# DEFENDING SINGAPORE'S INTERNAL SECURITY ACT: BALANCING THE NEED FOR NATIONAL SECURITY WITH THE RULE OF LAW

Josiah Zee*


## Abstract

The *Internal Security Act* (ISA)[1] has long been a contentious topic in Singapore. Labelled as a weapon against any internal threat, its relevance and usage have evolved alongside the changing security and political climate over the past five decades since its enactment in the 1960s. Notably, the legislation provides for indefinite preventive detention, which serves as a deterrent measure to combat subversive behaviour and acts of terror. However, the lack of safeguards protecting people's fundamental liberties and the limitations on judicial review by the ISA has made it open to criticism. This paper examines the two main issues concerning the rule of law in the context of the ISA: (1) whether the ISA allows the executive an arbitrary exercise of its discretion in enforcing preventive detention; and (2) whether the restrictions imposed on judicial review over executive discretion by the ISA contradict the rule of law. This paper suggests that the answer depends on the different perspectives adopted towards the concept of rule of law.


## 1 INTRODUCTION

> Stability does not come naturally to Singapore. We are peculiarly vulnerable. If our balance of security and stability is shattered, it is doubtful if we on our own can ever put Singapore together again.[2]

These words spoken by one of Singapore's founding fathers, Lee Kuan Yew,[3] have been the foundation for the country's zealous stance towards the protection of its domestic security. Over the past two decades or so, the Singapore Government has had to use the ISA on several occasions to contain threats that undermined the internal stability of the young nation. Between May and June 1987, the ISA detained 22 people who were alleged to be involved in a Marxist Conspiracy.[4] In January 1999, then Minister for Home Affairs, Wong Kan Seng, disclosed that over the past two years, six people had been arrested and detained without trial for espionage activities.[5] As recently as July 2010, a 20 year-old national serviceman was detained

* The author is currently completing his LLB degree at the Australian National University (ANU). He was also a student editor at the *elaw Journal: Murdoch University Journal of Law*. He can be reached at u4819708@anu.edu.au

[1] Unless otherwise stated, all references are to the *Internal Security Act* (Singapore, Cap 143, 1985 rev ed).

[2] Lee Kuan Yew, *Mission Statement*, Internal Security Department (2003) <http://www.mha.gov.sg/isd/abt-isd.htm>.

[3] Mr. Lee Kuan Yew was former Minister Mentor of Singapore. Effectively retired from the Cabinet on 21th May 2011 after the 2011 General Elections, he has retained his seat in Parliament and remains a Member of Parliament (MP) representing Tanjong Pagar Group Representation Constituency (GRC).

[4] See Editorial, 'Marxist Plot Uncovered', *The Straits Times* (Singapore), 22 May 1987, 1; Alan John, 'Govt Detains Six More', *The Straits Times* (Singapore), 21 June 1987, 1.

[5] Editorial, '6 Held for Espionage', *The Straits Times* (Singapore), 22 January 1999, 53.

under the ISA for wanting to join militant jihad overseas.[6] Evidently, the ISA remains relevant in the modern-day context where Singapore continues to 'contend with the threat of ethnic chauvinism, subversion, international terrorism and espionage'.[7]

In light of the necessity for the ISA to deter such threats to national security, this paper first examines the development of the ISA to its present form; taking note of the amendments made to the Act and the Constitution during this time. It also seeks to investigate whether there is a balance between the need for national security and the rule of law in Singapore. Specifically, this paper considers two main issues. Firstly, whether the ISA has allowed the executive an arbitrary exercise of its discretion in effecting preventive detention, which is open to abuse and secondly, whether the restrictions imposed on judicial review over executive discretion under the ISA are contrary to the rule of law. This paper contends that the difference is one of opinion and is primarily due to the different conceptions adopted regarding the rule of law. Amidst the criticisms, it submits that there is a system where the need for national security is balanced with the rule of law, and the nation's emphasis on domestic stability cannot be said to negate the presence of the rule of law. Furthermore, Singapore's practice of responsible governance has by and large ensured that the use of the ISA is not abused, and that people's fundamental rights stated within the Constitution are not infringed without lawful justification.

## 2 THE INTERNAL SECURITY ACT IN SINGAPORE

This section seeks to examine the historical perspective that led to the enactment of the ISA. Viewing the historical developments in retrospect, the purpose of the ISA will be evaluated. Provisions providing for indefinite detention under the ISA will also be discussed. Importantly, this section will address the question whether the ISA has allowed the executive an arbitrary exercise of its discretion in using preventive detention.

### 2.1 Genesis: Enactment and Subsequent Developments[8]

The ISA largely evolved out of the socio-political developments, which happened in Singapore and Malaysia at the end of the Second World War to the 1960s. During this period, several events highlighted the need for stern provisions to safeguard Singapore's national security.[9] Their main purpose was to contend with the threat of Communism that flourished after the end of the Second World War.

Notably, a key feature of the ISA (like its predecessors) is its ability to effect preventive detention. Preventive detention was first provided for in Malaya through

[6] Jeremy Au Yong, 'National Serviceman Detained under ISA: Two Years' Detention for 20 year-old Who Wanted to Join Militant Jihad Abroad', *The Straits Times* (Singapore), 7 July 2010, A1 and 4; Teo Xuanwei, 'The Virus that is Al Awlaki: Self-radicalised Singaporean Detained, Two Others on Restriction Orders, *Today* (Singapore), 7 July 2010, 1.

[7] Kevin Tan, and Thio Li-Ann, *Constitutional Law in Malaysia & Singapore* (Butterworths, 3rd ed, 2010) 182; See also Thio Li-Ann, Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore' (2002-2003) 20 *UCLA Pacific Basin Law Journal* 1, 5-7.

[8] For a detailed study of the history of the ISA: See Yee Chee Wai, Ho Tze Wei Monica, Seng Kiat Boon Daniel, 'Judicial Review of Preventive Detention under the Internal Security Act – A Summary of Developments' (1989) 10 *Singapore Law Review* 66, 70.

[9] Some of these events included the Maria Hertogh Riots from 11-13 December 1950, the 1964 Sino-Malay Riots, and the 1969 Racial Riots in Singapore.

the *Emergency Regulations Ordinance* issued on 7 July 1948.[10] It was only on 21 July 1948 that the Ordinance came into effect in Singapore.[11]

### 2.1.1 Countering the Communist threat: The Emergency Regulations Ordinance 1948 & The Preservation of Public Security Ordinance 1955

The standard of living for the masses failed to improve even with the return of the British at the end of the Second World War.[12] Leveraging on this lack of satisfaction with British rule and with the encouragement of the local political expression by the British, the Malayan Communist Party (MCP) began to organise and support strikes by the working class in order to achieve their political agenda.

When the national economy improved at the end of 1947, the MCP realised that they were beginning to lose the ground they once held. At the same time, the colonial masters sought to instill local political responsibility through certain constitutional changes. These developments had led to the establishment of an executive and legislative council. On 20 March 1948, Singapore held its first election for six members of the Legislative Council by popular vote. These advances were contrary to the MCP's intentions, which sought to impose Communist rule on Malaya. Furthermore, they had also failed to obtain any representation on the Legislative Council. This effectively meant that they were unable to influence Malaya's constitutional development.

To achieve their political aims, the MCP subsequently resorted to militant tactics. By February 1948, the MCP began retreating to the Malay Peninsula and engaging in guerilla warfare.[13] The resulting socio-economic instability posed an eminent danger to both civilian and security forces alike.[14]

While the main conflict was concentrated in Malaya, the British envisaged the possibility for the violence to manifest in and threaten the Colony of Singapore. Thus, the Singapore *Emergency Regulations Ordinance* came into effect on 21 July 1948. Under the Ordinance, the Governor-in-Council could declare, via proclamation, a state of emergency in the colony.[15] He could also issue under s 4(1) any regulations necessary for the defence of the Colony of Singapore, public safety and maintenance of supplies and services essential to sustain the community. Notably, s 4(2)(b) provided for the detention of persons. When a state of emergency was later proclaimed, preventive detention was introduced. Such detention allowed for the arrest of any person deemed to have acted or who was likely to act in a manner prejudicial to the security of the Colony. This arrest would be valid even in the absence of evidence or a warrant, and the suspect would be confined for investigation to the exclusion of others, and could be detained indefinitely without being charged or

[10] David Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Ashgate Publishing, 2007) 142.
[11] *Emergency Regulations Ordinance 1948* (Singapore).
[12] C M Turnbull, *A History of Singapore 1819-1975* (Oxford University Press, 5th ed, 1985) 224-254.
[13] Ibid, 237-238.
[14] See V Suryanarayan, *Singapore: Path to Independence* (Koodal Publishers, 1977) 34-35.
[15] *Emergency Regulations Ordinance 1948* (Singapore) s 3.

tried in a court of law.[16] Undoubtedly, the purpose of preventive detention was to counter the threat of communist-influenced violence faced at that time.

When issues arising out of the temporary nature of the *Emergency Regulations Ordinance 1948* were recognised,[17] it was decided that the *Preservation of Public Security Ordinance* (PPSO) be enacted to replace it. This happened on 21 October 1955.[18] Notably, it was this Ordinance that the present-day ISA resembles. Pursuant to s 3(1) of the PPSO:

> If the Governor-in-Council is satisfied with respect to any persons that, with a view to preventing that person from acting in a manner prejudicial to the security of Malaya or the maintenance of public order therein or the maintenance therein of essential services, it is necessary to do so, the Chief Secretary shall by order under his hand make an order directing that such person be detained for any period not exceeding two years.

The increasing frequency of violent student and labour-led strikes amplified the need for the Ordinance to contend with these threats to national security. Notably, the threat posed by the Communists had not yet been eradicated at that time. Having failed to achieve their aims through constitutional methods, these communists sought to instigate demonstrations as a means to realise their political agenda. While the Ordinance would not be able to eliminate Communism in Singapore, the then Chief Minister of Singapore, David Marshall, asserted that the Ordinance was crucial in containing and minimising the adverse effects caused by the Communist threat.[19]

### 2.1.2 The Modern-Day Internal Security Act

The Singapore ISA currently in force today originated from Malaysia when the nation merged with the Federation on 16 September 1963,[20] at which time the Malaysian ISA was made applicable to Singapore.[21] By virtue of s 13(1) of the *Republic of Singapore Independence Act* (RSI), the applicability of the Act remained even after Singapore's official separation from Malaysia on 9 August 1965.[22]

In 1985, the ISA appeared in the revised edition of the Singapore Statutes as Cap 143 and had several of its sections renumbered.[23] Particularly, s 8 of the ISA was modified and expanded. Following the decision in *Chng Suan Tze*,[24] ss 8A and B, which involved the application of the law of judicial review, sought to define the meaning of judicial review and to limit its applicability in ISA cases. Specifically, s 8B(1) was added to return the law regarding judicial review to the position established in the case of *Lee Mau Seng*,[25] when it was enunciated by Wee Chong Jin CJ that a subjective test

[16] Ibid, s 3.
[17] Regulations under the Emergency Regulations Ordinance had to be reviewed continually and re-issued every few months.
[18] *Preservation of Public Security Ordinance 1955* (Singapore) s 3(1); L A Sheridan, 'Extraterritorial Colonial Legislation' (1960) 23(1) *The Modern Law Review* 77.
[19] *Singapore Legislative Assembly Debates, Official Report* (21 September 1955) vol. 1 at col. 695.
[20] *Internal Security Act 1960* (Malaysia).
[21] *Malaysia Act 1963* (Malaysia).
[22] *Republic of Singapore Independence Act* (Singapore, 1985 rev ed) s 13(1).
[23] Yee, above n 8, 72; *Internal Security Act* (Singapore, Cap 143, 1985 rev ed).
[24] *Chng Suan Tze v Minister of Home Affairs & Ors* [1988] 2 SLR 132.
[25] *Lee Mau Seng v Minister for Home Affairs & Ors* [1971] SGHC 10; *Lee Mau Seng v Minister for Home Affairs, Singapore & Anor* [1969-1971] SLR 508.

should be preferred over an objective one.[26] This issue will be discussed further in section 3 of this paper. In addition to ss 8A and B, s 8C was enacted to abolish appeals to the Privy Council. However, s 8C was deleted with effect from 8th April 1994, when it became redundant with the abolition of all rights of appeal to the Privy Council.[27]

Essentially, the adoption of the ISA signified the adoption of the two main objectives of the Act: (1) to combat subversion and (2) to eliminate organised violence.[28] This is crucial given the instability of the region during the 1960s. Where threats to national security remain an issue,[29] the purpose of the ISA remains relevant in ensuring the internal security of Singapore.[30]

### 2.2 Preventive Detention

Preventive detention is a common tool in the fight against terror. Many countries have enacted legislation that provides for such detention whether against aliens or citizens alike. In the United Kingdom, preventive detention is provided for by virtue of ss 21 and 23 of the *Anti-Terrorism, Crime and Security Act 2001* (ATCSA).[31] Preventive detention also exists in Australia, where a person may be detained for a short time under a Preventive Detention Order (PDO) issued in accordance with Division 105 of the *Criminal Code Act 1995* (Cth).[32]

Likewise, preventive detention is not something new in Singapore. As seen above, the main purpose of the ISA is to provide the executive with certain sanctions for preventive detention. Under the ISA, preventive detention takes the form of detention without trial and may be indefinite insofar that the reasons for preventive detention continue to exist.[33] This section will first discuss the provisions in the ISA that allow for preventive detention. Thereafter, it will consider whether the ISA allows for an arbitrary exercise of executive discretion in effecting preventive detention, and whether such power is susceptible to abuse. In the discussion that follows, certain articles of the Constitution will also be examined in relation to the provisions considered under the ISA.[34] This is necessary as the power to enforce and validate preventive detention relies on these constitutional provisions.

#### 2.2.1 Provisions Allowing Preventive Detention

The provisions allowing for preventive detention shall be examined in three different stages: (a) pre-detention, (b) detention and (c) post-detention.

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[26] *Chng Suan Tze v Minister of Home Affairs & Ors* [1988] 2 SLR 132.
[27] See *Judicial Committee (Repeal) Act 1994* (Singapore, Cap 148, 1985 rev ed).
[28] See Yee, above n 8, 71-72; See also Long title of the *Internal Security Act* (Singapore, Cap 143, 1985 rev ed).
[29] See The Ministry of Home Affairs, Submission No Cmd. 2 of 2003 to the President of the Republic of Singapore, *White Paper: The Jemaah Islamiyah Arrests and the Threat of Terrorism*, 7 January 2003.
[30] See Editorial, 'Government's Statement on the Internal Security Act', *The Straits Times* (Singapore), 17 September 2011, A6; Editorial, 'ISA Still Relevant, Crucial to Security', *Today* (Singapore), 17 September 2011, 1 and 3.
[31] *Anti-Terrorism, Crime and Security Act 2001* (UK) c 24, ss 21 and 23.
[32] *Criminal Code Act 1995* (Cth) div 105.
[33] *Internal Security Act* (Singapore, Cap 143, 1985 rev ed) ss 8(1) and 8(2).
[34] *Constitution of the Republic of Singapore* (Singapore, 1999 rev ed).

### (a) Pre-detention

The power to order preventive detention lies in s 8(1) of the ISA. Pursuant to s 8(1), the Minister is empowered to order such detention if the President is satisfied 'with respect to any person' that he is acting in a manner prejudicial to the security of Singapore.[35] Section 74 complements s 8(1) by allowing arrests even without warrant. Notably, there is also a subjective element to arrests conducted under s 74.[36]

Fundamentally, the power to order preventive detention derives its constitutional basis from Article (Art) 149 of the Constitution. Pursuant to the 'notwithstanding clause' in Art 149(1):

> [A]ny provision of that law designed to stop or prevent that action or any amendment to that law or any provision in any law enacted under clause (3) is valid notwithstanding that it is inconsistent with Article 9, 11, 12, 13 or 14, or would, apart from this Article, be outside the legislative power of Parliament.[37]

Accordingly, the validity of the arrest cannot be challenged on the ground that the legislation enacted is beyond the powers conferred on the legislature, or is inconsistent with Art 9, 11, 12, 13 or 14. The purpose of Art 9, 11, 12, 13 and 14 is to detail an individual's fundamental rights and liberties.[38]

### (b) Detention

Upon initial detention, the person must be informed of the grounds for his detention as soon as possible.[39] In accordance with s 9(b) and (c), he shall be made aware of the 'allegations of the fact on which the order is based' and 'be given the opportunity to make representations against the order as soon as possible'.[40] According to s 11, he shall also be served with a copy of every order made by the Minister to assist in his representation against the detention order. He shall also, within 14 days of the issue of the order, be notified of his right to make representations to an Advisory Board,[41] and be furnished with a written statement by the Minister containing:

(i) The grounds on which the order is made;
(ii) The allegations of fact on which the order is based;
(iii) Any other information the Minister deems necessary for the detainee to make his representation to the board;[42] and

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[35] *Internal Security Act* (Singapore, Cap 143, 1985 rev ed) s 8(1).
[36] Ibid, s 74(1) and (2).
[37] *Constitution of the Republic of Singapore* (Singapore, 1999 rev ed) s 149.
[38] See *Constitution of the Republic of Singapore* (Singapore, 1999 rev ed) ss 9, 11, 12, 13 and 14.
[39] Ibid s 151(1)(a); *Internal Security Act* (Singapore, Cap 143, 1985 rev ed) s 9(a).
[40] It should be noted that the right to be informed under s 9(b) is subjected to the sensitivity of the information. The disclosing authority reserves the right to withhold any information it considers to be against the national interest if released.
See *Internal Security Act* (Singapore, Cap 143, 1985 rev ed) s 9(b) and (c).
[41] The Advisory Board consists of a Supreme Court Judge, and two other members appointed by the President on the advice of the Chief Justice. They represent the detainee by scrutinising the allegations against him. – See Yang Ziliang, 'Preventive Detention As A Counter-Terrorism Strategy: They Have Stopped Using It and So Should We' (2007) 25 *Singapore Law Review* 24, 31.
[42] *Internal Security Act* (Singapore, Cap 143, 1985 rev ed) s 11(1) and (2).

(iv) The Advisory Board shall have to consider his representation and make recommendations to the President within three months of the date of detention.[43]

Upon the issue of the initial detention order, a detainee may be incarcerated for up to two years. Such order may be extended biannually by virtue of s 8(2): 'The President may direct that the period of any order made under subsection (1) be extended for a further period or periods not exceeding two years at a time'.[44] However, there is an absence of any regulation limiting the number of terms a detainee can be held for. This means that a detainee can be detained indefinitely as long as the grounds for detention continue to exist.[45]

### (c) Post-detention

Pursuant to s 10 of the ISA, the Minister may at any time suspend the detention order and impose restrictions upon the person in lieu of detention. The Minister is also allowed to revoke any such direction at any time he sees fit, and the person would be liable for detention again.[46] Moreover, suspended orders are also included in regular reviews conducted by the Advisory Board under s 13,[47] which is entitled under s 13(2) to make recommendations to the Minister through a written report.[48]

## 2.2.2 Is the ISA Allowing the Executive an Arbitrary Exercise of its Discretion Over Preventive Detentions?

As discussed above, the ISA is legislatively empowered to impose preventive detention and to enforce it. The question remains whether the ISA has allowed the executive arbitrary exercise of its discretion in bringing about these detentions under the Act. An arbitrary exercise of this power implies that the executive's prerogative to exercise its discretion is unrestrained by law or statute.

It has been suggested in a number of places that issues arising out of national security are best left to the executive.[49] In January 1989, ss 8A and B were added to the ISA and amendments were made to Art 149 of the Constitution to accommodate s 8D, which was added to allow for a retrospective operation of ss 8A and B.

At the heart of ss 8A and B, lies the intention to define judicial review, and to bring the law regarding judicial review back to what was initially enunciated in *Lee Mau Seng*. Furthermore, s 8B(2) restricts judicial review to questions 'relating to compliance with any procedural requirement of this Act governing such act or decision'.[50] This effectively ensures that the decisions made by the executive in

[43] Ibid, s 12(1).
[44] *Internal Security Act* (Singapore, Cap 143, 1985 rev ed) s 8(2).
[45] See Eunice Chua, 'Reactions to Indefinite Preventive Detention: An Analysis of How the Singapore, United Kingdom and American Judiciary Give Voice to the Law in the Face of (Counter) Terrorism' (2007) 25 *Singapore Law Review* 5.
[46] *Internal Security Act* (Singapore, Cap 143, 1985 rev ed) s 10.
[47] Ibid, s 13(c).
[48] Ibid, s 13(2).
[49] See *Lee Mau Seng v Minister for Home Affairs, Singapore & Anor* [1969-1971] SLR 508; *Teo Soh Lung v Minister of Home Affairs & Ors* [1988] SLR 676; *Liversidge v Anderson* [1942] AC 206.
[50] See *Internal Security Act* (Singapore, Cap 143, 1985 rev ed) ss 8A, B and D; Chua, above n 45, 10.

matters concerning national security, or what constitute national security, stay as non-justiciable issues. Notably, the executive's position is further advanced by s 12(2) of the ISA, which states:

> Upon considering the recommendations of the Advisory Board under this section the President may give the Minister such directions, if any, as he thinks fit regarding the order made by the Minister; and every decision of the President thereon shall, subject to section 13, *be final and shall not be called in question in any court*.[51]

These provisions cement the executive's role as the chief authority over issues involving national security.[52]

Considering these reasons, it is easy to conclude prima facie that the executive has been afforded an arbitrary power in exercising its discretion over imposing preventive detention because it has been legislatively established as the chief, and arguably sole authority in considering what constitute matters of national security. Matters deemed to be of a national security nature fall wholly under their ambit, and decisions to bring preventive detention against a person cannot be questioned save in situations where there is procedural non-compliance.

Conversely, it is arguable that this discretionary power is not as arbitrary as one might perceive. As defined above, the executive's power to exercise its discretion in matters of national security (and imposing detention) can only be arbitrary if it is not subjected to the constraints of any law or statute. This paper submits that while the discretionary power of the executive under the ISA may be a non-justiciable issue, it is important to note that the effects of its exercise – preventive detention – have to comply with the procedures set out within the ISA. Elaborating further, by virtue of s 9(a) and in accordance with Art 151 of the Constitution, the detainee must be informed as soon as possible of the grounds for his detention. Pursuant to ss 11 and 12, there is also a system instituted where the grounds for his detention are reviewable by the Advisory Board, in order to ensure that his detention is justified. Should these procedures not be complied with, judicial review could also be instituted by means of s 8B(2), since any procedural non-compliance is a matter pertaining to the observance of any procedural requirement under the ISA 'governing such act or decision'. This means that the judiciary is still able to inquire whether the detention made in exercise of the executive discretionary power was lawful or not.[53] Therefore, it will not be correct to assert that the ISA has allowed the executive an arbitrary exercise of discretion, especially over preventive detentions.

### (a) Open to abuse?

Having established that such power is not as arbitrary as commonly perceived, it remains to be addressed whether this power to impose preventive detention is open to abuse. This issue was highlighted by the author of the ISA, Hugh Hickling, who once remarked:

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[51] See *Internal Security Act* (Singapore, Cap 143, 1985 rev ed) s 12(2) (emphasis added); See also, *Internal Security Act* (Singapore, Cap 143, 1985 rev ed) s 13.
[52] See also, Chua, above n 45, 10-11.
[53] *Teo Soh Lung v Minister of Home Affairs & Ors* [1988] SLR 676, 677.

> I could not imagine then that the time would come when the power of detention, carefully and deliberately interlocked with Article 149 of the Constitution, would be used against political opponents, welfare workers and others dedicated to nonviolent, peaceful activities.[54]

Opponents of preventive detention would argue that detention powers afforded to the ISA through Art 149 of the Constitution are easily abused because there is a lack of safeguards.[55] Basically, the 'notwithstanding clause' under Art 149(1) allows for the operation of the ISA even if it is contrary to Articles 9, 11, 12, 13 or 14 which as pointed out above, mainly provides for the protection of citizens' fundamental rights and liberties.

The main issue in contention is the subjective nature of ss 8(1) and 74 of the ISA. Particularly, there is a lack of specification within these provisions with regard to the nature of satisfaction – whether subjective or objective – required by the President or arresting authority under ss 8(1) and 74 respectively. Accordingly, the requirement of satisfaction is open to executive interpretation. This issue is further exacerbated by ss 8A and B, which as discussed earlier, limits judicial review to procedural issues. In essence, the courts are unable to question the executive about matters pertaining to the satisfaction of the President or the Minister. All in all, the ISA becomes a weapon open to abuse by the executive, with the potential to suppress any political dissidence in Singapore.

Nevertheless, this paper challenges the proposal above on the grounds that legislative safeguards have been instituted within the Constitution and the ISA that help prevent the abuse of such powers:

### (i) Constitutional Safeguards

The main constitutional safeguard lies with Art 9 of the Constitution, which protects the liberty of the person. Pursuant to Art 9:[56]

> (1) No person shall be deprived of his life or personal liberty save in accordance with law.
> (2) Where a complaint is made to the High Court or any Judge thereof that a person is being unlawfully detained, the Court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the Court and release him.
> (3) Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.
> (4) Where a person is arrested and not released, he shall, without unreasonable delay, and in any case within 48 hours (excluding the time of any necessary journey), be produced before a Magistrate, in person or by way of video-conferencing link (or other similar technology) in accordance with law, and shall not be further detained in custody without the Magistrate's authority.

[54] Statement written in connection with Malaysia in 1989 by Hugh Hickling, who is the author of the Internal Security Act; See 'Draconian ISA not meant for politics: Singapore has maintained its own version of the ISA', *Reuters* (Malaysia) April 18, 2001.
[55] Chee Soon Juan, *Dare to Change: An Alternate Vision for Singapore* (Singapore Democratic Party, 1994) 131-138.
[56] *Constitution of the Republic of Singapore* (Singapore, 1999 rev ed) s 9.

Whilst the 'notwithstanding clause' under Art 149(1) of the Constitution allows for the operation of the ISA even if it is inconsistent with Art 9, it should be noted that there is no specification within both articles preventing the detention from being unlawful if the detention order is not extended and subsequently, allowed to lapse.[57] In that case, the detention becomes unlawful if the detainee remains unreleased.

Additionally, Art 151(4) provides for a detainee's release if recommended by the Advisory Board. This is possible even if the detaining authorities do not accept those recommendations.[58] While the President can act in his discretion under Art 21(2)(g) and s 13A of the ISA to continue detention,[59] it can be argued that because the Advisory Board's recommendations are based on the inquisitorial role it adopts, it is likely that the President would exercise his discretion only if there are reasonable grounds to justify his actions. In particular, these recommendations are formed after all facts are considered. It is a thorough assessment of the information gathered from examining officers from the Internal Security Department (ISD), statements of witnesses, and a review of all the evidence and investigation.[60] Accordingly, the protection afforded cannot be dismissed as mere façade.

### (ii) Legislative Safeguards within the ISA & Habeas Corpus[61]

There are certain safeguards within the ISA that prevent an abuse of this discretionary power. Firstly, while the nature of the satisfaction required under s 8(1) is unspecified, it is important to note that the person must have engaged in acts that satisfy the need for such detention in the first place.[62] If the person has not acted in a manner that justifies the need for detention then prima facie no detention order can be made, as the required precondition is unlikely to be satisfied.[63]

Secondly, there are also certain limitations instituted within s 74 that impede the abuse of this power.[64] Pursuant to ss 74(3), (4) and (5), no person can be detained beyond 24 hours except with the authority of a police officer whose rank is of or above that of assistant superintendent (ASP) of Police. Such a person may be detained for a period not exceeding 48 hours. If necessary enquiries cannot be completed in the prescribed 48 hours, only a police officer with a rank of superintendent may order a further detention of 28 days, on the condition that he is satisfied that more time is needed to complete the necessary investigation. In accordance with s 74(5), the authorising officer must also report the circumstances to the Commissioner of Police and should the additional period of detention needed extend beyond 14 days, the Commissioner of

[57] See Yee, above n 8, 77.
[58] See Tan, above n 7, 189.
[59] Ibid, 189.
[60] See Yang, above n 41, 31.
[61] *Habeas corpus* or *Habeas corpus ad subjiciendum* is a prerogative writ to order review of detention.
[62] See *Constitution of the Republic of Singapore* (Singapore, 1999 rev ed) s 149(1).
[63] In 'Habeas Corpus And Preventive Detention in Singapore and Malaysia', it was observed that the final decision to issue a detention order is not a 'matter of pure judgment', as the Minister is unencumbered with a case-file of evidence thoroughly gathered by the Internal Security Department (ISD). – See H F Rawlings, 'Habeas Corpus And Preventive Detention in Singapore and Malaysia' (1983) 25 *Malaya Law Review* 337; See also Tham Chee Ho, 'Judiciary Under Siege?' (1992) 13 *Singapore Law Review* 60, 81-82.
[64] *Internal Security Act* (Singapore, Cap 143, 1985 rev ed) ss 74(3), (4) and (5).

Police must also report the circumstances to the Minister. Therefore, an arrest can be made only when there is a bona fide basis for it.

Thirdly, s 11 of the ISA ensures that the detainee is able to make representations to an Advisory Board against the order,[65] and by virtue of s 12, to have the board consider his representations and to make recommendations to the President. The President is then able to either direct the Minister to enforce the detention order, or terminate it if there is no reasonable case against the person.[66] The protection afforded under s 11 and 12 also has its constitutional basis in Art 151 of the Constitution, which states that:

> [...] Where an advisory board constituted for the purposes of this Article recommends the release of any person under any law or ordinance made or promulgated in pursuance of this Part, the person shall not be detained or further detained without the concurrence of the President if the recommendations of the advisory board are not accepted by the authority on whose advice or order the person is detained.[67]

In addition, the High Court is also empowered by s 18(2) of the *Supreme Court of Judicature Act* to issue a writ of *habeas corpus*.[68] The application of such writs has to be in accordance with the procedure set out in Order 54 of the *Rules of the Supreme Court 1970*.[69] If a person is found to be unlawfully detained, a writ of *habeas corpus* can be issued and he would be released following a successful grant of *habeas corpus* by the High Court.

Considering these measures, while the element of subjectivity persists (thereby relying on the executive to act in good faith), it is reasonably evident that the two different types of safeguards discussed above help mitigate any potential misuse. Appropriately, this paper contends that the ISA's powers to detain are not as easily abused as opponents have suggested.

## 3 MAINTAINING THE RULE OF LAW IN SINGAPORE

This section investigates the co-existence of the ISA with the rule of law in Singapore. Specifically, the nature of the rule of law in the context of Singapore will be examined and the question whether the restrictions imposed on judicial review under the ISA run contrary to the rule of law, be canvassed in detail.

### 3.1 The Rule of Law in Singapore

Before examining the rule of law in Singapore, it is essential to first understand the basic concept. Essentially, the rule of law prevents the exercise of arbitrary power by a state or individual against the people.[70] As conceived by Dicey, there are three aspects to the rule of law: (1) there can be no punishment save in accordance with law; (2) the law is supreme and all are equal before the law; and (3) the rule of law shall include

[65] Ibid, s 11.
[66] Ibid, s 12; See also, Yee, above n 8, 76.
[67] See *Constitution of the Republic of Singapore* (Singapore, 1999 rev ed) s 151.
[68] See *Supreme Court of Judicature Act* (Singapore, Cap 322, 1985 rev ed) s 18(2); First schedule of the *Supreme Court of Judicature Act* (Singapore, Cap 322, 1985 rev ed) 1(d).
[69] See Order 54 of *Rules of the Supreme Court 1970* (Singapore) s 274/70.
[70] Robin Creyke and John McMillan, *Control of Government Action: Text, Cases & Commentary* (LexisNexis Butterworths, 2005) 234.

the determination of an individual's rights by means of judicial decisions.[71] Raz supplements Dicey's observations, by asserting that the courts should have the power of judicial review over the way legal principles are implemented, and that the discretion afforded to the executive should not be allowed to pervert the law.[72]

The rule of law can also be advanced via constitutionalism. As a particular derivative of the rule of law, constitutionalism seeks 'to design legal institutions which will restraint power not by relying on people to be virtuous,' but 'by institutionalising restraints on what they can do even if they are virtuous'.[73] Notably, some constitutions also provide for a separation of powers where the powers of the legislature, executive and judicature are demarcated. Principally, this doctrine of separation acts as an institutionalised mechanism that complements constitutionalism such that the government is limited in a way that there will not be a despotic use of power.[74]

Ideally, the rule of law should promote a culture of legality; where a clear, stable and proper legal authority is present, which the society could respect as an operative standard in its ability to function.[75] Notably, there has been no standard definition for what the rule of law should entail. However, amidst the legal discourse lie two basic approaches to the rule of law namely: (1) the formal and (2) substantive approach. This was pointed out by Tamanaha, who wrote that:

> [M]ost legal theorists believe that the rule of law has purely formal characteristics, meaning that the law must be publicly declared, with prospective application, and possess the characteristics of generality, equality, and certainty, but there are no requirements with regard to the content of the law. Others, including a few legal theorists, believe that the rule of law necessarily entails protection of individual rights. Within legal theory, these two approaches to the rule of law are seen as the two basic alternatives, *respectively labelled the formal and substantive approaches*. Still, there are other views as well. Some believe that democracy is part of the rule of law.[76]

In Singapore, the rule of law is widely discussed. In November 1999, this concept was debated in Parliament upon a motion initiated by opposition MP JB Jeyaretnam.[77] It was observed that two distinct conceptions emerged from these debates: the opposition articulated a broader conception of the rule of law, which extended 'beyond the judicial process towards ensuring all government branches acted under the law'.[78] The government's view however, was that the culture of the rule of law should be 'deeply

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[71] A V Dicey, *An Introduction to the Study of the Law of the Constitution* (MacMillan, 10th ed, 1959) 187-196.
[72] Joseph Raz, 'The Rule of Law and Its Virtue' (1977) 93 *The Law Quaterly Review* 195.
[73] Alexander Hamilton, in G Wills (ed), *The Federalist Papers* (Bantam, 1982).
[74] See Baron de Montesquieu, *The Spirit of the Laws* (1748); Martin Krygier, 'Compared to What? Thoughts on Law and Justice' (1993) *Quadrant* 49; Philip P. Wiener, *Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas* (Charles Scribner's Sons, 1973-1974); Joseph Raz, 'The Politics of the Rule of Law' (1990) 3 *Ratio Juris* 331.
[75] Augusto Zimmermann, 'The Rule of Law as a Culture of Legality: Legal and Extra-Legal Elements for the Realisation of the Rule of Law in Society' (2007) 14(1) *eLaw Journal: Murdoch University Electronic Journal of Law* 10, 22 <https://elaw.murdoch.edu.au/archives/issues/2007/1/eLaw_rule_law_culture_legality.pdf>.
[76] Brian Tamanaha, 'The Rule of Law for Everyone?' (2007) 55 *Current Legal Problems* 97, 102 (emphasis added).
[77] Tan, above n 7, 47.
[78] Ibid, 48.

rooted in the public service'[79] and 'its key tenets established in the legal system'.[80] It is apparent, that the government had enunciated the adoption of a formal definition in relation to the rule of law in Singapore. Impliedly, the law should not be adjudged whether it is just or not. Rather, the rule of law merely defines the specific procedural attributes that the legal system should possess so that it is compliant with the rule of law.[81]

### 3.2 Has There Been A Compromise?

As already discussed, the concept of the rule of law in Singapore is likely a formal one. Thus, the question as to whether there has been a compromise through the ISA's restraints on judicial review should be considered in relation to the formal definition adopted.

This section attempts to answer the question by examining the development of the law concerning judicial review over the discretionary power of the executive in ISA-related issues. Thereafter, these changes will be juxtaposed against this 'thin' and positivistic approach to the rule of law adopted in Singapore.

#### 3.2.1 Development of the Law Concerning Judicial Review

As mentioned, the requirements of Presidential satisfaction stated under s 8(1) and the requirements for effecting arrest under s 74 are generally subjective and are open to executive interpretation. Consequently, they can be perceived as the main challengers to the rule of law. This leaves the judiciary with the onus of striking a balance between the need to protect national security through executive discretion with the rule of law in Singapore.

In *Lee Mau Seng*,[82] the court held that the requirement of Presidential satisfaction in effecting preventive detention under s 8(1) was a 'purely subjective condition so as to exclude a judicial enquiry into the sufficiency of the grounds to justify the detention'.[83] Hence, an affidavit by the Minister of Home Affairs would suffice as evidence of Presidential satisfaction.[84] Furthermore, the court was reluctant to inquire whether there was *mala fides* involved on the part of the President.[85] Notably, this

[79] The core values of the Singapore Public Service are: Integrity, Service and Excellence. For more information about the core values and mission of the Singapore Public Service: See Public Service Division, Prime Minister's Office, *Corporate Mission, Philosophy and Core Values* (2007) Public Service Division < http://www.psd.gov.sg/PublicService/CoreValue/>.

[80] In 'Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore', the government view on the rule of law was elaborated as 'the supremacy of law, as opposed to the arbitrary exercise of power. The other key tenet is that everyone is equal before the law. The concept also includes the notion of transparency, openness and prospective application of our laws, observations of the principles of natural justice, independence of the Judiciary and judicial review of administrative action.' – See Thio Li-Ann, Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore' (2002-2003) 20 *UCLA Pacific Basin Law Journal* 1, 5-7.

[81] See Tamanaha, above n 76, 102.

[82] *Lee Mau Seng v Minister for Home Affairs, Singapore & Anor* [1969-1971] SLR 508.

[83] *Lee Mau Seng v Minister for Home Affairs* [1971] 2 MLJ 137, 145 (Sing. HC).

[84] See Chua, above n 45, 10.

[85] In *Lee Mau Seng v Minister for Home Affairs*, Wee Chong Jin CJ held that *mala fides* was not a justiciable issue at all in the context of the ISA. - *Lee Mau Seng v Minister for Home Affairs* [1971] 2 MLJ 137, 145 (Sing. HC).

subjective standard was even lower than the standard enunciated in *Liversidge v Anderson* where sufficient grounds need to be present for the implementation of detention, and that the Secretary had acted in good faith.[86]

This position however, changed in the later case of *Chng Suan Tze* where Wee Chong Jin CJ said in obiter that '[a]ll power has legal limits and the rule of law demands that the courts be able to examine the exercise of discretionary power'.[87] While the appeals were allowed predominantly on technical grounds, the view of the Chief Justice signaled that there should be a change from subjective to objective standard. This means that the law in *Lee Mau Seng* might no longer be good law, and the dissenting approach advocated by Lord Atkin in *Liversidge* should be adopted instead.

### (a) Legislative Intervention: Back to Subjective Standard

Following the *obiter dicta* in *Chng Suan Tze*, Parliament decided that the law should be restored to its former subjective standard. Subsequently, the ISA and the Constitution were amended with the main purpose of ensuring that the courts will not be free to apply the 'objective test' in judicial review of executive discretion under the ISA.

To ensure that the subjective standard remains, judicial review was limited by virtue of ss 8A and B. In addition, s 8D was also added to allow the amendments within the ISA to operate retrospectively. Consequently, the judiciary can only exercise its powers of judicial review in procedural matters. Article 149(1) of the Constitution was also expanded, and the 'notwithstanding clause' clarified to include the amendments made within the ISA. The authority of the executive was effectively safeguarded,[88] and the law regarding judicial review reverted to the position as it was in the days of *Lee Mau Seng*.[89]

However, it will not be correct to rely on the abovementioned amendments to argue that the encroachment of the legislature had fully incapacitated the judiciary from applying the objective test. Noting that the Constitution was implicitly premised on the doctrine of separation of powers as well as fundamental principles of natural justice,[90] such amendments to the ISA could potentially be declared *ultra vires* should a substantive or 'thick' approach to the rule of law be taken. This is because they can easily be perceived as an infringement on the judiciary's right to review executive decisions.[91] If these amendments were to be declared as *ultra vires*, the court would then be able to substantively review executive decisions and impose the objective test.

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[86] *Liversidge v Anderson* [1942] AC 206.
[87] *Chng Suan Tze v Minister of Home Affairs & Ors and other appeals* [1988] SLR 132.
[88] See section 2.2.2 above.
[89] See *Lee Mau Seng v Minister for Home Affairs, Singapore & Anor* [1969-1971] SLR 508; Chua, above n 45, 11-12; See also, *Singapore Parliamentary Debates, Official Report* (25 January 1989) vol. 52 at col. 463.
[90] The executive, legislature and judiciary are separated under the Singapore Constitution. See *Constitution of the Republic of Singapore* (Singapore, 1999 rev ed) ss 23, 38 and 93; See especially, *Constitution of the Republic of Singapore* (Singapore, 1999 rev ed) ss 9, 11, 12, 13 and 14 (Part IV Fundamental Liberties).
[91] See also, Chua, above n 45, 11-12.

Yet in *Teo Soh Lung*, the court decided to defer to the 'thin' formulation of the rule of law.[92] In failing the arguments posited by the appellant that the amendments made to s 8 of the ISA are unconstitutional, it was enunciated that the rule of law and the doctrine of separation of powers cannot be said to be contradicted by a reaffirmation of the subjective test of judicial review in *Lee Mau Seng*. This is so, as Parliament was only enacting the rule of law relating to the law applicable to judicial review.[93]

Therefore, insofar that the procedures of the legislature are sound, the courts are not likely to interfere with its actions. Particularly, the result of this judgment in *Teo Soh Lung* made it clear that the Court recognised the intentions of the legislature to have decisions affecting national security left to the executive. Consequently, they remain insistent in applying the subjective standard.[94]

### 3.2.2 Substantive v Formal Concept of the Rule of Law

Essentially, the answer as to whether the rule of law was compromised depends on the approach taken towards interpreting what the rule of law in Singapore should be. If a substantive approach were to be taken, such developments of the law concerning judicial review in ISA-related issues would surely be criticised as contrary to the rule of law.[95] This is so as a substantive approach to the rule of law requires inter alia, that judicial review be unfettered so as to facilitate an objective determination of the executive's exercise of discretion.[96] Under a substantive concept of the rule of law, the substantive rights of an individual must be ensured. In the context of the ISA, it means that there should be concrete safeguards to an individual's rights.[97] However, the imposition of such substantive concepts has to be in harmony with the country's political doctrine of democracy. This is crucial since a substantive concept of the rule of law could potentially contradict the authoritative democracy adopted in Singapore. Such a scenario breeds undesirable and adverse political and social effects, especially when these substantive rights advocated under a substantive concept of the rule of law cannot be guaranteed under Singapore's doctrine of authoritative democracy.

This paper suggests that it is more appropriate for the question whether the rule of law was contradicted by the restriction of judicial review under the ISA, to be determined in relation to the 'thin' and positivistic approach taken by the judiciary. Only then can an accurate or relevant answer be adduced, with respect to Singapore.

Reiterating *Teo Soh Lung* above,[98] the restriction imposed on judicial review by the ISA is not an infringement of Singapore's rule of law as Parliament is merely

[92] See *Teo Soh Lung v Minister of Home Affairs* [1989] 2 MLJ 449 (Sing. CA).
[93] Ibid, 449.
[94] See *Singapore Parliamentary Debates, Official Report* (25 January 1989) vol. 52 at col. 467; See also, Tham, above n 63, 76.
[95] In The Rule of Law for Everyone?', Brian Tamanaha observed that a substantive approach to the rule of law would entail the protection of an individual's rights. This extends beyond the formal approach, which encompasses only the institution of characteristics identifiable with the rule of law without any requirements as to the content of the law. – See Tamanaha, above n 76, 102.
[96] See *Liversidge v Anderson* [1942] AC 206; See also, *Inland Revenue Commissioners v Rossminster Ltd* [1980] AC 952, 1011, 1025; *Khawaja v Secretary of State for the Home Department* [1984] AC 74, 110.
[97] See Tamanaha, above n 76, 102.
[98] *Teo Soh Lung v Minister of Home Affairs* [1989] 2 MLJ 449 (Sing. CA).

enacting the rule of law pertaining to judicial review.[99] The High Court had earlier elaborated this view, when Lai Kew Chai J asserted that such measure would facilitate:

> '[a] correct perception of the true basis and nature of judicial review [which] would ensure that a court of law would properly keep within the limits of judicial review over a decision-making process to ensure that there has been no unlawfulness in the decision-making process and would also prevent a court from becoming an appellate court and thereby wrongly deciding whether a decision was right or wrong on in either affirming or substituting its decision for the decision of the authority vested with the discretionary power'.[100]

Besides, the non-justiciability of national security and the restraints or in this case, articulation of what judicial review should be in relation to national security matters concerning the ISA, did not pervert the ability of the judiciary to inquire into the lawfulness of a decision pertaining to the executive's exercise of its discretionary power.[101] Moreover, as discussed earlier, the executive's discretionary power is subjected to both internal and external procedures that serve to regulate its use and to ensure that the situation for which such powers were designed does exist. Therefore, because it is not arbitrary in nature, it does not contravene the general principle behind the rule of law, which is the prevention of arbitrary powers being in the hands of one person or institution.[102]

### (a) What About the ISA in its Entirety?

Arguably, the ISA and the operation of its provisions are largely within the 'framework' of Singapore's rule of law.[103] Importantly, there is an observation of the principles of natural justice through the institution of an Advisory Board that is unbiased and whose aim is to scrutinise the allegations made against the detainee to ensure that the detention order is justified. By virtue of Art 151 of the Constitution and s 11 of the ISA, the detainee is granted the right to a fair hearing. A detainee also has a right to counsel.[104] While the amount of information disclosed is subjected to the interests of the nation, it should be noted that the doctrine of natural justice is a flexible one that should be adaptable to changes in the local context as well as the perspectives of its administrators.[105] Thus, it is arguable that there is still an observation of the principles of natural justice, albeit within in constraints set in s 9(b) of the ISA.

ISA has also not affected the independence of the judiciary. When the factual basis of the detention was determined in *Chng Suan Tze*, the facts surrounding the Minister's decision were scrutinised. Notably, the judges left unanswered questions regarding

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[99] See Chua, above n 45, 12.
[100] *Teo Soh Lung v Minister of Home Affairs & Ors* [1988] SLR 676, 677.
[101] Ibid, 677.
[102] See above, section 2.2.2.
[103] With the exception of s 8D, which allows for a retrospective application of ss 8A and B. This is contrary to the principle of prospective application of laws within the rule of law concept described by the government. – See Thio, above n 80, 5-7.
[104] See Yang, above n 41, 31; *Constitution of the Republic of Singapore* (Singapore, 1999 rev ed) s 151(2); *Lee Mau Seng v Minister for Home Affairs* [1971] 2 MLJ 137.
[105] *See Haw Tua Tau v PP* [1981-1982] SLR 133.

the effects the ISA amendments have on the role of the judiciary.[106] Hence, albeit to a limited extent, the courts are still able to assert their power to look into ISA actions.[107]

Moreover, the amendments made to the ISA do not replace the common law regarding judicial review. It has no power to stop the development of the common law and if the subjective test was to be perceived as illogical in the future, then even if the law pertaining to judicial review has reverted to its position at the time of *Lee Mau Seng*, it is not binding and could be overruled.[108] This is especially so, as the Court could take a more substantive approach to the rule of law, revise its earlier position and invalidate s 8 on the basis that it infringed the doctrine of separation of powers. Furthermore, the ISA does not abrogate the right of the judiciary to review administrative action. On the contrary, s 8B(2) expressly states that the judiciary is empowered to review questions involving the compliance of any procedural requirements dictated in the ISA.[109] On this basis, the paper asserts that the ISA has not affected the independence of the judiciary nor its right to review administrative action.

The principle that the law should be prospectively applied however is left uncertain. In particular, s 8D allows for the retrospective application of ss 8A and B. Prima facie, s 8D has infringed on the rule regarding the prospective application of law. However, it is interesting to note that in *Chng Suan Tze*, the court conceded it was obvious that the discretions under ss 8(1) and 10 of the ISA have been zealously entrusted to the executive, and under these circumstances the scope of review of these discretions was to be 'limited to the grounds of illegality, irrationality or procedural impropriety'.[110] This means that even without the intervention of ss 8A and B, much less s 8D, and with the law regarding judicial review being allowed to develop into the objective test, the application of the objective standard amidst so much subjectivity, is still unlikely to bring about the substantive results critics expect. Moreover, what s 8D is doing is merely borrowing 'from the common law by turning the clock back'.[111] It is apparent that there is a contradiction here, but it would be harsh to construe such aberration as a fundamental breach of the rule of law. In the context of the ISA, it cannot be condemned as a blatant disregard for the rule of law.

Considering all arguments, it can be concluded that the ISA – including its provisions restraining judicial review – has by and large stayed within the boundaries of the rule of law professed by the Singapore government.

### 3.2.3 Reforms: A Critical Approach

Considering Singapore's political context, it is likely that this 'thin' formulation of the rule of law can be perceived as a weakening of the judiciary in its powers to check the

[106] For a list of the questions and detailed discussion, see especially Tham, above n 63.
[107] See Tham, above n 63, 82.
[108] Ibid, 82-83.
[109] *Internal Security Act* (Singapore, Cap 143, 1985 rev ed) s 8B(2).
[110] See *Chng Suan Tze v Minister of Home Affairs & Ors and other appeals* [1988] SLR 134; See also, *Council of Civil Service Unions v Minister of the Civil Service (GCHQ case)* [1985] AC 374.
[111] Tham, above n 63, 82.

executive in its use of the ISA.[112] In recent years, other authors have suggested some key reforms in order to bolster the rule of law in Singapore.

One author attempted to postulate an ideal role for the judiciary; proposing that the court should also consider the sufficiency of the safeguards within the ISA before arriving at a decision.[113] In addition, it was advocated that Art 151 of the Constitution should be interpreted liberally in favour of the individual so as to give individuals 'a full measure'[114] of their constitutional liberties. The purpose of these reforms would be to let the onus of ensuring the fruits of substantive democracy lie with the judiciary when the government is reluctant to do so as seen in *Teo Soh Lung*.[115]

Another author suggests that the President's office be audited to cement impartiality in Advisory Board hearings. Stating that 'when the Advisory Board and the President unite, the government must yield',[116] he contends that this extra-judicial supervisory avenue depends on the strength of the Presidential office.[117]

This paper submits that these are valid suggestions. However, the implementation of these measures should be considered in conjunction with any possible consequences to Singapore's political landscape and policy discourses. Principally, these changes have to be implemented carefully because it will be detrimental to Singapore if its legal system is inconsistent with the government's political position. Simply put, the ISA is not to be viewed plainly from a legal or political perspective.

## 4 CONCLUSION

The balance between the need for national security with the rule of law will always be a controversial issue. As a weapon likened to be a 'blanket solution' against any form of internal threat, the harsh appearance of the ISA can easily be dismissed as contrary to the rule of law.

However, is it really the case here? As argued above, the powers for preventive detention conferred on the executive under the ISA are not as arbitrary as they seem to be. They are subjected to sound and fair procedures, albeit treading the fine balance between the rights of the detainee, and facts whose disclosure would be against the national interest. It also remains largely within the boundaries set by the local concept of the rule of law. Importantly, the key tenets are adhered to: the judiciary stays independent and public confidence in the judiciary remains as the courts have attempted to state clearly, their position with regard to their constitutional role in light

[112] See Chua, above n 45, 12.
[113] Ibid, 18.
[114] See *Ong Ah Chuan v PP* [1980] AC 64, 70.
[115] See Chua, above n 45, 18.
[116] Michael Hor, 'Constitutionalism and Subversion: An Exploration' in Thio Li-Ann and Kevin Y L Tan (eds) *Evolution of a Revolution: Forty years of the Singapore Constitution* (Routledge-Cavendish, 2009) 260, 275-276.
[117] Ibid, 275-276.

of the ISA amendments in Singapore.[118] The judiciary has also retained their right to conduct judicial reviews over administrative actions, even in ISA-related cases.[119]

The ISA is perceived by some as inconsistent with the rule of law simply because it has been juxtaposed inappropriately against a substantive concept. By doing so, these opponents have wrongly identified the extent to which the individual's fundamental liberties are protected under the Singapore system. As argued above, it should be compared with the standard set by a more 'formal' concept, since that is the model that Singapore largely adopts. Only then can there be a proper assessment of the implications the ISA has in relation to Singapore's rule of law.

Notwithstanding this, there are valid concerns regarding the use of the ISA. It is not totally impossible to abuse it, and the safeguards instituted are susceptible to human error or failure. However, one needs to understand that such errors could at best, only be mitigated but not eradicated due to the need for a certain level of human judgment and involvement in legal processes. Moreover, the ISA has so far gone unchallenged in Singapore by detainees suspected of terrorism.[120] This could be an indication that the detainees are really guilty.[121] In addition, the government has expressed its commitment to being accountable to its people, and taking responsibility over the country's future. It has also asserted that the fundamental liberties of its citizens will not be disturbed unless there is justification for it.[122]

In conclusion, the paper submits that in this catch-22 situation, the government has managed to strike a difficult balance between the need for national security and the rule of law in Singapore. Accordingly, this paper contends that the ISA should not be abolished but defended instead, especially in these uncertain times when threats remain prevalent in the face of international terrorism.

[118] Yeong Sien Seu, 'Clarity or Controversy – The Meaning of Judicial Independence in Singapore and Malaysia' (1992) 13 *Singapore Law Review* 107-108.
[119] See *Internal Security Act* (Singapore, Cap 143, 1985 rev ed) s 8B(2); *Teo Soh Lung v Minister of Home Affairs* [1989] 2 MLJ 449 (Sing. CA).
[120] The main use of the ISA at this time, is to contend with the threat of terrorism.
[121] See Chua, above n 45, 21.
[122] See Wong Kan Seng, 'The Real World of Human Rights' [1993] *Singapore Journal of Legal Studies* 605, 607.