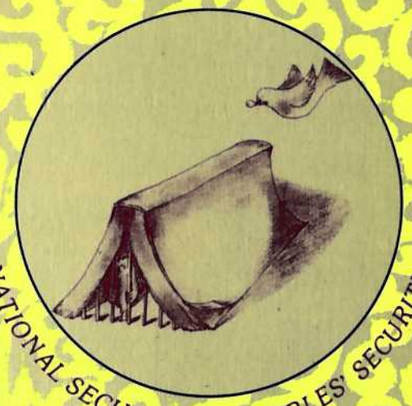
HUMAN RIGHTS VIOLATIONS UNDER THE NATIONAL SECURITY LAWS IN ASIAN COUNTRIES

WORLD CONFERENCE ON
HUMAN RIGHTS



VIENNA, AUSTRIA
JUNE 1993

UNITED NATIONS HUMAN RIGHTS

KOREA NGOS' NETWORK
FOR THE UN WORLD CONFERENCE
ON HUMAN RIGHTS

HUMAN RIGHTS VIOLATIONS UNDER THE NATIONAL SECURITY LAWS IN ASIAN COUNTRIES

WORLD CONFERENCE ON
HUMAN RIGHTS

**KOREA NGOS' NETWORK
FOR THE UN WORLD CONFERENCE
ON HUMAN RIGHTS**

This booklet is prepared for Asian NGOs' joint event for the World Conference on Human Rights in Vienna in June. Asian NGOs decided to hold a joint event on "Human Rights Violations under the National Security Laws in Asian Countries" during the Asia - Pacific NGOs' Conference on Human Rights in Bangkok in March 1993 and the Korea NGOs Network for the UN World Conference on Human Rights (KONUCH) was appointed to coordinate the event.

*** This event has been organised by the following co-organisers;**

Front Democrasi Indonesia;
New Life Prison Fellowship; and
Institute for the Defence of Human Rights of **Indonesia** ;
SUARA PAKYAT MALAYSIA(SUARAM) of **Malaysia** ;
Lawyers for Human Rights and Development of **Sri Lanka** ;
National Preparatory Committee for the Vienna Conference on Human Rights; and
The National Committee for the Protection of Fundamental Rights of the Chittagong Hill Tracts of **Bangladesh** ;
Burma Human Rights Committee of **Burma(Myanmar)** stationed in Thailand ;
Japan Civil Liberties Union of **Japan** ;
Philippine Alliance of Human Rights Advocates ;
Task Force Detainees - Philippines;
Assocation of Relatives and Friends of Political Prisoners (KAPATID);
Ecumenical Movement for Justice and Peace (EMJP) of **Philippines** ; and
The Korea NGOs Network for the UN World conference on Human Rights (KONUCH) of the **Republic of Korea** and its member organizations ;

- MINBYUN (Lawyers for a Democratic Society);
- MINKAHYUP (The Family Association for Democracy);
- Buddhists' Committee for Human Rights;
- The Human Rights Committee of the National Alliance for Democracy and Unification;
- The Catholic Human Rigths Committee;
- The Korea Association of Democracy - Bereaved Families;
- NCCK Human Rights Committee; and
- Institute for Democratic Legal Studies

* World Council of Churches (WCC) granted a financial support for the event and this booklet.

For more information, contact ;
KONUCH
2nd floor, Changlim Bldg. 816-3 Yoksam-Dong, Kangnam-Ku, Seoul, Korea
Tel. 822-567-2316 Fax. 822-568-3439
MINBYUN (Lawyers for a Democratic Society)
Room 404, Hyundae Officetel, 1589-8 Seocho-Dong, Seocho-Ku, Seoul, Korea
Tel. 822-522-7284 Fax. 822-522-7285

Contributors

* **Edward J. Baker** : Associate Director, Harvard-Yenching Institute
2 Divinity Avenue Cambridge, Massachusetts 02138, USA
Tel. 617-495-3369 Fax. 617-495-7798

* **K.S. Venkateswaran** : Advocate of the Indian Bar, now is engaged in establishing an international database on states of emergency in the Queen's University of Belfast
Belfast BT 7 1NN, Northern Ireland
Tel. 44-232-245133 Fax. 44-232-325590

* **Won Soon Park** : Lawyer, Korean Bar, MINBYUN (Lawyers for a Democratic Society)
Room 404 Hyundae Officetel, 1589-8 Seoco-Dong, Seocho-Ku, Seoul, Korea
Tel. 822-522-7284 Fax. 822-568-3439

* **H.J.C. Princen** : Lawyer, Institute for the Defence of Human Rights / Legal Aid Foundation
Jl.Puncak Pesanggraha VIII NO.22, Komp. BCI Cinere Jawa Barat Indonesia
Tel/Fax. 6221-722-0928

* **Mostafa Farook** : National Committee for the Protection of Fundamental Rights in the Chittagong Hill Tracts
Chamber B/D 2fl,122-124, Motijheel Commercial Area, Dhakar-1000, Bangladesh
Tel. 8802-23-2946 Fax. 8802-86-3409

* **Adilur Rahman Khan** : Advocate, Supreme Court of Bangladesh

* **Kalyananda Tirunugama** : Lawyer, Lawyers for Human Rights and Development
225 1/1, Cotta Road, Colombo-8, Sri Lanka
Tel. 941-68-6180 Fax. 941-68-7665

* **Nasir Hashim** : Lecturer in Public Health, SUARAM
NO.41-C, Jalan SS6/12, Kelana Jaya, 47301 Petaling Jaya, Selangor, Malaysia
Tel. 603-703-9266 Fax.603-703-2784

* **Ravi Nair** : Executive Director, South Asia Human Rights Documentation Centre
6/105, Kaushalya Park, Haus Khas, New Delhi-110016, India
Tel./Fax. 91-011-686-5736

* **Boonthan T. Verawongse** : Asian Cultural Forum on Development (ACFOD)
Po Box 26, Bungthonglang, Bangkok 10242,Thailand
Tel. 662-377-9357 Fax. 662-374-0464

* **Kyaw Thi Hao / Myint Shwe** : Burma Human Rights Committee
PO Box 260, Samsennai P.O., Bangkok 10400, Thailand
Tel. 662-319-0012 Fax. 662-589-9961

* **Yong Whan Cho** : Coordinator of the Event and Editor, Lawyer, Korean Bar, MINBYUN (Lawyers for a Democratic Society)
2nd Floor Changlim Bldg. 816-3 Yoksam-Dong, Kangnam-Ku, Seoul, Korea
Tel. 822-567-2316 Fax. 822-568-3439

CONTENTS

National Security Laws in Asia : An Overview

K.S. Venkateswaran

1. INTRODUCTION

One of the most intractable problems to exercise the minds of civil libertarians the world over has been the long-standing conflict between national security and human rihgts.The conflict revolves essentially around the need to the find the right balance between two strongly competing claims: society's interest in survival and the individual's interest in liberty.

Although these interests are not always irreconcilable, much less fundamentally antithetical to each other, they have remained a source of considerable tension in even relatively enlightened societies. The United States of America, for example, felt constrained to indiscriminately confine tens of thousands of Japanese-Americans in detention camps during the Second World War on a mere suspicion of threat to national security - an action which, far from drawing judicial opprobrium, received the U.S. Supreme Court's imprimatur of approval. Even in peace time administrative detention remains an integral part of the legal regime in scores of countries.

The issue of national security evokes strong emotive responses in public debate. But the arguments canvassed on either side are easily summarised. At one end are those who argue that, since human survival itself depends on security, national security should yield to all other interests. At the other end are those who believe that security is only one, and by no means the most important one, of several competing national interests, and that society should, to a large estent, be willing to subordinate national security to individual liberty.

Whatever the merits of either view, the fact remains that modern governments tend to place a high premium on national security doctrines in the formulation of policy. Almost every country in the world today has laws that curtail human rights on grounds of national or public security considerations. Given this reality, lawyers have pragmatically chosen to concentrate their efforts over the years on devising suitable controls on the exercise of state power in this area, with varying degrees of success in different jurisdictions.

2. SECURITY LAWS : SOME GENERAL OBSERVATIONS

The Asian experience with security laws in as interesting as it is instructive. Given the vastness of the Continent, it is not surprising that Asia has both a large number and a wide variety of laws based on national/public security considerations. Despite their inevitable potential to curtail civil liberties, the impact of these laws on human rights has varied quite considerably depending not only on the severity of their provisions, but also on such factors as the nature of the political regime at a given point in time and the manner in which national courts have moderated the use of such legislation.

It is well-nigh impossible, in the course of this brief presentation, to provide an exhaustive account of the various laws in force in the Continent, much less to describe at length how each of them has worked in practice. What I will attempt to do, therefore, is to give a broad-brush picture of the scene as a whole, using some of the more prominent laws as illustrative examples.

Before I refer to country-specific legislation, however, I would like to make a general observation concerning terminology. Security laws, as anyone familiar with them will know, are usually classified as emergency legislation, i.e. legislation most typically enacted or used during a state of emergency. But such laws can also be found in countries that do not have a declared state of emergency. Indeed, governments which are loath to admitting the existence of an emergency within their borders often go to great lengths to camouflage security legislation as "ordinary law". This results in a permanent derogation from many human rights without the government concerned feeling obliged to comply with even those minimal safeguards currently applicable to states of emergency under international human rights law[1]. Elsewhere, security laws exist cheek-by-jowl with officially proclaimed emergency legislation. Here, again, the regimes concerned show a marked unwillingness to accept any checks or limitations on the use of such laws.

Security laws are also of course characterised by wide variations in nomenclature. The most commonly used decriptions include : "Internal security act" "national security act", "state security act", "public security act", "public safety act", "defence of the state act", "anti-subversion act", and "prevention of terrorism act", although some governments have used less familiar terms. Occasionally, special powers based on national/public security doctrines are to be found in the ordinary criminal law, i.e. penal codes or criminal procedure codes, of countries.

1) e.g. Article 4 of the International Covenant on Civil and Political Rights.

Whatever the nomenclature, these laws share certain common characteristics. Broadly speaking, they include:

(1) extended powers of arrest and interrogation in respect of a wide range of acts, defined with varying degrees of precision;

(2) broad powers of detention without charge or trial, exercisable by the executive with little or no judicial supervision;

(3) provisions for restrictions on movement, both individual and collective, such as curfews, house arrest and internal exile;

(4) provisions for especially severe penalties, including the death penalty, for vaguely defined offences of terrorism and other politically motivated acts;

(5) provisions for special courts of special procedures which lack the traditional safeguards available to a defendant under ordinary criminal law, to deal with persons charged under these laws;

(6) provisions for the indemnification of members of state security forces against legal action for unlawful exercise of powers under these laws.

Another common characteristic of security laws is, of course, the secrecy that often surrounds their enforcement. While such secrecy is understandable when it relates to certain operational aspects of the application of such laws, e.g. the element of surprise that is needed if a raid on premises harbouring terrorists is to be successful or if vital information concerning an imminent terrorist act is to be prised out of a suspect, it hardly justifies a ban on, say, the disclosure of statistics concerning arrests or detentions under the law.

3. THE ASIAN EXPERIENCE

Given the limited scope of this presentation, it may be convenient to describe the Asian experience with security laws by bunching together countries in which broadly similar types of political crises, real or imagined, have either preceded the enactment of such legislation or provided the justification for their use in recent years. Two or three clearly identifiable groups emerge.

(1) Ideological Opposition

There are, first of all, countries with have enacted or used special security laws to combat threats from groups that are opposed to the ideological orientation of the state or of the regime in power. By far the most common example would be threats from communist groups or groups espousing some variant of leftist ideology against a state whose government is seen as right-wing. The laws themselves are usually couched in ideologically neutral language, so that they could in theory apply just as well to groups espousing, say, extreme right-wing views. Exceptionally, the law is specifically directed at a particular ideological group, e.g. the Anti-Communist Activities Act 1952 of Thailand.

Singapore provides a representative example in this category. The Internal Security Act 1960 (ISA)[2] (which it borrowed from the erstwhile Federation of Malaysia) has an impeccable anti-communist pedigree going back to the period immediately following the Second World War when Malaya was threatened with a strong communist insurgency. Although that threat subsided soon enough, the Act has targeted suspected left-wing activists in later years.[3] In 1987, for instance, some 16 young professionals, including a lawyer, church and social activists, were arrested and detained under the ISA for their suspected Marxist sympathies and for allegedly plotting to subvert and overthrow the government. These detentions drew considerable criticism from international human rights organisations, as did the prolonged detention without trial of Chia Thye Poh, a former Member of Parliament, for 23 years.[4] The 1987 detainees - whose number had increased to 22 by 1988 - were released in a phased manner in the following months, but at least five of them continued to be placed

2) The ISA was originally enacted as the federation of Malaysia's Internal Security Act(MISA), Act 18 of 1960, which was made applicable to Singapore by virtue of the Malaysia Act 1963 when Singapore joined the Federation. Two years later when it was expelled from the Federation, Singapore adopted MISA under s. 13(1) of the Republic of Singapore Independence Act 1965. It was reprinted as the ISA, Cap 115, in the 1970 Revised Editio of the Singapore Statutes, and as Cap 143 in the 1985 Revised Edition. It may be noted in passing that the ISA is not the only law in singapore which confers wide powers of detention without trial. Another enactment, the Criminal Law (Temporary Provision) Act 1955, which has also been used against hundreds of people over the years, permits detention of any person suspected of association whith "activities of a criminal nature" for up to a year "in the interests of public safety, peace and good order."

3) It has also been used against people suspected of fomenting communal violence.

4) Chia Thye Poh was exiled to the island of Sentosa on his release and although he was allowed to travel to the mainland in 1990, his movements were restricted.

under restriction orders until as recently as 1991.[5]

The ISA, which has constitutional sanction,[6] allows the Minister of Home Affairs to order the detention without trial of any person for up to two years on being satisfied that he is likely to act "in any manner prejudicial to the security of Singapore or any part thereof or to the maintenance of public order or essential services therein."[7] It allows any police officer to arrest without warrant and detain any person in respect of whom he has reason to believe that "there are grounds which would justify his detention under Section 8" or that "he has acted or is about to act or is likely to act in any manner prejudicial to the security of Singapore."[8]

Under the Act a detainee has the right: to be informed of the grounds of his detention as soon as possible, including any allegations of fact, although the government has the right to keep away such information as would in its opinion be against the national interest to disclose; to be served with a copy of the detention order; and to make representations against the order to an advisory board. The board is obliged to consider the representations and make recommendations to the President within three months from the date of detention. If the detention is allowed to continue, the board is further required to review the detention order periodically at intervals not exceeding a year. The Minister has the power to extend the detention indefinitely, for two years at a time and to suspend the detention order after subjecting the detainee to certain restrictions.

Although it would be beyond the scope of this presentation to analyse the case law under the ISA, one or two important aspects of the judicial approach to the Act are worth noting. As in other jurisdictions where similar powers have been conferred on the executive, the question as to whether the "satisfaction" of the Minister is amenable to judicial review has been examined by the Singaporean courts. In a landmark judgment delivered in 1989,[9] the Court of Appeal ruled that judges could review the exercise of executive discretion in ordering detentions. The effect of this judgment was however soon nullified by the Singapore Parliament which, by amending both the Constitution and the ISA,[10] restored the

5) *Amnesty international Report 1992*, London, p.231.

6) Art. 149 of the Constitution of Singapore

7) Section 8.

8) Section 74.

9) *Chang Suan Tze v. Minister of Home Affairs* : [1989] 1 MLJ 69

10) The Constitution of the Republic of Singapore (Amendment) Act, Act 1 of 1989 and The Internal Security Act (Amendment) Act, Act 2 of 1989: they were both rushed through

status *quo ante, i.e.* placed the Minister's judgment beyond judicial scrutiny.

Another country where special security laws have been targeted primarily against communist groups[11] is South Korea whose National Security Act 1980[12] has been the subject of much concern among human rights monitors. This Act, which has a chequered history,[13] confers broad powers of arrest and detention and prescribes severe penalties, including death, for vaguely defined "anti-state activities which endanger the national security". The Act targets anyone who organises, supports, benefits from, praises or encourages an "anti-state organisation" - a term which has been defined as "an association or group ··· as organised for the purpose or assuming a title of the government or disturbing the state".[14] It allows an extended period of pre-trial detention for up to 50 days[15] and imposes severe restrictions inter alia on freedom of association and expression.[16] The 1991 amendments eased some of the harshness of the NSA's provision by, for instance, permitting contact with communist organisations (except those allegedly linked to North Korea). Even so, human rights monitors have criticised the use of the Act to detain a diverse range of people including trade unionists, artists and students. Some of those detained are reported to have been tortured or severely ill-treated.[17]

Other security laws used in South Korea include the Special Act Concerning Punishment of Crimes Against the State[18] which targets persons who have:

(a) "requested a foreign government for a place of refugee or protection"; or

Parliament in a single day (25 January 1989).

11) Although they have also been used against a host of other opponents of the government.

12) Law No. 3318, promulgated on 31 December 1980.

13) It was first enacted as the NSA in 1948 and directed essentially against the North Korean government and its sympathisers, but was re-enacted in 1958 after substantial revision. It was further amended in 1960, with some of its provisions adopted to form part of another law, the Anti-Communism Act, passed two years later. The provisions of the latter Act were merged with the NSA which was re-enacted once again in 1980. In 1991, the South Korean Parliament passed a new National Security Act, Law No. 4373, which was made applicable with effect from 31 May 1991, leaving acts committed before that date to be governed by the old NSA.

14) Article 2.

15) Article 19.

16) Article 8.

17) Amnesty International Report 1992, London, pp.162-4

(b) not returned from a trip abroad "whose guilt is conspicuously heavy".[19] Such persons can be suspected of a number of offences such as "insurrection", "foreign aggression", "divulgence of official secrets", "rebellion", and "acts benefitting the enemy." Yet another law, the Security Observation Act,[20] allows the imposition of measures of supervision for two years against those released after penal service under the NSA, obliging them to report periodically to the police. It is reported that several thousand people have been subjected to the provisions of this law.

A third and prominent country where security legislation has been used extensively against ideological opponents of the state is China where the targets have been alleged enemies of the ruling communist party. China obviously does not lend itself easily to analysis using the normal yardsticks, given the uniqueness of its legal system, but some information has emerged in recent years about the formal use of the law to try and punish dissidents there. Despite large-scale reform of the Chinese legal system in the 1980s - when for the first time since 1949 a formal criminal law and a criminal procedure code were introduced - the system still suffers from many structural shortcomings, including an inadequate separation of powers between the party-controlled executive and the judiciary.[21]

Among the legal provisions mostly widely used to suppress dissent in China is Article 90 of the Criminal Law which relates to the offence of "counter-revolution". This article defines counter-revolution as "all acts endangering the People's Republic of China committed with the goal of overthrowing the political power of the dictatorship of the proletariat and the socialist system". Other provisions of the Criminal Law[22] prescribe punishments ranging from 3 years' imprisonment to death for a variety of acts, while a related chapter[23] defines and prescribes similar punishments for "crimes of endangering public security". These

18) Law no.4132, promulgated on 16 June 1989 and amended by Law no.4396 of 22 November 1991 (This is an amended version of the former Social Safety Law, Law No.2769 of 16 July 1975)

19) Article 2.

20) Law no. 4132, promulgated on 16 June 1989 and amended by Law no. 4396 of 22 November 1991 (This is an amended version of the former Social Safety Law, Law No. 2769 of 16 July 1975).

21) Judges are, for example, reportedly required to take guidance in the discharge of their duties from communist party-dominated "politics and law committees" and "adjudication committees".

22) Arts. 91-104.

23) Chapter II, Arts. 105-130.

provisions have been used too extensively, including against scores of students and intellectuals involved in the 1989 protests in Tiananmen Square, many of whom were sentenced to long prison terms after trials which human rights monitors judged to be grossly unfair in terms of both Chinese law and international human rights standards.[24]

Other countries where special laws have been used to fight iedological opposition include the Philippines, Indonesia, Taiwan, Thailand and Malaysia, although in some of these countries the laws in question were also directed against other target groups as will be noted below.

(2) Resistance to Military Rule

The second category of countries where security legislation has been used with serious consequences for human rights are those with a background of military rule or other, less direct, forms of involvement by the armed forces in civil administration. Here, national security laws have been pressed into service to perpetuate the dominance or continued influence of the ruling elite, usually a *junta*.

A prominent example in this category is Burma which has been under military rule since 1962.[25] Scores of decrees were issued by the ruling Revolutionary Council between 1962-74 which severely dented the rule of law, and this process was continued by the State

24) The Criminal Procedure Code of China 1980 provides that the maximum period for which a person suspected of a crime may be held before being brought to trial is five and a half months. But most of the Tiananmen Square defendants had been kept in detention for periods ranging from between 13 to 19 months before being tried. No satisfactory explanation has been offered by the authorities but some reports have indicated that the defendants may have been held under a special form of administrative detention called "shelter and investigation". Human rights researchers have also expressed concern over the extended use of emergency administrative regulations introduced during the 1983 "crackdown on crime" campaign which severely reduced even those few legal safeguards that were available to defendants. There was, in addition, a spate of martial law decrees issued by the government in the immediate aftermath of the 1989 events in Tiananmen Square which imposed further curbs on several freedoms. see, *e.g. Rough Justice in Beijing:* Asia Watch, New York, 27 January 1991.

25) In March 1962, General Ne Win deposed the civilian Prime Minister Ne Win and introduced rule by a revolutionary Council. This was replaced by a State Law and Order Restoration Council (SLORC) in 1988 following what was widely seen as a stage-managed coup by the Defence Minister, General Saw Maung.

Law and Order Restoration Council (SLORC) which took office in 1988.[26] Among the laws which has caused considerable concern to human rights monitors is the State Protection Law 1975[27] which provides for the detention without charge or trial for up to five years of persons who are suspected of "wishing to molest [or] annoy the state". The law also allows the imposition of severe restrictions on freedom of movement and confers sweeping powers to the executive without any form of judicial or quasi-judicial supervision. Several hundred people are believed to be detained under this and other similar laws.[28] The State Protection Law was also reported to have been used to place two prominent dissidents, Aung San Suu Kyi, General Secretary of the National League for Democracy and U Nu, patron of the League for Democracy and Peace, under administrative restriction orders in July and December 1989, respectively.[29]

Another country where the military has sought to intervene in civil administration and used special powers to curb dissent is Thailand. Though a constitutional monarchy since 1932, Thailand has seen several attempts at seizure of power through coup d'etats. The most recent of these occured in February 1991 when the military overthrew the elected government of Prime Minister Chatichai Choonhavan. This coup, like its predecessors, saw the use of the Martial Law Act 1914 to impose severe restrictions on a wide range of freedoms. It also led to the imposition of an interim constitution which conferred wide powers on the authorities to detain without charge or trial and to execute summarily those deemed to "undermine national peace and security". The Martial Law Act itself has the effect inter alia of suspending all legislation incompatible with its provisions, conferring large powers to the military over civilian affairs and transferring the jurisdiction to try all criminal cases from the ordinary courts to military tribunals.

26) e.g. Martial Law Order 2/88 which abolished several institutions of state including the People's Assembly, banned strikes and gatherings of more than five people and imposed curfews. The SLORC also enforced the Emergency Provisions Act 1950 which criminalises a wide range of acts including spreading of "false news items or a rumour to excite disaffection", acting to make "someone disloyal to the State" or acting with intent to "cause disintegration of the moral character of the people that cause harm to the security, the law and order and rehabilitation of the State."

27) Law No. 3 of 5 February 1975, amended by Law 11/91 of 9 August 1991. It is sub-titled "Law Safeguarding the State from the Danger of Destructionist Elements"

28) *Amnesty International report 1992*, London, pp. 194-6.

29) See *Myanmar (Burma) : Unfair Political Trials :* Amnesty International, London, September 1991, p. 4

Thailand has also seen the use of another law, the Anti-Communist Act 1952, to detain a large number of people until the early 1980s. This law[30] defines "communist activities" as "infilltration, propaganda, mobilisation, espionage, sabotage, coercion by force or other activities which have the aim of ....undermining national security, the institutions of religion, the monarchy and the democratic form of government with the King as head of state ... " and provides for the punishment of those guilty of such activities with imprisonment ranging from 10 years to life. It also makes it an offence to support, incite, advise, encourage, conduct any propaganda, hold any secret meeting, join any association, allow, enter into any agreement with others, or make any preparation with intent to carry on communist activities. Furthermore, it makes the "training, teaching and indoctrinating through propaganda and other means of any person in order to cause them to accept communism or join communist organisation" punishable with imprisonment for between 2 and 5 years. Under the Act, suspects can be kept in pre-trial detention for up to 480 days.[31]

A third country where also the military has sought to exercise a continuing influence in administration is Indonesia. Here, again, security laws have been used against more than one target group. These include members of separatist movements in Aceh, Irian Jaya and East Timor, students, farmers and suspected communists. Among the measures that have caused particular concern to human riaghts monitors is the Anti-Subversion Law 1963[32] which defines "subversive activities" very widely. Under the law, anyone who engages in an action likely to "distort, undermine or deviate from the ideology of the Pancasila[33] state or the broad policy lines of the State; or ... disseminate feelings of hostility, or arouse hostility, cause splits, conflicts, chaos, disturbances or anxiety among the population or broad sections of society or between [Indonesia] and a friendly state or ... disturb, retard or disrupt industry, production, distribution, commerce, co-operatives or transport conducted by the Government or based upon a decision of the Government or which exerts widespread influence on the livelihood of the people..."[34] is guilty of an offence punishable with death or with imprisonment for between 20 years and life.[35]

30) B.E. 2495 (1952).

31) "Emergency Laws in Thailand - Some Thoughts: by Jaroen Compeerapap in *Use of Emergency Regulations in Peacetime in the Region* : Proceedings of an Asian Legal Resource Centre Workshop held in Kuala Lumpur between 5-8 October 1987, P. 17

32) Presidential Decree on the Eradication of Subversive Activities, No. 11 of 1963.

33) *Pancasila* is itself a vague formulation of state policy based on the five principles of belief in One Supreme God, just and civilised Humanity, unity of Indonesia, democracy and social justice

34) Article 1.

The Anti-Subversion Law is reported to have been used to incarcerate scores of real or alleged opponents of the Indonesian government, often for several years after trials lacking in internationally-accepted safeguards. In the context of a country where other measures restrictive of human rights have been frequently employed[36], including a Presidential Decree of 1991 which made it an offence to "insult" the government or its officials, and where at least 17,000 people are believed to remain on a government black list restricting their travel to and from the country[37], this law has understandably been seen to pose a serious threat to freedom and the rule of law.

Other countries where security legislation has been used by, or at the instance of, military regimes include Pakistan, and Bangladesh.

(3) Miscellaneous threats

National security laws have also been employed for a host of other purposes by Asian governments, and sometimes by the same government for different purposes at different times. India offers a good example under this category. The country's constitution, widely acclaimed as a liberal document containing strong guarantees on human rights, permits preventive detention[38] by the executive. As a result, preventive detention laws have been operative in India almost ever since the inception of the republic in 1950. These laws have come in for especially sharp criticism on two occasions: between 1975-77 when the then Prime Minister, Mrs Indira Gandhi, imposed a state of emergency following a court order removing her from office for corrupt electoral practices, and between 1980 and the present, when the government, faced with growing violent opposition in several parts of the country, initiated a serious of measures which have been seen to violate civil liberties on a large

35) Article 13.

36) e.g. Presidential Decree No. 3 of 1963 which sanctions preventive detention and exile at the absolute discretion of the President (some tens of thousands of people suspected of communist sympathies were reportedly held under this decree for up to 13 years before being released in an amnesty in December 1975); and Defence of the Security of the Republic of Indonesia Law, No. 20 of 1982, which conferred extensive powers on the army (ABRI) to arrest and detain anyone suspected of posing a threat to the unity of the state, the Pancasila, or to the attainment of national goals.

37) *Amnesty International Report 1992*, London, p.

38) Article 22.

scale.

The 1975-77 state of emergency has been well documented to need elaboration here: it involved the use of draconial laws[39] to imprison tens of thousands of peaceful opponents of the government and led to massive curbs inter alia on freedom of expression and freedom of association. One of the unhappiest fall-outs of that period was the near-total eclipse of parliamentary accountability and judicial review of executive action. The lowest point came when the Supreme Court of India ruled[40] that, as long as the executive suspended the enforcement of fundamental rights by a presidential order, it could offer no redress to an aggrieved citizen who had been wrongly detained or mistreated. The right to apply for a writ of habeas corpus, said the court, stood suspended as well. It is generally agreed that the main purpose of the use of security legislation during that period was the preservation in power of the then prime minister and her beleaguered government.

Most of the laws of that period were repealed in 1977-78, but with new threats emerging, first in the state of Punjab and later in the states of Assam and Jammu & Kashmir, the government began enacting fresh legislation restrictive of fundamental freedoms. A notable example of such laws is the National Security Act 1980[41] (NSA) which permits detention without charge or trial for up to one year (two years in the case of Punjab) of any person who, in the government's opinion, is likely to act in a manner "prejudicial to the defence of India, the relations of India with foreign powers, or the security of India."[42] The Act dispenses with the obligation of the state to produce detainees before a magistrate 24 hours of arrest as required by the code of Criminal Procedure and allows the government to withhold from the detainees facts on which the decision to detain was made on vaguely defined grounds of "public interest".

Another law which has also caused considerable concern for its impact on human rights is the Terrorist and Disruptive Activities (Prevention) Act 1987[43] (TADA) which provides for the punishment - with imprisonment ranging form five years to life or with death - of

39) e.g. The Maintenance of Internal Security Act 1971, the Defence and Internal Security of India Act 1975, and Prevention of Publication of Objectionable Matter Act 1976, etc.

40) *Additional District Maistrate, Jabalpur v. Shivakant Shukla:* AIR 1976 SC 1207

41) Act 65 of 1980.

42) Section 3.

43) Act 28 of 1987.

anyone convicted of certain broadly defined "terrorist" and "disruptive" activities: these encompass any act, including the peaceful expression of an opinion, which questions the sovereignty or territorial integrity of India or which supports any secessionist claim. Those advising, inciting or facilitating such activities or any preparatory act are made similarly punishable. The Act also allows a person to be detained without charge for up to one year pending investigation into his or her involvement in such activities. The Act also allows a person to be detained without charge for up to one year pending investigation into his or her involvement in such activities. The Act dispenses with many of the traditional safeguards available to a defendant under Indian law: it requires all trials to take place before a special court conducting its business in camera where the identity of witnesses can be kept secret and where the burden of proof can, in certain circumstances, be reversed.

Tens of thousands of people have, over the years, been held under the NSA and TADA. The lack of judicial supervision under these laws has led to allegations of widespread mistreatment and torture of detainees[44]. The main targets of these laws have been alleged supporters of secessionism and those suspected of fermenting religious violence. It needs to be noted, however, that despite the exclusion of judicial controls, Indian courts have often intervened to offer a limited amount of redress to detainees, usually on procedural grounds. They have used such heads of judicial review as bad faith, non-application of mind, improper delegation of power, vagueness or irrelevance of grounds for ordering detentions, irrationality and arbitrariness to moderate the exercise of unfettered executive discretion.

Malaysia is another country where security legislation has been used for more than one purpose. Although, as has been noted earlier, the Internal Security Act of Malaysia has its origins in the country's fight against communist subversion. It has in recent years also been used against two other targets: suspected fermentors of ethnic violence and political opponents of the government generally. The broad language of the Act permits this: the Minister of Home Affairs can detain any person without trial if he is satisfied that it is necessary to do so to prevent such person from "acting in any manner prejudicial to the security of Malaysia" - a satisfaction which has been put beyond judicial review.[45] The Act also allows the detention, pending enquiries, of any person for up to sixty days[46]. Detention orders can be extended indefinitely at two-yearly intervals.

44) *Amnesty International Report 1992,* London, p.138.

45) Section 8B, inserted by the Internal Security (Amendment) Act No. A739 of 1989 w.e.f. 25 September 1989

46) Section 73.

The ISA has been used to detain a large number of people over the years. In 1986 it was reported that there were at least 30 prisoners held for a decade or more under the Act.[47] Many of them were soon released, but in a new wave of arrests in October and November 1987, some 106 people, including prominent politicians, trade unionists, community workers, environmentalists, teachers and members of church groups, were ordered to be detained. International human rights observers have described them as people "well-known for their non-violent and legitimate legal, social and political activities."[48] Although these detainees were also released in a phased manner by 1990, fresh detentions under the ISA have continued, including political opponents of the ruling party[49].

Political opposition, albeit to ruling monarchies, formed the backdrop to the use of security legislation in one of the smaller Asian countries : Nepal. Here, thousands of political activists campaigning for multi-party democracy, in defiance of a 30-year-old ban on party political activity, were arrested and detained in 1990 under the country's Public Safety Act 1989 (PSA). The PSA authorises the detention without charge or trial, for up to 18 months, of anyone likely to act in a manner which could "have an adverse effect" on the security of Nepal, order and tranquillity within the country, amicable relations between Nepal and other friendly states or amicable relations among people of different classes or regions in Nepal[50]. It also permits the imposition of restrictions on movement, both within Nepal and to and from the country. Although most of those detained were released before multi-party elections were held in 1991, the act has been a source of concern to civil libertarians.

Another neighbouring kingdom, Bhutan, where also there has been opposition to the ruling monarchy enacted a National Security Act in 1992. This law prescribes the death penalty or life imprisonment for "treasonable acts" against the government[51] and proclaims a series of vaguely-defined offences, punishable with imprisonment for up to ten years, including "attempts to undermine the security and sovereignty of Bhutan by creating or attempting to create hatred and disaffection among the people," and attempts to create

47) *Malaysia : The Detention of Political Prisoners without Charge or Trial under the Internal Security Act 1960* : Amnesty International, London, May 1986

48) See, e. g. *Malaysia : 'Operation Lallang' - Detention without Trial under the Internal Security Act* : Amnesty International, London, December 1988.

49) see, e.g. *Malaysia : New Internal Security Act (ISA) Detainees* : Amnesty International, London, September 1990

50) Section 3.

51) Section 4.

"misunderstanding or hostility between the government and people of Bhutan and the government and people of any foreign country with which Bhutan has friendly relations."[52]

In a slightly different category stands Israel which also has resorted to an array of national security legislation over the years. It is generally agreed that Israel has, since its inception in 1948, faced genuine threats to its security, although human rights monitors have sharply criticised some of the measures used by the Israeli government, especially in the Occupied Territories, as disproportionately heavy-handed. The legal regime in Israel and the Occupied Territories is rather complex, but one or two laws may be noted. The Defence (Emergency) Regulations 1945, originally promulgated by the British[53], gives every designated army officer wide powers of arrest and punishment exercisable at his discretion "for any purpose connected with the public safety, the defence of Palestine, the maintenance of public order of the maintenance of supplies and services essential to the life of the community". Ironically, these Regulations were condemned as draconian by some of the leaders of the Jewish community in Palestine before the formation of the state of Israel[54], but allowed to continue on the statute book when they assumed positions of power after independence.

Although the Defence (Emergency) Regulations permitted army officers to exercise powers of administrative detention over any person, those powers were taken away by the Israeli Parliament in 1979 when a new law, the Emergency Powers (Detention) Law 1979, was passed. This law introduced some procedural safeguards for the exercise of detention powers: it required the Minister of Defence, rather than an army officer, to issue orders for administrative detention; it necessitated the production of the detainee before a district judge within 48 hours of arrest, and again at requent intervals of not more than three months; and it empowered the president of the district court to quash a detention order if it was proved that the order was not based on objective reasons of state or public security or that it was

52) Section 7 & 8.

53) By virtue of s. 6 of the Palestine (Defence) Order-in-Council 1937, which authorises the issue of regulations as "necessary or expedient for securing the public safety, the defence of Palestine, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community."

54) e. g. Mr. Yaakov Shimsho Shapira, who later became Attorney-General and Minister of Defence of Israel : "The Defence Regulations of the Palestine government are tantamount to demolishing the foundations of justice in this country"; Dr Menachem Dunkelblum, a future Judge of the Inraeli Supreme Court : "This is a violation of elementary concepts of law, justice and equity ... absolute arbitrariness on the part of the administrative and military authorities."

made in bad faith or from irrelevant considerations. An attempt to introduce similar safeguards into the exercise of the power to issue restraining orders however failed to elicit the necessary support from the Israeli political establishment.

Several hundred people are believed to be subject to administrative detention for renewable periods of up to one year (reduced to six months in 1991) in Israel and the Occupied Territories. There have been allegations of mistreatment and torture of some of the detainees, although a number of security force personnel were reported to have been disciplined for misconduct[55].

The above survey has by no means covered all the areas in which Asian governments have used security laws, much less has it described exhaustively all such laws in force. It has also, of course, not touched upon the innumerable examples of state action based ostensibly on national security considerations which have no formal basis in law at all but which nevertheless impact severely on human rights. Even so, it has, I hope, succeeded in giving some idea of the pervasiveness of security laws in the continent.

4. CONCLUSIONS AND RECOMMENDATIONS

As was noted at the beginning, the use of national security or public security doctrines in the formulation of state policy is a reality of life which cannot be wished away. Indeed, even strident critics of some of the laws noted above will find it hard to deny that governments have a right, nay a duty, to ensure that those within their jurisdictions are afforded an adequate measure of security. The real challenge to the law-maker lies in accomodating the legitimate needs of security within a liberal legal framework that prizes individual liberty.

By far the most realistic way in which human rights can be protected from being too severely dented by national security laws - and indeed by other laws which necessitate the imposition of restrictions on individual liberty - is by devising suitable control mechanisms on the exercise of power under those laws. Such controls would essentially be of two kinds: legislative and judicial.

On the legislative side, it is necessary to ensure that laws are drafted with utmost tightness. Definitions of offences, in particular, should be made as narrow and precise as is humanly possible, avoiding such vague formulations as "any purpose connected with public

55) *Amnesty International Report 1992*, London, pp. 150-3

safety","acting in any manner prejudicial to the security of the state", "creating misunderstanding between the government and the people", "undermining national peace and security", "disturbing or annoying the state", etc. Provision should also be made for the widest possible consultation before such laws are introduced in the legislature, especially with professional bodies such as bar associations and law societies, and with human rights activists and researchers in the non-governmental sector. Equally importantly, sufficient room should be built into the laws for external oversight in their implementation. No single branch of government, it should be remembered, has a monopoly of wisdom in these matters.

As for judicial controls, much can be, and often has been, done to temper excessive executive zeal in the enforcement of security laws. A lot depends, of course, on the existence of a judiciary that is truly independent of the executive, and of judges who are forever alive to the need to strike the right balance between the interests of the state and those of the individual - preconditions that, alas, are far from universally present. But if the experience of many countries in the continent is anything to go by, there is cause for optimism.

Even in as security-conscious a country as Israel, for instance, judges have shown a remarkable reluctance to adopt a "hands-off" approach in reviewing executive action under national security laws. Chief Justice Olshan of the Israeli Supreme Court had this to say in a 1949-50 case:

> *"The authorities are subject to the law in the same manner as all citizens of the State. And the rule of law is one of the firm foundations of the State. It would be extremely harmful to both the public and the State if the authorities were to employ, even temporarily, the powers given to them by the legislator with complete disregard for the limitations which the legislator placed on the manner in which these powers are to be used. Although national security, which requires the detention of someone, is no less important than the need to protect a citizen's right, nevertheless whenever it is possible to achieve both purposes we should not ignore either one or the other."*[56]

Judges in other countries too have shown considerable imagination in dealing with security cases without appearing to tilt needlessly to one side or the other. Courts in India have, for instance, offered tangible redress to detainees by insisting that the executive should comply strictly with the procedural requirements in a statute, so that unexplained delay in

56) *Al-Karbuteli v. Minister of Defence* (1949-50) 2 P.D. 5 at 15

serving the grounds for detention, for example, can prove fatal to the survival of a detention order[57]. The Pakistani Supreme Court has held that the detaining authority has a duty to prove the relevance of the grounds stated in a detention order[58], while the Supreme Court of Bangladesh went so far as to assert in a 1975 case that it could review the "satisfaction" of the executive in issuing a detention order[59]. Another useful tool which can be employed by courts with considerable success is the adoption of administrative law concepts such as illegality, arbitrariness and irrationality in reviewing the exercise of executive discretion.

Even in dealing with delicate questions of confidentiality of evidence, courts have not been lacking in imagination. The Israeli Supreme Court, for instance, evolved a practice some years ago which allowed it, with the permission of the detainee, to examine confidential information from the detaining authority in private and away from the detainee. The court would then decide both if the detaining authority was justified in denying the detainee access to the information, and if the information itself justified the issuing of the detention order[60]. Although this procedure has been criticised by some lawyers on the grounds that it may leave the detainee less than fully satisfied, especially where the court refuses to order his release, it seems to offer the best possible solution to an otherwise intractable problem.

There are, of course, limits even to judicial creativity. In the ultimate analysis, the only bulwark against executive excesses in this area - as in other areas of the exercise of state power - in constant vigilance on the part of the citizenry. Human rights NGOs obviously have an important role to play, in terms of both keeping up that vigilance and mobilising public opinion in favour of concerted action whenever the need arises. There is considerable scope, too, for close international co-operation in this area. For a start, Asian human rights NGOs could develop suitable mechanisms - on either a continent-wide or sub-regional basis - for exchanging information on, and monitoring the implementation of, national security laws with a view to assessing their impact on human rights and taking suitable remedial action.

57) *Hem Lall Bhandari v. State of Sikkim* AIR 1987 SC 765

58) *Government of West Pakistan V. Begum A.S. Kashmiri* PLD 1969 SC 286

59) *Aruna Sen V. Government of Bangladesh* 27 DLR (1975) HCD 122

60) *e. g. Machul v. governor of the Jerusalem District* (1983) 37(i) P.D. 789

The National Security Law

- The Symbol of Korean Human Rights Adversity -

Park, Won-Soon

1. INTRODUCTION

The National Security Law (NSL) has been widely recognized as a symbol of Korean human rights adversity both in domestic and abroad. For nearly half a century, many innocent citizens had been arrested and suffered from the abuse of this law. It is undeniable that it has functioned as the *de facto* constitution and a sacred code whose legitimacy and legality no one dared to challenge. The threat from North Korea, which was the basic ground of its existence, has justified all kinds of restrictions and abuses of human rights in Korea since the division of the country in 1945.

However, in fact, it has been no more than a useful instrument for dictatorship. The NSL was indispensable to those in power to suppress and separate the political dissidents from society, taking advantage of the anti-communism or anti-north mentality among the general public. It was a good medicine for the dictators to cure the epidemic which threatened their authoritarian rule.

Since late 1980s, this situation began to change due to the courageous students who began to no longer fear this law. The arrests of thousands of students, citizens and labourers revealed dramatically the true nature of the NSL. People were able to witness that it was not the weapon to defend their freedom but on the contrary the means to eradicate their basic rights. In the struggle towards democracy since 1980s, the abolition of the NSL was at the top of the main demands list in the democratization movement.

Now, we all are witnessing the dramatic change in Korean political and social structures. No one can deny that this tide is going in a constructive and affirmative direction. Under President Kim Young-Sam's leadership, the remaining authoritarian systems are being removed and transformed. However, the NSL still exists. What is the implication of this contradiction? Is the law really necessary for the defense of national security or is the current government reluctant to be fully democratized? With more specific explanation, the judgment can be made.

2. THE HISTORICAL ORIGIN AND THE PROCESS OF DETERIORATION

The first step in understanding the NSL is an examination of its historical background; how, why, and when it came into existence and how its present diabolic face came about.

Its origin goes back to the most tragic chapter in modern Korean history, the year of 1945, when Korea was liberated from Japanese colonial domination and divided into two countries, South and North, by the separate occupation of Russia and American troops. The first government established in August 1948, faced a threat not only from the Communist North but also the pro-communism organization within its own territory; the isle of Cheju was occupied by rebels, and the provinces of Honam and Youngnam also challenged the new-born government. The leftist guerrillas haunted the entire country. This critical situation gave birth to the NSL in December 1948, even before the enactment of a normal Criminal Code.

This law prohibited such activities as forming the 'anti-state organization' and the encouragement of such organizations. Even though we might admit the urgent need of such legislation at that time, from the beginning it was easy to see that it could lead to mass violations of human rights. Simple membership in a socialist organization or an accidental utterance in favor of the communists could be incriminated. In fact, just during the one year of 1949, 118,621 persons, including some National Assembly members, were punished and 132 political parties and associations were dissolved.

Within a brief period, the government succeeded in squashing the rebels and in establishing stability with the support of America. Notwithstanding the disappearance of the original reasons for the legislation, all the successive dictators have widened and reinforced the NSL continually. Over the past forty-plus years, the law has been revised seven times. We can point out the characteristics of the changes as the following:

First, the law grew up from six articles in the beginning to about forty now. This means it has been strengthened out of political considerations.

Second, at first, the maximum penalty was a life sentence. But afterwards it was strengthened with more than thirty additional clauses which made it possible to use the death penalty. From this point of view, we are able to regard it as brutal.

Third, Park Chung-Hee regime which appeared after a military *coup d'etat* enacted the **'Anti-Communist Law'** besides the NSL in 1961. The Anti-Communist Law made it illegal to have contact not only with North Korea but all the communist countries and associations. In 1980, the General Chun Doo-Hwan's regime pretended to abolish this law, as they felt uneasy with the progress in trade with communist countries. But almost all of the main

articles remained as a part of the NSL.

Fourth, the aforementioned revision procedure was usually conducted in violation of the Constitution. For example, the revision of the law in 1962 and in 1980 was accomplished by the Military Committees (the 'Supreme Council for National Reconstruction' in 1961 and the 'National Security Legislative Council' in 1980) after the abrupt dissolution of the National Assembly. Also, the draft of the revised NSL in 1958 passed through the National Assembly with the unanimous approval of the ruling party after 300 armed police dragged resisting members of the opposition parties out of the National Assembly building. Just for these reasons, the NSL must be seen as a major cause for the destruction of the Constitution. It holds no legality, legitimacy and consent from the people on any point whatsoever.

3. THE REALITY OF APPLICATION AND ORDEAL OF DEMOCRACY

Despite the opposition and resistance of the people, the reason of indulgence of all the former regimes in strengthening this law was that it has been indispensable for maintaining discreditable powers. History shows the law has been the most important means in suppressing the basic freedoms of the people.

First of all, political dissent has been the main target of the law. A great number of citizens as well as political leaders who had challenged the regime have been dedicated to the bloody altar of this law. In 1958, *Cho Bong-Am*, a presidential candidate belonging to the standing opposition party against the then-president *Rhee Sung-Man*, received the death penalty and was executed according to this law. Since then, *Suh Min-Ho, Kim Chul* and *Kim Dae-Jung*, former presidential candidates of opposition parties, were not free from the reach of the NSL.

Students who have demanded the reform of the corrupt social system and the decrease of the sharp and ever-widening gap between the economic classes have been sent to prison as a result of the law. Recently, as the labour movement grew stronger, it became the practice to apply the law to the union leaders. Recent statistics continues to show that a fourth to a third of all the political prisoners arrested under this law are labourers.

It is not difficult to come across such cases in which authorities found fault with lectures given by professors, books issued by publishers, verses written by poets, and images illustrated by painters. In the view of the law, all communists and socialists whose activities are permitted in a democratic society or scholars and their books which have provided the academic with abundant nourishment should also be sent to prison. Under the present government, men who publish or possess *Karl Marx's 'Das Kapital'* may be punished. The list of authors of 'punished' books (It is ridiculous to say that books have been 'punished'.

But it means that the authors, translators, publishers, and even bookstore owners related to the books have been punished.) includes famous intellectuals like *Gramsi, Lucacci, E.H Carr, Bruce Cummings, Franz Fanon, Morris Dobb* and so on. If we collect all the cases indicted under this law in a book, it would be as interesting a comedy as Aesop's Fables.

These absurd cases have been accumulated owing to the unreasonable logic that all the activities and expressions similar to those of North Korea must be regarded as benefiting North Korea. Because thousands of books, leaflets have already been branded as 'enemy benefiting documents', any labourer, students, and citizen who possess at least one of them run the constant risk of arrest. To arrest someone or not is up to the authorities.

With the growing number of the arrests, many Koreans describe contemporary times as 'the heyday of NSL'. Many feel that without the abolition of this law, the promise for democracy is nothing more than a farce.

4. THE LIMITATIONS OF THE AMENDMENT MADE IN 1991

The Roh Tae-Woo regime, inaugurated with blue-prints towards democratic reforms, could not escape from the pressure of criticisms under this law. Furthermore, 'Northern Policy', the first priority given policy, which emphasize the improvement of relations with communist countries including North Korea, was also contradictory to the NSL.

We can hardly imagine the normalization of South-North relations and a peaceful unification policy without violating the law. The reason is that the law stipulates the North as an 'anti-state organization', and it totally prohibits anyone from any contact with the North, or from praising, encouraging and sympathizing with it. Accordingly, declarations of President Roh on unification policy, and since then, the exchange of diplomats, businessmen, sportsmen, or direct trade had explicitly violated the NSL. Any such violations committed by government itself have never been prosecuted, whereas, unauthorized contacts have been systematically punished. Condemnation ensued for the reason that such legal practice would destroy the principle of 'equality before the law'.

The government attempted to avoid the conflict and criticism by following;

The one was to feign with a little bit changes that it has already revised the 'cancer clause'. It was not until May 1991 that an amendment was passed without any legal discussion or vote within the National Assembly. The opposition members were violently overridden. Such a brutal exercise of power was possible after the ruling party was transformed into absolute majority by absorbing two opposition parties in January 1990. The government began to spread propaganda both inside and outside of the country that it had revised the NSL in a democratic fashion and that it had therefore completed its initial pledge

for democracy. But scrutinizing it makes us see that there are no real changes and it contains a few word changes. The main point of the revision was to impose a heavier burden on prosecutors to prove the intention of violatiors in a few clauses, for example, contacts with North Korea should be made 'with the intention of endangering the liberal democratic order'. It is meaningless if we take it into consideration that the prosecutors or judges have had no interest in examining the 'intention' and on the contrary, the 'intention' of 'benefiting' have always been presumed without any proof. In fact, there have been no changes in the number of the arrested, the decision of prosecution, and the trial procedure since its amendment.

The other measure adopted by the government was to enact another law, '**the Law concerning the Exchanges and Cooperation Between the South and the North**' of 1990. It contains articles which permit contacts and trade between two Koreas with the authorization of the government. Under these self-contradictory legal system, the people could not but suffer from the ambiguity and confusion. We have witnessed the 'double standard' that NSL has been applied only to the conduct of unfriendly persons to the government.

5. THE LAW HAVING NO RELATION WITH NATIONAL SECURITY

Every country has its own legal system designed to defend national security. It is true that we can find limitations in human rights, or abuse cases like 'Spy Catcher Case' in Britain or 'Pentagon Papers Case' in the United States, etc., committed in the name of national security. It is also needless to say such abuse cases are absolutely scarce, reinstituted afterwards and the victims have finally been compensated in civilized countries.

Now, as far as the NSL concerned, it has been altered and applied to restrict the basic human rights in the name of 'national scurity'. It stipulates 'espionage' as only 'the person who spied out the secret'. In relation to the crime, the Korean Supreme Court has maintained an unchanged interpretation that it could be applied to revelation of "all the political, economic, and social information advantageous to enemy, and disadvantageous to us, even though they had already been well known to the public by newspapers." As to this opinion, whoever say information obtained during ordinary life can be prosecuted as a spy. It's absolutely different from the legal system and practices of democratic countries which protect only the important military secrets with very strict terms and interpretations.

The real danger which has justified the existence of the law has also disappeared. The report submitted to the National Assembly by the Ministry of Domestic Affairs in October 1988 shows that the number of spies arrested sharply dropped and recently we can hardly

find any sent by North Korea. Many specialists point out that not only economic but military power of the South far exceeds those of the North. It is also noteworthy that the real reason for active position of the North concerning bilateral dialogue can be explained by the hardship of economic circumstances and urgent need to reduce the heavy burden of defense expenses. The recent **'Agreement on Reconciliation, Nonagression and Exchanges and Cooperation between the South and the North' ('South-North Agreement')** also diminishes the need for the law. However, the most important reason for the necessity of the abolition is that, without the NSL, the behavior of espionage, or the threat of invasion can sufficiently be protected with the existing normal Criminal Code and other various legal systems.

6. INFRINGEMENT OF THE CONSTITUTION AND THE INTERNATIONAL INSTRUMENTS

(1) The NSL Articles Infringing the Constitution

First of all, the NSL conflicts with the Korean Constitution itself protecting all the basic freedom. The Constitution embraces freedom of religion, thoughts, and expression, freedom from torture and so on. It declares that the law can not trespass the essence of basic freedom, even though it is necessary to restrict human rights in terms of national security and public order. In that sense, the Constitution is not inferior to that of any other country.

But the NSL makes the Constituion a decoration. The degradation have been undergone through the arbitrary interpretation of articles in a extremly abstract and ambiguous way. The law ignores the most important principle of the mordern criminal law, *'nullum crimen, nulla poena sine lege'*. Especially, article 7, incriminating "all the persons who give benefit to anti-state organization through praising, encouraging, sympathizing, and other means", is a typical example. It fails to define the meaning of the legal terms, leaving it into the hands of police, prosecutor, and judge. We Koreans cite a proverb as saying "Attached to ears, it become an ear-ring, while attached to nose, it turns to a nose-ring", equivalent to this situation.

These troublesome clauses and management of NSL succeed in nullifying the basic freedom proclaimed by the constitution.

(2) The Contradiction with the Common Standard of Human Rights

- NSL reviewed in terms of the 'International Covenant On Civil and Political Rights'(ICCPR), and the 'European Convention for the Protection of Human Rights and Fundamental Freedom'(European Convention) -

After World War II which had brought unspeakable disaster to mankind, it was imperative not to repeat the same experience and was natural that there was a collective endeavor to procure the legal system for human dignity and minimum human rights. International Covenant and European Convention can be classified as the models of such efforts. Therfore, these two international instruments deserves to be considered as a barometer suggesting a basic standard of human rights. It will be interesting to compare NSL with these instruments.

1) NSL enabling to sentence death penalty in more than 30 clauses violates article 6 of ICCPR, article 2 of European Convention protecting the inherent right to life and saying that "sentence of death may be imposed only for the most serious crimes".

2) Article 3 of NSL punishing "organizing or joining the anti-state organization" with conspicuously abstract terms, empowering the authorities to interpret the clause infinitely, violates article 22 of ICCPR, article 11 of European Convention.

3) Article 6 of NSL describing visiting North Korea itself as a crime without any other attempt to enter into another crime, violates article 12 of ICCPR guaranteeing the right "to leave any country and to enter his own country".

4) Article 7 of NSL, as mentioned, penalizing the possession of certain thoughts, conscience, religious belief and expression of them, violates article 18 of ICCPR and article 9 of European Convention (freedom of thoughts, conscience and religion), article 19 of ICCPR and article 10 of European Convention(freedom of expression).

5) Article 8 of NSL prohibiting from meeting people from the North and communications itself without proceeding to further steps, violates article 19(2) of ICCPR which protecting "the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of the art, or through any other media of his choice".

6) Article 10 of NSL compelling to inform the authorities of the knowledge about NSL related crimes against one's own conscience violates article 18 of ICCPR and article 10 of European Convention which guarantee freedom of conscience including the freedom of silence.

7) Article 19 of NSL, differing from the Code of Criminal Procedure, which extends the terms of arrest until maximum 50 days under the custody of the investigation authorities, is likely to lead to inhuman or ill treatment and forced confession orginated from long-term detention. It seems to violate article 7 of ICCPR and article 3 of European Convention(Prohibition of torture or cruel, inhuman or degrading treatment), article 9(3) of ICCPR and article 5(3) of European Convention which require anyone arrested or detained shall promptly be brought before a judge and entitled to trial within a reasonable time or release (In addition to the long-term detention of investigation up to 50 days under NSL, whole term of detention for trial at the first instance is 6 months under the Code of Criminal Procedure.), article 14(3) (g) of ICCPR protecting the right not to be compelled to confess guilt.

8) The bizarre inconsistency with which the same behavior of contacts with the North, as mentioned, can be interpreted differently as to whether he or she is friendly to government or not, is clearly violating article 25 of ICCPR and article 14 of European Convention (the principle of 'equality before the law')

7. CONCLUSION

- The Solidarity and Strife Against Legal Systems Violating Human Rights -

We could conclude with the clear idea that the NSL has encroached upon the general principle, the common standard of human rights and the due process of the law in the name of national security. It proves that to take only one step toward democracy and reunification of Korea is impossible with the law entirely unchanged. The law will keep a number of students, workers and citizens in the endless procession to prison for the sole reason that they called for democracy and unification. The present Kim's regime can not succeed in its policy of democratic reform without the confirmation that all kinds of notorious legal system should be abolished.

The NSL was brought to the attention of international organizations for human rights. They include Amnesty International, Asia Watch, and other human rights groups. In 1991, a hearing on the NSL was held in Strasbourg under auspices of the European Parliament. Despite these efforts to stigmatize the NSL as a notorious legal system, it survived.

We are also able to find many legal systems, similar to the NSL across the world. It gives us a common ground to wage a battle against such legal systems under which so many peoples have been suffering. It is highly recommendable to organize an international association to make research and to conduct a world-wide movement to remove them on this

earth. Those authoritarian weapons would not be dissapeard without streneous strife and endeavour of solidarity among the oppressed and people themselves.[1)]

1)Editor's Note : The UN Human Rights Committee adopted its final comments after the consideration of the initial report submitted by the government of the Republic of Korea, at its 1150th, 1151st and 1154th meetings, held in Geneva on 13, 14 and 15 July 1992(CCPR/C/79/Add. 6, 25 Sep. 1992). Relevant part of the comments are as following :

"4. ...According to the authorities, the Republic of Korea is, however, still coping with a very real threat of destabilization and military provocation and, therefore, the Government continues to hold the view that it is essential to retain the National Security Law in order to protect the security and integrity of its liberal democratic system."

"6. The Committee' main concern relates to the continued operation of the National Security Law. Although the particular situation in which the Republic of Korea finds itself has implications on public order in the country, its influence ought not to be overestimated. The Committee believes that ordinary laws and specifically applicable criminal laws should be sufficient to deal with offences against national security. Furthermore, some issues addressed by the National Security Law are defined in somewhat vague terms, allowing for broad interpretation that may result in sanctioning acts that may not be truly dangerous for State security and responses unauthorized by the Covenant."

"7. The Committee wishes to express its concern regarding ... the extent of the investigatory powers of the National Security Planning Agency; and the implementation of article 12, particularly in so far as visits to the Democratic People's Republic of Korea are concerned. The Committee also considers that the conditions under which prisoners are being re-educated do not constitute rehabilitation in the normal sense of the term and that the amount of coercion utilized in that process could amount to an infringement of the provisions of the Covenant relating to freedom of conscience. The broad definition of State secrets in connection with the definition of espionage is also potentially open to abuse."

"8. The Committee also expresses concern about the still high number of offences liable to the death penalty. ... Other areas of concern relate to the continued imprisonment of persons on grounds of their political opinion..."

"9. ... (T)he Committee recommends that the State party intensify its efforts to bring its legislation more in line with the provisions of the Covenant. To that end, a serious attempt ought to be made to phase out the National Security Law which the Committee perceives as a major obstacle to the full realization of the rights enshrined in the Covenant and, in the meanwhile, not to derogate from certain basic rights...."

National Security Laws of Indonesia

H.J.C. Princen

The government of President Suharto is equipped with a range of laws which helps justify its dictatorial method of rule. The major law which plays this role is the Anti-Subversion Act.

1. ANTI-SUBVERSION ACT

The central law which has been used top justify acts of repression, particularly arrests and detentions, has been the Anti-Subversion Act. This Act had its origions during the State of War on the 1950s when the Indonesian government faced armed rebellions and mutinies. However, later the Soekarno Government re-issued it as a decree and then had the then appointed parliament pass it as a law. This occurred in 1963.

Since then literally hundreds of thousands of people have been detained. The majority of these took place in the 1960s following an attempted coup or mutiny in 1965. Many people on the Indonesian "left" were arrested. Many thousands were detained for at least 14 years. Even after they were released in 1979, they have been forced to suffer many continuing restrictions. They are not allowed to work in a whole range of industries and public sector occupations. They are forced to report regularly to military authourities. They carry a special code "E.T." on their I.D. cards which indicates they are former political prisoners. In reality, they are prisoners in all respects except they live at home.

Since the 1970s, after the waves of arrests of "leftists" the Anti-Subversion Act has been used again and again to suppress to legitimate and legally expressed dissent. In the 1970s, Mr Sawito was tried and sentenced to over five years under this act. He had done nothing except collect signatures to a petition. In 1973, the economic lecturer Dr Syanrir, the student leader Hariman Siregar and the student activist Aini Chalid were all tried and sentenced under this act for doing nothing other than making legal criticisms of the government.

In the 1980s, more students have been arrested and tried under this act. These include three students who are now in gaol in the city of Jogjakarta. According to the US State Department report on human rights in Indonesia, there have been more than two dozen trials

under the anti-subversion act in 1992. Apart from students and intellectuals, outspoken Moslem people have also been put on trial and convicted.

In 1992 also two East Timorese university students were also tried under this law after they had joined a peaceful demonstration protesting the massacre of other demonstrators in Dill, East Timor. In East Timor itself the leader of the East Timorese resistance, Xanana Gusmao, has, however, been tried under criminal statutes as the government in this case seems to wish to refuse to acknowledge that his case is a political case.

There has never been a single person who has escaped a guilty verdict.

The continuing use of this law, where "subversion" is defined so broadly, acts as a major threat against anyone wishing to make outspoken criticisms of the government or to conduct a campaign against any particular policies.

An "Anti-Subversion" Legal and Political Culture

In fact, in Indonesia, there is a general legal and political culture which is consistent with the usage and spirit of the Anti-subversion Act.

Another law, the Social Organizations Act, for example, makes it compulsory for all social, cultural and political organizations to have the same ideology. It gives the government the right to dismiss leaders of social organizations if they do not confrom, This is parallel with a policy which enforces a situation where only those organisations, usually a single organisation, which have government blessing are given permission to represent different sections of the population. Therefore, for example, there is only one trade union. one teachers organization, one official women's organiztation and so on.

In almost all cases, the actual administration of the Anti Subversion Act in the field is carried out by the Indonesian Armed Forces. The arrest and detention in the field is carried out by combined units of police and military. These operations are supervised by a body called BAKORSTANAS, (Agency for Coordination of Assistance for the Consolidation of National Security) a military dominated body. The operations of this organization are backed by three other institutions. these are BAKIN (Intelligence Coordinating Agency), BAIS (Strategic Intelligence Agency) and the network of Regional Army Commands based in the provinces which each have intelligence units.

Individuals put on trial under the Anti-Subversion Act are often first arrested on the instruction of BAKORSTANAS. It should be noted however that BAKORSTANAS itself has no legal or constitutional standing and is simply an extension of milltary power. Moreover, many of the people who it orders detained are never on fact put on trial at all. Indeed, the vast majority of people detained on order of BAKORSTANAS, or its predecessor KOPKAMTIB, have never been tried. This includes the tens of thousands of people detained in 1965-66. On their release in 1979, after 14 years in gaol, many of them were given letters saying that there was no evidence against them.

Today, local BAKORSTANAS offices often order the detention of protesting students, workers or farmers. Such people are often detained for up to several days. They are often subjected to torture. However, they are never detained on the basis of any legal warrants for arrest. In interrogation, they are often threatened with being charged under the Anti-Subversion Act, which carries a maximum penalty of death.

A recent example was when over 50 students were detained in East Java for several days after protesting outside the East Java parliament and in the village of Blangguan. Six of these students were severely tortured, including with electric shock. Again it was military officials, within the BAKORSTANAS structure, who were involved.

2. NEW DANGER

A worrying new development is the talk of incorporating the various wide ranging provisions of the Anti Subversion Act into the general criminal code. This would make no distinction between common criminal activities and acts of political dissidence. It would enable the state to threaten all critics of the government, citizens carrying out their basic rights, with being treated as criminals.

Many Indonesian legal commentators, legal oriented NGO bodies and civil rights groups are calling instead for the total repeal of this repressive law. Indeed, in 1991., the U.N. Special Rapporteur on Torture, after visiting Indonesia, also recommended that this law be repealed.

3. HUMAN RIGHTS : NOT A PRIORITY

The widespread usage of this law together with the emergence of BAKORSTANAS indicates the lack of priority for human rights in present government policies. This fact is

also reflected in the persistent use also of extra-judicial executions. The Indonesian Armed Forces has carried out such executions in the troubled provinces of Aceh and West Irian, as well as in East Timor. It estimated that hundreds of people have been executed without being charged or put in trial. Indeed, the figure would be over 3,000 if the extra-judicial of petty criminals in 1982-3 is also included. In his recent auto-biography President Soeharto took responsibillty for this campaign of extra-judicial killings.

The low priority of human rights is also reflected in the operations of Indonesia's governmental institutions.

Firstly, the Armed Forces has an unconstitutional role in all civil affairs justified by the doctrine of Dual Function (DWIFUNGSI). Not only do they wiled enormous power through BAKORSTANAS and the local military commands, but they also are represented in Parliament with 100 appointed members. Their is no legal basis for this in the Indonesian Constitution. Furthermore, it is military, authorities which provide the compulsory security clearance for anybody wishing to become a candidate for election to any parliamentary body in Indonesia. It is also military bodies that check all officials regarding whether they satisfy "Clean Links" criteria. The "Clean Links" (Lingkungan Bersih) policy requires that all state officials and other people playing important social roles have no relatives or other links with former political prisoners. Theis "Clean Links" policy is also a denial of basic rights and is unconstitutional under the Indonesian Constitution.

4. IMMEDIATE DEMANDS

We believe that the human rights situation in Indonesia can only improve if the following basic reforms take place:

① repeal of the Anti-Subversion Act and all other regulations and decrees restricting the civil rights of citizens, including the policies restricting the rights of former political prisoners and the policies regarding "clean links".

② the separation of the judicial system from the civil service. At the moment the Indonesian judicial system is integrated into the state apparatus proper. this means there is no independent judiciary. Even a repeal of the Anti-Subversion Law would be insufficient to guarantee that nobody was persecuted for political reasons. Without an independent judiciary, there can be no guarantee that political dissidents or government critics would not be charged under criminal offences.

③ the abolition of extra-constitutional bodies, such as BAKORSTANAS and the exclusion of military officials from involvement in legal affairs and the ending of the practice of detentions of citizens by the military for alleged "political oftences". Only the police should be invoived in arresting people under criminal charges and this should be done in accordance with the law, including having arrest warrants.

Human Rights and the Internal Security Act in Malaysia

Dr. Mohd. Nasir Hashim

1. DETENTION WITHOUT TRIAL

We have seen how this draconian law, the Internal Security Act, for more than thirty years continues to sap the democratic vigour and shrinks democratic space. We have seen how this insidious Internal Security Act enshrined by the Malaysian Constitution continue to destory the integrity of the nation and it's people. We have now seen how the judiciary stuttered, stumbled and fall under the crunch of the executive power of the state merely to be the endearing puppets to be manipulated and dominated at will. We have also seen how the people in separate numbers, struggling desperately to hold on to democracy, freedom and justice, gradually but surely, being muffled and incarcerated for telling the truth. In the name of internal security and development, the government sacrificed it's own people in favour of individuals and specific interests groups who perpetuate discord amongst the people. Thus it consciously propagates the all encompassing lust for power and profits betraying all religious and moral values of humanity.

2. THE INTERNAL SECURITY ACT (ISA)

The Internal Security Act (1960), popularly known as ISA (revised in 1972; amended in 1988 and 1989) gives the Government unprecedented sweeping powers to detain persons indefinitely without trial, under the premise that it is protecting the security of the country. If at all we give such power to the government it is meant to be enforced judiciously when our country is threatened by war or under other extremely serious situations. It is not meant to muzzle voices of dissent from socially and politically conscious individual or groups from NGO's, opposition parties, consumerists, unions, religious groups, academicians and others. But they are the voices of conscience exposing the contradictions in society; constant abuses of power; the corruption and nepotism.

3. THE COMMUNIST SUBVERSION AND RACIAL TENSION BOGEYS

The Internal Security Act is the most powerful weapon for dictators who when obsessed

with power will conjure up situations, where necessary, so as to justify the use of such draconian Act. The initial 'communist bogey' has now been replaced with 'racial unrest'. In fact the rationale of 'communist subversion' and 'racial' 'tension' are so well orchestrated that they create fear amongst the people. Through it's ownership, control and constant bombardment of disinformation over the mass media, it successfully creates a paranoid sutuation (*'siege mentality'*) amongst the people as if the national sovereignty or security of the country is being threatended by some extenal force abetted by those from within. As an example, prior to the tabling of the called 'White Paper' in Parliament, for two consecutive weeks the Government went on a massive disinformation blitz in the mass media on issues pertaining to communist subversion and racial tension to justify the mass detention of it's citizens under the code name *'Operation Lallang'* using the notrious Internal Security Act. By doing so, they have found us guilty before we were ever given a chance to defend ourselves in the court of law. As such they have neutralized any form of dissent and garnered enough support from the people to legitimize the detention of innocent people who, in many ways, pose a threat to the ruling elites.

4. THE EXTENDED POWERS OF ISA

Now the powers of this draconian Internal Security Act is further extended to offenses involving firearms, forgery of passports and public protests despite of the fact that there are already existing laws to remedy such situations. In short, the ISA has been amended 18 times, giving it more bite, more repressive each time it is amended. The sad part is that there are already existing legislative restrictions such as Criminal Procedure Code; Essential (self Reliance) Regulations 1975; Banishment Act 1948; Immigration Acts 1959 and 1963; Sedition Act 1948 (Amendments 1971); Official Secrets Act 1972 (Amendments 1986); Printing Presses and Publishing Act 1948 (Amendments 1988); Public Order (Preservation) Ordinance 1958; Police Act 1967 (Amendments 1988); Essential (Prohibition of Strikes and Prescribed Industrial Actions) Regulations 1965; and other remedies. But all these require the accused to be tried in the court of law which the authorities would fiercely like to avoid because the accused is given the opportunity to defend himself and at the same time able to expose the corruption, nepotism and other dirty tricks by the authorities and their agents.

5. ISA OVERRIDES THE CONSTITUTION

The Articles 5 and 7 of the Malaysian Constitution theoretically guarantee the basic freedom not to be detained without a fair and public trial. But Article 149 in the same Constitution gives the powers to the government to override such freedom and renders it

worthless. As such Article 149 makes a mockery of the entire Constitution. In fact Justice Abdul Hamid (from Pakistan), one of the members of the Reid Commission which drafted the Constitution, disagreed with the inclusion of Article 149 and forewarned that it was unsafe to give such powers to the Parliament.

According to Section 8 of the Internal Security Act, it allows the Minister of Home Affairs (currently the Prime Minister) to detain a person without trial for renewable periods up to two years at a time if he is satisfied that the detention is necessary to safeguard the security of Malaysia, maintain essential services and the economic life of the country.

Section 73 of the same Act allows any police officer to detain without warrants of arrest for up to 60 days any person whom he has reason to believe that there are grounds which could justify his detention under Section 8 and that he or she has acted or is about to act or likely to act in a manner prejudicial to the security of the country. The victims are held incommunicado and without access to the lawyers. Access to family members is made dependent on the discretion of the authorities. Mental and physical torture is commonly employed. The discretionary and absolute power of the Home Minister has resulted in persons being detained for more than sixteen years.

The ISA is also being misused for the purpose of detaining people for 'rehavilitation' by the authorities. This is a violation of the fundamental freedom of thought and expression. The government has not stopped with the ISA. Using the invidious provisions of Article 149 of the Constitution, two more laws were passed that is,

(i) **The Emergency (Public Order and Prevention of Crime) Ordinance** in 1969. It gives the police the power to detain without trial persons 'suspected' of criminal activity.

(ii) **The Dangerous Drugs (Special Preventive Measures) Act** in 1985. The police can detain without trial for 'alleged' drug offenses.

Today several thousand persons remain detained under these laws without the right to a trial. Even accused murderers and rapists are allowed to have a trial.

6. THE DEMISE OF THE JUDICIARY

The interpretation of the ISA by the Malaysian courts since the enactment of the Act plus the recent amendments in 1988 and 1989 have removed practically all judicial review. This makes the Home Minister's decision as final. Furthermore there is absolutely no access to even filing a writ of *haveas corpus*. In fact *habeas corpus* was the only revenue for review open to the detainees. Unfortunately the Supreme Court also declined to become

embroiled in the contest between the executive and the citizen. It held that it was clearly stated in the Internal Security Act that the Minister had absolute power to detain and continue to detain citizens if he was satisfied that such action was necessary. Therefore it was outside the scope of the Court to review such detentions. In short, the Court sacrificed the democratic rights of the citizens by succumbing to the demands of their political masters, the executive and this spelt the death of the judiciary.

7. THE HISTORY OF ISA

The British first introduced detention without trial during the so called 'Emergency'. But when it was declared that the Emergency was over in 1960, the Government immediately introduced the Internal Security Act (ISA) giving itself power to detain persons without trial and to stifle peaceful and legitimate dissent. The Government's original promise to the people in 1960 that it would not abuse this power was never kept.

Between 1970 to 1975 alone, a total number of 6,861 persons mainly from the Parliamentary Opposition parties were arrested under the ISA. In 1977, 1,118 persons were arrested including trade unionists and students. The October 1987, *'Operation Lallang'* resulted in the detention of 108 persons including prominent opposition politicians, educationists, trade unionists, environmentalists, members of social and religious groups, on the flimsy allegations of inciting 'racial hatred' and 'communist subversion'. The authorities did not produce any evidence of the use of violence by any of the detainees. The detention was in fact a diversionary tactic to buffer the internal conflict of the members in the ruling party which finally led to the split in the party into two opposing camps. The release of detainees were precisely timed to fit the by-elections or the general elections. To date there are 149 persons detained without trial under the Internal Security Act and another 114 persons detained without trial under the Emergency (Public Order and Prevention of Crime) Order.

Torture has been a regular feature of detention without trial. Amnesty International reports on Malaysia in 1979 and 1988 revealed that they had received evidence of torture inflicted by the Special Branch. The Special Branch is the notorious arm of the police force who used physical and mental violence to elicit 'confessions' from detainees and finally destroy their social and political consciousness. This Special Branch of the police force is the equivalence of the FBI and the Scotland Yard and the officers are a special breed of people who behave like paranoid James Bonds and have total access to files and documentation on anybody in the country.

Some of the detainees were victimized for so long that they were simply forgotten. *Loo Ming Leong*, a labourer, was released in 1988 after 16 years of detention without trial under the ISA. A former Labour Party State Assemblyman, *Tan Hock Hin* was detained under ISA for 15 years.

8. EXPERINENCES OF VICTIMS OF ISA

I was also detained for 15 months under the ISA in the October 1987 *'Operation Lallang'* where they used the hard and soft approach to try and break my spirit. They threatened to isolate me from my families and friends by creating doubts about their integrity and sincerity towards me. I suffered humiliations, hallucinations, heart burns, diarrhea, severe coughs, infection of the skin, loss of hair, disorientation of time and space and not allowed to sleep for the first two months of detention. They were trying to reprogram my life to accept the realities of a corrupt, repressive and dehumanizing society.

The Advisory Board which was empowered to review my case while I was in detention was one big great farce. It was really not the safeguard to the arbitrary exercise of powers by the Government. It provided a false image of legitimacy and credibility of a fair minded Government.

Our families suffered most because they did not know where we were and our actual state of health and mind. The authorities gave them the run around. The Special Branch harassed them and disrupt families of detainees from getting together. They also threatened to detain them. The Special Branch would even visit the families of detainees and threatened to detain their loved ones longer if the families continue to campaign for their release. They tried to take advantage of the wives of the detainees. The growing economic problems faced by the families followed by the effort to put their house to order further sap their strength and spirit. This was further aggravated by the constant barrage of disinformation in media that created a culture of fear and apathy. The families made it through with the constant support from within the country and internationally.

9. IMPACT OF THE EXISTENCE OF ISA

The existence of the Internal Security Act destroys the fundamental issues pertaining to basic human rights. It also makes nonsense of the Malaysian Constitution for it abrogates freedom and justice. It denies the basic right to a fair trial; the right to dissent / to expression; the right to beliefs in terms of religion or ideology and the right to association. In

short, it is the most powerful weapon for unscrupulous dictator who wishes to remain in power for a very long time.

10. RECOMMENDATIONS

The people must come to grips to reality and must abolish laws that destroys democracy and humanity. Reasons for justifying the use of the Internal Security Act are not valid anymore. The issues of communist subversion or racial tension become a farce when we realize that these issues have been contrived, perpetuated and expoited to the fullest for the benefit of the privileged few to remain in power. A mission to Malaysia in 1982 by internationally renowned human rights lawyers concluded their findings that, "the claims of national security put forward by the government of Malaysia do not justify the continued use of detention without trial." As such there must be a concerted effort to campaign for the release of the ISA detainees or that they be tried in an open court of law. There must also be an independent judicial review to determine whether the detention of an individual is necessary. The Article 149 of the Constitution must be removed so that the judiciary can regain it's rightful role as the guardian of the fundamental rights of the people.

NATIONAL SECURITY LAWS AND THE VIOLATIONS OF HUMAN RIGHTS IN BANGLADESH

Mostafa Farooq / Adilur Rahman Khan

1. INTRODUCTION

The defence of the sovereignty and integrity of the nation are clearly priority concerns. A considerable body of laws exist to ensure the protection of national and internal security. However, the scope of "national or internal security" remaining vague and illdefined and a matter for executive discretion. In practice, the application of national security legislation has almost invariably resulted in violations of human rights. The exercise of executive discretion to define national security interests has more often than not involved taking measures to suppress all forms and voices of political dissent.

2. HISTORICAL BACKGROUND

On 16 December 1971, after nine months of war, Bangladesh won its independence. Previously, under the colonial rulc of the British and Pakistanis, laws such as the Indian Safety Act, Defence of Pakistan Ordinance etc, sanctioned preventive detention, the seizure of property and restrictions on the press, all in the name of protecting the security of the state.

The struggle against colonial rule and for independence was deeply imbued with the aspiration to ensure the right of all women and men to a life of human dignity and to enjoyment of their fundamental human rights and freedoms. It envisaged a democratic society allowing for the full exercise of political freedoms. Within a year, on 16 December 1972, the Constitution of Bangladesh came into effect. It guaranteed the fundamental rights to life, to liberty, to security of the person, to freedom of assembly, freedom of speech and expression, freedom of thought and conscience, freedom of property and freedom of religion. The Constitution allowed no scope for derogations from fundamental rights.

Twenty two years on, we face a bitter reality : the aspirations of the liberation struggle remain largely unfulfilled, and democratic rights unprotected. The survival of

millions is threatened by vicious poverty. The security of the people to survive, to live with dignity, to enjoy access to food shelter, health and education, cannot be ensured. And yet, in the name of national security, the Bangladeshi state continues to deploy repressive laws to violate political rights. Such laws violate the right to life, to liberty and to security of the person; they are discriminatory in their application and they violate all safeguards against arrest and detention and the prohibition on torture or cruel, degrading or inhuman punishment. Such laws may be found in : (i) the Constitution of Bangladesh, Articles 33, 141A, 141B, and 141C; (ii) special laws such as the Special powers Act 1764, the Vested and Non Resident Property Act 1974, the special Security Forces Act 1986 and the Suppression of Terrorist Offences Act 1997; (iii) the ordinary criminal law such as section 505A of the Penal Code 1860 and section 99A of the Code of Criminal Procedure 1898.

3. CONSTITUTIONAL PROVISTIONS

The Constitution of Bangladesh in its original form specifically did not allow for any derogations from fundamental rights. Article 11 of the Constitution states:

"The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed." [Article 11]

To ensure such guarantees, Article 26 explicitly provides that:

(1) All existing laws inconsistent with the provisions of this part [Fundamental Rights] shall to the extent of such inconsistency, become void on the commencement of the Constitution.

(2) The State shall not make any law inconsistent with any provisions of this part, and any law so made shall to the extent of such inconsistency, be void.

Articles 11 and 26 read together ensure the primacy of the constitutional protection of democratic rights. This basic democratic structure was irretrievably demaged as a result of the Second Amendment to the Constitution, which amended Article 26 (3) as follows:

Nothing in this Article shall apply to any amendment of this Constitution made under Article 142.

In other words, this sanctions any constitutional amendment passed by a 2/3 majority in

parliament, even if such amendment is inconsistent with fundamental rights.

Proclamation or Emergency

The second amendment inserted a new section, Part IXA, in the constitution. This enpowers the President, under Article 141A, to proclaim a State of Emergency if he is satisfied that "the security or economic life of Bangladesh, or any part thereof, is threatened by war or external aggression or internal disturbance". He may make such a Proclamation prior to the occurrance of any war, aggression or disturbance if he is "satisfied that there is an imminent danger thereof". The President may, pursuant to Article 141B, also make laws or take executive actions curtailing certain fundamental rights, namely the right to freedom of movement, freedom of assembly, freedom of association, freedom of speech and expression, freedom of thought and conscience, the right to property, and the right to a profession or trade. He is further invested with the power, under Article 141C, to suspend the right to move the courts for the enforcement of any of the fundamental rights guaranteed in the Constitution.

Some level of accountability is ensured by the requirement that the Prime Minister must countersign any Proclamation of Emergency and any order to suspend the enforcement of fundamental rights. It is also and that no such declaration shall remain valid beyond 120 days, unless ratified by Parliament. However, given the reality of majority parliamentary politics, the ruling party has effectively been handed a constitutional weapon to attack fundamental rights in the name of internal or national security - its main victims being the pwople of Bangladesh.

In fact, the state has repeatedly used emergency powers with the sole object of stifling democratic movements. In 1974 and again in 1987 and 1990, the ruling party declared emergency in order to suppress opposition activities. On each occasion, hundreds of political activists were detained. In 1987 and 1990, tens of people were killed by the law enforcing agencies during periods of emergency. During curfew hours, police shot without warning, killing unarmed and peaceful demonstrators. In the years since, few such victims or their families have ever received any redress for these acts, nor have the perpetrators been brought to justice.

The limitless powers that have been given to the executive to declare emergency and the ways in which these have been deployed in practice are in clear contravention of Article 4 of the International Covenant on Civil and Political Rights ("ICCPR") [not yet ratified by Bangladesh]

Removal of safeguards on Arrest and Detention

Amendments to Article 33 restricted the sateguards available to those under arrest and detention. The right of any person in custody to be informed "as soon as may be" of the grounds of arrest, to consult and be defended by a lawyer of one's choice, and to be produced before a magistrate within 24 hours of arrest or detention is denied to enemy allens and those in preventive detention.

Article 33 also provides that any person may be detained for upto 6 months without charge or trial. The period of detention may be further extended after giving the detenu an opportunity of being heard, if the Advisory Board, considers there is "sufficient cause" to do so. The Advisory Board is comprised of 3 persons, of whom two are or should hold to qualifications of a Judge of the Supreme Court, and one is a senior government officer.

Article 33 further limits the rights of any person in preventive detention. It is specified that the detenu must be informed of the grounds of her/his preventive detention as soon as possible, and given the "earliest opportunity" to make a representation against the order. However, this is qualified by a further provision which enables the enforcing authority to refuse to disclose such facts as it considers to be against the public interest to disclose. Effectively then, the detenu will be unable to discover the grounds for her/his detention.

This constitutional provision to arrest without charge or trial has been widely used to deny the human rights. It has acted as a check on challenges to the constitutionality of subsequent legislation authorising preventive detention - namely, the special Powers Act of 1974 (see below). The constitutional and legislative provisions in Bangladesh relating to preventive detention are in contravention of Articles 7(2), (4) and (5) and Art 14(3) (b) of the ICCPR.

4. SPECIAL LEGISLATION

Preventive Detention

Constitutional limitations on the right to liberty have been supplemented by specific legislation, the Special Power Act 1974 ("SPA"), which provides for preventive detention. The use and abuse of the SPA in the name of protecting security interests has resulted in a steady pattern of human rights violations.

The SPA was enacted to "take special measures" for the prevention of prejudicial

activities, for more speedy trial and effective punishment of grave offences". It declines a "prejudicial act" as "any act which is intended or likely".

(i) to prejudice the sovereignty or defence of Bangladesh;
(ii) to prejudice the maintenance of friendly relations with Bangladesh;
(iii) to prejudice the security of Bangladesh or to endanger public safety or the maintenance of public order;
(iv) to create or excite feelings of enmity or hatred between different communities, classes or sections of people;
(v) to interfere with or encourage or incite interference with the administration of law or the maintenance of law and order;
(vi) to prejudice the maintenance of supplies and services essential to the community;
(vii) to cause fear or alarm to the public or to any section of the public;
(viii) to prejudice the economic or financial interests of the state.

These expansive definitions of "prejudicial acts" allow considerable scope for their abuse by the authorities.

The SPA allows the authorities to detain any person on the above grounds [section 3, SPA]. Such detention can extend to 6 months, and may extend beyond this period if so sanctioned by the advisory Board (see above). The authorities must supply the detenu with the grounds of detention "at the time of his detention or as soon thereafter as is reasonaby practicable", but within a maximum period of 15 days. Pursuant to Art. 33(4), of the Constitution, the detenu must be produced before the Advisory Board within 120 days from the date of the order, and the Board shall after due investigation, including affording a hearing to the detenu, submit its report to the government within a period of 170 days from the date of detention. There is no right to legal representation before the Advisory Board [section 11 SPA]. In practice, the detenu is rarely even brought before the Advisory Board.

The SPA has been widely used to detain opposition activists. It has also been disproportionately deployed against hillpeople in the Chittagong Hill Tracts. With the passage of years, its use has increased exponentially. According to Amnesty International, 35,000 people were were detained under the Awami League, during the period upto August 1975; 100,000 under President Zia, between 1975-1981, and 150,000 under Lt. Gen. Ershad, during 1982-1990. There are no accurate figures available of the numbers of persons who remain under preventive detention today ; human rights workers estimate the numbers to be in the hundreds.