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The Past, Present and Future of the Internal Security Act

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The Past, Present and Future of the Internal Security Act

Jack Tsen-Ta *Lee*[1]

Assistant Professor Jack Tsen-Ta Lee, who teaches and researches constitutional and administrative law at the School of Law of the Singapore Management University, introduces the Internal Security Act (ISA) and assesses its continued relevance today.

MORE THAN 60 YEARS have passed since a law permitting detention without trial first took effect in Singapore. The need for the current version of this law, the Internal Security Act (ISA), has been questioned on many occasions, most recently last year when Malaysia announced that it was reviewing its own version of the Act. Each time, the Government has reaffirmed the statute's relevance. Is this statute still necessary in modern-day Singapore?

The ISA: A brief history

Preventive detention was first introduced in the Colony of Singapore in July 1948 when the Emergency Regulations Ordinance 1948 (No 17 of 1948) came into force. The Ordinance, based on analogous Malayan legislation that took effect the same month, was intended mainly to counter violence by communists in the Federation of Malaya which was becoming a threat to safety and peace. Regulations issued under the law had to be reviewed and, if necessary, reissued every few months.

In October 1955, this requirement was removed by the Preservation of Public Security Ordinance 1955 (No 25 of 1955). Chief Minister David Marshall cited the Hock Lee riots, which took place in May 1955, as a reason for the new Ordinance. Under the PPSO, the Chief Secretary could make an order directing that a person be detained for a period not exceeding two years if the Governor in Council was satisfied that the detention was necessary to prevent that person from acting in any manner prejudicial to the security of Malaya, the maintenance of public order, or the maintenance of essential services. This statutory wording is significant because it appears more or less unchanged in the present-day ISA.

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Five years later, in 1960, the Federation of Malaya enacted the Internal Security Act 1960 (No 18 of 1960) ('Malayan ISA'), to replace its Emergency Regulations Ordinance 1948. Like Singapore's PPSO, the Malayan ISA empowered a person to be detained for up to two years if the Yang di-Pertuan Agong – the Head of State of Malaya – was satisfied that such action was necessary for the Federation's security. Thus, when Singapore merged with the Federation in 1963, this Act applied to Singapore. Between 1963 and 1965, laws were passed by the Singapore legislature to replace various sections of the PPSO with provisions of the Malayan ISA. Finally, upon Singapore's independence from Malaysia on 9 August 1965, the Malayan ISA was made applicable to Singapore.

Constitutional basis

The ISA is an unusual piece of legislation as, on its face, detention without trial appears to violate a number of the fundamental liberties guaranteed by Part IV of the Constitution. These include the right not to be deprived of personal liberty and the rights to equality before the law and equal protection of the law, respectively protected by Articles 9(1) and 12(1) of the Constitution.

However, the Act is rescued from such potential invalidity by Article 149. Entitled "Legislation against subversion", the first clause of the Article states:

> If an Act recites that action has been taken or threatened by any substantial body of persons, whether inside or outside Singapore —
>
> (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property;
> (b) to excite disaffection against the President or the Government;
> (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence;
> (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
> (e) which is prejudicial to the security of Singapore,
>
> any provision of that law designed to stop or prevent that action... is valid notwithstanding that it is inconsistent with Article 9, 11, 12, 13 or 14, or would, apart from this Article, be outside the legislative power of Parliament.

Therefore, apart from Articles 9 and 12, the above provision immunizes the ISA from inconsistency with constitutional provisions prohibiting retrospective criminal laws and repeated criminal trials (Article 11), preventing citizens from being banished and guaranteeing them freedom of movement throughout Singapore (Article 13), and giving effect to the rights to freedom of speech, assembly and association (Article 14).

To comply with Article 149, the ISA contains the following preamble:

> Whereas action has been taken by a substantial body of persons to cause a substantial number of citizens to fear organised violence against persons and property:
>
> And Whereas action has been taken and threatened by a substantial body of persons which is prejudicial to the security of Malaya:
>
> And Whereas Parliament considers it necessary to stop or prevent that action:

> Now therefore pursuant to Article 149 of the Constitution be it enacted by the Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong with the advice and consent of the Dewan Negara and Dewan Ra'ayat in Parliament assembled, and by the authority of the same, as follows...

This recital seems oddly out of date, but one should recall that it dates from the Malayan ISA of 1960.

How the Act works

According to section 8(1) of the ISA, before a person may be detained without trial under the ISA, the President must be satisfied that such detention is necessary "with a view to preventing that person from acting in any manner prejudicial to the security of Singapore or any part thereof or to the maintenance of public order or essential services therein". The President does not act in his personal discretion but must follow the Cabinet's advice on the matter. In other words, it is Cabinet that makes the call as to whether a person constitutes a security risk.

Once the President has expressed his formal satisfaction, the Minister for Home Affairs is empowered to make an order directing that the person in question be detained for a period not exceeding two years. Alternatively, instead of detaining the person, the Minister may make orders restricting the person's activities and places of residence and employment; imposing curfews; requiring the person to notify the authorities of his or her movements; and prohibiting him or her from addressing public meetings; from holding office in, taking part in the activities of, or acting as adviser to, any organization or association; from taking part in political activities; or from travelling to any part of Singapore or abroad.

Upon a detention order being issued, a detainee has the following rights under the ISA:

- He or she must be informed of the grounds of detention as soon as possible.
- He or she must be informed of the factual allegations on which the detention order is based. However, the authorities need not disclose information that is against the national interest to release.
- He or she must be served with a copy of the detention order as soon as possible after it is made.
- He or she may make representations against the detention order to an advisory board, and must be informed of the right to do so within 14 days of the service of the detention order.

As a safeguard against governmental interference, Article 151 of the Constitution provides that the President is to appoint all the members of an advisory board reviewing a person's detention. He exercises personal discretion in this regard and does not have to act on the Cabinet's advice. An advisory board is made up of a chairman who is, formerly was, or is qualified to be a Supreme Court Judge, and two other members chosen after consultation with the Chief Justice.

Within three months of the date of detention, an advisory board is required to consider the detainee's representations and recommend to the President whether the detention order should be confirmed or not. At this point, the President exercises a

special discretion that serves to protect the detainee. According to Article 151(4), if there is a difference of opinion between the Minister and the advisory board – the Minister wishes to continue detaining the person, while the advisory board recommends his or her release – the President exercises personal discretion to decide whether or not the detention should carry on.

Although a single period of detention cannot exceed two years, the President, acting on the Cabinet's advice, can direct that the detention period be extended for a further period or periods not exceeding two years at a time. If such a step is taken, at least once every 12 months an advisory board must review the detention order and decide if it is still required.

The Minister for Home Affairs has power under section 10 of the ISA to suspend a detention order upon certain conditions, such as confining the former detainee to specified parts of Singapore or disallowing him or her to leave home between certain hours of the day. Any suspension of a detention order can be revoked as the Minister thinks fit.

Can a detention order be challenged in court?

You will recall that section 8(1) of the ISA makes a person's detention dependent on whether the President (acting on the Cabinet's advice) is satisfied that person poses a risk to national security, among other things. Similarly, section 10 states that the Home Affairs Minister can revoke a suspension direction if satisfied that the person has failed to observe any condition imposed, or that it is necessary in the public interest to do so.

However, is such satisfaction subjective or objective? To put it another way, can a person apply to the High Court for judicial review of his or her detention, and ask a judge to examine if there are objective grounds for the satisfaction? Or is this a decision left entirely to the Government's subjective discretion?

In a 1971 case called *Lee Mau Seng v Minister for Home Affairs*,[2] the High Court took the view that it could not examine whether the grounds upon which a detention order was based were sufficient or not. The judge said that the President's state of mind, when acting in accordance with the Cabinet's advice, was "a purely subjective condition".

The Internal Security Department launched Operation Spectrum in 1987, which led to the arrest and detention of 16 people said to have "acted in a manner prejudicial to the security of Singapore by being involved in a Marxist conspiracy to subvert the existing social and political system in Singapore, using communist united front tactics, with a view to establishing a Marxist state",[3] according to one of the statements on which a detention order was based. After a year's detention, the detainees had their detention orders suspended in September 1987. The following April, they issued a press statement denying involvement in any Marxist conspiracy. The Home Affairs Minister then revoked the suspension orders. This led to the detainees challenging their detention in court.

In December 1988, the Court of Appeal handed down a landmark decision called *Chng Suan Tze v Minister for Home Affairs*.[4] It ruled in the detainees' favour on a narrow, technical ground: that the Minister had not shown sufficient evidence of

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2 [1971–1973] SLR(R) [*Singapore Law Reports* (*Reissue*)] 135, High Court.

3 Reproduced in *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at 531, para 4, Court of Appeal.

4 *Ibid*.

the President's satisfaction. However, the case is better known for other important statements of law that were not strictly required for the conclusion reached by the Court. Applying numerous Commonwealth cases decided since 1971, the Court of Appeal held that *Lee Mau Seng* should no longer be followed. The discretion conferred by sections 8 and 10 of the ISA had to be justified objectively, and it was the duty of the courts to decide whether it had been properly exercised.

The Court of Appeal also found these sections inconsistent with various constitutional clauses. In 1988, Article 149(1) of the Constitution did not protect the ISA against inconsistency with the rights to equality and equal protection (Article 12) and the fact that judicial power may only be exercised by the courts (Article 93). The Court held that sections 8 and 10 were incompatible with these Articles unless they were interpreted to allow the courts to examine the facts on which detention orders were based, and thus prevent the executive from arbitrarily detaining people. As the Court put it: "[T]he notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power."[5]

The Government disagreed strongly with the legal principles laid down in the case. Less than two weeks later, it announced that it would restore the law to its pre-*Chng Suan Tze* state. Bills seeking to amend the Constitution and the ISA were introduced and enacted by Parliament on an urgent basis, and they came into force on 25 January 1989. The Constitution was amended so that the ISA would not be unconstitutional even if it is inconsistent with Articles 12 and 93. The ISA itself was amended to freeze the law relating to judicial review of any executive discretion under the Act as at 13 July 1971 – the day *Lee Mau Seng* was decided. A new provision, section 8B(1), now stated that "no part of the law before, on or after that date of any country in the Commonwealth relating to judicial review shall apply". Other fresh provisions severely restricted judicial review of acts done or decisions made by the President or the Minister under the ISA, and abolished appeals to the Privy Council in such cases. (Appeals to the Privy Council in all cases were eventually abolished in 1994.) Finally, retrospective effect was given to the amendments so that they applied to the Operation Spectrum detainees.

One of the detainees, Teo Soh Lung, tried to challenge the validity of these amendments to the ISA before the High Court and Court of Appeal,[6] but was unsuccessful. The Court of Appeal held that Parliament had effectively turned back the clock to 1971, and so it could not consider whether there were objective grounds for her detention. Nonetheless, the Court left the door slightly ajar. It noted that it has a responsibility to decide whether the President or Minister's satisfaction is in fact based on matters within the scope of sections 8 and 10. Thus, if a detainee can show that he or she was not detained on security grounds but for some wholly irrelevant purpose, it would be entirely appropriate for the courts to determine that the detention order is invalid.

Future directions

Does the ISA remain relevant today? Should it be retained in its existing form, done away with altogether, or modified in some way?

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5 *Id* at 553, para 86.

6 *Teo Soh Lung v Minister for Home Affairs* [1989] 1 SLR(R) 461, HC; [1990] 1 SLR(R) 347, CA. Another detainee, Vincent Cheng, also made an application with a similar lack of success: *Cheng Vincent v Minister for Home Affairs* [1990] 1 SLR(R) 38, HC.

The Government has consistently taken the stand that the ISA is a useful tool, though one to be used sparingly, that enables quick action to be taken against people who pose a risk to national security. Indeed, most of the detainees under the Act since the late 1980s have been members of the militant organization Jemaah Islamiyah or those sharing its ideology who were found to have been planning terror attacks. On the other hand, there is no denying that since the ISA allows people to be detained indefinitely without trial, this is a serious violation of their fundamental liberties. As the courts can only exercise very limited judicial review over detention-related decisions, a potential for abuse of the law exists.

This has led to calls for the Act to be repealed in its entirety. It is argued that terrorism can be combatted using existing criminal offences, such as those established by the Penal Code (Chapter 224, 2008 Revised Edition) and the Terrorism (Suppression of Bombings) Act (Chapter 324A, 2008 Revised Edition). However, even though there is some evidence against a person indicating involvement in a terrorist activity, it may be insufficient to allow him or her to be put on trial. Witnesses may also feel intimidated and refuse to testify against the accused. It is also said that criminal proceedings may have undesirable effects, such as stigmatizing a particular community or becoming a platform for the accused's ideological views. Conversely, it might be said that procedures can be put in place during trials to protect the identities and safety of witnesses. Moreover, an open trial can rally communities against the extremist ideas and behaviour manifested by accused persons.

Another possibility is for the ISA to be modified to reverse the 1989 legislative changes. The objective test established by *Chng Suan Tze* can be brought back to enable the court to examine whether there is sufficient evidence for the President and Minister for Home Affairs to be satisfied that a detainee is a security risk. The Government has argued, though, that the court does not have the necessary expertise to decide such matters. Alternatively, more limited additional safeguards can be introduced into the ISA regime, such as reducing the maximum period of each detention order; and allowing advisory board hearings to be held publicly, with discretion for a closed-door hearing if sensitive information may be disclosed.

It is clear that no decision about whether the ISA should be maintained, abolished or revised will be easy to make. Ultimately, it will need much discussion and thought, and the needs of national security on the one hand, and the public interest in a legal system that is transparent, fair and respectful of people's rights on the other, will have to be carefully balanced.

Further reading

You may find the following works useful if you wish to read more about the ISA. The Constitution of the Republic of Singapore (1985 Revised Edition, 1999 Reprint) and the Internal Security Act (Chapter 143, 1985 Revised Edition) are available on the Internet at Singapore Statutes Online (*http://statutes.agc.gov.sg*).

Michael D Barr, "Marxists in Singapore? Lee Kuan Yew's Campaign against Catholic Social Justice Activists in the 1980s" (2010) *Critical Asian Studies*, volume 42, issue 3, pages 335–362

Michael Hor, "Terrorism and the Criminal Law: Singapore's Solution" (2002) *Singapore Journal of Legal Studies*, pages 30–55

Michael Hor, "Law and Terror: Singapore Stories and Malaysian Dilemmas" in Victor V Ramraj, Michael Hor & Kent Roach, *Global Anti-terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005), pages 273–294

Ministry of Home Affairs Press Statement on ISA, 16 September 2011 <http://www.mha.gov.sg/news_details.aspx?nid=MjA4NQ%3d%3d-Dmf5juIlzOA%3d> (archived at <http:// www.webcitation.org/62v2pdhHB>)

A Singapore Safe for All (Singapore: Times Books Int'l for the Ministry of Home Affairs, 2002) <http://www.mha.gov.sg/get_blob.aspx?file_id=645_1008_312_ISA_Booklet-English.pdf> (archived at <http://www.webcitation.org/62uxS6JpI>) – this is a booklet containing a simple version of the Government's position on the ISA

Yang Ziliang, "Preventive Detention as a Counter-terrorism Strategy: They Have Stopped Using It and So Should We" (2007) *Singapore Law Review*, volume 25, pages 24–34