

Memorandum
to
Prime Minister
Y.A.B. Dato' Sri Najib bin Tun Abdul Razak
on the Internal Security Act (ISA)

Date: 14th July 2009

Proposed by:
Parti Gerakan Rakyat Malaysia
and
PGRM Central Bureau
on Human Rights and the Law

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Y.A.B. Dato' Sri Najib bin Tun Abdul Razak,

1. Introduction

Gerakan has always maintained that laws allowing preventive detention requires a robust justification. The people of Malaysia are now clamouring for greater accountability, transparency and openness. The 12th General Election was a sobering reminder of the expectations of the Rakyat.

The Internal Security Act 1960 (1960) has become a symbol of the wrongful exercise of power and discretion as a result of its overuse and abuse lately.

We are very pleased with Y.A.B. Dato' Sri on your commitment to review this issue which has already translated into the release of 26 detainees to date, including the five HINDRAF leaders, and is testimony to the Government's effort to begin a new chapter in its commitment to initiate people-centric and democratic reforms.

When the ISA was enacted in 1960, the realities of the situation were very different; Malaysia was facing an imminent threat from the Communists who used terror and fear to further their objectives.

The preamble of the ISA provides: “[This is] An Act to provide for the internal security of the Federation, preventive detention, the prevention of subversion, the suppression of organised violence against persons and property in specified areas of the Federation and for matters incidental thereto”.

ON June 21, 1960, in the Dewan Rakyat, then Deputy Prime Minister The Right Honourable Tun Abdul Razak said: “The Government has no desire whatsoever to hinder healthy democratic opposition in any way. This is a democratic country and the Government intends to maintain it as such. It is the enemies of democracy who will be detained.”

As such, the purpose of the ISA was to deal with violent acts threatening the health and democracy of the nation. Regrettably, the act has now been perceived as a symbol of oppression and the curtailment of our democratic freedom as a result of its overuse and abuse.

The time has come for this Government to take a stand against such wanton use of the ISA to stifle healthy and progressive democratic debate whilst allowing the police to trivialise their duties by seeking quick and expedient solutions and circumventing proper investigation of alleged crimes via the usage of preventive detention.

Gerakan calls for a total review of the **ISA**, and its replacement with an Anti-Terrorism Act to deal with immediate national threats and commission of violent acts that will likely threaten the health and safety of Malaysia and her people.

2. Purpose

As stated above, the original purpose of the ISA was to provide the Government of the day with the means necessary to take preemptive measures to deal with violent threats to the nation.

Once again quoting the then Deputy Prime Minister, The Right Honourable Tun Abdul Razak on 21st June 1960 in the Dewan Rakyat: “Part II of the Bill is applicable only to a Security Area, that is to say, Operations Area i.e. an area where we are fighting the terrorists and it will not be applicable to any other. Therefore much more powers are required to deal with a situation which is tantamount to war.”

The spirit of the legislation was to deal with situations ‘**tantamount to war**’, but the detention as recent as last year of journalist Tan Hoon Cheng was a sobering reminder of how far the ISA has strayed from its original purpose.

The ISA has been used to deal with individuals alleged to have forged passports and identity cards, those involved in social activism and others creating an indefensible conundrum as the penal code can adequately deal with such offences obviating the need for preventive detention.

Malaysia is a member of the United Nations Human Rights Council and is obliged to uphold the preponderant and pervasive values of human rights, human dignity and democratic values.

Article 3 of the Universal Declaration of Human Rights (UDHR) guarantees everyone the right to life, liberty and security of person. Malaysia has a moral obligation to uphold these rights and protect the values of human life.

Article 9 of the International Covenant on Civil and Political Rights (ICCPR) provides that: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

Malaysia must subscribe and uphold these ideals. The ICCPR even provides for derogation from Art. 9, but only when “**strictly demanded by the exigencies of the situation**” and “**in**

time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.”

We accept that the Government is obliged to ensure peace and security of the Nation, but it must not be at the expense of natural justice and basic human rights especially in times of peace.

It is the moral and legal obligation of any government to provide a secure and harmonious environment but an attempt to create such an environment does not validate disregard for basic legal norms and values.

In 2003, the **Human Rights Commission of Malaysia (SUHAKAM)** in its report *‘Review of the Internal Security Act 1960’* recommended the repeal of the ISA. The Report stated: “The power to detain a person without trial goes against human rights principles in that the person detained is denied the right to personal liberty, the right to a fair trial and the right to be presumed innocent until proven guilty. These rights are enshrined in articles 3, 10 and 11(1) of the UNDR. [Pg. 94 of the Report]

The Report concluded: “Therefore, by considering the law and practice in relation to the ISA to the date from the human rights perspective and in light of the four human rights principles and the limitation of the rights of the person (legitimate aim, absolute necessity, proportionality and adequate safeguards), it is clear that the balance between national security and human rights under the ISA is disproportionately weighed in favour of national security.” [Pg. 99 of the Report]

3. Gerakan’s Requests

- a. The review and replacement of the ISA with an Anti-Terrorism Act to replace the ISA to deal with “immediate threats threatening the health, safety, security and harmony of the nation.”
- b. The immediate release of all ISA detainees not involved in terrorist activities.

- c. To commit to a dialogue with all interested parties including Government Agencies, Non-Governmental Organisations, Pressure Groups and Professional Bodies on the review of ISA or enactment of an Anti-Terrorism Act.
- d. To recognize, protect, defend and institutionalise the powers of the Judiciary to serve as an effective check and balance against the Executive and Legislature.

4. Conclusion

It is our request that the Government makes a serious and genuine attempt to address the public anger and sorrow surrounding the indiscriminate use of the ISA.

We can no longer pretend that the public will be more than ready to accept justifications of the Government without proper facts and information. As such, the review of the ISA and/or enactment of the proposed Anti-Terrorism Act must have sufficient provisions to disseminate information and make public any threat to the nation that warrants preventive detention.

The person detained must be allowed to have his/her detention challenged before the law on both procedural and substantive grounds.

It is hoped that the proposals made will be studied and scrutinised and we eagerly anticipate the review, amendment and ultimate replacement of the ISA with the proposed Anti-Terrorism Act.

Thank You.

Satu Hati Bersama
Dato' Chang Ko Youn
Gerakan National Deputy President
Chairman, Central Bureau on Human Rights and the Law
Parti Gerakan Rakyat Malaysia

Appendix A: Proposal

1. To review and amend the ISA and eventually replace it with “a new comprehensive piece of legislation that takes a tough stand on threats to national security (including terrorism) but one that is in line with human rights and democratic principles”.

2. An amended version of the ISA or a new piece of anti-terrorism legislation ought to possess the following features, among others:

- A schedule which prescribes a list of specific offences pertaining to threats to national security.
- Police powers to detain a person for the purposes of investigations for a maximum period of 24 hours only if there are reasonable grounds to do so.
- After a period of 24 hours, the person must be produced before a Magistrate.
- If more time is needed for investigations, the Magistrate may order the further detention of the person for maximum periods of 7 days at a time provided that the person is not detained for more than 29 days in total from the date of arrest.
- Upon the expiration of 29 days in total from the date of arrest, the person must either be released or charged.¹
- The scope of its applicability should be clearly defined i.e. to detain terrorists in order to prevent terrorist acts.
- There must be judicial review of the Executive decision to detain on both procedural and substantive aspects.
- No ouster clauses whatsoever.
- There must be right to counsel and the right to appear in court to challenge the detention order.
- The grounds and particulars of detention must be stated clearly to support the basis of the detention.
- The Courts must be given the powers to look into the merits of detention and not just procedural improprieties or technicalities.
- The test for any challenge must be an objective one and not the subjective test.

¹ HRC Responds: Expand Consultation on ISA and SCC/IPCMC Bill Reviews, ensure consistency with human rights principles, Human Rights Committee, 24th May 2008

- There must be full and frank disclosure of all facts relating to the arrest and detention to enable the Court to arrive at an informed decision
- There must be parliamentary review at certain intervals to assess its operation, effectiveness, its relevancy due to changing circumstances, politically and socially and its impact and implications on human rights.²

² Preventive Detention in Malaysia, Jeyaseelan a/l T.Anthony, 13th January 2009

Appendix B: The Problems

Article 121 Federal Constitution

Courts have not taken it upon themselves to question the validity of article 121(1). In *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan*³ the Federal Court held that “***the court must give expression to parliament’s intention and inquire no further***”. In *Kerajaan Malaysia & Ors v Nasharuddin bin Nasir*⁴ the Federal Court held that “***an ouster clause may be effective in ousting the court’s review jurisdiction if that is the clear effect that parliament intended; that if the intention of parliament is expressed in words which are clear and explicit, then the court must give expression to that intention***”.

Article 121 of the Federal Constitution provides that the High Courts and inferior courts have such jurisdiction and powers as may be conferred by or under federal law. The inherent authority of the courts is taken from the idea of the separation of powers. To subject the jurisdiction and powers of the courts to federal law is a violation of this basic principle.

Section 8 Internal Security Act 1960

Amendments to the ISA in 1989 that inserted sections 8A, 8B and 8C ruled out judicial review in regards to the substantive powers exercised by the minister. The only review allowed hitherto has been with regards to procedural matters. In *Ng Boon Hock v Penguasa, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors*⁵, the High Court held that;

“As can be clearly seen, the term ‘judicial review’ as defined in s 8C encompasses almost every action that can be taken to court. The usage of the word ‘includes’ clearly indicates that the list of items of ‘judicial review’ in the said section is not exhaustive. Hence, reading s 8B together with s 8C of the said act, the only action anyone can take to court for any offence under the said act is ‘in regard to any question on compliance with any procedural requirement in this act governing such act or decision’. This means that one can only challenge the act done or decision made by the Yang

³ [2002] 3 MLJ 72

⁴ [2003] 6 AMR 497

⁵ [1998] 2 MLJ 174 at p 178

Di-Pertuan Agong or the minister on a question of non-compliance with any procedural requirement governing such act or decision.”

This has been reaffirmed in *Kerajaan Malaysia & Ors v Nasharuddin bin Nasir* thereby underlining the importance of procedural compliance while ousting the power of the courts to review the substantive groundsgiving rise to the exercise of the powers of preventive detention.

In *Kerajaan Malaysia & Ors v Nasharuddin bin Nasir* it was further said that the powers conferred by the ISA to the minister “*can be said to be draconian in nature but nevertheless valid under the Malaysian Constitution*”. This is but a classic example of the perverse and paradoxical understanding of the spirit of the constitution and the philosophy of law.

Section 73 Internal Security Act 1960

Here the provision allows a police officer to arrest and detain a person without warrant for a period of up to 60 days, though this has to be in accordance with the proviso laid down in section 73(3).

Distinct to section 8 however, the Federal Court in *Abdul Razak bin Baharudin & Ors v Ketua Polis Negara & Ors*⁶ has held that the restriction to review under section 8 does not apply to a detention by a police officer under section 73.

Appendix C: Other Jurisdictions

⁶ [2005] 333 MLJU 1

United State of America

In October 2002, the United States of America adopted the PATRIOT Act which provides for preventive detention of suspected terrorists. The Act provides for initial detention without charge of up to 7 days otherwise the AG shall release the detainee. The Act also provides for detention of up to 6 months if it is found that the release of the detainee will threaten the security of the United States of America. The AG has the power to certify that the detainee is a terrorist and is likely to be engaged in activities that might threaten national security. However, the AG's certification will be reviewed every 6 months.

One salient feature of the Act is that judicial review of any action or decision including its merits is available via habeas corpus, and the **Act is only applicable to non-US citizens.**⁷

Australia

Australia enacted the Australia Security and Intelligence Organization Amendment Act 2003, in response to the Resolution 1373. It provides for detention up to 7 days without charge of a person where such person need not be suspected of a terrorist offence or any other criminal offence as the Minister need only be satisfied that his detention will substantially assist the collection of intelligence that is important in relation to preventing a terrorism offence. One striking feature of the Australian Act is that the detainee is permitted while in detention to seek legal representation at least once in every 24 hours during the interrogation period. The detainee is also given the right to seek from the Federal Court a remedy relating to the warrant of detention or the treatment he is receiving during detention. A review of the Act is also conducted to gauge its effectiveness and implications.⁸

United Kingdom

In 2000, the Terrorism Act 2000 was enacted. The period of detention was increased to 5 days, but instead of giving authority to the ministry, it was given to the courts. Preventive detention is not allowed, preventive detention is only to gather evidence and to ask for information. Later on the police was granted 5 days, then 7 days, then 14 days. After discussion, a period of 28 days was agreed upon and assented to by the UK Parliament.

⁷ Preventive Detention in Malaysia, Jeyaseelan a/l T.Anthony, 13th January 2009

⁸ *ibid*

Here after the normal 48 hours, the officer would have to go in front of the magistrate to appeal for the first 14 days. Magistrates are specially assembled. Charge must be laid down by the Public Prosecutor. The person conducting must be satisfied investigation is done expeditiously. At the end must either to charge or release because of the 28 days limitation.