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MALAYSIA'S COUNTER-TERRORISM POLICY: SHIFTING FROM THE EXECUTIVE-BASED TO THE CRIMINAL JUSTICE APPROACH?

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ABSTRACT

Malaysia's counter-terrorism strategy has its roots within the 12-year campaign against the communist insurgency between 1948 and 1960. During the emergency period, the government relied heavily on executive-based measures, which operated as a primary instrument to execute the "Winning Hearts and Minds" agenda. The state executive body and its agents had a wide range of powers at its disposal, including indefinite detention without trial and the restriction of residence against terrorist suspects. A similar approach was maintained through various legislations, even after the country gained independence in 1957. However, recent developments indicate a significant change in the attitude of the government. The criminal justice approach begins to gain greater prominence, this being evident

from the growing number of prosecutions against terror suspects and the creation of new terrorism-related offences. This paper first examines whether the apparent change is genuine and sustainable in the long term. This concern is connected with the nature and limits of the criminal law and justice system, along with other challenges derived from the existing structure, culture, and practices within the country. By adopting a socio-legal approach, this research also investigates the factors favouring and hindering the criminal justice approach empirically and theoretically as a primary legal response to countering terrorism in Malaysia. The ultimate aim is to contextualise an effective and fair legal response to terrorism that is able to operate within multifaceted counter-terrorism arrangements involving different stakeholders.

Keywords: Counter-Terrorism, criminal justice, terrorism, Malaysia, law.

INTRODUCTION

Malaysia's counter-terrorism strategy originated from the 12-year campaign against the communist insurgency between 1948 and 1960, which is known as the Malayan Emergency (Jackson, 1991). During the emergency period, the Malayan government relied heavily on executive-based measures, which operated as a primary instrument to execute the forcible suppression of terrorist activity, which was later linked to the "Hearts and Minds" agenda (Dixon, 2009; Stubbs, 1989). The state executive body and its agents had a wide range of powers at its disposal, including indefinite detention without trial and the restriction of residence against terrorist suspects (Hack, 2009). The conception of Malaysia's counter-terrorism strategy comprises mainly the following two characteristics.

First, Malaysia's counter-terrorism policy essentially embodies the institutionalisation of "state exceptionalism" that provides broad powers to the executive (Bakashmar, 2008). The feature originated from the colonial period and was later maintained by the authoritarian tendencies of the successive governments (Munro-Kua, 1996; Slater, 2003). This can be seen from the preservation of emergency laws

that were used to counter communist terrorism, such as the Internal Security Act (ISA) 1960, which was only repealed in 2011. This piece of legislation, which was meant originally to contain the remaining communist threats (*Hansard* Dewan Ra'ayat, 21 June 1960, 1185), was later used to detain political, social, and student activists (Human Rights Watch, 2004).

Second, Malaysia's counter-terrorism policy signifies the normalisation of emergency powers and measures (Whiting, 2013). Apart from the recognition of emergency powers, which is common in other jurisdictions, the Federal Constitution 1957 also authorises the enactment of exceptional laws, which are even inconsistent with the fundamental constitutional rights of citizens. In order to counter subversion and action prejudicial to public order, Article 149 of the Constitution allows such special laws to operate in peacetime perpetually. That was how the ISA 1960 gained its constitutional legitimacy. Besides, according to Walker and Mat Rus (2018), the overlapping and continuous emergency proclamations from 1948 to 2011 have also "normalised" the exceptional measures of emergency legislation. Such laws have been perceived by some factions in society as a fundamental part of the counter-terrorism strategy (Harper, 1999). The executive power then broadened beyond legislative and judicial scrutiny, arguably undermining the rule of law (Das, 1994). The situation enabled executive-based measures to be the preferred tools in countering terrorism, at least until 2012. Accordingly, terrorist suspects were often detained without trial under the ISA 1960, rather than being prosecuted in court (Fritz & Flaherty, 2003). In defending the executive-based policy, the Malaysian Prime Minister from 1981 to 2003 and from 2018 to 2020, Mahathir Mohamad (Utusan Online, 2001), explained that "to bring these terrorists through normal court procedures would have entailed adducing proper evidence which would have been difficult to obtain". The use of criminal law and the criminal justice system to counter terrorism was mainly an ancillary to the preferred executive-based approach. The case of *Public Prosecutor v. Mohd Amin Mohd Razali & Ors* (2002) is a notable terrorism-related case where the suspects were charged in court with waging war against His Majesty, the Yang di-Pertuan Agong during the ISA 1960 era. Other related cases were related to the unlawful possession of arms.

However, on 15 September 2011, the then Prime Minister, Najib Razak announced that the government would repeal the ISA 1960 and existing Emergency Ordinances. Razak et al. (2015) argued that the government move is a significant shift away from the previous executive-based approach and towards the criminal justice approach. The criminal justice approach in the service of counter-terrorism denotes the use of criminal law and justice as the first and preferred response against terrorism threats (Walker, 2011). It is about optimising functions of the criminal law and justice process within counter-terrorism arrangements, while observing their limits and boundaries in order to maintain a fair and effective counter-terrorism strategy and operation. This approach is also known as a criminalisation approach that treats terrorism primarily as crimes, and treats terrorists just like other criminals within the existing criminal justice system and processes (Crelinsten, 2009). The criminal justice approach offers various potential benefits and values to a counter-terrorism strategy. Above all, the criminal justice approach carries an appeal to legitimacy (Walker, 2011). It embodies a fair, appropriate, and sustainable response to terrorism, which is based on a normative legal framework and embedded in the core principles of the rule of law, due process, and respect for human rights (UN Office on Drugs and Crime, 2009).

Based on the proposition that there is a policy change, this paper aims to examine the purported change and assess its implementation. Three pertinent questions were set. First, whether there is a genuine policy shift towards a criminal justice approach in Malaysia's counter-terrorism policy? If the answer is in the affirmative, the sub-question is what are the measures taken to implement the new approach? Second, what are the factors that enable or facilitate the change in approach? Third, what are the factors that hinder the change of approach, and what can be done to overcome the limitations? In order to answer the above questions, several research methods were adopted and these will be explained in the following section.

METHODOLOGY

This research paper is based on a socio-legal framework, which involves the doctrinal study of legal aspects allied with an empirical interview-based study of how the law and society interacted. The

socio-legal approach in general helps researchers to assess the law and its workings, by enabling the researcher to move beyond legal texts in favour of an analysis of the processes of law, such as enforcement, investigation, and prosecution (Lee, 1997). As proposed by Dworkin (1998), law and legal practice can be studied from these two points of view. One is the internal perspective, which comes from the lawmakers and legal practitioners who debate about what law permits or forbids. This is closely associated with the doctrinal method. On the other hand is the external perspective, which is often associated with the lens used by sociologists or historians, “who ask why certain patterns of legal argument develop in some periods or circumstances rather than other” or “how history and economics have shaped” the consciousness of the legislatures (Dworkin, 1998). This valuable perspective can be found throughout this paper, particularly when Malaysian political, social, and historical aspects are discussed and carefully examined.

A series of in-depth interviews was conducted with judges, prosecutors, private lawyers, police, and academics in order to obtain the internal and external perspectives on the three research questions of the present study; apart from references which were not limited to judgements and case law. As terrorism and counter-terrorism research may also touch on delicate issues, useful insights and critical views may not be obtained without the full assurances of confidentiality. In order to preserve confidentiality, any reference to and publication of a direct quotation from any interviewees will ensure that the respondents’ identity is protected, they will remain anonymous in this paper. The secondary sources related to the doctrinal method in this paper are mainly books, journal articles, Hansards, law reports, and theses.

THE CHANGE OF APPROACH

As mentioned earlier, in the context of Malaysia, there is no documented government policy statement which may be equivalent to policy papers issued by the UK and Australian governments that explicitly articulates the change of policy towards a criminal justice approach. The White Paper on Countering the Threats of Islamic State Group tabled by the Prime Minister at the Parliament (Prime Minister’s Department, 2014) makes no mention of the change of policy, except an assertion that the government has also looked

into the legal responses of other jurisdictions, including the laws in the UK and Australia, as well as the Commonwealth Secretariat recommendations, as a guideline in enacting anti-terrorism legislation. Nevertheless, it is posited that the change of policy is perceptible from the following four aspects.

First, the repeal of the infamous ISA 1960 by the introduction of the Security Offences (Special Measures) Act (SOSMA) 2012 (*Hansard Dewan Rakyat*, 17 April 2012, no 20, 64). The legislation, according to its preamble, is intended “to provide for special measures relating to security offences for the purpose of maintaining public order and security and for connected matters”. Accordingly, all terrorism-related offences, that fall within the definition of ‘security offences’ must be prosecuted in accordance with the special process under the SOSMA 2012. Apart from the procedures, the legislation also provides exceptional rules of evidence which govern the admissibility of evidence in terrorism-trials.

Second, the introduction of the SOSMA 2012 paves the way for the increase of criminal prosecutions of terrorist suspects in court. From 22 June, 2012 to 28 February, 2017, 641 individuals were prosecuted in court for such offences. Even though the number includes persons allegedly involved in human trafficking and other organised activities, the majority of the arrests during the period were linked to terrorism (*Hansard Dewan Rakyat*, 4 April 2017, 193). The increasing number of prosecutions, arguably sets a new trend because as mentioned during the ISA 1960 era, most terrorist suspects were detained without trial.

Third, the change of paradigm can be inferred from the enactment of special laws that criminalise terrorism-related activities. In 2012, a new chapter was inserted into the Penal Code 1936, namely Chapter VIA: Offences Relating to Terrorism. Among the new offences are committing terrorist acts, supporting terrorist groups, promoting terrorism activities, and concealing information related to terrorist acts. The new Chapter also provides definitions of “terrorist,” “terrorist group,” and “terrorist act”. Additionally, in 2015, more terrorism-related offences were included, such as possession of items associated with terrorist groups or terrorist acts and “travelling to, through or from Malaysia for the commission of terrorist acts in a foreign country”. Arguably, the 2012 and 2015 legislation has effectively facilitated prosecution and allowed for early intervention.

There was also a significant number of reported cases in which the accused persons were charged with possession of items linked to terrorism such as books, photographs, and video recordings. For example, in *Mohamad Nasuha bin Abdul Razak v. Public Prosecutor* (2019), *Siti Noor Aishah Atam v. Public Prosecutor* (2018), *Public Prosecutor v. Muhammad Hakim Azman* (2017), *Public Prosecutor v. Azizi Abdullah* (2017), and *Public Prosecutor v. Muhammad Sani Mahdi Sahar* (2016).

Fourth, the establishment of a special court to hear cases related to terrorism and national security also indicated the change of policy, which was in turn, welcomed by the judiciary (Zakaria, 2016). The special courts are presided over by the High Court judges who have been trained to hear terrorism-related cases (Malaysian Judiciary, 2017). During the ISA 1960 period, the role of the judiciary was minimal within Malaysia's counter-terrorism strategy (Ciorciari, 2003). The judiciary could only interfere with an executive decision if there was a defect in the detention order (Harding, 2012). The 1988 amendment of the ISA 1960 explicitly stipulated that no judicial review could be made by the detainee "save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision". Criminal prosecution of terrorism-related cases in court at that time was uncommon, with an exception for offences related to the unlawful possession of arms.

Overall, the repeal of the ISA 1960 and the introduction of the SOSMA 2012 have facilitated the criminal justice approach in Malaysia's counter-terrorism strategy. In view of constitutionalism and the rule of law, Walker and Mat Rus (2018) asserted that the new legislation was arguably a better national security law compared to the ISA 1960, but far from perfect due to the lack of sufficient safeguard.

ASSESSMENT

It has been posited earlier that the then Prime Minister, Najib Razak made some drastic "reforms" after the 2018 General Election. They included the repeal of several repressive laws such as the ISA 1960, Banishment Act 1959, Restricted Residence Act 1993, and Emergency Ordinance (Public Order and Crime Prevention) 1969. The outgoing Prime Minister, Najib, claimed that the reforms were

already part of his national transformation agenda, but for some, his action appeared more to be a political theatre (O'Shannassy, 2013). The announcement to repeal those laws was made when Malaysians were expecting the 13th General Election in 2013. The support for the Barisan Nasional (BN, National Front), however, did not change much as it won with a reduced majority of 133 parliamentary seats, down from 140 seats in the previous election in 2008 (Mohd Sani, 2013). It is important to note that the pledge to repeal the ISA 1960 and other oppressive laws was not included in the ruling party's election manifesto in 2008 (Barisan Nasional, 2008). However, the Malaysian main opposition parties constantly vowed to abolish such legislation, which was described as draconian (Democratic Action Party, 2018; Parti Keadilan Rakyat, 2008; Parti Islam Se-Malaysia, 2008). It is therefore correct to assert that the opposition, as well as civil society movements played a significant role in pushing the government to abolish the repressive laws (Malik, 2014).

As posited earlier, the repeal of the ISA 1960 and the introduction of the SOSMA 2012 indicate a shift of the government's policy on countering terrorism. The development was also reflected in the number of individuals who were detained without trial after 2012. Based on official records, only 92 out of 445 individuals linked with terrorism were detained from 2013 to 2018 (Chew, 2018). SUARAM (2017), a human rights group, however, reported that 114 suspects had been detained without trial. Both numbers were still smaller compared with the number of suspects who were charged in court during the period. The following Table 1 which is based on a police statement released to the media, shows the number of prosecutions, release, deportation, and detention of terrorist suspects after the introduction of the SOSMA 2012 (Chew, 2018).

As can be seen from Table 1, 42.5 percent of suspects were prosecuted, with a 85.2 percent conviction rate. Since the available information only provided the total number of prosecutions from 2013 to 2018, the researchers were not able to see the trend for the six-year period. The following Figure 1 perhaps may shed some light on the progress of terrorism-related prosecutions in Malaysia. Figure 1 shows the number of terrorism-related cases under the SOSMA 2012 at all the High Courts in Malaysia from 2013 to 2017. The chart is developed based on the information provided by an interview with a High Court judge (Judge A, personal communication, September 29, 2017).

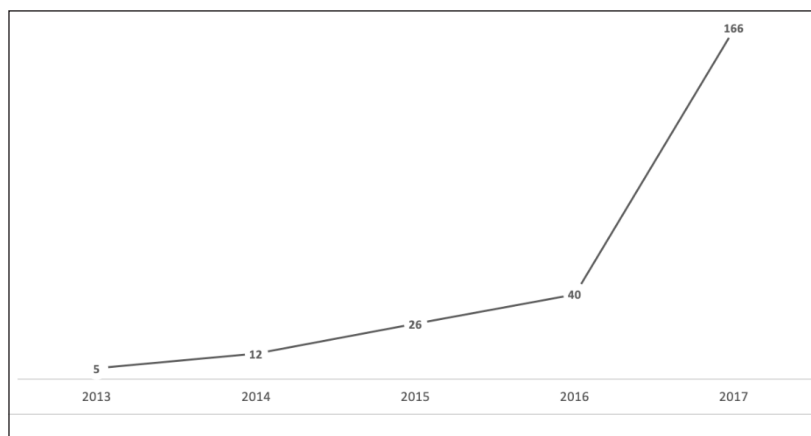
Table 1

Number of Terrorism-Related Arrests and Measures Taken from 2013–November 2018

	Measures taken	Number of individuals (Percentage of arrests)
1. Prosecution	Conviction: 161 (85.2%) Acquittal: 28 (14.8%)	189 (42.5%)
2. Detention without trial		92 (20.7%)
3. Deportation		50 (11.2%)
4. Release		114 (25.6%)
Total		445

Figure 1

Number of Registered Terrorism-Related Cases (under SOSMA 2012) at the High Courts of Malaya and Sabah-Sarawak from 2013 to 2017



It must be emphasised that the numbers in Figure 1 cannot be directly compared with those in Table 1. Figure 1 is based on the number of cases, but Table 1 shows the number of terrorist suspects. More than one accused person may be prosecuted in a “case”. However, Figure 1 demonstrates the increasing numbers of prosecution under the SOSMA 2012, especially in 2017. The judge, who provided the information, explained that the rise was because prosecutors began

to use the SOSMA 2012 in dealing with organised crime suspects. But, according to him, organised crime cases are less than half of the total number. Nevertheless, based on the numbers Figure 1, it can be seen that there was also an increase in the prosecution of terrorism-related cases within the five-year period. The decrease of detention without trial cases and the increased number of prosecutions arguably illustrate the shift of policy towards the criminal justice approach.

Notwithstanding the implications of the above statistics, this development, that is the shift in policy, has not only received favourable responses, but also scepticism from among the state counter-terrorism actors and other stakeholders, such as private practitioners and civil society activists. Their attitudes and perspectives mainly revolved around the following factors.

A Political Move or Genuine Reform?

The first factor relates to the motive behind the change of policy. The move to repeal the ISA 1960 and replace it with the SOSMA 2012 was arguably driven by political instability at that time, instead of any genuine desire for legal reform (Brown, 2013). In the 2008 General Election, the BN government failed to obtain a two-thirds majority in the Parliament due to what was widely termed a “political tsunami” (Khoo, 2016). The ISA 1960 was officially abolished in the Parliament in June 2012, which was several months before the 2013 General Election. Hence, some were not convinced about the “reform” (Spiegel, 2012; SUARAM, 2012). The subsequent use of the SOSMA 2012 against political dissidents and activists solidified the prevailing scepticism. For example, as evident in the cases of *Public Prosecutor v. Khairuddin Abu Hassan & Anor* (2017) and *Maria Chin Abdullah v. Supt Tham Lai Kuan & Others* (2016). Nevertheless, the replacement of the ISA 1960 with the SOSMA 2012 is still perceived as a significant move, albeit some construe it as a political stunt. For a senior prosecutor, it is a “policy call” (Prosecutor A, personal communication, August 16, 2017). A High Court judge described it as a “good direction”, which “gives the right to be heard and appreciates the liberty of a person as guaranteed by the Federal Constitution” (Judge A, personal communication, September 29, 2017). Another judge interviewed also welcomed the introduction of the SOSMA 2012 by highlighting the right of the accused to defend himself (Judge

B, personal communication, October 2, 2017). A senior prosecutor interviewed described the move towards the criminalisation approach as:

A good step forward, in other words the two-major principle in Common Law for natural justice, namely *audi alteram partem* and *nemo iudex in causa sua*, have been to a certain extent, observed, albeit in a modified form. It has been no one who claims that the rights have been deprived because of SOSMA or (when he is charged) under the Penal Code. (Prosecutor B, personal communication, August 16, 2017).

A similar tone comes from another interview with a prosecutor who was assigned to handle terrorism-related cases. According to him, the SOSMA 2012 provides.

Procedural law where the respective detainees still have access to legal recourse and they can air their grievances through the legal channel in open court, and all the evidence will be recorded, so it is in a way much better compared to what is this, detention without trial or preventive detention, this is a better avenue compared to preventive detention under the ISA. (Prosecutor C, personal communication, August 15, 2017).

Similarly, another prosecutor revealed that:

Quite a significant number of prosecutors were in favour of the repeal of the ISA because the ISA has become too controversial due to the use the application throughout the years, even though I believe generally the benefit of the ISA during the Emergency or the communist insurgency was well recognised, but it has become too political throughout the years, I would say it is a good move since the ISA has become a dirty word. (Prosecutor D, personal communication, September 22, 2017).

The same prosecutor also observed that the introduction of the SOSMA “to a limited extent changes the mindset of the prosecutors,

enforcement agency and investigating authorities” in performing their duty (Prosecutor D, personal communication, September 22, 2017).

The positive views of the above-mentioned prosecutors towards the criminal justice approach could be attributable to their professional status (Knapik, 2006; Quinney et al., 2016). However, it should be noted that other participants, who played different roles within a counter-terrorism strategy, also applauded the criminal justice approach. In sum, although the state counter-terrorism actors seem to accept the prosecution of terrorists as the government’s new approach, not all of them approved of the primacy of the criminalisation approach in Malaysia.

The Introduction of the POTA 2015

The second factor that has caused mixed perceptions towards the change of policy is the introduction of the Prevention of Terrorism Act (POTA) 2015. For some, it reflects the government’s faltering attitude towards the executive-based approach. The law provides for preventive detention without trial and other executive measures such as control orders to be imposed on terrorist suspects. The detention order is not subjected to judicial scrutiny, hence it is detrimental to the rule of law and is open to abuse. These circumstances prompted the impression that the law is the “reincarnation” of the ISA 1969 (Naz & Bari, 2018). Further, the Prevention of Crime Act (POCA) 1959 was also amended in 2014 to include executive detention for an indefinite period. Another amendment was made in 2015 to insert the word “terrorists” into the long title of the Act. Accordingly, the law is also used to detain and control individuals allegedly involved in terrorist activities. From 2014 to 2017, 47 individuals who were allegedly related to the Islamic State (IS) group were arrested under the law (Ministry of Home Affairs Malaysia, 2018a). The “U-turn” towards executive-based measures was made due to the resistance coming from the prevailing culture of the authorities and political decision-makers who were accustomed to wide and unchallenged powers (Harding, 2012). Additionally, after the ISA 1960 and Emergency Ordinances had been repealed, there was likely an attempt to cause “moral panic” among the population by linking the rise of violent and organised crime to the repeal (Whiting, 2013). For example, the Home Affairs Minister alleged that about 260,000 possible criminals were roaming the streets because of the release of some detainees

who had been held under the Emergency Ordinances (Zurairi, 2013). Besides, the POTA 2015 shares the same features with the ISA 1960, particularly the device of preventive detention. Moreover, the executive-based measures under the POTA 2015 have been used by the authorities in the absence of sufficient evidence to prosecute. A member of the Prevention of Terrorism Board, which is established by the POTA 2015, confirmed that prosecution is the first option, if “the evidence is intact” for a secure conviction (POTA Board member B, personal communication, August 24, 2017). According to a private lawyer interviewed, his client was arrested under the POTA 2015 after being acquitted by the court at the end of the trial (Lawyer C, personal communication, August 22, 2017).

The change of policy has also been perceived with doubt due to the prevailing attitude, mentality, and practice among state counter-terrorism actors. A favourable attitude is shown by the government and security officials towards the executive-based approach, which gives preference to detention without trial. A terrorism advisor to the Royal Malaysia Police, who has often been invited to give his opinion on terrorism trials, believed that the repeal of the ISA 1960 was a mistake and according to him, “the ISA is the most effective law in containing the threats of terrorism in Malaysia” (Terrorism Expert A, personal communication, September 28, 2017). This academic further argued that the ISA 1960 was fair because it provided flexibility, and the terrorist suspects were treated based on their level of involvement in terrorism and radicalisation. As an advisor to the government, the expert also cast doubt over the effectiveness of the SOSMA 2012 and POTA 2015 to prevent terrorism and reform the terrorist suspects. Besides him, a senior prosecutor also thinks that “the ISA 1960 is still a better option that could provide a prompt response to terrorism threats” (Prosecutor B, personal communication, September 27, 2017).

According to this prosecutor, who has served the legal service for more than 25 years, “the ISA is tool for you to act immediately. But if we use SOSMA, we must go through a lengthy process that does not give instantaneous deterrent effect. So, if you want to contain the threats, you need to straightaway detain the terrorists, put them inside for two years, then another two years”. The prosecutor also contended that the criminal justice process required a higher threshold of evidence, which was difficult to gather in terrorism-related cases. The above two

views arguably represent the favourable attitude towards the primacy of executive-based measures to counter terrorism. Both participants were familiar with the criminal justice system, but believed that the executive-based action was more effective and appropriate as the first response to terrorism. Nevertheless, from the interviews with government officials, there were those who viewed that executive-based measures should be available in parallel with the criminal justice approach. Another interviewee, a legal officer who has been assigned to oversee the preventive detention process under the POTA 2015 expressed the view that he preferred prosecution to executive-based detention when “a person has committed an offence which causes death, injury, and damage” (POTA Board A, personal communication, August 24, 2017). According to the officer, prosecuting a terrorist suspect in court under the SOSMA 2012 offered a more deterrent effect compared to preventive detention without trial.

The ‘Oppressive’ Nature of the SOSMA 2012

Third, the scepticism towards the policy shift also came about from the way the SOSMA 2012 was designed. According to a private lawyer who has handled a significant number of terrorism-related cases, the law was perceived as being as oppressive as the ISA and “too lopsided” in favour of the prosecution and security services (Lawyer A, personal communication, July 27, 2017). Another private practitioner who was interviewed, asserted that “the differences between the ISA and SOSMA is that the former provides detention without trial, the latter gives detention with a trial” (Lawyer B, personal communication, July 28, 2017). The lawyer was referring to the fact that a suspect could be detained for a 28-day pre-charge arrest under the SOSMA 2012 and continued to be detained under an open-ended period, which only ended when the trial proceeding had completed the appeal process in the highest court. Nevertheless, if a trial is fair and reflects proper standards of independence and due process, then detention with a trial is actually a real improvement.

The Readiness and Capability of the Judiciary to Provide Safeguards

The fourth factor that influences the perception towards the change of policy arises from the readiness and capability of the judiciary to try terrorism-related offences. Even though the independence of the judiciary in Malaysia and its ability to provide checks and balances

are contentious matters, the judiciary displays its commitment to play a vital role in the criminalisation approach (Malaysia Judiciary, 2017). A High Court judge who was interviewed had contended that the judiciary was ready to embrace the “new approach” and develop the related law (Judge A, personal communication, September 29, 2017). At the same time as the establishment of the SOSMA courts, some judges have been specifically trained to hear terrorism-related cases. In addition, from an outsider’s perspective, a representative of the SUHAKAM has observed that:

The Malaysian court system has brilliant individual judges, (those who) know the demand of balancing powers, there are enough cases to show that. We need to encourage the judiciary must stand up to the test. It is a tough job... Give back confidence to the judiciary; to be balancing power, we are in the right direction, after the executive has overtaken for a long time. (SUHAKAM A, personal communication, August 3, 2017).

Furthermore, a senior private practitioner who was also interviewed, shared the same view and added that:

The judges are hearing this kind of cases (i.e., terrorism cases) must be those who have been trained, not only in terrorism law, but must also be exposed to human rights law. Both are equally important because, at the end of the day, the court has to strike a balance between the interest of the public and the interest of an accused person who is facing serious charges. (Lawyer A, personal communication, July 27, 2017).

Other complaints voiced were related to the existing facilities and the lack of security measures in courts. For instance, a prosecutor raised concerns over insufficient measures adopted by the courts to protect witnesses’ identity and safety (Prosecutor A, personal communication, August 16, 2017).

The Competency of the State’s Counter-Terrorism Actors

The fifth factor relates to the behaviour and competency of the state’s counter-terrorism actors, mainly the police, who were seen as being not familiar with the criminalisation approach or the application

of court proceedings to the terrorists. A human rights organisation representative contended in an interview that the “shortcut approach” must be stopped, and “deeper criminal investigation, forensic, and intelligence, background checks need to be done [sic]” (SUHAKAM A, personal communication, August 3, 2017). The criminalisation approach required the police to gather evidence to a higher threshold in order to present cases in court, as compared to the demands under executive orders (Galli et al., 2016). Several prosecutors interviewed also complained that the police needed to improve the quality of the evidence gathered and the conduct of investigations (Prosecutor A, B & C, personal communication, 2017). According to one of the prosecutors, the lack of funding had significantly affected the quality of the investigations (Prosecutor A, personal communication, 2017). Such a limitation was not unique to Malaysia, but as a matter of fact, was faced by other jurisdictions too (Banks, 2010). The prosecutors underlined the importance of utilising up-to-date technology in terrorism-related investigations. In terms of developing skills, a senior police officer at the Counter-Terrorism Unit confirmed that the department provided special training to its officers in conducting terrorism-related investigations (Police A, personal communication, September 29, 2017). According to the senior police officer, the police force is “ready to implement the SOSMA” even though it is “something new”. The officer further explained that it would not be a burden for the police because the “new approach” also deployed the “same framework” used in dealing with ordinary crimes. The senior officer also acknowledged that the approach had also brought about more transparency. Moreover, another judge who was interviewed, also proposed that special training should be given to the police in the matter of giving testimony during a trial (Judge A, personal communication, 2017). Most of the police personnel involved in terrorism-related cases are from the Special Branch Division (SB), which is the intelligence branch of the Royal Malaysia Police.

CONCLUSION

Malaysia’s counter-terrorism policy has been constructed by its historical, social, and political foundations. The historical events, in some ways, explain the reasons why the government finds administrative and executive-based measures to be more preferable and practicable. The following three findings can be foregrounded in answering the questions set at the beginning of this paper. First, the

repeal of the ISA 1960, along with other Emergency Ordinances, is a significant and genuine step towards the criminalisation approach, which provides a broader room for criminal justice and processes to be deployed in countering terrorism. Correspondingly, one can see significant changes and greater roles to be played by prosecutors and courts rather than the police or other executive organs. Second, with the introduction of the SOSMA 2012, the criminalisation approach and the increased number of prosecutions have arguably enabled or facilitated the change of approach. Thus far, the shifting stance of the government to widen the use of criminal law is merely based on inferences derived from the number of cases prosecuted in court and the criminalisation of terrorism-related activities. Third, the enactment of a set of executive-based legislation recently may also connote the conflicted attitude of the government towards the criminalisation approach. As much as an effective counter-terrorism strategy requires a comprehensive framework, it also profoundly depends on the conduct of its key actors and institutions. Accordingly, future research should concentrate on counter-terrorism policing and investigation. The policy shift towards the criminalisation approach requires that the investigative authorities improve their skills in gathering and presenting evidence (including biometric, digital, and financial evidence) while being accountable and transparent through disclosure procedures. The process will however, involve a considerable period of arduous work and a commitment of much resources.

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