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The Use of Preventive Detention Laws in Malaysia: A Case for Reform

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ISBN 978-981-15-5810-8 ISBN 978-981-15-5811-5 (eBook)
<https://doi.org/10.1007/978-981-15-5811-5>

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The registered company address is: 152 Beach Road, #21-01/04 Gateway East, Singapore 189721, Singapore

*To our beloved parents, Mrs Umme Salma
Atiya Bari and late Professor M. Ershadul
Bari, for their undying love and limitless
sacrifices.*

Preface

Preventive detention is an extraordinary measure as it permits executive dispensation of the personal liberty of an individual on the mere apprehension that, if free and unfettered, he may commit acts prejudicial to national security or public order. Given the extraordinary nature of this power, it is, therefore, contended that the scope of the power should be confined to genuine emergencies threatening the life of the nation. Notwithstanding this, Article 149 of the Federal Constitution of Malaysia empowers the Parliament to enact preventive detention laws authorizing the executive branch of government to exercise the power of preventive detention without the precondition of an emergency. Furthermore, the Constitution does not stipulate adequate safeguards for mitigating the harshness of preventive detention laws. This book will make it manifestly evident that the weaknesses of the constitutional provisions concerning preventive detention have given the Parliament *carte blanche* power to enact a series of preventive detention statutes conferring wide powers on the executive to arbitrarily detain their political adversaries. Consequently, on the basis of this analysis, recommendations will be put forward for insertion in the Constitution detailed norms providing for legal limits on the wide power of the executive concerning preventive detention so as to ensure the maintenance of a delicate balance between protecting national interests and, simultaneously, observing respect for an individual's right to protection from arbitrary deprivation of liberty.

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Acknowledgements

This book could not have been written without the kind and generous support of mentors, colleagues and family members.

We would like to thank Professor David Weisbrot AM (Former President of the Australian Law Reforms Commission) and Associate Professor Johan Shamsuddin Bin Sabaruddin (Dean, Faculty of Law, University of Malaya) for their invaluable guidance and support.

We are profoundly grateful to our dearest mother, Mrs Umme Salma Atiya Bari, for her undying love and unconditional support. She has been the backbone of our family and words are not enough to express our gratitude to her. We also owe a profound debt of gratitude to our beloved father, late Professor M. Ershadul Bari (Former Vice-Chancellor, Bangladesh Open University, and Ex-Dean, Faculty of Law, University of Dhaka). He was our idol, and his teachings and lessons have guided all our academic endeavours.

Finally, Mrs Safia Naz would like to thank her husband, Sajal Rahman Azad, and son, Saafir Rahman Azad, for their love and support. M. Ehteshamul Bari would like to thank his wife, Samia Islam, for her constant support and encouragement.

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Chapter 1

Introduction



Abstract The exercise of the power of preventive detention is considered an extraordinary measure. For it entails deprivation of an individual's liberty generally by an order of the executive for safeguarding national security or public order. Accordingly, light will first be shed, in this chapter, on the safeguards which have the merit of constraining the scope of the extraordinary power of preventive detention. Second, the enabling provision concerning preventive detention as contained in the Constitution of Malaysia will briefly be introduced. Third, the objectives of the book will be discussed. Fourth and finally, a summary of the chapters of this book will be provided.

1.1 Introduction

Preventive detention, also known as administrative detention, refers to the deprivation of an individual's liberty, either by order of the head of state or of any executive authority—civil or military—without that individual being formally charged or brought to trial before a court of law.¹ Such detention is preferred on the apprehension that if free and unconstrained, the individual concerned may commit acts prejudicial to the national security or public order. Thus, preventive detention is a precautionary measure aimed at preventing “mischief to the State”.² However, it is also considered an extraordinary measure given it involves the executive dispensation of one of the most fundamental human rights, namely, the right to personal liberty, of an individual on the mere suspicion that, if not detained, he may commit an act endangering the security of the nation. In this context, the observations of Lord Macmillan in *Liversidge v. Anderson*³ are noteworthy:

The liberty which we so justly extol is itself the gift of the law and ... may by the law be forfeited or abridged. At a time when it is the undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possesses for

¹ International Commission of Jurists (1983), p. 394.

² *Rex v. Halliday* [1917] AC 260, p. 269.

³ *Liversidge v. Anderson* [1942] AC 206.

his country's cause it may well be no matter for surprise that there should be confided to the [executive]... a discretionary power of enforcing the relatively mild precaution of detention.⁴

In light of the objective underlying the exercise of the power of preventive detention, namely, preventing harm to the state, the international and regional human rights norms, such as those contained in the International Covenant on Civil and Political Rights, 1966 (ICCPR), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950, the American Convention on Human Rights, 1969 (ACHR), and the African Charter on Human and Peoples' Rights, 1981, acknowledge the right of state parties to use the power of preventive detention. However, these instruments do not provide state parties the blanket authority to exercise such power. Rather they seek to constrain the scope of the power by imposing an obligation on states to ensure that no one is detained arbitrarily.

Notwithstanding the utility of preventive detention, the extraordinary scope of the power often persuades the executive to misuse it during peacetime for political purposes. It is, therefore, necessary to stipulate adequate safeguards against the possibility of such abuse of the power. In Malaysia, the Constitution of Malaysia, which came into force in 1957, in Article 149 permits resort to preventive detention during peacetime for the maintenance of public order. Furthermore, the Constitution does not stipulate adequate safeguards for mitigating the harshness of preventive detention laws.

This book will make it manifestly evident that the weaknesses of the constitutional provisions concerning preventive detention have enabled succeeding generations of executives in Malaysia to use the wide powers concerning preventive detention under a series of preventive detention statutes enacted by the Parliament for arbitrarily detaining their political adversaries. Consequently, on the basis of this analysis, recommendations will be put forward for insertion in the Constitution detailed norms providing for legal limits on the wide power of the executive concerning preventive detention so as to ensure the maintenance of a delicate balance between protecting national interests and, simultaneously, observing respect for an individual's right to protection from arbitrary deprivation of liberty.

In this chapter, light will first be shed on the safeguards which have the merit of constraining the scope of the extraordinary power of preventive detention. Second, the enabling provision concerning preventive detention as contained in the Constitution of Malaysia will briefly be introduced. Third, the objectives of the book will be discussed. Fourth and finally, a summary of the chapters of this book will be provided.

⁴Ibid., p. 257.

1.2 Safeguards Necessary for Constraining the Scope of the Power of Preventive Detention

The exercise of the power of preventive detention, as discussed above, permits the curtailment of one of the most important human rights, namely, right to liberty, without any finding of guilt by a court of law. Accordingly, the International Commission of Jurists (ICJ) in its submission to the United Nations Human Rights Committee (HRC) prior to the drafting of a General Comment on Article 9 of the ICCPR observed that “‘preventive detention’ is, as a general matter, anathema to respect for human rights under the rule of law”.⁵ Consequently, taking into account the extraordinary nature of the power of preventive detention, the International Commission of Jurists (ICJ) in its submission to the Working Group on Arbitrary Detention had further opined that “a state may resort to preventive detention ... to the extent strictly necessary to meet a threat to the life of a nation, and then only during a properly declared state of emergency”.⁶

However, notwithstanding the adverse impact of the exercise of the power of preventive detention on the human rights of individuals, international human rights law does not stipulate that the scope of its exercise should be confined to genuine emergencies. Rather it merely stipulates that the exercise of the power of preventive detention must not be arbitrary.⁷

The absence of adequate safeguards against arbitrary detention under international human rights law has facilitated modern constitutional democracies to not circumscribe the exercise of the power of preventive detention to emergencies.⁸ Subsequently, there has often been a tendency to use the power as a means for deterring “legitimate political dissent and to imprison people for the non-violent exercise of fundamental human rights such as the rights to freedom of expression and belief and to freedom of association”.⁹ Furthermore, human rights scholars contend that in the absence of safeguards for constraining the scope of preventive detention, the exercise of such power not only causes the violation of the right to liberty but also core rights, such as the right to life and the proscription on torture.¹⁰ This argument is bolstered by reference to, for instance, the United States Senate Report on the various method of torture used by the Central Intelligence Agency (CIA) in Guantanamo Bay and the Report concerning the UK’s Belmarsh Case. These reports

⁵ United Nation Human Rights Committee (2013), https://www.ohchr.org/Documents/HRBodies/CCPR/GConArticle9/ICJ_GCArticle9.pdf

⁶ United Nations Human Rights Council (2012), <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Submission-working-Group-detention-analysis-brief-2012.pdf>

⁷ Londras (2011), p. 36.

⁸ Harding and Hatchard (1993), p. 6.

⁹ Cook (1992), p. 11.

¹⁰ Bari (2017a), p. 46.

demonstrate that indefinite or prolonged detention “often leads to inhuman treatment, death and certain forms of torture”.¹¹

Accordingly, it is necessary for national constitutions to guarantee certain safeguards for limiting the scope of abuse of the power of preventive detention. These safeguards can be summarized as follows:

- (a) confining the use of preventive detention to declared periods of emergency;
- (b) right of the detainee to be informed of the grounds of detention within the shortest possible timeframe;
- (c) right of the detainee to make representation against an order of detention before a body independent of the wishes of the executive branch of government;
- (d) right to protection from detention incommunicado, which means “non-publication of the names of persons detained, denial of access to a court or to a lawyer, [and] denial of visits by family members”¹²;
- (e) right of the detainee to challenge the legality of order of detention in pursuance of a writ of *habeas corpus*;
- (f) stipulation of a maximum time limit for keeping a detainee in preventive custody;
- (g) right of the detainee to claim financial compensation in the event of an unlawful and arbitrary deprivation of liberty.

It will be argued in this Book that the incorporation of the above safeguards in a constitution ensures the maintenance of a delicate balance between the necessity to preserve national security and to simultaneously maintain respect for the right of individuals to be free from arbitrary detention. Justice Fazl Ali of the Indian Supreme Court shed light on the importance of maintaining such balance when he remarked in *AK Gopalan v. State of Madras*¹³ that:

I am aware that ... in many countries, there has been reorientation of the old notions of individual freedom which is gradually yielding to social control in many matters. I also realize that those who run the State have very onerous responsibilities... Granting then that private rights must often be subordinated to the public good, is it not essential in a free community to strike a just balance in the matter? That a person should be deprived of his personal liberty without a trial is a serious matter, but the needs of society may demand it and the individual may often have to yield to those needs. Still the balance between the maintenance of individual rights and public good can be struck only if the person who is deprived of his liberty is allowed a fair chance to establish his innocence, and I do not see how the establishment of an appropriate machinery giving him such a chance can be an impediment to good and just government.¹⁴

The above safeguards also have the merit of guarding against the violation of core human rights of individuals, such the right to life and the right to freedom from torture, kept in preventive custody.

¹¹ *Ibid.*, p. 52.

¹² *Bari* (2017b), p. 430.

¹³ *AK Gopalan v. State of Madras* [1950] SCR 88 (India).

¹⁴ *Ibid.*, para 109.