventive detention. The Sedition Act 1948 and the Emergency Ordinance 1969 have also been frequently used.⁹²

The Sedition Act criminalizes any statements made with “seditious tendency,” and clarifies this term with definitions similar to the provisions of Article 149, including the catch all provisions prohibiting “exciting disaffection” against the government⁹³ or the administration of justice,⁹⁴ or “promot[ing] feelings of ill will and hostility between different races or classes.”⁹⁵ This act, which allows for warrantless arrests,⁹⁶ has often been used to silence opposition parties and people who question government policies. For example, in 2002 Prime Minister Badawi threatened use of the act on members of Parliament who disagreed with the official government

⁸⁹ *Id.* at 231–32 (citing Sugumar Balakrishnan v. Pengraeh Imigresen Negen Sabah [Minister for Immigration], [1998] 3 MLJ 289, 307–08 (Malay.) (claiming that the amendment had not removed Constitutional judicial power from the courts) and Public Prosecutor v. Kok Wah Kuan, [2008] 1 MLJ 1, 14–15, 17–18 (Malay.) (holding that the judiciary possesses only the powers given by federal law, and the Constitution did not establish separation of powers)).

⁹⁰ Simon Ingram, *Malaysia's Fearsome Security Law*, BBC NEWS, July 4, 2001, <http://news.bbc.co.uk/2/hi/asia-pacific/1420739.stm>; 2009 *Human Rights Report*, *supra* note 4.

⁹¹ Ingram, *supra* note 90.

⁹² See, e.g., *Malaysian Teacher Charged with Sedition*, BBC NEWS, Aug. 9, 2001, <http://news.bbc.co.uk/2/hi/asia-pacific/1481659.stm>; *More Arrests Possible Under Emergency Ordinance*, FREE MALAYSIA TODAY, July 3, 2011, available at <http://www.freemalaysiatoday.com/2011/07/03/more-arrests-possible-under-emergency-ordinance/>; Bernard Cheah, *Repeal Emergency Ordinance: Report*, SUN, Aug. 25, 2006, available at http://www.malaysianbar.org.my/human_rights/repeal_emergency_ordinance_report.html.

⁹³ Sedition Act 1948, § 3(1)(a) (Malay.).

⁹⁴ *Id.* § 3(1)(c).

⁹⁵ *Id.* § 3.

⁹⁶ *Id.* § 11.

policy of using English to teach science and math in school.⁹⁷ It was also used to arrest a political cartoonist who satirized the Malaysian government,⁹⁸ and recently in the Bersih 2.0 protests, when a septuagenarian poet was interrogated for ninety minutes over the content of poetry read at the event.⁹⁹ The Emergency Ordinance, providing for preventive detention up to two years for people found “acting in any manner prejudicial to public order,”¹⁰⁰ has also been used in a way similar to the ISA as recently as June 2011 to detain six members of a socialist party who took part in the Bersih 2.0 street protests.¹⁰¹

While the Emergency Ordinance has been repealed as part of the lifting of the May 1969 state of emergency to which it was linked,¹⁰² the Sedition Act is currently still in force. However, even though its validity was recently reaffirmed by the Court of Appeal¹⁰³ and Najib has previously stated “the government has no plans of repealing the Sedition Act 1948 as the legislation is still relevant to safeguard national security and harmony,”¹⁰⁴ Najib recently announced that it will also be repealed.¹⁰⁵ The law will be replaced however, by the suspiciously named “National Harmony Act,” which will, in the words of Najib, “help to strengthen national cohesion by protecting national unity and nurturing religious harmony”¹⁰⁶ and “balance the right of freedom of expression as enshrined in the Constitution, while at the same time ensuring that all races and religions are protected.”¹⁰⁷ Whether these

⁹⁷ Media Statement, Lim Kit Siang, *supra* note 53.

⁹⁸ *Detained Malaysian Cartoonist Vows to Carry on*, CHINA POST (Sept. 26, 2010), available at <http://www.chinapost.com.tw/asia/malaysia/2010/09/26/273928/Detained-Malaysian.htm>.

⁹⁹ Sipalan, *supra* note 55.

¹⁰⁰ Emergency (Public Order and Prevention of Crime) Ordinance 1969 § 4(1) (Malay. 1969).

¹⁰¹ Jeswan Kaur, *Taking It out on Rakyat for Backing Bersih*, FREE MALAYSIA TODAY (July 22, 2011), available at <http://www.freemalaysiatoday.com/2011/07/22/taking-it-out-on-rakyat-for-backing-bersih/>.

¹⁰² *History Made as EOs Lifted*, *supra* note 37.

¹⁰³ *Sedition Act 1948 a Valid Law, Says Court of Appeal*, STAR, Feb. 24, 2012, <http://thestar.com.my/metro/story.asp?sec=nation&file=/2012/2/24/nation/20120224175444>.

¹⁰⁴ Tarani Palani, *Sedition Act Won't Be Repealed*, FREE MALAYSIA TODAY (Apr. 9, 2012), available at <http://www.freemalaysiatoday.com/category/nation/2012/04/09/sedition-act-wont-be-repealed/>.

¹⁰⁵ *Najib: Sedition Act to Be Repealed*, MALAYSIAN INSIDER (July 11, 2011), available at <http://www.themalaysianinsider.com/malaysia/article/najib-sedition-act-to-be-repealed/>.

¹⁰⁶ *Id.*

¹⁰⁷ Syed Jaymal Zahiid, *National Harmony Act to Replace Sedition Act*, FREE MALAYSIA TODAY (July 11, 2012), available at <http://www.freemalaysiatoday.com/category/nation/2012/07/11/najib-repeals-sedition-act/>.

stated goals will have any effect on the drafting or interpretation of the future legislation remains to be seen.

E. Public Response to the ISA

In the 1990s, the continuing misuse of the ISA and its companion laws by Parliament and the Prime Minister began to cause much unrest among the citizenry of Malaysia. In 1998, Anwar Ibrahim, then Deputy Prime Minister, was arrested and imprisoned under the ISA and later convicted on corruption and sodomy charges in a trial widely regarded by the international community as politically motivated.¹⁰⁸ This incident caused a national uproar and increased calls for the repeal of the ISA.¹⁰⁹

Although the calls for a change to Malaysia's laws did not decrease as Malaysia entered the twenty-first century, the government continued to order arrests and detentions under the ISA.¹¹⁰ With Malaysia's historically large and continually growing base of civil society groups, these detentions have received increasing coverage over the last decade, especially the high profile cases of the last few years.¹¹¹ Three recent detentions that received high media coverage and caused much anger among Malaysian citizens are those of Raja Petra Kamarudin, editor of Malaysia Today,¹¹² Theresa Kok, Member of Parliament, and Tan Hoon Cheng, a newspaper reporter.¹¹³

¹⁰⁸ Felicity Hammond, *Terrorism's Next Victim? Judicial Review of the Malaysian Internal Security Act 1960*, 8 ASIAN-PAC. L. & POL'Y J. 270, 278 (2007). See, e.g., *US Leads Chorus of Anwar Anger*, BBC NEWS, Aug. 8, 2000, <http://news.bbc.co.uk/2/hi/asia-pacific/871814.stm>; Press Release, Amnesty Int'l, Malaysia: Double Injustice heaped on Anwar Ibrahim (Apr. 18, 2003), available at <http://www.amnesty.org/en/library/asset/ASA28/015/2003/en/4794163a-fad8-11dd-b531-99d31a1e99e4/asa280152003en.pdf>; *Human Rights Watch on Malaysia: It's Not Just The Trial*, Human Rights Watch (Nov. 3, 1998), <http://www.hrw.org/news/1998/11/01/human-rights-watch-malaysia-its-not-just-trial>.

¹⁰⁹ Hammond, *supra* note 108, at 278–79.

¹¹⁰ *ISA Watch*, ALIRAN, <http://aliran.com/isa-watch> (last visited July 10, 2011).

¹¹¹ Victor V. Ramraj, *The Post-September 11 Fallout in Singapore and Malaysia: Prospects for an Accommodative Liberalism*, 2003 SING. J. LEGAL STUD. 459, 470, 480 (discussing the significant involvement of civil society groups in Malaysian politics and culture); Wikileaks: Pressure Mounts Against Internal Security Act (ISA), MALAY. TODAY (Aug. 5, 2011), available at <http://www.malaysia-today.net/mtdcolumns/42425-wikileaks-pressure-mounts-against-internal-security-act-isa-> (discussing the mounting discontent against the ISA in late 2008).

¹¹² *Royal Revolutionary Pays Price for Backing Anwar*, SYDNEY MORNING HERALD, Mar. 30, 2002, <http://www.smh.com.au/articles/2002/03/29/1017206152563.html>.

¹¹³ *Police Detain Teresa Kok, Sin Chew Reporter Under ISA*, MALAY. TODAY (Sept. 13, 2008), available at <http://www.malaysia-today.net/archives/archives-2008/12603-police-detain-teresa-k>

Raja Petra Kamarudin, a Malay prince and nephew of the deceased former Sultan of Malaysia,¹¹⁴ is a well-known Malaysian blogger and government critic.¹¹⁵ He was arrested on September 12, 2008 under the ISA, and on September 23 he was officially detained for a period of two years.¹¹⁶ His arrest and detention led to an outcry among the citizenry and politicians across the political spectrum in Malaysia, including the Minister for Legal Affairs, Zaid Ibrahim, who resigned in protest.¹¹⁷ The reason given for Kamarudin's arrest and detention was that he had insulted Islam, therefore inciting racial tensions.¹¹⁸ However, Kamarudin's charge that Najib, the Deputy Prime Minister at the time, and his wife were involved in the murder of a Mongolian woman was widely believed to be the real reason that the political establishment wanted him silenced.¹¹⁹ Kamarudin was freed on November 7, 2008 by a state court and went into self-imposed exile in May 2009.¹²⁰

Two other arrests that happened on the same day as Kamarudins' also caused public outcry against the government and the ISA; specifically the arrests of Teresa Kok, an Opposition Member of Parliament, and Tan Hoon Cheng, a reporter. Kok was arrested and detained for allegedly asking a mosque to turn down the volume on its loudspeakers for the five-times-daily call to prayer, although the mosque publicly denied the allegation.¹²¹ Tan was arrested for reporting a ruling party MP's racist statements that Chinese citizens of Malaysia were "squatters and therefore not entitled to rights."¹²² The bizarre nature of these detentions, one for an alleged request to turn down some loudspeakers and one for simply reporting the race-baiting remarks of another person, reaffirmed for many people that the ruling party

ok-sin-chew-reporter-under-isa.

¹¹⁴ *Royal Revolutionary Pays Price for Backing Anwar*, *supra* note 112.

¹¹⁵ *Malaysia Detains 'Dissent' Writer*, BBC NEWS, Sept. 23, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7630789.stm>.

¹¹⁶ *Id.*

¹¹⁷ *Malaysian Blogger to Be Detained for Two Years: wife*, ASSOCIATED FOREIGN PRESS, Sept. 23, 2008, http://afp.google.com/article/ALeqM5h_0rU9tc6f5grv8KTedN-NRxy-A.

¹¹⁸ *Malaysia Detains "Dissent" Writer*, *supra* note 115.

¹¹⁹ *Id.*

¹²⁰ *Raja Petra a Free Man After Court Strikes Off Appeal*, MALAY MAIL, Nov. 1, 2010, available at <http://www.mmail.com.my/content/53778-raja-petra-free-man-after-court-strikes-appeal>.

¹²¹ *Why Teresa Kok is the Target*, MALAY TODAY (Oct. 4, 2008), available at <http://mt.m2day.org/2008/content/view/13398/84/>.

¹²² *Police Detain Teresa Kok, Sin Chew Reporter Under ISA*, *supra* note 113.

continued to use the ISA for purely political purposes.¹²³ In addition, following her release a week after her arrest, Teresa Kok caused a stir with her statements about the conditions she was subjected to while under ISA detention, especially her comments “that she was served food that was ‘almost like dog food.’”¹²⁴

The detentions and arrests described here are only a small portion of the arrests under the ISA in recent years. From 1960 until 2005, police arrested 10,662 people, with 4,139 issued formal detention orders and twelve executed.¹²⁵

F. Failure of the New “Reform” Laws

As stated above, when Najib announced that the ISA would be repealed, he also outlined plans for two new laws to replace the ISA; laws that would “take into consideration fundamental rights and freedom based on the Federal Constitution” and ensure “that no individual will be arrested merely on the point of political ideology.”¹²⁶ However, Najib did state that preventive detentions related to terrorism and maintaining peace and well-being would still be under the auspices of the Home Minister, and would therefore still be reviewed by a subservient judiciary under the subjective standard discussed above.¹²⁷ These loopholes and the codification of certain offenses that previously fell under the ISA make the new laws almost worse than the ISA itself.

The first of the laws that replaced the ISA is known as the Security Offenses (Special Measures) Bill (SOSMA), which replaces the procedural aspects of the ISA by limiting the detention period and providing other

¹²³ *MP Free as Malaysia Tensions Grow*, BBC NEWS, Sept. 19, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7625002.stm>; PETITION: FREE RAJA PETRA KAMARUDDIN, TERESA KOK AND OTHERS HELD UNDER THE INTERNAL SECURITY ACT, <http://www.petitiononline.com/isa1234/petition.html> (last visited Oct. 6, 2011); Lim Kit Siang, “Free MP Teresa Kok Perak State Assembly Caucus” to Be Formed Tomorrow, LIM KIT SIANG FOR MALAY. (Sept. 18, 2008, 5:59 PM), <http://blog.limitsiang.com/2008/09/18/%e2%80%9cfree-mp-teresa-kok-perak-state-assembly-caucus%e2%80%9d-to-be-formed-tomorrow/>.

¹²⁴ Dharmender Singh, *Govt to investigate Teresa Kok’s ‘dog food’ claim*, STAR, Sept. 20, 2008, <http://thestar.com.my/news/story.asp?file=/2008/9/20/nation/20080920195312&sec=nation>.

¹²⁵ Shazwan Mustafa Kamal, *Half a century on, Putrajaya Still Mulls ISA Reforms*, MALAYSIAN INSIDER, Aug. 1, 2010, <http://www.themalaysianinsider.com/malaysia/article/half-a-century-on-putrajaya-still-mulls-isa-reforms/>.

¹²⁶ *PM Announces Repeal of ISA*, *supra* note 9.

¹²⁷ *See id.* (discussing the structure of the new legislation).

safeguards against permanent preventive detention.¹²⁸ However, a close reading of the SOSMA clearly shows that the new bill can easily be interpreted in a way that would allow the government to continue the abuses of the ISA era.

A key failure of SOSMA is that the vagueness of the action required to trigger an arrest remains. Any action that is prejudicial to public order or seeks to procure the alteration by unlawful means of established law can trigger an arrest under this new law.¹²⁹ As discussed above, the vagueness of this definition has been exploited by the government in making arrests under the ISA, and absolutely nothing indicates that a more limited interpretation will be used by the Malaysian government in the future.¹³⁰

The maximum detention period has been reduced from two years under the ISA to twenty-eight days under SOSMA.¹³¹ Putting aside the fact that twenty-eight days is still a long time for a person against whom no charges have been filed to be confined, SOSMA includes Article 30, a provision that can be used to significantly increase the time of detention, perhaps for even longer than the ISA's two year period.¹³² Entitled "Detention Pending Exhaustion of Legal Process," this article allows the Public Prosecutor to ask the court to continue detaining an individual arrested under SOSMA even if that person has had a trial and been acquitted of any offense.¹³³ Article 30 leaves no room for discretion by the court because under this provision the individual must be remanded to prison for the duration of the appeals process upon request by the Public Prosecutor.¹³⁴ This post-acquittal detention includes continued imprisonment while waiting for the Public Prosecutor to file his appeal, with no time limit for the filing prescribed under SOSMA.¹³⁵ One can easily imagine a scenario where an individual is arrested under SOSMA, tried and acquitted, but then held in prison while the government stretches the preparation of its appeal into years. Even appeals taken with all

¹²⁸ Security Offenses (Special Measures) Bill 2012 (Malay.), available at http://Malaysianlaw.my/attachments/DR152012E-Security-Offences_29735.pdf.

¹²⁹ *Id.* pmb1.

¹³⁰ See *supra* notes 98–99, 118–19 and accompanying text (highlighting multiple examples of the government's use of the elusive language of SOMSA to consider individuals' criticisms of the Malaysian government as threats to public order).

¹³¹ Security Offenses (Special Measures) Bill 2012, *supra* note 128, § 4(5).

¹³² *Id.* § 30.

¹³³ *Id.* § 30(1).

¹³⁴ *Id.* § 30(2).

¹³⁵ *Id.* § 30(3).

due haste by the government can take years to be heard; take for example, the Home Ministry's appeal against the High Court decision allowing Christian newspapers to use the word "Allah" to refer to the Christian god.¹³⁶ This appeal, surely filed as quickly as possible, has yet to be heard even though the case was originally decided in December 2009.¹³⁷

Finally, according to SOSMA, the repeal of the ISA holds no benefit to those already imprisoned under the ISA, as Article 32 specifically states that the repeal has no effect on previous ISA detentions.¹³⁸ The forty-five individuals still detained under the ISA have been promised by the Home Minister that their cases will be reviewed individually, but the outlook is bleak as the Home Minister has not even begun the process.¹³⁹

The second law drafted to replace the ISA is the Penal Code (Amendment) Act 2012 (PCA).¹⁴⁰ This Act amends the Malaysian Penal Code and codifies many of the offenses that were previously charged under the ISA.¹⁴¹ In repealing the ISA, yet using the PCA to criminalize the activities the ISA punished, the repeal itself begins to look effectively like a bait-and-switch scheme to distract the populace.¹⁴² For example, the extraordinarily vague offense of "commit[ting] an activity detrimental to parliamentary democracy" now results in a sentence "for a term which may extend to twenty years."¹⁴³ Considering that citizens who were on their way to join the aforementioned Bersih 2.0 and protest for free elections were arrested for "waging war against" the Sultan, the government could very likely stretch the definition of "commit[ting] an activity detrimental to parliamentary democracy" to encompass the types of "offenses" that routinely resulted in arrests under the ISA.¹⁴⁴ Many other offenses

¹³⁶ Ding Jo-Ann, *False Hope in Security Offences Act*, NUT GRAPH, Apr. 23, 2012, <http://www.thenutgraph.com/false-hope-in-security-offences-act/>.

¹³⁷ *Id.*

¹³⁸ Security Offences (Special Measures) Bill 2012, *supra* note 128, § 32.

¹³⁹ Ida Lim, *Lawyers Want PM to Revoke ISA Arrests Orders, Speed Up Change*, MALAYSIAN INSIDER, June 30, 2012, available at <http://www.themalaysianinsider.com/litee/malaysia/article/lawyers-want-pm-to-revoke-isa-arrests-orders-speed-up-change/>.

¹⁴⁰ Penal Code (Amendment) Act 2012 (Malay.).

¹⁴¹ *Id.*; Malik Imtiaz Sarwar, *The Death of Civil Liberties*, ALIRAN, May 15, 2012, available at <http://aliran.com/9064.html>.

¹⁴² Sarwar, *supra* note 141.

¹⁴³ Penal Code (Amendment) Act 2012, *supra* note 140, § 6.

¹⁴⁴ See *Bersih Supporters Nabbed for Waging War Against King*, MALAYSIAN INSIDER, June 26, 2011, <http://www.themalaysianinsider.com/malaysia/article/bersih-supporters-nabbed-for-waging-war-against-king/> (demonstrating how the government's use of Section 122 of the Penal Code to prosecute and detain activists was similar to the first conviction of a rallying group set

previously dealt with under the ISA are criminalized with severe penalties under the PCA, such as printing, possessing, or even receiving documents “detrimental to parliamentary democracy.”¹⁴⁵

III. OTHER APPROACHES TO PREVENTIVE DETENTION

A. *Singapore: Same Law, Different Approach*

The fact that the Constitution and laws of Malaysia and Singapore are largely identical naturally leads to a comparison of how Singapore has approached the use of preventive detention through the use of the ISA.¹⁴⁶ The ISA in Malaysia and the ISA in Singapore are actually the exact same law, acquired by Singapore through its former union with Malaysia from 1963–1965.¹⁴⁷ Singapore has used the law to imprison political opponents at times, but has been far more restrained than its northern neighbor in its use of the ISA, especially in the last twenty years.¹⁴⁸ However, judicial review of preventive detention in Singapore has taken a very similar path to Malaysian judicial review, and on a very similar timeline.

Singapore’s Constitution provides for the existence of laws, like the ISA, that deny guaranteed constitutional freedoms through the use of special articles in the Constitution, just like in Malaysia.¹⁴⁹ The Constitutions of Malaysia and Singapore are in this regard identical, simply substituting the name of the country and removing references to the Sultan.¹⁵⁰ The exceptions to the guaranteed freedoms for reasons of public security, racial harmony, and sanctity of government—the key concepts that the ISA seeks to protect—are all duplicated in the Singapore Constitution under Article 149.¹⁵¹

out to overthrow the government); Penal Code Amendment Act, *supra* note 140, § 6.

¹⁴⁵ Penal Code (Amendment) Act, *supra* note 140, § 6.

¹⁴⁶ Damien Cheong, *Enhancing National Security Through the Rule of Law: Singapore’s Recasting of the Internal Security Act as an Anti-Terrorism Legislation*, ASIA RTS. J., Dec. 2005 at 1, 9.

¹⁴⁷ *Id.*

¹⁴⁸ See Press Statement, Singapore Ministry of Home Affairs, Statement on ISA (Sept. 16, 2011), available at http://www.mha.gov.sg/news_details.aspx?nid=MjA4NQ%3D%3D-Dmf5jullzOA%3D (demonstrating, for example, that the ISA was only used twice in Singapore between 1989 and 1998).

¹⁴⁹ SING. CONST. arts. 149–151.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* art. 149; MALAY. CONST. arts. 149–151.

This subjective standard was explicitly confirmed by the High Court, the lower bench of Singapore's two-tiered Supreme Court, in the case of *Lee Mau Seng v. Minister of Home Affairs*.¹⁵² Lee Mau Seng, a newspaper editor, was accused of stirring up pro-Communist and pro-Chinese sentiments through his paper and was detained under the ISA.¹⁵³ Appealing his claim of unlawful imprisonment to the courts,¹⁵⁴ he was rebuffed when the High Court dismissed his appeal stating that "the power to issue a detention order has been made to depend upon the existence of a *state of mind in the President . . . which is a purely subjective condition*."¹⁵⁵

Like Malaysia's Federal Court, the Singapore Supreme Court eventually reconsidered this position.¹⁵⁶ In *Chng Suan Tze v. Minister of Home Affairs*, the Supreme Court considered the case of four individuals who were allegedly involved in a Marxist conspiracy to overthrow the government.¹⁵⁷ The detainees released a statement denying the allegations and claimed that no grounds existed for their detention.¹⁵⁸ The Court of Appeal, the highest bench of the Singapore Supreme Court and the highest court in the country, decided the case based only on the narrow legal point that the Minister, who ordered the detention, failed to satisfy the burden of proving that the detention order was made with the President's satisfaction.¹⁵⁹ However, the Court also overturned the subjective standard in this opinion.¹⁶⁰ They concluded that "the subjective test . . . and its progeny can no longer be supported and the objective test is applicable."¹⁶¹ They also found that although the Court could not question what the executive determined to be necessary in cases involving national security, they were able to determine whether the decision made by the executive was actually based on national security considerations.¹⁶² The Court limited itself to the *Wednesbury* standard of review where a decision by the executive can be found invalid only if it is an irrational decision, defined as a decision that is "so outrageous

¹⁵² *Lee Mau Seng v. Minister of Home Affairs*, [1971] SGHC 10 (Sing.).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* (emphasis added).

¹⁵⁶ *Chng Suan Tze v. Minister of Home Affairs*, [1988] SGCA 16 (Sing.).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

in its defiance of logic or of accepted moral standards that no sensible person . . . could have arrived at it.”¹⁶³

However, even this self-limiting action by the Court could not conceal its attempted switch to an objective standard. Like the Malaysian Parliament, the Singaporean Parliament also enacted amendments to the Internal Security Act that invalidated any judicial review of the Act or actions taken pursuant to the Act.¹⁶⁴ Like Malaysian courts, the Singaporean courts later examined the validity of the amendments in a case brought by one of the unnamed plaintiffs in the Tze case, *Teo Soh Lung*.¹⁶⁵ In that case, the Court found that the constitutional amendments were valid, that they clearly established a subjective standard for review of the ISA, and that judicial review was limited to procedural matters.¹⁶⁶ The detention itself and the validity of the ISA belong to the discretion of the executive as determined by the legislature.¹⁶⁷

Although Singapore has followed much the same path as Malaysia regarding the ISA—from the judicial reaction to the law to the amendments making the law untouchable—Singapore has used the ISA against political opponents and government detractors far less frequently.¹⁶⁸ A likely reason for this is Lee Kuan Yew’s near total control of the government since Singapore’s independence.¹⁶⁹ In fact, “[f]ew societies have been as thoroughly dominated by a single man as Singapore has been dominated by Harry Lee Kuan Yew.”¹⁷⁰ In addition, Singapore is dominated by a single majority race, with citizens of Chinese origin representing over 75% of the population.¹⁷¹ This is in contrast to Malaysia, which has a more diverse

¹⁶³ *Id.* (quoting *Assoc. Provincial Picture Houses Ltd. v. Wednesbury Corp.* [1948] 1 K.B. 223 (U.K.)).

¹⁶⁴ Internal Security (Amendment) Act No. 2 1989 (Sing.).

¹⁶⁵ *Teo Soh Lung v. Minister of Home Affairs* [1989] 2 MLJ 449, 452 (H.C. Sing.).

¹⁶⁶ *See id.* at 452, 456–57 (interpreting Internal Security (Amendment) Act No. 2 1989 (Sing.)).

¹⁶⁷ *Id.* at 452–53.

¹⁶⁸ *See* Statement on ISA, *supra* note 148, at 23 (detailing the ISA’s infrequent use).

¹⁶⁹ CHRIS LYDGATE, *LEE’S LAW: HOW SINGAPORE CRUSHES DISSENT* 59 (2003). Lee Kuan Yew was Prime Minister of Singapore from its independence in 1959 until 1990, when he took the Cabinet position of “Senior Minister” and then “Minister Mentor.” Since 1968, Lee’s party has never held less than 95% of the seats in Singapore’s Parliament. Lee resigned from government employ in May of 2011 and his eldest son is the current Prime Minister of Singapore. *Id.*

¹⁷⁰ *Id.* at 59–60.

¹⁷¹ CIA WORLD FACTBOOK, *People and Society, Singapore*, <https://www.cia.gov/library/publications/the-world-factbook/geos/sn.html> (last updated Apr. 17, 2013).

society comprised it approximately 50% Malays, 25% Chinese, 11% Indigenous, 7% Indian, and 7% Other.¹⁷² Combined with this diversity is the more volatile nature of Malaysian politics.¹⁷³ Singapore has been dominated by one man since Independence, while Malaysia has had six prime ministers since Independence.¹⁷⁴ While all of these prime ministers have been from the same ruling party, they have represented different political factions traditionally at conflict with one another, creating a pattern of frequent political challenges to party leaders, an issue that has largely been absent in Singapore politics.¹⁷⁵

This broad racial diversity and political instability led to Malaysia's two most significant uses of the ISA in terms of people arrested. One was the arrests after the May 13, 1969 race riots that led to the state of emergency discussed above. The second was "Operasi Lalang" (translation: Weeding Operation) where Prime Minister Mahathir ordered the arrest of 106 opposition leaders, dissidents, political opponents within his own party, and intellectuals such as the Aliran Human Rights Commission President under the ISA.¹⁷⁶ Karpal Singh, the plaintiff in *Karpal Singh v. Minister of Home Affairs* discussed above, was one of the detainees arrested during this "Operation."¹⁷⁷ Like many detainees, the pretense for his arrest was his comments about a government plan to install non-Mandarin speaking principals in Mandarin schools, comments the Executive said increased tension between the different races in Malaysia.¹⁷⁸

Although the law is the same, the use of the ISA in Singapore has been quite different than in Malaysia. As stated above however, those differences appear largely because of the political and racial factors at work in the two countries, and not because of legal differences in the interpretation of the ISA.

¹⁷² CIA WORLD FACTBOOK, *People and Society, Malaysia*, <https://www.cia.gov/library/publications/the-world-factbook/geos/my.html> (last updated June 5, 2013).

¹⁷³ KHOO BOO TEIK, *BEYOND MAHATHIR: MALAYSIAN POLITICS AND ITS DISCONTENTS* 6–12 (2003).

¹⁷⁴ OFFICE OF THE PRIME MINISTER OF MALAYSIA, <http://www.pmo.gov.my>.

¹⁷⁵ KHOO, *supra* note 173, at 10–14.

¹⁷⁶ Saravanamuttu, *supra* note 52; HILLEY, *supra* note 52, at 88–89.

¹⁷⁷ Saravanamuttu, *supra* note 52.

¹⁷⁸ *Karpal Singh v. Minister for Home Affairs*, [1988] 1 MLJ 468, 470–71 (H.C. Malay.).

B. Canada: Guidance for Just Preventive Detention Laws

Preventive detention is not solely a Malaysian issue. Besides the various preventive detention laws passed by countries in response to terrorism during the last decade,¹⁷⁹ other British colonies often had such laws, such as Canada's War Measures Act of 1914.¹⁸⁰ Canada repealed and replaced this Act in 1988, recognizing civic rights concerns by incorporating safeguards against abuse similar to those Najib claimed would be included in Malaysia's ISA replacement laws.¹⁸¹ Given this link, the safeguards Canada included in its replacement law should be considered by the Malaysian government for inclusion in its current and future security laws.

The War Measures Act of 1914 was enacted at the outbreak of World War I for the purpose of detaining aliens with familial connection to enemy nations.¹⁸² In total, the Act was invoked three times: once in World War I to intern enemy aliens; again in World War II for the same purpose (much the same as the United States' internment of Japanese-Americans during World War II); and a third and final time in response to the "October Crisis," a domestic terrorism incident in 1970.¹⁸³ Under the War Measures Act, the Prime Minister could proclaim an emergency, and this proclamation alone would be "conclusive evidence that war, invasion, or insurrection, real or apprehended, exist[ed]."¹⁸⁴ The Canadian courts, like the Malaysian courts, were very deferential to the subjective opinion of the executive due to the "extraordinary times."¹⁸⁵

Clearly, the War Measures Act and the judicial treatment of decisions made under it were very similar to the Malaysian ISA and its judicial response.¹⁸⁶ In contrast to Malaysia's strengthening of the ISA over time, Canada repealed the War Measures Act in 1988, replacing it with the Emergencies Act which incorporated safeguards against the abuse of

¹⁷⁹ Ramraj, *supra* note 5, at 10–11.

¹⁸⁰ Kim Lane Scheppele, *North American Emergencies: The Use of Emergency Powers in Canada and the United States*, 4 INT'L J. CONST. L. 213, 220 (2006).

¹⁸¹ Irvin Studin, *Constitution and Strategy: Understanding Canadian Power in the World*, 28 NAT'L J. CONST. L. 1, 27 (2010).

¹⁸² Scheppele, *supra* note 180, at 221.

¹⁸³ John Ip, *Comparative Perspectives on the Detention of Terrorist Suspects*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 773, 853 (2007).

¹⁸⁴ Scheppele, *supra* note 180, at 220.

¹⁸⁵ *Id.* at 220–21.

¹⁸⁶ See *supra* notes 56–90 and accompanying text.

executive power.¹⁸⁷ Now that the Malaysian government claims it wants to incorporate similar safeguards into its security laws, the Emergencies Act could provide a useful model for future legislation.

The Emergencies Act severely limits the circumstances in which an emergency can be legitimately declared. The act allows emergencies only in those situations where there exists “an urgent and critical situation of a temporary nature that (a) seriously endangers the lives, health or safety of Canadians . . . or (b) seriously threatens the ability of the Canadian Government to preserve the sovereignty, security and territorial integrity of Canada.”¹⁸⁸ This provision would not allow the Emergencies Act and its inherent powers to be invoked in many of the incidents where the Malaysian government invoked the ISA.¹⁸⁹ In addition, the Emergencies Act requires prior consultation between the different levels of government¹⁹⁰ and “reasonable grounds” to declare the emergency in the first place.¹⁹¹

The Emergencies Act also gives Parliament the power to supervise and revoke the emergency declaration, as well as the authority to supervise all measures taken to combat the emergency.¹⁹² In addition, the preamble to the Act states that any actions taken under its provisions are subject to the Canadian Charter of Rights and Freedoms, the Canadian Bill of Rights, and the International Covenant on Civil and Political Rights.¹⁹³ The strong words of the preamble are reinforced by the fact that no exceptions or power to suspend these rights for any reason is found within the Emergencies Act.¹⁹⁴ Recall that the ISA and even the replacement laws, the SOSMA and the PCA, contain no such limiting language.¹⁹⁵

Although Canada acknowledges the need for strong legislation regarding times of emergency, the safeguards that it has put in place to avoid abuse of that emergency legislation are just as strong. Canada’s commitment to human rights and the inability of its government to circumvent those rights,

¹⁸⁷ See *supra* notes 82–90 and accompanying text.

¹⁸⁸ Emergencies Act, R.S.C., 1985, c. 22 § 3 (Can.).

¹⁸⁹ See, e.g., *Why Teresa Kok is the Target*, *supra* note 121 (discussing how Opposition MP Teresa Kok was detained under emergency legislation for allegedly asking a mosque to turn down the volume of its loudspeakers during its call to prayer, an arrest that would surely not survive the limiting language of the Canadian Emergencies Act, *supra* note 188, c. 22 § 3).

¹⁹⁰ Emergencies Act, *supra* note 188, § 25.

¹⁹¹ *Id.* § 6(1).

¹⁹² *Id.* §§ 57–63.

¹⁹³ *Id.* pmb1.

¹⁹⁴ Scheppele, *supra* note 180, at 231.

¹⁹⁵ Internal Security Act 1960, *supra* note 18; Security Offenses (Special Measures) Bill 2012, *supra* note 128; Penal Code (Amendment) Act 2012, *supra* note 140.

even in times of emergency, is an example that Malaysia should look to as it attempts to reform its emergency legislation.

IV. THE WAY FORWARD FOR INCREASED FREEDOM IN MALAYSIA

A. *Healthy Skepticism of the Government's Promises*

The frequent use of the ISA and other so-called “emergency” laws is clearly an obstacle to full recognition of human rights in Malaysia, and the laws that have replaced the ISA are no better. Malaysia’s history encourages skepticism of the Malaysia Day promise by Najib that in the future “no individual will be arrested merely on the point of political ideology” and that the power to detain and to extend preventive detentions will rest with the judiciary, not the executive, “except [for the] laws pertaining to terrorism.”¹⁹⁶ After all, when the ISA was created, the Deputy Prime Minister and the Prime Minister promised that the bill would only be used against Communists.¹⁹⁷ Further, even Prime Minister Mahathir, who often used the ISA to imprison political opponents,¹⁹⁸ spoke out against the ISA in his days as a backbencher Member of Parliament.¹⁹⁹ The ways that the government has stretched interpretations of words in the past, most notably in Operation Lalang, shows that terrorism could be used as a justification in any number of ways to penalize any number of activities or statements. For example, in 2002, citizens who spread rumors of possible terrorist attacks against Kuala Lumpur, some of them simply by forwarding emails, were arrested under the ISA.²⁰⁰ Would this type of activity be punished under the terrorism exception mentioned by Najib, or considered an activity “detrimental to parliamentary democracy”?²⁰¹ History tells us that the likely answer is yes.

¹⁹⁶ *PM Announces Repeal of ISA*, *supra* note 9.

¹⁹⁷ HUMAN RIGHTS WATCH, *supra* note 19.

¹⁹⁸ *See, e.g.*, Fritz & Flaherty, *supra* note 6, at 1357–68 (describing Mahathir’s frequent use of the ISA during his twenty-two-year tenure as Prime Minister to arrest political enemies such as his Deputy Prime Minister, Islamist party members, and journalists).

¹⁹⁹ RAIS YATIM, FREEDOM UNDER EXECUTIVE POWER IN MALAYSIA: A STUDY OF EXECUTIVE SUPREMACY 258 (1995) (“[N]o one in his right senses like[s] the ISA. It is in fact a negation of all the principles of democracy.”).

²⁰⁰ Letter to the Editor, *Stop Arresting ‘Rumour-Mongers’ Under ISA!*, ALIRAN, Dec. 21, 2002, <http://aliran.com/archives/ms/2002/1221.html>.

²⁰¹ Penal Code (Amendment) Act, *supra* note 140, § 6.

B. An Appropriate Reading of Article 149 is Essential

A major problem in restoring basic civil rights to Malaysians even after the planned repeal of the ISA is the historically liberal reading of Article 149 of the Constitution and the laws created under its provisions. The existence and use of the ISA and other emergency regulations such as the ISA replacement laws, the SOSMA and the PCA, have been justified under this article.²⁰² Although a close reading of Article 149 may indicate a very specific purpose is required to create a law under its provisions, laws like the ISA and the Emergency Ordinance have since been used outside of the original purposes given for their creation.²⁰³ Article 149 may not be intended as a catch-all article on its face, but laws created under its auspices such as the ISA have certainly taken on that character in the years since its enactment.²⁰⁴ For proof, we need only compare the recent use of the ISA with its original purpose as stated by Prime Minister Abdul Rahman: to fight Communist subversion.²⁰⁵

The Malaysian Federal Court has dismissed arguments that the ISA is unconstitutional or that it only applies to Communist activities because of the original justification for the law.²⁰⁶ In *Theresa Lim Chin Chin v. Inspector Gen. of Police*, the court found that the original justification for the law was not relevant and as long as the law is valid under Article 149, it will be held as valid by the court.²⁰⁷ Nothing in the ISA refers to Communists or Communist activities, thus the court found the use of the ISA was not limited to detention of Communists.²⁰⁸ Interestingly, although Najib claimed the SOSMA would only be used against terrorists, neither “terrorists” nor “terrorism” is mentioned in the SOSMA, allowing for the same type of verbal gymnastics to be employed by the government in future legal challenges against this “reform” legislation.²⁰⁹

This deferential judicial treatment of the ISA casts further doubt on Najib’s claim that the Executive’s power to order arrests and determine detention lengths will be limited to terrorist activities. Because there is no clear limiting language in the new laws, the government will be able to use

²⁰² *PM Announces Repeal of ISA*, *supra* note 9.

²⁰³ Fritz & Flaherty, *supra* note 6, at 1375–78.

²⁰⁴ *Id.*

²⁰⁵ HUMAN RIGHTS WATCH, *supra* note 19.

²⁰⁶ Fritz & Flaherty, *supra* note 6, at 1376–77.

²⁰⁷ *Theresa Lim Chin Chin v. Inspector Gen. of Police*, [1988] 1 MLJ 293, 295 (Malay.).

²⁰⁸ *Id.*

²⁰⁹ Security Offenses (Special Measures) Bill 2012, *supra* note 128.

them to imprison individuals at will and with the flimsiest of explanations. The government has already used similar such justifications; first for detaining hundreds under the ISA during Operation Lalang for “inciting racial tensions,”²¹⁰ and then for arresting Raja Petra and the Bersih 2.0 protestors for “exciting disaffection against the government.”²¹¹

It seems clear that the Executive’s liberal interpretations of the constitutional articles in question, combined with the constitutionally subordinate nature of the Judiciary and its general hesitancy, and near inability, to act as a check on government power, has led to an unjust use of states of emergency, the ISA, and other emergency legislation throughout Malaysia’s history.

C. *Changing the Constitution*

One solution to Malaysia’s problem would be to change the Constitution itself to put additional safeguards or restrictions into the articles that give the government so much unrestrained power. The Malaysian Constitution can be amended with a two-thirds vote of the Parliament.²¹² Parliament amends the Constitution often; it added a total of 643 amendments to individual articles from 1957 to 2003, including the amendments curtailing the power of the courts and subjugating them to the Legislature.²¹³

However, it seems unlikely that the Parliament will decide to amend Article 149 to give itself less power, especially considering how the Executive and the ruling party have behaved since Malaysia’s Independence, as evidenced by the uses of the ISA described above.²¹⁴ In addition, the ruling party lost its two-thirds majority in 2008, and it is unknown whether the ruling party will recapture it or whether the opposition party will someday reach a supermajority. While the constitutional amendment method is very difficult to follow due to the strong political will and power needed, it

²¹⁰ See *supra* notes 176–78 and accompanying text (discussing Operation Lalang).

²¹¹ See *supra* notes 99, 101 and accompanying text (discussing the arrest of Raja Petra and Bersih 2.0 protestors).

²¹² MALAY. CONST. art. 159(3).

²¹³ Anne Twomey, *The Involvement of Sub-national Entities in Direct and Indirect Constitutional Amendment Within Federations* 4 (2007) (VII World Congress of the Int’l Ass’n of Const’l L., Discussion Paper); see also *supra* notes 81–89 and accompanying text.

²¹⁴ See *supra* notes 97, 108, 114–19, 176–78 and accompanying text (discussing ways the Malaysian government has used its power through the ISA and other emergency legislation to imprison or harass political opponents).

may be necessary to build a strong safeguard against the abuse of executive power.

D. Restoration of the Judiciary

The impracticality of amending the Constitution also raises the question of judicial independence. After all, Najib stated in his Malaysia Day speech that “power to extend the detention period will shift from the executive to [the] judiciary.”²¹⁵ However, as discussed above, the Constitution has been amended so that the power of the courts is subordinate to that of the legislature, and by extension the executive. Thus even if the power of detention is shifted to the judiciary, there is nothing to stop the legislature and the executive from exerting their constitutional powers to ensure that certain detentions are extended. What will stop the judiciary itself from extending those detentions it knows to be of importance to the executive, simply to avoid such pressure being applied? The answer as of now is nothing. The legislature and the executive are still superior in power to the judiciary under the Constitution, and the judiciary serves, in effect, at the pleasure of the legislature.²¹⁶ This subservience prevents true judicial independence, and will therefore prevent the judiciary from independently reviewing the legitimacy of the SOSMA, the PCA, the proposed National Harmony Act, and any other security laws passed in the future.

Even if Najib does not use the new laws as he and his predecessors have used the ISA, the fact that the courts are constitutionally subordinate to the legislature gives the executive a power that could be used unscrupulously by a future prime minister. Amending the Constitution to restore constitutional power to the courts must be the first step in creating a new rule of law in Malaysia; and Malaysia can look to developed nations to see that their rules of law are built on strong and independent court systems. Restoring the judiciary to its rightful role as intended by the original Constitution is even more important than repealing the ISA.²¹⁷

E. Public Commitment to Human Rights Through Treaties

A cosmetic change that could show the Malaysian people and the world that the government intends to commit to the protection of human rights in

²¹⁵ *PM Announces Repeal of ISA*, *supra* note 9.

²¹⁶ *See Foo*, *supra* note 86, at 229–31; *see also supra* notes 86–90 and accompanying text.

²¹⁷ *See Constitution (Amendment) Act 1988*, *supra* note 81.

the future would be the signing of international human rights agreements.²¹⁸ Of the nine core international human rights treaties, Malaysia has signed and ratified only three: those concerning gender equality, the rights of the child, and the rights of disabled persons.²¹⁹ Malaysia has not signed any of the treaties relating to racial discrimination, civil and political rights, economic and social rights, migrant workers' rights, or freedom from enforced disappearance or torture.²²⁰ Signing these treaties and moving towards full acceptance of the international human rights regime²²¹ would be a strong signal that Najib's words are not just another smokescreen.

F. Strict Limitations on the Use of Preventive Detention in the New Laws

Restoring the rightful role of the judiciary is only the first step in reforming the ISA and other laws that have been abused in Malaysia. The process of repeal and replace has failed so far. Even the new laws, the SOSMA and the PCA, must be reworked under a review and recommendation process that looks to other nations to ensure that the new legal regime reflects international norms on preventive detention. Canada and its Emergencies Act is a good example to look at because it allows the executive to use strong powers during an emergency, but limits the abuse of those powers in other situations. The strict requirements for a situation to be qualified as an emergency, the parliamentary supervision, and the inherent subordination of the act to Canadian and international civil rights conventions²²² ensure that the Emergencies Act can only be used for the reason it was created: true national emergencies. The bending and twisting of the ISA and the Constitution that has permitted the executive to imprison people for reading poems or for requesting that a mosque turn down its loudspeakers must stop.²²³ The vague language continuously employed in

²¹⁸ Press Release, United Nations Malaysia, On Human Rights Day, UN Malaysia Reaffirms Its Commitment to Promoting Non-discrimination for all Malaysians (Dec. 8, 2009), <http://www.undp.org.my/uploads/HR%20Day%2009%20-%20Press%20Release%20-%20FINAL.pdf> [hereinafter Press Release, United Nations Malaysia].

²¹⁹ *Id.*

²²⁰ *Id.*; Amanda Whiting, *Situating Suhakam: Human Rights Debates and Malaysia's National Human Rights Commission*, 39 STAN. J. INT'L L. 59, 71–72 (2003).

²²¹ See Press Release, United Nations Malaysia, *supra* note 218 (discussing the fact that 80% of United Nations member states have ratified four or more of the core human rights treaties).

²²² See *supra* notes 188–94 and accompanying text.

²²³ *Why Teresa Kok is the Target*, *supra* note 121; Sipalan, *supra* note 55.

Malaysian security and emergency legislation must be rejected wholesale, while forthcoming laws are crafted and existing laws are reworked to contain very specific powers and limitations, narrowly defining the circumstances in which suspension of individual rights will be permitted.

V. CONCLUSION

The period of reform ushered in by Prime Minister Najib's Malaysia Day speech in 2011 may yet prove to be a watershed moment in the political and social history of Malaysia. It may, however, be rendered meaningless by continued abuses of executive power under the Security Offenses Act, the Penal Code Act, the proposed National Harmony Act, and other new laws to be ushered in over the next few years. Najib's pledge of reform is a bold one, but the history of Malaysian use of executive power is replete with instances of prime ministers promising not to use preventive detention laws unjustly; a promise they quickly break by imprisoning political opponents or people who have committed no real crimes. The true test of Najib's reform agenda is not what laws he chooses to repeal, but rather what he replaces them with, and so far his replacement laws have fallen far short of his promise. Future laws must contain strong protections of civil liberties and the rights of the person in order to be considered truly fair and just by the Malaysian citizenry and the international community.

To further ensure that civil liberties and human rights are protected in the future, Malaysia should also amend its Constitution to remove the articles that allow extreme laws like the ISA to exist. At a bare minimum, it must amend the Constitution to correct the mistakes of 1989 and restore the judiciary to its rightful constitutional role: that of the third branch of government and a check and balance on the activities of both the legislature and the executive. To leave the judiciary in a subservient position supports a form of government that allows any number of abuses of power to take place.

History will tell if Najib's speech on September 15, 2011, bears any significance either as mere window dressing for a bait-and-switch political ploy or as a signal that it truly ushered in a new era for Malaysia. The hope is that Malaysia can overcome the colonial-era mindset embodied in the ISA and its successor laws, which denies basic human rights in favor of expansive government detention power. Achieving this goal will allow Malaysians to move forward and address, together, all of the other issues that

are preventing Malaysia from becoming a truly developed country and an example of real democracy among the Asian nations.