

ISA repeal: Beware of old poison in new bottles
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COMMENT Prime Minister Najib Razak's recent announcement to repeal the much loathed Internal Security Act (ISA) does not give us cause for celebration when he simultaneously says that it will be replaced by two anti-terrorism laws.

There is no doubt that these new anti-terrorism laws will again allow the government-of-the-day to detain people without charge.

The entire function of the ISA since 1960 has been for the Alliance and then the BN government to deal with the opposition and other dissidents through detention without charge.

Before we look at the way in which other countries deal with terrorism, it may be worth our while to ask if an emergency situation exists in Malaysia to warrant such legislation.

The US, UK and other western countries are the objects of terrorism mainly because of their support for Israel and their aggression against Iraq, Afghanistan and other Muslim countries.

September 11th 2001 of course provided US President George Bush and British Prime Minister Tony Blair (right) with the perfect excuse to launch their offensive against Iraq, Afghanistan and now Libya and to pass anti-terrorism laws in their own countries.

Articles 149 & 150 which enabled the legislation of the Internal Security Act (which is inconsistent with Articles 5, 9 & 10 guaranteeing liberty of the person, freedom of movement and freedom of speech, assembly & association respectively) were included in the 1957 Federal Constitution because the Emergency of 1948-60 was on-going.

The BN pledge to annul the three states of emergency in force since 1964 shows their recognition of the fact that there is no justification for any state of emergency in Malaysia.

So why is there a justification for new anti-terrorism laws when our existing laws can cope with any eventuality?

If an emergency situation should arise in the future, the government still has Articles 149 and 150 to fall back on and to legislate appropriate laws to cope with the situation as they have done in the past.

Alas, as with other lapses in their governance, they have been most tardy in annulling the states of emergency once the emergency had blown over.

And their tardiness has been most costly for many victims of their draconian laws.

Based on its record, the government cannot be trusted to use detention-without-trial laws responsibly.

Apart from the detention of peace-loving citizens like me under the ISA, it is worth pointing out that out of the more than 10,000 ISA detainees since 1960, few if any have been charged in court for terrorist crimes.

It is also an indication of the warped priorities of the government and its security forces that the alleged terrorist in the Bali bombing killed by the Indonesian police, Mat Top, had never been detained under the ISA!

The importance of due process

Many people are not aware of the fact that throughout the repugnant career of the ISA since 1960 when the Emergency had been declared over, the ISA was more draconian than similar laws in South Africa under apartheid or even Northern Ireland during the IRA campaigns.

In 1962, a black South African was picked up after returning from training in bomb-making and guerrilla warfare in Ethiopia. He then spent 27 years in jail but he was given access to lawyers and his prosecutor had to follow rules of due process. That man later became the president of South Africa.

Terrorism laws must be clearly worded, passed by Parliament, and the powers of the executive must be balanced by wider review, new checks and balances.

The government will try to justify long periods of detention without charge by claiming that the police need time to scrutinise mountains of documents, computer data, etc.

However, this excuse does not carry water because major fraud and pornography trials face similar challenges. The government must bear in mind that suspects are not terrorists.

Existing anti-terrorism laws

Britain already has 200 pieces of anti-terrorism legislation, while Malaysia also has terrorism-related offences in the Penal Code and the Criminal Procedure Code of 2006.

There is also an Anti-Money Laundering and Anti-Terrorism Financing Act 2001. Moreover, the police can detain people on less serious charges and still question them on the more serious ones as they sometimes do.

In the UK, terrorism is defined as:

"Any politically motivated violence against people, property or electronic systems designed to influence the government or intimidate the public for a political, religious or ideological cause..."

This raises the question of whether people have the right to take up arms against tyranny, injustice or foreign occupation. And what about the assault on civilian targets by states as we have seen in Iraq, Afghanistan, Libya and elsewhere?

The definition of terrorism is also intended to proscribe organisations whose activities "glorify, exalt or celebrate terrorism." What happens is that in the process, peaceful organisations can be banned and support for mainstream Muslim causes criminalised.

Consequently, this will drive more to go underground.

It is instructive to treat "terrorists" as criminals (as in the UK) based on justice and due process and not as combatants in war based on fear and suspicion (as is the case in the US).

The executive's Extraordinary Powers

The US president possesses extraordinary powers compared with the executive in the UK.

Even so, it is instructive that in the Special Registration Program soon after September 11th 2001, 80,000 men from Arab and Muslim countries were "ethnically profiled" but it resulted in not a single terrorist conviction.

george w bush final days 130109 05With the US resolution of 18 Sept 2001, the US Congress authorised the President to use force against any person or entity he might determine to be responsible for Sept 11, providing for indefinite detention of suspected terrorists anywhere in the world without any guarantee of

charge or trial.

Then by a secret order, President Bush (right) authorised the National Security Agency to intercept communications (wire tapping) without judicial warrant.

Period of detention without charge in the west

With the war in Northern Ireland, Britain has had detention without charge although there is judicial review unlike the case of Malaysia's ISA.

In 1997, there was an upper limit of four days' detention without charge and in 2000, it became seven days. After 2001, it became 14 days. In 2005, the Terrorism Bill was proposed for 90 days of detention without charge but this was defeated in the House of Commons.

The new Terrorism Act then allowed 28 days of detention without charge. In 2008, the House of Lords defeated another Bill asking for 42 days' detention without charge.

In other countries, the period of detention without charge is as follows:

- * France: 4 days
- * Greece: 5 days
- * Spain: 3 days
- * Australia: 7 days
- * Canada: 1 day

In France & Spain, an independent judge decides if there is a case to answer while in Australia, detention is under ordinary remand provisions.

The US Patriot Act 2001

This Act stands for "Providing Appropriate Tools Required to Intercept and Obstruct Terrorism."

The first thing about this Act is that it can only be used against foreigners. This begs the question: Why is the same act not "terrorist" if committed by US citizens?

Secondly, the US government is required to press charges within seven days. Since the passing of the Act, US have detained more than 80,000 people, nearly 800 of them at Guantanamo Bay.

Guantanamo Bay prisoners are not given Prisoner Of War status nor charged nor given lawyers. The US government uses the "enemy combatant" designation to detain indefinitely, allowing no access to lawyers.

There is a repeated pattern of extraordinary powers first used only against non-citizens, but then extended to include citizens.

Judicial checks on the executive

President Bush has got away with a lot since Sept 11th 2001 and detainees have suffered for it.

But the US judiciary has also stood up to the US Commander-in-Chief. Thus in *Rasul v Bush* in 2004, the Supreme Court ruled that a non-citizen had the right to challenge detention:

"Executive imprisonment has been considered oppressive and lawless since King John at Runnymede

pledged that no free man should be imprisoned, dispossessed, outlawed or exiled save by the judgement of his peers or by the law of the land."

After each defeat in the Supreme Court, the US government amended the law but once again in Hamdan v Rumsfeld 2006, Supreme Court ruled:

"The (new) legislation did not prevent federal courts hearing habeas corpus petitions; detainees are entitled to protection of Article 3 of the Geneva Convention (which prohibits cruel treatment and torture) and that detainees were entitled to trial before a regularly constituted court affording all the judicial guarantees recognised as indispensable by civilised peoples."

After further legislative change, the US Supreme Court ruled in Boumediene v Bush 2008 that detainees had a constitutional right to habeas corpus and legislation was unconstitutional:

"The laws and constitution are designed to survive, and remain in force in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the law."

In 2006, the federal judge in Michigan ruled that President Bush's secret order authorising the National Security Agency to intercept communications without any judicial warrant was a violation of federal criminal law and added:

"There are no hereditary Kings in America."

Supranational Views on Terrorism Laws

The Council of Europe pronounced in 2002:

"While the state has the right to employ to the full its arsenal of legal weapons to repress and prevent terrorist activities, it may not use indiscriminate measures which would only undermine the fundamental values they seek to protect."

In 2004, the International Commission of Jurists in its Berlin Declaration proclaimed that:

"In adopting measures aimed at suppressing acts of terrorism, states must adhere strictly to the rule of law, including the core principles of criminal and international law and the specific standards and obligations of international human rights law, refugee law and, where applicable, humanitarian law."

Finally, Cicero's old adage is the wisest caution against terrorism laws from the Wild West: "Salus populi suprema est lex" (The safety of the people is the supreme law).

Malaysians would do well to demand that there is no return to detention without charge and that we do not accept the old ISA poison in a new bottle!

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