

**TERRORISM’S NEXT VICTIM? JUDICIAL REVIEW OF THE
MALAYSIAN INTERNAL SECURITY ACT 1960**

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I.	INTRODUCTION.....	270
II.	Last line of Defense: Judicial Review in the Age of Terrorism.....	272
III.	The Internal Security Act: A Repressive Tool.....	275
IV.	The ISA and History of Judicial Review	279
V.	September 11 and the Fall of the Judicial Tower.....	282
VI.	TERRORISM CASES AND JUDICIAL RESPONSES	283
VII.	Assessing Terrorism’s Impact on the Malaysian Judiciary.....	288

*“In matters of preventive detention relating to national security, the
Judges are the executive.”¹*
-Chief Justice Shim of Malaysian Federal Court, 2003.

I. INTRODUCTION

The threat of terrorism has placed pressure on the already fragile rule of law in Malaysia. Executive arms of government in countries around the world have introduced laws that inhibit various fundamental freedoms as an anti-terrorism measure. According to Irene Khan, Secretary General of Amnesty International, “[t]he ‘war on terror’, far from making the world a safer place, has made it more dangerous by curtailing human rights . . . and shielding governments from scrutiny.”² In this context, the need for robust judiciaries that perform the essential role of protecting civil liberties is heightened. Malaysia has dealt with the threat of terrorism by heavily relying on existing

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¹ *Kerajaan Malaysia, Menteri Dalam Negeri, and Ketua Polis Negara v. Nasharuddin Bein Nasir* [2003] No. 05-75-2002(B) (Unreported) (Malay. Federal Court of Appeal 2003), available at [http://www.kehakiman.gov.my/judgment/fc/archive/x05-75-2002\(B\).htm](http://www.kehakiman.gov.my/judgment/fc/archive/x05-75-2002(B).htm) [hereinafter *Kerajaan Malaysia*] (citing Lord Fraser in *Council Of Service Unions & Ors v Minister For Civil Service*, (1985) 1 AC 374).

² Antonio Tujan, Audrey Gaughran, & Howard Mollett, *Development and the Global War on Terror*, 46 RACE & CLASS 53, 68 (2004) (citing Amnesty International, *Annual Report 2003: Human Rights Threatened by “War on Terror,”* available at <http://www.amnesty.org.uk/deliver?document=14553>).

legislation, in particular, the Internal Security Act 1960 (ISA).³ The ISA, which provides for the imposition of Draconian indefinite preventative detention without trial, has been “used as a tool [by the Malaysian executive] to stifle . . . dissent.”⁴ Despite consistent abuse of this legislation in the limited circumstances where judicial review of the ISA has been available, the judiciary has been “unjustifiably compliant,”⁵ exhibiting significant deference to the executive.

This deference arguably flows from a historical distortion of the rule of law in Malaysia where the government has viewed the judiciary as an unwelcome interference in democratically based policy decisions.⁶ Breaking from this trend, a number of cases in which the court upheld habeas corpus⁷ applications of ISA detainees appeared to indicate an exceptional readiness to challenge the legality of executive decisions. However, since the age of terrorism, the executive's use of the ISA has been further legitimized as other countries have rushed to introduce preventative detention laws. In this context, the Malaysian judiciary's role as a bulwark against arbitrary executive action has become even more important.

However, this essay will contend that, as evidenced by recent ISA habeas corpus cases involving allegations relating to terrorism, the Malaysian judiciary has retreated from its

³ Internal Security Act, Act 82 (1960) (Malay.) [hereinafter ISA].

⁴ Human Rights Watch, *Malaysia's Internal Security Act and Suppression of Political Dissent: A Human Rights Watch Backgrounder* HUMAN RIGHTS WATCH NEWS (2006), available at <http://www.hrw.org/backgrounder/asia/malaysia-bck-0513.htm>.

⁵ Hari Singh, *Malaysia's National Security: Rhetoric and Substance*, 26 CONTEMP. SOUTHEAST ASIA 1, 2 (2004).

⁶ See Wu Min Aun, *The Malaysian Judiciary: Erosion of Confidence*, 1 No. 2 AUSTL. J. OF ASIAN L. 124, 128 (1999) (stating that the government “initiat[ed] amendments to art 121 of the Federal Constitution, excising the reference to the vesting of judicial power in the courts).

⁷ A writ of habeas corpus will be issued where a person “is detained without any authority or the purported authority is beyond the powers of the person authorising the detention and so is unlawful.” *Ahmad Yani bin Ismail & Anor v. Inspector General of Police & Ors* [2004] 4 MLJ 636, 671 (Malay. High Court 2005) [hereinafter *Ismail*] (quoting *R v. Sec'y of State for the Home Dep't* [1991] 1 W.L.R. 890, 894 (Eng.)).

willingness to challenge preventative detentions and has largely left such executive actions unchecked. The threat of terrorism combined with the courts' deferential attitude in national security cases has placed at risk the fragile civil liberties of Malaysian citizens, which the judiciary was designed to protect.

II. LAST LINE OF DEFENSE: JUDICIAL REVIEW IN THE AGE OF TERRORISM

The rule of law involves a "system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone."⁸ The judiciary plays a fundamental role in upholding the rule of law by providing a check on the exercise of executive power – effectively "sav[ing] democracy from itself."⁹ Although the courts' role is restricted to giving effect to any laws that are constitutionally valid, the courts are vested with legitimate powers to limit executive power. Accordingly, in a strained environment, such as that created by fear of terrorism, "the last line of defense for human rights, fundamental freedoms, and individual liberty tends to be the courts."¹⁰

It could be argued that as an elected body, the executive should have the final say in the exercise of the powers granted to it. However, "in no sense is majority rule 'self-policing[.]' . . . [as] [i]t affords no protection against arbitrary actions . . . or [from] majorities commanding the power of the state for a purely private use . . . under the guise of the public good."¹¹ Hence, "[j]udges should not defer to legislative decisions regarding rights of any kind."¹² Malaysia is a federal, common law country based on the rule of law and the supremacy of the Federal Constitution

⁸ Thomas Carothers, *The Rule of Law Revival*, 77 No. 2 FOREIGN AFFAIRS 95, 96 (Mar./Apr. 1998).

⁹ Tom Ginsburg, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 22 (2003).

¹⁰ Michael Kirby, *Terrorism: The International Response of the Courts*, 12 IND. J. GLOBAL LEG. STUD. 313, 324 (2005) (citing Simon Bronitt, *Constitutional Rhetoric v. Criminal Justice Realities: Unbalanced Responses to Terrorism?*, 14 PUB. L. REV. 76 (2003)).

¹¹ William Riker and Barry Weingast, *Symposium on the Theory of Public Choice: Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislature*, 74 VA. L. REV. 373, 398-99 (1998).

¹² *Id.* at 400.

(“Constitution”).¹³ However, the Malaysian judiciary has historically had pressures placed upon it that restrict its ability to fulfil its role within the rule of law system. It has been argued that the separation of powers in Malaysia has been distorted due to the deliberate intrusion of the executive in the judicial sphere. The government has conceived of the judiciary as an unwelcome interference in decisions of the publicly accountable government.¹⁴

The clearest manifestation of judiciary interference was in 1988 when the courts handed down a number of decisions against the government.¹⁵ In that year, article 121(1) of “the Constitution was amended to make the jurisdiction and powers of the court subject to federal law rather than the Constitution, making it possible for Parliament to limit or abolish judicial review by a simple majority vote rather than the two-thirds required for constitutional amendment.”¹⁶

Also during this time, a day before a significant court decision was to be handed down, the Lord President of the Federal Court (Malaysia’s highest court), Tun Salleh Abbas, was suspended and then dismissed for “misbehaviour in the form of bias against the government.”¹⁷ Another more recent assault was the transfer by the executive of Shah Alam High Court Judge Hishamudin Mohd to a commercial law division after he “ordered the release of KeADILan detainees.”¹⁸

¹³ MALAY. CONST. art. 4. Article 4 of the Constitution provides it is the supreme law of the land and any law passed by Parliament which is inconsistent with the Constitution is, to the extent of such inconsistency, void. *Id.*

¹⁴ See Wu, *supra*, note 6, at 128.

¹⁵ See *id.* at 127.

¹⁶ Nicole Fritz & Martin Flaherty, Special Report, *Unjust Order: Malaysia’s Internal Security Act*, 13 FORDHAM INT’L L.J. 1345, (2003) (citing AMNESTY INTERNATIONAL, REPORT ON MALAYSIA, HUMAN RIGHTS UNDERMINED: RESTRICTIVE LAWS IN A PARLIAMENTARY DEMOCRACY, A.I. Index: ASA (June 28, 1999), available at <http://www.web.amnesty.org/ai.nsf/index/ASA280061999>).

¹⁷ AMNESTY INTERNATIONAL, HUMAN RIGHTS UNDERMINED: RESTRICTIVE LAWS IN A PARLIAMENTARY DEMOCRACY 11 (June 28, 1999), available at http://web.amnesty.org/library/Index/ENGASA28_0061999?open&of=ENG-394.

¹⁸ Fritz & Flaherty, *supra* note 16.

The problems relating to the independence of the judiciary were also highlighted in an International Bar Association report, *Justice in Jeopardy: Malaysia 2000*.¹⁹ Against this background of intimidation, the judiciary has been extremely reluctant to question government action. Human Rights Watch has even suggested some judges see their job as upholding the judgment of the executive.²⁰ Justice Kirby of the High Court of Australia has noted that:

History teaches that increased pressure is placed on the independence of the legal profession in times of war and national emergency [T]he challenge for the judiciary . . . [is] to continue insisting upon the application of the rule of law and the protection of civil liberties, even in circumstances of heightened security concerns.²¹

Civil liberties have become a victim of the series of terrorist attacks that have occurred across the globe since the momentous attacks of September 11, 2001. Many countries around the world have recently introduced or extended legislation aiming to prevent terrorist attacks.²² Many of the laws legalize practices, including preventative detention, which are open to abuse and threaten fundamental human rights. A balance must be met between the need, on one hand, for legal tools to combat the threat of terrorism, and on the other hand, to preserve values associated with individual liberty and rule of law.

In a Canadian case reviewing the legality of the deportation of an alleged terrorist in light of the *Charter of Rights*, the court noted “it would be a Pyrrhic victory” if the balance was

¹⁹ The International Bar Association, et al., *Justice in Jeopardy: Malaysia 2000* (2000), <http://www.freeanwar.net/news/malaysia.pdf>.

²⁰ See Human Rights Watch, *supra* note 4.

²¹ *Id.*

²² Countries that have recently introduced or extended anti-terrorism legislation include: Australia, Canada, France, India, Indonesia, Israel, Japan, Pakistan and the United Kingdom. See Jurist, World Anti-Terrorism Laws, <http://jurist.law.pitt.edu/terrorism/terrorism3a.htm> (last visited Mar. 19, 2007). Perhaps the most notorious is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, H.R. 3162, 107th Cong. (2001).

lost and terrorism was used as a reason to sacrifice fundamental rights.²³ In Malaysia, the balance between security and individual liberty has become clearly skewed towards the former. This is a trend evident in other Southeast Asian countries.²⁴

Leaders of non-governmental groups in the region believe that security laws, legitimated under the terrorist paradigm, have been abused by governments to “serve other political agendas” and quell political dissent.²⁵ It is clear that there needs to be a guardian of the equilibrium between security and individual liberties. This paper will consider the impact of terrorism on the rule of law by analyzing whether the Malaysian judiciary has been this guardian in reviewing the legality of ISA preventative detentions of alleged terrorists.

III. THE INTERNAL SECURITY ACT: A REPRESSIVE TOOL

Although Malaysia amended its Penal Code to include broadly defined terrorism related offenses,²⁶ it largely relied on the existing ISA to deal with the perceived terrorist threat. Certain fundamental liberties and rights are included in Malaysia's Constitution such as the right to property, the right to profess and practice religion, the freedom of speech, and the freedom from slavery.²⁷ Article 5 outlines due process rights by stating, “no person shall be deprived of his life or personal liberty, save in accordance with law.”²⁸ Article 5 also includes the right of habeas corpus, the right to be informed of the grounds of arrest, and the right to a legal practitioner; as well as the right to be presented before a magistrate within 24 hours of arrest.²⁹

²³ *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 13.

²⁴ Sidney Jones, *The War on Terror in Southeast Asia Could Hurt Civil Liberties*, YALE GLOBAL ONLINE, Dec. 6, 2002, available at <http://yaleglobal.yale.edu/display.article?id=521>.

²⁵ *Id.*

²⁶ The Penal Code (Amendment) Act 2003, which inserted Chapter VI.A (Offences Relating to Terrorism) in the Penal Code received royal assent on Dec. 17, 2003.

²⁷ The illegality of slavery, speech, religion, and property rights are set forth under MALAY. CONST. art. 6, 10, 11, and 13 respectively,

²⁸ MALAY. CONST. art. 5(1).

²⁹ MALAY. CONST. art. 5(2)-(4).

However generous these constitutional rights may seem, they are not guaranteed because they are subject to Part XI of the Constitution – Special Powers Against Subversion, Organised Violence, and Acts and Crimes Prejudicial to the Public and Emergency Powers.³⁰ Article 150 in Part XI allows the *Yang di Pertuan Agong*³¹ to issue a Proclamation of Emergency which gives the Parliament power to make any laws considered necessary in the emergency, notwithstanding any provisions in the Constitution. In addition to article 150, regardless of whether a state of emergency has been declared, article 149 essentially upholds the validity of any act of Parliament designed to stop or prevent action or threatened action that may impact the public order of Federation security.³² An act of this kind is valid even if it is inconsistent with articles protecting various fundamental

³⁰ MALAY. CONST. pt. XI.

³¹ The term *Yang di Pertuan Agong* describes the King. Malaysian Judiciary, The Malaysian Bar, <http://www.malaysianbar.org.my/judiciary.html> (last visited May 7, 2007) (referring to “His Majesty” as *Yang di-Pertuan Agong*). The King acts on advice of the Cabinet led by the Prime Minister. *Id.*

³² MALAY. CONST. art. 149(1) states:
If an act of parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation -
(a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or
(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or
(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or
(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof,
any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament.

rights including those relating to due process in article 5.³³ The legislature has taken the opportunity to promulgate a number of acts under article 149, the most controversial and insidious of which is the ISA. Although originally designed to protect Malaysian society from the communist threat,³⁴ the government has continued to use the ISA claiming that it is still a necessary measure for stability in a multi-ethnic society, and in recent times has become necessary “to keep terrorists at bay.”³⁵ The Malaysian government stated in its Right of Reply to the Report of the 59th Session of United Nations Human Rights Commission on Human Rights Violations in 2003 that the ISA is a preventive law that is crucial for the continued peace and stability in our country.³⁶

The ISA contains powers to restrict assembly, association, and expression. Its most significant power is that conferred on the police force and the Minister to order preventative detention. Section 73 gives the police power to arrest and detain any person for up to 60 days without warrant or trial.³⁷ This is based on the suspicion that he or she has acted or is likely to act in “any manner prejudicial to the security of Malaysia.”³⁸ Furthermore, under section 8, the Minister can order the detention of any person without trial for up to two years if the Minister is satisfied that the detention is necessary to prevent that person from acting in any

³³ The law is valid notwithstanding that it is inconsistent with any of the provisions of MALAY. CONST. art. 5, 9, 10, and 13 which respectively provide for the rights to personal liberty, including due process; freedom of movement and from banishment; freedom of speech, assembly and association; and property guarantees.

³⁴ When presenting the bill in Parliament on June 21, 1960, Tun Razak, at that time the Deputy Prime Minister and Home Minister, stated there was “still a need for the people to be protected from communists’ subversion.” Tommy Thomas, *Human Rights in 21st Century Malaysia*, ALIRAN ONLINE, <http://www.aliran.com/hr/tt1.html> (last visited Mar. 28, 2007).

³⁵ Baradan Kuppusamy, *Malaysia's Security Blanket*, ASIA TIMES, Aug. 6, 2005, available at http://www.atimes.com/atimes/Southeast_Asia/GH06Ae01.html; see also AMNESTY INTERNATIONAL, REPORT ON MALAYSIA, HUMAN RIGHTS UNDERMINED: RESTRICTIVE LAWS IN A PARLIAMENTARY DEMOCRACY, A.I. Index: ASA (June 28, 1999), available at <http://www.web.amnesty.org/ai.nsf/index/ASA280061999>.

³⁶ ISA is Not Exercised Arbitrarily, Right of Reply by Malaysia Before the 59th Session of the U.N. Commission on Human Rights (Apr. 4, 2003), in 23(4) ALIRAN MONTHLY (2003), available at <http://www.aliran.com/oldsite/monthly/2003/4b.html>.

³⁷ ISA, *supra* note 3, at sec. 73.

³⁸ *Id.* at sec. 73(1)(b).

manner prejudicial to the security of Malaysia. This order can be extended for an indefinite period by the Minister.

In the introductory speech of the ISA Bill in Parliament in 1960, Tun Razak assured Parliament that the ISA would be used with the “utmost care” to avoid its abuse.³⁹ Reflecting this rhetoric, Prime Minister Badawi in 2005 claimed that enforcement of the ISA “has always been undertaken in the most decent moral conduct and with careful detail, to curb any element who jeopardizes the security of the country.”⁴⁰

Despite these assurances, the ISA has been labeled “the government’s most potent weapon of repression.”⁴¹ The list of ISA detainees is in the thousands, with periods of detention ranging from a few months to 16 years.⁴² Detainees have been denied access to their families and lawyers and have experienced threats and torture whilst in detention.⁴³ Former ISA detainee Tian Chua stated, “[w]e were routinely tortured during interrogations, stripped naked, beaten with broomsticks[,] and threatened with rape.”⁴⁴

The government has been particularly criticized for its use of the ISA to silence political opponents. A prominent example of one of the many is the 1998 arrest and detention of Anwar Ibrahim, former Deputy Prime Minister to Prime Minister Mahathir, who was detained under the ISA⁴⁵ and later convicted of sodomy and corruption in a politically motivated trial.⁴⁶ Ibrahim’s arrest and detention caused a national and international uproar. Ibrahim was released in 2004. Ibrahim’s case led to increased calls for the

³⁹ Thomas, *supra* note 34.

⁴⁰ *ISA and RRA Arrest are Not Harum-Scarum, Says PM*, ASIA TIMES, June 28, 2005, available at http://www.suaram.net/display_article.asp?ID=282.

⁴¹ Fritz & Flaherty, *supra* note 16, at 1353.

⁴² Kuppusamy, *supra* note 35; *see also* Thomas, *supra* note 34.

⁴³ AMNESTY INTERNATIONAL, MALAYSIA: THE INTERNAL SECURITY ACT (ISA) (Mar. 1, 2003), <http://web.amnesty.org/library/Index/ENGASA280062003?open&of=ENG-MYS>.

⁴⁴ Kuppusamy, *supra* note 35.

⁴⁵ *Id.*

⁴⁶ Human Rights Watch, *supra* note 4.

repeal of the dangerous legislation.⁴⁷ Reflecting on the 45th anniversary of the ISA, Baradan Kuppusamy lamented that the ISA has “served as an instrument of terror of the state and used consistently against dissidents who have defended the democratic and human rights of the Malaysian people.”⁴⁸

IV. THE ISA AND HISTORY OF JUDICIAL REVIEW

Given the extreme range of powers granted under the ISA and the propensity for the executive to abuse those powers, it is crucial for the Malaysian judiciary to be resilient in the protection of civil rights. However, a combination of the statutory limitations on judicial review and a “judiciary, with rare, courageous exceptions, disinclined to read the provisions to ameliorative effect,”⁴⁹ has meant that this source of protection is lacking.

The courts have traditionally shown significant deference to the executive in ISA habeas corpus applications. Originally, the courts adopted a subjective test when reviewing the exercise of discretion, which meant it was unnecessary to find that the grounds for acting were objectively reasonable. In *Karam Singh v. Menteri Hal Ehwal Dalam Negeri*, the 1969 habeas corpus case establishing the subjective test, Judge Suffian stated:

Whether or not the facts on which the order of detention is to be based are sufficient or relevant, is a matter to be decided solely by the executive. In making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact.⁵⁰

A subsequent case that adopted the subjective test is *Theresa Lim Chin Chin v. Inspector General of Police*.⁵¹ Lim, the

⁴⁷ *Id.*

⁴⁸ Kuppusamy, *supra* note 35.

⁴⁹ Fritz & Flaherty, *supra* note 16, at 1415.

⁵⁰ *Kerajaan Malaysia*, *supra* note 1.

⁵¹ *Theresa Lim Chin Chin v. Inspector General of Police*, [1988] 1 MLJ 293 (Sup. Ct., Kuala Lumpur, 1988) [hereinafter *Lim*].

leader of the opposition party DAP, was arrested during *Operasi Lalang* — a police crackdown on critics of the government. The court, in rejecting the habeas corpus application, held that the subjective test applied to both police and ministerial ordered detentions as “one scheme of preventive detention.”⁵²

There have been some small signs of retreat from the subjective test. For example, in the case of *Karpal Singh v. Menteri Hal Ehwal Dalam Negeri*,⁵³ Judge Peh Swee Chin held that there are exceptions to the non-justiciability of the Minister’s mental satisfaction, including *mala fides*. In that case, one of the six charges was factually incorrect and made in error. Viewed objectively, the detention was held to be *mala fide* as it was made without due care and caution. Hence, habeas corpus was granted.⁵⁴

In response to this expression of independence by the judiciary, in a 1989 amendment, the government moved to all but completely eliminate the power of judicial review of decisions made under the ISA. The new section 8B of the ISA states that “there will be no judicial review in any court . . . of any act done or decision made by the . . . Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement.”⁵⁵ Consequently, habeas corpus applications must be based on the small window of opportunity relating to the initial 60 day orders of detention made by the police under section 73 and procedural issues relating to section 8 ministerial orders. Demonstrating some willingness to counter excesses of the executive power, subsequent cases have upheld ISA habeas corpus applications. In the High Court decision of *Abdul Ghani Haroon v. Ketua Polis*

⁵² *Id.* at 296.

⁵³ *Karpal Singh v. Menteri Hal Ehwal Dalam Negeri*, [1988] 1 MLJ 468 (High Court, 1988); *cf. Inspector-General of Police v. Tan Sri Raja Khalid bin Raja Harun*, [1988] 1 MLJ 182, 188 (Sup. Ct., Kuala Lumpur, 1987) (affirming expressly the subjective test, yet also applying the objective test and stating “if facts are furnished voluntarily, exhaustively and in great detail as in this case for consideration of the court it would be naive to preclude the judge from making his own evaluation and assessment to come to a reasonable conclusion”).

⁵⁴ *Karpal Singh*, 1 MLJ 468 at 475.

⁵⁵ ISA, *supra* note 3, at sec. 8B.

*Negara*⁵⁶ Judge Hishamudin ruled that procedural irregularities, including failures to permit access to lawyers and family, and failures to state the grounds for arrest and extension of the detention, made the police detention invalid. Hishamudin also noted that a denial of these rights “makes a mockery of the right to apply for habeas corpus as guaranteed by art 5(2) of the Constitution.”⁵⁷ The Judge further stated that, “it is perhaps time for Parliament to consider whether the ISA . . . is really relevant to the present day situation.”⁵⁸

Another case upholding a habeas corpus application was the Federal Court case of *Mohamad Ezam Bin Mohd Noor v. Ketua Polis Negara*.⁵⁹ The appellants in that case were *reformasi* activists and arrested for allegedly planning a large street demonstration. The court held that the purpose of detaining the appellants was not for national security purposes as the police did not question them about their alleged military behavior, but questioned them for the ulterior purpose of intelligence gathering “unconnected with national security.”⁶⁰ Hence, the detention order made under section 73 was *mala fides* based on procedural grounds. Breaking with precedent, the court applied an objective test to the police’s decision because of the “enormous power conferred upon police officers . . . and the potentially devastating effect . . . arising from any misuse thereof.”⁶¹ However, the court then stated sections 73(1) and 8 “although connected, can nevertheless operate quite independently.”⁶² Hence, the incorrect police decision did not automatically invalidate the later ministerial detention that was still based on the subjective test. This brief analysis of the ISA’s judicial review history reveals that generally, the courts have sanctioned executive action. However, recently, there have been exceptions where the court has been

⁵⁶ *Abdul Ghani Haroon v. Polis Negara* [2001] 2 MLJ 689 (Malay. High Ct., 2001).

⁵⁷ *Id.* at 690-91, 706.

⁵⁸ *Id.* at 691.

⁵⁹ *Mohamad Ezam Bin Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449 (Malay. Federal Court 2001) [hereinafter, *Noor Appeal*].

⁶⁰ *Id.* at 470.

⁶¹ *Id.* at 476.

⁶² *Id.* at 474.

willing, in the small opportunity afforded to it, to put a check on executive power.

V. SEPTEMBER 11 AND THE FALL OF THE JUDICIAL TOWER

In Malaysia, as the fear of terrorism intensified post September 11, human rights have become particularly vulnerable with significant local and international support for the prioritization of stability and security over individual freedoms. This shift is evidenced by the reduction in pressure from other governments to repeal or amend the repressive ISA. According to Human Rights Watch, “[t]he September attacks also prompted a major shift in U.S. policy regarding political repression in Malaysia.”⁶³ In July 2002, Malaysian Foreign Minister Syed Hamid met with U.S. Secretary of State Colin Powell where Powell stated “we have always felt that the [Ibrahim trial] was flawed.”⁶⁴ State department officials indicated that a meeting between President Bush and Mahathir could only occur if treatment of political dissidents such as Anwar Ibrahim was improved.⁶⁵

However, since September 11, Bush has refrained from making any public comments about the use of preventative detention and even agreed to a visit by Mahathir in May 2002 to “thank him for Malaysia’s efforts against terrorism.”⁶⁶ Outcry from other states over the use of the ISA in the Ibrahim trial and the arrest of ten political *reformasi* activists in early 2001 has been muted.⁶⁷ According to Amnesty International, “governments that were once critical of such legislation have suddenly fallen silent. Having enacted similar security legislation in their own countries, they no longer speak out for the protection of fundamental human rights in Malaysia.”⁶⁸ While the ISA has long been used to

⁶³ Human Rights Watch, *supra* note 4.

⁶⁴ U.S. Dep’t of State, Press Briefing with Foreign Minister Datuk Seri Syed Hamid Albar of Malaysia (July 30, 2002), *available at* <http://www.state.gov/secretary/former/powell/remarks/2002/12275.htm>.

⁶⁵ *Id.*

⁶⁶ Human Rights Watch, *supra* note 4.

⁶⁷ Therese Lee, *Malaysia and the Internal Security Act: The Insecurity of Human Rights After September 11*, 2002 SING. J. LEGAL STUDIES 56, 61 (2002).

⁶⁸ Amnesty International, *supra* note 43.

arbitrarily restrict fundamental liberties, in the age of terrorism, its use now has an increased air of legitimacy.

As discussed previously, this pro-security environment requires the Malaysian judiciary to stand firm as the protector against government excesses. However, although cases such as *Noor* and *Haroon* have indicated that the judiciary may be assuming this protective role, in more recent cases involving suspected terrorists, the courts have again sanctioned the notion that it is the executive's role alone to decide questions of security. In her 2002 article, Therese Lee observed that the September 11 attacks had disturbing implications for the Malaysian judiciary.⁶⁹ Since the attacks, a number of cases involving habeas corpus applications of ISA detainees allegedly involved in terrorist activities have been handed down.

VI. TERRORISM CASES AND JUDICIAL RESPONSES

In efforts to combat terrorism, the Malaysian government has conducted a number of sweeps resulting in arrests and detentions under the ISA. As of June 2005, 68 detainees were purported members of Jemaah Islamiah (JI), a terrorist organization.⁷⁰ Nine detainees were also alleged to have belonged to Kumpulan Militan Malaysia (KMM). KMM has been described as an invisible group due to the lack of information released regarding its activities.⁷¹ The government has claimed that KMM is "an international terrorist organisation that is attempting to topple the government and establish an Islamic state by force."⁷²

A number of members of the Islamic opposition party, PAS, have also been accused by the government of being KMM members. PAS youth leader, Mahfuz Omar, stated "[t]he government wants to link us to KMM and make the non-Muslims

⁶⁹ Lee, *supra* note 67, at 71.

⁷⁰ *Waves of ISA Arrests in Malaysia since April 2001*, ALIRAN (August, 2006) available at <http://www.aliran.com/oldsite/monthly/2001/3e.htm> [hereinafter "*ISA Arrests*"].

⁷¹ Press Release, South Asian Human Rights Documentation Centre and Human Rights Documentation Centre, Malaysia's ISA: No Limits (Dec. 30, 2002), at <http://www.hrdc.net/sahrdc/hrfeatures/HRF70.htm>.

⁷² *Id.*

frightened of PAS.”⁷³ In 2001, ten people affiliated with PAS, including four youth leaders, were detained under the ISA. The government claimed that the ten belonged to KMM. In October 2001, Nik Adli bin Nik Abdul Aziz, the son of a prominent PAS leader made a habeas corpus application in the High Court challenging his section 73 detention order.⁷⁴ The court rejected the prosecutor’s preliminary objection that the hearing was frivolous because the applicant’s section 73 detention had been subsequently converted to a section 8 detention. The court stated it was necessary to consider the validity of the section 73 order as it would “certainly taint the subsequent impugned detention order.”⁷⁵

Despite this preliminary ruling, the court went on to reject the habeas corpus application as the applicant failed to rebut the assumption that a person detained under section 73 was in lawful custody.⁷⁶ This was mainly due to the finding of fact that the authorities had properly informed the applicant of the grounds of arrest.⁷⁷ The detention of the applicant and four of the other PAS affiliated detainees was extended a second time for two years by the Minister in September 2003.⁷⁸ The legality of this extension was challenged in the High Court in *Nik Adli bin Nik Abdul Aziz & Ors v. Ketua Polis Negara & Ors* (“Adli (2)”).⁷⁹ The applicants argued various procedural faults, including the failure to give a statement on the factual allegations on which the extension order was based.⁸⁰ The High Court dismissed the application holding the need for a statement of factual allegations had not arisen as the facts were the same as those relied on in the original decision; hence, “there had been no breach of any procedural

⁷³ Lee, *supra* note 67, at 62.

⁷⁴ *Nik Adli bin Nik Abdul Aziz v. Ketua Polis Negara* [2001], 4 MLJ 598 (Malay. High Court 2001) [hereinafter *Adli (1)*].

⁷⁵ *Id.* at 603.

⁷⁶ *Id.* at 607.

⁷⁷ *Id.*

⁷⁸ *Nik Adli bin Nik Abdul Aziz v. Ketua Polis Negara* [2005], 3 MLJ 425 (Malay. High Court 2004) at 428 [hereinafter *Adli (2)*].

⁷⁹ *Id.*

⁸⁰ *Id.* at 426.

requirement.”⁸¹ The applicants then appealed to the Federal Court which upheld the High Court’s dismissal of the application.⁸²

The way the courts have dealt with habeas corpus applications of detainees accused of terrorist activities is further illustrated in the Nasharuddin Bin Nasir cases. Nasir was arrested on April 17, 2002 for suspected links with KMM.⁸³ The High Court applications were split into two separate proceedings. In the initial High Court hearing, the applicant claimed the right to meet a lawyer, a right entrenched in article 5(3) of the Constitution.⁸⁴ Judge Suriyadi held that the police action was *mala fide* by unfairly denying this access during his detention.⁸⁵

Judge Suriyadi noted that the behavior of the police was “coldly calculative” by allowing access of the family immediately before the trial, but deliberately denying it for crucial legal advice.⁸⁶ In a bold statement, Judge Suriyadi suggested the police force was responsible for the counsel’s inability to meet with the detainee the next day as ordered because the detainee had to be taken to the hospital due to a rare and strange onset of illness:

The noble intention of arresting unsavory characters, with the sole purpose of ensuring permanent stability in Malaysia, surely has the backing of all right-minded citizens. But let not the very people who are supposed to be our protectors, go overboard and end up hijacking the hard-earned democratic processes, to the extent of sidelining a court order.⁸⁷

⁸¹ *Id.* at 428.

⁸² *Noor Appeal*, 4 MLJ at 462.

⁸³ *ISA Arrests*, *supra* note 70.

⁸⁴ *Nasharuddin bin Nasir v Kerajaan Malaysia & Ors* [2002] 6 MLJ 65, 68 (Malay. High Court 2002) [hereinafter *Nasir (1)*].

⁸⁵ *Id.* at 72.

⁸⁶ *Id.*

⁸⁷ *Id.*

This application was upheld. Hence, Nasir could proceed with the second substantial habeas corpus application again in the High Court.

In the second proceeding, *Nasharuddin bin Nasir v. Kerajaan Malaysia & Ors (No 2)* (“*Nasir (2)*”), Judge Suriyadi upheld the habeas corpus application⁸⁸ and held that the section 73 detention order was illegal for three main reasons. Firstly, the initial detention period was automatically extended.⁸⁹ Secondly, the officer did not specifically identify the purpose of the extension as required in *Noor*.⁹⁰ Thirdly, Suriyadi held that the respondents failed to satisfy the objective test.⁹¹ Each of the three grounds on its own would have been sufficient to tarnish the legal status of the detention.⁹² Suriyadi concluded that because the initial detention was tainted, the subsequent section 8 order of the Minister must similarly be tainted.⁹³ Hence, the appeal was allowed.

Despite the High Court *Nasir* decisions, any hope that the judiciary would be willing to question the legality of decisions made under the ISA was swiftly stamped out by the Federal Court appeal *Kerajaan Malaysia & Ors v. Nasharuddin Nasir*⁹⁴ (“*Nasir (3)*”), which denied habeas corpus. Firstly, in response to an argument by Nasir’s counsel, the court held that the ouster clause in section 8B of the ISA was constitutionally valid; and thus, the lower court had no jurisdiction to review the Minister’s decision except on procedural grounds.⁹⁵ Secondly, the Federal Court

⁸⁸ *Nasharuddin bin Nasir v Kerajaan Malaysia & Ors (No. 2)* [2002] 4 MLJ 617, 628 (Malay. High Court 2002) [hereinafter *Nasir (2)*].

⁸⁹ *Id.* at 623.

⁹⁰ *Id.* at 626; *see also Noor Appeal*, 4 MLJ 449.

⁹¹ Judge Suriyadi quoted *Noor* as precedent for the objective test which questions whether the officer has satisfied the preconditions in section 73(1)(a) and (b) and had the required “reason to believe” that the applicants were about to act or likely to act in a manner prejudicial to national security when making a section 73 detention order. *Nasir (2)*, 4 MLJ at 627

⁹² *Id.* at 628.

⁹³ *Id.* Judge Suriyadi cited the first *Nik Adli* case to support this view in the case *Nik Adli bin Nik Abdul Aziz v. Ketua Polis Negara* [2001], 4 MLJ 598 (Malay. High Court 2001) *Adli 1* 4 MLJ 598.

⁹⁴ *Kerajaan Malaysia*, *supra* note 1.

⁹⁵ *Id.*

overturned the decision that a tainted section 73 order immediately invalidated the subsequent section 8 order.⁹⁶ The Minister's order had to be examined under a separate habeas corpus application as suggested in *Noor*.⁹⁷ The Federal Court further stated that even if the judiciary "feels compelled to intervene" and consider the validity of the Minister's decision, the subjective test in *Karam Singh*⁹⁸ is appropriate. The court held, on these facts, that the order was valid because the Minister was subjectively satisfied that the conditions were met.⁹⁹

This attitude of non-interference is reflected in other recent cases including *Abdul Razak Bin Baharudin & Ors v. Ketua Polis Negara & Ors* [2004]¹⁰⁰ and *Ahmad Yani Bin Ismail & Anor v. Inspector General of Police & Ors* [2004]¹⁰¹ ("*Ismail*"). In *Ismail*, a 2004 High Court decision, a habeas corpus application was brought by detainees accused of association with JI activities.¹⁰² The High Court confirmed the arguments in *Nasir (3)*¹⁰³ including the conclusion that the section 8 order was not dependent on the validity of the section 73 order.¹⁰⁴ It also affirmed that the satisfaction of the Minister was not objectively justiciable.¹⁰⁵

The applicants argued that article 149 of the Constitution, under which the ISA was made, was invalid as it conflicts with article 11 of the Constitution, which guarantees freedom of religion. The court rejected this argument stating that the guarantee under article 11 was not absolute and "does not authorize any act contrary to any general law relating to public order, public health or morality."¹⁰⁶ The applicants also stated the

⁹⁶ *Id.*

⁹⁷ *Id.* (citing *Noor Appeal*, 4 MLJ at 482).

⁹⁸ *Id.* (citing *Karam Singh*, 2 MLJ at 159).

⁹⁹ *Id.*

¹⁰⁰ 7 MLJ 267 (Malay. High Court 2004).

¹⁰¹ 4 MLJ 636 (Malay. High Court 2005).

¹⁰² *Id.* at 636.

¹⁰³ *Kerajaan Malaysia, supra* note 1.

¹⁰⁴ *Ismail*, 4 MLJ at 656.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 666 (quoting MALAY CONST. art. 11(5)).

ouster clause in section 8B was invalid because it removed the fundamental right to seek judicial review and was “inimical to the rule of law.”¹⁰⁷ Like the Federal Court in *Nasir (3)*, the court upheld the validity of section 8B, finding the High Court does not have the inherent jurisdiction to declare a law (i.e. section 8B) made by Parliament *ultra vires* as it would amount to “rendering an advisory opinion which would tantamount to judicial vandalism.”¹⁰⁸

VII. ASSESSING TERRORISM’S IMPACT ON THE MALAYSIAN JUDICIARY

Although constrained by the boundaries outlined in the ISA, the court still has discretion to independently assess the validity of executive decisions made under the legislation. However, recent ISA cases relating to alleged terrorists indicate that the court is unwilling to play its essential role in upholding the rule of law and instead has acted largely as a rubber stamp for executive action. This is evidenced by the stance courts have taken in relation to a number of key issues that have arisen.

The first issue from the judgment is the validity of section 8B of the ISA, which shields the Minister’s powers from judicial review.¹⁰⁹ This has been raised by defense counsel in cases including *Nasir (3)* and *Ismail*. In both cases, the court refused to question the section’s validity as it would be seen as an improper questioning of a legislative action with a clear intent. This stance by the court, confirming the ability of the legislature to oust judicial review, has serious consequences for the rule of law.

A second issue that emerged from the judgments is whether sufficient reasons for detention must be provided to the detainee. Without an adequate reason for detention, it is practically impossible for a detainee to challenge the detention in a habeas corpus application. In *Adli (2)*, the court held that the Minister did not have to present a second statement of reasons when making the decision to extend the detention for another two

¹⁰⁷ *Id.* at 668.

¹⁰⁸ *Id.* at 639.

¹⁰⁹ Section 8B(1) of the ISA states, “[t]here shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the *Yang di-Pertuan Agong* or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.” *Id.* (Emphasis added).

years.¹¹⁰ Thus, a person may be held indefinitely on a series of ministerial orders based on an original and unchallenged statement of allegations. In *Ismail*, the appellants argued that the officers did not explain the reasons for arresting the detainees as required under article 5(3) of the Constitution.¹¹¹ The officers claimed immunity from disclosure under section 16 of the ISA and article 151(3) of the Constitution. Article 151(3) provides that information does not have to be supplied if it is the opinion of the authority that disclosure would be against the national interest. The court concluded that article 151(3) had a “wide and embracing” meaning.¹¹² Furthermore, even though section 16 is in a different section of the ISA than the detention powers, it is still relevant.¹¹³ The court concluded that the disclosure immunity still applied to section 73 orders and “relevant legislation has to be changed . . . before the court could compel the disclosure of information where national security consideration is specifically impleaded for nondisclosure of information.”¹¹⁴ Again, the court took a restrictive view by upholding the ability of the officers to withhold information regarding the detainee’s arrest that they considered to be “against the national interest,” hence severely inhibiting any challenge of the detention.

The third issue arising from the judgments is whether the validity of a section 8 order is dependent on the validity of a preceding section 73 order. Judge Suriyadi in the initial High Court decisions of *Adli (1)* and *Nasir (2)* refused to separate the two orders. Suriyadi stated in the latter case, “[I]f the roots are bad, surely the fruits too will be bad.”¹¹⁵ This proposition was set out in the 1988 case, *Theresa Lim Chin Chin & Ors v. Inspector General of Police*.¹¹⁶ However, subsequent cases such as *Nasir (3)*¹¹⁷ and *Ismail*¹¹⁸ have overruled this position by holding the two orders are separate.

¹¹⁰ *Adli (2)*, 3 MLJ at 430.

¹¹¹ *Id.*

¹¹² *Id.* at 687.

¹¹³ *Id.*

¹¹⁴ *Id.* at 691.

¹¹⁵ *Nasir (2)*, 4 MLJ at 628.

¹¹⁶ *Lim*, 1 MLJ 293. In this case, the conflation of the two detentions means the subjective test then applied to both orders.

¹¹⁷ *Kerajaan Malaysia, supra* note 1.

This leads to the anomalous situation where a ministerial order can be upheld despite the fact that the preceding police detention can be completely invalid and made *ultra vires*. The severely limited review of ministerial orders due to the ouster in section 8B and the confirmation of the subjective test for the Minister's discretion has indicated that the court's power of ISA judicial review has been largely removed. Although review of section 73 orders still technically remains, the executive can easily abuse the system by simply imposing a section 8 detention to avoid scrutiny of the validity of the initial arrest. This tactic has been attempted in the detention of Adli where the Minister imposed the subsequent section 8 detention the day before the application challenging the police detention was due to be heard in the court.

These trends in judicial reasoning are indications of the way the judiciary sees its role in Malaysian society particularly in the context of global terrorism. In these judgments, the courts have indicated a distinct unwillingness to question the exercise of executive power in matters of national security. The courts appear to have eliminated national security from their sphere of review. The Federal Court in *Nasir (3)* defined the role of the judiciary as follows:

It seems apparent from these cases that where matters of national security and public order are involved, the court should not intervene by way of judicial review or be hesitant in doing so as these are matters especially within the preserve of the executive, involving as they invariably do, policy considerations and the like.¹¹⁹

Concurring with this view, the court in *Ismail* concluded, "[t]he executive, by virtue of its responsibilities, has to be the sole judge of what the national security requires."¹²⁰ This major exception to the rule of law presents a dangerous precedent for the future of individual liberties in Malaysia.

¹¹⁸ *Ismail*, 4 MLJ at 667.

¹¹⁹ *Kerajaan Malaysia*, *supra* note 1.

¹²⁰ *Ismail*, 4 MLJ at 652.

VIII. CONCLUSION

The “War on Terror” has created a specific challenge for judiciaries around the world as governments have moved to introduce laws, often granting significant powers to the executive branch including preventative detention, in order to counter the terrorist threat. In this environment, it is essential that the judiciary uphold its role as the protector of individual rights from arbitrary action. However, the actions of the Malaysian judiciary indicate that courts may not necessarily play this role and instead, defer all matters of national security to the executive.

This essay has examined judicial review of decisions made under the ISA, Malaysia’s Draconian security legislation which provides for indefinite preventative detention. After suffering a number of attacks on its independence, the judiciary was hesitant to directly challenge government decisions. Despite this, there has been a sign of reassertion by the judiciary of its independence in cases overruling the subjective test for police discretion and upholding habeas corpus applications.

However, as the era of terrorism brought new legitimacy to legislation such as the ISA, the Malaysian judiciary retreated from this stance; and instead, in matters relating to national security, has left the executive effectively as judges in their own cause. This attitude is exhibited in the courts’ treatment of issues such as the constitutionality of the ISA judicial review ouster clause, the provision of reasons for detention, and the separation of the two detention orders. As noted by Justice Kirby, “in the long run, the fundamental struggle against terrorism is strengthened, not weakened, by court decisions that insist on strict adherence to the rule of law.”¹²¹ Therefore, it is essential that the Malaysian judiciary uphold its role in order that its independence not become another victim of terrorism.

¹²¹ Kirby, *supra* note 10, at 343.