

**The Emerging Security Paradigm in the West:
A Perspective from Southeast Asia**

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On the morning of September 12, 2001, I set off for my constitutional law tutorial at the National University of Singapore, sleep-deprived and still reeling from the events of the previous evening.¹ Neither I nor any of my students wanted to talk about anything but the attacks and so we spent much of the tutorial venting our thoughts and feelings. Later in the session, though, I felt duty-bound to bring the discussion back to constitutional law and so I asked them whether they thought that in the aftermath of September 11 civil liberties in the United States would be negatively affected. Their general conclusion, with which I agreed (naïvely, in retrospect), was that while there might be some initial pressure to curtail civil liberties, most Americans would be unwilling to give up their rights even in the face of such attacks. Such was the perception of my students, who regarded the United States as the crucible of civil liberties and the antithesis of communitarian and security-minded Singapore. Civil liberties in the United States, they said – and I agreed – were so deeply rooted in the American psyche that even the events of September 11, as horrific and terrifying as they were, would not undermine the protection of civil liberties. How wrong we all were.

My goal in this paper is to offer a perspective on the tension between security and liberty as a teacher of criminal and constitutional law in Singapore. I will have more to say about this in a moment, but let me begin with two caveats. First, I must declare right up front that I am a Canadian expatriate who has been teaching law at the National University of Singapore since 1998. While my four-and-a-half years in Singapore have helped me to learn a great deal about the legal, social, political, and cultural climate of Southeast Asia, I do not consider myself Asian. I am still, however, an outsider and so I offer you only a perspective from Southeast Asia – and not a Southeast Asian perspective. Second, Southeast Asia is a complex and multi-faceted region which itself gives rise to a number of different perspectives on terrorism as well as on security and liberty. This paper offers *one* perspective and does not purport to represent or reflect the views of Southeast Asia as a whole – although some attempt will be made to draw some broad conclusions about how the tension between security and liberty is generally regarded in the region. I do therefore offer some generalizations which, like all generalizations, must be taken with a grain of salt.

With these caveats in mind, I now return to the substance of my paper. Some have suggested that security and liberty can co-exist; that security is effectively a pre-

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¹ It was the evening of September 11 in Singapore when the attacks on New York and Washington D.C. took place.

condition for liberty.² But a survey of the recent changes in the security regimes of the West, when viewed from a Southeast Asian perspective, suggests instead that the West is moving quickly toward a security paradigm that is inconsistent with civil liberties and furthermore is likely to be longstanding. This move toward a security paradigm has serious implications for the regimes of constitutional rights in Southeast Asia and in the West. In Southeast Asia, the Western shift to a security paradigm has at once shattered the rhetoric of a distinct “Asian way” – at least to the extent that this rhetoric was called to the aid of strict Southeast Asian security regimes – and conferred a sense of vindication and legitimacy on those regimes, at least in Singapore and Malaysia.³ In the West, and particularly in the United States, the new security paradigm has levelled the ostensible moral high-ground from which the West once championed civil liberties. At the same time, it has created an urgent need to reconcile the new security paradigm with a longstanding tradition of constitutionalism and rights.⁴ And while, theoretically, it might be relatively easy to justify curtailing rights temporarily, in reality, the shift to a security paradigm is starting to look less and less temporary. As the implications of international terrorism in both Southeast Asia and the West continue to unfold, there are important lessons to be learned from and questions to be asked about this shift toward a security paradigm. This paper attempts to bring some of these lessons and questions into focus.

I. SECURITY AND LIBERTY IN SOUTHEAST ASIA

There was a clear sense in Southeast Asia prior to September 11 that as far as both constitutional liberties and criminal law were concerned, Asia had a distinct approach. Asian countries, it was often argued, were distinct from the West in placing the community above the individual⁵ and Asians themselves were considered unique in their willingness “to accept certain curbs on their civil liberties in exchange for a

⁶ Two years ago when this society met in Johannesburg, my colleague Michael Hor described Singapore’s preventive detention laws for dealing with organized crime, its harsh anti-drug laws, and its liberal use of corporal punishment and the death penalty, all as part of Singapore’s crime-control model of criminal law.⁷ He argued that the approach to criminal law in Singapore is part of a “stark utilitarian calculus,” one aspect of which is “the willingness to exchange (what others might see as) respect for ‘human rights’ for better criminal control, to barter expensive time-consuming trial processes for the efficiency of administrative

² See, for instance, Assistant United States Attorney General Viet D. Dinh, “Freedom and Security After September 11” (2002), 25 *Harvard Journal of Law & Public Policy* 399 at 400: “The dichotomy between freedom and security is false. For security and freedom are not rivals in the universe of possible goods; rather, they are interrelated, mutually reinforcing goods. Security is the very precondition of freedom.”

³ See Victor V. Ramraj, “Terrorism, Security, and Rights: A New Dialogue?” [2002] *Singapore Journal of Legal Studies* 1.

⁴ One early, post-September 11 example of precisely such an effort can be found in an anthology of essays on the Canadian then-draft anti-terrorism legislation: Ronald Daniels, Patrick Macklem, and Kent Roach, eds., *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001), published in November 2001.

⁵ See, for instance, White Paper on *Shared Values* (Singapore: 2 January 1991) Cmd 1 of 1991.

⁶ Venkat Iyer, “Asian Values and Human Rights” in Venkat Iyer, ed., *Democracy, Human Rights and the Rule of Law* (New Delhi: Butterworths, 2000), 155-172, at 170.

⁷ Michael Hor, “Singapore’s Innovations to Due Process” (2001), 12 *Criminal Law Forum* 25.

decisions.”⁸ This general attitude toward crime control and security is best captured by Singapore’s Chief Justice, commenting prior to September 11 on the strict approach taken to Jehovah’s Witnesses who refused, for religious reasons, to do compulsory military service: “[Any] administration which perceives the possibility of trouble over religious beliefs and yet prefers to wait until trouble is just about to break out before taking action must be not only pathetically naïve but also grossly

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This preventive approach to security is present in the internal security legislation of both Singapore and Malaysia. These laws, originally enacted by the British colonial government in the 1950s in response to the communist insurgency in the region,¹⁰ are now a fixture in the broad and extraordinary executive powers in both of these jurisdictions. These internal security laws permit preventive detention for renewable two-year periods by order of the executive for reasons of national security, subject only to an *in camera* administrative review by an advisory board. By a constitutional amendment in Singapore in 1989, the evidentiary basis for the government’s decision to issue a detention order under the Internal Security Act is no longer subject to judicial review, except for compliance with the procedures set out in the Act.¹¹

There is something particularly telling about this internal security legislation. In the aftermath of September 11, in response to UN Security Council resolution 1373, Singapore immediately enacted its own anti-terrorism legislation.¹² And yet it was the Internal Security Act that was used to detain two sets of suspected Jemaah Islamiyah terrorists in Singapore in December 2001 and, more recently, in September 2002. And while some dissenting views were publicly aired about the use of the Internal Security Act after the first set of arrests,¹³ the sentiment reflected in the press following the

⁸ *Ibid.* at 28.

⁹ *Chan Hiang Leng, Colin v. P.P.*, [1994] 3 S.L.R. 662 at 683 (Sing. H.C.).

¹⁰ See *Preservation of Public Security Ordinance, 1955* (No. 25 of 1955). Its Malaysian cousin, the *Internal Security Act*, was enacted in newly independent Malaysia in 1960 and extended to Singapore (superceding the earlier ordinance) during the brief merger of the two countries from 1963-1965. For more details as to the background of this legislation, see H.P. Lee, “Constitutional Values in Turbulent *Monash University Law Review* 375 at 382.

¹¹ The *Constitution of the Republic of Singapore (Amendment) Act 1989*, No. 1 of 1989 effectively reversed the decision of the Singapore Court of Appeal in *Chng Suan Tze v. Minister of Home Affairs*, [1989] 1 MLJ 69 (Sing. C.A.), by subjecting the scope of judicial review in national security decisions to the terms of the security legislation itself. The *Internal Security Act* was concurrently amended (see s. 8B(1) of the *Internal Security (Amendment) Act*, No. 2 of 1989) so as to “freeze” the law governing the scope of judicial review at 13 July 1971, the date of the decision of the Singapore Court of Appeal in *Lee Mau Seng v Minister of Home Affairs, Singapore* [1971] 2 MLJ 137 (Sing. H.C.), which effectively restricted judicial review of detention orders under the Act to matters of procedural compliance. This restricted approach to judicial review was affirmed and followed in *Teo Soh Lung v Minister for Home Affairs*, [1989] 2 MLJ 449 (Sing. H.C.); [1990] 2 MLJ 129 (Sing. C.A.).

¹² *United Nations Act 2001* (No 44 of 2001, Sing.) and its corresponding regulations: *United Nations (Anti-Terrorism Measures) Regulations 2001* (S. 561/2001 Sing.). These regulations create a number of new anti-terrorism offences (ss. 5, 6, 7A, 7B, 7C, 8, 9), consisting primarily of providing particular forms of aid or assistance to terrorists, the breach of which will, under s. 5(1) of the Act, render one liable to a maximum fine of \$100,000 (SGD) or a maximum of five years in prison, or both.

¹³ See Tan Tarn How, “Suspected terrorists deserve an open trial,” *The Sunday Times* (Singapore), 27 January 2002, at 46: “Opponents of the [Internal Security Act or “ISA”] argue that it violates fundamental rights because it denies a person the right to defend himself in a fair and open trial. They also criticize the law for going against the principles of justice – because a person detained under it is not presumed innocent until proven guilty. They also reject the stand that the ISA is necessary in cases where no witnesses would be forthcoming or that it will undermine its intelligence operations, and

second set of arrests was uniformly sympathetic to the government's approach. Referring to the alleged plot by the second set of detainees to target public works in Singapore, an editorial in *The Straits Times* declared that whatever "qualms some Singaporeans or foreigners may have had before about the use of the Internal Security Act to detain people without trial, few would entertain such qualms now."¹⁴

Similarly, in Malaysia, the government has used its own longstanding security legislation to effect a series of detentions under its own internal security legislation in the wake of the September 11 attacks.¹⁵ Despite setbacks in the courts, it has vowed to continue to use this legislation against domestic terrorists.¹⁶ Indeed, the Malaysian government has recently promised amendments to the Internal Security Act that will prohibit detainees "from divulging sensitive details in court documents" while sparing the police "from having to defend the detention by releasing information about any

¹⁷ There seems to be a distinct sense in official circles in Malaysia that the Internal Security Act is as important now as it has ever been. The wave of recent detentions under the Malaysian Act certainly confirms this view.

Indonesia is a special case since in recent years (after the fall of President Suharto in 1998) it has taken concrete steps to build and strengthen democratic institutions, to constitutionally protect human rights, and to create greater public respect for those rights. Adding to the complexity is the fact that Indonesia is also a predominantly Muslim country, unlike ethnically diverse Malaysia and predominantly Chinese Singapore. Prior to the bombing in Bali on October 12, 2002, the Indonesian government was hesitant to enact strict security laws, fearing a backlash from some elements of the Muslim community and not wanting to appear to be compliant to the demands of Singapore, Malaysia, and the United States. However, in the immediate aftermath of the bombing in Bali, the Indonesian government enacted new regulations (which previously, in draft form, had been the subject of political controversy), to enable it to tackle terrorism.¹⁸ While some of the provisions in the new regulations (such as the addition of offences of attempts, assistance, and conspiracy) are relatively uncontroversial from a civil liberties perspective, others are much more problematic. For instance, the regulations apply retroactively to the bombing in Bali,¹⁹ impose the

insist that the fundamental rights and principles of justice are of greater importance. If these arguments stand, they should stand in all cases... The average Singaporean, who is not likely to lose sleep over the problems of the ISA, will not be tossing and turning over the justice meted out to the 13 people who have been detained. Thus, pressing to bring them to court may not be popular. But it will certainly be right."

¹⁴ (21 September 2002) at 30.

¹⁵ On the Malaysian government's use of the Internal Security Act following the September 11 attacks, see Therese Lee, "Malaysia and the Internal Security Act: The Insecurity of Human Rights After *Singapore Journal of Legal Studies* 56.

¹⁶ "KL govt will continue using Internal Security Act," *The Straits Times* (Singapore), 22 September 2002 at 25.

¹⁷ "Security Act tightened to keep state's secrets," *The Straits Times* (Singapore), 5 October 2002 at A16.

¹⁸ See "Jakarta signs tough new laws, Bashir detained" *The Sunday Times* (Singapore), 20 October 2002 at 1. I am grateful to Gary Bell, Michael Hor, and especially Kent Roach for an email exchange which has helped me to better understand the scope of and potential problems with the new legislation. Any errors are, however, my own.

¹⁹ Article 1, *Government Regulation in Lieu of Law Number 2 Year 2002 Concerning Implementation of Government Regulation in Lieu of Law of the Republic of Indonesia Number 1 Year 2002 Concerning Elimination of Criminal Acts of Terrorism, on the Bomb Explosion in Bali Incident on*

The Security of Freedom, supra, note 4, 299-319; Tham Chee Ho, "Terrorist Property Rights in Singapore: What's Left After the United Nations Act 2001?" [2002] *Singapore Journal of Legal Studies* 176.

terrorism-related criminal offences²⁷ – all to counter the threat of terrorism.²⁸ But of particular interest from a Southeast Asian perspective are the enhanced powers of surveillance and information-gathering and of preventive detention. These powers strike at the hallmark liberal rights of privacy and due process respectively, and thus represent the most convincing proof of the shift to a security paradigm.

One well-known example of enhanced powers of surveillance and information-gathering can be seen in Title II of the *USA PATRIOT Act*, which creates broad new powers to facilitate the interception of private electronic communications.²⁹ Canada's new anti-terrorism legislation also provides for the "increased collection, storage, aggregation, sharing and linking of information sometimes with few accountability mechanisms."³⁰ New powers of preventive detention are also available in many jurisdictions and, in some instances, these powers can be used for information-gathering purposes. For instance, Canada's new *Anti-Terrorism Act* creates new provisions in the *Criminal Code* for preventive arrest of terrorist suspects for a maximum of 72 hours with the authorization of the courts,³¹ and for investigative hearings that can ostensibly be used to elicit material information about a terrorism offence that has been or will be committed.³² In the United States, the establishment by executive order of military tribunals allows for the detention and prosecution of suspected terrorists under military rather than civilian law,³³ without guaranteeing them the full range of constitutional or international human rights safeguards that would normally accrue to criminal defendants.³⁴ And in the United Kingdom, Part Four of the *Anti-Terrorism, Crime, and Security Act 2001*, which in effectively allows for the indefinite detention of suspected international terrorists under existing immigration laws,³⁵ expressly derogates³⁶ from Article 5(1) of the European

²⁷ See, in the Canadian context, see the newly enacted "Part II.1" of the *Criminal Code*, which creates a multitude of new terrorism-related offences and Kent Roach's discussion of these provisions in "Canada's New Anti-Terrorism Law" [2002] *Singapore Journal of Legal Studies* 122.

²⁸ Yet other changes include, in some instances, lowering the fault requirement in respect of some offences and increasing executive powers to define and designate terrorist groups, including the power to conclusively designate groups as terrorist groups for judicial purposes: see, generally, Ramraj, *supra*, note 3.

²⁹ *Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001). For an overview of the powers and procedures set out in this Act in relation to electronic surveillance, see Mary Wong, "Electronic Surveillance and Privacy in the United States after September 11, 2001" [2002] *Singapore Journal of Legal Studies* 214, esp. 221-24.

³⁰ Lisa Austin, "Is Privacy a Casualty of the War on Terrorism?" in *The Security of Freedom*, *supra*, note 4, 251 at 252.

³¹ Section 83.3 of the *Criminal Code*. See, generally, Roach, *supra* note 27 at 143-44.

³² Section 83.28 of the *Criminal Code*. See Roach, *ibid*, at 144-45.

³³ *Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* (George W. Bush, November 13/01).

³⁴ While the Military Order "states that defendants before military commissions shall be granted a full and fair trial, it does not expressly guarantee the presumption of innocence or the right of defendants to counsel of their choice; it denies defendants any remedy, including appeal and habeas corpus, to either a U.S. or international court; and it potentially bars defendants from seeking the evidence against them": Diane F. Orentlicher and Robert Kogod Goldman, "When Justice Goes to War: Prosecuting Terrorists Before Military Commissions" (2002), 25 *Harvard Journal of Law & Public Policy* 653 at 661-62.

³⁵ See *Immigration Act 1971*. See generally Christopher Harding, "International Terrorism: The British" *Singapore Journal of Legal Studies* 16 at 21-23.

³⁶ Section 30.

Convention on Human Rights.³⁷ The detention is effectively indefinite since it would allow for the detention of suspected terrorists “notwithstanding the fact that their removal from the UK is temporarily or indefinitely prevented by ... an international agreement or a practical consideration.”³⁸

These broad new laws represent an important departure from the longstanding tradition of civil liberties and the rule of law in the West. We should be careful not to exaggerate here; some of the legislation in the West is narrower in scope than the internal security legislation of Singapore and Malaysia, particularly since, at least in the United States and the United Kingdom, the more controversial anti-terrorism measures primarily target non-citizens.³⁹ But it nevertheless represents a significant shift and, in any case, powers of detention are only one part of the story. What is even more telling, perhaps, are the new policing powers which, when combined with intrusive new technologies, create a threat not only to liberty (as is in the case with preventive detention), but also to privacy. Even if a developed constitutional jurisprudence of due process might be able to fend off some of the new powers of arrest and detention, the underdeveloped jurisprudence of privacy in most jurisdictions poses a greater threat to civil liberties, particularly in an era in which technology can be used in ways unknown to the average computer user, to acquire information about them.⁴⁰

Beyond these new executive and policing powers, a parallel and complementary legal development has been the overt attempt by government to limit or exclude the supervision of the courts. For instance, Canada’s then-Minister of Justice, Anne McLennan, defended the new anti-terrorism laws by insisting that they would be “Charter-proof” – a point that is conceded even by critics of the new law in light of the recent deferential posture of the Supreme Court of Canada.⁴¹ Similarly, as noted earlier, the United Kingdom has invoked its power under the *Human Rights Act 1998* to expressly derogate from its obligations under the European Convention on Human Rights. And in the United States, the U.S. government has, by setting up military tribunals to try suspected terrorists, evaded judicial review and the constitutional due process rights that would accrue to the accused in an ordinary criminal trial.

The existence of preventive detention laws and surveillance powers is of course not new, even in the West. But in most cases in the past these powers were either temporary or exceptional and in any event would be subject to the jealous supervision of the courts. What is new, however, is the amplification of these powers and the

³⁷ Article 5(1) guarantees and qualified the right to liberty and security of the person. In particular, Article 5(1)(f) permits the “lawful arrest and detention of a person ... against whom action is being taken with a view to deportation or extradition.” Derogation from Article 5(1) was considered necessary since not all suspected international terrorists could be deported, and in light of European and British decisions holding that detention was permissible only if it was done for the purpose of deportation and only if the removal could be effected within a reasonable time: see Harding, *supra*, note 35 at 21.

³⁸ Harding, *supra*, note 35 at 22.

³⁹ This is not to say that these measures are unproblematic, but simply that they are narrower in scope than the internal security legislation in Singapore and Malaysia.

⁴⁰ I am grateful to Mary Wong of the Singapore Management University for bringing the extent of this problem to my attention. This problem was immediately recognized in the aftermath of the September 11 attacks: see Austin, *supra*, note 30.

⁴¹ Roach, *supra*, note 31 at 128.

attempt, in tandem, to limit the supervisory jurisdiction of the courts. This combination of new powers and limited judicial review suggests that the West is in the midst of a fundamental shift in its criminal and constitutional law from a paradigm of liberty to a paradigm of security.⁴²

III. IMPLICATIONS FOR SOUTHEAST ASIA

Most government officials in Southeast Asia would probably refrain from publicly expressing their sense of vindication in the post-September 11 era. But my impression is that there is a quiet but distinct feeling among many thinking persons in Singapore and Malaysia that the shift in the West toward a security paradigm represents, in effect, a shift to the Asian way of doing things. For instance, as Michael Hor asked rhetorically in an article on Singapore's response to terrorism, "Has the rest of the world come to appreciate Singapore's position?"⁴³ Others have expressed similar sentiments. For instance, Malaysia's Prime Minister Mahathir Mohamad was recently reported to have said that "even the West has conceded that preventive detention laws [are] necessary to safeguard internal security."⁴⁴ Some of my students have expressed similar views in class. But beyond merely observing this sense of vindication, in this part of the paper I want to consider some of the broader implications of the security paradigm in the West for the debate over security and liberty in Southeast Asia.

The first point follows directly from the sense of vindication I have described: The shift to a security paradigm in the West has bestowed a shroud of legitimacy around the internal security laws in Singapore and Malaysia. Internal security legislation has played a central role in the "war against terror" in Southeast Asia, so much so that well before the October 12, 2002 bomb attack in Bali, Singapore, Malaysia, and the United States had all been pressuring a reluctant Indonesia to enact new legislation to crack down on suspected terrorist groups within its borders.⁴⁵ The same sense of legitimacy has not, however, been conferred on the new anti-terrorism legislation in Indonesia. Persistent international (and especially U.S.) pressure⁴⁶ on the Indonesian government to crack down on suspected terrorists continues to be the source of considerable political controversy as well as a nationalistic backlash against stricter criminal and anti-terrorism measures. Indeed, prior to the October 12 attack, the chief drafter of the anti-terrorism bill had to defend the proposed draft as "a far cry from Singaporean and Malaysian internal security acts that allow preventive detention of renewable 2-year periods with minimal judicial involvement."⁴⁷ And yet, as we have

⁴² This shift has been recognized by the press. See, for instance, an Associated Press (AP) article, "Terror war curbs freedoms enjoyed by Americans" carried by *The Straits Times* (Singapore), 7 September 2002 at 24. The first paragraph of this article reads: "The government has imposed new limits on Americans' legal rights as it fights a war on terrorism, altering fundamentally the delicate

⁴³ "Terrorism and the Criminal Law: Singapore's Solution" [2002] *Singapore Journal of Legal Studies* 30 at 31.

⁴⁴ *Supra* note 16.

⁴⁵ See "Securing Indonesia" (editorial), *The Straits Times* (Singapore), 2 October 2002 at 10; "Indonesia media silent as others report on arrests," *The Straits Times* (Singapore), 18 October 2002 at H5.

⁴⁶ "Bush takes tough line with Jakarta on terror," *International Herald Tribune*, 16 October 2002 at 5.

⁴⁷ Romli Atmasasmita, "The advantages of the antiterrorism bill," *The Jakarta Post* (on-line edition), 1 October 2002.

seen, when the new regulations were enacted after the bomb attack in Bali they included measures permitting preventive detention for up to six months without judicial review.⁴⁸ While Indonesians struggle to deal with these new powers in the context of its new, fragile democratic regime, the new legitimacy of the internal security legislation in Singapore and Malaysia has made it easier for these governments to deflect criticisms that the legislation is unnecessary or subject to abuse.⁴⁹ But serious questions do remain on both of these scores, questions that deserve serious consideration.

My second point is this: The shroud of legitimacy around internal security legislation has come at a political cost, for the rhetoric of Asian values now rings rather hollow, at least in the security context. If the West can be equally concerned about security at the expense of civil liberties when the circumstances are deemed appropriate, the argument that there is a fundamental cultural difference between East and West loses its force.⁵⁰ Empirical and political circumstances, not fundamental norms, seem in hindsight to have been sustaining the supposed cultural differences.

The shift to a security paradigm in the West has thus had important, although perhaps not immediately obvious, implications both for the legitimacy of internal security legislation in Southeast Asia and for the credibility of the Asian-values argument, at least to the extent that this argument bears on questions of security and rights. The balance of this paper considers, in broad measure, the implications of the security paradigm for the West both in light of the Southeast Asian experience and in its own right.

IV. IMPLICATIONS FOR THE WEST

Just as the new security paradigm in the West has bestowed some new sense of legitimacy on internal security legislation in Southeast Asia, it has, by the same token, shattered whatever credibility Western democracies and, the United States in particular, once had as defenders of civil liberties. The United States is now working hand-in-hand with governments in Southeast Asia including (after the attack in Bali on October 12) Indonesia to contain threats posed by terrorist groups and their sympathizers in the region. Remarkably, *The Economist*, once temporarily banned in

⁴⁸ *Supra*, note 21.

⁴⁹ For instance, in an interview with *The Straits Times* (“Wait for a bomb to go off before we act? No way, says Kan Seng,” 27 September 2002 at H4), Home Affairs Minister Wong Kan Seng defended the use of the Internal Security Act against suspected terrorists in Singapore. When asked what he would say to those who question whether the arrests were justified, he replied rhetorically: “What would they like to see first before there is a threat? ... Do I want to choose to believe these critics or bother what they think or am I concerned about what we need to do to protect Singaporeans and strengthen security?” And when asked why there is no trial, he replied: “People who think stick to the route by going to the courts are just naïve. It is not the most constructive approach. Why? Once they go to court and, say, they are sentenced to 30 years’ jail and that’s it. Would this help us to understand the problem better, or has the problem been solved? After that, why would they talk to you? ... [Under] the ISA, it’s a two-year detention and who knows, depending on whether the person continues to pose a security threat or not, maybe he will get out. But if the person holds back and does not cooperate, then the person may be in for some time.” After the October 12, 2002, attack in Bali, these sorts of arguments are going to seem even more convincing not only in Singapore but in Indonesia as well: see Robert Go, “Blasts show need for crackdown,” *The Straits Times*, 14 October 2002 at 12.

⁵⁰ *Supra*, note 3.

Singapore, has held Malaysia and Singapore up as examples of Southeast Asian countries with “well-funded and efficient police and security services”⁵¹ with no mention of the internal security legislation at their disposal. But whatever credibility problems some Western countries might now encounter in Southeast Asia were they to criticize human rights abuses, the security paradigm gives rise to at least as pressing concerns at home. The experience of a longstanding security paradigm in Southeast Asia suggests three problems in particular that are likely to arise in the West.

First, there is a distinct possibility that these “temporary” incursions into civil liberties will slowly become permanent, despite the fact that some anti-terrorism legislation in some jurisdictions contains a sunset clause.⁵² As University of Toronto law professor David Dyzenhaus warns in relation to the Canadian *Anti-Terrorism Act*:

Terrorism legislation, because it seeks to normalize the exception by declaring a permanent state of emergency, is inherently a deviation from the ... reference model of emergency. The rule of law is relaxed, though not totally, and there is no clearly defined threat. We have the permanence of the temporary, an attempt to normalize the exception.⁵³

The fear that terrorism involves an invisible enemy with an agenda of indefinite duration (in contrast with war where the enemy is known and the war is itself of finite duration) only exacerbates the danger that exceptional anti-terrorism powers will endure and eventually come to be regarded as normal well after the immediate danger has passed.

The experience with a security paradigm in Southeast Asia provides a good example of how this can happen. The internal security legislation enacted in Singapore and Malaysia in the 1960s in response to communist insurgents in the region have long survived the demise of this threat. And in Singapore, the Criminal Law (Temporary Provisions) Act, which was enacted in the mid-1950s as a temporary measure to deal with Chinese secret societies,⁵⁴ has been faithfully renewed by the legislation and remains both in force and in use today.⁵⁵ This Act includes the power, on the part of executive, to detain without trial for renewable 12-month periods any person that the Minister is satisfied “has been associated with activities of a criminal nature.”⁵⁶ And while the power of preventive detention was seen as a short-term measure to deal with a serious and seemingly intractable problem of lawlessness and organized crime, described by one legal historian as an “abnormal crime-wave,”⁵⁷ it remains intact

⁵¹ “When Local Anger Joins Global Hate,” *The Economist*, 19 October 2002, at 24.

⁵² *USA PATRIOT Act*, *supra*, note 29, s. 224.

⁵³ David Dyzenhaus, “The Permanence of the Temporary” in Ronald Daniels, Patrick Macklem, and Kent Roach, eds., *The Security of Liberty* (Toronto: University of Toronto Press, 2001), at 28-29.

⁵⁴ For a detailed account of the history of anti-secret society legislation in Singapore, see Andrew BL Phang, *The Development of Singapore Law* (Singapore: Butterworths, 1990), 190-225.

⁵⁵ The current legislation can be traced to *Criminal Law (Temporary Provisions) Ordinance* (Ordinance 26 of 1955). It was most recently renewed by the Criminal Law (Temporary Provisions) (Amendment) Act (Act 17 of 1999).

⁵⁶ See section 30, *Criminal Law (Temporary Provisions) Act*, (Cap. 67, 2000 Rev. Ed. Sing.). The preventive detention provisions were introduced in 1958.

⁵⁷ Phang, *supra*, note 54 at 222.

today – some 44 years after it was initially introduced.⁵⁸ The real problem here is that once these laws are in place, it becomes more difficult psychologically to imagine –

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A second, related lesson from the Southeast Asia is that the tendency to focus on the uniqueness of the *empirical circumstances* as a justification for a departure from constitutional norms leads to a more general shift away from normative arguments in favour of politics, pragmatism, utility, and expediency. Civil liberties may come to be seen as idealistic or even irrelevant in such extraordinary circumstances and this scepticism toward a normative discourse of rights will begin to permeate ordinary thinking about criminal law and constitutional rights. So even if it could be argued in defence of the permanence of the new anti-terrorism laws that some form of these exceptional measures will always be needed, the danger remains that these departures from the norm will begin to encroach on ordinary criminal law principles. To return to the example of the *Criminal Law (Temporary Provisions) Act* in Singapore, this Act has been used not only against organized crime, but even against ordinary murder suspects where witnesses were not prepared to testify.⁶⁰ If civil liberties can be dispensed with to deal with pressing empirical circumstances, there is no reason to think that they are not expendable in the face of other, more commonplace threats to safety and security. After all, the victims of homicide are no less victims than the victims of the terrorist attacks in the United States, Indonesia, and elsewhere. Once politics, pragmatism, utility, and expediency are elevated above civil liberties and constitutional rights in the context of anti-terrorism law and policy, the argument in favour of expanding this approach into other areas of criminal law becomes much more compelling. The security paradigm will begin to claim its new place in the criminal justice system.

The third problem is that however vigilant the courts might be in safeguarding civil liberties, a security paradigm is likely to penetrate judicial thinking about civil liberties. In this respect, the experience of courts in Southeast Asia is again apposite, for the courts have been the most deferential to determinations of the executive and the legislature particularly when issues of national security are involved. In Singapore, for instance, the courts are generally accepting of derogations from constitutional rights, such as the right to freedom of religion, when national security matters are involved.⁶¹ On one rare occasion when the Singapore courts took it upon themselves to scrutinize the “objective” or evidentiary basis for the government’s

⁵⁸ Other jurisdictions, notably apartheid-era South Africa, have had similar experiences with ostensibly temporary legislation: see Dyzenhaus, *supra*, note 53 at 23ff.

⁵⁹ During the most recent Parliamentary debates on the renewal of the *Criminal Law (Temporary Provisions) Act*, it was argued that allowing “the Act to lapse may be misinterpreted as a softening of our tough stance and a weakening of our ability to deal with drug trafficking. This may encourage international drug trafficking”: *Parliamentary Debates*, v. 73, col. 1215 at 1220 (15 April 1999) (Ho Peng Kee).

⁶⁰ The Minister of State for Law, Ho Peng Kee, during the most recent Parliamentary debates on the renewal of the Act, explained: “The Act has also been invoked against criminals who have committed serious crimes, such as murder where witnesses were not prepared to testify in court. However, let me assure Members that the Act is used sparingly for these cases. Indeed, the last time the Act was so invoked was in 1994 when [five] Thai nationals were detained for their involvement in the murders of security guards and construction workers while committing thefts of surveying equipment or ‘theodolites.’ Since then, no [detention order] has been issued against any serious crime offender”: *supra*, note 59, at 1216.

⁶¹ See, for example, *Chan Hiang Leng, Colin*, *supra*, note 9.

decision to issue a detention order for reasons of national security, the government subsequently amended the constitution to ensure that the role of the courts is restricted to ensuring procedural compliance with the legislation.⁶² This sort of deferential posture of the courts in matters of national security faded in the West in the decades following the Second World War,⁶³ and its potential revival may well bring the courts in Canada, the United States, and the United Kingdom much closer in spirit to the security-minded courts of Southeast Asia.

V. CONCLUSION: A SECURITY PARADIGM IN AN AGE OF TECHNOLOGY

I would like to conclude with two brief observations. First of all, as I have not had very much to say about technology, let me try now to relate the arguments in this paper back to the general theme of the conference. If the thesis of this paper is correct, that jurisdictions in the West are shifting toward a security paradigm, and that this shift has the potential to become permanent, pervasive, and unchecked by the courts, the availability and use of powerful, invasive technologies by the state can only accelerate this shift and contribute to the general erosion of civil liberties.

Second, let me reiterate that this age of terrorism has opened a new window for dialogue between East and West, an opportunity that, as recent events in Bali remind us, is grounded in a mutual and international concern. So far, this window has been used primarily as an opportunity to coordinate anti-terrorism efforts in Southeast Asia. But there is equally an opportunity for a more enlightened dialogue about security and civil liberties, one that is premised on a deeper understanding of the kinds of threats, real or perceived, that might prompt a concerned government to take drastic measures in the name of self-protection. And yet, while there is more room now for a frank East-West dialogue than there was before September 11, the burden may well have shifted – even now in Indonesia, as it has in the West – to those who seek to defend a more robust approach to the protection of civil liberties.

⁶² See *supra*, note 11.

⁶³ The high water mark of this approach is arguably *Liversidge v. Anderson*, [1942] A.C. 206, which endorsed the deferential, “subjective” approach to national security decisions by which the courts ask only whether the Minister is subjectively satisfied that an issue of national security is involved.